
Standing — Challenges to Government Surveillance —
Clapper v. Amnesty International USA

Article III of the Constitution limits federal court jurisdiction only to “[c]ases” and “[c]ontroversies,”¹ a bar the Supreme Court has recognized as most “fundamental to the judiciary’s proper role.”² According to the Court, standing is critical to enforcing the case-or-controversy requirement.³ Under standing doctrine, in order to proceed in court, “[a] plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”⁴ Whether risk of future harm is an injury sufficient to show standing is a question that the Court has not clearly answered. Though it has allowed jurisdiction over claims to prevent some threatened future injuries,⁵ it has refused to find standing in suits where the alleged future injury is too “‘conjectural’ or ‘hypothetical.’”⁶

Last Term, in *Clapper v. Amnesty International USA*,⁷ the Supreme Court held that the plaintiffs — various attorneys and human rights organizations — lacked standing to challenge section 702 of the Foreign Intelligence Surveillance Act of 1978⁸ (FISA) because they could not show that future injury was “certainly impending,”⁹ nor could they show that future injury or present costs were fairly traceable to the FISA provision.¹⁰ While the Court left the scope of the “certainly impending” standard unclear, it should only be applied to litigants challenging governmental action in foreign affairs or national security. Although the standard could bring clarity to litigants if applied across the board, inevitable factual disagreements would still lead to imprecision. Moreover, applied universally, the standard would exclude numerous litigants from courts despite past precedent to the contrary. Since the “certainly impending” standard is, in any case, unnecessary given the two separation of powers principles that undergird standing doctrine, it can and should be read narrowly.

¹ U.S. CONST. art. III, § 2, cl. 1.

² *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)).

³ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”). But see Cass R. Sunstein, *Standing Injuries*, 1993 SUP. CT. REV. 37, 38 (“[T]he notion of injury in fact has no basis in the text or history of the Constitution.”).

⁴ *Allen v. Wright*, 468 U.S. 737, 751 (1984).

⁵ See, e.g., *Meese v. Keene*, 481 U.S. 465, 475 (1987) (“[T]he need to take such affirmative steps to avoid the risk of harm to [plaintiff’s] reputation constitutes a cognizable injury . . .”).

⁶ *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

⁷ 133 S. Ct. 1138 (2013).

⁸ 50 U.S.C. § 1881a (2006 & Supp. V 2011).

⁹ *Clapper*, 133 S. Ct. at 1148.

¹⁰ *Id.* at 1149, 1151–52.

FISA regulates certain electronic surveillance of communications used by the federal government for foreign intelligence purposes. The Act created two specialized courts to facilitate authorizing such surveillance. First, the Foreign Intelligence Surveillance Court (FISC) approves electronic surveillance if there is probable cause to believe that “the target of the electronic surveillance is a foreign power or [its] agent,” 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 [its] agent.”¹¹ Second, the Foreign Intelligence Surveillance Court of Review may review FISC denials of applications for electronic surveillance.¹²

In 2008, Congress enacted the FISA Amendments Act,¹³ a supplementary statute to FISA that created a “new framework under which the Government [could] seek the FISC’s authorization of certain foreign intelligence surveillance targeting the communications of non-U.S. persons located abroad.”¹⁴ Under § 1881a, the government must obtain FISC approval of proposed foreign surveillance, including approval of the government’s certification (1) that procedures are “reasonably designed” to limit targeting to individuals outside the United States; (2) that procedures will minimize acquisition, retention, and dissemination of nonpublic information about nonconsenting U.S. persons; (3) that “guidelines have been adopted to ensure compliance with targeting limits and the Fourth Amendment”; and (4) that all these procedures comport with the Fourth Amendment.¹⁵ But, importantly, unlike FISA as originally enacted, the 2008 amendment does not require the government to demonstrate probable cause that a target is a foreign power, nor does it require the government to specify the nature and location of each of the particular facilities or places at which the electronic surveillance will occur.¹⁶ In short, if the government receives FISC approval, the Attorney General and the Director of National Intelligence may “authorize jointly, for a period of up to 1 year . . . , the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.”¹⁷

On the day the FISA Amendments Act was enacted, various attorneys and human rights, labor, legal, and media organizations filed suit seeking a declaration that § 1881a facially violated the Fourth and

¹¹ 50 U.S.C. § 1805(a)(3)(A)–(B).

¹² *Id.* § 1803(b).

¹³ Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008) (codified at 50 U.S.C. §§ 1812, 1881, 1881a–1881g, 1885, 1885a–1885c).

¹⁴ *Clapper*, 133 S. Ct. at 1144.

¹⁵ *Id.* at 1145 (quoting 50 U.S.C. § 1881a(g)(2)) (internal quotation mark omitted).

¹⁶ Compare 50 U.S.C. § 1805(a)(2)(A)–(B), (c)(1), with 50 U.S.C. § 1881a.

¹⁷ 50 U.S.C. § 1881a(a).

First Amendments, Article III, and separation of powers principles, and seeking a permanent injunction against the use of § 1881A. The plaintiffs claimed they “engage[d] in sensitive and sometimes privileged telephone and e-mail communications with” individuals abroad as part of their work.¹⁸ They believed that “some of the people with whom they exchange[d] foreign intelligence information [were] likely targets of surveillance under § 1881A.”¹⁹ As such, the plaintiffs claimed that there was an “objectively reasonable likelihood that their communications would be acquired under § 1881A at some point in the future, thus causing them injury,” and “that the risk of surveillance” had “forced [them] to take costly and burdensome measures to protect the confidentiality of their international communications.”²⁰

Both parties moved for summary judgment, and the United States District Court for the Southern District of New York held that the plaintiffs did not have standing.²¹ The Second Circuit reversed.²² Judge Lynch,²³ writing for a unanimous panel, held that the plaintiffs had standing due to an “objectively reasonable likelihood” that their communications would be subject to § 1881A–authorized surveillance in the future.²⁴ Judge Lynch also held that the plaintiffs had standing because they were suffering “present injuries in fact — economic and professional harms — stemming from a reasonable fear of future harmful government conduct.”²⁵ The Second Circuit denied rehearing en banc by a divided vote.²⁶

The Supreme Court reversed.²⁷ Writing for the majority, Justice Alito²⁸ held that the plaintiffs lacked Article III standing because the plaintiffs’ “objectively reasonable likelihood” theory was “too speculative to satisfy the well-established requirement that threatened injury must be ‘certainly impending.’”²⁹ The Court described the “highly attenuated chain of possibilities” upon which plaintiffs relied in order to demonstrate how § 1881A caused injury.³⁰ First, they must assume that the government will decide to target the communications of non-

¹⁸ *Clapper*, 133 S. Ct. at 1145.

¹⁹ *Id.*

²⁰ *Id.* at 1146. In particular, the plaintiffs claimed that they stopped engaging “in certain telephone and e-mail conversations,” *id.* at 1145, and were compelled to “travel abroad in order to have in-person conversations,” *id.* at 1146.

²¹ *Amnesty Int’l USA v. McConnell*, 646 F. Supp. 2d 633, 635 (S.D.N.Y. 2009).

²² *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 122 (2d Cir. 2011).

²³ Judge Lynch was joined by Judges Calabresi and Sack.

²⁴ *Amnesty Int’l USA*, 638 F.3d at 134.

²⁵ *Id.* at 138 (emphasis omitted).

²⁶ *Clapper v. Amnesty Int’l USA*, 667 F.3d 163 (2d Cir. 2011).

²⁷ *Clapper*, 133 S. Ct. at 1146.

²⁸ Justice Alito was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas.

²⁹ *Clapper*, 133 S. Ct. at 1143 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

³⁰ *Id.* at 1148.

U.S. persons with whom the plaintiffs communicate.³¹ Yet the plaintiffs “set forth no specific facts demonstrating that the communications of their foreign contacts will be targeted,” so this assumption is “necessarily conjectural.”³² Second, they must assume that the government will seek to use § 1881A—authorized surveillance to target these individuals’ communications.³³ But the government has “numerous other methods of conducting surveillance, none of which is challenged here,” and plaintiffs can “only speculate as to whether any (asserted) interception would be under § 1881A.”³⁴ Third, the plaintiffs must assume that the FISC will authorize any such surveillance.³⁵ But the Court was “reluctan[t] to endorse standing theories that rest on speculation about the decisions of independent actors.”³⁶ Fourth, even with the FISC’s approval, it is “unclear whether the Government would succeed in acquiring the communications of [plaintiffs’] foreign contacts.”³⁷ And finally, the plaintiffs “can only speculate as to whether *their own communications* with their foreign contacts would be incidentally acquired.”³⁸

The Court also rejected the plaintiffs’ alternative argument: that they were suffering present injuries as a result of the risk of future harm from § 1881A.³⁹ According to the Court, plaintiffs cannot “manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.”⁴⁰ Such a theory would allow “an enterprising plaintiff” to gain Article III standing merely by “making an expenditure based on a nonparanoid fear.”⁴¹ The Court compared this case to *Laird v. Tatum*,⁴² where the Court rejected standing for plaintiffs who alleged a chilling effect arising from their subjective fear that a government

³¹ *Id.*

³² *Id.* at 1149.

³³ *Id.*

³⁴ *Id.* In addition, the Court noted that this speculation makes it impossible for plaintiffs to show that any future injury is “fairly traceable to § 1881A” — an additional standing requirement the Court found lacking. *Id.*

³⁵ *Id.* at 1149–50. For instance, the FISC would have to “assess whether the Government’s targeting and minimization procedures comport with the Fourth Amendment.” *Id.* at 1150.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ For instance, the plaintiffs asserted that they had discontinued “certain telephone and e-mail” communications. *Id.* at 1145.

⁴⁰ *Id.* at 1151.

⁴¹ *Id.* The Court also noted that the harms the plaintiffs alleged were not fairly traceable to § 1881A because the plaintiffs would have had a similar incentive even before § 1881A was enacted due to other methods of conducting surveillance. *Id.* at 1152.

⁴² 408 U.S. 1 (1972).

agency, “armed with the fruits of [surveillance], . . . might in the future take some *other* and additional action detrimental to [the plaintiffs].”⁴³

Finally, the Court rejected the plaintiffs’ suggestion that they must have had standing because they were the only possible challengers of § 1881a. For the Court, “[t]he assumption that if respondents [had] no standing to sue, no one would have standing, [was] not a reason to find standing.”⁴⁴ Regardless, the Court noted that if the government sought to use or disclose information obtained or derived from a § 1881a acquisition in a judicial or administrative proceeding, § 1881a would require that it provide advance notice of such intent, and the affected person could challenge the lawfulness of the acquisition.⁴⁵

Justice Breyer dissented.⁴⁶ First, he noted numerous factors that suggested “a very high likelihood that [the] Government, *acting under the authority of § 1881a*, will intercept at least some of the [plaintiffs’] communications.”⁴⁷ According to Justice Breyer, the plaintiffs engaged in communications of a kind that the 2008 amendment, but not the original Act, authorized the government to intercept,⁴⁸ the plaintiffs had a strong motivation to engage in such communications,⁴⁹ the government had a strong motivation to conduct surveillance of such communications,⁵⁰ the government had the capacity to conduct such surveillance,⁵¹ and the government’s past behavior suggested that it would continue to seek such information.⁵²

Justice Breyer also argued that the majority’s “certainly impending” standard was an incorrect application of prior standing doctrine.⁵³ Not only has the Court previously used standards that imply less than

⁴³ *Clapper*, 133 S. Ct. at 1152 (quoting *Laird*, 408 U.S. at 11) (internal quotation mark omitted).

⁴⁴ *Id.* at 1154 (first alteration in original) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982)) (internal quotation marks omitted).

⁴⁵ *Id.*

⁴⁶ Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan.

⁴⁷ *Clapper*, 133 S. Ct. at 1157 (Breyer, J., dissenting).

⁴⁸ *Id.* at 1157–58 (noting, *inter alia*, that Guantanamo detainees’ family members, friends, and acquaintances, with whom the plaintiffs communicated, were not “foreign power[s],” *id.* at 1158 (alteration in original), as required under FISA before the 2008 amendment).

⁴⁹ *Id.* at 1158 (noting that “elementary considerations of a lawyer’s obligation to his client” would require some of the plaintiffs to communicate with “families . . . and contacts” of alleged terrorists to understand the circumstances surrounding the crimes of which they were accused).

⁵⁰ *Id.* (noting that the government should be expected to want to learn as much as possible about the contacts and activities of suspected terrorists).

⁵¹ *Id.* at 1158–59 (noting that the government had the technology to conduct electronic surveillance, that the FISC rarely failed to approve a surveillance request under FISA, and that “[t]here [was] no reason to believe that the communications described [in this case] would all fail to meet the conditions necessary for approval,” *id.* at 1159).

⁵² *Id.* at 1158.

⁵³ *Id.* at 1160 (“[C]ertainty is not, and never has been, the touchstone of standing.”).

literal certainty,⁵⁴ but Justice Breyer also noted numerous cases in which the Court found standing where the relevant injury seemed less certain than in the present case.⁵⁵ Finally, Justice Breyer noted that in *Monsanto Co. v. Geertson Seed Farms*,⁵⁶ the Court found standing due to present injury through reasonable efforts to mitigate threatened effects of future injury.⁵⁷ As such, Justice Breyer would have held that the high probability of future harms, and the present harms of justifiable mitigating efforts, were enough to find standing.

The *Clapper* majority does not make clear whether the “certainly impending” standard applies to all future litigants of any kind, or only to those challenging governmental action in intelligence or foreign affairs. Though applying “certainly impending” across the board may clarify prior precedent regarding when a risk of future harm is sufficient to show standing, it would leave a lack of clarity regarding when a particular plaintiff has pleaded sufficient facts to demonstrate a particular level of risk. Moreover, applying “certainly impending” broadly would be a bludgeon that would exclude numerous litigants the Court has allowed under its prior jurisprudence. Since the standard is, in any case, unnecessary given the standing doctrine’s two undergirding separation of powers principles, it can and should be applied narrowly.

Language in *Clapper* leaves the scope of future applicability of “certainly impending” unclear. On one hand, the Court decreed that it “ha[d] repeatedly reiterated that ‘threatened injury must be *certainly impending*,’”⁵⁸ and held that the “‘objectively reasonable likelihood’ standard is inconsistent with [the Court’s] *requirement* that ‘threatened injury must be *certainly impending*.’”⁵⁹ That said, the Court admitted it has “not uniformly require[d] plaintiffs to demonstrate that it is literally certain that the harms they identify will come about,” and that the *Clapper* plaintiffs would “fall short” of even a less strict stan-

⁵⁴ See, e.g., *id.* at 1160 (requiring that plaintiffs “must demonstrate a *realistic danger* of sustaining a direct injury” (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (internal quotation mark omitted)); *id.* at 1161 (“reasonable probability” and “substantial risk” (quoting *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2754–55 (2010) (internal quotation marks omitted)).

⁵⁵ See, e.g., *id.* at 1162 (noting that in *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59 (1978), the Court found standing for plaintiffs challenging the building of a nuclear plant in part due to “our generalized concern about exposure to radiation and the apprehension flowing from the *uncertainty* about the health and genetic consequences of even small emissions,” *id.* at 74 (internal quotation marks omitted)).

⁵⁶ 130 S. Ct. 2743.

⁵⁷ *Clapper*, 133 S. Ct. at 1163–64 (Breyer, J., dissenting).

⁵⁸ *Id.* at 1147 (majority opinion) (first emphasis added) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

⁵⁹ *Id.* (emphasis added) (quoting *Whitmore*, 495 U.S. at 158).

dard.⁶⁰ Finally, the Court suggested that its “standing inquiry has been especially rigorous when reaching the merits of . . . an action taken by one of the other two branches of the Federal Government,”⁶¹ particularly in cases challenging decisions of “the political branches in the fields of intelligence gathering and foreign affairs.”⁶² Such dicta suggest that “certainly impending” may only apply to litigants challenging governmental decisions in foreign affairs or intelligence.

Given the imprecision of the “risk of future harm” jurisprudence prior to *Clapper*, a clearer, blanket rule like “certainly impending” could arguably improve doctrinal coherence. Without a precise doctrinal foundation, courts can reasonably disagree about what amount of risk of future harm is sufficient to show injury-in-fact. Indeed, the circuit courts have used divergent language to describe their standards: the D.C. Circuit has required “substantial probability” of injury,⁶³ the Seventh Circuit has allowed “a small probability of injury,”⁶⁴ and the Second Circuit in *Clapper* required an “objectively reasonable likelihood” of injury.⁶⁵ These differing standards are partly a product of the Supreme Court’s oscillation between stricter and more relaxed standards⁶⁶ — oscillation that one scholar has called “troublingly imprecise.”⁶⁷

However, although a universal “certainly impending” requirement may end *doctrinal* imprecision, courts will likely continue to disagree about whether the *facts* in a particular case demonstrate “certainly impending” injury. Factual disagreements often form the basis for disagreements as to whether plaintiffs have standing.⁶⁸ *Clapper* is a prime example of this phenomenon: while the majority believed that the plaintiffs’ theory of standing “relie[d] on a highly attenuated chain

⁶⁰ *Id.* at 1150 n.5. This acknowledgement may render “certainly impending” mere dictum, since the Court would have denied standing regardless of whether that standard was used.

⁶¹ *Id.* at 1147 (quoting *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997)).

⁶² *Id.* (citing *United States v. Richardson*, 418 U.S. 166, 167–70 (1974)).

⁶³ *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (quoting *Am. Petrol. Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000)) (internal quotation marks omitted).

⁶⁴ *Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993).

⁶⁵ *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 134 (2d Cir. 2011).

⁶⁶ *Compare* *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) (allowing environmentalists to challenge railroad rate increases because consequent railroad industry changes could eventually cause aesthetic harm to parks they might visit), *with* *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (denying standing to plaintiffs challenging geographic limit on certain endangered species protections because they could not show that they would personally visit habitats of these species). “[I]t is difficult to say that the probability of harm [in *Lujan*] was clearly lower than the probability of harm in *SCRAP*.” F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 75 (2012).

⁶⁷ Hessick, *supra* note 66, at 73.

⁶⁸ *Compare, e.g.,* *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007) (“[G]lobal sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming.”), *with id.* at 542 (Roberts, C.J., dissenting) (“[A]n inference of actual loss of Massachusetts coastal land . . . is pure conjecture.”).

of possibilities,”⁶⁹ the dissent believed there was a “very strong likelihood” that the plaintiffs’ fears would come true.⁷⁰ Part of the reason for such disagreement may be that courts are simply bad at making determinations about probabilities of future harm.⁷¹ How can a judge calculate the precise probability that each step in the *Clapper* “chain of possibilities” will take place, let alone accurately calculate the product of those probabilities? Add to that difficulty the fact that judges are biased by their “personal experiences” and ideologies when making such determinations.⁷² Taken in total, it is no wonder that judges looking at the same facts come to opposing conclusions about the likelihood of future harm.⁷³ Such factual disagreements would continue to stymie doctrinal precision even if the “certainly impending” standard were applied universally.

Applying “certainly impending” narrowly would also be preferable because most suits for injunctive relief involve harms that are by their nature probabilistic, such as challenges to increased environmental or safety risks.⁷⁴ The “certainly impending” standard threatens to exclude many individuals who seek such relief — especially so for environmental suits given “the diffuse and widespread nature of environmental or ecological harms . . . and the proactive nature of most environmental lawsuits.”⁷⁵ Moreover, many litigants who were granted standing in Supreme Court cases from the past decade could not have satisfied this standard. In *Monsanto*, the Court found standing for farmers challenging the deregulation of genetically engineered alfalfa because of the reasonable probability that the alfalfa would infect the plaintiffs’ farms.⁷⁶ Though the *Clapper* majority attempted to distinguish *Monsanto* because the *Monsanto* plaintiffs

⁶⁹ *Clapper*, 133 S. Ct. at 1148.

⁷⁰ *Id.* at 1159 (Breyer, J., dissenting).

⁷¹ See Hessick, *supra* note 66, at 75 (“Uncertainty about probability forces courts to forego precise calculations of probabilities and instead to evaluate probability on a gestalt feeling of the likelihood of a harm occurring.”); see also Sunstein, *supra* note 3, at 44 (“Evaluation of what would have happened in a counterfactual world is often extremely difficult after the fact.”).

⁷² Hessick, *supra* note 66, at 75; see also Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–43 (1999) (arguing that “judges provide access to the courts to individuals who seek to further the political and ideological agendas of judges”).

⁷³ This problem is exacerbated in the national security context. Often, when dealing with classified information, neither the plaintiff nor the Court has access to enough factual background to describe whether and how the government is implementing the challenged law. See Scott Michelman, *Who Can Sue over Government Surveillance?*, 57 UCLA L. REV. 71, 79–80 (2009).

⁷⁴ See Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665, 726–27 (2009) (noting “diffuse environmental problems that affect large numbers of persons,” *id.* at 727).

⁷⁵ Shi-Ling Hsu, *The Identifiability Bias in Environmental Law*, 35 FLA. ST. U. L. REV. 433, 467 (2008).

⁷⁶ *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2754 (2010).

“present[ed] . . . concrete evidence to substantiate their fears,”⁷⁷ the future harm in *Monsanto* was undisputedly not “certainly impending.”⁷⁸ Likewise, the Court in *Massachusetts v. EPA*⁷⁹ noted that global warming “threatens (among other things) a precipitate rise in sea levels by the end of the century.”⁸⁰ One cannot plausibly argue that a mere threat of injury one hundred years after a suit is “certainly impending.” In short, applying “certainly impending” across the board would leave out numerous litigants, some of whom explicitly had access to the courts under prior Supreme Court decisions.

In any event, a “certainly impending” standard is unnecessary given two purposes the Supreme Court has understood standing doctrine to serve.⁸¹ For one thing, the Court has utilized standing to ensure that plaintiffs have an actual stake in the controversy, such that “the most effective advocate of the rights at issue is present to champion them.”⁸² Though the theory has been criticized,⁸³ to the extent it is correct, a “certainly impending” standard across the board is unnecessary to ensure that the judicial forum remains adversarial. A plaintiff that faces a risk of future harm has a personal interest in preventing that future injury, and should be expected to litigate as an “effective

⁷⁷ *Clapper*, 133 S. Ct. at 1154.

⁷⁸ The *Monsanto* Court admitted that there was only a “substantial risk of gene flow,” 130 S. Ct. at 2754–55, not a certainty. The *Clapper* Court based its “certainly impending” standard on language from *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009), in which the Court held that a realistic threat of future injury does not satisfy the standing requirement for “imminent future injury.” *Id.* at 1150; see also *Clapper*, 133 S. Ct. at 1148. That case directly conflicts with *Monsanto*’s language allowing standing when “there is more than a strong likelihood” of injury. *Monsanto*, 130 S. Ct. at 2754. Additionally, though the Court emphasizes that “§ 1881a at most authorizes — but does not mandate or direct — the surveillance,” *Clapper*, 133 S. Ct. at 1149, the Court offers little reason to distinguish between already-promulgated regulations like the one in *Monsanto* and mere authorizations for executive action where no action is actually proved.

⁷⁹ 549 U.S. 497 (2007).

⁸⁰ *Id.* at 521 (emphasis added); see also *id.* at 521–22 (“[R]ising ocean temperatures may contribute to the ferocity of hurricanes.” (emphasis added)); *id.* at 523 (“Remediation costs alone . . . could run well into the hundreds of millions of dollars.” (emphasis added)).

⁸¹ See Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 461–63 (2008) (describing those purposes). Professor Heather Elliott also mentions a third purpose: resisting Congress’s use of citizen suits to monitor the executive branch’s compliance with the law. *Id.* at 463.

⁸² *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 80 (1978); see also *Massachusetts v. EPA*, 549 U.S. at 517 (noting that legal questions must “be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action” (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring))).

⁸³ See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 757–60 (1972) (Blackmun, J., dissenting) (“[Public interest groups are] possessed . . . of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment[] to litigate environmental issues.” *Id.* at 757.); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891 (1983) (“Often the very best adversaries are national organizations such as the NAACP . . . that have a keen interest in the abstract question at issue in the case, but no ‘concrete injury in fact’ whatever.”).

advocate of the rights at issue.”⁸⁴ Although the zeal to litigate may be lessened as the probability of future injury decreases, so too would the zeal to litigate as actual injury decreases in intensity — and the Court makes no distinctions between large and small injuries.⁸⁵ If the Court is willing to treat any “identifiable trifle” as an injury for standing purposes without believing that the personal stake is any lessened,⁸⁶ it need not insist on a “certainly impending” standard of future harm to ensure that same personal stake.

Additionally, the Court utilizes standing doctrine to ensure that vindication of generalized grievances — for instance, perhaps, where the risk is low and spread over a wide swath of the population — is left to the political branches as opposed to unelected judges.⁸⁷ Yet a “certainly impending” standard excludes numerous cases where an injury may be probabilistic but is not generalized. For instance, though the injury from pollution from a particular plant may be probabilistic in the sense that *chances* for cancer increase, the risk is not shared equally across the population. Individuals closer to the plant face a higher chance of exposure, and therefore a greater chance of injury.⁸⁸ Since there “will almost always be some group of people facing a greater risk than the general populace,”⁸⁹ there will always be a minority that has a greater stake in the controversy. That minority will have just as much trouble as other minorities in vindicating its rights through the majoritarian political branches, and a “certainly impending” standard would unduly exclude it from court.

Thus, because its standard is unnecessary, and because it would bar numerous litigants who otherwise would and previously did have access to courts, *Clapper* can and should be read to apply “certainly impending” only to requests “to review actions of the political branches in the fields of intelligence gathering and foreign affairs.”⁹⁰

⁸⁴ *Duke Power Co.*, 438 U.S. at 80.

⁸⁵ See Hessick, *supra* note 66, at 67–68 (noting that “standing treats identically a plaintiff who alleges only 1¢ in harm and a plaintiff who alleges a \$100,000 injury; both have a personal stake warranting invocation of the courts”).

⁸⁶ *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)).

⁸⁷ See *Lujan*, 504 U.S. at 576 (“Vindicating the *public* interest . . . is the function of Congress and the Chief Executive.”); Scalia, *supra* note 83, at 896 (arguing that, in a case that granted standing to all consumers of milk, “[i]t is hard to believe that the democratic process, if it works at all, could not and should not have been relied upon to protect the interests of that almost all-inclusive group”).

⁸⁸ See Hessick, *supra* note 66, at 87.

⁸⁹ *Id.* at 87 n.183.

⁹⁰ *Clapper*, 133 S. Ct. at 1147 (citing *United States v. Richardson*, 418 U.S. 166, 167–70 (1974)).