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# Psychological Harm and Constitutional Standing

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## INTRODUCTION

When a 21-year-old man was shot and killed by the Los Angeles police in 2008, his family members sued the city.[1] They claimed that the county coroner had failed to notify the family of their relative's death in a timely fashion and prevented them from burying him in accordance with their religion, causing the family members to suffer emotional pain.[2] The U.S. Court of Appeals for the Ninth Circuit held in 2014 that the family members had standing to bring this claim—not as representatives of the man's estate, but on their own behalf—since they had suffered "emotional harm (injury in fact)."[3]

In 1995, the D.C. Circuit reviewed a suit brought by the Humane Society against the Secretary of the Interior for exempting an Asian elephant from restrictions on transferring certain endangered species abroad.[4] One of the plaintiffs' claims was that they would no longer be able to visit the elephant at the zoo—a state of affairs that had caused them to "suffer[] severe distress," including "sleeplessness, depression, and anger."[5] The court responded that "general emotional 'harm,' no matter how



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1 Chaudhry v. City of Los Angeles, 751 F.3d 1096 (9th Cir. 2014). The family alleged that 21 days had elapsed between their relative's death and the notification of his family. *See id.* at 1100.

2 *Id.* at 1100, 1109.

3 *Id.* at 1109.

4 Humane Soc'y of the U.S. v. Babbitt, 46 F.3d 93 (D.C. Cir. 1995).

5 *Id.* at 98.

deeply felt, cannot suffice for injury-in-fact for standing purposes."[6] The court ultimately held that the plaintiffs lacked standing.[7]

Individual Catholics and a Catholic advocacy organization in San Francisco challenged San Francisco's adoption of a resolution criticizing the Catholic Church's stance on adoption by same-sex couples.[8] The "[p]laintiffs allege[d] that their 'Sacred Scripture' 'presents homosexual acts as acts of grave depravity'" and that "the resolution conveys a government message of disapproval and hostility towards their religious beliefs," a message that portrayed them as "outsiders, not full members of the political community."[9] The Ninth Circuit found in 2010 that the plaintiffs had standing because they had suffered "spiritual or psychological harm."[10]

These cases differ in many ways, but they all present the question of whether psychological harm can or should serve as a basis for constitutional standing. The Supreme Court has interpreted Article III's "case or controversy" language to impose certain limitations on the class of plaintiffs whose claims can be heard by federal courts.[11] An especially important limitation is the requirement of "injury-in-fact." To have constitutional standing, a plaintiff must show an "invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'"[12] This injury must, in turn, be "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[13]

The injury-in-fact requirement—along with standing doctrine more broadly—has been justified on the grounds that it promotes the separation of powers by restraining the federal courts in relation to the legislative and executive branches of government, including by protecting the executive branch's distinctive enforcement role;[14] that it prevents the federal courts

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[6] *Id.* The D.C. Circuit stated, however, that "no court has yet considered whether an emotional attachment to a particular animal (not owned by a plaintiff) based upon the animal being housed in a particular location could form the predicate of a claim of injury." *Id.*

[7] The D.C. Circuit noted that "it is difficult for us to see how the [Humane] Society's injury claim may be brought within standing precedent" but concluded that even if the plaintiff could show injury, it could not satisfy the other aspects of the standing inquiry. *Id.* at 99.

[8] Catholic League for Religious & Civil Rights v. City & County of San Francisco, 624 F.3d 1043 (9th Cir. 2010).

[9] *Id.* at 1052-53.

[10] *Id.* at 1050.

[11] *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 559-60 (1992).

[12] *Id.* at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

[13] Allen v. Wright, 468 U.S. 737, 751 (1984).

[14] *See, e.g.*, *id.* at 750, 761.

from being flooded with claims;[15] and that it ensures an adversarial presentation of legal issues.[16] The injury-in-fact requirement has been challenged just as vociferously on the grounds that, for example, it is applied in an arbitrary manner that merely reflects judges' substantive views of a case's merits; it unduly disfavors beneficiaries of government regulatory programs; and it lacks a genuine basis in Article III.[17]

Love it or hate it, the injury-in-fact requirement has become an increasingly significant gatekeeper to the federal courts over the past several decades. This article takes up the question of whether and how psychological harm can and should open these gates. Thus far, the Supreme Court has not directly analyzed the cognizability of psychological harm as injury-in-fact.[18] In the recently decided case *Spokeo v. Robins*, the Supreme Court confirmed that "intangible injuries can nevertheless be concrete" and cognizable as Article III injury-in-fact.[19] But the question remains whether and when psychological harms—which are not equivalent to the harms involving the dissemination of inaccurate information at issue in *Spokeo*—can constitute Article III injury as well.

The idea that certain intangible injuries can count for Article III standing is by no means novel. The Supreme Court has stated in the past that "non-economic injury" is cognizable;[20] in particular, the Court has shown a willingness to recognize injury to aesthetic and conservational interests,[21] a "spiritual stake in First Amendment values,"[22] the "inability to compete on an

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[15] *See* Amnesty Int'l USA v. Clapper, 638 F.3d 118, 132 n.15 (2d Cir. 2011) ("Standing has been said to serve a number of other values, as well, including: promoting judicial efficiency and effectiveness by preventing the courts from being overwhelmed with cases where plaintiffs have only an ideological stake . . . ."), *rev'd*, 133 S. Ct. 1138 (2013).

[16] *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); Baker v. Carr, 369 U.S. 186, 204 (1972).

[17] For a helpful account of such critiques, see Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 466, 501-07 (2008); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221-22 (1988); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1168 (1993); Cass R. Sunstein, *What's Standing After* Lujan*? Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 186-91 (1992).

[18] *Cf.* Awad v. Ziriax, 670 F.3d 1111, 1121 (10th Cir. 2012) ("[T]he Supreme Court has not provided clear and explicit guidance on the difference between psychological consequence from disagreement with government conduct and noneconomic injury that is sufficient to confer standing.").

[19] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

[20] *See Valley Forge*, 454 U.S. at 486; Ass'n of Data Processing Serv. Orgs., Inc. v. Camp (*ADAPSO*), 397 U.S. 150, 154 (1970).

[21] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183 (2000); *ADAPSO*, 397 U.S. at 154.

[22] *ADAPSO*, 397 U.S. at 154.

equal footing,"[23] and—possibly—stigma or indignity as bases of Article III injury.[24] Recognition of these intangible injuries leaves open the question of whether psychological effects on plaintiffs, stemming from either intangible or tangible injuries, could ground a viable injury-in-fact claim. But it is worth noting that the harmful nature of these intangible injuries seems to stem at least partially from their psychological effects on plaintiffs. All this suggests that the Supreme Court has not precluded the recognition of psychological harm as injury-in-fact.

At the same time, the Supreme Court has indicated that the "psychological consequence presumably produced by observation of conduct with which one disagrees"[25] cannot constitute injury-in-fact, and the Court has been especially concerned with preventing the federal courts from becoming forums for the adjudication of the "generalized grievances" that could arise when any citizen is psychologically affected by government action.[26] In addition, the Court's statement that a future injury must be "certainly impending"[27] raises questions about whether and when the particular emotions of fear or anxiety about future harm could count as injury-in-fact. Some Justices had previously expressed an interest in going further in resisting psychological harm as a basis for standing; in an Establishment Clause case, Justice Scalia wrote a concurrence, joined by Justice Thomas, urging the Court to reject "Psychic Injury" as injury-in-fact, and objecting to the "conceptualizing of injury in fact in purely mental terms."[28]

Accordingly, the Supreme Court's confirmation in *Spokeo* that intangible harm may constitute injury-in-fact renders all the more salient the issue of whether, and under what conditions,

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[23] Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993).

[24] *See* Allen v. Wright, 468 U.S. 737, 755-56, 757 n.22 (1984). The Court in *Allen v. Wright* indicated that a plaintiff could assert a claim of stigmatic injury based on being "personally subject to discriminatory treatment," *id.* at 757 n.22 (citing *Heckler v. Matthews*, 465 U.S. 728, 739-40 (1984)), but that the plaintiffs in *Allen* had alleged only an "abstract stigmatic injury," which was not judicially cognizable. *See id.* at 755-56; *see also infra* Section II.A.3.

[25] *Valley Forge*, 454 U.S. at 485.

[26] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 573-74 (1992); *Valley Forge*, 454 U.S. at 483.

[27] Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1143 (2013) (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)). *Clapper* left open the possibility that standing could be found based on a "substantial risk" that the anticipated harm would occur. *Id.* at 1150 n.5; *see also* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014) ("An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a '"substantial risk" that the harm will occur.'" (quoting *Clapper*, 133 S. Ct. at 1147, 1150 n.5)).

[28] Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 619-20 (2007) (Scalia, J., concurring).

psychological effects on plaintiffs could constitute injury-in-fact.[29] As of now, it seems that the Supreme Court has left open the door to claims of psychological harm as a general matter, while refusing to count as injury-in-fact certain *types* of psychological harm, such as harms that are overly abstract or "hypothetical" or insufficiently "particularized" or "concrete."[30] Beyond these broad statements, there is a lack of clarity about the circumstances under which psychological harm could create standing, and a dearth of legal analysis as to the circumstances, if any, under which psychological harm *should* create standing. Lower federal courts have offered a variety of illuminating and divergent approaches to psychological harm's place in standing doctrine. However, these courts generally do not explicitly tackle the conundrums raised by the possibility of recognizing psychological harm as injury-in-fact or articulate criteria by which cognizable claims of psychological harm could be distinguished from noncognizable ones. Courts seem caught between the recognition that psychological harm "in fact" causes genuine damage to citizens and may also be an aspect of already-established Article III injuries, on the one hand, and trepidation about the possibility of opening the floodgates to hurt feelings of every variety, on the other.

Against this background, the current article provides an in-depth analysis of the role of psychological harm in constitutional standing doctrine. It argues for the explicit recognition of psychological harm as injury-in-fact, coupled with restrictions on the cognizability of this type of harm. More specifically, this article contends that psychological harm should be cognizable as injury-in-fact for the following reasons. First, recognizing psychological harm would reflect an acknowledgement that this form of harm can genuinely and seriously affect citizens' lives—or that psychological

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[29] In fact, during oral argument for *Spokeo v. Robins* in November 2015, some questioning from the Justices appeared to contemplate the possibility that psychological or emotional harm could be an Article III injury. *See* Transcript of Oral Argument at 6, 9, Spokeo, Inc. v. Robins, No. 13-1339 (Nov. 2, 2015) (Justice Breyer to Spokeo's counsel: "You said it could be psychic harm, there could be economic harm, there could be all different kinds of harm." Justice Kagan: "if somebody did it to me, [i.e., disseminated false information about me] I'd feel harmed"). Neither of these Justices clearly endorsed the suggestion that psychological harm sufficed for injury-in-fact, and the term "feel" in Justice Kagan's statement does not necessarily denote psychological harm. But the questions seemed to treat as a live possibility the notion that mental harm could form a predicate for standing. Notably, in his amended complaint, respondent Thomas Robins had asserted that he suffered "actual harm in the form of anxiety, stress, concern, and/or worry about his diminished employment prospects." Amended Complaint at 8, Robins v. Spokeo, No. 10-cv-5306 (C.D. Cal. Feb. 17, 2011) (ECF No. 40).

[30] *Clapper*, 133 S. Ct. at 1147; *Lujan*, 504 U.S. at 560-61; Allen v. Wright, 468 U.S. 737, 750 (1984).

harm may be "concrete."[31] Second, such recognition would accord with one of the bases for constitutional standing doctrine: the adverse presentation of legal issues in a way that enhances comprehension of the stakes of judicial action. Since the specific factual dimensions of a legal dispute include litigants' psychological experiences, recognizing psychological harm as injury-in-fact can deepen and enrich the adjudicative process. Third, certain nonpecuniary or nonphysical injuries such as "aesthetic injury" and a "spiritual stake in First Amendment values" have been accepted as injury-in-fact, and it would be arbitrary to accept these injuries while excluding psychological harm, especially since the injuries caused by these intangible harms are frequently felt primarily in the psychological realm. In light of these considerations, justifications for standing doctrine based on the separation of powers and the limited role of the federal judiciary should motivate not a rejection of psychological harm as injury-in-fact, but a focus on how courts can differentiate cognizable from noncognizable claims.

Accordingly, this article argues, psychological harm ought to be cognized as injury-in-fact for Article III purposes when two conditions are met. First, the harm must be a response to the alleged invasion of a legally protected interest (constitutional, statutory, or common law). Second, there must be a sufficient nexus between the alleged legal violation and the circumstances of the particular plaintiff, so that it is reasonable to think that such a plaintiff would be especially likely to suffer psychological harm in the situation at hand.

The first condition is meant to ensure that courts can distinguish in a principled way between psychological harm resulting from actions or circumstances that the law censures from those that the law does not. For instance, psychological harm resulting from segregated public school systems would meet this criterion, while a person's devastation at not being able to attend a segregated public school, however deeply felt, would not. The second condition involves a particularity inquiry that draws on principles of tort law—an area in which courts have important reserves of experience dealing with psychological harm. In adjudicating whether there is a sufficiently tight nexus between the legal violation and the specific plaintiff alleging psychological harm, courts could consider such issues as the relationship between the plaintiff and another entity (such as a person or an animal) whose injuries give rise to the plaintiff's

[31] In *Spokeo*, the Supreme Court emphasized the need for injury-in-fact, even intangible injury, to be "concrete." *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

psychological harm, the plaintiff's physical proximity to the source of psychological harm, and the longevity of the plaintiff's connection to the situation from which the harm arises. For example, the family members of the man killed in Los Angeles would be more likely to state a cognizable claim of psychological harm than an unrelated individual, and the Catholic advocacy group challenging San Francisco's ordinance would have a better chance of showing injury-in-fact if the particular plaintiffs lived in San Francisco. The particularity inquiry responds both to evidentiary concerns about how plaintiffs can show they have suffered psychological harm and to the issue of imposing a limiting principle on the cognizability of psychological harm.

More generally, the article takes existing standing doctrine seriously while promoting innovation within that framework. It does not foreclose broader critiques of the injury-in-fact requirement, such as the view that the standing inquiry is not independent of the question of whether a plaintiff has a cause of action.[32] Indeed, the article marshals certain critiques of the injury-in-fact requirement to support its claims. For example, the article responds to the objection that its proposed particularity inquiry would license an undue expansion of judicial discretion by arguing that the injury-in-fact doctrine already asks courts to exercise discretion; the question is whether courts will do so in a clear and structured way. At the same time, this article remains tethered to standing doctrine as it has developed over the past several decades, in an effort to advance a proposal grounded in the case law. So, for instance, the article turns to previously decided cases for insight and synthesizes certain aspects of current doctrine while downplaying other strands. Engagement with existing standing jurisprudence is meant to advance a kind of "reflective equilibrium"[33] between courts' approaches to the topic and more general normative principles.

Many scholars have discussed the origins and development of current Article III standing doctrine, especially the role of

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[32] *See, e.g.*, Fletcher, *supra* note 17, at 232-33, 290-91 (arguing that "the nature and degree of injury . . . cannot be seen as a merely 'factual' question. Rather, it must be seen as part of the question of the nature and scope of the substantive legal right on which plaintiff relies," and "[i]n seeking to determine whether a particular plaintiff has standing, we should ask, as a question of law on the merits, whether the plaintiff has the right to enforce the particular legal duty in question"); Sunstein, *supra* note 17, at 166 ("[A]n 'injury in fact' . . . is neither a necessary nor a sufficient condition for standing. The relevant question is instead whether the law—governing statutes, the Constitution, or federal common law—has conferred on the plaintiffs a cause of action.").

[33] For a classic use of the term "reflective equilibrium," see JOHN RAWLS, A THEORY OF JUSTICE 43-44 (2009). The term is not used here in any technical sense.

"injury-in-fact."[34] Frequently, these writers have criticized courts' inconsistent treatment of standing cases. While such articles offer rich analyses of constitutional standing doctrine and its difficulties, they do not concentrate on the issue of psychological harm as injury-in-fact—the main purpose of this article. Other pieces have dealt with concepts related to psychological harm, such as expressive harm, as part of the merits of a case rather than as standing questions.[35] While their insights can help to inform the analysis here, this article instead focuses on the question of how plaintiffs can open the federal courthouse doors, not what they may argue once they arrive inside. Within the literature on constitutional standing doctrine, a smaller number of contributions have raised issues more specifically related to psychological harm, including expressive harm, stigmatic harm, and standing based on fear of future events.[36] This article

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[34] *See, e.g.*, Elliott, *supra* note 17; F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275 (2008); Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943 (2008). William Fletcher and Cass Sunstein have famously criticized courts for instituting a hurdle of "injury-in-fact" beyond a focus on "the nature and scope of the substantive legal right on which plaintiff relies" or the requirement that plaintiffs allege a viable cause of action. *See* Fletcher, *supra* note 17, at 232-33; Sunstein, *supra* note 17, at 166-67. Other scholars have offered analyses that aim to provide more consistent justifications for the Court's standing doctrine. Eugene Kontorovich, for example, has presented an account of standing as a mechanism to prevent "inefficient disposition of constitutional entitlements." Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1664, 1666 (2007). Richard Re has suggested that courts grant standing on a relative basis, depending on which plaintiffs have the most at "stake in obtaining a particular remedy." Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1204 (2014). Richard Fallon has recently provided a rich discussion of standing in the Roberts Court against the background of the doctrine's historical development. *See* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1064-67 (2015).

[35] *E.g.*, Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 351 (1996) (discussing the role of emotion in criminal law and noting that the "expressive theory of punishment" conceives of both criminal actions and criminal punishment as expressing certain societal values and meanings); Corinne Blalock, Hollingsworth v. Perry*: Expressive Harm and the Stakes of "Marriage,"* 8 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 217 (2012) (analyzing the topic of "expressive harm" in the context of legal disputes over same-sex marriage).

[36] *See, e.g.*, Carl H. Esbeck, *Unwanted Exposure to Religious Expression by Government: Standing and the Establishment Clause*, 7 CHARLESTON L. REV. 607 (2013) (discussing standing for plaintiffs bringing Establishment Clause–based claims grounded on unwanted exposure to religious expression); Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 448 (2007) (arguing that stigmatic harm should be recognized as a basis for Article III standing); Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in* Clapper v. Amnesty International USA *and* City of Los Angeles v. Lyons, 23 WM. & MARY BILL RTS. J. 127, 137 (2014) (providing a critique of some key standing cases, with a focus on cases that speak to the cognizability of future injury, in light of the federal courts' role in protecting rights not adequately vindicated by majoritarian political processes); Seth F. Kreimer, *"Spooky Action at a Distance": Intangible Injury in Fact in the Information Age*, 18 U. PA. J. CONST. L. 745 (2016) (investigating the relationship between standing law's treatment of intangible injury, including aesthetic injury and spiritual injury, and the status of harms stemming from the use or misuse of information); Jonathan

draws on several illuminating points made in these contributions while going further by focusing squarely on psychological harm and standing, widening the lens to consider a broader range of cases and doctrines (especially from the federal circuit and district courts),[37] and advancing a proposal for courts to distinguish cognizable from noncognizable claims.

Part I of this article begins by discussing the definition of psychological harm and its relationship to concepts such as aesthetic, expressive, and reputational injury. The article then moves on to a critical analysis of existing doctrine on psychological harm and constitutional standing, highlighting live questions in the courts' treatment of this subject and indicating the need for a clearer, more consistent approach. Part II presents a framework for the treatment of psychological

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Krieger, *Emotions and Standing for Animal Advocates After* APSCA v. Ringling Bros. & Barnum & Bailey Circus, 22 LAW & INEQ. 385 (2004) (arguing for standing based on emotional injury in cases involving the treatment of animals); William P. Marshall & Gene R. Nichol, *Not a* Winn*-Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 215, 232 (2011) (arguing that "protecting taxpayers from the 'psychic' harm of being compelled to support religion to which they do not adhere is a central substantive Establishment Clause concern"); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 513-15 (1993) (discussing the view that racially conscious redistricting could give rise to constitutionally cognizable expressive harms); Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 U.C.L.A. L. REV. 1333 (2000) (analyzing standing in the animal welfare context); Daniel J. Austin, Comment, *How to Reconcile the Establishment Clause and Standing Doctrine in Religious Display Cases with a New Coercion Test*, 83 MISS. L.J. 605 (2014) (proposing a test to evaluate standing to challenge religious displays as violations of the Establishment Clause); Note, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313 (1999) (analyzing standing in cases of expressive harm and suggesting inconsistencies in the Supreme Court's treatment of this subject); Brian Calabrese, Note, *Fear-Based Standing: Cognizing an Injury-in-Fact*, 68 WASH. & LEE L. REV. 1445 (2011) (investigating the topic of standing based on fear, including "chilling effect" injury, fear about enforcement of a statute, and fear based on anticipated harm); Andrew Meyer, Comment, Barnes-Wallace v. City of San Diego*: "Psychological Injury" and Its Effect on Standing*, 44 J. MARSHALL L. REV. 507 (2011) (arguing that the Supreme Court should clarify that psychological injury does not suffice for standing); Ashley C. Robson, Note, *Measuring a "Spiritual Stake": How to Determine Injury-In-Fact in Challenges to Public Displays of Religion*, 81 FORDHAM L. REV. 2901 (2013) (considering the standing issues raised by challenges to public displays of religious symbols, as well as the standards used to adjudicate such claims); *see also* Andy Hessick, *Zivotofsky and Spokeo, by Andy Hessick*, NOTICE & COMMENT: A BLOG FROM THE YALE J. ON REG. (May 18, 2015), http://www.yalejreg.com/blog/zivotofsky-and-spokeo-by-andy-hessick [http://perma.cc/5ZM5-SP4D] (commenting on whether emotional harm could suffice for standing in the context of *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015), a challenge to the State Department's decision not to put "Israel" on the passport of Zivotofsky, an American citizen born in Jerusalem); William Baude, *The Legal Power of 'Standing,'* N.Y. TIMES (May 14, 2015), http://www.nytimes.com/2015/05/14/opinion/the-legal-power-of-standing.html [http://perma.cc/74TE-QQG4] (discussing the issue of whether Zivotofsky had standing on the basis of expressive harm).

[37] See the Appendix for a number of cases that shed light on the topic of psychological harm and standing, as well as cases on related types of harms (for example, aesthetic and reputational harm).

harm as injury-in-fact. It describes both the reasons for courts to cognize psychological harm explicitly and the need for limitations on psychological harm's cognizability. Part II also fleshes out the proposal by considering the relationship between the article's approach to injury-in-fact and other threshold matters governing plaintiffs' access to the federal courts, including the causation and redressability prongs of constitutional standing doctrine; the question of whether the article's proposal would render psychological harm superfluous because the violation of a legally protected interest would be the feature that actually created standing; and the issue of whether the article's proposal licenses an undue expansion of judicial discretion.

## I. PSYCHOLOGICAL HARM AS INJURY-IN-FACT: THE CURRENT LANDSCAPE

### *A. Defining Psychological Harm*

How should we understand the term "psychological harm" in the context of constitutional standing doctrine? Neither courts nor scholarly commentators have engaged deeply with the question of what counts as psychological harm or how psychological harm relates to concepts such as expressive, emotional, or aesthetic harm, or the ideas of offense or insult. The absence of any accepted understanding adds to the difficulty of pinning down the doctrine in this area and identifying points of agreement and disagreement among courts.

For instance, courts that decline to cognize injuries related to plaintiffs' mental or emotional states sometimes refer to "purely psychological"[38] harm or "mere psychological discomfort,"[39] while courts that cognize psychological harm drop adjectives like "purely" and "mere."[40] What then is the distinction between "mere" psychological harm and psychological harm per se, and what might be needed in addition to "mere" psychological harm in order for injury-in-fact requirements to be satisfied? Courts frequently group together psychological

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[38] *E.g.*, United States v. All Funds on Deposit with R.J. O'Brien & Assocs., 783 F.3d 607, 616 (7th Cir. 2015); Family & Children's Ctr. v. Sch. City of Mishawaka, 13 F.3d 1052, 1058 (7th Cir. 1994).

[39] *E.g.*, Freedom From Religion Found., Inc. v. Zielke, 845 F.2d 1463, 1468 n.3 (7th Cir. 1988); *see also* Humane Soc'y of the U.S. v. Hodel, 840 F.2d 45, 52 (D.C. Cir. 1988) ("We therefore agree with the district court that what it terms the 'mere emotional injuries' in this case are noncognizable.").

[40] *E.g.*, Catholic League for Religious & Civil Rights v. City & County of San Francisco, 624 F.3d 1043, 1050 (9th Cir. 2010); Clayton v. White Hall Sch. Dist., 875 F.2d 676, 679 (8th Cir. 1989).

harm and other forms of noneconomic or intangible injury—such as aesthetic, emotional, or stigmatic harm.[41] But how does psychological harm relate to aesthetic, emotional, or stigmatic injuries, and can psychological harm on its own suffice for standing?

The thorny terminological landscape makes it difficult to tell whether courts are talking about the same phenomenon when they refer to various harms using the term "psychological," or whether they are talking past one another. These definitional issues are further complicated by the fact that the terms "psychological harm" and, even more strongly, "psychic injury" sometimes seem to be used primarily to dismiss the reality of a harm or to contrast a plaintiff's claims with an ostensibly more legitimate harm.[42] The definitional issue, in other words, is not merely terminological; it speaks to the substantive question of what the "state of the law" on psychological harm and constitutional standing actually is.

This article defines psychological harm as *mental or emotional suffering or distress*. This definition is intended to be broad and to encompass a wide variety of psychological reactions, including fear, sorrow, humiliation, and anger. This approach reflects a preference for courts to limit the cognizability of psychological harm as a matter of substantive law, rather than as a matter of definition. For example, the definition of psychological harm presented here includes a sense of offense or insult—harms that courts are especially wary of cognizing as injury-in-fact.[43] But courts need not cognize all feelings of insult or offense; rather, they may draw distinctions between types of psychological harm that count as injury-in-fact and types of

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[41] *E.g.*, Denney v. Deutsche Bank AG, 443 F.3d 253, 265 (2d Cir. 2006) ("[A]esthetic, emotional, or psychological harms also suffice for standing purposes."); *see also* Coal. for the Env't v. Volpe, 504 F.2d 156, 167 (8th Cir. 1974) (finding standing for proponents of an effort to enjoin a new development because plaintiffs stood to lose open space and natural environment, the viewing of which "provides aesthetic and psychological benefit").

[42] *See* Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 619, 629, 636 (2007) (Scalia, J., concurring) (arguing that "Psychic Injury" is "a contradiction of the basic propositions that the function of the judicial power 'is, solely, to decide on the rights of individuals,' and that generalized grievances affecting the public at large have their remedy in the political process" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803))); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) ("[A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."); Humane Soc'y of the U.S. v. Babbitt, 46 F.3d 93, 98 (D.C. Cir. 1995) ("[G]eneral emotional 'harm,' no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes.").

[43] *See, e.g.*, Chaplaincy of Full Gospel Churches v. U.S. Navy (*In re* Navy Chaplaincy), 534 F.3d 756, 763 (D.C. Cir. 2008).

harm that do not, without asserting that the latter types are simply not forms of psychological harm. The purpose of taking a broad approach to the definition of "psychological harm" is to avoid miring the courts in contentious arguments about the definition of "psychological harm" as the legally operative step in the analysis. Such arguments could provoke the criticism that the courts' very definitions are arbitrary and suspect. Further, if courts had to restrict the definition of psychological harm partially on the basis of whether the injury was cognizable, they might create a technical sense of "psychological harm" unmoored from any nonlegal understanding of the phenomenon.

The line between psychological harm and physical harm is not always clear-cut. For example, people may experience changed mental states as a consequence of physical injuries; mental illnesses have physical symptoms; and certain phenomena, such as lethargy and intoxication, span across mental and physical boundaries. Though this article cannot address all approaches to the relationship between psychological and physical harm, it generally focuses on psychological harm independently of any physical effects that such harm may have.

Additionally, the definition of psychological harm presented here includes emotional harm. Emotional harm is mentioned frequently in the case law,[44] sometimes in the same breath as psychological harm,[45] and this article's conclusions apply to emotional harm to the same extent that they apply to psychological harm in general. This article does not, however, make any substantive conclusions on the basis of a distinction among psychological harm, emotional harm, and mental harm. The aim is simply to devise a broad working definition of psychological harm that largely fits current invocations of the concept in the case law and provides a useful reference point for further discussion.

"Psychological injury" and "psychological harm" appear in areas of law other than the law of standing.[46] For example, the law of workers' compensation in various states deals with the question of whether and to what extent psychological injury

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[44] *E.g.*, Leibovitz v. N.Y.C. Transit Auth., 252 F.3d 179 (2d Cir. 2001); *Babbitt*, 46 F.3d at 98; Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 25 (D.D.C. 2010); Estate of Morris *ex rel.* Morris v. Dapolito, 297 F. Supp. 2d 680 (S.D.N.Y. 2004).

[45] *E.g.*, *Leibovitz*, 252 F.2d at 184; Denney v. Deutsche Bank AG, 443 F.3d 253, 265 (2d Cir. 2006).

[46] For example, William J. Koch writes that "[p]sychological injuries are stress-related emotional conditions resulting from real or imagined threats or injuries that may become the subjects of personal injury litigation, workers compensation claims, criminal injury compensation, other disability claims, or human rights tribunals." WILLIAM J. KOCH ET AL., PSYCHOLOGICAL INJURIES: FORENSIC ASSESSMENT, TREATMENT, AND LAW 3 (2006).

is compensable.[47] Psychological injury is a factor (though not a necessary one) used in assessing hostile work environment claims under Title VII,[48] and a victim's suffering from "extreme psychological injury" is a ground for upward departure under the U.S. Sentencing Guidelines.[49]

Psychological injury in these contexts often refers to a relatively grave form of psychological damage—one sufficient to meet a threshold of eligibility for legal compensation or redress.[50] For example, one treatise defines psychological injury as

> the result of exposure to an incident that is mentally and emotionally traumatic because the incident presents a threat to the plaintiff's life: to health, to control over one's life, to peace of mind and enjoyment of life, or even the threat of death itself. The individual is reminded of weaknesses and vulnerability and the lack of control over catastrophic events that can happen in an instant, without any warning, and that can totally alter or end a person's life.[51]

This article's proposed approach for evaluating whether psychological harm should confer Article III standing does not require psychological harm to be grave in this way. Instead, the article's approach calls for courts to consider the harm's gravity alongside other relevant factors, such as the harm's longevity and frequency, in assessing the cognizability of psychological harm. Gravity may weigh in favor of cognizability, but it does not constitute an inflexible threshold. This approach is intended to allow courts to make judgments about whether psychological harm counts as injury-in-fact that are predicated on a variety of relevant circumstances.[52] The article's approach also reflects

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[47] *See* Eric M. Larsson & Jean A. Talbot, *Recovery Under Workers' Compensation Statute for Emotional Injury or Disease Caused by Work-Connected Stress Without Physical Cause or Result*, *in* 45 CAUSES OF ACTION 2D 341 (2010).

[48] 1 FAIR EMPLOYMENT PRACTICES § 9:32 (2016); *see* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-23 (1993) (finding that conduct that has a serious effect on "a reasonable person's psychological well-being" is actionable as a violation of Title VII's protection against a hostile or abusive work environment, though such an effect is not required).

[49] *Extreme Psychological Injury: Policy Statement*, FED. SENT. L. & PRAC. § 5K2.3 (2015).

[50] *See* KOCH ET AL., *supra* note 46, at 3.

[51] 26 AM. JUR. PROOF OF FACTS 3d 1 (1994); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K2.3 (2015) (stating that "[n]ormally psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns"); Gerald Young & Eric Y. Drogin, *Psychological Injury and Law I: Causality, Malingering, and PTSD*, 3 MENTAL HEALTH L. & POL'Y J. 373 (2014) (discussing posttraumatic stress disorder, chronic pain, and traumatic brain injury as examples of psychological injury).

[52] See *infra* Section II.A.3 for a discussion of gravity as part of the inquiry into whether a particular instance of psychological harm counts as injury-in-fact.

the fact that the term "psychological harm" in the case law is not necessarily used to describe grave trauma.[53] More broadly, as noted above, the proposed approach emphasizes not the definition of psychological harm, but the question of which types of psychological harm can create standing. The article is not offering a theory of the nature of psychological harm; rather, it is developing a view of Article III standing that identifies certain kinds of psychological harm, and not others, as sufficient to create standing.

Another terminological point is that this article, for the sake of clarity and consistency, uses the phrase "psychological harm" rather than "psychological injury" except when quoting directly from cases or articles that mention "psychological injury." More specifically, the article uses "psychological harm" (and "emotional harm") to refer to the suffering that is allegedly undergone by the plaintiff. The article then refers to the forms of conduct that (according to plaintiffs' allegations) give rise to psychological harm as "injuries."

It is also instructive to consider the relationship between psychological harm and ideas such as "intangible," "expressive," "stigmatic," "aesthetic," and "reputational" injury or harm. Although "intangible injury" recently received attention in the Supreme Court case *Spokeo v. Robins*, the Court in *Spokeo* did not explicitly define this term, though it cited a free speech case and a free exercise case as examples of intangible injury.[54] One way to define intangible injury, and the approach that this article adopts, is to state that intangible injuries are those that are not economic or physical. This category incorporates a wide variety of injuries. Some types of injuries mentioned in the case law and scholarly literature on the topic of standing are "expressive injury," "stigmatic injury," "aesthetic injury," and "reputational injury." The following descriptions can help to structure an understanding of this nonexclusive list of intangible injuries

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[53] For example, the Sixth Circuit in 2011 found "psychological injury in fact sufficient to confer standing" when the American Civil Liberties Union (ACLU) challenged an Ohio judge's practice of hanging a poster with text including the Ten Commandments in his courtroom. ACLU of Ohio Found., Inc. v. DeWeese, 633 F.3d 424, 429 (6th Cir. 2011). It seems at least possible that ACLU members (one of whom practiced law in the judge's courtroom) did not experience severe mental or emotional trauma; at least, the court's reasoning did not draw attention to any such trauma. *Id.* The Second Circuit, in *Denney v. Deutsche Bank*, also provided no indication that the kind of psychological damage that individuals had suffered in taking action in reliance on fraudulent tax advice rose to the level of psychological injury actionable, for example, in a workers' compensation claim. *See* Denney v. Deutsche Bank AG, 443 F.3d 253, 265 (2d Cir. 2006).

[54] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (citing *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009), a free speech case, and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), a free exercise case).

(and the categories below may overlap). *Expressive injury*, following Richard H. Pildes and Richard G. Niemi, "results from the ideas or attitudes expressed . . . rather than from the more tangible or material consequences the action brings about."[55] Expressive injury frequently sends a demeaning message to the plaintiff, creating overlap between expressive and stigmatic injury.[56] *Stigmatic injury* refers to a form of treatment that "marks" the plaintiff in some way as defective, low, or unworthy of respect.[57] *Aesthetic injury* is injury to a plaintiff's opportunity to enjoy an aesthetically pleasing phenomenon.[58] *Reputational injury* can be understood as conduct that lowers the opinion of the plaintiff held by members of a relevant community for a given trait.

In light of these understandings of various forms of intangible injury, how does intangible injury relate to psychological harm? First, psychological harm might be viewed as a *type* of intangible injury—or intangible *harm*, if "harm" is used to refer to the effects of an intangible injury (just as this article uses psychological "harm" to refer to psychological effects on plaintiffs). Psychological harm is, after all, a form of noneconomic and nonphysical damage. Second, psychological harm might be viewed as a potential *effect* of intangible injury. So, for example, having one's reputation sullied may induce a negative mental or emotional reaction. On the latter account, psychological harm is not a necessary result of intangible injury, and it could also result from economic or physical injury. This article does not limit its analysis to one of these conceptions of the relationship between psychological harm and intangible injury, since the key points about this relationship are the same for the article's purposes. First, on both accounts, psychological harm is not the equivalent of intangible injury. Psychological harm might be a subset of intangible injury subject to its own constraints on cognizability, or a possible (though not necessary) consequence

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[55] Pildes & Niemi, *supra* note 36, at 506-07. Pildes and Niemi refer to "the ideas or attitudes expressed through a governmental action," but for the purposes of this article, expressive harm need not stem from government action. *Id.*

[56] *See* Note, *Expressive Harms and Standing*, *supra* note 36, at 1314 ("Expressive harms . . . are specifically concerned with the message—often a message of racial, gender, or religious inferiority—expressed by governmental action. Social meaning, defined as 'the semiotic content attached to various actions, or inactions, or statuses, within a particular context,' produces expressive harms." (footnotes omitted) (quoting Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995))). For an explanation of expressive theories in the context of criminal law, see Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594-605 (1996).

[57] *See* Healy, *supra* note 36, at 448 (citing ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963)).

[58] One judicial decision (albeit later vacated) stated that "[t]he term 'aesthetic' in ordinary usage refers to an artistic sense or a sense of beauty." Animal Legal Def. Fund v. Veneman, 469 F.3d 826, 833 (9th Cir. 2006), *vacated*, 490 F.3d 725 (9th Cir. 2007).

of intangible injury. Second, on both accounts of the relationship between psychological harm and intangible injury, there are close connections between the two concepts, such that accepting the cognizability of intangible injury raises questions about why psychological harm should not also be explicitly recognized.[59]

With this conceptual framework in mind, the next section expands on and critiques the treatment of psychological harm in current Article III standing doctrine.

## *B. The State of the Law Today*

### 1. Supreme Court Jurisprudence

Though the Supreme Court has never directly answered the question of whether and under which conditions psychological harm could count as injury-in-fact, the Court has ruled on several issues that offer clues to evaluating a claim based on psychological harm.

As an initial matter, the Supreme Court has not limited standing to those who have lost money. The Court has long accepted the general proposition that noneconomic injuries may count as injury for standing purposes,[60] and several specific types of intangible injuries have been recognized as sufficient. This section describes several such forms of injury, though it is not intended to provide an exhaustive list. These intangible injuries could theoretically be cognized without resort to any discussion of psychological harm, but it is plausible to think that they embody a concern for the influence of challenged conduct on plaintiffs' mental and emotional lives—a concern that, as discussed below,[61] supports the explicit recognition of psychological harm as injury-in-fact.

#### *a. Aesthetic Injury*

The Supreme Court has explicitly recognized harm to aesthetic interests as a legitimate Article III injury.[62] In a well-

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[59] *See infra* Section II.A.1.

[60] Ass'n of Data Processing Serv. Orgs., Inc. v. Camp (*ADAPSO*), 397 U.S. 150, 154 (1970); *see* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

[61] *See infra* Section II.A.1.

[62] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 562-63 (1992) ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose[s] of standing."); Sierra Club v. Morton, 405 U.S. 727, 734 (1972) ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."); *ADAPSO*, 397

known example, the Court found standing partially on the basis of aesthetic injury in *Friends of the Earth v. Laidlaw*, where it held that environmental groups had Article III standing to bring a challenge against operators of a wastewater treatment plant for violations of the Clean Water Act.[63] One member of the plaintiff organization alleged, in the Court's words, that

> he occasionally drove over the North Tyger River, and that it looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the facility . . . but would not do so because he was concerned that the water was polluted by Laidlaw's discharges.[64]

The Supreme Court found that this member of the organization (and others) had presented sufficient evidence of harm to their own interests to support standing.[65] Put differently, the Supreme Court found injury-in-fact based on the reduced aesthetic and recreational value that plaintiffs derived from a certain area.

*b. "Spiritual Stake" Injury*

If a government erects a religious display on public land, and a plaintiff wishes to challenge it as a violation of the Establishment Clause, how can she have standing to do so? After all, she will likely have trouble claiming that she has been monetarily or physically harmed.[66] The Supreme Court has not been unresponsive to this concern. In 1970, the Court indicated that "[a] person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause."[67] In 1968, in *Flast v. Cohen*, the Court carved

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U.S. at 154 (quoting Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 616 (1965)).

[63] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 173-74 (2000).

[64] *Id.* at 181-82.

[65] *Id.* at 183. As for the organization's standing, the Court explained that

> [a]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*Id.* at 181.

[66] For discussions of standing in an Establishment Clause context, see Esbeck, *supra* note 36, and Austin, *supra* note 36.

[67] Ass'n of Data Processing Serv. Orgs., Inc. v. Camp (*ADAPSO*), 397 U.S. 150, 154 (1970). Later, the Supreme Court emphasized that this language should not be read to suggest that "any person asserting an Establishment Clause violation possesses a 'spiritual stake' sufficient to confer standing," in the absence of exposure to

out an exception to the general rule that taxpayers have no standing, in their capacity as taxpayers, to challenge a federal statute's constitutionality.[68] Specifically, the Court held that the taxpayers in *Flast* had standing to sue the government to challenge laws authorizing the use of federal funds in ways that allegedly violated the Establishment and Free Exercise Clauses.[69] But the Court has since emphasized the narrowness of this exception.[70] Moreover, some Justices have called for the Court to reject "Psychic Injury" in Establishment Clause cases and to stop the "conceptualizing of injury in fact in purely mental terms."[71] Psychological standing doctrine in Establishment Clause cases presents, to some degree, unique issues because of the taxpayer standing exception. But this doctrine also reflects courts' broader ambivalence about cognizing harms that appear to be confined to plaintiffs' minds and emotions, despite the seeming recognition that certain kinds of illegal conduct primarily exert influence in this way.

### *c. Stigmatic Injury*

In the area of stigmatic or dignitary injury, the Supreme Court has made interesting distinctions between different kinds of stigmatic injury.[72] In 1984, in *Allen v. Wright*, the Court denied standing to parents of black public school children who challenged the Internal Revenue Service's grant of tax-exempt status to racially discriminatory private schools.[73] The Court stated that the plaintiffs' claim could be interpreted as "a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race."[74] The Court then rejected standing based on such a claim, because accepting it would enable "[a] black person in Hawaii" to

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the Establishment Clause violation. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 487 n.22 (1982). Regarding the Free Exercise Clause, the Supreme Court in *Spokeo* used the free exercise case *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), as an example to support the statement that "intangible injuries can nevertheless be concrete." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016). *Hialeah*, however, did not explicitly discuss standing or Article III.

[68] Flast v. Cohen, 392 U.S. 83 (1968).

[69] *Id.*

[70] *See, e.g.*, Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 609-11 (2007).

[71] *See id.* at 619-20 (Scalia, J., concurring, joined by Thomas, J.).

[72] For discussions of stigmatic harm and standing that explore *Allen v. Wright*, see Healy, *supra* note 36, and Carter Greenbaum, Standing of Stigma Under Article III 7-10 (June 20, 2014) (unpublished manuscript) (on file with author).

[73] Allen v. Wright, 468 U.S. 737 (1984).

[74] *Id.* at 754.

"challenge the grant of a tax exemption to a racially discriminatory school in Maine," thereby "transform[ing] the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'"[75]

Notably, however, the Court's opinion in *Allen* said more. In particular, the Court stated that "stigmatizing injury . . . is sufficient in some circumstances to support standing" for "those persons who are personally denied equal treatment."[76] Moreover, in a footnote, the Court stated that the parents' "stigmatic injury, though not sufficient for standing in the abstract form in which their complaint asserts it, is judicially cognizable to the extent that respondents are personally subject to discriminatory treatment."[77] The Court continued: "The stigmatic injury thus requires identification of some concrete interest with respect to which respondents are personally subject to discriminatory treatment."[78] *Allen v. Wright* therefore suggests that stigmatic injury *could* suffice for standing when plaintiffs can show that they, rather than other members of their racial or ethnic group, have been treated unequally.[79]

*d. Reputational Injury*

An injury that is related, though not identical, to stigmatic or dignitary harm is reputational harm. In *Meese v. Keene*, the Supreme Court found standing for a California state senator who challenged a law that would classify Canadian films he wanted to exhibit as "political propaganda."[80] The plaintiff claimed, according to the Court, that "his exhibition of films that have been classified as 'political propaganda' by the Department of Justice would substantially harm his chances for reelection and would adversely affect his reputation in the community."[81] The harm in this case might be viewed as a mixture of economic and noneconomic harm. The Court indicated that reputational harm, understood as "the risk of being seen in

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[75] *Id.* at 756 (quoting United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973)).

[76] *Allen*, 468 U.S. at 755 (quoting Heckler v. Matthews, 465 U.S. 728, 740 (1984)).

[77] *Id.* at 757 n.22.

[78] *Id.*

[79] Justice Brennan, dissenting in *Allen*, stated that he did not need to reach the issue of stigmatic injury, but he argued that the Court had mischaracterized the plaintiffs' stigmatic injury claim and that "the complaint, fairly read, limits the claim of stigmatic injury from illegal governmental action to black children attending public schools in districts that are currently desegregating yet contain discriminatory private schools benefiting from illegal tax exemptions." *Id.* at 770 n.3 (Brennan, J., dissenting).

[80] Meese v. Keene, 481 U.S. 465 (1987).

[81] *Id.* at 474.

an unfavorable light by the members of the public," was sufficient to establish the plaintiff's standing.[82] This reputational harm may have been closely tied to the plaintiff's ability to maintain his seat and career (at least partially an economic concern). Nevertheless, Justice Stevens, in a 1998 dissent, cited *Meese v. Keene* for the proposition that "an interest in one's reputation is sufficient to confer standing."[83]

The Supreme Court's ruling in *Meese* highlights the extent to which psychological harms may be bound up with economic ones, so that it can be difficult to say in certain cases whether psychological harm "sufficed" for injury-in-fact. Indeed, while a politician's job may be viewed as an economic good, the value of such a job may consist to a significant extent of less "tangible" benefits such as being respected (or at least deferred to) in the community, and the payoff of these benefits might be especially prominent in the psychological realm. The implications of the connection between psychological harm and other types of injury-in-fact are discussed further below.[84] For now, the point is that harm to a plaintiff's standing in the community has arguably been recognized as injury-in-fact.

*e. Opportunity to Compete*

The Supreme Court's affirmative action jurisprudence furnishes an additional type of noneconomic injury. In *University of California v. Bakke*, the Court took up a rejected white medical school applicant's claim that he had been discriminated against, in violation of the Equal Protection Clause, as a result of the school's special admissions program for minority applicants.[85] The Court indicated that the plaintiff applicant would have standing even in the event that he could not prove that but for the school's special admissions program,

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[82] *Id.* at 479 & n.14.

[83] Spencer v. Kemna, 523 U.S. 1, 22 (1998) (Stevens, J., dissenting). The federal Courts of Appeals have repeatedly cited *Meese v. Keene* for the proposition that reputational harm can be cognized as injury-in-fact. *See* Parsons v. U.S. Dep't of Justice, 801 F.3d 701, 711 (6th Cir. 2015) ("Reputational injury, on the other hand, is sufficient to establish an injury in fact." (citing Meese v. Keene, 481 U.S. at 473-76)); Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208, 220 (3d Cir. 2013) ("As a matter of law, reputational harm is a cognizable injury in fact. The Supreme Court so held in *Meese v. Keene* . . . ."); Foretich v. United States, 351 F.3d 1198, 1211 (D.C. Cir. 2003) ("Appellees concede, as they must, that injury to reputation can constitute a cognizable injury sufficient for Article III standing.") (citing, among other cases, *Meese v. Keene*, 481 U.S. at 473-77).

[84] *See infra* Section II.A.1.

[85] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

he would have been admitted to medical school.[86] The Court explained that the trial court had found injury in this case because the school had not allowed the plaintiff to compete for all places in the class due to his race.[87] In a later Supreme Court case, the "inability to compete on an equal footing in the bidding process" was accepted as injury-in-fact in the context of a challenge to a government ordinance setting aside a certain percentage of city contracts for minority-owned businesses.[88] Consequently, plaintiffs may challenge affirmative action programs by claiming not that they were deprived of a tangible good (such as a government contract or admission to medical school), but that they were deprived of the *equal opportunity* to pursue this good. Deprivation of equal opportunity might be cast, in economic terms, as a kind of reduction in the expected value of the foregone good. But deprivation of equal opportunity could also be viewed as an injury that is thought to affect plaintiffs' understanding of their relationship to the law and their place in society—and that moves closer towards the psychological realm.[89]

In sum, the Supreme Court has been willing to recognize intangible injury as injury-in-fact in a variety of settings.[90] Many of these types of injury are sources of psychological harm, and the detrimental nature of these injuries can be traced at least in part to their effects on plaintiffs' mental and emotional states. Aesthetic, spiritual, stigmatic injury and the like might be harmful even if no one felt mentally or emotionally disturbed by their presence. But these injuries often effect much of their damage to plaintiffs in the mental and emotional realms, and the Court's willingness to cognize these types of

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[86] *Id.* at 280 n.14. The Court also noted that the University of California had effectively conceded that Bakke had standing, although, as required, the Court went on to assess the issue of Bakke's standing independently. *Id.*

[87] *Id.*

[88] Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995).

[89] *See* Reva B. Siegel, *The Supreme Court 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 45 n.221 (2013) (noting that in affirmative action cases, "[s]howing injury in fact does not require demonstrating the wrongful distribution of a good, but focuses instead on the meanings generated as government interacts with citizens"). For a discussion of the standing of a recent plaintiff, Abigail Fisher, to challenge the University of Texas's affirmative action program, see Adam Chandler, *Legal Scholarship Highlight: The Trouble with* Fisher, SCOTUSBLOG (Sept. 6, 2012, 5:41 PM), http://www.scotusblog.com/2012/09/legal-scholarship-highlight-the-trouble-with-fisher [http://perma.cc/Q35D-WPZZ].

[90] As noted above, this list of noneconomic or intangible injuries is not meant to be exclusive. For example, the Supreme Court has also recognized, as "[i]ndividual injury or injury-in-fact . . . the loss of important benefits from interracial associations." Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209-10 (1972).

injury thus suggests that the door to psychological harm as injury-in-fact remains open.[91]

At the same time, the Court's record reveals strong reluctance to cognize certain types of psychological harm. In fact, the Court has sometimes treated these types of psychological harm as if they could wholly undermine limitations on federal courts' jurisdiction. An analysis of psychological harm and Article III standing that seeks to retain a connection to existing doctrine—as this article does—must pay close attention to the Court's statements on forms of psychological harm that are not cognizable as injury-in-fact. But it is important to recognize that the Court has rejected only certain types of psychological harm, as distinct from psychological harm writ large; the challenge is to identify these types.

### *f. Psychological Harm Stemming Solely from Disagreement with a Challenged Policy*

The Supreme Court has refused to recognize as injury-in-fact certain negative mental or emotional responses to conduct with which plaintiffs disagree. In a 1982 Establishment Clause case involving a challenge to a transfer of government property to a religious institution, the Court denied standing to an organization dedicated to the separation of church and state on the basis that the plaintiffs "fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees."[92] In particular, the Court rejected the notion that "the intensity of the litigant's interest or the fervor of his advocacy" could support Article III standing, noting that the "concrete adverseness which sharpens the presentation of issues" is "the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a

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[91] In addition, the Supreme Court (and other federal courts) may have not questioned the existence of standing in cases in which psychological harm or a related type of injury was the only predicate for standing. But "when questions of jurisdiction have been passed on in prior decisions *sub silentio*, [the Supreme] Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before [it]." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 119 (1984) (quoting Hagans v. Lavine, 415 U.S. 528, 535 n.5 (1974)). Moreover, federal courts have an independent obligation to ensure that they have subject matter jurisdiction. *See, e.g.*, Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006) ("[C]ourts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.").

[92] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 469, 485 (1982).

permissible substitute for the showing of injury itself."[93] In 1998, the Court came to a similar conclusion in *Steel Co. v. Citizens for a Better Environment*, where it denied standing to members of an environmental group suing a steel manufacturer for the failure to make reporting in a timely manner, as required by statute.[94] One of the issues was whether the plaintiffs could meet the redressability requirement for Article III standing on the ground that the relevant statute required manufacturers to pay a penalty to the government for violating the reporting provision.[95] The Supreme Court answered in the negative, reasoning that

> although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.[96]

According to *Steel Co.*, the psychological distress that people might experience if certain political outcomes are frustrated cannot constitute injury-in-fact. The Supreme Court's treatment of psychological reactions to disagreement with the defendant's (often the government's) conduct is in line with the Court's more general insistence that citizens do not have standing to sue simply on the basis that the law is not being, in their view, properly enforced.[97] The concern may well be about bootstrapping. If any citizen could tack onto a claim that a party was violating the law the additional allegation that she was psychologically hurt by the alleged violation, then what would become of injury-in-fact as a limitation on federal courts' jurisdiction? Furthermore, when the challenged party is the government, the Court has expressed strong reservations about the threat to the executive's enforcement role that would arise if any citizen had standing to sue.[98] This threat might materialize if a great many psychologically distressed litigants could sue because their preferred laws had been, in their view, improperly executed. The Court has thus declined to recognize standing

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[93] *Id.* at 486 (citing Baker v. Carr, 369 U.S. 186, 204 (1962)).

[94] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 86-87 (1998).

[95] *Id.* at 105-07.

[96] *Id.* at 107; *see also* Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 633 (2007) (Scalia, J., concurring) ("Is a taxpayer's purely psychological displeasure that his funds are being spent in an allegedly unlawful manner ever sufficiently concrete and particularized to support Article III standing? The answer is plainly no.").

[97] *Cf.* Fairchild v. Hughes, 258 U.S. 126 (1922).

[98] *See* Allen v. Wright, 468 U.S. 737, 761 (1984).

rooted purely in the psychological effects of policy disagreement.

### *g. Fear or Anxiety About Future Events*

Fear and anxiety about future events are common forms of mental and emotional suffering, and they fall into the category of psychological harm as defined in this article.[99] But these types of psychological harm raise special problems in the standing context. In *Clapper v. Amnesty International*, the Supreme Court held that a threatened injury must be "certainly impending" in order to suffice for Article III standing—or, possibly, that there must be a "substantial risk" that the threatened event will occur.[100] In doing so, the Court sought to avoid a situation in which "an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear."[101] The idea is that if plaintiffs could obtain standing by arguing that they feared a future event that is not "certainly impending"—or by incurring other injuries, such as monetary expenditures, in order to avoid the feared event—then the Court's insistence on "certainly impending" injury would be severely weakened. Here, again, the bootstrapping concern comes into play.

When if ever, then, could feelings of fear or anxiety resulting from anticipation of future events count for standing?[102] The Court has found standing on the basis of fear or anxiety in certain cases—such as fear of polluting discharges[103] and fear of criminal prosecution in First Amendment cases.[104] Yet the Court

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[99] Fear of future events also figures in Koch's definition of "psychological injury" in other legal contexts. *See* KOCH ET AL., *supra* note 46, at 3 (referring to "real or imagined threats or injuries").

[100] Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147, 1150 n.5 (2013); *see supra* note 27 and accompanying text.

[101] *Clapper*, 133 S. Ct. at 1151.

[102] For a discussion of "fear-based standing," see Calabrese, *supra* note 36.

[103] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181-83 (2000) (finding standing where plaintiffs reasonably feared the effects of pollution on a nearby waterway).

[104] *E.g.*, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2343 (2014) (finding standing where a political group feared that a statute prohibiting certain false statements during political campaigns would be enforced against it); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (finding standing where plaintiffs feared criminal prosecution under an allegedly unconstitutional statute). *But see* Laird v. Tatum, 408 U.S. 1, 10 (1972) (finding no federal court jurisdiction where plaintiffs were concerned about the chilling of their First Amendment rights by a government investigative program). Additionally, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), the Court considered a district court's finding that "'objectively reasonable' present fear and apprehension" about nuclear power plant emissions was part of the injury that created standing and declined to rule on whether this apprehension was sufficiently concrete to create Article III standing. *See id.* at 72-

has also circumscribed this ground for standing. In a notable example, in *City of Los Angeles v. Lyons*, the Court denied standing to a Los Angeles man who had been put in a chokehold by the police and who sought an injunction against the City of Los Angeles in order to prevent police officers from using chokeholds in the future, unless they faced a threat of the immediate use of deadly force.[105] Lyons said he feared he would be placed in a chokehold in a future encounter with the police, but the Court rejected this allegation as a ground for standing:

> It is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions. 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. Of course, emotional upset is a relevant consideration in a damages action.[106]

*Lyons* should not be read, however, to eliminate fear and anxiety as bases for standing.[107] The case left open, for instance, whether the emotional consequences of a prior act could be the basis for an injunction if there were a real and immediate threat of future injury by the defendant.[108] As of now, then, the Court's doctrine does not preclude fear or anxiety based on future events from counting for standing, but there remain questions regarding when precisely these psychological reactions could suffice.[109]

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73 (quoting Carolina Envtl. Study Grp., Inc. v. U.S. Atomic Energy Comm'n, 431 F. Supp. 203, 209 (W.D.N.C. 1977)).

[105] City of Los Angeles v. Lyons, 461 U.S. 95, 98-100 (1983). For a critique of this case for failing to vindicate the courts' role as protectors of individual rights in a constitutional democracy, see Jackson, *supra* note 36, at 161-75.

[106] *Lyons*, 461 U.S. at 107 n.8.

[107] A related issue is whether the Supreme Court does or should treat the *risk* of harm as sufficient for injury-in-fact. *See* F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55 (2012) (arguing that Article III does not impose a barrier on claims with a low risk of future injury, but that prudential considerations may properly limit courts' review of such claims); *see also* Note, *Standing—Challenges to Government Surveillance*—Clapper v. Amnesty International USA, 127 HARV. L. REV. 298, 305 (2013) (arguing that the "certainly impending" standard should be applied narrowly because "most suits for injunctive relief involve harms that are by their nature probabilistic, such as challenges to increased environmental or safety risks"). The risk of harm could be viewed as a basis for standing independently of the psychological harm resulting from plaintiffs' beliefs about this risk. But paying attention to the risk of harm also opens the door to a consideration of psychological effects, since in the absence of the actual harm it becomes worth asking why courts should be concerned about plaintiffs' aversion to it. It is plausible to think that an important part of the answer—though by no means the only part—is the effects of risk of harm on plaintiffs' psychological experiences. *See infra* notes 258-61 and accompanying text.

[108] *See Lyons*, 461 U.S. at 107 n.8, 109.

[109] The Court's jurisprudence on anticipation of future injury and standing also throws into sharp relief the question of whether the Court's treatment of psychological harm speaks more to ripeness concerns than to standing. Ripeness refers to whether a

Overall, then, Supreme Court jurisprudence on psychological harm leaves open important issues. The Court has not often referred directly to psychological or emotional harm. When it has addressed this subject, the Court has expressed concern about generalized and limitless standing, but it has not analyzed the relationship between psychological harm and noneconomic injuries that have been cognized as injury-in-fact. Furthermore, the Court has not clearly delineated the bounds of the type of "psychological consequence" that does not suffice for standing.[110] Other federal courts, however, have also confronted issues of psychological harm and standing. Therefore, the article now turns to lower federal courts' development of doctrine in this area.

### 2. Lower Federal Courts' Positions on Psychological Harm and Standing

This section examines federal appellate and district court jurisprudence on psychological harm and related concepts (such as emotional, aesthetic, and reputational injury) in the standing context. A more detailed breakdown appears in the Appendix.[111] The analysis reveals interesting possibilities for standards to govern the cognizability of psychological harm, some of which are supported in Part II. In general, however, the investigation of relevant case law suggests that there is a dearth of discussion regarding the distinction between the type of psychological harm that can create standing and the type of psychological harm that cannot.

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controversy is ready for judicial resolution at a given stage. The Supreme Court has explained the test for ripeness as "whether the issues tendered are appropriate for judicial resolution, and . . . the hardship to the parties if judicial relief is denied at that stage." Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 162 (1967). Part of the Court's reluctance to cognize psychological harm in certain circumstances, especially when the psychological harm involves fear or anxiety about future events, could implicitly be traced to a ripeness-related sense that no justiciable controversy has yet arisen—because, for example, it is easier to see what is at stake in a controversy when plaintiffs are alleging economic or physical harm. While this article follows several courts in treating fear or anxiety about future harm as a matter of standing rather than ripeness, this article's discussion of factors to be used in evaluating standing claims based on psychological harm takes into account issues related to ripeness, such as the gravity of anticipated harm.

[110] *Cf.* Awad v. Ziriax, 670 F.3d 1111, 1121 (10th Cir. 2012) ("[T]he Supreme Court has not provided clear and explicit guidance on the difference between psychological consequence from disagreement with government conduct and noneconomic injury that is sufficient to confer standing.").

[111] *See* Appendix. The Appendix does not provide an exhaustive list of all cases related to psychological harm and standing. Rather, the Appendix seeks to provide a wide-ranging sample of cases that illuminate the variety of approaches that courts have taken to this topic.

To provide a brief overview of case law in the federal Courts of Appeals: the D.C., Second, Sixth, Eighth, and Ninth Circuits have accepted psychological or emotional harm in some form as sufficient for Article III injury-in-fact.[112] The scenarios in which psychological or emotional harm has been cognized range from "generalized anxiety and stress" suffered by employees when a laptop containing their names, addresses, and social security numbers was stolen from their employer,[113] to "psychological and emotional injuries" resulting from a hostile working environment,[114] to emotional harm suffered by an elephant handler alleging that the circus for which he worked mistreated its elephants.[115] The Fifth Circuit has also recently suggested that emotional harm could count as injury-in-fact.[116] The Seventh Circuit has shown perhaps the most reluctance

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[112] *See* Chaudhry v. City of Los Angeles, 751 F.3d 1096, 1109 (9th Cir. 2014) (finding a sufficient allegation of "emotional harm (injury in fact)" when city authorities had failed to notify plaintiffs in a timely manner of their relative's death); Red River Freethinkers v. City of Fargo, 679 F.3d 1015, 1024 (8th Cir. 2012) (finding, in an Establishment Clause case, that "[t]o the extent that emotional harms differ from other, more readily quantifiable harms, that difference lacks expression in Article III's case-or-controversy requirement"); Catholic League for Religious & Civil Rights v. City & County of San Francisco, 624 F.3d 1043, 1052 (9th Cir. 2010) (stating that a "psychological consequence" does "constitute concrete harm where the 'psychological consequence' is produced by government condemnation of one's own religion or endorsement of another's in one's own community"); Leibovitz v. N.Y.C. Transit Auth., 252 F.3d 179, 184 (2d Cir. 2001) ("Leibovitz has alleged an actual injury to herself: the emotional trauma she suffered as a result of an allegedly hostile work environment."); Denney v. Deutsche Bank AG, 443 F.3d 253, 265 (2d Cir. 2006) ("The risk of future harm may also entail economic costs, such as medical monitoring and preventative steps; but aesthetic, emotional[,] or psychological harms also suffice for standing purposes."); ACLU of Ohio Found., Inc. v. DeWeese, 633 F.3d 424, 429 (6th Cir. 2011) ("In suits bought under the Establishment Clause, 'direct and unwelcome' contact with the contested object demonstrates psychological injury in fact sufficient to confer standing." (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998))); Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus (*APSCA I*), 317 F.3d 334, 337 (D.C. Cir. 2003) ("[In a previous case], we left open the question whether 'emotional attachment to a particular animal . . . could form the predicate of a claim of injury. . . .' We answer that question in the affirmative today." (citation omitted) (quoting Humane Soc'y v. Babbitt, 46 F.3d 93 (D.C. Cir. 1995) (alteration in original))); Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1396 (9th Cir. 1992) ("[T]he Fund's members had standing to sue because of the psychological injury they suffered from viewing the killing of the bison in Montana."); Gray v. Greyhound Lines, E., 545 F.2d 169, 175 (D.C. Cir. 1976) ("We therefore see no reason why the psychological injuries which plaintiffs claim are caused by defendants' actions cannot serve as the basis for invoking judicial remedies against defendants."); Coal. for the Env't v. Volpe, 504 F.2d 156, 167 (8th Cir. 1974) ("Individual plaintiffs and members of plaintiff organizations claim particularized injury stemming in various ways from the loss of open space . . . . For instance, they assert that they will lose off-tract uses such as viewing the open space and natural environment, which, contend plaintiffs, provides aesthetic and psychological benefit.").

[113] Krottner v. Starbucks Corp., 628 F.3d 1139, 1142 (9th Cir. 2010).

[114] *Leibovitz*, 252 F.3d at 184.

[115] *APSCA I*, 317 F.3d at 338.

[116] Rideau v. Keller Indep. Sch. Dist., 819 F. 3d 155, 168-69 (5th Cir. 2016) ("The emotional pain that results from seeing one's child abused seems to be a

to cognize psychological or emotional harm. This court found in a 2015 case, for example, that "[a]lthough we have described standing as 'undemanding,' neither intellectual curiosity nor purely psychological harm suffices to establish it."[117] Some circuits have rejected psychological or emotional harm that is "general" or that stems from personal disagreement based on commitment to a legal principle.[118] As for other forms of intangible harm, several circuits have found standing based on aesthetic injury,[119] and a few circuits have accepted reputational[120] and stigmatic[121] injury.

The degree to which courts are contradicting one another in arriving at these decisions is not clear. For example, there is a question about how the Seventh Circuit's "purely" psychological harm relates to other circuits' references to psychological harm;

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sufficiently concrete injury for standing purposes. . . . Indeed, the number of causes of action in which a person may recover for emotional harm—from many common law claims including, most obviously, intentional inflection of emotional distress to section 1983 claims that rely on common law remedies—supports the notion that emotional harm satisfies the 'injury in fact' requirement of constitutional standing." (internal footnote omitted)).

[117] United States v. All Funds on Deposit with R.J. O'Brien & Assocs., 783 F.3d 607, 616 (7th Cir. 2015) (citation omitted) (quoting Family & Children's Ctr., Inc. v. Sch. City of Mishawaka, 13 F.3d 1052, 1058 (7th Cir. 1994)); *see also* Freedom From Religion Found., Inc. v. Lew, 773 F.3d 815, 820 (7th Cir. 2014) (finding, in an Establishment Clause case involving tax exemptions for a "minister of the gospel," that "psychic injury alone is insufficient" to create standing); Clay v. Fort Wayne Cmty. Schs., 76 F.3d 873, 877 n.4 (7th Cir. 1996) (stating, in a discrimination case where the allegation was that the school system's Board of Trustees discriminated against African-Americans in the search to hire a school superintendent, that "[a]t best, the students allege amorphous psychological injuries insufficient to confer standing"); Freedom From Religion Found., Inc. v. Zielke, 845 F.2d 1463, 1467 (7th Cir. 1988) (noting, in an Establishment Clause case involving a Ten Commandments monument in a public park, that "[t]he psychological harm that results from witnessing conduct with which one disagrees, however, is not sufficient to confer standing on a litigant"). *But see* Leung v. XPO Logistics, Inc., No. 15-cv-3877, 2015 WL 10433667, at *5 (N.D. Ill. Dec. 9, 2015) (stating, in a Telephone Consumer Protection Act case about unwanted survey calls, that "[i]njuries to emotional and dignitary interests are among those that count as injuries in fact").

[118] *See, e.g.*, Schaffer v. Clinton, 240 F.3d 878, 884 (10th Cir. 2001) (stating, in a case on the Twenty-Seventh Amendment, that "Congressman Schaffer's moral outrage, however profoundly and personally felt, does not endow him with standing to sue in the present action"); Humane Soc'y of U.S. v. Babbitt, 46 F.3d 93, 98 (D.C. Cir. 1995) ("[G]eneral emotional 'harm,' no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes.").

[119] *E.g.*, Sierra Club v. Franklin Cty. Power of Illinois, LLC, 546 F.3d 918 (7th Cir. 2008); Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 517 (4th Cir. 2003); Coal. for the Env't v. Volpe, 504 F.2d 156, 167 (8th Cir. 1974).

[120] *See* Parsons v. U.S. Dep't of Justice, 801 F.3d 701, 711 (6th Cir. 2015); NCAA v. Governor of New Jersey, 730 F.3d 208, 220 (3d Cir. 2013); Foretich v. United States, 351 F.3d 1198, 1212 (D.C. Cir. 2003).

[121] *See Parsons*, 801 F.3d at 712; Awad v. Ziriax, 670 F.3d 1111, 1122-23 & n.8 (10th Cir. 2012); Catholic League for Religious & Civil Rights v. City & County of San Francisco, 624 F.3d 1043, 1052-53 (9th Cir. 2010); Smith v. City of Cleveland Heights, 760 F.2d 720, 722 (6th Cir. 1985).

perhaps "purely" psychological harm is a distinct phenomenon. The bottom line is that psychological and emotional harm have been recognized as injury-in-fact in several, though not all, circuits, and this provides all the more reason to take these claims seriously. Further, the current case law provides support for the position that psychological harm in some form should constitute injury-in-fact for standing purposes, but leaves open the issue of *which* types of harms are sufficient.

One conclusion that emerges from the review of the case law is that psychological injury-in-fact is not monolithic; it should be considered contextually, with reference to a variety of substantive claims. The article therefore turns to the lower federal courts' treatment of psychological injury-in-fact in commonly cited subject areas.

*a. Establishment Clause*

Establishment Clause jurisprudence, as noted above, presents a challenging and fertile ground for consideration of psychological harm, since it is difficult to point to a monetary or physical harm that citizens suffer when the state takes action that violates the clause.[122] Lower courts have grappled in different ways with the Supreme Court's statement, in the Establishment Clause context, that "the psychological consequence presumably produced by observation of conduct with which one disagrees" is insufficient to confer standing.[123]

First, some courts have denied standing claims on the basis that plaintiffs alleging violations of the Establishment Clause have failed to assert a sufficiently particularized or, perhaps, genuine harm. In *Freedom From Religion Foundation, Inc. v. Obama*, for example, the Seventh Circuit in 2011 rejected, on standing grounds, a suit challenging a federal statute designating a "National Day of Prayer," as well as presidential prayer proclamations issued under the statute.[124] The plaintiffs alleged that the challenged actions made them feel excluded and unwelcome.[125] The Seventh Circuit responded that "[i]t is

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[122] *See Catholic League*, 624 F.3d at 1049 ("The concept of a 'concrete' injury is particularly elusive in the Establishment Clause context . . . because the Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary, nature." (quoting Vasquez v. Los Angeles Cty., 487 F.3d 1246, 1250 (9th Cir. 2007) (alteration in original))).

[123] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485 (1982).

[124] Freedom From Religion Found., Inc. v. Obama, 641 F.3d 803 (7th Cir. 2011).

[125] *Id.* at 806-07.

difficult to see how any reader of the 2010 proclamation would feel excluded or unwelcome," but even if the plaintiffs did "feel slighted . . . , hurt feelings differ from legal injury," and "unless all limits on standing are to be abandoned, a feeling of alienation cannot suffice as injury in fact."[126]

Second, some courts have considered whether plaintiffs have shown that their psychological harm has given rise to some kind of nonpsychological harm, such as plaintiffs' physical avoidance of a religious display.[127] This approach seems to reflect an evidentiary concern. Plaintiffs may not be able to show the court exactly what is going on in their heads, but they can show the court that they took active steps to avoid contact with the source of the psychological harm. Of course, courts might also worry that plaintiffs would manufacture such avoidance,[128] but courts may be reassured by the presence of one additional step beyond the allegation of psychological harm. Third, some courts have been willing to cognize psychological harm itself if it is sufficiently particularized—if, for example, the plaintiff was forced to appear regularly in the vicinity of the challenged religious display,[129] lived in the same city and had "come in contact" with the challenged practice,[130] or was a participant in the same graduation ceremony as the challenged practice.[131]

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[126] *Id.* at 807-09; *see also* Chaplaincy of Full Gospel Churches v. U.S. Navy (*In re* Navy Chaplaincy), 534 F.3d 756, 764 (D.C. Cir. 2008). In the case *In re Navy Chaplaincy*, Protestant navy chaplains claimed, inter alia, that they were being subjected to the "message" conveyed by a retirement program that was allegedly preferential to Catholic chaplains, even if the plaintiffs had not personally been discriminated against, and that as a consequence of this program, the plaintiffs felt like second-class citizens within the Navy Chaplaincy. The D.C. Circuit responded that under the plaintiffs' standing theory, "any recipient of the Navy's 'message' in this case, including the judges on this panel, would have standing to bring suit challenging the allegedly discriminatory Chaplain Corps." *In re Navy Chaplaincy*, 534 F.3d at 763-64.

[127] *See, e.g.*, Barnes-Wallace v. City of San Diego, 530 F.3d 776, 782-84 (9th Cir. 2008); Freedom From Religion Found., Inc. v. Zielke, 845 F.2d 1463, 1467-68 (7th Cir. 1988).

[128] In *Clapper*, for example, the Supreme Court insisted that plaintiffs "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1143 (2013).

[129] *See* ACLU of Ohio Found., Inc. v. DeWeese, 633 F.3d 424, 429-30 (6th Cir. 2011).

[130] *See* Catholic League for Religious & Civil Rights v. City & County of San Francisco, 624 F.3d 1043, 1053 (9th Cir. 2010).

[131] Does 1-7 v. Round Rock Indep. Sch. Dist., 540 F. Supp. 2d 735 (W.D. Tex. 2007) (holding that students and their family members who participated in or attended a graduation exercise had standing to sue their school district, which permitted the graduating class to vote on whether a student would say a prayer at the high school graduation ceremony).

### *b. Animal Welfare*

In the animal welfare context, psychological injury provides a way for human plaintiffs to bring claims in an effort to protect against harm to animals.[132] "Emotional" harm is mentioned particularly frequently in the animal welfare setting. One approach that courts have taken in animal welfare cases is to cognize emotional harm on the basis that it falls into the category of *aesthetic injury*, which has been explicitly recognized by the Supreme Court as injury-in-fact.[133] For example, the D.C. Circuit stated, when it found standing for a circus employee to challenge the treatment of a circus elephant, that it saw "no principled distinction between the injury that person suffers when discharges begin polluting the river [as in *Laidlaw*] and the injury [the circus worker] allegedly suffers from the mistreatment of the elephants to which he became emotionally attached during his tenure at Ringling Bros.—both are part of the aesthetic injury."[134]

It is worth questioning whether a plaintiff's interest in the humane treatment of animals is most accurately characterized as an *aesthetic* interest. Does watching the suffering of an animal really provoke the same type of mental or emotional reaction as, say, watching a tree being cut down?[135] If the Supreme Court explicitly recognized emotional and other psychological injuries as sufficient for Article III injury, there would be less need to "twist" animal-welfare claims so that they fit into the Court's existing standing jurisprudence.[136] Nevertheless, as of now, some courts' incorporation of emotional injury into aesthetic injury in the animal welfare context has brought animal

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[132] For an example of a case holding that an animal itself did not have standing, see *Tilikum ex rel. People for the Ethical Treatment of Animals v. Sea World Parks & Entm't, Inc.*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012), where PETA tried to assert standing to sue for violations of the Thirteenth Amendment on behalf of captive whales. The court held that the whales had no standing on redressability grounds. *Tilikum*, 842 F. Supp. 2d at 1264.

[133] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183 (2000); Ass'n of Data Processing Serv. Orgs., Inc. v. Camp (*ADAPSO*), 397 U.S. 150, 154 (1970).

[134] Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus (*APSCA I*), 317 F.3d 334, 338 (D.C. Cir. 2003); *see also* Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 428, 445 (D.C. Cir. 1998) (finding standing on the basis of plaintiffs' aesthetic interest in seeing specific animals); Hill v. Coggins, No. 13-cv-47, 2014 WL 2738664, at *4 (W.D.N.C. June 17, 2014) ("Plaintiffs allege that they previously visited the grizzly bears at the Zoo and suffered aesthetic and emotional harm from observing the bears living in inhumane conditions. . . . Such factual allegations are sufficient to allege an injury for purposes of Article III standing.").

[135] *See* Krieger, *supra* note 36, at 404-05.

[136] *See id.* (arguing for a theory of standing based on emotional injury, rather than injury to aesthetic interests, in animal welfare cases).

welfare claims into court on the coattails of an injury clearly recognized by the Supreme Court.

### *c. Environmental Protection*

Plaintiffs suing to protect the environment also face the challenge of showing that they, as human beings, were harmed.[137] In accordance with Supreme Court precedent, lower courts have accepted injury to aesthetic and recreational interests as sufficient for injury-in-fact.[138] When courts find aesthetic injury, they often emphasize the connection between a particular plaintiff and the object of aesthetic interest, so as not to grant standing to "a roving environmental ombudsman seeking to right environmental wrongs wherever he might find them."[139] Because aesthetic and recreational interests suffice to create standing, courts seem to have faced less need to justify a grant of standing to environmental plaintiffs on the basis of emotional or psychological harm, and so the latter types of harm are not usually discussed explicitly in the environmental context. One exception, in the sense that the case clearly references psychological consequences, is a 1974 Eighth Circuit case that found that plaintiffs who lived in the vicinity of proposed construction had standing to seek to enjoin the development partly because they stood to lose open space and natural environment, which "provides aesthetic and psychological benefit."[140]

One type of psychological reaction more commonly mentioned in the environmental context is fear or concern about potential environmental consequences.[141] The courts are

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[137] *See* Sierra Club v. Morton, 405 U.S. 727, 734 (1972). Justice Douglas's dissent in *Sierra Club* highlights the alternative road (not taken) of holding that the environment itself could have standing:

> The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage.

*Id.* at 741 (Douglas, J., dissenting) (footnote omitted).

[138] *See, e.g.*, Sierra Club v. Franklin Cty. Power of Illinois, LLC, 546 F.3d 918, 925 (7th Cir. 2008); Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 517 (4th Cir. 2003).

[139] Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 157 (4th Cir. 2000).

[140] Coal. for the Env't v. Volpe, 504 F.2d 156, 167 (8th Cir. 1974).

[141] Of course, lower courts have addressed issues related to fear of harm outside the environmental context. *See, e.g.*, Tomsha v. Gen. Servs. Admin., No. 15-cv-7326, 2016 WL 3538380, at *2 (S.D.N.Y. June 21, 2016) ("Plaintiffs' genuine fears of a future terrorist attack at One World Trade Center are insufficient to establish constitutional standing."); Bernstein v. Kerry, 962 F. Supp. 2d 122 (D.D.C. 2013), *aff'd*,

reluctant to grant standing based on fears of future environmental harm that are insufficiently "concrete and particularized,"[142] but courts have found standing based on "reasonable" fear, such as concerns about the effects of polluting discharges.[143] It is sometimes unclear how reasonable fear of future harm interacts with increased risk of harm[144] or with the *current* violation of aesthetic, recreational, or economic interests as forms of injury.[145] Furthermore, courts addressing standing based on fear or anxiety about future harm in the post-*Clapper* era must contend with that Supreme Court case's requirement that injury-in-fact be "certainly impending"[146]—or at least that there be a "substantial risk" of its occurrence.[147] Adjusting to this standard may require revision of the type of fear or anxiety that could suffice for standing. As Part II indicates, however, *Clapper* does not wholly preclude psychological injury-in-fact that is based on anticipation of future events.[148]

*d. Discrimination*

Discrimination often causes economic harm, but its effects are also frequently felt in the psyche,[149] and psychological injury has on some occasions been held to suffice for standing in discrimination suits. The Second Circuit, for instance, found that a plaintiff had "standing under Article III to raise a claim of hostile work environment to redress psychological

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584 F. App'x 7 (D.C. Cir. 2014) (finding that American citizens living in Jerusalem could not show injury-in-fact based on fear of terrorism; the case was affirmed on redressability grounds).

142 *See, e.g.*, Coal. for Mercury-Free Drugs v. Sebelius, 671 F.3d 1275, 1280 (D.C. Cir. 2012) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

143 *E.g.*, Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 517-18 (4th Cir. 2003); *Gaston Copper*, 204 F.3d at 157.

144 *See Gaston Copper*, 204 F.3d at 160 ("Threats or increased risk thus constitutes cognizable harm."). For a discussion of standing based on risk of harm, see Hessick, *supra* note 107, at 67.

145 For example, the Fourth Circuit in *American Canoe Association* mentioned "fear and concern" as bases for standing but also noted that this fear affected the plaintiffs' aesthetic, recreational, and at times economic interests, so it is difficult to tell whether fear alone would have sufficed. *Am. Canoe Ass'n*, 326 F.3d at 520.

146 Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1141 (2013) (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

147 *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper*, 133 S. Ct. at 1147, 1150 n.5).

148 *See infra* Section II.A.3.

149 *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494 (1954) (stating that school segregation "generates a feeling of inferiority as to their status in the community that may affect [schoolchildren's] hearts and minds in a way unlikely ever to be undone").

and emotional injuries"[150] through a Title VII suit. Sometimes emotional, physical, and economic harms are found sufficient in combination, as in a Fair Housing Act case in which a plaintiff in Pomona, California alleged that the director of her neighborhood association had made racially derogatory comments at an association meeting with members of the city's police department in attendance.[151] A California district court held that the plaintiff had standing due to "[t]he physical and emotional upset that accompanied the stigma of being considered inferior by the director of [the plaintiff's] own neighborhood association, as well as by the city that continued to support the association."[152]

To sum up, this examination of several contexts in which psychological harm has appeared in the lower federal courts has not covered all the applicable subjects. For example, some cases discuss psychological harm resulting from the theft of personal information[153] and from fear of terrorism.[154] The discussion in this section, however, has focused on a variety of lower courts' responses to psychological harm in the constitutional standing arena. These courts' analyses of psychological harm can serve as the basis for a clearer framework to adjudicate these claims, of the type this article seeks to provide. Before turning to this task, this section explores the relationship between Article III standing doctrine and tort claims that are connected to psychological harm or emotional distress.

Cases involving psychological harm may raise unresolved questions in the Article III standing context, but such issues are regularly litigated in the torts context. All states have recognized the tort of intentional infliction of emotional distress (IIED), and all but two permit recovery for the negligent infliction of emotional distress (NIED).[155] These torts provide redress for plaintiffs who have been subjected to "severe emotional

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[150] Leibovitz v. N.Y.C. Transit Auth., 252 F.3d 179, 184 (2d Cir. 2001); *see also* Clayton v. White Hall Sch. Dist., 875 F.2d 676, 679 (8th Cir. 1989) (indicating that "[i]t is an emotional or psychological injury to the plaintiff herself which is the gravamen of [a hostile work environment claim]" (quoting Clayton v. White Hall Sch. Dist., 778 F.2d 457, 459 (8th Cir. 1985))).

[151] Inland Mediation Bd. v. City of Pomona, 158 F. Supp. 2d 1120, 1131-32 (C.D. Cal. 2001).

[152] *Id.* at 1138. In another case, a court rejected psychological harm as injury-in-fact in a discrimination case on the ground that "injury of this nature, if deemed sufficient to confer standing, inevitably will invite friction with First Amendment freedoms." Jones v. Deutsch, 715 F. Supp. 1237, 1246 (S.D.N.Y. 1989).

[153] Krottner v. Starbucks Corp., 628 F.3d 1139, 1142 (9th Cir. 2010).

[154] Tomsha v. Gen. Servs. Admin., No. 15-cv-7326, 2016 WL 3538380 (S.D.N.Y. June 21, 2016); Bernstein v. Kerry, 962 F. Supp. 2d 122, 127 (D.D.C. 2013), *aff'd*, 584 F. App'x 7 (D.C. Cir. 2014).

[155] John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 806, 809 (2007).

distress" as a result of "extreme and outrageous" conduct (for IIED)[156] and who have experienced "emotional distress" as a result of negligent conduct provided that certain conditions are satisfied (for NIED).[157] The conditions for NIED recovery vary from state to state, but they include the requirement that the plaintiff suffer physical impact (in a few states), experience a physical manifestation of emotional distress (in a majority of states), and be in the "zone of danger" when the tort occurred (in several states).[158] These conditions help to provide evidence that a plaintiff has in fact suffered emotional distress[159] and to limit liability to a specified circle of potentially harmed individuals. The "extreme and outrageous" requirement in the IIED context ensures, as the Restatement (Second) of Torts suggests, that not every form of psychological harm is actionable in tort: "There is no occasion for the law to intervene in every case where some one's feelings are hurt."[160]

These tort claims are usually litigated in state courts, which are not bound by Article III standing requirements in the absence of a relevant state provision or decision so specifying.[161] However, tort (or tort-like) claims also appear in federal courts—for example, in diversity cases, as a matter of supplemental jurisdiction, or in § 1983 actions against state officials.[162] There is not a great deal of litigation on standing and tort claims involving psychological or emotional harm, but

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[156] RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965).

[157] *Id.* § 313.

[158] Kircher, *supra* note 155, at 806-31.

[159] *See* Vance v. Vance, 408 A.2d 728, 733-34 (Md. 1979) (describing NIED standards "formulated with the overall purpose in mind of requiring objective evidence to guard against feigned claims"); *see also* Eugene Kontorovich, *The Mitigation of Emotional Distress Damages*, 68 U. CHI. L. REV. 491, 493 (2001) (noting that "the inchoate, subjective nature of [emotional distress] claims has created significant problems of measurement and proof").

[160] RESTATEMENT (SECOND) OF TORTS § 46 cmt. d. (AM. LAW INST. 1965).

[161] *See, e.g.*, New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 8 n.2 (1988) ("[T]he special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts."); Price v. King (*Ex parte* King), 50 So.3d 1056 (Ala. 2010) (stating that the Alabama Supreme Court had adopted a test for standing based on the U.S. Supreme Court's standard); William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 265 (1990) (proposing that "[s]tate courts should be required to adhere to Article III 'case or controversy' requirements whenever they adjudicate questions of federal law").

[162] 42 U.S.C. § 1983 (2012) (authorizing civil actions against state officials for certain deprivations "of any rights, privileges, or immunities secured by the Constitution and laws"); *see* Carey v. Piphus, 435 U.S. 247, 253 (1978) (holding that § 1983 "was intended to '[create] a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution" (alteration in original) (quoting Imbler v. Pachtman, 424 U.S. 409, 417 (1976))).

a few examples highlight courts' application of tort principles, or a state's particular tort law, to standing questions.

Some federal courts have turned to tort law to determine whether a particular claim of emotional harm is cognizable. For instance, in *Smith v. Frye*, the Fourth Circuit in 2007 reviewed a § 1983 action from a candidate for circuit clerk who alleged that his mother had been illegally fired from her position as magistrate court clerk.[163] The plaintiff claimed that his mother had been fired after he entered his candidacy for circuit clerk against the incumbent, who was his mother's colleague.[164] According to the plaintiff, he had "suffered the injuries of indignity, embarrassment, and emotional distress because he felt responsible for his mother's discharge."[165] The Fourth Circuit noted that § 1983 "was intended to create a species of tort liability,"[166] and so the district court was correct to apply the "venerable common-law tort principle that 'one cannot collect for emotional damage or humiliation occasioned by harm done to a family member absent fairly particular circumstances.'"[167] In light of this principle, the Fourth Circuit "agree[d] with the district court that '[a]llowing an adult son to collect for emotional damages and humiliation resulting from his mother's discharge from her employment casts the net of possible liability too broadly.'"[168] Accordingly, the Fourth Circuit concluded that plaintiff's "emotional distress is insufficient as an Article III injury in fact."[169] Here, the Fourth Circuit drew on tort law to reject a claim of constitutional standing that was based on psychological harm.

Another example of an approach to standing that is based on elements of tort law appears in a 2013 case in which female ambulance workers sued their employers in Illinois federal district court.[170] The workers alleged violations of Title VII as well as state law negligence claims, which included

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163 Smith v. Frye, 488 F.3d 263 (4th Cir. 2007).

164 *Id.* at 265.

165 *Id.* at 272. The plaintiff claimed, as another basis for standing, that his First Amendment rights had been chilled by the allegedly retaliatory firing of his mother, but the court rejected this ground for injury-in-fact on the basis that any alleged retaliatory action was taken against the plaintiff's mother, not against the plaintiff himself. *See id.* at 272-73.

166 *Id.* at 273 (quoting Smith v. Wade, 461 U.S. 30, 34 (1983)).

167 *Id.* The court cited a relevant provision of West Virginia law (the law of the state where the claim was brought) as an "example" of a state law IIED claim, the elements of which the plaintiff could not satisfy. *Id.* at 273 n.9.

168 *Id.* at 273-74 (quoting Smith v. Frye, 2006 U.S. Dist. LEXIS 39909, at *14 (N.D. W. Va. June 14, 2006)).

169 *Id.* at 274.

170 Volling v. Antioch Rescue Squad, 999 F. Supp. 2d 991 (N.D. Ill. 2013).

allegations that harassment by individuals whom the defendants had negligently supervised had caused the plaintiffs "emotional distress, severe embarrassment, pain, suffering, humiliation, fear, anxiety, damage and risk of damage to their careers and reputations, damage to their standing in the community, loss of enjoyment of life, inconvenience and other non-pecuniary losses."[171] In response to the question "whether some of these injuries 'count' for purposes of the standing analysis, to the extent they are purely emotional or reputational in nature," the court turned to Illinois law and found that negligence in Illinois "is actionable if it directly causes emotional distress even without any physical symptoms."[172] The court therefore found that the plaintiffs had satisfied Article III's requirements.[173] Here, the court seemed to be suggesting that the sufficiency of an injury for Article III purposes could be influenced by the standards for emotional harm claims under state law.

When federal courts assess tort claims involving psychological harm, they need not turn to the particulars of tort law to assess whether psychological harm counts as injury-in-fact. A different approach appears in the Ninth Circuit case *Chaudhry v. City of Los Angeles*, brought by relatives of a man shot and killed by the police.[174] In *Chaudhry*, the relatives brought negligence and IIED claims, as well as other claims, such as for violations of substantive due process under § 1983.[175] The Ninth Circuit, instead of relying on the specifics of tort law, simply indicated that the relatives had "suffered emotional harm (injury in fact)."[176] *Chaudhry* highlights the possibility for a court to hold that emotional harm is sufficient for Article III injury based on general principles of constitutional standing, rather than turning to aspects of tort law to assess whether a plaintiff's claim is cognizable.

Tort issues may additionally enter the domain of Article III standing in federal court through courts' inquiries into whether plaintiffs have suffered an "invasion of a legally protected interest," which is part of the injury-in-fact inquiry laid out in *Lujan*.[177] This subject has also not provoked a great

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[171] *Id.* at 999.

[172] *Id.*

[173] *Id.* at 998-1000.

[174] Chaudhry v. City of Los Angeles, 751 F.3d 1096 (9th Cir. 2014); *see supra* note 1 and accompanying text.

[175] *Chaudhry*, 751 F.3d at 1101.

[176] *Id.* at 1109.

[177] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). This article's proposal incorporates the suggestion that cognizable psychological harm must be a response to the alleged violation of a legally protected interest. *See infra* Section II.A.2. The inquiry

deal of litigation, but some courts have declined to find injury partially because the claimed psychological harm was not recognized under state tort law and so did not stem from the violation of a legally protected interest.[178]

In sum, federal courts adjudicating constitutional standing cases involving psychological harm have at times turned to tort law to clarify the bounds of cognizable injuries. Regardless of whether the legal inquiry undertaken in any particular case was correct, these cases speak to the possibility of drawing into the standing inquiry tort principles that both recognize and limit liability for emotional suffering. Such a possibility is explored at greater length in what follows.

## II. WHEN SHOULD COURTS COGNIZE PSYCHOLOGICAL HARM?

### *A. A Proposal*

#### 1. Motivating Principles

This article's proposed test for whether injury-in-fact based on psychological harm is cognizable requires two conditions to be met. First, the psychological harm must respond to the alleged violation of a legally protected interest. Second, there must be a sufficient nexus between the alleged violation of this interest and the plaintiff's particular circumstances, so that it is reasonable to think that such a plaintiff would be especially likely to suffer psychological harm in the situation at hand.

Why should courts recognize psychological harm as injury-in-fact at all? Another option, after all, would be simply to deny that "Psychic Injury"[179] counts for Article III standing. One reason is that psychological harm is, in fact, injurious. Citizens' senses of sadness, anguish, anger, anxiety, fright, humiliation, and so on play an important role in people's lives.

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into whether a plaintiff has suffered a violation of a "legally protected interest" could also be viewed as part of an investigation into the existence of a cause of action. *See infra* Section II.B.1.

[178] *E.g.*, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 25 (D.D.C. 2010) (declining to find Article III injury on the part of the father of an individual allegedly placed on a U.S. government "kill list" for terrorist activities partly on the grounds that the "D.C. wrongful death statute does not provide a basis for plaintiff's alleged legally protected interest in preserving his relationship with his adult son"); *In re* Tri-State Crematory Litig., 215 F.R.D. 660, 685 (N.D. Ga. 2003) (stating that plaintiffs did not have standing to bring an NIED claim because Georgia law on NIED required an impact on the plaintiff leading to physical injury).

[179] Hein v. Freedom From Religious Found., 551 U.S. 587, 620 (2007) (Scalia, J., concurring).

They can affect people as much as the (sometimes small) economic and physical harms that courts are willing to find sufficient for standing.[180] In fact, it is plausible to think that part of the actual harm suffered when plaintiffs are economically or physically hurt—though by no means the entirety of the harm—consists of its effect on the human psyche. Paying women less for equal work, for example, undoubtedly inflicts economic harm. But part of the reason why this economic injury hurts women is that it reflects a view of women's capacities and achievements that many find humiliating or otherwise psychologically disturbing.

It may be objected that even if psychological harm is *morally* relevant, law is not morality. After all, it is morally significant whether passersby facing little risk are willing to rescue others from mortal danger, but courts have historically declined to recognize a general duty to rescue for the purposes of imposing tort liability.[181] Psychological harm, however, is not alien to the law. As indicated above, psychological and emotional injuries are recognized in several legal contexts (such as IIED and NIED claims, workers' compensation, sentencing, and antidiscrimination law).[182] Damages are sometimes awarded on the basis of emotional distress.[183] These forms of recognition of psychological harm seem to reflect an understanding that plaintiffs' grievances can legitimately include psychological or emotional damage. Put differently, psychological harm can be "concrete."[184]

This argument in favor of acknowledging psychological harm as injury-in-fact is partly an expressive view, in the sense that recognition of psychological harm as injury-in-fact would

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[180] *See* Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 289 (2008) (suggesting that a dollar or two could suffice for Article III standing); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 127 (1998) (Stevens, J., concurring) ("Yet the Court fails to specify why payment to respondent—even if only a peppercorn—would redress respondent's injuries, while payment to the Treasury does not.").

[181] *See, e.g.*, L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334, 337 (Ind. 1942). The "no duty to rescue" rule has been modified in several jurisdictions. *See, e.g.*, Jennifer L. Groninger, *No Duty to Rescue: Can Americans Really Leave a Victim Lying in the Street? What Is Left of the American Rule, and Will It Survive Unabated?*, 26 PEPP. L. REV. 353 (1999).

[182] *See supra* notes 46-49 and accompanying text.

[183] *See supra* note 155 and accompanying text; *see also, e.g.*, Stewart A. Sutton, *Emotional Distress Damages—Recoverable in Legal Malpractice Actions*, MD. B.J. 52 (Sept./Oct. 2010) (discussing recovery for emotional distress in legal malpractice cases); Douglas J. Whaley, *Paying for the Agony: The Recovery of Emotional Distress Damages in Contract Actions*, 26 SUFFOLK U.L. REV. 935 (1992) (discussing recovery for emotional distress in contract actions and limitations on such recovery).

[184] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) ("A 'concrete' injury must be 'de facto'; that is, it must actually exist. . . . When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'").

appropriately send the message that psychological damage is a real and valid form of injury. But expressiveness need not be at odds with practical effects; explicit recognition of psychological harm as injury-in-fact could make a genuine difference to citizens' ability to obtain judicial redress. A first reason for courts to cognize psychological harm as injury-in-fact, therefore, is that doing so would reflect citizens' actual experiences of harm. A second and related reason ties the point about citizens' experiences of harm to the distinct values embedded in constitutional standing doctrine.

Specifically, the injury-in-fact requirement has frequently been defended on the basis that, in the words of Justice Kennedy's concurrence in *Lujan*, it

> preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that "the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[185]

The "concrete adverseness" rationale for the injury-in-fact requirement has been criticized for failing to acknowledge the reality of interest-group litigation. Why would a highly motivated interest group be less likely to present a pointed piece of advocacy that highlights the salient issues than someone who simply happens to meet the injury-in-fact requirements?[186] Indeed, the Supreme Court has avoided casting "concrete adverseness" as the be-all and end-all of injury-in-fact. As the Court stated in a 1982 case, the "concrete adverseness" that "sharpens the presentation of issues, is the anticipated consequence of proceedings commenced

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[185] Lujan v. Defs. of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472 (1982)); *see also* Massachusetts v. EPA, 549 U.S. 497, 517 (2007) ("At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))).

[186] *See, e.g.*, Elliott, *supra* note 17, at 474-75; Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1385 (1973) ("[T]here is no reason to believe that litigants with a 'personal interest' will present constitutional issues any more sharply or ably than the Sierra Club or the ACLU."). Indeed, Justice Scalia made a similar point in an article on standing published before he became a Supreme Court Justice. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891 (1983) ("Often the very best adversaries are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no 'concrete injury in fact' whatever."); *see also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 225 (1974) (rejecting the argument that standing was present simply because "the adverse parties sharply conflicted in their interests and views and were supported by able briefs and arguments").

by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself."[187]

Certain aspects of the "concrete adverseness" justification for the injury-in-fact requirement, however, are more defensible than others. In particular, plaintiffs who can plead a specific injury, even if their advocacy is no stronger than that of other potential plaintiffs, serve an important role in the judicial process. These plaintiffs' situations can highlight the precise factual consequences of judicial action and thereby enhance courts' adjudication of legal issues, as well as other actors' comprehension of what has been decided.

For example, a court's analysis of the specific contours of a claim that a certain practice (such as a debt collection or labor practice) is illegal is greatly bolstered by the ability to evaluate a particular plaintiff's factual circumstances: X individual or group was subject to Y conduct, which X claims violates law or regulation Z; Z has previously been interpreted to prohibit or permit A, B, and C types of conduct, which are analogous to X's situation in D and E ways, but not analogous in F and G ways. The same is true of challenges to regulatory statutes or administrative regulations (say, an environmental or health and safety provision). The claim that an individual wishes to engage in a certain course of conduct, but is blocked because of a specific provision, which also has the effect of precluding other particular types of conduct, can significantly aid a court's determination of whether the provision passes muster, in a way that the abstract assertion that, for example, the provision is unconstitutional would not. Furthermore, such particularity can help members of the public, including future litigants and members of the bar, to gain a better-developed sense of what a court has done and why. Put differently, plaintiffs with injuries that affect them in distinctive ways can draw attention to the consequences of judicial action. If plaintiff X wins, then plaintiffs Y and Z would likely also win, while plaintiffs A and B would likely lose. Making plain the specific effects of judicial decisionmaking can help to elucidate the scope of rulings and underscore the ramifications of legal interventions.[188]

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[187] *Valley Forge*, 454 U.S. at 486 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)) (citation omitted).

[188] Of course, courts' focus on specific factual scenarios also frequently differentiates the judiciary from the legislative and executive branches of government. This separation-of-powers rationale for the injury-in-fact requirement is considered below. *See infra* notes 199-200 and accompanying text.

And to the extent that the injury-in-fact requirement helps to deepen and enrich the adjudicative process, the explicit recognition of psychological harm as injury-in-fact furthers this goal. The factual dimensions of a dispute include litigants' psychological experiences. People's senses of sadness, humiliation, fear, and so on can lend as much concrete, stakes-highlighting detail to a case as their economic or physical injuries. Given that the standing inquiry ought to further the aim of enhancing adjudication and comprehension of the judicial process's results, this inquiry should take into account plaintiffs' psychological and emotional reactions.

Explicit recognition of psychological harm as injury-in-fact, then, would respond appropriately to the genuine character of psychological harm and would also comport with an important value embedded in the injury-in-fact requirement. A third reason to support such recognition is that psychological harm is a common consequence of intangible injuries that some courts have already, and plausibly, accepted as sufficient for injury-in-fact—notably, aesthetic, stigmatic, and reputational injury. These injuries could potentially be considered damaging independently of their psychological effects. For example, one could hold that reputational injury is deleterious simply because other members of the community have developed a lower opinion of the plaintiff. Such an approach is not theoretically impossible, but it involves an overly abstract conceptualization of recognized injuries that is out of step with the lived experience of plaintiffs suffering these injuries and with connections that courts have drawn between these injuries and psychological harm.

A well-known passage[189] from *Brown v. Board of Education* highlights the interconnectedness between psychological harm and related injuries. "To separate [African-American children] from others of similar age and qualifications solely because of their race," the Supreme Court stated in *Brown*, "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[190] Segregation is plausibly viewed as a form of stigmatic injury, which some courts of appeals have recognized as injury-in-fact,[191] and which the Supreme Court has, at the very least, not rejected.[192] Stigmatic injury, as the passage from *Brown* suggests, is intimately connected to the personal

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[189] *See* Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076, 3088 (2014).

[190] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494 (1954).

[191] *See supra* note 121 and accompanying text.

[192] *See supra* notes 72-79 and accompanying text.

feelings of those subject to it; a description of the nature of stigma seems difficult to construct without referencing its likely effects on people's mental states. This is not to say that segregation, or stigma more generally, would not be wrong if its victims suffered no mental or emotional harm. But it is to say that in the ordinary course of life, it would be natural for a person wishing to provide an adequate characterization of stigma's influence and its problematic nature to mention the psychological consequences for the stigmatized.

Aesthetic injury serves as another example. Without delving deeply into aesthetic theory, an aesthetic experience, as an intuitive matter, involves an interplay between the object of aesthetic interest and the mental life of the observer. To say, as courts have done, that plaintiffs have "aesthetic" or "conservational" interests in "an area of great natural beauty"[193] is to call attention to the positive impact of that area on the plaintiffs' inner experience, as well as the mental or emotional loss that would attend the area's destruction. In other words, this kind of aesthetic injury plausibly affects plaintiffs partly by inflicting psychological harm. Consequently, the courts' willingness to cognize aesthetic injury should support an acknowledgement of psychological harm as a legitimate form of legally redressable damage.

The broader point is that it would be arbitrary to reject psychological harm while explicitly accepting related intangible injuries.[194] This point does not apply only at a theoretical level; some courts have linked psychological harms and other noneconomic injuries.[195] The Supreme Court's recent confirmation in *Spokeo v. Robins* that intangible harm may count as Article III injury renders all the more pertinent the connections between psychological harm and various forms of intangible harm.[196]

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[193] Sierra Club v. Morton, 405 U.S. 727, 728 (1972).

[194] For further discussion of these intangible injuries, *see supra* notes 62-89 and accompanying text.

[195] *E.g.*, Denney v. Deutsche Bank AG, 443 F.3d 253, 265 (2d Cir. 2006) ("[A]esthetic, emotional or psychological harms also suffice for standing purposes."); Coal. for the Env't v. Volpe, 504 F.2d 156, 167 (8th Cir. 1974) (referring to the impending destruction of a natural area that "provides aesthetic and psychological benefit"). Other courts have distinguished between "abstract psychic harm" and related injuries. *E.g.*, Sierra Club v. Franklin Cty. Power of Illinois, LLC, 564 F.3d 918, 926 (7th Cir. 2008) (finding standing for an environmental organization to sue a power company because of reduced aesthetic and recreational uses of the area, and noting that this was not a case of "abstract psychic harm"). But as argued below, see *infra* Section II.A.3, it is possible for courts to cognize certain types of psychological harm without cognizing "abstract psychic harm."

[196] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

The discussion above has provided reasons to favor courts' explicit recognition of psychological harm as injury-in-fact. The approach advanced in this article, however, also supports certain limitations on the cognizability of psychological harm. One reason, though not the only one, is to be responsive to the structure of courts' existing standing doctrine and thereby to advance "reflective equilibrium" between courts' approaches to standing and more general principles. Courts often cite the potential for a significant increase in the number of injured plaintiffs as a ground for not recognizing psychological harm in a given case,[197] and courts that have accepted psychological injury-in-fact and related injuries often seek to cabin the range of cognizable injury.[198] Forced to choose between unlimited endorsement of psychological injury-in-fact and unequivocal rejection of psychological harm, most courts would likely choose the latter. The better option, this article argues, is for courts not to face this choice.

Further, limits on psychological harm-based standing—and standing more generally—advance principles embedded in constitutional standing doctrine. The discussion above suggested that there is value in having courts adjudicate legal issues not in the abstract, but with reference to specific factual contexts. This idea, while it supports the recognition of psychological harm as injury-in-fact, also suggests the value of a limiting principle. If any plaintiff could request a court ruling on the legality of a law, regulation, or course of conduct, then lawsuits would not be limited to those in which a more realistic and nuanced factual record is likely to develop. Moreover, the notion that the federal courts are courts of limited jurisdiction, and that an understanding of the proper parties to a federal lawsuit helps to enforce these limitations, is firmly embedded in U.S. constitutional structure and Supreme Court jurisprudence, even if the elements of standing doctrine as we know them today emerged in the second half of the twentieth century.[199] These limitations on federal jurisdiction are rooted, for example, in considerations of the legislature's distinctive role

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[197] *E.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) ("By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier."); Allen v. Wright, 468 U.S. 737, 756 (1984) ("All such persons could claim the same sort of abstract stigmatic injury respondents assert in their first claim of injury. A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine.").

[198] *See infra* notes 234-242 and accompanying text.

[199] For a brief overview of the recent history of standing doctrine, see Fallon, Jr., *supra* note 34, at 1064-68.

or the maintenance of executive enforcement discretion.[200] These restrictions ought to be taken seriously, though they should motivate not a wholesale rejection of psychological injury-in-fact, but rather a focus on how courts can differentiate between cognizable and noncognizable claims.

There are also reasons specifically related to psychological harm to endorse limitations on injury-in-fact. For example, although it is certainly possible to offer evidence of psychological harm (as plaintiffs bringing tort claims may do),[201] cases involving psychological harm raise evidentiary questions made harder by the absence of, say, a bank statement or a severed limb. In fact, limitations on liability for NIED tort claims seem to be based partially on concerns about showing that mental harm is genuine.[202] Although it would not be reasonable to dismiss psychological harm as *impossible* to prove, it is reasonable to acknowledge a need for additional evidentiary devices in the area of psychological harm. This article's endorsement of limitations on the cognizability of psychological harm therefore stems from a desire both to speak to existing doctrine and to acknowledge the concerns that underlie this doctrine.

### 2. Psychological Injury-in-Fact and Legally Protected Interests

The first part of this article's proposed framework is that psychological harm must be a response to the alleged violation of a legally protected interest (enshrined in the Constitution, a relevant statute, or the common law). This aspect of the test is grounded in the Supreme Court's statement of Article III standing doctrine in *Lujan*: "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."'"[203] Only

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[200] *See Allen*, 468 U.S. at 760-61; Lujan v. Defs. of Wildlife, 504 U.S. 555, 576-77 (1992).

[201] *See* Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805, 832 (2004) ("[C]ourts have become more comfortable with the nature of mental injuries as the psychiatric and psychological fields have progressed.").

[202] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54 (5th ed. 1991) (noting "the danger that claims of mental harm will be falsified or imagined"); Kircher, *supra* note 155, at 810 ("[A]t the root of these rules [for NIED recovery] is judicial concern over the genuineness of claims for negligently caused emotional distress.").

[203] *Lujan*, 504 U.S. at 560 (emphasis added) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984); Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (footnote omitted) (citations omitted)). The Court reiterated this standard in *Spokeo v. Robins*. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016).

plaintiffs who allege that they are suffering psychological harm as a result of the violation of an interest that the law recognizes as valid should be able to satisfy the injury-in-fact requirement.

This principle can be illustrated with reference to the 1998 D.C. Circuit case *Animal Legal Defense Fund, Inc. v. Glickman*, where the court pointed out the significance of the "legally protected interest" aspect of the standing inquiry.[204] In this case, the plaintiffs sued the U.S. Department of Agriculture for promulgating regulations that allegedly "permit[ted] dealers, exhibitors, and research facilities to keep primates under inhumane conditions."[205] These regulations, the plaintiffs argued, violated the Department of Agriculture's "statutory mandate" under the Animal Welfare Act.[206] The plaintiffs claimed that they had standing because they "suffered aesthetic injury during their regular visits to animal exhibitions when they observed primates living under such conditions."[207] The D.C. Circuit, sitting en banc, found standing for one plaintiff on the basis of this claimed injury.[208] A vigorous dissent, however, charged the majority with ignoring the "ill-defined and essentially subjective nature of the asserted injury," stating that "[a]ccording to the majority's theory, a sadist with an interest in seeing animals kept under inhumane conditions is constitutionally injured when he views animals kept under humane conditions."[209]

As the *Glickman* majority suggested, however, the "legally protected interest" part of the standing inquiry prevents plaintiffs concerned with animal welfare from being identically situated to sadistic plaintiffs for the purposes of meeting Article III injury-in-fact requirements.[210] After all, the psychological harm suffered by plaintiffs unable to experience animal suffering does not respond to the violation of a legally protected interest.[211] That is, while the

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[204] Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 431-32 (D.C. Cir. 1998).

[205] *Id.* at 428.

[206] *Id.*

[207] *Id.*

[208] *Id.* at 431-32. The D.C. Circuit granted rehearing en banc limited to the question of this plaintiff's standing. *See id.* at 431.

[209] *Id.* at 448-49 (Sentelle, J., dissenting).

[210] *Id.* at 434 n.7 (majority opinion).

[211] *Glickman*, 154 F.3d at 434 n.7. Sadistic plaintiffs might successfully assert Article III injury-in-fact under certain circumstances. For example, plaintiffs with religious beliefs that had sadistic implications could assert standing to sue under the Free Exercise Clause. But in that case, the relevant protected legal interest would be the interest in practicing their religion, not sadism per se. The point here is that sadistic plaintiffs would not be able to assert viable claims of injury-in-fact based on psychological harm simply because plaintiffs concerned about animal welfare would be able to do so—in other words, the two categories of plaintiffs would not be identically situated.

law protects animal welfare, it does not protect cruelty to animals. To take another example, psychological harm resulting from being unable to attend a desegregated public school would pass the "legally protected interest" prong of the test, whereas psychological harm resulting from attending a desegregated public school would not.[212]

In determining that a particular psychological harm stems from a legally protected interest, courts can look to the Constitution; for example, they can indicate that an interest is protected under the Equal Protection Clause[213] or the Establishment Clause.[214] They can also look to a relevant statute, such as environmental statutes when plaintiffs allege psychological harm due to the destruction of the natural environment, animal-welfare statutes when plaintiffs allege psychological harm as a result of harm to animals, or antidiscrimination statutes when plaintiffs allege emotional distress as a consequence of a hostile working environment.[215] Alternatively, courts can look to the common law of a relevant jurisdiction.[216] These inquiries will not necessarily be straightforward; there may be disagreement about whether the violated interest giving rise to psychological harm falls within the ambit of the pertinent constitutional, statutory, or common law provision, and parties can argue about whether this is the case when the harm is understood at different levels of

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[212] *See* Allen v. Wright, 468 U.S. 737, 756 (1984) (recognizing injury-in-fact for one of plaintiffs' claims of injury, on the basis that "children's diminished ability to receive an education in a racially integrated school[] is[] . . . not only judicially cognizable but . . . [is] one of the most serious injuries recognized in our legal system" (citing Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954); Bob Jones Univ. v. United States, 461 U.S. 574 (1983))). However, the Court in *Allen v. Wright* did not find the Article III causation requirement to be satisfied with respect to this injury.

[213] *See Allen*, 468 U.S. at 756-57 (citing *Brown*, 347 U.S. 483) (drawing on *Brown v. Board of Education* to conclude that "children's diminished ability to receive an education in a racially integrated school" is judicially cognizable).

[214] *Cf.* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp (*ADAPSO*), 397 U.S. 150, 154 (1970) (stating that "[a] person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause").

[215] *Cf.* Leibovitz v. N.Y.C. Transit Auth., 252 F.3d 179, 182, 188 (2d Cir. 2001) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65-66 (1986)) (determining that plaintiff had suffered a cognizable injury as a result of being situated in an allegedly hostile work environment and noting that this injury could be remedied through a damages award because noneconomic injury resulting from such an environment was actionable under Title VII). Courts could also draw on tort statutes, as in *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 25 (D.D.C. 2010) (looking to the D.C. wrongful death statute to determine whether a father could sue on the basis of his emotional distress).

[216] *E.g.*, Smith v. Frye, 488 F.3d 263, 273 (4th Cir. 2007) (finding that a son's emotional distress was insufficient for injury-in-fact because of the "venerable common-law tort principle that 'one cannot collect for emotional damage or humiliation occasioned by harm done to a family member absent fairly particular circumstances'" (quoting Smith v. Frye, No. 06-cv-0014, 2006 WL 4757805, at *4 (N.D. W. Va. June 14, 2006))).

generality. But this type of inquiry is neither impossible nor unprecedented. In fact, the "zone of interests" inquiry, long considered to be a component of "prudential" standing—an inquiry that asks "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"[217]—can serve as a model.[218]

The "legally protected interest" prong seeks to bolster the legitimacy of courts' distinctions between psychological harm that is cognizable and psychological harm that is not. Courts need not write on a blank slate when they address the cognizability of psychological harm; they can draw on previous understandings hashed out by Congress and other courts. This approach is especially valuable in the area of psychological harm, where concerns about the subjectivity of particular psychological reactions frequently arise.[219]

The article now turns to a discussion of the second proposed constraint on the cognizability of psychological harm: the particularity inquiry.

3. The Particularity Inquiry

The second prong of the article's proposed test is that in order for psychological harm to be cognizable as injury-in-fact, there must be a sufficient nexus between the alleged violation of the legally protected interest and the plaintiff's particular circumstances, so that it is reasonable to think that such a plaintiff would be especially likely to suffer psychological harm in the situation at hand.

The particularity inquiry is motivated by the following factors. First, it aims to track potential plaintiffs who are most likely to have suffered psychological harm as a consequence of the alleged legal violation. In this sense, it is an evidentiary

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[217] *ADAPSO*, 397 U.S. at 153.

[218] See *infra* note 268 for further discussion of the "zone of interests" inquiry.

[219] *See* Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 448-49 (D.C. Cir. 1998) (Sentelle, J., dissenting); *see also* Mangual v. Rotger-Sabat, 317 F.3d 45, 56-57 (1st Cir. 2003) ("A plaintiff's subjective and irrational fear of prosecution is not enough to confer standing under Article III . . . ."); 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."). It may be asked whether the plaintiffs in *Brown*, if they had alleged psychological harm as a consequence of segregation, would have been able to meet the first prong of the standing inquiry endorsed here. A plausible response is "yes," since these plaintiffs would have asserted a violation of the Fourteenth Amendment, and their interest in equal protection was legally protected, even if it had previously been interpreted not to require desegregation.

device that places emphasis on plaintiffs' capacity to show courts that the psychological harm they allege is unlikely to be feigned. Courts in constitutional standing cases do not generally acknowledge explicitly that they are concerned about evidence of plaintiffs' injuries, but such evidentiary concerns seem to underlie at least some skepticism about psychological harm as a legally cognizable injury more broadly.[220] The particularity inquiry aims, in part, to address these concerns.

Second, and relatedly, the particularity analysis—as with its cousins in tort law, such as many states' requirement that NIED plaintiffs be located in the "zone of danger" when the tortious conduct took place in order to recover[221]—tracks in a rough sense the "reasonable foreseeability" of plaintiffs' psychological harm. To the extent that a limiting principle is needed to circumscribe standing on the basis of psychological harm, it is most appropriate and fair to both plaintiffs and defendants to restrict standing to those whose psychological harm could reasonably have been foreseen by the defendants before they took the challenged action. If society wishes to use the legal system to encourage actors to prioritize the avoidance of certain types of anticipated harm, then the circle of jurisdiction should be drawn in a way that seeks to capture plaintiffs who have suffered from the presence of such harms. As with particularity as an evidentiary device, the factors presented below do not map onto reasonable foreseeability in every case, but they tend in this direction.

Third, the particularity inquiry speaks to courts' explicit insistence on limitations around the circle of potential plaintiffs, as evidenced by the requirement that "the party seeking review be himself among the injured."[222] In psychological harm cases, courts are largely unwilling to cognize psychological harm when the harm suffered by the plaintiffs is not "distinct from that suffered by the public at large,"[223] and the particularity factors help to distinguish viable plaintiffs from the public at large.

Given these motivating principles, this section suggests various factors that could be used in making the particularity determination. The proposal is designed to be flexible, so that courts could accept some factors without accepting others, and

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[220] *See* KEETON ET AL., *supra* note 202, § 54; *cf.* Barnes-Wallace v. City of San Diego, 530 F.3d 776, 786 n.6 (9th Cir. 2008) (emphasizing that unlike in *Barnes-Wallace*, "the problem with standing in *Valley Forge* was not the nature of the psychological injury but 'the absence of any personal injury at all'" (quoting Buono v. Norton, 371 F.3d 543, 547 (9th Cir. 2004))).

[221] *See* Kircher, *supra* note 155, at 815.

[222] Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

[223] Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1396 (9th Cir. 1992).

add other factors as well. Further, the following factors are meant to be illustrative rather than exhaustive. This flexibility responds to the reality that there are many different types of psychological harm, and courts should consequently be adaptable in adjudicating claims of standing based on psychological harm.

This section, in presenting factors to be used in the particularity inquiry, draws on previous cases as examples of the factors' application. The section also extends the factors to new sets of facts and offers correctives to previous cases.

*a. Relationship to a Harmed Object*

One factor that counts in favor of standing based on psychological injury-in-fact is the relationship between the plaintiff and another entity whose injuries give rise to psychological harm. Psychological harm, as suggested by the analysis above, often arises in the standing context when plaintiffs assert harm to themselves as a consequence of harm to a different object—an inanimate aspect of the environment,[224] an animal,[225] or another human being unable to sue.[226] Under the proposed particularity analysis, a plaintiff would be more likely to be able to assert standing successfully if he or she could show a close relationship with the other object. This criterion is inspired by, but not identical to, the requirement in many states that plaintiffs bringing NIED claims when they are bystanders to another person's physical injury must share a close family relationship with the physically injured.[227] A plaintiff could bolster claims of a close relationship through allegations (or evidence, at the appropriate stage in the proceedings) of time spent together, concern for the particular object's fate, or history of interest in that object.

An example of a case in which a court showed readiness to delve into a plaintiff's relationship to a harmed object is the D.C. Circuit case *American Society for Prevention of Cruelty to Animals v. Feld Entertainment*.[228] In the first iteration of this

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[224] *E.g.*, Coal. for the Env't v. Volpe, 504 F.2d 156, 167 (8th Cir. 1974).

[225] *E.g.*, Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus (*APSCA I*), 317 F.3d 334, 338 (D.C. Cir. 2003).

[226] *See, e.g.*, Chaudhry v. City of Los Angeles, 751 F.3d 1096, 1109 (9th Cir. 2014) (addressing allegations of emotional injury stemming from relationships with a deceased individual).

[227] *See Cause of Action by Bystander for Negligent Infliction of Emotional Distress*, *in* 40 CAUSES OF ACTION 2D 115 § 8 (2009).

[228] Am. Soc'y for the Prevention of Cruelty to Animals v. Feld (*APSCA II*), 659 F.3d 13 (D.C. Cir. 2011).

case, *American Society for Prevention of Cruelty to Animals v. Ringling Bros.*, the D.C. Circuit, reversing the district court, found that a former elephant handler had standing to sue the owner of the circus where he worked for mistreating the elephants in violation of the Endangered Species Act.[229] The court found injury-in-fact on the basis of the elephant handler's allegedly "strong, personal attachment to these animals"—an attachment that meant, the elephant handler claimed, that he would suffer "aesthetic and emotional injury" if he visited the animals in their current state.[230]

Eight years later, after the case had been dismissed and refiled, the D.C. Circuit upheld the district court's finding, following a bench trial, that the plaintiff did not show that he actually had a personal attachment to the animals and was not simply a "paid plaintiff,"[231] and so the plaintiff had failed to prove the allegations of injury-in-fact that had won him standing at the pleading stage. Among the pieces of evidence that the district court had considered were that the worker "complained publicly about the elephants' mistreatment only after he was paid by activists to do so," that he "had referred to one of the elephants as a . . . 'killer elephant' who 'hated' him," "that he struggled to recall the names of the elephants in two separate depositions," "that he had failed to take advantage of multiple opportunities to visit the elephants outside of the circus," and "that he was unable to identify the individual elephants on videotape, including one who had the 'distinctive and unusual (for an Asian elephant) characteristic of a swayed back.'"[232]

The D.C. Circuit in the later iteration of the case did not revoke its earlier declaration that emotional harm generated by personal attachment to animals could count as injury-in-fact. But the D.C. Circuit held, in effect, that the particular plaintiff had not established a sufficient nexus to the alleged violation of the Endangered Species Act. The district court's consideration of various concrete factors affecting the relationship between the circus worker and the elephant highlights the point that the idea of "relationship" as a particularity factor need not be an impenetrable black box; it can instead be a workable standard.

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[229] *APSCA I*, 317 F.3d at 338.

[230] *Id.* at 335-37.

[231] *APSCA II*, 659 F.3d at 18 (quoting Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc., 677 F. Supp. 2d 55, 67 (D.D.C. 2009)).

[232] *Id.* at 20 (quoting *Am. Soc. for Prevention of Cruelty to Animals*, 677 F. Supp. 2d at 84).

*b. Geographical Proximity*

Geographical proximity to the source of the challenged legal violation is another tool that courts can use to gauge the nexus between the alleged violation and a particular plaintiff's experience of psychological harm. For example, courts assessing the constitutionality of religious displays can take into account the extent of the plaintiff's actual exposure to the display.[233] Courts dealing with environmental cases can emphasize whether plaintiffs personally observed or interacted with the natural phenomena they are suing in order to protect,[234] and courts addressing animal welfare claims can find injury-in-fact partly on the basis that the plaintiffs personally witnessed the animal's suffering (even if there was no preexisting relationship between the plaintiff and the animal).[235]

The geographical proximity criterion draws on elements of NIED claims in jurisdictions in which plaintiffs must have a "sensory and contemporaneous observance" of the accident in order to recover when they suffer emotional distress as a result of witnessing an accident as bystanders.[236] Although there is no reason to believe that *only* plaintiffs in geographical proximity to the challenged practice would experience psychological harm, there seems to be some truth to the notion, reflected in this NIED doctrine, that proximity to conduct that is repugnant or otherwise distressing to a person would be especially likely to provoke mental or emotional suffering.[237] "Out of sight, out of mind" does not hold true across the board, but the fact that people frequently avoid direct contact with situations they find psychologically or emotionally distressing speaks to the influence that geographical proximity can have.

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[233] *See, e.g.*, Red River Freethinkers v. City of Fargo, 679 F.3d 1015, 1024 (8th Cir. 2012); ACLU of Ohio Found., Inc. v. DeWeese, 633 F.3d 424, 429 (6th Cir. 2011).

[234] *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181-82 (2000).

[235] *See, e.g.*, Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1396-97 (9th Cir. 1992); Hill v. Coggins, No. 13-cv-00047, 2014 WL 2738664, at *4 (W.D.N.C. June 17, 2014); Levine v. Johanns, Nos. 05-cv-04764, 05-cv-05346, 2006 U.S. Dist. LEXIS 63667, at *32-33 (N.D. Cal. Sept. 6, 2006), *rev'd on other grounds sub nom.* Levine v. Vilsack, 587 F.3d 986 (9th Cir. 2009). In *Levine*, a California district court held that workers at a poultry plant had suffered cognizable emotional injury from "directly witnessing the suffering of animals." *Levine*, 2006 U.S. Dist. LEXIS 63667, at *32. The Ninth Circuit reversed on redressability grounds and noted on appeal that the Department of Agriculture had challenged only the district court's redressability ruling. *See Levine*, 587 F.3d at 992, 997.

[236] 40 CAUSES OF ACTION 2D 115, *supra* note 227, § 11.

[237] *See, e.g.*, Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968) (including, among the factors used to evaluate NIED claims, "[w]hether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it").

It was therefore plausible for the Ninth Circuit to conclude in *Barnes-Wallace v. City of San Diego* that lesbian and agnostic plaintiffs showed "personal emotional harm" resulting from the Boy Scouts' lease of recreational land in the city.[238] In this case, the plaintiffs stated that they wished to use this land but did not do so, on account of their opposition to the Boy Scouts' positions on homosexuality and religion.[239] It was similarly appropriate for the Ninth Circuit in *Catholic League* to draw on proximity-related factors to conclude that Catholic citizens of San Francisco had standing to challenge a city resolution that condemned the Church's positions on adoption by same-sex couples.[240] The court noted that plaintiffs had pleaded, among other factors, that "(1) they live in San Francisco"; "(2) they are Catholics"; and "(3) they have come in contact with the resolution."[241] The court, in one of the most detailed discussions of psychological harm in a judicial opinion, used such proximity-related factors in distinguishing between different *types* of psychological harm: "[a] 'psychological consequence' does not suffice as concrete harm where it is produced merely by 'observation of conduct with which one disagrees.' But it does constitute concrete harm where the 'psychological consequence' is produced by government condemnation of one's own religion or endorsement of another's in one's own community."[242] The point that the alleged legal violation occurred in the plaintiffs' "own community" therefore helped, in this case, to constitute the nature of the psychological harm itself—as a response to government condemnation of a kind that was thought to damage the relationship between the individual and the community.

The proximity criterion would also have provided a more effective way for the Supreme Court to address the claim of stigmatic injury in *Allen v. Wright*. As Justice Brennan's dissent in that case pointed out, the plaintiffs' claims could be interpreted not as alleging that all African-Americans suffered stigmatic injury as a consequence of government policies on tax exemptions for racially discriminatory private schools, but rather that "black children attending public schools in districts

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[238] Barnes-Wallace v. City of San Diego, 530 F.3d 776, 784 (9th Cir. 2008).

[239] *Id.*

[240] Catholic League for Religious & Civil Rights v. City & County of San Francisco, 624 F.3d 1043, 1053 (9th Cir. 2010).

[241] *Id.* The court also indicated that the plaintiffs had alleged that the resolution "convey[ed] a government message of disapproval and hostility toward their religious beliefs" and sent a "clear message . . . that they are outsiders, not full members of the political community," thereby "chilling their access to the government" and "forcing them to curtail their political activities." *Id.*

[242] *Id.* at 1052.

that are currently desegregating yet contain discriminatory private schools benefiting from illegal tax exemptions" have suffered a stigmatic injury.[243] The Court could therefore have limited a claim of stigmatic injury (or psychological harm) to those plaintiffs in geographical proximity to the alleged legal violation and, in this way, avoided both the rejection of stigmatic injury and the open-ended expansion of standing.[244]

*c. Longevity and Frequency*

As part of the particularity inquiry, courts could take into account time-related factors, such as the longevity of the plaintiff's connection to the situation from which the harm arises and the frequency of the plaintiff's contact with the situation. For example, a student alleging illegal treatment by a public school teacher could bolster a claim of psychological injury-in-fact by showing that he had been subject to the hostile conduct frequently or for a long period of time.[245] By contrast, a person who had spent only a weekend vacationing at a place of great natural beauty would have less of a claim of injury-in-fact based on psychological harm if the place were slated to be destroyed. Like the "relationship" and "geographical proximity" factors, the time-related factors play an evidentiary role in suggesting that plaintiffs have suffered psychological harm; it is easier to conclude that such an allegation is plausible when plaintiffs can show that they have encountered the challenged conduct several times or over an extended period of time.

*d. Severity*

A court could also treat the severity of the mental or emotional suffering as an aspect of the case favoring a finding of injury-in-fact.[246] There are valid questions about the legitimacy

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[243] Allen v. Wright, 468 U.S. 737, 770 n.3 (1984) (Brennan, J., dissenting).

[244] *See* Healy, *supra* note 36, at 430, 465-66.

[245] *Cf.* Estate of Morris *ex rel.* Morris v. Dapolito, 297 F. Supp. 2d 680, 690 (S.D.N.Y. 2004) (finding injury-in-fact when a public school student suffered "public humiliation, public shame, public degradation, anxiety, public embarrassment, . . . emotional upset, loss of self-esteem, and was otherwise rendered sick and sore" (alteration in original) (quoting Amended Complaint ¶ 56)).

[246] A similar approach is taken in *Brooklyn Center for Independence of the Disabled*, where a court found standing partly "based on the threat of future harm and the fear and apprehension caused by it" and noted that "where the threatened injury is particularly severe, courts are more likely to find standing." Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg, 290 F.R.D. 409, 415 (S.D.N.Y. 2012) (citing Baur v. Veneman, 352 F.3d 625, 637 (2d Cir. 2003) ("Because the evaluation of risk is qualitative, the probability of harm which a plaintiff must demonstrate in order to allege a cognizable injury-in-fact logically varies with the severity of the probable harm.").

of using severity as part of the particularity inquiry. Ordinarily, courts do not inquire into the gravity of an injury before finding that it counts as injury-in-fact.[247] If a person loses five dollars, he or she is eligible to claim injury-in-fact; if the person is only slightly psychologically harmed, should he or she be less able to sue?

But it is not necessarily problematic to maintain different standards for injury-in-fact when it comes to psychological harm. One of the problems with standing doctrine may be that courts have insisted on using a single framework to govern all types of standing claims instead of engaging in a more contextually sensitive inquiry. Given reluctance to cognize psychological harm as compared to other types of harm, evidentiary issues about proving psychological harm, and the difficulty of distinguishing between cognizable harm and "generalized grievances" that provoke mental or emotional reactions in citizens, it is reasonable for courts to use severity as one factor in evaluating the question of whether a particular plaintiff bringing suit has suffered Article III injury. One could make an analogy to tort law, where IIED claims include "[s]evere emotional distress" as an element, even though other intentional torts do not include severe damage as an element of liability.[248]

Severity could also plausibly be seen not as a means of assessing whether a particular plaintiff has been *sufficiently* psychologically harmed, but as a means of assessing whether a particular plaintiff has been psychologically harmed *at all*. In fact, plaintiffs bringing claims of psychological harm frequently assert severe mental or emotional distress.[249] One reason may be to improve a damages award or to bring a claim that has severe distress as an element (notably IIED), but allegations of severity appear even when no such claims are at issue and plaintiffs do not seek damages.[250] The thought might well be that alleging severe psychological harm will make it more likely for the relevant harm to be acknowledged as real. It is difficult for courts to assess a claim that, say, a plaintiff experienced mild, passing annoyance—more difficult than assessing a claim that a plaintiff's bank account lost one dollar. In light of this

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[247] *See* Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 289 (2008); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 680 n.144 (1973); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 127 (1998) (Stevens, J., concurring in the judgment).

[248] *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965).

[249] *See, e.g.*, Doe v. Chao, 540 U.S. 614, 618 (2004); Humane Soc'y of the U.S. v. Babbitt, 46 F.3d 93, 98 (D.C. Cir. 1995); Estate of Morris *ex rel.* Morris v. Dapolito, 297 F. Supp. 2d 680, 690 (S.D.N.Y. 2004); *see also* Clayton v. White Hall Sch. Dist., 875 F.2d 676, 679 (8th Cir. 1989).

[250] *See, e.g.*, *Babbitt*, 46 F.3d at 98.

distinction, it is reasonable for courts to take severity into account in the particularity analysis. Of course, severity is only one factor in this analysis, so light psychological harm could sometimes suffice as injury-in-fact if other factors are present.

*e. Plaintiff's History*

The proposed approach to psychological harm and standing is flexible, and it could accommodate factors that would more aggressively stretch the bounds of courts' current Article III jurisprudence. In particular, a factor that courts could but need not take into account is the history of a plaintiff's attachment to a cause that would be set back by the alleged legal violation. Political and social activists may feel very strongly about causes such as the environment, firearm regulation, the relationship between religion and politics, abortion, animal welfare, and so on. Even courts that have rejected standing based on psychological harm that seems to stem simply from political disagreement have acknowledged the depth of some such plaintiffs' feelings.[251] Indeed, as discussed above, these plaintiffs may be especially motivated to present vigorous legal advocacy on behalf of their cause.[252]

Furthermore, courts are not incapable of adjudicating people's degree of attachment to a cause. For example, in *United States v. Seeger*, the Supreme Court found that for the purposes of conscientious objector exemptions, "the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[253] A court could similarly find that attachment to the environment, the separation of church and state, data privacy, or other beliefs and principles constitutes a crucial aspect of particular plaintiffs' lives in such a way that these plaintiffs are likely to be psychologically harmed when the object of this attachment is in jeopardy.

Recognizing plaintiffs' historical attachments as a particularity factor would run counter to the courts' current standing jurisprudence, which is generally highly skeptical of "ideological" plaintiffs.[254] One approach would be for courts to

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[251] *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 486 (1982).

[252] *See supra* note 186 and accompanying text.

[253] United States v. Seeger, 380 U.S. 163, 165-66 (1965).

[254] *E.g.*, *Valley Forge*, 454 U.S. at 485-86; United States v. 5 S 351 Tuthill Road, Naperville, Ill., 233 F.3d 1017, 1022 (7th Cir. 2000).

allow historical attachment to weigh in favor of finding injury-in-fact only when other particularity factors have been satisfied. But even if courts are inclined to reject plaintiffs' history as a particularity factor, this factor is not a necessary part of the proposal advanced here. The concept serves simply to show that the test may be adjusted to include a variety of factors depending on how expansively a court is willing to interpret injury-in-fact requirements.

In light of this enumeration of different factors, how do they all fit together? Take a hypothetical case (inspired by the facts of the Ninth Circuit case *Fund for Animals v. Lujan*)[255] in which members of an animal-welfare organization sue the government and claim injury-in-fact because on one occasion, they personally saw an animal being brutally killed as a result of an alleged legal violation. The relationship factor would not speak strongly in favor of standing, since none of the members had any preexisting relationship to the animal. However, the proximity factor would weigh heavily in favor of a finding of injury-in-fact, because the members were directly in front of the animal when it was killed. The longevity and frequency factors would likely not weigh in favor of standing, given the singular nature of the encounter. But in light of the encounter's intensity, the severity factor would pull the court in the direction of finding injury-in-fact. The plaintiffs' history, if the court were willing to include this factor, would also encourage a finding of injury-in-fact.

As with many multifactor legal tests, there is no mathematical formula to determine the result of combining these considerations. Overall, the severity criterion would likely make the difference in this hypothetical case, and accordingly, a court is likely to find injury-in-fact. Beyond this specific example, the essential point is that whatever way a court comes out, it should clearly explain the basis for its decision in accordance with the same framework that it would apply more generally. In the actual *Fund for Animals v. Lujan* case, the court found standing based on the "psychological injury [the plaintiff organization's members] suffered from viewing the killing of the bison in Montana," noting that the members "suffered an injury arising from a 'direct sensory impact of a change in [their] physical environment.'"[256] The court was correct to consider this proximity factor and to place

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[255] Fund for Animals, Inc. v. Lujan, 962 F.2d 1391 (9th Cir. 1992).

[256] *Id.* at 1396-97 (alteration in original) (quoting Animal Lovers Volunteer Ass'n v. Weinberger, 765 F.2d 937, 938 (9th Cir. 1985)).

it on the scales in a way that favored a finding of injury-in-fact. Nevertheless, to the extent that the members had only a brief, one-time contact with the bison, the court should also have taken into account the longevity and frequency prongs. The court might still justifiably have come out the same way, but it would have done so with an explicit acknowledgment that multiple factors can appropriately guide an analysis of psychological harm as injury-in-fact.

To round out the discussion of particularity factors, this section turns to the psychological reactions of fear or anxiety about future events. As noted above, there exists a "bootstrapping" concern that if courts cognize fear or anxiety that fails to meet the *Clapper* standard for injury-in-fact—of "certainly impending" injury or at least a "substantial risk" of injury—then the *Clapper* standard could be undermined by the recognition of psychological injury-in-fact. There are several possible ways of dealing with this issue.

One is simply to remove future events from the ambit of the test for psychological standing, so that if psychological harm results from an anticipated event, then it is not cognizable. The Supreme Court case *Lyons* gestured in this direction (though, as noted above, the Court in *Lyons* did not institute such a categorical bar). In *Lyons*, the Court stated, in evaluating a claim brought by a plaintiff who feared being placed in a chokehold by the Los Angeles police, that "it is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."[257] More recently, in 2013, a D.C. district court held in a case called *Bernstein v. Kerry* that American citizens living in Israel, one of whose asserted bases for standing was that, as a result of terrorism, "they live in constant fear that their lives and livelihood are at risk," did not sufficiently allege injury-in-fact.[258] The court, citing *Clapper*, ruled that the injury the plaintiffs asserted was too "speculative" to support standing and that "plaintiffs have no legal support for the view that a subjective emotional response to the possibility of an invasion of a legally-protected interest constitutes an injury-in-fact."[259] Yet neither *Lyons* nor *Bernstein* explained precisely what makes certain

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[257] City of Los Angeles v. Lyons, 461 U.S. 95, 107 n.8 (1983).

[258] Bernstein v. Kerry, 962 F. Supp. 2d 122, 127 (D.D.C. 2013); *see also* Tomsha v. Gen. Servs. Admin., No. 15-cv-7326, 2016 WL 3538380, at *2 (S.D.N.Y. June 21, 2016) ("Plaintiffs' genuine fears of a future terrorist attack at One World Trade Center are insufficient to establish constitutional standing."); George v. Islamic Republic of Iran, 63 F. App'x 917, 918 (7th Cir. 2003) ("[T]he inmates' 'injury' amounts to nothing more than a generalized fear of terrorism that is shared by many if not most Americans.").

[259] *Bernstein*, 962 F. Supp. 2d at 127.

apprehensions "subjective" or squarely addressed the issue of whether anxiety or fear should count as injury-in-fact when the feared harm is not considered overly "speculative."

The rejection of all anxiety or fear as injury-in-fact would draw too uncompromising a line between various types of psychological harm. Plaintiffs' concern about future legal violations can wreak as much psychological havoc as their psychological responses to currently occurring legal violations, and labeling the former type of harm per se not cognizable would be arbitrary. Moreover, prevailing standards for injury-in-fact—including those enumerated in *Clapper*—leave open the possibility of accepting events short of currently occurring injury as injury-in-fact, provided a certain "imminence" requirement is met.[260] There is no logical inconsistency between accepting events short of currently occurring injury as injury-in-fact on the one hand, and rejecting fear and anxiety about future events as bases for standing on the other.[261] But cognizing future events strengthens the grounds for cognizing fear and anxiety concerning those events. After all, part of the reason why future events are harmful is their effect on plaintiffs in the present, including their effects on plaintiffs' psychological states. It might be contended that the future "risk" of harm is injurious in itself. But when one delves into the precise nature of the concern with the future, present costs, including psychological ones, seem to be significant aspects of the concern.

Instead of rejecting all anxiety or fear as injury-in-fact, courts should, at a minimum, indicate that anxiety or fear about future events counts as psychological injury-in-fact when the anticipated event meets the "certainly impending" (or "substantial risk"[262]) standard. This approach would preserve both adherence to *Clapper* and a role for anxiety and fear about future events as injury-in-fact. Courts could also go further and abandon the *Clapper* standard, instead holding that a "reasonable fear" suffices for standing, as the Second Circuit Court of Appeals in *Clapper* had done.[263] This move would still allow courts to rule out unreasonable or overly "speculative"

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[260] *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1143, 1151 (2013); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). While *Clapper* rejected the proposition that present costs incurred on the basis of any reasonable fear would suffice for injury-in-fact, *Clapper* did not prevent future events per se from constituting injury-in-fact, provided that the projected event was "certainly impending." *See Clapper*, 133 S. Ct. at 1151.

[261] *See Clapper*, 133 S. Ct. at 1151.

[262] *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014).

[263] Amnesty Int'l USA v. Clapper, 638 F.3d 118, 122 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1138 (2013).

fears.[264] Such an approach would be more in line with the general proposal about psychological injury-in-fact that this article supports, as it would enable courts to cognize the particular psychological responses of anxiety or fear when there is a sufficiently close nexus between the alleged legal violation and a specific plaintiff. But abandoning the *Clapper* standard is not a necessary implication of this proposal. Overall, then, the Supreme Court's current jurisprudence can accommodate an approach that recognizes as injury-in-fact the psychological harm associated with fear and anxiety about future events, but this article's proposal also raises issues that would prompt a rethinking of the *Clapper* standard.

## *B. Psychological Harm and Injury-in-Fact: Further Development*

This section further develops the article's proposal through a consideration of additional features of the topic of psychological harm and injury-in-fact, including objections to the points made in this article thus far. In particular, this section considers (1) the relationship between restrictions on psychological injury-in-fact and other threshold matters governing plaintiffs' access to the federal courts, (2) whether psychological harm, on this article's proposal, becomes superfluous because the actual injury is simply the violation of a protected legal interest, and (3) whether this article's proposal unduly expands judicial discretion by giving courts too much latitude in determining when psychological harm counts as injury-in-fact.

### *1. The Proposed Limitations on Psychological Injury-in-Fact and Other Threshold Matters*

The question may arise how the article's proposed limitations on psychological harm as injury-in-fact interact with other limitations on Article III standing, such as the causation and redressability prongs of the Article III standing test, or, more broadly, with other threshold matters governing plaintiffs' access to the courts, such as the requirement that a plaintiff assert a valid cause of action. This article posits that there are reasons to decide issues of psychological harm–based

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[264] *See also* Baur v. Veneman, 352 F.3d 625, 628 & n.11 (2d Cir. 2003) (determining that a plaintiff had standing to sue the U.S. Department of Agriculture to stop certain Department practices based on the plaintiff's "exposure to an enhanced risk of disease transmission," and stating that "post-filing events may confirm that a plaintiff's fear of future harm is reasonable").

standing through a focus specifically on injury-in-fact. For instance, there is value in validating psychological harm as a genuine injury, and engagement with psychological harm and its limitations as part of the injury-in-fact inquiry can further this aim. At the same time, there is certainly overlap between various doctrines that play a role in determining plaintiffs' access to the federal courts. In fact, if one prefers to see a part of the article's proposal as better handled under another jurisdiction-related or justiciability doctrine, then that option may be left open. It may be less useful to draw bright lines between different aspects of standing doctrine than to consider whether a given approach to psychological harm as injury-in-fact serves the purposes of the standing inquiry, including the clear and adverse presentation of factual issues and the presence of a limiting principle.

For example, one issue is the relationship between the "legally protected interest" prong and the question of whether a plaintiff has a cause of action.[265] While the two issues could be treated separately, existing doctrine suggests that whether a legally protected interest has been violated is part of the injury-in-fact inquiry.[266] Consequently, the violation of such an interest can both provide a cause of action and constitute part of the test that permits a plaintiff to assert injury-in-fact successfully. In this sense, courts considering whether a plaintiff has a cause of action are simultaneously conducting one aspect, though not the only aspect, of the injury-in-fact inquiry. Such an outcome is compatible with the courts' view of standing doctrine as a requirement to be satisfied over and above the presence of a cause of action.[267] This is not to rule out the possibility that courts could review the "legally protected interest" issue through a cause of action analysis, treat psychological harm as injury-in-fact if it satisfies the particularity condition, and then put together these inquiries (and others) to

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[265] *See* Fletcher, *supra* note 17, at 232-33, 290-91; Sunstein, *supra* note 17, at 166.

[266] *See* Lujan v. Defs. 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"'" (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990))); *see also* Allen v. Wright, 468 U.S. 737, 756 (1984) (noting that "children's diminished ability to receive an education in a racially integrated school[] is[] . . . not only judicially cognizable but . . . one of the most serious injuries recognized in our legal system" (citing Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); Bob Jones Univ. v. United States, 461 U.S. 574 (1983))).

[267] *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp (*ADAPSO*), 397 U.S. 150, 154 (1970). For critiques of the requirement of injury-in-fact over and above the presence of a cause of action, see Fletcher, *supra* note 17, at 232-33, and Sunstein, *supra* note 17, at 166-67.

determine whether a plaintiff can bring a claim. But treating the "legally protected interest" prong as part of the inquiry into psychological harm's cognizability helps to address concerns that recognizing psychological harm would inject too much subjectivity into standing analysis, since the psychological harm would need to be connected to the violation of a genuine legal interest.[268]

Limitations on psychological injury-in-fact also intersect with other inquiries in constitutional standing doctrine, namely causation and redressability. For example, the particularity analysis might be seen as a way to ask whether the alleged legal violation actually *caused* the psychological harm. Looking into the nexus between a plaintiff and an alleged legal violation, that is, seems like an inquiry into the causal link between the two. It may be questioned, therefore, why the article's proposal treats the particularity inquiry as part of injury-in-fact rather than part of causation or redressability. In response, this article follows existing jurisprudence in considering factors related to the particularity inquiry—for example, personal observation of animal slaughter,[269] "direct and unwelcome" contact with a challenged religious display,[270] or personal use of a river[271]—as part of an examination of injury-in-fact rather than of causation. In arguing for a more explicit, thorough, and widespread application of particularity factors, this article aims to build on principles that some courts have already adopted.

Moreover, and moving past the interest in speaking to existing doctrine, the particularity condition is primarily designed

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[268] Another question is how the "legally protected interest" prong relates to the "zone of interests" test. The "zone of interests" inquiry involves asking whether the interest that the plaintiff seeks to protect is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *ADAPSO*, 397 U.S. at 153. In the past, the "zone of interests" test was viewed as a "prudential" standing doctrine. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004). Recently, however, the Supreme Court rejected the classification of the "zone of interests" test as a prudential standing doctrine and indicated that (at least in statutory cases) "[w]hether a plaintiff comes within 'the "zone of interests"' is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 (2014). To the extent that the "zone of interests" test is now more akin to the issue of whether a particular plaintiff has a cause of action, the comments above on the relationship between the "legally protected interest" prong and the issue of whether the plaintiff has a cause of action would apply.

[269] *See* Levine v. Johanns, Nos. 05-cv-04764, 05-cv-05346, 2006 U.S. Dist. LEXIS 63667, at *32-33 (N.D. Cal. Sept. 6, 2006), *rev'd on other grounds sub nom.* Levine v. Vilsack, 587 F.3d 986 (9th Cir. 2009).

[270] ACLU of Ohio Found., Inc. v. DeWeese, 633 F.3d 424, 429 (6th Cir. 2011).

[271] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 182 (2000).

to track not the origins of psychological harm, but the reasonability of supposing that psychological harm is present in a particular plaintiff at all. Once a court accepts that psychological harm is present in a particular plaintiff, the causation issue still remains as a separate inquiry. For instance, a court could find that the defendant's actions were not truly responsible for the leak of the plaintiff's personal information that gave rise to psychological harm, because the leak was "fairly traceable" only to an intervening party. The causation inquiry, in this example, is more about the appropriateness of the *defendant* than of the plaintiff. Did the psychologically harmed plaintiff sue the right individual or entity? This question remains after the issue of whether a particular plaintiff has the requisite connection to the alleged legal violation is addressed. Consequently, the particularity inquiry is not equivalent to causation analysis, even if particularity factors play a role in both. Rather, the particularity inquiry distinctly speaks to the suitability of specific plaintiffs to raise claims of psychological harm.

Another aspect of constitutional standing is redressability—whether it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision'"[272]—and one might argue that the "legally protected interest" test is actually a proxy for redressability. That is, in asking whether a plaintiff's psychological harm stems from the alleged violation of a legally protected interest, a court might effectively be asking whether enforcing or changing the law would redress the harm. In response, a concern about redressability may well broadly underlie courts' approaches to issues of standing and justiciability. If a plaintiff sues claiming that she has suffered psychological harm as a consequence of light mockery, a court may be concerned that it cannot rectify the situation and so may not wish to exercise jurisdiction. But even if redressability plays an underlying or motivating role in the "legally protected interest" inquiry, the latter inquiry is still conceptually distinct. A plaintiff can suffer psychological harm as a result of an alleged legal violation even if the likelihood of redressability is absent—for example, because a ruling against a particular defendant would not change the behavior of third parties not before the court.[273]

Overall, federal courts have created a web of legal doctrines governing plaintiffs' capacity to bring a claim. While the injury-in-fact requirement can do some work in terms of

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[272] *Lujan*, 504 U.S. at 561 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)).

[273] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (1992).

limiting standing claims, it need not do all of it. In fact, this point can help to alleviate concerns that recognizing psychological injury-in-fact will eviscerate limitations on the federal courts' jurisdiction. Even if plaintiffs show injury-in-fact as a result of psychological harm, they must still assert a cause of action, show causation and redressability, and fulfill the standards of justiciability doctrines such as mootness and ripeness.[274] Of course, in order to be ultimately successful, plaintiffs must also present valid legal claims on the merits. These points weigh against the concern that recognizing psychological injury-in-fact would license an undue expansion in the federal courts' jurisdiction.

### 2. Whether Psychological Harm Is Rendered Superfluous

According to this article's proposal for evaluating whether psychological harm is cognizable, the harm must respond to the alleged violation of a legally protected interest, and the harmed plaintiff must have a particular connection to that violation. It may be argued that once these conditions are satisfied, there is no longer any need for courts to cognize psychological harm, for under this article's proposal, it is the alleged violation of the legally protected interest, and not the resulting psychological harm, that gives rise to standing. In response, this objection would also undercut the cognizability of economic injury-in-fact if monetary harm results from the alleged invasion of a legally protected interest. In other words, if the alleged violation of a protected legal interest leads to economic loss, then why should the economic loss count as injury-in-fact? Yet courts have shown little appetite for questioning economic loss as injury-in-fact. It is coherent to say both (1) that psychological harm counts as injury-in-fact and (2) that psychological harm counts as injury-in-fact only when certain conditions are fulfilled, namely that the harm constitutes a response to the alleged violation of a legally protected interest and that the plaintiff has a sufficiently close relationship to the violation.

In fact, the possibility of holding both positions suggests that this article's proposal need not contradict the pronouncements of some courts that seem to reject psychological injury-in-fact altogether. Such courts frequently characterize the harm at issue using words like "mere psychological

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[274] For a discussion of ripeness doctrine, see *supra* note 109.

discomfort"[275] or "purely psychological harm."[276] If all these statements mean—and this is certainly debatable—is that a psychological reaction conceived independently of any cognitive response to an outside influence cannot count for standing, then they are not incompatible with the article's proposal, which requires plaintiffs to claim that their psychological harm is responsive to the alleged violation of a legally protected interest and to satisfy the particularity condition.[277]

The concern that psychological harm "drops out" could also be raised with respect to fear or anxiety about future events. If courts cognize fear or anxiety only when the future event is "certainly impending"—or even when the fear of a future event is "reasonable"—then are they not just cognizing the future event as injury-in-fact, independent of plaintiffs' fear? To some degree, courts simply have a choice about how to conceptualize the injury. Yet they could plausibly conceptualize the fear as injury-in-fact on the condition that the fear meets certain standards, among which is that it responds to a certainly impending event. This kind of conceptualization would have the advantage of clearly communicating courts' recognition of the genuine and significant impact of psychological harm on citizens. The article's proposal, therefore, does not render psychological harm superfluous.

### 3. Particularity and Judicial Discretion

Perhaps most fundamentally, the particularity inquiry might be challenged as an arbitrary standard that illegitimately enhances judicial discretion and leads to an open-ended expansion of standing. In particular, one could contend that the

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[275] Freedom From Religion Found., Inc. v. Zielke, 845 F.2d 1463, 1468 n.3 (7th Cir. 1988).

[276] United States v. All Funds on Deposit with R.J. O'Brien & Assocs., 783 F.3d 607, 616 (7th Cir. 2015); *see also* Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 619-20 (2007) (Scalia, J., concurring) (referring to the "conceptualizing of injury in fact in purely mental terms").

[277] These courts' conception of psychological states would then be in line with what Dan Kahan and Martha Nussbaum label a "mechanistic" conception of emotion, which "sees emotions as forces that do not contain or respond to thought." Kahan & Nussbaum, *supra* note 35, at 273. Kahan and Nussbaum distinguish this conception from an "evaluative conception" of emotion, according to which "emotions express cognitive appraisals" and "these appraisals can themselves be morally evaluated." *Id.* at 273. If psychological states are understood mechanistically, then this article may be interpreted as proposing that particular psychological states suffice for injury-in-fact when they respond to the alleged violation of a legally protected interest and the particularity condition is met. If psychological states are understood evaluatively, on the other hand, then responsiveness to the alleged violation of a legally protected interest might itself be viewed as part of the psychological state in question.

particularity analysis does not consistently track factors that ought to be relevant to plaintiffs' ability to claim psychological injury-in-fact. For example, a plaintiff with little connection to a particular forest, but a very strong interest in environmental protection, might be more likely to be kept out of court even under this article's proposal than a casual member of an environmental organization who alleges that she walks through the forest every so often.

In response, the particularity factors should be evaluated as a whole rather than individually. The analysis in this article leaves open the possibility that courts could consider a plaintiff's historical involvement with a cause. But even beyond the potential inclusion of this factor, other aspects of the particularity inquiry, such as the low frequency of the casual member's contact with the forest (in the example just given), might lower the likelihood that the casual member would have standing. More generally, seemingly arbitrary results might actually turn out to be less arbitrary once the entire particularity analysis is considered.

Furthermore, the particularity inquiry necessarily paints in broad strokes, and it is not alone among legal tests in doing this. Nothing guarantees that psychological harm will more likely be present—or be present in the form that courts ought to acknowledge for Article III purposes—when a plaintiff personally has a disturbing experience, for a prolonged period of time or at frequent intervals, or when a plaintiff has a close relationship with a harmed object. Similarly, in NIED claims, nothing guarantees that plaintiffs are more likely to suffer emotional distress as a result of negligent conduct when they are within the "zone of danger" created by the defendant's conduct or when they have a close relationship with an individual who is physically harmed by the defendant's negligence. Of course, NIED doctrines have also been criticized for arbitrariness.[278] But both types of inquiries justifiably involve the use of proxies that can be useful even if they do not always hit the target. Moreover, the proposed particularity factors are not binary (either applicable or not applicable) in the way some NIED elements are. Courts can determine that plaintiffs are more or less proximate, closer or further in relationship, and so on. In this way, they can adjust the particularity test in response to the facts of the specific situation. This approach can help to reduce, if not eliminate, the potential for arbitrariness in decisionmaking.

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[278] *See* Rhee, *supra* note 201, at 845-47.

This article's proposal, and especially the particularity inquiry's weighing of various factors, undeniably requires the exercise of judicial discretion. But the proposal must be judged in relation to the existing treatment of psychological harm in standing doctrine.[279] Currently, the distinction between "the psychological consequence presumably produced by observation of conduct with which one disagrees"[280] and "psychological injury in fact sufficient to confer standing"[281] is highly cryptic, and courts have provided little explicit guidance as to when mental or emotional reactions fall into each category.[282] Moreover, courts' assessments of injury-in-fact often involve the use of fairly ambiguous terms such as "concrete," "abstract," "particularized," "generalized," "diffuse," and "imminent." Against this background, the proposal advanced here offers an explicit and broadly applicable framework to govern the conditions under which the cognizability of psychological harm can be evaluated. The proposal requires courts to be clear about the nature of the types of harm they are cognizing as injury-in-fact, so that other parties can engage directly with the reasons for courts' decisions. It would be unrealistic and even undesirable to expect a standing test to eliminate all forms of judicial discretion. To the extent that standing doctrine presents recurring problems about arbitrariness, however, this article's proposal represents a corrective to the existing doctrine.

Consequently, this article's proposal should not be understood to license an open-ended expansion of standing—which is often an issue when psychological harm is being considered as a type of injury-in-fact. In addition to the fact that the proposal expressly provides limitations on psychological harm, as described above, injury-in-fact is, more broadly, only one potential restriction on plaintiffs' ability to bring suit. Also present, as mentioned earlier, are the other prongs of Article III standing (causation and redressability), the requirement that plaintiffs assert a cause of action, and justiciability doctrines such as ripeness, mootness, and political questions. Courts can explicitly recognize psychological harm

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[279] *Cf.* Kahan, *supra* note 56, at 645 (urging that shaming penalties be assessed in comparison to relevant alternatives, notably imprisonment).

[280] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485 (1982).

[281] ACLU of Ohio Found., Inc. v. DeWeese, 633 F.3d 424, 429 (6th Cir. 2011).

[282] *Cf.* Awad v. Ziriax, 670 F.3d 1111, 1121 (10th Cir. 2012). For one of the most developed discussions of the distinction between cognizable and noncognizable "psychological consequence," see *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010).

as injury-in-fact without undermining the notion that the federal courts possess limited jurisdiction.

## CONCLUSION

This article has argued that federal courts ought to recognize psychological harm as injury-in-fact explicitly and adopt a clear framework to govern limitations on its cognizability. It has provided an account of the current treatment of psychological harm in constitutional standing doctrine and recommended mechanisms for a more effective approach to this topic—in particular, an inquiry into whether the psychological harm responds to the alleged violation of a legally protected interest and stands in a particular connection to that violation. The latter inquiry, in turn, ought to consider such factors as the relationship between the plaintiff and another entity whose injury gives rise to the plaintiff's psychological harm, the plaintiff's geographical proximity to the source of the challenged legal violation, the longevity of the plaintiff's connection to the situation from which the harm arises, the frequency of the plaintiff's contact with the situation, the severity of the plaintiff's mental or emotional suffering, and, potentially, the history of a plaintiff's attachment to a cause that would be impaired by the alleged legal violation. The bottom line is that when plaintiffs claim that they have been hurt psychologically or emotionally, federal courts, far from closing their doors, should wade into the thicket of distinguishing cognizable psychological harms from noncognizable ones. Doing so will enable the federal courts to acknowledge more fully citizens' genuine experiences of harm without abandoning the restrictions on jurisdiction that Article III standing doctrine reflects.

## APPENDIX

This Appendix provides a database of several cases in which federal courts have dealt with the topic of psychological harm and related intangible injuries as injury-in-fact. The Appendix is designed to provide a sample, though not an exhaustive list, of such cases in order to illuminate judicial responses to the issue of psychological harm and standing. Though several distinct injuries may be alleged in any given case, the Appendix identifies those injuries most relevant to psychological harm. The Appendix is organized by judicial circuit (with Supreme Court cases first); within each circuit, appeals court cases precede district court cases, and within the categories of appeals court cases and district court cases, cases are organized chronologically.

### *U.S. Supreme Court Cases*

| Citation | Alleged Injury | Injury-in-Fact? | Further Notes |
|---|---|---|---|
| Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) | Consumer reporting agency's dissemination of allegedly inaccurate information regarding the plaintiff | Undecided (to be decided on remand) | The Supreme Court remanded to the Ninth Circuit to decide if the plaintiff's alleged injury was sufficiently "concrete." |
| Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014) | Threat of future enforcement of a statute prohibiting certain false statements made during a political campaign | Yes | |
| Clapper v. Amnesty Int'l, 133 S. Ct. 1138 (2013) | Potential for future surveillance and costs incurred as a result of fearing surveillance | No | |
| Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007) | Interest in not having tax money spent in a way that violates the Establishment Clause | No | Concurrence by Justice Scalia: "Psychic Injury" should not be cognizable in Establishment Clause cases |
| Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) | Concerns about polluted river that affected recreational, aesthetic, and economic interests | Yes | |

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| Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) | Right to know about toxic chemical releases | No redressability | "Psychic satisfaction" at knowing a wrongdoer gets just deserts or the law is enforced is not cognizable Article III injury |
| Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993) | Inability to compete on an equal footing in bidding process due to set-aside for minority-owned businesses | Yes | |
| Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992) | Threatened inability to view and study endangered species | No | |
| Meese v. Keene, 481 U.S. 465 (1987) | Reputational damage; harm to chances for reelection | Yes | |
| Allen v. Wright, 468 U.S. 737 (1984) | Stigmatic injury caused by racial discrimination | No | Stigmatic injury is "judicially cognizable to the extent that respondents are personally subject to discriminatory treatment" |
| City of Los Angeles v. Lyons, 461 U.S. 95 (1983) | Plaintiff's fear that he could be subject to an illegal chokehold | No | |
| Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982) | Constitutional right not to have government property transferred in violation of the Establishment Clause | No | "Psychological consequence presumably produced by observation of conduct with which one disagrees" is insufficient for injury-in-fact |
| Laird v. Tatum, 408 U.S. 1 (1972) | Chilling effect on First Amendment rights due to government investigative program and fear of future detrimental government action | No | |
| Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972) | Loss of benefits from interracial associations | Yes | The Court may have been dealing with standing to sue under the Civil Rights Act of 1968 |
| Ass'n of Data Processing Serv. Orgs., Inc. v. Camp (*ADAPSO*), 397 U.S. 150 (1970) | Economic competition and loss of future profits | Yes | "Spiritual stake" in First Amendment values, injury to aesthetic, conservational, recreational interests count for standing |

## *D.C. Circuit*

| Citation | Alleged Injury | Injury-in-Fact? | Further Notes |
|---|---|---|---|
| Coal. for Mercury-Free Drugs v. Sebelius, 671 F.3d 1275 (D.C. Cir. 2012) | Fear of injury caused by mercury in vaccines; reputational injuries to medical professionals due to FDA's inability to guarantee that products provided by medical professionals were safe | No | |
| *In re* Navy Chaplaincy, 534 F.3d 756 (D.C. Cir. 2008) | Being subjected to the "message" of religious preference conveyed by the Navy's allegedly preferential retirement program for Catholic chaplains, creating feelings of second-class citizenship in non-Catholic chaplains | No | |
| Am. Soc'y for Prevention of Cruelty to Animals v. Ringling Bros., 317 F.3d 334 (D.C. Cir. 2003) | Elephant handler's personal emotional attachment to mistreated elephants | Yes | In a later iteration of this case (*Am. Soc'y for the Prevention of Cruelty to Animals v. Feld (APSCA II)*, 659 F.3d 13 (D.C. Cir. 2011)), the D.C. Circuit held that plaintiff had not shown emotional attachment to the elephants, but it did not deny that emotional harm could count for standing |
| Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426 (D.C. Cir. 1998) | Aesthetic interest in seeing animals in humane conditions | Yes | |
| Humane Soc'y v. Babbitt, 46 F.3d 93 (D.C. Cir. 1995) | Emotional harm resulting from inability to visit or study elephant at the zoo | Likely not, but regardless, no causation or redressability | |
| Gray v. Greyhound Lines, E., 545 F.2d 169 (D.C. Cir. 1976) | Damage to psychological well-being caused by racially discriminatory hiring practices | Yes | |

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| Bernstein v. Kerry, 962 F.2d 122 (D.C. Cir. 2013) | Fear of terrorism | No | |
| Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) | Emotional harm suffered by father if son were to be killed by United States | No | |
| Newdow v. Bush, 355 F. Supp. 2d 265 (D.C. Cir. 2005) | Being offended and made to feel like an outsider because of prayers offered at the Presidential inauguration | Colorable claim of injury-in-fact | |

*First Circuit*

| Citation | Alleged Injury | Injury-in-Fact? | Further Notes |
|---|---|---|---|
| Blum v. Holder, 744 F.3d 790 (1st Cir. 2014) | Fear of future prosecution under the Animal Enterprise Terrorism Act | No | |
| Katz v. Pershing, LLC, 672 F.3d 64 (1st Cir. 2012) | Risk of future data insecurity | No | |
| Mangual v. Rotger-Sabat, 317 F.3d 45 (1st Cir. 2003) | Fear of prosecution under criminal libel statute | Yes | |

*Second Circuit*

| Citation | Alleged Injury | Injury-in-Fact? | Further Notes |
|---|---|---|---|
| Denney v. Deutsche Bank AG, 443 F.3d 253 (2d Cir. 2006) | Psychological and economic harm due to receipt of, and reliance on, allegedly fraudulent or negligent tax advice | Yes | Both psychological and economic harms count as injury-in-fact |
| Baur v. Veneman, 352 F.3d 625 (2d Cir. 2003) | Increased risk of contracting a foodborne illness | Yes | |
| Leibovitz v. N.Y.C. Transit Auth., 252 F.3d 179 (2d Cir. 2001) | Emotional trauma suffered as a result of a hostile work environment | Yes | |
| Tomsha v. Gen. Servs. Admin., No. 15-cv-7326, 2016 WL 3538380 (S.D.N.Y. June 21, 2016) | Plaintiffs' fear that their new workplace, One World Trade Center, would be the target of future terrorist attacks | No | |

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|---|---|---|---|
| Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg, 290 F.R.D. 409 (S.D.N.Y. 2012) | The threat of future harm to individuals with disabilities during an emergency and the fear and apprehension caused by it | Yes | |
| Friedman v. USPS, No. 08-cv-00913, 2011 WL 3267713 (D. Conn. 2011) | Personal sense of embarrassment and loss of status due to reassignment by postal service | No | |
| Estate of Morris *ex rel.* Morris v. Dapolito, 297 F.2d 680 (S.D.N.Y. 2004) | Public humiliation, shame, anxiety, and emotional upset as a result of school's retaliation against student seeking to pursue charges against an abusive public school teacher | Yes | |
| Jones v. Deutsch, 715 F. Supp. 1237 (S.D.N.Y. 1989) | Emotional harm resulting from the deprivation of benefits that inure with living in a discrimination-free environment | No | |

## *Third Circuit*

| Citation | Alleged Injury | Injury-in-Fact? | Further Notes |
|---|---|---|---|
| NCAA v. Governor of New Jersey, 730 F.3d 208 (3d Cir. 2013) | Reputational harm to sports leagues in the eyes of fans and the public by virtue of association with gambling | Yes | |
| Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011) | Increased risk of identity theft, time and monetary expenses to monitor financial information, and emotional distress after payroll processing firm suffered security breach | No | |

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|---|---|---|---|
| Koronthaly v. L'Oreal, 374 F. App'x 257 (3d Cir. 2010) | Concern about lipstick products containing lead | No | |
| Crisafulli v. Ameritas Life Ins. Co., No. 13-cv-5937, 2015 WL 1969176 (D.N.J. Apr. 30, 2015) | "Emotional distress including anxiety, fear of being victimized, harassment and embarrassment" due to unsealed transmittal of personal information; expenses for protection against identity theft | No | |

## *Fourth Circuit*

| Citation | Alleged Injury | Injury-in-Fact? | Further Notes |
|---|---|---|---|
| Lebron v. Rumsfeld, 670 F.3d 540 (4th Cir. 2012) | Fear of future military detention and ongoing stigma resulting from plaintiff's prior detention as an enemy combatant | No | |
| Smith v. Frye, 488 F.3d 263 (4th Cir. 2007) | "Indignity, embarrassment, and emotional distress because [son] felt responsible for his mother's discharge" | No | |
| Am. Canoe Ass'n, Inc. v. Murphy Farms, Inc., 326 F.3d 505 (4th Cir. 2003) | Fear of pollution that has kept plaintiff from swimming in or drinking from rivers and has produced diminished enjoyment; fear of losing business | Yes | |
| Friends of the Earth, Inc. v. Gaston Copper Recycling, 204 F.3d 149 (4th Cir. 2000) | Fear of pollution due to smelting facility, affecting plaintiff's recreational and economic interests in using a lake | Yes | |
| Hill v. Coggins, No. 13-cv-00047, 2014 WL 2738664 (W.D.N.C. June 17, 2014) | Aesthetic and emotional harm from observing bears in inhumane conditions | Yes | |

## *Fifth Circuit*

| Citation | Alleged Injury | Injury-in-Fact? | Further Notes |
|---|---|---|---|
| Rideau v. Keller Indep. Sch. Dist., 978 F. Supp. 2d 678 (N.D. Tex. 2013) | "Economic harm in the form of past and future medical expenses[,] . . . along with pain, suffering, and mental anguish" | Yes | Court noted that "the emotional pain that results from seeing one's child abused seems to be a sufficiently concrete injury for standing purposes" |
| Doe v. Beaumont Indep. Sch. Dist., 173 F.3d 274 (5th Cir. 1999) | Risk of having to participate in a "Clergy in the Schools" program | Yes | |
| Peters v. St. Joseph Servs. Corp., 74 F. Supp. 3d 847 (S.D. Tex. 2015) | Increased risk of credit card information theft or fraud | No | |
| Does 1-7 v. Round Rock Indep. Sch. Dist., 540 F. Supp. 2d 735 (W.D. Tex. 2007) | Exposure to religious ceremony at graduation event | Yes for those directly exposed; no for those not directly exposed | |

## *Sixth Circuit*

| Citation | Alleged Injury | Injury-in-Fact? | Further Notes |
|---|---|---|---|
| Parsons v. U.S. Dep't of Justice, 801 F.3d 701 (6th Cir. 2015) | Reputational injury and stigmatization arising from National Gang Intelligence Center's identification of music group fans as a "hybrid gang," leading to improper stops and detentions | Yes | |
| Platt v. Bd. of Comm'rs on Grievances and Discipline, 769 F.3d 447 (6th Cir. 2014) | Prospective judicial candidate's fear that provisions of the Ohio Code of Judicial Conduct would be enforced against him | Yes | |

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| ACLU of Ohio Found., Inc. v. DeWeese, 633 F.3d 424 (6th Cir. 2011) | "'Direct and unwelcome' contact" with Ten Commandments poster in a state judge's courtroom | Yes | |
| Smith v. City of Cleveland Heights, 760 F.2d 720 (6th Cir. 1985) | Racial steering policies in housing that stigmatize plaintiff as an inferior member of the community, although he was not personally denied housing | Yes | |
| Little Hocking Water Ass'n v. E.I. Du Pont de Nemours & Co., 91 F. Supp. 3d 940 (S.D. Ohio 2015) | "[D]iminished use of . . . land and . . . aquifer . . . 'out of reasonable fear and concern of pollution'" | Yes | |

## *Seventh Circuit*

| Citation | Alleged Injury | Injury-in-Fact? | Further Notes |
|---|---|---|---|
| United States v. All Funds on Deposit with R.J. O'Brien & Assocs., 783 F.3d 607 (7th Cir. 2015) | Impending forfeiture of seized terrorist funds to which plaintiffs had an arguable claim | Yes | Court noted that plaintiffs' harm "would be more than intellectual, psychological, or ideological. It would be financial" |
| Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688 (7th Cir. 2015) | Following data breach at a department store, "aggravation and loss of value of the time needed to set things straight, to reset payment associations after credit card numbers are changed, and to pursue relief for unauthorized charges" | Yes | |
| Freedom From Religion Found., Inc. v. Obama, 641 F.3d 803 (7th Cir. 2011) | Feeling of exclusion, or being made unwelcome, arising from Presidential proclamations calling on citizens to pray | No | |
| Sierra Club v. Franklin Cty. Power of Ill., 546 F.3d 918 (7th Cir. 2008) | Reduced aesthetic and recreational uses of an area | Yes | |

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|---|---|---|---|
| United States v. 5 S 351 Tuthill Rd., 233 F.3d 1017 (7th Cir. 2000) | "Right to future proceeds of unknown value" from forfeiture action against property | Yes | Court noted that "purely psychological harm" was insufficient to establish standing |
| Clay v. Fort Wayne Cmty. Schs., 76 F.3d 873 (7th Cir. 1996) | Racially discriminatory search for school superintendent candidates | No | "Indignation" and "personal offense" did not suffice for injury-in-fact |
| Schmidling v. City of Chicago, 1 F.3d 494 (7th Cir. 1993) | Fear of prosecution under city ordinance regarding garden weeds | No | |
| Freedom From Religion Found., Inc. v. Zielke, 845 F.2d 1463 (7th Cir. 1988) | "[R]ebuke to [plaintiffs'] religious beliefs" and plaintiffs' offense resulting from a Ten Commandments display in a city park | No | |
| Leung v. XPO Logistics, Inc., 15-cv-03877, 2015 WL 10433667, (N.D. Ill. Dec. 9, 2015) | Emotional or dignitary harm caused by an unwanted call about a survey | Yes | |
| Volling v. Antioch Rescue Squad, 999 F. Supp. 2d 991 (N.D. Ill. 2013) | Harassment that caused female ambulance workers to suffer "emotional distress, severe embarrassment, pain, suffering, humiliation, fear, anxiety, damage and risk of damage to their careers and reputations, damage to their standing in the community, loss of enjoyment of life, inconvenience and other non-pecuniary losses" | Yes | |
| Torres v. Nat'l Enter. Sys., Inc., No. 12-cv-2267, 2012 WL 3245520, (N.D. Ill. Aug. 7, 2012) | Nuisance and invasion of privacy due to debt collection company's phone calls | Yes | |
| Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006) | Personal offense at being required to produce ID to vote | No | |

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| Petit v. City of Chicago, 31 F. Supp. 2d 604 (N.D. Ill. 1998) | Emotional harm stemming from racial standardization to adjust scores on promotional exams in police department | Yes | |
| Tanford v. Brand, 883 F. Supp. 1231 (S.D. Ind. 1995) | Likelihood of being directly exposed to an unwelcome religious exercise at law school graduation ceremony | No for first year law student; yes for professor and graduating law student | |

## *Eighth Circuit*

| Citation | Alleged Injury | Injury-in-Fact? | Further Notes |
|---|---|---|---|
| Red River Freethinkers v. City of Fargo, 679 F.3d 1015 (8th Cir. 2012) | Feelings of exclusion, discomfort, and anger due to unwanted contact with a Ten Commandments monument on government property | Yes | |
| Clayton v. White Hall Sch. Dist., 875 F.2d 676 (8th Cir. 1989) | Emotional and psychological distress due to hostile working environment | Yes | The court may have been analyzing prudential standing requirements |
| Coal. for the Env't v. Volpe, 504 F.2d 156 (8th Cir. 1974) | Loss of ability to view open space and natural environment, which provides aesthetic and psychological benefit | Yes | |

## *Ninth Circuit*

| Citation | Alleged Injury | Injury-in-Fact? | Further Notes |
|---|---|---|---|
| Chaudhry v. City of Los Angeles, 751 F.3d 1096 (9th Cir. 2014) | Emotional harm caused by the City's failure to timely notify family of their relative's death | Yes | |
| Krottner v. Starbucks Corp., 628 F.3d 1139 (9th Cir. 2010) | Generalized anxiety and stress as a result of the theft of a laptop with personal information on it | Yes | |

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| Catholic League for Religious & Civil Rights v. City & County of San Francisco, 624 F.3d 1043 (9th Cir. 2010) | Spiritual or psychological harm due to stigmatizing government resolution | Yes | |
| Barnes-Wallace v. City of San Diego, 530 F.3d 776 (9th Cir. 2008) | Emotional and recreational harm resulting from the city's lease of public land to the Boy Scouts; plaintiffs were a lesbian couple and agnostics who were offended by Boy Scouts' exclusion of them and who avoided using the land | Yes | |
| Fund for Animals, Inc. v. Lujan, 962 F.2d 1391 (9th Cir. 1992) | Emotional distress suffered from viewing the shooting of bison | Yes | |
| Davis v. Astrue, 513 F. Supp. 2d 1137 (N.D. Cal. 2007) | Stress and anxiety suffered due to termination from Social Security program | Yes | |
| Levine v. Johanns, Nos. 05-cv-04764, 05-cv-05346, 2006 U.S. Dist. LEXIS 63667 (N.D. Cal. Sept. 6, 2006) | Emotional harm from watching the slaughter of conscious birds | Yes | |
| Inland Mediation Bd. v. City of Pomona, 158 F. Supp. 2d (C.D. Cal. 2001) | Emotional and physical upset, as well as stigma, as a result of racially derogatory comments made by neighborhood association director at a meeting | Yes | |

## *Tenth Circuit*

| Citation | Alleged Injury | Injury-in-Fact? | Further Notes |
|---|---|---|---|
| Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012) | Condemnation of Muslim faith; inhibition of practice of Islam; prevention of a | Yes | |

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| | court from probating a Muslim individual's will due to an amendment to the Oklahoma Constitution prohibiting use of Sharia law in courts | | |
| Bronson v. Swensen, 500 F.3d 1099 (10th Cir. 2007) | Fear of prosecution for polygamy and stigma of being branded a lawbreaker | No | |
| Schaffer v. Clinton, 240 F.3d 878 (10th Cir. 2001) | Member of Congress's personal offense and loss of credibility among constituency because his salary is paid in amounts unconstitutionally adjusted | No | |
| Citizens for Objective Pub. Educ. v. Kansas State Bd. of Educ., 71 F. Supp. 3d 1233 (D. Kan. 2014) | Message that plaintiffs, as theists, are outsiders in the community due to development of new science standards that may be implemented | No | |

*Eleventh Circuit*

| Citation | Alleged Injury | Injury-in-Fact? | Further Notes |
|---|---|---|---|
| Speaker v. U.S. Dep't of Health and Human Servs., 623 F.3d 1371 (11th Cir. 2010) | Harms suffered due to disclosure of medical information: marital dissolution, public criticism, death threats, reputational damage, emotional distress | Yes | |
| Waters v. City of Geneva, 47 F. Supp. 3d 1324 (M.D. Ala. 2014) | Physical beating and emotional trauma sustained by a citizen at the hands of a police officer | Yes | |

*Federal Circuit*

| Citation | Alleged Injury | Injury-in-Fact? | Further Notes |
|---|---|---|---|
| Madstad Eng'g, Inc. v. U.S. Patent and Trademark Office, 756 F.3d 1366 (Fed. Cir. 2014) | Increased risk of computer hacking and expenditures made in response to this risk | No | |
| Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329 (Fed. Cir. 2008) | Fear of future infringement suit | No | |
| McKinney v. U.S. Dep't of Treasury, 799 F.2d 1544 (Fed. Cir. 1986) | Injury to ethical interest in avoiding the purchase of foreign goods produced by forced labor | No | |