

# CONSTITUTIONAL STANDING BASED ON CALIFORNIA'S AGRICULTURAL INDUSTRY

## I. INTRODUCTION

In *Massachusetts v. Environmental Protection Agency*, the Supreme Court held that the State of Massachusetts presented a sufficient injury to create standing to sue the Environmental Protection Agency "E.P.A."<sup>1</sup> The Court determined Massachusetts had satisfied the requirements for standing by asserting an imminent injury from the potential loss of its coastal land as a result of rising sea levels caused by greenhouse gases.<sup>2</sup> In doing so, the Supreme Court defined how special solicitude is applied to a state action.<sup>3</sup>

California was one of the plaintiffs involved in *Massachusetts v. E.P.A.*<sup>4</sup> The Supreme Court determined that Massachusetts was the only plaintiff to successfully prove standing.<sup>5</sup> The Appellate Court avoided addressing the issue of standing, but the dissent noted that California did not adequately prove an injury beyond a generalization suffered by the public at large.<sup>6</sup>

Although California could have used its position as a coastal state to assert the same argument presented by the State of Massachusetts, California failed to do so. This Comment will analyze whether California's agricultural industry has suffered a particularized injury in connection with global warming, which would be sufficient for standing.

This Comment will provide a general overview of Article III of the United States Constitution and the requirements for standing. This Comment will then explain the devastating effects on California's agricultural industry as a result of the rise in global temperature. This Comment will analyze if the damage to the agricultural industry would provide a particularized injury for the State rather than a generalized griev-

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<sup>1</sup> *Massachusetts v. E.P.A.*, 127 S. Ct. 1438, 1455 (2007).

<sup>2</sup> *Id.* at 1456.

<sup>3</sup> *Id.* at 1454-1455.

<sup>4</sup> *Id.* at 1446 n.2.

<sup>5</sup> *Id.* at 1452 (explaining Tatel, J., dissenting).

<sup>6</sup> *Massachusetts v. E.P.A.*, 415 F.3d 50, 60 (2005) (Sentelle J., dissenting in part, concurring in part) *rev'd*, 127 S. Ct. 1438 (2007).

ance. Finally, this Comment will examine whether the special solitude that allowed Massachusetts to prove standing would apply to California's agricultural injury.

## II. GENERAL OVERVIEW OF ARTICLE III OF THE U.S CONSTITUTION

Article III confers powers to the legislature to create "such inferior courts as Congress should see fit to establish."<sup>7</sup> Congress created the federal court system through the Judiciary Act of 1789.<sup>8</sup> The courts must adhere to the limitations of jurisdiction listed in the Constitution. Article III limits the judicial power of the United States to the resolution of "cases and controversies."<sup>9</sup> One of the limitations provided by the cases and controversies requirement is the responsibility of the court to only administer the legal rights of plaintiffs who present a case with an actual controversy.<sup>10</sup> The court is precluded from exercising jurisdiction over cases which are hypothetical, or which are precluded because of problems with standing.<sup>11</sup>

Standing is a way to ensure that the proper parties are before the court and therefore, will bring an actual case or controversy to the tribunal.<sup>12</sup> A case must satisfy the preliminary requirement of standing in order to have the dispute decided on the merits.<sup>13</sup> The standing requirement is enforced to preserve the separation of powers, prevent ideological lawsuits, and improve the judicial process.<sup>14</sup> The Court utilizes the standing requirement to restrict the judicial review over legislative and executive acts. The restriction prevents an exercise of unconditioned authority over the other branches of government.<sup>15</sup> The theory behind restricting ideological lawsuits is to prevent the Court from becoming an "organ of political theories."<sup>16</sup> Lastly, standing is said to improve the judicial process by presenting the case in the best manner for judicial resolution.<sup>17</sup>

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<sup>7</sup> U.S. CONST. art. III, § 1.

<sup>8</sup> JOHN KANOVITZ, ET AL., CONSTITUTIONAL LAW 14 (Elisabeth Roszmann Ebben ed., Anderson Publishing Co. 8<sup>th</sup> ed. 1999) (1968).

<sup>9</sup> See U.S. CONST. art. III, § 2.

<sup>10</sup> *Biotechnology Indus. Org. v. Dist. of Colombia*, No. 1593, 2007 U.S. App. LEXIS 18236 at \*18 (Fed. Cir. Aug. 1, 2007).

<sup>11</sup> *Id.*

<sup>12</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 62 (Vicki Been et al. eds., Aspen Publishers 3<sup>rd</sup> ed. 2006).

<sup>13</sup> *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

<sup>14</sup> CHERMERINSKY, *supra* note 12, 61-62.

<sup>15</sup> See *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982).

<sup>16</sup> CHERMERINSKY, *supra* note 12, at 61-62.

<sup>17</sup> See *id.* at 62.

This is achieved by requiring that the litigant has a personal stake in the outcome, a concrete adverseness, and a strong incentive to bring the case before the court.<sup>18</sup>

#### A. Elements of Standing

To have standing, the Constitution requires that the plaintiff prove a concrete injury caused by the defendant's actions that can be redressed by the plaintiff's requested relief.<sup>19</sup> The Court has defined a valid injury as being an "injury in fact -- an invasion of a legally protected interest which is concrete and particularized; and actual or imminent."<sup>20</sup> The Court has defined the term "particularized" as meaning a personal and individual injury.<sup>21</sup> The court will adjudicate an imminent injury to prevent the plaintiff from suffering the actual injury prior to seeking relief.<sup>22</sup> This is especially important in environmental cases because the alternative would require the plaintiff to wait for a catastrophic injury to obtain relief.<sup>23</sup> Relief after a catastrophe would do little to redress the problem and reverse the environmental damage.<sup>24</sup>

The causation element of standing requires that the injury be fairly traceable to defendant's alleged conduct.<sup>25</sup> Lastly, the requested relief to redress the injury it must be "likely," as opposed to merely "speculative," that a favorable decision will cure the plaintiff's injury.<sup>26</sup>

#### B. Prudential Limitations on Standing

The judicial branch has also implemented three prudential limitations that may be overruled by Congress through statute.<sup>27</sup> The court may not grant standing where the litigant is raising the legal rights of a third party not before the court; the injury is a generalized grievance shared with the

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<sup>18</sup> *Id.* at 64.

<sup>19</sup> *Id.* at 63.

<sup>20</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>21</sup> *Id.* at 561 n.1.

<sup>22</sup> *Biotechnology Indus. Org. v. Dist. of Colombia*, No. 1593, 2007 U.S. App. LEXIS 18236 at \*17 (Fed.Cir. Aug. 1, 2007).

<sup>23</sup> Michael Dorf, *The Supreme Court Oral Argument in the Global Warming Reveals What's Wrong With the Standing Doctrine*, Findlaw.com, ¶ 19 (Dec. 4, 2006) <http://writ.news.findlaw.com/dorf/20061204.html>.

<sup>24</sup> *Id.*

<sup>25</sup> *Lujan*, 504 U.S. at 560.

<sup>26</sup> *Id.* at 562.

<sup>27</sup> CHEMERINSKY, *supra* note 12, at 63.

public at large, or the plaintiff's complaint is not within the zone of interests protected by the law invoked.<sup>28</sup>

Third party standing is when the plaintiff raises the legal rights of another person.<sup>29</sup> Though generally prohibited, the Court will allow exceptions where the plaintiff has a close relationship with the third party. The relationship has been extended to a patient and doctor relationship, and courts have also allowed vendors to assert standing of behalf of their customers.<sup>30</sup> The Court will allow third party standing where substantial obstacles prevent the third party from asserting their rights and the Court believes that the plaintiff can be an effective advocate on the third party's behalf.<sup>31</sup> An association may assert the rights of the association or members.<sup>32</sup> An association has standing when: (1) the members have a right to standing on their own; (2) the interest it seeks to protect is germane to the organization's purpose; and (3) neither the claim asserted or the relief requested requires the participation in the lawsuit of the individual members.<sup>33</sup>

General grievances are also prevented from standing.<sup>34</sup> General grievances are formed from "abstract questions of wide public significance."<sup>35</sup> The judicial branch will decline jurisdiction, because these cases are better remedied by the executive and legislative branches of government.<sup>36</sup> A plaintiff can still bring a case that would normally be considered a generalized grievance if the plaintiff can prove a direct injury.<sup>37</sup> The Court has explained, "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."<sup>38</sup> In the interest of justice, the Court was unwilling to accept a blanket denial of all general grievances.<sup>39</sup>

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<sup>28</sup> *Id.* (explaining the prudential limitation of generalized grievance as applied to taxpayer standing).

<sup>29</sup> *See id.*

<sup>30</sup> *Id.* at 85.

<sup>31</sup> *Id.* at 83 (citing *Secretary of State v. J.H. Munson Co.*, 467 U.S. 947, 956 (1984)).

<sup>32</sup> *Id.* at 88.

<sup>33</sup> *Id.* at 89. (quoting *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)).

<sup>34</sup> *Id.* at 90-91.

<sup>35</sup> *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982).

<sup>36</sup> *Id.*

<sup>37</sup> *Lujan*, 504 U.S. at 575.

<sup>38</sup> *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973).

<sup>39</sup> *See id.*

The courts will also refuse standing over cases that are outside the zone of interest protected by law.<sup>40</sup> The two tests used are: (1) zone of injury, where the injury is the type of injury that Congress expected might be addressed under the statute; and (2) zone of interests, where the party is within the zone of interest protected by the statute or constitutional provision.<sup>41</sup> The pivotal question is whether Congress vested the plaintiff's class with the right to challenge the agency.<sup>42</sup> To answer this question the court must examine the legislative intent of the law in question.<sup>43</sup> The plaintiff must be able to show Congress intended the plaintiff to benefit from the statute.<sup>44</sup>

### C. Overview of Historical Environmental Cases

Prior to *Massachusetts v. E.P.A.*, there were a number of court rulings giving precedence to environmental cases. In *Sierra Club v. Morton*, the Sierra Club petitioned the court to prevent a ski resort from being built in Mineral King Valley.<sup>45</sup> The Supreme Court denied standing, finding that the Sierra Club failed to allege that their members used Mineral King for any of their activities or that any of the members would be affected by the proposed ski resort.<sup>46</sup> The Court held, "[A] mere interest in a problem, no matter how long standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient."<sup>47</sup> A bona fide special interest organization could not claim standing if none of the members suffered an injury.<sup>48</sup> Justice White stated in *The Brethren* that if the plaintiff had claimed at least one member had walked through the park, there would have been standing to sue.<sup>49</sup> Based on the holding in *Sierra Club v. Morton* and the comment by Justice White, one might conclude that standing in environmental cases is best proved with a showing of land use, despite the plaintiff's knowledge about the geographical area.<sup>50</sup>

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<sup>40</sup> See Michael Dorf, *The Supreme Court Oral Argument in the Global Warming Reveals What's Wrong With the Standing Doctrine*, Findlaw.com ¶ 19 (Dec. 4, 2006) <http://writ.news.findlaw.com/dorf/20061204.html>.

<sup>41</sup> *Assoc. of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970).

<sup>42</sup> *Id.* at 154-155.

<sup>43</sup> *Sacilor v. United States of America*, 815 F.2d 1488, 1491 (1987).

<sup>44</sup> CHEMERINSKY, *supra* note 12, 98.

<sup>45</sup> *Sierra Club v. Morton*, 405 U.S. 727, 729 (1972).

<sup>46</sup> *Id.* at 735.

<sup>47</sup> *Id.* at 739.

<sup>48</sup> *Id.* at 739-740.

<sup>49</sup> CHEMERINSKY, *supra* note 12, at 65 (quoting from Bob Woodward & Scott Armstrong, *THE BRETHREN* n.164).

<sup>50</sup> *Id.* at 65.

The next landmark case, *United States v. Students Challenging Regulatory Agency Procedures* “S.C.R.A.P.,” was distinguished from the previous case of *Sierra Club v. Morton*.<sup>51</sup> In *United States v. S.C.R.A.P.*, the students were requesting an injunction against the Interstate Commerce Commission’s increase in freight rates and claimed standing under the Administrative Procedures Act.<sup>52</sup> The students claimed that the increase would discourage the use of recycled goods.<sup>53</sup> A decrease in recycled goods would lead to an increase in the use of natural resources and pollutants, thereby ruining the aesthetic beauty of the land.<sup>54</sup> The Supreme Court held, “aesthetic and environmental injuries are sufficient for standing so long as the plaintiff claims to suffer the harm personally.”<sup>55</sup>

*SCRAP* clarified the nexus that must be asserted between the plaintiff and the land. The Court emphasized the direct harm to one’s use and enjoyment of the land as being the crux of an injury viable for standing.<sup>56</sup> Plaintiffs who have only a minor stake in the outcome and are not “significantly” harmed, can assert standing as long as they are “adversely affected.”<sup>57</sup> Based on this reasoning, a group that sought to preserve their continued recreational use of the land presented a stronger case for standing than a group that protected endangered animals in an area they no longer visited.

In *Lujan v. National Wildlife Federation*, the National Wildlife Federation challenged the government’s reduction of environmental procedures on federal land. The Federation claimed that the lack of protection would endanger the wild animals in the area.<sup>58</sup> Some of the members claimed to have visited the land in the vicinity, but they had no concrete plans to ever return.<sup>59</sup> The court held, “the allegation was too general to establish a particular injury and thus the defendant was entitled to prevail.”<sup>60</sup> In this case, the Court felt that the injury claimed by the National

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<sup>51</sup> ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 65 (Vicki Been et. al. eds.) Aspen Publishers (3<sup>rd</sup> ed. 2006); *See and c.f.* *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973).

<sup>52</sup> *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 684-685 (1973).

<sup>53</sup> *Id.* at 687-688.

<sup>54</sup> *See id.* at 688.

<sup>55</sup> *Id.* at 686-687.

<sup>56</sup> *See id.* at 687.

<sup>57</sup> *Id.* at 690.

<sup>58</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

<sup>59</sup> *Id.* at 564.

<sup>60</sup> CHERMERINSKY, *supra* note 12, at 66 (citing the lower court in *Lujan*, 504 U.S. at 883).

Wildlife Federation fell into the prudential limitations of a general grievance.<sup>61</sup>

The National Wildlife Federation had claimed the same aesthetic injury that existed in *United States v. S.C.R.A.P.*, with an interest in protecting endangered animals. Their injury was insufficient because the group lacked current ties to the land.<sup>62</sup> The plaintiff's use of the land is what transforms a mere interest shared by the public into a particularized harm, necessary for standing.<sup>63</sup> After the *Lujan* ruling, scholars predicted the ruling was an indication that the Supreme Court would not allow a broad authorization for standing.<sup>64</sup>

#### D. Significance of *Massachusetts v. E.P.A* on Standing

In *Massachusetts v. E.P.A.*, the state of Massachusetts was among twelve other states and various organizations who petitioned against the E.P.A. for failing to regulate carbon monoxide.<sup>65</sup> In 2003, the E.P.A. concluded that the agency lacked authority to regulate greenhouse gasses under the Clean Air Act.<sup>66</sup> The agency also decided that if it did have authority to regulate the gases, it would decline regulation on the basis of global warming.<sup>67</sup> The petitioners argued that the E.P.A. did have the authority to regulate greenhouse gases because of the broad language of the statute.<sup>68</sup> The Supreme Court held that Massachusetts asserted a concrete injury from the potential loss of its coastal land, from rising sea levels caused by climate change. Massachusetts was therefore allowed to proceed with the lawsuit.<sup>69</sup>

The Supreme Court reasoned that "a litigant to whom Congress has accorded a procedural right to protect his concrete interests can assert that right without meeting all of the normal standards for redressability and immediacy."<sup>70</sup> In essence, the Supreme Court acknowledged Massachusetts' statutory right to assert standing.<sup>71</sup> The procedural right Massachusetts asserted is found in the Clean Air Act.<sup>72</sup> When Congress drafted

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 72.

<sup>65</sup> *Massachusetts v. E.P.A.*, 127 S. Ct. 1438, 1446 (2007).

<sup>66</sup> *Id.* at 1450.

<sup>67</sup> *Id.* at 1459.

<sup>68</sup> *Id.* at 1450.

<sup>69</sup> *Id.* at 1458.

<sup>70</sup> *Id.* at 1453 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992)).

<sup>71</sup> *Id.* at 1455.

<sup>72</sup> Clean Air Act of 1963 42 U.S.C. § 304(a).

the Clean Air Act, it included a provision that gave any person the power to bring suit to enforce certain pollution control regulations.<sup>73</sup> The Court did not expressly state whether Massachusetts was within the zone of injury to be protected by the Clean Air Statute because the injury was the result of pollution, or if Massachusetts was within the zone of interest because States were among the intended beneficiaries of the Clean Air Act.<sup>74</sup>

This contrasts from the *Lujan* case, which was based on a statutory right created in the Endangered Species Act.<sup>75</sup> The Endangered Species Act gave any person the right to bring a civil suit for violation of the Act.<sup>76</sup> Though both cases were based on a statutory right to sue, the Court affirmed that while Congress could place any person within the zone to enforce the statutes, the Court will not exercise jurisdiction unless the constitutional requirements were satisfied.<sup>77</sup> To sue under an Act, the plaintiff must have the right to statutory standing and the court must categorize the plaintiff's injury as valid for standing.

In *Lujan*, the Supreme Court determined, the request to preserve the land and animals for future study by members, who had visited the region in the past, was insufficient to create a personalized injury.<sup>78</sup> The circumstances in *Massachusetts v. E.P.A.* were based on enforcement of a regulation which one might consider an "abstract question of wide public significance."<sup>79</sup> Critics of the standing doctrine believe case precedence suggests the federal courts will deny standing based on generalized grievances even if the litigant has suffered a particularized harm, if that harm is shared with many.<sup>80</sup> The Supreme Court did not deny standing as predicted by their critics.<sup>81</sup> The Court determined the State had a significant amount of territory affected, and the fact the injury was shared among others did not diminish the State's interest.<sup>82</sup> It is important to note, the Court acknowledged that most of the coastal land is owned by

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<sup>73</sup> *Id.*

<sup>74</sup> See *Assoc. of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970).

<sup>75</sup> *Lujan*, 504 U.S. at 571-572.

<sup>76</sup> Endangered Species Act of 1973, 16 U.S.C. § 11(g) (amended 1978, 1982 and 1988).

<sup>77</sup> CHEMERINSKY, *supra* note 12, at 75.

<sup>78</sup> *Lujan*, 504 U.S. at 564.

<sup>79</sup> *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982).

<sup>80</sup> Michael Dorf, *The Supreme Court Ruling on Global Warming May Not Slow Global Warming, But it Does Restore Some Common Sense to Standing Doctrine*, Findlaw.com 2 ¶ 7 (April 9, 2007) <http://writ.lp.findlaw.com/dorf/20070409.html>.

<sup>81</sup> CHEMERINSKY, *supra* note 12, at 72.

<sup>82</sup> *Massachusetts v. E.P.A.*, 127 S. Ct. 1438, 1456 (2007).

the State of Massachusetts.<sup>83</sup> In *Lujan*, the association was fighting to protect land owned by the government and not the association. This may be an indication that when an environmental dispute affects a large population, the more rights a plaintiff has to use of the land, the stronger plaintiff's claim for standing based on injury to that land.

*Massachusetts v. E.P.A.* also clarifies the difference between a state's rights to sue the government on behalf of its citizens as opposed to a private citizen bringing action against the government. In *Lujan*, the court stated:

[W]hen the suit is one challenging the legality of government action or inaction [and the] plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated third party to the government action or inaction -- and perhaps on the response of others as well.<sup>84</sup>

The Supreme Court clearly stated that when a third party is committing the harm, causation and redressability are important elements in determining if action against the government could change the behavior of the third party.<sup>85</sup> If the third party is not bound by the government, then the requested relief cannot redress the problem. In *Lujan*, the funding agencies that created the alleged injury were not parties to the case and therefore would only be prevented from acting if they were bound by the Secretary of State's regulation.<sup>86</sup> The Court would not speculate if the government's ability to influence the third party would "likely" redress the problem.<sup>87</sup> The dissent for the Court of Appeals in *Massachusetts v. E.P.A.* noted that the director of the E.P.A. acknowledged the regulation would influence other governments to create better technologies.<sup>88</sup> The statement implies some inquiry by the Court into the influence of nonbinding government regulation on third parties.<sup>89</sup>

### III. GLOBAL WARMING AND CALIFORNIA'S AGRICULTURAL INDUSTRY

The Appeals Court did not comment on the issue of California's standing.<sup>90</sup> However, the dissenting opinion wrote:

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<sup>83</sup> *Id.* at 1454.

<sup>84</sup> *Lujan*, 504 U.S. at 562.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 568.

<sup>87</sup> *Id.* at 571.

<sup>88</sup> *Massachusetts v. E.P.A.*, 127 S. Ct. at 1452. (quoting Tatel, J., dissenting).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1451.

[E]mission of certain gases that the EPA is not regulating may cause an increase in the temperature of the earth - a phenomenon known as global warming. This is harmful to humanity at large. Petitioners are or represent segments of humanity at large. This would appear to be neither more nor less than the sort of general harm eschewed as insufficient to make out an Article III controversy by the Supreme Court and lower courts.<sup>91</sup>

In essence, the dissenting opinion indicates that the other plaintiffs, including California, failed to prove a particularized injury instead of a general grievance. There is no dispute that humanity in general suffers some type of injury in correlation to the increase in temperature. In California's situation, the State could have claimed a more specific injury by asserting potential loss to the agricultural industry.

According to the Union of Concerned Scientists, "California is the largest and most diverse agricultural producer in the nation, growing half the country's fruits and vegetables, employing more than one million people, and covering a quarter of the state's total land area."<sup>92</sup> The State has continuously been the leader in the nation's agricultural industry.<sup>93</sup> In 2005, California's agricultural sales accounted for \$31.71 billion.<sup>94</sup> Livestock and poultry amounted for \$8.45 billion, fruits and nuts accounted for \$10.47 billion, vegetables and melons were \$6.25 billion, greenhouse nursery and floriculture produced \$3.44 billion in sales and field crops produced \$3.09 billion in sales.<sup>95</sup> The Central Valley of California is the leading agricultural area for the State.<sup>96</sup> The Central Valley is composed of various counties, which are among the top five agricultural counties for the State.<sup>97</sup> In 2005, Fresno County grossed a total of \$4.64 billion, making it the number one agricultural county in California.<sup>98</sup> Despite advances in technology and irrigation, agricultural produc-

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<sup>91</sup> *Massachusetts v. E.P.A.*, 415 F.3d. 50, 60 (Sentelle, J., dissenting) *rev'd* 127 S. Ct. 1438 (2007).

<sup>92</sup> UNION OF CONCERNED SCIENTISTS, GLOBAL WARMING AND CALIFORNIA AGRICULTURE, [http://www.ucsusa.org/assets/documents/global\\_warming/ucs-ca-agriculture2.pdf](http://www.ucsusa.org/assets/documents/global_warming/ucs-ca-agriculture2.pdf) (last visited Feb. 22, 2008).

<sup>93</sup> CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, AGRICULTURAL STATISTICAL REVIEW [http://www.cdfa.ca.gov/files/pdf/card/ResDir06\\_Overview.pdf](http://www.cdfa.ca.gov/files/pdf/card/ResDir06_Overview.pdf) (last visited Feb. 22, 2008).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *See id.* (Fresno, Tulare, Kern and Merced counties are the top agricultural counties for the state).

<sup>98</sup> UNION OF CONCERNED SCIENTISTS, *supra* note 92.

tion remains highly dependent on the weather, which can affect both the quantity and quality of harvested crops.<sup>99</sup>

Changes in temperature could cause statewide problems with damaged crops, reduced water supply, and a financial loss to the economy.<sup>100</sup> Higher temperatures due to global warming could cause a forty percent drop in some of California's most popular crops by mid-century.<sup>101</sup> Almonds, walnuts, oranges, avocados and table grapes could be especially vulnerable to the change.<sup>102</sup> Fruit and nut trees require a minimum number of chill hours.<sup>103</sup> Chill hours are necessary for proper bud setting for many fruit and nut trees, and are rapidly decreasing in many areas of the State, approaching insufficient levels for proper plant growth.<sup>104</sup> If the average statewide temperature rises into the higher warming range, the temperatures will reach critical thresholds for some fruit trees.<sup>105</sup> If these thresholds are reached, some high-value fruit crops such as almonds, cherries, and apricots may no longer be capable of production in California.<sup>106</sup>

Farmers will also feel the effects of global warming; scientists predict higher temperatures and less precipitation inland will result in a reduction of snow pack in the Sierra Mountains, thereby diminishing the runoff that feeds the State's rivers.<sup>107</sup> The Sacramento-San Joaquin River Delta is the single most important link in California's water supply system.<sup>108</sup> A federal court in Sacramento, California, has already blocked increased water deliveries from the Sacramento Delta to both the Central

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<sup>99</sup> World Climate Report, *Global Warming and California Agriculture*, <http://www.worldclimaterreport.com/index.php/2007/04/02/global-warming-and-california-agriculture/#more-230> (last visited Feb. 22, 2008).

<sup>100</sup> Cary Lowe, *California Steamin'; Sooner Than You Think, Global Warming Is Going to Alter How and Where We Build and Live*, L.A. TIMES, June 10, 2007, at 1-2.

<sup>101</sup> *Scientists Predict Declining Crops Due to Global Warming*, GLOBAL WARMING TODAY, December 5, 2006 (Crops categorized as perennials are only planted in California every twenty five to forty years, making them vulnerable to weather changes).

<sup>102</sup> David Lobel et al., *Impacts of Future Climate Change on California Perennial Crop Yields: Model Projections with Climate and Crop Uncertainties*, LAWRENCE LIVERMORE NATIONAL LABORATORY, March 14, 2006, available at <http://e-reportsext.iinl.gov/pdf/329204>.

<sup>103</sup> UNION OF CONCERNED SCIENTISTS, *supra* note 92 (chill hour are the hours per year the temperature drops below 45°F).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (higher warming range is considered more than 8°F).

<sup>106</sup> *Id.*

<sup>107</sup> *Scientists Predict Declining Crops Due to Global Warming*, GLOBAL WARMING TODAY, December 5, 2006.

<sup>108</sup> CaliforniaWaterCrisis.Org, *California's Water: A Crisis We Can't Ignore*, <http://www.calwatercrisis.org/pdf/ACWA.WS.Delta%202007.pdf> (last visited Feb. 22, 2008).

Valley of California and to Southern California.<sup>109</sup> The problem with the reduced water supply is evident from the number of efforts from Central Valley farmers to increase their water rights. Farmers have been forced to pump from lakes that are already severely low because of the reduced rainfall.<sup>110</sup> Low water levels at the Kings River in Central California are putting an end to water deliveries for some valley growers, and the 2007 peak season runoff is expected to be less than thirty eight percent.<sup>111</sup> In addition, the rainfall season of 2007 made history as the driest recorded in Merced, California, since 1896.<sup>112</sup> It has caused a water shortage for farmers who rely on the Merced River for irrigation.<sup>113</sup>

Agriculture is lucrative for California; the State's financial economy would certainly be affected by crop damage and reduction. California has already experienced some financial loss due to increased temperatures.<sup>114</sup> As global temperatures began to rise in the early 1980s, the extra heat slowed the growth of certain crops.<sup>115</sup> By 2002, about forty million tons of barley, corn, and wheat, worth nearly \$5 billion and constituting between two and three percent of the crop, were being lost each year.<sup>116</sup> A recent report suggests that California's agricultural industry may be hit the hardest, as the effects of global warming increase.<sup>117</sup> The American Economic Review Study predicts the national agricultural industry may experience a \$1.3 billion boost over the next century as a result of longer growing periods.<sup>118</sup> Although California may see an annual loss of fifteen percent, or \$750 million, over the next 100 years, largely due to water shortages.<sup>119</sup>

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<sup>109</sup> Lowe, *supra* note 100, at 1-2.

<sup>110</sup> KFSN TV: Water Running Out for Valley Farmers (ABC television broadcast July 31, 2007) available at <http://abclocal.go.com/kfsn/story?section=local&id=5527450> (last visited, Feb. 22, 2008).

<sup>111</sup> *Id.*

<sup>112</sup> KFSN TV: Merced River Showing Signs of Drought (ABC television broadcast Aug. 8, 2007) available at <http://abclocal.go.com/kfsn/story?section=local&id=5552945> (last visited, Feb. 22, 2008).

<sup>113</sup> *Id.*

<sup>114</sup> Rebecca Kessler, *Cereal Killer; Sampling: The Warming Earth*, NATURAL HISTORY, June 1, 2007, at 16.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Greenwire, *Climate: Alpine Glaciers to Disappear by 2050 Experts Say*, AIR, WATER & CLIMATE, January 23, 2007, at 2.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

## IV. CALIFORNIA'S CLAIM OF SPECIAL SOLICITUDE

To have standing, a party must show a concrete injury, caused by the defendant's actions, with the ability to be redressed by the plaintiff's requested relief.<sup>120</sup> California's agricultural industry is vital to the economy due to the variety and amount of crops the State produces for the nation.<sup>121</sup> This would create a special economic interest that California would have in maintaining stable climate temperatures.

California is the top exporter of agricultural products for the United States, with the largest portion going to the European Union.<sup>122</sup> Therefore, allowing California to protect the State's economic interest would also be in the benefit of protecting the national domestic product. As noted in *United States v. S.C.R.A.P.*, a plaintiff could have standing based on their decreased enjoyment of the land stemming from the injury.<sup>123</sup> The State could sue on behalf of the farmers who would be deprived from enjoying the benefits from the land if climate change eliminated the harvesting of certain crops.

However, one may view this interest as a generalized grievance shared with many around the globe. Because the European Union receives a large portion of California's products, they too have a strong economic interest in California's Agriculture. If certain exported crops were devastated by climate change the European Union would have to find alternative areas to purchase the products that may not be so readily available in the current market. Due to California's dominate position as an agricultural leader in the United States; this example could be carried over to any person working in the field of agriculture or even the everyday consumer of produce.<sup>124</sup> This scenario may even apply to a consumer out of state that enjoys the taste of wine produced in the Napa Valley.

The requirement that prevents a generalized environmental grievance from becoming a claim worthy of standing is the plaintiff's connection to the use of the land.<sup>125</sup> The difference between the State claiming injury as opposed to an out of state consumer claiming injury, would be the fact that California directs its efforts to utilize the land for farming while a consumer would only reap the benefits produced by California's efforts.

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<sup>120</sup> CHEMERINSKY, *supra* note 12, at 63.

<sup>121</sup> UNION OF CONCERNED SCIENTISTS, *supra* note 92, at 1.

<sup>122</sup> AGRICULTURAL STATISTICAL REVIEW, *supra* note 93, at 22.

<sup>123</sup> *See e.g.* *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973).

<sup>124</sup> *See id.* at 687.

<sup>125</sup> CHEMERINSKY, *supra* note 12, at 66.

Reaping the benefits of the land without possessing any rights to the land is not enough to create an injury necessary for standing.

Historically, promoting a person's rights to land as directly connected with their use of the land has existed for centuries.<sup>126</sup> Most important to California's case is the historical notion that property rights are derived from mixing one's labor with the land.<sup>127</sup> California's agricultural industry is a classic example. The temperature is ideal for a variety of crops. Farmers across the State have used the land to produce food for the nation and the world.<sup>128</sup> The State would have a strong interest in preserving one of the most productive uses of the land. The California farmers have expended their labor and cultivation efforts to harvest the land; therefore the farmers should assert standing. California farmers may face substantial obstacles to standing since all farmers are not financially able to absorb the cost of lengthy trials. Due to the amount of farmers that could potentially be affected by global warming, it could create a burden on the legal system to have each plaintiff bring a separate action. In addition, because there are a variety of different farming operations to be affected, a class action may not be appropriate in this case. In the interest of efficiency and justice, the State of California should act in a third party capacity to bring the action on behalf of the farmers.

California could make the claim that, while the actual financial loss has not reached significant levels, the imminent financial loss if crops are further damaged could potentially devastate the State's economy.<sup>129</sup> The biggest hurdle would be proving this is not a speculative claim. The court would have to determine how much of an economic loss California must suffer to be substantial. The court would have to determine whether the temperatures contributed to crop damage or if the crop damage would occur in the natural harvest cycle.

The State of California may have a hard time proving that it is the best representative for standing in an agricultural case because the State is not the true owner of the land. The agricultural land is owned by 76,500 privately owned farms through out the State.<sup>130</sup> This is a different case from the situation in *Massachusetts v. EPA*, where the Court acknowledged that most of the coastal land was owned by the State.<sup>131</sup>

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<sup>126</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT, \*24 available at <http://socserv.mcmaster.ca/econ/ugcm/3113/locke/government.pdf>.

<sup>127</sup> *Id.*

<sup>128</sup> See UNION OF CONCERNED SCIENTISTS, *supra* note 92.

<sup>129</sup> Greenwire, *supra* note 117, at 1.

<sup>130</sup> AGRICULTURAL STATISTICAL REVIEW, *supra* note 93.

<sup>131</sup> *Massachusetts v. E.P.A.*, 127 S. Ct. 1438, 1454 (2007).

Also, California would not suffer a potential permanent loss of territorial land, as would Massachusetts.<sup>132</sup> California's issue would stem from the loss of crops produced on the land. California would still have the use of the land, whereas Massachusetts would be permanently or temporarily deprived of use.<sup>133</sup> In addition, if temperature conditions were to change, California farmers could change the types of crops they grow to adapt to the weather. Farmers often change their crops to those that yield a higher market value. The plaintiff only needs to prove an injury of particularized harm.<sup>134</sup> Currently, the State has not suffered a grave injury, but the State may still be able to prove an injury to satisfy standing.

California would have to prove that the lack of regulation was part of the cause of injury.<sup>135</sup> In *Massachusetts*, the Supreme Court rejected the E.P.A.'s argument that the regulation would only create minute changes to greenhouse gases, because some action on the defendant's part would prevent part of the plaintiff's injury, even if it is only a diminutive amount.<sup>136</sup> The Court acknowledged that the government's failure to regulate does not have to be the complete cause of the injury.<sup>137</sup> Under this reasoning, California would only have to prove that part of the increase in greenhouse gases are related to the E.P.A.'s failure to act.

The court may be reluctant to find the E.P.A at fault in a case stemming from an agricultural injury when it is commonly known that certain farming practices, such as pesticides, fertilizers, and dairies also contribute to greenhouse gases.<sup>138</sup> The Court would have to determine at what level a government agency should be held liable when both the plaintiff's actions and the government's omissions contribute to the injury. The Court may not apply this reasoning because it requires the Court to assess the fault of each party. Although this may be easily handled in torts cases, issues like air pollution are ill suited for such discussions. Since the Court did not examine the issue of fault in *Massachusetts v. E.P.A.*, the Court may choose not to examine the issue in agricultural cases as well. Overall, California has a strong argument for injury but would have a difficult time proving the causation element because of contribu-

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<sup>132</sup> *Id.* at 1456.

<sup>133</sup> *Id.*

<sup>134</sup> *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 686 (1973).

<sup>135</sup> *Massachusetts v. E.P.A.*, 127 S. Ct. at 1457.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1458.

<sup>138</sup> Earthjustice.org, California Farm Bureau Seeks to Revive Air Pollution Exemption Again, available at [http://www.earthjustice.org/news/press/002/california\\_farm\\_bureau\\_seeks\\_to\\_revive\\_air\\_pollution\\_exemption\\_again.html](http://www.earthjustice.org/news/press/002/california_farm_bureau_seeks_to_revive_air_pollution_exemption_again.html) (last visited March 3, 2007).

tory actions and the widespread global pollution from a number of different sources. Therefore, it would also be difficult to prove that California would be likely to avoid the injury, even if the E.P.A. had regulated the greenhouse gasses.

#### A. *Special Solitude*

Because causation and redressability would pose a problem to California's case, the State may ask the court for special solicitude. In *Massachusetts v. E.P.A.*, the action was against a government agency because they failed to regulate a third party, but the State was afforded special solicitude to meet the standing requirements.<sup>139</sup> The Supreme Court noted, "States are not normal litigants for the purposes of invoking federal jurisdiction."<sup>140</sup> By allowing special solicitude, the Court granted Massachusetts "the right to challenge an agency action unlawfully withheld . . . without meeting all the normal standards for redressability and immediacy."<sup>141</sup> The general rule in environmental cases is that special solicitude is only granted if the plaintiff has been given a procedural right to protect their concrete interest, and that interest is the basis for standing.<sup>142</sup>

The Court's application of special solicitude was followed in *South Carolina Wildlife Federation v. South Carolina Department of Transportation*. The plaintiffs sought to prevent a roadway from being built through a swamp wetland.<sup>143</sup> The plaintiffs claimed an injury to their enjoyment of the swamp. Judge Norton followed the *Massachusetts* opinion, adding that the plaintiff only needed to prove a possibility that the relief would cause the defendant to reconsider the decision that allegedly caused the plaintiffs' injury.<sup>144</sup> Therefore, special solicitude lightens the plaintiff's burden. The likelihood relief would redress the injury is no longer required, only its possibility of redress.<sup>145</sup> Other than a hypothetical guess at the defendants' state of mind, there is no bright-line test for the court to use.

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<sup>139</sup> *Massachusetts v. E.P.A.*, 127 S. Ct. at 1454.

<sup>140</sup> *Id.* at 1464 (Roberts, C.J., dissenting).

<sup>141</sup> *Id.* at 1453.

<sup>142</sup> *See id.*

<sup>143</sup> *South Carolina Wildlife Federation v. South Carolina Dep't Transp.*, 485 F. Supp. 2d 661, 667 (2007).

<sup>144</sup> *Id.* at 670.

<sup>145</sup> *Id.*

### B. California's Claim of Special Solicitude

Since California is a quasi-sovereign state, as the court determined Massachusetts is, California does not have the power to regulate other states.<sup>146</sup> California must depend on Congress and the administrating agencies to enforce regulations on third parties.<sup>147</sup> In this case, California would advocate for enforcement of the Clean Air Act. California would have statutory standing to sue, since any person is allowed to sue to enforce the Act. The Court in *Massachusetts* determined that this could also apply to a state.<sup>148</sup>

The argument against allowing California to sue under the statute would be that an agricultural injury is not within the zone of injuries the Clean Air Act was intended to prevent. Cases presented by states to protect the land may dilute Congress' original intention of enacting the statute to protect the public health. The Clean Air Act may be expanding the original intentions by becoming the States' policing agent to enforce rights not consistent with the original purpose. This potential argument is not likely to succeed because of its overreaching implications. California could prove an injury sufficient for standing. Special solicitude would circumvent the State having to prove the weaker elements of their case. The procedural right to claim special solicitude would originate from the Clean Air Act and protection from environmental pollutants.

## V. CONCLUSION

California would face a number of obstacles to qualify for standing in the traditional sense. Special solicitude would allow California to present the strongest arguments, while avoiding the weak points of the case. California would have to prove beyond speculation that the imminent loss to the agricultural industry will occur, and that California's interest is significant and strong enough to allow standing. Special solicitude would allow California to concentrate only on the injury and possible redress.<sup>149</sup> Therefore, California's best choice is to plead standing using special solicitude.

Although this is an option for California, it is not necessarily the answer. It is at the discretion of the court to allow California to have special solicitude. The State must be proactive in eliminating pollutants. California seems to be moving in the right direction. The State has

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<sup>146</sup> *Massachusetts v. E.P.A.*, 127 S. Ct. at 1454.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 1455.

<sup>149</sup> *Id.* at 1464 (Roberts, C.J., dissenting).

started this approach by proposing stricter standards of car emissions.<sup>150</sup> California has led the way nationally with the proposal of a law requiring the rate of greenhouse gas emissions in the state to be cut to the 1990 level by 2020, which would result in a twenty-five percent reduction.<sup>151</sup> In addition, the state created a Citrus Mutual website, monitoring temperatures of oranges and other fruits extremely susceptible to temperature changes. Therefore, even if California would not be allowed special solicitude or traditional standing, in some small way they would be working to receive the change that the State is petitioning for.

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<sup>150</sup> Foster Electric Report, *In an Effort to Decrease California's Rising Air Pollution Levels*, Gov. Schwarzenegger Signs Two Emissions Mitigation Bill, Report No. 476, at 11 (Oct. 4, 2006).

<sup>151</sup> *Id.*