Boston College Law Review

Volume 58 | Issue 1 Article 8

1-31-2017

Standing in the Future: The Case for a Substantial Risk Theory of "Injury-in-Fact" in Consumer Data Breach Class Actions

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STANDING IN THE FUTURE: THE CASE FOR A SUBSTANTIAL RISK THEORY OF "INJURY IN FACT" IN CONSUMER DATA BREACH CLASS ACTIONS

Abstract: The increasing digitalization of our personal and professional lives has generated corresponding growth in the amount of electronically stored private information in the hands of third parties. That private information is at risk of theft, loss, or manipulation. Employers that hold employee tax information and merchants that hold significant troves of consumer credit card data are particularly attractive targets. When hackers strike, victims often band together in federal class actions, naming the custodians of their private data as defendants. More and more, however, district courts are dismissing these class action claims at the doorstep for lack of Article III standing. The corporate defendants argue, and many courts agree, that a plaintiff's alleged increased risk of future data misappropriation is insufficient to satisfy the U.S. Supreme Court's test for an "injury in fact," a critical component of the traditional standing analysis. This Note argues that many consumer data breach class actions do in fact satisfy the Supreme Court's standing requirements, as outlined in the Court's 2013 decision in *Clapper v. Amnesty International USA* and its 2016 decision in *Spokeo, Inc. v. Robins*.

INTRODUCTION

In the age of the Internet consumer market, merchants and service providers hold increasing amounts of private personal data in their databases and on their servers.[1] With this vast amount of data storage comes increased risk that thieves and rouges, from both inside and outside a custodian entity, will breach the security protecting individual personal information.[2] Because the federal Class Action Fairness Act ("CAFA") provides a lower threshold for Article III diversity jurisdiction in multistate class actions than in traditional diversity

[1] *See* FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY 8–9, 22 (May 2014), https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf [https://perma.cc/5WJP-RKHS]; J. Thomas Richie, *Data Breach Class Actions*, BUS. LITIG. COMMITTEE NEWSL. (ABA), Winter 2015, at 12 (examining trends in data breach litigation).

[2] *See* Timothy H. Madden, *Data Breach Class Action Litigation—A Tough Road for Plaintiffs,* 55 BOS. B.J. 27, 28 (2011) (describing litigation challenges for plaintiffs in data breach class actions); Daniel J. Solove, *The New Vulnerability: Data Security and Personal Information*, in SECURING PRIVACY IN THE INTERNET AGE 111–12 (Anupam Chander et al., eds. 2008).

suits, many data breach cases are brought in federal district courts.[3] As courts of limited jurisdiction, the district courts are required to ensure cases are properly before them as a threshold matter.[4] Among other required components of proper jurisdiction, plaintiffs must have standing to sue.[5] Plaintiffs bear the burden of showing standing at every stage of litigation, and must allege sufficient facts to support their right to sue at the pleading stage or risk dismissal under Federal Rule of Civil Procedure 12(b)(1).[6]

In data breach class actions, often the most difficult aspect of standing for plaintiffs to adequately allege is that they have suffered an "injury in fact."[7] In essence, plaintiffs must show that they themselves have suffered the invasion of a legally protected right, and that their injury is neither hypothetical nor conjectural.[8] In many cases, data breach plaintiffs have not suffered actual misappropriation of their personal data, but are at increased risk for future data misuse.[9] The federal circuits have split on the adequacy of a future misappropriation theory of injury in fact, with some finding standing and others dismissing suits for want of it.[10] Many district courts assess the future misappropriation theory in light of the 2013 U.S. Supreme Court decision in *Clapper v. Amnesty International USA*, which was decided in the context of a challenge to the Foreign Intelligence Surveillance Act ("FISA").[11]

This is Note argues that *Clapper* may not have narrowed the standing inquiry as much as some district courts have concluded, and that there are valid reasons even in light of the Supreme Court's decision in *Clapper* to uphold Article III standing in at least some future injury theory data breach class ac-

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[3] *See* 28 U.S.C. § 1332(d) (2012) (waiving the complete diversity requirement for certain class action cases and allowing for the aggregation of claims to determine amount in controversy).

[4] *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005) (explaining that district courts are "courts of limited jurisdiction"); Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884) (explaining that U.S. courts have a continuing sua sponte duty to inquire into proper jurisdiction); *see also* FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

[5] Raines v. Byrd, 521 U.S. 811, 818 (1997).

[6] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (confirming that standing is an "irreducible constitutional minimum"); Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (establishing basic standing requirements).

[7] Richie, *supra* note 1, at 14.

[8] *Lujan*, 504 U.S. at 560–61.

[9] Richie, *supra* note 1, at 14 (noting cases in Ohio, Missouri, and Massachusetts where federal courts dismissed cases for lack of standing where plaintiffs failed to allege actual misappropriation of their personal information).

[10] *See* Katz v. Pershing, LLC (*Katz II*), 672 F.3d 64, 80 (1st Cir. 2012) (discussing the split); *see also* Richie, *supra* note 1, at 14 (observing that the federal circuits have diverged on standing issues in consumer data breach class actions).

[11] *See* Richie, *supra* note 1, at 10 (noting the impact that the *Clapper* decision has had on lower courts). *See generally* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013) (a standing case that implicated the future injury analysis).

tions.[12] Part I reviews the state of standing in the federal circuits and at the Supreme Court as it relates to data breach cases.[13] Part II provides a summary of the factual background and the Court's decision in *Clapper*.[14] Part III argues that the Court's opinion in *Clapper* embraces both a "certainly impending" injury theory and a "substantial risk" of injury theory for Article III standing, depending on the nature of the case.[15] Part IV argues that at least some data breach cases meet the requisite criteria for consideration under a substantial risk of injury theory of standing.[16]

I. DATA, BREACH, AND THE STATE OF STANDING

This Part begins in Section A with a brief examination of digitally stored information, and then sketches the challenges associated with its security.[17] Section B explores the state of the Supreme Court's standing doctrine, especially as it relates to consumer data breach class actions.[18]

A. Personal Data in the Modern World

Humanity produces 2.5 quintillion bytes of data daily.[19] One recent study concluded that the amount of data housed on the Internet in 2020 will be forty-four times larger than in 2009.[20] Companies have been quick to capitalize on this newfound source of consumer information, with U.S. Internet revenue reaching $42.8 billion in 2013.[21] A single data analytics company, Acxiom, recorded $850 million in revenue during 2015.[22] Consumer data now constitutes a more than $300 billion industry.[23]

Companies are not, however, the only actors interested in capitalizing on the growth of personal information.[24] Along with all of this increased data have

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[12] *See infra* notes 171–267 and accompanying text.
[13] *See infra* notes 17–83 and accompanying text.
[14] *See infra* notes 84–109 and accompanying text.
[15] *See infra* notes 110–170 and accompanying text.
[16] *See infra* notes 171–267 and accompanying text.
[17] *See infra* notes 19–36 and accompanying text.
[18] *See infra* notes 37–83 and accompanying text.
[19] *What Is Big Data?*, IBM, www-01.ibm.com/software/data/bigdata/what-is-big-data.html [https://perma.cc/B78K-C9QM] (last visited on Jan. 17, 2017).
[20] Billy Ehrenberg, *How Much Is Your Personal Data Worth?*, THE GUARDIAN (Apr. 22, 2014), https://www.theguardian.com/news/datablog/2014/apr/22/how-much-is-personal-data-worth [https://perma.cc/7G2R-JD4W].
[21] *Id.*
[22] *Acxiom Announces Fourth Quarter and Fiscal Year Results*, ACXIOM (May 17, 2016), http://investors.acxiom.com/releasedetail.cfm?releaseid=971434 [https://perma.cc/XR5Y-Q7TT].
[23] Jason Morris & Ed Lavandera, *Why Big Companies Buy, Sell Your Data*, CNN (Aug. 23, 2012), www.cnn.com/2012/08/23/tech/web/big-data-acxiom [https://perma.cc/V4CC-33PN].
[24] *See generally* FED. TRADE COMM'N, *supra* note 1 (providing an overview of the variety of organizations involved in the growth of personal data supplies).

come significant security challenges, and companies have been slow to react.[25] Hackers gained access to more than 177 million individual records in 2015.[26] Many breaches are at large companies and affect significant numbers of consumers.[27] In late 2013, Target acknowledged that hackers had gained access to forty million credit card records.[28] A year later, Home Depot announced an even bigger consumer credit card breach.[29] In December 2016, Yahoo announced that hackers had gained unauthorized access to more than one billion accounts.[30] That announcement came on top of a similar disclosure by Yahoo in September 2016, where the Internet giant conceded that 500 million accounts were compromised.[31]

Ordinary victims of data breach experience a diversity of injuries.[32] For many, compromised credit cards are simply canceled and reissued.[33] Others are compensated for unauthorized charges by the card-issuing banks.[34] Some, however, have their identities stolen and their credit ruined.[35] Victims have sought redress for these problems in the courts.[36]

B. Future Injury Standing and the Circuit Split

On December 23, 2010, Brenda Katz filed a class action lawsuit in the Federal District Court for the District of Massachusetts, pursuant to Massachu-

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[25] *See* Victoria L. Schwartz, *Corporate Privacy Failures Start at the Top*, 57 B.C. L. REV. 1693, 1694–96 (describing a series of corporate security failures and the corporations' responses).

[26] IDENTITY THEFT RESOURCE CTR., DATA BREACH REPORTS 4 (Dec. 29, 2015), http://www.idtheftcenter.org/images/breach/DataBreachReports_2015.pdf [https://perma.cc/46CW-Z229].

[27] *See* Claire Groden, *Here's Who's Been Hacked in the Past Two Years*, FORTUNE (Oct. 2, 2015), http://fortune.com/2015/10/02/heres-whos-been-hacked-in-the-past-two-years/ [https://perma.cc/V7YX-A7XQ] (providing a list of some of the largest data breaches between 2013 and 2015).

[28] Hiroko Tabuchi, *$10 Million Settlement in Target Data Breach Gets Preliminary Approval*, N.Y. TIMES (Mar. 19, 2015), https://www.nytimes.com/2015/03/20/business/target-settlement-on-data-breach.html [https://perma.cc/RE65-8VAK].

[29] Robin Sidel, *Home Depot's 56 Million Card Breach Bigger Than Target's*, WALL ST. J. (Sept. 18, 2014), http://www.wsj.com/articles/home-depot-breach-bigger-than-targets-1411073571 [https://perma.cc/3KPC-XP3W].

[30] Seth Fiegerman, *Yahoo Says Data Stolen from 1 Billion Accounts*, CNN (Dec. 15, 2016), http://money.cnn.com/2016/12/14/technology/yahoo-breach-billion-users/ [https://perma.cc/AY6Z-JB9R].

[31] *Id.*

[32] N. ERIC WEISS & RENA S. MILLER, THE TARGET AND OTHER FINANCIAL DATA BREACHES: FREQUENTLY ASKED QUESTIONS 18–19 (Cong. Research Serv. Feb. 2015), https://fas.org/sgp/crs/misc/R43496.pdf [https://perma.cc/4KEL-UZ32].

[33] *Id.*

[34] *Id.*

[35] *See* Kara Brandeisky, *These Are the Only Data Breaches You Really Need to Worry About*, TIME (Mar. 18, 2015), http://time.com/money/3746449/identity-theft-hacked-what-do/ [https://perma.cc/X9PD-PC69].

[36] *See* Richie, *supra* note 1 (examining growing numbers of consumer data breach class actions).

setts data privacy laws.[37] Katz held a brokerage account with an "introducing firm" that utilized clearing services provided by Pershing, LLC.[38] Her complaint alleged that Pershing's protection of her non-public personal information was inadequate, and that its fees for this inadequate protection were unfairly passed on to consumers.[39] In addition to pleading various contract, common law, misrepresentation, and consumer protection claims, Katz relied on provisions of Massachusetts state consumer data privacy laws, and sued on behalf of herself and all others similarly situated.[40] Pershing moved to dismiss the lawsuit under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) arguing that Katz lacked the required constitutional and statutory standing to sue.[41] The District Court granted the motion.[42]

Katz originally filed her complaint in federal district court pursuant to CAFA, codified at 28 U.S.C § 1332(d).[43] CAFA provides the federal district courts with subject matter jurisdiction over class actions that are minimally diverse, so long as there are at least one hundred plaintiffs and the amount in controversy exceeds five million dollars.[44] Because her state law claims were filed in federal court, Katz was required to show constitutional standing to pursue the case under the federal jurisdictional grant in Article III, in addition to statutory standing for her state law claims.[45] The resulting decision from the U.S. Court of Appeals for the First Circuit in 2012, upholding the dismissal, highlighted a profound split among the federal circuits on the issue of constitutional standing for consumers alleging improper storage or compromise of their personal data.[46]

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[37] Katz v. Pershing, LLC (*Katz I*), 806 F. Supp. 2d 452, 455 (D. Mass. 2011).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 456.

[43] *See* 28 U.S.C. § 1332(d) (2012); Class Action Complaint at 3, Katz v. Pershing, LLC, 806 F. Supp. 2d 452 (D. Mass. 2011) (1:10-cv-12227-RGS).

[44] *See* 28 U.S.C. § 1332(d). Congress passed the Class Action Fairness Act ("CAFA") in February 2005. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended at 28 U.S.C. § 1332(d)). In the first section of CAFA, Congress outlined its rationale for providing a lower threshold for invoking federal jurisdiction in class actions, finding that "[o]ver the past decade, there have been abuses of the class action device . . . ." *Id.* § 2(a)(2). These difficulties included damage to defendants who have acted responsibly and plaintiffs with legitimate claims, unduly large awards to certain plaintiffs while others received very little, and cases where plaintiffs' counsel received large contingency fees and actual plaintiffs received as little as a coupon. *See id.* § 2(a)(2)–(3). To solve these perceived problems, Congress sought to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction . . . ." *Id.* § 2(b)(2).

[45] *Katz II*, 672 F.3d at 71; *see also* Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 255 n.3 (1994) (explaining that plaintiffs are required to show standing at the outset).

[46] *See Katz II*, 672 F.3d at 80 (acknowledging the inconsistent approaches taken by other federal circuits).

Article III of the Constitution limits the federal judiciary's jurisdiction to "cases" or "controversies."[47] Over time, the Supreme Court has developed a standing jurisprudence that is designed in large part to ensure compliance with this constitutional mandate.[48] In recent years, the Court has developed a standard test for lower courts to apply in considering this threshold issue.[49] This test was clearly summarized in the Court's 1992 decision in *Lujan v. Defenders of Wildlife*.[50] In that case, the Court drew on aspects of several prior holdings to generate the three essential requirements of constitutional standing.[51]

First, plaintiffs must show that they have suffered an actual injury in fact.[52] The Court defined injury in fact as "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical."[53] Second, plaintiffs must show that the injury in fact is causally connected to the acts or omissions of the defendant—the injury must be "fairly traceable" to the conduct at issue.[54] Finally, the defendant must show the likelihood that there is a legal remedy for the injury; that is, it must be likely that "the injury will be redressed by a favorable decision."[55] The Court reaffirmed *Lujan*'s basic requirements in its 2016 decision in *Spokeo, Inc. v. Robins*, a case involving alleged misuse of personal information.[56]

In data breach class actions, like the one brought by Brenda Katz, the injury-in-fact analysis—the first prong of the *Lujan* test—is often the most com-

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[47] *See* U.S. CONST. art. III, § 2. Several prominent commentators, including The Chief Justice Roberts, have argued that the standing requirement in Article III serves the essential purpose of ensuring proper separation of powers, by prohibiting the judiciary from providing advisory opinions or ruling on matters of policy. *See, e.g.*, John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L. J. 1219, 1220 (1993); *see also* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (quoting Valley Forge Christian College v. Ams. United for Separation of Church & State, 454 U.S. 464, 474 (1982)) (stating that "this Court has recognized that the case-or-controversy limitation is crucial in maintaining the tripartite allocation of power set forth in the Constitution") (internal quotation marks omitted).

[48] *See* Whitmore v. Arkansas, 495 U.S. 149, 154–55 (1990) (explaining that standing inquiry is essential for compliance with Article III); Warth v. Seldin, 422 U.S. 490, 498 (1975) (finding that the requirement of Article III standing is "founded in concern about the proper—and properly limited—role of the courts in a democratic society"); Baker v. Carr, 369 U.S. 186, 198–200 (1962) (determining that violations of the Fourteenth Amendment's equal protection guarantee affecting the particular plaintiffs involved in the suit satisfied the "case or controversy" requirement of Article III); Fairchild v. Hughes, 258 U.S. 126, 129 (1922) (holding that Article III does not provide standing for private citizens to challenge alleged violations of public rights).

[49] *See Lujan*, 504 U.S. at 560–61 (citing cases from the Court have that have helped develop the standard).

[50] *See id.* at 560.

[51] *See id.* at 560–61.

[52] *Id.* at 560.

[53] *Id.* (citations and internal quotation marks omitted).

[54] *Id.* (citations and internal quotation marks omitted).

[55] *Id.* at 561 (citations and internal quotation marks omitted).

[56] *See Spokeo*, 136 S. Ct. at 1547.

plex.[57] This is because the injuries alleged are prospective; the plaintiffs are concerned about the future misappropriation of their personal information.[58] Absent definitive guidance on the application of the "actual or imminent" standard outlined in *Lujan* to these particular kinds of future injuries, the federal circuits analyzed data breach claims in differing ways.[59]

When called upon to decide whether Brenda Katz had standing to sue, the First Circuit was thus confronted with a substantial disagreement between its sister circuits.[60] To begin, the court dismissed all of Katz's common law, misrepresentation, and consumer protection claims as insufficiently plead or lacking justiciability for various reasons.[61] All that remained were her claims for violations of the Massachusetts data privacy laws.[62] The First Circuit ultimately agreed with the district court that Katz lacked Article III standing because she could not show that her personal information was actually compromised, but the court indicated in dicta a possible willingness to consider a theory of injury centered on future misappropriation of actually compromised data.[63]

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[57] *See Katz I*, 806 F. Supp. 2d at 457 (citing *Lujan*, 504 U.S. at 560–61, and noting that several federal district courts have dismissed similar probabilistic standing arguments in data breach cases as not satisfying the injury-in-fact requirement); David L. Silverman, *Developments in Data Security Breach Liability*, 70 BUS. LAW. 231, 236–37 (2014/2015) (collecting cases and analyzing injury-in-fact allegations after defendants moved for dismissal under Federal Rule of Civil Procedure 12).

[58] *See* Angelo A. Stio III et al., *Standing and the Emerging Law of Class Actions*, 2015 N.J. LAW. 49, 49–50 (noting standing challenge for data breach class action plaintiffs).

[59] *Compare* Reilly v. Ceridian Corp., 664 F.3d 38, 41–42 (3d Cir. 2011) (finding a future injury too speculative under the standard announced in *Lujan*), *with* Krottner v. Starbucks Corp., 628 F.3d 1139, 1141–43 (9th Cir. 2010) (finding future injury based standing in light of the standard set out in *Lujan*).

[60] *See Katz II*, 672 F.3d at 80 (noting the circuit split and distinguishing the case at bar on the facts).

[61] *See id.* at 72–78. With respect to Katz's common law claims for breach of contract, the court concluded that Katz had standing, but failed to state a claim upon which relief could be granted under New York law (which applied as to the contractual provisions she and Pershing agreed to). *See id.* Consequently, the court dismissed those claims under Federal Rule of Civil Procedure 12(b)(6). *Id.*

[62] *See id.* at 78. Contrary to the district court, for the purposes of determining federal standing and jurisdiction, the First Circuit assumed, without deciding, that Massachusetts data privacy laws included a private right of action. *See id.*

[63] *See id.* at 80 ("[T]he risk of harm that [Katz] envisions is unanchored to any actual incident of data breach. This omission is fatal: because she does not identify any incident in which her data has ever been accessed by an unauthorized person, she cannot satisfy Article III's requirement of actual or impending injury."). Katz raised two primary allegations with respect to the Massachusetts data privacy statute. *Id.* The first came from Pershing's failure to provide adequate security measures, and her assumption that numerous breaches must have occurred. *Id.* Katz further argued that the statute required notification of those breaches, and that Pershing failed to notify her as required. *Id.* The court dispensed with that allegation quickly, noting that Katz was unable to point to a single instance of actual unauthorized access or misappropriation of her personal data. *See id.* In analyzing the injury-in-fact requirement, the court analogized to *Lujan*. *See id.* at 78. The court held that *Lujan* and a series of other environmental standing cases instruct courts to dismiss cases where the only alleged injury is the defendant's failure to meet a particular legal requirement, if that failure does not create an injury in fact for the plaintiff. *See id.*

The essence of Katz's claim was that Pershing's failure to adhere to particular Massachusetts privacy regulations increased the risk of misappropriation and the resultant harm.[64] The court noted a significant circuit split with respect to this theory of injury, but concluded that Katz's case was distinguishable from the cases that embraced the theory.[65] Her case did "not mirror" those that found injury in fact for future misappropriation of compromised data because she did not plead any facts suggestive of actual data compromise.[66] In other words, because Katz could not show that her data was ever actually stolen or leaked from Pershing, the future injury theory was unavailable.[67]

Though the First Circuit never squarely addressed the future misappropriation theory of injury in fact for a case where data was truly lost, several other circuits have, and reached opposite conclusions.[68] *Krottner v. Starbucks*, a 2010 case from the U.S. Court of Appeals for the Ninth Circuit, is paradigmatic of the future data misappropriation injury theory.[69] In that case, a laptop was stolen that contained the unencrypted personal data of 97,000 Starbucks employees on its hard drive.[70] Most of the plaintiffs did not allege that their data had been misused, but pointed to the increased risk of future misuse.[71] The Ninth Circuit found that such an injury was sufficient to confer Article III standing, noting that plaintiffs who have plead "a credible threat of harm" that is "not conjectural or hypothetical," have established their right to sue.[72] In so holding, the Ninth Circuit implicitly found that the threat of future data misappropriation is both "credible" and "not hypothetical."[73]

The U.S. Court of Appeals for the Seventh Circuit reached a similar conclusion in 2007, in *Pisciotta v. Old National Bancorp*.[74] There, the court analogized the enhanced risk of future data misappropriation theory to other cases

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[64] *Id.* at 78.

[65] *Id.* at 80.

[66] *Id.*

[67] *Id.* at 79.

[68] *See id.* at 80 (noting that "[t]he allegations in [the] case do not mirror" cases where standing was found after plaintiffs alleged actual data breach occurred); *see also Krottner*, 628 F.3d at 1143 (finding that plaintiffs had adequately plead injury in fact when a laptop containing personal information of 97,000 employees was stolen); Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 632, 634 (7th Cir. 2007) (concluding that future risk of injury resulting from a "sophisticated, intentional and malicious" banking database intrusion was an adequate injury in fact).

[69] *See Krottner*, 628 F.3d at 1142 (concluding that increased risk of data misuse was sufficient injury).

[70] *Id.* at 1140.

[71] *Id.* at 1142. One employee did allege that an unknown individual attempted to open a bank account with his social security number, but the bank closed the offending account before any financial loss was incurred. *Id.*

[72] *Id.* at 1143.

[73] *See id.* (reviewing injury-in-fact requirements for Article III standing and concluding that, "on these facts," injury in fact had been adequately pleaded).

[74] *See Pisciotta*, 499 F.3d at 634.

both inside and outside of the Seventh Circuit that found standing in situations where plaintiffs alleged increased risk of future injuries.[75] The court examined cases involving elevated risk of future injury from exposure to toxic substances, the possibility of future health problems associated with defective medical devices, and the increased risk of the loss of retirement benefits based on an ERISA plan administrator's increased discretion.[76] The court concluded that "the injury-in-fact requirement can be satisfied by a threat of future harm . . . ."[77]

In 2011, the U.S. Court of Appeals for the Third Circuit took a very different view in its decision in *Reilly v. Ceridian Corp*.[78] In that case, a payroll processing company suffered a data breach that exposed approximately 27,000 individuals to at least some potential misappropriation of social security numbers, full names, and in some cases birthdates and bank account numbers.[79] The plaintiffs in the resulting class action plead, among other present injuries, the increased risk of future identity theft.[80] Citing *Whitmore* and *Lujan*, the Third Circuit found that this theory of injury in fact was hypothetical and did not give rise to Article III standing.[81] The court found that *Whitmore* precluded standing for allegations of "possible future injury," and concluded that where plaintiffs have alleged no actual misuse of personal data stemming from the breach, there is no injury.[82] The court explicitly rejected the reasoning of both the Seventh and Ninth Circuits, finding that the facts before it closely paralleled *Lujan* and noting that the Supreme Court has routinely dismissed cases for lack of standing when future injuries that are not "certainly impending" are alleged.[83]

II. GUIDANCE FROM THE U.S. SUPREME COURT: *CLAPPER V. AMNESTY INTERNATIONAL USA*

This Part examines constitutional standing doctrine in light of the U.S. Supreme Court's 2013 opinion in *Clapper v. Amnesty International USA*, with particular focus on the decision's consequences for data breach plaintiffs at the pleading stage.[84]

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[75] *See id.* at 634 n.3 (citing class action cases involving toxic torts, medical device manufacturing defects, and environmental damage or pollution).

[76] *Id.*

[77] *Id.* The court affirmed dismissal of the plaintiff's suit, however, because there was no state law remedy under traditional Illinois tort and contract law, absent a showing of actual damages. *See id.* at 640.

[78] *See Reilly*, 664 F.3d at 42–43 (concluding that increased risk of future data misappropriation does not satisfy Article III standing requirements).

[79] *Id.* at 40.

[80] *Id.*

[81] *Id.* at 42.

[82] *Id.* at 42, 44.

[83] *Id.* at 42, 44–45.

[84] *See infra* notes 85–109 and accompanying text.

The Court's decision in *Clapper* provided additional guidance for courts analyzing prospective injuries related to misappropriation of personal data and communications under the Court's 1992 decision in *Lujan v. Defenders of Wildlife*.[85] The *Clapper* plaintiffs were a collection of non-profits and news media organizations conducting significant communication and research with overseas entities, often in areas of strategic intelligence importance to the United States.[86] The plaintiffs were concerned that provisions of FISA, which allows the Foreign Intelligence Surveillance Court to approve federal wiretapping aimed at targets that are not "United States persons" overseas absent the traditional elements of probable cause.[87] The plaintiffs, United States persons under the statutory definition, feared that FISA would eventually lead the government to capture their conversations as well, in violation of the Fourth Amendment and the text of the statute itself.[88] They sought a declaration that the FISA provisions at issue were facially unconstitutional and an injunction prohibiting any further collection of data pursuant to them.[89]

The Court did not reach any of the merits of the constitutional claims related to FISA, and instead disposed of the case by holding that the plaintiffs lacked standing to sue because their asserted future injuries were too speculative.[90] Justice Samuel Alito, writing for the five-member majority, emphasized that future injuries must be "certainly impending," and that the definition of imminent "cannot be stretched beyond its purpose," so that it defeats the primary purpose of ensuring compliance with Article III.[91]

Clapper cited to *Whitmore v. Arkansas*, decided by the Supreme Court in 1990, for the "certainly impending" standard.[92] In that case, the Court ex-

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[85] *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1142, 1146–47 (2013); *see also* Bradford C. Mank, Clapper v. Amnesty International*: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211, 221 (2014) (explaining that, prior to *Clapper*, the Court had never defined the imminent injury test outlined in *Lujan*).

[86] *Clapper*, 133 S. Ct. at 1145–46.

[87] *Id.* at 1144.

[88] *Id.* at 1144–45. The Foreign Intelligence Surveillance Act ("FISA") defines a "United States person" as "a citizen of the United States, an alien lawfully admitted for permanent residence . . . , an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States." 50 U.S.C.A. § 1801(i) (West 2015).

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

[90] *See id.* at 1143, 1147–48 (concluding that "respondents' theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending").

[91] *Id.* at 1147 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 565 n.2 (1992)).

[92] *See id.* (citing Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)). In *Whitmore*, the Court dismissed a death row inmate's attempt to intervene on behalf of another condemned prisoner's behalf. 495 U.S. at 166. The petitioner inmate argued that, if his own federal habeas corpus petition was approved, he would receive a new trial. *Id.* at 156–57. If at the end of his second trial he was again convicted and sentenced to death, he would receive additional review from the Arkansas Supreme Court, which would compare his crime and sentence to other crimes that received death sentences in Arkan-

plained that "allegations of possible future injury," that are the final results of long, speculative casual chains are insufficient to support Article III standing.[93] In analyzing the plaintiffs' arguments for standing based on future injury in *Clapper*, the Court found that their theories relied on a similarly improbable series of events occurring before they suffered an actual injury.[94] For example, the Court noted that even if the plaintiffs could show that the government intended to seek FISA Court approval to tap their communications, they could not know whether the FISA Court would approve the government's request.[95]

In addition, the court was concerned that, even if the plaintiffs' data was collected (and an injury in fact was present), there would be no way to know if it was collected pursuant to the challenged FISA provisions or some other statutory vehicle.[96] Such indeterminacy would violate the second prong of the *Lujan* test, which requires a causal connection between (in this case) the challenged statute and the plaintiffs' injuries.[97]

The Court was also not persuaded by the plaintiffs' alternative arguments that, because of the FISA statutory scheme, they were forced to *assume* that their data was collected, and thus to take appropriate protective measures.[98] It found those allegations factually insufficient and based on speculation, and declined to allow plaintiffs to "manufacture" an injury in fact by taking preventative measures in response to feared future harms.[99]

Some commentators have suggested that the Supreme Court intended to resolve the dispute with respect to future injury standing when it decided

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sas. *Id.* He argued that, if such relief and review were granted, he would be harmed if the condemned prisoner on whose behalf he sought to intervene chose to forego a final round of post-conviction relief, because that crime would not be included in the state supreme court's "database" of capital crimes. *Id.* The Court deemed this chain of events far too speculative to support third party standing in the other condemned prisoner's case. *See id.* at 157. The Court's "certainly impending" language in *Whitmore* is drawn from an early twentieth century decision, 1923's *Pennsylvania v. West Virginia*, where the court ruled that actual present injury is not required to satisfy Article III. *Id.* at 158; Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923).

[93] *See Whitmore*, 495 U.S. at 158; *see also Clapper*, 136 S. Ct. at 1147–48 (citing *Whitmore*, among other cases, for the proposition that injury-in-fact standing theories predicated on the future occurrence of inference after inference are insufficient for Article III purposes).

[94] *See Clapper*, 135 S. Ct. at 1148–50 (reviewing the five ways in which the plaintiff's injury theory rested on speculative chains of causation).

[95] *Id.* at 1149–50.

[96] *Id.* at 1149.

[97] *Id.*; *see also Lujan*, 504 U.S. at 560 (requiring alleged injuries to be "fairly traceable to the challenged action of the defendant") (internal quotation marks omitted).

[98] *Clapper*, 133 S. Ct. at 1150–51. The respondent journalists and non-profits argued that because the government had the power to collect information related to non-citizens overseas and because they made regular contact with such individuals likely to be included in the surveillance, their own communications were likely to be intercepted. *Id.* at 1144–46. Accordingly, plaintiff organizations stopped communicating electronically with certain non-U.S. contacts, instead incurring the cost to travel and meet in person. *Id.*

[99] *Id.* at 1151.

Clapper.[100] Nevertheless, the case has both served as the primary justification for dismissals in data breach cases at the pleading stage and been cited as justification for upholding standing in others, leaving the uncertainty unresolved.[101] Some courts that have found sufficient standing even in light of *Clapper* had standing precedents for data breach plaintiffs that were well-established before the case was decided.[102]

In *Remijas v. Neiman Marcus Group, LLC*, the U.S. Court of Appeals for the Seventh Circuit determined that its future injury jurisprudence in data breach cases survived the Supreme Court's holding in *Clapper*.[103] The Seventh Circuit reaffirmed its holding in *Remijas* in its 2016 decision in *Lewert v. P.F. Chang's China Bistro, Inc.*, reiterating that increased risk of future data misappropriation is sufficient to confer Article III standing under *Clapper*.[104] District courts in the Ninth Circuit have expressed a similar view with respect to the Ninth Circuit Court of Appeals 2010 decision *Krottner v. Starbucks*.[105] Some California district courts have noted that *Clapper* did not overrule any existing precedent or establish any new Article III standing framework, and concluded that "certainly impending" future injuries continue to provide adequate standing.[106] One court, the U.S. Court of Appeals for the Sixth Circuit, has applied *Clapper* in the absence of prior circuit precedent and concluded that future injuries meet the Supreme Court's demanding standard.[107]

By contrast, a series of district court decisions in states other than California have found that *Clapper* precludes the future misappropriation theory of

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[100] *See* Mank, *supra* note 85, at 264 (arguing that "[t]he text of the *Clapper* majority opinion suggested that the 'certainly impending' injury requirement is generally applicable to all standing cases").

[101] *Compare In re* Barnes & Noble Pin Pad Litig., No. 12–cv–8617, 2013 WL 4759588, at *5 (N.D. Ill. Sept. 3, 2013) (unpublished memorandum and order dismissing a claim for future injuries in light of *Clapper*), *with* Remijas v. Neiman Marcus Group, LLC, 794 F.3d 688, 692–93 (7th Cir. 2015) (finding that Seventh Circuit data breach standing in future injuries cases survived the Supreme Court's ruling in *Clapper*), *and In re* Adobe Systems, Inc. Privacy Litig., 66 F. Supp. 3d 1197, 1212 (N.D. Cal. 2014) (finding that Ninth Circuit precedent regarding data breach standing and future injuries was valid after *Clapper*). *See* Angelo A. Stio III et al., *supra* note 58, at 49–50 (noting that many district courts have allowed motions to dismiss on standing grounds in the wake of *Clapper*).

[102] *See Adobe Systems*, 66 F. Supp. 3d at 1212; *see also* Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 632 (7th Cir. 2007) (finding a future injury theory sufficient to establish standing). *But see* Galaria v. Nationwide Mut. Ins. Co., Nos. 15-3386 & 15-3387, 2016 WL 4728027, at *3 (6th Cir. Sept. 12, 2016) (citing *Clapper* to uphold standing in the absence of established circuit precedent).

[103] *See Remijas*, 794 F.3d at 692–693.

[104] Lewert v. P.F. Chang's China Bistro, Inc., 819 F.3d 963, 966–67 (7th Cir. 2016).

[105] *See* Krottner v. Starbucks Corp., 628 F.3d 1139, 1143 (9th Cir. 2010); *see also In re* Sony Gaming Networks & Consumer Data Security Breach Litig., 996 F. Supp. 2d 942, 961–62 (S.D. Cal. 2014) (reaffirming a prior finding of Article III standing in light of *Clapper*); *Adobe Systems*, 66 F. Supp. 3d at 1213–14 (citing *Sony Gaming Networks*, 996 F. Supp. 2d at 961).

[106] *See, e.g.*, *Adobe Systems*, 66 F. Supp. 3d at 1213–14 (citing *Sony Gaming Networks*, 996 F. Supp. 2d at 961) ("[T]he Court is reluctant to conclude that *Clapper* represents the sea change that Adobe suggests.").

[107] *Galaria*, 2016 WL 4728027, at *3.

standing.[108] While a circuit opinion precisely on point that finds a lack of standing has yet to issue, it seems clear that *Clapper* has turned the tide against plaintiffs in a great number of data breach class action cases where the pre-existing law of the circuit was already against them.[109]

III. FOOTNOTE FIVE: AN INTERMEDIATE STANDARD?

This Part first considers the standing theories evident in both the U.S. Supreme Court's 2013 majority opinion in *Clapper v. Amnesty International USA* and in Justice Breyer's dissent in that case, and notes that the splintered decision reflects at least two historically conflicting visions of Article III's limitations.[110] Nevertheless, a close examination of the *Clapper* majority opinion's inclusion of footnote five suggests the presence of a third standing theory with roots in the Court's environmental jurisprudence, that may have been included to secure Justice Kennedy's vote.[111] That theory, called the "substantial risk" theory may have survived *Clapper*'s perceived narrowing of the federal courthouse doors.[112] This Part examines how such a rule might, at least in theory, apply to some data breach class actions.[113]

Justice Alito, writing for the majority in *Clapper*, emphasized that the Court has often articulated the "certainly impending" standard, and that the Court was not announcing any new law or working a major change in its standing jurisprudence.[114] Consequently, it is possible to view the result in *Clapper* as merely an affirmation of the Court's prior jurisprudence, and a reminder to the lower

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[108] *See, e.g.*, *Barnes & Noble*, 2013 WL 4759588 (concluding that "actual injury in the form of increased risk of identity theft is insufficient to establish standing"); Galaria v. Nationwide Mut. Ins. Co., 998 F. Supp. 2d 646, 654 (S.D. Ohio 2014), *rev'd*, 2016 WL 4728027 (6th Cir. 2016) (holding that "an increased risk of identity theft, identity fraud, medical fraud or phishing is not itself an injury in fact because Named Plaintiffs did not allege—or offer facts to make plausible—an allegation that such harm is 'certainly impending'").

[109] *See* Heidi J. Milicic, *Standing to Bring Data Breach Class Actions Post*-Clapper, ABA SEC. LITIG.: COMMERCIAL & BUS. (Aug. 7, 2014), http://apps.americanbar.org/litigation/committees/commercial/articles/summer2014-0814-data-breach-class-actions-post-clapper.html [https://perma.cc/BP5Y-QPZ9] (noting high rates of successful standing challenges by data breach defendants in wake of *Clapper*).

[110] *See infra* notes 114–170 and accompanying text.

[111] *See infra* notes 114–170 and accompanying text.

[112] *See infra* notes 134–170 and accompanying text.

[113] *See infra* notes 134–170 and accompanying text.

[114] *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1148 (2013); *see also id.* at 1150 (noting the Court's "usual reluctance" to accept contingent theories of standing).

courts of the judiciary's proper role in a constitutional democracy.[115] The dissenters in *Clapper*, however, felt differently.[116]

Justice Breyer, writing in dissent for himself and three other justices, acknowledged that the Court continues to use the same language to describe the requirement for a well-pleaded injury in fact: the injury must be "certainly impending."[117] He argued, however, that the *Clapper* majority changed the semantic meaning of the word "certainly," and produced a significantly more restrictive standing jurisprudence as a result.[118] Surveying a series of landmark standing cases, Justice Breyer maintained that the Court has used the word "certainly" in a variety of ways across cases, but that it has never intended it to mean absolute certainty.[119] Broadly speaking, he argued that "certainly" is meant to emphasize the word "impending," which immediately follows.[120] In essence, he suggested that the imminence requirement for injury in fact is intended to point to the basic constitutional requirement that a case or controversy be readily cognizable to a reviewing court.[121] Injuries too distant in time or lacking in reasonable probability, like those arising in a future campaign for reelection (which might or might not occur at all) are not "certainly impending."[122] In other words, it is uncertain if such an injury is impending at all.[123]

Justice Breyer suggested that many future-risk-of-injury cases have met this more elastic standard.[124] He pointed to the fact that the future is, after all, inherently uncertain, but that this baseline indeterminacy of forthcoming events has never stopped the federal judiciary from issuing injunctions to prevent impending harms (as in environmental cases) or for hearing requests for declaratory relief (as in the case of facially unconstitutional laws).[125] Instead of requiring certainty in the absolute sense as the majority appears to do, Justice

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[115] *See* Mank, *supra* note 85, at 242–44 (observing that both the majority and dissent in *Clapper* cite *Lujan* heavily, and that both cases express the importance of the standing inquiry for judicial compliance with Article III, in addition to ensuring the separation of powers).

[116] *See Clapper*, 133 S. Ct. at 1160 (Breyer, J., dissenting) ("[*C*]*ertainty* is not, and never has been, the touchstone of standing.").

[117] *Id.*

[118] *See id.* at 1161 (arguing that the Majority's interpretation of the word "certainly" is too literal).

[119] *See id.* at 1160–61 (pointing out some of the Court's cases that interpret the term "certainly").

[120] *Id.* at 1161 ("Taken together the case law uses the word 'certainly' as if it emphasizes, rather than literally defines, the immediately following term 'impending.'").

[121] *See id.* at 1155–56 (explaining that standing doctrine "helps to ensure that the legal questions presented to the federal courts will not take the form of abstract intellectual problems").

[122] *See id.* at 1160 (Breyer, J., dissenting) (citing McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010)).

[123] *See id.*

[124] *See id.* at 1160–61.

[125] *See id.*

Breyer advocated for a "reasonably likely" or "highly likely" standard.[126] He concluded that the plaintiffs in *Clapper* met this standard.[127]

Clapper thus presents at least two divergent views of the constitutional dimensions of standing.[128] Justice Alito and the majority appear to suggest that future injuries do not generate standing to sue unless they are almost certain to occur.[129] The majority's reasoning in *Clapper* mirrors other rule-based standing theories that are intended to curtail the reach of the federal judiciary and ensure the separation of powers.[130] Chief among these is Justice Scalia's majority opinion in *Lujan v. Defenders of Wildlife*, where the Court put great emphasis on the standing doctrine's traditional role of limiting the province of the federal courts to cases actually in controversy.[131] By contrast, Justice Breyer and the dissenters in *Clapper* would embrace a more liberal standing jurisprudence for future injuries, and require only a "reasonable probability" of the injury occurring.[132] Observers have dubbed this the probabilistic approach to standing and noted its pragmatic or legal realist underpinnings.[133]

At least one commentator, however, has suggested that there is a third theory of standing lurking in the shadows of what appears to be a relatively straightforward ideological split in the Court.[134] In footnote five of the majority opinion in *Clapper*, Justice Alito seemed to acknowledge that absolute certainty might not be required in all cases.[135] He admitted that, in certain circum-

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[126] *See id.* at 1160. ("[T]hat degree of certainty is all that is needed to support standing here.").

[127] *Id.* at 1165.

[128] *See id.* at 1148 (majority opinion); *id.* at 1160 (Breyer, J., dissenting); *see also* Mank, *supra* note 85, at 215 ("[T]he *Clapper* decision presented two familiar approaches to standing.").

[129] *See Clapper*, 133 S. Ct. at 1143, 1147 (majority opinion).

[130] *See id.* at 1147; *see also* Mank, *supra* note 85, at 240 (noting similarities between the Court's rationale in *Clapper* and the separation of powers arguments made by Justice Antonin Scalia and Chief Justice Roberts).

[131] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (explaining the nexus between the standing doctrine and separation of powers); *see also* Mank, *supra* note 85, at 242–43 (examining Justice Scalia's scholarship espousing standing as a means of ensuring separation of powers in relation to his opinion for the Court in *Lujan*).

[132] *Clapper*, 133 S. Ct. at 1165 (Breyer, J., dissenting).

[133] *See* F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 65–70 (2012) (providing an overview of the probabilistic approach to standing).

[134] *See, e.g.*, Mank, *supra* note 85, at 215–16 (arguing that *Clapper*'s footnote five implies a third theory of standing).

[135] *See Clapper*, 133 S. Ct. at 1150 n.5. The full text of footnote five reads:

> 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. In addition, plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the

stances, the Court has "found standing based on a 'substantial risk' that the harm will occur . . . ."[136]

Some legal scholars speculate that the language of footnote five was added to secure Justice Kennedy's vote for the majority.[137] It is true that Justice Kennedy has often proved the swing vote in a wide range of standing-related cases.[138] His vote to allow the House of Representatives to defend the federal Defense of Marriage Act in *United States v. Windsor* is particularly illustrative.[139] His dissent in the companion case, *Hollingsworth v. Perry*, which dismissed a challenge to California's Proposition 8 on standing grounds, also indicates Justice Kennedy's willingness to entertain a somewhat expansive view of standing in some cases.[140]

Other writers suggest that Justice Kennedy's concurrence in *Lujan* indicated he is receptive to the idea that Congress may grant standing through statute where the common law ordinarily would not.[141] One author speculates that Justice Kennedy voted against the plaintiffs in *Clapper* because Congress did not provide a well-articulated and narrowly-drawn private right of action within the statutory text of FISA.[142]

Still others note that footnote five helps to "square" *Clapper*'s holding with a long line of Supreme Court decisions upholding standing in environ-

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> substantial risk of harm. Plaintiffs cannot rely on speculation about "the unfettered choices made by independent actors not before the court."

Id. (citations and internal quotation marks omitted).

[136] *Id.* (citing Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 153 (2010)).

[137] Mank, *supra* note 85, at 260; *see also* Clapper *and* Remijas*: A Footnote in the Door for Data Breach Plaintiffs*, ABA SEC. LITIG.: MASS TORTS LITIG. (Nov. 10, 2015), http://apps.americanbar.org/litigation/committees/masstorts/articles/fall2015-1115-clapper-remijas-footnote-door-data-breach-plaintiffs.html [https://perma.cc/BP5Y-QPZ9] [hereinafter ABA, Clapper *and* Remijas] ("The footnote, an unusual concession that undercuts the [Court's] newly minted standard, feels out of place and may have been inserted to hold the narrow majority in light of Justice Breyer's dissent.").

[138] *See* Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1070 (2009) ("Here, as in other areas, Justice Kennedy is the median Justice whose views determine the outcome in close cases.").

[139] *See* United States v. Windsor, 133 S. Ct. 2675, 2685–86, 2688 (concluding that the government's failure to pay tax refunds to same-sex couples preserved an Article III injury, despite the government's acknowledgment that the Defense of Marriage Act was unconstitutional); *see also* Mank, *supra* note 85, at 261 (noting Justice Kennedy's distinction in *Windsor* between judicially created prudential standing rules and Article III's more narrow constitutional demands).

[140] *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (Kennedy, J., dissenting) (arguing that a California law allowing private citizens to defend the constitutionality of initiative legislation where the State executive fails to enforce it confers Article III standing in federal court); *see also* Heather Elliot, *Federalism Standing*, 65 ALA. L. REV. 435, 444–45 (2014) (examining Justice Kennedy's willingness to grant ballot initiative proponents standing to defend a California law where the state refused to do so).

[141] *See, e.g.*, Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1054–55 (2009).

[142] Mank, *supra* note 85, at 259.

mental cases.[143] As one scholar explained, environmental cases frequently allege injuries that are prospective and non-economic in nature.[144] Often, plaintiffs allege an increased risk of future injuries due to agency rulemaking or defendant conduct.[145] The Court, in a series of cases including 1972's *Sierra Club v. Morton* and 2000's *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* explicitly acknowledged the sufficiency of future injuries for the purposes of satisfying Article III in the environmental context.[146] Both *Sierra Club* and *Laidlaw* even acknowledged that, at least in environmental cases, mere aesthetic degradation of the resource may be sufficient to establish injury in fact.[147]

In *Sierra Club,* an environmental group challenged federal approval of a plan to develop an area of the Sequoia National Park into a ski area under the Administrative Procedure Act.[148] The plaintiffs argued that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations."[149] While the Supreme Court ultimately concluded that the Sierra Club lacked standing to sue because it had failed to allege that any of its members actually used the area in question (something they presumably could have established but neglected), the Court did acknowledge that aesthetic future injuries were sufficient to confer standing under Article III.[150] In *Laidlaw*, the Court was confronted with similar alleged injuries, this time upholding standing.[151] In that case, environmental groups brought "citizen suits" under the Clean Water Act alleging that Laidlaw was discharging toxic chemicals into the North Tyger River in violation of permit obligations.[152] Laidlaw argued that the environmental groups had not suffered an injury in fact, but the Court concluded that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the

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[143] *See* Jeremy P. Jacobs, *Wiretap Ruling Could Haunt Environmental Lawsuits*, GREENWIRE (May 20, 2013), http://www.eenews.net/stories/1059981453 [https://perma.cc/MN3W-NRYC].

[144] *See* Richard J. Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 19 PACE ENVTL. L. REV. 619, 636 (2002).

[145] *See, e.g.*, Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 615, 616 (2d Cir. 1965) (finding that plaintiffs had established standing where they had demonstrated sufficient interest in natural resources that might be negatively impacted by the construction of a power plant).

[146] *See* Friends of the Earth, Inc., v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 184 (2000) (finding standing where river pollution from a hazardous waste incineration facility increased likelihood that petitioner recreational river users would be affected in their use of the resource); Sierra Club v. Morton, 405 U.S. 727, 734, 741 (1972) (holding that standing exists for future injuries in environmental cases, but denying Article III standing on other grounds).

[147] *Laidlaw*, 528 U.S. at 183; *Sierra Club*, 405 U.S. at 735.

[148] *Sierra Club*, 405 U.S. at 729–30.

[149] *Id.* at 734.

[150] *See id.* at 734–35.

[151] *See Laidlaw*, 528 U.S. at 184.

[152] *Id.* at 174–77.

aesthetic and recreational values of the area will be lessened' by the challenged activity."[153] In both cases, the Court found the traditional standing doctrine difficult to reconcile with the often non-monetary and non-physical injuries alleged in environmental cases, and adjusted the traditional rule accordingly.[154]

Justice Alito went to considerable lengths to distinguish *Laidlaw* in the text of the Court's decision in *Clapper*.[155] Justice Alito noted that both sides conceded that pollution was occurring in *Laidlaw*, and the only standing issue before the Court was whether citizens' future choice to avoid recreational activities in the polluted water constituted sufficient injury to satisfy Article III.[156] By contrast, the government certainly did not admit in *Clapper* that it was gathering communications made by American media organizations and lawyers to contacts overseas.[157] Indeed, had *Clapper* been decided on the merits, this likely would have been the crux of the case.[158] Consequently, the *Clapper* majority viewed the injury theory in *Laidlaw* as much more tangibly tied to actual defendant misconduct than the plaintiff's theory in the case before them.[159] This apparent effort to uphold the result in *Laidlaw*, coupled with the language in footnote five, has led some observers to conclude that there is a majority of the Court willing to maintain an expanded "substantial risk" standing analysis for future injuries in environmental cases and perhaps a limited subset of other cases.[160] Indeed, some say that the *Clapper* majority intentionally declined to overrule its prior standing jurisprudence in environmental cases.[161]

This observation is buttressed by the Court's clear focus on the national security and foreign affairs implications of the precise facts in *Clapper*.[162] The Court noted its history of deference to the Executive in matters of state and security on multiple occasions, and explained that its standing doctrine is "es-

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[153] *Id.* at 184 (quoting *Sierra Club*, 405 U.S. at 735).

[154] *See* Lazarus, *supra* note 144, at 636 (outlining the Court's original approach to standing in environmental cases, but noting that the Court has tightened those requirements in recent years).

[155] *See Clapper*, 133 S. Ct. at 1153 (acknowledging that "*Laidlaw* is . . . quite unlike the present case").

[156] *Id.*

[157] *Id.*

[158] *See id.* at 1155–56 (Breyer, J., dissenting) ("[T]he basic question is whether the injury, i.e., the interception, is actual or imminent") (internal quotation marks omitted).

[159] *See* Mank, *supra* note 85, at 232–33 (noting a distinction between *Laidlaw*, where pollution of the river was not in dispute, and *Clapper*, where the government did not acknowledge tapping plaintiffs' communications).

[160] *See id*. at 260 (observing that Justice Kennedy was the only Justice to join the majority in both *Laidlaw* and *Clapper*, and that footnote five may have been an attempt to avoid "stepping on precedent"); *see also* Jacobs, *supra* note 143 (quoting academics who believe the Court was attempting to preserve its environmental precedent).

[161] *See* Jacobs, *supra* note 143; Mank, *supra* note 85, at 260.

[162] *See Clapper*, 133 S. Ct. at 1147 ("[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.") (citations omitted).

pecially rigorous" when plaintiffs seek to challenge the actions of the elected branches in this arena.[163] The Court's emphasis on the national security context in *Clapper* suggests that the case might be more limited to its facts than the text of the opinion suggests at first glance.[164]

Footnote five and Justice Alito's efforts to distinguish *Laidlaw* leave open the possibility that there are five votes to sustain a less rigorous "substantial risk" standing theory in cases that do not involve areas of traditional judicial deference.[165] Such a theory might more closely resemble Justice Breyer's probabilistic formulation.[166] If this is the case, district courts have placed too great an emphasis on the result in *Clapper* when considering standing for plaintiffs in data breach cases.[167] Instead of announcing a new rule of law that significantly tightens the standing requirements for plaintiffs across the board, *Clapper* might fairly be read as reiterating the Court's long held view that the federal courts should, as a general rule, avoid wading into matters of national security and foreign affairs.[168] Footnote five, on this interpretation, is the Court's less-than-obvious signaling that at least some cases not involving national security matters will be evaluated under the more forgiving substantial risk theory.[169] This interpretation, if valid, requires a careful reexamination of the prevailing trend in the district courts of dismissing data breach cases for lack of Article III standing.[170]

IV. PUBLIC HARMS AND ABSTRACT INJURIES: THE CASE FOR A SUBSTANTIAL RISK STANDARD IN DATA BREACH CLASS ACTIONS

This Part argues that the "substantial risk" standing formulation mentioned in footnote five of the Supreme Court's 2013 decision *Clapper v. Amnesty International USA* applies to at least some data breach cases.[171] Section A examines the four principle decisions cited in footnote five to illustrate the substantial risk framework and concludes by suggesting that certain data

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[163] *Id.*

[164] *See* John L. Jacobus & Benjamin B. Watson, Clapper v. Amnesty International and Data Privacy Litigation*: Is a Change to the Law "Certainly Impending"?*, 21 RICH. J. L. & TECH 3, 62–63 (2014) (arguing that *Clapper*'s test could be plausibly limited to cases involving national security).

[165] *See* Mank, *supra* note 85 at 26 (discussing the possibility of the Court adopting a "substantial risk" standard).

[166] *See Clapper*, 133 S. Ct. at 1165 (Breyer, J., dissenting)*; see also* Mank, *supra* note 85, at 264.

[167] *See, e.g.*, *In re* Barnes & Noble Pin Pad Litig., No. 12–cv–8617, 2013 WL 4759588, at *5 (N.D. Ill. Sept. 3, 2013) (finding *Clapper* controlling in analyzing the injury in fact alleged by plaintiffs in a data breach case).

[168] *See Clapper*, 133 S. Ct. at 1147 (discussing the Court's history of not finding standing in cases that involve foreign affairs or national security).

[169] *See* Mank, *supra* note 85, at 274.

[170] *See* Angelo A. Stio III et al., *supra* note 58, at 49 (noting increasing numbers of data breach class action dismissals for lack of standing, and examining strategies for plaintiffs to avoid dismissal).

[171] *See infra* notes 176–267 and accompanying text.

breach cases share similar characteristics with those cases.[172] Section B analyzes the public harm factor as applied to data breach cases and argues that they fit squarely within the kinds of harms to which the Court often applies the "substantial risk" framework.[173] Section C applies the same analysis with respect to the private rights factor.[174] Section D concludes with a brief analysis of the Court's 2016 standing decision in *Spokeo, Inc. v. Robins*, and a collection of support for a substantial risk theory in lower federal courts.[175]

A. The Substantial Risk Framework

If the Court's decision in *Clapper* was in fact meant to preserve the substantial risk theory of standing for future injuries in at least some subset of cases, it follows that the theory may be available for any case that shares sufficiently similar characteristics to those the Court identified as qualifying for the substantial risk analysis in footnote five.[176]

The text of footnote five explicitly mentions four cases.[177] In 2010, in *Monsanto Co. v. Geertson Seed Farms*, the Supreme Court considered a district court injunction prohibiting a federal regulatory agency from partially deregulating genetically modified seeds while an environmental impact study was pending.[178] The seed manufacturers appealed and argued that the district court's injunction was overbroad.[179] The plaintiffs argued at the Supreme Court that the manufacturers had failed to allege an adequately concrete injury, because it was unclear if the agency would in fact order partial deregulation if the injunction prohibiting it from doing so was modified.[180] The Court found that,

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[172] *See infra* notes 176–207 and accompanying text.

[173] *See infra* notes 208–224 and accompanying text.

[174] *See infra* notes 225–243 and accompanying text.

[175] *See infra* notes 244–267 and accompanying text.

[176] *See, e.g.*, Hedges v. Obama, 724 F.3d 170, 196 (2d Cir. 2013) (examining Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979), a case identified by the *Clapper* Court in footnote five as qualifying for the "substantial risk" treatment for similarities with the case *sub judice*).

[177] Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1150 n.5 (2013) (citing Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010); Pennell v. City of San Jose, 485 U.S. 1 (1988); Blum v. Yaretsky, 457 U.S. 991 (1982); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979)).

[178] *Monsanto*, 561 U.S. at 146–48. Plaintiff organic farmers and environmental groups sued to prevent the Animal and Plant Health Inspection Service from deregulating the use of alfalfa seeds that are resistant to weed killer, because the agency failed to perform an environmental impact study as required by federal law. *Id.* The plaintiffs' suit was based on the theory that the genetically modified seeds would eventually cross breed with organic or conventional seeds and pollute both the seed pool and the food chain. *Id.* The district court found for the plaintiffs and issued a sweeping injunction that prohibited the agency from allowing nearly any deregulation of the contested seeds. *Id.* The seed manufactures appealed but did not challenge the underlying finding that an impact study was required. *Id.*

[179] *Id.* at 148. The manufacturers argued that the federal agency should be allowed to order partial deregulation while the impact study was prepared. *Id.*

[180] *Id.* at 150.

because the agency had suggested in every phase of the litigation that it would allow partial deregulation of the seeds, there was "more than a *strong likelihood* that [the agency] would partially deregulate [the seed] were it not for the district court's injunction. The District Court's elimination of that likelihood is plainly sufficient to establish a constitutionally cognizable injury."[181]

In the Court's 1988 decision, *Pennell v. City of San Jose*, members of a landlord's association challenged portions of the City of San Jose's rent control ordinance as facially unconstitutional.[182] The defendants argued that the landlord association and the named plaintiff had failed to make any showing that any of the real property they owned and leased had been subject to the challenged provisions.[183] Thus, in the defendants' view, the injury was too speculative to give rise to Article III standing.[184] Noting that the standing inquiry is not a "mechanical exercise," Chief Justice William Rehnquist examined the record before the Court and determined that a "*sufficient threat* of actual injury" existed.[185] The Court found that the plaintiffs had shown a "realistic danger of sustaining a direct injury . . . ."[186]

The Court's 1982 decision in *Blum v. Yaretsky* involved senior citizen Medicaid recipients who challenged reassignments to lower levels of care that were made without a notice or a hearing.[187] The defendants argued that the senior citizens lacked standing because they were protected by a consent decree that precluded governmental agencies from moving them to a lower level of care.[188] The Court disagreed, finding that the risk of being moved to a lower level of care by the facilities themselves, or the senior's attending physicians, constituted a "*sufficiently substantial*" threat to justify Article III standing.[189] Similarly, in 1979, in *Babbitt v. United Farm Workers National Union*, the Court held that an Arizona law imposing strict limits on the ability of farm workers to unionize posed a "*realistic danger*" of causing an injury, even though the labor union had not yet tried to organize under the restrictive law.[190]

The facts of these cases, and their specific inclusion in *Clapper*'s footnote five, suggest that the Court may consider two factors, among others, when de-

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[181] *Id.* at 152–53 (emphasis added).

[182] *Pennell*, 485 U.S. at 4. The plaintiffs alleged that the ordinance's consideration of the hardship to a tenant resulting from a rent increases was a facial violation of the Fifth Amendment's takings clause. *Id.* at 4–6.

[183] *Id.* at 6.

[184] *Id.* 6–7.

[185] *Id.* at 7–8 (emphasis added) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 377 (2014)).

[186] *Id.* at 8 (quoting *Babbitt*, 442 U.S. at 298).

[187] *Yaretsky*, 457 U.S. at 993.

[188] *Id.* at 999.

[189] *Id.* at 1000.

[190] *Babbitt*, 442 U.S. at 292–93, 297–99 (emphasis added).

ciding whether to apply the stringent "certainly impending" standard or the more expansive "substantial risk" standard in the footnote.[191]

The first factor is the increased risk of public harm alleged in the pleadings.[192] In *Monsanto*, the Court confronted a crossroads in the American food supply debate.[193] It reached the merits of the case by applying the substantial risk standard to a speculative chain of inferences.[194] Likewise, in *Babbitt*, the Court dealt with the labor supply in the American food production business.[195]

The second factor is an allegation of an increased risk of substantial non-monetary, non-physical individual injuries.[196] In *Babbitt*, the injury alleged implicated the fundamental First Amendment right to organize for the purposes of collective bargaining.[197] The injuries alleged in *Blum* implicated both the right to due process and the right to individual autonomy in medical decisions.[198]

Applying this two-pronged framework to environmental cases like the Court's decision in 2000 in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* reveals similarities between environmental standing doctrine and the analysis found in the cases cited in footnote five.[199] In environmental cases, the risk of public harm can be great, both in terms of health and safety and the corruption of scarce natural resources.[200] In addition, individual citizens suffer non-economic and non-physical injuries in the form of destruction of ecosystems, species extinction, climate change, pollution, and harm to animals.[201] It seems unsurprising then, viewing the cases cited in foot-

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

[192] *See generally id.* (citing cases involving public harms here the Court applied a "substantial risk" theory).

[193] *See Monsanto*, 561 U.S. at 146–47 (concerning a dispute over genetically engineered alfalfa).

[194] *See id.* at 152. A federal district court entered an injunction barring partial deregulation of genetically modified alfalfa by agency action. *Id.* at 151. Respondents argued that petitioners, the manufacturers of the alfalfa, could not show that the injunction caused an Article III injury because the theory of injury rested on a speculative chain of events: if the injunction were lifted, the district court would remand the case to the agency, the agency would then conduct an environmental assessment, and the manufacturers would benefit only if that subsequent assessment favored partial deregulation. *See id.* at 151–52. The Supreme Court concluded that the likelihood of all of the events in the chain occurring was high enough to support Article III standing. *Id.* at 152–53.

[195] *See Babbitt*, 442 U.S. at 292–93 (dispute over an Arizona law regulating farm worker unionization).

[196] *See Clapper*, 133 S. Ct. at 1150 n.5 (citing cases involving non-monetary individual injuries where the Court applied a "substantial risk" theory); *see also Babbitt*, 442 U.S. at 298 (injury alleged was prospective violation of a constitutional right).

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

[198] *See Yaretsky*, 457 U.S. at 993 (due process rights of notice and opportunity to be heard were implicated by automatic, non-consensual transfers between levels of care).

[199] *See generally* Friends of the Earth, Inc., v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) (giving consideration to non-economic and intangible harms).

[200] *See generally* Lazarus, *supra* note 144 (discussing the basis for environmental suits in a variety of contexts).

[201] *See* Jan G. Laitos, *Standing and Environmental Harm: The Double Paradox*, 31 VA. ENVTL. L.J. 55, 67 (2013) (listing categories of environmental harm).

note five together with the facts of *Laidlaw*, that the Court distinguished *Laidlaw* in its *Clapper* opinion.[202]

Consumer data breach cases have elements of both the public harm factor and the individual right factor.[203] Research suggests that the public suffers significant harm when hackers access large troves of individual consumer data.[204] In addition, some moral and jurisprudential theories (in addition to Supreme Court precedent) suggest that an individual right to privacy and security may be violated when non-public information in made widely available.[205] Data breach cases thus also implicate risks to non-monetary, non-physical individual rights without crossing into the arenas traditionally afforded judicial deference (as the data collection in *Clapper* arguably did).[206] Consequently, consumer data breach class actions appear to fit well within the framework of cases that the Court has indicated may be subjected to the "substantial risk" standard for future injuries.[207]

B. Public Harms

Much of the attention generated by recent large consumer data breach cases has focused on the cost to the affected companies themselves.[208] A recent study by Ponemon Institute in collaboration with IBM found that each data breach cost companies in the United States $3.79 million on average, and that the cost of data breaches has increased 23% globally since 2013.[209] When these costs are incurred because of mismanaged or inadequately protected consumer data, the whole economy feels the effects of the corporate negligence.[210]

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[202] *See Clapper*, 133 S. Ct. at 1153; *Laidlaw*, 528 U.S. at 184; *see also* Mank, *supra* note 85, at 260 (examining how the Court in *Clapper* distinguished the case from *Laidlaw*).

[203] *See* WEISS & MILLER, *supra* note 32.

[204] *See infra* notes 208–224 and accompanying text (collecting data on public harms resulting from data breaches).

[205] *See infra* notes 235–243 and accompanying text (examining various theories of privacy rights).

[206] *Compare Clapper*, 133 S. Ct. at 1146–47 (data at issue in *Clapper* were related to national security and collection was authorized pursuant to FISA warrant), *with* Krottner v. Starbucks Corp., 628 F.3d 1139, 1141–42 (9th Cir. 2010) (data at issue in *Krottner* were related to Starbucks employee records).

[207] *See Clapper*, 133 S. Ct. at 1150 n.5; *see also* Jacobus & Watson, *supra* note 164, at 16–18 (suggesting that *Clapper* preserved the applicability of a "substantial risk" theory for some cases). *See generally* ABA, Clapper *and* Remijas, *supra* note 137 (examining data breach cases in light of *Clapper*'s footnote five).

[208] *See, e.g.*, Robert Hackett, *How Much Do Data Breaches Cost Big Companies? Shockingly Little*, FORTUNE (Mar. 27, 2015), http://fortune.com/2015/03/27/how-much-do-data-breaches-actually-cost-big-companies-shockingly-little/ [https://perma.cc/UR3N-C7KD].

[209] PONEMON INST., 2015 COST OF DATA BREACH STUDY: GLOBAL ANALYSIS 1 (May 2015), https://nhlearningsolutions.com/Portals/0/Documents/2015-Cost-of-Data-Breach-Study.PDF [https://perma.cc/XND2-NV6W].

[210] *See* WEISS & MILLER, *supra* note 32, at 16–19 (discussing how the costs of a data breach are spread among different parties involved).

One estimate puts the total cost to the global economy from data breaches at as much as $2 trillion in the next five years.[211]

Research indicates that the costs of a significant data breach are borne by entities throughout a complicated chain of payment processors, banks, card issuers, and the merchants themselves.[212] As these costs to companies are certainly increasing, so too are less tangible costs to the general public.[213]

It is true that individual consumers face relatively small monetary damages when their data is stolen, as credit issuers, banks, and the merchants themselves are generally responsible for the cost of mitigating any damage that results from a breach.[214] Companies that are the victims of external hacking or internal theft may offer their customers credit monitoring services and identity theft protection.[215] Nevertheless, companies that store information irresponsibly, or fail to police the conduct of internal employees, adequately expose consumers to considerable stress and undermine public confidence in electronic transactions.[216]

A recent survey of American consumers found that 79% of respondents would never use a credit or charge card again with a company that had suffered a data breach.[217] Another survey found that the number of survey respondents afraid of becoming victims of identity theft nearly doubled after a breach where the breached entity held the respondent's private data.[218] Almost 40% of respondents to the same survey indicated that they spent time resolving problems caused by a breach, and more than 75% reported feeling stress as a result of the data compromise.[219] This data suggests that consumer data breaches

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[211] Zack Whittaker, *Data Breaches to Cost Global Economy $2 Trillion by 2019*, ZDNET (May 12, 2015), http://www.zdnet.com/article/data-breaches-to-cost-2-trillion-by-2019/ [https://perma.cc/UL6R-X7G3].

[212] *See* WEISS & MILLER, *supra* note 32, at 16–19 (discussing the sources of the costs of a data breach).

[213] *See id.* (summarizing the allocation of a variety of costs of data breaches).

[214] *See* Nathaniel Popper, *Stolen Consumer Data Is a Smaller Problem Than It Seems*, N.Y. TIMES (July 31, 2015), http://www.nytimes.com/2015/08/02/business/stolen-consumer-data-is-a-smaller-problem-than-it-seems.html?_r=0 [https://perma.cc/MQQ4-SLTE] (discussing the legal and social dynamics that generally protect individual consumers from significant losses when their data is stolen); *see also* PONEMON INST., THE AFTERMATH OF A DATA BREACH: CONSUMER SENTIMENT 18 (Apr. 2014) (finding that 81% of data breach victims surveyed experienced no out-of-pocket costs).

[215] *See* Popper, *supra* note 214. It is worth noting, however, that 70% of respondents to a consumer survey sponsored by Experian in 2014 indicated that they received data breach notifications that did not include any offer of credit monitoring or identity theft protection. PONEMON INST., *supra* note 214, at 4.

[216] *See* Ozzie Fonseca, *Damage Beyond Cost*: *How Data Breaches Undermine Consumer Confidence*, EXPERIAN (Apr. 21, 2015), http://www.experian.com/blogs/data-breach/2015/04/21/damage-beyond-cost-how-data-breaches-undermine-consumer-confidence/ [https://perma.cc/69D4-DB9V] (discussing the effects on consumer confidence after a data breach).

[217] *See id.*

[218] PONEMON INST., *supra* note 214, at 5.

[219] *Id.* at 6.

cause widespread harm to the public at large, both through increased costs distributed throughout the economy, and through deflated consumer confidence.[220]

These public harms are similar to the kinds of harms identified in many environmental cases.[221] The Supreme Court has identified the loss of recreational and aesthetic value as justiciable injuries, in addition to a broadly defined "environmental wellbeing."[222] These harms are not individualized, though the Court does continue to require an individual plaintiff to show that they are among the group more broadly harmed.[223] Instead, these injuries apply to a large group of the recreating public, who stand to lose access to significant natural resources.[224]

C. Abstract Injuries

In addition to cases that challenge governmental or private conduct that creates an increased risk of public harm, the cases cited by the Court in footnote five implicate non-economic and non-physical rights of individuals.[225] In *Babbitt*, for example, the court dealt with both the economic injury created by restrictive unionization laws and the more fundamental right to freedom of association implicit in the ability to organize for the purpose of collectively bargaining.[226] In *Blum*, the Court addressed a technical piece of administrative law, but also confronted the much more fundamental right of individual autonomy in making personal medical decisions.[227]

Likewise, in environmental cases, the Court has been forced to develop a theory of standing that does not turn on economic or physical injury in the traditional sense.[228] Instead, more abstract injuries are contemplated, like aesthet-

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[220] *Id.* at 1.

[221] *See* Laitos, *supra* note 201, at 67–71 (discussing the types harms recognized by courts in environmental cases).

[222] *See Laidlaw*, 528 U.S. at 184 (concluding that river pollution injured recreational users of the river); Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972) (holding that aesthetic and environmental damages are cognizable under Article III).

[223] *See Sierra Club*, 405 U.S. at 735; Laitos, *supra* note 201, at 71 (noting the Court's requirement for environmental standing that an individual plaintiff alleged personal injury).

[224] *See Sierra Club*, 405 U.S. at 734 (discussing the alleged injury, which related to access to recreation).

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

[226] *See Babbitt*, 442 U.S. at 292–93; *see also* N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (reiterating that the right to organize is a fundamental right).

[227] *See Yaretsky*, 457 U.S. at 993–94 (dispute over the authority to transfer Medicaid recipients to lower levels of nursing care). The Court recognizes, in certain contexts, a fundamental right to individual autonomy in making medical decisions. *See, e.g.*, Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 845–46, 851 (1992) (citing Roe v. Wade, 410 U.S. 113 (1973)) (upholding the principle that the fundamental right to privacy protects a woman's choice to terminate her pregnancy); Cruzan v. Dir., Mo. Dep't Pub. Health, 497 U.S. 261, 278 (1990) (holding that competent individuals have a fundamental right to refuse unwanted medical treatment).

[228] *See* Laitos, *supra* note 201, at 71; Lazarus*, supra* note 144, at 636.

ic damage or dilution of a natural resource.[229] Standing based on abstract injuries, according to some commentators, has proven to be one of the most essential aspects of the modern development in environmental law.[230]

The future injuries asserted by data breach plaintiffs often turn on the increased risk of monetary damages if their personal data are misappropriated.[231] Plaintiffs seldom argue that the increased risk that their private data is now, or will become, public constitutes an injury in and of itself.[232] This abstract, non-economic and non-physical injury is precisely the kind of injury often asserted in the cases the Court has indicated might receive a "substantial risk" standing analysis.[233] Plaintiffs could plausibly argue that the increased risk of publication is, without any further showing, an injury for Article III purposes.[234]

Such an argument would find support both in the legal ethical literature and in analogous case law from the basic law of torts.[235] Some ethicists have suggested that mere publication of private information is an invasion of individual rights, and that corporate custodians of that data have a moral responsibility to protect it.[236] Plaintiffs whose private information is compromised through a data breach are at a significantly increased risk of future publication.[237] Further disclosure of that information might be embarrassing or com-

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[229] *See Laidlaw*, 528 U.S. at 184 (aesthetic and recreational harm caused by river pollution); *Sierra Club,* 405 U.S. at 734 (aesthetic impact of a ski area and access road in a national park); *see also* Laitos, *supra* note 201, at 67–71 (describing a broad categories of environmental harms that are often asserted in environmental suits).

[230] *See* David Sive, *Environmental Standing*, 10 NAT. RESOURCES & ENV'T 49, 51–52 (1995) (collecting cases with abstract injuries leading to the modern environmental standing doctrine).

[231] *See* Jacobus & Watson, *supra* note 164, at 16 (summarizing common data breach injury allegations).

[232] *See id.* at 16–30 (surveying common alleged injuries in data breach class actions and concluding that most allegations relate to an increased risk of data misuse or identity theft).

[233] *See Clapper*, 133 S. Ct. at 1150 n.5; *see also supra* notes 176–207 and accompanying text (examining cases cited in *Clapper*'s footnote five in support of the "substantial risk" framework).

[234] *See, e.g.*, *Laidlaw*, 528 U.S. at 184 (finding Article III standing where plaintiffs alleged non-economic aesthetic and recreational injuries).

[235] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. R. 193, 195–96, 198 (1890) (explaining that the common law provides adequate basis for a right to privacy); *see also* Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1810–11 (2010) (arguing that privacy injuries must be reimagined in the modern era as including personal data collected and stored digitally).

[236] *See generally, e.g.*, Mary J. Culnan & Cynthia Clark Williams, *How Ethics Can Enhance Organizational Privacy: Lessons from the Choicepoint and TJX Data Breaches*, 33 MISS. Q. 673 (2009) (arguing that the corporate custodians of consumer data have a moral responsibility to protect consumer privacy).

[237] *See* Stacey L. Schreft*, Risk of Identity Theft: Can the Market Protect the Payment System?*, FED. RES. BANK OF KANSAS CITY: ECON. REV., 4th Q. 2007, at 9 (explaining that a limited data breach can provide crucial missing information for identity thieves, who use the breached data to complete a stolen identity).

promising in non-economic or non-physical ways, and yet still be properly characterized as an injury.[238]

This logic is traceable to the common law torts for intrusion upon seclusion and the publication of private affairs.[239] The *Restatement (Second) of Torts* attaches liability for the invasion into the private affairs of an individual without publication of the information as well as for the publication of a matter concerning the private life of an individual.[240] Taken together, these provisions seem to attach legal protection to the private information of an individual.[241] Even though data made public through a breach does not result in economic harm to the plaintiffs, they might nonetheless suffer the invasion of a legally protected right.[242] In much the same way that an environmental plaintiff can assert standing even though his or her injuries are not pecuniary, a data breach plaintiff might assert standing based on the substantial risk that further publication of his or her private information may occur.[243]

D. Support in the Case Law

The Supreme Court's recently addressed standing in 2016's *Spokeo, Inc. v. Robins*.[244] In *Spokeo*, the Court reversed a U.S. Court of Appeals for the Ninth Circuit decision that found Article III standing where the plaintiff alleged that an Internet search engine listed inaccurate information about his credit history, in violation of the Fair Credit Reporting Act.[245] The Ninth Cir-

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[238] *See, e.g.*, Kim Zetter, *Hackers Finally Post Stolen Ashley Madison Data*, WIRED (Aug. 8, 2015), http://www.wired.com/2015/08/happened-hackers-posted-stolen-ashley-madison-data/ [https://perma.cc/B2XM-NZS9]. The Ashley Madison case is illustrative of the potential risk of non-economic and non-physical injury that can result from the publication of private information. *See id.*

[239] *See* RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977) (providing general principles of invasion of privacy tort law).

[240] *Id.* § 652B, § 652D.

[241] *See id.* § 652A, § 652B, § 652D. *See generally* Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887 (2010) (providing an overview of the history of privacy tort law, including William Prosser's impact on the field).

[242] *See* RESTATEMENT (SECOND) OF TORTS § 652A; *see also* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (explaining that provisions of the Bill of Rights create "zones of privacy" that protect individuals from unwarranted government intrusion). While it is true that *Griswold* recognized a constitutional right to privacy only in the face of *government* action (a limitation the state action doctrine requires), the case is illustrative of the strong societal presumption of the individual's right to be free from unwarranted intrusion. *See id.* In this sense, *Griswold* mirrors the provisions in the *Restatement Second) of Torts* that make publication and intrusion into private affairs actionable at common law. *See Griswold*, 381 U.S. at 484; RESTATEMENT (SECOND) OF TORTS §§ 652A–652I (containing the *Restatement*'s privacy law provisions).

[243] *See Laidlaw*, 528 U.S. at 184 (finding standing where alleged injury was non-monetary).

[244] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1540 (2016).

[245] *Id.* at 1550.

cuit concluded that the search engine's pure statutory violation was sufficient to confer standing.[246]

The petitioners in *Spokeo* argued that plaintiff had not alleged the "concrete harm" required by the Court's 2002 decision *Lujan v. Defenders of Wildlife*.[247] In other words, the petitioner maintained that the plaintiff had not suffered any actual harm as the result of the bare statutory violation.[248] The plaintiff argued that his alleged injuries, including reputational harm and other intangible damages, amounted to an injury in fact under the traditional analysis outlined in *Lujan v. Defenders of Wildlife*.[249]

The Supreme Court handled the case cautiously, perhaps in light of the fact that the Court sat and decided the case with only eight justices.[250] Ultimately, the Court concluded that the Ninth Circuit's opinion failed to address *Lujan's* "concrete injury" requirement, and remanded the case.[251] Nevertheless, the Court emphasized that the concreteness requirement "does not mean, however, that the risk of real harm cannot satisfy" Article III's requirements.[252] The Court's citation for that proposition: *Clapper*.[253]

The Court's acknowledgement in *Spokeo* that *Clapper* supports a substantial risk theory of injury was accompanied by the observation that plaintiffs often allege intangible injuries in tort cases.[254] This observation buttresses the claim that tort law may provide a foundation for data breach injury in fact, as suggested in the previous section of this Note.[255]

At the federal circuit level, courts have taken divergent views on *Clapper*'s standing requirements.[256] Some appear to hew more closely to the "cer-

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[246] *Id.* at 1546.

[247] *See* Brief for Petitioner at 7–8, *Spokeo*, 136 S. Ct. 1540 (2016) (No. 13-1339); *see also* Alison Frankel, *SCOTUS to Decide if "Unharmed" Plaintiffs Have Right to Sue*, REUTERS (Apr. 27, 2015), http://blogs.reuters.com/alison-frankel/2015/04/27/scotus-to-decide-if-unharmed-plaintiffs-have-right-to-sue/ [https://perma.cc/X46S-9D9V] (describing petitioners' arguments in *Spokeo*).

[248] *See* Brief for Petitioner, *supra* note 247, at 7–8; *see also* Frankel, *supra* note 247.

[249] *See* Brief of Respondent at 24–27, *Spokeo*, 136 S. Ct. 1540 (2016) (No. 13-1339); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (outlining requirements of injury in fact).

[250] *See* Mark Joseph Stern, *SCOTUS Misses an Opportunity to Gut Class Actions and Consumer Privacy Laws*, SLATE (May 16, 2016), http://www.slate.com/blogs/the_slatest/2016/05/16/spokeo_v_robins_spares_class_actions_and_consumer_privacy.html [https://web.archive.org/web/20170121001539/http://www.slate.com/blogs/the_slatest/2016/05/16/spokeo_v_robins_spares_class_actions_and_consumer_privacy.html] (analyzing the Court's decision in *Spokeo*).

[251] *Spokeo*, 136 S. Ct. at 1550.

[252] *Id.* at 1549.

[253] *See id.* (citing *Clapper*, 133 S. Ct. at 1138).

[254] *Id.* ("[T]he law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure.")

[255] *See supra* notes 225–243 and accompanying text (suggesting a basis in tort for injuries alleging mere publication of private data, absent misuse).

[256] *Compare* Blum v. Holder, 744 F.3d 790, 797 (1st Cir. 2014) (applying *Clapper*'s certainly impending standard), *with Hedges*, 724 F.3d at 196 (noting that *Clapper* maintained a "substantial risk" analysis).

tainly impending" standard, and the law of future injury standing in those jurisdictions may have narrowed as a result.[257] At least a few circuits, however, appear to agree that the Supreme Court preserved the substantial risk test for at least some subset of cases.[258]

Most directly, the U.S. Court of Appeals for the Sixth Circuit has held, in an unpublished 2016 opinion, that *Clapper* preserved a substantial risk injury theory that supported Article III standing in a data breach class action, where the alleged injuries turned on increased risk of future data misuse.[259] That opinion from the Sixth Circuit cited *Clapper's* footnote five in support of its holding.[260] The U.S. Court of Appeals for the Seventh Circuit has explicitly applied the substantial risk test in the context of a data breach analysis, and cited to *Clapper* while doing so.[261] That court concluded that the Supreme Court had no intention of eliminating the "substantial risk" analysis, let alone foreclosing the use of future injuries to establish standing altogether.[262]

The Sixth and Seventh Circuit decisions, in combination with several district court decisions in California, indicate that the issue remains unsettled in the lower federal courts.[263] The Court's *Spokeo* decision did little to resolve the heart of the issue: what, precisely, constitutes a sufficient future injury in the data breach context to confer Article III standing?[264] It is likely that the Supreme Court will be faced with a petition for certiorari that is squarely on point in the near future.[265] The Court will then have a chance to clarify whether or not the

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[257] *See, e.g.*, *Holder*, 744 F.3d at 797.

[258] *See* Galaria v. Nationwide Mut. Ins. Co., Nos. 15-3386 & 15-3387, 2016 WL 4728027, at *3 (6th Cir. Sept. 12, 2016); Remijas v. Neiman Marcus Group, LLC, 794 F.3d 688, 693 (7th Cir. 2015); *Hedges*, 724 F.3d at 196; *see also* Mank, *supra* note 85, at 264–70 (examining approaches taken by the circuit courts).

[259] *Galaria*, 2016 WL 4728027, at *3 (citing *Clapper* to uphold standing in the absence of established circuit precedent).

[260] *Id.*

[261] *See Remijas*, 794 F.3d at 693 (concluding that *Clapper* preserved the substantial risk analysis and that the plaintiffs' allegations satisfied that framework).

[262] *See id.*

[263] *See Galaria*, 2016 WL 4728027, at *3; *Remijas*, 794 F.3d at 693; Silverman, *supra* note 57, at 236–37 (providing an overview of the variety of approaches courts have taken with respect to standing). One recent data breach, which has resulted in litigation over a range of district courts, has resulted in starkly divergent decisions. *Compare* Whalen v. Michael Stores Inc., 153 F. Supp. 3d 577, 582–84 (E.D.N.Y 2015) (citing *Clapper* and dismissing future injury claims resulting from data breach), *with* Moyer v. Michaels Stores, Inc., No. 14 C 561, 2014 WL 3511500, at *4–5, 7 (N.D. Ill. July 14, 2014) (finding *Clapper* and Seventh Circuit precedent allow for "imminent" injuries to satisfy the standing requirement).

[264] *See, e.g.*, Stern, *supra* note 250 (suggesting that the Court's decision to remand in *Spokeo* leaves the fundamental issue unresolved).

[265] *See* Paul Karlsgodt, *5 Big Developments in Privacy Class Actions in 2015, and 3 to Look for in 2016*, DATA PRIVACY MONITOR (Dec. 31, 2015), http://www.dataprivacymonitor.com/data-breaches/significant-developments-in-privacy-class-actions-in-2015-and-what-to-watch-for-in-2016/ [https://perma.cc/2ZNR-KGHW] (examining trends and concluding that Supreme Court cases will continue to shape the landscape of data breach standing going forward).

substantial risk analysis applies in the particular context of consumer data breach class actions.[266] Given the implications of its prior holdings, the Court ought to include at least some data breach cases in the substantial risk category.[267]

Conclusion

The Supreme Court's 2013 decision in *Clapper v. Amnesty International USA* may have substantially tightened the pleading requirements for Article III standing in certain cases. In others, however, a more flexible substantial risk theory of injury arguably applies. This less rigorous approach to standing appears to hold in some environmental cases, as well as other cases that invoke significantly increased risk of public harm. It may also apply in cases where the plaintiff alleges abstract injuries that are non-economic and non-physical in nature. Consumer data breach cases appear to satisfy both of these elements, because the harm is broadly diffused throughout the economy and some of the injuries alleged are non-economic and non-physical. Consequently, federal district courts should apply a substantial risk analysis absent definitive guidance from the Supreme Court to the contrary.

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[266] *See id.*

[267] *See Clapper*, 133 S. Ct. at 1150 n.5; *see also Monsanto*, 561 U.S. at 152; *Pennell*, 485 U.S. at 7–8; *Yaretsky*, 457 U.S. at 1000; *Babbitt*, 442 U.S. at 297–99.