Standing Still: The Implications of *Clapper* for Environmental Plaintiffs' Constitutional Standing

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I. INTRODUCTION

In 2013, the Supreme Court decided *Clapper v. Amnesty International*, denying standing to a group of human rights, labor, legal, and media organizations to challenge the constitutionality of a provision of the Foreign Intelligence Surveillance Act ("FISA").[1] Justice Alito, writing for a 5-4 majority, held that the respondents lacked standing because the alleged injury was not "certainly impending," the injury was not fairly traceable to the FISA provision, nor were the costs incurred by the respondents fairly traceable to the FISA provision.[2] Naturally, the four dissenters proposed an alternate view of the facts: Justice Breyer compared the likelihood of the respondents' injury *not* occurring as similar to the chance that "despite pouring rain, the streets will remain dry (due to the presence of a special chemical)."[3] He then criticized the majority, arguing that "*certainty* is not, and never has been, the touchstone of standing."[4]

Although *Clapper* did not deal with issues of environmental law, it signaled a further heightening of standing requirements, prompting much discussion of the forecasted increased difficulty of proving standing in environmental litigation.[5] Because standing is often a contentious issue in environmental litigation, some surmised that the Court's use of the "certainly impending" standard for injury-in-fact—and its express rejection of the Second Circuit's "objectively reasonable likelihood" standard—might shut the door on many more environmental

1. 133 S.Ct. 1138.
2. *Id.*
3. *Id.* at 1160 (Breyer, J., dissenting).
4. *Id.*
5. *See, e.g.*, Michael Caplan, *What Do Gay Rights Cases Say About Environmental Standing to Sue?*, CTR. ON URBAN ENVTL. L. (July 8, 2013), http://ggucuel.org/what-do-gay-rights-cases-say-about-environmental-standing-to-sue [http://perma.cc/EJC6-AQ7K]; Jeremy P. Jacobs, *Supreme Court: Wiretap Ruling Could Haunt Environmental Lawsuits*, E&E PUBLISHING, LLC (May 20, 2013), http://www.eenews.net/stories/1059981453 [http://perma.cc/43TX-E8W3]; Devin McDougall, *Recent Supreme Court Decision May Affect Environmental Standing*, SPR ENVTL. L. BLOG (Mar. 12, 2013, 4:50 PM), http://blog.sprlaw.com/2013/03/recent-supreme-court-decision-may-affect-environmental-standing/ [http://perma.cc/DWB8-6TN6]; Eric Biber, *Did the Supreme Court Shut the Door on Environmental Plaintiffs?*, LEGAL PLANET (Mar. 1, 2013), http://legalplanet.org/2013/03/01/did-the-supreme-court-just-shut-the-courthouse-door-on-environmental-plaintiffs/ [http://perma.cc/FGX6-KGEL].

plaintiffs at the standing stage.[6] For example, some scholars have noted the general "concern" regarding *Clapper's* application to the environmental context, and have argued that its holdings, without clarification, "could produce new standing obstacles for environmental plaintiffs."[7] The Harvard Law Review's case commentary argued that *Clapper's* heightened inquiry threatened to exclude environmental suits in particular, "given 'the diffuse and widespread nature of environmental or ecological harms . . . and the proactive nature of most environmental lawsuits.'"[8] It further asserted that "many litigants who were granted standing in Supreme Court cases from the past decade could not have satisfied [*Clapper*'s] standard," citing cases like *Monsanto Co. v. Geerston Seed Farms* and *Massachusetts v. EPA* as examples.[9] Similarly, others have pointed out that *Clapper* requires environmental plaintiffs "to challenge discrete actions rather than overarching government regulations or policy statements. . . . For example, since scientific disagreement on future harm based on exposure to environmental toxins exists, it may be virtually impossible for a claimant to show with *certainty* that [her] exposure will lead to imminent harm."[10] This in turn "places environmental groups with limited resources at a strategic disadvantage."[11]

Contrary to this discourse, in this Note I argue that *Clapper* may not have as large an impact on standing for environmental plaintiffs as early commentators believed. Instead, the opinion is carefully constructed so as to reaffirm the major standing decisions before it, namely *Lujan*, *Laidlaw*, *Massachusetts*, and *Summers*.[12] An important concession in footnote 5 of *Clapper*

6. *See, e.g.*, Jacobs, *supra* note 5; McDougall, *supra* note 5.

7. Patrick Gallagher, *Environmental Law,* Clapper v. Amnesty International USA*, and the Vagaries of Injury-in-Fact: "Certainly Impending" Harm, "Reasonable Concern," and "Geographic Nexus*,*"* 32 UCLA J. ENVTL. L. & POL'Y 1, 4 (2014).

8. *The Supreme Court, 2012 Term – Leading Cases*, 127 HARV. L. REV. 298, 305 (2013) (citing Shi-Ling Hsu, *The Identifiability Bias in Environmental Law*, 35 FLA. ST. U. L. REV. 433, 467 (2008)).

9. *Id.*

10. Sean J. Wright, *No Leg to Stand on:* Clapper v. Amnesty International USA *and the Dawn of an Increasingly Strict Standing Doctrine*, 74 OHIO STATE L.J. FURTHERMORE 41, 44 (2013).

11. *Id.*

12. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Friends of the Earth v. Laidlaw Envtl Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

also leaves open the possibility that plaintiffs may demonstrate injury in fact based on a "substantial risk" of harm.[13] Finally, as I will argue below, there is ample reason to believe that dismissing this suit was at least in part motivated by a desire to avoid more difficult and sensitive questions on the merits, which included constitutional claims and issues of national security and counterterrorism. Thus, this case is not a departure from the existing standing doctrine, and environmental plaintiffs need not strategize new ways of demonstrating standing.

This Note is comprised of four sections. In the second section, I discuss the *Clapper* opinion in depth, analyzing the reasoning of the Court and its implications for standing doctrine in general. I also discuss its feared effects on environmental plaintiffs. In the third section, I examine standing doctrine as it stood prior to *Clapper* in a brief but critical historical overview. I analyze four cases—*Lujan*, *Laidlaw*, *Massachusetts*, and *Summers*—that I believe represent the outer displacements of the swinging pendulum of standing doctrine. Against this background, in the fourth section I argue that standing doctrine, particularly in the environmental context, has already seen many restrictions and liberalizations, and that *Clapper* does not significantly change the outer reaches of this doctrine. I then turn to *Susan B. Anthony v. Driehaus*, a post-*Clapper* Supreme Court standing decision, and argue that the Court's use of the "substantial risk" standard confirms my thesis. After also assessing how the lower federal courts have dealt with *Clapper* in subsequent cases (not limited to the environmental context), I imagine the types of environmental cases that *Clapper* might actually implicate, and hypothesize as to their outcomes. I then conclude by arguing that *Clapper* will not significantly restrict standing inquiry in the environmental context and will have less of an impact on standing doctrine than some may have projected.

II. STANDING IN *CLAPPER*

In its 2012 to 2013 term, the Court dismissed *Clapper v. Amnesty International USA* without ever reaching the merits due

13. 133. S.Ct. at 1150 n.5.

to the plaintiffs' lack of standing.[14] Although this case did not deal with standing in the environmental context—*Clapper* dealt with issues of national security and the First Amendment—several commentators expressed concern about *Clapper* in particular, noting that the decision could have significant effects on standing analysis in the environmental context.[15] *Clapper*, on its face, appears to present a more restrictive standing inquiry than some earlier decisions, such as *Massachusetts v. EPA*[16] or *Friends of the Earth v. Laidlaw*.[17] But the decision did not significantly change the standing analysis as it stood before the 2012–2013 term, nor did it add any significant additional burdens for environmental plaintiffs to show standing. In this section, I analyze the *Clapper* decision and the reasoning of the Court, explaining why the plaintiffs were denied standing.

A. Standing Analysis in *Clapper v. Amnesty International USA*

Clapper dealt with Section 702 of the Foreign Intelligence Surveillance Act of 1978, which was added to the statute by the FISA Amendments Act of 2008.[18] FISA permits the Attorney General and the Director of National Intelligence to authorize surveillance of communications of individuals who are not "United States persons" and are reasonably believed to be located outside of the United States for purposes of collecting foreign intelligence information, so long as certain procedures are followed.[19] One such procedure is obtaining the approval of the Foreign Intelligence Surveillance Court ("FISC") to conduct surveillance of a particular target. The FISC may grant the request if there is probable cause to believe that "the target of the electronic surveillance is a foreign power or an agent of a foreign power," and that each of the specific "facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign

14. *See* Clapper v. Amnesty Int'l USA, 133 S.Ct. 1138 (2013).
15. *See supra* note 6 & accompanying text.
16. 549 U.S. 497, 516–21 (2007).
17. 528 U.S. 167, 180–88 (2000).
18. Clapper v. Amnesty Int'l USA, 133 S.Ct. 1138, 1144 (2013) (quoting 50 U.S.C. § 1881(a)).
19. *Id.* at 1143.

power."[20] Section 702, however, changed these procedures so as not to require probable cause to believe that the target is a foreign power or an agent of a foreign power, nor to require the Government to specify the facilities or places at which the surveillance is directed.[21]

After the enactment of the FISA Amendments Act, the *Clapper* respondents, who were attorneys and human rights, labor, legal, and media organizations whose work requires communications with individuals abroad, filed suit. Their action, challenging the constitutionality of Section 702 under the Fourth Amendment, First Amendment, Article III, and separation of powers principles, sought both declaratory and injunctive relief.[22] The respondents, some of whom were, for example, lawyers to foreign nationals facing criminal charges and civil cases related to September 11 and detainees in Guantanamo Bay,[23] alleged that some of their communications were likely targets of surveillance under Section 702, as they were likely to be people the Government might associate with terrorist organizations or people located in geographic areas where counterterrorism efforts were focused.[24] At least one respondent stated that the Government had already, "(under the authority of the pre-2008 law) 'intercepted some 10,000 telephone calls and 20,000 email communications involving [his client] Mr. Al-Hussayen.'"[25] As a result of their fear of surveillance, the respondents claimed that they were injured in multiple ways: they were hampered in their ability to conduct their work, including communicating confidential information to clients; they were compelled to travel abroad rather than communicate via email or telephone; and they had taken costly measures to protect the confidentiality of their communications.[26]

Justice Alito delivered the opinion of the Court. In outlining the legal standard for Article III standing, he grounded standing doctrine in separation of powers principles,[27] reminiscent of

20. *Id.* (quoting § 105(a)(3), 92 Stat. 1790; § 105(b)(1)(A), (b)(1)(B)).
21. *Id.* at 1144.
22. *Id.* at 1145–46.
23. *Id.* at 1156–57 (Breyer, J., dissenting).
24. *Id.* at 1145.
25. *Id.* at 1158 (Breyer, J., dissenting).
26. *Id.* at 1145–46.
27. *Id.* at 1146–47.

Justice Scalia's approach in an earlier decision, *Lujan v. Defenders of Wildlife*.[28] In addition to the usual explanation that an injury in fact must be "concrete, particularized, and actual or imminent,"[29] Justice Alito specified that imminence "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*."[30] And relying on the "certainly impending" standard, Justice Alito invalidated the "objectively reasonable likelihood" standard used by the Second Circuit in the proceedings below, reversing the judgment.[31]

Unsurprisingly given the lead in, Justice Alito held that the respondents did not have standing, both for lack of sufficient injury as well as causation.[32] The respondents' supposed injury was the fear of a future injury that "relie[d] on a highly attenuated chain of possibilities" and "[did] not satisfy the requirement that threatened injury must be certainly impending."[33] Justice Alito separated their future injury into five attenuated stages:

> [R]espondents' argument rests on their highly speculative fear that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under § [702] rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy § 188a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts.[34]

28. 504 U.S. 555, 559–60; *see also infra* notes 76–78 & accompanying text. Unlike *Lujan*, neither *Laidlaw* nor *Massachusetts* (two important standing decisions in the environmental context that upheld standing, to be discussed in Section III) discussed separations of powers principles in their formulations of standing doctrine or in their analysis. *See* Massachusetts v. EPA, 549 U.S. 497, 516–21 (2007); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–88 (2000).

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

30. *Id.* (quoting *Lujan*, 504 U.S. at 564 n.2).

31. *Id.*

32. *Id.* at 1150.

33. *Id.* at 1148.

34. *Id.*

Because all five of these contingencies would have to occur in order for the respondents to claim a sufficient injury, Justice Alito held that the respondents' threatened future injury was too speculative.[35] Justice Alito further explained that because the Government, even if it did decide to target the respondents' communications, might not do so under the authority of Section 702, the respondents also failed to show that their future injury would be fairly traceable to Section 702.[36] Finally, the respondents' alternative argument, that the costs they undertook to avoid surveillance under Section 702 constituted a sufficient and present injury, also failed.[37] Justice Alito noted that the respondents willingly undertook such costs of their own accord, and they "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."[38] As such, the Court found that the respondents could not prove Article III standing.[39] In an important footnote, however, Justice Alito added one caveat, conceding that the case law "do[es] not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about."[40] Instead, he recognized that in some instances, standing based on a "substantial risk" of injury would suffice, but did not clarify what instances those were.[41]

As most standing decisions do, *Clapper* came with a vigorous dissent, authored by Justice Breyer and joined by three others. Justice Breyer's dissent criticized not only the majority's standing analysis, but also the constitutionalization of standing requirements by the Court in *Lujan*.[42] He noted the apparent disconnect between the Court's simultaneous recognition "that the precise boundaries of the 'case or controversy' requirement are matters of degree . . . not discernible by any precise test"[43]

35. *Id.*
36. *Id.* at 1149.
37. *Id.* at 1150–51.
38. *Id.* at 1151.
39. *Id.* at 1155.
40. *Id.* at 1150 n.5.
41. *Id.*
42. *Id.* at 1155–56 (Breyer, J., dissenting).
43. *Id.* at 1155 (internal quotation marks and citations omitted).

on the one hand, and its creation of "a subsidiary set of legal rules" to govern the inquiry on the other.[44]

Turning to the case at bar, he detailed several considerations, "based upon the record along with commonsense inferences," that led him to conclude "that there is a very high likelihood that [the] Government, *acting under the authority of § [702]*, will intercept at least some of the communications just described."[45] He argued that the respondents engaged in the types of electronic communications specifically targeted by Section 702 (but not the un-amended FISA), that the Government had a strong motive to listen to and conduct surveillance of the respondents' communications, that the Government had in fact surveilled such communications in the past, and that the Government has the capacity to conduct this type of electronic surveillance.[46] Taken together, he argued, "we need only assume that the Government is doing its job (to find out about, and combat, terrorism) in order to conclude that there is a high probability" that the Government will take action that would satisfy the injury-in-fact inquiry.[47]

Justice Breyer then took issue with the majority's use, or perhaps misuse, of the "certainly impending" standard. Surveying the case law, he argued that "*certainty* is not, and never has been, the touchstone of standing," pointing out that the majority seemed to concede this in footnote five.[48] He also outlined a number of cases in which the Court "*found* standing where the occurrence of the relevant injury was far *less* certain than here," pointing to cases of merely probabilistic injuries as well.[49] Asking how the law could be otherwise, he listed a number of situations in which injury was not literally certain, but was nonetheless sufficient.[50] He concluded that the respondents here satisfied the standing inquiry.[51]

44. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).
45. *Id.* at 1157.
46. *Id.* at 1157–59.
47. *Id.* at 1160.
48. *Id.* at 1160–61.
49. *Id.* at 1161–62.
50. *Id.* at 1162–63.
51. *Id.* at 1165.

B. Standing Post-*Clapper*

Because standing is often such a contentious issue in the environmental context, it is easy to see why at first glance, *Clapper* seems like it would even further raise the bar for environmental plaintiffs seeking to prove standing. In fact, several blogs and articles noted that *Clapper* could cause trouble for environmental plaintiffs.[52] *Clapper*'s explicit rejection of the Second Circuit's use of the "reasonable likelihood" standard, and use of the more searching "certainly impending" standard,[53] indeed seems like it would make proving an injury in fact all the more difficult for plaintiffs seeking to prevent speculative injuries that have not yet recurred.

Yet despite the fact that *Clapper* closed the door on the particular plaintiffs at issue, its holdings do not necessarily affect environmental plaintiffs. Not only did this case arise in a very particular context, and thus there is reason to believe that it should be limited to its specific contexts, but it also fits well within the outer limits of standing doctrine as it already existed prior to the 2012 term. In order to understand this argument, it is necessary first to provide a brief but critical overview of how standing doctrine in the environmental context has evolved in the Supreme Court.

III. STANDING FOR ENVIRONMENTAL PLAINTIFFS

A. Standing Generally

Standing, an oft-discussed issue in environmental litigation, is a doctrine of justiciability that governs whether a case or controversy is appropriate for adjudication in federal court.[54] It focuses on whether the plaintiff has a sufficient stake in the outcome of the litigation to justify his or her right to bring suit in federal court.[55] Standing inquiry begins with the Constitu-

52. *See supra* note 5 & accompanying text.

53. *Clapper*, 133 S.Ct. at 1147–48.

54. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . [and] to Controversies to which the United States shall be a Party.").

55. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the

tion, which prescribes that the federal judicial power extends only to "[c]ases" and "[c]ontroversies."[56] Beyond these specifications, however, the Constitution is silent; today's standing doctrine and its requirements are largely judge-made law developed by the Court only as recently as the 1970's.[57] One of the earliest cases to specifically name all three requirements is *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, which articulated the standing inquiry as follows:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision.[58]

The burden of establishing these three elements falls on the plaintiff.[59] Although the three elements have since been developed and refined, their application is often plagued with ambiguity,[60] and *Clapper* was no exception. But the standing inquiry has proven especially contentious in the environmental context, and it is this context to which I now turn.

dispute or of particular issues."); *see also* PETER L. STRAUSS, TODD D. RAKOFF, CYNTHIA R. FARINA, & GILLIAN E. METZGER, GELLHORN AND BYSES'S ADMINISTRATIVE LAW 1207 (11th ed. 2011) ("Standing is the key to the courthouse door; those who possess the key possess power. From the agency's [or defendant's] perspective, the very act of being haled into court and required to defend its action involves considerable costs. Hence, parties who are capable of imposing such costs at the *end* of the regulatory process become parties whose interests must be reckoned with *during* the regulatory process.").

56. U.S. CONST. art. III, § 2.

57. For a concise history of the development and constitutionalization of standing doctrine, *see* Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 323–26 (2001).

58. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (internal quotation marks and citations omitted).

59. *See, e.g.*, *id.* ("Art. III requires *the party who invokes the court's authority* to show" the requirements for standing.) (emphasis added).

60. *See* Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002) (characterizing the standing inquiry as "radically unsatisfying" in its inconsistency).

B. A Brief History of Standing in Environmental Litigation: *Lujan*, *Laidlaw*, *Massachusetts*, and *Summers*

The Supreme Court has heard a number of environmental cases since the 1970's, many of which also dealt with issues of standing.[61] This section focuses on four of those cases—*Lujan*, *Laidlaw*, *Massachusetts*, and *Summers*[62]—as they have had the most profound impacts on standing doctrine through the years and represent the outer reaches of both ends on the spectrum of standing doctrine. *Lujan* and *Summers*, on the more restrictive end, denied environmental plaintiffs standing and represented a heightening of standing requirements;[63] *Laidlaw* and *Massachusetts*, on the other hand, presented a more liberal analysis and upheld standing for the plaintiffs involved.[64] It is critically important to understand exactly how these cases have shaped standing doctrine, as they define its outer limits, and, I argue, reveal that standing doctrine has always been a volatile and inconsistent inquiry in the courts.

i. *Lujan v. Defenders of Wildlife*[65]

Although not the earliest environmental case dealing with issues of standing, *Lujan* is perhaps the most fundamental, and is frequently cited for its updated reiteration of standing's three requirements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly trace[able] to the challenged action of the defendant, and not th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to

61. *See, e.g.*, Lujan v. National Wildlife Federation, 497 U.S. 871 (1990); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978); United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972).

62. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Friends of the Earth v. Laidlaw Envtl Servs. (TOC), Inc., 528 U.S. 167 (2000); Massachusetts v. EPA, 549 U.S. 497 (2007); Summers v. Earth Island Inst., 555 U.S. 488 (2009).

63. *See infra* notes 65–81, notes 114–129, & accompanying text.

64. *See infra* notes 82–113 & accompanying text.

65. 504 U.S. 555 (1992).

> merely "speculative," that the injury will be "redressed by a favorable decision."[66]

In *Lujan*, environmental groups brought suit challenging a regulation limiting the territorial scope of a provision of the Endangered Species Act of 1973 to the United States and the high seas only, rather than to foreign nations as well.[67] The petitioners claimed that this regulation injured their aesthetic interest in observing endangered and threatened animal species in that it would result in an increased rate of extinction of such animals.[68] Justice Scalia delivered the opinion for a highly fractured court. Writing for the majority, he rejected such claims, holding that they did not qualify as "actual or imminent" injuries in fact because the petitioners merely had "'some day' intentions" and not "concrete plans" to visit the animals' natural habitats and observe them in the wild.[69] Then, speaking only for a four-justice plurality, he further held that such an injury was not redressable by the Court.[70]

In the context of the case, Justice Scalia's reasoning seems simple enough. This decision, however, was remarkable for three reasons: first, it represented a heightened application of the injury in fact requirement; second, it strongly solidified the importance of the separation of powers element in and the constitutionalization of Article III standing; and third, it was the first time the Court (albeit a plurality) had denied standing despite an explicit grant of standing in the citizen suit provision of a statute passed by Congress.[71] By upholding the acceptability of even a "purely [a]esthetic" injury,[72] yet demanding that the injury be nonetheless "concrete," "particularized," "actual," and "imminent,"[73] as well as that the party bringing suit be "directly affected apart from [any] special interest,"[74] the standing

66. *Id.* at 560–61 (internal citations omitted).
67. *Id.* at 558–59.
68. *Id.* at 562.
69. *Id.* at 564.
70. *Id.* at 568.
71. *See* Strauss et al., supra note 55, at 1267.
72. *Lujan*, 504 U.S. at 562–63.
73. *Id.* at 560.
74. *Id.* at 563.

inquiry became unpredictable and hotly contested.[75] Perhaps more importantly, however, Justice Scalia's opinion went out of its way to argue that the doctrine and limitations of standing are grounded in the separation of powers principle, and that the standing inquiry itself with its three requirements is one demanded by the Constitution.[76] Along the same line of reasoning, the opinion was the first to deny standing despite the citizen suit provision of the Endangered Species Act. In assessing the possibility of Congress vesting an injury with the citizen-plaintiff sufficient for Article III standing in a citizen suit provision, Scalia vigorously argued that Congress has no such power, and that to allow such a power would run afoul of the Constitution:

> The question presented here is whether the public interest in proper administration of the laws . . . can be converted into an individual right by a statute that denominates it as such. . . . If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3.[77]

Citizen suit provisions continue to be invoked in environmental litigation; however, after *Lujan*, it is unclear whether or not they can supplant Article III standing analysis.[78] Taken to-

75. *See* Nigel Cooney, *Without a Leg to Stand on: The Merger of Article III Standing and Merits in Environmental Cases*, 23 WASH. U. J. L. & POL'Y 175, 185 (2007) (noting that post-*Lujan*, standing "bec[ame] an increasingly convoluted and confusing area of law"); Robin Kundis Craig, *Standing and Environmental Law: An Overview* 2 (FSU College of Law, Public Law Research Paper No. 425, Jan. 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1536583 ("Standing has long been one of the most common constitutional challenges in federal environmental cases.").

76. *Lujan*, 504 U.S. at 559–60.

77. *Id.* at 576–77.

78. Gone away is also the era of "hypothetical jurisdiction," an approach used by various federal appellate courts post-*Lujan*. *See* Cooney, *supra* note 75, at 185–86. "Under this approach, a court could hypothetically assume" standing, so long as the court "ultimately ruled against the plaintiff on the merits." *Id.* In *Steel Co. v. Citizens for a Better Env't*, however, Justice Scalia invalidated the practice of assuming hypothetical jurisdiction. Under a similar line of reasoning in *Lujan*, he held that such an

gether, these three developments in standing doctrine significantly raised the stakes for environmental plaintiffs at the standing stage.

A deeply divided Court delivered this opinion,[79] and the ensuing critical commentary has been similarly vociferous.[80] The standards articulated by Justice Scalia for proving injury in fact in particular represented a heightened requirement at the time, and continue to be cited in opinions dealing with standing, whether or not in the environmental context.[81]

ii. *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*[82]

One of the next major environmental cases dealing with standing was *Laidlaw*, which, unlike the more restrictive decisions that had come before it, unexpectedly upheld standing for several environmental groups.[83] In *Laidlaw*, the petitioners, various environmental groups, brought suit against the owner of a wastewater treatment plant for discharging toxic pollutants into a river in excess of the limits set by a permit under the Clean Water Act.[84] Like the Endangered Species Act, the Clean Water Act also contains a citizen suit provision in Section 505,[85] under which the petitioners brought suit. Not sur-

approach "offends fundamental principles of separation of powers," 523 U.S. 83, 94 (1998) and "produces nothing more than a hypothetical judgment." 523 U.S. at 101.

79. Justice Scalia authored the opinion, but a majority of the Court only agreed with respect to Parts I, II, III-A, and IV. Part III-B was only joined by a plurality of the Court (Chief Justice Rehnquist, Justice White, and Justice Thomas), but Justice Kennedy, joined by Justice Souter (who also wrote his own concurrence), wrote separately in disagreement with this section. Finally, Justice Blackmun, joined by Justice O'Connor, dissented. 504 U.S. 555.

80. *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L. J. 1141(1993); Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife: *Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L. J. 1170 (1993); David Sive, *Environmental Standing*, 10 NAT. RESOURCES & ENV'T 49, 56-58 (1995); Christopher Warshaw and Gregory E. Wannier, *Business As Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 HARV. L. & POL'Y REV. 289 (2011).

81. Unsurprisingly, the *Clapper* decision cites *Lujan* as well. *Clapper*, 133 S.Ct. 1138, 1146 (2013).

82. 528 U.S. 167 (2000).

83. *Id.*

84. *Id.* at 175–76.

85. 33 U.S.C. § 1365(a).

prisingly, the respondents challenged the petitioners' standing, arguing that they failed to show sufficient injury in fact.[86] The petitioners claimed several injuries on behalf of their members: one member alleged that the river "looked and smelled polluted," which prevented him from fishing, camping, swimming, and picnicking in and near the river downstream from the wastewater treatment plant as he used to;[87] another testified that she lived two miles from the facility and no longer "picnicked, walked, birdwatched, and waded in and along" the river due to her concern about the pollution;[88] other members made similar allegations.[89]

The Court upheld the members' averments as adequate injury in fact, *Lujan* notwithstanding.[90] Writing for the Court, Justice Ginsburg held that the petitioners' allegations were consistent with the standard for injury in fact applied in *Lujan*, as they "aver[red] that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity."[91] Unlike in *Lujan*, the petitioners presented more than "general averments" and showed actual intentions to use the affected area, rather than the "some day intentions" presented in *Lujan*.[92] Whereas the district court below had found no proof of environmental harm, Justice Ginsburg reframed the focus: "[t]he relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff."[93] And because the Court found that the members' fear was entirely reasonable, "that [was] enough for injury in fact."[94]

In a second win for the petitioners, the Court further held that the potential imposition of civil penalties, as prescribed in the citizen suit provision of the Clean Water Act, satisfied the redressability element of standing.[95] Justice Ginsburg explained that "Congress has found that civil penalties in Clean

86. *Laidlaw*, 528 U.S. at 181.
87. *Id.* at 181–82.
88. *Id.* at 182.
89. *Id.* at 182–83.
90. *Id.* at 183.
91. *Id.*
92. *Id.* at 183–84.
93. *Id.* at 181.
94. *Id.* at 184–85.
95. *Id.* at 187.

Water Act cases . . . deter future violations," and in stark contrast to Justice Scalia's opinion in *Lujan*, reasoned that "[t]his congressional determination warrants judicial attention and respect."[96] Unsurprisingly, Justice Scalia dissented "from all of this."[97]

This decision was a break from *Lujan*, and was followed by a more liberal application of standing analysis by the lower courts.[98] Contrasted against the restrictive vision of standing articulated in *Lujan*, *Laidlaw* was heralded by those on the side of environmental plaintiffs for easing the requirements of standing.[99] Some commentators rightly noted that the liberalized standing inquiry of *Laidlaw* was inconsistent with Justice Scalia's approach to standing in *Lujan*.[100] In fact, it is anything but consistent, as Justice Scalia's vehement dissenting opinion made clear.[101] But the worst was yet to come for Justice Scalia and his vision of constitutional standing.

iii. *Massachusetts v. Environmental Protection Agency*[102]

Less than a decade later, in 2007, Justice Stevens authored another win for environmental plaintiffs in *Massachusetts v. Environmental Protection Agency*.[103] In *Massachusetts*, the state of Massachusetts (as an intervener) joined a group of several private organizations that sought review of the EPA's denial of their petition to regulate the emission of certain greenhouse gases, including carbon dioxide.[104] The EPA argued that neither Massachusetts nor the private organizations had standing to seek such review.[105] Justice Stevens, writing for a

96. *Id.* at 185.

97. *Id.* at 198.

98. *See* Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1521 (2007).

99. *See, e.g.*, Emily Longfellow, Friends of the Earth v. Laidlaw Environmental Services: *A New Look at Environmental Standing*, 24 ENVIRONS ENVT'L L. & POL'Y J. 3, 37–38, 42–43 (2000).

100. *See, e.g.*, Maxwell L. Stearns, *Lujan to Laidlaw: A Preliminary Model of Environmental Standing*, 11 DUKE ENVT'L L. & POL'Y F. 321 (2001).

101. 528 U.S. at 198–215 (Scalia, J., dissenting). Note that Justice Scalia cites his opinion in *Lujan* four times in the first section alone, and then another four times in the rest of his dissent.

102. 549 U.S. 497 (2007).

103. *Id.*

104. *Id.* at 510–14.

105. *Id.* at 517.

5-4 majority, reasoned that Massachusetts, as a state and a landowner, had a "stake in protecting its quasi-sovereign interests," and as such was entitled to "special solicitude in [ ] standing analysis."[106] Justice Stevens held that Massachusetts fulfilled all three requirements of standing: the loss of coastal land due to the rising sea levels brought on by global climate change represented sufficient injury;[107] the EPA's refusal to regulate greenhouse gas emissions, which contributed to climate change, therefore also contributed to and was at least one of many causes of Massachusetts' injuries;[108] and finally, the regulation of such emissions, though it may not reverse climate change, may redress Massachusetts's injuries by "*slow[ing]* or *reduc[ing]*" climate change.[109]

Massachusetts was undoubtedly a win for environmental plaintiffs, and although it stretched beyond *Laidlaw* in terms of its standing inquiry for states, it did not radically liberalize the standing inquiry. Although the Court did allow states "special solicitude," and as a result engaged in a somewhat more lenient standing analysis, the Court carefully cabined its discretion by discussing not only "the environmental damage yet to come" as a result of climate change,[110] but more importantly, the fact that "rising seas have already begun to swallow Massachusetts' coastal land."[111] Thus, although some commentators hoped that *Massachusetts* "indicated that expected future harms from climate change could support standing,"[112] or that it "arguably support[ed] giving standing to other plaintiffs who seek to protect future generations,"[113] there was reason to doubt that the Court would hold as such in the future. It did, however, show that a Court determined to uphold standing could indeed do so despite *Lujan*.

106. *Id.* at 519.
107. *Id.* at 521–23.
108. *Id.* at 523.
109. *Id.* at 525.
110. *Id.* at 521.
111. *Id.* at 522.
112. Craig, *supra* note 75, at 9.
113. Bradford C. Mank, *Standing and Future Generations: Does* Massachusetts v. EPA *Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 101, 107 (2008).

iv. *Summers v. Earth Island Institute*[114]

The pendulum swung back to a more restrictive view of standing with the Court's decision in *Summers v. Earth Island Institute* only two years later.[115] *Summers* involved a group of environmental organizations seeking injunctive relief against the U.S. Forest Service's exemption of certain actions from procedural rules.[116] After a large sale of timber known as the Burnt Ridge Project, the U.S. Forest Service began exempting certain smaller sales of fire-damaged federal land from the notice, comment, and appeal process it used for more significant decisions.[117] The respondents also challenged other related regulations.[118] Because the parties settled their original dispute over the Burnt Ridge Project,[119] the Court reviewed whether the respondents could challenge the remaining regulations at issue.[120]

In another 5-4 opinion penned by Justice Scalia, the Court held that the respondents lacked standing to challenge the remaining regulations because they lacked sufficient injury.[121] Whereas the respondents had submitted affidavits that would have established sufficient injury with respect to the Burnt Ridge Project, their affidavits could not establish injury with respect to the other regulations.[122] Justice Scalia refused to consider additional but late-filed affidavits submitted by the respondents in support of standing,[123] which likely would have fulfilled the injury in fact requirement, even under Justice Scalia's analysis.[124] The one affidavit that the Court entertained expressed only that one member had "visited many Na-

114. 555 U.S. 488 (2009).
115. *Id.*
116. *Id.*
117. *Id.* at 490–92.
118. *Id.*
119. *Id.* at 491.
120. *Id.* at 492.
121. *Id.* at 499–500.
122. *Id.* at 494–95.
123. *Id.* at 500.
124. *See id.* at 509–10 (Breyer, J., dissenting) (describing the late-filed affidavits, including one affidavit from a member who described a salvage-timber sale schedule for a forest which he had visited multiple times and planned to revisit in the coming weeks, as well as several specifically named sales in specific locations frequently used by particular Sierra Club members).

tional Forests and plan[ned] to visit several unnamed National Forests in the future," but did not specify any "particular timber sale or other project" subject to the challenged regulations that would impede his ability to enjoy the forests.[125] This, the Court held, was "insufficient to satisfy the requirement of imminent injury."[126] It further rejected the dissent's reasoning that "imminent" harm could include "'a *realistic* threat' that reoccurrence of the challenged activity would cause [the plaintiff] harm in the reasonably near future,"[127] even though the harm was based on a statistical probability.[128] Justice Scalia wrote that to allow standing based on a probabilistic future injury "would make a mockery of [the Court's] prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm."[129]

v. After *Lujan*, *Laidlaw*, *Massachusetts*, and *Summers*

These four cases—*Lujan*, *Laidlaw*, *Massachusetts*, and *Summers*—provide a brief but important background to standing doctrine in the environmental context. Far from remaining static, standing analysis has been transformed and reshaped through the years, and continues to surprise many with its dynamic evolution. Put another way, standing doctrine has been anything but consistent, with these four cases marking its outer bounds. Within the context of these four cases, *Clapper* does not restrict standing analysis beyond what had already been established in the more restrictive cases of *Lujan* and *Summers*, nor does it overrule the more liberal analyses in *Laidlaw* and *Massachusetts*.

IV. THE ROLE OF *CLAPPER* IN THE ENVIRONMENTAL CONTEXT

A. Cabining *Clapper's* Holdings

Although Justice Alito's analysis was a setback for the respondents in *Clapper*, it might not be so for future environmen-

125. *Id.* at 495.
126. *Id.* at 496.
127. *Id.* at 499–500 (quoting Breyer, J., dissenting).
128. *Id.* at 497–98.
129. *Id.* at 498.

tal plaintiffs. Considering the context of the decision, Justice Alito's careful semantic construction of the decision, as well as the concession in footnote five,[130] *Clapper* does not necessarily change standing doctrine from its formulations after *Lujan*, *Laidlaw*, *Massachusetts*, and *Summers*.

The first and most compelling reason to believe that this decision may not implicate standing in the environmental context is because this decision arose in the national security context. The FISA Amendments Act of 2008, which was at issue in the case, was passed as a direct response to President George W. Bush's call for increased ability to conduct electronic surveillance for counterterrorism purposes in the wake of September 11th.[131] Given the context of this decision, there is reason to believe that the Court would have been unwilling to declare the FISA Amendments Act unconstitutional. Justice Alito was careful to situate this decision in that context, beginning the opinion by describing not only the statutory schemes at work in FISA and the FISA Amendments Act as usual, but also the reasons why the FISA Amendments Act was necessary.[132] He noted that the Amendments were designed to "provide the intelligence community with additional authority to meet the challenges of modern technology and international terrorism."[133]

Not only did this decision arise in the national security context, but it also called into question the constitutionality of the Amendments Act under the Fourth Amendment, First Amendment, Article III, and principles of separation of powers.[134] In his discussion of standing doctrine, Justice Alito stated, "[o]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[135] His language clearly supports the idea that the Court's restrictive view of standing was at least in part motivated by a desire to avoid a constitutional question. Even further, he gave one

130. *See infra* notes 146–47 & accompanying text.
131. Clapper v. Amnesty Int'l USA, 133 S.Ct. 1138, 1143–44 (2013).
132. *Clapper*, 133 S.Ct. at 1143–44.
133. *Id.* at 1144.
134. *Id.* at 1146.
135. *Id.* at 1147 (quoting *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997)).

more caveat, cabining this decision and perhaps confining it to this very context: "we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches *in the fields of intelligence gathering and foreign affairs*."[136] Justice Alito not only made sure to contextualize the case, but also went out of his way to specify that the standing analysis was more likely to fail specifically because it arose in the national security context. Given such extenuating circumstances, as well as Justice Alito's carefully worded decision, it is reasonable to believe that this restrictive view of standing would and should be limited to its context, and will not necessarily extend to environmental plaintiffs.

Furthermore, Cass R. Sunstein, the Felix Frankfurter Professor of Law at Harvard Law School, conducted research on how the federal courts have decided cases dealing with national security issues to which the government was a party in the post-September 11th era (from 2001 to 2008).[137] Among other conclusions, he found that the overall rate of invalidation—that is, when the government loses a litigated case—is only fifteen percent, lower than almost any other area of law.[138] Although this shows that judges by no means have adopted "an irrebuttable presumption in the government's favor," Sunstein concluded that federal judges "have been showing a high rate of deference to the executive branch."[139] Given this recent history, it is unsurprising, then, that the Court ruled in the government's favor on another decision dealing directly with national security and counterterrorism issues. Although it is true that the Court ruled against the respondents on standing rather than on the merits, it is reasonable to believe that the Court was motivated by the same concerns.[140]

136. *Id.* at 1147 (emphasis added).

137. Cass R. Sunstein, *Judging National Security Post-9/11: An Empirical Investigation* (Harvard Law School, Public Law & Legal Theory Research Paper No. 08-53, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1297287.

138. *Id.* at 9.

139. *Id.* at 12.

140. *See generally* Molly McQuillen, *The Role of the Avoidance Canon in the Roberts Court and the Implications of its Inconsistent Application in the Court's Decisions*, 62 CASE W. RES. L. REV. 845 (2012). McQuillen notes that although the Roberts Court has been somewhat inconsistent in certain rulings (mainly regarding campaign finance and notably not the national security context), it has generally been called a minimalist

Finally, even if *Clapper's* holdings do extend to the environmental context, the propositions it stands for are not new and do not significantly change standing doctrine. The *Clapper* Court specifically upheld its former decision in *Laidlaw*, as well as two other cases that had applied more liberal standing analyses in environmental contexts.[141] It also took the time to differentiate this case, in which the Court held there were too many contingencies before the threatened future injury would occur,[142] from its former decisions, based on the proximity of the challenged actions to the threatened injuries.[143] Furthermore, in stating that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm," the Court inherently conceded that there *could* be an injury based on the threat of a specific future harm.[144] Of course, the Court's "certainly impending" language was not novel either. Justice Alito directly cited *Lujan* in iterating the "certainly impending" standard.[145] The Court's use of the "certainly impending" standard was also restricted by footnote 5, which states:

> 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.[146]

Court. *Id.* at 845–46. *See also* ANDREW NOLAN, CONG. RESEARCH SERV., R43706, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW (2014).

141. *Id.* at 1153–54 (discussing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000), Meese v. Keene, 481 U.S. 465 (1987), and Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010), respectively).

142. *Id.* at 1153–54 (discussing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000), Meese v. Keene, 481 U.S. 465 (1987), and Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010), respectively).

143. *Id.* at 1153–54.

144. *Id.* at 1152.

145. *See id.* at 1147 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 n.2(1992)). Interestingly, the actual phrase "certainly impending" appears to be borrowed from a case as early as 1923. *See* Pennsylvania v. West Virginia, 262 U.S. 553, 593. Somewhat ironically, in that case, the Court used the phrase "certainly impending" so as to lower the threshold for standing. *Id.* ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.").

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

This marks twice that Justice Alito went out of his way to qualify the "certainly impending" standard, specifying that a sufficient injury for Article III standing purposes could be based on a threatened specific future harm, so long as the threat carried a "substantial risk" of occurring. Although the "substantial risk" standard appeared only in the footnote, the footnote may be of the utmost importance, as it is likely this qualification that secured the vote of the Court's usual swing voter, Justice Kennedy.[147] Justice Kennedy was the only justice to have voted in the majority in all of the major environmental cases discussed—*Lujan*, *Laidlaw*, *Massachusetts*, and *Summers*—and also voted in the majority in *Clapper*. If Justice Kennedy continues to be the all-important swing vote in cases involving standing in the environmental context in the future, it is likely that the "substantial risk" standard may be more relevant than the "certainly impending" one.

Given these qualifications, as well as the Court's care in upholding its earlier decisions, *Clapper* does not represent any significant change in standing doctrine, and taking its context into consideration, it does not represent any significant change in its application either. Even if *Clapper's* holdings are not limited to the national security context, there is ample room in the qualifications to the majority's decision and the addition of the "substantial risk" standard to suggest that environmental plaintiffs will still be able to prove standing by pleading a substantial risk of a threatened future injury.

B. *Clapper's* Application in *Driehaus*

Looking at how the Supreme Court and the lower courts have dealt with *Clapper* in subsequent cases thus far supports the hypothesis that *Clapper* will not significantly affect standing analysis with respect to environmental plaintiffs. The Supreme Court confirmed in its 2013 term that the "substantial risk" standard buried in footnote five of *Clapper* is just as relevant as the "certainly impending" language, at least in the context of First Amendment claims of fear of chilled speech.[148] The

147. *See* Jacobs, *supra* note 5 ("Leiter, of American University, speculated that the footnote was added in order to persuade Justice Anthony Kennedy, the Court's swing vote, to join the conservative wing.").

148. Susan B. Anthony List v. Driehaus, 134 S.Ct. 2334 (2014).

lower courts, while acknowledging some confusion about the application of these standards, have also adopted the "substantial risk" standard in a variety of contexts, including cases dealing with environmental plaintiffs.

In its 2013 term, the Supreme Court decided *Susan B. Anthony List v. Driehaus*,[149] and confirmed that the "substantial risk" standard buried in footnote five was indeed of great import. In *Driehaus*, the Susan B. Anthony List ("the SBA List"), a "pro-life advocacy organization," challenged the constitutionality of an Ohio statute that prohibited certain "false statements" during the course of any political campaign.[150] During the 2010 election cycle, the SBA List had sought to purchase a billboard display that condemned then-Congressman Steve Driehaus for voting for the Affordable Care Act.[151] The billboard would have read: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion!" but the billboard company refused to display the ad after being threatened with legal action by Driehaus.[152] Driehaus filed a complaint with the Ohio Elections Commission under the statute, alleging that the SBA List falsely stated that he voted for "taxpayer-funded abortion"; the SBA List filed suit in federal court challenging the statute's constitutionality.[153] The federal action was stayed under *Younger v. Harris*, and the Commission hearing was postponed until after the election.[154] When Driehaus lost reelection, he withdrew his complaint against the SBA List.[155]

Once the Commission proceedings were dismissed, the District Court lifted its stay on the SBA List's federal action, but dismissed the suit as non-justiciable, stating that the SBA List failed to show a sufficiently concrete injury both for purposes of standing and ripeness.[156] The Sixth Circuit affirmed, noting that the SBA List could not show "an imminent threat of *future*

149. 134 S.Ct. 2334 (2014).
150. *Id.* at 2338–40.
151. *Id.* at 2339.
152. *Id.*
153. *Id.*
154. *Id.* at 2339–40.
155. *Id.* at 2340.
156. *Id.*

prosecution," especially where the original proceedings against the SBA List were dismissed.[157]

The Supreme Court reversed, and upheld the SBA List's fear of future prosecution as a sufficient injury. Whereas in *Clapper*, the "substantial risk" language was buried in a footnote, the Court specifically presented it as equally as important as the "certainly impending" standard in its elaboration of what suffices for the analysis of a future injury: "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending' or there is a 'substantial risk that the harm will occur.'"[158] Use of the "substantial risk" standard was particularly crucial in this case, as the SBA List's fear of future litigation or prosecution for engaging in political speech likely would not have survived the "certainly impending" standard. Driehaus had already withdrawn his complaint against the SBA List,[159] and the SBA List would not be subject to another such complaint unless it engaged in similar speech in a future election cycle *and* the target of the speech decided to file an additional complaint.[160] As such, *Driehaus* confirmed the "substantial risk" language was just as much in play as the "certainly impending" language.

Though it addressed the uncertainty between the two *Clapper* standards, *Driehaus* left many more questions unaddressed. The Court consciously declined to answer whether the threat of Commission proceedings alone would have "give[n] rise to an Article III injury," noting the additional threat of criminal prosecution in the case.[161] The Court also failed to clarify when the "substantial risk" standard should apply (rather than the "certainly impending" standard), which has caused confusion in the lower courts.[162] It is possible that

157. *Id.*

158. *Id.* at 2341 (citing Clapper v. Amnesty Int'l USA, 123 S.Ct. 1138, 1147, 1150 n.5 (2013) (emphasis deleted and internal quotation marks omitted)).

159. *Id.* at 2340.

160. *Id.* at 2343.

161. *Id.* at 2346.

162. *See, e.g.*, Blum v. Holder, 744 F.3d 790, 798, 799 (1st Cir. 2014) ("In rejecting the Second Circuit's 'objectively reasonable likelihood' standard, the Supreme Court may have adopted a more stringent injury standard for standing than this court has previously employed in pre-enforcement challenges on First Amendment grounds to state statutes. . . . *Clapper* left open the question whether the previously-applied 'substantial risk' standard is materially different from the 'clear[ly] impending' require-

the Court may have applied the lower "substantial risk" standard on account of the nature of the SBA Lists's alleged injury, which dealt with freedom of speech and censorship in the political process.[163] Yet the Court did not specifically confine its holding to this context.

C. *Clapper* in the Lower Courts

To be clear, it is still too early to draw any formal conclusions about the legacy of *Clapper* from lower court decisions that have cited it in the past several months. Their applications of the decision, however, may hint at coming trends in standing doctrine in the wake of *Clapper* and *Driehaus*. The result of *Clapper*, particularly after *Driehaus*, seems to be that the "certainly impending" standard truly has had little effect on the decisions of the various lower courts, including in the environmental context, as many have chosen to proceed with the less searching "substantial risk" standard. The Ninth Circuit, for example, followed *Driehaus's* adoption of both the "substantial risk" and "certainly impending" standards in *Montana Environmental Information Center v. Stone-Manning*.[164] This case involved environmental organizations challenging the approval of a pending mining application by the Director of the Montana Department of Environmental Quality.[165] The Federal Circuit, on the other hand, chose to apply the "substantial risk" standard alone in lieu of the "certainly impending" standard, even before the issuance of *Driehaus*. In *Organic Seed Growers and Trade Ass'n v. Monsanto Co.*, the Federal Circuit framed the

ment."); Madstad Engineering, Inc. v. U.S. Patent & Trademark Office, 756 F.3d 1366, 1380–81 (Fed. Cir. 2014) (noting that after *Clapper* and *Driehaus* there may be "alternative tests for standing applicable to all factual circumstances," but finding that plaintiff's claim failed under both the "certainly impending" and "substantial risk" standards).

163. The Court noted that the "petitioners' intended future conduct concern[ed] political speech," and as such was "certainly affected with a constitutional interest," citing *Babbitt* for the proposition that "the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Driehaus*, 134 S.Ct. at 2344 (internal quotation marks and citations omitted); Babbitt v. Farm Workers, 422 U.S. 289, 298 (1979).

164. 766 F.3d 1184, 1189 (9th Cir. 2014) ("An injury is imminent 'if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur.'") (quoting Susan B. Anthony v. Driehaus, 134 S.Ct. 2334, 2341 (2014)).

165. *Id.*

inquiry as "whether [the appellants] have demonstrated a "substantial risk' that the harm will occur, which may prompt [them] to reasonably incur costs to mitigate or avoid that harm.'"[166] Its decision to apply the lower standard, however, may have been simply because the appellants could not show standing either way.[167]

Other circuits have asserted or implied that *Clapper's* language has not changed standing doctrine. For instance, the D.C. Circuit has issued two opinions applying the *Clapper* and *Driehaus* holdings. In June 2014, just two weeks after the *Driehaus* decision, the D.C. Circuit decided *Sierra Club v. EPA*.[168] Interestingly, although it noted the *Driehaus* decision in support of its proposition, it chose to cite one of its own decisions from 2000 as it enunciated the standard for sufficient injury in fact: "the petitioner need demonstrate only a 'substantial probability' that local conditions will be adversely affected, and thus will harm members of the petitioner organization."[169] This seems to imply that the D.C. Circuit does not believe that the *Clapper* decision has affected standing doctrine, but rather that the relevant standard has always been a "substantial risk" or probability. Similarly, in *Sierra Club v. Jewell*, the D.C. Circuit stated that the relevant showing for injury in fact is a "substantial probability of injury," this time citing one of its 2011 decisions as well as *Clapper* in support.[170]

The Second Circuit has also addressed *Clapper*, and implied that it may not have such a great effect on standing analysis. In *Natural Resources Defense Council, Inc. v. U.S. Food and Drug Administration*, the Second Circuit held that, despite the "scientific uncertainty as to triclosan's harmfulness to humans," a "sufficiently serious risk of medical harm" could suffice as sufficient injury.[171] It drew a distinction between the "speculative future injury" in *Clapper*, and the "actual, present

166. 718 F.3d 1350, 1355 (Fed. Cir. 2013).

167. *Id.* at 1360–61.

168. Sierra Club v. E.P.A., 754 F.3d 995 (D.C. Cir. 2014).

169. 755 F.3d 968, 973 (D.C. Cir. 2014) (citing American Petroleum Inst. v. EPA, 216 F.3d 50, 63 (D.C. Cir. 2000)).

170. 764 F.3d 1, 7 (D.C. Cir. 2014) (citing Chamber of Commerce of the U.S. v. EPA, 642 F.3d 192, 200 (D.C. Cir. 2011)).

171. 710 F.3d 71, 81–82 (2d Cir. 2013).

health risk" present in the case,[172] stating in a footnote that *Clapper* "does not alter the analysis here."[173] Finally, in *Waste Connections, Inc. v. Chevedden*, the Fifth Circuit explicitly rejected one party's argument that *Clapper* heightened the standard for injury in fact: "*Clapper v. Amnesty International USA* simply confirms the *well-established* requirement that threatened injury must be 'certainly impending.'"[174] Although the opinion was not published and has no precedential value, it might hint at how the Fifth Circuit will treat *Clapper* and its holdings in the future.

The district courts are in similar disarray. The Eastern District of New York, perhaps following the lead of the Second Circuit in *NRDC v. FDA*, cited both the "certainly impending" and "substantial risk" standards in *Taylor v. Bernanke*.[175] The Southern District of New York also cited both standards in *Robinson v. Blank*.[176] In *Bernstein v. Kerry*, the District Court for the District of Columbia cites the "substantial risk" standard, but in the context of causation rather than injury.[177] Many cases show adherence to the "certainly impending" standard instead, but with highly variable results. In *Klayman v. Obama*, for example, the District Court for the District of Columbia cited *Clapper* and briefly recounted its facts, but differentiated its situation because the plaintiffs' feared injury was based on "strong evidence" of a challenged activity.[178] But sev-

172. *Id.* at 83.

173. *Id.* at 75 n.1.

174. 554 Fed. App'x. 334, 335–36 (5th Cir. 2014).

175. No. 13-CV-1013, 2013 WL 4811222, at *6 (E.D.N.Y. Sept. 9, 2013).

176. No. 11 Civ. 2480, 2013 WL 2156040, at *6 (S.D.N.Y. May 20, 2013).

177. No. 12-1906, 2013 WL 4505280, at *5 (D.D.C. Aug. 26, 2013).

178. No. 13-0851, 2013 WL 6571596, at *14–15 (D.D.C. Dec. 16, 2013); *see also*, *e.g.*, Free Speech Coalition, Inc. v. Holder, No. 09-4607, 2013 WL 3761077, at *33–34 (E.D. Pa. July 18, 2013) (citing the "certainly impending" standard but upholding a threatened future injury for standing purposes by reasoning that the plaintiffs' injuries are "less contingent on a speculative chain of possibilities" than those in *Clapper*) (internal quotation marks omitted); Cherri v. Mueller, No. 12-11656, 2013 WL 2558207, at *8–10 (E.D. Mich. June 11, 2013) (citing the "certainly impending standard," then likening plaintiffs' situation to *Laidlaw* rather than *Clapper* and holding that a threatened future injury could be said to be "certainly impending" due to past exposure to said injury).

eral cases have also cited *Clapper* so as to deny a plaintiff standing.[179]

Although the bottom line is that it is too soon to tell what exactly *Clapper's* legacy will be, the decisions above show that at least some of the lower courts are applying the "substantial risk" standard, or do not feel that the "certainly impending" standard is a necessarily new or radical addition to standing doctrine. But this variety of results post-*Clapper* importantly shows that *Clapper* does not significantly change standing inquiry or shut the door on plaintiffs generally. Only time will reveal its true legacy, but *Clapper* does leave enough space for considerable discretion, as the decisions discussed above show.

D. Potential *Clapper* Problems for Environmental Plaintiffs

Only a handful of the above cases dealt with environmental issues. The obvious question is, then, in what contexts would *Clapper* problems arise for environmental plaintiffs, and how are they likely to be handled by the courts? Environmental litigation arises from many contexts, and I do not purport to address them all. However, looking at some recent decisions in the environmental law context that have also dealt with troublesome standing issues, I outline a few hypothetical situations in which standing issues frequently affect environmental plaintiffs and discuss whether or not *Clapper*'s analysis will affect them. I conclude that *Clapper* is unlikely to have much of an effect on traditional environmental litigation beyond the requirements imposed by *Summers*. However, in the climate change context, *Clapper* might prove to be an additional hurdle, especially when considered in combination with *Massachusetts*.

Beginning with more traditional environmental litigation, cases often arise under the Clean Air Act and Clean Water Act, with environmental plaintiffs seeking to prevent an alleged vio-

179. *See, e.g.*, Polanco v. Omnicell, Inc., No. 13-1417, 2013 WL 6823265, at *11 (D.N.J. Dec. 26, 2013) (denying standing to a plaintiff on grounds that her injury was too speculative and self-imposed); State Nat'l Bank of Big Spring v. Lew, 2013 WL 3945027, at *7 (D.D.C., Aug. 1, 2013) (denying a plaintiff standing where injury would require "guesswork as to how independent decisionmakers will exercise their judgment"); Genesis Brand Seed, Ltd. v. Limagrain Cereal Seeds, LLC, 944 F. Supp. 2d 564, 567–70 (W.D. Mich. 2013) (denying a plaintiff standing where the injury was neither imminent nor certainly impending).

lation or seeking injunctive relief via the citizen suit provisions in these two statutes.[180] Although the ins and outs of these cases differ, they often share a similar framework. Typically, the plaintiff will bring suit against a defendant for alleged violations of either statute, and the defendant will often challenge the plaintiff's standing. Whether the challenge is brought by an environmental organization on behalf of its members or by individual citizens themselves, they must prove constitutional standing,[181] beginning with the injury in fact prong.[182] The plaintiff must assert that she lives near or use the affected area for some sort of aesthetic, conservational, or recreational interest, and that the defendant's challenged activity will somehow lessen or decrease the plaintiff's interest.[183] Using the Clean Water Act as an example,[184] one possible fact pattern that might arise is a suit seeking injunctive relief against a wastewater treatment plant for discharging pollutants into a waterway used by the public (and the plaintiff in particular) for recreational purposes.[185] The plaintiff might prove injury in fact by averring that she had used the affected waterway in the past for recreational activities such as swimming, kayaking, or observing wildlife, but that she no longer felt safe doing so due to concerns about the pollution.

In the past, such allegations were generally considered the standard for proving standing in Clean Air Act or Clean Water Act litigation.[186] But in what types of situations might *Clapper*

180. James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 1–3 (2003).

181. *See* Hunt v. Washington State Apple Advertising Com'n, 432 U.S. 333, 343 (1977) (Among other requirements, in order to bring suit on behalf of its members, an association must show that "its members would otherwise have standing to sue in their own right.").

182. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

183. Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

184. The following example is also applicable to violations of the Clean Air Act.

185. This hypothetical fact pattern is based loosely around that in San Francisco Baykeeper v. West Bay Sanitary District, 791 F. Supp. 2d 719 (N.D. Cal. 2011).

186. Indeed, they were sufficient in the case under which those facts arose. *See* San Francisco Baykeeper v. West Bay Sanitary District, 791 F. Supp. 2d 719 (N.D. Cal. 2011). For a similar case arising under the Clean Air Act instead, *see* Concerned Citizens Around Murphy v. Murphy Oil USA, Inc., 686 F. Supp. 2d 663 (E.D. La. 2010). Most importantly, the hypothetical situation described also fits the fact pattern under *Laidlaw*. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000).

come into play? One possible situation would be if a company were discharging pollution into a particularly expansive waterway from a point source that made it possible for pollutants to flow in any number of directions (depending on water flow, the season, or the weather), such that it would be difficult to predict where such pollutants might be present at any given point in the future. In such a situation, courts following *Clapper's* "certainly impending" standard might discount the plaintiff's concerns about water pollution if it were not possible to show that a particular area used for recreational or aesthetic purposes would exhibit a concentration of the pollutants at the same time that it was being used by the plaintiff. However, this analysis goes little beyond what courts applying *Summers* would already consider: is the possibility of water pollution a realistic enough threat to validate the plaintiff's concerns, preventing her from enjoying her recreational or aesthetic interests in the waterway? I would argue that, even under *Summers*, so long as the plaintiff could show a significant concentration of pollutants at *any* time, then her concerns are valid and such a fear of pollution could reasonably lessen the plaintiff's interest in the waterway. *Clapper* would not influence the decision, whether the court applied the heightened "certainly impending" standard or not.

Environmental litigation arising from other types of claims often presents even more difficulty in proving standing. Environmental plaintiffs also often bring procedural challenges to regulations passed by administrative agencies, for example, alleging that the agency has failed to follow the procedural requirements of an environmental statute such as the National Environmental Policy Act or the Endangered Species Act. Such a claim might have more difficulty surviving *Clapper's* "certainly impending" standard than those brought under the Clean Air or Water Acts. One hypothetical situation in which such a problem might arise is if a plaintiff challenged a regulation allowing logging of certain species of trees in a national forest promulgated by the United States Forest Service, alleging that the agency failed to follow notice and comment procedures or failed to prepare an environmental impact statement. Again, the plaintiff must show that the failure to follow such procedures and the resulting challenged regulations will

threaten some legal interest. The plaintiff could do so by averring that he uses the national forest for recreational activities such as hiking and observing wildlife, and that such logging activities would prevent him from being able to do so. The situation would become slightly pricklier, however, if the national forest at issue were extremely expansive and the given species of trees were not present in all parts of the forest but rather only existed sparsely in certain parts. In such a situation, the plaintiff would have to show that the particular area in which he enjoyed such recreational activities would be affected by showing that the particular species of trees exists there, and thus the logging activities would affect his recreation. Yet even given these particular facts, it is difficult to imagine how the plaintiff could survive *Summers* and yet fail under *Clapper*. The difficulty that the plaintiff would face in this hypothetical is showing that the future logging activities, should they even occur, would affect the particular species of tree in question *and* would take place in the particular area of recreational use. Even if the plaintiff could show a "realistic threat," that showing would not be enough to satisfy *Summers'* "imminence" requirement.

The one type of litigation that actually seems at risk under *Clapper*, beyond the heightened requirements imposed by *Lujan* and *Summers*, is litigation arising within the climate change context, particularly when considering *Clapper* in combination with *Massachusetts*. Although *Massachusetts* was a win for environmental plaintiffs, the case arose under unique circumstances: a perfect storm of several favorable factors.[187] The Court came out in favor of the environmental plaintiffs, but they had a number of advantages bolstering their claims: the EPA had agreed that atmospheric levels of greenhouse gases had dramatically increased, it had agreed that this was the result of human activity, it had previously stated that it had the authority to regulate carbon dioxide emissions under the Clean Air Act, and it did not contest the plaintiffs' contentions about rising sea levels and loss of coastline.[188] However, the case was also unique in that it forced the Court to consider the merits of climate change science generally amidst its standing

187. *See supra* Part III.B.iii.

188. Massachusetts v. EPA, 549 U.S. 497, 510–13, 522 (2007).

inquiry in a way that most traditional environmental cases do not.[189] It is easy to imagine that a future administration might choose to appoint an EPA administrator more skeptical of not only climate change's effects but also its existence.

A more skeptical defendant who denies the effects of climate change, coupled with an environmental plaintiff that is not entitled to the "special solicitude" of a state, and finally in combination with the "certainly impending" standard imposed by *Clapper* may indeed have a much more difficult time pleading standing. Just as the Court was forced to consider the merits of climate change science in its consideration of the plaintiffs' claims in *Massachusetts*, a court imposing the "certainly impending" standard for a threatened injury challenged by a defendant will also have to consider the merits of climate change science as it relates to a plaintiff's claims. Because of the political nature of climate change, this puts climate change litigation at risk in courts where climate change is not yet accepted as a scientific certainty. Further, even if a court does believe that climate change is a scientific certainty, it may not be sure as to whether certain effects of climate change, many of which will only occur over long periods of time, are to be considered "certainly impending." For example, as discussed in *Massachusetts*, one effect of climate change is rising sea levels. Some possible effects of rising sea levels are more intense coastal flooding and storm surge.[190] However, an individual plaintiff who is a coastal landowner who fears rising sea levels would likely not be able to prove that rising sea levels were "certainly impending" in his particular small section of coastline, especially without the "special solicitude" granted to the State of Massachusetts.

Similarly, another effect of climate change is ocean acidification, which affects much marine life and in particular inhibits the survival and reproduction of organisms like oysters, clams,

189. Justice Stevens's discussion of the injury-in-fact, for example, began with the statement that "[t]he harms associated with climate change are serious and well recognized," and went on to discuss those harms and the potential risks of climate change. *Massachusetts*, 549 U.S. at 521–22.

190. U.S. Global Change Research Program, National Climate Assessment Development Advisory Committee, *Third National Climate Assessment Report* (January 2013 draft) at 5, *available at* http://ncadac.globalchange.gov/download/NCAJan11-2013-publicreviewdraft-fulldraft.pdf [http://perma.cc/44XY-FHC8].

and crabs.[191] Another hypothetical situation might arise in which an oyster farmer seeks review of an EPA regulation or challenges a particular action or permit as it relates to climate change, claiming an injury in the increased acidification of his oyster bays. It will be extremely difficult to prove that increased acidification of the ocean and in turn the increased acidification of that farmer's particular oyster bay in any given amount of time is "certainly impending." In this way, the combination of climate change litigation, in which the merits of climate change science can be conflated with the standing inquiry, in combination with *Clapper's* "certainly impending" standard, will create a high bar for environmental plaintiffs to overcome.

V. CONCLUSION

In *Clapper* the Supreme Court shut the door on the plaintiff-respondents for lack of standing. The Court reviewed the respondents' alleged threatened future injury, but found that the respondents failed to show that the injury was "certainly impending." Because standing is often an extremely contentious issue in environmental litigation, early commentators suggested that these restrictive iterations of standing might harm environmental plaintiffs seeking their day in court. Yet the decision added no new language or requirements to standing doctrine, and the implications for environmental plaintiffs are cabined by its contexts and caveats. Indeed, looking at how *Clapper* has played out in the lower courts shows no clear pattern, suggesting that *Clapper* has not significantly restricted standing beyond *Summers*. Whereas some courts have chosen to adopt the "substantial risk" language in lieu of the "certainly impending" language, even those that have adopted the "certainly impending" language have not applied it consistently. The one potential exception to this would be in the context of climate change litigation, in which the imposition of *Clapper's* "certainly impending" standard to the effects of climate change might prove troublesome for environmental plaintiffs. That said, the lack of clarity over when to use the "certainly impending" and "substantial risk" standards may produce an interest-

191. *Id.* at 4.

ing circuit split to be resolved by the Supreme Court during a later term. Only at that point, however, should environmental plaintiffs be seriously concerned.