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Standing In The Ether: Constitutional Standing In Data Breach Cases After McMorris

Andrew Ridge

STANDING IN THE ETHER: CONSTITUTIONAL STANDING IN DATA BREACH CASES AFTER *MCMORRIS*

ABSTRACT

For some time, circuit courts have been ostensibly divided over the power of plaintiffs to maintain claims for injuries sustained from data breaches based merely on an increased risk of injury. However, in McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295 (2d Cir. 2021), the Second Circuit denied the existence of the circuit split, instead contending that its three-factor balancing test for determining standing for risk of future injury in data breach cases could be reconciled with the positions of both clusters of circuits. The three factors are "(1) whether the plaintiffs' data has been exposed as the result of a targeted attempt to obtain that data; (2) whether any portion of the dataset has already been misused, even if the plaintiffs themselves have not yet experienced identity theft or fraud; and (3) whether the type of data that has been exposed is sensitive such that there is a high risk of identity theft or fraud." The Second Circuit frames the circuit split in terms of whether future injury in these cases can ever furnish a plaintiff with standing, when in reality, it appears that the reluctance of the circuits that have yet to furnish standing for future injury lies more so in their emphasis on the second factor—whether the data has been misused. Although McMorris has not been appealed, the Supreme Court should clarify this ambiguity at the next opportunity. The most equitable solution would be to uphold the Second Circuit's three-factor test, and while allowing the second factor to hold special importance over the other two factors, not require its presence in all these types of cases for constitutional standing.

INTRODUCTION

Devonne McMorris had a problem, or at least she thought she did. In June 2018, her employer inadvertently released her personal data, including her social security number, through an errant email.[1] She, along with several coworkers, sued her employer because of the data breach.[2] They feared that hackers might find their leaked information and use it for fraud or identity theft.[3] Although their data had not yet been misused, McMorris and her coworkers wanted to be compensated for the increased risk that it soon would

1. McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295, 298 (2d Cir. 2021).
2. *Id.*
3. *Id.*

be.[4] However, not all courts agree on whether this type of problem can even constitute a "case" in the first place.[5]

As the "v." in most case names suggests, for a legal dispute to see daylight, it must involve a true "Case" or "Controvers[y]."[6] In fact, the Constitution itself requires this.[7] Generally speaking, plaintiffs need not despair at the potential ambiguity of this requirement because the Supreme Court, as the ultimate interpreter of the Constitution,[8] has defined in broad strokes what constitutes a case or controversy.[9] Whether the plaintiff can plead facts alleging that the defendant has decisively injured them often constitutes a, if not *the*, key component in determining whether the case is clearly cut enough for a federal court to address it.[10]

However, the Supreme Court has not addressed this issue in a critical category of conflict: disputes arising from data breaches, often under the watch of business entities, where concrete injury from the breach has not yet occurred.[11] Employee or customer plaintiffs in these cases nonetheless sue, concerned that their confidential data, although yet to be used to defraud them or siphon away their hard-earned personal savings, may soon be used for such nefarious purposes.[12] These plaintiffs hope to hold defendants liable for allowing the increased risk of these now likely soon-to-occur injuries to exist, defining this oversight itself as an injury to them.[13]

The common wisdom is that courts disagree about the showing required to state a claim based on the risk of future injury.[14] The ostensible division

4. *Id.*

5. *See* Katz v. Pershing, LLC, 672 F.3d 64, 80 (1st Cir. 2012); Beck v. McDonald, 848 F.3d 262, 273–74 (4th Cir. 2017); Tsao v. Captiva MVP Rest. Partners, LLC, 986 F.3d 1332, 1340 (11th Cir. 2021).

6. U.S. CONST. art. III, § 2, cl. 1.

7. *Id.*

8. *Id.* § 1, cl. 1.; Marbury v. Madison, 5 U.S. 137, 177–78 (1803).

9. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (outlining the "irreducible constitutional minimum of standing," requiring an injury, a causal connection between the defendant's behavior and the injury, and likelihood that a favorable decision by the court would adequately address the injury. This note discusses the injury requirement in further detail below); Mass. v. EPA, 549 U.S. 497, 523–24 (2007) (noting that a court's remedy for the injury need not entirely redress the injury, so long as it works to reduce the harm caused by the injury); Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409–10 (2013) (clarifying that the "threatened injury must be certainly impending to constitute injury in fact . . . [a]llegations of possible future injury are not sufficient," and that when an injury "rests on [one's] highly speculative fear" or "a highly attenuated chain of possibilities," it "does not satisfy the requirement that [the] threatened injury must be certainly impending" (internal quotation marks omitted)); Spokeo, Inc. v. Robins, 578 U.S. 330, 340–341 (2016) (explaining that intangible harms can still furnish a case with standing, particularly when the harm resembles an injury traditionally viewed by the courts as providing a basis for a lawsuit), to name some of the heavy hitters.

10. *See Lujan*, 504 U.S. at 560–61.

11. *See Clapper*, 568 U.S. 398; Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014).

12. McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295, 298 (2d Cir. 2021).

13. *Id.*

14. *See* Brandon Ferrick, *No Harm, No Foul: The Fourth Circuit Struggles with the "Injury-In-Fact" Requirement to Article III Standing in Data Breach Class Actions*, 59 B.C. L. REV. E-

appears to rest on whether a plaintiff can claim risk of future injury when misuse, even absent actual harm to the particular plaintiff in question, has not yet occurred.[15] In McMorris's case, *McMorris v. Carlos Lopez & Associates, LLC*, the Second Circuit attempted to put the controversy to rest by explaining that it and the other lower courts actually did not disagree; it posited that the circuits that had not yet furnished a case involving no misuse with standing had simply not gotten a case with the correct facts to support standing despite the absence of data misuse.[16]

This Note argues that misuse is such an important factor that it should be given extra consideration, while allowing for the other factors outlined by the Second Circuit and the other lower courts also to hold weight in the judicial decision-making process. Although some may argue that a Congressional statute without a Supreme Court ruling would provide more clarity, that assessment fails to account for the interpretive role of the Court in outlining the permissible bounds within which Congress may impose restrictions on bringing this variety of claim.

Part I of this Note provides additional information on the contours of the data breach problem in general and how this creates challenges for constitutional standing in specific. Part II focuses on the factual and procedural background of *McMorris* and its ultimate holding. Part III provides an overview of the circuit split, parting from the Second Circuit's position that such a split does not exist. Part IV considers how the Supreme Court may rule on the issue, in part based on a brief consideration of recent trends in the Roberts Court. Part V offers a proposed solution—a compromise of sorts—recommending that the Court allow the misuse factor to hold special importance in judicial evaluation of standing in increased risk of injury data breach cases, without making it an outright requirement.

I. DATA BREACH AND ITS PROBLEMS FOR CONSTITUTIONAL STANDING

A. INJURIES IN FACT: THE GENERAL IDEA

Although the Supreme Court has noted three requirements for constitutional standing to assert a claim against a defendant,[17] the crux of a

SUPPLEMENT 462 (2018); Michael Hooker et al., *Have We Reached the Tipping Point? Emerging Causation Issues in Data-Breach Litigation*, 94-JUN. FLA. BAR J. 8 (2020); Patrick J. Lorio, *Access Denied: Data Breach Litigation, Article III Standing, and A Proposed Statutory Solution*, 51 COLUM. J.L. & SOC. PROBS. 79 (2017).

15. *See* Katz v. Pershing, LLC, 672 F.3d 64, 80 (1st Cir. 2012); Beck v. McDonald, 848 F.3d 262, 273–74 (4th Cir. 2017); Tsao v. Captiva MVP Rest. Partners, LLC, 986 F.3d 1332, 1340 (11th Cir. 2021).

16. *McMorris*, 995 F.3d at 300–02.

17. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (explaining that "Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally

standing challenge often lies in whether the event that started the dispute can be characterized as creating an injury. To confer standing, the complaint must allege facts demonstrating an "injury in fact," which the Court has described as "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical."[18]

The ambiguity present in claims based on the increased risk of future injury creates problems for all parties involved. Litigation is expensive. And when it is unclear whether a case will survive the foundational stage of litigation—that is, the portion of litigation where courts decide whether the case is actually a "Case"—everyone suffers, in the form of time, energy, and money. So, it is no surprise that cases where it is not too clear whether both, or even either, of (a) and (b) of the injury-in-fact requirement have been fulfilled give judges special reason to reach for the nearest bottle of headache medicine. Even better, then, when the plaintiff frames a *risk* of future injury as *the injury* that checks off both (a) and (b).

B. DATA BREACHES: THE BASIC TREND AND ITS STANDING CHALLENGE

Now that we are in the third decade of the Twenty-First Century, the relentless pace of new technological advances comes as no surprise. Nor does the fact that with greater connectivity comes greater potential for data security violation. Indeed, 64% of Americans report having suffered a major data breach.[19] Americans are nonetheless unlikely to take the measures necessary to protect themselves from nefarious actors obtaining access to their personal information.[20] Despite their great resources, many large corporations, like Yahoo, Meta, and Marriott International, have suffered severe data privacy leaks, with hundreds of millions, and in some cases billions, of people's data falling into the hands of third parties.[21] Research indicates that in 2022, the cost of the average data breach in the United States rose to $4.35 million, the cost zenith of data breach cases up to this point.[22]

This creates the perfect recipe for data breach cases with a twist: that being, of course, a plaintiff asserting not that a data breach with actual,

protected interest which is (a) concrete an particularized; and (b) 'actual or imminent, not "conjectural" or "hypothetical."' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" (internal citations omitted)).

18. *Id.* at 560 (internal citations omitted).

19. Kenneth Olmstead & Aaron Smith, *Americans and Cybersecurity*, PEW RSCH. CTR. (Jan. 26, 2017), https://www.pewresearch.org/internet/2017/01/26/americans-and-cybersecurity/.

20. *Id.*

21. Abi Tyas Tunggal, *116 Must-Know Data Breach Statistics for 2022*, UPGUARD, https://www.upguard.com/blog/data-breach-statistics (last visited Aug. 17, 2022).

22. Abi Tyas Tunggal, *What is the Cost of a Data Breach in 2022?*, UPGUARD, https://www.upguard.com/blog/cost-of-data-breach (last visited Aug. 17, 2022).

concrete harm has already occurred, but that they now stand at increased vulnerability of suffering harm from the data breach in the future. Standing based on an increased risk of future injury is not untraversed territory for the Supreme Court.[23] The Court has held that "'threatened injury must be *certainly impending* to constitute injury in fact' and that "[a]llegations of *possible* future injury' are not sufficient."[24] Further, standing may exist where "there is 'a substantial risk' that the harm will occur."[25] However, none of the cases outlining these general principles have dealt with future risk of harm in the context of data breaches.[26] In fact, the Court has not yet squarely[27] heard a case involving future harm stemming from a data breach.[28]

Until recently, neither had the Second Circuit.[29] However, in April 2021, the Second Circuit decided *McMorris v. Carlos Lopez & Associates, LLC*, a case addressing constitutional standing based on increased risk of future injury from a data breach head-on.[30] The case stemmed from a lawsuit filed by the plaintiff McMorris, an employee of Carlos Lopez & Associates, LLC, after another employee inadvertently sent a mass email out to the entire staff containing the personally identifiable information ("PII") of over 100 current and former employees.[31] Although the plaintiff did not complain that she had suffered fraud or identity theft as a result of the data breach, she asserted that because her PII had been leaked, she suffered from an increased risk of falling victim to identity theft—so much so that the harm should be considered "certainly impending," in line with Supreme Court precedent.[32]

23. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013); Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014).

24. *Clapper*, 568 U.S. at 409 (emphasis added by the *Clapper* court) (internal quotation marks omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

25. *See Driehaus*, 573 U.S. at 158 (quoting *Clapper*, 568 U.S. at 414, n.5).

26. *See Clapper*, 568 U.S. 398, (concerning standing for "United States persons" with respect to a claim that future harm may result from the ability of the Attorney General and the Director of National Intelligence to surveil sensitive international communications made by these individuals); *Driehaus*, 573 U.S. 149 (addressing standing for advocacy organizations that wished to challenge the constitutionality of a state statute banning false statements about political candidates during election season when the organizations had not yet engaged in such speech).

27. TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021), discussed below, concerns future-risk claims in a data disbursement case but resolves the issue primarily based on its relation to the statute under which the plaintiffs brought their claims. Further, the case involves intentional disbursement, the putative harm (or risk of harm) being that the consumer report data itself was not accurate when it (potentially, or actually) reached parties who used that incorrect information to make decisions that could disfavor the plaintiffs, as opposed to an unintentional breach of data containing true information about the plaintiffs (the topic of this Note). Nonetheless, as discussed in Part IV, the language in the case strongly suggests that the Court would not be receptive to acknowledging standing for plaintiffs based on an increased-risk theory in data breach cases unless the plaintiff's data has suffered misuse, and so the case is instructive on how the Court would likely rule on the circuit split.

28. McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295, 300 (2d Cir. 2021).

29. *Id.*

30. *Id.* at 295.

31. *Id.* at 297–98.

32. *Id.* at 298.

The fact that the plaintiff's data had not yet been misused proved to be an important aspect not only for the outcome in the plaintiff's individual case, but also for the Second Circuit's position on what facts will allow a case like hers to prevail when faced with a standing challenge.[33] The Second Circuit held that whether data had been misused following a data breach should be one nonexclusive factor to be considered when determining whether a plaintiff's claim will be furnished with standing.[34] However, as the *McMorris* court acknowledged,[35] several other circuits had never upheld plaintiff standing without evidence of misuse,[36] and the Third Circuit arguably indicated that misuse should not only be emphasized, but explicitly required to find standing.[37] Despite this perceived hostility towards the misuse factor being not necessarily required for plaintiffs to prevail, the Second Circuit denied the existence of the apparent circuit split over the issue; it explained that the circuits that had not yet furnished a plaintiff with standing based on the increased-risk theory in data breach cases with no misuse had simply, up to this point, not gotten a case with the correct facts.[38] The Second Circuit essentially took the position that the other circuits see things the way it does and will rule similarly on the optional nature of the misuse factor if given the correct facts.[39]

The Supreme Court did not clarify the issue because the plaintiff did not appeal the case.[40] This leaves open the question about the necessity of the misuse factor for plaintiff standing until the Court addresses the issue. If the Court sees things the way the Second Circuit does,[41] then the optional nature of the misuse factor will be binding on all courts. Even if the Court acknowledges that the split exists, it could still choose the Second Circuit approach over the perceived approach of other circuits less receptive to the optional nature of the misuse factor. However, a third possibility exists: The Court may determine that the split exists and favor an approach closer to that suggested by the Third Circuit, possibly even making data misuse a requirement for increased-risk theory.

The controversy surrounding a potential Supreme Court decision about which method to adopt may appear to border on the abstruse, particularly considering that it appears judges among the circuits do not even agree about

33. *See id.* at 300–03.

34. *McMorris*, 995 F.3d at 303.

35. *Id.* at 300–01.

36. *See* Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011); Beck v. McDonald, 848 F.3d 262 (4th Cir. 2017); *In re* SuperValu, Inc., 870 F.3d 763 (8th Cir. 2017); Tsao v. Captiva MVP Rest. Partners, LLC, 986 F.3d 1332 (11th Cir. 2021).

37. *See Reilly*, 664 F.3d at 44.

38. *McMorris*, 995 F.3d at 300.

39. *Id.*

40. *See McMorris*, 995 F.3d 295. Plaintiffs in civil cases such as *McMorris* typically have 90 days to appeal to the Supreme Court from an appellate court decision. 28 U.S.C. § 2101. This window has long since passed.

41. *See McMorris*, 995 F.3d 295.

whether a conflict exists. However, it bears remembering that the course this doctrinal stream takes will have profound impacts on the amount of liability business entities will face and, in turn, the ability of regular people to hold businesses accountable for what happens to their most personal secrets.

II. *MCMORRIS* BACKGROUND

A. THE FACTS

The controversy began with a routine activity: sending an email to coworkers.[42] However, the email, sent in June 2018 by an employee of Carlos Lopez & Associates, LLC, a business providing mental health services to veterans, did not contain ordinary information.[43] A spreadsheet attachment contained personally identifiable information of 130 current and former employees.[44] The PII included a plethora of sensitive content: "Social Security numbers, home addresses, dates of birth, telephone numbers, educational degrees, and dates of hire," and the employee inadvertently disseminated the information to all 65 current employees of the company.[45] Carlos Lopez & Associates notified its employees, including the plaintiff, Devonne McMorris, of the data breach.[46] The plaintiff, displeased with her employer's role in the release of her PII, sued her employer on behalf of herself and her fellow coworkers for failing to protect their personal data.[47] The plaintiff did not report that anyone aside from her employer and coworkers got ahold of her data, nor did she allege fraud or identity theft had resulted from the breach.[48] The plaintiff took a different approach: she asserted that the increased risk that someone might intercept and take advantage of her data, possibly to steal her identity or defraud her in some other way, itself constituted a harm inflicted upon her by her employer.[49] The plaintiff brought the claim in federal court[50] because, as permitted by Congressional statute, cases involving opposing parties from different states may be heard in federal, rather than state, court.[51]

42. *Id.* at 298.
43. *Id.* at 297–98.
44. *Id.* at 298.
45. *Id.*
46. *Id.*
47. *McMorris*, 995 F.3d at 298.
48. *Id.*
49. *Id.*
50. *See* Complaint at 4, Steven v. Carlos Lopez & Assocs., 422 F. Supp. 3d 801 (S.D.N.Y. 2019) (No. 18-cv-6500), *aff'd sub nom.* McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295 (2d Cir. 2021).
51. 28 U.S.C. § 1332(d)(2)(A).

B. THE REASONING

Neither the federal district court,[52] which initially heard the case, nor the Second Circuit, hearing the case on appeal, bought the plaintiff's argument.[53] Circuit Judge Richard Sullivan, writing for the Second Circuit, focused on the injury aspect of standing—the most tenuous aspect of the plaintiff's case.[54] Owing to the lack of direct harm suffered from the breach, the Second Circuit noted that if the case could be furnished with standing at all, it could only be powered by an increased risk of future injury theory.[55] The Second Circuit surveyed the other twelve circuit courts and found that they looked to three factors, any of which, if present, weighed in favor of a plaintiff possessing standing on an increased-risk theory.[56]

To that end, the Second Circuit explained, "We therefore hold that courts . . . should consider the following non-exhaustive factors in determining whether those plaintiffs have adequately alleged an Article III injury in fact . . . ."[57] By describing the factors as "non-exhaustive," the Second Circuit left open to judicial discretion additional factors that it had not outlined in this case because determining standing is "an inherently fact-specific inquiry."[58] The Second Circuit then introduced the first factor: "whether the plaintiffs' data has been exposed as the result of a targeted attempt to obtain that data . . . ."[59] The Second Circuit highlighted this as the most important factor and explained that the absence of a targeted attempt to compromise the plaintiff's data generally leaves risk of injury too attenuated to be actionable in court; it further noted that the purpose of intentionally compromising data almost invariably is to then use it for criminal purposes.[60] The Second Circuit next turned to the second factor: "whether any portion of the dataset has already been misused, even if the plaintiffs themselves have not yet experienced identity theft or fraud."[61] The court noted that misuse of *any* of the breached data, even if the plaintiff's individual data itself had not been compromised, weighs in favor of allowing the plaintiff's claim standing.[62] The Second Circuit carefully qualified that despite its significance to a standing analysis, misuse is "not a necessary component of establishing standing."[63] Finally, the court outlined the third factor: "whether the type of data that has been

52. *See* Steven v. Carlos Lopez & Assocs., 422 F. Supp. 3d 801 (S.D.N.Y. 2019), *aff'd sub nom.* McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295 (2d Cir. 2021).
53. *See McMorris*, 995 F.3d at 298, 303.
54. *Id.* at 299–300.
55. *Id.* at 298, 300.
56. *Id.* at 299–300.
57. *Id.* at 303.
58. *Id.* at 302–03.
59. *McMorris*, 995 F.3d at 303.
60. *Id.* at 301, 303.
61. *Id.* at 303.
62. *Id.* at 301–03.
63. *Id.* at 301.

exposed is sensitive such that there is a high risk of identity theft or fraud."[64] The Second Circuit specified that social security numbers and dates of birth, especially when paired with plaintiffs' names, constituted sensitive data, while publicly available information or data that the victim could rapidly make valueless to hackers would be considered less risky data.[65]

Applying this test to the plaintiff, the Second Circuit noted first that the plaintiff's data had not been exposed through a targeted attempt because a fellow employee had inadvertently sent out the PII.[66] Next, the Second Circuit pointed out that the data had not been misused by anyone: in fact, it had only been disseminated to other employees, not potentially malicious third parties.[67] However, the Second Circuit acknowledged that the data exposed—social security numbers, dates of birth, and so on—constituted sensitive information that would typically indicate a high risk of identity theft or fraud.[68] Nonetheless, the Second Circuit reasoned that the absence of the first two factors in this particular case made the presence of the third factor much less meaningful.[69] Since the plaintiff did not present any evidence that someone with malicious intent had attempted to obtain the plaintiff's data, and no one up to this point had actually done so, dissemination of the information had not created harm of a sufficient degree to furnish her case with standing.[70]

III. THE CIRCUIT SPLIT

A. THE SECOND CIRCUIT'S ASSESSMENT OF THE CIRCUIT SPLIT

Following this adverse ruling from the Second Circuit, for reasons that remain opaque, the plaintiff did not appeal to the Supreme Court.[71] Nonetheless, the Second Circuit's ruling in her case has profound implications for the future of increased-risk theory data breach cases. Primary in shaping these effects is the way the Second Circuit has attempted to shift the debate surrounding the circuit split. Rather than argue for its position over that of other circuits, the Second Circuit has asserted that its sister circuits share its point of view.[72] The Second Circuit's argument finds its grounding

64. *Id.* at 303.
65. *McMorris*, 995 F.3d at 302.
66. *Id.* at 303.
67. *Id.* at 304.
68. *Id.*
69. *Id.* at 304–05.
70. *Id.* at 304.
71. *See* Case History for McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295 (2d Cir. 2021), WESTLAW, https://1.next.westlaw.com/RelatedInformation/Ic3b29050a6ab11eb92df8355da0440b9/kcJudicialHistory.html?originationContext=documentTab&transitionType=History&contextData=(sc.Default)&docSource=8c9c678e494b47c3aae2301b903265b9&rulebookMode=false&ppcid=26ad80242dea4fb48e10d07b0e909ea0&firstPage=true&bhcp=1 (last visited Oct. 13, 2022).
72. *See McMorris*, 995 F.3d at 300–01.

in the premise that other circuit courts do not weigh evaluation criteria differently, but rather that the other circuits have not yet received cases with facts sufficient to allow a plaintiff standing on the same standard that the Second Circuit uses for the increased-risk theory.[73]

In presenting this argument, the Second Circuit first acknowledged that the First,[74] Fourth,[75] and Eleventh[76] Circuits have explicitly posited that a circuit split exists concerning whether plaintiffs can establish standing in this area.[77] In couching its denial of the split's existence, the Second Circuit analyzed the framing of the split as presented by these circuits:[78] that the differences in the approaches taken by the circuits lie in whether they have ever been willing to confer standing on an elevated-risk theory in data breach cases as a threshold matter.[79] While none of the cases cited by the Second Circuit that represent the First, Fourth, and Eleventh Circuit views attempts to explain *why* some circuits have been willing, in some circumstances, to confer standing on an increased-risk theory, while others have not, the representative cases from all three circuits observe that in all situations where courts have found standing, unauthorized third-party access (*McMorris* factor #1) or misuse of the data (*McMorris* factor #2) have been present.[80] These three representative cases further define the circuit split by grouping the circuits into two general battleground camps based on whether they have ever found elevated-risk standing in a data breach case.[81] Taken together, these cases present a circuit war where the Sixth,[82] Seventh,[83] Ninth,[84] and D.C. Circuits[85] have countenanced standing, while the First, Third,[86] Fourth, Eighth,[87] and Eleventh Circuits have not yet allowed for elevated-risk data breach standing (the Fifth and Tenth Circuits do not appear in these surveys of the circuit court standing landscape).[88] These aggregated assessments of

73. *See id.*

74. *See* Katz v. Pershing, LLC, 672 F.3d 64, 80 (1st Cir. 2012).

75. *See* Beck v. McDonald, 848 F.3d 262, 273–74 (4th Cir. 2017).

76. *See* Tsao v. Captiva MVP Rest. Partners, LLC, 986 F.3d 1332, 1340 (11th Cir. 2021).

77. *McMorris*, 995 F.3d at 300.

78. *Id.* Essentially, the Second Circuit is saying that the First, Fourth, and Eleventh Circuits are potentially conflating "misuse" with denial of increased-risk theory altogether. *Id.* However, this Note argues that requiring misuse, as the Third Circuit does, itself constitutes a split from the Second Circuit's view that the misuse factor is optional.

79. *See Katz*, 672 F.3d at 80; *Beck*, 848 F.3d at 273–74; *Tsao*, 986 F.3d at 1340.

80. *See Katz*, 672 F.3d at 80; *Beck*, 848 F.3d at 274; *Tsao*, 986 F.3d at 1340.

81. *See Katz*, 672 F.3d at 80; *Beck*, 848 F.3d at 273–74; *Tsao*, 986 F.3d at 1340.

82. *See* Galaria v. Nationwide Mut. Ins. Co., 663 F. App'x 384, 388 (6th Cir. 2016).

83. *See* Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 634 (7th Cir. 2007).

84. *See* Krottner v. Starbucks Corp., 628 F.3d 1139, 1143 (9th Cir. 2010).

85. *See* Attias v. Carefirst, Inc., 865 F.3d 620, 629 (D.C. Cir. 2017).

86. *See* Reilly v. Ceridian Corp., 664 F.3d 38, 43–44 (3d Cir. 2011).

87. *See* In re SuperValu, Inc., 870 F.3d 763, 768 (8th Cir. 2017).

88. *See* Katz v. Pershing, LLC, 672 F.3d 64, 80 (1st Cir. 2012); Beck v. McDonald, 848 F.3d 262, 273-74 (4th Cir. 2017); Tsao v. Captiva MVP Rest. Partners, LLC, 986 F.3d 1332, 1340 (11th Cir. 2021).

the circuit court alignments generally comport with the broad description of the circuit split by commentators in recent years.[89]

Taking these characterizations of the split at face value, the Second Circuit refuted the existence of the circuit split, noting, "But in actuality, no court of appeals has explicitly foreclosed plaintiffs from establishing standing based on a risk of future identity theft—even those courts that have declined to find standing on the facts of a particular case."[90] This argument—that the plaintiff has conflated cases where courts applied a standard more or less consistently, yet came to different results because the facts just happened to be different enough to demand those varying results, with cases where courts actually used different standards in evaluating cases—deserves substantial consideration.

It is not difficult to imagine that cases with subtle factual distinctions could be distorted by one party so that it appears that different circuits have used contrasting and potentially mutually exclusive evaluation methods, rather than discerning important distinctions in the underlying facts. After all, the common law develops through distinctions based on differences between factual scenarios among cases. Indeed, the value of recognizing true circuit splits from different-facts scenarios has been supported by several recent cases in which the Supreme Court denied certiorari after one party argued that no true circuit split existed.[91]

Aware of these concerns, the Second Circuit made a persuasive argument for a different-facts scenario. It rightly noted that "no court of appeals has explicitly foreclosed plaintiffs from establishing standing based on a risk of future identity theft."[92] This falls in line with the idea that true, recognizable legal differences in appellate review come from the way one evaluates the facts, rather than from the facts themselves. Facts merely shape the setting for principles to develop and distinctions to be made based on precise varieties of circumstances that have not yet been addressed by a court's evaluative methods (or, of course, those methods it must develop to resolve novel situations). Further, this reading aligns with the general interpretive approach of prominent legal luminaries, including the late legal philosopher

89. *See* Ferrick, *supra* note 14; Hooker et al., *supra* note 14; Lorio, *supra* note 14.

90. McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295, 300 (2d Cir. 2021).

91. *See* On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit at 25–26, Jensen v. Clyde, 989 F.3d 848 (10th Cir. 2021), *cert. denied*, 2021 WL 4733347 (U.S. Oct. 12, 2021) (No. 21-152); *See* On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit at 13–18, Jammal v. Am. Fam. Ins. Co., 914 F.3d 449 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 643 (U.S. Dec. 9, 2019), *reh'g denied*, 140 S. Ct. 985 (U.S. Jan. 27, 2020) (No. 19-248). It should be noted that although the Supreme Court typically does not explain why it has denied a writ of certiorari, deciding on the existence of a circuit split likely plays a substantial role in the outcome of a case. Therefore, it is reasonable to conclude that, at least to some degree, the Court denied certiorari because it found merit in the arguments for the denial of the existence of a circuit split.

92. *McMorris*, 995 F.3d at 300.

Ronald Dworkin[93] and recently retired Supreme Court Justice Stephen Breyer,[94] who both contend that ambiguities in the law should be read so as to bring coherence and consensus, rather than dispute and division.[95]

Despite this interpretive support, the Second Circuit perceptively identified a proverbial fly in the ointment, *Reilly v. Ceridian Corporation*, albeit in a brief footnote.[96] The Second Circuit acknowledged "[t]he Third Circuit's decision in *Reilly v. Ceridian Corp.* perhaps comes closest to unilaterally rejecting an 'increased-risk' theory of injury in fact in the context of a data breach."[97] The Second Circuit quoted *Reilly* to highlight the language least resonant with its no-circuit split stance: "In data breach cases where no misuse is alleged, however, there has been no injury."[98] The Second Circuit countered, "[b]ut even there, the Third Circuit distinguished analogous cases from the Ninth and Seventh Circuits on their facts instead of rejecting the 'increased-risk' theory altogether."[99]

The Second Circuit bolstered this argument by asserting that *Reilly* could not be read to foreclose claims that do not involve misuse because such a reading of *Reilly* would seem to contravene prior Supreme Court rulings that "an allegation of future injury may suffice" to furnish a case with standing "if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur."[100] At its core, the Second Circuit's four-sentence counterargument to those who see the Third Circuit's position as constituting a flat denial of the increased-risk theory altogether—or potentially to those who view the Third Circuit's position being, as this Note argues, in opposition to the optional nature of the presence of the misuse factor—serves as an extension, to the Third Circuit's brusque, seemingly definitive language, of the Second Circuit's general assertion that the seemingly standing-disfavoring circuits have only evaluated different-facts cases up to this point.

93. *See* RONALD DWORKIN, LAW'S EMPIRE 225 (1986) (asserting that the "adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness.").

94. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992) (arguing that "law itself is a human institution, serving basic human or societal needs. It is therefore properly subject to praise, or to criticism, in terms of certain pragmatic values, including both formal values, such as coherence and workability, and widely shared substantive values, such as helping to achieve justice by interpreting the law in accordance with the 'reasonable expectations' of those to whom it applies." (internal citations omitted)).

95. *See* DWORKIN, *supra* note 93, at 225; Breyer, *supra* note 94, at 847.

96. *See McMorris*, 995 F.3d at 300 n.2.

97. *Id.*

98. *See id.* (quoting Reilly v. Ceridian Corp., 664 F.3d 38, 45 (3d Cir. 2011)).

99. *Id.*

100. *See id.* at 300 (quoting Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014)).

B. WHY A CIRCUIT SPLIT ACTUALLY DOES EXIST

1. Supreme Court Precedent Can Be Read To Not Require Increased-Risk Standing In Every Variety Of Case.

However, this assessment belies both *Reilly*'s true, general thrust, as well as its analysis distinguishing "analogous" cases from the Ninth and Seventh circuits. As a preliminary matter, the Second Circuit's assertion that even if it read *Reilly* in the light most oppositional to its own, no-circuit split interpretation of the case law, *Reilly* should not be read to contravene the Supreme Court's allowance for future injury, falters as a matter of logic separate from its contextual circumstance. This is because the Supreme Court does not explicitly require future injury as an available means to provide standing for plaintiffs in all variety of cases. Rather, the language from the Supreme Court, which the Second Circuit itself quotes to support its position, notes that "an allegation of future injury *may* suffice" (emphasis added) to furnish a claim with standing.[101] Far from serving as a direct imperative for the availability of increased-risk standing for all varieties of claim, this language indicates that it is possible for such a claim to be heard in court so long as "the threatened injury is certainly impending, or there is a substantial risk that the harm will occur."[102]

This leaves interpretive room for the Third Circuit to determine that the absence of the misuse factor will always render a future risk of injury less than certainly impending or of an insufficiently substantial risk of harming the plaintiff. While this is not the only way to interpret *Reilly*, the viability of this interpretation undercuts the Second Circuit's contention that reading *Reilly* as requiring misuse for standing contravenes Supreme Court precedent. Additionally, even if a platonically accurate interpretation of Supreme Court precedent would not allow a reading of *Reilly* that requires misuse for standing, since the Supreme Court has not yet ruled on this issue, the Second Circuit's assertion that such a reading violates the Constitution does not mean that the Third Circuit could not, at the time, have put forth this argument in the good faith belief that the argument did not contravene constitutional standards.

2. *Reilly*'s Variance With Other Circuits Does Not Hinge On Differences In Facts Between The Cases.

At least as significantly, under further scrutiny, the different-facts rationale does not pass muster in *Reilly*. In support of its facts-based distinction assertion, the Second Circuit highlighted the Third Circuit's efforts to distinguish the facts of *Reilly* from those of cases from the Seventh

101. *Id.*
102. *See Driehaus*, 573 U.S. at 158.

and Ninth Circuits.[103] As mentioned above, the Seventh and Ninth circuits have generally been receptive to increased-risk standing in data breach cases, and the cases cited by the Third Circuit in *Reilly* also fit that mold.[104]

Although the facts in *Reilly* do indeed differ from those of the Seventh and Ninth Circuit cases, and the Third Circuit used the ostensible greater immediacy of the risk of harm in those cases to support its contention of attenuated harm in *Reilly*, the Third Circuit drew the sharpest distinctions from the conceptual underpinnings of the evaluative methods used between the cases.[105] The Third Circuit noted that "neither [case] . . . discussed the constitutional standing requirements and how they apply to generalized data theft situations."[106] It went on to explain that "instead of making a determination as to whether the alleged injury was 'certainly impending,' both courts simply analogized data-security-breach situations to defective-medical-device, toxic-substance-exposure, or environmental-injury cases."[107] The Third Circuit classified the Seventh and Ninth Circuits' reliance on these types of cases as a "skimpy rationale."[108] The court elaborated that the justifications for the outcomes in the Seventh and Ninth Circuit cases were unpersuasive, because in the comparator cases "an injury has undoubtedly occurred," as opposed to data breach cases, "where [if] no misuse is alleged . . . there has been no injury."[109]

Here, the Third Circuit took issue with the lack of constitutional standing analysis in the Seventh and Ninth Circuit cases, and in particular, those circuits' apparent failure to adopt a misuse requirement for standing. The Third Circuit's significant focus on the (assertedly flimsy) conceptual underpinnings of the Seventh and Ninth Circuits' justifications for allowing constitutional standing, as opposed to the varying facts of the cases, indicates that the true bone of contention laid not in different facts, but in the courts' overall approaches to evaluating those facts. Further, although the Third Circuit did briefly note factual differences between the cases, the Third Circuit's substantial criticism of the conceptual approaches taken by the Seventh and Ninth Circuits renders any distinctions drawn upon the facts relatively insignificant because agreement on evaluative methods must precede any comparison of facts, so as not to risk comparing apples to some other constitutional standing fruit.

103. *See McMorris*, 995 F.3d at 300 n.2.
104. *See* Reilly v. Ceridian Corp., 664 F.3d 38, 43–44 (3d Cir. 2011).
105. *See id.* at 43–46.
106. *Id.* at 44.
107. *Id.*
108. *Id.*
109. *Id.* at 45.

3. *Reilly*'s Language Explicitly Requires Misuse.

Finally, the strong language in *Reilly* strikes down any doubt that the Third Circuit intended *Reilly* to be susceptible to interpretation as broad as that applied by the Second Circuit to its other sister circuits. The Third Circuit stated in unambiguous language that misuse is a necessary predicate to standing in data breach cases based on increased risk: "[u]nless and until these conjectures come true, Appellants have not suffered any injury; there has been no misuse of the information, and thus, no harm."[110] Again, the court noted, "Appellants have alleged no misuse, and therefore, no injury."[111] Finally, and most definitively, the Third Circuit explained, "In data breach cases where no misuse is alleged, however, there has been no injury."[112]

Any honest interpretation of *Reilly*, even from a "coherence and consensus" reading lens,[113] cannot massage away this concrete and unequivocal language, which elevates the misuse factor to a requirement for constitutional standing based on future risk of harm in data breach cases in the Third Circuit. Rather than classify this difference in opinion as general receptiveness to increased-risk standing, as many courts, including the Second Circuit, and commentators have done up to this point, *Reilly* makes evident that the circuit split actually hinges on whether misuse of data must be present to furnish standing. Therefore, while it may be possible to interpret other sister circuit methods as potentially falling within the interpretive purview of the Second Circuit's *McMorris* ruling, it is not feasible to deny that an unresolved circuit split exists, at least between the Second and Third Circuits.[114]

110. *Reilly*, 664 F.3d at 42.

111. *Id.* at 44.

112. *Id.* at 45.

113. *See* DWORKIN, *supra* note 93, at 225; Breyer, *supra* note 94, at 847.

114. It must be noted that in September 2022, in *Clemens v. ExecuPharm Inc.*, the Third Circuit again ruled on increased risk of future injury in a data breach case, this time with language that appeared to potentially soften the Third Circuit's stance on the misuse factor. 48 F.4th 146 (3d Cir. 2022). In specific, the court explained, "Of note, misuse is not necessarily required." *Id.* at 154. This statement is hard to square with the above-noted language in *Reilly* that forecloses standing without misuse, but contextual considerations somewhat clarify the issue. After making this assertion in *Clemens*, the Third Circuit went on to note a single instance in which the Seventh Circuit found standing without misuse. *Id.* Rather than describe such a finding as a live concern for this case, the Third Circuit invited the reader to peer in on the finding as if to take in the details of a historical diorama–a view of misuse treatment in another circuit that may color, but not define, the case at hand. *Id.* This statement ultimately constitutes dicta, as the court distinguished *Clemens* from *Reilly* not on the presence of misuse per se, but rather on the idea that after considering all factors, the injury in *Reilly* was not sufficiently imminent, as it was in *Clemens*. *Id.* at 153, 157. Certainly, language in *Clemens* casts doubt on the *Reilly* holding concerning the necessity of the misuse factor, and may signal future receptiveness to the absence of the misuse factor, but without a ruling basing its justification on such logic, or a more direct statement on the matter, the Third Circuit cannot be said to have meaningfully changed its position as articulated in *Reilly*.

IV. SIDES TO TAKE: STANDING IN THE ROBERTS COURT

A. THE OPTIONS

Although the *McMorris* plaintiff did not appeal her case to the Supreme Court,[115] the vigorous debate among the circuits on constitutional standing based on increased risk in data breach cases suggests that the Court may grant certiorari to hear such a case in the near future. Considering that the Second Circuit does not require the presence of misuse for standing, a ruling that does not mandate, but merely permits, the Second Circuit approach generally could preserve the status quo, allowing the circuits to pursue their separate evaluation methods. However, given the decisive split between the Second and Third Circuits, a decision by the Supreme Court would likely favor one of the approaches over the other, even if the ruling did not fully endorse either approach. Even denial of the circuit split would ultimately favor the Second Circuit, considering, as noted above, the stark contrast between its approach and that of the Third Circuit.

While in the last decade predicting outcomes for significant national events has proven to be a risky endeavor, attorneys for plaintiffs and defendants in cases like *McMorris* will likely find it useful to assess the strength of their claims by looking to the recent past history of the Court that will evaluate their arguments. As hinted at above during the brief footnote discussion of inferences that can be made from certiorari denials, while empirical analysis extends beyond the scope of this Note, looking to prominent examples of Supreme Court decisions that may be descriptive of general trends can be helpful in conceptualizing, in broad strokes, the Court's general attitudes toward significant controversies.

Very generally, it appears that the Roberts Court has been reluctant to furnish plaintiffs with standing in cases where the injury is arguably attenuated. This would seem to point to the Court favoring an approach more like that of the Third Circuit, which requires, rather than merely values, the presence of data misuse, and thus raises the constitutional standing burden on the plaintiff. Two recent significant cases touching upon fundamental constitutional standing issues, *TransUnion LLC v. Ramirez* and *Whole Women's Health v. Jackson*, demonstrate this trend.

115. *See* Case History for McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295, 298 (2d Cir. 2021), WESTLAW, https://1.next.westlaw.com/RelatedInformation/Ic3b29050a6ab11eb92df8355da0440b9/kcJudicialHistory.html?originationContext=documentTab&transitionType=History&contextData=(sc.Default)&docSource=8c9c678e494b47c3aae2301b903265b9&rulebookMode=false&ppcid=26ad80242dea4fb48e10d07b0e909ea0&firstPage=true&bhcp=1 (last visited Oct. 13, 2022).

B. THE EXAMPLES

1. TransUnion

Two months after the Second Circuit's *McMorris* ruling, the Supreme Court, in *TransUnion*, touched upon injuries stemming from data privacy, although from the intentional disbursement of data that, unbeknownst to the sender, contained error.[116] In addition, the case involved, in part, a violation of the Fair Credit Reporting Act ("FCRA"), which determines how the government regulates credit reporting agencies, including TransUnion.[117] TransUnion failed to live up to its obligations under the Act by erroneously listing several thousand customers as "specially designated nationals" who allegedly threatened the security of the United States.[118] The Court ruled that only the plaintiffs whose inaccurate credit reports had actually been released to third-party businesses, incorrectly warning them of the putative national security threat the plaintiffs posed based on their credit reports, would be furnished with standing to sue.[119] In determining this, the Supreme Court focused on the relationship to the statutory violations under which the plaintiffs made their claims.[120] The Court held that floating violations of a statute, without any tethering to harm resembling a traditionally recognized tort injury, such as harm to reputation from a third party discovering one's erroneously listed "specially designated national" status, could not be deemed sufficiently concrete to furnish a plaintiff with standing.[121]

In describing the tethering that created a concrete harm beyond the statutory violation, the court noted, "Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court."[122] (emphasis in original). The Court further held that "the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm."[123] This meant that, at least in this case, the risk of future harm could not serve as the tethering harm for the statutory violation, since it did not fall within a traditional tort injury category, and so floated in the ether.[124]

The Court did not venture to further define factors or assessments that would allow a court to determine whether exposure to risk of harm rose to a level sufficient to invoke constitutional standing, and instead merely rejected

116. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021).
117. *Id.* at 2200–01.
118. *Id.* at 2201.
119. *Id.* at 2200.
120. *Id.* at 2208–10.
121. *Id.*
122. *TransUnion*, 141 S. Ct. at 2204–05.
123. *Id.* at 2210–11.
124. *Id.* at 2208–10.

standing based on increased risk of harm in this case.[125] Such an assessment would have only been persuasive, and likely not binding, on lower courts considering an inadvertent data breach claim because *TransUnion* involved intentional disbursements of potentially harmful information, rather than an unintentional data breach, like those in *McMorris* and *Reilly*. However, the Court's decision not to extend standing to the plaintiffs in this related area of the data privacy family of standing case law suggests it would be similarly reluctant to furnish plaintiffs with standing in the unintentional data breach context as well.

2. *Whole Women's Health*

In the procedurally complicated case *Whole Woman's Health*, the Court, in an emergency midnight ruling, found itself confronted with intricate standing issues presented by both parties to the suit.[126] The case originated from a Texas law that banned abortions after about six weeks, furnishing the public, and not the government, with standing to enforce the ban.[127] The abortion clinic plaintiffs requested that the Court issue an injunction on the law until the courts resolved the many constitutional issues surrounding the substance of the law itself and the procedures through which it would be enforced.[128] Although the many layers of this case defied simple analysis, the controversy, at least indirectly, pitted the standing rights of those who wished to enforce the law against those of abortion providers who hoped to assert a claim against enforcers of the law and federal judges who in the future may cause harm by failing to honor what at the time[129] was their clients' federally recognized fundamental constitutional right to abortion during the earlier stages of pregnancy.[130]

The indirect conflict existed in the sense that in deciding whether to grant the injunction, the Court could not both recognize the temporary legitimacy of the standing under Texas state law for those who may potentially enforce the law while also acknowledging that the plaintiffs made a "strong showing" that they were "likely to succeed on the merits," that is, all elements of their claim, including the federal constitutional standing requirement.[131] Indeed, in denying the injunction, the Court in part used standing as a justification, explaining that the threatened injury to the abortion clinics may not be "certainly impending," as required by Supreme Court precedent.[132] However, the apparent standing skirmish in *Whole Women's Health* proved to be

125. *See generally*, *id.*
126. *See* Whole Women's Health v. Jackson, 141 S. Ct. 2494 (2021).
127. *Id.* at 2496.
128. *Id.*
129. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
130. *Whole Women's Health*, 141 S. Ct. at 2495.
131. *Id.*
132. *Id.* (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013)).

largely illusory, because although the decision generally favored those who sought to potentially enforce the abortion law, including their threshold standing to do so, it left the ultimate constitutionality of that ability (as well as the question of the substantive state law loophole via procedural means around the then-recognized fundamental constitutional right to an abortion) to live another day.[133]

C. THE COURT'S LIKELY DIRECTION

Whole Women's Health, like *TransUnion*, serves as a compelling example of the Roberts Court's reluctance to recognize standing where the harm involved is at all attenuated, and the concreteness and imminence of the (likely soon-to-come) injury are called into question. This general trend, coupled with the Court's recent denial of standing based on an increased-risk theory in the data privacy setting,[134] suggests that should the *McMorris-Reilly* conflict come before the Court, the Court would likely be more inclined to rule in favor of denying standing to data breach plaintiffs. Considering that requiring misuse for standing would increase the burden on the plaintiff in this area, where the harm remains somewhat amorphous, it seems likely that the Supreme Court would favor the *Reilly* approach of mandating misuse, rather than the *McMorris* contention that misuse should be optional for standing.

Although the Supreme Court recently denied standing based on increased risk in the intentional disbursement of erroneous data in *TransUnion*, considering that no circuit court has outright denied increased-risk standing in all data breach cases, it seems unlikely that the Supreme Court would directly graft its *TransUnion* reasoning onto unintentional data breach cases, and therefore overrule every circuit that has decided these cases by denying standing for increased risk of future harm in any circumstance. However, siding with the *Reilly* court would likely mean overruling *McMorris* and cases from other circuits that favor the optional nature of the misuse factor. Without either a compromise or maintaining the status quo, the Supreme Court would directly overrule a substantial amount of law covering vast swathes of the country. This Note proposes a compromise.

133. *Id.* at 2495–96. When the case returned to the Supreme Court a few months later, the Court ruled that the abortion clinics lacked standing to sue a potential enforcer of the law because that enforcer-defendant had not yet taken enforcement action. The Court resolved the claim against a state court judge and clerk in favor of those defendants through sovereign immunity, a doctrine distinct from, but related to, standing doctrine. *See* Whole Women's Health v. Jackson, 142 S. Ct. 522 (2021).

134. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021).

V. A PROPOSED SOLUTION

A. THE SOURCE OF THE SOLUTION

Coming to a precise solution recipe involves considering not only the mechanics and the effect of the process, but also the tools chosen to reach the result in the first place. A federal dispute, such as a dispute between federal circuit courts, like the *McMorris-Reilly* conflict, requires a federal solution. Under the Constitution, Congress and the Supreme Court serve as the major law-making forces at the federal level.[135] The Constitution entrusts Congress with the power to pass statutes that govern the actions of the people,[136] while the Supreme Court creates laws by resolving "Cases" or "Controversies" brought before it by contesting parties who fail to resolve their disputes in the lower courts.[137] Congress attempts to proactively resolve legal concerns by passing statutes to direct the legal outcomes of the public's behavior. The cases that reach the Supreme Court tend to present new flavors of conflict that, because of their novelty or ambiguities in the existing law, have not been resolved at an earlier stage of litigation. However, once the Court decides on a legal question, its precedential value works much like a Congressional statute to govern the behavior of society and the resolution of future legal disputes.

The bifurcated nature of the federal law-making process raises the question of which branch finds itself best positioned to resolve the *McMorris-Reilly* circuit split, and therefore, the dispute over whether misuse must be present to allow a plaintiff to move forward in federal court under an enhanced-risk theory in data breach cases. Congressional statutes carry the advantage of (hopefully) careful dealmaking between competing political parties, which ideally produces laws that reflect the broad consensus of the American people and that stand the test of time. Federal statutes further benefit from the expertise of administrative experts in the Executive Branch, who refine the "intelligible principle[s]" laid out in Congressional statutes through more detailed regulations.[138] More specifically, statutes have long been used to furnish plaintiffs with standing in situations that legislative bodies have felt so important as to explicitly lay out a standing roadmap.[139] Indeed, the plaintiffs in *TransUnion*, discussed above, brought their data privacy claims against the defendant under the FCRA, which provided some of the plaintiffs the ability to bring suit when they suffered harm from

135. U.S. CONST. art. I, §§ 1, 8; U.S. CONST. art. III, § 1, cl. 1.

136. *Id.* art. I, §§ 1, 8.

137. *Id.* art. III, § 1, cl. 1.

138. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406–09 (1928) (allowing Congress to delegate its law-making power to the Executive Branch so long as it provides an "intelligible principle" to guide rule makers in administrative agencies).

139. *See TransUnion*, 141 S. Ct. at 2205.

TransUnion's dissemination of inaccurate and harmful information about the plaintiffs.[140]

However, Congressional statutes have their drawbacks. One of the major disadvantages being, of course, the possibility of invalidation or limitation by the Supreme Court.[141] As the ultimate interpreter of the Constitution, the Supreme Court may weigh in on a statute contested by parties to litigation if the Supreme Court believes that Congress has run afoul of the Constitution through part of the law Congress has passed.[142] Aside from refining statutes to comply with Supreme Court guidance, Congress has no real recourse against unfavorable Supreme Court rulings aside from taking the end-run measure of ratifying a Constitutional amendment—an extremely onerous endeavor considering that this requires the approval of three-fourths of all state legislatures.[143] Therefore, Supreme Court decisions bear an inherent durability to them, subject only to amendment ratification or overruling by a future majority of the Court, which the Court is often unwilling to do because it historically tends to abide by decisions already made, a concept called *stare decisis*.[144]

Additional factors beyond these general principles militate toward a Supreme Court decision as the superior route for resolution of the circuit split. Although Congress has been known to provide plaintiffs with standing by statute, as it did through the FCRA,[145] in *TransUnion* the Supreme Court emphasized that "even though 'Congress may "elevate" harms that "exist" in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its law-making power to transform something that is not remotely harmful into something that is.'"[146] So while Congress can use its law-making powers to create standing where the Supreme Court may not have upheld any of its own accord, should the Supreme Court perceive the injury as "not remotely harmful," a Congressional statute conferring standing on plaintiffs for attenuated harm would be in real trouble.[147] Moreover, the Second Circuit has noted that

140. *Id.* at 2200.

141. *See* Marbury v. Madison, 5 U.S. 137, 177–78 (1803).

142. *See id.*

143. U.S. CONST. art. V.

144. However, it should be noted that the Supreme Court profoundly weakened the concept of *stare decisis* when it, for the first time in history, fully eliminated a previously recognized fundamental individual right in recently overturning *Roe v. Wade*. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

145. *See TransUnion*, 141 S. Ct. at 2200.

146. *Id.* at 2205 (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018)).

147. A Supreme Court ruling would at least theoretically be more difficult to displace than a statute, allowing for stability in the law and the inculcation of just standards for the resolution of standing controversies in future injury data breach claims at the stage of determining constitutional standing (assuming a majority of the Court would be willing to rule in the manner described below). Further, such a ruling would allow the Court to explain how the optional nature of the misuse factor does not conflict with its holding in *TransUnion*.

"determining standing is an inherently fact-specific inquiry,"[148] which the Supreme Court has specified "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."[149] This emphasis on the unique factors of each case, both by the Supreme Court and the Second Circuit, suggests that a factor test, subject to the flexibility of judicial determination, would be the better fit in resolving the necessity of the misuse factor for standing. Further, the Supreme Court's role as the ultimate interpreter of the Constitution,[150] the fact that every determination of standing necessarily invokes a constitutional question, and that circuit splits typically find their resolution through Supreme Court constitutional interpretation together indicate that the Supreme Court, rather than Congress, should address the ambiguities in this area of the law.

B. RECOMMENDED SUPREME COURT RULING

With the case before it, and all the ingredients in place, the Supreme Court will need to decide whether to furnish plaintiffs with standing based on increased risk of harm in data breach cases, and if so, how and what factors will weigh in coming to a standing determination in any given case. As noted above, the circuit courts do not seem to disagree about what factors should be considered when making a decision about standing. They come to a consensus that at the very least, courts should take into account the *McMorris* factors: "whether the plaintiffs' data has been exposed as the result of a targeted attempt to obtain that data," "whether any portion of the data set has already been misused, even if the plaintiffs themselves have not yet experienced identity fraud or theft," and "whether the type of data that has been exposed is sensitive such that there is a high risk of identity theft or fraud."[151] As discussed above, the Third Circuit requires misuse for a plaintiff to enjoy standing in court,[152] while the Second Circuit allows for misuse to serve as an optional factor in determining whether to confer a plaintiff with standing.[153] Both approaches bring with them merit that should be seriously considered by the Supreme Court.

As an initial matter, considering that nearly all the circuits seem to have come to a consensus about what matters when deciding standing (although they do not necessarily agree to what degree misuse should matter), the Supreme Court would be ill-advised to simply disregard the three-factor test developed somewhat independently by the various appellate courts. The strength of this consensus, despite a climate where judges frequently disagree

148. McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295, 302 (2d Cir. 2021).
149. Allen v. Wright, 468 U.S. 737, 752 (1984).
150. Marbury v. Madison, 5 U.S. 137, 177–78 (1803).
151. *McMorris*, 995 F.3d at 303.
152. Reilly v. Ceridian Corp., 664 F.3d 38, 43 (3d Cir. 2011).
153. *See McMorris*, 995 F.3d at 300–02.

sharply about how to evaluate facts, speaks to the durability of the test over the last decade or so that it has been used. Further, although judicial application of the factor test could potentially be inconsistent depending on who stands in the place of evaluator, assuming that courts are best positioned to resolve standing issues, as this Note argues, factor tests serve as one of the most predictable measures of the outcomes of cases. While a bright-line rule for determining whether large swathes of claims would be eligible to be heard in court certainly would bring even greater predictability,[154] such a rigid approach would fail to account for the nuanced, fact-specific inquiry that Supreme Court precedent calls for.[155]

This leaves the controversial (except, at least, from the perspective of the see-no-conflict stance of the Second Circuit) factor weighing. Interestingly, in *McMorris*, the Second Circuit, which does not appear to weigh the misuse factor more heavily than the other factors, noted "First, and most importantly, our sister circuits have consistently considered whether the data at issue has been compromised as the result of a targeted attack intended to obtain the plaintiffs' data."[156] While this could draw the potential conclusion that the Second Circuit views targeted attacks or, perhaps even misuse, which typically motivates targeted attacks, as so crucial to standing that they are almost always functionally (but not actually) required, considering that, unlike the *Reilly* court, the Second Circuit explicitly refers to the standing considerations, including the "targeted attack" issue, as factors (as opposed to elements or requirements),[157] such a strict reading seems improbable. This is especially true considering that the Second Circuit notes that "none of these factors is alone necessary or sufficient to confer standing."[158] More likely, it seems that the Second Circuit valued the "concrete injury" guidance from the Supreme Court[159] in determining the primacy of the "targeted attack" factor.

The Third Circuit appears to have been motivated by similar concerns when it made misuse an outright requirement.[160] In explaining that "Unless and until these conjectures come true, Appellants have not suffered any injury; there has been no misuse of the information, and thus, no harm," the Third Circuit tethered the concrete injury requirement to misuse, as this displays that harm had truly occurred (or, would soon occur if another person's data in the same dataset had been compromised instead of that of the plaintiff).[161] Although the Second Circuit's (much looser) tether to the targeted attack involves a similar concern, the Third Circuit's focus on actual

154. Requirements outlined by statutes tend to be much less flexible and more specific than judicially applied factor tests.

155. *See* Allen v. Wright, 468 U.S. 737, 752 (1984).

156. *McMorris*, 995 F.3d at 301.

157. *Id.*

158. *Id.*

159. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

160. Reilly v. Ceridian Corp., 664 F.3d 38, 42 (3d Cir. 2011).

161. *Id.*

misuse seems more in line with Supreme Court precedent. Targeted, yet unsuccessful attacks strike less clearly at the core of harm than does misuse, which indicates concretely that someone has something they should not and has already directed it towards nefarious purposes.

However, the Third Circuit's tether is too tight. One can imagine a scenario where no misuse has occurred, yet the evidence shows a clearly targeted strike at very sensitive PII—the bad actor has gotten ahold of sensitive data yet has not displayed evidence of using the data for ill purposes. Perhaps the bad actor in this situation is well known for misusing data. It would be severely restrictive for a court to prevent a plaintiff from making a claim when the other two factors are so strongly present. Therefore, the misuse factor, which strikes at the heart of standing in data breach claims based on increased risk, should not be required, but should be especially valued.

CONCLUSION

Data breaches are becoming ever more prevalent for corporations and other business entities as technology continues to play a more prominent role in our lives.[162] The courts have an important role to play in determining whether plaintiffs who fall victim to data breaches because of business entity oversights can be heard in court, especially in murky situations where they can only assert an increased risk of harm claim. While the Second and Third Circuits disagree about whether the data must have been misused for a plaintiff to demonstrate standing, they agree on the general factors to be considered and the idea that these factors must point to the injury being concrete, as the Supreme Court precedent requires. The Supreme Court, rather than Congress, should resolve this controversy because, as the ultimate interpreter of the Constitution,[163] the Supreme Court is best positioned to decide ambiguous questions about the meaning of the Constitution in different contexts. The Roberts Court has generally demonstrated a tendency to deny standing to plaintiffs whose harm is to some degree attenuated. This means that the Court will most likely side with the Third Circuit in requiring misuse for standing based on an increased-risk theory in data breach cases. However, a more expansive ruling could still account for the concrete injury requirement for standing, while allowing for the fact-specific nuances of data breaches by placing special importance, without explicitly requiring, misuse of the data for constitutional standing. Such a solution would bear the most equitable fruit.

162. Olmstead & Smith, *supra* note 19.
163. *See* Marbury v. Madison, 5 U.S. 137, 177–78 (1803).

Andrew Ridge[*]

* J.D. Candidate 2023, Brooklyn Law School; B.A. 2016, Tufts University. Thank you to Professor Gerber, friends, and family for your support.