ALLEGING A FIRST AMENDMENT "CHILLING EFFECT" TO CREATE A PLAINTIFF'S STANDING: A PRACTICAL APPROACH

TABLE OF CONTENTS

I. INTRODUCTION

> *"[I]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."*[1]

This principle, of course, reflects this nation's commitment to the First Amendment guarantees of freedom of speech and association.[2] Everyday, however, people refrain from exercising these sacred rights because of various types of governmental actions.

This phenomenon results, for example, when an individual wishes to attend a public meeting where the FBI, or other governmental entity, has publicly revealed its intention to monitor the event. In this situation, the individual is chilled from either attending or speaking outright for fear of repercussions, how-

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1. Elrod v. Burns, 427 U.S. 347, 356 (1976) (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 647 (1943)).

2. The First Amendment provides, in part, "Congress shall make no law . . . abridging the freedom of speech . . . or of the right of the people peaceably to assemble . . . ." U.S. CONST. amend I. In the Supreme Court's words, "These protections reflect our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' a principle itself reflective of the fundamental understanding that '[c]ompetition of ideas and governmental policies is at the core of our electoral process.'" Elrod v. Burns, 427 U.S. at 356 (quoting West Virginia State Bd. of Educ. v. Burnette, 319 U.S. at 357) (citations omitted).

ever subtle. Thus, an official action may abridge First Amendment rights without directly proscribing a protected activity. This is the so-called "chilling effect."[3] The debate has raged on the issue of when, if ever, a governmental action may legally result in chilling effect injuries.[4]

An individual faces an enormous procedural barrier when challenging a governmental action that has allegedly caused a chilling effect injury: standing to sue.[5] As a result, many victims of such injuries may be denied their day in court to enforce their rights even if their rights have been abridged. The standing doctrine essentially closes the courtroom doors to many potentially legitimate claims.

Unfortunately, existing case law does not provide a clear standard for predicting whether a plaintiff will be successful in alleging a chilling effect injury as a basis of standing. This Note attempts to discover in what circumstances a chilling effect injury on First Amendment rights might establish a plaintiff's standing in the federal court system. The focus is on the procedural barrier of standing. Substantive issues regarding the chilling effect doctrine, which encompass an entirely different analysis, are outside the scope of this Note.[6]

Part II of this Note defines the "chilling effect" and explains its relationship with the First Amendment. Part III offers a brief sketch of relevant standing principles as a foundation for analyzing the treatment of the chilling effect in the Supreme Court, discussed in Part IV, and in the circuit courts, discussed in Part V. Finally, this Note concludes that chilling effect injuries may, if alleged properly by counsel, establish sufficient standing to permit the court to reach the merits of the case.

II. "CHILLING EFFECT" DEFINED

Justice Frankfurter first introduced the term "chilling effect" in the First Amendment context in 1952.[7] Since then, commentators and judges have proliferated the use of the term, offering differing thoughts on its precise meaning and application.[8]

The chilling effect "occurs when individuals seeking to engage in activity protected by the First Amendment are deterred from so doing by governmental regulations not specifically directed at that protected activity."[9] Thus, the essence of the chilling effect is "an act of deterrence."[10]

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3. For an expanded definition and brief history of the "chilling effect," see *infra* part II.

4. *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

5. For a discussion of standing, see *infra* part III.

6. For excellent discussions of the substantive issues regarding the chilling effect see Schauer, *supra* note 4; Note, *supra* note 4.

7. *See* Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

8. *See* Schauer, *supra* note 4, at 689.

9. *Id.* at 693.

10. *Id.* at 689 (citing Freedman v. Maryland, 380 U.S. 51, 59 (1965); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 556-57 (1963)).

Justice Harlan described the chilling effect as "ubiquitous," "slippery," and "amorphous."[11] However defined, First Amendment chilling effect issues are continuously brought into the courts as a basis for a plaintiff's standing.

III. THE STANDING DOCTRINE

A major barrier to alleging a First Amendment chilling effect injury is standing to sue in the federal courts.[12] Although standing principles are "riddled with ambiguities,"[13] there are two universally accepted standing barriers a plaintiff must overcome to establish subject matter jurisdiction in the federal courts.[14] First, a plaintiff must show his injury is a "case or controversy" under Article III.[15] To meet this constitutional minimum, the court must be satisfied that the plaintiff has suffered an "'injury in fact'" resulting from the challenged action of the defendant.[16] The Supreme Court offered some guidance on applying this standard: "Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged official conduct and the injury or threat of injury must be 'real and immediate,' not 'conjectural' or 'hypothetical.'"[17]

The second standing barrier is made up from nonconstitutional prudential requirements that have been erected by the Court.[18] Under prudential standing analysis, courts are willing to loosen nonconstitutional standing limitations when societal interests to resolve the controversy outweigh the goals of the limitations.[19]

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11. Zwickler v. Koota, 389 U.S. 241, 256 n.2 (1967) (Harlan, J., concurring).

12. *See infra* parts IV-V.

13. Bordell v. General Elec. Co., 922 F.2d 1057, 1059 (2d Cir. 1991).

14. Warth v. Seldin, 422 U.S. 490, 498 (1975). Because standing issues are jurisdictional, they may be raised by appellate judges on any level of appeal. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 230-31 (1990).

15. Allen v. Wright, 468 U.S. 737, 750-52 (1984); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982). Article III provides, in part, "The judicial Power shall extend to all Cases . . . and . . . Controversies . . . ." U.S. CONST. art. III, § 2.

16. Virginia v. American Booksellers Ass'n, 484 U.S. 383, 392 (1988) (quoting Warth v. Seldin, 422 U.S. at 499). There are actually three requirements for establishing Article III standing: an injury, a causal connection between the injury and the complained-of acts, and redressibility. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. at 472. The focus in chilling effect injuries is whether the plaintiff's injuries are sufficient to establish standing; thus, the second and third requirements are easily met. *See* Meese v. Keene, 481 U.S. 465, 476-77 (1987); Smith v. Meese, 821 F.2d 1484, 1494 (11th Cir. 1987).

17. City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) (citations omitted).

18. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. at 471. These self-imposed limits on the exercise of federal jurisdiction include the "general prohibition on raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement a plaintiff's complaint fall within the zone of interests protected by the law invoked." Allen v. Wright, 468 U.S. 737, 751 (1984) (citing Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. at 474-75).

19. Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 956-57 (1983).

The focus in chilling effect cases has generally centered on Article III standing requirements.[20] Thus, the issue to be explored is whether the plaintiff has alleged an injury-in-fact sufficient to meet Article III requirements.

IV. THE "CHILL" IN THE SUPREME COURT

The Supreme Court has recognized, albeit implicitly, chilling effect injuries may be sufficient to establish a plaintiff's standing in federal courts.[21] The Supreme Court has directly raised the issue of First Amendment chilling effect injuries as a basis for a plaintiff's standing in three cases. These cases are considered in the order in which they were decided.

A. Laird v. Tatum

The question of whether a plaintiff may have Article III standing by alleging a chilling effect was first addressed in *Laird v. Tatum.*[22] The suit involved an action for declaratory and injunctive relief by Tatum and other members of political groups who were subjected to continuous surveillance by the Department of the Army.[23] The plaintiffs maintained that "the very existence of the Army's data-gathering system produce[d] a constitutionally impermissible chilling effect

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20. *See* Laird v. Tatum, 408 U.S. 1, 13-14 (1972). At least one commentator has contended the only standing barriers to plaintiffs alleging chilling effect injuries are prudential, despite the *Laird* opinion. Jonathan R. Siegel, *Chilling Injuries as a Basis for Standing*, 98 YALE L.J. 905, 905 (1989).

Although this theory sounds good in the groves of academe, the courts have generally applied Article III principles to the chilling effect standing problem. *See, e.g.*, Laird v. Tatum, 408 U.S. 1 (1972); *infra* parts IV-V. *But see* United Presbyterian Church in the United States v. Reagan, 738 F.2d 1375, 1379 (D.C. Cir. 1984) (holding the chilling effect is a prudential standing issue only). In fact, the distinction between the two standing barriers is often muddled by the courts. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982); *see also* Polykoff v. Collins, 816 F.2d 1326, 1331 (9th Cir. 1987) (applying Article III and prudential standing requirements to an allegation of chilling effect injuries). As a practical matter, the similarity of the facts in each case to those made in prior Supreme Court cases, not a specific standing principle, will normally control the outcome of these difficult standing problems. *See* Allen v. Wright, 468 U.S. at 751-52.

21. *See infra* part IV (A) - (C).

22. Laird v. Tatum, 408 U.S. 1 (1972). Justice Burger, in his majority opinion, framed the issue as:

> whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose.

Id. at 10.

23. *Id.* at 2-3. The opinions in *Laird* provide a paucity of details on the nature of the political organizations, the members of which brought the suit. The opinions did provide, however, an arsenal of facts regarding the Army's surveillance procedures. *See id.* at 3-8; *id.* at 16-24 (Douglas, J., dissenting). For a more detailed factual scenario, see Comment, Laird v. Tatum: *The Supreme Court and a First Amendment Challenge to Military Surveillance of Lawful Civilian Political Activity*, 1 HOFSTRA L. REV. 244 (1973).

upon the exercise of their First Amendment rights."[24] Significantly, the plaintiffs admitted they complained of no specific action of the Army against them, and the Army's activities showed no evidence of illegality.[25]

In a five to four decision, the Court held the plaintiffs lacked Article III standing. "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; 'the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.'"[26] The Court noted, "[I]t is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action," to monitor the wisdom and soundness of executive actions.[27]

This language provides the lower courts with the controlling standard for establishing Article III standing when a plaintiff alleges a chilling effect.[28] *Laird*

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24. Laird v. Tatum, 408 U.S. at 13. The plaintiffs feared "permanent reports of their activities will be maintained in the Army's data bank, and their 'profiles' will appear in the so-called 'Blaklist' [sic] and that all of this information will be released to numerous federal and state agencies upon request." *Id.* at 25 (Douglas, J., dissenting). Also, in oral argument, Tatum's counsel asserted that the uncertainty of what the Army "ha[d] in mind" as a use for the information gathered is what caused the chilling effect. *Id.* at 8 n.5.

25. *Id.* at 9 (citing Tatum v. Laird, 444 F.2d 947, 953 (D.C. Cir. 1971)). The dissent contended the plaintiffs were targets of the surveillance. *Id.* at 25 (Douglas, J., dissenting). Also, the circuit court's details of the surveillance indicated they were actual targets. Tatum v. Laird, 444 F.2d at 954 n.17.

This dispute is significant to the lower courts' adjudication of surveillance cases. Whether or not the plaintiffs in *Laird* were actual targets, the case is often cited as if they were not. *See, e.g.*, Olagues v. Russoniello, 797 F.2d 1511, 1518 (9th Cir. 1986) (holding the plaintiffs in *Laird* were not direct targets of the surveillance). This appears to be the correct interpretation of *Laird* given Justice Burger's statement of the question presented, which does not include a direct surveillance inquiry. *See supra* note 22. *But see* Siegel, *supra* note 20, at 907 n.10 (arguing the position that the *Laird* plaintiffs were not direct targets of the surveillance was incorrect because the plaintiffs were actual targets).

26. Laird v. Tatum, 408 U.S. at 13-14 (quoting United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947)). The majority distinguished past Supreme Court cases that recognized the chilling effect allegation as valid. *Id.* at 11. These cases included *Baird v. State Bar*, 401 U.S. 1 (1971); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965); and *Baggett v. Bullitt*, 377 U.S. 360 (1964). Essentially, these cases were distinguished from *Laird* by noting the challenged governmental power was "regulatory, proscriptive or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." Laird v. Tatum, 408 U.S. at 11. Thus, cases in which governmental regulations are challenged demand a separate inquiry from cases in which government surveillance is challenged. *See infra* part V (B).

27. Laird v. Tatum, 408 U.S. 1, 15 (1972).

28. *See* Meese v. Keene, 481 U.S. 465, 472-73 (1987); *infra* part V. *But see* Socialist Workers Party v. Attorney Gen., 419 U.S. 1314, 1318 (1974) (stating the Court in *Laird* did not intend to set out a rule for determining whether or not a party had standing).

Laird is also cited by lower courts regarding the substantive aspects of chilling effect claims. *See, e.g.*, Spear v. Town of West Hartford, 954 F.2d 63, 67 (2d Cir.), *cert. denied*, 113 S. Ct. 66 (1992); American Postal Workers Union v. United States Postal Serv., 766 F.2d 715, 722 (2d Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986); Trotman v. Board of Trustees, 635 F.2d 216, 227 (3d

has been criticized for leaving the law "unfortunately ambiguous" because it leaves many important questions unanswered.[29] For example, what are the criteria for distinguishing a "subjective chill," which was found in *Laird*, from an "objective harm or threat of specific future harm"?[30] Also, is a plaintiff necessarily denied standing for alleging chilling effect injuries as a basis for standing because only subjective chills are outside the realm of Article III by the plain language in *Laird*?[31] Thus, the meaning of *Laird* has been, and continues to be, open to varying degrees of interpretation.

B. Socialist Workers Party v. Attorney General

Two years after the *Laird* decision, a similar set of facts was presented to Justice Marshall on application for stay in *Socialist Workers Party v. Attorney General*.[32] The applicants, members of the Socialist Workers Party Youth Organization (YSA), were planning a national convention in St. Louis.[33] The YSA officials learned the FBI planned to monitor the YSA convention and use "confidential informants" to gather information on the event.[34] In essence, the YSA claimed FBI monitoring chilled their free participation and debate and may even have "discouraged some from attending the convention altogether."[35] Accordingly, they sought to enjoin the FBI and its agents from "attending, surveilling, listening to, watching, or otherwise monitoring," the convention.[36]

The threshold question was whether YSA raised a justiciable controversy under *Laird*.[37] Justice Marshall reasoned the *Laird* Court did not set out "a rule

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Cir. 1980), *cert. denied*, 451 U.S. 986 (1981). These substantive issues are beyond the scope of this Note.

29. George E. Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 244-46 (1975) (listing questions left unanswered by *Laird*).

30. There is no such standard. *See, e.g.*, Socialist Workers Party v. Attorney Gen., 419 U.S. at 1318-19 (noting because *Laird* did not provide a standard to determine whether a plaintiff has standing, the inquiry is whether the facts are distinguishable from those in *Laird*); Ozonoff v. Berzak, 744 F.2d 224, 229 (1st Cir. 1984) (holding its facts resemble the cases *Laird* distinguished rather than the facts in *Laird*).

31. Several circuit courts have answered this question in the negative. *See, e.g.*, Davis v. Village Park II Realty Co., 578 F.2d 461, 463 (2d Cir. 1978) (stating *Laird* "did not hold that chilling effect is not legally cognizable"); Bordell v. General Elec., 922 F.2d 1057, 1060 (2d Cir. 1991) (finding under *Laird* "the fact that a plaintiff's speech has actually been chilled can establish an injury in fact"); *see also infra* part V.

32. Socialist Workers Party v. Attorney Gen., 419 U.S. 1314 (1974). This case was resolved solely by Justice Marshall on application for stay. *Id.* at 1314. Its precedential value, therefore, is limited only to Justice Marshall's opinion. This probably explains why this case is very rarely mentioned in lower court cases. *But see* Gordon v. Warren Consol. Bd. of Educ., 706 F.2d 778, 781 (6th Cir. 1983) (comparing the holding in *Socialist Workers Party*).

33. Socialist Workers Party v. Attorney Gen., 419 U.S. at 1315.

34. *Id.*

35. *Id.* YSA claimed the FBI agents intended "'to participate in the convention debate posing as *bona fide* YSA members.' This 'double agent' activity, the applicants claim[ed], will result in 'corruption of the democratic process' and consequent irreparable harm to the applicants and others who would participate in the convention." *Id.* at 1316.

36. *Id.* at 1315.

37. *Id.* at 1317-18.

for determining whether an action is justiciable or not."[38] Accordingly, Justice Marshall distinguished *Laird* and granted the applicants standing:

> In this case, the allegations are much more specific [than in *Laird*]: the applicants have complained that the challenged investigative activity will have the concrete effects of dissuading some YSA delegates from participating actively in the convention and leading to possible loss of employment for those who are identified as being in attendance. Whether the claimed "chill" is substantial or not is still subject to question, but that is a matter to be reached on the merits, not as a threshold jurisdictional question. The specificity of the injury claimed by the applicants is sufficient, under *Laird*, to satisfy the requirements of Art. III.[39]

Justice Marshall went on to deny the applicants' stay on the merits.[40]

Under *Socialist Workers Party*, therefore, a plaintiff alleging a chilling effect injury will almost never be denied standing. The significance of *Socialist Workers Party* was Marshall's willingness to reach the merits of the case despite the questionable character of the plaintiffs' injuries. This orientation is persuasive because injuries cannot be sufficiently analyzed unless the plaintiff can offer proof of the objective nature of harms. This view seems consistent with the Court's subsequent handling of the issue.

C. Meese v. Keene

Meese v. Keene[41] is the Supreme Court's latest application of *Laird* to the issue of Article III standing for chilling effect injuries. Barry Keene, a California attorney and state senator, challenged the application of the Foreign Agents Registration Act (FARA)[42] to several Canadian films he wished to exhibit.[43] The Department of Justice,[44] pursuant to FARA, labeled these films as "political propaganda."[45]

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38. *Id.* at 1318. The government in *Socialist Workers Party* contended "under *Laird*, a 'chilling effect' will not give rise to a justiciable controversy unless the challenged exercise of governmental power is 'regulatory, proscriptive, or compulsory in nature,' and the complainant is either presently or prospectively subject to the regulations, proscriptions, or compulsions that he is challenging." *Id.* (quoting Laird v. Tatum, 408 U.S. 1, 11 (1972)). Justice Marshall, however, wrote that this reading of *Laird* is too broad because the Court was "merely distinguishing earlier cases" in the passage relied upon by the government. *Id.*

39. *Id.* at 1319.

40. *Id.* at 1319-20. Justice Marshall wrote that the limited nature of the legal FBI monitoring did not justify the extraordinary remedy of a stay, and he essentially deferred to the Second Circuit Court of Appeals's decision to dismiss. *Id.*

41. Meese v. Keene, 481 U.S. 465 (1987).

42. 22 U.S.C. §§ 611-621 (1988).

43. Meese v. Keene, 481 U.S. at 467. The films were entitled *If You Love This Planet*, *Acid Rain: Requiem or Recovery*, and *Acid From Heaven*. *Id.* at 468 n.3. The subject matter of the first film concerned the environmental impacts of nuclear war. *Id.*

44. *Id.* at 467 n.1.

45. Under FARA, the films were labeled "political propaganda" because they contained "political material intended to influence the foreign policies of the United States," or may have

Keene claimed this characterization of the films deterred him from exhibiting them in public.[46] In support, Keene submitted the results of a Gallup opinion poll concluding that the showing of the films, if labeled as "political propaganda," would adversely affect the candidate's chances of re-election.[47] This evidence of potential harm to Keene's reputation proved imperative to his showing of standing.[48] Justice Stevens, writing for a unanimous Court, found the potential detriment to Keene's reputation and candidacy was substantial and his allegations "demonstrated more than a 'subjective chill'" resulting in a "cognizable injury."[49] Thus, Keene had shown sufficient injury for Article III standing to assert his constitutional claim.[50] In a five to three decision, however, the Court found the use of the term "political propaganda" was constitutional because the injuries to Keene were due to public misinterpretation of the term.[51]

Under *Keene*, a plaintiff who can allege some type of specific injury likely to result from the exercise of a First Amendment activity cannot be denied standing. Thus, *Keene* shifts the focus from the First Amendment abridgment injury to the feared injury that has not even occurred. Accordingly, plaintiff's counsel, when alleging a chilling effect injury, should draft the petition with a focus on the consequences of participating in the protected activity as well as the First Amendment abridgment.[52] In this respect, *Keene* relaxes the standing barrier for those plaintiffs alleging a chilling effect injury.

V. CIRCUIT COURTS' TREATMENT OF THE "CHILLING EFFECT"

Three types of cases have emerged in the circuit courts' treatment of chilling effect standing principles: *Laird*-type cases in which an individual or a class of persons claimed surveillance activities of the government chilled their First Amendment rights, cases in which plaintiffs challenged governmental regulations as causing First Amendment chilling effects, and cases in which plaintiffs challenged discretionary governmental actions targeted directly against an individual or group.

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been "reasonably . . . adapted to do so." *Id.* For the full FARA definition of "political propaganda," see *id.* at 471-72 (quoting 22 U.S.C. § 611(j) (1982)).

Under FARA, an agent disseminating the film labeled as "political propaganda" must comply with several regulations. *See id.* at 470-71 nn.5-6 (citing 22 U.S.C. § 614(a)-(b) (1982)). Significant in this case was the requirement Keene "conspicuously" mark the film with his identity and the identity of the principal for whom he was acting. *Id.* at 471.

46. *Id.* at 473 (citing Keene v. Smith, 569 F. Supp. 1513, 1515 (E.D. Cal. 1983)).

47. *Id.* at 473-74. Keene also submitted an affidavit of an experienced political analyst who concluded that the "political propaganda" stigma, if communicated, will result in a diminished communicative value and deter persons from viewing the films. *Id.* at 473-74 n.8.

48. *See id.* at 473. In dictum, Justice Stevens wrote, "If Keene had merely alleged that the appellation deterred him by exercising a chilling effect on the exercise of his First Amendment rights, he would not have standing to seek its invalidation." *Id.*

49. *Id.* at 475.

50. *Id.*

51. *Id.* at 485.

52. For example, *Keene* might allow allegations of harm to personal reputation (including embarrassment), vocational standing, professional standing, and forgone monetary losses as "demonstrating more than a 'subjective chill'" if sufficiently substantiated. *See id.* at 473.

A. *Governmental Surveillance*

In government surveillance cases, the plaintiffs claimed certain governmental surveillance actions or policies chilled their First Amendment rights to free speech or free association or both. The guiding principles for these cases, of course, come from *Laird*. When facing these issues, the court must decide if the facts are similar to those in *Laird*, or closer to those Supreme Court cases distinguished in *Laird*.[53] This analysis becomes troublesome, however, because no one seems to agree what the facts in *Laird* were.[54] Two types of surveillance cases have emerged since *Laird*: federal surveillance and local police surveillance.

1. *Federal Agency Surveillance Operations*

Generally, the courts have followed *Laird* and denied plaintiffs standing when challenging federal surveillance operations. The D.C. Circuit has provided the most expansive and jurisprudentially interesting reading of the *Laird* decision. In *United Presbyterian Church in the United States v. Reagan*,[55] then Circuit Judge Antonin Scalia all but rejected the "chilling effect" as a basis for a plaintiff's standing by stating the "chilling effect is cited as the *reason* why the governmental imposition is invalid rather than as the *harm* which entitles the plaintiff to challenge it."[56]

The logical consequence of this restrictive application of *Laird* in *United Presbyterian Church* is a chilling effect injury can never establish a plaintiff's standing.[57] The chilling effect only permits a person who already has standing to assert injuries that affect others, but not necessarily himself.[58] In short, the chill-

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53. *See supra* notes 26-31 and accompanying text.

54. *See supra* note 25 and accompanying text.

55. United Presbyterian Church in the United States v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984).

56. *Id.* at 1378, *quoted with approval in* American Library Ass'n v. Barr, 956 F.2d 1178, 1193 (D.C. Cir. 1992). The plaintiffs in *United Presbyterian Church* were political and religious organizations, a Member of Congress, and private individuals assertedly active in political, religious, academic, or journalistic affairs. United Presbyterian Church in the United States v. Reagan, 738 F.2d at 1377. They challenged an Executive Order that specified the rules applicable to foreign intelligence activities of the Executive Branch. *Id.* Plaintiffs claimed certain injuries including the "chilling" of First Amendment rights for fear certain protected activities would cause them to be targeted by intelligence operations. *Id.*; *see also* Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982).

57. United Presbyterian Church in the United States v. Reagan, 738 F.2d at 1379-80. In distinguishing between "chilling effect" and "immediate threat of concrete, harmful action," Judge Scalia concluded the "'chilling effect' . . . will not by itself support standing." *Id.* at 1380. But "imminence of concrete, harmful action such as threatened arrest for specifically contemplated First Amendment activities—does support standing." *Id.*

58. *Id.*; *see also* American Library Ass'n v. Barr, 956 F.2d at 1193 (quoting *United Presbyterian Church* with approval).

ing effect is only a rationale for the doctrine of overbreadth, which is applicable only if a plaintiff has already established standing.[59]

The opinion in *United Presbyterian Church* offers a qualification of the "specific present objective harm or threat of specific future harm" standard announced, but not defined, in *Laird*:[60] a plaintiff must show he has "unquestionably suffered some concrete harm (past or immediately threatened) apart from the 'chill' itself" to establish standing.[61]

This position appears consistent with the Supreme Court's dictum in *Keene*.[62] Arguably, this standard does not bar all First Amendment claims against governmental surveillance activities.[63]

Like the D.C. Circuit in *United Presbyterian Church*, most circuit courts faced with allegations of chilling effect injuries caused by federal surveillance have applied *Laird* and denied standing.[64] These courts did not exclude, however, chilling effect injuries per se.

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59. United Presbyterian Church in the United States v. Reagan, 738 F.2d at 1379. If a plaintiff has already demonstrated an injury-in-fact to invoke a federal court's jurisdiction under Article III, the courts may depart from the normal adjudicatory rules that forbid plaintiffs from asserting interests of third parties. *See, e.g.*, Virginia v. American Booksellers Ass'n, 484 U.S. 383, 392-93 (1988); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 956-57 (1984); Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). This overbreadth doctrine relaxes only the prudential limits on standing, and therefore is a distinct inquiry from an Article III standing issue. *See* Bordell v. General Elec. Co., 922 F.2d 1057, 1060-61 (2d Cir. 1991); *supra* part III.

60. Laird v. Tatum, 408 U.S. 1, 13-15 (1972).

61. United Presbyterian Church in the United States v. Reagan, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (citing Baird v. State Bar, 401 U.S. 1 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Lamont v. Postmaster Gen., 381 U.S. 301 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964)).

62. *See supra* note 48.

63. *See* Clark v. Library of Congress, 750 F.2d 89 (D.C. Cir. 1984). The injury alleged in *Clark* would most likely meet Justice Scalia's stringent requirements for standing. The plaintiff in *Clark*, who shelved books at the Library of Congress, was the subject of a complete profile investigation by the FBI due to his affiliation with a socialist organization. *Id.* at 90-91. The court found the targeted investigation was based solely on his exercise of his associational rights and resulted in "concrete harms to his reputation and employment opportunities." *Id.* at 93. Also, because the investigation resulted in the plaintiff's failure to get promoted to jobs for which he was indisputably qualified, his allegation was one of "direct injury" and he was "entitled to a determination of the lawfulness of the investigation." *Id. Clark* did not refer to *United Presbyterian Church*, which was decided five months earlier. *See also* Ozonoff v. Berzak, 744 F.2d 224, 227-30 (1st Cir. 1984) (holding a plaintiff's chilling effect injuries caused by a loyalty investigation required to get a government job established standing under *Laird*).

64. *See, e.g.*, Sinclair v. Schriber, 916 F.2d 1109, 1115 (6th Cir. 1990) (holding FBI wiretaps causing chill not actionable under *Laird*); Halkin v. Helms, 690 F.2d 977, 999-1000 (D.C. Cir. 1982) (holding Vietnam protesters subject to government surveillance in their foreign communications were generalized harms and not cognizable under *Laird*); Fifth Ave. Peace Parade Comm. v. Gray, 480 F.2d 326, 333 (2d Cir. 1973), *cert. denied*, 415 U.S. 948 (1974) (holding a specific investigative FBI incident against the plaintiffs was insufficient to establish a specific real or threatened harm under *Laird* to establish federal jurisdiction).

Several courts have upheld standing when federal investigative and surveillance activities were challenged. In *Olagues v. Russoniello*,[65] the Ninth Circuit distinguished *Laird* on the ground the plaintiffs in *Laird* were not direct targets of the federal investigations.[66] Also, in *The Presbyterian Church (U.S.A.) v. United States*,[67] an organization's injuries, caused by chilling effect injuries of its members, were sufficient under *Laird* and *Keene* to establish standing.[68] By this reasoning, *Keene* significantly reduces the Article III standing barrier for allegations of chilling effect injuries and narrows the holding in *Laird*.[69]

2. *Local Police Surveillance Operations*

Challenges to local police surveillance activities have been treated differently in the circuit courts, although the reasons for such differences are not apparent. For example, in *Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate*,[70] the Third Circuit held *Laird* did not intend to deny a plaintiff standing when the alleged chilling effect injury was "strikingly apparent," even though not concrete.[71] Also, in *Riggs v. City of Albuquerque*,[72] the Tenth Circuit applied *Keene* and held that harms to personal, political, and professional reputations in the community are justiciable under *Laird*.[73] Other courts recognized the mere existence of local police investigatory files created, at most,

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65. Olagues v. Russoniello, 797 F.2d 1511 (9th Cir. 1986) (en banc), *cert. granted*, 481 U.S. 1012 (1987), *vacated as moot*, 484 U.S. 806 (1987).

66. *Id.* at 1518. The plaintiffs in *Laird* may have been direct targets of the surveillance. *See supra* note 25. The plaintiffs in *Olagues* were Chinese-Americans and Hispanic-Americans who were targets of voter registration fraud investigations by the U.S. Attorney. Olagues v. Russoniello, 797 F.2d at 1513. The court upheld their standing to challenge the investigations. *Id.* at 1518.

67. Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518 (9th Cir. 1989).

68. *Id.* at 522. The plaintiff, a Presbyterian Church, suffered diminished membership and attendance due to alleged INS surveillance. *Id.* This was, in essence, a chilling effect injury within a chilling effect injury because the injury to the church was the result of the injuries to the individuals. *See id.* The court reasoned the injury to the church was analogous to the "reputational" or "professional" injuries found sufficient to establish standing in *Keene*. *Id.* at 522-23.

69. *See* Siegel, *supra* note 20, at 909.

70. Philadelphia Yearly Meeting of the Religious Soc'y of Friends v. Tate, 519 F.2d 1335 (3d Cir. 1975).

71. *Id.* at 1339. The local police had disclosed on national television the contents of their intelligence files on the plaintiffs. *Id.* at 1338-39. This "has a potential for a substantial adverse impact on such persons and organizations even though tangible evidence of the impact may be difficult, if not impossible, to obtain." *Id.* at 1339. Thus, plaintiffs had standing for these allegations. *Id.*; *see also* Paton v. La Prade, 524 F.2d 862, 868 (3d Cir. 1975) (holding existence of an FBI file containing allegedly false information on plaintiff's involvement with a socialist party threatened plaintiff's job opportunities and therefore established standing under *Laird*).

72. Riggs v. City of Albuquerque, 916 F.2d 582 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1623 (1991).

73. *Id.* at 585. The plaintiffs were lawyers, political activists, and politically active organizations, all subjected to city police investigations that were made public. *Id.* at 583. The court distinguished *Laird* because the plaintiffs' allegations were not generalized chilling effect injuries like those in *Laird*. *Id.* at 585.

a "subjective" chill.[74] These cases, therefore, fell within *Laird* to deny standing, despite the fact the plaintiffs were direct targets of the investigations.

B. *Governmental Regulations*

Governmental regulations may create a First Amendment chilling effect in two ways.[75] First, an individual may be deterred from engaging in potentially punishable activities because a regulation imprecisely defines what speakers may say.[76] Second, by labeling a type of expression or person as appropriate for regulation, those who might share the speaker's views feel societal pressures to abstain from such activities.[77] Thus, regulation may chill the tendency to speak out due to threat of future prosecutions[78] or, as in *Keene*, fear of negative societal perceptions.[79]

These types of injuries as a basis for standing have been met disfavorably in the circuit courts when the plaintiff could not show evidence of chilling effect injuries.[80] For example, in *American Library Ass'n v. Barr*,[81] the D.C. Circuit interpreted *Laird* and *United Presbyterian Church*[82] to hold plaintiffs' standing depends on the likelihood of government attempts to use the Act's provisions against them—"that is, on the threat of enforcement—and not on how much the

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74. Philadelphia Yearly Meeting of the Religious Soc'y of Friends v. Tate, 519 F.2d at 1337-38; *see also* Gordon v. Warren Consol. Bd. of Educ., 706 F.2d 778, 780-81 (6th Cir. 1983) (holding discovery of the presence of an undercover police agent in a high school created only a subjective chill and did not establish standing under *Laird*; distinguishing *Tate* because surveillance there was directed at individuals); Donahoe v. Duling, 465 F.2d 196, 199-202 (4th Cir. 1972) (holding class action challenging local police use and retention of photographic surveillance operations did not present an injury sufficient to establish standing under *Laird*; mere knowledge of the surveillance is not enough for standing).

75. Fred C. Zacharias, *Flowcharting the First Amendment*, 72 CORNELL L. REV. 936, 987 (1987).

76. *Id.*

77. *Id.*

78. *Id.*

79. Meese v. Keene, 481 U.S. 465, 473 (1987) (holding harm to reputation by stigmatism from statute is a cognizable injury under Article III).

80. *See* Salvation Army v. Department of Community Affairs, 919 F.2d 183, 193 (3d Cir. 1990). In *Salvation Army*, the Third Circuit interpreted *Laird* and *Meese* as permitting plaintiffs to offer evidence of their chilling injuries to establish standing. *Id.* In the court's words, "[A]llegations of chilling injury are not sufficient basis for standing to challenge a government action, at least when the chill is 'subjective' and not substantiated by evidence that the government action has a present and concrete effect." *Id.*

In *Salvation Army*, the plaintiff alleged chilling effect injuries due to the state's ability to enforce provisions of housing regulations that applied to the plaintiff's shelters even though the state had promised not to enforce them. *Id.* at 185. The court denied standing because the plaintiff had not presented evidence of any perceptible First Amendment chilling injuries. *Id.* at 193. The court found it was "unlikely" the plaintiff would alter the operation of the shelters for fear of enforcement of the statute. *Id.* The court did not provide, however, any indication of what might have constituted sufficient evidence to establish standing. *See id.*

81. American Library Ass'n v. Barr, 956 F.2d 1178 (D.C. Cir. 1992).

82. *See supra* text accompanying notes 54-62.

prospect of enforcement worries them."[83] *Barr* held a plaintiff must show a "credible threat of prosecution under a statute that appears to render the litigant's arguably protected speech illegal."[84] Thus, conclusory assertions of a plaintiff's fear of future prosecution alone will generally result in denial of standing.[85]

This position is easily reconciled with *Keene* in which the plaintiff provided detailed proof of likely injuries from governmental regulations. The degree of these injuries necessary to meet standing requirements is, however, far from resolved.[86] The stage of the proceedings must be significant when evaluating the plaintiffs' allegations of chilling effect injuries as a basis for standing.[87] Arguably, this analysis applies to all three categories of chilling effect cases discussed in this Note.[88]

Several courts have found threatened prosecutions may be sufficient to establish standing from chilling effect injuries even absent specific threats of enforcement.[89] Under these decisions, plaintiffs need not wait until they are

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83. American Library Ass'n v. Barr, 956 F.2d at 1193.

84. *Id.* at 1194. In *Barr*, various plaintiffs lacked standing under *United Presbyterian Church* to challenge the Child Protection and Obscenity Act. *Id.* The Act was interpreted by plaintiffs to proscribe some of their First Amendment activities. *Id.* at 1192. The court denied plaintiffs standing. *Id.* at 1194.

85. *See id.* at 1192-93; Bordell v. General Elec. Co., 922 F.2d 1057, 1060-61 (2d Cir. 1991) (holding fear of possible prosecution under challenged "no comment policy" is insufficient to establish standing under *Laird* and *Keene*); Hallandale Professional Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756, 760-61 (11th Cir. 1991) (holding no standing for plaintiff union that challenged city policy restricting criticisms of supervisors); Doe v. Duling, 782 F.2d 1202, 1206-07 (4th Cir. 1986) (holding fear of prosecution under antifornication statute not sufficient to establish standing); St. Martin's Press, Inc. v. Carey, 605 F.2d 41, 44-45 (2d Cir. 1979) (holding plaintiffs lacked standing because there was no expressed threat of prosecution under the challenged child obscenity statute).

86. *See* Meese v. Keene, 481 U.S. 465, 473-75 (1987) (holding polls and affidavits were sufficient to show Article III standing); Salvation Army v. Department of Community Affairs, 919 F.2d 183 (3d Cir. 1990) (providing no indication in the opinion establishing any standard for the required level of proof, although the plaintiff did not meet it).

87. At the summary judgment stage, the plaintiff has been given the opportunity to establish his chilling effect injuries through discovery and the court may require a showing of actual injuries. *See* Aiello v. City of Wilmington, 623 F.2d 845 (3d Cir. 1980). The plaintiff in *Aiello* alleged certain Bureau of Fire rules, which proscribed firemen from criticizing official actions of superior officers, chilled his free speech while plaintiff was on probation. *Id.* at 856-57. The court found evidence on the record that the plaintiff did in fact engage in the very same activities he alleged he was deterred from during the probationary periods. *Id.* at 857-58. Thus, the evidence on record contradicted the plaintiff's chilling effect allegations. *Id.* at 857.

At the dismissal of the complaint stage, however, a plaintiff's burden of showing evidence may be significantly relaxed. *See* Frissell v. Rizzo, 597 F.2d 840, 846-47 (3d Cir.), *cert. denied*, 444 U.S. 841 (1979) (holding a plaintiff who alleges a chilling effect should be entitled to discovery before his complaint is dismissed).

88. *See, e.g.*, Smith v. Meese, 821 F.2d 1484, 1496 (11th Cir. 1987) (discretionary governmental action).

89. American-Arab Anti-Discrimination Comm. v. Thornburgh, 940 F.2d 445, 450-51 (9th Cir. 1991) (holding aliens who challenged statute allowing deportation of aliens advocating communism ideals had standing due to fear of future governmental prosecutions); United Food & Commercial Workers Int'l Union v. IBP, Inc., 857 F.2d 422, 428 (8th Cir. 1988) (holding union's

prosecuted to challenge a statute if they can show a sufficient likelihood of prosecution.[90] Other courts have upheld standing, finding the challenged regulation resulted in an objective injury-in-fact.[91]

C. *Discretionary Governmental Actions*

The final category of cases discussing chilling effect injuries as a basis for standing deal with the discretionary action of governmental officials. In these cases, plaintiffs complained of injuries resulting from direct actions of governmental officials that chilled their First Amendment rights.

For example, in *Levin v. Harleston*[92] administrators at a state university subjected Levin, a tenured university professor, to unique policies in response to his publishing several controversial writings.[93] Levin alleged a First Amendment chilling effect through fear of being discharged even absent express threats of dismissal by the administrators.[94]

The Second Circuit in *Levin* held an "implicit threat" causing a chilling injury can create a judicially cognizable injury.[95] Moreover, the determination of whether such a threat is justiciable under Article III is a question of fact.[96] Therefore, the fact Levin was not explicitly threatened with disciplinary charges did not prove fatal to his standing.[97] Because he was under investigation and university officials could discipline him for exercising his free speech rights, Levin sufficiently met the "threat of specific future harm" requirement under *Laird*.[98]

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allegations of refrained conduct due to threat of prosecution under antipicketing statute were sufficient to establish standing).

90. American-Arab Anti-Discrimination Comm. v. Thornburgh, 940 F.2d at 450 ("It is not necessary that [plaintiffs] currently be subject to the challenged provision in order to have standing."); United Food & Commercial Workers Int'l Union v. IBP, Inc., 857 F.2d at 427 ("[P]laintiffs need not expose themselves to actual arrest or prosecution if they legitimately possess more than an 'imaginary or speculative' fear of prosecution.") (citations omitted).

91. *See* Penny Saver Publications, Inc. v. Village of Hazel Crest, 905 F.2d 150, 154 (7th Cir. 1990) (holding newspaper suffered injury-in-fact due to the "chilled" speech of its advertisers resulting from an antisolicitation statute); Polykoff v. Collins, 816 F.2d 1326, 1331 (9th Cir. 1987) (holding obscenity statute would cause immediate chilling of speech under *Laird* to owners and employees of adult bookstores); Planned Parenthood Ass'n v. Kempiners, 700 F.2d 1115, 1119 n.2 (7th Cir. 1983) (distinguishing *Laird* after anti-abortion counseling policy prevented the organization from competing freely for public funds).

92. Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992); *see also* Davis v. Village Park II Realty Co., 578 F.2d 461, 462-64 (2d Cir. 1978) (holding a tenant whose lease was discontinued due to her participation in a tenants' association had a cognizable injury under *Laird*).

93. Levin v. Harleston, 966 F.2d at 87-88. Specifically, the administration offered an "alternative" section with another professor for students enrolled in Levin's class. *Id.*

94. *Id.* at 89. Specifically, he claimed he had turned down invitations to speak or write about his controversial views because of his fear of discharge. *Id.*

95. *Id.* at 89-90.

96. *Id.* at 90.

97. *Id.* at 89.

98. *See id.* at 89-90.

Other circuit court decisions have also applied the *Laird* standards liberally to uphold standing for those falling victim to such discretionary governmental conduct.[99] Several other cases have denied standing, however.[100]

VI. CONCLUSION

The ambiguous language in *Laird* offers little guidance to the lower courts on the issue of chilling effect injuries as a basis for standing. The lower courts' interpretation of *Laird* therefore becomes quite significant in deciding if a potential case is justiciable under the standing doctrine. The cases collected in this Note, however, reveal several factors to consider when evaluating the potential of a First Amendment chilling effect case.

First, counsel should classify the governmental actions under one of the three classifications discussed in Part V. The courts have been more favorable to plaintiffs challenging governmental regulations and discretionary official actions than those who challenged government surveillance operations.

Second, counsel should consider separately the First Amendment activities being chilled and the likely injuries if the activities are exercised as allegeable injuries. The chilling effect injuries create a First Amendment cause of action and the potential injuries may constitute an "objective" injury under *Keene* to establish standing.[101] Plaintiff's counsel must carefully draft the petition with relevant language used by the Supreme Court and the lower courts of the particular jurisdiction. Proof by affidavit and opinion polls may also be necessary to establish a cognizable injury.[102]

Under the current state of the law, a plaintiff must show some injury, besides a mere chilling effect injury, to establish standing in the federal court system. Given the ambiguity of the law on this issue, however, the creative and

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99. *See* Smith v. Brady, 972 F.2d 1095, 1097-98 (9th Cir. 1992) (holding a letter from the IRS labeling Scientology as a "scam religion" and allegedly chilling the organization's freedom of association was sufficient for Article III standing under *Laird* and *Keene*); Smith v. Meese, 821 F.2d 1484, 1493-95 (11th Cir. 1987) (holding members of "target group" who were not actually being investigated had standing; black voters established standing to challenge alleged discriminatory practices designed to deny blacks their voting rights); Frissell v. Rizzo, 597 F.2d 840, 845-55 (3d Cir.), *cert. denied*, 444 U.S. 841 (1979) (holding newspaper that alleged mayor's action to discontinue public ads due to newspaper's criticism of city policy had shown sufficient chilling injuries to proceed with discovery); Davis v. Villiage Park II Realty Co., 578 F.2d 461, 463 (2d Cir. 1978) (holding tenant in government housing project who spoke for tenant association against landlord had standing under *Laird* due to anxieties caused by threats of lease termination); Apter v. Richardson, 510 F.2d 351, 354 (7th Cir. 1975) (holding professor who applied for government research grant and was denied the grant after participating in feminist associations had standing because the injury was not abstract under *Laird*).

100. *See* Spear v. Town of West Hartford, 954 F.2d 63, 67-68 (2d Cir. 1992) (denying a publisher of a newspaper standing to sue a town after the publisher was sued for participating in an anti-abortion protest and publishing an article critical of police actions, because there was an insufficient showing of inhibited First Amendment activities); English v. Powell, 592 F.2d 727, 730 (4th Cir. 1979) (holding a wife had no standing to contest an alcohol board decision to fire her husband that resulted after her phone calls).

101. *See* Meese v. Keene, 481 U.S. 465, 473 (1987).

102. *See id.*

well-researched counselor will find establishing standing for First Amendment chilling effect injuries permissively attainable.

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