Essay

Standing Underwater

*Daniel A. Fiedler**

Abstract

The basic requirements of Article III standing are well known: injury in fact, causal connection between that injury and conduct being complained of, and likelihood that the injury would be redressed by a favorable decision. For cases where an injury has not yet occurred, however, the Supreme Court has failed to establish a clear standard for when the likelihood of an injury is sufficient to demonstrate an "injury in fact." Regarding future injury caused by climate change, plaintiffs have had a particularly difficult time convincing the Court that the future injury is definite enough to establish standing.

In 2013, the Court in Clapper v. Amnesty International, USA *established what seemed to be an insurmountable hurdle for plaintiffs complaining of future injury by declaring that "threatened injury must be certainly impending to constitute injury in fact." In the same opinion, however, it conceded that plaintiffs are not uniformly required to show literal certainty. One year later, in* Susan B. Anthony List v. Driehaus*, the Court applied the "certainly impending" standard as well as a "substantial risk" standard for future injury. Lower courts attempting to apply these standards have had, unsurprisingly, incongruous outcomes.*

This Essay argues that the seemingly conflicting standards are not only reconcilable, but were meant to be reconcilable, and that the Clapper *standard*

* J.D., 2017, The George Washington University Law School; B.A., International Studies, 2012, University of Washington. I would like to thank the editors of *The George Washington Law Review*, who I know work tirelessly and without sufficient recognition; my friend Daniel Brookins, who offered his support while we drafted our administrative law essays; Professor Robert Glicksman, my advisor and administrative law professor; and finally, my parents, Dr. and Mrs. Al and Carrie Fiedler, without whom my legal education would not have been possible.

does not mean absolute, literal certainty of future harm. Instead, as exemplified by the Sixth Circuit in Galaria v. Nationwide Mutual Insurance Co.*, plaintiffs should be permitted to recover costs reasonably incurred in response to the substantial risk of future injury. Accordingly, plaintiffs may satisfy the "injury in fact" requirement by reasonably incurring mitigation costs in response to a sufficiently substantial risk of harm. This result, consistent with a close reading of* Clapper*, would provide plaintiffs facing an imminent threat of harm caused by climate change with standing, and permit them to reasonably incur costs to avoid that harm.*

Table of Contents

Introduction

"Ma! . . . . My feet are wet!" Karen Speights cried one night at dinner as she felt saltwater swell around her feet at her home in Norfolk, Virginia.[1] Because the house had not flooded since the family moved there in 1964, the phenomenon seemed anomalous when it first happened.[2] However, it has now happened three times in eight

1 Justin Gillis, *Flooding of Coast, Caused by Global Warming, Has Already Begun*, N.Y. Times (Sept. 3, 2016), http://nyti.ms/2c9EXZQ (internal quotations omitted).

2 *Id.*

years.[3] The area in which Ms. Speights resides has undergone a significant increase in flooding in recent years due to sinking land and numerous tidal creeks and marshes that reveal the effects of global warming sooner than other parts of the East Coast.[4] In the same area, William A. Stiles, Jr. can point to the physical effects of frequent ocean flooding such as salt marks on the roads, grasses that thrive in salt water environments, and trees damaged by salt water.[5] The local government has installed roadside rulers to help local residents know where the flood levels have been highest, which is especially important at low-lying intersections at risk of washing out.[6]

Individuals in coastal communities like Norfolk are at a substantial risk of suffering similar injury. Southeast Florida, Southern Louisiana, and the entire Chesapeake Bay region, which also feature sinking land and ubiquitous tidal creeks and marshes, could face flooding like that experienced by Ms. Speights.[7] According to the National Climate Assessment, global sea levels are expected to rise between one and four feet by 2100.[8] For parts of the southeastern United States, this means "an imminent threat of increased inland flooding during heavy rain events in low-lying coastal areas," and that homes and infrastructure are subject to increased risk of flooding.[9]

Due to the harms associated with climate change and the research that points to human-created causes of climate change, the Supreme Court has held that a state would suffer sufficient injury to have standing to challenge the refusal of the Environmental Protection Agency ("EPA") to regulate greenhouse gas emissions.[10] However, more recent decisions from factual contexts outside that of climate change have sent mixed messages regarding the capacity for standing based on increased risk of future harm. In *Clapper v. Am-*

---

3 *Id.*

4 *See id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 John Walsh et al., *Chapter 2: Our Changing Climate*, *in* CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT 19, 21 (Jerry M. Melillo et al. eds., 2014), http://s3.amazonaws.com/nca2014/low/NCA3_Full_Report_02_Our_Changing_Climate_LowRes.pdf?download=1.

9 Lynne M. Carter et al., *Chapter 17: Southeast and the Caribbean*, *in* CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT 396, 401 (Jerry M. Melillo et al. eds., 2014), http://s3.amazonaws.com/nca2014/low/NCA3_Full_Report_17_Southeast_LowRes.pdf?download=1.

10 *See* Massachusetts v. EPA, 549 U.S. 497, 521, 526 (2007).

nesty International USA,[11] a five to four decision from 2013 dealing with foreign intelligence gathering, the Court declared that "threatened injury must be *certainly impending* to constitute injury in fact."[12] If read literally, this language creates a nearly insurmountable bar for plaintiffs to overcome before their case is heard, though they suffer a realistic danger and genuine threat of injury resulting from climate change. In *Massachusetts v. EPA*,[13] the Court relied on the injury in fact standard that *Clapper* reshaped, making the meaning of standing with regard to climate change more opaque.

Part I of this Essay provides a background of the debate within the Supreme Court about the injury in fact requirement for standing, specifically the use of the "certainly impending" standard for future injury, culminating in an obscure decision, *Clapper*, and its application in *Susan B. Anthony List v. Driehaus*.[14] Part II explains the different ways lower courts have addressed the varying standards and the resulting confusion. The resolution in Part III explains why *Clapper* should not be understood to completely close the door to plaintiffs at risk of future harm from climate change under a literal "certainly impending" standard. Due to the opinion's contemporaneous recognition that in certain cases, showing a "substantial risk" of future injury could be sufficient. Instead of rejecting outright future harm caused by climate change, courts should recognize that if plaintiffs are forced to incur costs to avoid future harm, this should satisfy the injury in fact requirement for standing.

I. Background

A. The Foundations of Standing

The question of standing for claimants has been thoroughly litigated in courts and analyzed by commentators across the United States.[15] The elements required to establish standing are regularly recited in decisions by district courts,[16] circuit courts,[17] and the Supreme

11 133 S. Ct. 1138 (2013).

12 *Id.* at 1147 (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

13 549 U.S. 497 (2007).

14 134 S. Ct. 2334 (2014).

15 *See, e.g.*, Heather Elliott, *The Functions of Standing*, 61 Stan. L. Rev. 459 (2008); Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009); Jan G. Laitos, *Standing and Environmental Harm: The Double Paradox*, 31 Va. Envtl. L.J. 55 (2013).

16 *See, e.g.*, Yershov v. Gannet Satellite Info. Network, Inc., 204 F. Supp. 3d 353, 358 (D. Mass. 2016); Coal. for a Sustainable Delta v. McCamman, 725 F. Supp. 2d 1162, 1184 (E.D. Cal. 2010); Young Am.'s Found. v. Gates, 560 F. Supp. 2d 39, 47 (D.D.C. 2008).

Court.[18] The case most often cited when laying out the requirements for standing, *Lujan v. Defenders of Wildlife*,[19] dealt with an interpretation of the Endangered Species Act of 1973 ("ESA").[20] In *Lujan*, the Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") had promulgated a joint regulation stating that section 7(a)(2) of the ESA[21] applied to actions taken in foreign nations.[22] After reexamining the position, this view was revised, and the statute was reinterpreted as applying only to actions taken in the United States or on the high seas.[23]

Soon after the reinterpretation, environmental organizations filed a claim against the Secretary of the Interior, which was dismissed at the district court level for lack of standing.[24] On remand from the Eighth Circuit, the case was decided in favor of the environmental organizations, and subsequently affirmed by the Eighth Circuit.[25] On appeal, the Supreme Court addressed whether the environmental organizations had standing.[26] The Court listed three required elements of standing derived from the language in Article III vesting the federal courts with subject matter jurisdiction over cases or controversies:

> (1) Injury in fact, comprised of a legally protected interest which is
> a. Concrete and particularized, and
> b. Actual or imminent, as opposed to conjectural or hypothetical;
> (2) A causal connection between the injury and the conduct being complained of; and

---

17 *See, e.g.*, NO Gas Pipeline v. FERC, 756 F.3d 764, 767 (D.C. Cir. 2014); Katz v. Pershing, LLC, 672 F.3d 64, 71–72 (1st Cir. 2012).

18 *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006); Utah v. Evans, 536 U.S. 452, 459 (2002).

19 504 U.S. 555 (1992).

20 *Id.* at 557–58.

21 Previously referred to as § 7(a)(2), the relevant provision currently reads:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . . .

16 U.S.C. § 1536(a)(2) (2012).

22 *Lujan*, 504 U.S. at 558.

23 *See id.* at 558–59.

24 Defenders of Wildlife v. Hodel, 658 F. Supp. 43, 44 (D. Minn. 1987).

25 *Lujan*, 504 U.S. at 559.

26 *Id.* at 558.

> (3) A likelihood, as opposed to mere speculation, that the injury will be redressed by a favorable decision.[27]

Ultimately, in an opinion by Justice Scalia determining that the plaintiffs had not shown sufficient injury in fact, the Court reversed the decision of the Eighth Circuit.[28] The plaintiffs had claimed that the interpretation "increas[ed] the rate of extinction of endangered and threatened species."[29] However, the fact that two affiants for the plaintiffs had traveled to Egypt and Sri Lanka to observe certain endangered species in their natural habitats, and intended to do so again, was not sufficient to establish the requisite injury for standing.[30] Despite expressly stating that a desire to observe animal species, even if only for an aesthetic purpose, was recognized as a "cognizable interest for purpose of standing,"[31] the Court determined that the indefinite intentions of the affiants to return to areas outside the United States to once again view the endangered species "without any description of concrete plans, or indeed even any specification of *when* the some day will be—[did] not support a finding of the 'actual or imminent' injury that our cases require."[32] The Court focused on the affiants' claims that, while they had visited the affected areas in the past, they were not sure of when they would return and presumably suffer the harm of being deprived of an opportunity to view the species in question.[33] Justice Blackmun recognized in his dissent that the affiants' past visits to the sites, intent to return, and professional backgrounds in wildlife preservation could have led a reasonable finder of fact to determine that they would "soon return to the project sites, thereby satisfying the 'actual or imminent' injury standard."[34] The majority understood this argument to suggest that "soon" could merely mean "in this lifetime," which it could not reconcile with its understanding of imminence.[35] Despite the majority's concession that imminence is an elastic concept, it understood an imminent injury to be one that was "*cer-*

---

27 *See id.* at 560–61 (citing numerous cases).

28 *See id.* at 578. The opinion was a majority for parts I, II, III.A, and IV, but only a plurality for the analysis of redressability in section III.B, which is not applicable to the current discussion.

29 *Id.* at 562.

30 *See id.* at 564.

31 *Id.* at 562–63.

32 *Id.* at 564.

33 *Id.*

34 *Id.* at 591–92. (Blackmun, J., dissenting).

35 *See id.* at 564 n.2 (majority opinion).

tainly impending."[36] Since this decision, and partly in response to it, widespread debate has ensued over what constitutes sufficient allegations of future injury for purposes of standing, particularly the meaning of "certainly impending."[37]

Less than a decade after *Lujan*, the Court revisited the question of sufficient injury for purposes of standing in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc*.[38] In *Laidlaw*, the Court found that claims made by members of petitioner organization Friends of the Earth ("FOE") sufficiently established injury in fact as an element of standing,[39] moving away from the stricter "certainly impending" standard from *Lujan*. Unlike *Lujan*, where the environmental groups' claims were based on the reduced likelihood of being able to enjoy observing certain endangered species,[40] affiants in *Laidlaw* made more specific claims to injury. The defendant in *Laidlaw* had constructed a hazardous waste incinerator facility near a South Carolina river and consistently failed to meet standards set in place by the South Carolina Department of Health and Environmental Control designed to limit the amount of pollutants it was permitted to discharge into the river.[41] One FOE member averred that he lived a half-mile from the facility and "occasionally drove over" the river affected by defendant's activities.[42] He went on to state that the affected river "looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river . . . as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by [defendant's] discharges."[43] At least four other members of petitioner environmental groups made claims of injury ranging from reduced capacity for recreation and aesthetic enjoyment to reduced home value resulting from concerns relating to the defendant's discharges.[44] The Court cited favorably to *Lujan* in holding that these sworn statements claiming various injuries were adequate docu-

---

36 *Id.* at 565 n.2 (citing Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

37 *See, e.g.*, Donald W. Hansford, Lujan v. Defenders of Wildlife*: The Court Maintains Its Proper Role in Environmental Issues*, 44 MERCER L. REV. 1443 (1993); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Christopher T. Burt, Comment, *Procedural Injury Standing After* Lujan v. Defenders of Wildlife, 62 U. CHI. L. REV. 275 (1995).

38 528 U.S. 167 (2000).

39 *Id.* at 185.

40 *Lujan*, 504 U.S. at 562–63.

41 *See Laidlaw*, 528 U.S. at 175–76.

42 *Id.* at 181.

43 *Id.* at 181–82.

44 *See id.* at 182–83.

mentation of injury in fact.[45] But while the opinion in *Lujan* focused on the required imminence of the plaintiffs' alleged injury,[46] the Court in *Laidlaw* took a different approach, recognizing that the testimony provided by members of petitioner organizations "assert[ed] that [defendant's] discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests."[47] Even though these "reasonable concerns" did not seem to show that the alleged injuries were "certainly impending," the Court still held that petitioners had sufficient standing to sue.[48]

Justice Scalia, the author of the majority opinion and its interpretation of standing requirements in *Lujan*, entered a dissenting opinion declaring that "plaintiffs in this case fell far short of carrying their burden of demonstrating injury in fact."[49] Instead of the "concrete and particularized" injury required by the decision in *Lujan*, he concluded that the "vague allegations of injury" made by the affiants in *Laidlaw* were "woefully short on 'specific facts.' "[50] In the eyes of Justice Scalia, as well as numerous other commentators, *Laidlaw* significantly lowered the bar to show injury in fact.[51]

The question of injury in fact was addressed again in *Massachusetts v. EPA*, where the party seeking review was a sovereign state,[52] as opposed to a private individual or organization like in *Lujan* and *Laidlaw*.[53] Again citing to *Lujan* for the requirement that a litigant "must demonstrate that it has suffered a concrete and particularized injury" as an element of standing,[54] the Court in *Massachusetts v. EPA* determined that the state of Massachusetts had done just that by describing the harm climate change would bring to its shores.[55] Citing Justice Holmes, the Court concluded that even though Massachusetts

45 *See id.* at 183 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing." (quoting *Lujan*, 504 U.S. at 562–63)).

46 *See Lujan*, 504 U.S. at 555–56, 560, 564.

47 *Laidlaw*, 528 U.S. at 183–84.

48 *See id.* at 183.

49 *Id.* at 198 (Scalia, J., dissenting).

50 *Id.* at 198–99.

51 *See id.* at 215; *see also* Peter Van Tuyn, *"Who Do You Think You Are?": Tales from the Trenches of the Environmental Standing Battle*, 30 ENVTL. L. 41, 48 n.** (2000); Courtney Chin, Note, *Standing Still: The Implications of* Clapper *for Environmental Plaintiffs' Constitutional Standing*, 40 COLUM. J. ENVTL. L. 323, 339 (2015).

52 Massachusetts v. EPA, 549 U.S. 497, 518 (2007).

53 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992); *Laidlaw*, 528 U.S. at 176.

54 Massachusetts v. EPA, 549 U.S. at 517 (citing *Lujan*, 504 U.S. at 560–61).

55 *See id.* at 521–23.

"own[ed] very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, [was] small," the state still had "an interest . . . in all the earth and air within its domain. It ha[d] the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."[56] Through certain unchallenged affidavits, petitioners asserted that rising sea levels due to global warming had "begun to swallow Massachusetts' coastal land," and that "[i]f sea levels continue[d] to rise as predicted . . . a significant fraction of coastal property [would] be 'either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events.'"[57] The majority never mentioned the need for a "certainly impending" injury, but merely stated that the future harm to Massachusetts caused by climate change was a sufficient "particularized injury."[58]

In another dissent objecting to the Court's finding of injury in fact, this time authored by the Chief Justice and joined by Justice Scalia, four justices agreed that petitioners had failed to satisfy the requirement of particularized and "certainly impending" injury provided in *Lujan*.[59] Beyond merely stating that Massachusetts did not suffer the requisite injury to show standing, the dissenters remarked that "[t]he very concept of global warming seems inconsistent with this particularization requirement."[60]

The holdings of *Laidlaw* and *Massachusetts v. EPA* combined to create conditions friendlier to plaintiffs attempting to demonstrate sufficient injury in fact for standing. However, the dissenting minority from these two cases became a majority soon after in *Summers v. Earth Island Institute*.[61] The division of the Court was identical to that of *Massachusetts v. EPA*, except for a shift by Justice Kennedy.[62] In a majority opinion authored by Justice Scalia, the Court reversed a Ninth Circuit decision that had found sufficient injury in fact.[63] Like the alleged future harm in *Lujan*, the *Summers* petitioner's "vague desire . . . [was] insufficient to satisfy the requirement of imminent injury."[64] The plaintiffs in *Summers* challenged certain regulations of

56 *Id.* at 518–19 (quoting Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907)).

57 *Id.* at 522–23 (citing affidavits for Massachusetts).

58 *Id.* at 522.

59 *See id.* at 535–36 (Roberts, C.J., dissenting).

60 *Id.* at 541.

61 555 U.S. 488 (2009).

62 *See id.*

63 *See id.* at 488, 501.

64 *Id.* at 496.

the U.S. Forest Service that exempted particular land sales from the regular notice, comment, and appeals process required of other more significant sales.[65] Because of settlements of other portions of the case, petitioners' only asserted injury was that of an affiant who would suffer a decreased capacity to enjoy the National Forests.[66] The alleged injury showed "[t]here may [have been] a chance, but . . . hardly a likelihood" that the affiant would visit a parcel of land "about to be affected by a project unlawfully subject to the regulations."[67]

The Justices that comprised the majority in *Massachusetts v. EPA*, except for Justice Kennedy, joined in a dissenting opinion authored by Justice Breyer.[68] In direct opposition to the findings of the majority, the dissent foreshadowed conflict to come when it concluded that the Court should have asked "whether there is a *realistic likelihood* that the challenged future conduct [would], in fact, recur and harm the plaintiff."[69] By focusing on "realistic likelihood," the dissenters would have erected a lower bar than the majority for certainty of alleged future injury.[70] After *Summers*, the question of what set of facts and alleged injury would satisfy the standing requirement in climate change cases was left unsettled.

B. The Supreme Court's Recent Approach to Future Injury

By the time the Court granted certiorari for *Clapper v. Amnesty International USA*, the stage had been set for another clash between its opposing wings regarding standing. Justice Souter and Justice Stevens had been replaced by Justice Kagan and Justice Sotomayor, but the result in *Clapper* was otherwise in line with previous divisions in the standing cases.[71] Justices who found sufficient injury in fact included Breyer, Ginsburg, Sotomayor, and Kagan, while Justices Scalia, Roberts, Thomas, and Alito found it to be insufficient.[72] As it had in *Summers*, Justice Kennedy's swing vote in *Clapper* went in favor of the no standing bloc.[73]

---

65 *See id.* at 490.

66 *See id.* at 494–95.

67 *Id.* at 495.

68 *Id.* at 501 (Breyer, J., dissenting).

69 *Id.* at 505.

70 *See id.* ("Precedent nowhere suggests that the 'realistic threat' standard contains identification requirements more stringent than the word 'realistic' implies.").

71 Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1142 (2013).

72 *Id.*

73 *See id.*

The issue in *Clapper* arose from a context outside the environmental harm addressed in *Lujan*, *Laidlaw*, *Massachusetts v. EPA*, and *Summers*. Despite its nonenvironmental factual context, however, some environmental law experts saw how it could affect environmental advocacy groups' efforts to show standing after suffering environmental harm.[74] In *Clapper*, the Court addressed whether plaintiffs who claimed injury resulting from section 702 of the Foreign Intelligence Surveillance Act ("FISA")[75] had suffered sufficient injury in fact.[76] The Act allowed surveillance of certain individuals outside the United States whom plaintiffs, attorneys as well as human rights and media organizations, thought might include individuals with whom they worked and communicated overseas.[77] The plaintiffs argued that the risk of having their sensitive communications surveilled by the U.S. Government had forced them to discontinue some communications and incur costs in maintaining the confidentiality of others.[78]

To begin its standing analysis, the Court dutifully listed the requirements for standing from *Lujan*, ultimately holding that "threatened injury must be *certainly impending* to constitute injury in fact."[79] It is illuminating to consider the source of the "certainly impending" standard. *Whitmore v. Arkansas*,[80] the case both *Lujan* and *Clapper* cited to support the "certainly impending" standard for future injury,[81] derived the language from *Pennsylvania v. West Virginia*,[82] a 1923 Supreme Court case dealing with a statute plaintiffs claimed would cause them injury, but had not yet done so.[83] In determining if the suit was brought prematurely, the Court found 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."[84] This holding, which seems to establish a "certainly impending" injury as a sufficient (as opposed to necessary) condition for plaintiffs to

---

74 Jeremy P. Jacobs, *Wiretap Ruling Could Haunt Environmental Lawsuits*, E&E NEWS (May 20, 2013), http://www.eenews.net/stories/1059981453.

75 50 U.S.C. § 1881(a) (2012).

76 *Clapper*, 133 S. Ct. at 1140, 1142–43.

77 *Id.* at 1142.

78 *Id.* at 1145–46.

79 *Id.* at 1147 (citing and adding emphasis to Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

80 495 U.S. 149 (1990).

81 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 n.2 (1992); *Clapper*, 133 S. Ct. at 1147.

82 262 U.S. 553 (1923).

83 *See id.* at 581, 592–93.

84 *Id.* at 593 (emphasis added).

show their case is ripe,[85] has evolved into the core of what the conservative wing of the Court demands for standing.[86]

Indeed, in Justice Breyer's dissent in *Clapper*, he pointed out the Court's shift in the reading of *Pennsylvania v. West Virginia*.[87] Justice Breyer quoted the text of *Pennsylvania v. West Virginia*, which on its face presents a showing of "certainly impending" injury as sufficient to obtain preventive relief but does not declare that showing to be a requirement to seek relief.[88] Justice Breyer also cited a case decided before *Lujan*, which, citing *Pennsylvania v. West Virginia*, also characterizes "certainly impending" injury as sufficient injury in fact.[89] In *Babbitt v. United Farm Workers National Union*,[90] the Court addressed a statute that the plaintiffs claimed would cause them future harm by deterring them from exercising their right to vote.[91] In this context, the plaintiff was required to "demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," and the Court recognized that a "certainly impending" harm would satisfy this requirement.[92] Under this reading of *Pennsylvania v. West Virginia*, while injury that was literally "certainly impending" would satisfy the standard, the minimum requirement was not literal certainty, but a "realistic danger" of future injury.[93]

Clapper, however, did not conclude its analysis of risk of future injury with "certainly impending." It conceded in a footnote that plaintiffs are not uniformly required "to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a 'substantial risk' that the harm will occur."[94] In other words, despite the Court's proclamation that the alleged threatened injury to the plaintiff must be "certainly impending" to constitute injury in fact, it simultaneously recognized that literal certainty was not always required.[95]

---

85 *See Clapper*, 133 S. Ct. at 1160 (Breyer, J., dissenting).

86 *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 345 (2006); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000); *Lujan*, 504 U.S. at 564 n.2.

87 *See Clapper*, 133 S. Ct. at 1160 (Breyer, J., dissenting).

88 *See id.* (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923)).

89 *See id.* (citing Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)).

90 442 U.S. 289 (1979).

91 *See id.* at 299.

92 *Id.* at 298.

93 *Id.* ("A plaintiff . . . must demonstrate a realistic danger of sustaining a direct injury . . . .").

94 *Clapper*, 133 S. Ct. at 1150 n.5 (quoting Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 153 (2010)).

95 *See id.*

One explanation of these arguably incongruous positions is that an opinion offering only the "certainly impending" standard, with no mention of the possibility of a continued "substantial risk" standard, would not have gained a majority vote. In *Laidlaw*, Justice Kennedy voted with the majority in finding petitioners had suffered sufficient injury in fact based on their "reasonable concerns" about future injury.[96] In *Massachusetts v. EPA*, Justice Kennedy voted with the majority in finding sufficient injury in fact when the alleged impending injury was potential damage caused by climate change over the course of the next century,[97] instead of with Chief Justice Roberts's dissenting opinion, which had cited *Whitmore*'s "certainly impending" language and found that the majority's time horizon "render[ed] requirements of imminence and immediacy utterly toothless."[98] In *Clapper*, however, Justice Kennedy joined the dissenting justices from *Massachusetts v. EPA* to form a majority.[99] Based on these outcomes, it seems possible that footnote five, with its relaxed "substantial risk" standard, was included in *Clapper* to secure Justice Kennedy's vote.[100]

However, the discord in *Clapper* is not limited to two varying standards to show sufficient risk of future injury. The Court also compared the "substantial risk" standard to a "*clearly* impending" requirement,[101] which would seem to fall somewhere between the two previously mentioned standards. This language has led some commentators to suggest that after *Clapper*, there were actually three different standards to show risk of future injury for standing.[102] Others have attributed the use of the "clearly impending" language in footnote five to clerical error.[103] If this is the case, it is possible the error will be corrected upon publication of the authoritative version of *Clapper* in the United States Reports,[104] but its decision has already been cited by

96 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 171, 183–84 (2000).

97 Massachusetts v. EPA, 549 U.S. 497, 526 (2007).

98 *Id*. at 542 (Roberts, C.J., dissenting, joined by Scalia, Thomas, and Alito, JJ.) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 565 n.2 (1992)).

99 *Clapper*, 133 S. Ct. at 1142.

100 Jacobs, *supra* note 74; *see also* Bradford C. Mank, Clapper v. Amnesty International*: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211, 259–63 (2014).

101 *See Clapper*, 133 S. Ct. at 1150 n.5 (emphasis added).

102 *See* Mank, *supra* note 100, at 215; Jacobs, *supra* note 74.

103 *See* Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 601–03 (2014).

104 Lazarus, *supra* note 103, at 601–03, 602 n.378 (suggesting the "clearly impending" phrase in Clapper footnote five was the result of clerical error and indicating that the author had notified the Court of the potential error).

numerous lower courts, and has even been relied on in a subsequent Supreme Court decision.[105]

One year after *Clapper*, in a unanimous decision authored by Justice Thomas, the Court in *Susan B. Anthony List v. Driehaus* presented the two standards from *Clapper* as alternative tests and found that the plaintiffs had shown sufficient standing.[106] Petitioner Susan B. Anthony List ("SBA List") is a pro-life nonprofit organization that challenged an Ohio false statement statute that would have prohibited it from erecting a billboard featuring a political attack on then–U.S. Representative Steve Driehaus.[107] SBA List contended that the threat of enforcement of the false statement statute amounted to sufficient risk of future injury in fact.[108] Concluding that SBA List had met its burden to show injury in fact, the Court, quoting *Clapper*, stated that "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur."[109] Dealing with a factual context like that of *Babbitt*, where the alleged threatened future injury would result from enforcement of a statute,[110] the Court held there was a "credible threat" of enforcement of the statute sufficient to satisfy the injury in fact requirement.[111] Considering the Court's varied approaches regarding what is required to show sufficient threat of future injury in *Clapper* and *Driehaus*, the line has been consistently blurred. Future applications of these standards might be affected by the makeup of the Court, but considering that Justice Gorsuch appears to mirror Scalia's general philosophy,[112] the divided Court will likely remain divided.

---

105 *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341–42 (2014); *infra* Part II.

106 *See Driehaus*, 134 S. Ct. at 2341, 2347.

107 *See id.* at 2339.

108 *Id.* at 2343.

109 *Id.* at 2341 (citing Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147, 1150 n.5 (2013)). Though the Court addressed both standards, it left unclear which was controlling or what the difference is between the two. *See id.*

110 *See supra* text accompanying notes 91–92.

111 *See Driehaus*, 134 S. Ct. at 2346.

112 *See* Jonathan H. Adler, Opinion, *Gorsuch's Judicial Philosophy Is Like Scalia's—With One Big Difference*, WASH. POST (Feb. 1, 2017), https://www.washingtonpost.com/opinions/gorsuchs-judicial-philosophy-is-like-scalias—with-one-big-difference/2017/02/01/44370cf8-e881-11e6-bf6f-301b6b443624_story.html; Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html.

II. Lower Court Treatment

In light of the varying approaches in Supreme Court decisions, it is not surprising to find that lower courts have gone in different directions in their standing analysis. The decisions have fallen into one of three categories: (1) adopting a strict view of standing under *Clapper*'s "certainly impending" standard; (2) adopting a more relaxed approach under the "substantial risk" standard from *Clapper* footnote five; and (3) some mix of the two.

Some courts have read the *Clapper* decision to set a high bar for plaintiffs attempting to show sufficient standing. In a 2016 decision dealing with the implementation of secular science education in Kansas schools, the Tenth Circuit latched on to the strict reading of *Clapper*: "For this potential future injury to support standing, the injury must be 'certainly impending.'"[113] The court, however, did not mention the "substantial risk" standard from *Clapper* footnote five. Because the statute requiring the Kansas State Board of Education to adopt certain curriculum standards still allowed for school district discretion in choice of curriculum, and there was no guarantee of injury if the standards were adopted, the court of appeals found that the plaintiffs had not "demonstrate[d] that implementation is beyond doubt or certainly impending."[114]

Since *Clapper*, the Fifth Circuit has twice addressed the question of standing and both times cited to *Clapper*'s strict standard, omitting any reference to the more relaxed standard.[115] In the earlier of the two decisions, the court found no certainly impending injury when a plaintiff faced potential lawsuits that would have had minimal chances of success.[116] The court subsequently distinguished that decision, and found that a plaintiff had sufficiently demonstrated "certainly impending" injury, when the facts showed that the plaintiff was subject to the "almost-certain" probability of an SEC investigation.[117] There was no

---

113 COPE v. Kan. State Bd. of Educ., 821 F.3d 1215, 1222 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 475 (2016) (quoting *Clapper*, 133 S. Ct. at 1147).

114 *Id.* at 1222 n.7 (citing *Clapper*, 133 S. Ct. at 1147).

115 *See* Sullo & Bobbitt P.L.L.C. v. Abbott, 536 F. App'x 473, 477 (5th Cir. 2013) ("A 'threatened injury must be *certainly impending* to constitute injury in fact,' and claiming '*possible* future injury' does not meet plaintiff's burden." (quoting *Clapper*, 133 S. Ct. at 1147)); *see also* Waste Connections, Inc. v. Chevedden, 554 F. App'x 334, 335–36 (5th Cir. 2014) ("[*Clapper*] simply confirms 'the *well-established* requirement that threatened injury must be certainly impending.'" (quoting *Clapper*, 133 S. Ct. at 1143)).

116 *See Sullo*, 536 F. App'x at 477.

117 *See Waste Connections*, 554 F. App'x at 336 n.1.

mention of a "substantial risk" of injury, even though "almost certain" is arguably closer to "substantial risk" than "certainly impending."[118]

Other courts have followed the more relaxed path of "substantial risk" from *Clapper* footnote five. Soon after *Clapper*, the Federal Circuit found that plaintiffs had not made the necessary showing to meet even the relaxed standard in *Organic Seed Growers & Trade Ass'n v. Monsanto Co.*[119] The court determined that even though "plaintiffs need not be 'literally certain that the harm they identify will come about,'" the plaintiffs' fear of being subject to potential future legal action was too speculative to justify the claim, and failed the "substantial risk" standard.[120] Additionally, the Ninth Circuit, in *Mendia v. Garcia*,[121] cited only *Clapper*'s "substantial risk" standard in recognizing that a plaintiff could not demonstrate sufficient injury with mere speculation that he would be injured at the hands of the defendant.[122] It is possible that the Federal Circuit and Ninth Circuit were merely recognizing that because plaintiffs failed to meet even the "substantial risk" standard, there was no need to differentiate between that standard and the "certainly impending" standard from *Clapper*. However, neither court indicated that it was using the more easily met standard for this reason, and though both courts cited *Clapper*, neither cited it for its "certainly impending" language.[123]

Despite its holding in *Mendia*, the Ninth Circuit has also approached the question with a mixed standard in other cases. One year after *Mendia*, and after the Supreme Court's decision in *Driehaus*, the Ninth Circuit in *Montana Environmental Information Center v. Stone-Manning*[124] referred to *Driehaus*'s mixed treatment of *Clapper*'s standards and read the caselaw to provide two alternate tests for injury.[125]

---

118 Indeed, "*almost* certain" is by definition not "certainly impending." *See Almost*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/almost (last visited July 2, 2017) (defining "almost" as "very nearly but not exactly or entirely").

119 718 F.3d 1350, 1352 (Fed. Cir. 2013).

120 *Id.* at 1360 (quoting *Clapper*, 133 S. Ct. at 1150 n.5).

121 768 F.3d 1009 (9th Cir. 2014).

122 *See id.* at 1013 n.1 ("[T]o establish standing to seek redress for this injury, [plaintiff] must be able to allege a 'substantial risk' that the future harm would occur." (quoting *Clapper*, 133 S. Ct. at 1150 n.5)).

123 *See* Mendia v. Garcia, 768 F.3d 1009 (9th Cir. 2014); Organic Seed Growers & Trade Ass'n v. Monsanto Co., 718 F.3d 1350 (Fed. Cir. 2013).

124 766 F.3d 1184 (9th Cir. 2014).

125 *See id.* at 1189 ("An injury is imminent 'if the threatened injury is "certainly impending", or there is a "substantial risk" that the harm will occur.'" (quoting Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014))).

Ultimately, the court found that plaintiffs, environmental advocacy groups, failed to meet even the lower, easier to meet standard.[126]

In September 2016, the Sixth Circuit heard a case in which it recognized the "certainly impending" standard, but ultimately proceeded under the "substantial risk" standard.[127] That case, *Galaria v. Nationwide Mutual Insurance Co.*,[128] is particularly helpful for understanding the difference between the two standards. After the plaintiffs lost control of sensitive personal information through a data breach of the defendant's computer network, the Sixth Circuit found that "although it might not be 'literally certain' that [p]laintiffs' data will be misused, . . . it would be unreasonable to expect [p]laintiffs to wait for actual misuse . . . before taking steps to ensure their own personal and financial security."[129] The *Galaria* court also recognized *Clapper*'s warning that parties cannot "manufacture standing by incurring costs in anticipation of non-imminent harm."[130] Instead, it characterized plaintiffs' harm as "concrete injury suffered to mitigate an imminent harm."[131] This means that even though the Sixth Circuit recognized the "certainly impending" standard from *Clapper*, it did not understand that language to mean that future injury must be literally, absolutely certain to occur to satisfy the standard for future harm in the standing analysis. The *Galaria* court seems to have understood that requiring absolute certainty of future events is essentially a per se rejection of any claim based on future harm, while recognizing that reasonable costs incurred to avoid or mitigate the "substantial risk" of a future harm could satisfy the injury in fact requirement of standing.

Other courts have even expressly recognized the dilemma resulting from *Clapper*. In *Blum v. Holder*,[132] the First Circuit noted that "*Clapper* left open the question whether the previously-applied 'substantial risk' standard is materially different from the 'clear[ly] impending' requirement."[133] And, even if the "substantial risk" standard

126 *See id.*

127 *See* Galaria v. Nationwide Mut. Ins. Co., 663 F. App'x 384, 388 (6th Cir. 2016) ("[T]he Supreme Court has explained 'that threatened injury must be *certainly impending* to constitute injury in fact' . . . . However, the Supreme Court has also 'found standing based on a substantial risk that the harm will occur . . .' even where it is not 'literally certain the harms they identify will come about.'" (quoting *Clapper*, 133 S. Ct. at 1147, 1150 n.5)).

128 663 F. App'x 384 (6th Cir. 2016).

129 *Id.* at 388 (quoting *Clapper*, 133 S. Ct. at 1150 n.5).

130 *Id.* at 389 (quoting *Clapper*, 133 S. Ct. at 1155).

131 *Id.*

132 744 F.3d 790 (1st Cir. 2014).

133 *Id.* at 799 (citing *Clapper*, 133 S. Ct. at 1147).

were adopted, it is unclear what level of harm would be required to satisfy the test.[134]

Despite lower courts' efforts to address the confusion produced by the *Clapper* standards, the above decisions make clear that a lower court could interpret the language to mean different things, ranging from a literal requirement that plaintiffs show, with undoubtable certainty, that they will be subject to harm,[135] to a requirement of a mere "objectively reasonable likelihood" that the harm will occur.[136]

III. Resolving the Confusion

The dilemma described above is the result of a Supreme Court opinion that seemingly points lower courts in different directions with its standing analysis.[137] While there are arguments for why one direction may be exclusive of, and superior to, the other, this Essay argues that the seemingly conflicting standards are not only reconcilable, but were meant to be reconcilable.

A. Clapper*'s "Certainly Impending" Standard for Risk of Future Injury Does Not Mean Absolute, Literal Certainty of Future Harm*

In *Clapper*, the Court makes frequent reference to its "well-established requirement that threatened injury must be 'certainly impending.'"[138] Because the Court also includes important qualifications for this standard, however, it should not be read in isolation or apart

134 *See* Food & Water Watch, Inc. v. Vilsack, 808 F.3d 905, 914–15 (D.C. Cir. 2015) ("The word 'substantial' of course poses questions of degree, questions far from fully resolved." (quoting Va. State Corp. Comm'n v. FERC, 468 F.3d 845, 848 (D.C. Cir. 2006))).

135 *See, e.g.*, Sullo & Bobbitt P.L.L.C. v. Abbott, 536 F. App'x 473, 477 (5th Cir. 2013) ("A statement solely of abstract legal possibility but not of meaningful factual potential is insufficient to confer standing. A 'threatened injury must be *certainly impending* to constitute injury in fact . . . .'" (quoting *Clapper*, 133 S. Ct. at 1147)).

136 The Seventh Circuit seems to have completely misunderstood the holding from *Clapper*. *Compare* Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 693 (7th Cir. 2015) ("Like the *Adobe* plaintiffs, the Neiman Marcus customers should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing, because there is an 'objectively reasonable likelihood' that such an injury will occur." (quoting *Clapper*, 133 S. Ct. at 1147)), *with Clapper*, 133 S. Ct. at 1147 ("Respondents assert that they can establish injury in fact . . . because there is an objectively reasonable likelihood that their communications with their foreign contacts will be intercepted . . . at some point in the future. This argument fails. As 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.'" (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990))).

137 *See supra* Part II.

138 *Clapper*, 133 S. Ct. at 1143 (citing *Whitmore*, 495 U.S. at 158).

from its context and the rest of the opinion. Initially, the Court pointed out that the alleged future injury was too speculative to satisfy the requirement,[139] suggesting it was closer to the "conjectural or hypothetical" end of the "actual/imminent versus conjectural/hypothetical" continuum originally presented in *Lujan*.[140] Indeed, when *Clapper* quoted the "certainly impending" language directly from *Lujan*, it also quoted its preface which acknowledged that "imminence is concededly a somewhat elastic concept,"[141] more evidence that it was not speaking in absolute terms. Later, the Court again referenced plaintiffs' "highly attenuated chain of possibilities" in juxtaposition with the "certainly impending" standard for risk of future injury.[142] At this juncture, though, the Court supported its assertion by citing the principle from *Summers* that standing based on a speculative chain of possibilities would be insufficient, and even threatens to completely eliminate the requirement of injury in fact.[143] This provides another example of the Court's insistence on contrasting one side of the spectrum—complete certainty of future injury—with the other side—mere hypothesis and speculation. Repeatedly, when the Court referred to its "certainly impending" standard, it either did so as a foil to emphasize the uncertainty of injury in the facts before it,[144] or as a summation of its previously discussed juxtaposition.[145]

In addition to the contextual clues provided by the Court that "certainly impending" was not to be understood as absolute certainty, the Court itself expressly conceded the point. At the end of its discussion of the "certainly impending" standard, the Court found it necessary to include the footnote five disclaimer: "Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about."[146] Furthermore, whether or not it was a clerical error,[147] when the Court juxtaposed the varying standards, it quoted its own more strict standard as "clearly impending," as if referring to a phrase provided elsewhere in the opinion.[148] The phrase "clearly impending," however, appeared

139 *See id.*

140 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citing *Whitmore*, 495 U.S. at 155).

141 *Clapper*, 133 S. Ct. at 1147 (quoting *Lujan*, 504 U.S. at 565 n.2).

142 *See id.* at 1148.

143 *See id.* (citing Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009)).

144 *See id.* at 1143, 1147–48.

145 *See id.* at 1150, 1155.

146 *Id.* at 1150 n.5.

147 *See supra* text accompanying note 103.

148 *See Clapper*, 133 S. Ct. at 1150 n.5.

nowhere else. This suggests that the Court itself saw its stricter standard as something that could be described with the idea of either "certainty" or "clarity." While the equivocation is confusing, and likely the result of a majority with more than one mind,[149] the outcome is this: when the Court wrote "certainly impending," it meant something less than absolute, literal certainty.[150] Indeed, because "[t]he future is inherently uncertain,"[151] to understand the Court to have meant absolute certainty would have foreclosed completely the possibility of standing in any claim of risk of future injury, a position *Clapper* never took.

The combination of the qualifications surrounding the references to the "certainly impending" standard, and the Court's own recognition that it did not always require literal certainty, is evidence that *Clapper* in fact left the door open for standing to exist when the risk of future injury is, at least to some small degree, uncertain.

B. The Supreme Court, Citing Clapper*, Applied a Mixed Standard in* Driehaus

Beyond the contemporaneous language from *Clapper* suggesting the "certainly impending" language was not meant to be absolute, the Court itself did not read it to be an absolute bar when it applied the standard in *Driehaus*. As discussed previously, the unanimous *Driehaus* decision found sufficient injury in fact and cited *Clapper* for the proposition that "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'"[152] This opinion, decided in the context of threat of future injury resulting from the enforcement of a statute,[153] has also been cited for its use of a mixed standard in cases addressing similar factual situations. In *Kiser v. Reitz*,[154] the Sixth Circuit was faced with an Ohio State Dental Board regulation that would have permitted the Board to impermissibly infringe upon a dentist's First Amendment commercial free speech rights in his advertising.[155]

---

149 *See supra* text accompanying notes 96–98.

150 *See, e.g.*, Food & Water Watch, Inc. v. Vilsack, 79 F. Supp. 3d 174, 188–89 (D.D.C. 2015) (equating *Clapper*'s "certainly impending" with "imminent" and recognizing that "an increased *risk* of harm to the plaintiff—as opposed to certain injury—may constitute a cognizable injury-in-fact").

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

152 Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014) (citing *Clapper*, 133 S. Ct. at 1147, 1150 n.5) (internal quotation marks omitted).

153 *See supra* text accompanying notes 107–11.

154 765 F.3d 601 (6th Cir. 2014).

155 *Id.* at 608.

Citing *Driehaus*, the court concluded that the plaintiff had "standing to assert his pre-enforcement challenge to the regulations" because he had "alleged facts demonstrating that he face[d] a credible threat that the . . . regulations [would] be enforced against him in the future."[156] In another case arising from comparable facts, where the plaintiff's alleged risk of future injury resulted from the operation of a statute, a federal district court found plaintiffs had standing, also citing *Driehaus*'s mixed standards.[157] If the Court had understood *Clapper*'s "certainly impending" language to be literal and absolute, it would have denied standing in *Driehaus*. To the contrary, it unanimously held that the plaintiffs had demonstrated sufficient risk of future injury in fact to have standing, and lower courts have followed suit.[158]

C. *The Approach Taken by the Sixth Circuit in* Galaria *Exemplifies How Lower Courts Can Function Under* Clapper *and* Driehaus

Outside the context of alleged future harm resulting from the operation of a statute, the Sixth Circuit has also applied the mixed standards from *Clapper* to find standing. In *Galaria*, described above,[159] the defendant insurance company was the target of computer hackers who had stolen personal information of 1.1 million customers, including that of the plaintiffs.[160] The plaintiffs alleged that the insurance company had willfully and negligently violated the Fair Credit Reporting Act[161] through its failure to adequately protect the plaintiffs' personal information.[162] In its analysis of the *Clapper* standards for risk of future injury, the *Galaria* court noted that *Clapper*'s "substantial risk" standard could be applied in at least one area.[163] Following its disclaimer that plaintiffs need not be literally certain of alleged future injury to have standing,[164] *Clapper* identified when "substantial risk" of harm could suffice: when plaintiffs are prompted "to reasonably

156 *Id.* at 604.

157 *See* Planned Parenthood Ariz., Inc. v. Brnovich, 172 F. Supp. 3d 1075, 1085, 1088, 1099 (D. Ariz. 2016) (finding standing for physicians and their patients when physicians would be required to deliver state-mandated messages even if it was against their best medical judgment).

158 Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014) (citing Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147, 1150 n.5 (2013)).

159 *See supra* text accompanying notes 127–31.

160 *See* Galaria v. Nationwide Mut. Ins. Co., 663 F. App'x 384, 386 (6th Cir. 2016).

161 15 U.S.C. § 1681 (2012).

162 *Galaria*, 663 F. App'x at 385.

163 *Id.* at 388.

164 *Id.*

incur costs to mitigate or avoid that harm."[165] The *Galaria* court applied this test to find that the plaintiffs, who were subjected to the costs of monitoring their credit, checking bank statements, modifying their financial accounts, and obtaining protections from identity theft, had reasonably incurred such costs and thus had sufficiently demonstrated injury in fact.[166]

The *Galaria* court attempted to reconcile its conclusion with *Clapper*'s requirement that plaintiffs could not manufacture standing by incurring costs in the face of non-imminent injury;[167] it failed, however, to recognize that *Clapper* mandated plaintiffs could not manufacture standing "based on their fears of hypothetical future harm that is not certainly impending."[168] On its face, and removed from the context of the rest of the *Clapper* opinion, this admonishment appears to preclude standing for plaintiffs who have incurred costs without literal certainty that future harm will occur. Under the proposed understanding of the mixed standards from *Clapper*, though, we know that such literal, absolute certainty is not what is required,[169] thus saving the result in *Galaria*. The applicable rule, as applied in *Galaria*, is that plaintiffs can still show "sufficiently substantial risk of harm that incurring mitigation costs is reasonable" and that if plaintiffs do not "manufacture standing by incurring costs in anticipation of non-imminent harm" they may still "satisfy the injury requirement of Article III standing."[170]

To make the necessary showing of substantial risk, however, plaintiffs are still required to show more than a mere increased risk of harm.[171] In assessing whether an alleged increased risk was sufficiently imminent for injury in fact, the D.C. Circuit adopted a two-part test to determine what risk is "substantial."[172] In the earlier decision of *Public Citizen v. National Highway Safety Administration* ("*Public Citizen I*"),[173] the court had recognized that there was no "hard-and-fast numerical rule[]," but that a plaintiff could demonstrate injury in fact by showing both the potential harm, and the increased risk, are "substan-

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

166 *See Galaria*, 663 F. App'x at 388–89.

167 *See id.* at 388.

168 *Clapper*, 133 S. Ct. at 1151.

169 *See supra* Section III.A.

170 *Galaria*, 663 F. App'x at 388–89.

171 Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin. (*Public Citizen II*), 513 F.3d 234, 237 (D.C. Cir. 2008).

172 *Id.*

173 489 F.3d 1279 (D.C. Cir. 2007).

tial."[174] According to *Public Citizen II*, to avoid nullifying the requirement that harm be actual or imminent, courts must have "'a very strict understanding of what increases in risk and overall risk levels' will support injury in fact."[175] One subtlety that might be added to this test, however, is the gravity of the ultimate alleged harm. Multiplying the gravity of the potential future harm by the increased likelihood that it will occur is not a new concept in the law,[176] nor in the analysis of injury in fact for standing.[177] Even within the small window of "substantial risk," there is still room for courts to consider the magnitude of the harm along with the increase in probability.

D. For Harm Resulting from Climate Change, Plaintiffs Should Be Able to Reasonably Incur Mitigating Costs if There Is a Substantial Risk the Harm Will Occur

In cases in the climate change context since *Clapper*, few plaintiffs have taken advantage of the theory of substantial risk standing provided in *Clapper*'s footnote five, and applied by the Supreme Court in *Driehaus* and the Sixth Circuit in *Galaria*. If courts apply the narrow understanding of "substantial risk" described in *Public Citizen II*, the showing, though difficult, should not be impossible.

One pre-*Clapper* decision dealing with climate change that may have been approached differently if litigated and decided under the proposed theory of increased risk injury is *Center for Biological Diversity v. United States Department of the Interior*.[178] The United States Department of Interior ("DOI") had begun the process to expand lease areas for offshore oil and gas development.[179] Petitioners, nonprofit organizations working to protect the habitats and animal species located off the coast of Alaska, and the Native Alaskan Village of Point Hope, alleged that this action by the DOI would contribute to

---

174 *Id.* at 1295–98 ("In sum, the proper way to analyze an increased-risk-of-harm claim is to consider the ultimate alleged harm—such as death, physical injury, or property damage from car accidents—as the concrete and particularized injury and then to determine whether the increased risk of such harm makes injury to an individual citizen sufficiently 'imminent' for standing purposes.").

175 *Public Citizen II*, 513 F.3d at 241 (quoting *Public Citizen I*, 489 F.3d at 1296).

176 *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.).

177 *See* Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1234 (D.C. Cir. 1996) ("[W]e do not understand the customary rejection of 'speculative' causal links as ruling out all probabilistic injuries. The more drastic the injury that government action makes more likely, the lesser the increment in probability necessary to establish standing." (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 567 (1992))).

178 563 F.3d 466 (D.C. Cir. 2009).

179 *See id.* at 471.

climate change, resulting in the nonprofit members' decreased enjoyment of the natural areas and derivative effects on members of Point Hope.[180] One reason the Ninth Circuit dismissed the claim was that the alleged future harm was not "certainly impending," citing the same language and decision from which *Clapper* derived its "certainly impending" standard.[181] Without further analysis, the court rejected petitioner's claims of increased risk of future injury. If the case were decided post-*Clapper*, and had interpreted the *Clapper* standard not to mean literal, absolute certainty but instead showing a "substantial risk" of future injury, petitioners may have crafted their arguments to reflect the reasonable costs incurred to avoid or mitigate the "substantial risk" of future harm, and the court's analysis may have led to a different result. Though there were other reasons to dismiss the claims, failing to show certainty of an alleged risk of future injury resulting from climate change would not have been one of them if the plaintiffs had tried to recover for costs reasonably incurred in mitigating the future harm.

In a post-*Clapper* Ninth Circuit decision dealing with alleged injury resulting from climate change, the court seemed more open to recognizing the plaintiff's injury in fact.[182] The court in *Washington Environmental Council v. Bellon*[183] recognized that "[i]njury may also include the risk of future harm," providing as an example a plaintiff showing injury through decreased aesthetic and recreational satisfaction resulting from the negative effects of climate change.[184] Most of the plaintiffs' alleged injury was harm that had already occurred, but affidavits of Sierra Club and Washington Environmental Council members also included the "increased risk of forest fire," concern "that climate change [would] negatively affect [members'] enjoyment of climbing the glaciated volcanoes in Washington and Mt. Rainier," and the allegation "that flooding and decreased water availability [would] further reduce the benefits from and enjoyment of [members'] property."[185] Ultimately, though the plaintiffs were not able to satisfy other standing requirements, the lack of literal, absolute certainty in the alleged future harms of climate change did not bar them from having their case heard.[186]

---

180 *See id.* at 472, 476–77.

181 *Id.* at 478 (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

182 *See* Wash. Envtl. Council v. Bellon, 732 F.3d 1131, 1140–41 (9th Cir. 2013).

183 732 F.3d 1131 (9th Cir. 2013).

184 *Id.* at 1140.

185 *Id.* at 1140–41.

186 *See id.* at 1141, 1147.

More recently, the Western District of Washington also recognized that "an increased risk of harm can itself [be] injury in fact for standing."[187] One affiant was "concerned that her ability to harvest clams and other shellfish and explore tidepools with her family [would] decrease due to ocean acidification,"[188] and other affiants expressed similar concerns over their decreased ability to enjoy the waters of the Puget Sound area.[189] The court determined that "[t]hese alleged harms and *increased risk of harms* fall squarely into the category of aesthetic and recreational injuries countenanced by the Supreme Court in [*Laidlaw*]."[190]

The approach to increased risk of future injury taken by the Ninth Circuit in *Bellon* and the Western District of Washington in *Center for Biological Diversity v. United States EPA*[191] are positive indicators that alleged future harm can be grounds for injury in fact even when literal certainty is lacking. It is not necessarily true, therefore, that the "certainly impending" requirement for future harm proposed in *Clapper* created a new, and essentially insurmountable, hurdle for climate change plaintiffs.[192] The Court's numerous clues in *Clapper*,[193] and subsequent cases interpreting *Clapper*,[194] suggest plaintiffs are not required to make a showing of absolute certainty of future injury to fulfill the injury in fact element of standing. If a plaintiff in a climate change case could show the same level of "substantial risk" of future harm that the plaintiffs in *Galaria* showed,[195] they would have a chance to recover for the reasonable costs incurred to mitigate that harm, even without showing the harm was literally "certainly impending."

Conclusion

The "certainly impending" standard set forth in *Clapper v. Amnesty International USA*, when considered in isolation, at first seems like an impossible bar for plaintiffs to overcome in climate change

187 *See* Ctr. for Biological Diversity v. EPA, 90 F. Supp. 3d 1177, 1187 (W.D. Wash. 2015) (quoting Ocean Advocates v. U.S. Army Corps. of Engineers, 402 F.3d 846, 860 (9th Cir. 2005)).

188 *Id.*

189 *Id.* at 1187–88.

190 *Id.* at 1188 (emphasis added).

191 90 F. Supp. 3d 1177 (W.D. Wash. 2015).

192 *See* Chin, *supra* note 51, at 355–57.

193 *See supra* Section III.A; *see also* Jonathan Remy Nash, *Standing's Expected Value*, 111 Mich. L. Rev. 1283, 1297–98 (2013) ("[T]here is much in the *Clapper* opinion that suggests that standing based on probabilities is far from foreclosed . . . .").

194 *See supra* Sections III.B, III.C.

195 *See supra* Section III.C.

cases because of the inherent uncertainty of harm resulting from climate change. However, the Court's opinion provides counterweights to the seemingly strict "certainly impending" test. It is more accurately understood not as foreclosing standing based on probability of future injury, but as merely emphasizing the high level of probability necessary to satisfy Article III's injury in fact requirement for standing. The result is that plaintiffs bringing suits based on climate change injury should still have a window through which they can successfully show injury in fact. Residents of Norfolk, Virginia—Karen Speights included—would not face an impossible task to show injury in fact through future harms based on climate change. While there would be other hurdles to overcome to make the sufficient showing, she would be able to satisfy the injury in fact requirement if faced with a "substantial risk" of future injury and if she reasonably incurred costs to mitigate that injury.