THE IMPACT OF *CLAPPER V. AMNESTY INTERNATIONAL USA* ON THE DOCTRINE OF FEAR-BASED STANDING

TABLE OF CONTENTS

I. INTRODUCTION

On February 26, 2013, the Supreme Court handed down its decision in *Clapper v. Amnesty International USA*.[1] The Court split 5–4 along ideological lines,[2] rendering a decision packed with controversial issues. The case stemmed from Congress's enactment of the 2008 Foreign Intelligence Surveillance Act (FISA) Amendments.[3] The Amendments give the Intelligence Community much greater flexibility to engage in electronic surveillance of non-U.S. persons.[4]

The Court, in a majority opinion written by Justice Alito,[5] extensively discussed the requirements of Article III standing[6] before holding that a group of U.S. attorneys and U.S. human rights, labor, and media organizations did not have standing to challenge the constitutionality of the FISA Amendments.[7] The legal doctrine of standing stems from Article III's requirement that federal courts adjudicate actual "Cases" and "Controversies,"[8] and involves the determination of whether a specific party is the proper person to bring a case for adjudication.[9] The *Clapper* Court explained in detail the requirement that a plaintiff must demonstrate a concrete and particularized injury, or a sufficient threat of future injury, to establish Article III standing.[10] The *Clapper* Court held that the plaintiffs' fear of future unlawful surveillance under FISA was not "certainly impending" and thus was insufficient to meet the injury requirement of Article III standing.[11]

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[1] 133 S. Ct. 1138 (2013).

[2] Adam Liptak, *A Secret Surveillance Program Proves Challengeable in Theory Only*, N.Y. TIMES (July 16, 2013), http://www.nytimes.com/2013/07/16/us/double-secret-surveillance.html?_r=0.

[3] FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436.

[4] DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS § 17:3 (2012).

[5] Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined the majority opinion.

[6] *Clapper*, 133 S. Ct. at 1142–43.

[7] *Id.*

[8] U.S. CONST. art. III, § 2.

[9] Allen v. Wright, 468 U.S. 737, 750–51 (1984), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

[10] *Clapper*, 133 S. Ct. at 1147.

[11] *Id.* at 1142–43.

The Court's decision will be closely analyzed by scholars for its potential impact on future government surveillance, as well as for its possible impact on constitutional law issues. For instance, scholars have expressed concern that the decision has essentially shielded the statute from review and has authorized far-reaching surveillance that is beyond the reach of the Constitution.[12] This Note addresses a more subtle area of interest arising from the *Clapper* decision, which is its potential impact on a plaintiff's ability to establish Article III standing based on fear of future injury.

The concept of using fear of future injury to establish standing is sometimes referred to as "fear-based standing."[13] To illustrate this concept, consider the following hypothetical. An agricultural agency decides to cease regulation of the alfalfa plant without first issuing an environmental impact statement.[14] Although the impact of the agency's deregulation is unclear, a local alfalfa farmer fears that the deregulation will result in a contamination of his crops. The farmer's fear of future injury might be a sufficient injury to allow him to seek injunctive relief from the agency's deregulation of the alfalfa crop.

The *Clapper* decision's lengthy discussion of the requirements of standing may be subject to several different interpretations. In particular, the decision could be understood so as to significantly impact a plaintiff's ability to establish standing based on fear of future harm. This Note will set forth three plausible interpretations of the decision: (1) *Clapper* severely limits the scope of fear-based standing,[15] (2) *Clapper* is mostly consistent with precedent,[16] or (3) *Clapper* only applies to cases involving

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[12] *See* Matt Sledge, *Supreme Court's* Clapper v. Amnesty International *Decision Could Affect Indefinite Detention Lawsuit*, HUFFPOLITICS BLOG (Feb. 27, 2013, 8:41 AM), http://www.huffingtonpost.com/2013/02/27/clapper-v-amnesty-international_n_2769294.html ("Legal advocates fret that the Supreme Court has handed the government a virtual 'get out of jail free' card for national security statutes that are written, like the 2008 wiretapping law was, with an eye toward secrecy."). For an extended discussion on the ability to challenge government surveillance under the FISA after *Clapper*, see Liptak, *supra* note 2.

[13] *See* discussion *infra* Part II.A.*3*.

[14] This hypothetical is based on the facts of *Monsanto Co. v. Geertson Seed Farms*, in which the Supreme Court held that a group of alfalfa farmers had sufficiently established an injury for purposes of Article III standing. 561 U.S. 139, 153–56 (2010).

[15] *See* discussion *infra* Part III.A.

[16] *See* discussion *infra* Part III.B.

foreign affairs.[17] After setting forth these possible interpretations of the decision and the implications that each might have on the doctrine of fear-based standing, this Note suggests that the most accurate reading of the decision is that *Clapper* only slightly narrows the reach of fear-based standing, and that *Clapper*'s "certainly impending" standing test should be flexibly applied.[18]

This theory is supported by footnote five in the decision, which softens the impact the decision may have on the doctrine of standing.[19] Footnote five in *Clapper* suggests a more lenient standing inquiry, which allows courts to depart from the more stringent "certainly impending" test that is used throughout the decision.[20] However, *Clapper* does not explain when this more lenient standard applies,[21] and lower courts will likely struggle with this issue. This Note suggests that one specific context where courts should adopt the more lenient footnote five test is in cases that involve an anticipatory challenge of an allegedly unconstitutional statute that implicates free speech concerns. This conclusion is supported by the Court's most recent standing decision in *Susan B. Anthony List v. Driehaus*.[22] There, the court applied the more lenient footnote five test and held that a pro-life organization had standing to challenge an Ohio statute that restricted electoral speech.[23]

This Note proceeds in two parts. Part II of this Note gives a general overview of Article III standing and conducts an in-depth analysis of the *Clapper* decision itself. Additionally, Part II discusses how *Clapper* has been applied in several lower court decisions. After setting the framework, Part III discusses *Clapper*'s potential impact on the doctrine of fear-based standing and proposes a particular application of the decision that lower courts should adopt.

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[17] *See* discussion *infra* Part III.C.
[18] *See* discussion *infra* Part III.D.
[19] *See* discussion *infra* Part III.D.
[20] Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1150 n.5 (2013).
[21] *Id.*
[22] 134 S. Ct. 2334 (2014).
[23] *Id.* at 2338–41.

II. BACKGROUND

A. OVERVIEW OF ARTICLE III STANDING

1. Requirements of Article III Standing. Article III of the Constitution constrains the federal courts to deciding actual "Cases" and "Controversies."[24] The standing doctrine emanates from the Court's interpretation of Article III and commands the determination of whether a specific party is the proper person to bring a case for adjudication.[25] Further, the Supreme Court has characterized standing as "perhaps the most important" of the limits on the federal judicial power.[26] Additionally, as the doctrine is currently construed, Article III standing is an issue of subject-matter jurisdiction and thus represents a jurisdictional requirement that persists throughout all stages of litigation.[27] Consequently, federal courts are obligated to dismiss a case without reaching the merits if a plaintiff fails to meet the constitutional requirements of Article III standing.[28]

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[24] Allen v. Wright, 468 U.S. 737, 750 (1984), *abrogated by* Lexmark Int'l, Inc. v. Static Control Component, Inc., 134 S. Ct. 1377 (2014). Article III of the Constitution states:

> 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 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.

[25] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 59 (4th ed. 2011); *see also* Warth v. Seldin, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."); Stark v. Wickard, 321 U.S. 288, 310 (1944) (stating the Article III standing requirement for the first time).

[26] *Allen*, 468 U.S. at 750.

[27] 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.15 n.1 (3d ed. 2012) (quoting Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 255 (1994)).

[28] *See* Bradford C. Mank, Clapper v. Amnesty International*: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211, 223 (2014) ("Before the [*Clapper*] 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.").

In *Lujan v. Defenders of Wildlife*, the Supreme Court identified three constitutional standing requirements.

> First the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[29]

In addition to these constitutional requirements, the Court has also identified prudential standing principles. The prudential standing principles are not found in the Constitution, so Congress retains the power to overrule the Supreme Court's recognition of these principles by statute.[30] For instance, a party generally cannot raise a third party claim before the Court.[31] Further, a party must raise a claim that falls within the "zone of interests" protected by the statute in question.[32]

2. Purposes Behind the Doctrine of Standing. The standing doctrine is a relatively recent development.[33] One commentator attributes the creation of a separately articulated law of standing to two developments: the growth of the administrative state and an increase in litigation surrounding constitutional issues.[34]

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[29] 504 U.S. 555, 560–61 (1992) (citations omitted) (internal quotation marks omitted).

[30] CHEMERINSKY, *supra* note 25, at 62.

[31] *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 113 (1976) ("Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation.").

[32] *See, e.g.*, Bennett v. Spear, 520 U.S. 154, 162 (1997) ("[A] plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.").

[33] William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224 (1988). Before the development of standing, "a plaintiff's right to bring suit was determined by reference to a particular common law, statutory, or constitutional right, or sometimes to a mixture of statutory or constitutional prohibitions and common law remedial principles." *Id.*

[34] *Id.* at 225.

Since its emergence, the Court has articulated several clear purposes behind the doctrine. First, the standing requirement is a primary means by which the Judiciary upholds the principle of separation of powers, which relies on an understanding of what activities are best dealt with by the Legislature, the Executive, or the Judiciary.[35] Additionally, standing promotes judicial efficiency by preventing a flood of frivolous lawsuits.[36] Further, standing advances judicial decisionmaking by confirming that there is a definite controversy before the court and an advocate with a sufficient personal stake in the outcome.[37] Federal courts have limited means to perform independent investigations. Consequently, they depend on litigants to set forth pertinent information and make compelling arguments.[38] The common belief is that adverse parties, cognizant of their stake in the outcome of the litigation, will best perform this task.[39]

3. The Development of Fear-Based Standing. Fear-based standing is the idea that fear of future harm can satisfy the injury-in-fact requirement for purposes of Article III standing.[40] Several noteworthy Supreme Court cases give shape to this concept. For instance, in *Laird v. Tatum*, the Court heard a dispute involving the Army's data-gathering system, which was authorized by statute and allegedly allowed the Army to survey lawful and peaceful civilian political activity.[41] The plaintiffs claimed that the

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[35] Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992); *see also* Allen v. Wright, 468 U.S. 737, 752 (1984) ("[S]tanding is built on a single basic idea—the idea of separation of powers."). One commentator contends that Justice Scalia has been a major force behind the perception that Article III standing is built on the separation-of-powers principle. Mank, *supra* note 28, at 240–41. For a further discussion of Justice Scalia's argument that standing is vital to separation of powers, see generally Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

[36] *See* CHEMERINSKY, *supra* note 25, at 60–61 ("[S]tanding is said to serve judicial efficiency by preventing a flood of lawsuits by those who have only an ideological stake in the outcome.").

[37] *Id.*; *see also* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 191 (2000) ("Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake.").

[38] CHEMERINSKY, *supra* note 25, at 50.

[39] *Id.*

[40] *See* WRIGHT ET AL., *supra* note 27, § 3531.4 (discussing when courts have allowed the risk of future injury to support standing).

[41] 408 U.S. 1, 5–6 (1972).

existence of the data-gathering program chilled the exercise of their First Amendment rights.[42] The *Laird* Court denied standing to the plaintiffs on the ground that they failed to establish a direct injury as a result of the government's action.[43] The Court reasoned that while "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations,"[44] this does not erode the established principle that a plaintiff must "show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of the action."[45]

In *City of Los Angeles v. Lyons*, a police officer used an unprovoked chokehold on the plaintiff, who subsequently sought damages for his physical injuries and injunctive relief against the use of future chokeholds.[46] The Court held that the plaintiff did not have standing to seek the injunction requested, because he failed to establish a real and immediate threat of future injury.[47] The Court explained that the likelihood that the plaintiff would be the victim of another chokehold was based on a speculative and hypothetical chain of events that was insufficient to establish an actual controversy.[48] Notably, the Court explained that it was the "*reality* of the threat of repeated injury that [was] relevant to the standing inquiry, not the plaintiff's subjective apprehensions."[49]

Then, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, forty individuals and two organizations challenged the constitutionality of the Price-Anderson Act, which limits the liability of utility companies in the event of a nuclear reactor accident.[50] The Supreme Court found standing to exist because the construction of a nuclear reactor in the plaintiffs' area

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[42] *Id.* at 10.

[43] *Id.*

[44] *Id.* at 11.

[45] *Id.* at 13 (citing *Ex Parte* Levitt, 302 U.S. 633, 634 (1937)).

[46] 461 U.S. 95, 97–98 (1983).

[47] *Id.* at 105.

[48] *See id.* at 105–06 (explaining that in order to establish standing, Lyons would have to make "the incredible assertion either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, . . . or, (2) that the City ordered or authorized police officers to act in such manner").

[49] *Id.* at 107 n.8.

[50] 438 U.S. 59, 65–68 (1978).

subjected the plaintiffs to several injuries, one of which was *fear* of a major nuclear accident.[51]

In *Lujan v. Defenders of Wildlife*, several environmental groups alleged that a regulation of the Secretary of Interior would increase the rate of extinction of certain endangered and threatened species and, subsequently, would affect their future observation of these species.[52]

The Court held that the plaintiffs' fear of future harm was not an imminent injury for purposes of Article III standing, because they did not provide sufficient evidence of their intentions to visit the relevant foreign countries in the future.[53] The Court explained that "such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."[54] The Court further suggested that "imminence" is a malleable standard but courts still must ensure that any threat of future injury is "*certainly* impending."[55]

More recently, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, several environmental organizations sought an injunction to stop Laidlaw's discharge of toxic pollutants into a river.[56] The plaintiffs alleged that their fear of harmful pollutants in the river water deterred them from using the river for recreational activities, such as fishing and swimming.[57] The Court held that the plaintiffs had standing to pursue an injunction, because they demonstrated "reasonable concerns" about the effects of the river discharge, which in turn affected their "recreational, aesthetic, and economic interests."[58] Additionally, the unlawful discharge of pollutants was "ongoing" at the time the plaintiffs brought the suit, which was sufficient to establish a "realistic threat" of future harm.[59]

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[51] *Id.* at 73–74.

[52] 504 U.S. 555, 563–64 (1992).

[53] *Id.* at 564.

[54] *Id.*

[55] *Id.* at 565 n.2.

[56] 528 U.S. 167, 174–77 (2000). Laidlaw's river discharges exceeded the requirements set forth by its permit, which was issued by the National Pollutant Discharge Elimination System. *Id.* at 176.

[57] *Id.* at 181–82.

[58] *Id.* at 183–84.

[59] *Id.* at 184–88.

B. *CLAPPER V. AMNESTY INTERNATIONAL USA*

1. The Foreign Intelligence Surveillance Act Amendments. The dispute in *Clapper v. Amnesty International USA* arose from the 2008 Foreign Intelligence Surveillance Act (FISA) Amendments, which creates a new framework under which the government may seek authorization of certain foreign intelligence surveillance.[60] A key provision of the FISA Amendments, 18 U.S.C. § 1881(a), revises traditional FISA authority by no longer requiring the government to demonstrate probable cause that the target of the electronic surveillance is a foreign power or agent of a foreign power.[61] Further, § 1881(a) no longer obligates the government to specify the nature and location of the particular facilities or places at which the electronic surveillance will occur.[62]

While the Amendments give the government substantially more flexibility to engage in electronic foreign surveillance, § 1881(a) still contains explicit limitations on this ability. For instance, the surveillance "may not intentionally target any person known at the time of the surveillance to be located in the United States."[63] Additionally, any surveillance under the statute must be authorized by the Foreign Intelligence Surveillance Court (FISC).[64]

2. The Clapper *Decision.* The plaintiffs in *Clapper*—a group of attorneys and human rights, labor, and media organizations—performed work that allegedly required them to engage in sensitive telephone and e-mail conversations with colleagues and clients located abroad.[65] The *Clapper* plaintiffs alleged that these people were likely targets of government surveillance under § 1881(a) because the Government believed many of them to be "associated with terrorist organizations" or because they were

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[60] 133 S. Ct. 1138, 1144 (2013); FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436.

[61] *Clapper*, 133 S. Ct. at 1144.

[62] *Id.*

[63] Amnesty Int'l USA v. McConnell, 646 F. Supp. 2d 633, 638 (S.D.N.Y 2009). Further, any requested surveillance cannot target "any person reasonably believed to be located outside the United States if the purpose of the surveillance is to target a particular, known person reasonably believed to be in the United States; or any United States person reasonably believed to be located outside the United States." *Id.*

[64] *Id.* at 639.

[65] *Clapper*, 133 S. Ct. at 1145.

located in areas that were a "special focus of the Government's counterterrorism or diplomatic efforts."[66] For example, one of the plaintiffs, Scott McKay, is an attorney who, at the time of the action, represented Sami Omar Al-Hussayen, who had been previously acquitted on terrorism charges and was facing criminal charges after September 11th.[67] McKay claimed that his fiduciary relationship with Al-Hussayen required him to communicate with Al-Hussayen, who was located outside the United States, by telephone and e-mail.[68] McKay produced evidence that prior to 2008 the Government had intercepted around 10,000 telephone calls and 20,000 e-mail communications involving his client, in support of his contention that there was a high probability that his future communications with Al-Hussayen would be interpreted.[69]

As soon as the FISA Amendments were enacted, the plaintiffs filed an action challenging their constitutionality. Specifically, the plaintiffs sought: (1) a declaration that § 1881(a) violates the Fourth Amendment, the First Amendment, Article III, and the principle of separation of powers; and (2) a permanent injunction against the use of § 1881(a).[70] The *Clapper* plaintiffs advanced two independent bases for Article III standing. First, they argued that there was an "objectively reasonable likelihood" that their communications would be acquired under § 1881(a) in the future and that this fear of future surveillance provided a basis for standing.[71] In the alternative, they maintained that Article III standing was satisfied, because their fear of surveillance under § 1881(a) caused them to take "costly and burdensome measures" to protect the confidentiality of their conversations.[72]

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[66] *Id.* (internal quotation marks omitted).

[67] *Id.* at 1156–57 (Breyer, J., dissenting).

[68] *Id.* at 1157.

[69] *Id.*

[70] *Id.* at 1146. Plaintiffs claimed that § 1881(a) violates the Fourth Amendment because it fails to safeguard the privacy interests of Americans in the content of their telephone calls and e-mails; that § 1881(a) violates the First Amendment by chilling the constitutionally protected speech of Americans who fear that their telephone calls and e-mails will be subject to surveillance; and that § 1881(a) violates the separation of powers principle under Article III by setting forth a process of judicial review that allows the FISC to issue orders approving the authorization of surveillance in the absence of any case or controversy. Amnesty Int'l USA v. McConnell, 646 F. Supp. 2d 633, 642–43 (S.D.N.Y. 2009).

[71] *Clapper*, 133 S. Ct. at 1146.

[72] *Id.*

The United States District Court for the Southern District of New York held that the plaintiffs did not have standing to pursue the action and reasoned that any fear of surveillance was speculative and insufficient to meet the injury-in-fact requirement of Article III standing.[73] A panel of the Second Circuit reversed, and held that the plaintiffs demonstrated that they were suffering present injuries originating from their objectively reasonable fear of future government conduct.[74]

Ultimately, the Supreme Court reversed and held that the *Clapper* plaintiffs had not established Article III standing.[75] According to the Court, the threat of future government surveillance faced by the plaintiffs was not "certainly impending" and the plaintiffs' allegations of "*possible* future injury" were not sufficient to establish injury for Article III purposes.[76] The Court reasoned that the plaintiffs' theory of standing rested on a "highly attenuated chain of possibilities,"[77] and also noted that the standing inquiry is "especially rigorous when reaching the merits of [a] dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[78]

Notably, the Court rejected the Second Circuit's standing analysis: "As an initial matter, the Second Circuit's 'objectively reasonable likelihood' standard is inconsistent with our requirement that 'threatened injury must be certainly impending

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[73] *See McConnell*, 646 F. Supp. 2d at 652 ("[T]he plaintiffs in this case have only a hypothetical fear of being harmed by the statute that is insufficient to support standing.").

[74] Amnesty Int'l USA v. Clapper, 638 F.3d 118, 138 (2d Cir. 2011).

[75] *Clapper*, 133 S. Ct. at 1155.

[76] *Id.* at 1147 (citations omitted) (internal quotation marks omitted).

[77] *Id.* at 1148. The Court explained that the plaintiffs' arguments rested on a highly speculative fear that:

> (1) the Government [would] decide to target the communications of non-U.S. persons with whom they [communicated]; (2) in doing so, the Government [would] choose to invoke its authority under § 1881(a) rather than utilizing another method of surveillance; (3) the Article III judges . . . on the [FISC] [would] conclude that the Government's proposed surveillance procedures satisf[ied] § 1881(a)'s many safeguards and [were] consistent with the Fourth Amendment; (4) the Government [would] succeed in intercepting the [plaintiffs' communications]; and (5) [the plaintiffs would] be parties to the particular communications that the Government intercepts.

Id.

[78] *Id.* at 1147.

to constitute injury in fact.' "[79] However, in a footnote the Court appeared to leave open the possibility that standing might still exist even when an injury is not "certainly impending." Footnote five stated:

> Our cases do not uniformly require plaintiffs 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, 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.[80]

Finally, Justice Alito's majority opinion also rejected the plaintiffs' alternative argument that the measures they took and the expenditures they made in order to avoid surveillance under § 1881(a) constituted injuries sufficient to confer standing.[81] As discussed above, the plaintiffs claimed that they were forced to take costly precautions to maintain the confidentiality of their communications, such as traveling to have in-person conversations.[82] The Court explained that the plaintiffs could not "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."[83]

The Court's holding was met by a spirited dissent. The dissent departed from the majority's view that the harm was speculative and reasoned that the harm was "as likely to take place as are most future events that commonsense inference and ordinary

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[79] *Id.*

[80] *Id.* at 1150 n.5 (citations omitted).

[81] *Id.* at 1151.

[82] *Id.*

[83] *Id.* Additionally, the Court sharply criticized the Second Circuit's decision to allow the plaintiffs to establish standing by asserting that they were suffering present costs and burdens, and explained that the Second Circuit's reasoning "improperly watered down the fundamental requirements of Article III." *Id.*

knowledge of human nature tell us will happen."[84] The dissent explained that the Government had strong motives to attempt to monitor the communications of the plaintiffs' foreign clients, some of whom were suspected terrorists and other persons of interest.[85]

Notably, the dissent rejected the majority's use of a "certainly impending" standard to deny standing in cases dealing with future harm and pointed out that 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."[86] Justice Breyer observed that the Court has used the phrase "certainly impending" to describe "a *sufficient* rather than a *necessary* condition for jurisdiction."[87] In conclusion, Justice Breyer remarked that "the Constitution requires . . . something more akin to [a] 'reasonable probability' or 'high probability' " of future injury.[88]

C. *CLAPPER* IN THE LOWER COURTS

Only time will reveal the impact that the *Clapper* decision will have on the lower courts' analyses in standing cases involving fear of future injury. This Section discusses several lower court decisions that have relied on *Clapper*.

1. Cases that Applied Clapper*'s "Certainly Impending" Test.* In *Hedges v. Obama*, the Second Circuit denied standing to a group of writers, journalists, and activists who brought an action to

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[84] *Id.* at 1155 (Breyer, J., dissenting). The dissent noted that there was a very high likelihood that the Government, acting under § 1881(a), would intercept at least some of the plaintiffs' future communications. *Id.* at 1157. Indeed, prior to 2008, the Government had intercepted some 10,000 telephone calls and 20,000 e-mail communications of plaintiff Scott McKay's client. *Id.*

[85] *Id.* at 1157–58. Further, Justice Breyer concluded that:

> [W]e 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."

Id. at 1160.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 1165. One commentator suggests that Justice Breyer favors a "realistic likelihood standard" but would be willing to shift to a "high probability" standard to win the support of his colleagues. Mank, *supra* note 28, at 251–52.

challenge the constitutionality of a provision of the National Defense Authorization Act that appeared to affirm the President's authority to detain persons covered by the Authorization for Use of Military Force (AUMF).[89] The *Hedges* court explained that the plaintiffs did not demonstrate an imminent threat that the government would detain them under the statute, and thus their fear of future injury was insufficient to meet *Clapper*'s "certainly impending" standing test.[90]

Further, the *Hedges* court alluded to the idea that *Clapper* tightened the constitutional standing inquiry: "Particularly after *Clapper*, plaintiffs must show more than that they fall within the ambit of [a statute's] authority to establish the sufficient threat of enforcement necessary for Article III standing."[91] The Second Circuit acknowledged that the "substantial risk" test discussed in footnote five of *Clapper* could provide a more lenient standing inquiry than the "certainly impending" test, but ultimately declined to adopt the more lenient test because the *Clapper* Court did not explain when this alternative standard should apply.[92]

Along the same lines, the Federal Circuit in *Madstad Engineering, Inc. v. United States Patent & Trademark Office* held that the plaintiff-inventor did not have standing to challenge the constitutionality of the "first-inventor-to-file" provision of the America Invents Act (AIA).[93] The Federal Circuit analogized the plaintiff-inventor's fear of an IP thief stealing his close-to-patentability ideas to the *Clapper* plaintiffs' highly speculative fear of future government surveillance.[94] The Federal Circuit concluded that in order for the plaintiff-inventor to suffer any injury that was attributable to the AIA, an "acutely attenuated concatenation of events" had to occur, such as an increase in cyber

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[89] 724 F.3d 170, 173–74 (2d Cir. 2013). The AUMF empowered President Bush "to use all necessary and appropriate force" against those responsible for the September 11th terrorist attacks and appeared to permit the President to detain anyone who was a part of, or substantially supported al-Qaeda, the Taliban, or other associated forces. *Id.* at 173.

[90] *Id.* at 200–03. The Fifth Circuit also recently held that a threatened injury must be "*certainly impending*" and that a "*possible* future injury" is insufficient to meet a plaintiff's burden in establishing injury in fact. Sullo & Bobbit P.L.L.C. v. Abbott, 536 F. App'x 473, 477 (5th Cir. 2013).

[91] 724 F.3d at 204.

[92] *Id.* at 196.

[93] 756 F.3d 1366, 1368 (Fed. Cir. 2014).

[94] *Id.* at 1374–75.

hacking linked to the AIA and a successful cyber attack resulting in the theft of the plaintiff-inventor's ideas.[95]

2. Cases that Distinguished Clapper. While the Second Circuit stringently applied *Clapper's* "certainly impending" test in *Hedges*, it distinguished *Clapper* in its decision in *Natural Resources Defense Council (NRDC) v. United States Food & Drug Administration*.[96] There, the Second Circuit granted the plaintiff standing to challenge the FDA's decision not to regulate triclosan—a chemical used in over-the-counter soap—even though there was "scientific uncertainty" as to triclosan's harmfulness to humans.[97] The Second Circuit explained that the plaintiff's threat of future injury was not speculative, as in *Clapper*, because the plaintiff presented a particularized showing of an increased risk of ovarian cancer.[98]

One commentator suggests that the Second Circuit's opinion in *NRDC* illustrates a way in which lower courts might seek to distinguish *Clapper* in environmental health and safety cases "by emphasizing the actual harms posed by chemicals or actions that the government [fails] to regulate."[99] Notwithstanding its potential influence, the *NRDC* decision may be susceptible to reversal if the Supreme Court were to grant certiorari, because the plaintiffs in the case did not present any scientific studies that proved triclosan's harmfulness to humans.[100]

In *Klayman v. Obama*, subscribers to certain telecommunication and internet services brought actions against the Government to challenge the constitutionality of the National Security Agency's (NSA) Bulk Telephony Metadata Program, which authorized certain intelligence-gathering practices relating to the NSA's

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[95] *Id.* at 1373–75.

[96] 710 F.3d 71 (2d Cir. 2013).

[97] *Id.* at 74–75, 79–84.

[98] *Id.* at 81–84. Similarly, the United States District Court for Eastern District of Michigan distinguished *Clapper* in its decision to grant plaintiffs standing to challenge invasive border inspections. Cherri v. Mueller, 951 F. Supp. 2d 918, 930–31 (E.D. Mich. 2013). The *Cherri* court explained: "Unlike *Clapper,* plaintiffs have alleged a certainly impending injury. . . . 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." *Id.* at 930.

[99] Mank, *supra* note 28, at 266.

[100] *Id.*

collection of phone record metadata of U.S. citizens.[101] The United States District Court for the District of Columbia held that the plaintiffs demonstrated a sufficient threat of future surveillance and had standing to challenge the metadata collection procedures.[102] The court explained that unlike the *Clapper* plaintiffs, who "could only speculate" about future surveillance, the *Klayman* plaintiffs could point to "strong evidence that . . . their telephony metadata ha[d] been collected for the last seven years and . . . [would] continue to be collected barring judicial or legislative intervention."[103]

The Ninth Circuit in *Libertarian Party of Los Angeles County v. Bowen* held that the plaintiffs had standing to seek a pre-enforcement challenge to certain provisions in the California Elections Code.[104] The court found that the plaintiffs established a credible threat of future enforcement based solely on guidelines posted on the defendant's website, which framed the requirements of the statute in absolute terms.[105] The Ninth Circuit noted that the *Clapper* decision did not change its analysis, because the plaintiffs' fear of law enforcement was "well-founded and [did] not involve a highly attenuated chain of possibilities."[106]

3. Cases that Adopted a More Lenient Test than Clapper*'s "Certainly Impending" Test.* Some courts have not adopted *Clapper*'s "certainly impending" test, and instead have opted for a less strict standing inquiry. For instance, in *Organic Seed Growers and Trade Association v. Monsanto Co.*, the Federal Circuit adopted the more lenient "substantial risk" standing test referenced in footnote five of *Clapper*.[107] The Federal Circuit denied the plaintiffs standing to pursue a declaratory judgment on the validity of certain seed patents, because there was no longer a "substantial risk" that the plaintiffs might be sued for patent infringement.[108] The court explained that "[d]eclaratory judgment plaintiffs need not be literally certain that the harm they identify

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[101] 957 F. Supp. 2d 1, 26 (D.D.C. 2013).
[102] *Id.* at 26–29.
[103] *Id.* at 26.
[104] 709 F.3d 867, 869–70 (9th Cir. 2013).
[105] *Id.* at 871–72.
[106] *Id.* at 870 n.3 (internal quotation marks omitted).
[107] 718 F.3d 1350, 1360 (Fed. Cir. 2013).
[108] *Id.* at 1360–61.

will come about, but they must show that they are at a *substantial risk* of that harm, and that costly precautions are a reasonable response."[109]

The Sixth Circuit appeared to ignore *Clapper* altogether in its decision in *Shearson v. Holder*.[110] The Sixth Circuit held that a citizen had standing to pursue an action against the Department of Homeland Security and other government agencies, because she suspected she was on a "terrorist watchlist" and would be subjected to future heightened searches at the border.[111] The Sixth Circuit's standing inquiry seemed to closely parallel the "objectively reasonable likelihood" standard, which was rejected by the *Clapper* Court. For instance, the Sixth Circuit explained that the plaintiff's "past detention, in conjunction with the presumption that she remains on terrorist watchlists, [made] it likely she [was] '*realistically* threatened' with future injury."[112]

III. ANALYSIS

The impact that *Clapper* will have on standing jurisprudence is uncertain. Part of this uncertainty may stem from the fact that standing is considered one of the most complex areas of the law, largely due to the Court's varying formulations of the doctrine's requirements.[113] More likely, *Clapper*'s impact is uncertain because of the Court's reluctance to explicitly define the "certainly impending" test that is discussed throughout the opinion. Additionally, the decision seems to fluctuate between endorsing a strict standing test on the one hand, and affirming precedent that endorses a more flexible approach to standing on the other hand. For instance, at several points in the decision the Court doggedly insists that a plaintiff's injury must be "certainly impending" to satisfy Article III standing.[114] Yet, at other instances the majority goes to great lengths to reconcile its decision with established

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[109] *Id.* at 1360 (emphasis added) (internal quotation marks omitted).

[110] 725 F.3d 588 (6th Cir. 2013).

[111] *Id.* at 592–93.

[112] *Id.* at 593 (emphasis added).

[113] *See* CHEMERINSKY, *supra* note 25, at 59 ("The Court has not consistently articulated a test for standing. . . . Moreover, many commentators believe that the Court has manipulated standing rules based on its views of the merits of particular cases.").

[114] Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1143, 1147, 1148 (2013).

precedent, including prior cases that endorsed a more liberal standing inquiry.[115] As a result, *Clapper* is subject to several plausible interpretations.

This Part lays out several ways that the lower courts may interpret *Clapper*. First, courts might see *Clapper* as a directive to severely limit the scope of fear-based standing, or they may even find that *Clapper* eliminates the doctrine altogether. Second, courts might see the decision as entirely consistent with established standing precedent. A third possibility is that courts might limit *Clapper* to cases involving foreign affairs and intelligence gathering. This Note contends that courts should read the decision as a balance between the first two approaches and that the "certainly impending" test can be flexibly applied. Finally, this Note suggests that the more lenient "substantial risk" inquiry set forth in footnote five of *Clapper* should be applied in cases that involve an anticipatory challenge of an allegedly unconstitutional statute where the fear of future injury is a threat of prosecution.

A. *CLAPPER* SEVERELY LIMITS THE SCOPE OF FEAR-BASED STANDING

One possibility is that courts will see *Clapper* as a directive to severely limit the scope of fear-based standing. Such an interpretation is supported by the Court's insistence that a threatened injury must be "certainly impending" to establish Article III standing, coupled with its statement that "allegations of *possible* future injury are not sufficient."[116]

Additionally, this interpretation is supported by *Clapper*'s rejection of the Second Circuit's more lenient "objectively reasonable likelihood" standing inquiry for cases involving fear of future harm.[117] The dissent in *Clapper* pointed out that the majority's adoption of the "certainly impending" requirement seems inconsistent with past cases that have found standing to exist based on actions that were reasonably or highly likely, but not absolutely certain, to occur.[118] For instance, in *Duke Power Co.*

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[115] *See id.* at 1150 n.5 (citing several cases that endorsed a more lenient standing test).
[116] *Id.* at 1143, 1147 (internal quotation marks omitted).
[117] *Id.* at 1147.
[118] *Id.* at 1160.

v. Carolina Environmental Study Group, Inc. the Court found standing to exist based on the plaintiffs' "generalized concern about exposure to radiation" from the defendant's nuclear power plant and the plaintiffs' "apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions" of radiation.[119] Allowing Article III injury to be established based on a "generalized apprehension" in *Duke Power* seems at odds with the Court's decision to deny standing in *Clapper* because a high likelihood, arguably more than just a generalized concern, existed that the plaintiffs in *Clapper* would have their communications intercepted.[120]

In his dissent in *Clapper*, Justice Breyer sharply criticized the majority's standing analysis and explained that "*certainty* is not, and never has been, the touchstone of standing."[121] Further, the Court's prior use of the term "certainly impending" seems to have been used as a way to describe a *sufficient*, rather than a *necessary*, condition for jurisdiction.[122] Thus, the majority's insistence that an injury be "certainly impending" may suggest that the Court now requires a much stricter standing inquiry in cases involving fear of future injury.

This conclusion is also supported by a textual analysis of the phrase "certainly impending." The dictionary defines the term "certainly" to mean "established beyond doubt or question."[123] However, "[t]he future is inherently uncertain,"[124] and it is practically impossible to know beyond any doubt that a certain course of action will take place. Instead, establishing standing based on fear of future injury seems contingent on the ability to allege an injury that is only *possible* to occur. Thus, a literal adherence to the "certainly impending" requirement may practically eliminate the ability of plaintiffs to establish an Article III injury based on fear of future injury altogether.

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[119] 438 U.S. 59, 74 (1978).

[120] Indeed, the *Clapper* dissent stated that the likelihood of future surveillance was "as likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tell us will happen." *Clapper*, 133 S. Ct. at 1155 (Breyer, J., dissenting).

[121] *Id.* at 1160.

[122] *Id.*

[123] THE AMERICAN HERITAGE DICTIONARY 256 (2d ed. 1985).

[124] *Clapper*, 133 S. Ct. at 1160 (Breyer, J., dissenting).

Additionally, the Court's rejection of the plaintiffs' alternative argument—that they were suffering ongoing injuries based on the high risk of surveillance[125]—also supports a conclusion that *Clapper* announces a much stricter standing inquiry. As previously discussed, the *Clapper* plaintiffs argued that the costly measures they took in order to eschew surveillance under § 1881(a) caused them to suffer injuries sufficient to establish standing.[126] The Court rejected this argument and explained that the plaintiffs could not "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."[127]

However, this reasoning seems to conflict with past cases where the Court held that present injuries suffered in relation to a risk of future harm were sufficient to establish standing. For instance, in *Monsanto Co. v. Geertson Seed Farms* the Court held that a group of farmers had standing to challenge an agency's decision to deregulate alfalfa crops, because the farmers would be forced to take preventative measures based on their fear of future crop contamination.[128] The preventative measures that the farmers took to counter potential crop contamination in *Monsanto* seem similar to the preventative measures that the plaintiffs in *Clapper* took to avoid unlawful surveillance. Thus, *Clapper* may have foreclosed the use of standing theories based on "preventative measures" taken to combat fear of future harm.

In sum, the Court's rejection of a standing inquiry contingent on an "objectively reasonable likelihood" of future harm—as well as the Court's rejection of the *Clapper* plaintiffs' alternative argument that they were suffering present injuries to combat the threat of surveillance—might lead courts to see *Clapper* as a directive to greatly limit the doctrine of fear-based standing. Going a step further, a strict textual adherence to the "certainly impending" requirement arguably leaves no room for plaintiffs to establish standing based on fear of future injury at all.

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[125] *Id.* at 1150–53.

[126] *Id.* at 1150–51.

[127] *Id.* at 1151.

[128] 561 U.S. 139, 155 (2010); *see also* Friends of the Earth Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 183–84 (2000) (finding standing to exist based on the plaintiffs' cessation of recreational activities on a river due to their fear that the river was contaminated).

B. *CLAPPER* IS ENTIRELY CONSISTENT WITH STANDING PRECEDENT

A second interpretive possibility is that *Clapper* will be seen as entirely consistent with past precedent involving fear-based standing. Under this view, the decision is fully reconcilable with established standing precedent, and thus does not alter the doctrine of fear-based standing in any way. As such, *Clapper* will have little to no impact on lower courts' analysis in future standing cases.

This interpretation is plausible based on *Clapper*'s extensive discussion of established standing jurisprudence. For example, the majority went to great lengths to distinguish *Clapper* from its holding in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, which granted standing to the plaintiffs based on the premise that a company's continuous discharge of pollutants into a river was causing the plaintiffs to curtail their recreational use of the river.[129] The *Clapper* court explained that *Laidlaw* was "quite unlike the present case," because the unlawful discharge of pollutants into the river in *Laidlaw* was "ongoing."[130] Thus, the only issue in *Laidlaw* was whether the plaintiffs acted reasonably in refraining from using the polluted river, while the *Clapper* plaintiffs never even demonstrated that they would be subject to unlawful surveillance in the first place.[131] The Court explained that the scenario in *Clapper* would mirror that in *Laidlaw* only if: "(1) it were [sic] undisputed that the Government was using § 1881(a)-authorized surveillance to acquire the plaintiffs' communications and (2) the sole dispute concerned the reasonableness of the plaintiffs' preventive measures."[132]

Additionally, the majority classified the injuries complained of by the *Clapper* plaintiffs as mere "allegations of a subjective chill,"[133] which has long been considered insufficient to establish

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[129] 528 U.S. at 183–84.

[130] *Clapper*, 133 S. Ct. at 1153 (internal quotation marks omitted).

[131] *Id.*

[132] *Id.* Additionally, the Court described *Monsanto Co. v. Geertson Seed Farm*, 561 U.S. 139 (2010), as "inapposite," because the plaintiffs in *Monsanto* had presented concrete evidence to substantiate their fear of future injury. *Id.* at 1153–54.

[133] *Clapper*, 133 S. Ct. at 1152 (internal quotation marks omitted).

standing.[134] Although, the Court in *Laird v. Tatum* recognized that constitutional violations may arise from the "chilling effect" that a regulation can have on a person's First Amendment rights, the Court clarified that standing does not exist when the chilling effect is merely "subjective."[135] The *Clapper* Court explained that *Laird* "makes it clear that [the *Clapper* plaintiffs'] fear [was] insufficient to create standing."[136] Thus, not only does *Clapper* distinguish itself from cases where the Court has found standing to exist, but it also aligns itself with previous case law where the Court denied standing—lending further credence to the idea that the decision is consistent with current standing jurisprudence.

Furthermore, specific language in the opinion suggests that the majority did not intend to alter the current doctrine of fear-based standing. In particular, the majority stated: "We decline to abandon *our usual reluctance* to endorse standing theories that rest on speculation about the decisions of independent actors."[137] The idea being that in order to engage in surveillance under § 1881(a), the Government had to obtain approval from an independent actor, the Foreign Intelligence Surveillance Court, which is the type of situation where the Court is typically reluctant to find standing to exist.[138] The Court's use of the phrase "usual reluctance" alludes again to the idea that the allegations of injuries presented in *Clapper* fall into categories of standing theories that the Court has previously rejected.

Finally, the Court goes to great lengths to show that the plaintiffs' theory of standing rested on a "highly attenuated chain of possibilities."[139] The Court listed four reasons why the plaintiffs' fear was speculative and thus insufficient to support standing: (1) the plaintiffs did not have actual knowledge of the Government's § 1881(a) targeting practices; (2) even if the

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[134] *See* Laird v. Tatum, 408 U.S. 1, 13 (1972) (holding that "[a]llegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm" as is required by Article III).

[135] *Id.* at 11, 13–14.

[136] *Clapper*, 133 S. Ct. at 1152.

[137] *Id.* at 1150 (emphasis added).

[138] *Id.*; *see, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (explaining that the causal connection between the injury and the conduct cannot be the result of the independent action of some third party not before the court).

[139] *Clapper*, 133 S. Ct. at 1148.

plaintiffs could demonstrate that the targeting of their foreign contacts was imminent, they could only speculate as to whether the Government would use § 1881-authorized surveillance; (3) even if the plaintiffs could show that the Government would seek § 1881-authorized surveillance, they could only speculate as to whether the FISC would authorize such surveillance; and (4) it was unclear whether the Government would even succeed in obtaining the foreign communications.[140] Thus, the *Clapper* majority makes a strong case that the plaintiffs based their standing theory on an untenable chain of inferences.

Based on the following reasons, courts might reasonably find that *Clapper* does not signify any change whatsoever as to the doctrine of fear-based standing. Thus, a lower court that adopts this interpretation is unlikely to alter its analysis in future cases involving an issue of fear-based standing and may choose not to even mention *Clapper* at all.[141]

C. *CLAPPER* IS LIMITED TO FOREIGN AFFAIRS CASES

Third, courts might limit *Clapper*'s applicability to cases involving foreign affairs and intelligence gathering issues. Accordingly, courts relying on this approach would apply a more rigorous standing inquiry—presumably a strict adherence to the "certainly impending" test—only in cases involving issues of foreign affairs.

At different points in the opinion, the majority arguably implies that the standing inquiry in cases involving intelligence gathering and foreign affairs may be distinct from the general law of standing. For instance, the *Clapper* Court explained: "[W]e 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."[142] The Court then gave three examples of prior decisions where the Court denied standing in these contexts.[143] Additionally, the Court

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[140] *Id.* at 1148–50.

[141] *See, e.g.*, Shearson v. Holder, 725 F.3d 588, 593 (6th Cir. 2013) (holding that the plaintiff had established standing based on a "realistic" threat of future injury).

[142] *Clapper*, 133 S. Ct. at 1147.

[143] *Id.* First, the Court referenced *United States v. Richardson*, 418 U.S. 166, 175 (1974), which held that the plaintiff lacked standing to challenge the constitutionality of a statute

stated that the standing inquiry is "*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."[144] Thus, the Court may have been using *Clapper* as an opportunity to clarify the law of standing in the surveillance context, which has been criticized by scholars as inconsistent.[145]

While such an interpretation is tenable, it should not be adopted for several reasons. First, the majority's consistent and expansive use of the "certainly impending" standard suggests that the decision was meant to apply to standing questions in a wide variety of contexts.[146] Further, the Court discussed the "certainly impending" test in conjunction with past cases that did not involve political issues, further suggesting that the decision was meant to be broadly applied.[147] Additionally, it seems unlikely that the Court would choose to forgo doctrinal consistency without making it more clear that this was its intent. For instance, the Court never clarified the types of political or military issues that would be sufficient to fall into a distinct and more "rigorous" standing inquiry. Finally, a separate standing inquiry for surveillance cases would be controversial and would likely engender a large backlash. One obvious reason it would be controversial is that government surveillance has become a highly contentious issue and raises privacy concerns.

Additionally, a separate and distinct standing inquiry for intelligence gathering cases would raise concerns that certain governmental action in this context could become insulated from

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permitting the Central Intelligence Agency (CIA) to account for its expenditures solely on the certificate of the CIA Director. Next, the Court cited *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220–24 (1974), which held that plaintiffs lacked standing to challenge the Armed Forces Reserve membership. Finally, the Court referenced *Laird v. Tatum*, 408 U.S. 1, 13 (1972), in which the Court held that plaintiffs lacked standing to challenge an Army intelligence-gathering program.

[144] *Clapper*, 133 S. Ct. at 1147 (emphasis added).

[145] For instance, one commentator describes the law of standing in the surveillance context as "murky" and "out of line with the larger body of standing jurisprudence." Scott Michelman, *Who Can Sue Over Government Surveillance?*, 57 UCLA L. REV. 71, 71 (2009). Michelman explains that in some cases, courts seem to "impose on surveillance plaintiffs a stricter test for probabilistic injuries than exists in the rest of standing law." *Id.*

[146] Mank, *supra* note 28, at 226.

[147] *See Clapper*, 133 S. Ct. at 1147 (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979)).

review.[148] Although this possibility is not sufficient to obviate the Article III requirements of standing,[149] the possibility of complete insulation is arguably still a consideration that the Court considers. For instance, during oral argument in the *Clapper* case Solicitor General Donald B. Verrilli was asked about this very consideration. Justice Sotomayor inquired: "Is there anybody who has standing?"[150] Not only did this issue come up in oral argument, but the *Clapper* Court also directly addressed this concern in its decision. The Court explained: "[O]ur holding today by no means insulates § 1881(a) from judicial review."[151] The Court then explained that Congress created a comprehensive scheme to monitor the Government's certifications under § 1881(a) and that any electronic-communications provider that the Government directs to assist in § 1881(a) surveillance can challenge the lawfulness of that directive.[152]

Nonetheless, courts that are charged with determining whether a plaintiff has standing to challenge governmental surveillance will almost certainly discuss the Court's holding in *Clapper*, at the very least because the cases will likely involve similar issues.[153] For this reason alone, it seems more probable that these types of cases will be the ones most likely to adhere to a more literal interpretation of *Clapper*'s "certainly impending" test. However, the Court's broad use of the "certainly impending" standard suggests that the Court did not intend to limit *Clapper* solely to cases involving these types of foreign affairs issues.[154]

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[148] *Id.* at 1154.

[149] *Id.*

[150] Liptak, *supra* note 2.

[151] *Clapper*, 133 S. Ct. at 1154.

[152] *Id.* at 1154–55.

[153] *See, e.g.*, Hedges v. Obama, 724 F.3d 170, 196 (2d Cir. 2013) (discussing *Clapper* extensively in a case involving a challenge to a provision of the National Defense Authorization Act).

[154] For instance, while the Second Circuit applied the "certainly impending" test in *Hedges v. Obama*, it made a point to explain that it was not "rely[ing] on any notion that Article III standing rules are different just because [the] case implicates national security and foreign affairs." *Id.* at 196–204, 201 n.183.

D. FOOTNOTE FIVE SOFTENS *CLAPPER*'S IMPACT

While the previously discussed interpretations of *Clapper* are certainly plausible, this Note contends that *Clapper* is best read as only a slight shift to a stricter standing doctrine and should not be seen as a major departure from current standing jurisprudence. In other words, the "certainly impending" standing test discussed in *Clapper* can be flexibly applied. Footnote five in the opinion is the key moment where the Court effectively "softens" the impact of the "certainly impending" test.[155] The Court's statement that it does not "uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about,"[156] leaves courts with the ability to choose a more lenient standing inquiry than the "certainly impending" test. The *Clapper* Court clarified that the inquiry for the more lenient standing test looks to whether there is a "substantial risk" of future harm.[157]

Another interesting aspect of footnote five is the use of the phrase "*clearly* impending" rather than "*certainly* impending."[158] Notably, the phrase "clearly impending" is not used anywhere else in the opinion. While the Court may have felt that the phrases "clearly impending" and "certainly impending" could be used interchangeably, the addition of this phrase may have also been a tactical move to garner a majority. Some commentators suggest that "clearly" seems to indicate a lower burden than "certainly," and that footnote five was added to the opinion as a concession in order to secure Justice Kennedy's vote.[159] Justice Kennedy was the only member of the *Clapper* majority who was also in the majority in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, and he may have been concerned with adhering to precedent.[160] Thus, footnote five's "substantial risk" test and its use of the phrase "clearly impending" may have been an attempt

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[155] *See* discussion *supra* Part II.B.

[156] *Clapper*, 133 S. Ct. at 1150 n.5.

[157] *Id.*

[158] *Id.* (emphasis added).

[159] Jeremy P. Jacobs, *Wiretap Ruling Could Haunt Environmental Lawsuits*, GREENWIRE (May 20, 2013), http://www.eenews.net/stones/1059981453.

[160] *Id.*

by the majority to reconcile the "certainly impending" inquiry with previous cases.[161]

The practical effect of footnote five is that it gives lower courts the option of using either the "substantial risk" test, or even the "clearly impending" test, to establish standing when a fear of future harm would not meet the "certainly impending" test. At the very least, footnote five undercuts the idea that *Clapper* requires a strict and uniform adherence to the "certainly impending" test. While footnote five seems to water down the impact of the "certainly impending" test, the *Clapper* decision still slightly tightens the standing inquiry in cases involving fear of future harm. As discussed above, the Court rejected a standing test based on an "objectively reasonable likelihood" of future harm.[162] The rejection of this test narrows the scope of fear-based standing, because at the very least, the Court is clarifying that the "substantial risk" inquiry—rather than the "objectively reasonable likelihood" standard—is now the lowest threshold that can be used to establish standing.[163]

E. APPLYING THE MORE LENIENT FOOTNOTE FIVE

Footnote five of *Clapper* may, in all practical respects, raise more questions than it answers. The previous section alluded to the idea that footnote five allows for the "certainly impending" test to be flexibly, rather than uniformly, applied.[164] One glaring question that emerges from the opinion is *when* courts should adopt the more lenient "substantial risk" standing inquiry. The *Clapper* Court never answered this question and instead succinctly observed that to the extent the "substantial risk" inquiry was

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[161] *Id.* While there is no direct proof for this theory, the fact that Justice Kennedy is generally a swing vote on the current Court, particularly in the context of standing cases, supports this theory. Mank, *supra* note 28, at 260. This also makes sense given the majority's efforts to distinguish the facts in *Clapper* from those in *Laidlaw*. *Clapper*, 133 S. Ct. at 1153.

[162] *See* discussion *supra* Part II.B.*2*.

[163] The First Circuit seemed to agree with this assertion in its decision in *Blum v. Holder*, which involved a pre-enforcement challenge of the Animal Enterprise Terrorism Act. 744 F.3d 790, 792 (1st Cir. 2014). The First Circuit noted that *Clapper*'s rejection of the Second Circuit's "objectively reasonable likelihood" standard may signal the Court's adoption of a "more stringent injury standard for standing" than it previously employed. *Id.* at 798.

[164] *See* discussion *supra* Part III.D.

relevant, the plaintiffs would have failed its requirements as well.[165] Lower courts have already begun voicing confusion as to when this alternative standard might apply,[166] and courts may fluctuate between the two tests depending on their preconceived notions as to whether standing should exist.[167]

This Note contends that an anticipatory challenge of an allegedly unconstitutional statute is one particular context where courts should apply the more lenient "substantial risk" test found in footnote five of *Clapper*. Anticipatory challenges involve cases where a plaintiff attempts to challenge the constitutionality of a statutory provision before any actual violation or enforcement takes place,[168] which is referred to as pre-enforcement review. In these contexts, the alleged injury for purposes of Article III standing comes in the form of a threat of prosecution arising from future statutory violations,[169] or the "chilling effect" that this threat has on First Amendment rights.[170] The overlap between anticipatory challenges and the general law of standing occurs when a plaintiff attempts to establish that a threat of future prosecution is credible, rather than speculative or imaginary.[171] While some courts analyze the ripeness doctrine[172] in conjunction

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[165] *Clapper*, 133 S. Ct. at 1150 n.5.

[166] *See, e.g.*, Hedges v. Obama, 724 F.3d 170, 196 (2d Cir. 2013) ("The Court did not explain when such a [substantial risk] standard might apply . . . .").

[167] Frequently with questions of justiciability, results are shaped by an unarticulated sense of the importance of the rights claimed and by an uncertain pragmatic assessment of the reality of the plaintiff's claimed need for guidance. WRIGHT ET AL., *supra* note 27, § 3532.5.

[168] *See, e.g.*, Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (involving a challenge of an Arizona statute before it was enforced against the plaintiffs).

[169] *See, e.g.*, *id.* (acknowledging that a future threat of prosecution can satisfy the injury requirement for Article III standing).

[170] *See, e.g.*, Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 393 (1988) (granting plaintiffs standing to pursue a pre-enforcement suit based on the danger of self-censorship which could occur even without an actual prosecution).

[171] *See Babbitt*, 442 U.S. at 298 (explaining that a plaintiff who desires to challenge a statute before its enforcement must demonstrate a "realistic danger" of sustaining a direct injury as a result of the statute's operation or enforcement).

[172] The ripeness doctrine seeks to separate matters that are premature for review from those cases that are appropriate for federal court action, because in the former matters, the injury may never occur. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967) (noting that the basic rationale for the ripeness doctrine is to keep courts form entangling themselves in abstract disagreements over administrative policies), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977). When analyzing the ripeness of an action, courts

with cases involving pre-enforcement review of a statute, more recently courts seem to fluctuate between considerations of standing and ripeness in this particular context "without pausing to explain the choice."[173]

The Supreme Court in *Steffel v. Thompson* held that when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative, a plaintiff need not first expose himself to actual arrest or prosecution in order to challenge the statute.[174] In other words, the Court does not require that one endure a criminal prosecution to be able to seek relief.[175] Rather, for purposes of establishing standing, it is sufficient for a plaintiff to "alleg[e] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," when "there exists a threat of prosecution thereunder."[176] However, a fear of future prosecution that is merely imaginary or speculative is not justiciable.[177]

A significant clue that the *Clapper* Court wanted to preserve the more lenient "substantial risk" test in the context of an anticipatory challenge is found in its reference to *Babbitt v. United Farm Workers National Union* in footnote five.[178] The Court in *Babbitt* held that the plaintiffs had standing to pursue an anticipatory challenge of an Arizona statute, even though the criminal penalty provision of the statute had never before been applied.[179] The *Clapper* Court's reference to *Babbitt* in footnote five is noteworthy, because some scholars suggest that *Babbitt* marked a shift in anticipatory challenge jurisprudence that broadened plaintiffs' ability to establish standing in these contexts.[180] This theory is supported by the *Babbitt* Court's

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generally look to the hardship on the parties by withholding consideration and the fitness of the issues for judicial review. *Id.* at 149.

[173] WRIGHT ET AL., *supra* note 27, § 3532.5.

[174] 415 U.S. 452, 459 (1974).

[175] Doe v. Bolton, 410 U.S. 179, 188 (1973).

[176] *Babbitt*, 442 U.S. at 298.

[177] Younger v. Harris, 401 U.S. 37, 42 (1971).

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

[179] *Babbitt*, 442 U.S. at 302.

[180] *See* MICHAEL L. WELLS ET AL., CASES AND MATERIALS ON FEDERAL COURTS 526–27 (2d ed. 2011) (discussing *Babbitt*). Lower courts have followed suit. For example, Judge Easterbrook recently heard a case involving an anticipatory challenge and explained that

statement that a plaintiff "must demonstrate a *realistic* danger of sustaining a direct injury."[181] Thus, the *Clapper* Court's approval of *Babbitt*, which contained language that suggested a fairly lenient standing inquiry, seems to suggest that "*Babbitt*" type anticipatory challenges are one context in which the Court wanted to apply the more lenient footnote five standing inquiry.

An additional reason why a more lenient standing inquiry is appropriate in this context is that anticipatory challenges often involve statutes that regulate free expression, which implicates First Amendment considerations.[182] The Court has long recognized free expression as a precious right[183] and has arguably used a relaxed standing inquiry for anticipatory challenges involving First Amendment concerns. For instance, *Virginia v. American Booksellers Ass'n* involved an anticipatory challenge to a statute that prohibited the display of sexually explicit material to juveniles.[184] The Court explained that it was "not troubled by the pre-enforcement nature of [the] suit," because the plaintiffs sufficiently alleged "some threatened or actual injury" stemming from the costly compliance measures they would be forced to take to avoid criminal prosecution.[185]

The Supreme Court's recent decision in *Susan B. Anthony List v. Driehaus*[186] suggests that the less onerous "substantial risk" test can be used in the context of pre-enforcement challenges to statutes that implicate free speech concerns. In that case, several advocacy organizations, including the Susan B. Anthony List (SBA), challenged the constitutionality of an Ohio law that criminalizes certain false statements made during the course of a political campaign.[187] Specifically, the law allows any person

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the threat of prosecution only had to be "actual" rather than "imminent" in order to confer standing. 520 S. Mich. Ave. Assocs. v. Devine, 433 F.3d 961, 962–63 (7th Cir. 2006).

[181] *Babbitt*, 442 U.S. at 298 (emphasis added). One commentator describes the standing theory in *Babbitt* as a "thin reed." WELLS ET AL., *supra* note 180, at 527.

[182] *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479, 489–90 (1965) (approving of plaintiffs' theory that the Louisiana Subversive Activities and Communist Control Law violated their right to freedom of expression).

[183] *See* Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 392–93 (1988) (discussing the standing "exception" in the First Amendment context).

[184] *Id.* at 387–88.

[185] *Id.* at 392–93.

[186] 134 S. Ct. 2334 (2014).

[187] *Id.* at 2338–39.

acting on personal knowledge to file a complaint with the Ohio Elections Commission (Commission).[188] After a complaint is filed, the Commission conducts an expedited hearing and issues a reprimand or can refer the matter to the relevant county prosecutor.[189] The SBA, a pro-life organization, desired to issue statements that various politicians who voted for the Patient Protection and Affordable Care Act supported "taxpayer-funded abortion."[190] The SBA claimed that its speech and associational rights were being "chilled and burdened" based on the prospect of being hailed before the Commission and being forced to "expend time and resources defending itself."[191]

The Court held that SBA's pre-enforcement challenge to the Ohio law was justiciable, and, specifically, that the SBA alleged a sufficiently imminent injury for the purposes of Article III standing.[192] While the Court did not resolve when the less onerous "substantial risk" test should be used, the Court 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."[193] The Court's use of the phrase "may suffice" rather than "will suffice" suggests that the "certainly impending" test and the "substantial risk" test are not interchangeable.[194] The *Susan B. Anthony List* Court did not further discuss the "certainly impending" test and went on to conclude that the "substantial" threat of Commission proceedings backed by the additional threat of criminal prosecution sufficed to create an Article III injury under the circumstances of the case.[195] The Court's discussion of the less demanding "substantial risk" test in the *Susan B. Anthony List* case is a telling indication that the Court intends the

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[188] *Id.* at 2338.

[189] *Id.* at 2338–39.

[190] *Id.* at 2339.

[191] *Id.* at 2340.

[192] *Id.* at 2338.

[193] *Id.* at 2341 (emphasis added).

[194] *See* Marty Lederman, Commentary, Susan B. Anthony List, Clapper *Footnote 5, and the State of Article III Standing Doctrine*, SCOTUSBLOG (June 17, 2014, 4:34 PM), http://www.scotusblog.com/2014/06/commentary-susan-b-anthony-list-clapper-footnote-5-and-the-state-of-article-iii-standing-doctrine/ (noting that one might infer ambiguity as to whether the use of "may suffice" rather than "will suffice" indicates that a showing of substantial harm might not be insufficient).

[195] 134 S. Ct. at 2346.

"substantial risk" test to be used in pre-enforcement challenges of statutes that implicate free speech issues.

Lower courts certainly have grounds to apply the less demanding "substantial risk" test in these contexts. Anticipatory challenges that involve a fear of future prosecution under a statute or that involve a statute that has a "chilling effect" on First Amendment freedoms are distinguishable from *Clapper*. For instance, "*Babbitt*"-like anticipatory challenges involve statutes that directly govern the plaintiff's intended conduct.[196] However, the FISA Amendments did not directly prohibit the *Clapper* plaintiffs' foreign communications in any way.[197] Instead, it only *authorized* government surveillance in *certain* contexts.[198] Thus, because § 1881(a) in *Clapper* did not "regulate, constrain, or compel any action" on the part of the plaintiffs,[199] it can be distinguished from the type of anticipatory challenges where the more lenient footnote five test should apply.

IV. CONCLUSION

The Supreme Court's 2013 decision in *Clapper v. Amnesty International USA* dealt with the controversial issue of the Government's electronic surveillance authority under the Foreign Intelligence Surveillance Act. While the surveillance issue in *Clapper* will undoubtedly be closely analyzed by scholars, the decision may also have a significant impact on the doctrine of Article III standing. *Clapper* has the potential to be interpreted in several different ways in the lower courts and, depending on which interpretation is adopted, may decidedly affect the ability of plaintiffs to establish Article III standing based on fear of future harm.

Lower courts could begin applying the strict "certainly impending" standing test used throughout *Clapper* in a rigid manner. On the other hand, courts might read the decision narrowly and reconcile it with past precedent or limit it to the

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[196] *See* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (explaining that the plaintiffs' intended conduct was directly proscribed by the statute in question).

[197] *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1144–45 (2013) (explaining the relevant FISA provision).

[198] *Id.* at 1149.

[199] *Id.* at 1153.

foreign affairs context. However, the best reading of *Clapper* is that the Court meant to signal a slight shift to a stricter standing doctrine where the "certainly impending" test would be *flexibly* applied. This theory is supported by footnote five of the opinion, which softens the potential impact of the decision by referencing an alternative and more lenient "substantial risk" standing inquiry. Thus, after *Clapper*, lower courts have the option of either adopting a more rigid "certainly impending" test to determine whether a fear of future harm is sufficient to establish the injury requirement of Article III standing, or of adopting a more lenient test that asks whether there is a "substantial risk" that a future harm will occur.

A glaring question left open in *Clapper* is *when* these two standards should apply, and lower courts have already begun expressing confusion as to this issue. One particular context where the more lenient footnote five test should apply is in the context of an anticipatory challenge of a statute where the alleged fear of future harm is a threat of future prosecution or the "chilling effect" the statute has on First Amendment rights. The more lenient "substantial risk" test is appropriate here because the Court tends to endorse more liberal theories of standing in these contexts, especially when First Amendment rights are implicated.

In all likelihood, the lower courts will continue to struggle with the proper interpretation of *Clapper* and the correct application of the "certainly impending" test referenced throughout the opinion. A true resolution of the proper scope of fear-based standing after *Clapper* may only come after another Supreme Court decision that applies the "certainly impending" test. Until then, *Clapper* has left courts with both a strong weapon to deny standing to plaintiffs in close cases, as well as an alternative avenue to grant plaintiffs standing in deserving contexts.

Amanda Mariam McDowell