

**Uncertain Standing: Normative Applications of Standing Doctrine Produce Unpredictable Jurisdictional Bars to Common Law Data Breach Claims\***

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## INTRODUCTION

The specter of identity theft looms over the American consumer. Over seventeen million Americans had their identities stolen in 2014, and identity theft has been the most popular complaint among American consumers for fifteen consecutive years.<sup>1</sup> Accordingly, as consumers become more sophisticated guardians of their own personally identifiable information (“PII”), they are becoming increasingly anxious about the data security practices of corporations that process or store consumer data.<sup>2</sup> In the absence of far-reaching congressional or administrative mandates,<sup>3</sup> data breach litigation should help establish data security standards to guide entities and reassure consumers. Regrettably, too many consumers who bring data breach claims are denied standing before those claims can proceed to the merits because the plaintiffs cannot convince courts that they have suffered injuries-in-fact, even after data thieves accessed but did not misuse their PII.<sup>4</sup>

In a 2013 case, *Clapper v. Amnesty International*,<sup>5</sup> the Supreme Court affirmed that a plaintiff might be able to satisfy the injury-in-fact requirement on the grounds that the plaintiff faced a substantial risk of harm, rather than having to show that the harm will certainly occur.<sup>6</sup> However, this decision did little to open up federal courts to

1. ERIKA HARRELL, U.S. DEP’T OF JUSTICE, VICTIMS OF IDENTITY THEFT, 2014, at 1 (2015), <http://www.bjs.gov/content/pub/pdf/vit14.pdf> [<https://perma.cc/B6MV-YCD4>]; *Identity Theft Tops FTC’s Consumer Complaint Categories Again in 2014*, FED. TRADE COMMISSION (Feb. 27, 2015), <https://www.ftc.gov/news-events/press-releases/2015/02/identity-theft-tops-ftcs-consumer-complaint-categories-again-2014> [<https://perma.cc/4EQV-QBK7>].

2. MARY MADDEN & LEE RAINIE, PEW RESEARCH CTR., AMERICANS’ ATTITUDES ABOUT PRIVACY, SECURITY, AND SURVEILLANCE 7 (May 20, 2015), [http://www.pewinternet.org/files/2015/05/Privacy-and-Security-Attitudes-5.19.15\\_FINAL.pdf](http://www.pewinternet.org/files/2015/05/Privacy-and-Security-Attitudes-5.19.15_FINAL.pdf) [<https://perma.cc/8WVE-D3GU>] (finding that just four percent of Americans are “very confident” and twenty-two percent are “somewhat confident” that companies or retailers that maintain records of their activity will keep that information private and secure).

3. Unfortunately for consumers, most of the data security regulations that the federal government promulgates either only apply to a narrow set of industries or are only sporadically enforced. *See, e.g.*, 15 U.S.C. §§ 6801–6821 (2015) (covering financial institutions); Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2012) (protecting educational information); 42 U.S.C. §§ 1320d-2, 1320d-9 (2015) (protecting healthcare information).

4. Miles L. Galbraith, Comment, *Identity Crisis: Seeking a Unified Approach to Plaintiff Standing for Data Security Breaches of Sensitive Personal Information*, 62 AM. U. L. REV. 1365, 1378–79 (2013) (“A survey of district court rulings in data breach cases reveals a history of inconsistent outcomes, but most courts support the conclusion that plaintiffs whose data has been breached, but not yet misused, have not suffered injury-in-fact to satisfy the standing requirements under Article III.”).

5. 133 S. Ct. 1138 (2013).

6. *Id.* at 1150 n.5.

data breach litigants. While the Court in *Clapper* approved the “certainly impending” standard as the appropriate measure of a future injury’s cognizability, the Court’s application of the standard was devoid of substantive, and particularly empirical, meaning. Adding to the confusion, the Court observed in a footnote that an alternative standard, one that insists on a “substantial risk” of future harm, remains viable, but the Court failed to explain how the two standards differ or operate together.<sup>7</sup> Consequently, since *Clapper*, lower courts have disagreed about the requisite imminence of PII misuse that a consumer’s allegations must demonstrate in order for the consumer to establish an injury.<sup>8</sup>

More broadly, the application of the injury-in-fact requirement in data breach litigation forces courts to make at least two normative choices that lead to doctrinal unpredictability. When applying the factual injury requirement, courts must decide which injuries ought to be cognizable and when the likelihood of an injury is sufficiently imminent to recognize the injury.<sup>9</sup> This framework stands in stark contrast to a positive legal injury requirement that would simply ask a court to determine an injury’s cognizability with reference to the relevant substantive law.<sup>10</sup> Instead, in making these normative choices, a court can easily dismiss a claim on jurisdictional grounds that may well be compensable under substantive law.<sup>11</sup> This result is irreconcilable with the Supreme Court’s modern theoretical justification for the injury-in-fact requirement as a restraint on the unconstitutional expansion of judicial power.<sup>12</sup>

Courts could reduce doctrinal confusion in data breach litigation, and thus encourage more predictable outcomes, by either recognizing a different factual injury or by requiring only a nominal probability of the injury’s occurrence to render that harm sufficiently imminent. Professor Andrew Hessick has persuasively advocated for a low minimum risk requirement to render an injury sufficiently imminent for standing purposes.<sup>13</sup> The ideal solution for the problems that data breach claims pose would be to align the proper constitutional standard for assessing the imminence of future harms, the “substantial risk” standard, with Professor Hessick’s minimum risk

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7. See *infra* Section III.A.

8. See *infra* Section II.B.

9. See *infra* Part IV.

10. See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 231–33 (1988).

11. See *infra* Part IV.

12. See *infra* Part III.

13. F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 65–73 (2012).

requirement.<sup>14</sup> Nonetheless, courts can still remain faithful to contemporary standing doctrine and still reduce the unpredictability that results from their application of the normative factual injury requirement with a simpler solution: adopting the rule that the exposure of sensitive PII resulting from a data breach is itself a cognizable injury.<sup>15</sup>

This Comment proceeds in four parts. Part I discusses the origins of standing doctrine and the injury-in-fact requirement. Part II discusses how courts have applied the “certainly impending” standard to determine whether a plaintiff has satisfied the injury-in-fact requirement in *Clapper* and other recent data breach cases. Part III argues that the “certainly impending” standard applied in *Clapper* is inapposite in data breach cases, so courts should instead apply the alternative “substantial risk” standard. Finally, Part IV argues that courts should adopt the rule that the exposure of sensitive PII resulting from a data breach, even absent misuse of the data, is the applicable injury in data breach cases. Doing so would lead courts to reach more predictable and theoretically sound outcomes and would help provide corporations and consumers with practical guidance on reasonable data security practices.

#### I. BACKGROUND ON STANDING DOCTRINE AND THE INJURY-IN-FACT REQUIREMENT

Standing doctrine derives from the Article III jurisdictional grant to the judiciary to hear cases or controversies.<sup>16</sup> A “case or controversy” only occurs between parties that are adverse with respect to a particular matter.<sup>17</sup> Standing doctrine thus purports to ensure that courts entertain actual disputes by mandating that truly adverse parties litigate a particular claim.<sup>18</sup> To this end, “[t]o establish Article III standing, an injury must be ‘concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.’”<sup>19</sup> The constitutional justification for standing doctrine is merely to ensure that adverse parties litigate a

14. See *infra* Part IV.

15. See *infra* Part IV.

16. U.S. CONST. art. III, § 2.

17. See *Muskrat v. United States*, 219 U.S. 346, 356–57 (1911); see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) (“There is no case or controversy, the reasoning has gone, when there are no adverse parties with personal interest in the matter.”).

18. *Id.*

19. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)).

given matter, but in recent decades, the Court has applied standing doctrine as an exclusionary tool to render certain alleged injuries that give rise to disputes between adverse parties incapable of judicial resolution.<sup>20</sup>

Standing doctrine is a relatively recent phenomenon in American constitutional law. The Supreme Court has only discussed standing as a derivation of the Article III jurisdictional grant over “cases or controversies” eight times in total before 1965, the first time being in 1944.<sup>21</sup> However, standing has since become a necessary prerequisite for any litigant that seeks to bring a claim before a federal court.<sup>22</sup> The brief discussion that follows, though not an exhaustive history of the doctrine, helps to explain why the Court has applied a more exacting factual injury test in cases, including data breach cases, that threaten the balance of powers between the branches of government.

#### A. *Early Standing Doctrine*

Before 1920, a plaintiff could bring a cognizable claim so long as he could allege that the defendant had violated one of his legal rights.<sup>23</sup> However, as Congress began to construct the modern administrative state during the Progressive Era and through the New Deal, litigants began to bring claims that challenged new expansions of federal power.<sup>24</sup> Notably, in cases where these inquiries foreclosed the plaintiffs’ claims, there was neither a common law right at stake, a private right of action created under a statute, nor a constitutional provision that litigants could claim was invaded through the challenged governmental actions.<sup>25</sup> In concurring opinions, Justices Brandeis and Frankfurter sought to develop inquiries akin to modern standing doctrine that limited challenges from citizens who sought to invalidate the new statutory schemes without demonstrating a

20. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (holding that a plaintiff who was placed in a chokehold by two officers of the Los Angeles Police Department lacked standing to bring a claim for injunctive relief against the city); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 278 (2008); see Scalia, *supra* note 17, at 882.

21. Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 169 (1992).

22. Hessick, *supra* note 20, at 276.

23. See Sunstein, *supra* note 21, at 170 (“[W]hat we now consider to be the question of standing was answered by deciding whether Congress or any other source of law had granted the plaintiff a right to sue.”).

24. *Id.* at 179.

25. See *id.* at 180.

personal stake in the matter before the Court.<sup>26</sup> Nonetheless, the conception of justiciability that prevailed at that time was simple: any person could seek judicial redress for the invasion of a legal right.<sup>27</sup>

*B. The Growth of the Administrative State*

Modern standing doctrine has its origins in judicial interpretations of the Administrative Procedure Act (“APA”).<sup>28</sup> The APA provides a private right of action to individuals who are injured because of an agency’s action.<sup>29</sup> Under the relevant provision, “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to review thereof.”<sup>30</sup> Congress likely intended this provision to codify existing law by allowing litigants to bring claims that implicated agency actions and arose from one of three distinct legal injuries: the invasion of a common law right, the infringement of a statutory right, or a harm for which a governing statute provided a private right of action.<sup>31</sup>

As the reach of the administrative state expanded in the 1960s, courts began to allow beneficiaries of agency actions to challenge those actions. An object of an agency action could still challenge the action under the prevailing legal injury test.<sup>32</sup> However, a beneficiary of an agency’s regulatory action would not suffer an invasion of a legal right as a result of an agency’s regulation of some other actor.<sup>33</sup> For example, imagine that a fisher sought to challenge an Environmental Protection Agency (“EPA”) determination about whether a polluter could dump waste in a water source that supports her livelihood. Under that scenario, however, the EPA action would

26. *Id.* at 179–80; *see, e.g.*, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150–53 (1951) (Frankfurter, J., concurring) (concluding in suits “challeng[ing] governmental action,” that “if no comparable common-law right exists and no such constitutional or statutory interest has been created, relief is not available judicially”); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341–56 (1936) (Brandeis, J., concurring) (describing the bounds of justiciability doctrine including the observation that “[t]he Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation”).

27. *See* Sunstein, *supra* note 21, at 180.

28. *See id.* at 181.

29. 5 U.S.C. § 702 (2012).

30. *Id.*

31. Sunstein, *supra* note 21, at 181–82.

32. *See id.* at 184. For example, an object of an agency action could be an automobile manufacturer that is regulated by the National Highway Traffic Safety Administration.

33. *See id.* For example, a beneficiary of an agency’s regulatory action could be a consumer of a water source regulated by the Environmental Protection Agency.

not have resulted in the fisher suffering a cognizable injury under the prevailing conception of standing doctrine. Thus, courts began to relax the legal injury test in order to allow a wider range of stakeholders to challenge administrative acts.<sup>34</sup>

Pursuing this liberalization of access to the judiciary, in 1970, the Court replaced the legal injury requirement with a factual injury requirement that forms the basis of modern standing doctrine. In *Association of Data Processing Service Organizations v. Camp*,<sup>35</sup> the Court announced that in order to establish standing, (1) a plaintiff must suffer an “injury in fact” and (2) a plaintiff must prove that “the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>36</sup> The injury-in-fact requirement was intended to be a factual—and thus non-normative—inquiry that would open courts to a broader range of stakeholders who suffered some wrong as a result of administrative action.<sup>37</sup> Since *Camp*, satisfying the injury-in-fact requirement has been necessary to establish jurisdiction under Article III, especially in separation of powers cases.<sup>38</sup>

### C. Separation of Powers Concerns

In 1983, while sitting on the D.C. Circuit, then-Judge Antonin Scalia authored an influential law review article, *The Doctrine of Standing as an Essential Element of the Separation of Powers*,<sup>39</sup> that would in retrospect seem prophetic. Scalia argued that standing doctrine is a means by which courts fulfill “their traditional undemocratic role of protecting individuals and minorities against impositions of the majority.”<sup>40</sup> Moreover, he asserted that the requirement must be applied such that only an individual who is the object of a challenged government action and suffers a concrete injury distinct from that suffered by the general public can acquire standing to challenge a governmental action.<sup>41</sup> According to Scalia, a

34. See *id.*; see, e.g., *Office of Comm’n of the United Church of Christ v. FCC*, 359 F.2d 994, 1000–06 (D.C. Cir. 1966) (discussing how television viewers had standing under the Federal Communications Act to contest the renewal of a broadcast license).

35. 397 U.S. 150 (1970).

36. *Id.* at 152–54; Sunstein, *supra* note 21, at 185 (“The zone-of-interest test was intended to be exceptionally lenient.”).

37. See Fletcher, *supra* note 10, at 230.

38. See *id.*

39. See generally Scalia, *supra* note 17 (discussing standing’s role in separation of powers cases).

40. *Id.* at 894.

41. *Id.* at 895.

court applies the injury-in-fact requirement in separation of powers cases to ensure that a plaintiff is the person to whom the framers intended to provide judicial—rather than political—redress.<sup>42</sup> Therefore, in such cases, he asserted that a court would apply the injury test in a more exacting manner as a jurisdictional requirement in order to safeguard the constitutional role of the judiciary.<sup>43</sup>

After joining the Supreme Court, Justice Scalia's opinion in *Lujan v. Defenders of Wildlife*<sup>44</sup> reflected the philosophical conceptualization of standing that he expressed years before.<sup>45</sup> In *Lujan*, the plaintiffs brought a citizen suit under the Endangered Species Act of 1973 ("ESA").<sup>46</sup> The ESA required the federal government to consult with the secretary of the interior to ensure that the expenditure of federal funds did not "jeopardize the continued existence of any endangered species."<sup>47</sup> In 1978, the secretary of commerce and the secretary of the interior promulgated a joint regulation that applied the ESA to federal expenditures in foreign nations,<sup>48</sup> but the U.S. Department of the Interior changed that position in a subsequent regulation issued in 1986.<sup>49</sup>

In seeking a declaratory judgment that the second regulation violated the ESA, members of the plaintiff environmental organizations claimed that they had observed specific endangered species in their habitats and that they intended to do so again.<sup>50</sup> However, the plaintiffs could not attest to when their return visit would occur, and therefore, the Court held that the plaintiff organizations had failed to satisfy the injury-in-fact requirement.<sup>51</sup> The Court reasoned that the plaintiffs' injuries were not "certainly impending" as required under standing doctrine because the plaintiffs failed to introduce evidence that would render their stated intent to return to the foreign nations sufficiently imminent.<sup>52</sup>

42. *Id.* at 894–95 (explaining that "there is no reason to remove the matter from the political process and place it in the courts" simply because a plaintiff may care more about the generalized injury than others).

43. *See id.* at 895.

44. 504 U.S. 555 (1992).

45. *See supra* notes 39–43 and accompanying text.

46. *Lujan*, 504 U.S. at 557–58.

47. *Id.* at 558 (quoting 16 U.S.C. § 1536(a)(2) (1988)).

48. *Id.* (citing 43 Fed. Reg. 874, 874 (Jan. 4, 1978)).

49. *Id.* at 558–59 (citing 50 C.F.R. § 402.01 (1991)).

50. *Id.* at 563–64.

51. *Id.*

52. *Id.* ("[T]he affiants' profession of an 'inten[t]' to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such 'some day'



*D. Applying Lujan's Exacting Standing Inquiry in a Recent Case*

In *Clapper v. Amnesty International*, the Supreme Court applied the “certainly impending” standard outlined in *Lujan*, which has since become the leading standard for determining whether an increased risk of future harm is sufficiently imminent for standing purposes.<sup>53</sup> In *Clapper*, several organizations challenged the federal government’s communications surveillance under the Foreign Intelligence Surveillance Act of 1978 (“FISA”).<sup>54</sup> Under FISA, the federal government can obtain an order from the Foreign Intelligence Surveillance Court (“FISC”) that authorizes the government to intercept communications targeted toward “persons reasonably believed to be located outside the United States to acquire foreign intelligence information.”<sup>55</sup> The respondent organizations asserted that their members communicated with individuals who were likely targets of FISA-authorized surveillance.<sup>56</sup> As a result, the respondent organizations argued that their ability to “communicate confidential information” was compromised, that they were forced to cease having certain conversations, and that they were compelled to “undertake[] ‘costly and burdensome measures’” to ensure that sensitive communications would remain private.<sup>57</sup>

Even though the respondent organizations alleged concrete harms resulting from FISA-authorized surveillance, the Court held that those harms were not “certainly impending.”<sup>58</sup> In so holding, the Court reasoned that the respondents could not demonstrate that the federal government would target their particular communications because FISA prohibited the government from targeting domestic members of their organizations.<sup>59</sup> Furthermore, the Court stated that the respondents could not anticipate that the government would target any particular foreign individual with whom the organizations might communicate because the organizations had no actual

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intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.” (alteration in original)).

53. Unlike *Lujan*, *Clapper* is a data collection case. See *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1142 (2013).

54. *Id.*

55. *Id.* at 1144 (quoting 50 U.S.C. § 1881a(a) (2012)).

56. *Id.* at 1145.

57. *Id.* at 1145–46 (quoting Petition for a Writ of Certiorari, *Clapper*, 133 S. Ct. 1138 (No. 11-1025)).

58. *Id.* at 1150.

59. *Id.* at 1148.

knowledge of the government's targeting practices.<sup>60</sup> Even if the government did target individuals with whom the respondents communicated, the Court concluded that the organizations could not demonstrate that the FISC would authorize the government to do so, that the government's data collection would succeed, or that the intercepted communications would include the respondents' communications with a targeted individual.<sup>61</sup> Finally, because the respondents could not demonstrate concrete injury, the Court decided that the respondents' efforts to avoid FISA-authorized surveillance were not "fairly traceable" to the challenged government acts.<sup>62</sup>

*Clapper* is critical to the analysis that follows for two reasons. First, *Clapper* is a separation of powers case in that the plaintiffs sought to invoke the power of the federal courts to invalidate a law that Congress duly enacted.<sup>63</sup> In such cases, the Court explicitly applies standing doctrine in an "especially rigorous" manner;<sup>64</sup> thus, the rationale for applying a similarly exacting inquiry in common law claims between two private parties is lacking. Second, *Clapper* specifically preserves an alternative standard to determine whether a future injury is sufficiently imminent for standing purposes. According to the Court, a plaintiff can also establish standing by showing that there is a "substantial risk" that a future harm will occur.<sup>65</sup> Unfortunately, the Court utterly failed to distinguish the "certainly impending" and "substantial risk" standards, and as a result, the Court did not instruct lower courts on the proper application of either.<sup>66</sup> This failure has produced confusion among lower courts.

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60. *Id.*

61. *Id.* at 1149–50.

62. *Id.* at 1151 ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.").

63. *See id.* at 1146–47.

64. *Id.* (quoting *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997)).

65. *Id.* at 1150 n.5.

66. *See id.* ("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.").

## II. LOWER COURTS APPLYING *CLAPPER* HAVE REACHED VARYING RESULTS

When applying *Clapper*, lower courts have imposed a more rigorous test on data breach victims who assert that their injuries result from an increased risk of future harm, regardless of whether the separation of powers exacting inquiry is triggered. Plaintiffs in data breach cases often allege injuries that arise from one of three factual circumstances: (1) unauthorized access to their PII, (2) misuse of their PII, or (3) misuse of their PII that results in direct economic loss.<sup>67</sup> When a plaintiff claims that a data breach has resulted in direct economic loss, such as a fraudulent charge on a credit card account that will not be reimbursed, courts have agreed that the plaintiff has alleged a cognizable injury sufficient to confer standing.<sup>68</sup> Similarly, when a plaintiff asserts that a data breach has not resulted in direct economic harm but nonetheless results in a form of misuse, such as an attempt to open a bank account using the plaintiff's identity, most courts seem to agree that a plaintiff has suffered an injury-in-fact.<sup>69</sup> However, when a plaintiff alleges that an unauthorized party has accessed but not yet misused her data, courts disagree on whether that plaintiff has alleged a cognizable injury.<sup>70</sup> Furthermore, under *Clapper*'s holding that the plaintiffs in that case could not “manufacture standing by incurring costs in anticipation of non-

67. See *infra* notes 68–72 and accompanying text.

68. See, e.g., *Whalen v. Michael Stores Inc.*, 153 F. Supp. 3d 577, 580–81 (E.D.N.Y. 2015) (holding that a plaintiff did not satisfy the injury-in-fact requirement because she failed to allege that the fraudulent charges that she suffered after a data breach were not reimbursed); *Burton v. MAPCO Express, Inc.*, 47 F. Supp. 3d 1279, 1284–85 (N.D. Ala. 2014) (noting that an “allegation that the charges on [plaintiff’s] account were not forgiven, and [plaintiff] had to pay for the charges” would satisfy the injury-in-fact requirement).

69. See, e.g., *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 693 (7th Cir. 2015) (holding that plaintiffs bringing suit based on stolen credit card numbers satisfied the injury-in-fact requirement because the hack was presumably intended to make fraudulent charges or to assume the consumers’ identities); *In re Sci. Applications Int’l Corp. Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 31 (D.D.C. 2014) (“Plaintiffs who claim that their information was, in fact, accessed and misused have alleged an actual injury.”).

70. Compare *In re Adobe Sys. Privacy Litig.*, 66 F. Supp. 3d 1197, 1215 (N.D. Cal. 2014) (“[T]o require Plaintiffs to wait until they actually suffer identity theft or credit card fraud in order to have standing would run counter to the well-established principle that harm need not have already occurred or be ‘literally certain’ in order to constitute injury-in-fact.”), with *Galaria v. Nationwide Mut. Ins. Co.*, 998 F. Supp. 2d 646, 657 (S.D. Ohio 2014) (holding “that the increased risk that Plaintiffs will be victims of identity theft [or] identity fraud . . . at some indeterminate point in the future does not constitute injury sufficient to confer standing where, as here, the occurrence of such future injury rests on the criminal actions of independent decisionmakers”).

imminent harm,”<sup>71</sup> most courts have held that a plaintiff who takes preventative measures such as subscribing to a credit monitoring service also fails to suffer an injury-in-fact.<sup>72</sup>

Before *Clapper*, there was a clear circuit split on the question of whether a plaintiff in a data breach case could demonstrate that the plaintiff suffered an injury-in-fact without alleging actual misuse of the stolen PII.<sup>73</sup> But even though *Clapper* now controls, only one appellate court has applied that case’s “certainly impending” standard in data breach litigations.<sup>74</sup> That Seventh Circuit decision, *Remijas v. Neiman Marcus Group, LLC*,<sup>75</sup> and similar opinions from district courts in the Ninth Circuit,<sup>76</sup> suggest that a circuit split may soon re-emerge on the question of whether a plaintiff can satisfy the injury-in-fact requirement without alleging actual misuse of PII.<sup>77</sup> Resolving this question is essential because data breach claims are often brought when the thieves actually misuse the stolen PII, and identity thieves can wait an indefinite period of time to fraudulently use the data.<sup>78</sup> Thus, a requirement that all plaintiffs suffer actual misuse of their PII following a data breach could prevent prospective plaintiffs from bringing viable state law claims until years after their data has been stolen.<sup>79</sup> Courts should instead relax the standing inquiry so that consumers can vindicate their interests as the applicable law permits, even if the consumer has not suffered actual misuse of his or her PII.

71. *Clapper*, 133 S. Ct. at 1155.

72. See, e.g., *Green v. eBay Inc.*, No. 14-1688, 2015 U.S. Dist. LEXIS 58047, at \*19–22 (E.D. La. May 4, 2015).

73. *Peters v. St. Joseph Servs. Corp.*, 74 F. Supp. 3d 847, 856 (S.D. Tex. 2015) (“The Court recognizes that before *Clapper*, a split existed among the Third, Seventh and Ninth circuit courts over whether the increased risk of harm stemming from a data security breach constitutes imminent injury under Article III.”).

74. *Neiman Marcus*, 794 F.3d at 692–94.

75. 794 F.3d 688.

76. See, e.g., *In re Adobe Sys. Privacy Litig.*, 66 F. Supp. 3d 1197, 1213–14 (N.D. Cal. 2014) (discussing difficulties courts may face when interpreting *Clapper*).

77. See *infra* Part II.A.

78. *Neiman Marcus*, 794 F.3d at 694 (“[S]tolen data may be held for up to a year or more before being used to commit identity theft. Further, once stolen data have been sold or posted on the Web, fraudulent use of that information may continue for years.” (quoting U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-737, PERSONAL INFORMATION: DATA BREACHES ARE FREQUENT, BUT EVIDENCE OF RESULTING IDENTITY THEFT IS LIMITED; HOWEVER, THE FULL EXTENT IS UNKNOWN 29 (2007))).

79. See *id.* at 693–94 (discussing that an alleged risk of future harm was sufficient at the motion to dismiss stage and allowing the case to proceed).

A. *Not All Courts Agree That Actual Misuse Is the Relevant Harm*

Since *Clapper*, most district courts that sit in circuits other than the Seventh and Ninth Circuits have concluded that the injury-in-fact requirement is not satisfied unless the plaintiff can allege actual misuse of the plaintiff's PII.<sup>80</sup> Misuse can take the form of an unauthorized charge to a credit card, filing a fraudulent tax return, or an attempt to open an account using the stolen PII.<sup>81</sup> Interestingly, since *Clapper*, at least four district courts have concluded that actual misuse is insufficient to demonstrate an injury-in-fact.<sup>82</sup> In addition to misuse, these courts required plaintiffs to allege that they suffered misuse that resulted in direct economic loss.<sup>83</sup>

For various reasons, the four cases where courts have demanded direct economic loss in addition to misuse appear to have limited precedential value. In one of these cases, despite alleged misuse, the court held that the plaintiff's alleged future injury was not imminent in part because the plaintiff filed the claim thirty-six months after the data breach incident occurred.<sup>84</sup> Another case, *In re Barnes & Noble Pin Pad Litigation*,<sup>85</sup> was decided by a district court within the Seventh Circuit and was therefore overruled by *Neiman Marcus*.<sup>86</sup>

In the two remaining cases where courts required a showing of economic harm in addition to actual misuse, the courts explicitly required the plaintiff to demonstrate that her economic harm would not be reimbursed. In one of those cases, *Whalen v. Michael Stores Inc.*,<sup>87</sup> the court curiously placed primary reliance on *In re Barnes & Noble* even after the *Neiman Marcus* decision,<sup>88</sup> applied one case whose analysis contradicted the rule that the court announced in

80. See, e.g., *In re Sci. Applications Int'l Corp. Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 19 (D.D.C. 2014) (observing that "most [courts] have agreed that the mere loss of data—without evidence that it has been either viewed or misused—does not constitute an injury sufficient to confer standing").

81. See, e.g., *Tierney v. Advocate Health & Hosps. Corp.*, No. 13-CV-6237, 2014 U.S. Dist. LEXIS 158750, at \*5–6 (N.D. Ill. Sept. 4, 2014) (concluding that some plaintiffs in the case had established Article III standing under the *Clapper* standard because someone had attempted to access their bank accounts and opened new cell phone accounts).

82. See *infra* notes 85–94 and accompanying text.

83. See, e.g., *Burton v. MAPCO Express, Inc.*, 47 F. Supp. 3d 1279, 1284–85 (N.D. Ala. 2014).

84. *Fernandez v. Leidos*, 127 F. Supp. 3d 1078, 1087–88 (E.D. Cal. 2015).

85. No. 12-CV-8617, 2013 U.S. Dist. LEXIS 125730 (N.D. Ill. Sept. 3, 2013).

86. See *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 693 (7th Cir. 2015).

87. *Whalen v. Michael Stores Inc.*, 153 F. Supp. 3d 577 (E.D.N.Y. 2015).

88. *Id.* at 580–81.

*Whalen*,<sup>89</sup> and applied another case (also from a district court in the Seventh Circuit that was decided before *Neiman Marcus*) where the court in fact *rejected* the contention that the plaintiffs had to prove that they incurred unreimbursed expenses at the pleading stage.<sup>90</sup> Interestingly, in the other case where a court required the plaintiff to prove that his asserted economic harm would not be reimbursed, *Burton v. MAPCO Express, Inc.*,<sup>91</sup> the court applied Alabama common law on tort damages instead of standing doctrine to determine whether the plaintiff's asserted injuries were cognizable.<sup>92</sup> The *Burton* court's application of a legal injury test to determine whether the plaintiff in that case established injury-in-fact does not fit within the Supreme Court's current reliance on a factual injury test. Still, applying the legal injury test helped the *Burton* court reach a more theoretically sound result, which can provide guidance for future courts dealing with similar cases.<sup>93</sup>

*B. The Seventh Circuit's Application of Clapper in Neiman Marcus and Similar Decisions from District Courts Within the Ninth Circuit*

1. *Neiman Marcus*

*Neiman Marcus* is the first federal appellate opinion that applied *Clapper* to determine whether asserted injuries arising from a data breach satisfied the injury-in-fact requirement. In *Neiman Marcus*, the retailer discovered that a data breach caused up to 350,000 payment cards to be exposed to unauthorized parties.<sup>94</sup> Nine thousand two hundred of those cards were misused, so the retailer offered one year of free credit monitoring and identity theft protection to all individuals whose cards were potentially

89. *Id.* at 581. *Whalen* applied a higher standard than the standard applied in *In re Target Corp. Data Securities Breach Litigation*, 66 F. Supp. 3d 1154, 1159 (D. Minn. 2014), which did not require a demonstration of actual unreimbursed economic harm. *Whalen*, 153 F. Supp. at 581.

90. *Whalen*, 153 F. Supp. at 581 (citing *In re Michaels Stores Pin Pad Litig.*, 830 F. Supp. 2d 518, 527 (N.D. Ill. 2011)).

91. 47 F. Supp. 3d 1279 (N.D. Ala. 2014).

92. *Id.* at 1284–85 (“Because *Resnick* does not provide clear direction with respect to [plaintiff’s] pleading obligation in this consumer data theft action and because Alabama law governs [plaintiff’s] negligence claim, the Court turns to Alabama law for guidance.”). *But see* *Smith v. Triad of Ala., LLC*, No. 1:14-CV-324-WKW-PWG, 2015 U.S. Dist. LEXIS 132514, at \*20–23 (M.D. Ala. Sept. 22, 2015) (declining to apply *Burton* in a data breach case).

93. *See infra* Part III.

94. *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 690 (7th Cir. 2015).

compromised.<sup>95</sup> In response to the breach, several individuals filed purported class action complaints that sought to represent all consumers whose data was breached and that relied on several common law causes of action.<sup>96</sup> The complaints were later consolidated, and the named plaintiffs of the purported class alleged distinct factual harms: two named plaintiffs alleged that fraudulent charges appeared on their payment card accounts, one plaintiff alleged that her bank informed her that “her debit card had been compromised,” and another plaintiff alleged that her card was potentially exposed in the breach.<sup>97</sup> The district court dismissed the consolidated complaint for lack of standing.<sup>98</sup>

On appeal, the Seventh Circuit held that two of the plaintiffs’ asserted future injuries sufficed to establish injury-in-fact for all plaintiffs whose data was potentially exposed in the breach because the plaintiffs’ alleged injuries demonstrated an increased risk of identity theft and the necessary present cost of preventative measures to detect identity theft.<sup>99</sup> To reach these holdings, the court applied the “substantial risk” standard that *Clapper* explicitly preserved.<sup>100</sup> In holding that the increased susceptibility to identity theft satisfied the “substantial risk” standard, the court reasoned that the hackers who stole consumer data must have intended to use that data for fraudulent purposes.<sup>101</sup> The court’s holding that the cost of a preventative measure—credit monitoring—was an independent cognizable injury is significant because it rests on a factual distinction with *Clapper* that could apply in future data breach cases.

In *Clapper*, the Supreme Court concluded that costs incurred to prevent a non-imminent harm could not constitute actual harm.<sup>102</sup> The Court justified its conclusion by reasoning that a decision to allow mitigation expenses to constitute actual harm would allow a

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95. *Id.*

96. *Id.* at 690–91.

97. *Id.*

98. *Remijas v. Neiman Marcus Grp., LLC*, No. 14 C 1735, 2014 U.S. Dist. LEXIS 129574, at \*10 (N.D. Ill. Sept. 16, 2014).

99. *Neiman Marcus*, 794 F.3d at 693–96.

100. *Id.* at 693.

101. *Id.* (“Presumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers’ identities.”).

102. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1152 (2013) (“Because respondents do not face a threat of certainly impending interception . . . the costs that they have incurred to avoid surveillance are simply the product of their fear of surveillance [and] . . . such a fear is insufficient to create standing.”).

plaintiff to “manufacture standing.”<sup>103</sup> However, the Seventh Circuit read that conclusion narrowly, stating that the rule in *Clapper* did not apply in *Neiman Marcus* because, unlike the plaintiffs in *Clapper*, the *Neiman Marcus* plaintiffs could confirm that they were exposed to an independently cognizable risk of harm because they were offered credit monitoring services as a preventative measure.<sup>104</sup> Thus, in holding that the cost of credit monitoring was itself a cognizable harm,<sup>105</sup> the Seventh Circuit noted that *Neiman Marcus*’s decision to offer free credit monitoring for one year to consumers whose data had been potentially exposed indicated that the consumers’ concern of impending identity theft was not purely speculative.<sup>106</sup>

*Neiman Marcus* suggests two rules that could possibly help district courts reach more uniform and perhaps doctrinally sound results in determining whether data breach plaintiffs can establish standing. The first rule would be that actual misuse is a sufficiently imminent harm whenever it is apparent that the data thief purposefully stole PII.<sup>107</sup> That rule is enticingly simple and entirely reconcilable with several recent district court opinions.<sup>108</sup>

103. *Id.* at 1151 (“[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.”).

104. *Neiman Marcus*, 794 F.3d at 694 (“[I]t is important not to overread *Clapper*. *Clapper* was addressing speculative harm based on something that may not even have happened to some or all of the plaintiffs. In our case, *Neiman Marcus* does not contest the fact that the initial breach took place. An affected customer, having been notified by *Neiman Marcus* that her card is at risk, might think it necessary to subscribe to a service that offers monthly credit monitoring.”).

105. *Id.*

106. *See id.*

107. *See id.* at 693–94. The District Court for the District of Maryland has endorsed a similar test:

[I]n the data breach context, plaintiffs have properly alleged an injury in fact arising from increased risk of identity theft if they put forth facts that provide either (1) actual examples of the use of the fruits of the data breach for identity theft, even if involving other victims; or (2) a clear indication that the data breach was for the purpose of using the plaintiffs’ personal data to engage in identity fraud.

*Khan v. Children’s Nat’l Health Sys.*, No. TDC-15-2125, 2016 U.S. Dist. LEXIS 66404, at \*15 (D. Md. May 19, 2016). The court indicated that the nature of the compromised PII, the methods that data thieves use, and confirmation of whether the data has been stolen may all indicate the data thieves’ purpose. *See id.* at \*16–17.

108. *See, e.g., Green v. eBay Inc.*, No. 14-1688, 2015 U.S. Dist. LEXIS 58047, at \*15–19 (E.D. La. May 4, 2015) (noting that plaintiffs did not have standing because no actual misuse of PII occurred); *In re Sci. Applications Int’l Corp. Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 25–26 (D.D.C. 2014) (finding that there was no evidence of actual misuse of PII because of the thief’s lack of sophistication, meaning the plaintiffs did not have standing). From these and other cases, it appears as though some courts treat a data



Nonetheless, it is difficult to imagine that courts can apply such a conclusory test in a consistent manner. Data thieves' identities and therefore their intentions are often unknown; thus, even a hacker who accesses the PII of a large number of consumers could hack into a system for some purpose other than to defraud consumers. The second rule *Neiman Marcus* offers would be that the cost of a preventative measure like credit monitoring is always a cognizable harm. To avoid violating the rule announced in *Clapper* that mitigation expenses do not constitute actual harm, courts could limit the application of this second *Neiman Marcus* rule to cases where sensitive PII—and not just benign information like a consumer's name and address—is exposed.

## 2. District Courts Within the Ninth Circuit

Three district courts that sit within the Ninth Circuit have also held that a consumer whose data is disclosed to unauthorized parties because of a data breach can satisfy the injury-in-fact requirement without alleging misuse.<sup>109</sup> In reaching those holdings, each of those courts applied a Ninth Circuit case, *Krottner v. Starbucks Corp.*,<sup>110</sup> that was decided before *Clapper*. In *Krottner*, the Ninth Circuit applied a less exacting test for demonstrating legal injury on a theory of increased risk of future harm.<sup>111</sup> The plaintiffs in *Krottner* were among 97,000 Starbucks employees whose “unencrypted names, addresses, and social security numbers” were contained on a laptop that was stolen from the company.<sup>112</sup> After the laptop was stolen, the plaintiff employees enrolled in free credit monitoring services that Starbucks offered, and just one employee reportedly suffered misuse.<sup>113</sup> Nonetheless, the court held that the plaintiffs' allegations satisfied the injury-in-fact requirement.<sup>114</sup> In so holding, the court reasoned that “the theft of a laptop containing their unencrypted personal data” was a “credible threat of real and immediate harm” and therefore sufficed to establish standing.<sup>115</sup>

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thief's apparent intent or ability to steal financial data as contributing to the imminence of impending identity theft.

109. See *infra* notes 116–25 and accompanying text.

110. 628 F.3d 1139 (9th Cir. 2010).

111. See *infra* notes 114–15 and accompanying text.

112. *Krottner*, 628 F.3d at 1140.

113. *Id.* at 1141 (noting that someone attempted to open a bank account using an employee's social security number).

114. *Id.* at 1143.

115. *Id.*

Each of the three district courts that found standing without allegations of misuse applied *Krottner* in similar factual circumstances to reach the same conclusion.<sup>116</sup> In the first case, *In re Sony Gaming Networks & Customer Data Security Breach Litigation*,<sup>117</sup> the plaintiffs were video game consumers who “provide[d] Sony with personal identifying information, including their names, mailing addresses, email addresses, birth dates, credit and debit card information . . . and login credentials.”<sup>118</sup> Sony was subsequently hacked, and the plaintiffs alleged that their financial information was compromised, although only one of the plaintiffs alleged misuse.<sup>119</sup> In another case, *Corona v. Sony Pictures Entertainment, Inc.*,<sup>120</sup> the plaintiffs were Sony Entertainment employees who alleged that their personal—including financial—information was stolen in a data breach and posted on file sharing websites accessible to identity thieves.<sup>121</sup> The plaintiffs also alleged that the stolen information was used to send threatening e-mails to the employees and their families.<sup>122</sup> Finally, in *In re Adobe Systems Privacy Litigation*,<sup>123</sup> customers supplied payment card information that hackers stole and subsequently decrypted, and at least some of the information later appeared on the Internet.<sup>124</sup> The *Adobe* court offered the most persuasive rationale for concluding that the risk of identity theft for plaintiffs whose sensitive PII was exposed have inherently suffered a sufficiently imminent harm: “[T]o require Plaintiffs to wait until they actually suffer identity theft or credit card fraud to have standing would run counter to the well-established principle that harm need not have already occurred or be ‘literally certain’ in order to constitute injury-in-fact.”<sup>125</sup>

However, not every district court within the Ninth Circuit has reached the same conclusion as the three aforementioned courts. In factually distinct cases, other district courts within the Ninth Circuit have not found that plaintiffs suffered cognizable injuries, despite

116. *Corona v. Sony Pictures Entm’t, Inc.*, No. 14-CV-09600, 2015 U.S. Dist. LEXIS 85865, at \*5–6 (C.D. Cal. Jun. 15, 2015); *In re Adobe Sys. Privacy Litig.*, 66 F. Supp. 3d 1197, 1211–14 (N.D. Cal. 2014); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 961–62 (S.D. Cal. 2014); see *infra* notes 117–25 and accompanying text.

117. 996 F. Supp. 2d 942 (S.D. Cal. 2014).

118. *Id.* at 954.

119. *Id.* at 955–58.

120. 2015 U.S. Dist. LEXIS 85865 (C.D. Cal. June 15, 2015).

121. *Id.* at \*2, \*5.

122. *Id.* at \*6.

123. 66 F. Supp. 3d 1197 (N.D. Cal. 2014).

124. *Id.* at 1215.

125. *Id.* (citing *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1150 n.5 (2013)).

asserting that personal information was disclosed in data breaches.<sup>126</sup> In those cases, the courts' analyses turned on the following considerations: the length of time between the date on which the data breach occurred and the complaint was filed,<sup>127</sup> the plaintiffs' failure to assert that financial information was breached,<sup>128</sup> and the plaintiffs' failure to assert that any of their financial information that was breached was capable of misuse.<sup>129</sup> These cases seem to support a general rule that an increased risk of harm arising from a data breach is a cognizable injury-in-fact, even without an explicit showing of misuse, when the plaintiff alleges that the breach resulted in an unauthorized disclosure of sensitive PII that is capable of misuse and the plaintiff files the claim in a reasonably expeditious manner.

### C. *Explaining the Divergent Outcomes*

#### 1. Ripeness Concerns

Federal courts may be declining to recognize factual injuries in data breach cases because those courts believe that the claims are not ripe for adjudication.<sup>130</sup> Because ripeness doctrine prevents judicial review when an injury is speculative and may never occur,<sup>131</sup> ripeness and standing often appear to be conflated inquiries that observers struggle to differentiate.<sup>132</sup> It is possible that courts are applying ripeness considerations under the guise of standing doctrine in an attempt to determine when parties should litigate these claims, as opposed to determining whether the parties are sufficiently adverse, as standing doctrine requires. However, in data breach cases, the rule of decision from the applicable precedent already supplies a simple

126. See, e.g., *Foster v. Essex Prop. Tr.*, No. 5:14-CV-05531-EJD, 2015 U.S. Dist. LEXIS 159573, at \*10 (N.D. Cal. Nov. 25, 2015); *Antman v. Uber Techs., Inc.*, No. 3:15-CV-01175-LB, 2015 U.S. Dist. LEXIS 141945, at \*29–30 (N.D. Cal. Oct. 19, 2015); *Fernandez v. Leidos, Inc.*, 127 F. Supp. 3d 1078, 1086–87 (E.D. Cal. 2015).

127. See *Fernandez*, 127 F. Supp. 3d at 1087–88. This factor could be relevant to the imminence inquiry on the grounds that a prolonged period after PII exposure but before misuse suggests that a hacker did not intend to misuse PII at all. That analysis, however, seems purely speculative since courts cannot ascertain an unidentifiable data thief's intent.

128. See *Foster*, 2015 U.S. Dist. LEXIS 159573, at \*8.

129. See *Antman*, 2015 U.S. Dist. LEXIS 141945, at \*29–30.

130. As noted, “[The] ripeness doctrine seems to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate for federal court action.” ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 119 (6th ed. 2012).

131. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563–64 (1992).

132. CHERMERINSKY, *supra* note 130, at 119–20 (“Although the phrasing makes the questions of who may sue and when they may sue seem distinct, in practice there is an obvious overlap between the doctrines of standing and ripeness.”).

answer to the question of whether the parties are seeking to litigate a matter that is capable of redress.<sup>133</sup> Therefore, courts should look to substantive law—and not to justiciability doctrines—to make this determination.

## 2. Docket Control

Similarly, district courts could also be applying standing doctrine in data breach cases as a mechanism to control their dockets. As the number of data breach incidents continues to increase, judges could reasonably anticipate that the number of data breach claims would increase dramatically under a more permissive standing inquiry. Hearing such claims would force courts across the country to spend limited resources on complex and often novel questions of state law.<sup>134</sup> Thus, courts could function more efficiently by limiting the number of data breach claims that are allowed to reach the merits.

Even if courts are taking this approach, however, the injury requirement is a poor vehicle for docket control. The Supreme Court has insisted that the existence of a factual injury is a constitutional requirement and not merely a prudential consideration that courts can require at their discretion.<sup>135</sup> Thus, when courts do apply the injury-in-fact requirement in data breach litigation, they are creating precedent regarding the cognizability of future injuries that could affect all types of claims outside of the data breach context. Therefore, courts should look to the merits of a claim to ensure that prudential considerations that weigh in favor of a certain disposition in a data breach case do not effectively become constitutional requirements that could bar an otherwise cognizable claim in another type of case.

## III. THE “CERTAINLY IMPENDING” STANDARD IS INAPPOSITE IN DATA BREACH LITIGATION

The federal courts’ divergent application of injury standards in data breach litigation reveals that there is widespread confusion regarding the cognizability of an increased risk of future harm as an

133. *See infra* Part IV.

134. *Compare* *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151, 167 (1st Cir. 2011) (concluding that Maine negligence law allows recovery for financial losses such as “identity theft insurance and replacement card fees” as mitigation damages so long as they are reasonable), *with* *Krottner v. Starbucks Corp.*, 406 Fed. App’x 129, 131 (9th Cir. 2010) (concluding that actual loss is a necessary element of a negligence claim under Washington law).

135. *See supra* Part I.

injury-in-fact. The Supreme Court contributed to this confusion in *Clapper* by simultaneously applying the “certainly impending” standard from *Lujan* to determine the cognizability of such an injury, declaring that an impending harm need not be “literally certain” to be cognizable, and concluding that the “substantial risk” standard could also be applied in the same inquiry.<sup>136</sup> Specifically, after noting that the “substantial risk” standard remained good law, the Court concluded that the plaintiffs in *Clapper* would fail that standard due to the “attenuated chain of inferences necessary to find harm” in that case.<sup>137</sup> Disappointingly, however, the Court failed to provide any guidance to help lower courts understand the difference between the “certainly impending” standard and the “substantial risk” standard.<sup>138</sup>

While the Supreme Court has failed to coherently explain why it applied the more rigorous “certainly impending” standard in *Clapper*, it is likely that the more exacting inquiry was applied because *Clapper* was at its heart a separation of powers case in which the plaintiffs looked to the federal courts to invalidate a law passed by Congress.<sup>139</sup> Thus, insofar as the “certainly impending” standard requires a high probability of a harm’s occurrence to render the harm cognizable, that standard is inapposite in data breach litigation that does not involve a separation of powers issue.<sup>140</sup> Even if a risk need not be substantial for Article III purposes, an application of the “substantial risk” standard that requires a harm’s occurrence to be minimally probable is better suited for these disputes between private parties. In this way, more claims would rise or fall according to the bounds of the underlying substantive law.

136. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147, 1150 n.5 (2013) (discussing the “certainly impending” standard outlined in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1993), and noting that an injury does not have to be “certainly” or “clearly” impending to be cognizable).

137. *Id.*

138. *See id.* (acknowledging that the “substantial risk” standard is distinct from the “clearly impending” standard but failing to elaborate on this distinction). Moreover, the Court perpetuated this indecision when it acknowledged that both standards remain good law in a subsequent case but failed to explain how courts should apply these two different standards. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (“An allegation of future injury may suffice if the threatened injury is ‘certainly impending,’ or there is a ‘substantial risk’ that the harm will occur.” (quoting *Clapper*, 133 S. Ct. at 1150 n.5)).

139. *See supra* notes 63–64 and accompanying text.

140. *See infra* Section III.A.1.

A. *The Unhelpfulness of “Certainly Impending”*

The Supreme Court’s inconsistent explanation of the “certainly impending” standard’s meaning has rendered the term superfluous. In formulating the injury-in-fact requirement, the Court has repeatedly stated that a threatened harm must be “actual or imminent.”<sup>141</sup> In *Clapper*, the Court explained that imminence “ensure[s] that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending.”<sup>142</sup> However, the words “imminent” and “impending” mean essentially the same thing.<sup>143</sup> Therefore, “certainly” is the operative term in the standard and must have been intended to add some clarity to the matter.<sup>144</sup> Confusingly, in *Clapper*, the Court went on to explain that a threatened harm need not be “literally certain” in order to be a cognizable injury.<sup>145</sup> The term “certainly” is entirely capable of accommodating more than one meaning,<sup>146</sup> but if the Court insists that the term’s literal meaning does not control, then the Court’s failure to offer anything more than “not too speculative” as a definition<sup>147</sup> may explain lower courts’ confusion on the standard’s application.

The Court’s prior applications of the “certainly impending” standard also do not add clarity to the standard’s precise meaning. The *Clapper* majority opinion cited *Lujan* and *Whitmore v. Arkansas*<sup>148</sup> to support its statement that the imminence requirement necessitates a showing that an asserted injury is “certainly impending.”<sup>149</sup> In *Lujan*, the plaintiffs alleged that they intended to travel to the location where they would be subjected to the future harm, but the plaintiffs did not allege a specific time at which they planned to return.<sup>150</sup> As a result, Justice Breyer argued in his dissent

141. *E.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1993) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

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

143. *Compare Imminent*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 621 (11th ed. 2003) (defining “imminent” as “ready to take place”), with *Impend*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra*, at 623 (defining “impend” as “to be about to occur”).

144. *See Clapper*, 133 S. Ct. at 1147. The Court indicated that “certain” was the operative term in its elaboration of imminence indicated by its italicization of the word. *Id.*

145. *Id.* at 1150 n.5.

146. *But see* *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 227 (1994) (“When the word ‘modify’ has come to mean *both* ‘to change in some respects’ *and* ‘to change fundamentally’ it will in fact mean *neither* of those things.”).

147. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 565 n.2 (1992).

148. 495 U.S. 149 (1990).

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

150. *Lujan*, 504 U.S. at 564 (stating that the plaintiffs’ assertion that they would return “soon” did not sufficiently qualify as imminent).

that the Court's conclusion that the asserted future harm was not "certainly impending" resulted from the Court's application of the standard as a measure of temporality.<sup>151</sup> In *Whitmore*, the plaintiff's injury relied on an exceedingly "speculative" series of implausible events,<sup>152</sup> and on that ground, the Court declined to recognize an injury-in-fact.<sup>153</sup> *Whitmore* was also notable because it was the first case where the Court construed the "certainly impending" standard as a necessary measure of cognizable harm.<sup>154</sup>

The most logical way to read the Court's applications of the "certainly impending" standard is, however, that it refers to a sufficient, but not necessary, measure of probabilistic harm.<sup>155</sup> If one

151. *Clapper*, 133 S. Ct. at 1160 (Breyer, J., dissenting) (observing that the *Lujan* Court used the "certainly impending" term "as if it concerned *when*, not *whether*, an alleged injury would occur"). To the extent the construction of "certainly impending" in *Lujan* did contemplate whether the alleged injury would occur, the Court also seemed to limit this consideration to circumstances where the plaintiff controls the likelihood of the relevant occurrence. *Lujan*, 504 U.S. at 565 n.2 ("Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is 'certainly impending.' It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control." (citations omitted)).

152. In *Whitmore v. Arkansas*, Chief Justice Rehnquist discussed this "speculative" series of events in humorous detail:

Whitmore's principal claim of injury in fact is that Arkansas has established a system of comparative review in death penalty cases, and that he has "a direct and substantial interest in having the data base against which his crime is compared to be complete and to not be arbitrarily skewed by the omission of any other capital case." Although he has already been convicted of murder and sentenced to death, has exhausted his direct appellate review, and has been denied state post-conviction relief, petitioner suggests that he might in the future obtain federal habeas corpus relief that would entitle him to a new trial. If, in that new trial, Whitmore is again convicted and sentenced to death, he would once more seek review of the sentence by the Supreme Court of Arkansas; that court would compare Whitmore's case with other capital cases to insure that the death penalty is not freakishly or arbitrarily applied in Arkansas. Petitioner asserts that he would ultimately be injured by the State Supreme Court's failure to review Simmons' death sentence, because the heinous crimes committed by Simmons would not be included in the data base employed for Whitmore's comparative review. The injury would be redressed by an order from this Court that the Eighth Amendment requires mandatory appellate review.

495 U.S. 149, 156–57 (1990) (citations omitted) (quoting Brief for the Petitioner, *Whitmore*, 495 U.S. 149 (No. 88-7146), 1989 WL 1127486, at \*21).

153. *Id.* at 157.

154. *See id.* at 157–58 (stating that petitioner's theory of injury was insufficient to establish injury-in-fact for Article III standing).

155. This is true because, as Justice Breyer observed in his *Clapper* dissent, the Court has also applied several other standards to determine whether an alleged future harm was sufficiently imminent. *See Clapper*, 133 S. Ct. at 1160–61 (Breyer, J., dissenting) ("Taken

assumes that “certainly impending” and “substantial risk” are distinct standards, then each of the two standards is meant to be sufficient on its own to demonstrate cognizable injury. Further, the Court’s statement that a “certainly impending” injury is one that is not “too speculative for Article III purposes” suggests that the standard should be applied as a measure of probabilistic harm.<sup>156</sup> This conclusion raises two questions that are essential to understanding how either standard should be applied in data breach litigation: what causes of action should demand that a court apply one of these two standards instead of the other,<sup>157</sup> and what necessary minimum probability would render a harm cognizable?<sup>158</sup>

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together the case law uses the word ‘certainly’ as if it emphasizes, rather than literally defines, the immediately following term ‘impending.’”).

156. See, e.g., *id.* at 1147 (majority opinion) (quoting *Lujan*, 504 U.S. at 565 n.2). *Lujan* offers mixed support for this assertion. The footnote that *Clapper* cites—and the sentence that the footnote supports—applied imminence as if it encompassed both the questions of whether and when the alleged harm would occur. *Lujan*, 504 U.S. at 565 n.2 (concluding that imminence “has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff’s own control”). However, because the Court was reviewing a determination on a motion for summary judgment, the plaintiffs had an evidentiary burden that was higher than at the pleading stage. *Id.* at 561. For instance, the Court would only accept as true those particular factual allegations that plaintiffs set forth at the summary judgment stage. *Id.* Moreover, because the Court concluded that the plaintiffs in *Lujan* were not the objects of the challenged government action, the Court scrutinized the plaintiffs’ evidence in an even more exacting manner. *Id.* at 562; see Scalia, *supra* note 17, at 894–95 (arguing that a plaintiff who challenges a government regulation but is not the object of that regulation cannot establish standing “[u]nless the plaintiff can show some respect in which he is harmed *more* than the rest of” the citizenry). Therefore, the Court’s inquiry as to when the plaintiffs professed to subject themselves to the asserted harm should be read as an evidentiary inquiry to determine probability that was necessitated by the stage of the litigation—not by the “certainly impending” standard itself. See *Lujan*, 504 U.S. at 563–64 (“Such ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”); Hessick, *supra* note 13, at 64 (asserting that *Lujan* “stated that imminence is relevant to justiciability *only* insofar as it relates to the probability that an injury will occur”). But see *Whitmore*, 495 U.S. at 155 (observing that an injury-in-fact “must be concrete in both a qualitative and temporal sense”).

157. See Bradford C. Mank, *Clapper v. Amnesty International: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211, 261–69 (2014) (discussing different cases that have applied these two standards). For further discussion, see *infra* Section III.A.1.

158. See *infra* Part IV. For further discussion, see Hessick, *supra* note 13, at 65–73.



### 1. Applying the “Certainly Impending” Standard in Disputes Between Private Parties

The Supreme Court has never applied the “certainly impending” standard in a claim between two private parties; the standard has been limited to separation of powers cases in which a plaintiff asks a court to nullify an act of another branch of government.<sup>159</sup> In fact, the Court has only applied the “certainly impending” standard fifteen times in its entire history.<sup>160</sup> In thirteen of those cases, the plaintiffs sought declaratory or injunctive relief arising from a governmental action.<sup>161</sup> In another case, a third party sought a stay of the execution of a capital defendant.<sup>162</sup> In the sole remaining case, a group of states (and other parties) challenged an administrative agency’s denial of a rulemaking petition and the agency’s corresponding construction of a statute.<sup>163</sup> Indeed, in each case except for the third-party standing case, *Whitmore v. Arkansas*,<sup>164</sup> the plaintiffs sought to invoke the power of the judiciary against another branch of the federal government.<sup>165</sup>

*Whitmore* presents a rather curious exception to the Court’s pattern of applying the “certainly impending” standard in separation of powers cases. In that case, Simmons, a capital defendant, elected to waive his right to appeal his sentence.<sup>166</sup> The plaintiff—another capital inmate who had exhausted his own appellate review—sought to intervene in the case.<sup>167</sup> As an injury, the plaintiff alleged that the state’s decision not to hear an appeal in Simmons’ case would deprive the plaintiff of comparative review should he somehow obtain habeas relief in the future.<sup>168</sup> In holding that the plaintiff’s alleged injury was insufficiently immediate to be cognizable, the Court reasoned that the chain of events necessary for that injury to occur was too speculative.<sup>169</sup> As an alternative, the plaintiff also asserted that he could demonstrate standing as a “next friend of . . . Simmons.”<sup>170</sup> On

159. See F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. Rev. (forthcoming Mar. 2017).

160. When narrowed to the U.S. Supreme Court, both LEXIS and Westlaw searches performed in September 2016 of “certainly impending,” each generated fifteen results.

161. E.g., *Pennsylvania v. West Virginia*, 262 U.S. 553, 590 (1923).

162. See *Whitmore v. Arkansas*, 495 U.S. 149, 151, 154 (1990).

163. *Massachusetts v. EPA*, 549 U.S. 497, 510–14 (2007).

164. See *Whitmore*, 495 U.S. at 154.

165. E.g., *Pennsylvania*, 262 U.S. at 591.

166. *Whitmore*, 495 U.S. at 153.

167. *Id.*

168. *Id.* at 157.

169. *Id.* at 159–60.

170. *Id.* at 161.

that point, the Court concluded that the plaintiff would not have satisfied the elements necessary to acquire “next friend” standing because the plaintiff could not demonstrate that Simmons was unable to litigate on his own behalf.<sup>171</sup>

There is little reason to conclude that *Whitmore* offers courts a prescriptive precedent for applying the “certainly impending” standard outside of separation of powers cases. In the entire opinion, the Court only mentioned the standard once.<sup>172</sup> The Court did not even purport to apply the standard to reach its ultimate holding on the issue.<sup>173</sup> It is particularly notable that *Whitmore* was the first case in the history of the Supreme Court to articulate the “certainly impending” standard as a necessary requirement for standing and not merely as a condition that would suffice to establish injury-in-fact.<sup>174</sup> In light of these facts, the expression of the “certainly impending” standard in *Whitmore* should not be read as an authoritative statement of the Article III “case or controversy” requirement.<sup>175</sup>

*Lujan* is the most instructive case on the application of the “certainly impending” standard as a necessary condition to establish injury-in-fact. The Burger and Rehnquist Courts advanced the notion that Article III courts were unsuited to provide redress for majoritarian concerns.<sup>176</sup> Consequently, in cases challenging legislative or executive action, those courts applied a more rigorous standing doctrine in response to concerns about an unwarranted expansion of the federal judicial power.<sup>177</sup> *Lujan* embodies that theoretical framework and ensures that “plaintiffs are alleging their

171. *Id.* at 161–66. As the Court explained in *Whitmore*, “‘next friends’ appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves.” *Id.* at 162.

172. *See id.* at 158.

173. *See id.* at 156–61.

174. *Compare id.* at 158 (“A threatened injury must be ‘certainly impending’ to constitute an injury-in-fact.” (citing *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979))), *with* *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (“But ‘[o]ne does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending that is enough.’” (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923))).

175. Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93, 116 (1996) (“The cite in *Whitmore* to *Pennsylvania* thus appears to be an attempt to support a higher standard of injury with a precedent that, when properly read, does not lend itself to such support.”).

176. Hessick, *supra* note 20, at 296.

177. *Id.* at 294–98.

own, personal rights.”<sup>178</sup> Thus, in a case where two parties dispute the invasion of a common law right, there is no theoretical justification for a more rigorous standing inquiry.<sup>179</sup>

It is important to offer the caveat that the Court may not have intended to apply the “certainly impending” standard exclusively in separation of powers cases. Thus, the Court may not have intended for the standard to be applied more rigorously than any alternative standard, including the “substantial risk” standard. Nonetheless, because the Court has only applied the “certainly impending” standard in separation of powers cases, and the Court has generally applied standing doctrine more rigorously in these cases over the last three decades, it is now difficult to read the standard without reference to separation of powers principles.

In contrast to cases that implicate separation of powers principles, in private rights cases, the Court’s insistence on factual injury limits plaintiffs’ abilities to obtain judicial relief in “claims that courts historically would have permitted.”<sup>180</sup> The injury requirement poses a related but unique problem in data breach cases where plaintiffs allege so-called future injuries: the requirement routinely denies federal jurisdiction to claims that often present novel questions of state law.<sup>181</sup> Thus, the application of the injury-in-fact requirement poses a modern-day *Erie* problem.<sup>182</sup> If a plaintiff brings a claim that a state’s common law recognizes, then that plaintiff would nonetheless be barred from bringing that claim in federal court because abstract but binding federal precedent dictates that the resulting factual harm is insufficiently probable.<sup>183</sup> Yet, that result seems curious as a

178. *Id.* at 298–300. Moreover, this reading of *Lujan* comports with *Clapper*; as in *Clapper*, the Court noted that the standing inquiry is more rigorous in separation of powers cases. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013).

179. Hessick, *supra* note 20, at 304 (“In addition to being superfluous in cases involving private rights, the injury-in-fact requirement in such cases has depleted the requirement of objective meaning.”).

180. *Id.* at 277.

181. See, e.g., *Burton v. MAPCO Express, Inc.*, 47 F. Supp. 3d 1279, 1284–85 (N.D. Ala. 2014).

182. Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 253 (2008) (“Properly understood, *Erie* sets forth a constitutional principle that federal judicial lawmaking cannot dictate substantive rights where such lawmaking has only an *adjudicative* rationale—that is, where it is justified solely on the basis that there is federal authority to adjudicate a dispute or to create procedures for such adjudication.” (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938))).

183. See Hessick, *supra* note 20, at 327 (“Requiring injury in fact in private rights cases has not simply resulted in the denial of standing to plaintiffs alleging the violation of

constitutional command that applies to all substantive claims because courts have long granted standing for other types of prospective injuries.<sup>184</sup> In light of the historical application and theoretical justification for the “certainly impending” standard, courts assessing the imminence of future harms in data breach cases should apply the “substantial risk” standard that *Clapper* preserved instead, which notes that there must be a “substantial risk” that the future injury will occur.<sup>185</sup>

#### IV. THE ROLE OF THE SUBSTANTIVE LAW

If courts hearing data breach cases did apply the “substantial risk” standard instead of the “certainly impending” standard, the risk of future harm needed to establish injury would be quite low. Professor Andrew Hessick has offered a compelling argument that Article III only demands an exceedingly low minimum probability that an alleged harm will occur.<sup>186</sup> At its essence, the injury requirement can be reduced to a simple inquiry: who is the right person to bring a particular claim?<sup>187</sup> This inquiry, based on the historical application of the doctrine, would turn on adverseness.<sup>188</sup> In this sense, even if a plaintiff alleges that he is only at a minimally increased risk of suffering a harm caused by an action that a defendant has already committed, then those two parties would have adverse interests. Because the parties would be adverse, the constitutional requirement would be satisfied.<sup>189</sup> Hessick argues that courts could then apply prudential considerations to shape their jurisdictional limitations.<sup>190</sup> With a clear distinction between a low

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private rights. . . . [M]ost important[ly], it presents the threat of limiting jurisdiction in future cases.”).

184. Hessick, *supra* note 13, at 67 (“[T]he fact that the injury might not occur does not render the claim nonjusticiable; otherwise, federal courts would lack jurisdiction to hear *any* claims for prospective relief because all potential future injuries have some chance of not transpiring.”); *see, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990) (discussing how future injuries must be “real and immediate”).

185. *See supra* note 65 and accompanying text.

186. Hessick, *supra* note 13, at 67 (“Whether there is an actual dispute between two parties is a binary question: there either is a dispute, or there is not. If a substantial risk of injury constitutes an actual dispute, a small risk of injury does as well. The degree of risk goes to the intensity of the dispute, not whether it exists at all.”).

187. *E.g.*, Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 468 (2008) (stating that the injury requirement “ensures that the federal courts hear only those disputes characterized by the kind of adversary relationship that makes a legal ‘case’ or a ‘controversy’”).

188. *See supra* note 18 and accompanying text.

189. *See supra* notes 16–20 and accompanying text.

190. Hessick, *supra* note 13, at 91–92.

constitutional threshold for standing and any prudential considerations that a court might apply,<sup>191</sup> a court that adopted this approach would “increase the legitimacy of judicial decisions by promoting transparency.”<sup>192</sup>

In data breach cases, courts have held that preventative costs like credit monitoring are not cognizable injuries unless the threat of identity theft is sufficiently probable.<sup>193</sup> For example, in addition to its central holding, *Clapper* held that mitigation expenses are merely future injuries when the alleged harms are not imminent.<sup>194</sup> Yet, if imminence is simply a question of probability, then it is difficult to accept the notion that Article III commands both the aforementioned result in data breach cases and opposite results in cases arising from other causes of action such as toxic exposure or defective medical devices.<sup>195</sup> Rather, courts are actually engaging in normative inquiries about the sorts of harms that should be cognizable.<sup>196</sup> Courts could ensure more predictable, doctrinally sound outcomes in data breach cases by adopting Hessick’s test that only a minimal risk of harm is required to satisfy the factual injury requirement.<sup>197</sup> However, a simpler and more direct solution<sup>198</sup> in data breach cases would be to identify the disclosure of sensitive PII as a factual harm that could satisfy the factual injury requirement.<sup>199</sup>

#### A. *The Normative Nature of the Factual Injury Requirement*

In 1988, Judge William A. Fletcher of the United States Court of Appeals for the Ninth Circuit authored a seminal work on standing

191. Docket control is an example of one such consideration. *See supra* Section II.C.

192. Hessick, *supra* note 13, at 59.

193. *E.g.*, *Green v. eBay Inc.*, No. 14-1688, 2015 U.S. Dist. LEXIS 58047, at \*5–6 (E.D. La. May 4, 2015).

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

195. *See Galbraith, supra* note 4, at 1391–92 (“In either case, notwithstanding greater harm that may result in the future, when a defendant creates a risk of harm requiring monitoring costs, whether they are medical or financial costs, the damage has been done.”). *See generally Clapper*, 133 S. Ct. at 1162–64 (Breyer, J., dissenting) (discussing how different kinds of cases, such as environmental cases, found plaintiff standing based on a probabilistic or imminent risk of harm).

196. *See infra* Section IV.A.

197. *See supra* note 186–87 and accompanying text.

198. This solution would be simpler because it would encourage courts to permit more claims to proceed to the merits without requiring them to speculate about the likelihood of future events occurring.

199. *See infra* Section IV.C.

doctrine, *The Structure of Standing*.<sup>200</sup> Fletcher's critical insight into standing doctrine is that courts cannot apply the doctrine in both a singular and coherent manner to all types of substantive claims.<sup>201</sup> This is because the law provides remedies for the violation of legal rights, and those violations manifest themselves in different factual harms.<sup>202</sup> Therefore, the controlling substantive legal authority, and not "disembodied and abstract application[s] of general principles of standing law[.]" dictates the acceptable legal injury and must then determine the outcome of the standing inquiry.<sup>203</sup>

According to Fletcher's positivist criticism of standing doctrine, judicial insistence on a demonstration of factual injury obstructs the essential question that the standing inquiry poses.<sup>204</sup> Under this view, the factual injury requirement set forth in *Association of Data Processing Service Organizations v. Camp* is inherently inoperative "except in the relatively trivial sense of determining whether [the] plaintiff is telling the truth about her sense of injury."<sup>205</sup> Rather, when the Supreme Court applies a factual injury test to determine whether someone has been harmed, the Court is actually applying external, normative considerations about the sorts of harms that ought to be cognizable.<sup>206</sup> Moreover, when the Court rejects the premise that it applies such norms, it necessarily fails to provide clear guidance to lower courts on how to apply them.<sup>207</sup> The result is that lower courts then apply their own normative considerations disguised as formalistic tests to reach unpredictable and divergent outcomes.<sup>208</sup>

#### B. Data Breach Claims Under State Law

Data breach claims are often brought into federal court under state law claims.<sup>209</sup> Many courts that have applied the factual injury

200. Fletcher, *supra* note 10, at 221; see also Ernest A. Young, *In Praise of Judge Fletcher—And of General Standing Principles*, 65 ALA. L. REV. 473, 473–74 (2013) (discussing the lasting significance of Fletcher's work).

201. See Fletcher, *supra* note 10, at 229.

202. *Id.* at 239.

203. *Id.*

204. See *id.* at 231.

205. *Id.* (citing *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152–54 (1970)).

206. *Id.*

207. See *supra* Section III.A.

208. See Elliot, *supra* note 187, at 501 ("No jurist can produce predictable results from a set of rules that arises from incoherence."); Fletcher, *supra* note 10, at 231 (arguing that "the 'injury-in-fact' requirement cannot be applied in a non-normative way").

209. See, e.g., *In re Sci. Applications Int'l Corp. Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 21 (D.D.C. 2014).

test in data breach cases have reached inconsistent conclusions on similar facts,<sup>210</sup> but one case illustrates the test's normative nature particularly well. *In re Science Applications International Corp. Backup Tape Data Theft Litigation* ("SAIC")<sup>211</sup> considered the theft of tapes containing sensitive information—including the names and social security numbers—of millions of TRICARE beneficiaries.<sup>212</sup> The tapes were stolen from the car of a Science Applications International Corporation employee along with a GPS and a stereo.<sup>213</sup> Just one of the thirty-three plaintiffs in the suit alleged that the information that he provided to TRICARE had been misused.<sup>214</sup>

The court held that the plaintiffs who did not allege misuse could not demonstrate that their injuries were "certainly impending."<sup>215</sup> In so holding, the court reasoned that the degree to which the plaintiffs were at a higher risk for identity theft was irrelevant under the "certainly impending" standard.<sup>216</sup> The court first determined in a conclusory fashion that the alleged relevant harm was identity theft.<sup>217</sup> The court then observed that "the likelihood that any individual Plaintiff will suffer harm remains entirely speculative" because there was no indication that the thief would recognize that the tapes contained data or possess the tools or knowledge to decrypt that data.<sup>218</sup> Finally, applying *Clapper*, the court held that the plaintiff's mitigation expenses could not qualify as actual injuries because the alleged harm—identity theft—was not imminent.<sup>219</sup>

Next, the court held that the plaintiffs who did not allege misuse could not demonstrate that their harms presented a sufficiently "substantial risk" of occurring to establish injury-in-fact.<sup>220</sup> In so holding, the court noted that 19% of individuals whose data is exposed in a breach become victims of identity theft,<sup>221</sup> and therefore,

210. See *supra* Sections II.A.–II.B.

211. 45 F. Supp. 3d 14 (D.D.C. 2014).

212. *Id.* at 19. TRICARE is the U.S. military's health system. See *About Us*, TRICARE, <http://www.tricare.mil/About> [<https://perma.cc/VG45-HHSY>] (last updated Sept. 14, 2016).

213. *In re Sci. Applications Int'l Corp. Backup Tape Data Theft Litig.*, 45 F. Supp. 3d at 20.

214. *Id.* at 32.

215. *Id.* at 28.

216. *Id.* at 25.

217. *Id.* The court's analysis thus failed to consider whether the substantive law recognized that expending resources to mitigate the invasion of a legal right could be a legal injury. See *infra* Section IV.C.

218. *In re Sci. Applications Int'l Corp. Backup Tape Data Theft Litig.*, 45 F. Supp. 3d at 25.

219. See *id.* at 26.

220. *Id.*

221. *Id.*

over 80% of data breach victims were not likely to have their identities stolen.<sup>222</sup> Moreover, and with little support for its conclusion, the court then noted that even fewer of the victims in this case were likely to become victims of identity theft because the theft was unsophisticated.<sup>223</sup>

The *SAIC* court's analysis demonstrates the normative nature of courts' application of the factual injury test in data breach cases that arise under common law.<sup>224</sup> The problems posed by the court's construction of the term "certainly impending" have been addressed.<sup>225</sup> Notably, though, the court also failed to define the term "substantial," and indeed the term's definition suggests that it invites a normative application.<sup>226</sup> Thus, the court's conclusion that a 19% chance of identity theft is insubstantial is not supported by a generally applicable empirical test.

For example, imagine that a group of consumers who were exposed to a toxic chemical brought a common law claim against a business in the same jurisdiction as the *SAIC* plaintiffs. Assume that the exposure rendered the consumers with a 19% chance to develop a terminal cancer. It seems reasonable that the consumers who faced a 19% risk of terminal cancer would regard that risk as quite substantial. Yet, the *SAIC* court's test would erect a federal jurisdictional bar to those consumers' claims—even though courts routinely permit such suits.<sup>227</sup> Moreover, if the substantive body of law did provide a remedy for the preventative expenses necessary to detect both the onset of the terminal cancer and the occurrence of identity theft, then what would be the constitutional basis to recognize the harm in one case but not the other? Regardless of what the *SAIC* court should have done, this example demonstrates the normative nature of the applicable test.<sup>228</sup>

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222. *Id.*

223. *Id.*

224. The plaintiffs pled many causes of action, including negligence. *Id.* at 21.

225. See *supra* Section III.A.

226. See *Substantial*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 143, at 1245 (defining "substantial" as "considerable in quantity: significantly great"); *Considerable*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 143, at 266 (defining "considerable" as "large in extent or degree"); *Significant*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 143, at 1159 (defining "significant" as "of a noticeably or measurably large amount"); *Great*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 143, at 547 (defining "great" as "remarkable in magnitude, degree, or effectiveness").

227. See Galbraith, *supra* note 4, at 1388–90.

228. See Fletcher, *supra* note 10, at 229–34 (discussing the normative considerations that contribute to various applications of the injury-in-fact rule).



*C. A Less Rigorous Standing Inquiry*

Another example of the incoherent, normative nature of standing doctrine in data breach litigation is the widespread agreement among courts that alleging misuse suffices to establish injury-in-fact, while merely alleging exposure to misuse does not suffice.<sup>229</sup> Both exposure and misuse of PII are harms that are sufficiently concrete to allow identification of particular parties with adverse interests. Moreover, both exposure and misuse are factual harms that are unrelated to the question of whether the applicable substantive law provides a remedy for the preventative measures that an affected consumer would likely take. Given that there is no applicable empirical test to determine when a risk of harm is sufficiently substantial to become imminent (or that such a test could be consistently applied), it seems doubtful that a distinction between exposure and misuse of PII is necessarily appropriate. For example, mere exposure of a consumer's social security number could make a consumer vulnerable to a more severe and enduring risk than actual misuse of a credit card if the card brand refunded the fraudulent expense and closed the account.

Courts can resolve this doctrinal incoherence by allowing claims where plaintiffs in data breach litigation allege disclosure of sensitive PII<sup>230</sup> to proceed to the appropriate inquiry on the merits. Courts could do so in two ways that should satisfy the constitutional demands imposed by Article III: by applying the "substantial risk" standard while requiring only a low probability of a harm's occurrence for less sensitive PII, or by recognizing exposure of sensitive PII as a cognizable injury. Because the substantive law of various states differs on critical aspects of a data breach claim, such as the provision of damages for measures taken to prevent financial loss incurred after one's sensitive PII is exposed in a data breach,<sup>231</sup> there should not be a jurisdictional bar from bringing such claims in some federal courts and not others when the claims arise from identical facts. One may or may not have a right to keep one's data from being breached, but regardless of how one answers that question, the ultimate arbiter should be the relevant substantive law.

229. See *supra* note 80 and accompanying text.

230. Sensitive PII would include all information capable of resulting in economic harm, such as financial information or social security numbers.

231. See *supra* note 134 and accompanying text.

## CONCLUSION

Allowing more consumers to establish standing in data breach litigation does not mean that a new flood of cases would necessarily proceed to trial. Parties must still bring a dispute to the court that warrants judicial resolution. Alleging that a data breach caused the disclosure of one's name and phone number, for example, would probably not expose someone to any significant risk of financial loss. Moreover, if these claims survived the standing inquiry, they would still be susceptible to motions to dismiss or summary judgment motions. Courts' inquiries at those stages of the proceedings could be better tailored to the requirements of the applicable state law, and litigants would also gain the benefit of being better able to forecast their liability and take the necessary measures to prevent litigation altogether.

The differences in requirements for actionable claims under the substantive law of various states also demonstrate the need for Congress to enact a federal data security scheme with a private right of action. Data breach cases arising from the security practices of large retailers can include plaintiffs from all fifty states.<sup>232</sup> One large claim can accordingly raise novel questions of many states' laws and complicate litigation strategies. Moreover, consumers should be entitled to some redress if corporations fail to maintain reasonable security standards. Credit card brands can mandate that their interests are protected,<sup>233</sup> but if these claims cannot be maintained as class actions, many consumers could be unable to maintain their own separate actions. Until Congress acts, however, standing doctrine should not obstruct litigation from shaping the development of reasonable data security standards.

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232. See, e.g., *In re Target Corp. Data Sec. Breach Litig.*, 66 F. Supp. 3d 1154, 1160 (D. Minn. 2014) (noting that the Target data breach claim involved plaintiffs from "every state in the union save four and the District of Columbia").

233. See Kim Zetter, *Will Target's Lawsuit Finally Expose the Failings of Security Audits?*, WIRED (Mar. 28, 2014, 6:30 AM) <http://www.wired.com/2014/03/trustwave-target-audit/> [https://perma.cc/BVQ3-FB7Z] (discussing the data security standards established by credit card brands that bind businesses accepting bank card payments).

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