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CLAPPER V. AMNESTY INTERNATIONAL: TWO OR THREE COMPETING PHILOSOPHIES OF STANDING LAW?

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CLAPPER V. AMNESTY INTERNATIONAL: TWO OR THREE COMPETING PHILOSOPHIES OF STANDING LAW?

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In its 2013 decision Clapper v. Amnesty International, the United States Supreme Court invoked separation-of-powers principles by holding that public interest groups alleging that the Government was spying on their foreign clients failed to demonstrate Article III standing because they could not prove that the future surveillance injury that they purportedly feared was "certainly impending." Justice Breyer's dissenting opinion argued that "commonsense" suggested that the Government was spying on the plaintiffs' foreign clients and proposed a "reasonable" or "high" probability standing test. Implicitly, the Clapper decision also presented a third approach to standing decisions. In footnote 5 of the opinion, the majority acknowledged that the Court had sometimes found standing based on a "substantial risk" standard that is arguably distinct from the "certainly impending" test. Justice Kennedy is the most likely supporter of a "substantial risk" standing test. Lower court decisions are divided in their interpretation of Clapper, but the Second and Federal Circuits have suggested that the substantial risk standard espoused in footnote 5 of the Clapper decision is applicable in some cases. The future of Article III standing depends on the three competing philosophies of standing discussed in Clapper.

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INTRODUCTION[1]

The Supreme Court has held that the Constitution's Article III "Cases" and "Controversies" language imposes mandatory jurisdictional standing requirements that a plaintiff must meet for each form of relief sought before federal courts can consider the merits of a case.[2] In its 2013 decision *Clapper v. Amnesty*

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1. This article is one of a series of explorations of modern standing doctrines that I have written. The other pieces are: (1) Bradford C. 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 (2008) [hereinafter Mank, *States Standing*]; (2) Bradford C. Mank, *Standing and Future Generations: Does* Massachusetts v. EPA *Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 1 (2009); (3) Bradford C. Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665 (2009); (4) Bradford C. Mank, Summers v. Earth Island Institute *Rejects Probabilistic Standing, but a "Realistic Threat" of Harm is a Better Standing Test*, 40 ENVTL. L. 89 (2010); (5) Bradford C. Mank, *Revisiting the* Lyons *Den*: Summers v. Earth Island Institute*'s Misuse of* Lyons*'s "Realistic Threat" of Harm Standing Test*, 42 ARIZ. ST. L.J 837 (2010); (6) Bradford C. Mank, Summers v. Earth Island Institute*: Its Implications for Future Standing Decisions*, 40 ENVTL. L. REP. 10958–73 (Oct. 2010); (7) Bradford C. Mank, *Standing in* Monsanto Co. v. Geertson Seed Farms*: Using Economic Injury as a Basis for Standing When Environmental Harm is Difficult to Prove*, 115 PENN ST. L. REV. 307 (2010); (8) Bradford C. Mank, *Informational Standing After* Summers, 39 B. C. ENVTL. AFF. L. REV. 1 (2012); (9) Bradford C. Mank, *Reading the Standing Tea Leaves in* American Electric Power Co. v. Connecticut, 46 U. RICH. L. REV. 543 (2012) [hereinafter Mank, *Tea Leaves*]; (10) Bradford C. Mank, *Judge Posner's "Practical" Theory of Standing: Closer to Justice Breyer's Approach to Standing than to Justice Scalia's*, 50 HOUS. L. REV. 71 (2012); (11) Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. ST. L. REV. 869 (2012); and (12) Bradford C. Mank, *Is Prudential Standing Jurisdictional?*, 64 CASE W. RES. L. REV. (forthcoming 2013–2014).

2. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013) ("Article III of the Constitution limits federal courts' jurisdiction to certain [c]ases and

International USA,[3] the Court, in a majority opinion written by Justice Alito, held that the plaintiffs—including attorneys as well as human rights and media organizations in the United States—who alleged that their communications with foreign contacts would be intercepted pursuant to the Foreign Intelligence Surveillance Act (FISA)[4] failed to demonstrate Article III standing.[5] The Court determined that the plaintiffs could not prove that the future surveillance injury that they purportedly feared was certainly impending or fairly traceable to the FISA provision at issue.[6] Accordingly, the Court held that the plaintiffs did not satisfy the Article III standing requirements that are essential if a plaintiff wishes to sue in federal court.[7] The majority opinion's approach is grounded in the separation-of-powers standing theories advanced by Justice Scalia, a member of the *Clapper* majority, in both his academic writings and in his prior Court opinions on standing.[8]

In his dissenting opinion, which was joined by three other Justices,[9] Justice Breyer argued that the Court, in several previous cases, had applied the "certainly impending" or "imminence" requirement for standing injury much more liberally than the majority opinion elected to apply in *Clapper*.[10] Furthermore, he argued that the Court should use either a "reasonable probability" or "high probability" standard in determining what constitutes an imminent injury for Article III standing.[11] Finally, Justice Breyer contended that the plaintiffs' assertions about government surveillance were sufficiently likely to harm at least some of the plaintiffs so that they could meet either his standing test or the

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[c]ontroversies . . . . One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue."); *see also* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."); Mank, *States Standing*, *supra* note 1, at 1710; *infra* Part I.

3. 133 S. Ct. 1138 (2013).

4. Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 (2006). In 2008, Congress passed the FISA Amendments Act. FISA Amendments Act of 2008, Pub. L. No. 110–261, 122 Stat. 2436 (2008).

5. *Clapper*, 133 S. Ct. at 1143.

6. *Id.* at 1143, 1150. Chief Justice Roberts, as well as Justices Scalia, Kennedy, and Thomas, joined Justice Alito's majority opinion. *Id.* at 1142.

7. *Id.* at 1143, 1155.

8. *See infra* Part III.

9. Justices Ginsburg, Sotomayor, and Kagan joined Justice Breyer's dissenting opinion. *Clapper*, 133 S. Ct. at 1142.

10. *Id.* at 1160–65 (Breyer, J., dissenting).

11. *Id.* at 1164–65.

majority's standard.[12] Justice Breyer's probabilistic approach to standing in *Clapper* is consistent with his prior academic writings and standing opinions.[13]

On the surface, the *Clapper* decision presented two familiar approaches to standing. However, a footnote in the majority opinion presented a third potentially groundbreaking approach. First, Justice Alito's majority opinion took a narrow view of when an injury is certainly impending and fairly traceable to government action.[14] Second, by contrast, Justice Breyer's dissenting opinion took a broader view of the type of injuries that are sufficient to qualify for standing under the majority's tests for injury and traceability.[15] Justice Breyer also suggested that the Court adopt either a "reasonable" or "high" probability test as an alternative to the majority's standard.[16] Implicitly, however, the *Clapper* decision presented a third approach to standing decisions. In footnote 5 of the opinion, the Court acknowledged that it had sometimes found standing based on a "substantial risk" standard that is arguably distinct from the "certainly impending" requirement for standing injury used in the text of the majority opinion.[17] Ultimately, though, the majority opinion concluded that the plaintiffs' speculative assertions could not meet either standard.[18]

The *Clapper* majority's acknowledgment in footnote 5 of an alternative "substantial risk" standard that is arguably distinct from the certainly impending requirement suggests that at least one justice in the majority was not fully in accord with Justice Alito's view that the Court had consistently applied a narrow certainly impending test for standing injury.[19] Justice Kennedy has often been the key swing vote in standing cases on the current Court.[20] The

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12. *Id.* at 1156–65.

13. *See infra* Part IV.

14. *Clapper*, 133 S. Ct. at 1143 (majority opinion).

15. *Id.* at 1160–65 (Breyer, J., dissenting).

16. *Id.* at 1165.

17. *Id.* at 1150 n.5 (majority opinion).

18. *Id.*

19. *Compare id.* (discussing the "substantial risk" standing test as potentially different from the "clearly impending" standard), *with id.* at 1143 (applying the "certainly impending" test for standing injury). *See also* Jeremy P. Jacobs, *Wiretap Ruling Could Haunt Environmental Lawsuits*, GREENWIRE (May 20, 2013), *available at* http://www.eenews.net/greenwire/stories/1059981453/ (reporting that "[i]n footnote 5, Alito sets out how the standing precedent in *Clapper* differs from those in previous rulings, seemingly in an attempt to make sure the ruling is viewed narrowly"). *See generally infra* Part II.

20. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment) ("Congress has the power to

other four Justices in the *Clapper* majority—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—have written or joined Court decisions articulating the need for strict standing principles to protect separation-of-powers principles and prevent excessive judicial interference with the political branches.[21] Accordingly, as is

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define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, . . . [provided that Congress] identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."); Mank, *Informational Standing After* Summers, *supra* note 1, at 25, 45–54 (discussing the swing vote of Justice Kennedy in standing cases); *infra* Part V (also discussing Justice Kennedy's swing vote). *See generally* Jacobs, *supra* note 19 (describing Justice Kennedy as a swing vote on the current Supreme Court); Charles Lane, *Kennedy Seen as the Next Justice in Court's Middle*, WASH. POST, Jan. 31, 2006, at A4, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001356.html (describing Justice Kennedy as a swing vote on the current Supreme Court). During the most recent 2012–2013 Supreme Court term, "Kennedy, the Court's acknowledged 'swing vote,' was more likely to agree with the Court's four most conservative justices[, Chief Justice Roberts and Justices Scalia, Thomas, and Alito,] (ranging from 52% to 73% agreement in the 5-4 decisions) than the moderate-to-liberal ones[, Justices Ginsburg, Breyer, Sotomayor, and Kagan,] (30% to 43%)." Drew Desilver, *Chart of the Week: Supreme Court Justices—Who Agrees With Whom?*, PEW RESEARCH CENTER (June 28, 2013), http://www.pewresearch.org/fact-tank/2013/06/28/chart-of-the-week-supreme-court-justices-who-agrees-with-whom/ (presenting a chart describing the percentage of agreement in full, part, or only in judgment in the twenty-three 5-4 decisions among the nine Supreme Court justices during the 2012–2013 Supreme Court term).

21. *See, e.g.*, *Clapper*, 133 S. Ct. at 1142 (reporting that Chief Justice Roberts, as well as Justices Scalia, Kennedy, and Thomas, joined Justice Alito's majority opinion). *Clapper* also argued that separation-of-powers principles and the resulting need to limit judicial interference with political branches demand that plaintiffs prove the Government caused "certainly impending" injury and not speculative, probable injuries. *Clapper*, 133 S. Ct. at 1147–55. Chief Justice Roberts, as well as Justices Kennedy, Thomas, and Alito, joined Justice Scalia's majority opinion, although Justice Kennedy also filed a concurring opinion. Summers v. Earth Island Inst., 555 U.S. 488, 489 (2009). *See also Summers*, 555 U.S. at 492–500 (rejecting probabilistic injuries as too speculative and requiring that plaintiffs prove alleged injury by Government is imminent in light of separation-of-powers principles); Massachusetts v. EPA, 549 U.S. 497, 535–38, 547–49 (2007) (Roberts, C.J., dissenting) (joined by Justices Scalia, Thomas, and Alito in the opinion and arguing that separation-of-powers principles in traditional standing doctrine counsel against giving states more lenient standing rights than non-state plaintiffs); *Lujan*, 504 U.S. at 556, 573–78 (Scalia, J., majority opinion, joined by Thomas, J.) (concluding that Articles II and III of the Constitution limit Congress' authority to authorize citizen suits by any person lacking a concrete injury); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1229 (1993) (noting that "the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution"); Michael E. Solimine, *Congress, Separation of*

discussed in Part V, Justice Kennedy is the most likely supporter of a "substantial risk" standing injury test that may be more lenient than the "certainly impending" or "clearly impending" injury standard employed by the *Clapper* majority.[22] While the *Clapper* majority concluded that the plaintiffs had failed to prove an injury under either the "substantial risk" test or the "certainly impending" standard, the two approaches may well yield conflicting results in other cases.[23] Additionally, Justice Breyer's proposal of using either a "reasonable probability" or "high probability" standard in determining what constitutes an injury for Article III standing suggests that he was perhaps seeking to gain the vote of a colleague in the majority.[24] Based on his previous standing opinions, Justice Breyer likely prefers a reasonable probability standing test. But, he is apparently willing to support a high probability test if he could convince Justice Kennedy or another member of the *Clapper* majority to adopt the high probability test in a future case.[25]

Lower courts are already beginning to address the implications of *Clapper*. The Second Circuit recently distinguished *Clapper* by holding that the Natural Resources Defense Council (NRDC) had Article III standing to sue the United States Food and Drug Administration (FDA) to regulate triclosan, a chemical used in antimicrobial soap.[26] In *Organic Seed Growers and Trade Ass'n v. Monsanto Co.*, the Federal Circuit applied the "substantial risk" standing test in footnote 5 of *Clapper*.[27] In *Hedges v. Obama*, the Second Circuit discussed the possibly less stringent standing test in footnote 5 as a means for pre-enforcement review of possible criminal charges.[28] In *Cherri v. Mueller*, the District Court for the Eastern District of Michigan distinguished *Clapper* by holding that Muslim-Americans had standing to challenge the allegedly

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Powers, and Standing, 59 CASE W. RES. L. REV. 1023, 1049 (2009) (arguing that Justice Scalia and Chief Justice Roberts believe that "Congress cannot tinker with the core constitutional standing requirements, though it might relax the prudential ones"); *infra* Part III.

22. Jacobs, *supra* note 19 (reporting that Professor Amanda "Leiter, of American University, speculated that the footnote [5] was added in order to persuade Justice Anthony Kennedy, the court's swing vote, to join the conservative wing"); *see infra* Part V.B.

23. *Clapper*, 133 S. Ct. at 1150 n.5 (majority opinion).

24. *Id.* at 1165 (Breyer, J., dissenting); *see infra* Parts IV.B and V.B.

25. *See Clapper*, 133 S. Ct. at 1165 (Breyer, J., dissenting).

26. Natural Res. Def. Council v. FDA, 710 F.3d 71, 82–83 (2nd Cir. 2013); *see infra* Part VI.A.

27. 718 F.3d 1350, 1355 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 901 (2014); *see infra* Part VI.B.

28. 724 F.3d 170, 196–97 (2nd Cir. 2013); *see infra* Part VI.C.

religiously-motivated discrimination and harassment by government agents during border inspections.[29] In *Madstad Engineering, Inc. v. the U.S. Patent and Trademark Office*, the United States District Court for the Middle District of Florida followed *Clapper* in holding that the plaintiffs' expenditures to avoid alleged potential future injuries from possible third-party intellectual property thieves were too speculative to satisfy Article III's injury requirement.[30] However, the court also noted that these injuries might have satisfied Article III's requirements had the Second Circuit's objectively reasonable test not been overturned by *Clapper*.[31]

Part I of this Article discusses the basics of the Article III standing doctrine. Part II examines the *Clapper* decision. Part III explores Justice Scalia's separation-of-powers-based approach to standing and how his approach is consistent with Justice Alito's majority opinion in *Clapper*. Part IV explains Justice Breyer's probabilistic approach to standing. Part V examines Justice Kennedy's approach to standing and suggests that he is the most likely Justice to favor the substantial risk standard in footnote 5 of *Clapper*. Part VI explores the impact of *Clapper* amongst lower courts.

I. INTRODUCTION TO CONSTITUTIONAL STANDING[32]

A. Constitutional Standing

Although the Constitution does not explicitly require that a plaintiff possesses "standing" in order to file suit in federal courts, the Supreme Court has inferred from the Constitution's Article III limitation of judicial decisions to "Cases" and to "Controversies" that federal courts must utilize standing requirements to guarantee that a plaintiff has a genuine interest and stake in a case.[33] The federal

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29. No. 12–11656, 2013 WL 2558207, at *8 (E.D. Mich. June 11, 2013); *see infra* Part VI.D.

30. No. 8:12–CV–1589–T–23MAP, 2013 WL 3155280, at *4–7 (M.D. Fla. May 8, 2013); *see infra* Part VI.E.

31. *Madstad*, 2013 WL 3155280, at *4–7.

32. The discussion of standing in Part I relies upon my earlier standing articles. *See supra* note 1.

33. Section 2 of Article III provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of

courts only have jurisdiction over a case if at least one plaintiff in that case can prove standing for each form of relief sought.[34] If the plaintiff fails to meet the constitutional standing test, the federal court must dismiss the case without deciding the merits.[35]

Standing requirements are related to broader constitutional principles. For example, the standing doctrine prohibits unconstitutional advisory opinions.[36] Furthermore, standing requirements support separation-of-powers principles by defining the division of powers between the judiciary and political branches of government so that the "Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'"[37] There is disagreement, however, regarding to what extent separation-of-powers principles limit the authority of Congress to authorize standing to sue in federal courts for private citizens challenging the executive branch's alleged under-enforcement or non-enforcement of congressional requirements mandated by statute.[38]

> admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2; *see also* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 339–41 (2006) (explaining why the Supreme Court infers that Article III's case and controversy requirement necessitates standing limitations); Stark v. Wickard, 321 U.S. 288, 310 (1944) (stating explicitly the Article III standing requirement in a Supreme Court case for the first time); Mank, *States Standing*, *supra* note 1, at 1709–10. *But see* Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs, 650 F.3d. 652, 655–56 (7th Cir. 2011) (questioning whether standing is based on Article III requirements and citing academic literature). *See generally* Solimine, *supra* note 21, at 1036–38 (discussing the debate on whether the Constitution implicitly requires standing to sue).

34. *DaimlerChrysler*, 547 U.S. at 351–54; Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000) (stating that "a plaintiff must demonstrate standing separately for each form of relief sought"); *see* Mank, *States Standing*, *supra* note 1, at 1710.

35. *See DaimlerChrysler*, 547 U.S. at 339–43; *Laidlaw*, 528 U.S. at 180 ("[W]e have an obligation to assure ourselves that [petitioner] had Article III standing at the outset of the litigation."); Mank, *States Standing*, *supra* note 1, at 1710.

36. *DaimlerChrysler*, 547 U.S. at 340, 344; Fed. Election Comm'n v. Akins, 524 U.S. 11, 23–24 (1998); Mank, *Standing and Future Generations*, *supra* note 1, at 23.

37. *DaimlerChrysler*, 547 U.S. at 339–41 (quoting Allen v. Wright, 468 U.S. 737, 750 (1984)); *see* Mank, *States Standing*, *supra* note 1, at 1710.

38. *Compare* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–78 (1992) (concluding that Article II and III of the Constitution limit Congress' authority to

For constitutional standing, the Court has used a three-part standing test that requires a plaintiff to show that (1) she has "suffered an injury in fact," which is (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical"; (2) there is a "causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[39] A plaintiff has the burden of establishing all three prongs of the standing test.[40]

B. What is an Imminent Injury?

The Supreme Court has interpreted the injury requirement for standing to preclude speculative or hypothetical injuries. In *Lujan v. Defenders of Wildlife*, the majority concluded that the plaintiff, Defenders of Wildlife, lacked standing to challenge the failure of certain government agencies to consult with the Secretary of Interior about funding projects that might hurt endangered species in foreign countries.[41] The Court found that the plaintiff lacked standing because the two members of the organization who filed affidavits only had intentions to visit the relevant foreign countries—Egypt and Sri Lanka—at some indeterminate future date.[42] The Court concluded that "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of

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authorize citizen suits by any person lacking a concrete injury), *with Lujan*, 504 U.S. at 602 (Blackmun, J., dissenting) (arguing that the "principal effect" of Justice Scalia's majority opinion's restrictive approach to standing was "to transfer power into the hands of the Executive at the expense—not the Courts—but of Congress, from which that power originates and emanates"). *See generally* Heather Elliott, *The Functions of Standing*, 61 STAN. L REV. 459, 496 (2008) (arguing that courts should not use standing doctrine as a "backdoor way to limit Congress's legislative power"); *infra* Part V.A (discussing Justice Kennedy's views regarding to what extent Congress may define Article III standing injuries).

39. *Lujan*, 504 U.S. at 560–61 (citations omitted) (internal quotation marks omitted).

40. *See DaimlerChrysler*, 547 U.S. at 342 (stating that parties asserting federal jurisdiction must "carry the burden of establishing their standing under Article III"); *Lujan*, 504 U.S. at 561 (also stating that parties asserting federal jurisdiction must carry the burden of establishing standing under Article III); LARRY W. YACKLE, FEDERAL COURTS 336 (3d ed. 2009).

41. *Lujan*, 504 U.S. at 557–59, 578.

42. *Id.* at 562–64.

when the some day will be—do not support a finding of an 'actual or imminent' injury that our cases require."[43]

The imminent injury test in *Lujan*, however, fails to define what constitutes a sufficient probability of risk to a plaintiff and how quickly such an injury must result for it to constitute a sufficient injury for Article III standing purposes.[44] In some cases, a threatened injury may be sufficiently concrete and imminent to satisfy Article III if the harm is likely to occur in the relatively near future; the Supreme Court, however, has never precisely defined what constitutes an "imminent injury."[45] In *Babbitt v. United Farm Workers National Union*, the Court stated that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."[46] In the *Clapper* decision, the Court endorsed the "certainly impending" definition of what constitutes an imminent injury.[47] But in *Babbitt*, the Court also stated that the test for a standing injury is that a plaintiff "must demonstrate a *realistic danger* of sustaining a direct injury."[48] In footnote 5, the *Clapper* majority acknowledged that the *Babbitt* decision and other decisions setting forth a "substantial risk" or similar test might be less stringent than the "certainly impending" standard for defining an imminent injury.[49]

The imminent injury test has been interpreted in different ways by different courts. For instance, the Ninth Circuit has interpreted the imminent standing test to require an increased risk of harm.[50] By contrast, the Supreme Court's subsequent *Summers v. Earth Island Institute* decision implicitly overruled the Ninth Circuit's approach to the imminence test by requiring plaintiffs to demonstrate when and where they would be injured in the future and by explicitly rejecting the probabilistic standing approach in

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43. *Id.* at 564.

44. Mank, *Standing and Future Generations*, *supra* note 1, at 39; *see* Mank, *Standing and Statistical Persons*, *supra* note 1, at 684.

45. *See* Mank, *Standing and Future Generations*, *supra* note 1, at 39; Mank, *Standing and Statistical Persons*, *supra* note 1, at 684.

46. 442 U.S. 289, 298 (1979) (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923)).

47. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147–55 (applying a "certainly impending" test for standing injury).

48. *Babbitt*, 442 U.S. at 298 (emphasis added).

49. *Clapper*, 133 S. Ct. at 1150 n.5 (discussing *Babbitt* and other "substantial risk" standing tests as potentially different from the "clearly impending" standard); *see also Clapper*, 133 S. Ct. at 1155, 1160 (Breyer, J., dissenting) (discussing the different tests used in previous decisions regarding Article III standing).

50. *See* Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1151 (9th Cir. 2000).

Justice Breyer's dissenting opinion.[51] Similar to *Summers*, the *Clapper* decision appears to tighten the imminence test by requiring that a plaintiff demonstrate that an injury is certainly or clearly impending rather than probable or objectively reasonable.[52] Despite this, footnote 5's reference to a possibly alternative substantial risk test might arguably provide a less stringent test for injury in some cases.[53]

II. THE *CLAPPER* DECISION: TWO OR THREE COMPETING STANDING DOCTRINES?

A. Introduction to Clapper

Section 702 of the Foreign Intelligence Surveillance Act of 1978[54] (FISA) enables "the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by jointly authorizing the surveillance of individuals who are not 'United States persons'[55] and are reasonably believed to be located outside the United States."[56] Before conducting such surveillance, "the Attorney General and the Director of National Intelligence normally must obtain the Foreign Intelligence Surveillance Court's approval."[57] The plaintiffs in *Clapper* were "United States persons

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51. *See* Summers v. Earth Island Inst., 555 U.S. 488, 498–99; *infra* Parts III-IV.

52. *Clapper*, 133 S. Ct. at 1147–55, 1150 n.5 (applying the "certainly impending" test for standing injury and discussing the "substantial risk" standing test as potentially different from "clearly impending" standard).

53. Jacobs, *supra* note 19 (reporting that the substantial risk test is potentially more lenient than the "certainly impending" test). *See generally infra* Part II.

54. *See* 50 U.S.C. § 1881a (2006).

55. *Clapper*, 133 S. Ct. at 1142 (defining the term "United States person" as citizens of the United States, aliens admitted for permanent residence, and certain associations and corporations).

56. *Id.*

57. *See generally id.* at 1142–45 (discussing the evolving role of the Foreign Intelligence Surveillance Court (FISC) in approving Government electronic surveillance for foreign intelligence purposes). The FISA required the government to demonstrate that "there is probable cause to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power, and that each of the specific facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power." *Id.* at 1143 (internal quotation marks omitted). But, the 2008 Amendments to FISA eliminated the probable cause requirement and also the requirement that the Government "specify the nature and location of each of the particular facilities or places at which the electronic surveillance will occur." *Id.* at 1144. Even after the 2008 FISA Amendments, the Government must obtain the FISC's approval for its

whose work, they allege[d], require[d] them to engage in sensitive international communications with individuals who they believe[d to be] likely targets of surveillance under [FISA] § 1881a."[58] The plaintiffs asked the Court to both declare § 1881a unconstitutional and to issue "an injunction against § 1881a-authorized surveillance."[59] Before the Court could address the merits of their claims, however, the plaintiffs had to demonstrate that they had the required Article III standing necessary to seek this type of relief.[60]

The plaintiffs in *Clapper* were a variety of U.S. persons, including "attorneys and human rights, labor, legal, and media organizations whose work allegedly requires them to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients, sources, and other individuals located [outside the United States]."[61] The plaintiffs asserted their belief that some of the foreign persons "with whom they exchange foreign intelligence information are likely targets of Government surveillance under § 1881a" because their foreign contacts include people that "the Government 'believes . . . to be associated with terrorist organizations' [or] 'people located in geographic areas that are a special focus' of the Government's counterterrorism or diplomatic efforts, and activists who oppose governments that are supported by the United States Government."[62] The plaintiffs claimed that § 1881 interferes with their "ability to locate witnesses, cultivate sources, obtain information, and communicate confidential information to their clients."[63] The plaintiffs also contended that they had begun to avoid "engaging in certain telephone and e-mail conversations."[64] According to the plaintiffs, the threat of § 1881 surveillance would force them to incur significant expenses to protect the confidentiality of their communications—e.g., by compelling them "to travel abroad in order to have in-person conversations."[65]

"targeting procedures, minimization procedures, and a governmental certification regarding proposed surveillance" to ensure that the Government only targets persons outside the United States and minimizes "the acquisition, retention, and dissemination of nonpublic information about unconsenting U.S. persons, as appropriate." *Id.* at 1144–45 (internal quotation marks omitted).

58. *Clapper*, 133 S. Ct. at 1142.
59. *Id.*
60. *Id.*
61. *Id.* at 1145.
62. *Id.* (quoting App. to Pet. for Cert. 399a).
63. *Id.*
64. *Id.*
65. *Id.* at 1145–46.

Soon after Congress enacted the 2008 Amendments to FISA, the plaintiffs filed suit "seeking (1) a declaration that § 1881a, on its face, violates the Fourth Amendment, the First Amendment, Article III, and separation-of-powers principles and (2) a permanent injunction against [its use]."[66] The plaintiffs proffered two separate theories for why they met the Article III standing requirements.[67] First, "they claim[ed] that there is an objectively reasonable likelihood" that the Government will use § 1881a to obtain their communications at some time in the future, therefore causing them injury.[68] Additionally, the plaintiffs contended that "the risk of [Government] surveillance under § 1881a is so substantial that they have been forced to take costly and burdensome measures to protect the confidentiality of their international communications," and those costs "constitute present injury that is fairly traceable to § 1881a."[69]

At the summary judgment stage, the District Court held that the plaintiffs did not have standing.[70] On appeal, however, a panel of the Second Circuit reversed because it "agreed with the plaintiffs' argument that they have standing due to the objectively reasonable likelihood that [the Government will intercept their communications with foreign clients] at some time in the future."[71] Additionally, the panel held that the plaintiffs had demonstrated that they were suffering "*present* injuries in fact—economic and professional harms—stemming from a reasonable fear of *future* harmful government conduct."[72] The Second Circuit denied rehearing en banc, with six judges filing or joining dissents from the denial of rehearing.[73] The Supreme Court granted certiorari[74] and then reversed the Second Circuit's decision because it concluded that the plaintiffs had failed to prove Article III standing.[75]

B. Standing in Clapper

In *Clapper*, Justice Alito's majority opinion held that the plaintiffs could not establish Article III standing because they failed

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66. *Id.* at 1146.
67. *Id.*
68. *Id.*
69. *Id.*
70. Amnesty Int'l USA v. McConnell, 646 F. Supp. 2d 633, 635 (S.D.N.Y. 2009).
71. Amnesty Int'l USA v. Clapper, 638 F.3d 118, 133–34, 139 (2nd Cir. 2011).
72. *Id.* at 138.
73. Amnesty Int'l USA v. Clapper, 667 F.3d 163, 164–204 (2nd Cir. 2011), *cert. granted*, 132 S. Ct. 2431 (2012).
74. Clapper v. Amnesty Int'l USA, 132 S. Ct. 2431 (2012).
75. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146–55 (2013).

to prove that the alleged potential future injury of Government surveillance of their communications with foreign clients was certainly impending or fairly traceable to the FISA provision at issue.[76] Furthermore, the Court rejected the plaintiffs' theory that they were currently suffering an injury because the risk of § 1881 surveillance had forced them to spend significant amounts of money to protect the confidentiality of their communications. The Court stated that the plaintiffs "[could not] manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending."[77] Accordingly, the majority held that the plaintiffs had failed to meet the Article III standing requirements.[78]

Justice Alito's majority opinion emphasized that "[t]he law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."[79] Part III will show that Justice Scalia is the leading proponent on the Court of a separation-of-powers-based approach to standing doctrine and will show that the *Clapper* majority opinion is consistent with his approach to standing.[80] Justice Alito's majority opinion further expounded that "[i]n keeping with the purpose of this doctrine, '[o]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'"[81] He also stated that "'[r]elaxation of standing requirements is directly related to the expansion of judicial power.'"[82] The majority's warning that lax standing requirements inevitably lead to excessive judicial power is also consistent with Justice Scalia's standing approach.[83]

The *Clapper* decision sent mixed signals about whether its approach to standing was generally applicable to all cases or whether it was more limited to standing in intelligence-gathering and foreign affairs cases. As the majority observed, "we have often found a lack of standing in cases in which the Judiciary has been

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76. *Id.* at 1146–55.

77. *Id.* at 1143.

78. *Id.* at 1143, 1155.

79. *Id.* at 1146.

80. *See infra* Part III.

81. *Clapper*, 133 S. Ct. at 1147 (quoting Raines v. Byrd, 521 U.S. 811, 819–20 (1997)).

82. *Id.* (quoting United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring)).

83. *See infra* Part III.

requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs."[84] The Court then cited three prior decisions that had denied standing to plaintiffs in cases involving intelligence or military affairs.[85] The question that the *Clapper* Court never fully answered is whether its narrow interpretations of both the "certainly impending" injury requirement and the "fairly traceable" causation requirement are only applicable to intelligence and foreign affairs cases or more broadly applicable to standing questions in a wide variety of contexts.[86] The text of the majority opinion suggests that the "certainly impending" test is broadly applicable, but footnote 5 raises serious questions about the test.

Justice Alito summarized the Article III standing doctrine as follows: "an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'"[87] He then quoted *Lujan* to support the principle that the imminence doctrine forbids plaintiffs from asserting merely hypothetical injuries, even if different judges might debate the exact boundaries of what is an imminent injury. The Court in *Lujan* stated that "[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending."[88] To emphasize the principle that a standing injury must be "certainly impending," Justice Alito quoted another decision addressing that rule by stating, "we have repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient."[89] As is discussed below, the majority opinion stressed that the *Clapper* plaintiffs' assertions about future injury from possible Government

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84. *Clapper*, 133 S. Ct. at 1147.

85. *Id.* (citing *Richardson*, 418 U.S. at 167–70; Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 209–11 (1974); Laird v. Tatum, 408 U.S. 1, 11–16 (1972)). *See generally* Scott Michelman, *Who Can Sue Over Government Surveillance?*, 57 UCLA L. REV. 71 (2009) (discussing numerous cases involving standing issues in the context of challenges to government surveillance, including *Laird*, and various cases addressing FISA).

86. *See Clapper*, 133 S. Ct. at 1143, 1146–55.

87. *Id.* at 1147 (quoting Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2752 (2010)).

88. *Clapper*, 133 S. Ct. at 1147 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 565 n.2 (1992)).

89. *Id.* (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

surveillance of their foreign contacts could not meet the "certainly impending" injury requirement in the Article III standing test.[90]

The plaintiffs argued that they could meet both the injury in fact and fairly traceable prongs of the Article III test because, as a panel of the Second Circuit had concluded, "there is an objectively reasonable likelihood that their communications with their foreign contacts will be intercepted under § 1881a at some point in the future."[91] The *Clapper* majority opinion squarely rejected the Second Circuit's standing analysis, stating that "[a]s an initial matter, the Second Circuit's 'objectively reasonable likelihood' standard is inconsistent with our requirement that 'threatened injury must be certainly impending to constitute injury in fact.'"[92] The Court then gave several reasons why the plaintiffs' allegations were too speculative to meet either the certainly impending or fairly traceable prongs of the standing test:

> [R]espondents' argument rests on their highly speculative fear that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under § 1881a rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy § 1881a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts.[93]

A significant portion of the majority opinion is devoted to explaining why these five allegations are too speculative to meet either the certainly impending test or fairly traceable standard.

First, the Court pointed out that it was undisputed that the plaintiffs did not have actual knowledge that the Government was attempting to intercept or actually intercepting their communications with their foreign clients, and therefore the majority reasoned that it was speculative whether the Government had targeted or would imminently target those communications.[94]

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90. *Clapper*, 133 S. Ct. at 1147–55.
91. *Id.* at 1147.
92. *Id.* (quoting *Whitmore*, 495 U.S. at 158).
93. *Clapper*, 133 S. Ct. at 1148.
94. *Id.* at 1148–49.

The Court rejected the plaintiffs' suggestion for an *in camera* proceeding, in which a court would obtain confidential information from the Government about whether the plaintiffs' clients were actually subject to government surveillance, because of the risk that a terrorist might learn through his attorney that he was under Government surveillance.[95] However, after the Court issued the *Clapper* decision in June 2013, several media stories revealed, and the Obama Administration subsequently acknowledged, that the National Security Agency (NSA) has intercepted many internet communications through its "Prism" program.[96] Additionally, the United States Government has collected metadata information about who placed and received domestic phone calls through the Verizon phone network and possibly other phone carriers, but not the content of such calls.[97] Even these revelations might not have swayed the majority because the *Clapper* plaintiffs likely could not have proved for certain that their personal communications were targeted or captured by the revealed NSA programs. On the other hand, Justice Breyer probably views these revelations as vindication for his belief that the NSA was likely spying on the plaintiffs and their clients.[98]

Second, even if the plaintiffs could prove that the Government was targeting their foreign contacts, the Court pointed out that the plaintiffs could only speculate as to whether the Government was using § 1881a-authorized surveillance rather than utilizing another method of intelligence-gathering.[99] The Court observed that the

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95. *Id.* at 1149 n.4 (rejecting in-camera proceedings).

96. Paul Barrett wrote:

> Prism is the code name for a classified program under which the NSA accessed the central computer servers of nine U.S. Internet companies, extracting e-mail, audio and video chats, photographs, documents, and other material. Prism came to light on June 6 as a result of reporting by the *Washington Post* and the British *Guardian*. The Obama Administration then confirmed much of what the newspapers reported.

Paul M. Barrett, *What You Need to Know to Understand the NSA Spying Scandal*, BLOOMBERG BUS. WK. (June 7, 2013), http://www.businessweek.com/articles/2013-06-07/what-you-need-to-know-to-understand-the-nsa-spying-scandal.

97. Jane Mayer, *What's the Matter with Metadata?*, THE NEW YORKER (June 6, 2013), http://www.newyorker.com/online/blogs/newsdesk/2013/06/verizon-nsa-metadata-surveillance-problem.html (defining metadata as "meaning it excluded the actual content of the phone conversations, providing merely records, from a Verizon subsidiary, of who called whom when and from where").

98. *See infra* Part II.G.

99. *Clapper*, 133 S. Ct. at 1149.

Government could conduct surveillance without using § 1881a by either relying on older sections of FISA that require it to demonstrate probable cause, by obtaining information from the intelligence services of other nations, or possibly pursuant to Executive Order No. 12333.[100] Because of these other possible methods for gathering intelligence and the fact that the plaintiffs had only challenged the Government's use of § 1881a, the Court concluded that the plaintiffs could not satisfy the fairly traceable standing requirement even if they could prove that the Government was imminently targeting their communications.[101] The Court determined that the plaintiffs could only speculate as to whether the Government was using § 1881a-authorized surveillance or another means.[102] Unlike Justice Breyer's dissenting opinion, the majority did not discuss the probability of the Government using § 1881a-authorized surveillance as compared to the other methods it discussed.[103]

Third, even if the plaintiffs could prove that the Government had sought permission from the Foreign Intelligence Surveillance Court (FISC) to use § 1881a-authorized surveillance to target the plaintiffs' foreign contacts, the Court reasoned that its prior cases had rejected standing theories that depended upon how independent actors, especially judicial officials, might act in response to requests made by a defendant.[104] Because the government must obtain the approval of the FISC to use § 1881a surveillance, including the judicial imposition of targeting and minimization procedures to meet Fourth Amendment privacy requirements, the majority in *Clapper* concluded that the plaintiffs could only speculate as to whether the FISC would approve such surveillance, and therefore they could not prove that they would be harmed by any possible surveillance.[105] By contrast, Justice Breyer pointed out that in the overwhelming majority of cases, the FISC approves Government requests for surveillance without modification, and accordingly, that it was reasonable to assume that the FISC would approve surveillance of the plaintiffs' foreign contacts.[106]

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100. *Id.*

101. *Id.*

102. *Id.*

103. *See id.* at 1155–65 (Breyer, J., dissenting) (arguing that the plaintiffs had standing to challenge Section 1881a because it was likely that the Government used that provision to conduct surveillance against the plaintiffs' foreign contacts).

104. *Id.* at 1149–50 (majority opinion).

105. *Id.* at 1150.

106. *See id.* at 1159 (Breyer, J., dissenting).

The Court quickly summarized its last two reasons that the plaintiffs failed to prove standing as follows:

> Fourth, even if the Government were to obtain the Foreign Intelligence Surveillance Court's approval to target respondents' foreign contacts under § 1881a, it is unclear whether the Government would succeed in acquiring the communications of respondents' foreign contacts. And fifth, even if the Government were to conduct surveillance of respondents' foreign contacts, respondents can only speculate as to whether *their own communications* with their foreign contacts would be incidentally acquired.[107]

Even in light of the recent leaks about extensive NSA surveillance of United States internet and phone communications,[108] the Court's fourth and fifth requirements that the plaintiffs prove that their personal communications with their foreign contacts were actually acquired by the Government would be impossible to prove without actual disclosure of such information, either in an *in camera* proceeding—which the majority rejected because of the risk that the information might be leaked to terrorists[109]—or in the unlikely event that the government voluntarily disclosed such information.

C. Footnote 5's Substantial Risk Test

Section III.A of the majority opinion concluded by stating, "In sum, respondents' speculative chain of possibilities does not establish that injury based on potential future surveillance is certainly impending or is fairly traceable to § 1881a."[110] The Court, however, added footnote 5 to that concluding sentence; this footnote acknowledged that the Court had sometimes used a "substantial risk" test for standing injury that is arguably different from the "certainly impending" test used by the majority in the rest of its opinion.[111] Footnote 5 stated:

> Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will

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107. *Id.* at 1141 (majority opinion).

108. *See generally* Barrett, *supra* note 96 (discussing the NSA leaking scandal); Mayer, *supra* note 97 (discussing metadata).

109. *Clapper*, 133 S. Ct. at 1149 n.4 (rejecting in camera proceedings).

110. *Id.* at 1150.

111. *Id.* at 1150 n.5; *see also* Jacobs, *supra* note 19 (reporting about the view that the substantial risk test is potentially more lenient than the "certainly impending" test).

> come about. In some instances, we have found standing based on a "substantial risk" that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm . . . . But to the extent that the "substantial risk" standard is relevant and is distinct from the "clearly impending" requirement, respondents fall short of even that standard, in light of the attenuated chain of inferences necessary to find harm here.[112]

One odd issue in footnote 5 is that the footnote contrasted the "substantial risk" standard with the "clearly impending" requirement, but the majority, throughout the text of the opinion, used the term "certainly impending" rather than the "clearly impending" term in footnote 5.[113] Perhaps the Court's use of "clearly impending" in footnote 5 was an oversight, and that oversight will be of little significance if the majority treats the terms "certainly impending" and "clearly impending" as equivalent. Professor Richard Lazarus, however, suggests that "the use of 'clearly' is a mistake and an important one, since 'clearly' would seem to indicate a lower burden than 'certainly.'"[114] Only the future will answer the question of how influential footnote 5 will be on other standing decisions, although the Second and Federal Circuits have already discussed footnote 5.[115] The *Clapper* Court concluded that the plaintiffs allegations failed to meet even the "substantial risk" test, as they did not meet their "burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm" because they had relied upon speculation about whether an independent actor, the FISC, had authorized government surveillance of the plaintiffs' foreign contacts.[116]

D. The Majority Rejects Standing Based on the Plaintiffs' Alleged Expenditures to Avoid Surveillance

In Section III.B, the *Clapper* majority rejected standing based on the plaintiffs' alleged measures and expenditures to avoid surveillance.[117] The Court disagreed with the Second Circuit's conclusion that the plaintiffs already were suffering ongoing injuries

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112. *Clapper*, 133 S. Ct. at 1150 n.5.

113. *Compare Clapper*, 133 S. Ct. at 1147–55 (using the "certainly impending" standard), *with Clapper*, 133 S. Ct. at 1150 n.5 (contrasting the "substantial risk" and "clearly impending" standards).

114. Jacobs, *supra* note 19.

115. *See infra* Parts VI.B and VI.C.

116. *Clapper*, 133 S. Ct. at 1150 n.5.

117. *Id.* at 1150–53.

from avoiding Government surveillance because "[t]he Second Circuit's analysis improperly allowed respondents to establish standing by asserting that they suffer present costs and burdens that are based on a fear of surveillance, so long as that fear is not 'fanciful, paranoid, or otherwise unreasonable.'"[118] The Court sharply criticized the Second Circuit approach for "improperly water[ing] down the fundamental requirements of Article III."[119] The *Clapper* majority reasoned that the Second Circuit's and plaintiffs' avoided costs argument was incompatible with the "certainly impending" standard. The majority explained:

> Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.[120]

The Court was apprehensive that the Second Circuit's approach would allow an "enterprising plaintiff . . . to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear."[121] The Court held that the plaintiffs' "self-inflicted injuries are not fairly traceable to the Government's purported activities under § 1881a, and their subjective fear of surveillance does not give rise to standing."[122]

E. The Majority Distinguishes Three Decisions Relied Upon by the Plaintiffs

In Section IV.A, the majority distinguished three decisions that the plaintiffs relied upon because each of those three decisions involved real harms to the respective plaintiffs, and thus were different from the speculative harms alleged by the *Clapper* plaintiffs.[123] For example, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, the Court explained that it was undisputed that the defendant was discharging illegal pollutants

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118. *Id.* at 1151 (quoting Amnesty Int'l USA v. Clapper, 667 F.3d 163, 173 (2nd Cir. 2011)).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 1152–53.

123. *Id.* at 1153–54.

into a river, and the only question was whether the plaintiffs had acted reasonably in avoiding recreational use of the polluted river.[124] Conversely, in *Clapper*, the Government never conceded that it was attempting to conduct unlawful surveillance of the plaintiffs.[125] In *Meese v. Keene*, the Court held that a state legislator had standing to challenge the Government's attempt to label as political propaganda three films the plaintiff wished to show where there was clear harm to his reputation and political career.[126] But, by contrast, it was unclear whether the *Clapper* plaintiffs would suffer any harm.[127] Finally, in *Monsanto Co. v. Geertson Seed Farms*, the Court held that the plaintiffs, conventional farmers, had standing to seek injunctive relief to prevent contamination of their crops by nearby farmers who were using genetically modified seeds where there was solid evidence that pollinating bees could be expected to cause such cross-contamination and it was reasonable for them to incur expenditures to avoid contamination.[128] In contrast, there was no clear evidence that the *Clapper* plaintiffs would be subject to surveillance or that their costs in attempting to avoid surveillance were reasonable.[129]

F. The Majority Approach Does Not Insulate § 1881 from Judicial Review

The plaintiffs suggested that "they should be held to have standing because otherwise the constitutionality of § 1881a could not be challenged," but the majority opinion rejected that argument for several reasons.[130] First, the Court observed that in several decisions it had held that "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."[131] Second, the majority opinion strongly disagreed with the premise that the plaintiffs' failure to prove standing insulated § 1881 from judicial review.[132] The Court explained that "if the Government intends to use or disclose information obtained or

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124. *Id.* at 1153 (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183–84 (2000)).

125. *Id.*

126. *Id.* at 1153 (citing Meese v. Keene, 481 U.S. 465, 467, 473–75 (1987)).

127. *Clapper*, 133 S. Ct. at 1153.

128. *Id.* at 1153–54 (citing *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2754–55 (2010)).

129. *Clapper*, 133 S. Ct. at 1153–54.

130. *Id.* at 1154.

131. *Id.* (citations omitted) (internal quotation marks omitted).

132. *Id.*

derived from a § 1881a acquisition in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition."[133] Although the Court did not decide the issue, it mentioned that while a foreign client might not have a viable Fourth Amendment claim to challenge the statute, his American attorney would have a stronger argument to challenge the monitoring of his conversations under § 1881a if the Government sought to prosecute the client using § 1881a evidence.[134] Finally, the Court stated that "any electronic communications service provider that the Government directs to assist in § 1881a surveillance may challenge the lawfulness of that direction before the FISC".[135]

G. Justice Breyer's Dissenting Opinion

1. It Is Likely That the Government, Pursuant to § 1881a, Would Intercept Some Plaintiff Communications

Justice Breyer's dissenting opinion argued that the plaintiffs' allegations that the Government, pursuant to § 1881a, would intercept at least some of their communications with foreign clients was not "'speculative'" and was indeed "likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tell us will happen."[136] He asserted that prior Supreme Court decisions had "often found the occurrence of similar future events sufficiently certain to support standing."[137] Accordingly, he disagreed with the majority's assertion that the plaintiffs' alleged injuries were insufficient for standing.[138]

Justice Breyer argued that the plaintiffs had demonstrated standing by showing that it was probable that the Government would intercept a portion of their communications with their foreign clients pursuant to § 1881a.[139] He observed that the addition of § 1881a in the 2008 Amendments to FISA had made it much easier for the Government to conduct surveillance by eliminating the need to identify specific targets and to individualize privacy minimization procedures, although the Government must still obey court-approved

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133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 1155 (Breyer, J., dissenting).
137. *Id.*
138. *Id.* at 1155–65.
139. *Id.* at 1156–60.

general minimization procedures.[140] Based upon the plaintiffs' allegations about their various foreign clients and their descriptions of the general nature of the communications between them, Justice Breyer concluded "that there is a very high likelihood that Government, *acting under the authority of § 1881a*, will intercept at least some of the communications just described."[141] He reasoned that the Government had strong motives to attempt to monitor the communications of the plaintiffs' foreign clients because they included suspected terrorists and their friends and family.[142] Furthermore, there was evidence that under the pre-2008 FISA law the Government had intercepted 10,000 telephone calls and 20,000 e-mails of Mr. Al-Hussayen, a foreign client of plaintiff Scott McKay.[143] Based upon publically available information about Government surveillance by the NSA, Justice Breyer reasoned that it was likely that the Government would intercept at least some of the plaintiffs' communications pursuant to § 1881a.[144] Furthermore, the Government itself had provided evidence that the FISC only rarely denied, or even modified, requests for Government surveillance of foreign targets, and § 1881a had simplified and expedited the judicial approval process for such surveillance.[145] While one could not know with absolute certainty that the Government would intercept at least some of the plaintiffs' communications with their foreign clients pursuant to § 1881a, Justice Breyer argued that it was as reasonable to think that such interceptions would happen as pouring rain would make streets wet and the Government had offered no evidence to defeat that natural inference.[146] He concluded:

> Consequently, we need only assume that the Government is doing its job (to find out about, and combat, terrorism) in order to conclude that there is a high probability that the Government will intercept at least some electronic communication to which at least some of the plaintiffs are parties. The majority is wrong when it describes the harm threatened plaintiffs as "speculative."[147]

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140. *Id.* at 1156.
141. *Id.* at 1157 (emphasis in original).
142. *Id.* at 1157–58.
143. *Id.* at 1158.
144. *Id.* at 1158–59.
145. *Id.* at 1159.
146. *Id.* at 1159–60.
147. *Id.* at 1160.

2. The Majority's Interpretation of Standing Law Is Wrong

Citing footnote 5 of the majority opinion—which acknowledged a different "substantial risk" standing test that had been applied in some prior Court decisions—Justice Breyer's dissenting opinion argued that the majority's "certainly impending" standing test was wrong.[148] He contended instead that "federal courts frequently entertain actions for injunctions and for declaratory relief aimed at preventing future activities that are reasonably likely or highly likely, but not absolutely certain, to take place. And that degree of certainty is all that is needed to support standing here."[149] Justice Breyer maintained that prior Court decisions had used the "certainly impending" standing test "as if the phrase described a *sufficient*, rather than a *necessary*, condition for jurisdiction."[150] Furthermore, he observed that prior Court decisions had also used the "certainly impending" language "as if it concerned *when*, not *whether*, an alleged injury would occur."[151]

Observing that the majority opinion had acknowledged that "'imminence' is concededly a somewhat elastic concept," Justice Breyer argued that the Court, in eleven different decisions, had required a plaintiff to demonstrate only that an injury posed a "reasonable probability" or similar probability of occurring in the future rather than the "absolute, or literal certainty" suggested by the majority opinion.[152] He concluded that "the case law uses the word 'certainly' as if it emphasizes, rather than literally defines, the immediately following term 'impending.'"[153] Furthermore, Justice Breyer argued that at least four of the Court's prior decisions had recognized standing in cases with less certainty than *Clapper* by using standards such as a (1) "realistic danger" of harm;[154] (2) a

148. *Id.*

149. *Id.*

150. *Id.* (emphasis in original) (citing Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923)); *see also* Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979) (standing for the principle that a certainly impending injury is enough).

151. *Clapper*, 133 S. Ct. at 1160 (Breyer, J., dissenting) (emphasis in original).

152. *Id.* at 1160–61 (citing *Babbitt*, 442 U.S. at 298; Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc., 528 U.S. 167, 190 (2000)); *see also* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2754–55 (2010); Davis v. Fed. Election Comm'n, 554 U.S. 724, 734 (2008); MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129 (2007); Dep't of Commerce v. United States House of Representatives, 525 U.S. 316, 333 (1999); Clinton v. N.Y.C., 524 U.S. 417, 432 (1998); Pennell v. San Jose, 485 U.S. 1, 8 (1988); Blum v. Yaretsky, 457 U.S. 991, 1001 (1982); Bryant v. Yellen, 447 U.S. 352, 367–68 (1980); Buckley v. Valeo, 424 U.S. 1, 74 (1976).

153. *Id.* at 1161.

154. *Pennell*, 485 U.S. at 8.

"quite realistic" threat;[155] (3) a "realistic and impending threat";[156] or a (4) "genuine threat."[157] He argued that the *Clapper* plaintiffs had proven a sufficient risk of harm to meet the tests in all four of these cases.[158] In footnote 5, the majority acknowledged some, but not all, of the decisions cited by Justice Breyer as having employed an arguably more lenient standard than the "certainly impending" or "clearly impending" standard used by the majority.[159] As is discussed in Part V.B, it is possible that Justice Kennedy supports the substantial risk test in footnote 5.[160]

3. Justice Breyer Supports Probabilistic Standing

As is discussed *infra* in Part IV, Justice Breyer's dissenting opinion in *Summers* supported a probabilistic approach to what constitutes a sufficient injury for Article III standing.[161] Justice Breyer's dissenting opinion in *Clapper* went beyond his prior opinion in *Summers* in arguing that "courts have often found *probabilistic* injuries sufficient to support standing."[162] For example, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, the Court "found standing in part due to '[its] generalized concern about exposure to radiation and the apprehension flowing from the *uncertainty* about the health and genetic consequences of even small emissions.'"[163] Justice Breyer also cited several court of appeals decisions in which the courts had found standing because the defendants' actions had caused an increased risk of harm to at least some plaintiffs.[164] All of these court of appeals decisions, however, pre-dated Justice Scalia's 2009 opinion in *Summers*, which strongly rejected probabilistic standing.[165]

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155. *Blum*, 457 U.S. at 1000–01.

156. *Davis*, 554 U.S. at 734.

157. *MedImmune*, 549 U.S. at 129.

158. *Clapper*, 133 S. Ct. at 1161–62 (Breyer, J., dissenting).

159. *Id.* at 1150 n.5 (majority opinion).

160. *See infra* Part V.B.

161. *See infra* Part IV.

162. *Clapper*, 133 S. Ct. at 1162 (Breyer, J., dissenting) (emphasis in original).

163. *Id.* (emphasis added by Justice Breyer to original quote) (quoting Duke Power Co. v. Carolina Envt'l Study Grp., Inc., 438 U.S. 59, 74 (1978)).

164. *Clapper*, 133 S. Ct. at 1162 (Breyer, J., dissenting) (citing Constellation Energy Commodities Grp., Inc. v. FERC, 457 F.3d 14, 20 (D.C. Cir. 2006); Natural Res. Def. Council v. EPA, 464 F.3d 1, 7 (D.C. Cir. 2006); Sutton v. St. Jude Med. S.C., Inc., 419 F.3d 568, 570–575 (6th Cir. 2005); Johnson v. Allsteel, Inc., 259 F.3d 885, 888–90 (7th Cir. 2001); Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1234–35 (D.C. Cir. 1996)).

165. *See infra* Part III.

Justice Breyer offered a number of examples from common law actions, including anticipatory breach and nuisance, in which federal courts and treatise writers had recognized the appropriateness of granting relief even though the threatened harm was not certain.[166] Because of this, Justice Breyer argued that Article III standing doctrine should similarly recognize reasonably probable future injuries.[167] Furthermore, he observed that even regular declaratory judgment actions do not "always involve the degree of certainty upon which the Court insists here."[168] As is discussed in Part IV, Justice Breyer's dissenting opinion in *Summers* cited a number of common law analogies to support probabilistic standing.[169]

4. The *Clapper* Plaintiffs Are Suffering Present Injuries from Their Reasonable Efforts to Avoid or Mitigate Future Injuries

Justice Breyer argued that the Court, in some standing cases, had found an injury where plaintiffs suffered present injuries from incurring expenses or taking other costly actions to avoid reasonably feared future harms.[170] Most notably, in *Monsanto Co. v. Geertson Seed Farms*, conventional alfalfa growers incurred expenses through testing measures and acquiring additional conventional seeds to avoid a reasonably feared risk that their crops would be contaminated in the future by nearby farms using genetically modified seeds that could be blown by the wind or carried by insects onto the plaintiffs' properties.[171] The *Monsanto* Court held that the plaintiffs had standing because they had incurred present expenses to avoid reasonably feared future injuries, even if those potential injuries never occurred.[172] Justice Breyer argued that "virtually identical circumstances" were present in both *Monsanto* and *Clapper*, because in each case the plaintiffs incurred present

166. *Clapper*, 133 S. Ct. at 1162–63 (Breyer, J., dissenting).

167. *Id.* He offered a similar, but shorter, list of common law examples in his dissenting opinion in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). *See infra* Part III.

168. *Clapper*, 133 S. Ct. at 1163 (Breyer, J., dissenting) (citing Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239–44 (1937)); *see also, e.g.*, Assoc. Indem. Corp. v. Fairchild Indust., Inc., 961 F.2d 32, 35–36 (2d Cir. 1992) (reversing Rule 11 sanctions after determining that insured could seek liability payment prior to being found liable).

169. *See infra* Part IV.B.

170. *Clapper*, 133 S. Ct. at 1163–64 (Breyer, J., dissenting).

171. *Id.* (discussing Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2754–56 (2010)).

172. *Id.* at 1164 (discussing *Monsanto Co.*, 130 S. Ct. at 2755).

expenses in order to avoid reasonably probable future injuries, and therefore that the additional travel expenses incurred by the *Clapper* plaintiffs to avoid potential surveillance of their foreign clients was sufficient to prove standing.[173] The majority opinion, however, distinguished *Monsanto* as involving quite different facts than *Clapper* because of the great uncertainty about whether the latter plaintiffs would be subject to surveillance or if their costs in attempting to avoid surveillance were reasonable.[174]

5. The Court Should Adopt a Reasonable Probability or High Probability Standard for Standing Injury

While acknowledging that the Court had sometimes used the term "certainly impending" to deny standing, Justice Breyer argued that in each of these cases, including *Lujan* and *Summers*, the injuries were less likely to occur than in *Clapper*, in which, he argued, the injuries were likely to occur because "the ongoing threat of terrorism means that . . . the relevant interceptions will likely take place imminently, if not now."[175] Furthermore, the majority itself had conceded in footnote 5 that the term "certainly impending" does not necessarily mean that there is an absolute certainty that an injury will occur, but instead that the injury requirement for standing can be satisfied in some cases by a "substantial risk."[176] Justice Breyer interpreted the Court's Article III standing cases to require "something more akin to 'reasonable probability' or 'high probability.' The use of some such standard is all that is necessary here to ensure the actual concrete injury that the Constitution demands."[177] He concluded that the *Clapper* plaintiffs had met either of these probability standards, and accordingly, dissented from the majority's contrary holding.[178]

Justice Breyer's proposal of using either a "reasonable probability" or "high probability" standard in determining what constitutes an injury for Article III standing suggests that he was perhaps seeking to gain the vote of a colleague in the majority.[179] Based on his proposal for a "realistic threat" standing test in his dissenting opinion in *Summers*, Justice Breyer likely prefers a reasonable probability standing test over a "high probability"

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173. *Id.*
174. *Id.* at 1153–54 (majority opinion).
175. *Id.* at 1164–65 (Breyer, J., dissenting).
176. *Id.* at 1150 n.5 (majority opinion); *id.* at 1165 (Breyer, J., dissenting).
177. *Id.* at 1165 (Breyer, J., dissenting).
178. *Id.*
179. *See infra* Parts IV–V.

standing test.[180] However, he is apparently willing to support a "high probability" test if he could convince Justice Kennedy or another member of the *Clapper* majority to adopt it in a future case.[181] As is discussed in Part V.B, Justice Kennedy is the most likely justice in the *Clapper* majority to support the "substantial risk" alternative discussed in footnote 5 of that opinion. So, it is probable that Justice Breyer's suggestion of a "high probability" standing test was directed at Justice Kennedy.[182]

III. JUSTICE SCALIA'S SEPARATION-OF-POWERS-BASED THEORY OF STANDING[183]

A. Justice Scalia Treats Standing as an Essential Element of the Separation of Powers and Clapper *Follows*

The *Clapper* decision emphasized that Article III standing doctrine is "built on separation-of-powers principles, [and] serves to prevent the judicial process from being used to usurp the powers of the political branches."[184] The separation-of-powers approach to standing in *Clapper* developed from Justice Scalia's academic writing and his opinions in cases such as *Lujan* and *Summers*.[185] Chief Justice Roberts has made similar arguments about a separation-of-powers-based theory of standing, but his scholarship and judicial decisions are less extensive than Justice Scalia's on this subject.[186]

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180. *See infra* Part IV.B.

181. *Clapper*, 133 S. Ct. at 1165 (Breyer, J., dissenting).

182. *See infra* Part V.B.

183. Part III relies significantly on prior articles that I have written. *See* Mank, *Judge Posner's "Practical" Theory of Standing*, *supra* note 1, at 104–14 (discussing Justice Scalia's approach to Article III standing); Mank, *Informational Standing After* Summers, *supra* note 1, at 22–24 (same).

184. *Clapper*, 133 S. Ct. at 1146 (majority opinion).

185. *See supra* Part I; Mank, *Judge Posner's "Practical" Theory of Standing*, *supra* note 1, at 104–14 (discussing Justice Scalia's separation-of-powers-based approach to Article III standing doctrine).

186. *See* Massachusetts v. EPA, 549 U.S. 497, 535–38, 547–49 (Roberts, C.J., dissenting) (arguing that separation-of-powers principles in traditional standing doctrine counsel against giving states more lenient standing rights than non-state plaintiffs); Roberts, *supra* note 21, at 1229 ("[T]he judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution."); Solimine, *supra* note 21, at 1049 (arguing that Justice Scalia and Chief Justice Roberts believe that "Congress cannot tinker with the core constitutional standing requirements, though it might relax the prudential ones").

In 1983, Justice Scalia, then a judge on the United States Court of Appeals for the District of Columbia Circuit, wrote *The Doctrine of Standing as an Essential Element of the Separation of Powers*.[187] He argued that the "judicial doctrine of standing is a crucial and inseparable element" of separation-of-powers principles required by the structure and original intent of the Constitution, "which successively describes where the legislative, executive and judicial powers, respectively, shall reside."[188] His separation-of-powers approach to standing reflects his broader original intent interpretation of the Constitution.[189] Justice Scalia has vigorously condemned proponents of a "Living Constitution," who argue that judges could reinterpret the Constitution based on changing circumstances, because he believes that approach gives judges too much authority to ignore the will of the majority as expressed through Congress and the President.[190] He criticized Supreme Court cases during the late 1960s and early 1970s for weakening the separation-of-powers principles in standing requirements and causing "an overjudicialization of the processes of self-governance."[191] By contrast, Justice Scalia praised the Court, beginning in the mid-1970s and continuing through a 1982 decision, for "return[ing] to earlier [standing] traditions," and thereby "Returning To The Original Understanding"[192] of the Constitution's separation-of-powers principles.[193]

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187. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

188. *See id.* at 881.

189. A full discussion of Justice Scalia's originalist approach to constitutional interpretation is beyond the scope of this article. *See generally* DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 36–41 (1996) (discussing Justice Scalia's originalist approach to constitutional interpretation); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851–62 (1989) (defending his originalist approach to constitutional interpretation but acknowledging some difficulties).

190. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 44–47 (Amy Gutmann ed., 1997).

191. Scalia, *supra* note 187, at 881–99 (criticizing United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Ass'n for Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); and Flast v. Cohen, 392 U.S. 83 (1968)).

192. This quotation is from the heading of Part V of Judge Scalia's article. *See* Scalia, *The Doctrine of Standing as an Essential Element*, *supra* note 187, at 897.

193. *Id.* at 897–99 (citing with approval United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservist Comm. to Stop the War, 418 U.S. 208 (1974);

B. *Justice Scalia's Standing Masterpiece:* Lujan v. Defenders of Wildlife *Makes Separation of Powers the Key to Standing*

The *Clapper* majority opinion cited *Lujan v. Defenders of Wildlife*[194] on nine different occasions;[195] Justice Breyer's dissenting opinion cited the decision six times.[196] *Lujan* is still an important decision twenty-one years after it was decided in 1992, though only Justices Scalia, Kennedy, and Thomas were members of the Court for both the *Lujan* and the *Clapper* decisions.[197] Justice Scalia's opinion in *Lujan* was clearly based on his view in his 1983 standing article that standing doctrine is an essential element of the separation of powers.[198] In *Lujan*, he stated:

> While the Constitution of the United States divides all power conferred upon the Federal Government into "legislative Powers," Art. I, § 1, "[t]he executive Power," Art. II, § 1, and "[t]he judicial Power," Art. III, § 1, it does not attempt to define those terms . . . . One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III—"serv[ing] to identify those disputes which are appropriately resolved

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and Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982)).

194. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

195. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147–52 & nn.4–5 & 7 (2013).

196. *Id.* at 1155–65 (Breyer, J., dissenting).

197. Only Justices Scalia and Thomas joined the majority opinions in both *Lujan* and *Clapper*. *Compare Lujan*, 504 U.S. at 556 (listing the majority), *with Clapper*, 133 S. Ct. at 1142 (same). Justice Kennedy concurred in *Lujan* but joined the majority opinion in *Clapper*. *Compare Lujan*, 504 U.S. at 579–81 (Kennedy, J., concurring), *with Clapper*, 133 S. Ct. at 1142 (listing the majority). Chief Justice Roberts and Justice Alito were in the majority in *Clapper* but did not serve on the Court in 1992 when *Lujan* was decided. *See Clapper*, 133 S. Ct. at 1142 (listing the majority). President Bush successfully appointed Chief Justice Roberts in 2005 and Justice Alito in 2006. *Biographies of Current Justices of the Supreme* Court, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/biographies.aspx (last visited Dec. 17, 2013). Justices Ginsburg, Breyer, Sotomayor, and Kagan, the dissenters in *Clapper*, all joined the Court after the *Lujan* decision in 1992. *Id.*

198. *Compare Lujan*, 504 U.S. at 559–60 (discussing the important role of standing in the constitutional separation of the federal government's powers), *with* Scalia, *The Doctrine of Standing as an Essential Element*, *supra* note 187, at 881–82 (arguing that "standing is a crucial and inseparable element of the [separation-of-power] principle" and that disregarding standing leads to "an overjudicialization of the processes of self-governance").

> through the judicial process," Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)—is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.[199]

In both his 1983 article and his *Lujan* opinion, Justice Scalia emphasized that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."[200] Justice Scalia's *Lujan* opinion reasons that a plaintiff must have a concrete personal injury to sue in the federal courts, both because adjudicating personal injuries is the traditional function of courts and because eliminating standing injury requirements would unnecessarily expand the scope of the judiciary to address many issues better suited to the political branches in violation of separation-of-powers principles.[201] Justice Scalia, in both *Lujan* and his 1983 article, views standing requirements as serving important separation-of-powers concerns by limiting the role of the judiciary and preventing "an overjudicialization of the processes of self-governance."[202] Similarly, the *Clapper* decision declares that "[t]he law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."[203] Additionally, the *Clapper* majority opinion quoted Justice Powell's concurring opinion in *United States v. Richardson*—which denied standing in a suit seeking classified information about foreign intelligence expenditures—for the principle that "[r]elaxation of standing requirements is directly related to the expansion of judicial power."[204] The *Lujan* and *Clapper* decisions are in broad

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199. *Lujan*, 504 U.S. at 559–60 (alterations in original).

200. *Id.* at 560; *see also* Scalia, *The Doctrine of Standing as an Essential Element*, *supra* note 187, at 881–82 (arguing that standing is a crucial element of the separation-of-powers principle).

201. Lujan, 504 U.S. at 559–60, 577 (explaining that permitting standing without a concrete injury would unconstitutionally shift power from the executive branch to the judicial branch).

202. *Compare* Scalia, *The Doctrine of Standing as an Essential Element*, *supra* note 187, at 881–82 (arguing that standing is a crucial element of the separation-of-powers principle and without it there is a risk of "overjudicialization of the processes of self-governance"), *with Lujan*, 504 U.S. at 559–60, 577 (arguing that allowing a party to have standing without proving a concrete injury would "unconstitutionally shift power from the executive branch to the judicial branch").

203. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013).

204. *Id.* at 1147 (quoting United States v. Richardson, 418 U.S. 166, 188 (1974)

philosophical agreement on the relationship between standing and separation-of-powers principles in limiting judicial usurpation of powers better suited to the political branches.[205]

In *Lujan*, Justice Scalia linked the concrete injury requirement of standing to preventing the judiciary from interfering with the political branches of government, and particularly from interfering with the role of the President in enforcing the laws. Justice Scalia explained:

> Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches. "The province of the court," as Chief Justice Marshall said in *Marbury v. Madison*, "is, solely, to decide on the rights of individuals." Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed[.]" It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department" and to become "'virtually continuing monitors of the wisdom and soundness of

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(Powell, J., concurring)).

205. *Compare Lujan*, 504 U.S. at 559–60, 577 (explaining that permitting standing without a concrete injury would unconstitutionally shift power from the executive branch to the judicial branch), *with Clapper*, 133 S. Ct. at 1146–47 (same).

> Executive action.'" We have always rejected that vision of our role.[206]

The *Clapper* decision raises similar concerns about the need for standing requirements to protect the political branches from unnecessarily intrusive judicial interference. However, the *Clapper* decision also adds that these concerns are even greater in cases involving intelligence gathering and international relations, stating that "we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs."[207]

C. Summers v. Earth Island Institute: *Rejecting Pragmatic, Probabilistic Standing for a Rule-Based Separation of Powers*

In *Summers v. Earth Island Institute*, Justice Scalia's majority opinion rejected Justice Breyer's probabilistic and pragmatic approach to standing in favor of a strict rule requiring plaintiffs to demonstrate where and when alleged future injuries will occur.[208] Justice Scalia rejected standing for the plaintiffs in *Summers*, despite acknowledging that it was "likely" that at least one member of the Sierra Club would be injured in the future by the Government's sale of fire-damaged timber without giving members of the public notice that would allow them an effective opportunity to challenge such sales; he demanded that the plaintiffs meet the traditional standing rule by proving when and where a specific member would be injured.[209] By contrast, Justice Breyer, in his dissenting opinion in that case, which is discussed in more detail in Part IV, articulated a probabilistic standing test based on whether the plaintiffs could prove a "realistic threat" of future harms from the defendant's actions.[210] The *Clapper* majority opinion cited the *Summers* decision six times when explaining that plaintiffs must

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206. *Lujan*, 504 U.S. at 576–77 (citations omitted) (quoting U.S. CONST. art. II, § 3).

207. *Clapper*, 133 S. Ct. at 1147.

208. Summers v. Earth Island Inst., 555 U.S. 488, 492–94, 496–500 (2009); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) (opining that instead of using totality of the circumstances tests, appellate judges should use the rule of law whenever possible).

209. *Summers*, 555 U.S. at 490–91, 499.

210. *See id.* at 500–06 (Breyer, J., dissenting) (arguing that Supreme Court precedent supports a realistic threat or probabilistic standing test); *infra* Part IV (arguing that a probabilistic standing test is based on precedent and common sense).

demonstrate that an alleged future injury is concrete, certainly impending, and not merely speculative.[211] While Justice Breyer's dissenting opinion in *Clapper* sought to distinguish what he claimed were the more likely harms in that case from the less likely harms in *Summers*, his probabilistic approach to standing was roughly the same in both dissenting opinions.[212]

In *Summers*, several environmental groups, including the Sierra Club, challenged United States Forest Service regulations that allowed the Service to sell fire-damaged timber without public notice and comment if the sale was for less than 250 acres on the ground that applicable statutes required public notice and comment.[213] The United States District Court for the Eastern District of California initially issued a preliminary injunction involving one tract of land, the Burnt Ridge Project, where one party had undisputed standing, but the parties subsequently settled their dispute over that Project.[214] At the heart of a controversy that eventually reached the Supreme Court, the district court issued a nationwide injunction against five Forest Service regulations, even though the Government argued that the plaintiffs no longer had standing to challenge those regulations once the parties had settled the Burnt Ridge Project dispute.[215] Attempting, perhaps, to split the difference between the opposing positions of the plaintiffs and the Government, the Ninth Circuit partially affirmed the district court's nationwide injunction against those regulations applicable to the Project but also determined that regulations inapplicable to the Project were not ripe for adjudication.[216]

In his *Summers* majority opinion, Justice Scalia reiterated his view from *Lujan* that separation-of-powers principles require plaintiffs to demonstrate a concrete, personal injury because any judicial review without proof of traditional injury standing requirements would lead the judiciary to impermissibly interfere with legislative and executive prerogatives.[217] He reasoned:

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211. *Clapper*, 133 S. Ct. at 1146–48 (majority opinion).

212. *Compare id.* at 1165 (Breyer, J., dissenting) (distinguishing *Summers* as a case where injury was less likely than in *Clapper*), *with Summers*, 555 U.S. at 505–10 (Breyer, J., dissenting) (arguing that the plaintiffs in *Summers* had proven standing injury).

213. *Summers*, 555 U.S. at 490–91 (majority opinion).

214. *Id.* at 491.

215. *Id.* at 492.

216. *Id.*

217. *Id.* at 492–93.

> In limiting the judicial power to "Cases" and "Controversies," Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. This limitation "is founded in concern about the proper—and properly limited—role of the courts in a democratic society."[218]

Justice Scalia concluded that the plaintiffs could not meet traditional standing requirements for personal injury because they had shown no actual harm from the challenged regulations, except for a Burnt Ridge Project case that the parties had already settled.[219] He explained that the standing that the plaintiffs had to challenge the Project could not serve as the basis for standing to seek a nationwide injunction against other projects that had caused no harm to any of the plaintiffs' members at the time the parties settled the Project issue.[220]

Additionally, Justice Scalia concluded that none of the plaintiffs' allegations about possible future harms from the regulation's exemption of some timber sales from notice and comment requirements was sufficient for proving standing injury.[221] One affiant for the plaintiffs alleged that he visited numerous national parks during his lifetime, that he had suffered recreational injuries in the past from development on Forest Service land, and that he planned to visit several unnamed national forests in the future.[222] The Court concluded that his affidavit was insufficient for standing because he could not identify any particular site and time where he was likely to be harmed by alleged illegal actions authorized by the challenged regulations; therefore, his speculative assertions about possible future harms failed to satisfy the imminent injury requirement in the Article III standing test.[223]

Justice Scalia's majority opinion in *Summers* rejected the plaintiffs' and Justice Breyer's argument for probabilistic standing based on the probability that some members of a plaintiff

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218. *Id.* (citations omitted) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

219. *Summers*, 555 U.S. at 494–95.

220. *Id.* at 491–95.

221. *Id.* at 495–97.

222. *Id.* at 495.

223. *Id.* at 495–97. The Court stated, "There may be a chance, but is hardly a likelihood, that [the affiant's] wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations." *Id.* at 495.

organization will be harmed in the future.[224] The Sierra Club alleged in its complaint that it had more than 700,000 national members, and, accordingly, that it was probable that the Government's implementation of the challenged regulations would harm at least one of its members in the near future.[225] The *Summers* decision rejected the plaintiffs' probabilistic standing argument because it concluded that an organizational plaintiff must identify specific members who are actually injured or will suffer an imminent injury at a particular time and location.[226] Justice Scalia argued that although it may be possible that a member of the plaintiff organization might meet the standing criteria at some point in the future, mere statistical probability is insufficient to satisfy the Court's standing requirements, "which have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm."[227]

Justice Scalia concluded his *Summers* opinion on standing by rejecting Justice Breyer's proposed realistic threat based on its inconsistency with the Court's imminent harm test. The opinion stated:

> The dissent would have us replace the requirement of "imminent" harm, which it acknowledges our cases establish with the requirement of "a *realistic* threat that reoccurrence of the challenged activity would cause [the plaintiff] harm in the reasonably near future." That language is taken, of course, from an opinion that did *not* find standing, so the seeming expansiveness of the test made not a bit of difference. The problem for the dissent is that the timely affidavits no more meet that requirement than they meet the usual formulation. They fail to establish that the affiants' members will *ever* visit one of the small parcels at issue.[228]

The *Summer* majority's rejection of Justice Breyer's probabilistic standing test and its insistence that plaintiffs prove the precise time and place that an imminent injury will occur is strikingly similar to *Clapper's* clearly impending test and requirement that the plaintiffs prove that specific communications are subject to actual government surveillance or will definitely be subject to imminent interception by

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224. *Id.* at 496; *see* Mank, *Standing and Statistical Persons*, *supra* note 1, at 750.

225. *See Summers*, 555 U.S. at 502–03 (Breyer, J., dissenting).

226. *Id.* at 499 (majority opinion). Justice Scalia acknowledged that an organization has standing if *all* of its members are likely to suffer an injury. *Id.*

227. *Id.* at 497–98.

228. *Id.* at 499–500 (alterations in original) (citations omitted) (internal quotation marks in original omitted).

government pursuant to FISA § 1881a.[229] The correspondence between standing doctrine in *Summers* and *Clapper* is not surprising because the same five justices formed the majority in each case: Chief Justice Roberts and Justices Scalia, Kennedy, Thomas and Alito.[230] The only difference, which is discussed in Part V.A, is that Justice Kennedy wrote a short concurrence in *Summers*.[231]

IV. JUSTICE BREYER'S PRECEDENT-BASED LEGAL PRAGMATISM AND HIS "REALISTIC THREAT" STANDING TEST IN *SUMMERS V. EARTH ISLAND INSTITUTE*[232]

A. Justice Breyer's Precedent-Based Legal Pragmatism

Justice Breyer's approach to constitutional and statutory interpretation is quite different from Justice Scalia's originalist and textualist approaches to judicial interpretation described in Part III.[233] In his 2008 book, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION, Justice Breyer criticizes originalist approaches to constitutional interpretation, although he acknowledges that history and tradition are important factors for a court to consider when interpreting the Constitution.[234] He also criticizes textualist approaches to interpretation.[235] Justice Breyer's

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229. *Compare id.* at 492–500 (requiring plaintiffs to prove that a specific member will suffer imminent harm at a particular time and place), *with* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1142–55 (2013) (applying the certainly impending standing test to require plaintiffs to prove that specific communications are subject to actual government surveillance or will definitely be subject to imminent interception by government pursuant to FISA § 1881a).

230. *See Clapper*, 133 S. Ct. at 1142 (reporting that Chief Justice Roberts, as well as Justices Scalia, Kennedy, and Thomas, joined Justice Alito's majority opinion); *see also Summers*, 555 U.S. at 489 (reporting that Chief Justice Roberts, as well as Justices Kennedy, Thomas, and Alito, joined Justice Scalia's majority opinion and that Justice Kennedy filed a concurring opinion).

231. *See Summers*, 555 U.S. at 501 (Kennedy, J., concurring); *infra* Part V.A.

232. Part IV's discussion of Justice Breyer's standing views is based significantly on my article *Judge Posner's Practical Theory of Standing*, *supra* note 1, at 76–77, 115–17, 130.

233. *Compare supra* Part III (discussing Justice Scalia's views on standing and judicial interpretation), *with infra* Part IV (discussing Justice Breyer's views on standing and judicial interpretation).

234. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 12–25, 113–25 (2d ed. 2008) (discussing historical perspectives on the role of democratic self-government within the Constitution's governmental structure and criticizing the originalist approach to constitutional interpretation).

235. *Id.* at 85–97 (criticizing textualists' interpretation of statutes and the

criticism of originalism and textualism clearly distinguishes his view of judicial interpretation from that of Justice Scalia, who favors both approaches to judicial interpretation.[236] Justice Breyer has argued that the Constitution is a living document that must be interpreted differently by succeeding generations. For example, Justice Breyer once stated that "[t]oday's Court should not base an answer to a question about an issue such as gun control on the facts and circumstances of eighteenth-century society."[237] He does concede, however, that judges should adopt an attitude of judicial modesty because their understanding of the world is always limited and imperfect compared to that of elected officials who are in closer contact with the voting public.[238]

Furthermore, Justice Breyer's 2010 book, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW, argues that judges should usually adopt a pragmatic approach to constitutional interpretation; however, he also contends that judges should give significant weight to judicial precedent and past societal practices, even if prior decisions appear to be inconsistent with modern pragmatic reasoning, because a judge should consider "a particular decision . . . as part of a complex system of rules, principles, canons, institutional practices, and understandings."[239] Justice Breyer's approach to judicial pragmatism gives significant weight to precedent; he observes that "pragmatism does not require a court to automatically overrule a decision because it produces harmful consequences" because a court must consider the negative effects of overruling precedent on the "law's stability."[240] Furthermore, he writes that

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Constitution).

236. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 18 (2001) (characterizing Justice Scalia as one of the "most consistent judicial textualists"); *supra* Part III (discussing Justice Scalia's views on standing and judicial interpretation).

237. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 170 (2010).

238. BREYER, ACTIVE LIBERTY, *supra* note 234, at 11, 44–45, 62, 69–70 (arguing for judicial modesty and caution); *see also* Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism*, 119 HARV. L. REV. 2387, 2388–89, 2397–403 (2006) (arguing that Justice Breyer's Active Liberty book, *see supra* note 234, presents a more moderate approach to constitutional interpretation than the activist "Living Constitution" approach of the Warren Court during the 1960s).

239. BREYER, MAKING OUR DEMOCRACY WORK, *supra* note 237, at 82. Justice Breyer's book proposes a pragmatic approach to constitutional interpretation. *Id.* at xiii–xiv, 74–75, 80–87, 154–57, 216.

240. *Id.* at 83. Justice Breyer also stresses the importance of considering stability and stare decisis when deciding whether to overrule an earlier case. *Id.* at

"[p]ragmatic approaches to law . . . can take account of the interactions of a single decision with, for example, other decisions, rules, principles, methods, canons, practices, and the consequential overall effects of modifying the legal fabric."[241]

B. *Justice Breyer's "Realistic Threat" Standing Test in* Summers v. Earth Island Institute

In his dissenting opinion in *Summers v. Earth Island Institute*, Justice Breyer—joined by Justices Stevens, Souter, and Ginsburg—proposed a "realistic threat" standing test for determining when a potential future injury is sufficiently imminent and concrete for Article III standing.[242] Justice Breyer used existing standing precedent and analogies to common law actions to justify his pragmatic or realistic test for standing.[243] He argued that the majority opinion had inappropriately used the term "imminent" injury to prohibit standing, despite the significant likelihood that at least some members of the Sierra Club would suffer an injury from the Government's fire-sale policy.[244] His dissenting opinion contended that prior Court decisions had used the term "imminent" injury to reject standing only when the alleged harm was "merely 'conjectural' or 'hypothetical' or otherwise speculative."[245] Additionally, Justice Breyer contended that the majority's use of the imminent test was inappropriate if a plaintiff was already injured, as he claimed was the case in *Summers*.[246]

Proposing a probabilistic approach to standing similar to that in his subsequent *Clapper* dissent, Justice Breyer reasoned in his *Summers* dissent that standing should not be denied if "there is a *realistic likelihood* that the challenged future conduct will, in fact, recur and harm the plaintiff."[247] Justice Breyer argued that the Court's prior standing decisions demanded only that a plaintiff establish a "realistic threat" of injury, which does not require more "than the word 'realistic' implies."[248] Although he conceded that the plaintiffs could not predict where and when their members would be

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155–56.

241. *Id.* at 83.

242. Summers v. Earth Island Inst., 555 U.S. 488, 505–10 (2009) (Breyer, J., dissenting).

243. *Id.* at 505–06.

244. *Id.* at 504–06.

245. *Id.* at 505 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

246. *Summers*, 555 U.S. at 503–04 (Breyer, J., dissenting).

247. *Id.* at 505.

248. *Id.*

harmed by the Service's sale of salvage timber, Justice Breyer reasoned that there was a realistic threat that some of the thousands of members of the plaintiff organizations would likely be harmed in the reasonably near future.[249] Accordingly, he endorsed a probabilistic approach to Article III standing based on the likelihood that at least one member of the plaintiff organizations would meet all standing criteria in the near future, even if it is impossible to predict the specific person, time, or place, as demanded by Justice Scalia's majority opinion.[250] In light of his proposal for a "realistic threat," Justice Breyer likely personally prefers the reasonable probability standing test he suggested in *Clapper*, rather than the alternative "high probability" standing test he offered in the same opinion; however, he would undoubtedly adopt the "high probability" standing test if he could gain a majority for that test in a future case.[251]

Justice Breyer also analogized different common law causes of action that are based on probabilistic future threats to justify a "realistic threat" or probabilistic test for standing. He wrote:

> How could the Court impose a stricter criterion [than a realistic threat standing test]? Would courts deny *standing* to a holder of a future interest in property who complains that a life tenant's waste of the land will almost inevitably hurt the value of his interest—though he will have no personal interest for several years into the future? Would courts deny *standing* to a landowner who complains that a neighbor's upstream dam constitutes a nuisance—even if the harm to his downstream property (while bound to occur) will not occur for several years? Would courts deny *standing* to an injured person seeking a protection order from future realistic (but nongeographically specific) threats of further attacks?[252]

Similarly, in his *Clapper* dissenting opinion, Justice Breyer offered other common law examples in which courts had awarded relief even though the threatened harm was not certain, and he argued that Article III standing doctrine should likewise recognize reasonably probable future injuries.[253]

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249. *Id.* at 506–09.

250. *Id.*

251. *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1165 (2013) (Breyer, J., dissenting).

252. *Summers*, 555 U.S. at 505–06 (Breyer, J., dissenting).

253. *Clapper*, 133 S. Ct. at 1162–63 (Breyer, J., dissenting).

In his *Summers* dissenting opinion, Justice Breyer discussed how the Court in *Massachusetts v. EPA* found standing based on predicted future harms to the coastline of Massachusetts from climate change that computer models estimated would occur several decades in the future. Justice Breyer implied that the forestry issues in *Summers* involved more imminent injuries than those in *Massachusetts v. EPA*, and therefore ought to be easier to use as the basis for standing. Accordingly, he wrote:

> To the contrary, a threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates. Thus, we recently held that Massachusetts has *standing* to complain of a procedural failing, namely, the Environmental Protection Agency's failure properly to determine whether to restrict carbon dioxide emissions, even though that failing would create Massachusetts-based harm which (though likely to occur) might not occur for several decades.[254]

In light of common law analogies and the *Massachusetts v. EPA* Court's willingness to consider future injuries, Justice Breyer contended that the affiants' affidavit in *Summers* contained sufficient allegations of future harm to satisfy a "realistic threat" standing test. He wrote:

> The . . . affidavit does not say *which particular* sites will be affected by future Forest Service projects, but the Service itself has conceded that it will conduct thousands of exempted projects in the future. Why is more specificity needed to show a "realistic" threat that a project will impact land [affiant] uses? To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive. The law of standing does not require the latter kind of specificity. How could it?[255]

Justice Breyer was suggesting that Justice Scalia's demands for exactitude in standing allegations were unreasonable in the light of common sense, such as what we know about snowfall in New England. Justice Breyer's realistic threat standing test and his homey commonsense analogies to the common law and snowfall in New England are quite different in approach from Justice Scalia's

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254. *Summers*, 555 U.S. at 506 (Breyer, J., dissenting) (citing Massachusetts v. EPA, 549 U.S. 497 (2007)).

255. *Summers*, 555 U.S. at 507–08 (Breyer, J., dissenting).

originalist and rule-based approach to standing doctrine.[256] Justice Breyer reads Article III standing doctrine more broadly within the framework of the Court's precedent and the broader background of common law analogies.[257]

Additionally, perhaps anticipating that the issue might arise in the future and that he might win Justice Kennedy's vote in a subsequent standing case, Justice Breyer argued that the plaintiffs would have had standing if Congress had expressly provided standing to groups like the plaintiffs.[258] In making the assertion that "[t]he majority cannot, and does not, claim that such a statute would be unconstitutional," Justice Breyer cited *Massachusetts v. EPA* for support;[259] in *Massachusetts v. EPA*, Justice Kennedy joined the majority and Justice Scalia and the three other members of the *Summers* majority dissented.[260] Based on Justice Kennedy's previous decisions in other major standing cases,[261] Justice Breyer appeared to want Justice Kennedy's support in future cases if Congress were to explicitly define a statutory injury-in-fact with an injury similar to the one suffered by the plaintiffs in *Summers*.[262]

V. JUSTICE KENNEDY'S APPROACH TO STANDING[263]

Justice Kennedy was the only justice to join the majority in all of the following key standing cases: *Lujan*, *Laidlaw*, *Massachusetts v. EPA*, *Summers*, and *Clapper*, although he wrote concurring opinions in *Lujan*, *Laidlaw*, and *Summers*.[264] Accordingly, any effort to find a

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256. *Compare supra* Part III (discussing Justice Scalia's views on standing and judicial interpretation), *with supra* Part IV (discussing Justice Breyer's views on standing and judicial interpretation).

257. *See supra* Part IV (discussing Justice Breyer's views on standing and judicial interpretation).

258. *Summers*, 555 U.S. at 502–03 (Breyer, J., dissenting).

259. *Id.* at 504 (citing Massachusetts v. EPA, 549 U.S. 497, 516–18 (2007)).

260. *Compare Summers*, 555 U.S. at 488 (majority opinion) (listing members of the Court joining the majority opinion and dissenting opinion), *with* Massachusetts v. EPA, 549 U.S. at 501 (listing members of the Court joining the majority opinion and dissenting opinion).

261. *See infra* Part V.

262. *See Summers*, 555 U.S. at 502–03 (Breyer, J., dissenting); *infra* Part V.

263. Part V's discussion of Justice Kennedy's standing views is based significantly on my article, *Informational Standing After* Summers. *See* Mank, *Informational Standing After* Summers, *supra* note 1, at 25, 44–54 (discussing the crucial swing vote of Justice Kennedy in standing cases).

264. *See* Clapper v. Amnesty Int'l, 133 S. Ct. 1138, 1142 (2013) (listing members of the Court joining the majority opinion); *Summers*, 555 U.S. at 489 (same); Massachusetts v. EPA, 549 U.S. at 501 (same); Friends of the Earth, Inc. v. Laidlaw

consistent line of reasoning in these important standing cases must focus on Justice Kennedy's approach to standing.[265] Justice Kennedy's concurring opinion in *Lujan* offers the most insight into whether Congress may, through statutory rights, recognize injuries that would not have satisfied common law requirements, and thus possibly enlarge at the margins the definition of concrete injury sufficient to satisfy Article III standing requirements.[266] Justice Kennedy likely rejected standing in *Clapper* because Congress did not establish statutory rights for plaintiffs similar to those in that case.

A. *Justice Kennedy's* Lujan *Concurrence: To What Extent May Congress Affect Constitutional Standing Requirements?*

There has been considerable debate about the extent to which Congress may enlarge the definition of concrete injury under Article III's constitutional standing requirements.[267] In his *Lujan* majority opinion, Justice Scalia argued that Article III and broader separation-of-powers principles limit the authority of Congress to grant universal standing rights to plaintiffs who lack a concrete injury.[268] More controversially, he contended that both Article III limits on judicial authority and the President's Article II authority to enforce federal laws require federal courts to impose standing injury requirements in order to limit congressional authority to authorize suits against the executive branch.[269] In his *Lujan* dissenting opinion, Justice Blackmun argued that Justice Scalia's approach to standing has the practical effect of aggrandizing executive authority

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Envt'l Servs. (TOC), Inc., 528 U.S. 167, 190 (2000) (same); Lujan v. Defenders of Wildlife, 504 U.S. 555, 556 (1992) (same).

265. Mank, *Informational Standing After* Summers, *supra* note 1, at 25, 44–54 (discussing the importance of Justice Kennedy's swing vote in standing cases).

266. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment) (discussing Congress's power to define injuries that satisfy Article III standing); *see also Summers*, 555 U.S. at 501 (Kennedy, J., concurring in part and concurring in the judgment) (stating that nothing in the statute shows an intent by Congress to convey anything more than a procedural right).

267. *See* Solimine, *supra* note 21, at 1028–31 (examining different interpretations of congressional authority to alter standing).

268. *See Lujan*, 504 U.S. at 576–78; Scalia, *The Doctrine of Standing as an Essential Element*, *supra* note 187, at 894–97.

269. *Lujan*, 504 U.S. at 577. *See* Scalia, *The Doctrine of Standing as an Essential Element*, *supra* note 187, at 890–93; Solimine, *supra* note 21, at 1049 (arguing that Justice Scalia and Chief Justice Roberts believe "that Congress cannot tinker with the core constitutional standing requirements, though it might relax the prudential ones").

and undermining Congress's ability to ensure that the executive branch faithfully enforces the law.[270] However, Justice Scalia acknowledged in *Lujan* that Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."[271]

Some commentators have sought a middle ground on congressional authority to modify Article III standing requirements that balances both the executive and congressional role in making and enforcing federal law, as well as a limited, but appropriate, role for judicial review.[272] Justice Kennedy's concurring opinion in *Lujan* suggests that he may take such a position with respect to Congress's authority to modify standing requirements beyond traditional common law requirements for a concrete injury.[273] Justice Kennedy's concurring opinion in *Lujan* implicitly addresses the authority of Congress to modify common law injury requirements, or even constitutional standing requirements, for a concrete injury.[274] Justice Kennedy agreed with the majority that a plaintiff must demonstrate a concrete injury and that the affiants had failed to do so because they were uncertain as to when they would return to the project sites.[275] He suggested, however, that "[a]s Government programs and policies become more complex and far reaching," courts should recognize, at least to some extent, congressional authority to expand the definition of a concrete injury to include new rights of action that do not correlate to rights traditionally

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270. Lujan, 504 U.S. at 602 (Blackmun, J., dissenting) (noting that the "principal effect" of Justice Scalia's majority opinion's restrictive approach to standing was "to transfer power into the hands of the Executive at the expense—not of the Courts—but of Congress, from which that power originates and emanates"); *see* Solimine, *supra* note 21, at 1050 ("With respect to the argument that a broad reading of Article III standing improperly limits executive power under Article II, some scholars contend that it does not give sufficient weight to the balance, as opposed to the separation, of powers.").

271. *Lujan*, 504 U.S. at 578.

272. Solimine, *supra* note 21, at 1052. Professor Solimine contends that liberal and conservative critiques both have persuasive arguments that can be reconciled. *Id.* "The liberal critique enhances the power of the judiciary and that of private parties empowered by Congress, at the expense of representative government in general and of the executive branch in particular." *Id.* Conversely, "[t]he conservative critique enhances the power of the President and in theory encourages Congress to exercise its nondelegable oversight and appropriations functions, at the expense of giving space for the executive branch to underenforce or violate federal law." *Id.*

273. *See Lujan*, 504 U.S. at 579–81 (Kennedy, J., concurring in part and concurring in the judgment).

274. *See id.* at 580.

275. *Id.* at 579.

recognized in common law.[276] Justice Kennedy reasoned that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[277] He limited his potentially broad endorsement of congressional authority to redefine Article III standing with the caveat that "[i]n exercising this power, . . . Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[278]

In his *Lujan* concurrence, Justice Kennedy balanced Congress's discretionary authority to expand the definition of injuries beyond common law limits against separation-of-powers concerns that restrict Article III standing to concrete injuries.[279] Specifically, he observed that "the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government."[280] In *Lujan*, Justice Kennedy concluded that the citizen suit provision of the Endangered Species Act was problematic to the extent that it purported to extend standing to "any person," but did not define what type of injury was caused by the government's violation of the Act or explain why "any person" was entitled to sue the government to challenge a procedural violation that does not cause a concrete injury in fact to the plaintiff.[281] Justice Kennedy noted that the concrete injury requirement is important because it "preserves the vitality of the adversarial process by assuring . . . that the parties before the court have an actual, as opposed to professed, state in the outcome."[282] Therefore, "the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[283]

In his short concurring opinion in *Summers*, Justice Kennedy echoed his views from his *Lujan* concurrence and explained that he believed a plaintiff can challenge the alleged violation of a procedural right only if the plaintiff can demonstrate a separate concrete injury.[284] He concluded that the plaintiffs in *Summers* did

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276. *Id.* at 580.
277. *Id.*
278. *Id.*
279. *Id.* at 580–81.
280. *Id.* at 581.
281. *Id.* at 580.
282. *Id.* at 581.
283. *Id.* (citations omitted) (internal quotation marks omitted).
284. Summers v. Earth Island Inst., 555 U.S. 488, 501 (2009) (Kennedy, J., concurring).

not meet this standard because the statute at issue did not include an express citizen suit provision, meaning that Congress did not intend the statute to bestow any right other than a procedural right.[285] Justice Kennedy asserted that "[t]his case would present different considerations if Congress had sought to provide redress for a concrete injury 'giv[ing] rise to a case or controversy where none existed before.'"[286] Like his concurrence in *Lujan*, Justice Kennedy's concurrence in *Summers* left open the possibility that he might have concluded that the plaintiffs met Article III standing requirements—despite Justice Scalia's more fundamental separation-of-powers concerns—if Congress had enacted a more explicit statute that clearly defined when a procedural injury constitutes a concrete harm to a particular class of plaintiffs.[287]

While there is some overlap between the standing views of Justice Scalia and Justice Kennedy—i.e., Justice Kennedy at least concurred in Justice Scalia's *Lujan* and *Summers* decisions—there is a significant difference between Justice Kennedy's balancing approach to when Congress may define standing injuries and Justice Scalia's more rule-based approach to which injuries are concrete.[288] Nevertheless, even Justice Scalia acknowledged in *Lujan* that Congress has some authority to recognize injuries not cognizable in common law courts.[289] Justice Kennedy rejected standing in *Lujan* and *Summers* in part because Congress had not defined what constituted an injury sufficient for standing in the relevant statutes; he suggested, however, that the plaintiffs' injuries might have been sufficient if there had been a statutory framework consistent with those injuries.[290]

By contrast, Justice Scalia's majority opinions in *Lujan* and *Summers* ridiculed the plaintiffs' injuries as constitutionally deficient because the plaintiffs could not specify when or where they would be injured.[291] It is questionable whether a more carefully drafted statute in either case would have persuaded Justice Scalia that the plaintiffs had constitutionally cognizable Article III

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285. *Id.*

286. *Id.* (alterations in original) (quoting *Lujan*, 504 U.S. at 580).

287. *Summers*, 555 U.S. at 501.

288. *Compare supra* Part III (discussing Justice Scalia's views on standing and judicial interpretation), *with supra* Part V (discussing Justice Kennedy's views on standing and judicial interpretation).

289. *Lujan*, 504 U.S. at 578.

290. *See Summers*, 555 U.S. at 501 (Kennedy, J., concurring); *Lujan*, 504 U.S. at 579–81 (Kennedy, J., concurring in part and concurring in the judgment).

291. *See Summers*, 555 U.S. at 495 (majority opinion); *Lujan*, 504 U.S. at 563–64 (majority opinion).

injuries.[292] Based on his concurring opinions in *Lujan* and *Summers*, Justice Kennedy appears to believe that Congress has some power to define or redefine what constitutes a cognizable concrete injury under Article III, although Congress may not confer universal standing without defining the requisite injury.[293]

In response to Justice Kennedy's opinions, Professor Solimine asked a critical standing question: "How do we know a statute meets Justice Kennedy's test?"[294] To address this question, Professor Solimine suggests that scholars and courts should closely examine the statutory text, structure, and legislative history of each statute at issue in a standing case before deciding whether the plaintiff's asserted facts are sufficient for Article III standing in that case.[295] Justice Kennedy likely rejected standing in *Clapper* because Congress did not establish specific statutory rights for Americans who communicate with foreigners who are being targeted by the NSA to sue to challenge such interceptions.[296] By contrast, the statute does explicitly authorize any electronic communications service provider ordered by the Government to assist it pursuant to § 1881a to challenge that order before the FISC.[297]

B. Is Justice Kennedy Responsible for Footnote 5 in Clapper*?*

Professor Richard Lazarus and Professor Amanda Leiter have each suggested that the "substantial risk" test for standing in footnote 5 of *Clapper* is potentially more lenient than the "certainly impending" test used in the text of the majority opinion.[298] Professor Lazarus has also contended that the Court's perhaps mistaken use of the term "clearly impending" in that footnote instead of the "certainly impending" test may offer an easier approach to standing in some future cases.[299] Potentially, the Court or lower courts in future cases could use either the "substantial risk" or "clearly impending" test for standing in footnote 5 of *Clapper* to find standing injury where it might be more difficult to find harm pursuant to the "certainly impending" standing test. As is discussed below in Parts

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292. Solimine, *supra* note 21, at 1049 (arguing that Justice Scalia and Chief Justice Roberts believe that "Congress cannot tinker with the core constitutional standing requirements, though it might relax the prudential ones").

293. *See id.* at 1050.

294. *See id.* at 1055.

295. *Id.*

296. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1154–55 (2013).

297. *Id.*

298. Jacobs, *supra* note 19.

299. *Id.*

VI.B and VI.C, the Federal and Second Circuits have already discussed the "substantial risk" test for standing in footnote 5 of *Clapper*.[300]

Professor Leiter has speculated that footnote 5 was added by the *Clapper* majority to secure Justice Kennedy's vote.[301] While there is no direct proof for this theory, the fact that Justice Kennedy is generally a swing vote on the current Court, especially in standing cases, lends credence to her speculation.[302] As a *Greenwire* story reporting Professor Leiter's speculation observed, "Kennedy is the only member of the majority in *Clapper* who was also a member of the majority in *Laidlaw*, so he may have been particularly concerned about stepping on precedent."[303] The fact that Justice Kennedy was in the majority in *Laidlaw* also likely influenced Justice Alito to carefully distinguish its facts from the facts in *Clapper* by observing that it was undisputed in *Laidlaw* that the defendant was discharging illegal pollutants into a river.[304] By contrast, in *Clapper*, the Government never conceded that it was attempting to conduct unlawful surveillance of the plaintiffs.[305]

The opinion that Justice Kennedy was the anonymous source for footnote 5 is possibly reinforced by his expansive views on standing in the two same-sex marriage cases decided in June 2013—three months after *Clapper*. In *United States v. Windsor*, a challenge to the Defense of Marriage Act's (DOMA)[306] exclusion of same-sex marriage partners from numerous federal laws, Justice Kennedy's majority opinion drew sharp distinctions between prudential standing and Article III standing in stating that prudential standing rules are "more flexible" than the jurisdictional requirements of Article III standing.[307] The Court held that certain leaders of the House of Representatives—the Bipartisan Legal Advisory Group

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300. *See infra* Parts VI.B–C.

301. Jacobs, *supra* note 19.

302. *See supra* note 20; *supra* Part V (discussing Justice Kennedy's swing vote in standing cases, and especially his concurrences in *Lujan* and *Summers*).

303. Jacobs, *supra* note 19. It is not absolutely clear whether the discussion of *Laidlaw* in the story reflects Professor Leiter's views or those of the reporter, but in context it appears more likely to reflect the views of Professor Leiter. *See id.*

304. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183–84 (2000).

305. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1153 (2013).

306. 1 U.S.C. § 7 (2006). Windsor challenged Section 3 of DOMA, which amended the federal definition of "marriage" and "spouse" in Title 1, Section 7 of the United States Code so that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." *Id.*

307. United States v. Windsor, 133 S. Ct. 2675, 2685–86 (2013).

(BLAG)—could defend the statute when the executive branch declined to defend the law's constitutionality.[308] The decision also appeared to distinguish between prudential standing and Article III standing in reasoning that the general principle that prevailing parties cannot appeal a decision, which would normally prevent the Supreme Court from hearing the case because the executive branch agreed with lower court decisions in favor of Ms. Windsor that had struck down DOMA, was a mere prudential rule that the Court could waive because the principle "does not have its source in the jurisdictional limitations of Art[icle] III."[309] In his dissenting opinion, joined by Chief Justice Roberts and Justice Thomas, Justice Scalia justifiably complained that:

> [T]he majority seeks to dismiss the requirement of party-adverseness as nothing more than a "prudential" aspect of the sole Article III requirement of standing. (Relegating a jurisdictional requirement to "prudential" status is a wondrous device, enabling courts to ignore the requirement whenever they believe it "prudent"—which is to say, a good idea.)[310]

Justice Alito's dissenting opinion concluded that the congressional leaders had standing; but, his approach to standing was far more narrow than the majority opinion's approach because he limited standing to rare situations in which a President refuses to defend a statute whose constitutionality is struck down by a court and where the leaders of at least one house of Congress are willing to defend that statute.[311]

In *Hollingsworth v. Perry*, which addressed whether a ballot initiative known as Proposition 8 could amend California's state constitution to prohibit same-sex marriage after the California Supreme Court had authorized such marriages, Chief Justice Roberts' majority opinion, joined by Justices Scalia, Ginsburg, Breyer, and Kagan, held that the petitioners did not have Article III standing to defend on appeal the ballot initiative they had initiated after California officials refused to defend the initiative on appeal after a federal district court declared it unconstitutional.[312] The majority concluded that initiative proponents do not have Article III standing to defend the initiative because they only have the same

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308. *Id.* at 2689.
309. *Id.* at 2686–87.
310. *Id.* at 2701 (Scalia, J., dissenting).
311. *Id.* at 2711–14 (Alito, J., dissenting).
312. Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013).

generalized grievance as any other citizen in seeing it enforced, and state law does not appoint them as agents or representatives of the State of California in defending it.[313] In his dissenting opinion, Justice Kennedy, joined by Justices Thomas, Alito, and Sotomayor, argued that the proponents had Article III standing to defend the initiative because California law treats them as agents of the people in defending a successful initiative that is not supported by elected officials, even if the proponents are not formally agents of the state.[314] While its facts were unusual and difficult to precisely analogize to other cases, *Hollingsworth* is another example of Justice Kennedy taking a liberal approach to Article III standing, although it was unusual that he was joined in the case by two conservative justices—Justices Thomas and Alito—who usually take a narrow view of Article III standing.[315] The unusual alignment of justices in *Hollingsworth* on standing issues may have been influenced by the outcome on the merits of same-sex marriage. For example, while they usually take a liberal view of standing, Justices Ginsburg, Breyer, and Kagan might have been happy to deny standing in *Hollingsworth* because that denial preserved the district court's decision to strike down the statute as unconstitutional; the same three justices supported same-sex marriage rights in *Windsor*.[316] Similarly, it is possible that Justices Thomas and Alito favored liberal standing in *Hollingsworth* because they did not agree with the district court decision below, which struck down Proposition 8; they supported DOMA's restrictions on federal benefits in *Windsor*.[317] By contrast, Justices Kennedy and Sotomayor supported recognizing Article III standing in both *Hollingsworth* and *Windsor* despite the different issues on the merits in each case.[318]

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313. *Id.* at 2666–68.

314. *Id.* at 2668 (Kennedy, J., dissenting).

315. *Id.* at 2658 (listing majority and dissenting justices).

316. *Compare Windsor*, 133 S. Ct. at 2689–96 (striking down DOMA's refusal to provide federal benefits to legally married same-sex couples), *with Hollingsworth*, 133 S. Ct. at 2659–68 (denying Article III standing to state ballot proponents of ban on same-sex marriage to appeal district court decision striking down ballot initiative as unconstitutional).

317. *Compare Windsor*, 133 S. Ct. at 2714–20 (Alito, J., dissenting and joined by Justice Thomas on the merits of DOMA's constitutionality) (arguing DOMA's refusal to provide federal benefits to legally married same-sex couples complies with Fifth Amendment's Equal Protection Requirements), *with Hollingsworth*, 133 S. Ct. at 2668–75 (Kennedy, J., dissenting joined by Justices Thomas and Alito) (arguing Article III standing should be granted to state ballot proponents of ban on same-sex marriage to appeal district court decision striking down ballot initiative as unconstitutional).

318. *Compare Windsor*, 133 S. Ct. at 2685–89 (holding prudential standing

Justice Kennedy's liberal views on Article III standing requirements in *Hollingsworth* at least suggest that he could have supported the more liberal views on "substantial risk" standing in footnote 5, although the cases are so different that his vote in *Hollingsworth* can provide only modest insight into his vote in *Clapper*.[319] Likewise, Justice Kennedy's liberal views on prudential standing requirements in *Windsor* do not directly address his approach to Article III standing, though his views certainly make it more likely that he was the source of footnote 5 instead of another member of the *Clapper* majority.[320] Justice Alito wrote the majority opinion in *Clapper*, so it is likely that he supports the "certainly impending" standard repeatedly highlighted in the opinion.[321] Justices Scalia, Thomas, and Chief Justice Roberts were so consistently restrictive in their Article III standing views in *Massachusetts v. EPA* and *Summers* that it seems unlikely that they would raise an alternative substantial risk standard in footnote 5. Therefore, Professor Leiter has good reasons to suppose that Justice Kennedy is the source of footnote 5.[322]

Unfortunately, one must wait to see how future standing cases are decided by the Court and the lower courts to discover the impact of footnote 5's alternative substantial risk test. As is discussed in Parts VI.B and VI.C, the Federal and Second Circuits have already discussed footnote 5's substantial risk standard.[323] It also will be interesting to see if Justice Kennedy, in a future standing case, departs from the four other justices in the *Clapper* majority—Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Would Justice Kennedy be willing to join Justice Breyer's proposed "high probability" standing test in another set of factual circumstances?[324]

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principles allowed congressional leaders standing to defend DOMA because of statute's financial importance to government interests), *with Hollingsworth*, 133 S. Ct. at 2668–75 (Kennedy, J., dissenting) (arguing Article III standing should be granted to state ballot proponents of ban on same-sex marriage to appeal district court decision striking down ballot initiative as unconstitutional).

319. *See Hollingsworth*, 133 S. Ct. at 2668–75 (Kennedy, J., dissenting).

320. *See Windsor*, 133 S. Ct. at 2685–89.

321. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1143, 1146–48, 1150–52, 1156 (2013).

322. *See* Jacobs, *supra* note 19.

323. *See infra* Part VI.B.

324. *See Clapper*, 133 S. Ct. at 1165 (Breyer, J., dissenting); *supra* Part IV.B.

VI. HOW *CLAPPER* MIGHT INFLUENCE FUTURE STANDING CASES

The *Clapper* opinion did not satisfactorily explain whether its narrow interpretations of both the "certainly impending" injury requirement and the fairly traceable causation requirement are only applicable to intelligence and foreign affairs cases or more broadly applicable to standing questions in a wide variety of contexts.[325] The text of the *Clapper* majority opinion suggested that the "certainly impending" injury requirement is generally applicable to all standing cases, but footnote 5 raised the possibility that the Court had in the past—and might again in the future—use a "substantial risk" injury test that is arguably different.[326] Lower court decisions are divided in their interpretations of *Clapper*, but the Second and Federal Circuits have suggested that the substantial risk standard is applicable in some cases.[327]

A. NRDC v. FDA *("Triclosan") Distinguishes* Clapper

The Second Circuit recently distinguished *Clapper* in *Natural Resources Defense Council v. FDA*, holding that the NRDC had Article III standing to sue the FDA to regulate triclosan (a chemical used in antimicrobial soap), despite the FDA's argument that any potential harm was too uncertain to constitute a valid Article III injury.[328] The panel held "that NRDC's evidence [was] sufficient to satisfy the injury-in-fact requirement notwithstanding the scientific uncertainty as to triclosan's harmfulness to humans."[329] The panel relied on the Second Circuit's 2003 decision in *Baur v. Veneman*.[330] The Second Circuit summarized *Baur* as follows:

> In *Baur*, this court held that "exposure to potentially harmful products" may satisfy the injury-in-fact requirement of Article III standing in "the specific context of food and drug safety suits." This court explained that, in such cases, "the relevant 'injury' for standing purposes may be exposure to a

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325. *See Clapper*, 133 S. Ct. at 1143, 1146–55 (majority opinion).

326. *See* Jacobs, *supra* note 19 ("In footnote 5, Alito sets out how the standing precedent in *Clapper* differs from those in previous rulings, seemingly in an attempt to make sure the ruling is viewed narrowly."). *Compare Clapper*, 133 S. Ct. at 1150 n.5 (discussing "substantial risk" standing test as potentially different from "clearly impending" standard), *with Clapper*, 133 S. Ct. at 1143, 1147–55 (applying "certainly impending" test for standing injury). *See generally supra* Part II.

327. *See infra* Part VI.

328. Natural Res. Def. Council v. FDA, 710 F.3d 71, 79–84 (2nd Cir. 2013).

329. *Id.* at 79–80.

330. *Id.* at 80–86 (discussing Baur v. Veneman, 352 F.3d 625 (2d Cir. 2003)).

> sufficiently serious risk of medical harm—not the anticipated medical harm itself." That is, the injury contemplated by exposure to a potentially harmful product is not the future harm that the exposure risks causing, but the present exposure to risk.[331]

In his dissenting opinion in *Clapper*, Justice Breyer cited several court of appeals decisions, though not *Baur*, that had found standing because the defendants' actions had caused an increased risk of harm to at least some plaintiffs.[332] The Second Circuit's approach to standing is similar in focusing on "the present exposure to risk."[333] An important question is whether the *Baur* decision or the lower court cases cited by Justice Breyer survive the Court's decisions in *Summers* or *Clapper*, which both reject probabilistic standing injuries.[334]

The Second Circuit attempted to differentiate the facts in *Triclosan* from those in *Clapper* as follows:

> Unlike the claimed injury in *Clapper*, here, the injury alleged by NRDC is not highly speculative. Rather, NRDC has made a particularized showing that FDA's failure to regulate triclosan led to increased health-related uncertainty arising from exposure to triclosan, a form of injury that this Court has recognized as sufficient to constitute an injury in fact. The injury at issue in this case is not one of speculative future injury, as in *Clapper*, but is based on the actual,

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331. *Natural Res. Def. Council*, 710 F.3d at 80–81 (citations omitted) (quoting *Baur*, 352 F.3d at 634, 641).

332. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1162 (Breyer, J., dissenting) (citing Constellation Energy Commodities Grp., Inc. v. FERC, 457 F.3d 14, 20 (D.C. Cir. 2006); Natural Res. Def. Council v. EPA, 464 F.3d 1, 7 (D.C. Cir. 2006); Sutton v. St. Jude Med. S.C., Inc., 419 F.3d 568, 570–75 (6th Cir. 2005); Johnson v. Allsteel, Inc., 259 F.3d 885, 888–91 (7th Cir. 2001); Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1234–35 (D.C. Cir. 1996)).

333. *Natural Res. Def. Council*, 710 F.3d at 80–81.

334. *See Clapper*, 133 S. Ct. at 1165 (Breyer, J., dissenting) (proposing reasonable or high probability standing test); Summers v. Earth Island Inst., 555 U.S. 488, 498–500 (2009) (rejecting Sierra Club and Justice Breyer's proposed probabilistic standing theories); *id.* at 506–08 (Breyer, J., dissenting) (arguing that Supreme Court precedent supports a realistic threat or probabilistic standing test); *supra* Parts II.G, III.C and IV.B (discussing Justice Breyer's proposed probabilistic standing test and its rejection in *Summers* and *Clapper*). *See generally* Mank, Summers v. Earth Island Institute *Rejects Probabilistic Standing*, *supra* note 1 (discussing whether *Summers* implicitly rejected all standing decisions based on probabilistic risk or increased risk of harm).

> present health risk arising out of actual, present exposure to triclosan.[335]

The Second Circuit's *Triclosan* decision demonstrates how lower courts might attempt to distinguish *Clapper* in environmental health and safety cases by emphasizing the actual harms posed by chemicals or actions that the government has failed to regulate.

Of the five lower court decisions discussed in Part VI, the *Triclosan* decision might be the most vulnerable to reversal if the Supreme Court granted certiorari. It is worth noting that Judge Lynch—who wrote the Second Circuit's panel decision in *Clapper* that was later reversed by the Court—was one of the three panel members in the *Triclosan* decision.[336] Judge Pooler, who wrote the *Triclosan* decision, did not join the six dissenting Second Circuit judges who voted to rehear the panel decision in *Clapper*, and therefore, at a minimum, probably did not strongly disagree with that panel decision.[337] The third judge in the *Triclosan* case was a district court judge sitting by designation, Brian M. Cogan, who was not involved in *Clapper*.[338]

The same majority justices in *Clapper* who disagreed with the Second Circuit panel below might also disagree with the Second Circuit's *Triclosan* decision that "increased health-related uncertainty arising from exposure to triclosan" is sufficient harm to constitute an Article III standing risk in the absence of scientific studies proving that triclosan is actually harmful. Nevertheless, the facts in the two cases are sufficiently different that a reasonable judge might agree with the Court's *Clapper* decision in the national security context yet also agree with the Second Circuit's liberal approach to standing for potential health or environmental injuries.[339] Justice Kennedy's views on standing might depend on how Congress has defined health injuries in the statute[340] and also whether he believes that triclosan poses a "substantial risk," as

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335. *Natural Res. Def. Council*, 710 F.3d at 82–83 (citations omitted) (internal quotation marks omitted).

336. *Compare id.* at 74, *with* Amnesty Int'l USA v. Clapper, 638 F.3d 118, 121 (2nd Cir. 2011) (Lynch, J., majority opinion).

337. *Compare Natural Res. Def. Council*, 710 F.3d at 74 (Pooler, J., majority opinion), *with* Amnesty Int'l USA v. Clapper, 667 F.3d at 163–64 (listing six dissenting judges).

338. *Natural Res. Def. Council*, 710 F.3d at 74 (listing District Judge Cogan as sitting by designation).

339. *Id.* at 83 (internal quotation marks omitted).

340. *See supra* Part V.A.

defined in *Clapper's* footnote 5.[341] The Second Circuit's *Baur* and *Triclosan* decisions likely stand a better chance of surviving the substantial risk test in footnote 5 of *Clapper* because they are based on an increased risk of harm rather than the "certainly impending" standing test in the text of *Clapper*; but, the scientific issues regarding whether triclosan poses health risks to humans are sufficiently complex that reasonable judges might disagree whether the plaintiffs' scientific evidence could pass a substantial risk test.[342]

B. Organic Seed Growers & Trade Ass'n v. Monsanto Co. *Invokes Footnote 5's Substantial Risk Test*

In *Organic Seed Growers & Trade Ass'n v. Monsanto Co.*, the Federal Circuit applied the "substantial risk" standing test from footnote 5 of *Clapper*.[343] The Federal Circuit's use of the substantial risk test in this case is not surprising because the facts were close to those in the court's prior *Monsanto* decision, which had used the same test.[344] The plaintiffs sought a declaratory judgment to prevent the Monsanto Company from filing patent infringement suits against them if their organic crops were contaminated by trace amounts of Monsanto-patented seed blown from nearby farms using that seed.[345] The Federal Circuit suggested that there was initially a "substantial risk" that Monsanto might sue the farmers, but that risk, and any basis for standing, was eliminated when Monsanto clearly guaranteed that it would not sue any farmers with a trace amount of less than 1% of its seed.[346] Citing *Clapper*, the Federal Circuit concluded that the possibility that the plaintiffs might someday have more than a trace amount of Monsanto seed on their property, and thus be at risk of suit by Monsanto, was too

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341. *See supra* Part V.B.

342. *Natural Res. Def. Council*, 710 F.3d at 77–79 (reviewing scientific evidence presented by plaintiff that triclosan poses health risks). Some consumer product companies are phasing out use of triclosan, despite continuing to maintain that it is safe because of continuing controversy about its safety. Pat Rizzuto, *Procter & Gamble Declares 2014 Deadline To Stop Use of Phthalates, Triclosan*, Daily Env't Rep. (BNA) A-4 (Sept. 9, 2013) (reporting that Proctor & Gamble will discontinue using triclosan by the end of 2014).

343. Organic Seed Growers & Trade Ass'n v. Monsanto Co., 718 F.3d 1350, 1360 (Fed. Cir. 2013), *cert. denied*, 134 S.Ct. 901 (2014).

344. *Organic Seed Growers*, 718 F.3d at 1360 (discussing Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2752–55 (2010)).

345. *Organic Seed Growers*, 718 F.3d at 1352–61.

346. *Id.* at 1355–61 (citing Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1150 n.5 (2013)).

speculative to justify standing in a suit seeking an immediate declaratory judgment.[347] While denying standing, the Federal Circuit's use of the "substantial risk" standing test in footnote 5 of the *Clapper* decision could lead other lower courts to rely on that test.

C. Hedges v. Obama *Discusses a Possibly Less Stringent Standing Test in Footnote 5 in* Clapper

In *Hedges v. Obama*, the Second Circuit discussed the possibly less stringent standing test in footnote 5 of the *Clapper* decision.[348] After the horrendous terror attacks on September 11, 2001 by al-Qaeda terrorists who used hijacked commercial airplanes to kill 3,000 people, Congress enacted the Authorization for Use of Military Force (AUMF),[349] "which empowered President Bush to use all necessary and appropriate force against those nations, organizations, and persons responsible for the attacks and those who harbored such organizations or persons."[350] In the National Defense Authorization Act for Fiscal Year 2012, Section 1021 of that statute clarified continuing questions about the President's authority under the AUMF to place certain individuals in military detention without trial by appearing "to permit the President to detain anyone who was part of, or has substantially supported, al-Qaeda, the Taliban, or associated forces."[351] The plaintiffs filed suit seeking an injunction "barring enforcement of Section 1021 and a declaration that it violates, among other things, their rights under the First and Fifth Amendments to the United States Constitution. The district court agreed and entered a permanent injunction restraining detention pursuant to Section 1021(b)(2)."[352]

The Second Circuit, however, held that the plaintiffs lacked Article III standing to seek pre-enforcement review of Section 1021 and therefore vacated the permanent injunction.[353] The court concluded that "[t]he American citizen plaintiffs lack[ed] standing because Section 1021 says nothing at all about the President's authority to detain American citizens."[354] Additionally, the court determined that the non-citizen plaintiffs also failed to establish

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347. *Id.* at 1360 (citing *Clapper*, 133 S. Ct. at 1151).
348. Hedges v. Obama, 724 F.3d 170, 189, 196 (2nd Cir. 2013).
349. P.L. 107–40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541).
350. *Hedges*, 724 F.3d at 173.
351. *Id.* at 173 (discussing Section 1021 of P.L. 112-81, 125 Stat. 1298 (2011)).
352. *Id.* at 173.
353. *Id.*
354. *Id.* at 173–74.

standing because they did not demonstrate an imminent threat that the government would detain them under Section 1021 sufficient to meet *Clapper's* "certainly impending" standing test.[355]

The Second Circuit in *Hedges* noted that the "substantial risk" test discussed in footnote 5 of *Clapper* may be less strict than *Clapper's* "certainly impending" test, but reasoned that *Clapper* "did not explain when such a standard might apply, noting only that the plaintiffs in *Clapper* failed that test as well to whatever extent it might have been relevant and distinct."[356] The *Hedges* decision then discussed the *Babbitt* decision—which is cited by *Clapper* in footnote 5 as an example of a possibly less demanding standing test—and interpreted *Babbitt* to hold "that a plaintiff has standing to make a preenforcement challenge 'when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative.'"[357] The Second Circuit reasoned that it was not clear that the *Babbitt* approach was applicable to either the American citizen or non-citizen plaintiffs because the Government had stated that it interpreted the statute to exclude American citizens and there was no evidence that the Government had plans to seize the non-citizen plaintiffs, even if in theory the statute could apply to them.[358] The Second Circuit suggested that plaintiffs who are potentially subject to criminal prosecution might have standing in some circumstances under *Babbitt* to seek preenforcement review, but that the threat of prosecution for any of the plaintiffs in *Hedges* was too remote to require the court to deny standing.[359]

D. Cherri v. Mueller *Distinguishes* Clapper

In *Cherri v. Mueller*, the District Court for the Eastern District of Michigan distinguished *Clapper* by holding that several Muslim-American plaintiffs had standing to challenge and alleged religious profiling, invasive body searches, and prolonged detentions at border inspections conducted by Government employees.[360] The Government defendants argued that the plaintiffs did not have standing to seek prospective relief because they acknowledged that they no longer crossed the border between the United States and

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355. *Id.* at 174.

356. *Id.* (discussing Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1150 n.5 (2013)).

357. *Id.* at 196–97 (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 302 (1979)).

358. *Id.* at 200–03.

359. *Id.* at 197–99.

360. No. 12-11656, 2013 WL 2558207, at *7–10 (E.D. Mich. June 11, 2013).

Canada, but the district court concluded that the plaintiffs still had standing if they avoided using their lawful right to cross the border only because of alleged Government harassment based on religious profiling.[361] The district court distinguished *Clapper* and found that the plaintiffs' allegations constituted a clearly impending injury if their assertions were true. The court stated:

> *Clapper* is inapposite. Unlike *Clapper*, plaintiffs have alleged a certainly impending injury that is fairly traceable to Defendants' purported conduct at the border. Plaintiffs' decision to stop traveling across the border is based on a reasonable fear that they would be questioned about their religious practices and beliefs. Indeed, Plaintiffs allege that they were stopped and questioned about their religious practices and beliefs each time that they crossed the border on numerous occasions. In *Clapper*, the plaintiffs did not claim that their communications were ever monitored or that the Government had applied to monitor their communications. However, in this case, taking the allegations of the first amended complaint as true, the only reason Plaintiffs do not cross the border is to avoid harm that is real and immediate and that has occurred on numerous past occasions. Plaintiffs' fear, again taking the allegations in the first amended complaint as true, is well-founded and the claimed injury is certainly impending.[362]

The District Court analogized the alleged facts in its case to *Laidlaw*, where the Supreme Court held that a group of plaintiffs had standing to sue the defendants for polluting a river, even though the plaintiffs stopped swimming or fishing in that river because of their reasonable subjective health concerns about the potential impacts of that discharged pollution.[363]

E. Madstad Engineering, Inc. v. the U.S. Patent & Trademark Office *Follows* Clapper

In *Madstad Engineering, Inc. v. the U.S. Patent & Trademark Office*, the United States District Court for the Middle District of Florida followed *Clapper* and held that the plaintiffs' expenditures to avoid alleged potential future injuries from possible third-party intellectual property thieves were too speculative to satisfy Article

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361. *Id.* at *6–10.
362. *Id.* at *8.
363. *Id.* at *9–10.

III's injury requirement.[364] However, the court also noted that these injuries might have satisfied the requirement had the Second Circuit's objectively reasonable test not been overturned by *Clapper*.[365] The plaintiffs challenged as unconstitutional the America Invents Act (AIA),[366] and their complaint sought injunctive and declaratory relief against the AIA's enforcement.[367] The plaintiffs argued that the United States patent law system had traditionally "awarded patents to the first person to invent a new discovery," but that the AIA effectively changed this system so that "the patent will be awarded to the person who is first to file a patent application, regardless of whether the applicant was the actual first inventor of the technology in question."[368] In regard to the AIA's new "First-to-File" system, the plaintiffs contended that the system "violate[d] the Intellectual Property Clause, Article I, Section 8, Clause 8 of the Constitution, which provides Congress with the power '[T]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.'"[369]

The plaintiffs argued that the AIA's "First-to-File" system increased their costs in two different ways. First, they contended that it "creates the need to file a provisional patent application [PPA] and full patent application for an invention as soon as possible."[370] They alleged that their need to file a PPA and then a full patent application on an expedited basis increased their expenses by requiring them to hire outside companies to build prototypes and perform testing that resulted in additional expenses compared to pre-AIA requirements.[371] Second, the plaintiffs alleged that the system increased the risk that hackers or thieves would steal their intellectual property, thereby causing them to incur additional expenses to deter such thefts.[372]

The district court concluded that the plaintiffs' allegations were too speculative to meet the standing test in *Clapper*.[373] The defendants, including the U.S. Government, the U.S. Patent and

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364. No. 8:12-CV-1589-T-23MAP, 2013 WL 3155280, at *4–7 (M.D. Fla. May 8, 2013).

365. *Id.* at *7.

366. Pub. L. No. 112–29, 125 Stat. 284 (2011).

367. *Madstad Eng'g, Inc.*, 2013 WL 3155280, at *1.

368. *Id.*

369. *Id.*

370. *Id.* at *2 (internal quotation marks omitted).

371. *Id.*

372. *Id.* at *1–2.

373. *Id.* at *4–6.

Trademark Office (PTO), and the Director of the PTO, acknowledged that although the money spent by the plaintiffs on security measures might be a concrete injury, such expenditures were not fairly traceable to its actions or the AIA, but instead depended on the actions of third-party hackers and thieves outside the control of the defendants.[374] Additionally, the PTO argued that the plaintiffs' allegations that they might lose business or avoid lucrative business deals because the structure of the AIA system made them fearful that potential investors or business partners might steal their intellectual property was too speculative and hypothetical to constitute a valid standing injury.[375]

In light of *Clapper*, the district court agreed with the defendants' arguments that the plaintiffs' allegations were either too speculative or not traceable to the defendants' actions because they depended on third-party actions.[376] While the national security context of *Clapper* and the patent issues in *Madstad Engineering* might initially appear to be very different from one another, the district court concluded that the two cases were really quite similar in terms of standing doctrine. The court stated:

> But, despite differences in the particulars of the respective actions, a manifest and compelling congruence emerges between the facts and law of *Clapper* and the facts and the law of the present action. In each case, the plaintiffs test the constitutionality of a statute—in *Clapper*, the plaintiffs sued on the effective date of the statute; in the present action the plaintiffs sued in anticipation of the effective date—and in each case the plaintiffs trigger an especially rigorous inquiry into the plaintiffs' standing. In each case, the plaintiffs responded to a felt need to expend money to avoid entirely hypothetical consequences of legislation, that is, in each case the plaintiffs expended funds in response to an entirely subjective and self-actuated trepidation about conjectural events. In each case, actualization of the conjectural events depends upon the contingent action of a third party (an "independent actor[ ] not before the court"). In each case, the expenditures in anticipation of these conjectural events are controlled entirely by the judgment and discretion of the plaintiffs ("manufactured" and "self-inflicted wounds").[377]

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374. *Id.* at *3.

375. *Id.*

376. *Id.* at *4–6.

377. *Id.* at *6 (citations omitted) (alterations in original) (quoting Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1150 n.5, 1151–52 (2013)).

The district court then suggested other similarities between *Clapper* and the facts in its case:

> Additionally, in each case, the events about which the plaintiffs directly complain—the events in anticipation of which the plaintiffs expend the money and other resources on which the plaintiffs rely to evidence a tangible and present injury-in-fact—depend contingently upon an acutely attenuated concatenation of events that are insufficient to qualify as "certainly impending" for the transparent and compelling reason that the events are neither certain nor impending.[378]

The district court explained that whether third-party hackers or thieves would attempt to steal or actually steal the plaintiffs' intellectual property was too speculative to constitute a certainly impending injury, and therefore the fact that the plaintiffs spent money to avoid hypothetical future injuries was insufficient for standing in light of *Clapper*'s similar conclusion that spending money to avoid speculative future injuries is not enough for Article III standing.[379] Furthermore, the district court observed that the plaintiffs might have made at least some of these security expenditures even in the absence of the enactment of the AIA. Accordingly, it is uncertain how much of these expenditures are due solely to the AIA.[380]

Because the Supreme Court's decision in *Clapper* occurred after the parties in *Madstad Engineering* had filed their initial briefs and the plaintiffs had relied on the Second Circuit's panel decision in *Clapper*, the district court addressed how the case might have been decided before the Court's *Clapper* decision and conceded that "[w]ere the Second Circuit's (former) 'novel' standard—'objectively reasonable likelihood,' 'chilling effect,' and the rest—the governing standard of the Supreme Court, the plaintiffs' complaint and the accompanying papers, viewed in the context of the AIA, would present a more persuasive claim for standing."[381] The Florida district court in *Madstad Engineering* argued that the standing analysis in the *Clapper* panel decision was erroneous even before the Court's reversal as the district court in *Clapper* had denied standing and several members of the Second Circuit dissented from that Circuit's denial of en banc review on the grounds that the panel decision was

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378. *Madstad Eng'g, Inc.*, 2013 WL 3155280, at *6.
379. *Id.* at *4–6.
380. *Id.* at *6.
381. *Id.* at *7.

inconsistent with the Court's standing doctrine.[382] Moreover, neither the *Madstad Engineering* district court nor the Eleventh Circuit in which the district court sat was bound by the standing approach of the Second Circuit panel in *Clapper*, even if the Supreme Court had not overruled the panel decision.[383] Accordingly, the *Madstad Engineering* district court granted the defendants' motion to dismiss the case for lack of standing.[384] A district court judge more sympathetic to the plaintiffs' arguments could have possibly found standing by emphasizing their claim that AIA makes it easier than the previous law for hackers and thieves to gain an unjustified patent, but even that argument is vulnerable in light of *Clapper* because they could not quantify to what extent the AIA increases fraudulent patent claims.[385]

CONCLUSION

In future cases, the Supreme Court will have to address whether the *Clapper* decision's strict interpretation of the "certainly impending" standing injury test will have a broad impact on future standing cases or if it will only impact the narrower area of foreign intelligence litigation. The impact of *Clapper* will depend, in part, upon whether the Court applies the "certainly impending" standing injury test in all cases, or whether it also utilizes the "substantial risk" standard discussed in footnote 5 in at least some cases.[386] Based on the Court's present membership, Justice Kennedy is the key swing vote in standing cases and is the most likely member of the *Clapper* majority to support the "substantial risk" standard in footnote 5.[387] Justice Kennedy likely rejected standing in *Clapper* because Congress did not establish specific statutory rights for Americans who communicate with foreigners who are being targeted by the NSA to sue to challenge such interceptions, but he may favor standing in other circumstances where a statute authorizes suits against the government.

Some lower court cases, including the *Triclosan* and *Cherri* decisions, have distinguished *Clapper* by arguing that the allegations in their cases were more certain than the speculative

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382. *Id.*

383. *Id.*

384. *Id.*

385. *See id.* at *1 (summarizing plaintiffs' argument that AIA increases the risk of fraudulent patent claims).

386. *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1150 n.5 (2013).

387. *See supra* note 20 and Part V.

assertions in *Clapper*.[388] If many lower courts distinguish its facts, *Clapper* will have less influence until future Court decisions clarify its significance. By contrast, the district court in *Madstad Engineering* relied on *Clapper* and helpfully explained how the Court's "certainly impending" standard made a difference in the case compared to the "objectively reasonable" standard applied by the Second Circuit panel in *Clapper*.[389] If many lower court decisions follow the interpretation of standing in *Madstad Engineering*, the *Clapper* decision could have a broad impact.

The Federal Circuit's invocation of footnote 5's "substantial risk" raises the possibility that lower courts could use that standard in lieu of the "certainly impending" test, but it is not clear whether that case will have broad applicability or only limited impact because it is closely related to the Court's *Monsanto* decision, which had used the substantial risk test.[390] Suggesting a possible exception to *Clapper's* narrow "certainly impending" test, the Second Circuit in *Hedges* observed that plaintiffs potentially subject to criminal prosecution might have standing in some circumstances under the Court's *Babbitt* decision, a case cited in footnote 5 of *Clapper* as an example of potentially more lenient standing, to seek preenforcement review of an allegedly unconstitutional statute before the Government files charges; however, *Hedges* denied standing in a national security case with some factual similarities to *Clapper*.[391] There is likely to be disagreement among lower court judges about the interpretation of *Clapper* and especially the importance of the "significant risk" test in footnote 5 until the Supreme Court provides further guidance.

388. *See supra* Parts VI.A and VI.D.
389. *See supra* Part VI.E.
390. *See supra* Part VI.B.
391. *See supra* Part VI.C.