No. 17-15589

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAI'I; ISMAIL ELSHIKH
Plaintiffs-Appellees,

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR DISTRICT OF HAWAII

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF NEITHER PARTY

Claire Loebs Davis
Jessica N. Walder
Taylor Washburn
LANE POWELL PC
1420 Fifth Avenue, Suite 4200
Seattle, WA 98101-2375
Telephone: 206.223.7000
Facsimile: 206.223.7107
Attorneys for Proposed Amici Curiae Law Professors

Non-party law professors, Todd Aagaard, Robin Kundis Craig, Brigham Daniels, Lincoln L. Davies, Noah Hall, Alexandra B. Klass, David Owen, Zygmunt J. B. Plater, Alexander T. Skibine, Lisa Grow Sun, Joseph P. Tomain, and Amy J. Wildermuth ("the Law Professors") hereby move for leave to file an *amicus curiae* brief, and for the Court to consider the Law Professors' attached brief on the issue of state standing in adjudicating this matter. The Law Professors respectfully request that the Court consider this brief because the Law Professors are scholars on the issue of state standing and hope the Court may benefit from their analysis of this issue. The Law Professors maintain a neutral position on the underlying merits of the case, and are not filing this brief in support of either party. The Law Professors rather seek to offer guidance to the Court to help resolve the issue of state standing consistent with current law.

I. INTEREST OF THE LAW PROFESSORS

The Law Professors are scholars who have spent considerable time studying the question of state standing. As such, the Law Professors have a strong interest in ensuring that the Court's decision on standing is consistent with this body of law.

The Law Professors are professors at law schools across the country who research, teach, and write on constitutional law, federal courts and administrative law. The Law Professors are all particularly interested in questions of state standing, and continue to research and study this area of the law.

- Todd Aagaard is the Vice Dean of the Villanova University Charles Widger School of Law. His teaching and research focuses on administrative law, property law, energy law, and environmental law.
- Robin Kundis Craig is the William H. Leary Professor of Law at the S.J. Quinney College of Law at the University of Utah. She researches the law and policy of "all things water," including water rights, water pollution, and ocean and coastal issues, as well as climate change adaptation and the intersection of constitutional and environmental law.
- Brigham Daniels is a Professor of Law at Brigham Young University. He writes and teaches on a variety of topics in environmental law, property law, natural resources law, and administrative law.
- Lincoln L. Davies is the Associate Dean for Academic Affairs, the Hugh B. Brown Professor of Law, and a Presidential Scholar at the University of Utah. His research focuses on administrative law, including standing issues, and on energy and environmental regulation.
- Noah Hall is a law professor at Wayne State University and Scholarship Director of the Great Lakes Environmental Law Center. His research focuses on federalism, state sovereignty, and interstate environmental disputes.
- Alexandra B. Klass is a Professor of Law at the University of

Minnesota. She teaches and writes in the areas of energy law, environmental law, natural resources law, tort law, property law, and administrative law.

- Dave Owen is a Professor of Law at University of California Hastings College of Law. He teaches courses in environmental, natural resources, water, and administrative law.
- Zygmunt J. B. Plater is a Professor of Law at Boston College Law School, teaching and researching in the areas of environmental, property, land use, and administrative agency law.
- Alexander T. Skibine is a Professor of Law at the S.J. Quinney College of Law at the University of Utah. Professor Skibine has published many articles in the area of federal Indian law and he is frequently invited to speak on federal Indian law issues at venues around the country. He teaches administrative law, constitutional law, torts, and federal Indian law.
- Lisa Grow Sun is an Associate Professor at the J. Reuben Clark Law School at Brigham Young University. She teaches constitutional law, torts, and disaster law, and her research focuses on disaster law.
- Joseph P. Tomain is Dean Emeritus and the Wilbert and Helen Ziegler Professor of Law at University of Cincinnati College of Law. A highly

respected professor and scholar, his teaching and research interests focus in the areas of energy law, land use, regulatory policy, and contracts.

- Amy J. Wildermuth is the Associate Vice President for Faculty, Chief Sustainability Officer, and a Professor of Law at the University of Utah. She teaches and writes on civil procedure, administrative law, and U.S. Supreme Court practice.

II. ARGUMENT IN SUPPORT OF LEAVE TO FILE

Pursuant to Fed. R. App. P. 29(a), this Court may grant leave for a non-party to file an *amicus curiae* brief. In this case, the District Court granted the Law Professors leave to file an amicus brief on standing. *State of Hawaii v. Trump*, 1:17-cv-00050, Dkt. 122. In addition, the Law Professors have previously been granted leave to file *amicus* briefs on this issue in the State of Washington's challenge to the Executive Order. *See State of Washington v. Trump*, 9th Cir. No. 17-35105, Dkt. 135; *State of Washington v. Trump*, W.D. Wash. No. 2:17-cv-00141, Dkt. 51.

The Law Professors seek leave to file the accompanying memorandum to offer their unique perspective on the underlying standing issue. Issues of standing are central to the disposition of this matter,[1] and the Law Professors believe that their

[1] The District Court's decision begins its analysis with standing, and devotes several pages to discussing the issue of state standing. *See State of Hawaii v. Trump*, 1:17-cv-00050, Dkt. 219 at 15-21. Moreover, the Defendants-Appellants focus a

analysis on this issue will provide the Court with valuable insight on this question. For example, Professor Wildermuth was counsel of record for several states appearing as *amici curiae* in *Massachusetts v. United States Environmental Protection Agency*[2] on the issue of state standing and has published law review articles on this question. *See* Amy J. Wildermuth, *Why State Standing in* Massachusetts v. EPA *Matters*, 27 J. LAND, RESOURCES, & ENVTL. L. 273 (2007); *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); *see also Brief of the States of Arizona, Iowa, Maryland, Minnesota, and Wisconsin, as Amici Curiae in Support of Petitioners, Massachusetts v. United States Environmental Protection Agency*, 549 U.S. 497 (2007) (No. 05-1120), 2006 WL 2563380.

III. CONCLUSION

For the foregoing reasons, the Court should grant this motion and should consider the Law Professors' brief regarding state standing.

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considerable portion of their appeal on this issue. *See State of Hawaii v. Trump*, 17-15589, Dkt. 23 at 21-26.

[2] *Massachusetts v. EPA* is one of the seminal cases on the question of state standing.

RESPECTFULLY SUBMITTED this 21st day of April, 2017.

LANE POWELL PC

By: *s/Claire Loebs Davis*

Claire Loebs Davis, WSBA No. 39812
Jessica N. Walder, WSBA No. 47676
Taylor Washburn, WSBA No. 51524
1420 Fifth Avenue, Suite 4200
Seattle, WA 98101-2375
Telephone: (206) 223-7000

Attorneys for Proposed *Amici Curiae* Law Professors

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 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: April 21, 2017

Respectfully submitted,

s/Claire Loebs Davis
Claire Loebs Davis

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LANE POWELL PC
1420 Fifth Avenue, Suite 4200
Seattle, WA 98101-2375
Telephone: 206.223.7000
Facsimile: 206.223.7107
Attorneys for Proposed Amici Curiae Law Professors

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I. INTERESTS OF *AMICUS CURIAE*

The non-party law professors are Todd Aagaard of Villanova University, Robin Kundis Craig of the University of Utah, Brigham Daniels of Brigham Young University, Lincoln L. Davies of the University of Utah, Noah Hall of Wayne State University, Alexandra B. Klass of the University of Minnesota, 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 the 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, their interest is in ensuring that the Court's decision on standing is consistent with this complex and evolving body of law. The Law Professors maintain a neutral position on the underlying merits of the case, and therefore do not file this brief in support of either party.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *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.

II. INTRODUCTION

Few cases address issues of state standing, and, as a result, the Supreme Court has provided limited guidance in this area. *Amici* offer this brief to provide insight as to the appropriate analysis under existing law.[2] Based on our analysis of the factual pleadings and supporting declarations filed by the State of Hawaii ("Hawaii" or "State"), we conclude that Hawaii has standing to challenge the March 6, 2017 Executive Order ("Executive Order") as violative of the Establishment Clause.

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 interests for a sovereign seeking to bring suit:

(1) proprietary interests;

(2) quasi-sovereign interests; and

(3) sovereign interests.

Id. at 601–02. Because the standing analysis varies by the type of interest asserted, it is essential to first identify the interest(s) at stake.

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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), 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).

In this case, Hawaii asserted that the Executive Order implicates interests within each of these three categories. This brief focuses on Hawaii's proprietary interests and quasi-sovereign interests.

A. Proprietary Interests

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

When a state asserts an injury to or interference with a proprietary interest, the Article III standing analysis should be the same as the one applied to a case brought by a private plaintiff. *Cf. 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 states asserting a proprietary interest satisfy the Article III standing requirements of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), namely, demonstrating (1) an actual and concrete injury (or "injury-in-fact"); (2) that this injury is traceable to the defendant's conduct; and (3) that a favorable decision will likely redress the injury. *Id.* at 560–61; *see also Washington v. Trump*, 847 F.3d 1151, 1158–61 (9th Cir. 2017) (applying *Lujan* factors in analyzing state standing based on alleged harm to proprietary interests).

Here, Hawaii asserts two main proprietary injuries stemming from the Executive Order. The first is the negative financial impact that the Executive Order will have on the University of Hawaii, which is an arm of the State. *See* Haw. Const. art. 10, §§ 5, 6; Haw. Rev. Stat. § 304A-103 (2011); *see also Mukaida v. Hawaii*, 159 F. Supp. 2d 1211, 1221 (D. Haw. 2001).

The Executive Order's financial impact on the University is clear. The University has an established record of recruiting students from the six targeted countries. For example, 23 of the University's current graduate students hail from those countries. Supplemental Declaration of Risa E. Dickson ("Supp. Dickson Decl.") (E.R. 117) ¶ 7; *see also Hawaii v. Trump*, No. 17-00050, 2017 WL 1011673, at *8 (D. Haw. Mar. 15, 2017).

Prospective students who are without visas when the Executive Order goes into effect, however, are banned. As a result, the University of Hawaii will not be able to collect these students' tuition. Supp. Dickson Decl. ¶¶ 7–8 ("Individuals who are neither legal permanent residents nor current visa holders will be entirely precluded from considering our institution."); *Hawaii*, 2017 WL 1011673, at *8.

Moreover, the University has hired and supported many faculty members and visiting scholars from the six listed countries: "The University also has employees including faculty from two of the designated countries, namely Iran and Sudan, who are here on immigrant visas. In addition, the University has at least 29 visiting

faculty members and scholars with valid visas from the six countries affected by the new Executive Order." Supp. Dickson Decl. ¶ 7.

The University of Hawaii will no longer be able to recruit and hire faculty or staff from the targeted countries, or host visiting faculty and scholars from those areas, if they are without valid visas before the Executive Order goes into effect. This will be a significant loss for the University because those in faculty, scholarly, or other academic professional roles often perform highly specialized work for which it is difficult to find replacements. Further, the University's cost of finding replacements is expected to be higher than the cost of recruiting such academic professionals from an open and free market of job seekers, allowing for selection of individuals from all over the world.

These alleged injuries are concrete, not speculative, and "nearly indistinguishable from those found to support standing" based on proprietary interests by the Ninth Circuit panel in *Washington v. Trump*, 847 F.3d at 1158–61.[3] *Hawaii*, 2017 WL 1011673, at *8. In particular, the Court observed that, under the prior Executive Order, "some [nationals of the targeted countries] will not enter state universities, some will not join those universities as faculty, some will be prevented

[3] As Hawaii explains in its Complaint, the March 2017 Executive Order currently under challenge was preceded by a similar order issued on January 25, 2017. The prior Executive Order was the subject of the *Washington v. Trump* litigation. E.R. 147–56.

from performing research, and some will not be permitted to return if they leave." *Washington*, 847 F.3d at 1161. Here, Hawaii has similarly asserted that the Executive Order "will impair the University's ability to recruit and accept the most qualified students and faculty," *Hawaii*, 2017 WL 1011673, at *8, and has therefore alleged "a concrete and particularized injury to [its] public universities" sufficient to ground Article III standing. TRO Motion (ECF No. 65-1) at 46 (quoting *Washington*, 847 F.3d at 1159).[4]

Beyond alleging that the Executive Order will deprive the University of tuition-paying students and hard-to-replace academic personnel, the State also asserts that the Executive Order will "depress[] international travel to and tourism in Hawai'i," which "directly harms Hawaii's businesses and, in turn, the State's revenue." E.R. 164.[5] According to Hawaii, tourism is the State's "lead[ing] economic driver," accounting for $15 billion in spending in 2015. *Id.* ¶ 18. A decline

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[4] The previous panel's opinion appears to conflate two distinct concepts: (1) a state's standing to sue based on an injury to its own proprietary interests in the form of financial harm suffered by a state's universities; and (2) a state's "third-party" standing "to assert the rights of the students, scholars, and faculty." *Washington*, 847 F.3d at 1159–61. What the Ninth Circuit calls "third-party" state standing might be better classified as "quasi-sovereign" standing, which is analytically distinct from proprietary-interest state standing. Notwithstanding this distinction, the Court correctly held that financial harm to state universities is a valid basis for a state to claim Article III standing. *Id.* at 1161.

[5] *See also* Supplemental Declaration of Luis P. Salaveria (E.R. 106) ¶¶ 6–10 ("I expect, given the uncertainty the new executive order and its predecessor have caused to international travel generally, that these changing policies may depress tourism, business travel, and financial investments in Hawaii.").

in tourism would have a direct effect on the State's revenue. For example, as part of the draw for tourists, Hawaii has 51 state parks encompassing approximately 30,000 acres. *See* About Our Parks, Hawaii Department of Land and Natural Resources, Division of State Parks, at http://dlnr.hawaii.gov/dsp/parks/about-our-parks/ (last visited on April 21, 2017). These parks rely on fees charged for various activities, such as camping, which generate significant revenue for the State. When nationals from the designated countries are banned from visiting the United States, they will not be able to visit Hawaii's state parks, resulting in a loss of State revenue. The district court found that "losses of current and future [tourism] revenue are traceable to the Executive Order," concluding, "this injury to the State's proprietary interest also appears sufficient to confer standing." *Hawaii*, 2017 WL 1011673, at *8.

As the Fifth Circuit held in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016), a state's "financial loss[es]" stemming from a federal action constitute a concrete and immediate injury to the state's proprietary interests. *Id.* at 156–60 (considering the administrative costs imposed on the state by a federal law requiring that the state issue drivers' licenses to undocumented aliens). Although the financial injuries alleged by Hawaii could be substantial, even limited monetary harm can satisfy Article III standing. Indeed, when any financial damage is alleged, injury-in-fact for standing purposes "is often assumed without discussion." *Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d

286, 293 (3rd Cir. 2006). This principle applies to state as well as private plaintiffs. *Texas*, 809 F.3d at 155 (state had proprietary-interest standing because it would incur "a minimum of $130.89" in connection with each license issued); *see also Preminger v. Peake*, 552 F.3d 757, 763 (9th Cir. 2008) (holding that an injury-in-fact "may be minimal," and relying on *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (noting that the Supreme 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")).

Hawaii has demonstrated (1) that its University will suffer monetary damage, and that it will likely lose tourism revenue; (2) that such monetary harm will be a direct result of the Executive Order; and (3) that it would not lose that money in the absence of the Executive Order. As a result, the State has satisfied the traditional *Lujan* test for Article III standing, as is required when a state asserts harm to its proprietary interests.

B. Quasi-Sovereign Interests

Hawaii also asserted standing based on its quasi-sovereign interests, *i.e.*, in its role as *parens patriae* for its citizens. Quasi-sovereign interests are difficult to describe, and "admittedly vague." 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE JURIS. 2D § 3531.11, at 31 (1984). When a state brings

suit based on quasi-sovereign interests, it "must articulate an interest apart from the interests of particular private parties." *Snapp*, 458 U.S. at 607.

The Supreme Court has described this separate interest as the state's own interest "in the well-being of its populace," *id.* at 602, and provided two examples: (1) a state'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 state's interest in seeing that its "residents are not excluded from the benefits that flow from participation in the federal system," including "securing residents from the harmful effects of discrimination." *Id.* at 607–09 (citation omitted).[7]

Even where a state properly asserts a quasi-sovereign interest, it has not always been clear that a state can sue to protect its residents from the federal government because the federal government has a similar duty to protect those same residents. In the past, *Massachusetts v. Mellon*, 262 U.S. 447 (1923) was understood to have barred such suits: states could not sue the federal government based on their

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

7 As noted in footnote 3, *supra*, the Ninth Circuit panel held in *Washington v. Trump* that the States had "third-party standing" to "assert the rights of the students, scholars and faculty affected by the Executive Order." 847 F.3d at 1160. Rather than invoke the third-party standing doctrine, the panel could have relied upon the States' *own* quasi-sovereign interest in protecting its residents' well-being and freedom from discrimination.

parens patriae interests unless Congress waived the restriction. *See Md. People's 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 appears to have lifted the bar to a state litigating against the federal government when a quasi-sovereign interest is at stake. In doing so, the Court explained:

> [T]here 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. Commentators have noted that this footnote seems to confuse the different interests a state might have—namely, it seems to focus on Massachusetts asserting its *own* interests, for which there was traditionally no *Mellon* bar, not those of its residents, for which there would have traditionally been a bar. The Supreme Court, however, has not clarified this point. As a result, although *Massachusetts v. EPA* offered little explanation, it suggests that a state can assert Article III standing based on a quasi-sovereign interest of ensuring that its citizens receive the benefits of federal law, such as when the federal government acts or fails to act in a way that violates federal statutory 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).

In this case, Hawaii has asserted harm to several quasi-sovereign interests. Our analysis focuses on those suffered by the University. First, as the Ninth Circuit noted in considering the prior Executive Order, the federal government's actions have impacted the education of state residents attending public universities. *Washington*, 847 F.3d at 1160–61; *see also Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017). By restricting entry from the listed countries, the federal government will prevent the University of Hawaii from attracting and retaining students and faculty from these countries. This will harm the current faculty, staff, and students at the University of Hawaii by causing "damage to the collaborative exchange of ideas among people of different religions and national backgrounds on which the State's educational institutions depend." *Hawaii*, 2017 WL 1011673, at *8; *see also* Supp. Dickson Decl. ¶¶ 5–9; *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").

Second, these restrictions may affect University researchers' ability to do important, sometimes life-saving research. Supp. Dickson Decl. ¶ 5. Many researchers must travel to present their work at conferences. These venues allow researchers to share knowledge quickly as well as to receive critical feedback that moves their work forward. In addition, many researchers must travel to sites where

unique raw data or information is located, or to laboratories around the globe to learn new techniques and processes. Hawaii hosts many such conferences and is the home to many research collaboration laboratories and sites. If researchers from the six targeted countries cannot travel to the University of Hawaii to perform or share their work, the work of researchers at the University will be negatively impacted. *See, e.g.*, Henry Fountain, *Science Will Suffer Under Trump's Travel Ban, Researchers Say*, N.Y. TIMES (Jan. 30, 2017).

Once a state asserts a quasi-sovereign interest, the next issue is what further showing is required to establish standing. *Massachusetts* sets forth the Court's most recent articulation of this standard. There the Supreme Court analyzed the quasi-sovereign interest under the three *Lujan* factors but did so using a less demanding version of that analysis: a "*Lujan*-lite" version. Applying this standard, the Court held 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. *Massachusetts*, 549 U.S. at 520.

Because *Massachusetts* appears to have changed much with little explanation, as the dissent in that case complained, *see id.* at 536–37 (Roberts, C.J., dissenting),

and because there has been little additional guidance from the Court, the path for a state to assert quasi-sovereign interest standing is less clear than the path to assert proprietary standing. Nevertheless, *Massachusetts* remains controlling precedent: it removed the *Mellon* bar to a state bringing suit against the federal government in its role as *parens patriae*, which means Hawaii may base its standing to sue the federal government on its quasi-sovereign interests.

In fact, the quasi-sovereign interests asserted by Hawaii are stronger and less speculative than those invoked by the Commonwealth in *Massachusetts*. In that case, Massachusetts relied on an injury to coastal lands many years in the future, a lengthy causal chain, and unclear redressability in terms of solving the larger global problem of climate change when the regulation impacted only greenhouse gas emissions from new motor vehicles in the United States. Here, the injuries asserted by Hawaii—*e.g.*, to its students' learning environment and to its academics' ability to do research—are clear, are directly tied to the Executive Order, and would be immediately remedied by restraining its enforcement.

C. Scope of Standing

Appellants insist that Hawaii does not have standing to assert an Establishment Clause claim because the State is "alleging only institutional and financial injuries." Brief for Appellants (Dkt. No. 23) at 30. Appellants, however, have confused the standing analysis.

First, the State alleges proprietary harms to its University and tourism industry that directly stem from the alleged violation of the Establishment Clause. In simplest terms, Hawaii alleged that the Executive Order violates the Establishment Clause. As a result of that violation, the State will suffer harm. That these harms are financial, rather than spiritual, does not distinguish them from the monetary injuries to taxpayers that have been sufficient to grant standing in other Establishment Clause cases. *See, e.g.*, *Hinrichs v. Speaker of House of Rep. of Ind.*, 506 F.3d 584, 606 (7th Cir. 2007) ("the plaintiffs here have shown more concrete damage than most [in Establishment Clause cases]: they have enumerated … the [monetary] value of the 'three pence' they pay" as a result of the violation). The State would not suffer these harms in the absence of the portions of the Executive Order that the State alleges violate the Establishment Clause. And the injuries will be redressed by an order from this court striking down the Executive Order as unconstitutional. Hawaii therefore has standing to bring an Establishment Clause claim under the straightforward application of the *Lujan* factors.

There is also no clear prudential bar to the State bringing an Establishment Clause claim. On the contrary, prudential standing principles suggest that the harms to Hawaii resulting from the alleged violation fall well within the "zone of interests to be protected or regulated by the constitutional guarantee in question." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009) (quoting *Alaska Right to Life*

Political Action Comm. v. Feldman, 504 F.3d 840, 848–49 (9th Cir. 2010)). "The prudential 'zone of interest' test, as the Supreme Court has observed, is 'not meant to be especially demanding.'" *Stormans*, 586 F.3d at 1122 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). As the Supreme Court has repeatedly held, once a party has established Article III standing, that party "may invoke the general public interest in support of their claim." *E.g.*, *Warth v. Seldin*, 422 U.S. 490, 501 (1975). "At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Catholic League for Religious & Civil Rights v. City & Cty. of S.F.*, 624 F.3d 1043, 1048 (9th Cir. 2010) (en banc) (quoting *Massachusetts*, 549 U.S. at 517). By reading the test otherwise, Appellants turn the core purpose of standing on its head.

Indeed, here, Hawaii clearly meets the Article III test and satisfies any prudential concern about its ability to bring suit. Hawaii's loss of tuition and tourism dollars, as well as the harm to its institutions, are more than adequate to show an injury-in-fact. They are not generalized grievances. And Hawaii, particularly in claiming harm to its proprietary interests, is asserting its own rights—as well as protecting the public interest, which states have been granted "special solicitude" by the Supreme Court to do. There is no bar to its standing to do so.

D. Standing and Scope of Injunction

Because Appellants have raised this issue, we offer a final observation on the intersection between the analysis for standing and that for an injunction. Appellants suggest that the court below erred by providing a remedy that is broader than necessary to redress the specific injury-in-fact asserted by Hawaii as its basis for standing. This theory fails to recognize that courts do not require a one-to-one relationship between the harms suffered by a party for the purposes of standing and the appropriate remedy once standing to assert the claim has been established.

It is clear that an Establishment Clause plaintiff must have "sufficient personal concern to effectively litigate the matter," *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1250 (9th Cir. 2007) (quoting ERWIN CHEMERINSKY, FEDERAL JURISDICTION 58 (4th ed. 2003)). But, especially in the Establishment Clause context, "the court is not confined to the particular harm on which the plaintiff's standing to sue is based" in awarding injunctive relief. *ACLU v. City of St. Charles*, 794 F.2d 265, 275 (7th Cir. 1986).

In weighing an injunction to address an Establishment Clause violation, courts engage in a very different exercise: they must consider the harm that the violation will inflict on "the public interest, a traditional element in the determination whether to grant a preliminary injunction," *id.*—and in particular, whether the violation at issue would, in the absence of the requested injunction, contribute to the "erosion of

religious liberties [that] cannot be deterred by awarding damages to the victims of such erosion." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 304 (D.C. Cir. 2006) (quoting *City of St. Charles*, 794 F.2d at 275).

Consistent with this approach, the Ninth Circuit has, on several occasions, granted injunctions broader than the plaintiff's harm. For example, in *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 950–53 (9th Cir. 2011), the court concluded that a plaintiff bringing suit under the ADA may receive injunctive relief to remove not only the unlawful barriers that he or she has encountered, but also barriers that he or she has not yet encountered that likewise violate the ADA. *See also Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 907–08 (9th Cir. 2011); *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039–47 (9th Cir. 2008). In this case, like *Pier I Imports*, *Ralphs Grocery*, and *Doran*, when determining the appropriate remedy for a violation of the Establishment Clause, the court must pay particular attention to the public interest at stake.

IV. CONCLUSION

Although *amici* offer no recommendation on the ultimate outcome of this case or the appropriate remedy, based on the analysis above, Hawaii has asserted proprietary and quasi-sovereign interests that would afford it standing to pursue this action. We also urge the court to carefully separate the analyses of whether a party

has standing to assert a claim, from determining the appropriate remedy once it has been established that standing to assert that claim exists.

RESPECTFULLY SUBMITTED this 21st day of April, 2017.

LANE POWELL PC

By: *s/Claire Loebs Davis*

Claire Loebs Davis, WSBA No. 39812
Jessica N. Walder, WSBA No. 47676
Taylor Washburn, WSBA No. 51524
1420 Fifth Avenue, Suite 4200
Seattle, WA 98101-2375
Telephone: (206) 223-7000

Attorneys for Proposed *Amici Curiae*
Law Professors

333333.0441/6936013.3

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 4690 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 April 21, 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: April 21, 2017

Respectfully submitted,

s/Claire Loebs Davis
Claire Loebs Davis