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## Fear-Based Standing: Cognizing an Injury-in-Fact

Brian Calabrese

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# Fear-Based Standing: Cognizing an Injury-in-Fact

Brian Calabrese\*

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### *I. Introduction*

#### *A. The Argument*

##### *1. The Question*

Can fear constitute injury-in-fact for Article III standing? Setting out the first unified treatment of the doctrine of fear-based standing, this Note argues that it can. This Note defines, identifies, and expounds the doctrine of fear-based standing, an Article III standing doctrine. Courts apply it often, but selectively and with limited consistency. Fear-based standing is a doctrine that permits fear of future or present harm to constitute injury-in-fact. This Note identifies the doctrine through courts' use of it and emphasizes how fear-based standing is developing. The doctrine is

changing. Some courts are poised to expand it radically, others to eliminate it. This Note argues for a robust doctrine of fear-based standing and proposes an analytical framework for courts to adopt when confronted with alleged fear-based grounds for standing.

## 2. What is Fear-Based Standing?

Fear-based standing is the doctrine that allows fear of harm to lead to cognizable injury-in-fact for Article III<sup>1</sup> standing. It is an exception carved out of—or another way of fulfilling—the requirement that cognizable injury-in-fact be actual or imminent as well as concrete and particularized.<sup>2</sup> The cognizability of fear as injury-in-fact is not a simple issue. Since the early 1970s, courts have developed a complex jurisprudence of fear-based standing that reaches areas of the law as diverse as environmental litigation,<sup>3</sup> electoral law,<sup>4</sup> and national security law.<sup>5</sup> The doctrine, developed in three distinct lines of cases, encompasses three ways of cognizing fear as injury-in-fact: (1) as chilling effect injury; (2) as fear of the enforcement of a statute or regulation before it is enforced; and (3) as fear of anticipated, future harm.

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1. U.S. CONST. art. III.

2. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[T]he plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” (citations and internal quotation marks omitted)).

3. See, e.g., *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 150 (4th Cir. 2000) (challenging Gaston Copper’s discharge of pollutants into a river); cf. *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 943 (9th Cir. 2002) (considering fear-based standing in a case that deals with an issue characterized as being of great importance). According to the *Central Delta Water Agency* court, the case “requires us to address the circumstances under which a party that *fears* that it will be significantly injured by another’s actions may bring a lawsuit to prevent the possible future injury. The dispute involves *one* [of] the most contentious issues in the western United States: the management of water resources.” *Cent. Delta Water Agency*, 306 F.3d at 943 (emphasis added).

4. See, e.g., *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 379 (2d Cir. 2000) (considering a challenge to provisions of Vermont’s campaign finance system); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 10 (1st Cir. 1996) (considering a challenge to aspects of New Hampshire’s campaign finance system regulations).

5. See, e.g., *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 121 (2d Cir. 2011) (challenging statutory provisions providing for surveillance of “non-United States persons outside the United States for the purpose of collecting foreign intelligence”), *reh’g en banc denied*, \_\_\_ F.3d \_\_\_, No. 09-4112-cv, 2011 WL 4381737 (2d Cir. Sept. 21, 2011).

### 3. *Why Fear-Based Standing?*

Fear-based standing is an issue of critical importance—both because of the substantive claims of the litigation in which it is invoked and because of the increasingly unsettled character of the doctrine. For example, in recent years, in suits challenging government action, particularly certain responses to the terrorist attacks of September 11, 2001 and government national security programs, the doctrine of fear-based standing—or, more precisely, its limits—has been one of the government's primary defenses.<sup>6</sup> Recently, the doctrine has become essential to fear of identity theft litigation.<sup>7</sup> More broadly, however, the doctrine potentially may be implicated whenever plaintiffs challenge as yet unrealized future harm.

Not only is fear-based standing an issue of critical importance, but this is a critical moment in its development. Since 2000 and the Supreme Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,<sup>8</sup> courts have expressed a willingness to grant standing to fear-based claims.<sup>9</sup> They have hinted at expanding the cognizability of

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6. See *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1137 (9th Cir. 2009) (challenging "the President's authority to designate terrorist organizations when there is an extraordinary threat to national security"); *ACLU v. NSA*, 493 F.3d 644, 651 (6th Cir. 2007) (Batchelder, J.) (noting that the NSA appealed from summary judgment in favor of the plaintiffs by "arguing that the plaintiffs lacked standing"); *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633, 635 (S.D.N.Y. 2009) ("The Government contends as a threshold matter that the plaintiffs lack standing to challenge the [FISA Amendments Act of 2008]."), *rev'd sub nom.* *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 122 (2d Cir. 2011), *reh'g en banc denied*, \_\_\_ F.3d \_\_\_, No. 09-4112-cv, 2011 WL 4381737 (2d Cir. Sept. 21, 2011).

7. See *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142–43 (9th Cir. 2010) (reversing dismissal of a complaint for lack of standing because both "generalized anxiety and stress" and "increased . . . risk of future harm" as a result of data theft constituted sufficient injury); *McLoughlin v. People's United Bank, Inc.*, No. 3:08-cv-00944(VLB), 2009 WL 2843269, at \*4 (D. Conn. Aug. 31, 2009) (recognizing fear of identity theft as sufficient for standing (citing *Denny v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006))); *cf.* *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 634 (7th Cir. 2007) (finding increased risk of harm from data theft sufficient for standing).

8. See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000) (discussing reasonable fear as a basis for standing).

9. See, e.g., *Me. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 285 (1st Cir. 2006) (finding injury-in-fact sufficient for standing in "increased risk" which "rendered reasonable the actions of the plaintiffs' members in abstaining from their desired enjoyment of the Penobscot"); *Denny*, 443 F.3d at 264 ("An injury-in-fact may simply be the fear or anxiety of future harm."); *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002) (finding injury-in-fact on the basis of "a credible threat of harm" to environmental interests); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (finding injury-in-fact sufficient for standing in a plaintiff's

alleged fear-based injuries.<sup>10</sup> Yet, this evolution in the doctrine has taken place largely without Supreme Court guidance: *Laidlaw* is the only case in which the Supreme Court has dealt with fear-based standing directly since the 1980s.<sup>11</sup> But the Court's treatment of the issue is unclear and cast in ambiguous language.<sup>12</sup>

Moreover, in the courts of appeals, no clear approach has emerged. Before 2010, courts recognized that it was at least theoretically possible for fear to constitute injury-in-fact in some circumstances. Some courts have even liberalized the doctrine and expanded the cognizability of fear, although they limited these changes to particular factual circumstances.<sup>13</sup> Some judges too, although not writing for majorities, have urged the expansion of the doctrine to the point that political fear would be independently cognizable as injury.<sup>14</sup> And one court has found fear to be independently cognizable as injury-in-fact.<sup>15</sup>

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member's "reasonable fear and concern about the effects of Gaston Copper's discharge, supported by objective evidence," fear and concern which "directly affect his recreational and economic interests").

10. See *Laidlaw*, 528 U.S. at 184 (rejecting an argument made by the dissent that *Lyons* should be invoked to reject the plaintiffs' asserted injuries for standing (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983))).

11. See Bradford Mank, *Revisiting the Lyons Den: Summers v. Earth Island Institute's Misuse of Lyons's "Realistic Threat" of Harm Standing Test*, 42 ARIZ. ST. L.J. 837, 845-72 (2010) [hereinafter Mank, *Revisiting the Lyons Den*] (surveying *Lyons's* progeny in the Supreme Court and in the courts of appeals); Jeremy A.M. Evans, Note, *Speech, Spouses, and Standing: Is there Standing to Sue when Sanctions Threatened against One's Spouse Chill Protected Expression?*, 45 B.C. L. REV. 147, 153-55 (2003) (surveying the Supreme Court's chilling effect jurisprudence and listing the most recent such Supreme Court decision as *Meese* in 1987).

12. See *Laidlaw*, 528 U.S. at 184-85 (discussing the sufficiency of reasonable fear for the injury-in-fact requirement of Article III).

13. Cf. *Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003) (understanding *Gaston Copper* to allow for increased cognizability of probabilistic, risk-related harm and extending this understanding from an environmental context to a food safety one).

14. See, e.g., *ACLU v. NSA*, 493 F.3d 644, 699 (6th Cir. 2007) (Gilman, J., dissenting) (arguing that reasonable fear can be sufficient or even "well beyond what is needed" for standing).

15. See *Denny v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("An injury-in-fact may simply be the fear or anxiety of future harm."). Even since 2010, the Second Circuit has followed a more permissive approach to fear-based standing. 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."). Dissenting opinions from the recent denial of a rehearing en banc, however, show that the judges of the Second Circuit are sharply divided about the result in *Clapper*. See, e.g., *Amnesty Int'l USA v. Clapper*, \_\_\_ F.3d \_\_\_, No. 09-4112-cv,

Since 2007, the Sixth Circuit, perhaps the court of appeals with the most extensive fear-based standing jurisprudence, has been expounding, case-by-case, a doctrine of fear-based standing.<sup>16</sup> Yet, in 2010, the Sixth Circuit, in *White v. United States*,<sup>17</sup> implied the elimination of the doctrine and the denial of standing to any fear-based claim not independently cognizable as another type of injury-in-fact.<sup>18</sup>

This Note is the first assessment of *White* in legal scholarship. It argues against *White* and advocates a pre-*White* approach. It urges its proposed framework as an alternative to *White*, as a distillation and refinement of the doctrine as it existed in 2009. The Note does what commentators and courts have not done—set out the doctrine of fear comprehensively, as a unified doctrine that has three distinct strains.

Commentators—both academics and practitioners—have overlooked the doctrine of fear-based standing, considered comprehensively. Academic discussion focuses instead on specific aspects of the doctrine in particular areas of the law, most frequently environmental litigation, national security, and surveillance law.<sup>19</sup> Courts have approached fear-

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2011 WL 4381737, at \*8 (2d Cir. Sept. 21, 2011) (Raggi, J., dissenting) ("The panel's reduced standing standard is so at odds with [Supreme Court] precedent as to compel rejection *en banc*. Because this court, by an equally divided vote, declines to convene for that purpose, I respectfully dissent.").

16. See *White v. United States*, 601 F.3d 545, 552–53 (6th Cir. 2010) (considering fear of false prosecution as alleged injury-in-fact); *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 962 (6th Cir. 2009) (discussing the alleged chilling of speech because of a court's "courtesy and civility rules and the threat of discipline for violating them" as an alleged injury-in-fact as well as the threat of future injury as alleged injury-in-fact); *Morrison v. Bd. of Ed. of Boyd Cnty.*, 521 F.3d 602, 610 (6th Cir. 2008) (finding an alleged chill of First Amendment rights to be subjective and therefore not cognizable as injury-in-fact); *Hange v. City of Mansfield*, 257 Fed. App'x 887, 892 (6th Cir. 2007) (finding that fear of being subject to future discipline by an employer without "a likelihood of future or continuing injury" is insufficient harm to constitute injury-in-fact); *ACLU v. NSA*, 493 F.3d 644, 665 (6th Cir. 2007) (Batchelder, J.) (discussing and rejecting certain chilling effects, *inter alia*, as bases for standing); *Grendell v. Ohio Sup. Ct.*, 252 F.3d 828, 834–35 (6th Cir. 2001) (rejecting the alleged chilling effect of attorney sanctions as injury-in-fact).

17. See *White*, 601 F.3d at 548 (affirming dismissal of a challenge to the Animal Welfare Act for lack of standing).

18. *Id.* at 554 (requiring, effectively, the showing of an independently cognizable injury as confirmatory of a subjective fear in order for the fear to be cognizable as injury-in-fact).

19. See, e.g., Robin Kundis Craig, *Removing "The Cloak of a Standing Inquiry": Pollution Regulation, Public Health, and Private Risk in the Injury-in-Fact Analysis*, 29 CARDOZO L. REV. 149, 169–221 (2007) (considering increased risk as a potential injury for the purposes of standing in suits related to the environment and public health); Steven G. Davison, *Standing to Sue in Citizen Suits Against Air and Water Polluters Under Friends of the Earth, Inc., v. Laidlaw Environmental Services (TOC), Inc.*, 17 TUL. ENVTL. L.J. 63, 86–

based standing more completely, but even the most comprehensive opinions do not address all three of the doctrine's strains substantially.<sup>20</sup>

This Note identifies and articulates the doctrine fully. It identifies its various strains, their points of overlap, and the difficulties that spring from them. It proposes an analytical framework that both clarifies and unifies the doctrine and its various strains to preserve the doctrine as it was in 2009 against the countervailing trend of *White*.

### B. The Structure of the Note

This Note has two purposes. First, to expound the doctrine of fear-based standing as it currently exists. Second, to propose and advocate an

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87 (2003) (suggesting that *Laidlaw* imposes a "reasonable concern" test" for standing in similar environmental cases); Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 945–54 (2006) (discussing fear as injury in the specific context of environmental law); Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665, 737 (2009) [hereinafter Mank, *Standing and Statistical Persons*] (discussing probabilistic risk as a potential injury for standing and arguing that "[a] one in one million risk of death or serious injury is the most plausible quantitative threshold for standing"); Bradford Mank, *Summers v. Earth Island Institute Rejects Probabilistic Standing, but a "Realistic Threat" of Harm is a Better Standing Test*, 40 ENV. L. 89, 100–12 (2010) [hereinafter Mank, *Summers v. Earth Island Institute Rejects Probabilistic Standing*] (discussing risk of harm as a basis for standing in *Laidlaw* and *Summers* and focusing on the concept of probabilistic harm); Scott Michelman, *Who Can Sue Over Government Surveillance?*, 57 UCLA L. REV. 71, 105–06 (2009) (arguing for "the viability of chilling-effect claims as a basis for standing to challenge government surveillance"); Michael N. Dolich, Note, *Alleging a First Amendment Chilling Effect to Create a Plaintiff's Standing: A Practical Approach*, 43 DRAKE L. REV. 175, 189 (1994) (listing factors that a plaintiff's attorney should consider when making a claim based on an alleged First Amendment chilling effect injury); Evans, *supra* note 11, at 167 (arguing that courts should adopt a "choice test" when determining whether an alleged chill of First Amendment rights based on fear of harm to one's spouse is asserted as injury-in-fact for standing); Mary D. Fan, Case Comment, *Risk Magnified: Standing Under the Statist Lens*, 112 YALE L.J. 1633, 1634 (2003) (discussing probabilistic future injuries with respect to *Lyons*, *Laidlaw*, and *Central Delta Water Agency*); Michael C. Miller, Note, *Standing in the Wake of the Terrorist Surveillance Program: A Modified Standard for Challenges to Secret Government Surveillance*, 60 RUTGERS L. REV. 1039, 1069–70 (2008) (advocating application of a "reasonable fear of harm from undisputed conduct" test be allied to "challenges to the [Terrorist Surveillance Program]").

20. See *ACLU v. NSA*, 493 F.3d 644, 661–62, 685–86 (6th Cir. 2007) (Batchelder, J.) (discussing chilling effect and anticipatory harm); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1996) (discussing pre-enforcement fear and chilling effect); *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633, 644–45 (S.D.N.Y. 2009) (discussing chilling effect and pre-enforcement fear), *rev'd sub nom.* *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 122 (2d Cir. 2011), *reh'g en banc denied*, \_\_\_ F.3d \_\_\_, No. 09-4112-cv, 2011 WL 4381737 (2d Cir. Sept. 21, 2011).



analytical framework for courts to adopt when deciding fear-based standing arguments.

This Note achieves these purposes in five Parts. Part I is this introduction. Part II sets out the doctrine of fear-based standing and its three distinct but often interrelated strains as they have developed from Supreme Court decisions in the early 1970s<sup>21</sup> up to, but not including, the Sixth Circuit's 2007 decision in *ACLU v. NSA*.<sup>22</sup> Part II contains three substantive subparts, each of which addresses a different strain of fear-based standing: alleged chilling effect injury, pre-enforcement fear, and anticipatory harm injury.

Part III considers in detail the most significant recent appellate decisions on fear-based standing, the Sixth Circuit's 2007 decision in *ACLU* and its 2010 decision in *White*. These two cases, unlike other recent appellate cases that discuss fear-based standing and primarily apply existing doctrine, not only show, but also shape and advance the development of fear-based standing doctrine.

Part IV proposes and advocates the adoption of a framework for analysis of fear-based standing arguments. It details problems inherent in courts' current approaches, outlines and explicates the proposed framework, and argues that it resolves the problems inherent in current approaches. Part IV contains three substantive subparts. The first considers the current doctrine of fear-based standing. The second proposes the framework. The third argues for the framework.

### *C. The Doctrine of Constitutional Standing*

As noted, the doctrine of constitutional standing has its foundation in Article III's grant of jurisdiction to the federal judiciary to hear and decide "Cases"<sup>23</sup> and "Controversies."<sup>24</sup> Although the doctrine developed irregularly<sup>25</sup> and is the subject of considerable

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21. See *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972) (rejecting an argument for standing based on an alleged chill of the plaintiffs' First Amendment rights); *Younger v. Harris*, 401 U.S. 37, 42 (1971) (rejecting an argument for standing based on plaintiffs' alleged feeling of inhibition).

22. See *ACLU*, 493 F.3d at 687 (Batchelder, J.) (dismissing a challenge to the NSA's wiretapping program for lack of standing).

23. U.S. CONST. art. III, § 2, cl. 1.

24. *Id.*

25. See, e.g., Amanda Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 GEO. L.J. 391, 394–400 (2009) (surveying the history of the

debate,<sup>26</sup> particularly as to its theoretical justifications,<sup>27</sup> it may be stated succinctly. As the Supreme Court noted in *Lujan v. Defenders of Wildlife*:<sup>28</sup> "[O]ur cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."<sup>29</sup> The Court went on to describe the other two requirements of constitutional standing. The second: "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court."<sup>30</sup> And the third: "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"<sup>31</sup>

That said, fear-based standing doctrine, while governed by these rules and derived from them, as will be seen, operates on its own terms in ways considered consistent with these broader, general provisions of constitutional standing.<sup>32</sup>

#### *D. Definitions of Frequently Used Terms*

This subpart outlines how this Note uses terms that refer to frequently discussed concepts. The words "fear," "harm," "injury," and "threat" appear throughout this Note. This Note uses the example of a shark attack to explain further the precise meanings of the terms at issue. Except when

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development of Article III standing).

26. See Heather Elliot, *The Functions of Standing*, 61 STAN. L. REV. 459, 466–67 (2008) (surveying the controversies that relate to standing doctrines).

27. See *id.* at 461 (arguing that standing is traditionally justified on separation of powers grounds, but that, in this context, separation of powers has multiple meanings or understandings, which are in effect distinct rationales for standing doctrine).

28. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (holding that *Defenders of Wildlife* lacked standing to challenge environmental regulations).

29. *Id.* at 560 (citations omitted) (internal quotation marks omitted).

30. *Id.* (citations omitted).

31. *Id.* at 561 (citations omitted).

32. See *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (setting out a three-part test for alleged chilling effect injuries such that "plaintiffs in a suit for prospective relief based on a 'chilling effect' on speech can satisfy the requirement that their claim of injury be 'concrete and particularized'").

referring to and describing courts' uses of these terms, this Note employs them consistently with the following meanings:

*Fear*—an emotional or psychological effect of the expectation of experiencing or suffering something undesirable or detrimental. Fear has a subject—the person who experiences it. It has an object—that which is undesirable or detrimental. It relates to future time, whether the immediate or distant future. It may be rational or irrational—justified by valid reasons (for example, evidence of the likelihood of the realization of the undesired event) or not. For example, when a swimmer is afraid of a shark attack, the swimmer is the subject of the fear. The shark attack is the object. The fear may exist whether the swimmer is currently swimming or plans to go swimming in the distant future. It may exist whether the swimmer is swimming in a part of the ocean where there have been frequent shark attacks or the swimmer is swimming in a shark-free indoor swimming pool. While fear may be felt or experienced individually or collectively,<sup>33</sup> this Note emphasizes its individual aspects.

*Harm*—something undesirable, such as pain, suffering, damage, loss, or deprivation of a right. In most cases, a harm is the object of fear. For the purposes of this Note, it is a broader term than "injury": All injury may be harm, but not all harm is injury. In the shark attack example, the shark attack is the harm.

*Injury*—a technical term that indicates the first prong of an Article III standing analysis. It does not appear in a more colloquial sense as particularized suffering. As indicated above, this Note refers to such suffering as harm.

*Threat*—a future, as yet unrealized, harm also referred to as a threatened harm. That is, a threat is a particular type of harm and, like harm more generally, is often an object of fear. A threat can also be a present statement of a future harm. Because it is not yet realized, whether it is in fact real may be open to speculation. It is therefore often described as alternatively, for example, credible or real. Yet, even the existence of a real threat does not necessarily imply the realization of the threatened harm, but the existence of the conditions under which the threatened harm may occur. Consider the shark attack example. For the swimmer swimming as yet unassaulted by a shark, the attack is a threat. If a shark approaches and begins to follow the swimmer, there may be a real threat of a shark attack.

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33. See COREY ROBIN, FEAR: THE HISTORY OF A POLITICAL IDEA 18 (2004) (discussing two "mode[s]" of political fear, the first of which "involves a collective's fear of far away dangers or of objects, like a foreign enemy, separate from the collective").

If the swimmer sets out swimming after having been told that there have been sightings of a shark in the area and that the previous day it had attacked a surfer, there may be a credible threat of a shark attack. The conditions are conducive to a shark attack.

## II. The Development of the Doctrine of Fear-Based Standing

### A. Introduction

This Part of the Note sets out the state of the law of fear-based standing prior to the Sixth Circuit's decision in *ACLU*. It discusses the leading cases on the issue, their holdings, and the scope and applicability of these holdings. Seven cases form the foundation of the Supreme Court's jurisprudence of fear-based standing—*Laird v. Tatum*<sup>34</sup> and *Meese v. Keene*;<sup>35</sup> *Younger v. Harris*,<sup>36</sup> *Babbitt v. United Farm Workers National Union*,<sup>37</sup> and *Virginia v. American Booksellers Association*;<sup>38</sup> and *City of Los Angeles v. Lyons*<sup>39</sup> and *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*—and these cases deal with three distinct aspects of fear-based standing—chilling effect injury, pre-enforcement fear of the enforcement of a statute, and anticipated, but unrealized, anticipatory or proleptic harm. This Part groups these cases by the aspect of fear-based standing that each considers. In addition, various circuit court decisions further explicate rules that the Court established. This Part addresses these cases after the relevant Supreme Court decisions

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34. See *Laird v. Tatum*, 408 U.S. 1, 15 (1972) ("[O]n this record the respondents have not presented a case for resolution by the courts.").

35. See *Meese v. Keene*, 481 U.S. 465, 473 (1987) ("We find, however, that appellee has alleged more than a 'subjective chill'; he establishes that the term 'political propaganda' threatens to cause him cognizable injury.").

36. See *Younger v. Harris*, 401 U.S. 37, 42 (1971) ("A federal lawsuit to stop a state prosecution is a serious matter. And persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases.").

37. See *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) (finding that plaintiffs had alleged cognizable injury to establish standing to challenge the constitutionality of a section of an Arizona farm labor statute).

38. See *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (finding cognizable injury because the "plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them").

39. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 110 (1983) (rejecting the plaintiff's claim for injunctive relief because of lack of standing).

that they interpret. Of particular note are *United Presbyterian Church v. Reagan*<sup>40</sup> and *Ozonoff v. Berzak*,<sup>41</sup> which discuss chilling effects; *New Hampshire Right to Life Political Action Committee v. Gardner*,<sup>42</sup> which considers pre-enforcement fear; and *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*<sup>43</sup> and *Denny v. Deutsche Bank AG*,<sup>44</sup> which discuss anticipatory harm.

### B. Chilling Effect

*Laird* is the lead case on chilling effect<sup>45</sup> as cognizable injury-in-fact.<sup>46</sup> In it, the plaintiffs, "seeking declaratory and injunctive relief,"<sup>47</sup> challenged intelligence or data gathering activity conducted and intended to be used by the United States Army in the event that local law enforcement organizations sought its assistance in responding to civil unrest.<sup>48</sup> They asserted that the Army's action violated their rights<sup>49</sup> and, specifically, that they suffered a chilling effect on their First Amendment rights.<sup>50</sup> On review, the Court considered the question of whether Article III standing

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40. See *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1381 (D.C. Cir. 1984) (finding that the plaintiffs' alleged chilling effect injury was "nothing more than a 'generalized grievance'" and therefore not cognizable).

41. See *Ozonoff v. Berzak*, 744 F.2d 224, 230 (1st Cir. 1984) (noting that *Ozonoff's* alleged injury satisfied the requirements for standing).

42. See *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 17 (1st Cir. 1996) (determining that the plaintiffs had standing to challenge provisions of New Hampshire election law).

43. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (finding that the plaintiffs asserted cognizable injury-in-fact for Article III standing).

44. See *Denny v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006) (concluding that a class of plaintiffs fulfilled the requirements for Article III standing).

45. See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 689-90 (1978) (defining what a chilling effect is, particularly in a First Amendment context).

46. See, e.g., Michelman, *supra* note 19, at 82 (discussing the influence of *Laird* on subsequent jurisprudence).

47. *Laird v. Tatum*, 408 U.S. 1, 2 (1972).

48. See *id.* at 4-6 (describing the Army's surveillance operations).

49. See *id.* at 2 ("Respondents brought this class action in the District Court seeking declaratory and injunctive relief on their claim that their rights were being invaded by the Department of the Army's alleged 'surveillance of lawful and peaceful civilian political activity.'").

50. *Id.* at 10.

exists for "a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose."<sup>51</sup>

According to the Court, "[a]llegations of a subjective 'chill' are not" sufficient to constitute injury-in-fact for Article III standing.<sup>52</sup> Fear of government action—on the basis of such surveillance or intelligence gathering—does not, by itself, constitute injury.<sup>53</sup> Yet, it may if "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging."<sup>54</sup> The Court did not preclude fear from leading to sufficient injury for standing.<sup>55</sup> But fear cannot do this if it exists solely in the mind of the plaintiff.<sup>56</sup>

In *Meese*, the Court offered an example of circumstances in which a chilling effect constituted sufficient injury for Article III standing.<sup>57</sup> *Meese* involved a plaintiff who, while a state senator, wanted to show three films that had been classified as political propaganda by the Department of Justice.<sup>58</sup> Doing so, however, would have subjected him to registration and reporting requirements under the Foreign Agents Registration Act of

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51. *Id.*

52. *Id.* at 13–14.

53. *See id.* at 10 (setting out the question considered by the Court and noting that the court of appeals, which had previously found cognizable injury, was incorrect).

54. *See id.* at 11 (distinguishing cases in which a chilling effect was found to be a violation of First Amendment rights).

55. *See id.* at 15 ("[O]ur conclusion is a narrow one, namely, that on this record the respondents have not presented a case for resolution by the courts."). This statement by the Court has produced some question about the broader applicability of the Court's ruling in *Laird*. *See* Michelman, *supra* note 19, at 86 (listing questions that remained after *Laird* about the sufficiency of alleged surveillance-based chilling effect injury as a basis for standing).

56. *See Laird v. Tatum*, 408 U.S. 1, 2 (1972) ("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 . . .").

57. *See Meese v. Keene*, 481 U.S. 465, 475 (1987) (concluding that the harms that the plaintiff suffered constituted "cognizable injury").

58. *Id.* at 467–68. The films were Canadian and "deal[t] with the subjects of nuclear war and acid rain." *Id.* at 468. Further, "one of them won an 'Oscar' award from the Academy of Motion Picture Arts and Sciences as the best foreign documentary in 1983." *Id.* at 475.

1938.<sup>59</sup> Because of the potential damage to his reputation due to the requirements of the Act, the plaintiff sought an injunction against the application of the Act to the showing of these three films.<sup>60</sup> On review, the Court considered what would constitute sufficient injury for standing. The Court addressed *Laird*,<sup>61</sup> but found that the plaintiff "demonstrated more than a 'subjective chill.'"<sup>62</sup> The future classification by the Justice Department of his showing the films as political propaganda constituted sufficient injury.<sup>63</sup> Even so, *Meese* did not set out a broad rule about what constitutes injury for standing, but offered a data-point that helps mark the parameters of *Laird*'s rule.

Circuit court decisions offer additional data-points that further indicate the contours of the *Laird* rule. *United Presbyterian Church* involved a challenge to Executive Order 12333, which dealt with "the organization, procedures and limitations to the foreign intelligence and counterintelligence activities of the Executive Branch."<sup>64</sup> In addition to other alleged injuries, the D.C. Circuit considered in particular as an alleged injury the chilling of First Amendment speech and assembly rights.<sup>65</sup> It analyzed this issue under *Laird*'s rule rejecting subjective chill as cognizable injury.<sup>66</sup> But, in doing so, the court cast doubt on the sufficiency of a chilling effect as injury: "'Chilling effect' is cited as the *reason* why the governmental imposition is invalid rather than as the *harm* which entitles the plaintiff to challenge it."<sup>67</sup> To paraphrase, a chilling effect may not be a harm, but the reason why another harm, which is cognizable as injury, is harmful.<sup>68</sup> Regardless, the court found that the

59. *Id.* at 467 (citing the Foreign Agents Registration Act of 1938, 52 Stat. 631–33 (codified as amended at 22 U.S.C. §§ 611–21 (1966))).

60. *Id.* at 468.

61. *See id.* at 472 ("In determining whether a litigant has standing to challenge governmental action as a violation of the First Amendment, we have required that the litigant demonstrate 'a claim of specific present objective harm or a threat of specific future harm.'" (quoting *Laird v. Tatum*, 401 U.S. 1, 14 (1972))).

62. *Id.* at 473. Although the *Meese* Court does not emphasize this, recent alleged chilling effect case law tends to emphasize the showing of something "more than a 'subjective chill.'" *Id.*

63. *See id.* (noting that the classification of films as "political propaganda" "threatens to cause [the plaintiff] cognizable injury").

64. *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1377 (D.C. Cir. 1984).

65. *Id.* at 1377–78.

66. *Id.* at 1378.

67. *Id.*

68. *See id.* at 1378–79 ("In fact, some who have successfully challenged governmental action on 'chilling effect' grounds have themselves demonstratively not suffered the harm of

plaintiffs' alleged chill was not an effect of "direct government constraint"<sup>69</sup> such as would meet *Laird*'s requirement for sufficiency for injury.<sup>70</sup>

In contrast, in *Ozonoff*, the First Circuit found circumstances under which an alleged chilling effect constituted injury-in-fact. As part of an application for short-term employment with the World Health Organization (WHO), Ozonoff, an international health expert, underwent a full FBI background check,<sup>71</sup> which did not produce "reasonable doubts concerning his loyalty."<sup>72</sup> After receiving the position and completing the tasks required, the WHO invited him to apply for a subsequent, possibly permanent, position.<sup>73</sup> The application process for this new position would have entailed another loyalty investigation.<sup>74</sup> Asserting, among other harms,<sup>75</sup> that the loyalty investigation "inhibit[ed] him from joining the organizations that he wish[ed] to join and from expressing opinions that he [might] hold," Ozonoff sued for declaratory relief against the government action.<sup>76</sup>

On appeal, the court considered the sufficiency of the alleged injury—a chilling effect on First Amendment rights—for standing. When considering the issue with respect to *Laird*, the court emphasized *Laird*'s indication that a chill when combined with something "more" would constitute sufficient injury for standing.<sup>77</sup> Because of the role of governmental action, the *Ozonoff* court found that the requirements of the "more" test had been met and that the chilling effect was cognizable injury for standing.<sup>78</sup>

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any chill, since they went ahead and violated the governmental proscription anyway.").

69. *Id.* at 1380.

70. *See id.* ("[H]ere, as in *Tatum*, no part of the challenged scheme imposes or even relates to any direct governmental constraint upon the plaintiffs, and there is no reason why they would be unable to challenge any illegal surveillance of them when (and if) it occurs.").

71. *Ozonoff v. Berzak*, 744 F.2d 224, 226 (1st Cir. 1984).

72. *Id.*

73. *Id.*

74. *Id.* at 227.

75. *See id.* ("Ozonoff says that the previous investigation took time, intruded upon his privacy, and injured his reputation.").

76. *Id.*

77. *Id.* at 229 (quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972)).

78. *See id.* ("Our case thus resembles, not *Laird*, in which the Court found no standing, but, rather, the cases that *Laird* distinguished, where standing was found."). More specifically: "The problem for the government with *Laird*, however, lies in the key words 'without more.' The plaintiffs in *Laird* did *not* claim that the information gathering activities were directed against them specifically or that the gathered data could be directly used against them in any foreseeable way." *Id.*



More generally, review of chilling effect cases that consider injury-in-fact for Article III standing shows that *Laird* retains its force. The primary issue for courts in such circumstances is determining what governmental action fulfills *Laird*'s something more test.<sup>79</sup>

### C. Pre-Enforcement Fear

Fear also has a role in an injury-in-fact analysis for standing in pre-enforcement challenges to the constitutionality of statutes. In First Amendment claims—but only in First Amendment claims—a plaintiff need only show a well-founded or reasonable fear of prosecution under the statute to meet the injury prong of a standing analysis.<sup>80</sup> In cases that address this way of showing injury for standing, there has been some confusion with the analysis in chilling effect cases.<sup>81</sup> Yet pre-enforcement fear remains a distinct way of establishing injury on account of fear and is perhaps the most direct way in which fear leads to cognizable injury.

*American Booksellers* is the lead Supreme Court decision on this issue.<sup>82</sup> The case involved a facial challenge by individual booksellers and American Booksellers Association to a Virginia statute that proscribed the knowing display of pornographic material in such a manner that minors

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79. See *Fieger v. Mich. Sup. Ct.*, 553 F.3d 955, 965 (6th Cir. 2009) ("[T]he purported 'chilling effect' . . . is objectively unsubstantiated and, accordingly, fails to give rise to an injury-in-fact); *Morrison v. Bd. of Ed. of Boyd Cnty.*, 521 F.3d 602, 609 (6th Cir. 2008) ("The question before us, then, is what 'more' might be required to substantiate an otherwise-subjective allegation of chill, such that a litigant would demonstrate a proper injury-in-fact?").

80. See *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392–93 (1988) ("[I]n the First Amendment context, [l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected expression." (quoting *Sec'y of State of Md. v. J.H. Munson Co.*, 467 U.S. 947, 956–57 (1984) (internal quotation marks omitted))).

81. See *id.* at 393 (indicating that, when discussing pre-enforcement fear, "the alleged danger of this statute is, in large measure, one of self-censorship," that is, an inhibition from acting in a particular manner); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996) (applying, explicitly, the same analytical framework to both pre-enforcement fear and alleged chilling effect injury after recognizing that pre-enforcement fear and alleged chilling effect injury are separate bases for standing).

82. See David T. Hardy, *Standing to Sue in the Absence of Prosecution: Can a Case Be Too Controversial for Case or Controversy?*, 30 T. JEFFERSON L. REV. 53, 57 (2007) (listing *American Booksellers* along with *Babbitt* as foundational to this area of standing doctrine).

would be able to view it.<sup>83</sup> In considering injury for standing, the Court noted that the alleged injury must be "threatened or actual"<sup>84</sup> and that the plaintiffs did not run afoul of this requirement because they had "alleged an actual and well-founded fear that the law will be enforced against them."<sup>85</sup> The Court's discussion of this way of establishing injury for standing is not detailed or extended, but rather limited to a recitation of this basis without citation of relevant authority—even though the Court had previously found injury on similar reasoning in *Younger*<sup>86</sup> and *Babbitt*.<sup>87</sup>

In this context, *Babbitt* is particularly significant because it supplies a rule of decision subsequently adopted by various circuit courts.<sup>88</sup> The case involved pre-enforcement challenges to certain provisions of Arizona's agricultural labor laws.<sup>89</sup> Setting out the rule of decision, the Court noted:

When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to undergo criminal prosecution as the sole means of seeking relief."<sup>90</sup>

*Babbitt* uses the presence of a credible threat of prosecution as part of its test for cognizable injury for standing.<sup>91</sup> The Court tempered this rule by referring to fear: "But 'persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as

83. *American Booksellers*, 484 U.S. at 386.

84. *Id.* at 392 (quoting *Wrath v. Seldin*, 422 U.S. 490, 499 (1975)).

85. *Id.* at 393.

86. *See Younger v. Harris*, 401 U.S. 37, 42 (1971) ("[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases."). *Younger* shows well the similarity between alleged chilling effect injury and pre-enforcement fear. Two of three plaintiffs challenging the constitutionality of a state syndicalism law—the plaintiffs who were not being prosecuted under it—alleged that they "fe[lt] inhibited in advocacy of the program of their political party through peaceful, nonviolent means, because of the presence of the Act on the books." *Id.* at 41–42 (internal quotation marks omitted). In this case, pre-enforcement fear is the fear that leads to the chilling effect.

87. *See infra* notes 89–94 and accompanying text (discussing *Babbitt*'s treatment of this issue).

88. *See, e.g., Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) (following *Babbitt*'s rule).

89. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 292–93 (1979).

90. *Id.* at 298 (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)) (citations omitted).

91. *See id.* (quoting *Younger*'s rule of decision regarding the sufficiency of fear to be cognizable injury). That is, "imaginary and speculative fears" are not cognizable as injury. *Id.*

appropriate plaintiffs."<sup>92</sup> In its analysis, the *Babbitt* Court made reference to, if not relied on, fear: A plaintiff may show cognizable injury "when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative."<sup>93</sup> In this case, "[a]ppellees are not thus without some reason in fearing prosecution for violation of the ban on specified forms of consumer publicity. In our view, the positions of the parties are sufficiently adverse . . . to present a case or controversy within the jurisdiction of the District Court."<sup>94</sup>

Significantly, this requirement for pre-enforcement fear-based standing in these cases is less exacting than those for chilling effects and anticipatory harms.<sup>95</sup> The threat or harm threatened need only be *credible*, not *real*, or, to rephrase, believable, not actual. Likewise, the resultant fear need not be reasonable, without qualification, or confirmable with objective evidence,<sup>96</sup> but "not wholly speculative." Presumably, in this context, *partially* speculative fear is cognizable as injury. One might argue that this test is a rewording of the "something more than subjective fear" test that has emerged out of *Laird* and its progeny<sup>97</sup>—a negatively phrased version instead of a positively phrased one. Such a view is incorrect. Subjective fear itself is not necessarily imaginary or speculative. The terms used in *Babbitt* encompass more amorphous and less grounded emotional states. For example, in *Laird*, actual Army surveillance led to the subjective fear, which itself led to a non-cognizable subjective chill.<sup>98</sup> There was some reason for this fear; it was not imaginary. Yet, regardless, it was not cognizable. *Babbitt's* pre-enforcement fear test is more permissive than *Laird's* chilling effect test.

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92. *Id.* (quoting *Younger*, 401 U.S. at 42).

93. *Id.* at 302.

94. *Id.*

95. *Cf.* *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983) ("It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions.").

96. *Cf.* *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) ("Shealy's reasonable fear and concern about the effects of Gaston Copper's discharge, *supported by objective evidence*, directly affects his recreational and economic interests." (emphasis added)). The *Babbitt* Court notes that the plaintiff's having "some reason" to be afraid fulfills the "not imaginary or wholly speculative" standard. *Babbitt*, 442 U.S. at 302.

97. *See supra* Part II.B. (discussing subsequent Supreme Court and Circuit Court interpretation of *Laird*).

98. *See Laird v. Tatum*, 408 U.S. 1, 13–14 (1972) (listing possible bases for the plaintiffs' alleged chill and dismissing them as not leading to a chilling effect cognizable as injury).

Circuit court decisions further explicate the requirements for standing in constitutional challenges to statutes on the basis of pre-enforcement fear, but also show the difficulties and confusion that they can create. For example, in *New Hampshire Right to Life*, the conflation of pre-enforcement fear-based standing with chilling effect fear-based standing. Because both types of fear-based standing deal with First Amendment claims and involve similar factual situations, when plaintiffs assert both pre-enforcement fear and a chilling effect as cognizable injuries, some courts have shown a tendency to combine their analyses. *American Booksellers* hinted at this at the end of its standing analysis: "Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."<sup>99</sup> *New Hampshire Right to Life*, considering a challenge to certain sections of a campaign finance law,<sup>100</sup> stated the tension between or relation of these two types of fear-based standing more directly:

[T]hese two types of injury are interrelated. Both hinge on the existence of a credible threat that the challenged law will be enforced. If such a threat exists, then it poses a classic dilemma for an affected party: either to engage in the expressive activity, thus courting prosecution, or to succumb to the threat, thus forgoing free expression. Either injury is justiciable.<sup>101</sup>

Despite recognizing the distinction between pre-enforcement fear as injury and chilling effect as injury, the court applied the same, single analytical approach to both: "Because the threat of prosecution is a common denominator for both types of injury, their existence can be resolved with a single inquiry."<sup>102</sup>

This is *Babbitt's* credible threat analysis,<sup>103</sup> and it controls both pre-enforcement and chilling effect alleged injuries. The court extended

99. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 389 (1988).

100. *See* N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 10 (1st Cir. 1996) (outlining the statutory provisions that the plaintiffs challenged). In the case, the New Hampshire Right to Life Political Action Committee challenged a "\$1000 per election limit that New Hampshire place[d] on 'independent expenditures' in a political campaign." *Id.* (citing N.H. REV. STAT. ANN. § 664:5, V; 664:3, I; 664:3, II (1995)). "New Hampshire consider[ed] independent expenditures to include expenditures by a political committee for the purpose of 'expressly advocating the election or defeat of a clearly identified candidate, or any authorized committee or agent of [any] candidate, and which are not made in concert with . . . any candidate . . .'" *Id.* at 10 n.1 (quoting N.H. REV. STAT. ANN. § 664:2 (1995)).

101. *Id.* at 14.

102. *Id.*

103. *See id.* (noting that the credible threat standard "encapsulate[s]" *Babbitt's* "not

*Babbitt* to apply to a situation that would otherwise be analyzed under *Laird* and its progeny. In doing so, it applied a less onerous test—a one-pronged analysis, instead of a two-pronged analysis.<sup>104</sup> Further, in applying this rule, the court adopted a somewhat less stringent understanding of it than seen either in *Babbitt* or in the court's statement of the rule earlier in the opinion: "[T]here is more than enough in the record to show that the threat of future prosecution is not wholly conjectural, but, rather, that it is sufficiently credible to confer standing . . . ."<sup>105</sup>

This is not to suggest that such a conflation of pre-enforcement fear and chilling effect injuries has been widely adopted—it has not—but to suggest that there is a spectrum of existing approaches to the type of fear that may constitute or lead to cognizable injury-in-fact and that this spectrum is more liberal, or oriented toward cognizing fear as injury, in pre-enforcement challenges to statutes' constitutionality on First Amendment grounds than in challenges based on the alleged chilling of First Amendment rights.

#### D. Anticipatory Harm

In addition to pre-enforcement fear and chilling effect injuries, fear has a significant role in the injury-in-fact analysis of standing in considerations of anticipated harms as injuries. Because a potential plaintiff fears a future harm, can he or she assert that future harm as cognizable as injury-in-fact? The general rule suggests that only imminent threats of harm are cognizable.<sup>106</sup> The injury is the harm threatened, but cognized in near

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imaginary or wholly speculative" fear standard). That is, it is possible to think of the credible threat standard as standing for the not imaginary or wholly speculative fear standard. Further, as the court noted, *Babbitt*'s standard "is quite forgiving." *Id.* It represents a "low threshold" for establishing cognizable injury-in-fact. *Id.* at 15.

104. See, e.g., *Laird v. Tatum*, 408 U.S. 1, 9 (1972) (setting out requirements for injury as a chill *and* something "more"); *Morrison v. Bd. of Ed. of Boyd Cnty.*, 521 F.3d 602, 609 (6th Cir. 2008) ("The question before us, then, is what 'more' might be required to substantiate an otherwise subjective allegation of a chill, such that a litigant would demonstrate a proper injury in fact?" (citations omitted)).

105. *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.2d 8, 17 (1st Cir. 1996).

106. See *Summers v. Earth Island Inst.*, 555 U.S. 488, \_\_\_, 129 S. Ct. 1142, 1149 (2009) ("To seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical . . . ."); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 180 (2000) (same); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (same); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) ("The plaintiff

immediate anticipation of its realization, not only after its realization.<sup>107</sup> Fear-based anticipatory harm, however, expands the time prior to the realization of harm when the harm can be cognized as injury: A harm can be cognizable when it begins to be feared, even if this occurs *before* it is imminent. This strain of fear-based standing doctrine is an exception carved out of the general imminent threat rule. Further, it is specific to fear: Fear-based anticipatory harm is different from risk or probabilistic harm, concepts with which it is frequently grouped in legal scholarship<sup>108</sup> and court opinions.<sup>109</sup> Fear is primarily subjective or has a substantial subjective component. Risk and probabilistic harm are objective. Two Supreme Court cases indicate the existence of and begin to set out the anticipatory harm strain of fear-based standing. These are *Lyons* and *Laidlaw*.

*Lyons* involved a complaint against the use by the police of a "chokehold"<sup>110</sup> in the course of a traffic stop. Lyons, allegedly injured by this chokehold, sought both damages for physical injury<sup>111</sup> and injunctive relief.<sup>112</sup> Lyons predicated his claim to this injunctive relief on his "justifiabl[e] fear that any contact he has with Los Angeles police officers may result in his being choked and strangled to death"<sup>113</sup> and "threatened impairment of"<sup>114</sup> First, Fourth, Eighth, and Fourteenth Amendment

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must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" (citations omitted).

107. See Fan, *supra* note 19, at 1634 ("The probability of a claimed future injury occurring ranges from nil to certainty. The imminence standard shows that the Supreme Court calls for future injuries near certainty to find standing.").

108. See Craig, *supra* note 19, at 190 ("[F]ollowing the *Laidlaw* decision, several lower federal courts have explicitly and consciously transformed both the *Laidlaw* Court's recognition of 'reasonable fear' and prior courts' reliance on threatened injuries into an increased risk standing jurisprudence."); Lin, *supra* note 19, at 946–48 (viewing risk as objective and potentially causing or being the object of fear); Mank, *Summers v. Earth Island Institute Rejects Probabilistic Standing*, *supra* note 19, at 136–37 (suggesting that courts use the *Summers* dissent's realistic threat test "to supplement or supplant the wobbly reasonable concerns test in *Laidlaw*").

109. See *Baur v. Veneman*, 352 F.3d 625, 630 (2d Cir. 2003) (describing the plaintiffs' complaint as alleging injury due to "risk," "apprehension," and "concern"); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160–61 (4th Cir. 2000) (describing "increased risk" as "sufficient to provide injury in fact" and the effect of "reasonable fear" as "constitut[ing] injury in fact").

110. *Lyons*, 461 U.S. at 97.

111. *Id.* at 97–98.

112. *Id.*

113. *Id.* at 98 (internal quotation marks omitted).

114. *Id.*

rights.<sup>115</sup> On review, the Court considered and then denied the claim to injunctive relief because of lack of standing.<sup>116</sup> To show cognizable injury, a plaintiff must, on the particular claim, "show that he 'has sustained or is *immediately* in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or *threat of injury* must be 'real and immediate,' not 'conjectural' or 'hypothetical.'"<sup>117</sup> The Court found that the alleged injury was conjectural or speculative, and thus not cognizable.<sup>118</sup>

In a footnote, the Court addressed Lyons's argument about his fear.<sup>119</sup> It noted that "[t]he reasonableness of Lyons' fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct. It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."<sup>120</sup> The Court did not mention fear, even if reasonable, leading to cognizable injury. Rather, fear is somewhat detached from a standing analysis. To the extent that it is consistent with—or evidence of—a real threat it may be cognizable. But even if it is reasonable, unless it is accompanied by a real threat, it is not cognizable: "The emotional consequences of a prior act are simply not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant."<sup>121</sup>

If there is uncertainty here, it is a result of there being two potential understandings of fear. First, as injury on its own terms—an emotional harm related to prior physical harm. The Court accepted this as a cause of action, but not relevant to Lyons's claim to injunctive relief: "[E]motional upset is a relevant consideration in a damages action."<sup>122</sup> Second, as an extension of

115. *Id.*

116. *See id.* at 101 ("We nevertheless hold . . . that the federal courts are without jurisdiction to entertain Lyons' claim for injunctive relief.").

117. *Id.* at 101–02 (emphasis added).

118. *See id.* at 105 ("That Lyons may have been illegally choked by the police on October 6, 1976 . . . does nothing to establish a real and immediate threat that he would be stopped for a traffic violation, or for any other offence, by an officer or officers who would illegally choke him . . .").

119. *Id.* at 107 n.8.

120. *Id.*

121. *Id.*

122. *Id.* Here, the Court distinguished between standing to sue for injunctive relief, which it considered here, and standing to sue for damages, which it did not. *See id.* at 105 ("That Lyons may have been illegally choked by the police on October 6, 1976, *while presumably affording Lyons standing to claim damages* against the individual officers and perhaps against the city, does nothing to establish a real and immediate threat . . .") (emphasis added); *see also* Mank, *Revisiting the Lyons Den*, *supra* note 11, at 849 (discussing academic discussion and criticism of the Court's requiring standing analyses for damages and injunctive relief).

the cognizability of anticipated harm as injury. The Court rejected this. One cannot assert a fear of a distant, non-immediate harm or a threat, however likely or probable if not real and actual, and successfully achieve cognizable injury-in-fact.<sup>123</sup>

However, the *Lyons* Court's mention of the reasonableness of fear without much concerted explanation of the effect of this reasonableness might cause one to think that in some circumstances reasonableness of fear could have some effect or bearing on an injury-in-fact analysis. It had such an effect in *Laidlaw*. *Laidlaw* involved a suit against Laidlaw Environmental Services for violations of the Clean Water Act.<sup>124</sup> To show injury for standing, members of Friends of the Earth claimed that various harms arose from Laidlaw's discharge of mercury into a river from a wastewater treatment facility that it operated.<sup>125</sup> These asserted harms included seeing the river apparently polluted,<sup>126</sup> smelling such pollution,<sup>127</sup> and refraining from fishing in the river, as done previously, because of "concern[] that the water was polluted by Laidlaw's discharges."<sup>128</sup> The Court found that these harms were sufficient to establish injury-in-fact.<sup>129</sup>

The Court considered *Lyons* in response to an argument offered by the dissent,<sup>130</sup> namely, that the alleged harms that the plaintiffs asserted

123. *But cf.* *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1152–53 (2009) (suggesting that *Lyons*'s realistic fear test is less restrictive than the imminent harm standard for anticipatory harm, which standard is more broadly applicable, if not the current standard itself). That is, in *Summers*, the Court criticized the *Lyons* test as being too permissive and, additionally, an inaccurate statement of the current standard. *Id.*

124. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 173 (2000).

125. *See id.* at 176 (noting that Laidlaw operated the facility pursuant to a permit that "placed limits on Laidlaw's discharge of several pollutants into the river" and that "Laidlaw's discharges exceeded the limits set by the permit").

126. *Id.* at 181.

127. *Id.*

128. *Id.* at 182.

129. *See id.* at 183 ("These sworn statements . . . adequately documented injury in fact. We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972))).

130. *See id.* at 199 (Scalia, J., dissenting) ("Ongoing 'concerns' about the environment are not enough, for '[i]t is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions . . . ." (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983))). Justice Scalia continued: "At the very least, in the present case, one would expect to see evidence supporting the affidavit's bald assertions regarding decreasing recreational usage and declining home values, as well as evidence for the improbable proposition that Laidlaw's violations . . . are somehow



constituted no more than subjective apprehension, which, according to *Lyons*, is not cognizable as injury-in-fact.<sup>131</sup> Yet, the Court found that *Lyons* "does not weigh against standing in this case."<sup>132</sup> In making this determination, the Court considered *Lyons*'s discussion of fear. The Court understood *Lyons* to reject cognizing as injury subjective apprehension about the recurrence of unlawful conduct taking place: "In the footnote from *Lyons* cited by the dissent, we noted that '[t]he reasonableness of Lyons' fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct,' and that his 'subjective apprehensions' that such a recurrence would even *take place* were not enough to support standing."<sup>133</sup> In *Laidlaw*, "unlawful conduct . . . was occurring."<sup>134</sup> The Court's analysis might have ended here. It presented a rule of decision, applied that rule to the facts of *Laidlaw*, and found sufficient injury.

But the Court did not stop here. Instead, it stepped back and re-characterized *Lyons*: "Under *Lyons*, then, the only 'subjective' issue is '[t]he reasonableness of [the] fear' that led the affiants to respond to the concededly ongoing conduct by refraining from use of the North Tyger River and surrounding areas."<sup>135</sup> By doing this, the Court placed new emphasis on fear and the reasonableness thereof, which, as noted in *Lyons*, were not dispositive.<sup>136</sup> To be sure, they were not here either. But the Court continued to underline this reasonableness: "[W]e see nothing 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms."<sup>137</sup> It stated more explicitly: "The proposition is entirely reasonable, the District Court found it was true in this case, and that is enough for injury in fact."<sup>138</sup> Yet, this last sentence is potentially ambiguous. Is the reasonableness alone of the proposition sufficient for injury-in-fact or is reasonableness only sufficient

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responsible for these effects." *Id.* at 199–200.

131. *Id.* ("*Los Angeles v. Lyons*, relied on by the dissent, does not weigh against standing in this case." (citations omitted)).

132. *Id.*

133. *Id.* (citations omitted).

134. *Id.*

135. *Id.*; see *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983) ("It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry . . .").

136. See *Lyons*, 461 U.S. at 107 n.8.

137. *Laidlaw*, 528 U.S. at 184.

138. *Id.* at 184–85.

if the proposition is also true? To restate this question: Should courts follow a one-pronged test (reasonableness of the proposition) or a two-pronged test (reasonableness of the proposition *and* truth of the proposition)?<sup>139</sup>

The Court probably did not intend a one-pronged approach.<sup>140</sup> It would mean cognizing reasonable fear as injury-in-fact. And this would be directly opposed to the *Lyons* Court's footnote.<sup>141</sup> That said, even the more likely intended understanding modifies the *Lyons* fear-based standing framework. *Lyons* requires a real threat of imminent harm for this harm to constitute injury. *Laidlaw* requires a real or "true" harm but only a reasonable fear thereof. Potentially, the set of reasonably feared harms is broader than that of imminently threatened ones. Because the harm—or at least the conduct that led to the harm—in *Laidlaw* was "ongoing" and "continuous," *Laidlaw* does not conclusively establish this distinction.<sup>142</sup>

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139. Cf. Davison, *supra* note 19, at 98–99 (suggesting that the court applied a test with two elements—plaintiffs' statements of fear or concern and conditional statements to refrain from recreational activity—but that the court did not indicate whether this test was conjunctive or disjunctive).

140. *But see id.* at 108–09 (arguing for an understanding of *Laidlaw*'s cognizability of fear-based injury test that is closer to the first option suggested above than the second).

Justice Ginsburg did not state that the affiant members, in order to establish a reasonable concern or fear about the effects of *Laidlaw*'s pollutant discharges, had to establish either that they had specific knowledge of the types and amount of pollutants being discharged by the *Laidlaw* facility, or that they had a reasonable belief that *Laidlaw*'s pollutant discharges were in violation of discharge limitations . . . .

*Id.* at 108. Davison suggests that "general knowledge" of the defendant's conduct is sufficient. *Id.* at 109. That said, Davison does not envision this test having broader applicability outside of environmental suits or, even, Clean Water Act suits. *Id.* Hardy views *Laidlaw* as more permissive and less specific to environmental cases: "[T]he Court affirmed standing based on claims that the plaintiffs had chosen to forgo recreational opportunities on the river in question, even though the Court accepted the finding that there was, in fact, no basis for that fear." Hardy, *supra* note 82, at 58. *See also* Craig, *supra* note 19, at 182 ("[T]he Court subjectivized these risks [to human health] by elevating the plaintiffs' 'fear of risk' to legally cognizable injury status.").

141. *See Lyons*, 461 U.S. 95, 107 n.8 (1983) ("The reasonableness of *Lyons*' fear is dependent on the likelihood of a recurrence of the allegedly unlawful conduct. It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."). That is, however reasonable the plaintiff's fear, if the threat whose object it is is not real, it is not cognizable as injury.

142. *Laidlaw*, 528 U.S. at 184. Mank thinks that, because of this, "reasonable concern," that is, reasonable fear, would likely only be cognizable with actual conditions leading to the harm: "If *Laidlaw* had been dumping a harmless substance into the river, it is doubtful that the Court would have found that reasonable grounds for avoiding use of the river." Mank, *Standing and Statistical Persons*, *supra* note 19, at 686. Mank, however, acknowledges the

But it does suggest it.<sup>143</sup> *Laidlaw* stands for a potential expansion of the role of fear in leading to cognizable injury for standing.

Subsequent circuit court decisions reflect the tension between these two understandings of fear-based standing in *Laidlaw*. *Gaston Copper*, decided by the Fourth Circuit shortly after *Laidlaw*, involved a similar factual background.<sup>144</sup> The plaintiffs were environmental organizations some of whose individual members owned property and engaged in recreational activities in the area near a facility operated by Gaston Copper.<sup>145</sup> They noted that Gaston Copper, through smelting facilities that it operated, discharged polluted wastewater into a river.<sup>146</sup> The individual members of the plaintiff organizations asserted that fear of pollution in the river and other downstream bodies of water was the source of harm: For example, Wilson Shealy owned a lake downstream from the smelting facility. He claimed that he "limit[ed] the amount of time that he and his family sw[a]m[] in the lake because of his concern that the water [was] polluted. He also limit[ed] the quantity of fish that they [ate] out of fear that Gaston Copper's chemicals ha[d] lodged in the fish."<sup>147</sup>

In a rehearing en banc of an appeal from a dismissal of the suit for lack of standing,<sup>148</sup> the court addressed injury-in-fact. It considered the issue with regard to *Laidlaw*,<sup>149</sup> which it understood to indicate that "citizen affidavits attesting to reduced use of a waterway out of reasonable fear and

ambiguity in this part of *Laidlaw* and notes that the Court "did not define when a plaintiff has 'reasonable concern' sufficient to meet standing requirements." *Id.*

143. *Cf.* Davison, *supra* note 19, at 109 (suggesting that, although the discharges were ongoing, the harm that was cognizable was the effect of the discharges).

144. *See* Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 149 (4th Cir. 2000) (indicating that the Fourth Circuit decided the case on Feb. 23, 2000). *Laidlaw* was decided on Jan. 12, 2000. *Laidlaw*, 528 U.S. at 167.

145. *See* *Gaston Copper*, 204 F.3d at 150–51 (noting that Wilson Shealy was "a CLEAN member who own[ed] a lake only four miles downstream from Gaston Copper's facility"); *id.* at 153 (describing Guy Jones who was a member of both Friends of the Earth and CLEAN and who engaged in recreational activity in an allegedly affected river).

146. *See id.* at 152 (describing Gaston Copper's "discharge of wastewater containing limited quantities of pollutants" into bodies of water pursuant to a permit); *id.* at 153 ("[P]laintiffs claimed that Gaston Copper had exceeded its permit's discharge limitations on numerous occasions, failed to observe its permit's monitoring and reporting requirements, and failed to meet its schedule of compliance.").

147. *Id.* at 153.

148. *See id.* (describing the case's procedural history).

149. *See id.* at 156–57 (citing *Laidlaw* for the proposition that "health and recreational interests are constitutionally recognized as cognizable bases for injury in fact" (citations omitted)); *id.* at 159 (relying on *Laidlaw* when ruling on fear of pollution as a basis for standing).

concern of pollution ‘adequately documented injury in fact.’<sup>150</sup> After assessing the plaintiffs’ factual allegations, the court found the plaintiffs’ fears reasonable: “Further, CLEAN has presented ample evidence that Shealy’s fears are reasonable and not based on mere conjecture.”<sup>151</sup> And, later: “Shealy’s testimony that pollution of the type discharged . . . has reached his lake in the past shows that his fears are based on more than mere speculation.”<sup>152</sup> In *Gaston Copper*’s understanding of *Laidlaw*, reasonable fear combined with objective evidence of a threatened harm was sufficient to establish cognizable injury: “Shealy’s reasonable fear and concern about the effects of Gaston Copper’s discharge, supported by objective evidence, directly affect his recreational and economic interests. This impact constitutes injury in fact.”<sup>153</sup>

*Gaston Copper* appears to endorse a two-pronged *Laidlaw* test, similar to that discussed above. Cognizable injury-in-fact exists when there is reasonable fear and objective evidence that supports the existence of this fear. The application of this test may be limited to environmental suits,<sup>154</sup> but, even if so, the emphasis on reasonableness of fear is striking. *Lyons*’s emphasis on the reality of a threat is maintained, even clarified and emphasized. Fear can have a central place in an injury-in-fact analysis.

In 2006, the Second Circuit set out the most expansive test in *Denny v. Deutsche Bank*. The case involved a class action suit “against professional advisors for improper and fraudulent tax counseling.”<sup>155</sup> Two of the plaintiffs “challenge[d] class certification on the grounds that: (1) [T]he class contain[ed] members who ha[d] not yet been assessed tax penalties

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150. *See id.* at 159 (quoting *Laidlaw*, 528 U.S. at 183).

151. *Id.* at 157.

152. *Id.* at 158.

153. *Id.* at 161. *But see* Mank, *Standing and Statistical Persons*, *supra* note 19, at 686–87 (“According to *Gaston Copper*’s [sic] reasoning, a plaintiff can sue if her recreational activities are harmed or diminished because of her reasonable concern about a potential probabilistic injury.”). *Gaston Copper* would offer, under this view, a *more* permissive approach than *Laidlaw*, at least as regards probabilistic harm, which, however, is distinct from fear.

154. *Cf.* *Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003) (noting that probabilistic harm “has been most commonly recognized in environmental cases”); Davison, *supra* note 19, at 109 (emphasizing *Laidlaw*’s relation to Clean Water Act citizen suits). *But cf.* *Becker v. Fed. Election Comm’n*, 230 F.3d 381, 387 (1st Cir. 2000) (citing *Laidlaw* in a standing analysis as part of an *ultra vires* challenge to Federal Election Commission regulations for the proposition that the reasonableness of a plaintiff’s fear is the point on which a standing analysis turns).

155. *Denny v. Deutsche Bank AG*, 443 F.3d 253, 259 (2d Cir. 2006).

and who . . . therefore lack[ed] Article III and/or statutory standing . . ."<sup>156</sup> That is, the plaintiffs argued that any harm alleged by the class members was hypothetical and, therefore, not cognizable as injury.<sup>157</sup> The Second Circuit rejected this argument. According to the court: "An injury-in-fact may simply be the fear or anxiety of future harm."<sup>158</sup> The court did not impose any confirmatory requirement. "The risk of future harm may also entail economic costs . . . but aesthetic, emotional, or psychological harms also suffice for standing purposes."<sup>159</sup> To be sure, the court moved away from this expansive, general rule when applying the law. The court, finding cognizable injury, emphasized the reliance costs of allegedly faulty tax advice.<sup>160</sup> But it also indicated that the fear of being audited by IRS was a cognizable, psychological injury.<sup>161</sup> Simply stated, no view of fear-based standing is more expansive than *Denny*'s. Under it, fear of—or even mere anxiety about—future harm is cognizable as injury.

### E. Conclusion

On a broad level, fear has had a circumscribed role in leading to cognizable injury for standing. It is foundational to—but not by itself sufficient for—a First Amendment chilling effect claim. Conversely, for a First Amendment pre-enforcement challenge to a statute, fear—potentially less objectively demonstrable fear—is sufficient to establish cognizable injury. A well-founded or reasonable fear may be sufficient, but also, to follow certain courts, a fear that is merely not imaginary or wholly speculative may be sufficient. As an auxiliary to harm, as an anticipatory or proleptic harm, there may be some space for fear to have a more extensive role. *Lyons*, emphasizing the need for real threat and non-subjective fear,

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156. *Id.*

157. *See id.* at 264 ("The Matteis argue that the *Denny* class includes (by definition) two groups who have not suffered and are not likely to suffer an injury-in-fact—the so-called 'future risk' plaintiffs . . .").

158. *Id.* Curiously, the *Denny* court did not rely on any on previous fear-based standing case law to develop this test.

159. *Id.* at 265 (emphasis added).

160. *See id.* (describing the costs incurred as a result of the defendants' alleged conduct, for example, paid advice to correct previous tax returns).

161. *See id.* at 265, 266 n.5 (describing the potential of IRS punishment or penalty); *cf. id.* at 266 ("The other elements of Article III standing—traceability and redressability—are also satisfied. That these injuries—psychological and economic—are fairly traceable to the alleged conduct of the defendants is clear . . .").

foreclosed such a possibility, but, more recently, *Laidlaw*, emphasizing reasonableness, has raised it.

At the broadest level, there seems to be a tendency for courts to expand, however tentatively, the cognizability of fear as injury-in-fact. Although there is generally a requirement that a plaintiff asserting fear demonstrate its reality or the reality of the threat or threatened harm on which it is predicated, cases such as *New Hampshire Right to Life* and *Gaston Copper* move away from this standard. They place an additional focus on the plaintiff who is afraid.

Subsequent cases point to the continuing development of the doctrine of fear-based standing. There is a greater emphasis on fear, an extension of the doctrines into additional areas of the law, particularly national security, and a tendency to move away from the three distinct categories outlined above and to merge the particular aspects of the strains of the doctrine.

### *III. Recent Developments in the Doctrine of Fear-Based Standing*

#### *A. Introduction*

Fear-based standing is a well-established and frequently invoked doctrine, as Part II of this Note has shown. Its functioning and exact perimeters have not been fully determined, but this is a result of circuit courts' repeated consideration of the doctrine and its multiple aspects with recent Supreme Court guidance charitably described as hermetic. The doctrine's importance has led to its unsettled character. In light of this unsettled character—or perhaps because of it—since 2007, the Sixth Circuit has begun what is in effect a wholesale rethinking of the doctrine. It has set out four distinct approaches to fear-based standing. Three, none of which commands a majority of the court, appear in the opinions of *ACLU v. NSA*, and one, which is the decision of the unanimous majority of the court, in *White v. United States*.

#### *B. ACLU v. NSA: Three Potential Approaches*

##### *1. Introduction*

##### *a. Argument*

In *ACLU*, the Sixth Circuit offers the most extensive recent discussion of fear-based standing and the clearest, most complete statements of what a

more permissive doctrine might be.<sup>162</sup> Because there is no majority opinion,<sup>163</sup> the case does not resolve what the rules or standards for fear-based standing are. Rather, the case is most valuable for isolating and identifying different approaches to fear-based standing. The Sixth Circuit's decision contains three opinions—a lead opinion, a concurrence, and a dissent—which express three distinct approaches to fear-based standing. The lead opinion's approach is restrictive and traditional. It would permit only a limited class of alleged injuries to constitute injury-in-fact sufficient for standing.<sup>164</sup> The concurrence and the dissent offer approaches that would expand the cognizability of fear-based harm. The dissent, which is more expansive than the concurrence, is open to fear independently fulfilling the injury-in-fact requirement for Article III standing and, perhaps more significantly, suggests the application of a single rule of decision to all fear-based standing claims.<sup>165</sup>

### *b. Factual Background*

*ACLU* involved a challenge to the Terrorist Surveillance Program (TSP) operated by the National Security Agency (NSA).<sup>166</sup> Briefly, "the TSP includes the interception (i.e., wiretapping), without warrants, of telephone and email communications where one party to the communication is located outside the United States"<sup>167</sup> and when "the NSA has a reasonable basis to conclude that one party to the communication" has some relation to al Qaeda.<sup>168</sup> The plaintiffs did not claim to be members of al Qaeda or its supporters, but were "journalists, academics, and lawyers who regularly communicate with individuals located overseas, who the plaintiffs believe are the types of people the NSA suspects of being al Qaeda terrorists."<sup>169</sup> Alleging injury from the TSP, the plaintiffs sued for a

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162. See generally *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007).

163. See *id.* at 648 (Batchelder, J.) (offering the lead opinion); *id.* at 688 (Gibbons, J., concurring) (offering a concurring opinion that would resolve the issue of standing in the same way, but for different reasons); *id.* at 693 (Gilman, J., dissenting) (offering an opinion that would reach a different conclusion on standing).

164. See *infra* notes 173–82 and accompanying text (discussing the lead opinion).

165. See *infra* notes 197–200 and accompanying text (discussing the dissenting opinion).

166. *Id.* at 648 (Batchelder, J.).

167. *Id.*

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

169. *Id.* at 648–49.

permanent injunction against the continued operation of the TSP—particularly its wiretapping and data-mining components—and a declaration that the TSP violated constitutionally and statutorily protected rights.<sup>170</sup> On cross-motions for summary judgment at the district court, the plaintiffs prevailed on the "data-mining aspect of [their] claim"; the NSA prevailed on the wiretapping aspects of the claim.<sup>171</sup> On appeal to the Sixth Circuit, the NSA argued that "the plaintiffs lacked standing and that the State Secrets Doctrine prevented adjudication on the merits."<sup>172</sup>

## 2. *Lead Opinion: The Traditionalist-Compartmentalized Approach*

As noted, Judge Batchelder's lead opinion offers the most restrictive approach of the three to fear-based standing. Her approach is predicated on, and fits into an enumerated list of, the plaintiffs' claims; she evaluates standing for each of them on its own terms. Batchelder characterizes the plaintiffs as having asserted six claims, of which three are constitutional and three statutory.<sup>173</sup> Fear-based standing is implicated only in the first of these claims. The plaintiffs' argument for standing for this claim is predicated on fear-related injuries-in-fact.<sup>174</sup> It is also a claim that asserted violation of First Amendment rights.<sup>175</sup> Batchelder presents the plaintiffs as having asserted two such injuries-in-fact in support of standing on this claim, but only resolves the first—"the plaintiffs' inability to communicate with their overseas contacts by telephone or email due to their self-governing ethical obligations"<sup>176</sup>—on fear-based standing grounds.<sup>177</sup>

Batchelder follows *Laird's* approach to a chilling effect as cognizable as injury-in-fact in a First Amendment claim. Such an approach rejects a "subjective chill"<sup>178</sup> as sufficient and requires "something 'more.'"<sup>179</sup> That is, "to allege a sufficient injury under the First Amendment, a plaintiff must establish that he or she is regulated, constrained, or compelled directly by

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170. *Id.* at 649.

171. *Id.*

172. *Id.* at 651.

173. *Id.* at 652–53.

174. *See id.* at 653–55 (discussing the injuries alleged in the plaintiffs' first claim).

175. *Id.*

176. *Id.* at 653.

177. *See id.* at 653–55 (listing the plaintiffs' alleged injuries).

178. *Id.* at 661.

179. *Id.* at 660.



the government's actions, instead of by his or her own subjective chill."<sup>180</sup> The chilling effect, if it is to be sufficient for standing, must not be predicated solely on an individual's personal, subjective fear, but also on objective evidence of coercive or regulatory governmental action.

Yet, according to Batchelder, the plaintiffs' alleged injury does not exceed this insufficient subjective chill.<sup>181</sup> The *ACLU* plaintiffs asserted less of an injury than did the *Laird* plaintiffs, who were not able to establish standing to sue: "[U]nlike the *Laird* plaintiffs, the plaintiffs here do not assert that they personally anticipate or fear any direct reprisal by the United States government . . . ." <sup>182</sup>

### 3. *Concurring Opinion: Unified Approach I—"Laidlaw Lite"*

Judge Gibbons concurs with Batchelder in the court's judgment.<sup>183</sup> The plaintiffs did not meet Article III's standing requirements. Specifically, Gibbons would find that they cannot establish injury-in-fact.<sup>184</sup> Gibbons's opinion deals explicitly with fear-based standing,<sup>185</sup> but it differs significantly from Batchelder's. It offers a different way of assessing fear-based standing. This way is more accepting of the role of fear in leading to injury-in-fact.

Gibbons does not offer the comprehensive, claim-by-claim analysis that Batchelder does.<sup>186</sup> Rather, Gibbons begins by addressing constitutional standing for all claims,<sup>187</sup> finds that no claim can satisfy the constitutional injury-in-fact requirement,<sup>188</sup> and does not proceed further.<sup>189</sup> Gibbons would not find that *Laird* or its progeny are controlling, but,

180. *Id.* at 661.

181. *See id.* at 662 ("Moreover, even if their allegations are true, the plaintiffs still allege only a subjective apprehension and a personal (self-imposed) unwillingness to communicate, which fall squarely within *Laird* . . . ." (citations omitted)).

182. *Id.* at 663.

183. *Id.* at 688 (Gibbons, J., concurring).

184. *Id.* at 688.

185. *See id.* at 689 (emphasizing fear as determinative of the standing issue).

186. *See id.* at 658 (Batchelder, J.) (setting out a claim-by-claim approach to her standing analysis and distinguishing it from those of the concurrence and the dissent).

187. *Id.* at 688 n.1 (Gibbons, J., concurring).

188. *See id.* ("Because in my view the plaintiffs have no constitutional standing to raise any of their claims, I find it unnecessary to discuss the applicability of other statutes.").

189. *Id.*

rather, *Lyons* and *Laidlaw*.<sup>190</sup> Fear, to the extent that it is alleged as an injury, is a cognizable injury in the same way that an imminent threat of harm is a cognizable injury.<sup>191</sup> While fear is alleged to be cognizable as injury-in-fact, it is so as a proxy for the as yet unrealized harm, which, should it be realized, would be a cognizable injury-in-fact itself.<sup>192</sup> The First Amendment analysis has no place here.<sup>193</sup>

Gibbons takes as the rule of decision the rule supplied in the *Lyons* footnote, as modified by *Laidlaw*: *Laidlaw*, in her view, allows fear to be cognizable as injury if it is reasonable and if it has as its object harm from conduct to which the plaintiff is subject.<sup>194</sup> This two-part test incorporates a subjective element (reasonableness of fear) and an objective element (being subject to conduct).<sup>195</sup> The harm on which the fear is predicated remains the basis of the injury-in-fact. Because the plaintiffs do not and cannot show that they are actually subject to the alleged harmful conduct—NSA wiretaps—they cannot establish injury-in-fact—and therefore cannot establish standing—regardless of how reasonable their fear may be.<sup>196</sup>

#### 4. Dissenting Opinion: Unified Approach II—Fear Itself

In his dissent, Judge Gilman offers an approach to fear-based standing that is the most innovative approach in *ACLU* and most suited to informing subsequent efforts to expand the doctrine of fear-based

190. *See id.* at 689 (relying on *Lyons* and *Laidlaw* for a rule of decision).

191. *See id.* ("In order for a plaintiff to show that the injury from a government policy is actual and imminent, a plaintiff must demonstrate that he personally would be subject to the future application of that policy." (citations omitted)).

192. *See id.* at 689 n.2 ("This is not to say that a plaintiff lacks standing until a defendant has acted. A 'genuine threat' of enforcement of a policy against a plaintiff who is demonstrably subject to that policy supports standing." (citations omitted)).

193. *See id.* at 688 n.1 (noting disagreement with Batchelder "about the depth of treatment required, at least with respect to the plaintiffs' constitutional claims and FISA claim").

194. *See id.* at 689 ("In summary, I read *Laidlaw* to require that plaintiffs demonstrate that they (1) are in fact subject to the defendant's conduct, in the past or in the future, and (2) have at least a reasonable fear of harm from that conduct.").

195. *See id.* ("[T]he only 'subjective' issue here is 'the reasonableness of the fear' that led the affiants to respond to that concededly ongoing conduct." (quoting *Laidlaw*, 528 U.S. at 184)).

196. *See id.* at 692 ("[T]he state secrets privilege has prevented the plaintiffs from conducting discovery that might allow them to establish that they are personally subject to the TSP, as I believe constitutional standing requires.").

standing. Gilman's departure or, phrased more positively, innovation, is simply this: He combines Batchelder's reliance on *Laird* and Gibbons's reliance on *Laidlaw* into a single rule of decision.<sup>197</sup> By combining two disparate strains of fear-based standing analysis, he sets out a comprehensive approach to injury-in-fact for fear-based standing.

According to Gilman: "My colleagues believe that the attorney-plaintiffs must establish that they were actually subject to surveillance under the TSP, whereas I conclude that a demonstration of a reasonable, well-founded fear that has resulted in actual and particularized injury suffices."<sup>198</sup> This approach to fear-based standing still contains an objective component, but it is no longer the cause of fear, but the effect of fear.

This is a new test. Under it, reasonable fear of unlawful government action would satisfy the injury-in-fact requirement for Article III standing. It is not restricted to particular types of claims, whether First Amendment or environmental. Nor does it extend the cognizability as injury-in-fact of an as yet unrealized harm to a point when it is merely anticipated. Rather, fear is a harm cognizable as injury-in-fact, or it produces and exists concurrently with a cognizable harm. The requirement that the fear have a basis in actual conduct has eroded: Reasonable fear alone is more than sufficient.<sup>199</sup> If any basis in actual, objectively verifiable conduct be required—and it is not<sup>200</sup>—it need only have a decidedly *post factum* character: As noted, it would be an effect of fear, not a cause.

### 5. Conclusion

For the judge or litigator seeking to understand the contours of fear-based standing, *ACLU* is a difficult case. It does not establish or confirm any rule of decision for injury-in-fact in a fear-based standing

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197. *See id.* at 697–98 (Gilman, J., dissenting) (applying *Laidlaw* to a chilling effect analysis).

198. *Id.* at 702.

199. *See id.* at 699 ("Based on the principles set forth in *Laidlaw*, the 'reasonableness of fear' of the attorney-plaintiffs strikes me as being well beyond what is needed to establish standing to sue." (quoting *Laidlaw*, 528 U.S. at 184)).

200. *See id.* at 702 ("[T]he critical question in this case is... whether the 'reasonableness of the fear' of such surveillance is sufficient to establish that they [the plaintiffs] have suffered actual, imminent, concrete, or particularized harm from the government's alleged unlawful action.").

analysis. If it stands for any single proposition, it would be this: A plaintiff's attempt to establish Article III standing on the basis of an alleged fear-related injury is not likely to be successful.

*ACLU*'s value lies not in setting a rule of decision, but in offering different approaches to or ways of thinking about fear-based standing. The three opinions in the case provide three such approaches. Judge Batchelder notes that fear can produce a chilling effect, which, when it regards First Amendment rights, is cognizable as injury-in-fact. Judge Gibbons would cognize fear as injury to the extent that it is anticipatory of harms that are so cognizable. Fear would extend the time during which a harm is cognizable as injury to some time before the harm, as yet unrealized, becomes imminent. Judge Gilman would have reasonable fear be cognizable injury. Gilman's approach to fear-based standing is the most expansive of those discussed in this Note, more so even than the Second Circuit's approach in *Denny*, because it is not limited to one strain of fear-based standing—anticipatory harm, for example—but transcends the divisions between the strains of fear-based standing. Gilman's is a permissive and unified approach.

Again, there is no resolution of these approaches here. That is left to subsequent cases. But the case, particularly in its concurring and dissenting opinions, expresses a willingness to look beyond current case law, and envision new rules expanding the cognizability of fear-based harm.

#### D. *White v. United States: Saying "No" to Fear-Based Standing*

##### 1. Introduction

Since *ACLU*, several appellate decisions have considered fear-based standing.<sup>201</sup> Most apply the doctrine as set out traditionally in *Laird*, *Lyons*, and *Babbitt*.<sup>202</sup> The Sixth Circuit, however, in

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201. See generally *Fieger v. Mich. Supreme Court*, 553 F.3d 955 (6th Cir. 2009); *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133 (9th Cir. 2009); *Morrison v. Bd. of Ed. of Boyd Cnty.*, 521 F.3d 602 (6th Cir. 2008).

202. See, e.g., *Morrison*, 521 F.3d at 610 ("Absent a concrete act on the part of the Board, Morrison's allegations fall squarely within the ambit of 'subjective chill' that the Supreme Court definitively rejected for standing purposes. Morrison cannot point to anything beyond his own 'subjective apprehension and a personal (self-imposed) unwillingness to communicate.'" (citations omitted) (quoting *ACLU v. NSA*, 493 F.3d 644, 662 (6th Cir. 2007) (Batchelder, J.)). To be sure, *Morrison* hints at the modification seen later in *White*, a modification that requires actual, imminent harm to fulfill the "more"

*White*,<sup>203</sup> examines plaintiffs' arguments for standing based on fear in a way that combines all three areas of fear-based standing doctrine considered hitherto. The *White* court's way of doing this—at the broadest level—is similar to that suggested by either Judge Gibbons or Judge Gilman in *ACLU*—it combines all fear-based standing inquiries into a single analysis that follows the approach seen in courts' assessment of alleged anticipatory harm injuries. However, while Gibbons and Gilman urge an expanded role for *Laidlaw* in determining cognizable injury-in-fact, the *White* court returns to *Lyons* and offers a more restrictive test, one which eliminates the cognizability of fear as injury.

This subpart explores the Sixth Circuit's assessment of fear-based standing in *White*. In doing so, it adopts the following analytical approach: It sets out the court's characterization of the claims, examines the rule of decision and the application thereof, and discusses how the court understands the role of fear in the decision. Although the case contains—and the court considers—claims that are not fear-based, this subpart does not address them.<sup>204</sup>

## 2. Factual and Procedural Background

In its decision in *White*, the court addressed what it termed a "pre-enforcement challenge"<sup>205</sup> to the Animal Welfare Act,<sup>206</sup> particularly as it related to cockfighting. The sections of the Act at issue proscribed "various activities associated with animal fighting that involve interstate travel and

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requirement, but here, such a showing is not dispositive because the plaintiff cannot meet the lesser standard set by *ACLU*. See *id.* ("In order to have standing, therefore, a litigant alleging a chill must still establish that a concrete harm—i.e. enforcement of a challenged statute—occurred or is imminent." (citing *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1193 (D.C. Cir. 1992))). Subsequent case law follows *Morrison* in conjunction with *White* for the more restrictive rule, as will be discussed below. See *All Children Matter, Inc. v. Brunner*, No. 2:08-cv-1036, 2011 WL 665356, at \*4 (S.D. Ohio Feb. 11, 2011) ("Both *Morrison* and *White* highlight the necessity of the component of imminent or actual harm to a plaintiff's alleged injury-in-fact to confer standing in an as-applied, pre-enforcement challenge.").

203. See *White v. United States*, 601 F.3d. 545, 550–51 (6th Cir. 2010) (characterizing certain injuries asserted by the plaintiffs as fear-based).

204. See *id.* at 552 (discussing economic injuries as a basis for standing).

205. *Id.* at 547.

206. See Animal Welfare Act, 7 U.S.C. §§ 2131–56 (2006) (setting out federal regulations on animal treatment).

commerce."<sup>207</sup> Although the Act did not itself proscribe "animal fighting, including cockfighting,"<sup>208</sup> state law in all fifty states did.<sup>209</sup> Initially, the Act contained an exception that related to live birds. According to the court: "[The Act's] prohibitions applied to fighting ventures involving birds 'only if the fight is to take place in a state where it would be in violation of the laws thereof.'"<sup>210</sup> However, a 2002 amendment narrowed the exception<sup>211</sup> and a 2007 amendment added restrictions on "knives, gaffes and other sharp instruments intended for bird-fighting purposes."<sup>212</sup>

The plaintiffs were individuals involved in business that related to birds, particularly gamefowl, and the president of the American Game Fowl Society.<sup>213</sup> The plaintiffs sold, transported, showed, and collected gamefowl.<sup>214</sup> Because of the proscriptions of the Act and thinking that Act might be enforced against them, the plaintiffs brought suit against the Act for declaratory and injunctive relief.<sup>215</sup>

Fear was the basis of many of the injuries that the plaintiffs claimed. The court characterizes the alleged injuries of the plaintiffs by referring to such concepts as fear, risk, and chilling. The court mentions five plaintiffs and their respective injuries. White "fear[ed] arrest under the AWA and consequent economic damages."<sup>216</sup> Taylor claimed, in part, injuries from "fear of wrongful prosecution."<sup>217</sup> Doolittle "ceased to ship birds even for lawful purposes because of the risk of wrongful prosecution."<sup>218</sup> Seville

207. *White*, 601 F.3d at 549.

208. *Id.*

209. *See id.* (noting that "Louisiana's ban had not yet taken effect at the time at which the plaintiffs filed their complaint and that cockfighting remains legal in some U.S. territories and the Commonwealth of Puerto Rico").

210. *Id.* at 548 (quoting Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, 90 Stat. 417 (1976)).

211. *Id.*

212. *Id.*

213. *See id.* at 549–50 (listing the plaintiffs' occupations and their connection to gamefowl). White sold chickens "for breeding and show purposes" for supplemental retirement income. *Id.* at 549. Taylor sold gamefowl for "show and breeding purposes." *Id.* Doolittle "operated a feed store" that catered to the "gamefowl industry." *Id.* Seville, president of the American Game Fowl Society, "work[ed] as a gamefowl judge and promote[d] gamefowl shows." *Id.* at 550. Brooks "collect[ed] rare gamefowl stock for show and breeding purposes." *Id.*

214. *Id.* at 549–50.

215. *Id.* at 549.

216. *Id.*

217. *Id.*

218. *Id.*

asserted injury because of "the legal risks associated with transporting birds, including that of wrongful prosecution."<sup>219</sup> And Brooks argued that "the AWA had reduced his ability to sell birds for non-fighting purposes because it had chilled the purchase and transport of breeding and show birds."<sup>220</sup> Collectively, the plaintiffs asserted an injury in the "chilling [of their] right to travel with chickens intended for non-fighting purposes."<sup>221</sup>

In setting out its analytical approach, the court considers all of the fear-based claims together.<sup>222</sup> The Sixth Circuit lists four types of injury: "first, the plaintiffs' economic injuries caused by the AWA; second, the plaintiffs' fear of false prosecution and the resulting 'chill' on the plaintiffs' conduct; third, the AWA's violation of the plaintiffs' constitutional rights; and fourth, the AWA's violation of the principles of federalism."<sup>223</sup> All fear-based injury is contained in the second category—both pre-enforcement fear *and* alleged chilling effect injury.<sup>224</sup> The following section explores these fear-based injuries in the court's analysis of Article III standing.

### 3. White's Analysis: Rewriting the Doctrine

In its analysis of fear-based injury, the court first addresses fear<sup>225</sup> of false prosecution and then addresses alleged chilling effect injury.<sup>226</sup> Although it treats the two alleged injuries sequentially, it applies closely similar rules of decision for their analyses. According to the Sixth Circuit,

219. *Id.* at 550.

220. *Id.*

221. *Id.*

222. *See id.* at 552 ("[W]e can distill the claimed injuries into four categories: . . . second, the plaintiffs' fear of false prosecution under the AWA and resulting 'chill' on the plaintiffs' conduct . . .").

223. *See id.* at 552 (listing the injuries in four, not two, groups).

224. *See id.* at 555 (closing the discussion of alleged chilling effect injury before discussing other alleged constitutional injuries).

225. *Id.* at 553–54. There is, throughout the court's opinion, some imprecision in its use of the terms "fear" and "risk." The court uses the terms synonymously or interchangeably. This is seen clearly at the outset of the court's section on fear-based standing: It titles its section "*Fear of false prosecution* and resulting 'chill' on plaintiffs' conduct" while the very first sentence in the section reads: "The *risk of false prosecution* under the AWA is also too speculative to confer standing on the plaintiffs." *Id.* at 553 (emphasis added). This conflation of the terms appears throughout the opinion, although commentators on the broader issue argue that the terms refer to distinct concepts. *See* Craig, *supra* note 19, at 150 (describing "emotional injury," "fear of environmental contamination," and "increased risk of disease" as distinct types of harm).

226. *White v. United States*, 601 F.3d 545, 554 (6th Cir. 2010).

*Lyons* supplies the rule of decision for all alleged fear-based injuries. All are analyzed under *Lyons*'s anticipatory harm framework—regardless of whether they are more properly classified as pre-enforcement fear or alleged chilling effect injury. Chilling effect jurisprudence only *adds* a further restriction—that the alleged chill affect First Amendment rights.

In order to distill this rule, the court first collapses a pre-enforcement fear analysis into an anticipatory harm one. The district court followed a pre-enforcement fear analysis when ruling on the plaintiffs' fear of prosecution claim. It invoked *Babbitt*'s "credible threat of prosecution"<sup>227</sup> test. Because the plaintiffs did not assert that they "[were] going to . . . engage in prohibited conduct,"<sup>228</sup> the district court found that there was no credible threat of prosecution and concluded that the injury-in-fact requirement for standing had not been met.<sup>229</sup>

The Sixth Circuit rejects this reasoning by applying a "threatened injury" test: "A threatened injury must be certainly impending to constitute injury in fact."<sup>230</sup> The plaintiffs' alleged, threatened injury, false prosecution,

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227. *White v. United States*, No. 2:08-cv-118, 2009 WL 173509, at \*3 (S.D. Ohio Jan. 26, 2009) (quoting *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1396 (6th Cir. 1987) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979))).

228. *Id.* at \*4.

229. *See id.* ("Plaintiffs' pleading as to the scenario that must unfold to injure them . . . is 'simply too speculative' or 'highly conjectural, resting on a string of actions the occurrence of which is merely speculative' to present a threat of imminent injury." (quoting *Cohn v. Brown*, 161 F. App'x 450, 455 (6th Cir. 2005))).

230. *White v. United States*, 601 F.3d 545, 553 (6th Cir. 2010) (quoting *Rosen v. Tenn. Comm'r of Fin. & Admin.*, 228 F.3d 918, 929 (6th Cir. 2002)). The Sixth Circuit displaces the pre-enforcement fear analysis without direct comment. As it notes: "Whether or not the plaintiffs alleged an intention to engage in prohibited conduct is not relevant to their allegations that they risk false prosecution under the AWA even if they engage only in lawful conduct." *Id.* That is, according to the Sixth Circuit, the district court was wrong to apply a two-part *Babbitt* test—intent to engage in conduct arguably constitutionally protected, but statutorily proscribed *and* credible threat of prosecution under the statute—and to conclude that, because the plaintiffs did not fulfill the first part of the test, they could not fulfill the second part. At least under the facts of *White*—significantly, a false prosecution claim—the first part of the test is "not relevant." *Id.* This reasoning does not affect the validity of the second part of the *Babbitt* test, the fear-based part of the test and the part that requires a credible threat of prosecution. But the Sixth Circuit distances itself from—if not abandons and implicitly rejects—this second part of the *Babbitt* test as well. *See id.* ("This issue aside, however, the district court was correct to conclude that the risk of false prosecution to the plaintiffs is too speculative to confer standing."). The court, here, does not argue for the application of a different rule, but focuses on the conclusion under the different rule. To expand on this approach: The result reached under *Babbitt* is the same as that reached under *Lyons* or an even more restrictive approach. One could argue, although the court does not, that the coincidence of the results under these two different tests points to



however, is "conjectural"<sup>231</sup> and "speculative."<sup>232</sup> As such, it is too remote or uncertain to constitute cognizable injury.<sup>233</sup>

This is a restrictive rule of decision. To the extent that it invokes prior fear-based standing case law, the court only cites *Lyons*—the seminal anticipatory harm case.<sup>234</sup> In its assessment of the plaintiffs' alleged injuries, the court emphasizes not the plaintiffs' reaction to the threats that they alleged, but the likelihood of these threats being realized. The court focuses on the objective components of fear—threats and the probability of their realization—rather than subjective elements, such as apprehension or psychological trauma.<sup>235</sup> Without a clearly established objective basis, pre-enforcement fear will not be cognizable injury for Article III standing.<sup>236</sup>

the correctness of the court's ultimate disposition rejecting an argument for fear-based standing. Such an argument, however, would not offer much guidance about how to approach fear-based standing arguments.

231. *Id.* at 554 (quoting *White*, 2009 WL 173509, at \*4).

232. *Id.* at 553.

233. *See id.* (comparing the facts of *White* to those of *O'Shea v. Littleton*, a suit for injunctive relief against judges allegedly engaged in "discriminatory and unconstitutional bond setting, sentencing, and mandating of fee payments" (citing *O'Shea v. Littleton*, 414 U.S. 488, 491–92, 497 (1974))).

234. *Id.* (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). This citation from *Lyons* does not itself address fear, but the cognizability of future harm generally: "The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Lyons*, 461 U.S. at 101–02 (internal quotation marks omitted). The court here explicitly discusses a fear-based argument for injury-in-fact, but does not subject it to a fear-based standing analysis, even though it cites a case that provides or has been determined to provide a rule for fear-based standing. *See* *ACLU v. NSA* 493 F.3d 644, 689 (6th Cir. 2007) (Gibbons, J., concurring) (relying on the *Lyons* footnote for a rule of decision for fear-based standing, specifically anticipatory harm (citing *Lyons*, 461 U.S. at 107 n.8)).

235. *See White*, 601 F.3d at 554 ("While wrongful prosecution may be more likely here than in *O'Shea* . . . the risk remains too remote to confer standing."); *cf.* Lin, *supra* note 19, at 946–49 (discussing the differences between fear and risk as they relate to harm in an environmental law context). According to Lin: "[E]ven if objective levels of risk remain the same—indeed, even if they decrease—public concern about risks may nevertheless rise. As the ability to detect low-level risks improves, scientists will generate more risk related information. . . . [S]uch information may also increase public apprehension in both rational and irrational ways." *Id.* at 947–48 (citations omitted). At this point in *White*, what seems to be at issue is more the likelihood, considered objectively, of wrongful prosecution and not the plaintiffs' subjective beliefs about its likelihood. "While wrongful prosecution may be more likely here than in *O'Shea* . . . the risk remains too remote to confer standing." *White*, 601 F.3d at 554. By favoring an objective test to the exclusion of a subjective one or one with a subjective component, the court effectively transforms its fear analysis into a risk analysis—a particularly restrictive risk analysis.

236. *See White*, 601 F.3d at 554 n.5 (discussing a possible objective basis for the

When the court turns to alleged chilling effect injury, it follows the same analytical approach: The court analyzes alleged chilling effect injury as anticipatory harm. Even chills of First Amendment rights "will not suffice for standing absent a real and immediate threat of future harm."<sup>237</sup> One might expect *Laird* to supply the rule of decision here<sup>238</sup>—and to be sure it is implicated in the restriction of cognizability to First Amendment claims<sup>239</sup>—but it does not, apart from *adding* the further requirement that the chill be of First Amendment rights. The court emphasizes *Lyons* and its progeny instead.<sup>240</sup> In fact, the court's rule here is arguably more restrictive than *Lyons*'s. *Lyons* emphasizes the reality of the threat.<sup>241</sup> Here, the Sixth Circuit emphasizes both the reality and the immediacy of the threat.<sup>242</sup> In doing so, the court sets out a rule similar to that in the pre-enforcement fear part of its analysis, where the court requires a "certainly impending" threat.<sup>243</sup> The only difference is the First Amendment addendum. In both rules, any subjective element is minimized. An objective test will determine the cognizability of an alleged injury.

In applying this rule, the court explicitly relies on its analysis of the plaintiffs' pre-enforcement fear argument—the analysis in which it applied an anticipatory harm rule: "As argued above, the risk of false prosecution the

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plaintiff's fear of false prosecution in defendants' alleged "providing to law enforcement officials or other organizations 'false or misleading information pertaining to characteristics of chickens'"). The plaintiffs suggested initially, although not on appeal, that individuals and groups such as the Humane Society of the United States aimed at subjecting the plaintiffs to prosecution under the AWA by falsely affecting law enforcement officers' understandings of what activity with respect to what birds constituted a violation of the Act. *Id.*

237. *Id.* at 554.

238. *Cf.* *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972) (discussing the circumstances under which a subjective chill can be cognizable as injury).

239. *White*, 601 F.3d at 554 (citing *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 962 (6th Cir. 2009) (quoting *Laird*, 408 U.S. 1, 13–14)).

240. *See id.* (citing *Hange v. City of Manchester*, 257 Fed. App'x 887, 891 (6th Cir. 2007) (relying on *Lyons*) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983))).

241. *See Lyons*, 461 U.S. at 107 n.8 ("It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."). To be sure, later in the footnote, the Court mentions the requirement that the threat be immediate as well as real, but by mentioning reality independently in a preceding sentence, the Court focuses on that aspect of the test. *See id.* ("The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a *real and immediate* threat of future injury by the defendant." (emphasis added)).

242. *See White*, 601 F.3d at 554 (listing both requirements—reality and imminence—without assigning priority to either of them or adding special emphasis to either of them).

243. *Id.* at 553.

plaintiffs face in this case is too speculative to confer standing. Their resulting decision to curtail their activities based on their subjective fear of prosecution—the alleged ‘chill’ on their constitutional rights—does not affect this analysis.<sup>244</sup> That is, pre-enforcement fear is the source of the chill. Because this fear is purely subjective—and therefore not cognizable—the resultant chill is also subjective and therefore not cognizable.

Alleging a chilling effect injury does not change the analytical approach—it remains *Lyons*'s restrictive anticipatory harm test. *Laird*'s chilling effect analysis has no bearing on the cognizability of the plaintiffs' alleged chilling effect injury. To be sure, the court mentions the "something more" test,<sup>245</sup> but only injury that is cognizable under *Lyons* can fulfill this requirement. Merely reasonable fear will not suffice.<sup>246</sup>

When applying this rule, the court considers whether the plaintiffs alleged injury that could constitute "something more": "While the plaintiffs argue that law enforcement officials' mistaken belief regarding the distinctive characteristics of fighting birds helps transform their subjective fear of prosecution into a fear of imminent injury sufficient to confer standing, the risk of wrongful prosecution remains overly speculative, even in light of this allegation."<sup>247</sup> The plaintiffs failed to fulfill the objective component of a fear-based injury analysis under *Laird* and could not establish cognizable injury because the court defined the harm that would be cognizable harm in *Lyons*'s terms, as "fear of imminent injury."<sup>248</sup>

244. *Id.* at 554.

245. *See id.* ("[S]ubjective apprehension and a personal (self-imposed) unwillingness to engage in First Amendment conduct, without more, fail to substantiate an injury-in-fact for standing purposes." (quoting *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 610 (6th Cir. 2008) (citing *ACLU v. NSA*, 493 F.3d 644, 662 (6th Cir. 2007) (Batchelder, J.))). *Laird* sets the parameters of *Morrison*'s analysis; the *Morrison* court frames the question that it considers as an inquiry into what set or sets of facts fulfill *Laird*'s "more" test. *See Morrison*, 521 F.3d at 608–09 (summarizing the *Laird* test and noting that "[t]he question before us, then, is what 'more' might be required to substantiate an otherwise-subjective allegation of chill, such that a litigant would demonstrate a proper injury-in-fact?").

246. *See White*, 601 F.3d at 554 ("[S]ubjective apprehension and a personal (self-imposed) unwillingness" to engage in First Amendment conduct, "without more," "fail[s] to substantiate injury-in fact for standing purposes." (quoting *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 610 (6th Cir. 2008) (citing *ACLU v. NSA*, 493 F.3d 644, 662 (6th Cir. 2007) (Batchelder, J.))).

247. *Id.*

248. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983) ("The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant"). The term "imminent" does not appear in *Lyons*, but appears in the test adopted in *Lujan* and subsequently is recited in anticipatory harm cases. *See Laidlaw*, 528 U.S. at 180 (citing *Lujan v. Defenders of*

*Lyons* provides a rule for fear-based standing generally; *Laird* adds the specific requirement that alleged chilling effect injuries affect First Amendment rights. To establish cognizable injury-in-fact for a First Amendment chilling effect claim, the *Lyons* test must be met. The plaintiffs, however, did not meet it.

#### 4. Conclusion

The *White* court sets out a reactionary approach to fear-based standing. All fear-based injury is anticipatory harm, and is to be analyzed as such. The *White* court collapses pre-enforcement fear into anticipatory fear,<sup>249</sup> it also collapses alleged chilling effect injury into anticipatory fear.<sup>250</sup> To

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Wildlife, 504 U.S. 555, 560–61 (1992)). The *White* court does not draw a distinction between the terms. At the beginning of its discussion of fear-based standing, it cites *Lyons*, although not exclusively, when setting out a rule of "certainly impending" harm to be required for cognizable injury. *White*, 601 F.3d at 553 (quoting *Rosen v. Tenn. Comm'r of Fin. & Admin.*, 228 F.3d 918, 929 (6th Cir. 2002)).

249. See *supra* Part III.D.3 (discussing the *White* court's treatment of the plaintiffs' pre-enforcement fear claim). The District Court for the Southern District of Ohio has recently adopted *White* and, in particular, this understanding of it. In a pre-enforcement challenge to the constitutionality of campaign laws the district court dismissed the plaintiff's claim for lack of standing. *All Children Matter, Inc. v. Brunner*, No. 2:08-cv-1036, 2011 WL 665356, at \*4 (S.D. Ohio Feb. 11, 2011). The plaintiffs asserted a chilling effect as injury in response to the defendant's motion to dismiss for lack of standing. *Id.* at \*7–8. The court analyzed the plaintiff's argument for cognizable injury under *Morrison*'s understanding of *Laird* and under *White*: "Both *Morrison* and *White* highlight the necessity of the component of imminent or actual harm to a plaintiff's alleged injury-in-fact to confer standing in an as-applied, pre-enforcement challenge." *Id.* at \*11. But the plaintiff "present[ed] no evidence at all to demonstrate that it has suffered or will suffer an imminent harm through the enforcement of the statutes or regulation." *Id.* at 14. Of particular note here is the avoidance of a pre-enforcement fear analysis, which *Morrison* mentions and which *White* incorporates into its effectively uniform approach. See *Morrison*, 521 F.3d at 609 (citing *Younger* for the proposition that "fears of prosecution cannot be merely 'imaginative or speculative'" (quoting *Grendell v. Ohio Supreme Court*, 252 F.3d 828, 834 (6th Cir. 2001) (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971))). To be sure, the plaintiff did not argue for standing on the basis of pre-enforcement fear, but the court's applying a restrictive test from a related, but distinct area of the law, while citing cases that refer to a more apparently applicable test, is indicative, at least, of a post-*White* weakening of the doctrine of pre-enforcement fear as cognizable injury.

250. See *All Children Matter*, No. 2:08-cv-1036, 2011 WL 665356, at \*4 ("At bottom, ACM offers no showing of imminent or actual harm beyond its self-imposed chill."). Here, again following *White*, but also *Lujan*, the *All Children Matter* court moved away from the chilling effect analytical approach seen in *ACLU*. According to Judge Batchelder: "[T]o allege a sufficient injury under the First Amendment, a plaintiff must establish that he or she is regulated, constrained, or compelled directly by the government's actions, instead of by his own subjective chill." *ACLU*, 493 F.3d at 661 (Batchelder, J.). That is, the chilling

determine whether a chill is cognizable, one determines whether the fear on which it is predicated is cognizable. To do this, one uses an objective test. If a threat is actually imminent, then fear thereof is cognizable as injury. If the threat is not actual or not imminent, it is not cognizable.<sup>251</sup>

As noted, the *White* test is reactionary. It adopts the most restrictive approach to fear-based standing of those seen hitherto. It begins with *Lyons*'s focus on the reality of a threat, adds an additional emphasis on the imminence of the threat, and applies this test not only to situations of anticipatory harm, but also to chilling effects and pre-enforcement fears, which have been cognizable with the showing of a credible threat or a not wholly subjective or imaginary fear.<sup>252</sup>

By adopting this test, the Sixth Circuit retreats from *ACLU*. To be sure, at the broadest level, it may exhibit some similarity with *ACLU*—allegations of fear-based injury are unlikely to be cognizable<sup>253</sup>—but it rejects sharply the tendency toward permissiveness seen in *ACLU*. The *White* court does not mention *Laidlaw* or the *Laidlaw*-influenced concurrence and dissent in *ACLU*.<sup>254</sup> The reasonableness of fear is not at

effect is itself a harm, but one that becomes cognizable when combined with the presence or application of governmental coercive force. *See id.* at 663 ("[T]he something 'more' required by *Laird* is not more subjective injury, but is the exercise of governmental power that is regulatory . . ."). In *All Children Matter*, by contrast, the court requires harm in addition to the subjective chill, not objective confirmation that the subjective harm actually exists.

251. *See supra* Part III.D.3 (discussing the *White* court's treatment of the plaintiffs' chilling effect claim). Because *Lyons* is more restrictive than *Laird*, and because—for alleged chilling effect injury—both cases' tests are to be considered, *Lyons* sets the rule for the nature and type of fear necessary to serve as a basis for standing. *Laird*, then, has a more limited role—it provides further restrictions not contained in *Lyons*, namely that the alleged chilling effect injury must affect a First Amendment right to be cognizable.

252. *See* *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (applying an actual and well-founded fear test); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (reciting both credible threat and non-imaginary fear rules); *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1142 (9th Cir. 2009) (following the three-part *Thomas* test, which includes the requirement of a credible threat).

253. *Cf.* *Summers v. Earth Island Inst.*, 555 U.S. 488, 500 (2009) (discussing the dissent's suggestion that "realistic threat" be used as the test for anticipatory harm and noting that "[t]hat language is taken, of course, from an opinion that did *not* find standing, so the seeming expansiveness of the test made not a bit of difference."). Factual situations that fail to meet the requirements of permissive tests will also fail to meet the requirements of restrictive tests. That said, not every argument for fear-based standing has failed. *Laidlaw*, *Gaston Copper*, *Meese*, *Ozonoff*, and *Paton*, for example, all exhibit cognizable, fear-based injury. Whether they would under *White* is not certain.

254. *See White*, 601 F.3d at 554 (referring to the lead opinion in *ACLU* as cited in *Morrison* (citing *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 610 (6th Cir. 2008) (citing *ACLU v. NSA*, 493 F.3d 644, 662 (6th Cir. 2007) (Batchelder, J.))).

issue; rather, its validity as a test or part of a test is implicitly rejected. The *White* court mentions the lead opinion in *ACLU* and cites its "something more" test with some approval. But even this approval is qualified. "Something more" becomes an actual, imminent harm, rather than an exposure to governmental coercive or regulatory force.<sup>255</sup> Phrased more generally, to the question of whether fear is cognizable as injury-in-fact for Article III standing, *White* offers a clear answer: No.

### E. Conclusion

*White* and *ACLU* express different visions of the doctrine of fear-based standing. *ACLU* is permissive, but inconclusive—its permissiveness appears in the tests followed by the concurring and dissenting judges. *White* is restrictive and conclusive. But this does not mean that *White* actually clarifies the current doctrine of fear-based standing. Far from it. *White* may command a majority of the court, while *ACLU* does not. But *ACLU* has been considered favorably outside of the Sixth Circuit, and *White* has not. Further, and more problematically, *White* implicitly rejects Supreme Court precedent (*Babbitt*, *American Booksellers*, and *Laidlaw*), which, of course, it cannot overrule.

However, by setting aside the specific content of the *White* and *ACLU* rules, one sees an additional similarity between the cases in the desire to unify the doctrine of fear-based standing. Judges Cole and Gilman, however much they disagree as to the substantive content of the doctrine, would have there be one rule applied to all fear-based standing claims. The next Part of this Note explores what such a rule should be.

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255. *See id.* ("While the plaintiffs argue that law enforcement officials' mistaken belief . . . helps transform their subjective apprehension of prosecution into a fear of imminent injury sufficient to confer standing, the risk of wrongful prosecution remains overly speculative, even in light of this allegation."); *All Children Matter, Inc. v. Brunner*, No. 2:08-cv-1036, 2011 WL 665356, at \*4 (S.D. Ohio Feb. 11, 2011) ("At bottom, ACM offers no showing of imminent or actual harm beyond its self-imposed chill"). The *All Children Matter* court continues: "To survive Defendants' summary judgment motion, ACM must have submitted affidavits or other evidence showing, through specific facts, that it had suffered or would suffer an imminent harm from the enforcement of the statutes." *Id.* at \*4.

#### *IV. A New Analytical Framework*

##### *A. Introduction*

This Note has shown that the doctrine of fear-based standing is undergoing significant changes. Two radically different trends have emerged in recent decisions, whether those of federal district courts, the courts of appeals, or the Supreme Court itself. One of these trends would expand the doctrine to the point where fear is almost independently cognizable as injury-in-fact. The other would all but eliminate it as a basis for standing. Within these two overarching trends, rules of decision in particular subparts of the doctrine vary, often subtly at times, due to the particular characterization of an issue or the nature of a plaintiff's claim. This Part of this Note, on the basis of this ferment and uncertainty in the doctrine, proposes and argues for a framework that would settle the doctrine. The second subpart sets out in detail the differences between different areas of the doctrine of fear-based standing as seen in the cases considered in the second and third Parts of this Note. The third subpart outlines and explicates a framework that the Note urges courts to adopt. The framework clarifies and resolves the present difficulties that the second subpart discusses. The fourth subpart argues for this proposed framework on the ground that it clarifies and unifies the doctrine of fear-based standing while accounting for recent trends in the development of the doctrine.

##### *B. Existing Analytical Approaches: Weaknesses and Directions*

The doctrine of fear-based standing has been divided into three usually distinct areas, First Amendment chilling effect injury, pre-enforcement fear of the enforcement of laws and regulations allegedly violating First Amendment rights, and anticipatory or proleptic harm—harm cognized as injury before its realization.

In First Amendment chilling claims, *Laird* may be well established as offering the rule: A subjective chill—a chill based on a subjective fear—is not cognizable without more.<sup>256</sup> But what harm constitutes "something

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256. See *Laird v. Tatum*, 408 U.S. 1, 9 (1972) (identifying the question considered as "whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity" and answering in the negative).

more" remains an open question.<sup>257</sup> In First Amendment pre-enforcement challenges, case law offers multiple overlapping tests—"actual and well-founded fear,"<sup>258</sup> "credible threat,"<sup>259</sup> "not imaginary or wholly subjective fear,"<sup>260</sup> "realistic danger,"<sup>261</sup> or "objectively reasonable fear."<sup>262</sup> Presumably, the existence of a credible threat would imply that any resultant fear is not wholly subjective or imaginary. But, for example, is a not imaginary fear objectively reasonable or credible? From time to time courts admit to not knowing.<sup>263</sup>

In addition to these points of ambiguity in these two types of First Amendment fear-based standing, determining when alleged deprivations of First Amendment rights should be analyzed as chilling effects or pre-enforcement harm also poses a difficulty.<sup>264</sup> Particular factual circumstances may—and often do—implicate both doctrines, but it is easier to establish cognizable injury for a pre-enforcement challenge than a chilling effect claim or, at least, a potentially lesser degree of fear is required.<sup>265</sup>

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257. See *Morrison v. Bd. of Ed. of Boyd Cnty.*, 521 F.3d 602, 609 (6th Cir. 2008) ("The question before us is what 'more' might be required to substantiate an otherwise-subjective chill, such that a litigant would demonstrate a proper injury-in-fact?" (citations omitted)); cf. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) ("Line-drawing in standing cases is rarely easy, but where the plaintiff's alleged injury is a chilling effect on the freedom of speech, the standing inquiry is particularly delicate.").

258. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988).

259. *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996).

260. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979).

261. *Id.* at 298.

262. *R.I. Ass'n of Realtors v. Whitehouse*, 199 F.3d 26, 31 (1st Cir. 1999) (internal quotation marks omitted).

263. See *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633, 645 n.12 ("The difference between the 'actual and well-founded fear' standard and the 'realistic danger' standard has never been explained, and it should be noted that there are some indications that there is no meaningful difference between the two standards."), *rev'd sub nom.* *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 122 (2d Cir. 2011), *reh'g en banc denied*, \_\_\_ F.3d \_\_\_, No. 09-4112-cv, 2011 WL 4381737 (2d Cir. Sept. 21, 2011). The court declined to answer the question because it had "no bearing on the outcome of [the] case, and the parties agreed that Article III standing should be addressed under a single standard with respect to all of the plaintiffs' claims." *Id.*

264. See *N.H. Right to Life*, 99 F.3d at 14 ("[T]hese two types of injury are interrelated. Both hinge on the existence of a credible threat . . . . If such a threat exists, then it poses a classic dilemma for an affected party: either to engage in the expressive activity, thus courting prosecution, or to succumb to the threat . . . .").

265. See Joshua Newborn, Note, *An Analysis of Credible Threat Standing and Ex Parte Young for Second Amendment Litigation*, 16 GEO. MASON L. REV. 927, 935–36 (2009)



Further, the doctrine relating to anticipatory harm is undergoing a process that could only be considered an upheaval. Before *White*, the primary threshold question was whether fear was cognizable as injury only through a subsequent, derivative harm, that is, a chilling effect, or was also cognizable presently—and proleptically—in anticipation of a future harm, which future harm was the substantive basis of the claim. Indeed, the disagreement in *ACLU* between the lead opinion and the concurrence is on just this point. Since *White*—and arguably since *Morrison* and *Summers*—there has been the possibility, at the very least, that fear of any harm that is not imminent or immediate is not cognizable.<sup>266</sup>

Even when anticipatory harm may be cognizable, the analytical approach called for is open to question. *Laidlaw*, the leading Supreme Court decision on the issue, seems to admit of two different understandings. The first, although still an innovation, is more traditional. It requires both fear and confirmation of the threat.<sup>267</sup> The second, requires fear alone or fear and resultant harm.<sup>268</sup> Circuit courts have tended to favor the more traditional—though also innovative—approach,<sup>269</sup> but not exclusively,<sup>270</sup> and sometimes only when cabined to particular circumstances or areas of the law.<sup>271</sup> Some of the most recent opinions—*ACLU* at the Sixth Circuit, for example—suggest a trend

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("[T]he Court requires plaintiffs to show that their reaction to the challenged statute is objectively reasonable. This is rather simple to do . . ." (citations omitted)). That said, Newborn actually conflates alleged chilling effect injury with pre-enforcement fear. In this passage, he cites *American Booksellers*, *Meese*, *Laird*, and *New Hampshire Right to Life*. *Id.*

266. See *supra* Parts III.D.1–3 (discussing *White* and decisions that preceded it).

267. See *supra* Part II.D (arguing that there are two ways of understanding *Laidlaw*'s discussion of fear-based standing and discussing this first understanding).

268. See *supra* Part II.D (discussing the second way of viewing the *Laidlaw* Court's discussion of fear-based standing).

269. See, e.g., *Me. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 285 (1st Cir. 2006) (determining that a "substantial probability of increased harm" "rendered reasonable the plaintiffs' members in abstaining from their desired enjoyment of the Penobscot"); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (noting that reasonable fear confirmed by objective evidence of the conduct leading to it leads to injury-in-fact).

270. Cf. *Denny v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) (indicating that "[a]n injury in fact may simply be the fear or anxiety of future harm" but not relying on *Laidlaw* for this proposition).

271. Cf. *Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003) (extending *Gaston Copper*'s reasoning as regards increased risk to "consumer food and drug safety suits").

toward the increased cognizability of fear,<sup>272</sup> even without a confirmation requirement.<sup>273</sup>

Internal to itself, the anticipatory harm part of fear-based standing doctrine is experiencing a moment of crisis. *White* implies a rejection of not just the rules of decision of one particular area of fear-based standing, but those of all areas of fear-based standing. As noted, because *White* is such a departure from existing case law, it is far from certain that *White* will be followed by courts nationwide, even though it has recently been followed in the Southern District of Ohio.<sup>274</sup>

This Note has demonstrated three primary areas of uncertainty in the doctrine of fear-based standing and its three strains. First, uncertainty as to the contours of particular tests; second, uncertainty as to the characterization of alleged fear-based injuries; and, third, uncertainty post-*White* as to the cognizability of fear as injury.

### C. The Proposed Framework

In view of the current unsettled character of the doctrine of fear-based standing and to provide courts with a model for an analytical approach to

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272. See *ACLU v. NSA*, 493 F.3d 644, 689 (6th Cir. 2007) (Gibbons, J., concurring) (setting out a *Laidlaw*-based framework for the analysis of an argument for cognizing alleged fear-based injury); *id.* at 698 (Gilman, J., dissenting) (indicating that the point of disagreement with the concurrence is the application of *Laidlaw* to the facts of *ACLU* rather than the understanding of the rule derived from *Laidlaw*); *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 663, 657 n.16 (S.D.N.Y. 2009) (citing, with some approval, Gibbons's *Laidlaw*-based framework), *rev'd sub nom.* *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 122 (2d Cir. 2011), *reh'g en banc denied*, \_\_\_ F.3d \_\_\_, No. 09-4112-cv, 2011 WL 4381737 (2d Cir. Sept. 21, 2011). In *Clapper*, the Second Circuit accepted fear as a cognizable injury. See *Clapper*, 638 F.3d at 122 ("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."). However, its analysis did not emphasize the injury prong of a standing analysis, but the causation prong. See *id.* at 133 (discussing the "plaintiffs' asserted grounds for standing").

273. See *ACLU*, 493 F.3d at 699 (Gilman, J., dissenting) ("Based upon the principles set forth in *Laidlaw*, the 'reasonableness of the fear' of the attorney-plaintiffs in the present case strikes me as being well beyond what is needed to establish standing to sue."). To be sure, Gilman also indicates that some confirmatory element may be necessary in an injury-in-fact analysis. *Id.* at 702. But the fact that he steps back at times from advocating such a requirement shows a potential direction for fear-based standing doctrine.

274. See *All Children Matter, Inc. v. Brunner*, No. 2:08-cv-1036, 2011 WL 665356, at \*3-4 (S.D. Ohio Feb. 11, 2011) (rejecting an argument for alleged chilling effect and pre-enforcement fear injury by relying in part on *White*).

fear-based standing, this Note proposes the following framework for an injury analysis in considerations of fear-based standing. This framework offers modified and relaxed requirements for showing cognizable injury. It applies to all types of fear-based standing: chilling of First Amendment rights; pre-enforcement fear of laws and regulations that allegedly violate First Amendment rights; and anticipatory harm.

*The framework:* Injury-in-fact requirements for Article III standing are met by fear of an existing or threatened harm when (1) there is a subjective fear of the harm; and (2) this fear is reasonable, (a) because objective evidence shows the actual existence of a threatened harm, or (b) because some evidence suggests the existence of a grave harm.

#### D. Explication of and Argument for the Proposed Framework

##### 1. Explication of the Framework

At a broad level, the framework offered above adopts the general, theoretical approach common to *Laird* and its progeny as well as to *Lyons* and *Laidlaw*.<sup>275</sup> Of the approaches considered in the cases discussed in this Note, its approach is closest to that seen in *Gaston Copper*.<sup>276</sup> It rejects *White*'s implied restrictive approach.<sup>277</sup> It requires the showing of a subjective fear as a threshold inquiry and then requires additional showings as confirmation of the fear. Further, like *Lyons* and *Laidlaw* it does not treat fear as the substantive cause of action, but as an auxiliary that enhances or extends forward in time the cognizability of another

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275. Compare *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of present objective harm or a threat of specific future harm . . ."), with *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000) ("In the footnote from *Lyons* . . . we noted that . . . [the plaintiff's] 'subjective apprehensions' that such a recurrence would even *take place* were not enough to support standing." (citations omitted)), and *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983) ("It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."). The insufficiency of subjective apprehension—or subjective fear, if there is no distinction between fear and apprehension—is common to these two strains of the doctrine.

276. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) ("Shealy's reasonable fear and concern about the effects of Gaston Copper's discharge, supported by objective evidence, directly affect his recreational and economic interests. This impact constitutes injury in fact.")

277. See *White v. United States*, 601 F.3d 545, 554 (6th Cir. 2010) (developing and applying a unified, highly restrictive analytical approach to arguments for fear-based injury-in-fact for Article III standing).

substantive claim. That said, for reasons that will be explained below, under this framework, fear is a more robust auxiliary than under either *Lyons* or *Laidlaw*. To consider specific aspects of the framework in more detail, this Note will use and manipulate the hypothetical situation of the swimmer, the surfer, the shark, and the potential attack.

*Fear of an existing or threatened harm:* The framework applies to the fear that underlies a chilling effect as well as pre-enforcement fear and the fear that is anticipatory of subsequent harm. The framework does not distinguish between these types of fear. The harm—alleged injury—can be present, as in the case of a chilling effect, or future, as in the cases of pre-enforcement fear and anticipatory harm. That said, the framework does not extend the cognizability of chilling effects and pre-enforcement fears to chills and fears of violations or limitations of rights other than those protected by the First Amendment.

*Subjective fear:* This term refers to a fear that is particular to its subject and need not have any basis in fact or reason. For example, fear of an imminent shark attack is a subjective fear regardless of whether it is experienced by a surfer in the ocean or someone learning to swim in a shark-free pool. It can arise because of actually seeing a shark in the water or merely because of having watched *Jaws*<sup>278</sup> recently. That the surfer's fear seems more likely to be realized and the novice swimmer's seems imaginary at best does not affect the existence of a subjective fear. That said, to an extent, in fact, all fear is subjective. Because it is a personal or collective emotional or psychological response to a threat or threatened harm, it exists in the person or group experiencing it.<sup>279</sup> Unlike the threat which causes it, it does not exist independent of this person or group.

*Reasonable fear:* This is fear that exists because of a process of reasoning or the existence of which is justifiable by a process of reasoning, whether inductive or deductive. It is a type of subjective fear—it is particular to its subject in the same way that other types of subjective fear—imaginary fear, for example—are particular to theirs. But because of its being arrived at or confirmable by reason or reasons, it admits of greater analytical rigor than other types of subjective fear. For an example of such reasoning, consider the shark attack. For the novice swimmer learning to swim in a shark-free pool, fear of a shark attack is not reasonable. If there is no shark, there can be no shark attack. For the surfer surfing in a part of

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278. *JAWS* (Universal Pictures 1975).

279. See ROBIN, *supra* note 33, at 18 (discussing how fear can be experienced collectively).

the ocean attractive to sharks, where sharks have been observed, and where there have been recent, confirmed incidents of shark-on-human attacks, who then witnesses a shark attack a surfing companion, and then sees the same attacker-shark approaching, fear is reasonable.

*Objective evidence:* This is evidence the existence of which is capable of being demonstrated by a third party and is a necessary premise in fear-related reasoning. Consistent with the requirements of the procedural posture of a case, courts have accepted plaintiffs' affidavits attesting to the existence of a threat as objective evidence.<sup>280</sup> In the shark attack example, the best evidence would be the shark, nearby, in the water. Such evidence would also include news reports or other accounts of prior but recent shark attacks, viewing dorsal fins in the distance, and more generalized evidence of the propensity of locally-found sharks to attack humans. The critical point here is that the threat must be verifiable by an external observer. The amount of evidence offered must be enough to show the actual existence of a threatened harm, although as noted, the procedural posture of a case may obviate the need to make a complete showing.<sup>281</sup>

*Actual existence of a threatened harm:* This is where the threat that will produce the harm to be cognized as injury exists in fact. The actual existence of a threat is, of course, closely related to the evidence thereof. If there is a distinction to be made, it is that the actual existence of a threat is prior to evidence that demonstrates its existence. To use the shark attack example, the shark in the water is the threat. Reports or images documenting the shark's being in the water are evidence of the threat. This part of the framework, on this example, concerns the reality of the shark's being in the water.

*Some evidence suggests:* For this alternative means of confirming subjective fear and thus establishing cognizable injury, complete demonstration of the existence of the threat is not necessary. Rather, evidence that by itself would be inconclusive, but that nonetheless indicates the possibility of the reality of the threat, here, is sufficient. In the shark attack example such evidence would include reports of a recent shark attack in the area, a sighting of what appears to be a dorsal fin in the distance, or

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280. See, e.g., *Gaston Copper*, 204 F.3d at 159 ("In *Laidlaw*, the Court found that several citizen affidavits attesting to reduced use of a waterway out of reasonable fear and concern of pollution 'adequately documented injury in fact.'" (citations omitted)).

281. See, e.g., *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000) (noting that, in an appeal from the district court's grant of summary judgment in favor of the State-defendant, "the State's representation cannot remove VRLC's reasonable fear that it will be subjected to penalties for its planned expressive activities").

reports that a shark or group of sharks wont to attack is migrating to the particular body of water in question.

*Grave harm:* In order to balance the permissiveness of the some evidence standard, it is combined with a heightened requirement regarding the threatened harm at issue. Standing doctrine allows for nominal harm to constitute cognizable injury.<sup>282</sup> This new, alternative test does not allow for this possibility. Determining what exactly constitutes grave harm is the province of the courts, and best considered on a case-by-case basis. But such alleged harms as aesthetic injury<sup>283</sup> and inability to fish as much from a river as at some prior time<sup>284</sup> should be insufficient. Other threatened harms, such as deprivations of constitutional rights, particularly First Amendment rights, as well as death and personal physical injury, should be sufficient. Standing doctrine, to be sure, requires particularized injury, but, in determining gravity of harm, a court may consider the extent to which others have been or will be subject to the same threatened harm.

More generally, as the particulars discussed above demonstrate, the proposed framework offers two ways of cognizing threatened harm as injury-in-fact. The first is based on the more restrictive understanding of *Laidlaw*<sup>285</sup> but places greater emphasis on demonstrating the reasonableness of fear. The second—the alternative—is an innovation. It balances reduced evidentiary or demonstration requirements with a requirement for the increased seriousness of the harm implicated. Both of these approaches are more permissive than the traditional approaches taken in *Laird* and *Lyons*. Although, like in the approaches taken by *Laird* and *Lyons*, both options under the proposed framework require a subjective fear subject to confirmation, what constitutes this confirmation differs. Under both alternatives, the requirements are less stringent, although to different degrees.

To demonstrate this, consider again the shark attack example—and presume a subjective fear thereof. Under *Lyons*, for his or her fear of attack to be cognizable as injury, the surfer would need to see the shark approaching and—perhaps—see or hear other signs of an immediately prior

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282. See *Gaston Copper*, 204 F.3d at 156 (“[T]he claimed injury ‘need not be large, an identifiable trifle will suffice.’” (citations omitted)).

283. See *Laidlaw*, 528 U.S. at 183 (noting the cognizability of aesthetic injury).

284. See *Gaston Copper*, 204 F.3d at 156 (indicating that one of the plaintiffs’ members asserted that his practice of fishing in a lake had been affected by Gaston Copper’s discharge of pollutants).

285. See *supra* Part II.D (discussing possible interpretations of *Laidlaw* and, especially, those presented by circuit courts).

shark attack: blood in the water, screams, other surf boards, recently occupied, now abandoned. That is, a real threat of imminent attack. Under *Laidlaw*, sharks, known for their propensity to attack, in the water where the surfer is surfing would likely be sufficient. Under the first of the two alternatives of the proposed framework, the same facts that would be sufficient under *Laidlaw* would be sufficient, provided that they can be demonstrated by evidence—in this example, evidence of both the sharks in the water and their propensity to attack. Under the second alternative of the proposed framework, the distant sighting of what looks to be a dorsal fin by the surfer while he or she is in the water would be sufficient.

To be sure, the framework varies in application somewhat across the three types of fear-based standing. This Note does not envision the expansion of the cognizability of chilling effect injury and pre-enforcement fear to situations that implicate rights other than those protected by the First Amendment. For First Amendment chilling effect claims, the framework applies to the fear underlying the chill. If a subjective fear shown by objective evidence of a threat or some evidence of a grave threat leads to a chilling effect, the chilling effect is cognizable as injury. For First Amendment pre-enforcement challenges, the framework applies to the fear that is itself cognizable as injury. Here, the framework operates in much the same way as for anticipatory harm, where it applies to the fear that precedes the harm.

## 2. *Argument for the Framework*

### a. *Introduction*

The framework proposed above draws on but modifies the analytical approaches seen in existing fear-based standing case law. The argument for it proceeds in three steps or as answers to three particular inquiries. The first is the broadest. It asks whether courts should adopt a unified approach to fear-based standing—one that applies one analytical test to all strains of the doctrine—or a particularized approach that preserves the distinct analytical frameworks of alleged chilling effect injury, pre-enforcement fear, and anticipatory harm. This Note argues for a unified approach. The second asks what type of unified approach should be followed: a restrictive one or a more permissive one? The question might be rephrased as whether courts should follow *White* or a form of the doctrine as it existed prior to *White*. This Note argues that the pre-*White* doctrine should inform courts' analytical

approaches. The third asks how the pre-*White* doctrine should be adapted to create a unified analytical approach. The framework answers this question and has been discussed above. Here, this Note argues for the framework's two distinctive features that set it apart from pre-*White* approaches.

### *b. A Unified Approach*

Courts should adopt a unified approach to an alleged fear-based injury analysis for the purposes of determining Article III standing. They should apply the same analytical framework to all arguments for standing predicated on alleged fear-based injury. Such an approach is justified not only theoretically, but also—and perhaps more importantly—empirically. Theoretically, a unified approach—whatever its content—advances goals of clarity and ease of applicability. A court need not devote as much effort into characterizing a claim because, regardless of the characterization, the analysis would be the same. If, as now, different analytical approaches are used for different types of claims, the characterization itself can become dispositive. A unified approach—whether fully restrictive, fully permissive, or otherwise—shifts the court's focus to the nature of the threat, which is the focus of the plaintiff's complaint.

As a practical matter, as preceding sections of this Note have indicated, whether courts should adopt a unified approach to fear-based standing is increasingly a settled issue. Courts' recent decisions have shown a tendency toward, if not an outright explicit preference for, a unified approach.<sup>286</sup> In a particular case, the adoption of a unified or partially unified approach may be explicit and intentional,<sup>287</sup> a result of a

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286. Cf. Michelman, *supra* note 19, at 104 (urging application of a uniform test for alleged probabilistic surveillance injuries and noting that "[c]ourts' willingness to apply the same standard of likelihood across a variety of contexts . . . establishes a strong baseline presumption in favor of a uniform rule that applies in the surveillance context as well as others"). Michelman's uniform test would be "a reasonable likelihood of injury," which he indicates, *inter alia*, "reconcile[s] *Laird* with *Lyons*." *Id.* at 105. This Note has argued that such an interpretation is unsupported by the case law.

287. See *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996) ("Because the threat of prosecution is a common denominator of both types of injury [chilling effect and pre-enforcement fear], their existence can be resolved in a single inquiry."); *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633, 645 n.12 (S.D.N.Y. 2009) ("[A]ny difference between the 'actual and well founded fear' standard and the 'realistic danger' standard has no bearing on the outcome of this case, and the parties agree that Article III standing should be assessed under a single standard with respect to all of the plaintiff's claims."), *rev'd sub nom.* *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 122 (2d



plaintiff's creative pleading,<sup>288</sup> or an unintentional effect of the complexity of the doctrine.<sup>289</sup> Regardless of the reason, courts increasingly combine elements of the doctrines in setting out analytical approaches and refer to cases that explain one particular strain of the doctrine to decide issues pertaining to other strains of the doctrine.<sup>290</sup> This occurs regardless of the courts' views of the substance of the doctrine. For example, despite disagreeing radically on whether fear may constitute cognizable injury, both the *White* court and Judge Gilman, dissenting in *ACLU*, offer unified approaches.<sup>291</sup> Courts' tendencies and preferences are clear. This Note follows them.

### c. What Unified Approach?

#### (1) Threshold Argument: Why not White?

The *White* court's changes to the doctrine of fear-based standing should be rejected by courts considering arguments for standing predicated on fear-based injury. Its approach is too substantial a departure from previous case

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Cir. 2011), *reh'g en banc denied*, \_\_\_ F.3d \_\_\_, No. 09-4112-cv, 2011 WL 4381737 (2d Cir. Sept. 21, 2011).

288. See *McConnell*, 646 F. Supp. 2d at 657 (describing plaintiffs' argument as invoking *Laidlaw* in support of cognizing alleged chilling effect injury), *rev'd sub nom.* *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 122 (2d Cir. 2011), *reh'g en banc denied*, \_\_\_ F.3d \_\_\_, No. 09-4112-cv, 2011 WL 4381737 (2d Cir. Sept. 21, 2011).

289. Cf. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (suggesting a similarity between pre-enforcement fear and alleged chilling effect injury); *Clapper*, 638 F.3d at 133 ("Having accepted the truthfulness of the plaintiffs' declarations for purposes of the summary judgment motion, the government cannot now dispute whether the plaintiffs genuinely fear being intercepted. . . . Thus, we have little doubt that the plaintiffs have satisfied the injury-in-fact requirement."). The Second Circuit, in accepting the plaintiffs' allegations about the harms that they suffered (fear and economic costs), also accepted that these harms constituted injury-in-fact for the purposes of standing. That is, it conflated a *factual* question (whether the plaintiffs were afraid) with a *legal* one (whether the plaintiffs' fear constituted injury).

290. See, e.g., *Amnesty Int'l USA*, 646 F. Supp. 2d at 649–57 (analyzing arguments for alleged chilling effect and pre-enforcement fear injuries), *rev'd sub nom.* *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 122 (2d Cir. 2011), *reh'g en banc denied*, \_\_\_ F.3d \_\_\_, No. 09-4112-cv, 2011 WL 4381737 (2d Cir. Sept. 21, 2011).

291. See *White v. United States*, 601 F.3d 545, 553–54 (6th Cir. 2010) (offering a restrictive unified analytical approach to arguments for the cognizability of alleged fear-based injury); *ACLU v. NSA*, 493 F.3d 644, 702 (6th Cir. 2007) (Gilman, J., dissenting) (offering a permissive unified analytical approach to arguments for the cognizability of alleged fear-based injury).

law. Since *Babbitt* and *Laird*, courts have tried to assess and account for the complexities of alleged fear-based injuries, and have recognized that, while many alleged injuries are too speculative to be justiciable, some are not.<sup>292</sup> *White* may advocate uniformity, but it is not a uniformity of a single rule distilled from the various strains of a doctrine. It is the uniformity left by the elimination of the doctrine.

*White*'s treatment of alleged fear-based injuries to First Amendment rights is more problematic. Fear-based standing doctrine prior to *White* recognized the uniqueness of First Amendment rights and their warranting special protections.<sup>293</sup> *White* eliminates these protections<sup>294</sup> and treats such claims with the same, if not more, severity with which it would treat fear of aesthetic injury, for example. It is not the purpose of this Note to offer an extended defense of the First Amendment and argue for the distinctive character and heightened importance of the rights that it protects. But, given their broadly accepted importance, this Note is unwilling to deny them well-established protections.<sup>295</sup>

## (2) Adapting the Pre-White Doctrine

The framework proposed above adopts the core values of the pre-*White* doctrine. As discussed, it draws from existing, pre-*White* analytical approaches to fear-based standing. It incorporates features common to

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292. See, e.g., *Meese v. Keene*, 481 U.S. 465, 473 (1987) (finding a cognizable chilling of First Amendment rights in the government's classification of films that Keene desired to show as political propaganda).

293. See, e.g., *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1129 (9th Cir. 1996) ("The only exception to this general rule [non-cognizability of chilling effects] has been the relaxed standards for overbreadth facial challenges involving protected speech. In these First Amendment cases, the Supreme Court has recognized 'chilling' effect as an adequate injury for standing . . ." (citations omitted)).

294. See *White*, 601 F.3d at 554 ("[W]here a plaintiff seeks injunctive or declaratory relief to remedy a First Amendment violation, a subjective fear of chilling will not suffice for standing absent a real and immediate threat of future harm.").

295. Cf. *Michelman*, *supra* note 19, at 110 (emphasizing the harm of chilling effects and arguing against restrictive approaches to standing in a surveillance context); *Miller*, *supra* note 19, at 1069–71 (proposing an approach more permissive than the one advocated by this Note, namely, that *Laidlaw*'s "reasonable fear" test be applied more broadly, to Fourth Amendment surveillance injury arguments). To be sure, both *Michelman* and *Miller* advocate approaches that are more permissive than the one that this Note proposes and urge special consideration of Fourth Amendment rights, which the case law has not emphasized. Nonetheless, arguments—even those that are primarily theoretical—for the expansion of fear-based standing underscore the importance of the rights presently—or previously, given *White*—protected by the doctrine.

analytical approaches for all three strains of fear-based standing doctrine. The most common feature of these approaches is that subjective fear is not cognizable as injury without an objective, confirmatory element.

The proposed framework also follows this approach. But it modifies the approach by emphasizing evidentiary showings and by allowing lesser evidentiary showings to be cognizable if a grave harm is threatened. Evidentiary showing requirements appear throughout the case law.<sup>296</sup> The proposed framework does not so much innovate here as emphasize a sometimes overlooked aspect of the doctrine.

The proposed framework's most novel aspect—its alternative means of establishing reasonable fear by allowing a showing of less evidence if a grave threat is involved—also develops out of existing approaches but applies their values to all types of fear-based standing to enhance the goal of uniformity. The proposed framework extends the principle that underlies two distinct strains of fear-based standing—First Amendment chilling effects and pre-enforcement fears—namely, that threats to certain rights are sufficiently grave that they merit additional protection in the form of increased cognizability as injury, to fear-based standing generally. Current doctrine grants cognizability to chills of First Amendment rights and pre-enforcement fear of violations of First Amendment rights while it denies cognizability to chills of other rights and pre-enforcement fears of violations of other rights because it views threats to First Amendment rights as particularly grave and these rights as worthy of increased protection.<sup>297</sup> The proposed framework extends this reasoning. When grave harm is threatened, the framework grants increased protections. These protections do not, however, include cognizing the chilling of the exercise of other, non-First Amendment rights or pre-enforcement fear of the violations of other rights, but applying the principle of increased protection in the face of grave harms to anticipatory harm injury.

### V. Conclusion

The doctrine of fear-based standing is an important justiciability doctrine. It operates at the limits of more general standing doctrine and has the potential to create standing for a plaintiff whose claims might seem—to one unfamiliar with the doctrine—to run the risk of being too attenuated or

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296. See, e.g., *Meese*, 481 U.S. at 473–74 (noting that Keene's affidavits sufficiently supported his argument for alleged chilling effect injury).

297. See *ACLU v. NSA*, 493 F.3d 644, 660–61 (6th Cir. 2007) (Batchelder, J.) (discussing courts' First Amendment chilling effect jurisprudence).

speculative to constitute injury-in-fact. This Note has shown, however, that the doctrine of fear-based standing, despite the fact that courts have considered it often since the early 1970s, has not yet coalesced into a fixed set of rules or standards. To be sure, at first glance, aspects of it seem settled—subjective chills are not cognizable as injury—but closer examination has shown that, if the doctrine is settled in any way, it is only at the broadest, most general level.

Further, the doctrine is not content to remain in a fluid state. Two trends have developed in recent years. Since 2000, one trend has pointed toward the liberalization of fear-based standing rules of decision, as they currently exist and toward the cognizability of fear of future harm as injury without a need or much need for confirmation. Since 2010, there has been a divergent trend that rejects the doctrine of fear-based standing and would deny cognizability to alleged fear-based injuries unless they are independently cognizable as some other type of injury accepted as cognizable.

In view of this uncertainty in the doctrine, to reject *White*'s elimination of the doctrine and to guide courts as they address arguments for fear-based standing, this Note has offered a proposed framework. This framework draws together the best aspects of fear-based standing doctrine as they have developed in potentially distinct strains of the doctrine and applies them to all aspects of the doctrine. Under it, subjective fear is cognizable as injury if it is reasonable. And to demonstrate reasonableness, a plaintiff must produce sufficient evidence to demonstrate the existence of the feared harm.

