GOVERNING FOR IMPACT

BIDEN V. NEBRASKA'S EFFECT ON STATE STANDING IN REGULATORY LITIGATION

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Issue Brief

I. INTRODUCTION

Progressive state attorneys general should litigate against the actions of a hostile administration frequently and aggressively. Lawsuits during the Trump Administration show the fruits of that strategy. State litigants successfully blocked, among other things, federal efforts to rescind the DACA program[1] and add a citizenship question to the Census.[2]

To challenge a particular action in federal court, plaintiffs must demonstrate standing under Article III of the Constitution — that the challenged act caused them a legally recognized injury that a court order would remedy. Standing doctrine is complicated and malleable, and the conservative Supreme Court majority has, for years, sought to limit standing as part of a broader effort to prevent federal courts from being used to vindicate important rights. In particular, the rules concerning when states have standing to sue have long been clouded by uncertainty. Two decades ago, the Supreme Court held that states, by virtue of their status as sovereign entities, get some ill-defined "special solicitude" in standing matters. Since then, an increasingly restrictive Court has seemed intent on overruling that doctrine.

But, in an overlooked reversal, the Supreme Court has, for practical purposes, recently simplified and broadened state standing. And in so doing, it has provided the means to overcome a political hurdle that stymied efforts to challenge several Trump-era regulations. In 2023's *Biden v. Nebraska*, the Court held that Missouri could challenge the Biden Administration's student loan forgiveness plan based on an injury to a state-chartered but functionally independent loan-servicing corporation. The case gives states a roadmap for generating standing to challenge nearly any federal regulation: simply identify how a regulation harms a state-created entity. Since states create and (at least nominally) oversee numerous entities operating in an exceptionally broad range of fields — universities, hospitals, utilities, financial institutions, public authorities, and transit agencies, among others — that should often be a straightforward task. *Nebraska* revives standing doctrine's "special solicitude" for states in a far more muscular form. The decision also allows states to assert the injuries of public corporations that, because they rely on federal grants or otherwise depend on the goodwill of federal officials on a recurring basis, would be unwilling to pursue claims against the federal government in their own names. The powerful role *Nebraska* suggests for states has become especially important to a good-governance litigation strategy in light of the Court's recent restriction of mission-driven organizations' ability to challenge regulations that affect their agendas.

In this memo, we offer a brief overview of standing doctrine in light of *Nebraska* and offer guidance on the many interests states possess that could justify a lawsuit.

[1] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1 (2019).

[2] *Dep't of Comm. v. New York*, 588 U.S. 752 (2019).

II. STANDING

Standing in general. The Constitution limits federal courts' jurisdiction to "cases" and "controversies."[3] The Supreme Court has read those words to mean that a federal plaintiff must have what it calls "standing." There are three elements of standing:

1. **Injury in fact.** A plaintiff must be able to allege a concrete, nonspeculative, legally recognized injury that it has suffered or will suffer imminently.
2. **Causation.** That injury must be "fairly traceable" to conduct by the defendant.
3. **Redressability.** It must be likely that the relief the plaintiff seeks from the court would actually redress the injury, at least in part.[4]

The standing test is often indeterminate — or, to put less charitably, manipulable.[5] The doctrine, as elaborated over the decades by the Supreme Court, can be complicated and confusing.[6] Beyond that, sometimes judges appear to glide past standing when they wish to decide a case's merits,[7] or analyze the elements of standing with special rigor when they are hostile to a plaintiff or a claim.[8] Consequently, it is often hard to predict how a standing analysis will turn out, especially in politically salient cases.

State standing. In general, states suing in federal court are subject to the same standing rules that apply to private plaintiffs. But states, as landowners, employers, market participants, and sovereigns, generally have more interests to protect than a typical individual or corporation does. Questions of state standing generally turn on when injuries to these many interests "qualify as concrete injuries under Article III."[9] Several state interests may be protected in federal court:

[3] U.S. Const. Art. III, cl. 2.

[4] *See generally Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992); *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).

[5] *See* William Baude, Samuel L. Bray, *Proper Parties, Proper Relief*, 137 Harv. L. Rev. 153, 189 (2023); *Biden v. Nebraska*, 143 S. Ct. 2355, 2391 (2023) (Kagan, J., dissenting); *Massachusetts v. EPA*, 549 U.S. 497, 548 (2008) (Roberts, C.J., dissenting).

[6] *See* 13A Edward H. Cooper, Fed. Prac. & Proc. Juris. § 3531.4 (3d ed. Jun. 2024 update) ("In application, however, the injury requirement is often far more complex than these phrases and frequent easy cases might suggest."); *FDA v. All. for Hippocratic Med.*, 144 S. Ct. 1540, 1557 (2024) ("Unfortunately, applying the law of standing cannot be made easy, and that is particularly true for causation.").

[7] *See, e.g.*, *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 n.4 (1986).

[8] *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408–22 (2013).

[9] *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021).

1. **Sovereign interests.** If a challenged action injures a state's interests in, for example, enforcing its own laws[10] or protecting its sovereign prerogatives in the federal system, like its right not to be "commandeered" by the federal government,[11] the state has a legally recognized injury.

2. **Proprietary interests.** A state may sue to remedy direct financial harm.[12] It may also sue in its capacity as a property owner,[13] employer,[14] or market participant.[15] This is the category most dramatically expanded by the Supreme Court's decision *Biden v. Nebraska*, which we discuss more below.

3. **Quasi-sovereign interests.** A "quasi-sovereign interest" is a "a judicial construct that does not lend itself to a simple or exact definition."[16] But, generally, "a state has a quasi-sovereign interest in the health and well-being — both physical and economic — of its residents in general."[17] As a rule of thumb, an injury to a quasi-sovereign interest "is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers."[18] Courts have allowed states to assert base standing on injuries to these interests.[19]

More generally, in the landmark *Massachusetts v. EPA* case, the Supreme Court held that states are to be accorded "special solicitude" in the standing analysis.[20] It is not clear, though, what special solicitude means or what work it did in that case. There, Massachusetts challenged the EPA's denial of its petition for the regulation of greenhouse gasses as pollutants under the Clean Air Act.[21] The Court recognized that the failure to regulate greenhouse gasses would likely cause sea level rise, implicating Massachusetts's proprietary interest in coastal land it owned and its quasi-sovereign interests more

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[10] *Dep't of Labor v. Triplett*, 494 U.S. 715, 717 (1990) (interest in enforcement of law sufficient); *Kentucky v. Biden*, 23 F.4th 585, 602 (6th Cir. 2022) (vaccination regulation's effect on "sovereign interests and traditional prerogatives in regulating public health and compulsory vaccination" sufficient).

[11] *Haaland v. Brackeen*, 143 S. Ct. 1609, 1632 n.5 (2023). A state's "interest in not being discriminatorily denied its rightful status within the federal system" has also been described as a "quasi-sovereign interest." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Berez*, 458 U.S. 592, 607 (1982).

[12] *General Land Off. v. Biden*, 71 F.4th 264, 272 & n.11 (5th Cir. 2023) (showing of "unrecoverable costs" imposed by federal regulation sufficient).

[13] *Massachusetts*, 549 U.S. at 522 (harm to state-owned land sufficient).

[14] *Texas v. Dep't of Labor*, 2024 WL 3240618, at *15 (Jun. 28, 2024) (demonstration that wage-and-hour rule would cause state "injuries as an employer" sufficient).

[15] *Kentucky*, 23 F.4th at 601 (showing that federal regulation could lead to modification or loss of states' federal contracts sufficient).

[16] *Alfred L. Snapp & Son*, 458 U.S. at 601.

[17] *Id.* at 607.

[18] *Massachusetts*, 549 U.S. at 519 (quoting *Alfred L. Snapp & Son*, 458 U.S. at 607).

[19] *Id.* at 518–21 (interest in preserving sovereign territory sufficient); *Kentucky*, 23 F.4th at 601–02 (showing that vaccination mandate would harm states' economies sufficient).

[20] 549 U.S. at 520.

[21] *Id.* at 514.

generally.[22] That would appear to have settled the standing question without any need for special solicitude. At any rate, special solicitude — at least phrased in those terms — may not be the rule for long. The Court's conservative supermajority is eyeing it for overruling.[23]

Not every state interest may be vindicated in a challenge to federal action. Under some circumstances, states have the power to sue as "*parens patriae*" to protect the rights of particular citizens. "[A] state, however, does not have standing as *parens patriae* to bring an action against the Federal Government"[24] because "only the United States, and not the states, may represent its citizens and ensure their protection under federal law in federal matters."[25] It must rely on a sovereign, proprietary, or quasi-sovereign interest instead.[26]

States can protect many interests in federal court — many more than individuals and private entities can. But state standing doctrine has been in flux in recent years, mainly because of uncertainty over the scope and future of *Massachusetts v. EPA*'s "special solicitude" rule.[27]

[22] *Id.* at 520 & n.17, 522.

[23] *See United States v. Texas*, 599 U.S. 670, 688–89 (2023) (Gorsuch, J., concurring) ("Before *Massachusetts v. EPA*, the notion that States enjoy relaxed standing rules had no basis in our jurisprudence. Nor has 'special solicitude' played a meaningful role in this Court's decisions in the years since." (alteration, citation, and internal quotation marks omitted)); *see* 13B Edward H. Cooper, Fed. Prac. & Proc. Juris. § 3531.11.1 (3d ed. Jun. 2024 update) ("Massachusetts v. Environmental Protection Agency illustrates the precarious nature of state standing to challenge federal action.").

[24] *Alfred L. Snapp & Son*, 458 U.S. at 610 n.16.

[25] *Ctr. for Biological Diversity v. Dep't of Interior*, 563 F.3d 466, 477 (D.C. Cir. 2009).

[26] The line between a cognizable quasi-sovereign interest and an impermissible *parens patriae* theory is not entirely clear. The basic principle is that a quasi-sovereign interest "is a matter of grave public concern in which the State, as representative of the public, has an interest *apart* from that of the individuals affected." *Alfred L. Snapp & Son*, 458 U.S. at 605 (quoting *Pennsylvania v. West Virginia*, 262 U.S 553, 592 (1923)) (emphasis added); *see also Kentucky*, 23 F.4th at 596–98 (distinguishing "two distinct concepts" of *parens patriae* standing: while a state may not sue the federal government "purely on behalf of their own citizens' interests," it may "assert[] some injury to [its] own interests separate and apart from [its] citizens interests," like its prerogative to ensure "health, comfort, and welfare." (internal quotation marks omitted))

[27] There is uncertainty over whether "special solicitude" is just another formulation of the rule that states may sue to protect their quasi-sovereign interest in their citizens and territory, *see New Mexico ex rel. Richardson v. Bur. of Land Mgmt.*, 565 F.3d 683, 696 n.1 (10th Cir. 2009) (conflating the two), whether the Court will reject special solicitude, *Texas*, 599 U.S. at 688–89 (Gorsuch, J., concurring), and whether doing so might affect any of the traditional state standing rules. Beyond that, the "concept of quasi-sovereign interest" is "admittedly vague," Cooper, *supra*; *see also Alfred L. Snapp & Son*, 458 U.S. at 601 (admitting that the term has no "simple or exact definition"), and some Justices have expressed "doubt" about "a State's standing to assert a quasi-sovereign interest — as opposed to a direct injury — against the Federal Government," *Massachusetts*, 549 U.S. at 539 (Roberts, C.J., dissenting).

III. BIDEN V. NEBRASKA

Biden v. Nebraska simplified state standing — not by resolving the uncertainties in the doctrine, but by making them largely irrelevant. It held that a state could base standing on injury to a state-created but functionally independent corporation. The rule that public corporations count as the state itself for standing purposes gives states a roadmap for challenging a broad range of federal regulations. And they can do so based on direct injuries — which no one doubts as a basis for standing — rather than relying on the confusing and vulnerable doctrines of quasi-sovereign interests and special solicitude.

In *Nebraska*, the Supreme Court held that Missouri had standing to challenge the Biden Administration's plan to forgive student loan debt. Federal loan servicers — the entities that collect borrowers' payments and administer the terms and conditions of loan programs — earn an administrative fee for each account they manage. Forgiving loans would have reduced those fees. One major servicer of federal loans is MOHELA, the Missouri Higher Education Loan Authority. The Court held that MOHELA's impending loss of fees was an injury to Missouri itself, giving rise to standing.

MOHELA, the Court held, is a state "instrumentality."[28] It is a "government corporation," chartered by the state to serve an "essential public function."[29] It is "subject to the state's supervision and control" because its board members are either state officials or gubernatorial appointees, all of whom may be removed by the governor for cause.[30] Because it submits annual financial reports to the Missouri Department of Education, MOHELA is "directly answerable" to the state.[31] The state "sets the terms of its existence" and can "set the terms of its dissolution."[32] Because of these connections, the loan forgiveness plan's "acknowledged harm to MOHELA in the performance of its public function is necessarily a direct injury to Missouri itself."[33]

In dissent, Justice Kagan explained why this was not an obvious result. She characterized MOHELA as a "legally and financially independent public corporation."[34] Because MOHELA's losses are not "passed through to the state," its "revenue decline — the injury in fact claimed to justify this suit — is not in fact Missouri's."[35] Beyond that, MOHELA, "is — like the lion's share of corporations, whether public or private — a separate legal entity with distinct legal rights and obligations from those belonging to its creator."[36] Its assets "are not part of the

[28] 143 S. Ct. at 2366.

[29] *Id.* at 2365–66.

[30] *Id.* at 2366.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 2386 (Kagan, J., dissenting).

[35] *Id.* at 2386–87.

[36] *Id.* at 2387 (alteration and internal quotation marks omitted).

revenue of the State" and "Missouri cannot be liable for" its debts.[37] Indeed, Missouri's highest court found that a similarly structured public corporation was a "separate entit[y]" from the state.[38] Because of this "independence," according to Justice Kagan, "[t]he injury to MOHELA . . . does not entitle Missouri — under our normal standing rules — to go to court."[39]

Nebraska has changed those rules, perhaps dramatically. Now, a state should usually have an injury in fact whenever a state-created corporation is harmed. And there are many types of state-created corporations — state universities, public hospitals, financial institutions, and public authorities like utilities and transit agencies. Under *Nebraska*, any of these entities should, for standing purposes, count as the state itself. Indeed, Nebraska relied on cases holding that a state could sue to remedy an injury to a public university,[40] and that Amtrak was an instrumentality of the federal government.[41]

To be sure, it may be that not every public corporation is an "instrumentality" of the state.[42] *Nebraska* relied not just on MOHELA's state charter, but also on Missouri's ongoing "supervision and control" over MOHELA.[43] The Court, however, found to be sufficient several formalistic indicia of state control — a board composed of public officials and gubernatorial appointees, a financial reporting requirement, and a reserved state power to dissolve MOHELA — that should be present as to many, if not all, state corporations. It seems likely, for instance, that state universities qualify as the state for standing purposes.[44] Indeed, in *Nebraska*, evidence that MOHELA functioned as a fully independent corporation did not affect the Court's analysis.[45]

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[37] *Id.* (alteration and internal quotation marks omitted).

[38] *Id.* at 2387–88 (quoting *Menorah Med. Ctr. v. Health & Ed. Facilities Auth.*, 584 S.W.2d 73, 76 (Mo. 1979)).

[39] *Id.* at 2388.

[40] *See Arkansas v. Texas*, 346 U.S. 368 (1953).

[41] *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 375 (1994); *Dep't of Transp. v. Ass'n of Am. R.R.s.*, 575 U.S. 43 (2015).

[42] *Id.* at 2366 (maj. op.).

[43] *Id.*

[44] See, for example, N.Y. Educ. L. title I, art. 5 and N.Y. Regs. ch. 1, pt. 3, which establish the State University of New York, and, among other things, provide for a governing board made up largely of gubernatorial appointees and establish reporting requirements. *See also Nebraska*, 143 U.S. at 2366–67.

[45] The Court recently rejected state standing in *United States v. Texas*. There, the Court held that states lacked standing to challenge federal immigration guidelines that, according to the states, provided for insufficient arrests of noncitizens. 599 U.S. at 673. "The States ha[d] not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions" and so had not demonstrated a right to sue. *Id.* at 677. Because it involved an unprecedented claim, *Texas* does not affect our view that *Nebraska* allows states to assert the rights of state-created corporations in typical regulatory litigation.

IV. STRATEGIC CONSIDERATIONS

States are powerful and useful litigants. They have resources and talent at their disposal. They represent powerful political constituencies. And — as we have shown — they can open the federal courthouse doors more often than any other type of litigant. If a deregulatory administration returns to power, states should plan to aggressively challenge federal action in court.

Biden v. Nebraska, by broadening the already wide range of state interests that can be the basis for a lawsuit, should be a cornerstone of a state's regulatory litigation strategy. For any adverse regulation, state attorney generals should seek to identify a state-chartered corporation or entity that has been harmed. That should often be straightforward. For instance, state universities will be impacted by any regulation that affects their funding, their enrollment, or the wellbeing and security of their student bodies.[46] Health care regulations can affect the operation and funding of public hospitals and health systems.[47] Financial rules affect state-chartered banks. Changes to federal spending programs could affect any number of state-created entities receiving federal funds. There are many possibilities.

There is another important reason states should pursue regulatory litigation in the name of state corporations. Frequently, entities likely to have standing to challenge a regulatory rollback are repeat players who are reluctant to sue the government in their own names. Now, the state itself is empowered to assert those claims — whereas before, they might never have been brought. *Nebraska* illustrates this dynamic. There, MOHELA itself was "[a]s far from [Missouri's] suit as it [could] manage."[48] It was not a party, an amicus, or "even a rooting bystander."[49] Indeed, the Missouri attorney general could only obtain certain documentation from MOHELA through a formal records request.[50] "MOHELA had no interest in assisting voluntarily."[51] Missouri nevertheless was legally — and politically — empowered to assert MOHELA's injury as its own. Similarly, during the Trump Administration, public hospitals were reluctant to challenge a federal regulation limiting prescription drug reimbursements under Medicare.[52] That sort of reluctance may become more acute during a

[46] *See Regents of Univ. of Cal. v. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1033–34 (N.D. Cal. 2018) (DACA "rescission has harmed the University in multiple ways," giving rise to standing).

[47] *See* Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714, 7717 (Mar. 4, 2019) (Trump-era regulation prohibiting recipients of Title X funding "from referring for abortion as a method of family planning, or from performing, promoting, referring for, or supporting abortion as a method of family planning.").

[48] *Nebraska*, 143 S. Ct. at 2387 (Kagan, J., dissenting).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *See generally Am. Hosp. Ass'n v. Azar*, 596 U.S. 724 (2022).

second Trump Administration, in light of former President Trump's threats to retaliate against political opponents if reelected.[53]

Nebraska's new paradigm, of course, supplements the set of interests states have long been able to vindicate in court. Labor and employment rules can injure states in their capacity as employers.[54] Insufficient environmental regulation can harm state property.[55] Commercial regulations can affect states' ability to participate in the market.[56] Direct financial harms nearly always create standing. And while our view is that *Nebraska*'s breadth has largely freed states of the need to rely on nebulous concepts like "quasi-sovereign interests" and "special solicitude," it remains blackletter law that states can challenge regulations that impair their sovereign prerogatives and affect their citizens and territory.

A final point. The Supreme Court recently pared back the so-called "organizational standing" doctrine, emphasizing that a mission-driven organization cannot generally challenge a regulation merely because it "incurr[ed] costs to oppose" it.[57] That limitation, which could affect numerous organizations that would ordinarily oppose a hostile administration in court, only emphasizes the importance of the "utility player" role that *Nebraska* suggests for states in regulatory litigation. States should embrace Nebraska and move aggressively to block adverse regulations, as the coalition of stakeholders who helped challenge rules during the first Trump Administration has likely shrunk.[58]

[53] *See* David Smith, *Revenge: Analysis of Trump Posts Shows Relentless Focus on Punishing Enemies*, The Guardian (June 2, 2024).

[54] *Texas*, 2024 WL 3240618, at *15

[55] *Massachusetts*, 549 U.S. at 522.

[56] *Kentucky*, 23 F.4th at 594–95.

[57] *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 393 (2024).

[58] Standing is just one doctrine affecting a state's ability to pursue regulatory litigation against the federal government. Other doctrines like finality, *see Bennett v. Spear*, 520 U.S. 154 (1997), and reviewability, *see* 5 U.S.C. § 701(a), frequently come into play. Those doctrines are beyond the scope of this issue brief, but we can separately advise on navigating those roadblocks as well.