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Standing Uncertainty: An Expected-Value Standard for Fear-Based Injury in *Clapper v. Amnesty International USA*

Andrew C. Sand
University of Michigan Law School

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NOTE

STANDING UNCERTAINTY: AN EXPECTED-VALUE STANDARD FOR FEAR-BASED INJURY IN *CLAPPER V. AMNESTY INTERNATIONAL USA*

*Andrew C. Sand**

*The Supreme Court has held that a plaintiff can have Article III standing based on a fear of future harm, or fear-based injury. The Court's approach to fear-based injury, however, has been unclear and inconsistent. This Note seeks to clarify the Court's doctrine using principles from probability theory. It contends that fear-based injury should be governed by a substantial-risk standard that encapsulates the probability concept of expected value. This standard appears in footnote 5 of *Clapper v. Amnesty International USA*, a recent case in which the Court held that a group of plaintiffs lacked standing to challenge the constitutionality of a section of the Foreign Intelligence Surveillance Act of 1978.*

*This Note begins by tracing three competing lines of doctrine within the Court's jurisprudence on fear-based injury and analyzes them using probability theory, arriving at a tripartite framework. After applying this framework to *Clapper*, this Note concludes that footnote 5's substantial-risk standard should govern fear-based injury. Finally, this Note argues that the substantial-risk standard should be informed by an expected-value inquiry and justifies this proposal through precedent, probability principles, and practical concerns.*

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INTRODUCTION

This Note is about uncertainty and justiciable injury. Despite its doctrinal discomfort with uncertainty,¹ the Supreme Court clearly allows plaintiffs to bring suit for injuries that have not yet occurred.² At the same time, however, the Court requires *some* threshold showing of potential injury.³ This Note seeks to clarify the state of the doctrine⁴ between these two bookends by using concepts from probability theory.⁵

The Supreme Court has held that standing is a “core component” of the cases-and-controversies requirement of Article III of the Constitution and that a plaintiff must therefore have standing in order to sue in federal

1. Cf. Liz Clark Rinehart, Note, *Clapper v. Amnesty International USA: Allowing the FISA Amendments Act of 2008 to Turn “Incidentally” into “Certainly”*, 73 MD. L. REV. 1018, 1048 (2014) (discussing the “confusion and uncertainty regarding when an injury is sufficiently likely to occur such that a plaintiff can bring suit in federal court”). Additionally, the Court has struggled with uncertainty in nonstanding doctrines, such as with the standard for probable cause, Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 800–03 (2013) (discussing various forms of confusion resulting from the Court’s imprecise standard for probable cause), and reasonable doubt, Luis E. Chiesa, *When an Offense Is Not an Offense: Rethinking the Supreme Court’s Reasonable Doubt Jurisprudence*, 44 CREIGHTON L. REV. 647, 649 (2011) (“Despite the fact that the Court has had various opportunities to flesh out the contours of the [reasonable-doubt] doctrine, the meaning and scope of the doctrine remain unclear.”).

2. See, e.g., *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2746–47 (2010); see also F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 61 (2012) (“[T]he Court has not hesitated to exercise its power to grant injunctions to prevent threatened injuries that are likely to occur.”); discussion *infra* Section I.C.

3. See Hessick, *supra* note 2, at 61–62 (discussing the Court’s “minimum-risk requirement,” which bars standing when the threat of injury to the plaintiff is too low).

4. It is important to note that cases discussing standing and uncertainty typically involve two related disputes: a factual and doctrinal dispute. See *Standing—Challenges to Government Surveillance—Clapper v. Amnesty International USA*, 127 HARV. L. REV. 298, 304–05 (2013). This Note confines its discussion to the doctrinal dispute.

5. Probability theory is the “branch of mathematics concerned with the analysis of random phenomena.” David O. Siegmund, *Probability Theory*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/477530/probability-theory> (last visited Oct. 10, 2014); see also SHELDON ROSS, A FIRST COURSE IN PROBABILITY ix (9th ed. 2014) (providing a brief discussion of probability theory). Throughout this Note, the phrases “probability theory,” “probability principle,” and “probability concepts” are used interchangeably.

courts.⁶ The “irreducible constitutional minimum” to establish standing requires three showings: (1) injury in fact, (2) causation, and (3) redressability.⁷ To satisfy the injury-in-fact prong, a plaintiff must demonstrate a violation of a legally protected interest that is “(a) concrete and particularized, and (b) ‘actual or imminent, not conjectural or hypothetical.’”⁸ For causation, there must be a causal link between the injury suffered and the conduct complained of—that is, the injury must be “fairly . . . trace[able]” to the defendant’s actions and not attributable to independent third party actions.⁹ For redressability, the plaintiff must show that it is “‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”¹⁰

This Note focuses on an underappreciated¹¹ aspect of injury in fact: fear-based injury. *Probabilistic injury* refers to any injury where it is uncertain that the underlying injury will actually occur,¹² and it includes two categories: (1) threatened injury, and (2) fear-based injury. *Threatened injuries* are future injuries in which injury to the plaintiff is anticipated but has not yet occurred.¹³ By contrast, *fear-based injuries*, also called *chilling-effect injuries*, are present injuries in which the plaintiff suffers actual injury based on fear or anticipation of a threatened injury.¹⁴

The Supreme Court recently addressed fear-based injury in *Clapper v. Amnesty International USA*,¹⁵ which involved a constitutional challenge to § 702 of the Foreign Intelligence Surveillance Act of 1978 (“FISA”).¹⁶ FISA

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

7. *Id.* at 560–61.

8. *Id.* at 560 (footnote omitted) (citations omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (internal quotation marks omitted).

9. *Id.* (alteration in original) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976)).

10. *Id.* at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 42–43 (1976)).

11. Brian Calabrese, Note, *Fear-Based Standing: Cognizing an Injury-in-Fact*, 68 WASH. & LEE L. REV. 1445, 1449–51 (2011) (noting that Supreme Court guidance regarding fear-based injury has been nominal and that academics and practitioners have not examined the doctrine comprehensively).

12. This Note makes this distinction because other scholars use the term differently. *See, e.g.*, Hessick, *supra* note 2 (using probabilistic standing to refer to threatened harm); Bradford C. Mank, *Clapper v. Amnesty International: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211, 237–38 (2013) (using the phrase “probabilistic approach” to standing to refer to Justice Breyer’s dissent in *Clapper*).

13. Calabrese, *supra* note 11, at 1454 (defining “threatened harm” as “a future, as yet unrealized, harm”).

14. For this Note, fear-based injury broadly encompasses all present injuries that result from fear of future threatened injury. In addition to chilling-effect injuries, this category includes preenforcement fear, anticipatory harm, and other similar terms used by courts. *See id.* at 1455–73 (using fear-based injury broadly to include all present injuries that result from fear of future threatened injury).

15. *Clapper v. Amnesty Int’l USA*, 133 S. Ct 1138 (2013).

16. 50 U.S.C. § 1881a (2012).

authorizes and regulates the government's use of communications obtained through electronic surveillance conducted for foreign-intelligence purposes.¹⁷ In 2008, Congress amended FISA¹⁸ and added § 702, which allows the government to target certain non-U.S. persons located abroad without demonstrating probable cause.¹⁹

On the day that Congress enacted § 702, a group of U.S. reporters, attorneys, activists, and workers—the *Clapper* plaintiffs—challenged the statute, offering two distinct claims under probabilistic standing. First, they alleged threatened injury because there was an “objectively reasonable likelihood” that their communications with their clients, a group including detainees associated with the September 11 attacks, would be intercepted under § 702 at a future time.²⁰ Second, the plaintiffs contended that they had suffered fear-based injury because the risk of § 702 surveillance required them to take “costly and burdensome measures” to protect the confidentiality of their communications.²¹ In a 5–4 decision, the Supreme Court held that the plaintiffs lacked standing under both claims.²²

This Note analyzes the Supreme Court's jurisprudence on fear-based injury and its *Clapper* opinion using probability theory and argues that fear-based injury should be governed by an expected-value standard.²³ *Expected value* is a concept in probability theory that provides a weighted average of the likelihood and magnitude of injury.²⁴ More importantly, expected value can be used to assign a present value to uncertain future events²⁵—an assessment directly applicable to *Clapper*'s claims of fear-based injury.

17. *Clapper*, 133 S. Ct. at 1143; see also Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. §§ 1801–1885c.

18. FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008).

19. *Clapper*, 133 S. Ct. at 1144 (“Compare § 1805(a)(2)(A), (a)(2)(B), with § 1881a(d)(1), (i)(3)(A) . . .”).

20. *Id.* at 1146.

21. *Id.* at 1145–46, 1150–51, 1156–57 (internal quotation marks omitted).

22. For threatened injury, the *Clapper* Court held that “we have repeatedly reiterated that ‘threatened injury must be *certainly impending* to constitute injury in fact,’ and that ‘[a]llegations of *possible* future injury’ are not sufficient.” *Id.* at 1147 (alterations in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). For fear-based injury, the Court declared that the plaintiffs “cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending,” even if the costs were incurred as a “reasonable reaction to a risk of harm.” *Id.* at 1151.

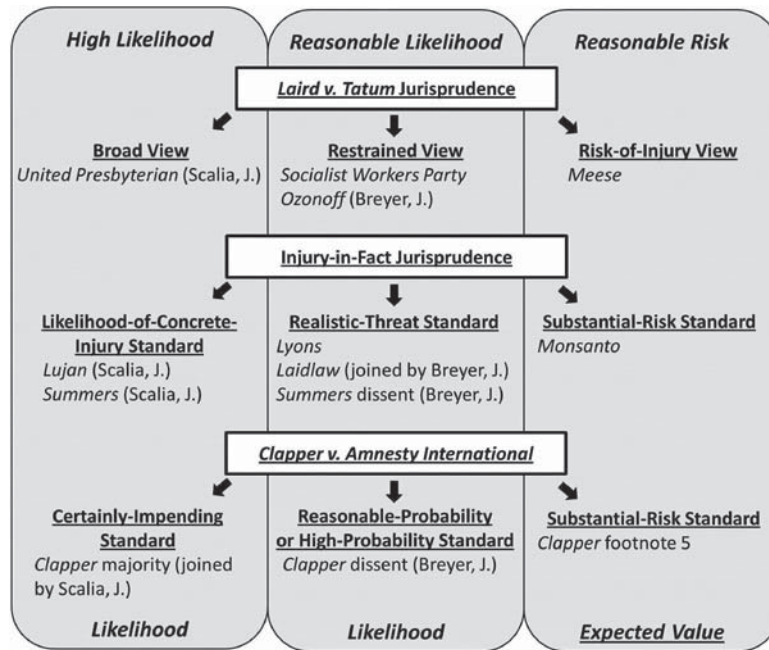
23. See generally Jonathan Remy Nash, *Standing's Expected Value*, 111 MICH. L. REV. 1283, 1284–89 (2013) (discussing and advocating for an expected-value approach to standing prior to *Clapper*). This Note advocates for an expected-value inquiry for fear-based injury, whereas Professor Nash's proposal broadly allows *all* injuries with a positive expected value. *Id.* at 1285. More generally, this Note promotes an interdisciplinary approach to law and specifically recommends using economic and mathematical thinking to identify the appropriate standard in resolving certain legal issues.

24. See IAN HACKING, AN INTRODUCTION TO PROBABILITY AND INDUCTIVE LOGIC 95 (2001).

25. MICHAEL B. MILLER, MATHEMATICS AND STATISTICS FOR FINANCIAL RISK MANAGEMENT 35 (2d ed. 2014) (discussing how “expectations are often thought of as being forward looking” and providing an example).

This Note proceeds in three Parts. Part I surveys the Supreme Court’s doctrine on fear-based injury, moving chronologically from the differing interpretations of *Laird v. Tatum*²⁶ to the Court’s modern injury-in-fact jurisprudence. This study reveals three lines of doctrine and reframes them according to probability theory. Part II applies the resulting tripartite framework to *Clapper* and uses the *Clapper* Court’s reasoning to argue in favor of footnote 5’s substantial-risk standard. Part III then contends that the Court should interpret footnote 5’s standard as encapsulating the probability concept of expected value. The Part justifies this augmented standard through legal precedent, additional probability principles, and practical concerns. A brief summary of all three Parts of this Note is provided in the following illustration:

FIGURE 1.
FEAR-BASED INJURY DOCTRINE



I. THREE DOCTRINAL STANDARDS FOR FEAR-BASED INJURY

To situate properly the doctrinal dispute in *Clapper*, it is necessary first to survey the competing standards regarding the justiciability of fear-based injury. Section I.A begins chronologically with *Laird*—the foundational Supreme Court case governing the justiciability of claims of fear-based injury in the government-

26. 408 U.S. 1 (1972); see also discussion *infra* Section I.A. This is the foundational Supreme Court case governing the justiciability of claims of fear-based injury in the surveillance context.

surveillance context—and examines the case’s three subsequent interpretations. Section I.B analyzes these three views of *Laird* according to probability theory and derives a doctrinal framework based on judicial treatment of uncertainty. Section I.C expands the discussion to the Supreme Court’s injury-in-fact jurisprudence, identifying three distinct lines of doctrine for fear-based injury. Section I.D then reframes this tripartite division according to probability theory and argues that such a framework corresponds elegantly to the framework derived from the *Laird* jurisprudence. Ultimately, this Note contends that these three separate standards are manifest within *Clapper*.²⁷

A. Three Views of Laird

Decided by the Supreme Court in 1972, *Laird* established a limit on the justiciability of claims of fear-based injury challenging governmental action, holding that such claims require more than “[a]llegations of a subjective ‘chill.’”²⁸ More specifically, the Court held that the plaintiffs’ challenge to an Army surveillance program was not justiciable.²⁹ Although the Court acknowledged that constitutional violations might arise from a deterrent effect associated with governmental action,³⁰ it distinguished *Laird* from justiciable cases³¹ in which the complainants were subject to “regulatory, proscriptive, or compulsory” governmental action.³² Ultimately, the Court held 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” and that the plaintiffs’ claims were not justiciable under this standard.³³

Since *Laird*, the Supreme Court and lower courts have consistently applied the case as a limitation on claims of fear-based injury involving governmental action but have construed its holding in three distinctive ways that emphasize different aspects of the opinion.³⁴ First, the broad,³⁵ Judge

27. See discussion *infra* Part II.

28. *Laird*, 408 U.S. at 13–14 (quoting *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947)).

29. *Id.* at 13–16.

30. *Id.* at 11 (“In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or ‘chilling,’ effect of governmental regulations . . .”).

31. The *Laird* Court explicitly distinguished the instant case from *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); and *Baggett v. Bullitt*, 377 U.S. 360 (1964). *Laird*, 408 U.S. at 11.

32. *Laird*, 408 U.S. at 11.

33. *Id.* at 13–14.

34. Other scholars frame *Laird* jurisprudence as including a broad and restrained view. See Scott Michelman, *Who Can Sue over Government Surveillance?*, 57 UCLA L. REV. 71, 89 (2009). But this Note argues that *Meese v. Keene*, 481 U.S. 465 (1987), uses a third, risk-of-injury standard.

35. Judge Scalia’s view can be construed as a *broad* interpretation of *Laird*’s limit, which allows a *narrow* range of claims for fear-based injury. See Michelman, *supra* note 34, at 89.

Scalia—endorsed reading of *Laird* permits only fear-based injury that results from “regulatory, proscriptive, or compulsory” governmental action—a category that did not include surveillance in *Laird*.³⁶ Second, a restrained,³⁷ Judge Breyer—sanctioned interpretation of *Laird* allows all objectively reasonable claims in which the plaintiff can demonstrate that a reasonable person would have felt legally cognizable apprehension under the circumstances.³⁸ Third, the view espoused in *Meese v. Keene* applies *Laird* according to a distinct risk-of-injury standard.³⁹

Then—Judge Scalia’s opinion in *United Presbyterian Church in the U.S.A. v. Reagan*⁴⁰ represents a broad view of *Laird*’s limit as permitting only claims of fear-based injury resulting from “regulatory, proscriptive, or compulsory” governmental action.⁴¹ In *United Presbyterian*, the D.C. Circuit held that a coalition of activists, journalists, and politicians lacked standing to challenge an executive order establishing a framework for executive intelligence activities.⁴² Judge Scalia held that the plaintiffs’ claims failed under *Laird*’s requirement of “regulatory, proscriptive, or compulsory” governmental action⁴³ because the executive order did not govern the plaintiffs’ conduct⁴⁴ and “d[id] not *direct* . . . but merely *authorize[d]*” intelligence activities.⁴⁵

In contrast, then—Judge Breyer’s opinion in *Ozonoff v. Berzak*⁴⁶ exemplifies a restrained reading of *Laird*’s limit—used by the Supreme Court⁴⁷ and

36. *Laird*, 408 U.S. at 11; see *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (Scalia, J.) (citing *Laird*, 408 U.S. at 11).

37. Judge Breyer’s view can be construed as a *restrained* interpretation of *Laird*’s limit, which allows a *broad* range of claims for fear-based injury. See Michelman, *supra* note 34, at 89, 94.

38. See *Ozonoff v. Berzak*, 744 F.2d 224, 229–30 (1st Cir. 1984) (stating that “[t]he problem for the government with *Laird*, however, lies in the key words ‘without more’” and then citing *Laird*, 408 U.S. at 10); see also *Laird*, 408 U.S. at 10 (identifying the issue presented as “whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of [plaintiff’s] First Amendment rights is being chilled by the mere existence, *without more*, of a governmental [surveillance program]” (emphasis added)).

39. *Meese*, 481 U.S. at 472 (quoting *Laird*, 408 U.S. at 14); see also *Laird*, 408 U.S. at 11–14 (“Allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”).

40. 738 F.2d 1375 (D.C. Cir. 1984).

41. *United Presbyterian*, 738 F.2d at 1378 (quoting *Laird*, 408 U.S. at 11) (internal quotation marks omitted).

42. *Id.* at 1375.

43. *Id.* at 1378 (quoting *Laird*, 408 U.S. at 11) (internal quotation marks omitted).

44. *Id.* (“Executive Order No. 12333 issues no commands or prohibitions to these plaintiffs, and sets forth no standards governing their conduct.”).

45. *Id.* at 1380 (“[T]his order does not *direct* intelligence-gathering activities against all persons who could conceivably come within its scope, but merely *authorizes* them.”).

46. *Ozonoff v. Berzak*, 744 F.2d 224, 225 (1st Cir. 1984) (Breyer, J.).

47. In *Socialist Workers Party v. Attorney General*, Justice Marshall held that the plaintiffs had standing to challenge governmental surveillance. 419 U.S. 1314, 1318–19 (Marshall, Circuit Justice 1974) (rejecting the broad view of *Laird* because “the passage” was “not setting out a rule for determining whether an action is justiciable or not”); see also Michelman, *supra* note 34, at 93–94 (discussing *Socialist Workers Party* as utilizing a restrained view of *Laird*).

lower courts⁴⁸—that allows claims of fear-based injury where the governmental action “reasonably leads [the plaintiff] to believe he must conform his conduct.”⁴⁹ In *Ozonoff*, the First Circuit held that a plaintiff had standing to challenge an executive order that required a loyalty check for employment with the World Health Organization.⁵⁰ The plaintiff claimed fear-based injury because he felt constrained to conform his conduct and speech to loyalty standards.⁵¹ In response, Judge Breyer explicitly rejected a broad reading of *Laird*’s limit⁵² and held that the proper doctrinal inquiry was whether the governmental action “reasonably leads [the plaintiff] to believe he must conform his conduct.”⁵³ Because the government forced a choice between free speech and loss of an employment opportunity, Judge Breyer held that the plaintiff’s claims were justiciable.⁵⁴

Finally, in *Meese v. Keene*,⁵⁵ the Supreme Court interpreted *Laird*’s limit through a separate, risk-of-injury standard.⁵⁶ The Court held that a politician had standing to raise a First Amendment challenge to the designation of three films as foreign “political propaganda”⁵⁷ because he “could not exhibit the films without incurring a *risk of injury* to his reputation and of an impairment of his political career.”⁵⁸ Moreover, even after acknowledging that the plaintiff could have taken preventive steps to minimize the harm, the Court still held that “the need to take such affirmative steps to avoid the *risk of harm* to his reputation constitute[d] a cognizable injury.”⁵⁹

B. Reframing the Three Views of Laird

This Section analyzes the three views of *Laird* according to probability principles and contends that the views can be reframed as *high-likelihood*, *reasonable-likelihood*, and *reasonable-risk* standards. The Section argues that Judge Scalia’s view can be reframed as a *high-likelihood* standard while Judge Breyer’s view can be reframed as a *reasonable-likelihood* standard. Both Judge Scalia’s and Judge Breyer’s views are similarly situated as likelihood

48. The restrained view of *Laird* can also be found in the surveillance context. *E.g.*, *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522 (9th Cir. 1989) (analyzing a group church’s First Amendment challenges to a governmental surveillance program under a restrained reading of *Laird*); *see also* Michelman, *supra* note 34, at 97–98 (discussing *Presbyterian Church* as an example of the restrained reading of *Laird*).

49. *Ozonoff*, 744 F.2d at 229–30.

50. *Id.* at 227–30.

51. *Id.* at 228.

52. *Id.* at 229.

53. *Id.* at 229–30.

54. *Id.*

55. 481 U.S. 465 (1987).

56. *Meese*, 481 U.S. at 472, 475.

57. *Id.* at 467–69.

58. *Id.* at 475 (emphasis added).

59. *Id.* (emphasis added).

standards—they relate purely to the probability that the feared governmental action will occur. In contrast, *Meese*'s view can be reframed as a *reasonable-risk* standard, which includes an examination of both the likelihood and magnitude of harm.

First, Judge Scalia's view of *Laird*, which strictly ties claims of fear-based injury to "regulatory, proscriptive, or compulsory"⁶⁰ governmental action, can be understood as a *high-likelihood* standard. In *United Presbyterian*, Judge Scalia focused his inquiry on the likelihood that the harm would occur, rejecting the plaintiffs' claim "that they are more *likely* than the populace at large to be subjected to the unlawful activities which the order allegedly permits."⁶¹ Furthermore, Judge Scalia indicated that his requirement is more demanding than an objectively reasonable standard, declaring that, even if "these factors place the plaintiffs at greater risk than the public at large, that would still fall far short of the 'genuine threat' required to support . . . standing."⁶² Hence, Judge Scalia's standard in *United Presbyterian* constitutes a *high-likelihood* standard that is more stringent than an objectively reasonable threshold.

In addition, characterizing Judge Scalia's broad view as a *high-likelihood* standard appears consistent with *Laird* itself. In *Laird*, the Court explicitly distinguished justiciable claims involving "regulatory, proscriptive, or compulsory" governmental action from the plaintiffs' claims, which rested purely on a general knowledge of and disagreement with the surveillance program.⁶³ From a likelihood-of-harm perspective, it appears that "regulatory, proscriptive, or compulsory" governmental action is more likely to occur because the government has an explicit duty to act, and, as a result, a plaintiff subject to these actions is more likely to suffer a justiciable injury.⁶⁴ Conversely, for the *Laird* plaintiffs, the governmental action was not "regulatory, proscriptive, or compulsory," nor was there sufficient indication that the plaintiffs were subject to the governmental action.⁶⁵ In other words, the *Laird* plaintiffs' claims rested on a more attenuated chain of events, with a lower likelihood that the alleged harm of illegal surveillance would actually occur.⁶⁶ As a result, the plaintiffs' claims were deemed nonjusticiable.

Second, Judge Breyer's view of *Laird*, which asks whether the governmental action "reasonably leads [the plaintiff] to believe he must conform his conduct,"⁶⁷ can be reframed as a *reasonable-likelihood* standard. As an initial matter, Judge Breyer's view constitutes a likelihood standard because the *Ozonoff* plaintiff's belief that he was required to conform his conduct

60. *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

61. See *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1380 (D.C. Cir. 1984) (emphasis added).

62. See *id.* (quoting *Steffel v. Thompson*, 415 U.S. 452, 475 (1974)).

63. *Laird*, 408 U.S. at 11, 13.

64. *Id.* at 11, 13–14.

65. See *id.*

66. *Id.* at 4, 13–14.

67. *Ozonoff v. Berzak*, 744 F.2d 224, 229–30 (1st Cir. 1984).

depended on his perception of the likelihood that the governmental harm would occur. Judge Breyer declared that an individual “reading the Order would think it *probable* that WHO would not offer a job to a ‘disloyal’ American.”⁶⁸ In other words, Judge Breyer’s standard examined the plaintiff’s belief in the likelihood that the harmful governmental action would in fact occur. Next, Judge Breyer explicitly required that this belief must be reasonable.⁶⁹ His analysis of whether the *Ozonoff* plaintiff reasonably believed that it was likely that the government would withhold employment can therefore be construed as a *reasonable-likelihood* standard, one that is less demanding than Judge Scalia’s standard. Still, both judges advance likelihood standards because these standards rest solely on the likelihood that the feared harm will occur.

Third, and in contrast, *Meese*’s risk-of-injury interpretation of *Laird*⁷⁰ can be characterized as a distinct, *reasonable-risk* standard that examines the likelihood and magnitude of harm according to a reasonably objective standard. First, *Meese* explicitly cited *Laird*’s requirement of a “specific present objective harm,”⁷¹ which suggests an objectively reasonable standard. Second, in holding that the exhibition of the propaganda-labeled films “would substantially harm [the plaintiff’s] chances for reelection and would adversely affect his reputation in the community,”⁷² the *Meese* Court appears to have examined both the likelihood and magnitude of harm. In terms of likelihood of harm, by using “would,” the Court implicitly held that, in the event the plaintiff exhibited the film, there was a sufficient likelihood that professional and reputational injury would occur.⁷³ The Court also seems to have examined the magnitude of the harm. The *Meese* Court repeatedly discussed the professional aspect of the harm as it related to the plaintiff’s “ability to obtain re-election and to practice his profession,”⁷⁴ a statement that suggests a monetary consideration. Additionally, the Court focused on how the governmental action would “*substantially* harm” or cause “*substantial* detriment” to the plaintiff’s career—references further indicating an inquiry into a quantifiable magnitude of harm.⁷⁵ *Meese*’s risk-of-injury standard therefore can be reframed as a *reasonable-risk* standard that examines both the likelihood and magnitude of harm. Moreover, because *Meese* examines the magnitude of harm, its standard is distinct from the pure likelihood standards promoted by Judge Scalia and Judge Breyer.

68. *Id.* at 230 (emphasis added).

69. *Id.* (“[H]e would reasonably think it necessary to avoid acting in ways that may show ‘disloyalty’ as described in the Order.”).

70. *Meese v. Keene*, 481 U.S. 465, 476 (1987).

71. *Id.* at 472 (citing *Laird*, 408 U.S. at 14).

72. *Id.* at 474.

73. *Id.* at 473–75.

74. *Id.* at 473.

75. *Id.* at 474–75 (emphasis added).

In sum, a probability analysis of the three views of *Laird* yields a tripartite framework for fear-based injury that includes *high-likelihood*, *reasonable-likelihood*, and *reasonable-risk* standards.

C. Three Lines of Doctrine in Injury-in-Fact Jurisprudence

The tripartite division in *Laird* jurisprudence can be extended to the Supreme Court's injury-in-fact doctrine. In 1992, in *Lujan v. Defenders of Wildlife*,⁷⁶ the Court formalized standing as a constitutional requirement and held that a plaintiff must show injury that is "(a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'"⁷⁷ For fear-based injury, the Court has focused on different aspects of this requirement, giving rise to three competing doctrinal standards: (1) a likelihood-of-concrete-injury standard espoused by Justice Scalia;⁷⁸ (2) a realistic-threat standard supported by Justice Breyer;⁷⁹ and (3) a substantial-risk standard used in *Monsanto Co. v. Geertson Seed Farms*.⁸⁰

First, consistent with his opinion in *United Presbyterian*, Justice Scalia has promoted a demanding⁸¹ likelihood-of-concrete-injury standard for fear-based injury, a view illustrated by his majority opinion in *Summers v. Earth Island Institute*.⁸² In *Summers*, Justice Scalia held that a group of environmental organizations lacked standing to challenge an agency regulation allowing the sale of fire-damaged timber.⁸³ Justice Scalia consolidated⁸⁴ his doctrinal views into a likelihood-of-concrete-harm⁸⁵ standard and held that the plaintiff's "vague desire" to revisit a timber site in the future failed this

76. 504 U.S. 555 (1992).

77. *Lujan*, 504 U.S. at 560 (footnote omitted) (citations omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (internal quotation marks omitted).

78. *Summers v. Earth Island Inst.*, 555 U.S. 488, 495–96 (2009) ("The allegations here present a weaker *likelihood of concrete harm* than that which we found insufficient in [a previous case]" (emphasis added)).

79. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000) (Ginsburg, J.) (distinguishing the present opinion from a previous case in which the plaintiff could not "credibly allege that he faced a *realistic threat*" (emphasis added)). Although Justice Ginsburg wrote the *Laidlaw* opinion, it was joined by Justice Breyer and applies a standard similar to the one he employed in *Ozonoff*. *See id.*

80. 130 S. Ct. 2743, 2754–55 (2010) ("A *substantial risk* of gene flow injures respondents in several ways." (emphasis added)).

81. Mank, *supra* note 12, at 242–49 (arguing that, in *Lujan* and *Summers*, Justice Scalia favored a "strict rule" for standing as part of a separation-of-powers approach to standing).

82. 555 U.S. 488.

83. *Summers*, 555 U.S. at 490–91, 500.

84. In *Lujan*, in which the Court denied standing to a group of environmental organizations challenging agencies' failure to consult on projects that threatened endangered species abroad, Justice Scalia explained that injury in fact required "more than an injury to a cognizable interest" and that the plaintiffs had to "be 'directly affected' apart from their 'special interest' in th[e] subject." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (alteration in original) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734–35, 739 (1972)).

85. *Summers*, 555 U.S. at 495–96.

requirement.⁸⁶ Additionally, Justice Scalia explicitly rejected the standard that Justice Breyer promoted in his dissent, which required only “a realistic threat” of harm.⁸⁷ Thus, in *Summers*, Justice Scalia utilized a likelihood-of-concrete-harm standard that was more demanding than Justice Breyer’s realistic-threat inquiry.⁸⁸

Second, the majority opinion in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,⁸⁹ along with Justice Breyer’s dissent in *Summers*, exemplifies a competing line of fear-based injury doctrine that uses a reasonable⁹⁰ realistic-threat requirement.⁹¹ In *Laidlaw*, the majority, joined by Justice Breyer, held that a group of environmental organizations had standing to challenge a company’s alleged noncompliance with a governmental permit regulating the discharge of pollutants into waterways.⁹² Doctrinally, the Court utilized a realistic-threat standard that inquired into the plaintiffs’ “reasonable concerns”⁹³ or the “reasonableness of the[ir] fear”⁹⁴ that the injury would occur. Applying this standard, the *Laidlaw* Court unmistakably declared that the plaintiffs’ claims of fear-based injury arising from the threat of illegal discharge were “entirely reasonable . . . and that [was] enough for injury in fact.”⁹⁵ Subsequently, in his dissent in *Summers*, Justice Breyer explicitly endorsed the realistic-threat standard for fear-based injury, arguing for a threshold based on “‘a realistic threat’ that the

86. *Id.* at 496 (“[Plaintiff’s] vague desire to return is insufficient to satisfy the requirement of imminent injury . . .”).

87. *Id.* at 499–500 (alteration in original) (quoting *id.* at 505 (Breyer, J., dissenting)).

88. See Bradford Mank, *Summers v. Earth Island Institute Rejects Probabilistic Standing, but a “Realistic Threat” of Harm Is a Better Standing Test*, 40 ENVTL. L. 89, 136 (2010) (arguing that Justice Breyer’s realistic-threat test in his *Summers* dissent would allow standing in instances that Justice Scalia’s test in the *Summers* majority opinion would not).

89. 528 U.S. 167 (2000).

90. Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665, 686 (2009) (“*Laidlaw* concluded that if a plaintiff has ‘reasonable concerns’ about a present threatened harm, the plaintiff may seek injunctive relief or civil penalties to prevent future harms . . .”).

91. *Laidlaw*, 528 U.S. at 184; Calabrese, *supra* note 11, at 1467–68 (“[A] mention of the reasonableness of fear . . . [suggests] reasonableness of fear could have some effect or bearing on an injury-in-fact analysis. It had such an effect in *Laidlaw*.”). An earlier example of the reasonable realistic-threat approach to fear-based injury can be found in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). In *Lyons*, the Court held that a plaintiff lacked standing to challenge a police chokehold policy under a realistic-threat standard, which examined the objective “reasonableness of [plaintiff’s] fear . . . dependent upon the likelihood of a recurrence of the allegedly unlawful conduct.” *Id.* at 96, 106 n.7, 107 n.8; see also Michelman, *supra* note 34, at 100–01 (arguing that the *Lyons* Court utilized a reasonable-likelihood standard to find that the plaintiffs lacked standing). Both the *Laidlaw* Court and the *Summers* dissent reference *Lyons*’s realistic-threat standard. *Laidlaw*, 528 U.S. at 184 (citing *Lyons*, 461 U.S. at 107 n.7); *Summers*, 555 U.S. at 505 (Breyer, J., dissenting) (citing *Lyons*, 461 U.S. at 107 n.7).

92. *Laidlaw*, 528 U.S. at 167–71.

93. *Id.*

94. See *supra* note 91 and accompanying text.

95. *Laidlaw*, 528 U.S. at 185–86.

reoccurrence of the challenged activity would cause [the plaintiff] harm ‘in the reasonably near future.’”⁹⁶

Third, in *Monsanto Co. v. Geertson Seed Farms*,⁹⁷ the Court applied a substantial-risk⁹⁸ standard for claims of fear-based injury. In that case, the Court held that a group of conventional alfalfa growers had standing to challenge an agency decision to deregulate genetically engineered alfalfa.⁹⁹ The plaintiffs feared that deregulation would lead to contamination of conventional alfalfa plants and alleged fear-based injury arising from their efforts to minimize the likelihood of contamination.¹⁰⁰ The Court first held that there was a sufficient likelihood that some deregulation would occur and that it would result in the infection of the plaintiffs’ crops.¹⁰¹ The Court then discussed how the “substantial risk of gene flow injures [plaintiffs] in several ways,” and it listed the various costs associated with the threat of infection.¹⁰² Finally, applying its substantial-risk standard, the Court held that “even if [the plaintiffs’] crops are not actually infected . . . [their claims] are sufficiently concrete to satisfy the injury-in-fact prong.”¹⁰³

D. Reframing the Three Doctrinal Standards for Injury in Fact

This Section analyzes the three lines of injury-in-fact doctrine using probability principles and argues that they can be reframed as standards of *high likelihood*, *reasonable likelihood*, and *reasonable risk*—standards well situated within the tripartite framework derived from the *Laird* jurisprudence. First, the likelihood-of-concrete-injury standard promoted by Justice Scalia can be reframed as a *high-likelihood* standard. Second, the realistic-threat standard endorsed by Justice Breyer can be reframed as a *reasonable-likelihood* standard. Again, both doctrines can be characterized as likelihood standards that inquire purely into the probability that the feared harm will occur. Third, and in contrast to the previous two standards, the substantial-risk test utilized in *Monsanto* can be reframed as a *reasonable-risk* standard.

As in his opinion in *United Presbyterian*, Justice Scalia’s likelihood-of-concrete-injury doctrine can be reframed as a *high-likelihood* standard that examines the likelihood of harm but requires a greater showing of likelihood than a reasonable standard.¹⁰⁴ In *Summers*, addressing the plaintiffs’ present

96. *Summers*, 555 U.S. at 505 (Breyer, J., dissenting).

97. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010).

98. *Id.* at 2747 (“A substantial risk of such gene flow injures respondents in several ways that are sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis.”).

99. *Id.* at 2746–47.

100. *Id.* at 2755.

101. *Id.* at 2754–55 (noting that there is “more than a strong likelihood” of partial “Roundup Ready Alfalfa” deregulation and a “reasonable probability” of infection in the event of complete deregulation).

102. *Id.*

103. *Id.* at 2755.

104. See discussion *supra* Section I.B.

fear-based injury, Justice Scalia demanded more specificity regarding the plaintiffs' alleged future injury.¹⁰⁵ He framed his inquiry into the "actual-and-imminent" requirement of injury in fact¹⁰⁶ in terms of a greater or "weaker *likelihood*" of harm.¹⁰⁷ Thus, his focus on the likelihood that the harm will occur supports characterizing his requirement as a likelihood standard.¹⁰⁸ Furthermore, by explicitly rejecting the *Summers* dissent's reasonable realistic-threat standard, Justice Scalia showed that his threshold is more demanding than a *reasonable-likelihood* standard. His doctrinal standard therefore can be described as a *high-likelihood* standard.

Consistent with his opinion in *Ozonoff*, the realistic-threat doctrine sanctioned by Justice Breyer can be characterized as a *reasonable-likelihood* standard that examines the likelihood that harm will occur according to a reasonableness requirement.¹⁰⁹ First, the realistic-threat standard explicitly adheres to a reasonableness standard. In *Laidlaw*, the majority analyzed the plaintiffs' claims of fear-based injury according to the "[t]he reasonableness of [the] fear"¹¹⁰ and held that the plaintiffs' claims were "entirely reasonable . . . and that [was] enough for injury in fact."¹¹¹ Second, the realistic-threat standard examines the likelihood that the feared harm will occur. In *Laidlaw*, the majority discussed how "[t]he reasonableness of [the] fear"¹¹² is "dependent upon the likelihood of a recurrence of the allegedly unlawful conduct."¹¹³ The *Laidlaw* Court further discussed the likelihood of harm in holding that there was "nothing improbable" about the plaintiffs' claims that the illegal discharges would cause residents to suffer economic and aesthetic harms.¹¹⁴ In his *Summers* dissent, Justice Breyer applied the realistic-threat standard in analyzing "whether there is a *realistic likelihood* that the challenged future conduct will, in fact, recur and harm the plaintiff."¹¹⁵ Thus, as shown in *Laidlaw* and in Justice Breyer's *Summers* dissent, the realistic-threat doctrine requires showing a reasonable likelihood that harm will

105. *Summers v. Earth Island Inst.*, 555 U.S. 488, 495–96 (2009).

106. *Id.* at 496 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)) ("[Plaintiffs' claims] do not support a finding of the 'actual or imminent' injury that our cases require.").

107. *Id.* at 495 (emphasis added).

108. Hessick, *supra* note 2, at 64 (arguing that, in *Lujan*, the Court "stated that imminence is relevant to justiciability *only* insofar as it relates to the probability that an injury will occur" (emphasis in original)).

109. See discussion *supra* Section I.B.

110. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000) (alteration in original) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983)) (internal quotation marks omitted).

111. *Laidlaw*, 528 U.S. at 184–85.

112. *Id.* at 184 (alteration in original) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 n.8 (1983)) (internal quotation marks omitted).

113. *Id.* (internal quotation marks omitted).

114. *Id.*

115. *Summers v. Earth Island Inst.*, 555 U.S. 488, 505 (2009) (Breyer, J.) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.7, 108 (1983)).

occur, and the doctrine consequently can be characterized as a *reasonable-likeness* standard. In this sense, both Justice Scalia's and Justice Breyer's standards relate solely to the likelihood that the feared harm will occur, even though Justice Scalia's *high-likeness* standard is more demanding than Justice Breyer's *reasonable-likeness* standard.

Finally, channeling *Meese*, *Monsanto*'s substantial-risk inquiry can be characterized as a *reasonable-risk* standard that assesses both the likelihood that harm will occur and the magnitude of the harm.¹¹⁶ First, in its substantial-risk inquiry, the *Monsanto* Court addressed the reasonable likelihood of harm. The Court held that there was "more than a strong likelihood" that the governmental agency would partially deregulate the genetically engineered plants¹¹⁷ and agreed with the district court that there was a "reasonable probability" that complete deregulation would cause infection of the plaintiffs' crops.¹¹⁸ Second, the *Monsanto* Court analyzed the alleged harm.¹¹⁹ It discussed several of the plaintiffs' alleged injuries, including costs associated with testing conventional seeds for contamination, certifying contamination-free seeds, and taking measures to minimize contamination.¹²⁰ Each injury entails a monetary cost, which suggests a quantitative consideration or an inquiry into the magnitude of the injury.¹²¹ Additionally, the operative use of "substantial" within the substantial-risk standard provides further support for a quantitative inquiry.¹²² In sum, the *Monsanto* Court's substantial-risk requirement ostensibly examines the reasonable likelihood and magnitude of harm. This substantial-risk doctrine therefore can be termed a *reasonable-risk* standard, which includes both an inquiry into the reasonable likelihood and the magnitude of the harm. Furthermore, because *Monsanto* openly considered the magnitude of the harm, its doctrinal standard is distinct from the pure likelihood standards espoused by Judges Breyer and Scalia.¹²³

Looking back, then, the three views of *Laird* with respect to fear-based injury parallel the three lines of Supreme Court injury-in-fact doctrine, especially when they are reframed as *high-likeness*, *reasonable-likeness*, and

116. See discussion *supra* Section I.B.

117. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2754 (2010).

118. See *id.* at 2754–55.

119. *Id.*

120. *Id.*

121. See *id.* at 2755; see also Bradford Mank, *Standing in Monsanto Co. v. Geertson Seed Farms: Using Economic Injury as a Basis for Standing when Environmental Harm Is Difficult to Prove*, 115 PENN ST. L. REV. 307, 338–39 (2010) (discussing how the *Monsanto* Court focused on economic loss as part of its inquiry).

122. *Monsanto*, 130 S. Ct. at 2754–55.

123. Other scholars also frame the Supreme Court's jurisprudence on fear-based injury as divided between a "sufficient-likeness" and "sufficient-risk" approach. *E.g.*, Marty Lederman, *Commentary: Susan B. Anthony List, Clapper footnote 5, and the state of Article III standing doctrine*, SCOTUSBLOG (June 17, 2014, 4:34 PM), <http://www.scotusblog.com/2014/06/commentary-susan-b-anthony-list-clapper-footnote-5-and-the-state-of-article-iii-standing-doctrine/>.

reasonable-risk standards. Looking ahead, these three competing standards are manifest within *Clapper*—in the majority, dissent, and footnote 5, respectively. This tripartite framework’s presence in *Clapper* ultimately suggests a governing standard for fear-based injury.

II. THREE DOCTRINAL STANDARDS FOR FEAR-BASED INJURY WITHIN *CLAPPER*

This Part contends that the competing lines of fear-based injury doctrine converge in *Clapper* and further argues that the *Clapper* Court’s reasoning suggests that footnote 5’s substantial-risk inquiry should prevail as the doctrine’s governing standard.¹²⁴ Section II.A summarizes *Clapper*’s majority opinion, dissent, and footnote 5. Section II.B situates *Clapper*’s three competing standards within the tripartite doctrinal framework derived from *Laird* and the injury-in-fact jurisprudence. Section II.C then analyzes the *Clapper* Court’s reasoning and argues that footnote 5’s substantial-risk standard should govern fear-based injury.

A. Summary of *Clapper v. Amnesty International USA*

In *Clapper*, the Supreme Court, with Justice Alito writing for the majority,¹²⁵ held that the plaintiffs lacked standing to challenge the constitutionality of FISA § 702 because their claims of future threatened injury and present fear-based injury did not meet a certainly-impending requirement.¹²⁶ First, the Court held that the plaintiffs’ threatened-injury claims were too “speculative” to meet the “well-established” requirement that the threatened harm must be “certainly impending.”¹²⁷ The Court then denied the plaintiffs’ claims of fear-based injury¹²⁸ because the allegations were not based on threatened harm that was “certainly impending.”¹²⁹ Doctrinally, for fear-based injury, the Court held that plaintiffs “cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not *certainly impending*,” even if the costs were incurred as a “reasonable reaction to a risk of harm.”¹³⁰ The Court

124. See discussion *infra* Section II.C.

125. Justice Alito was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1142 (2013).

126. *Id.* at 1143.

127. *Id.* at 1143, 1147–48.

128. *Id.* at 1150 (“Respondents’ alternative argument—namely that they can establish standing based on the measures that they have undertaken to avoid § 1881a-authorized surveillance—fares no better.”).

129. *Id.* at 1151.

130. *Id.* (emphasis added).

proceeded to reject unambiguously an alternative standard based on “a reasonable fear of *future* harmful government conduct,”¹³¹ denouncing the proposal as “improperly water[ing] down the fundamental requirements of Article III.”¹³² In justifying its move, the Court declared that such a standard would allow “an enterprising plaintiff . . . to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear.”¹³³

Writing in dissent, Justice Breyer, joined by three other justices,¹³⁴ argued that “something more akin to a ‘reasonable probability’ or ‘high probability’” standard should govern.¹³⁵ Justice Breyer criticized the majority’s certainly-impending doctrine as incorrectly applying precedent.¹³⁶ He declared that the Court had previously used “certainly impending” in varying ways¹³⁷ and that the majority had adopted the narrowest interpretation, one that required a necessary occurrence.¹³⁸ Additionally, Justice Breyer argued that the Court had previously held probabilistic-injury claims justiciable under a myriad of doctrinal standards, including “realistic danger,” “quite realistic [injury],” “realistic and impending threat,” “genuine threat,” and “substantial risk.”¹³⁹ Lastly, he concluded that, for fear-based injury, the appropriate threshold was satisfied where “a *reasonable* probability of future injury comes accompanied with present injury that takes the form of *reasonable* efforts to mitigate the threatened effects of the future injury or to prevent it from occurring.”¹⁴⁰

131. *Id.* (emphasis in original) (quoting *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 138 (2d Cir. 2011)) (internal quotation marks omitted).

132. *Id.* *But see* *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 122 (2d Cir. 2011) (“Because standing may be based on a reasonable fear of future injury and costs incurred to avoid that injury, and the plaintiffs have established that they have a reasonable fear of injury and have incurred costs to avoid it, we agree that they have standing.”), *rev’d*, 133 S. Ct. 1138 (2013).

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

134. Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan. *Id.* at 1155.

135. *Id.* at 1165.

136. *Standing—Challenges to Government Surveillance—Clapper v. Amnesty International USA*, *supra* note 4, at 302.

137. On some occasions, the Court had used “certainly impending” to determine *whether* an action had occurred, and, on other occasions, it had used the phrase to inquire into *when* an action had occurred. *Clapper*, 133 S. Ct. at 1160. Furthermore, the Court had also used “certainly impending” to describe a “*sufficient*, rather than *necessary*, condition for jurisdiction.” *Id.* (emphasis in original).

138. *Id.*

139. *Id.* at 1160–62; *see also, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2747 (2010) (“substantial risk”); *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734 (2008) (“realistic and impending threat of direct injury”); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (“genuine threat”); *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) (“realistic danger of sustaining a direct injury”); *Blum v. Yaretsky*, 457 U.S. 991, 1001 (1982) (“quite realistic” injury).

140. *Clapper*, 133 S. Ct. at 1163–64 (emphasis added) (emphasis omitted).

Meanwhile, the *Clapper* majority quietly acknowledged another valid standard for fear-based injury in footnote 5.¹⁴¹ Citing *Monsanto*, the Court conceded that, “[i]n 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.”¹⁴² The Court then expounded on this substantial-risk standard, noting that plaintiffs must provide “concrete facts” of the “defendant’s actual action” that do not “rely on . . . ‘unfettered choices made by independent actors not before the court.’”¹⁴³ The Court ultimately pulled back, however, averring without explanation that, “to the extent that this ‘substantial risk’ standard is relevant and distinct from the ‘clearly impending’ requirement, respondents fall short of even that standard.”¹⁴⁴

B. Three Doctrinal Standards for Fear-Based Injury Within *Clapper*

This Section contends that *Clapper*’s majority opinion, dissent, and footnote 5 reflect the three competing lines of doctrine for fear-based injury.¹⁴⁵ First, the majority’s certainly-impending standard can be represented as a *high-likelihood* standard. Second, the dissent’s reasonable-probability or high-probability standard can be restated as a *reasonable-likelihood* standard.¹⁴⁶ Third, footnote 5’s substantial-risk standard can be characterized as a *reasonable-risk* standard.

141. *Id.* at 1150 n.5 (“Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harm they identify will come about.”); *see also* Lederman, *supra* note 123 (“Footnote 5, in other words, appeared to be an alternative holding in *Clapper* . . .”). Additionally, in *Susan B. Anthony List*, a post-*Clapper* case, the Supreme Court discussed the *Clapper* majority’s standard and footnote 5’s standard disjunctively: “[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.” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (emphasis added) (internal quotation marks omitted).

142. *Clapper*, 133 S. Ct. at 1150 n.5 (quoting *Monsanto*, 130 S. Ct. at 2754–55).

143. *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)) (internal quotation marks omitted).

144. *Id.*

145. Professor Mank also suggests that a tripartite framework appears within *Clapper*. Mank, *supra* note 12, at 224–40. While he similarly connects Justice Scalia’s *Lujan–Summers* doctrine and Justice Breyer’s *Summers* doctrine with *Clapper*’s majority and dissent, Mank’s framework remains distinct from this Note’s analysis because he links *Clapper*’s footnote 5 with Justice Kennedy’s concurrence in *Lujan*. *Id.* at 254–63.

146. Despite using the term “high probability,” Justice Breyer arguably prefers a reasonable-probability test. *Id.* at 252 (“Justice Breyer likely personally prefers the reasonable probability standing test he suggested in *Clapper*, rather than the alternative ‘high probability’ standing test he offered in the same opinion.”).

The *Clapper* majority's certainly-impending standard can be reframed as a *high-likelihood* standard that is well situated within Justice Scalia's opinions in *Summers*¹⁴⁷ and *United Presbyterian*.¹⁴⁸ Initially, for its certainly-impending standard, the *Clapper* majority, which included Justice Scalia, explicitly demanded something more than an objectively "reasonable reaction to a risk of harm."¹⁴⁹ The majority then explicitly tied the certainly-impending standard to Justice Scalia's *high-likelihood* view by citing *United Presbyterian* and declaring that "our decision in *Laird* makes it clear that such a fear is insufficient."¹⁵⁰ Finally, the *Clapper* majority distinguished the instant case from *Laidlaw*, *Meese*, and *Monsanto*.¹⁵¹ While the Court framed the distinction factually, its explicit discussion of these cases also suggests a doctrinal divide. The certainly-impending standard therefore constitutes a *high-likelihood* standard.

Similarly, Justice Breyer's dissent advocates for a *reasonable-likelihood* standard that conforms to the approach in *Laidlaw*.¹⁵² In arguing that the Court had previously utilized a standard based on "reasonable efforts [by plaintiffs] to mitigate . . . or to prevent" future harm that had a "reasonable probability" of occurring, Justice Breyer cited *Laidlaw* itself.¹⁵³ Consequently, in a move reflecting his adherence to a *reasonable-likelihood* standard for fear-based injury, he proposed a reasonable-probability or high-probability standard.¹⁵⁴ Justice Breyer contended that "[t]he use of some such standard is all that is necessary here to ensure the actual concrete injury that the Constitution demands."¹⁵⁵ Hence, the *Clapper* dissent's standard constitutes a *reasonable-likelihood* standard that is less demanding than the majority's *high-likelihood* requirement. At the same time, the two standards are similarly situated because they relate purely to the likelihood that the feared harm will occur.

147. *Id.* at 245–49 (arguing that Justice Scalia's opinion in *Summers* is "strikingly similar to *Clapper*'s clearly impending test").

148. *See supra* text accompanying notes 61–62, 104–108.

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

150. *Id.* at 1152; *see also supra* text accompanying notes 61–62.

151. *Clapper*, 133 S. Ct. at 1153 ("Respondents incorrectly maintain that '[t]he kinds of injuries incurred here . . . are the same kinds of injuries that this Court held to support standing in cases such as' *Laidlaw*, *Meese v. Keene*, and *Monsanto*." (alteration in original) (citation omitted) (quoting Brief for Respondents at 24, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) (No. 11-1025))); *see also* discussion *supra* Sections I.B. and I.D.

152. *See supra* text accompanying notes 109–112.

153. *Clapper*, 133 S. Ct. at 1163–64.

154. *Id.* at 1165 (internal quotation marks omitted).

155. *Id.*

Finally, as direct progeny of *Monsanto*, footnote 5's substantial-risk standard can be seen as a *reasonable-risk* standard that examines the likelihood and magnitude of harm.¹⁵⁶ First, footnote 5 cited *Monsanto*'s substantial-risk standard,¹⁵⁷ which examined both the likelihood and magnitude of harm.¹⁵⁸ The Court then made reference to three additional justiciable cases, all of which similarly analyzed the likelihood and magnitude of harm.¹⁵⁹ Second, while footnote 5 raised concerns pertaining to "the proving [of] concrete fact[]" and "speculation about 'the unfettered choices made by independent actors,'" it discussed these concerns within the framework of *Monsanto*'s standard and allowed claims of fear-based injury based on "*reasonably* incur[red] costs to mitigate or avoid that harm."¹⁶⁰ Footnote 5's standard therefore adopts an objectively reasonable inquiry. Third, *Clapper* provides support for treating footnote 5's standard as distinct from the majority's *high-likelihood* standard and the dissent's *reasonable-likelihood* standard. Footnote 5 explicitly stated that "the 'substantial risk' standard is . . . distinct from the 'clearly impending' requirement."¹⁶¹ Moreover, by validating the substantial-risk standard as a basis for standing,¹⁶² the *Clapper* Court distinguished it from the rejected *reasonable-likelihood* standard of the dissent. As a result, footnote 5 promotes a *reasonable-risk* standard that is distinct from the likelihood standards of the *Clapper* majority and dissent.

C. Resolving the Three Doctrinal Standards for Fear-Based Injury Within *Clapper*

Because the three standards for fear-based injury are manifest within *Clapper*, examining the Court's reasoning not only offers a snapshot of the current state of the doctrine but also provides an opportunity to resolve the

156. See discussion *supra* Section I.D.

157. *Clapper*, 133 S. Ct. at 1150 n.5 (citing *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2754–55 (2010)).

158. See discussion *supra* Part I.

159. *Clapper*, 133 S. Ct. at 1150 n.5. All three cases involved justiciable claims of fear-based injury, and, as a doctrinal matter, they can be seen as inquiring into the likelihood and magnitude of harm. *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) (finding standing based on the "likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance"); *Blum v. Yaretsky*, 457 U.S. 991, 1000–01 (1982) (finding standing after determining that "the threat of facility-initiated discharges or transfers to lower levels of care [was] sufficiently substantial" based on a "real and immediate" possibility (quoting *O'Shea v. Littleton*, 414 U.S. 488 (1974)) (internal quotation marks omitted)); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298–99 (1979) (finding standing under a "realistic-danger" standard for statutory enforcement or operation after determining a "credible threat of prosecution" that affected the plaintiffs' "constitutional interest").

160. *Clapper*, 133 S. Ct. at 1150 n.5 (emphasis added) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)) (internal quotation marks omitted).

161. *Id.*

162. *Id.* ("In some instances, we have found standing based on a 'substantial risk' that the harm will occur . . .").

underlying issues in this long-standing doctrinal dispute. This Section contends that the *Clapper* majority inappropriately blurred the distinction between *future* threatened injury and *present* fear-based injury. The Section concludes that footnote 5's standard should therefore govern fear-based injury because it examines both the likelihood and magnitude of harm.

As an initial matter, for fear-based injury, the *Clapper* majority explicitly rejected the *reasonable-likelihood* standard that Justice Breyer promoted in his dissent. Although many of Justice Breyer's arguments are compelling, the Court's decision to reverse the Second Circuit signaled the defeat of the *reasonable-likelihood* standard in the continuing doctrinal debate. At least in the context of *Clapper*, therefore, such a standard cannot govern.

But this result does not settle the doctrinal dispute because the *Clapper* Court recognized two valid standards for fear-based injury: (1) the majority's certainly-impending standard, and (2) footnote 5's substantial-risk standard. Fortunately, an analysis of the *Clapper* Court's reasoning can resolve the remaining doctrinal conflict. In arriving at its certainly-impending standard for fear-based injury, the *Clapper* majority first held that threatened injury must be certainly impending and then extended this standard to the plaintiffs' claims of fear-based injury.¹⁶³ But the majority's reasoning did not properly account for the inherent differences between *future* threatened injury and *present* fear-based injury, especially with regard to the magnitude of the harm. Consequently, footnote 5's standard should govern.

As a *high-likelihood* standard, the *Clapper* majority's certainly-impending standard focused on the likelihood of harm, an appropriate inquiry for uncertain, threatened injury. The majority initially utilized its certainly-impending standard to examine the plaintiffs' threatened-injury claims.¹⁶⁴ Because the plaintiffs' future injuries were uncertain, these claims could be assessed purely on the likelihood that the harm would occur. For example, the *Clapper* Court expressed uncertainty about whether the government would ever use § 702, especially in light of other data-collection tools. Moreover, because the plaintiffs filed suit immediately, on the day the statute was enacted, the threatened injury was remote in time.¹⁶⁵ Additionally, the Court expressed reservations regarding independent Foreign Intelligence Surveillance Court approval for surveillance.¹⁶⁶ Based on these concerns about the likelihood that actual injury would occur, the *Clapper* Court held that the plaintiffs lacked standing for their threatened-injury claims.

163. *Id.* at 1151–52; see also discussion *supra* Section II.A.

164. *Clapper*, 133 S. Ct. at 1151–52.

165. See *id.* at 1148–50 (implying that plaintiffs' decision to file on the first day did not leave enough time for the Court to draw a conclusion that the government would use § 702).

166. *Id.* at 1149–50 (“[E]ven if respondents could show that the Government will seek the Foreign Intelligence Surveillance Court’s authorization to acquire the communications of respondents’ foreign contacts under § 1881a, respondents can only speculate as to whether that court will authorize such surveillance.”).

As a *high-likelihood* standard, however, the *Clapper* majority's certainly-impending test is not appropriate for the plaintiffs' fear-based injuries because it fails to inquire into the magnitude of the harm. Although a connection exists between future threatened injuries and present fear-based injuries, the two are intrinsically different. Because threatened injuries occur in the future, they can be analyzed using a standard based solely on the likelihood that harm will occur. Meanwhile, because fear-based injuries are suffered presently, they contain a measure of certainty and a quantifiable magnitude, in addition to including a likelihood-of-harm component. The flaw of a *high-likelihood* standard for present fear-based injuries is that such a standard inquires *solely* into the likelihood of the uncertain injuries—whether or not they will occur—and disregards any inquiry into the magnitude of the present harm itself. In *Clapper*, the plaintiffs alleged fear-based injuries that caused them to take “costly and burdensome measures,”¹⁶⁷ implicitly suggesting that there was a measurable magnitude to their present, actual harm. In its certainly-impending analysis, however, the *Clapper* majority shunned any examination into the magnitude or resulting costs of the plaintiffs' fear-based injuries. As a result, the majority inappropriately blurred the distinction between future threatened injury and present fear-based injury.

In contrast, as a *reasonable-risk* standard, footnote 5's substantial-risk requirement examined both the likelihood and magnitude of harm. In footnote 5, the *Clapper* Court explicitly discussed whether the plaintiffs' claims of fear-based injury may lead to “reasonably incur[red] costs”¹⁶⁸ as part of its substantial-risk requirement. While the Court held that the plaintiffs alleged insufficient facts to meet this benchmark,¹⁶⁹ the doctrinal inquiry was appropriate. Thus, by assessing both the likelihood and magnitude of harm, footnote 5's substantial-risk standard properly accounted for the present nature of fear-based injuries.

In sum, present fear-based injuries are inherently different from future threatened injuries. As a likelihood standard, the majority's certainly-impending standard examined only the likelihood that a threatened harm would occur. Such a standard therefore proves inappropriate for claims of fear-based injury. Conversely, as a risk standard, footnote 5's substantial-risk approach analyzed *both* the likelihood and the magnitude of the harm. Given the measurable magnitude of the plaintiffs' claims of fear-based injury, substantial risk is the more appropriate standard. As a result, footnote 5's substantial-risk standard, which examines the likelihood and magnitude of harm according to an objectively reasonable inquiry, should govern claims of fear-based injury.¹⁷⁰

167. *Id.* at 1150–51.

168. *Id.* at 1150 n.5.

169. *Id.*

170. See generally Lederman, *supra* note 123 (contending that a post-*Clapper* Supreme Court case “does appear to indicate that it is footnote 5 of *Clapper*—rather than . . . ‘certainly impending’ harm—that will generally govern Article III standing doctrine going forward.”).

III. AN EXPECTED-VALUE STANDARD FOR FEAR-BASED INJURY

The preceding examination has concluded that *Clapper* footnote 5's substantial-risk standard—which analyzes the likelihood and magnitude of harm according to an objectively reasonable inquiry—should govern claims of fear-based injury. This Part proposes that the Court adopt an interpretation of footnote 5's standard that encapsulates an expected-value assessment. Section III.A contends that footnote 5's substantial-risk standard corresponds to and should be informed by the probability concept of expected value. Section III.B provides support for this expected-value standard through (1) using precedent, (2) drawing on probability principles, and (3) introducing practical considerations.

A. Footnote 5 Should Be Informed by Expected Value

Footnote 5's substantial-risk standard should be informed by an expected-value assessment. First, as a *reasonable-risk* standard that examines the likelihood and magnitude of harm, footnote 5's substantial-risk standard corresponds to the concept of expected value in probability theory. *Expected value*, or expectation, is defined generally as a weighted average of possible events, which includes a summation of the magnitude of each possible event weighted by the likelihood that the corresponding event will occur.¹⁷¹ In other words, in the context of *Clapper*, an expected-value inquiry assesses both the magnitude and likelihood of the plaintiffs' claims of fear-based injury. Thus, footnote 5's substantial-risk standard and expected value involve parallel inquiries into the likelihood and magnitude of harm. Second, expected value, a concept that traces its roots at least to 1657, has enjoyed a long-standing connection to the assessment of risk of injury.¹⁷² This historical relationship suggests that expected value has an intuitive appeal as a method of measuring risk of injury. Third, the concept of expected value can aid in the assessment of fear-based injury. By weighting the likelihood and magnitude of events, expected value provides a means to assign a present value to uncertain future events,¹⁷³ an assessment applicable to fear-based injury, which is a present injury based on uncertain future harm.¹⁷⁴

171. E.g., HACKING, *supra* note 24, at 80, 95; ROSS, *supra* note 5, at 120. More formally, “[i]f X is a discrete random variable having a probability mass function $p(x)$, then the expectation, or the expected value, of X , denoted by $E[X]$, is defined by” the following:

$$E[X] = \sum_{x:p(x)>0} xp(x)$$

ROSS, *supra* note 5, at 119 (emphasis omitted).

172. E.g., HACKING, *supra* note 24, at 94–95; MILLER, *supra* note 25, at 34–35; see also CHRISTIAAN HUYGENS, *LIBELLUS DE RATIOCINIIS IN LUDO ALEAE* (W. Browne trans., London, S. Keimer 1714) (1657), available at <http://www.stat.ucla.edu/history/huygens.pdf>.

173. See MILLER, *supra* note 25, at 35 (“[E]xpectations are often thought of as being forward looking.”); see also discussion *supra* Introduction.

174. For a simple and concrete example, imagine that, in one week, there is a 20% chance that the government will engage in illegal surveillance of a plaintiff, which will cost him

Because expected value is directly applicable to footnote 5's substantial-risk standard, the Court should draw on this probability concept to make its standard for fear-based injury more comprehensive and robust.

B. *Three Justifications for an Expected-Value Standard*

This Section contends that the following considerations support adopting an expected-value interpretation of *Clapper* footnote 5's substantial-risk standard: (1) legal precedent, (2) additional probability principles, and (3) practical concerns.

First, legal precedent, both binding and persuasive, can support an expected-value standard for fear-based injury. As this Note has argued, the *reasonable-risk* approach flows from a valid line of Supreme Court doctrine associated with *Meese*, *Monsanto*, and *Clapper* footnote 5, and this standard should be informed by an expected-value assessment.¹⁷⁵ In fact, an expected-value inquiry maps cleanly onto the two prongs of injury in fact—(1) “actual or imminent, not conjectural or hypothetical,” relates to the likelihood of harm, and (2) “concrete and particularized” involves the magnitude of harm.¹⁷⁶ Additionally, an expected-value standard for fear-based injury finds explicit support in legal scholarship¹⁷⁷ and lower court opinions. For example, in *In re C.P. Hall Co.*,¹⁷⁸ Judge Posner held that an excess insurer plaintiff had standing after explicitly applying an expected-value standard to assess the plaintiff's claims of fear-based injury.¹⁷⁹ Not only does Judge Posner's assessment illustrate how an expected-value standard for fear-based injury is applied in practice but it also shows how a plaintiff can have standing “even when the probability that the harm will actually occur is small”¹⁸⁰—a reality that suggests tension with *Clapper*'s certainly-impending standard. Finally, expected-value standards also appear in other legal doctrines, such as the

\$10,000. The present expected value of this future harm is $.2 \cdot \$10,000 = \$2,000$. Even in its simplified form, this example demonstrates (1) that including a magnitude component to claims of fear-based injury is intuitively appropriate and (2) that even a rudimentary expected-value calculation can aid in the assessment of a claim of fear-based injury.

175. See discussion *supra* Part I and Section III.A.

176. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (internal quotation marks omitted).

177. *E.g.*, Calabrese, *supra* note 11, at 1493–1500 (proposing a framework analogous to expected value for fear-based injury but without incorporating an analysis of *Clapper*); Mank, *supra* note 88, at 134–37 (arguing for an expected-value framework for probabilistic injuries in administrative law cases); Nash, *supra* note 23, at 1284–90 (arguing for an expected-value standard for all standing inquiries, including fear-based injuries).

178. *In re C.P. Hall Co.*, 750 F.3d 659 (7th Cir. 2014) (Posner, J.).

179. *Id.* at 660–61 (citations omitted) (“[O]ften a probabilistic harm suffices for Article III standing even when the probability that the harm will actually occur is small. A 10 percent probability of obtaining \$1,000 is \$100; this is called an ‘expected value’ and is real even though not certain.”).

180. *Id.*

Hand formula for finding negligence in tort.¹⁸¹ Thus, using expected value is consistent with “the essence of existing standing doctrine,”¹⁸² and its use as a standard for fear-based injury finds support in case law and legal scholarship.

Second, an expected-value standard for fear-based injury accords with other concepts in probability theory, notably *decision theory*.¹⁸³ Decision theory is a subset of probability theory that pertains to decisions made under uncertain conditions¹⁸⁴—a problem set analogous to claims of fear-based injury. Decision theory argues that, in uncertain conditions, individuals make decisions according to a dominating expected-value rule.¹⁸⁵ In other words, when individuals face a decision under uncertain conditions, they make an internal expected-value calculation for each possibility and then elect the option that maximizes their expected value.¹⁸⁶ Decisions involving uncertainty can be modeled using *decision trees*.¹⁸⁷ Analyzing a decision tree involves a technique called backward induction, which determines a present value from uncertain future values using the concept of expected value.¹⁸⁸ Because footnote 5’s substantial-risk standard includes the concept of expected value, the doctrine can draw on decision theory to analyze claims of fear-based injury such as those in *Clapper*. Thus, the plaintiffs’ claims of fear-based injury can be modeled as a decision tree and analyzed using the expected value of the likelihood and magnitude of threatened injury. This assessment in turn must adhere to an objectively reasonable standard as established by footnote 5.¹⁸⁹ In sum, construing footnote 5’s substantial-risk requirement as an expected-value assessment creates a robust standard and accords with a well-established framework used to assess decisions made under uncertain conditions.

Lastly, adopting an expected-value standard can address practical concerns, especially regarding doctrinal clarity and flexibility. By linking *Clapper*’s substantial-risk requirement with expected value, the standard can draw on probability principles to clarify the doctrine. Because the certainly-impending standard constitutes such a high bar, claims of fear-based injury

181. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); see also *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988) (holding that, in the context of securities regulation, “materiality ‘will depend . . . upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event.’” (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968))).

182. Nash, *supra* note 23, at 1285.

183. JOHN W. PRATT ET AL., *INTRODUCTION TO STATISTICAL DECISION THEORY 1* (1995) (introducing decision theory as pertaining to the problem of decisions under uncertainty).

184. See HACKING, *supra* note 24, at 94–95.

185. *Id.* at 118–23 (discussing Pascal’s Wager to explain how decision theory rests on the maximization of expected value).

186. *Id.*

187. PRATT ET AL., *supra* note 183, at 1–9 (introducing decision trees as an analytical tool used to examine decisions made under uncertainty).

188. *Id.* at 124–29.

189. See discussion *supra* Section II.B.

after *Clapper* are likely to gravitate toward the substantial-risk standard as a potentially more relaxed requirement.¹⁹⁰ As a result, clarity regarding the standard is particularly important. Unfortunately, there has been some confusion in lower courts about footnote 5's standard.¹⁹¹ For example, the Second Circuit in a recent case interpreted footnote 5 as supporting a "more permissive standard [for] a preenforcement challenge to a criminal statute."¹⁹² In contrast, the Federal Circuit focused on footnote 5's "reasonably incur costs to mitigate or avoid that harm" language.¹⁹³ Linking the substantial-risk standard to the concept of expected value helps to provide a framework for clarifying the doctrine. For example, the Second Circuit's reading of footnote 5 relates to the likelihood prong of expected value and can be clarified in that context. Comparatively, the Federal Circuit's interpretation of footnote 5 pertains to the objectively reasonable standard for the entire expected-value assessment. Incorporating the concept of expected value into footnote 5's substantial-risk doctrine therefore creates a framework for clarifying the standard itself.

Furthermore, adopting an expected-value standard provides doctrinal flexibility for the Court. While the Court typically inquires into the magnitude of harm, under an expected-value standard, it can also account for different *types* of harm. For example, there has been discussion of whether the Court utilizes a heightened standing requirement for challenges to the government's national security programs.¹⁹⁴ Under an expected-value

190. *E.g.*, *Hedges v. Obama*, 724 F.3d 170, 196 (2d Cir. 2013) (noting that *Clapper* footnote 5 might constitute a "more permissive standard"); *see also* Alan Butler, *Standing up to Clapper: How to Increase Transparency and Oversight of FISA Surveillance*, 48 *NEW ENG. L. REV.* 55, 75 (2013) (noting that, outside of the surveillance context, courts will gravitate toward the substantial-risk standard); Lederman, *supra* note 123 (suggesting that "it is footnote 5 of *Clapper*—rather than . . . 'certainly impending' harm—that will generally govern Article III standing doctrine going forward"); Mank, *supra* note 12, at 275 (discussing how "lower courts could use [*Clapper*'s substantial-risk] standard in lieu of the 'certainly impending' test").

191. *See, e.g.*, *Hedges*, 724 F.3d at 196 ("The [*Clapper*] Court did not explain when [footnote 5's] standard might apply."); *cf.* Mank, *supra* note 12, at 275 ("There is likely to be disagreement among lower court judges about the interpretation of *Clapper* and especially the importance of the . . . test in footnote 5 . . .").

192. *Hedges*, 724 F.3d at 196 (citing *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 n.5 (2013), and *Babbitt v. United Farm Workers Nat'l Union*, 422 U.S. 289, 298 (1979)).

193. *Organic Seed Growers & Trade Ass'n v. Monsanto Co.*, 718 F.3d 1350, 1355 (Fed. Cir. 2013) (citing *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 n.5 (2013)), *cert. denied*, 134 S. Ct. 901 (2014).

194. "[W]e have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013); *see, e.g.*, Alan Rozenshtein, *Clapper Opinion Recap: Supreme Court Denies Standing to Challenge NSA Warrantless Wiretapping*, *LAWFARE* (Feb. 26, 2013, 9:17 PM), <http://www.lawfareblog.com/2013/02/clapper-opinion-recap-supreme-court-denies-standing-to-challenge-nsa-warrantless-wiretapping> ("[The *Clapper*] dissent makes a convincing case that such a heightened 'national security standing' requirement exists, at least after *Clapper*.").

standard, if the Court wishes (based on separate concerns¹⁹⁵) to narrow claims of fear-based injury relating to national security programs, it can do so under the magnitude prong. Or, if the Court desires to broaden the scope of claims of fear-based injury relating to the environment,¹⁹⁶ it can utilize the proposed framework in a similar fashion. In either scenario, an expected-value standard allows the Court the flexibility to create subject-matter carve-outs and promote transparency in its analysis, without disturbing the underlying doctrinal framework. For the Court, the proposed standard's flexibility should be especially appealing given the dynamic nature of the various areas of law involving claims of fear-based injury. In sum, while an expected-value, substantial-risk standard is well grounded in precedent and probability principles, the doctrine also provides litigants and courts with a practical standard.

CONCLUSION

The differing doctrinal standards in fear-based injury jurisprudence generally and in *Clapper* more specifically demonstrate the Supreme Court's discomfort with uncertainty, especially in the context of standing. With the convergence of all three lines of fear-based injury doctrine in *Clapper*, the Supreme Court has an opportunity to bring clarity to a divided area of law.

Although it constitutes only a subset of injury-in-fact jurisprudence, the justiciability of claims of fear-based injury has important implications for a wide range of legal issues, including intelligence collection, agency action, environmental preservation, and the First Amendment. By more explicitly adopting an objectively reasonable, expected-value inquiry for fear-based injury, the Supreme Court could draw on probability principles to provide a practical standard while adhering to precedent. The result would be a doctrine that is consistent, flexible, and clear.

195. See *supra* note 81 and accompanying text.

196. See 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, 38–39 (2014) (arguing for a limited reading of *Clapper* in the context of environmental law and for a broader scope of justiciable claims for fear-based injury for "[c]itizens who establish a nexus to violations of environmental law").

