COMMENT

THE RISE AND DEMISE OF SPECIAL SOLICITUDE*

ABSTRACT

Standing doctrine preserves separation of powers and ensures the proper litigants are before the court when it decides a dispute. When the Supreme Court issued its opinion in *Massachusetts v. EPA*, which declared that states should receive special solicitude in the standing analysis, there was a seismic shift in standing doctrine. However, *Massachusetts v. EPA*, an opinion that brought about more questions than answers, failed to clarify the details of how to apply its new special solicitude doctrine to states. Lower courts were left to interpret the opinion and to define special solicitude when state plaintiffs argued that they had valid standing because of special solicitude. Because the Supreme Court never spoke any clarifying word on the doctrine, each circuit was left to create its own precedent for what situations warranted special solicitude and which did not. The circuit courts continued in this fashion for years after *Massachusetts v. EPA*. However, in the October 2022 term, the Supreme Court issued opinions that seemed to indicate its separation from the special solicitude doctrine. *United States v. Texas* and *Biden v. Nebraska* both presented situations where special solicitude could have played a major role in the analysis, but instead of invoking the doctrine, the Court appeared to distance itself from special solicitude. The Court will likely not formally overrule or clarify where it stands on special solicitude, leaving lower courts to continue with little guidance.

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I. INTRODUCTION

If you want your lawsuit heard in federal court, you need what it takes to be there. You must have standing.[1] Standing doctrine, rooted in Article III of the Constitution, requires proof that a litigant has an injury-in-fact that is fairly traceable to conduct of the defendant and that injury must be able to be redressed by the court.[2] Before 2007, if a state brought a lawsuit in federal court, it faced the same standing barriers as any other litigant.[3] However, in 2007 with the penning of *Massachusetts v. EPA*, the Supreme Court sent waves through courts and scholars alike with two words: special solicitude.[4] In this opinion, the Court declared that states should receive "special solicitude in our standing analysis."[5] However, the Court failed to elaborate on what exactly it meant

1. *See* Crane v. Napolitano, 920 F. Supp. 2d 724, 745–46 (N.D. Tex. 2013), *aff'd sub nom*. Crane v. Johnson, 783 F.3d 244 (5th Cir. 2015).

2. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

3. *See* Massachusetts v. EPA, 549 U.S. 497, 520–21, 520 n.17 (2007).

4. *Id.* at 520 & n.17; Jonathan H. Adler, *God, Gaia, the Taxpayer, and the Lorax: Standing, Justiciability, and Separation of Powers After* Massachusetts *and* Hein, 20 REGENT U. L. REV. 175, 190–92 (2008); Jennifer Lee Koh, *The Rise of the 'Immigrant-As-Injury' Theory of State Standing*, 72 AM. U. L. REV. 885, 933–35 (2023); *see infra* Section III.A.

5. Massachusetts v. EPA, 549 U.S. at 519–20.

for a state to receive special solicitude, simply stating that it should exist.[6] In an opinion that provided more questions than answers, a new doctrine was born and lower courts were left to interpret and clarify that doctrine.

Almost immediately, district and circuit courts alike received filings arguing the applicability of this special solicitude.[7] With minimal guidance from the Supreme Court in the *Massachusetts v. EPA* opinion itself, circuits were left to interpret the doctrine and direct their district courts when special solicitude issues arose. Some circuits experienced more litigation than others from state plaintiffs arguing the doctrine's applicability.[8] One theme prevailed—lower courts wanted guidance and answers.[9]

Much to these courts' dismay, the Supreme Court was and still remains silent on the topic.[10] However, in its October 2022 term, the Court gave significant signals that special solicitude standing doctrine has gone by the wayside and is no longer relevant in Supreme Court jurisprudence.[11] The Court distanced itself from the majority opinion of *Massachusetts v. EPA*, failing to reference the doctrine in situations that would have typically benefitted from special solicitude.[12] Though the legal community still may have more questions than answers from *Massachusetts v. EPA* and its legacy, one answer seems clear, that the Supreme Court has moved away from special solicitude.[13] How the lower courts will follow remains to be seen.

Part II of this Comment discusses what standing doctrine is and its purposes. Then, this Comment addresses how *Massachusetts v. EPA* presented a seismic shift in standing doctrine and introduced special solicitude. After this, Part III surveys how each circuit court has interpreted and applied special solicitude to identify any similarities or differences between the different circuits' interpretations of *Massachusetts v. EPA* and the circuits' understanding of what special solicitude means. Finally,

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6. *Id.* at 520–21.

7. *See* Nat'l Ass'n of Clean Air Agencies v. EPA, 489 F.3d 1221, 1228 (D.C. Cir. 2007); Michigan v. EPA, 581 F.3d 524, 529 (7th Cir. 2009); Vullo v. Off. of Comptroller of Currency, 378 F. Supp. 3d 271, 284 (S.D.N.Y. 2019).

8. *See infra* Section III.A.

9. *See infra* Section III.B.

10. *See infra* Section III.B.

11. *See infra* Section III.B.

12. William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 174–77 (2023).

13. *Id.*

this Comment addresses the October 2022 Supreme Court term and the cases that provide a peek behind the curtain at the Court's desire to say goodbye to special solicitude.

II. BACKGROUND

A. Modern Standing Doctrine and Its Purpose

The constitutional doctrine of standing serves as a barrier to entry for all federal civil lawsuits.[14] Standing is a threshold issue; before a federal court will examine the merits of a plaintiff's claim, the plaintiff must demonstrate that she has a right for her case to be heard in federal court.[15] This is because federal courts are not courts of unlimited jurisdiction that can hear any case that comes before them.[16] Federal courts are limited by the jurisdiction granted by Article III of the Constitution which instructs that the judicial power shall be limited to adjudication of "[c]ases" or "[c]ontroversies."[17] Standing doctrine is a principle that limits what types of cases and controversies federal courts can hear.[18]

14. *See* Crane v. Napolitano, 920 F. Supp. 2d 724, 745–46 (N.D. Tex. 2013), *aff'd sub nom*. Crane v. Johnson, 783 F.3d 244 (5th Cir. 2015) (dismissing Mississippi's claim because the State's alleged injury-in-fact was not sufficient to meet the standing requirement); *ArtIII.S2.C1.6.1 Overview of Standing*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-1/ALDE_00012992 [https://perma.cc/8M8U-MAFR] (last visited Mar. 13, 2024). It is of note that standing does not apply to criminal cases. F. Andrew Hessick & Sarah A. Benecky, *Standing and Criminal Law*, 49 BYU L. REV. 961, 975 (2024). State prosecutors must bring state criminal charges in state court, and federal prosecutors must bring federal criminal charges in federal court. *Introduction to the Federal Court System*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/justice-101/federal-courts [https://perma.cc/V375-LMJ9] (last visited Mar. 13, 2024). As a result, this Comment discusses only civil federal cases.

15. *ArtIII.S2.C1.6.1 Overview of Standing*, *supra* note 14; Dep't of Educ. v. Brown, 143 S. Ct. 2343, 2351–52 (2023).

16. *Introduction to the Federal Court System*, *supra* note 14.

17. U.S. CONST. art. III, § 2; *Introduction to the Federal Court System*, *supra* note 14. Despite standing doctrine finding its roots in Article III, standing itself has not been around since the Founding. Standing is generally accepted by academics as "being a judicial creation of relatively recent vintage," as the doctrine emerged in the mid-twentieth century. Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 185 (2012). However, standing doctrine's central themes can be seen even at the time of the Founding in *Marbury v. Madison*. Marbury v. Madison, 5 U.S. 137, 168 (1803); *see* Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961).

18. Koh, *supra* note 4, at 889. Other limitations on what cases federal courts can hear include mootness, ripeness, and statutory limitations of diversity jurisdiction and federal question jurisdiction. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) (explaining how the doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does); 28 U.S.C. §§ 1331, 1332.

Standing serves multiple purposes in the federal judicial system, but it primarily preserves and supports the separation of powers.[19] Standing doctrine prevents Article III courts from "usurp[ing] the powers of the political branches" and keeps the federal courts in their proper constitutional judicial role.[20] Standing requires parties to bring particularized injuries to the courts; this prevents federal courts from issuing advisory opinions—without any provocation from an injured litigant—about whether the legislative or executive branches have properly followed the law.[21] If the courts could issue opinions on any issue they saw fit, they would go beyond the power granted to them to adjudicate specific cases or controversies, and the courts would infringe the powers of the other two governmental branches.[22]

Standing also serves purposes beyond preserving separation of powers. Standing requires the litigant to have a personal stake in the outcome of her case.[23] This personal stake ensures courts will decide complex legal and factual issues in the context of a specific case and set of facts, and prevents judges from attending to abstract grievances.[24] When parties have a personal stake in the litigation, the parties will also be available to help illuminate specific issues in the case for the judge.[25] Practically, standing doctrine helps focus the limited resources of the federal judiciary on concrete disputes in need of resolution.[26]

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19. Allen v. Wright, 468 U.S. 737, 751 (1984), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014); United States v. Texas, 143 S. Ct. 1964, 1969 (2023).

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

21. *ArtIII.S2.C1.6.1 Overview of Standing*, *supra* note 14.

22. *Id.*

23. *Id.*

24. *Id.* "If individuals and groups could invoke the authority of a federal court to forbid what they dislike for no more reason than they dislike it, we would risk exceeding the judiciary's limited constitutional mandate and infringing on powers committed to other branches of government." Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2099 (2019).

25. *ArtIII.S2.C1.6.1 Overview of Standing*, *supra* note 14.

26. *Id.* Justice Kennedy succinctly explained the purpose of standing in his *Lujan* concurrence:

> While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that "the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."

Lujan v. Defs. of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).

Modern standing doctrine was dictated by the Supreme Court in *Lujan v. Defenders of Wildlife* as a three-part test: (1) a plaintiff must have suffered an injury-in-fact, (2) the injury must be fairly traceable to the challenged conduct of the defendant, and (3) it must be likely the injury will be redressed by a favorable decision by the court.[27] The party invoking federal jurisdiction has the burden to prove she has met the elements of standing.[28]

The first required element of standing—injury-in-fact—is really an additional three-part test that a plaintiff must satisfy: a plaintiff must show that she has suffered "an invasion of a legally protected interest" that is "concrete and particularized" and that is "actual or imminent, not conjectural or hypothetical."[29] First, an invasion of a legally protected interest is an invasion "to any interest that the Court finds protectable under the Constitution, statutes, or regulations."[30] Next, the plaintiff's injury must be both concrete and particularized.[31] Concreteness of injury means that the injury is "real" and not "abstract."[32] The Supreme Court has not articulated a bright-line standard of what makes a particular harm sufficiently concrete, but some intangible injuries are concrete enough to survive the standing test.[33] Concreteness of injury differs from particularization in that concreteness ensures the harm or threat of harm actually exists, and particularization ensures the injury affects the plaintiff specifically.[34] A sufficiently particularized injury is one that "affect[s] the plaintiff in a personal and individual way."[35] Particularization of injury ensures that the plaintiff is among those who are injured.[36]

27. *Id.* at 560–61 (majority opinion).

28. *Id.* at 561.

29. Spokeo, Inc. v. Robins, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at 560).

30. *Standing Requirement: Overview*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/standing-requirement-overview [https://perma.cc/TX4T-P4DJ] (last visited Mar. 3, 2024).

31. *Spokeo*, 578 U.S. at 339–41.

32. *Id.* at 340.

33. *ArtIII.S2.C1.6.4.2 Concrete Injury*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-4-2/ALDE_00012997/ [https://perma.cc/3UC6-SJZR] (last visited Mar. 13, 2024) (collecting cases in footnotes 2–10 that provide examples of what injuries are concrete enough to meet the standing injury-in-fact requirement and what injuries are not concrete enough); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021) (collecting cases of intangible harms that have been held as concrete).

34. *Spokeo*, 578 U.S. at 339–40; *see ArtIII.S2.C1.6.4.2 Concrete Injury*, *supra* note 33.

35. *Spokeo*, 578 U.S. at 339 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992)).

36. Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972).

Finally, an actual or imminent injury ensures that the alleged injury a plaintiff brings is not too speculative for Article III purposes.[37] This means that if an alleged injury has not already occurred, it must certainly be impending.[38] To satisfy an actual or imminent injury, allegations of possible injury are not sufficient.[39] Hypothetical injury or possible future injury are not ripe claims and should be judged by the courts only when they sufficiently meet the actual or imminent standing requirement.[40]

After satisfying the element of injury-in-fact, the second element of standing a litigant must meet is causation. Causation, also referred to as traceability, specifies that the injury must be fairly traceable to the challenged conduct of the defendant.[41] The Supreme Court has dictated that this element may not be met when "the line of causation between the illegal conduct and injury [is] too attenuated."[42] "But for" causation alone is not sufficient to connect a defendant's conduct to a plaintiff's alleged injury—the conduct must be fairly traceable.[43] This fairly traceable requirement ensures both that the defendant in court is the correct defendant that is alleged to have caused the injury the plaintiff complains about, and that the defendant's actions, within reason, are what caused or will cause the injury the plaintiff complains about.[44]

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37. *Lujan*, 504 U.S. at 565 n.2. In *Lujan v. Defenders of Wildlife*, the imminence requirement was put to the test. *Id.* at 564. Plaintiffs alleged their injury to be harm to certain endangered species that plaintiffs once observed in Africa and Egypt, such as the Nile crocodile and the Asian elephant. Their harm, as alleged, was that certain federally funded projects would harm these animals in foreign lands that they once enjoyed and looked forward to enjoying again. *Id.* at 563. However, the Court failed to see a connection to how any potential damage to the species would cause an "imminent" injury to either plaintiff. *Id.* at 564. The Court proceeded in stating that the plaintiffs':

> "[I]nten[t]" to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the "actual or imminent" injury that our cases require.

Id. (second alteration in original).

38. *Id.* at 565 n.2.

39. Whitmore v. Arkansas, 495 U.S. 149, 158 (1990).

40. *See Lujan*, 504 U.S. at 560; *ArtIII.S2.C1.7.1 Overview of Ripeness Doctrine*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-7-1/ALDE_00001244/ [https://perma.cc/FNF6-NCXY] (last visited Mar. 13, 2024).

41. *See Lujan*, 504 U.S. at 560–61 (citing Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41–42 (1976)).

42. *See* Allen v. Wright, 468 U.S. 737, 752 (1984).

43. Mahoney v. U.S. Dep't of the Interior, 682 F. Supp. 3d 265, 269 (E.D.N.Y. 2023).

44. *See id.* at 270–71.

The third and final element of standing is redressability. Redressability ensures the likelihood that the plaintiff's injury will be redressed, or remedied, by a favorable decision by the court.[45] If the courts do not have the power or means to provide a remedy for the plaintiff's alleged injury, the dispute is not one meant to be decided by the courts.[46] Also, when a plaintiff requests a form of relief that, if granted, would not redress their injury, the plaintiff's claim fails the redressability element of standing.[47] However, the Supreme Court has held that redressability may exist even if the plaintiff's requested judicial relief would not completely, but only partly, redress its injury.[48]

Overall, the requirements of standing serve the purpose to ensure disputes heard before federal courts are those that are particularized enough, and likely to have been caused by the named defendants, that a federal court should evaluate the merits of the plaintiff's claims. These requirements ensure federal courts are hearing cases and controversies as instructed by Article III of the Constitution.[49]

B. Origins of Special Solicitude Standing for States

The standing requirements delineated in Section II.A apply to all litigants attempting to bring suit in federal court.[50] However, the Supreme Court has declared that "[s]tates are not normal litigants for the purposes of invoking federal jurisdiction."[51] The Supreme Court declared in *Massachusetts v. EPA* that the Commonwealth of Massachusetts was entitled to "special solicitude" in the Court's standing analysis.[52] With this declaration, the doctrine of special solicitude was born.[53] However, *Massachusetts v. EPA*, the case introducing and outlining special solicitude, provides little guidance on what exactly special solicitude means or how it should impact the Court's traditional standing analysis.[54] It is even unclear whether Massachusetts had already met the Court's traditional *Lujan* standing

45. *Lujan*, 504 U.S. at 561.

46. *See* M.S. v. Brown, 902 F.3d 1076, 1083 (9th Cir. 2018).

47. *See id.* at 1083–85.

48. Massachusetts v. EPA, 549 U.S. 497, 525–26 (2007).

49. U.S. CONST. art. III.

50. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 99 (1979); Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 37–38 (1976).

51. Massachusetts v. EPA, 549 U.S. at 518 (citing Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907)).

52. *Id.* at 520.

53. *See id.*

54. *See* Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 887 (2016) (discussing the varying reactions to *Massachusetts v. EPA* in the lower courts).

analysis without application of special solicitude—meaning special solicitude's birth and application was technically not necessary at all.[55]

In *Massachusetts v. EPA*, Massachusetts, as lead plaintiff, challenged the Environmental Protection Agency (EPA), claiming the agency had "abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases."[56] Massachusetts alleged that the EPA's failure to regulate greenhouse gases was accelerating climate change which would ultimately cause Massachusetts to lose coastal property.[57]

In 1999, a rulemaking petition was filed asking the EPA to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act.[58] After requesting public comment on the proposed rulemaking and seeking scientific counsel on climate change, the EPA officially denied the rulemaking petition in 2003.[59] The Clean Air Act contains a citizen-suit provision that creates a procedural right for anyone to challenge the EPA's denial of a rulemaking petition as arbitrary and capricious.[60] Massachusetts based its challenge on this provision following the EPA's denial of its Clean Air Act rulemaking petition.[61]

Before it could reach the merits of the case, the Court first had to decide if Massachusetts even had standing to bring its claim at all. As the Court analyzed whether Massachusetts had standing, it recognized that both a procedural right to challenge the rulemaking denial and "Massachusetts' stake in protecting its quasi-sovereign interests" entitled Massachusetts to special solicitude in the standing analysis.[62] However, after declaring this special standing entitlement, the Court proceeded to analyze Massachusetts's claims under each traditional *Lujan* standing requirement.[63]

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55. *See* Massachusetts v. EPA, 549 U.S. at 521–26 (detailing how Massachusetts meets all three traditional *Lujan* elements of standing).

56. *See id.* at 505.

57. *Id.* at 510, 522.

58. *Id.* at 510.

59. *Id.* at 511.

60. *Id.* at 520 (citing 42 U.S.C. § 7607(b)(1)).

61. *See id.* at 516.

62. *Id.* at 520. The quasi-sovereign interest at issue here is Massachusetts's earth and air, particularly its receding coastline. *Id.* at 519–20, 522. The Court sees this as analogous to the quasi-sovereign interest present in *Georgia v. Tennessee Copper Co.*—Georgia's independent interest "in all the earth and air within its domain." *Id.* at 518–19 (quoting Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907)).

63. *Id.* at 520–26. A concern of both Chief Justice Roberts and Justice Scalia, as explained in their dissents, is that the application of the *Lujan* framework in this case is far beyond the traditional *Lujan* framework. *See* Jody Freeman & Adrian Vermeule,

As to the first standing element of injury, the Court noted that qualified scientific experts agreed that, among other threats, global warming threatened a rise in sea levels and severe, irreversible changes to ecosystems.[64] The Court then acknowledged Massachusetts had alleged a sufficiently particularized injury as it was a landowner of coastal property and "rising seas have already begun to swallow Massachusetts' coastal land."[65] The Court seemed to show that Massachusetts pled "an invasion of a legally protected interest" that is "concrete and particularized" and that is "actual or imminent, not 'conjectural' or 'hypothetical'" as required by *Lujan*.[66]

Next, the Court addressed the standing element of causation.[67] The EPA did not dispute that greenhouse gases caused global warming; however, the EPA argued that its decision not to regulate greenhouse gas emissions—which it effectively decided by denying the rulemaking requesting it to do so—contributed so insignificantly to Massachusetts's injuries that causation was too tenuous to provide standing.[68] The Court rejected this argument.[69] It stated that the amount of greenhouse emissions from the United States transportation industry was so significant that the emissions did contribute meaningfully to global warming.[70] Therefore, the causal connection between the EPA failing to regulate greenhouse gases from the transportation industry did have enough of a link to global warming which caused the injuries Massachusetts alleged.[71]

Finally, the Court discussed the requested remedy.[72] Here, the Court acknowledged that if petitioners received the relief they sought, remanding the denial of the rulemaking back to the agency, the risk of catastrophic harm from global warming would be reduced to some extent.[73] Therefore, the alleged injury was able to be redressed by the Court.[74]

Massachusetts v EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 65, 69–70 (2008). One of the most confusing factors of *Massachusetts v. EPA* is that, arguably, three separate standing arguments are approved of and analyzed by the Court: special solicitude standing, procedural standing, and traditional *Lujan* standing. *Id.* at 67.

64. Massachusetts v. EPA, 549 U.S. at 521.
65. *Id.* at 522.
66. *See id.* at 521–23; Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).
67. Massachusetts v. EPA, 549 U.S. at 523.
68. *See id.* at 510–11, 523.
69. *Id.* at 523–26.
70. *Id.* at 523–25.
71. *Id.*
72. *Id.* at 525.
73. *Id.* at 521, 526, 534–35.
74. *See id.* at 526.

As the Court moved on to address the merits of Massachusetts's claims, it left the discussion and explanation of "quasi-sovereign interests," "procedural right[s]," and "special solicitude" for some future court's further clarification.[75] Chief Justice Roberts's dissent pointedly noted the majority's lack of definition and explanation for special solicitude in particular.[76] He stated that "[i]t is not at all clear how the Court's 'special solicitude' for Massachusetts plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms."[77]

In sum, the Supreme Court declared in *Massachusetts v. EPA*, that in certain circumstances states should receive "special solicitude" in the standing analysis but failed to clarify what analysis or elements were necessary for a state to actually earn this special solicitude.[78] Then, after the Court declared that states should receive special solicitude, the Court analyzed the state-plaintiff's standing under the traditional *Lujan* standing test—suggesting that special solicitude was not necessary at all for Massachusetts to ultimately have standing to bring its claim.[79] The Court did not clarify what specific situations states should receive special solicitude in.[80] Should it be in every case, or just environmental cases like the present case? How does special solicitude change the traditional *Lujan* standing elements? These questions were raised by courts and scholars alike in the aftermath of *Massachusetts v. EPA* and met with no answer from the Supreme Court.[81]

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75. *See id.* at 520.

76. *Id.* at 540 (Roberts, C.J., dissenting). "The nature of this 'special solicitude' was famously undefined." Baude & Bray, *supra* note 12, at 166; *see, e.g.*, Seth Davis, *The Private Rights of Public Governments*, 94 NOTRE DAME L. REV. 2091, 2100 (2019); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 67 (2011); Dru Stevenson, *Special Solicitude for State Standing:* Massachusetts v. EPA, 112 PENN ST. L. REV. 1, 19–20 (2007).

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

78. *See generally id.*

79. Freeman & Vermeule, *supra* note 63, at 67.

80. *See* Massachusetts v. EPA, 549 U.S. at 520.

81. *See* Connecticut v. Am Elec. Power Co., 582 F.3d 309, 338 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011). *Massachusetts v. EPA* and special solicitude also helped usher in a new era of public law litigation. Baude & Bray, *supra* note 12, at 165–66.

> All of these developments from the twentieth century put greater pressure on standing doctrine, as courts increasingly came to use it as a filter for the cases to be decided.
>
> But one more source is especially important for the centrality of standing in the twenty-first century: the role of states as litigants against the federal government. There is an institutional side to the story, including a dramatic infusion of resources and expertise into the offices of state solicitors general. And there is a doctrinal side,

III. ANALYSIS

A. The Circuit Courts' Interpretations of Special Solicitude and Massachusetts v. EPA

Since *Massachusetts v. EPA* was handed down by the Supreme Court in 2007, lower courts have had to interpret the meaning of special solicitude and determine how to apply the doctrine.[82] Despite opportunities to do so, the Supreme Court has failed to clarify the special solicitude doctrine in a majority opinion.[83] As a result, when a state plaintiff argued that special solicitude should apply to them in the standing analysis, lower courts had to parse *Massachusetts v. EPA* to determine practically how to respond to the argument.[84] This resulted in each circuit's own interpretation and application of special solicitude in its standing analysis. This Section provides a survey of each circuit court and how it has interpreted special solicitude.[85] This section also examines the frequency of which states

> especially the Supreme Court's decision in Massachusetts *v. EPA*. In that case, a narrow majority of the Court read state standing broadly, saying states were to be given "special solicitude in our standing analysis." The consequences have been predictable. In just the last decade and a half, states have come to dominate the public law scene. States — often large coalitions of states, all represented by attorneys general from the opposite political party of the President — now file suits challenging any important action taken by the executive branch.

Id. at 154 (footnotes omitted).

82. Missouri v. Biden, 52 F.4th 362, 369 (8th Cir. 2022) ("Whether and when alleged sovereign injuries can constitute the concrete and particularized injury in fact required for Article III standing is a controversial, unsettled question, as the Supreme Court's 5 to 4 decision in *Massachusetts v. EPA* makes clear." (citation omitted)), *cert. denied*, 144 S. Ct. 278 (2023). It is important to note that scholars have discussed three potential strands of standing analyses emanating out of the *Massachusetts v. EPA* decision. Freeman & Vermeule, *supra* note 63, at 67–70. The first strand, being the focus of this Comment, was the suggestion that "federal standing law embodies some form of 'special solicitude' for states that bring lawsuits as plaintiffs to vindicate their sovereign interests." *Id.* at 67. The second strand was that statutes can create procedural rights and when the violation of one of these procedural rights is the basis of the lawsuit, the normal standard for redressability and immediacy need not be met. *Id.* The third strand of analysis was an ordinary standing analysis that focused on Massachusetts as a landowner of its coastal property. *Id.* It is important to clarify that this Comment only addresses the first strand of analysis, special solicitude, seeking to understand how the lower courts have understood what that means and applied it in their own standing analyses.

83. *See infra* Section III.B.

84. *See* Connecticut v. Am Elec. Power Co., 582 F.3d at 314, 336–38.

85. The research in this section was completed personally through keynote, headnote, key word, and citing sources research to determine what cases in each circuit have discussed special solicitude. I compared cases that reference both special solicitude and standing, focused on cases issued after 2006, as *Massachusetts v. EPA* was handed down in 2007, and then filtered by circuit to determine how each circuit discussed the topic. I also double checked all cases that cited to *Massachusetts v. EPA* and then filtered by those that used the specific term of special solicitude in the opinion to try to ensure I captured every

as litigants bring claims asserting special solicitude standing within each circuit.

Beginning with the First Circuit, this court has only issued two opinions that discuss special solicitude since the 2007 *Massachusetts v. EPA* decision.[86] The circuit's first mention of special solicitude was a simple statement that the Commonwealth of Massachusetts had sufficient Article III standing under a traditional analysis and did not need special solicitude to confer standing on it.[87] The next, and only other opinion from the First Circuit mentioning special solicitude, comes in *Penobscot Nation v. Frey*. This case centered on a dispute over land between the Penobscot Nation and the state of Maine.[88] As part of its claim, the Penobscot Nation asserted that Maine had infringed on its sustenance-fishing rights and sought declaratory relief that the Penobscot Nation had these fishing rights in the disputed land.[89] The First Circuit originally heard this appeal in a panel but the judges later voted to rehear the case en banc.[90] In its order granting rehearing en banc, the First Circuit specifically directed the parties to file supplementary briefs concerning the question of whether the Penobscot Nation had standing to bring its claims and how special solicitude may impact that analysis.[91]

When the First Circuit issued its en banc opinion in *Penobscot Nation v. Frey*, it held that the Penobscot Nation did not have standing to bring its claim related to the sustenance-fishing rights because the Nation suffered no injury-in-fact.[92] This aligns with Justice Stevens's holding in *Massachusetts v. EPA* that any special solicitude afforded to states does not lessen the injury-in-fact

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case discussing the topic. I could not find another article that discussed this topic, so this is original research and therefore, some claims may not be able to be substantiated beyond the research in this Comment.

86. Technically, the First Circuit has issued three opinions, but one of these was an order granting rehearing en banc with specific instructions for the parties to file supplemental briefing related to the Penobscot Nation's standing to bring its claims. Penobscot Nation v. Frey, 954 F.3d 453, 454–55 (1st Cir. 2020). The First Circuit looked to the Second Circuit's case, *Mashantucket Pequot Tribe v. Town of Ledyard*, which held that Native American tribes are afforded special solicitude in the standing analysis much like states. Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 463 (2d Cir. 2013).

87. Massachusetts v. U.S. Dep't of Health & Hum. Servs., 923 F.3d 209, 222 (1st Cir. 2019).

88. Penobscot Nation v. Frey, 3 F.4th 484, 487–88 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 1669 (2022).

89. *Id.*

90. *Penobscot Nation*, 954 F.3d at 453.

91. *Id.* at 453–55.

92. *Penobscot Nation*, 3 F.4th at 508.

requirement that must be established by states.[93] Overall, the First Circuit has yet to delineate the elements it requires state parties to meet to assert special solicitude, but so far it appears to simply acknowledge that special solicitude exists and that the doctrine has no impact on the injury-in-fact requirement of standing.[94]

The Second Circuit's engagement with special solicitude has been similar to the First's. The Second Circuit presented the Supreme Court with its first chance to clarify special solicitude doctrine with *Connecticut v. American Electric Power Co.*[95] The circuit opinion seemingly did not know what to do with *Massachusetts v. EPA* as the opinion provides a lengthy summary of the Court's opinion and points out its confusing and unclear aspects.[96] However, after the lengthy interlude, the circuit court found it need not parse *Massachusetts v. EPA* to resolve the case at hand because all of the plaintiffs had met the traditional three-part *Lujan* test for standing.[97] Perhaps the court's opining was a call for the Supreme Court to provide clarity to lower courts about how special solicitude was to differ from *parens patriae* standing or how special solicitude should impact the analysis of traditional *Lujan* standing.[98]

Next, in *Mashantucket Pequot Tribe v. Town of Ledyard*, the Second Circuit established that Native American tribes, like states, can receive special solicitude in the standing analysis.[99] The Second Circuit again acknowledged special solicitude in *Lacewell v. Office of Comptroller of Currency* when it considered a state-agency plaintiff, but declined to apply the doctrine because the state agency had failed

93. Massachusetts v. EPA, 549 U.S. 497, 520–22 (2007).

94. *See Penobscot Nation*, 3 F.4th at 508; Massachusetts v. U.S. Dep't of Health & Hum. Servs., 923 F.3d 209, 222 (1st Cir. 2019).

95. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 336–38 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011).

96. *See id.* The authoring judge provides nearly two pages simply summarizing the effects of *Massachusetts v. EPA* and its potential impact on the case before the court. *Id.* The circuit opinion found that *Massachusetts v. EPA* "arguably muddled state proprietary and *parens patriae* standing." *Id.* at 337. The circuit court concluded its special solicitude interlude by posing the following questions:

> The question is whether *Massachusetts*' discussion of state standing has an impact on the analysis of *parens patriae* standing. . . . That is, what is the role of Article III *parens patriae* standing in relation to the test set out in *Lujan*? Must a state asserting *parens patriae* standing satisfy both the *Snapp* and *Lujan* tests?

Id. at 338. The Supreme Court failed to weigh in on these questions when it penned the reversing decision. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 420 (2011).

97. Connecticut v. Am. Elec. Power Co., 582 F.3d at 338.

98. *See id.*; Bradford C. Mank, *Reading the Standing Tea Leaves in* American Electric Power Co. v. Connecticut, 46 U. RICH. L. REV. 543, 553–55 (2012).

99. Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 463 (2d Cir. 2013).

to establish a sufficiently concrete and particularized injury.[100] The court recognized *Massachusetts v. EPA*'s holding that special solicitude does not absolve a state plaintiff of meeting the traditional standing requirement of injury-in-fact.[101]

Lacewell provided the last word on special solicitude from the Second Circuit.[102] This decision leaves the circuit's interpretation of special solicitude much like the First Circuit, with an acknowledgement that the doctrine exists and a clarification that it has no impact on the injury-in-fact analysis.[103]

The Third Circuit first addressed special solicitude when it found that state plaintiffs in *Pennsylvania v. President United States*, had standing to bring their claim under the traditional standing inquiry so an analysis under special solicitude was unnecessary.[104] The Third Circuit's acknowledgement has been its only discussion of special solicitude by name since *Massachusetts v. EPA* created the doctrine.[105]

The Fourth Circuit has only minimally engaged with special solicitude over the years. *In re Trump* brought the first mention of the doctrine in the Fourth Circuit in 2020—thirteen years after *Massachusetts v. EPA* was issued.[106] The court, handling a novel argument from the respondent states, cited to *Massachusetts v. EPA* to support its conclusion that it was debatable whether respondents in the case had asserted any cognizable injury.[107] This debate led the circuit court to deny then-President Trump's writ of mandamus asking the district court to certify his interlocutory appeal.[108]

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100. Lacewell v. Off. of Comptroller of Currency, 999 F.3d 130, 145–46 (2d Cir. 2021). Prior to this appellate decision, the district court began its analysis stating that "[s]tate plaintiffs are entitled to 'special solicitude' in the standing analysis because they 'are not normal litigants for the purposes of invoking federal jurisdiction.'" Vullo v. Off. of Comptroller of Currency, 378 F. Supp. 3d 271, 284 (S.D.N.Y. 2019). The district court then remarked that "[t]he depth of this 'special solicitude' and its impact on other doctrines, such as the state's ability to bring suits on behalf of its citizens as *parens patriae*, is unclear." *Id.* In 2019, twelve years after *Massachusetts v. EPA*, the depth of special solicitude remained unclear and district courts were still determining its impact. *See id.*

101. *Lacewell*, 999 F.3d at 145–46.

102. This was determined by evaluating all opinions the Second Circuit issued related to special solicitude citing *Massachusetts v. EPA*.

103. *Lacewell*, 999 F.3d at 145–46.

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

105. *Id.*

106. *In re Trump*, 958 F.3d 274, 286 (4th Cir. 2020), *vacated sub nom.* Trump v. District of Columbia, 141 S. Ct. 1262 (2021).

107. *Id.*

108. *Id.* at 286–87.

Of all circuit courts, the Fifth Circuit has housed a bulk of the discussion and application of the special solicitude doctrine.[109] The circuit first addressed special solicitude in a footnote.[110] In *Comer v. Murphy Oil*, non-state plaintiffs asserted a similar climate change-based injury to that claimed by the state in *Massachusetts v. EPA*.[111] Plaintiffs, landowners along the Mississippi Gulf Coast impacted by Hurricane Katrina, alleged that defendant companies had contributed to the emissions of global greenhouse gases that increased global air and surface temperatures, which then increased the ferocity of Hurricane Katrina due to increased sea levels.[112] Plaintiffs claimed compensatory and punitive damages from the destruction of their private property and public property useful to them.[113] The court briefly mentioned special solicitude as it acknowledged that the causal chain asserted by the state plaintiffs in *Massachusetts v. EPA* may have needed special solicitude to give it standing.[114] Whereas, in *Comer v. Murphy Oil*, the plaintiffs' asserted causal chain was one step closer and thus stronger than that present in *Massachusetts v. EPA*.[115] Meaning, the *Comer v. Murphy Oil* plaintiffs had no need for special solicitude, though it would not have been available to them in the first place as they were private citizens and not states.[116]

After this footnote acknowledgement, the Fifth Circuit's first analysis and application of special solicitude to a plaintiff came in *Texas v. United States* (*The DAPA Case*).[117] Texas and twenty-five other states challenged the government's Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA) as a

109. This was determined by evaluating all opinions the circuit courts issued related to special solicitude citing *Massachusetts v. EPA*. This could be the case because of Texas's approach on challenging federal policy decisions with lawsuits. *See* Becca Aaronson et al., *Interactive: Texas v. the Federal Government*, TEX. TRIB., https://www.texastribune.org/library/about/texas-versus-federal-government-lawsuits-interactive [https://perma.cc/6QTD-38U5] (last updated July 17, 2013). In 2013 alone, eighteen lawsuits were ongoing between Texas and the United States including suits about greenhouse gas regulations and the Affordable Care Act's contraception rule. *Id. See* Elysa M. Dishman, *Generals of the Resistance: Multistate Actions and Nationwide Injunctions*, 54 ARIZ. ST. L.J. 359, 365–82 (2022) (discussing state attorneys general's increased rate of suing the federal government including multistate actions and seeking nationwide injunctions).

110. Comer v. Murphy Oil USA, 585 F.3d 855, 865 n.5 (5th Cir. 2009), *aff'd on reh'g*, 607 F.3d 1049 (5th Cir. 2010).

111. *See id.* at 859, 865.

112. *Id.* at 859.

113. *Id.*

114. *Id.* at 865 n.5.

115. *See id.*

116. *See id.*

117. Texas v. United States (*The DAPA Case*), 787 F.3d 733, 751–52 (5th Cir. 2015).

violation of both the Administrative Procedure Act (APA) and the Take Care Clause.[118] In the district court, Texas put forth four different arguments in favor of it having standing to sue—one of which included special solicitude.[119] The Fifth Circuit affirmed the district court's finding of special solicitude standing on appeal for three reasons: the states were not normal litigants for the purposes of invoking federal jurisdiction, the dispute turned on the interpretation of a federal statute, and DAPA impacted the quasi-sovereign interests of the states by imposing pressure on them to change their laws.[120]

This analysis soon became the Fifth Circuit rule as it has been applied by many district courts.[121] In the Fifth Circuit, a state is entitled to special solicitude if it can show (1) it has a procedural right to challenge the action and (2) the challenged action affects one of the state's quasi-sovereign interests.[122] If a state shows it is entitled to special solicitude, then the standards for redressability and imminence are relaxed.[123] In this opinion, the Fifth Circuit also elaborated on what exactly might suffice to establish a quasi-sovereign interest, which included:

> (1) [F]ederal assertions of authority to regulate matters they believe they control, (2) federal preemption of state law, and (3) federal interference with the enforcement of state law, at least where "the state statute at issue regulate[s] behavior or provide[s] for the administration of a state program" and does not "simply purport[] to immunize [state] citizens from federal law."[124]

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118. *Id.* at 743.

119. Texas v. United States, 86 F. Supp. 3d 591, 625, 633 (S.D. Tex. 2015). Of particular interest in *Texas v. United States*, is the theory of abdication standing. *Id.* at 636. The district court itself described the theory as "provocative and intellectually intriguing." *Id.* Abdication is a theory of standing that applies when the federal government has full authority over an area of American life and excludes any ability for the states to regulate in that area but refuses to act in the area. *Id.* This leaves states helpless in a sense and thus, a state is allowed to bring a suit to protect itself and the interests of its people. *See id.* Even more curious, was that the states had not even raised this theory of standing argument before the court in their pleadings. Texas v. United States, 809 F.3d 134, 213 (5th Cir. 2015) (King, J., dissenting). For an in-depth discussion of the abdication approach to standing see generally Note, *An Abdication Approach to State Standing*, 132 HARV. L. REV. 1301 (2019).

120. *The DAPA Case*, 787 F.3d at 751–52.

121. Texas v. U.S. Dep't of Health & Hum. Servs., No. 4:23-CV-66-Y, 2023 WL 5333274, at *3 (N.D. Tex. Aug. 18, 2023); Louisiana v. Horseracing Integrity & Safety Auth. Inc., 617 F. Supp. 3d 478, 492–93 (W.D. La. 2022); Colville v. Becerra, No. 1:22CV113-HSO-RPM, 2023 WL 2668513, at *14 (S.D. Miss. Mar. 28, 2023).

122. Texas v. United States (*The DACA Case*), 50 F.4th 498, 514 (5th Cir. 2022).

123. *Id.* at 514.

124. Texas v. United States, 809 F.3d at 153 (first alteration added) (citations omitted).

The Fifth Circuit then applied this two-step test in another *Texas v. United States*, this time, the Deferrer Action for Childhood Arrivals (DACA) case.[125] Ultimately, the Fifth Circuit held that Texas did have standing to challenge the DACA program because Texas had a procedural right to challenge the Department of Homeland Security's agency action under the APA.[126] Satisfying the second element, Texas's rights in "classifying aliens" was a quasi-sovereign interest.[127] This was because immigration was an area of policy that the states lodged in the federal government and thus relied on the federal government to protect their interests in.[128]

District courts within the Fifth Circuit continue to apply this two-part test for special solicitude to state plaintiffs.[129] Special solicitude has aided state plaintiffs in satisfying the standing inquiry and allowing the Fifth Circuit to reach the merits many times.[130] Some examples include when Texas sought to compel the Department of Homeland Security to spend its allocated funds to build a border wall,[131] when Mississippi challenged the validity of the Department of Health and Human Services' final agency rule requiring Medicare providers to create an anti-racism plan,[132] and when Texas challenged the Department of Education's regulation of state educational institutions.[133]

125. *The DACA Case*, 50 F.4th at 514.

126. *Id.* at 514, 517.

127. *Id.* at 515.

128. *Id.*

129. *See, e.g.*, Texas v. Cardona, No. 4:23-CV-00604-O, 2024 WL 2947022, at *19 (N.D. Tex. June 11, 2024); Mississippi v. Becerra, No. 1:22CV113-HSO-RPM, 2024 WL 1335084, at *15 (S.D. Miss. Mar. 28, 2024); Colville v. Becerra, No. 1:22CV113-HSO-RPM, 2023 WL 2668513, at *14–15 (S.D. Miss. Mar. 28, 2023).

130. *See infra* notes 131–33 and accompanying text.

131. Gen. Land Off. v. Biden, 71 F.4th 264, 268 (5th Cir. 2023).

132. *Colville*, 2023 WL 2668513, at *1.

133. *Cardona*, 2024 WL 2947022, at *1. Curiously, the district court noted in *Texas v. Cardona* when it responded to the defendant's argument against the applicability of special solicitude in the standing analysis, that special solicitude is still a "binding legal doctrine," notwithstanding Justice Gorsuch's concurrence in *United States v. Texas*. *Id.* at *20. To support this, the court cites other Fifth Circuit cases decided in 2023 holding special solicitude's application. *Id.* However, in 2023, the Fifth Circuit also questioned special solicitude's future applicability and relevance to the Supreme Court in *Netflix, Inc. v. Babin*. Netflix, Inc. v. Babin, 88 F.4th 1080, 1089 n.12 (5th Cir. 2023). This uncertainty of whether special solicitude is still a live doctrine to be applied within the Fifth Circuit leaves district courts with only questions rather than answers.

Despite frequent citation to special solicitude in the Fifth Circuit district courts, the circuit recently noted an apparent doctrinal shift signaling special solicitude's apparent demise:

> We will merely make the related and additional point, perhaps for the benefit of a future panel or en banc court, that the "special solicitude" once afforded to states under *Massachusetts v. EPA*, with respect to justiciability doctrines like standing, seems to also be falling out of favor with the Supreme Court.[134]

The Fifth Circuit has been the most active circuit when it comes to special solicitude application. As the circuit's case law developed, it was at the forefront of the shift from environmental injury to economic injury as a basis for special solicitude.[135] But now, the circuit seems to acknowledge from recent Supreme Court opinions that special solicitude might not be in favor for much longer.[136]

The Sixth Circuit began its interpretation of the impact of special solicitude in *Saginaw County v. STAT Emergency Medical Services, Inc.*[137] The circuit court made clear that any dilution of the standing requirement made by *Massachusetts v. EPA* did not "abandon the constitutional baseline" of Article III's case or controversy requirement.[138] Actual or imminent invasion of a judicially cognizable interest must be shown by a government entity.[139] Additionally, the circuit court distinguished *Massachusetts v. EPA* from the case at hand by highlighting that when a state sues a federal sovereign, it may not have its normal recourse available to it, but Saginaw County faced no similar limitation in enforcing its law against private entities—meaning special solicitude would not apply in this case.[140]

The Sixth Circuit next emphasized that, although states may have more types of injury available to them—like quasi-sovereign injuries—special solicitude does not allow states to bypass proof of injury or Article III as a whole.[141] In elaborating this point in *Arizona v. Biden*, the Sixth Circuit reversed the district court's finding that Arizona, Montana, and Ohio had standing to bring a challenge to the

134. *Netflix, Inc.*, 88 F.4th at 1089 n.12 (citation omitted).
135. Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1233–34, 1239–40 (2019).
136. *Netflix, Inc.*, 88 F.4th at 1089 n.12.
137. Saginaw County v. STAT Emergency Med. Servs., Inc., 946 F.3d 951, 957 (6th Cir. 2020).
138. *Id.*
139. *Id.*
140. *Id.*
141. Arizona v. Biden, 31 F.4th 469, 476 (6th Cir. 2022).

federal government's enforcement of its immigration guidance.[142] Here, the Sixth Circuit emphasized the type of injury a state pleads needs to fall under the types of injuries *Massachusetts v. EPA* intended to extend special solicitude standing to—regulation of the states or preemption of local-lawmaking authority, incursions on state property, or traditional public nuisance.[143]

Moving to the Seventh Circuit, this court's engagement with special solicitude began with a denial of the doctrine's application to Michigan.[144] Michigan attempted to challenge the EPA's process of designating nearby tribal lands as a more protected area for air quality under the Clean Air Act.[145] The court denied applying special solicitude to Michigan because, in this case, it only stood to benefit from cleaner air if the Tribe's lands were reclassified as Class I, whereas in *Massachusetts v. EPA*, the state's coastal lands were actively threatened by rising sea levels.[146] This supported an interpretation not only that there must be an actual injury to invoke special solicitude, but that the injury must be to a quasi-sovereign interest.[147] Here, Michigan's air, the quasi-sovereign interest, would not be injured at all

142. Arizona v. Biden, 40 F.4th 375, 380, 387 (6th Cir. 2022). The Sixth Circuit examined the standing issue twice: first, in its order granting a stay of the nationwide injunction issued by the district court and second, in its order reversing the district court's ruling and remanding. Arizona v. Biden, 31 F.4th at 476, 482 (granting stay); Arizona v. Biden, 40 F.4th at 381, 394 (reversing and remanding). The Sixth Circuit took issue with the "host of justiciability challenges to the lawsuit" that the district court rejected, emphasizing that "considerable speculation" undergirded the States' claim. *Id.* at 381, 383. The Sixth Circuit's main objections to the lower court's standing analysis were that the injury alleged in this case was not the type of injury within *Massachusetts v. EPA*'s compass and the failure by Arizona to show it met even the basic requirements of standing. *Id.* at 385–87.

143. Arizona v. Biden, 40 F.4th at 386 ("They do not protest regulation of them as States or preemption of local lawmaking authority. They do not protest any threatened incursions on their property or territory. And they do not involve the 'classic' sovereign case, 'public nuisances,' in which a State invokes a desire 'to safeguard its domain and its health, comfort and welfare.'") (citing Kentucky v. Biden, 23 F.4th 585, 596 (6th Cir. 2022); Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 602–03 (1982)).

144. Michigan v. EPA, 581 F.3d 524, 529 (7th Cir. 2009).

145. *Id.* at 525. The Forest County Potawatomi Community (the Tribe) petitioned EPA to designate its tribal lands from Class II to Class I under the Prevention of Significant Deterioration (PSD) program of the Clean Air Act which would impose stricter air quality controls on the neighboring areas. *Id.* at 525. After fifteen years of administrative proceedings and dispute resolution efforts between the Tribe and the neighboring state of Michigan failed, the EPA issued a final rule designating the lands as Class I. *Id.* Michigan then brought its suit claiming the "EPA pursued the redesignation in an improper manner and, as a result, needlessly complicated Michigan's air quality control programs." *Id.* The court then evaluated the threshold inquiry of whether Michigan even had standing to bring these claims. *Id.* at 528.

146. *Id.* at 529.

147. *See id.*

and Michigan itself did not stand to be injured, only those sources emitting within Michigan.[148]

The Seventh Circuit goes on to clarify its discussion of *Massachusetts v. EPA* in *Indiana v. EPA*. Indiana challenged EPA's approval of a change to Illinois's air regulation plans, arguing that the change would cause Indiana to have an increased regulatory burden.[149] The court found Indiana had met standing requirements under the traditional inquiry and thus did not need to address standing under special solicitude.[150] However, in a footnote, the court did compare the injury in this case with the injury in *Massachusetts v. EPA*.[151] Massachusetts's injury was clearer because the State actually owned the coastal property being impacted by rising sea levels whereas in the present case, Indiana did not own its air, which was the state sovereign interest at stake.[152]

Issuing only two opinions discussing special solicitude since *Massachusetts v. EPA*, the Eighth Circuit has not significantly weighed in on the topic. The first opinion in 2022, *Missouri v. Yellen*, involved Missouri's challenge to the Secretary of the Treasury's implementation of the American Rescue Plan Act of 2021—which gave states funds to mitigate the fiscal effects of the COVID-19 pandemic.[153] In the court's analysis, it determined that Missouri had failed to plead a sufficient injury-in-fact because the State had alleged a hypothetical injury that was not actual or imminent.[154] In a footnote, the court acknowledged the Supreme Court's suggestion that states are not normal litigants in situations like these, but that special solicitude did not eliminate the basic requirements of standing solely because a state is the plaintiff.[155]

This analysis leans heavily on the fact that in *Massachusetts v. EPA*, the Court engaged in a full standing analysis *after* declaring the state had special solicitude.[156] This focus from the Eighth Circuit also aligns with other circuits that any special solicitude afforded to

148. *Id.*

149. Indiana v. EPA, 796 F.3d 803, 809–10 (7th Cir. 2015).

150. *Id.* at 810 & n.5.

151. *Id.* at 810 n.5.

152. *Id.* at 811 n.5 ("On the other hand, while Massachusetts actually owns some of its coastal property, Indiana does not own its air; the state sovereign interest, therefore, was much clearer in *Massachusetts* than it is here.").

153. Missouri v. Yellen, 39 F.4th 1063, 1065–66 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 734 (2023).

154. *Id.* at 1070.

155. *Id.* at 1070 n.7.

156. *Id.*

a state plaintiff does not impact the state's need to still plead an injury-in-fact that would satisfy the *Lujan* test.[157]

The Eighth Circuit built on this idea in *Missouri v. Biden*, when it emphasized that "even if the [s]tates as sovereigns are entitled to some undefined 'special solicitude' in the standing analysis, they still must satisfy the basic requirements of Article III standing."[158] In that case, the court dismissed the state plaintiffs' claims as the injury was not concrete enough and the causation was too tenuous between the defendant's actions and the alleged injury.[159] The Eighth Circuit seems to have kept special solicitude at an arm's length, acknowledging it exists and that its application is a controversial, unsettled question.[160]

Like the Fifth Circuit, the Ninth Circuit is a sizable contributor to special solicitude jurisprudence. The mass of Ninth Circuit litigation involving special solicitude centers around environmental lawsuits and environment-related injuries. The Ninth Circuit focused on the procedural right present in *Massachusetts v. EPA*, when it analyzed states' standing.[161] However, the court did emphasize that an alleged environmental injury must cause injury to the plaintiffs, not just the environment.[162] This conclusion was supported by Massachusetts's ownership of the coastline that was disappearing in *Massachusetts v. EPA*.[163] Notably, in a concurrence of a denial to hear en banc, Judge Smith construed *Massachusetts v. EPA*'s holding on special solicitude to apply only when sovereigns plead environmental injuries.[164] This limitation of the doctrine is unique to the Ninth Circuit.

In 2020, Judge Staton pointed out that perhaps special solicitude served a specific purpose at the time of *Massachusetts v. EPA*, because it was uncertain how an individual plaintiff would succeed in bringing a climate change lawsuit at the time.[165] Perhaps the Supreme Court

157. *See id.*

158. Missouri v. Biden, 52 F.4th 362, 369 (8th Cir. 2022), *cert. denied*, 144 S. Ct. 278 (2023).

159. *Id.* at 369–70.

160. *Id.* at 369. The court makes its view on special solicitude's application clear by stating, "[w]hether and when alleged sovereign injuries can constitute the concrete and particularized injury in fact required for Article III standing is a controversial, unsettled question, as the Supreme Court's 5 to 4 decision in *Massachusetts v. EPA*, makes clear." *Id.* (citation omitted).

161. Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1179 (9th Cir. 2011) (focusing on both the procedural injury to plaintiffs and actual harm).

162. Wash. Env't Council v. Bellon, 732 F.3d 1131, 1144 (2013).

163. *See id.* at 1144–45.

164. Wash. Env't Council v. Bellon, 741 F.3d 1075, 1078 (9th Cir. 2014) (Smith, J., concurring).

165. Juliana v. United States, 947 F.3d 1159, 1183 n.9 (9th Cir. 2020) (Staton, J., dissenting).

held how it did to show that Massachusetts, and other state sovereigns, had an interest in protecting their interests that justified relaxing the other elements of standing.[166]

The Ninth Circuit only recently diverted from solely discussing special solicitude in environmental related opinions in *Arizona v. Yellen*. This case focused on a Spending Clause issue unrelated to the state plaintiff's environmental interests.[167] However, standing based on the state plaintiff's sovereign interest was a theory pled in the alternative to a theory of future injury.[168] The court accepted both theories of standing, meaning any reliance on special solicitude did not determine the outcome of the case.[169] Overall, the Ninth Circuit has stayed relatively true to the facts of *Massachusetts v. EPA*, primarily discussing special solicitude in the context of environmental injury, and only recently stepping into considering a relaxed standing test for other injuries. The circuit's rule focuses primarily on the state as plaintiff and its sovereignty and less on the procedural right specified in *Massachusetts v. EPA*.

The Tenth Circuit mentioned special solicitude in its standing rules in 2008 after the *Massachusetts v. EPA* decision was handed down,[170] but the court did not meaningfully discuss the doctrine's application in the standing analysis until 2012 in *Wyoming v. U.S. Department of Interior*.[171] The court declined to give Wyoming special solicitude in the analysis while also noting the "lack of guidance on how lower courts are to apply the special solicitude doctrine to standing questions."[172]

166. *See id.*

167. Arizona v. Yellen, 34 F.4th 841, 845 (9th Cir. 2022).

168. *Id.* at 851.

169. *See id.* at 853.

170. *See* Utah *ex rel.* Div. of Forestry, Fire & State Lands v. United States, 528 F.3d 712, 721–22 (10th Cir. 2008) (stating states get special solicitude in the standing analysis but not applying special solicitude in the standing analysis); Wyoming *ex rel.* Crank v. United States, 539 F.3d 1236, 1241–42 (10th Cir. 2008) (highlighting the guidance from *Massachusetts v. EPA* that states are not normal plaintiffs for federal jurisdiction purposes but continuing to analyze that Wyoming's stake in the controversy was sufficiently adverse without invoking special solicitude).

171. Wyoming v. U.S. Dep't of Interior, 674 F.3d 1220, 1238 (10th Cir. 2012). The petitioners argued special solicitude's support of their standing argument, but the court emphasized that special solicitude does not eliminate the State's obligation to establish a concrete injury, which petitioners lacked. *Id.* Despite special solicitude's application, the State was found ultimately to not have standing. *Id.*

172. *Id.*

The Tenth Circuit's interpretation of the special solicitude rule took its current shape in *New Mexico v. Department of Interior*.[173] There, the court stated that the special solicitude analysis "requires that a state be afforded some special consideration when analyzing its standing to bring suit, despite 'the lack of guidance on how lower courts are to apply the special solicitude doctrine to standing questions.'"[174] The court found both a procedural injury and an actual injury to New Mexico sufficient enough to meet Article III standing requirements before applying special solicitude.[175] In its application, the court did not analyze the traceability or redressability prongs of the standing analysis directly, supporting a conclusion that the Tenth Circuit follows the doctrine that special solicitude relaxes these two prongs.[176]

A New Mexico district court, following the guides of the Tenth Circuit and the Supreme Court, concluded that New Mexico did not receive special solicitude in its standing analysis because the State did not suffer a procedural injury.[177] This demonstrates the Tenth Circuit's focus on the procedural-injury requirement to receive special solicitude.

The Eleventh Circuit has been quiet on the topic. Despite a few district courts within the circuit addressing special solicitude for the first time in recent years, the circuit itself has not issued an opinion discussing special solicitude state standing.[178]

173. *See* New Mexico v. Dep't of Interior, 854 F.3d 1207, 1219 (10th Cir. 2017).

174. *Id.* (citations omitted).

175. *Id.* at 1215–18.

176. *See id.* at 1218–19.

177. New Mexico v. McAleenan, 450 F. Supp. 3d 1130, 1179–82 (D.N.M. 2020). In its opinion, the district court relayed a detailed summary of the origin of "special solicitude" and the confusion surrounding lower courts' application of *Massachusetts v. EPA*. *Id.* at 1178–79. The court noted that "it is not obvious whether States' special solicitude derives from their special position to assert procedural rights and ensure that the federal government performs regulatory responsibilities in which States cannot engage, or whether it derives from quasi-sovereign interests in regulating federal law's impact within states' borders." *Id.* at 1179.

178. Florida v. United States, 540 F. Supp. 3d 1144, 1153–54 (M.D. Fla. 2021) (discussing how Florida must still demonstrate an actual and imminent harm despite its receiving special solicitude in the standing analysis under *Massachusetts v. EPA*), *vacated*, No. 21-11715, 2021 WL 5910702 (11th Cir. Dec. 14, 2021); Florida v. United States, No. 3:21CV1066-TKW-ZCB, 2024 WL 677713, at *1 & n.1, *4 (N.D. Fla. Feb. 20, 2024) (holding that Justice Gorsuch's concurrence in *United States v. Texas* did not negate Florida's receipt of special solicitude in the standing analysis because Florida's standing did not solely depend on special solicitude).

The D.C. Circuit's jurisprudence on special solicitude is almost entirely related to environmental cases—likely due to environmental agencies' presence in the District of Columbia.[179] Initially, the D.C. Circuit interpreted special solicitude as simply a cherry on top of a state already showing Article III standing.[180] However, the circuit court also seemed not to distinguish special solicitude as a separate standing doctrine that modified traditional Article III standing requirements for states.[181] The D.C. Circuit also limited *Massachusetts v. EPA*'s holding to only apply in cases "where a harm is widely shared, a sovereign, suing in its individual interest, has standing to sue where that sovereign's individual interests are harmed, wholly apart from the alleged general harm."[182] Overall, the D.C. Circuit has not had any standing cases it decided solely based on a state's reception of special solicitude. The circuit recognizes that special solicitude is limited to states, it is limited to procedural rights, and it does not affect any plaintiff's requirement to show a proper injury-in-fact.[183]

The only time the Federal Circuit addressed special solicitude was in *Canadian Lumber Trade Alliance v. United States*.[184] In this case, the government of Canada sued the United States in the Court of International Trade seeking a declaratory judgment interpreting the Continued Dumping and Subsidy Offset Act in its favor.[185] However, the court held that Canada could not establish Article III standing to bring its suit[186] This was because it failed to demonstrate its own independent injury-in-fact, and it was not entitled to special solicitude that would "temper the injury-in-fact" requirement.[187] This interpretation is contrary to how other courts interpreted *Massachusetts v. EPA*'s impact on the injury-in-fact requirement.[188] Other courts understood special solicitude to not

179. *See, e.g.*, Del. Dep't of Nat. Res. & Env't Control v. FERC, 558 F.3d 575, 576, 579 & n.6 (D.C. Cir. 2009); Ctr. for Biological Diversity v. U.S. Dep't of Interior, 563 F.3d 466, 475–78 (D.C. Cir. 2009); New Jersey v. EPA, 989 F.3d 1038, 1045 (D.C. Cir. 2021).

180. Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316, 1322 (D.C. Cir. 2008).

181. North Carolina v. EPA, 587 F.3d 422, 426 (D.C. Cir. 2009).

182. *Ctr. for Biological Diversity*, 563 F.3d at 476–77.

183. Marino v. Nat'l Oceanic & Atmospheric Admin., 33 F.4th 593, 598 (D.C. Cir. 2022); North Carolina v. EPA, 587 F.3d at 426; Alaska v. U.S. Dep't of Agric., 17 F.4th 1224, 1230 (D.C. Cir. 2021).

184. Canadian Lumber Trade All. v. United States, 517 F.3d 1319, 1337 (Fed. Cir. 2008).

185. *Id.* at 1324–25.

186. *Id.* at 1337–38.

187. *Id.* at 1338.

188. *Compare id.* (finding that special solicitude would temper the injury-in-fact requirement), *with* Lacewell v. Off. of Comptroller of Currency, 999 F.3d 130, 145 (2d Cir. 2021) (understanding *Massachusetts v. EPA* to have no impact on the injury-in-fact requirement).

impact the injury-in-fact requirement, but to ease the causation and redressability requirements.[189]

Overall, what is displayed through each of the circuit's applications of special solicitude doctrine is that what *Massachusetts v. EPA* left unclear, no court was able to clarify. Some strains of analysis remained mostly consistent throughout the doctrine's application, such as that of procedural injury and quasi-sovereign interests, but much did not. The two largest bodies of opinions, the Fifth Circuit and the Ninth Circuit, seemed to disagree fundamentally on the doctrine's applicability to solely environmental injury or a broader application to any injury. In the seventeen years since *Massachusetts v. EPA* entered the scene, lower courts have looked to and asked the Supreme Court for answers. But no answers came.

B. The Supreme Court Is Unlikely to Provide Direct Clarification on Special Solicitude's Future Application

Since *Massachusetts v. EPA*, the Supreme Court has not answered the calls from district and circuit courts to clarify what exactly it meant for states to receive special solicitude in the standing analysis. Though the Court has not directly addressed how lower courts have interpreted or applied the doctrine, the Supreme Court's October 2022 term gave signals about special solicitude's future, or lack thereof. Two opinions from the term indicate that the doctrine has fallen out of favor and the Court intends to leave special solicitude behind.[190] These two cases were *Biden v. Nebraska* and *United States v. Texas*.[191] Both of these cases had state plaintiffs with interests that typically would have fallen under the category of those that received special solicitude.[192] The Court, however, distanced itself from *Massachusetts v. EPA* and special solicitude in both cases, indicating a departure from the doctrine.[193]

In *United States v. Texas*, Texas and Louisiana brought suit against federal agencies and officials, alleging that guidelines from the Department of Homeland Security on immigration enforcement policies violated federal statutes and imposed costs upon the states.[194] However, the Supreme Court found that the state plaintiffs lacked

189. *Compare Canadian Lumber*, 517 F.3d at 1338 (determining that special solicitude impacts the injury-in-fact requirement), *with* Louisiana Horseracing Integrity & Safety Auth. Inc., 617 F.3d 478, 490 (W.D. La. 2022) (finding that special solicitude affects satisfaction of traceability and redressability requirements).

190. Baude & Bray, *supra* note 12, at 174–77.

191. *Id.* at 174.

192. *Id.* at 174–75.

193. *Id.* at 175–77.

194. United States v. Texas, 143 S. Ct. 1964, 1968–69 (2023).

standing.[195] The plaintiffs lacked a cognizable interest that was redressable by the Court, failing to meet the third element of the standing inquiry.[196]

More interestingly though, was how the Court arrived at this conclusion and its implication on special solicitude. In the second part of Justice Kavanaugh's majority opinion, he states that "a *citizen* lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."[197] *United States v. Texas* involved state plaintiffs, yet Justice Kavanaugh intentionally stated the applicable rule as applying to citizens.[198] Despite acknowledging that the plaintiffs were states, the Court never found that special solicitude should apply or favorably cited to *Massachusetts v. EPA*.[199]

In footnote six, the current Court separated itself from *Massachusetts v. EPA*. It did this by stating, "[p]utting aside any disagreements that some may have with *Massachusetts v. EPA*, that decision does not control this case," implying members of the *United States v. Texas* majority did not agree with special solicitude.[200] The Court held *Massachusetts v. EPA* as inapplicable because there were key differences between its denial of a statutorily authorized petition for rulemaking and *United States v. Texas*'s challenge to the Executive's enforcement discretion.[201] This is a notable limitation of *Massachusetts v. EPA*'s scope as precedent.[202]

Criticisms of special solicitude and *Massachusetts v. EPA* also came in concurrence and dissent. Justice Gorsuch, in his concurrence, found it "hard not to wonder why the Court [said] nothing about 'special solicitude' in this case. And it's hard not to think, too, that lower courts should just leave that idea on the shelf in future ones."[203] In dissent, Justice Alito then acknowledged the majority's skeptical treatment of *Massachusetts v. EPA* and how its footnote reference raised more questions than *Massachusetts v. EPA* itself.[204] Justice Alito even went so far as to question whether

195. *Id.* at 1968.

196. *Id.* at 1970–71.

197. *Id.* at 1968, 1970 (emphasis added) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973)).

198. *Id.* at 1970.

199. *Id.*; Baude & Bray, *supra* note 12, at 174–76.

200. United States v. Texas, 143 S. Ct. at 1975 n.6.

201. *Id.*

202. Baude & Bray, *supra* note 12, at 174–76.

203. United States v. Texas, 143 S. Ct. at 1977 (Gorsuch, J., concurring).

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

the monumental decision of *Massachusetts v. EPA* had been "quietly interred."[205]

Just one week later, the Court published *Biden v. Nebraska*, where there was not a single mention of special solicitude or *Massachusetts v. EPA*.[206] *Biden v. Nebraska* was one of the student loan cases where the state of Missouri as plaintiff challenged the Secretary of Education's loan forgiveness plan as exceeding statutory authority.[207] The injury Missouri alleged was that to the Missouri Higher Education Loan Authority (MOHELA).[208]

Despite MOHELA being a separate non-profit corporation, the Court found that the state of Missouri had standing.[209] The "harm to MOHELA [was] also a harm to Missouri. MOHELA is a 'public instrumentality' of the State."[210] In its analysis, the Court never mentioned special solicitude or *Massachusetts v. EPA*, seemingly confirming Justice Alito's observation that the doctrine had been "quietly interred."[211]

Each of these cases, among others from the October 2022 Supreme Court term, reinforce the notion that the Court is distancing itself from special solicitude.[212] The Court seems to acknowledge that future jurisprudence will not embrace the doctrine when determining if a state plaintiff has standing to sue. This conclusion is not suspect when the reaction and mixed application of the lower courts is understood.[213] Many courts did not know what to do with the doctrine: using it to supplement traditional *Lujan* standing, insisting it applied to environmental injuries only, or using it to allow broad injury claims to proceed through federal court.[214] Lower courts would likely benefit more

205. *Id.*

206. Baude & Bray, *supra* note 12, at 176–77. *See generally* Biden v. Nebraska, 143 S. Ct. 2355 (2023) (holding that a state plaintiff had standing to challenge an executive agency's actions resulting in increased cost to a non-profit government corporation).

207. Biden v. Nebraska, 143 S. Ct. at 2365–66.

208. *Id.*

209. *Id.* at 2365.

210. *Id.* at 2366.

211. Baude & Bray, *supra* note 12, at 177; United States v. Texas, 143 S. Ct. 1964, 1997 (2023) (Alito, J., dissenting).

212. *See* Haaland v. Brackeen, 143 S. Ct. 1609, 1638, 1640 (2023); Dep't of Educ. v. Brown, 143 S. Ct. 2343, 2354 (2023); Baude & Bray, *supra* note 12, at 177–80.

213. This conclusion is even more understandable when the motives behind the *Massachusetts v. EPA* opinion are examined. Many believe special solicitude was included in the majority to get Justice Kennedy's fifth vote in the 5–4 decision. This crafting of opinions to capture the majority can result in vague or confusing precedent for other courts to follow, as seen with *Massachusetts v. EPA*. RICHARD J. LAZARUS, THE RULE OF FIVE: MAKING CLIMATE HISTORY AT THE SUPREME COURT, 239–40, 247–49, 252–53 (2020).

214. *See supra* Section III.A.

from a direct separation from the doctrine and a clear standard set for state-plaintiff standing. However, the October 2022 term indicates the Supreme Court may never directly overrule its special solicitude doctrine, and lower courts will be left to read the writing on the wall.

IV. CONCLUSION

Standing doctrine preserves separation of powers and ensures the proper litigants are before the court. This doctrine presents a threshold issue ensuring those cases being heard in federal court are those that are appropriate for the federal courts to hear. States received a lower standing threshold inquiry when the special solicitude doctrine emerged through *Massachusetts v. EPA*. After this vague opinion, lower courts parsed and ciphered the opinion to understand exactly how the different strains of analysis should influence the way they analyzed state plaintiffs before them.

Each circuit was left to its own devices to understand what the Supreme Court intended precedentially with its special solicitude doctrine. Some circuits saw little litigation on the subject and thus were not pressed to create a circuit rule. Others, like the Fifth and Ninth Circuits, received more frequent litigation with states pushing a special solicitude argument of standing. The common theme throughout was an ask for the Supreme Court to clarify the doctrine. However, that ask remained unanswered until the most recent Supreme Court term.

While the Supreme Court provided no direct decline of the special solicitude doctrine, the Court was presented with multiple opportunities to apply the doctrine. Each opportunity saw the Court shying further away and separating itself from the majority opinion in *Massachusetts v. EPA*. Despite no true overruling, the Court seems to have spoken on the issue, leaving special solicitude in the past, once and for all.

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