No. 17-35105

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, et al.,
Plaintiffs-Appellees,

v.

DONALD TRUMP, President of the United States, et al.,
Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

Page

I. INTERESTS OF AMICI CURIAE 1

II. INTRODUCTION 1

III. ARGUMENT 2

A. Proprietary Interests 3

B. Quasi-Sovereign Interests 6

IV. CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez,
458 U.S. 592 (1982)....................2, 3, 7, 9

Danvers Motor Co., Inc. v. Ford Motor Co.,
432 F.3d 286, 293 (3rd Cir. 2006)....................4

Georgia v. Tennessee Copper Co.,
206 U.S. 230 (1907)....................7

Grutter v. Gratz,
539 U.S. 306 (2003)....................10

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)....................4, 6, 9

Maryland People's Counsel v. FERC,
760 F.2d 318 (D.C. Cir. 1985) (Scalia, J.)....................7

Massachusetts v. EPA,
549 U.S. 497 (2007)....................8, 9, 11

Massachusetts v. Mellon,
262 U.S. 447 (1923)....................7, 10

North Dakota v. Minnesota,
263 U.S. 365 (1923) 7

Preminger v. Peake,
552 F.3d 757, 763 (9th Cir. 2008) 5

United States v. Students Challenging Regulatory Agency Procedures (SCRAP),
412 U.S. 669, 689 n.14 (1973)....................5

United States v. Texas,
809 F.3d 134 (5th Cir. 2015) 4

Statutes

Administrative Procedure Act..2

Other Authorities

Kathryn A. Watts & Amy J. Wildermuth, Massachusetts v. EPA: *Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. 1029 (2008), 102 NW. U. L. REV. COLLOQUY 1 (2007)..2

Amy J. Wildermuth, *Why State Standing in* Massachusetts v. EPA *Matters*, 27 J. LAND, RESOURCES, & ENVTL. L. 273 (2007)..2

Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?:* EPA's *New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1769–74 (2008)..8

13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE JURIS. 2D § 3531.11 (1984) 6

Henry Fountain, *Science Will Suffer Under Trump's Travel Ban, Researchers Say*, N.Y. TIMES (Jan. 30, 2017) 10

U.S. Const. art. III..*passim*

I. INTERESTS OF AMICI CURIAE

The non-party law professors are Todd Aagaard of Villanova University, David E. Adelman of the University of Texas, Robin Kundis Craig of the University of Utah, Lincoln L. Davies of the University of Utah, Noah Hall of Wayne State University, David Owen of the University of California Hastings, Zygmunt J. B. Plater of Boston College, Alexander T. Skibine of the University of Utah, Lisa Grow Sun of Brigham Young University, Joseph P. Tomain of University of Cincinnati, and Amy J. Wildermuth of the University of Utah ("the Law Professors").[1] The Law Professors research, teach, and write on federal courts, constitutional law, and administrative law. They are scholars who have spent considerable time studying state standing. As such, the Law Professors are interested in ensuring that the Court's decision on standing is consistent with this evolving body of law. The Law Professors maintain a neutral position on the underlying merits of the case, and are therefore not filing this brief in support of either party.

II. INTRODUCTION

The States of Washington and Minnesota ("States") have brought a

[1]*Amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to its preparation or submission.

challenge to the Executive Order issued on January 27, 2017, asserting claims under the U.S. Constitution as well as several federal statutes, including the Administrative Procedure Act. The district court concluded that the State of Washington ("Washington") has Article III standing to sue based on both proprietary and quasi-sovereign interests.

To date, there are few cases on state standing and, as a result, the Supreme Court has provided limited guidance in this area. *Amici* offer this brief to provide guidance on the appropriate analysis under existing law.[2]

Based on our analysis of the factual pleadings and supporting declarations filed by Washington, as clarified during oral argument, we believe the district court was correct in finding that the States have standing to bring suit.

III. ARGUMENT

When analyzing state standing, the first task is to identify the interest being asserted by the state. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982), the Supreme Court articulated three categories of potential

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

interests when a sovereign brings suit:

(1) proprietary interests,

(2) quasi-sovereign interests, and

(3) sovereign interests.

Id. at 601–02. Each category requires a different analysis. It is therefore essential in a case involving state standing that the analysis correctly identify the interest(s) at stake. In this case, Washington has not claimed that a sovereign interest gives rise to its ability to bring this suit.[3] Instead, it asserted both proprietary and quasi-sovereign interests as the basis for this lawsuit. We examine each in turn.

A. Proprietary Interests

The most straightforward path for the State in this case to bring suit is to demonstrate (1) that a federal action has harmed a proprietary interest of the State and (2) that the State, on that basis, has satisfied the traditional test for standing. Here, the district court correctly found that Washington demonstrated standing based on harm to its proprietary interests.

Proprietary interests are direct interests of a state, such as ownership of land or participation in a business venture. *Id.* These interests are the same kind that a private party would assert in litigation. *Id.* As a result, when a state asserts an injury

[3] Sovereign interests are unique to a state, such as the "power to create and enforce a legal code, both civil and criminal." *Snapp*, 458 U.S. at 601. Because the State has not asserted a sovereign interest, we will not examine it further.

to or interference with this kind of interest, the state should be treated just as a private party would when determining Article III standing. *Id.* at 611 (Brennan, J., concurring) ("At the *very* least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations."). Courts therefore require that sovereigns asserting a proprietary interest satisfy the well-known requirements of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992): In order to have Article III standing to bring suit in federal court, a state must show that (1) it has an actual and concrete injury, (2) the injury is traceable to the defendant's conduct, and (3) a favorable decision will likely redress the injury. *Id.* at 560–61.

When any party—state or otherwise—claims monetary harm as its injury for standing purposes, there is no minimum amount of harm that must be shown. In fact, when monetary harm is alleged, the injury-in-fact "is often assumed without discussion." *Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 293 (3rd Cir. 2006). For example, in *United States v. Texas*, 809 F.3d 134 (5th Cir. 2015), the State of Texas brought suit against the federal government, challenging the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program, including the requirement that the State issue drivers licenses to undocumented aliens. The Fifth Circuit concluded that Texas had suffered a proprietary injury-in-fact because the State had to incur "a minimum of $130.89"

in administrative costs for each license. *Id.* at 155; *see also Preminger v. Peake*, 552 F.3d 757, 763 (9th Cir. 2008) (relying on *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973), which held that the Court has "allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax.")).

Here, Washington asserted, *inter alia*, that its institutions of higher education, which are arms of the State, have lost and will continue to lose money as a result of the Executive Order.[4] As documented in its complaints and declarations, and clarified in argument before the district court, Washington has proprietary interests in its universities that have been harmed by the Executive Order. As a result of the travel ban, scholars and faculty affiliated with the university will have to cancel trips and events that require international travel. *See* ECF 17-2[5] ("Second Riedinger Decl.") at ¶¶ 5-6; ECF 17-4 ("Second Chaudry Decl.") at ¶ 3. These cancellations will cost the universities the money they paid for these trips, including potentially airfare, accommodations, and administrative costs incurred for booking travel. *See* Second Chaudry Decl. at ¶ 7 (detailing cancelled trip of a student impacted by the ban). In addition, because students and

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[4] *Amici* focus on the claims related to the State's universities because they are strong examples of the State's proprietary interests.

[5] ECF cites refer to the documents on the district court docket.

scholars who were admitted but are now banned from travel will be unable to enroll, the universities will lose the money paid in processing the applications and visas for these individuals, as well as any tuition dollars that would have been collected. Second Riedinger Decl. at ¶ 10(b)-(d). In addition, for those performing specific research or teaching tasks, replacements will need to be found, which, at a minimum, requires additional administrative costs. *See, e.g.*, ECF 9 ("First Riedinger Decl.") at ¶ 8.

Because Washington demonstrated (1) that its institutions of higher education will suffer monetary damage, (2) that such damage is a result of the travel ban, and (3) that they would not lose or have lost that money if the travel ban did not exist, Washington has satisfied the traditional *Lujan* requirements for Article III standing to sue and therefore is a proper party to bring this suit.

B. Quasi-Sovereign Interests

The district court also properly found that Washington has standing on the basis of its quasi-sovereign interests, i.e., in its role as *parens patriae* for its citizens. Although this is a more difficult path for standing in this case, there is clear support for the district court's holding.

Quasi-sovereign interests are difficult to describe. The Supreme Court has never precisely defined these interests, leading scholars to characterize them as "admittedly vague." 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND

PROCEDURE JURIS. 2D § 3531.11, at 31 (1984). When a sovereign brings suit based on quasi-sovereign interests, "the State must articulate an interest apart from the interests of particular private parties." *Snapp*, 458 U.S. at 607. *Snapp* generally described this separate interest as the State's interest "in the well-being of its populace," *id.* at 602, and provided two examples of quasi-sovereign interests: (1) a sovereign's interest in protecting the health and well-being—"both physical and economic"—of its citizens from injuries, such as transboundary pollution;[6] and (2) a sovereign's interest in seeing that its "residents are not excluded from the benefits that flow from participation in the federal system," such as when railroads conspire to discriminatorily fix freight rates in a manner that harms a particular state's shippers. *Id.* at 607–08 (citation omitted).

Even where a state properly asserts a quasi-sovereign interest, if the state is suing the federal government, one issue that arises is whether a state should be able to sue to protect its residents from the federal government because the federal government has a similar duty to protect those same residents. Previously, *Massachusetts v. Mellon*, 262 U.S. 447 (1923), was understood to have erected a bar to such suits: states could not sue the federal government based on their *parens patriae* interests unless Congress waived the restriction. *See Maryland People's*

[6] *See, e.g.*, *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (flooding) and *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (air pollution in Georgia caused by discharge of noxious gases from the defendant's plant in Tennessee).

Counsel v. FERC, 760 F.2d 318, 322 (D.C. Cir. 1985) (Scalia, J.). In *Massachusetts v. EPA*, 549 U.S. 497 (2007), however, the Court appeared to lift the bar to a state litigating against the federal government when a quasi-sovereign interest is at stake. In doing so, the Court explained:

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

Id. at 520 n.17. Although this passage seems to confuse the different interests a state might have, the Court has never offered further clarification on this point. As a result, it appears that after *Massachusetts*, a state can assert Article III standing based on a quasi-sovereign interest of ensuring that its citizens are provided the benefits of federal law, such as when the federal government acts or fails to act in a way that violates federal statutory (as reflected in an APA claim) or constitutional law. *See, e.g.*, 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, 1769–74 (2008).

Accordingly, once a state asserts a quasi-sovereign interest, what further showing, if any, is required in order to establish standing? The Court's most recent articulation of what is required is also found in *Massachusetts*. There, the Court

recited the *Lujan* factors—injury-in-fact, causation, and redressability—and went on to analyze each requirement. As the dissenting opinion pointed out, however, the Court's analysis appeared to substantially "[r]elax[]Article III standing requirements." *Massachusetts*, 549 U.S. at 536–37 (Roberts, C.J., dissenting). Instead of a more rigid, traditional analysis of the *Lujan* factors, the Court employed a "*Lujan*-lite" analysis, finding that Massachusetts had standing even though its injury—the loss of coastal lands—would occur many years in the future, and even though the relief sought by the parties was less than certain to substantially remedy that harm. In so holding, the Court acknowledged that its analysis was informed by the notion that states are entitled to "special solicitude" when they assert quasi-sovereign interests. *Id.* at 520.[7]

Because *Massachusetts* appears to have changed much and there has been little additional guidance from the Court, the path for a state to assert standing on the basis of a quasi-sovereign interest is less clear. In this case, Washington has argued that at least two of its relevant interests related to the state's universities are quasi-sovereign.

First, Washington residents attending state universities have had their

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[7] It is important to note that *Massachusetts v. EPA* did limit its standing analysis to territorial injuries. *See* Ex. E at 34:22–36:9 (ECF 14). The Court in *Massachusetts* specifically noted, as *Snapp* did, the "direct and important economic consequences" as part of the injury. *Massachusetts*, 549 U.S. 521–22.

education impacted by the federal government's actions. When the federal government restricted entry from the listed countries, it reduced the institutions' ability to attract and retain students and faculty from certain countries, thus diminishing and devaluing the rich and diverse learning environment that is core to the mission of higher education. *See Grutter v. Gratz*, 539 U.S. 306, 330 (2003) ("student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society"); *see also* ECF 17-3 ("Boesenberg Decl.") at ¶ 8.

Second, the ban inhibits the ability of Washington residents who are members of the university communities to do important, life-saving research. Many researchers must travel to present their work at conferences, which is critical to the progress of research. Second Riedinger Decl. at ¶¶ 5-6. Equally important is the ability to physically travel to sites where raw data or information is located that is the subject of their research, as well as to travel to labs around the globe to learn new techniques and processes. *See, e.g.*, Henry Fountain, *Science Will Suffer Under Trump's Travel Ban, Researchers Say*, N.Y. TIMES (Jan. 30, 2017), https://www.nytimes.com/2017/01/30/science/scientists-donald-trump-travel-ban.html?_r=0.

Because both of these grounds are quasi-sovereign interests, it appears proper for Washington to bring suit on these bases. If, as explained above, there is

no *Mellon*-bar to a state bringing this suit against the federal government in its role as *parens patriae*, then the district court's finding that Washington also had standing on these interests is correct. In fact, Washington's asserted quasi-sovereign interests in this case are stronger than those in *Massachusetts*. Massachusetts relied on injury to coastal lands many years in the future, a lengthy causal chain, and unclear redressability in terms of solving climate change because the regulation impacted only greenhouse gas emissions from new motor vehicles in the United States. Here, Washington's asserted injuries—e.g., to a student's learning environment and to a researcher's ability to do her work—are clear, can be directly tied to the travel ban, and would be immediately remedied by lifting the ban.

IV. CONCLUSION

Although *amici* offer no recommendation on the ultimate outcome of this case, based on the analysis above, we believe the district court correctly found that Washington has standing to bring this suit.

DATED: February 6, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limitation of Fed. R. App. P. 29 because it contains 2596 words. This Motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

s/ Claire Loebs Davis
Claire Loebs Davis

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: February 6, 2017

Respectfully submitted,

s/Claire Loebs Davis
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