SPORTS & ENTERTAINMENT LAW JOURNAL
ARIZONA STATE UNIVERSITY
VOLUME 6 FALL 2016 ISSUE 1

STANDING IN THE OCTAGON: THE ULTIMATE FIGHTING CHAMPIONSHIP'S BATTLE TO LEGALIZE MIXED MARTIAL ARTS IN NEW YORK STATE

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> "If you take four street corners, and on one they are playing baseball, on another they are playing basketball and on the other, street hockey. On the fourth corner, a fight breaks out. Where does the crowd go? They all go to the fight."[1]

INTRODUCTION: THE UFC AND MMA'S FIGHT FOR RECOGNITION AND EQUALITY

As of 2016, The Ultimate Fighting Championship (UFC) is the face of Mixed Martial Arts (MMA) around the world.[2] Starting from a single weight class in a one night tournament, today the UFC has made MMA a globally recognized professional sport.[3] Recently, the UFC set the record for the

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[1] Dana White, *Dana White Quotes*, EVAN CARMICHAEL, http://www.evancarmichael.com/Famous-Entrepreneurs/1166/Dana-White-Quotes.html (last visited Sept. 30, 2016).

[2] *See The UFC*, ULTIMATE FIGHTING CHAMPIONSHIP, http://www.ufc.com/discover/ufc (last visited Sept. 30, 2016) [hereinafter *The UFC*] (tracking growth and evolution of UFC since its inception in 1993 and noting its dominance in martial arts today).

[3] *See* Jonathan Strickland, *How the Ultimate Fighting Championship Works,* HOW STUFF WORKS (May 1, 2007), http://entertainment.howstuffworks.com/ufc4.htm (noting origins of UFC 1 and how they were different compared to modern UFC events). Specifically, the article discusses the implementation of one-night tournaments, no weight classes, and how the original UFC tournament was billed as a chance for martial artists to fight against other fighters from various martial arts disciplines.

largest sale of any professional sports organization.[4] In light of these milestones, the UFC has taken steps to increase the safety of its competitors, to further legitimize itself in the eyes of the professional sports world and garner the respect that mainstream sports demand.[5] For the most part, these efforts have proved successful.[6] However, until early 2016, one of the biggest venues in the world was still off limits: New York State.[7] Before

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[4] Darren Rovell & Brett Okamoto, *Dana White on $4 billion UFC Sale: 'Sport is going to the next level,'* ESPN (July 11, 2016), http://espn.go.com/mma/story/_/id/16970360/ufc-sold-unprecedented-4-billion-dana-white-confirms.

[5] *See* Adam Hill, *A Timeline of UFC Rules: From No-Holds-Barred to Highly Regulated*, BLEACHER REPORT (Apr. 24, 2013), http://bleacherreport.com/articles/1614213-a-timeline-of-ufc-rules-from-no-holds-barred-to-highly-regulated (tracing the evolution of UFC regulations and safety procedures from MMA's inception to present day); *see also Unified Rules and Other Important Regulations of Mixed Martial Arts*, ULTIMATE FIGHTING CHAMPIONSHIP, http://media.ufc.tv//discover-ufc/Unified_Rules_MMA.pdf (last visited Sept. 30, 2016) (listing unified rules of MMA which govern all UFC bouts).

The unified rules of MMA govern all aspects of a UFC bout, including weight classes, ring size, equipment, specifications for hand wrapping, protective equipment, and appearance. *Id.* Further, the UFC has recently named the United States Anti-Doping Agency as the new administrator for drug testing. Jesse Holland, *UFC Names United States Anti-Doping Agency (USADA) as Independent Administrator for New Drug-Testing Policy*, MMA MANIA (June 3, 2015), http://www.mmamania.com/2015/6/3/8724401/ufc-names-usada-independent-administrator-new-drug-testing-policy-july-1-mma.

[6] *See* Michael McCarthy, *As Business, UFC is a Real Knockout*, USA TODAY (June 21, 2011), http://usatoday30.usatoday.com/sports/mma/2011-06-21-mma-business_N.htm (noting explosive popularity gained by UFC after free televised fights were broadcast in 2005). Additionally, the UFC signed a major endorsement deal with Reebok in 2015, further solidifying itself as a main stream sport. Kevin Iole, *UFC's Sponsorship Deal with Reebok About More Than a New Look*, YAHOO! SPORTS (June 30, 2015, 1:59 PM), http://sports.yahoo.com/news/ufc-s-sponsorship-deal-with-reebok-about-more-than-just-a-new-look-205716284.html (noting that UFC's Reebok deal makes MMA more appealing to television networks and fringe fans). For more examples of the UFC's growth and acceptance as a mainstream sport, *see supra* text accompanying notes 1–3.

[7] N.Y. UNCONSOL. LAW § 8905-a (McKinney 2016), repealed by L.2016, c. 32, §1, eff. Sept. 1, 2016 (S.5949A), *but see Governor*

overturning its Combative Sports Ban, New York stood in stark contrast to its sister states and did not allow any professional martial arts competitions within its borders.[8] Numerous attempts were made to convince the New York legislature to overturn the Combative Sports Ban with varying degrees of success.[9] However, in 2012, attempts at diplomacy waned when a group consisting of MMA fighters, trainers, fans, and the UFC's parent company, Zuffa, LLC (Zuffa), brought a lawsuit against New York State in *Jones v. Schneiderman* claiming that the statewide ban on MMA was unconstitutional.[10]

After a long legal battle, a federal court in the Southern District of New York dismissed the claim on grounds that the plaintiffs did not have standing to sue.[11] Although this result angered critics, fans, and the media, the legal ramifications were significant.[12] Primarily, the standing doctrine and the imminence of injury requirement were applied in a way that contradicted other courts' holdings.[13] Further, the court almost backhandedly

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Cuomo Signs Legislation Legalizing Mixed Martial Arts in New York State, NEW YORK STATE (Apr. 14, 2016), https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-legalizing-mixed-martial-arts-new-york-state.

[8] N.Y. UNCONSOL. LAW § 8905-a (McKinney 2016), repealed by L.2016, c. 32, §1, eff. Sept. 1, 2016 (S.5949A). From 2013–2016, New York State was the only governing body in the U.S. which still outlawed MMA. Dave Meltzer, *Major Day for MMA Legislation as Bills Pass in Canada and Connecticut*, MMA FIGHTING (June 5, 2013, 9:20 PM), http://www.mmafighting.com/2013/6/5/4400386/major-day-for-mma-legislation-as-bills-pass-in-canada-and-connecticut (noting that with MMA legal in Connecticut, New York is the only state which still outlaws MMA).

[9] Kenneth Lovett, *UFC Spent $1.6 Million in Lobbying in New York*, NEW YORK DAILY NEWS (Apr. 29, 2013, 12:49 AM), http://www.nydailynews.com/new-york/ufc-spent-1-6-million-new-york-lobbying-article-1.1329863 (noting that New York State Senate has passed legislation which would legalize MMA in New York four separate times only to see said bill fail in New York State Assembly).

[10] 888 F. Supp. 2d 421, 422 (S.D.N.Y. 2012).

[11] Jones v. Schneiderman, 101 F. Supp. 3d 283, 293 (S.D.N.Y. 2015) [hereinafter *Jones III*].

[12] *See infra* notes 154 to 215 and accompanying text.

[13] *See also infra* notes 16, 75, 122, 208, 209, 211, 212 and accompanying text. *Compare* Jones III, 101 F. Supp. 3d at 289, n.4 (analyzing when to apply credible threat of prosecution standard for

agreed with the merits of the plaintiffs' lawsuit, claiming that if they were to sue again, events that took place during the previous litigation could alter the outcome.[14] Thus, the Court rejected some commentators' critiques, which suggest that the standing doctrine is employed to evaluate the merits of a case before that stage of the litigation is reached.[15]

This article starts by discussing the facts surrounding *Jones v. Schneiderman* and the precedent cases which led the court to issue a summary judgment in favor of the defendants.[16] Part II of this article will discuss the standing doctrine as defined by the Supreme Court and later look to its application by the Second Circuit.[17] Part III narrates the holding of the Southern District of New York Court in finding the plaintiffs lack of standing,[18] and Part IV analyzes that decision in light of the

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purposes of standing), *with* Pacific Capital Bank, N.A. v. Connecticut, 542 F.3d 341, 350 (2d. Cir. 2008) (explaining that Pacific has standing if its interpretation of the statute is reasonable and it legitimately fears enforcement of the statute.).

[14] *See Jones III*, 101 F. Supp. 3d at 291, n.6.

[15] *See, e.g.,* Gene Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 650 (1985) (noting the extra considerations courts implicitly take into account when determining standing); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977) (claiming inconsistencies in standing decisions show that courts use standing to rule on merits); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221, 221-23 (1988) (noting scattered standing decisions by courts and proposing a standing analysis that incorporates the merits of plaintiffs' claims); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1918-99 (1986) (noting courts' incomplete description of injury analysis and its requirements); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N. C. L. REV. 1741, 1742 (1999) (arguing that judges use standing to further their political ideologies in courts); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 639-40 (1999) (describing injury analysis in standing as incoherent). *But see* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 881 (1983) (classifying standing as essential to separation of powers).

[16] *See infra* notes 22 to 35 and accompanying text.

[17] *See infra* notes 36 to 125 and accompanying text.

[18] *See infra* notes 126 to 159 and accompanying text.

material discussed in Part II.[19] The article concludes with a discussion of Zuffa's subsequent actions since the disposition of *Jones v. Schneiderman*, an analysis of scholarly critiques of the standing doctrine, and a brief discussion of New York's subsequent actions, which have legalized MMA, since the disposition of *Jones v. Schneiderman*.[20]

I. FACTS: TRASH TALKING, UGLY HISTORY, AND THE BEGINNINGS OF A HEAVYWEIGHT BRAWL

In 1993, the UFC promoted its first professional MMA event in a "winner take all" one-night tournament.[21] MMA then continued to grow throughout the 1990s, with various promotions having varying amounts of success in both the USA and abroad.[22] Eventually, the UFC emerged as the leader of professional MMA events[23] which attracted both positive and negative media attention.[24]

Reacting to the growing popularity of MMA, New York enacted a ban on professional combative sports in 1997 (the "Combative Sports Ban") which outlawed all professional martial arts competitions within the state (subject to only a few exceptions).[25] Under the terms of the 2016 iteration of the

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[19] *See infra* notes 160 to 198 and accompanying text.

[20] *See infra* notes 201 to 218 and accompanying text.

[21] *See The UFC*, *supra* note 2; *see* Strickland *supra* note 3.

[22] *See* Tony Loiseleur, *MMA's Cold War: The UFC vs. Pride Fighting Championships*, SHERDOG (Nov. 22, 2013), http://www.sherdog.com/news/articles/MMAS-Cold-War-The-UFC-vs-Pride-Fighting-Championships-59579 (discussing the rivalry between Pride FC and UFC promotions); *The Rise and Fall of Pride FC, Fedor Emelianenko*, BOXING INSIDER, http://www.boxinginsider.com/mma/the-rise-and-fall-of-pride-fc-fedor-emelianenko (noting the success of Pride FC in early 2000's in Japan and Asia) (last visited Sep. 29, 2016).

[23] *Source: UFC buys Pride for less than $70M,* ESPN (Mar. 27, 2007), http://sports.espn.go.com/sports/news/story?id=2814235 (finding that with the purchase of Pride FC the UFC becomes the front runner of professional MMA promotions).

[24] *See* McCarthy, *supra* note 6; N.Y UNCONSOL. LAW § 8905-a.

[25] *See* N.Y. UNCONSOL. LAW § 8905 (McKinney 1997). The law effectively bans combative sports from taking place in New York state. *Id.* Textually, the ban in 2016 defines combative sports as "any

Combative Sports Ban, the New York State Attorney General may criminally prosecute those who violate the act;[26] however, to date no such actions have been pursued.[27] Although the New York State Athletic Commission (NYSAC) is tasked with issuing licenses and permits for professional sporting events, it lacks the authority to enforce them because that authority has

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professional match or exhibition other than boxing, sparring, wrestling or martial arts wherein the contestants deliver, or are not forbidden by the applicable rules thereof from delivering kicks, punches or blows of any kind to the body of an opponent or opponents." N.Y. UNCONSOL. LAW § 8905-a (McKinney 2016).

Further, the law narrowly defines "martial arts" for purposes of what is allowed under the ban as any professional match or exhibition which is sanctioned by any of the following organizations: U.S. Judo Association, U.S. Judo, Inc., U.S. Judo Federation, U.S. Tae Kwon Do Union, North American Sport Karate Association, U.S.A. Karate Foundation, U.S. Karate, Inc., World Karate Association, Professional Karate Association, Karate International, International Kenpo Association, and the World Wide Kenpo Association. *Id.* The law grants power to the New York State Athletic Association to remove or add martial art organizations to the list of professional organizations exempt from the law. *Id.* at 1(A)-(C); *see also* Steven Rondina, *MMA Still Banned in New York: Bill Once Again Fails to Reach Vote in Assembly,* BLEACHER REPORT (Jun. 25, 2015, 7:52 PM), http://bleacherreport.com/articles/2500677-mma-still-banned-in-new-york-bill-once-again-fails-to-reach-vote-in-assembly (suggesting that the New York MMA ban was enacted in response to media backlash after event was planned there in 1997).

For a political take on why MMA is illegal in New York, see Matthew Doarnberger*, Why is Mixed Martial Arts Banned Only in New York?,* NEWSWEEK (July 28, 2015, 5:01 PM), http://www.newsweek.com/why-mixed-martial-arts-banned-only-new-york-357899 (suggesting that UFC is banned in New York because of conflicts between UFC executives and powerful labor unions); Jillian Kay Melchior, *A Union's Low Blow to MMA Fighters*, NY POST (Nov. 20, 2013, 1:59 AM), http://nypost.com/2013/11/20/a-unions-low-blow-to-mma-fighters (claiming that strong demands in New York for UFC fights remain unmet due to a Nevada union circumventing the democratic process to serve its own political ends).

[26] N.Y. UNCONSOL. LAW § 8905-a(3)(d) (McKinney 2016).

[27] Jones v. Schneiderman, 101 F. Supp. 3d 283, 288 (S.D.N.Y. 2015) (stating that the New York Office of the Attorney General has never prosecuted anyone under the Combative Sports Ban).

been vested in the state's Attorney General.[28] Nevertheless, the Combative Sports Ban empowers the NYSAC to withhold licensing matches or exhibitions for outlawed combative sports.[29]

To combat the Act's blanket ban on combative sports, the UFC's parent company, Zuffa, filed a civil action against New York State in 2011.[30] It alleged that the Act was unconstitutional.[31] The plaintiffs of the case included Zuffa, professional fighters, amateur fighters, trainers, and MMA fans in New York State.[32] These plaintiffs alleged a variety of constitutional infringements, including violations of the First Amendment, the equal protection clause, and the due process clause.[33] The first judgment issued in this legal battle dismissed two of the plaintiffs' allegations for failing to state a claim.[34] In

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[28] *Id.* at 287 ("The NYSAC lacks such prosecutorial authority, although it may refer potential statutory violations to the OAG for investigation.").

[29] N.Y. UNCONSOL. LAW § 8905-a(2) (McKinney2016) ("No combative sport shall be conducted, held or given within the state of New York, and no licenses may be approved by the commission for such matches or exhibitions."). *See* N.Y. ALCO. BEV. CONT. LAW § 106(6-c)(c) (McKinney 2016) (granting the New York State Liquor Authority the power to institute "a proceeding to suspend, cancel or revoke the license" of any business entity that violates N.Y. UNCONSOL. LAW § 8905-a). Because losing a liquor license for a major venue would amount to a major loss of revenue, this liquor law effectively acts as a second "back up ban" on the New York MMA ban. *Id.*

[30] Jones v. Schneiderman, 888 F. Supp. 2d 421, 422 (S.D.N.Y. 2012).

[31] *Id.*

[32] *Id.* at 422.

[33] *Id.* Zuffa, LLC alleged seven distinctive counts against New York State's Combative Sports Ban: that the law violated the plaintiff's First Amendment right of free expression; that the law violated the First Amendment due to being overbroad; that the law violated the due process clause due to being vague; that the law violated the equal protection clause; that the law violated the due process clause because it lacked a rational basis to a legitimate governmental purpose; the law violated the commerce clause; and that a separate 2001 liquor law violated the plaintiff's First Amendment right of expression.

[34] *Id.* The court dismissed the equal protection clause claim and the rational basis due process claim. *Id.* For both counts, the court

response, Zuffa's legal team amended its complaint, and reasserted all seven constitutional violations (hereinafter, "*Jones II*"). [35] This time the court dismissed all of the plaintiffs' vagueness challenges except Zuffa's.[36]

Following the disposition of *Jones II* and a lengthy discovery process, both parties filed cross motions for summary judgment on the void-for-vagueness claim.[37] But, the court found that the plaintiffs lacked standing to state a claim against New York State.[38] The court, however, left its doors open to the plaintiffs when it indicated a willingness to evaluate the merits of their claim in a future suit – so long as the standing requirements were met.[39]

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found that the law in question passed the rational basis analysis needed in order to be upheld. *Id.*

[35] Jones v. Schneiderman, 974 F. Supp. 2d 322, 327 (S.D.N.Y. 2013) [hereinafter *Jones II*]. In *Jones II* plaintiffs reasserted all seven claims as described in *Jones I*.

[36] *Id.* In dismissing six of the seven claims asserted by plaintiffs, the court noted that the First Amendment is not implicated by New York's MMA ban because any particularized message intended by MMA will probably not be understood by those viewing it on television or live in person. *Id.* at 336. Further, the court felt that New York's MMA ban was not sufficiently overbroad to warrant protections by the First Amendment. *Id.* at 338–39. Additionally, the court noted that the law was not unconstitutionally facially vague because "[a] vagueness challenge based on a speculative threat of arbitrary enforcement" would be premature before a broad use of the ban is implemented. *Id.* at 347 (quoting Richmond Boro Gun Club v. City of New York, 97 F.3d 681, 686 (2d Cir. 1996)). Further, the court ruled out any challenge based on equal protection or due process because the law survives rational basis scrutiny. *Id.* at 348–49. Lastly, the court found that the ban did not violate the commerce clause because it did not burden or discriminate against interstate commerce and "[d]oes [n]ot [h]ave the [p]ractical [e]ffect of [e]xtraterritorial [c]ontrol of [c]ommerce[.]" *Id.* at 349–52.

[37] Jones v. Schneiderman, 101 F. Supp. 3d 283, 287 (S.D.N.Y. 2015) (noting summary judgment pleadings by both plaintiffs and defendants).

[38] *Id.* at 293.

[39] *Id.* at 299 ("Plaintiffs, particularly Zuffa, may consider filing new vagueness claims based on events that occurred after this lawsuit commenced….").

II. BACKGROUND: THE RULES OF THE BOUT: THE LAW SURROUNDING STANDING AND THE CREATION OF AN UNWIELDY DOCTRINE

A. THE CREATION AND HISTORY OF THE STANDING DOCTRINE

The judicial power of the federal government is limited to certain cases and controversies which are deemed justiciable.[40] To satisfy this justiciability standard, the plaintiff must meet the initial burden of standing.[41] The threshold question for determining exactly what cases and controversies are eligible for federal jurisdiction is embodied in the constitutional doctrine of standing.[42]

In *Lujan v. Defenders of Wildlife*,[43] the Supreme Court established a three prong test to determine whether or not standing exists: (1) an injury in fact, (2) causation by the defendant, and (3) redressability by a favorable ruling in court.[44] In *Lujan*, the Secretary of the Interior interpreted the Endangered Species Act in a way that reduced the Act's scope and

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[40] U.S. CONST. art. III, § 2.

[41] Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) ("The litigant must . . . set forth facts sufficient to satisfy . . . Art. III standing requirements.").

[42] *Id.* (stating that standing doctrine determines which cases and controversies are eligible for judicial review); *see also* F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 57 (2012) (noting that courts use standing to determine what cases are eligible for jurisdiction under the federal judiciary).

[43] 504 U.S. 555 (1992).

[44] *Id.* at 560–61 ("Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements[:] . . . injury in fact . . . fairly traceable to [the] . . . defendant . . . that will be redressed by a favorable decision"); *see also* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (identifying injury, causation, and redressability as necessary to establish Article III standing); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103–04 (1998) ("[the] triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence"); Bennet v. Spear, 520 U.S. 154, 162 (1997) (There must be injury in fact that is fairly traceable to the defendant and a favorable decision must be able to solve the problem.); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 62 (Vicki Been et al., eds., 4th ed. 2011).

effectiveness.[45] The plaintiffs in *Lujan*, who intended to travel to the affected lands at some point in the distant future, claimed they would be injured by the Secretary's interpretation because it diminished the number of endangered species eligible for viewing.[46] The Court ruled in favor of the defendant reasoning that the injury-in-fact prong had not been satisfied.[47] It explained that this prong requires more than just "an injury to a cognizable interest."[48] Because the plaintiffs failed to express any concrete or imminent plans to travel to the affected lands in the future, the Court found that there was no injury in fact.[49]

Following *Lujan*, courts further developed the Standing Doctrine so as to better fit a wider array of controversies.[50] In 2007, the Supreme Court decided *Massachusetts v. EPA*, which further altered the imminent injury aspect of the standing test.[51]

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[45] 504 U.S. at 558–59.

[46] *Id.* at 562–64.

[47] *Id.* at 562–68.

[48] *Id.* at 563 (stating that injury to interest is not enough to amount to standing but injury to oneself is).

[49] *Id.* at 564 ("Such 'some day' intentions–without any description of concrete plans, or indeed even any specification of *when* the some day will be–do not support a finding of the 'actual or imminent' injury that our cases require.") (emphasis in original).

[50] *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1143 (2013) (elaborating on when a claimed injury is too speculative for purposes of standing); Summers v. Earth Island Inst., 555 U.S. 488, 493–97 (2009) (analyzing the concreteness of the aspect of claimed injury); Massachusetts v. EPA, 549 U.S. 497, 526 (2007) (finding standing for Massachusetts in the fear and injury resulting from global warming); Wolfson v. Brammer, 616 F.3d 1045, 1058 (9th Cir. 2010) (discussing when threatened prosecution can amount to injury for purposes of standing); San Diego Cty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996) (discussing when potential prosecution amounts to injury for purposes of standing); *see also* Bradford C. Mank, *Reading the Standing Tea Leaves in* Am. Elec. Power Co. v. Connecticut, 46 U. RICH. L. REV. 543 (2012). Professor Mank's article focuses on how the Supreme Court was evenly divided on a standing issue presented to them in a case based on greenhouse gas emissions. *Id.* at 543–45. He theorizes that this division in the Court showcased the Court's apprehension in allowing standing for "generalized grievances." *Id.* at 598–602.

[51] 549 U.S. at 521–23 (noting that progressive global warming and rising of ocean levels is sufficient injury to Massachusetts to show injury for purposes of standing); *see also* Fed. Election Comm'n v.

In *EPA*, Massachusetts, among other states, brought suit against the EPA to force it to regulate greenhouse gasses more effectively.[52] To satisfy the injury-in-fact prong, Massachusetts explained that an increase in greenhouse gasses would lead to higher global temperatures and rising ocean levels which, in turn, would threaten Massachusetts's coastlines.[53] Here, the Court ruled that Massachusetts had standing.[54] It explained that, although the injury of rising sea levels may not be imminent, the injury was nevertheless real and concrete.[55] The Court also noted that, although the risks associated with climate change are widely shared, Massachusetts was particularly in danger of suffering great harm because of its extensive coastal land.[56] Therefore, because Massachusetts could show a concrete injury caused, in part, by the EPA, it had standing to bring a claim.[57]

The immanency aspect of the injury-in-fact requirement was further developed in *Summers v. Earth Island Inst.*,[58] which discussed the attenuation of a claimed injury.[59] In *Summers*, the

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Akins, 524 U.S. 11, 24 (1998) ("[W]here a harm is concrete, though widely shared, the Court has 'found injury in fact.'") (internal quotations omitted).

[52] EPA, 549 U.S. at 505 n.2, 514 (identifying California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington as states suing, and elaborating on the cause of action giving rise to this claim).

[53] *Id.* at 521–23 (alleging rise in ocean levels is concrete danger that threatens states with coastal land like Massachusetts).

[54] *Id.* at 526.

[55] *Id.* at 522 ("[R]ising seas have already begun to swallow Massachusetts' coastal land."). Further, the Court put great weight into the fact that the Massachusetts Commonwealth owns a large portion of the state's coastal land, thus adding to the level of particularity of the injury. *Id.* at 522–23 (noting that if coastal waters continue to rise the significance of this identified injury will only increase).

[56] *Id.* at 522.

[57] *Id.* at 526.

[58] 555 U.S. 488, 488 (2009).

[59] *Id.* at 494 ("We know of no precedent for the proposition that when a plaintiff has sued to challenge . . . the basis for that action . . . apart from any concrete application that threatens imminent harm to his interests."); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 64 (Vicki Been et al. eds., 4th ed. 2011) (noting the importance that plaintiff be the individual suffering actual harm not general harm).

United States Forest Service (USFS) approved a salvage sale of timber on 238 acres of forest damaged by fire.[60] This, however, was in violation of the Forest Service Decision Making and Appeals Reform Act, which requires the USFS to utilize a notice, comment, and appeals process for USFS actions that implement certain land and resource management plans.[61] The plaintiffs were a group of forest protection organizations.[62] They challenged the USFS's compliance with the Forest Service Decision Making and Appeals Reform Act.[63] However, the Supreme Court found that they did not have standing because they lacked a "concrete, particularized injury in fact."[64] The Court reasoned that the plaintiffs alleged only that they planned to return to the affected forest sites someday in the future.[65] Further, the Court found that even if it was within the realm of possibility that one of the plaintiffs would potentially be affected by the actions of the USFS, "speculation does not suffice."[66] The majority specifically noted that a "vague desire to return is insufficient to satisfy the requirement of imminent injury."[67] While plaintiffs claimed that they could properly show injury in fact if they could introduce new facts into the record post

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[60] *Summers*, 555 U.S. at 491.

[61] *Id.* at 490–92.

[62] *Id.* at 490.

[63] *Id.* at 490–92.

[64] *Id.* at 496 (explaining that in order to meet the injury requirement, there must be a finding that "actual or imminent" injury will occur) (quoting Lujan 504 U.S. at 564).

[65] *Id*.

[66] *Id.* at 499 (noting that standing requires a "factual showing of perceptible harm"). The Majority rejects the standard for standing suggested by the Dissent, specifically that "a realistic threat that reoccurrence of the challenged activity would cause [the plaintiff] harm in the reasonably near future." *Id.* at 499–500 (alteration in original) (internal quotations omitted). However, the Dissent suggested that "precedent nowhere suggests that the 'realistic threat' standard contains identification requirements more stringent than the word 'realistic' implies." *Id.* at 505 (Breyer, J., dissenting). The Dissent relied on Los Angeles v. Lyons, 461 U.S. 95 (1983), where the plaintiff attempted to sue in order to get an injunction requiring that the police stop using chokeholds on arrestees. *Id.* In *Lyons*¸ the Court claimed that the plaintiff would have standing if he could show a "realistic threat" that he would be subject to a police chokehold in the "reasonably near future." *Lyons*, 461 U.S. at 106 n.7, 107–08.

[67] *Summers*, 555 U.S. at 496.

appeal—a suggestion that found some traction with the dissent [68] —the majority conclusively did away with that suggestion when it reasoned that adding new facts into the record is not a practice that had been done before.[69]

In recent years, "the imminence of injury" required to show standing has become somewhat of a malleable element in the standing analysis.[70] In *Monsanto Co. v. Geerston Seed Farms*,[71] two farms brought suit against Monsanto, alleging that Monsanto's new variety of alfalfa would contaminate and subsequently lead to the disappearance of the farmers' brand of alfalfa.[72] Although injury in the traditional sense of standing could not be shown, a "reasonable probability" of harm was deemed sufficient to find standing.[73] Other cases reaching the Supreme Court have been held to the same lax standard, suggesting that the ruling in *Monsanto* was not limited to the specific facts in that case.[74] The departure from precedent seen in *Monsanto* exemplifies the variety of standards utilized when evaluating standing, and adds credibility to the critiques of

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[68] *Summers*, 555 U.S. at 508–09 (Breyer, J., dissenting).

[69] *Id.* at 500 ("[t]he dissent cites no instance in which 'supplementation' has been permitted to resurrect and alter the outcome in a case").

[70] *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (quoting Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2138–39 n.2 (1992) ("Imminence is concededly a somewhat elastic concept, [but] it cannot be stretched beyond its purpose.").

[71] 561 U.S. 139 (2010).

[72] *Id.* at 144–49.

[73] *Id.* at 153–54 (finding that a reasonable probability of cross contamination is a sufficient injury for purposes of standing).

[74] *See, e.g.*, MedImmune, Inc. v. Genetech, Inc., 549 U.S. 118, 129 (2007) (observing a 'genuine threat of prosecution' standard); Dep't of Commerce v. U.S. House of Reps., 525 U.S. 316, 332–33 (1999) (observing a 'substantially likely' standard); Clinton v. City of New York, 524 U.S. 417, 432 (1998) (observing a 'sufficient likelihood of economic injury' standard); Pennell v. San Jose, 485 U.S. 1, 8 (1988) (applying a 'realistic danger' standard); Buckley v. Valeo, 424 U.S. 1, 74 (1976) (observing a 'reasonable probability' standard).

commentators who suggest that the Standing Doctrine has become incoherent.[75]

In *Clapper v. Amnesty Int'l USA*,[76] plaintiffs claimed that the Foreign Intelligence Surveillance Act of 1978 would imminently harm them because it authorized the surveillance of persons who were not United States citizens.[77] Here, the plaintiffs were United States citizens who regularly communicated with foreign individuals who could be targeted by surveillance.[78] The Court held that this possible injury was too attenuated to amount to an injury that was certainly impending.[79] Led by Justice Breyer, the dissent prescribed to the idea that the harm or injury in this case was not too speculative to find standing because there was a very high likelihood that the

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[75] *See, e.g.*, Gene R. Nichol, Jr., *Standing For Privilege: The Failure of Injury Analysis*, 82 B.U.L. REV. 301 (2002) (noting how standing is an incomprehensible area of the law).

[76] 133 S. Ct. 1138 (2013).

[77] *Id.* at 1143.

[78] *Id.* at 1145.

[79] *Id.* at 1147–49 (asserting that "threatened injury must be *certainly impending* to constitute injury in fact") (emphasis in original) (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)). Another issue pertaining to the plaintiffs' standing in *Clapper* was the plaintiffs' claim that they had undertaken "costly and burdensome" precautions in order to ensure confidentiality in their communications. *Id.* at 1145–46. However, the Court rejected this argument, stating that injury in fact cannot be created by choosing to harm oneself economically due to the fear of a possible future harm. *Id.* at 1150–51 ("[Plaintiffs] cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.").

In a footnote, the *Clapper* Court admitted that the Standing Doctrine is not held to a uniform standard. *Id.* at 1150, n.5 ("Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. . . . [W]e have found standing based on a 'substantial risk' that harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.") (internal quotations omitted). The Court goes on to claim that even if the "substantial risk" standard is lower than the "certainly impending'" standard, the plaintiffs in this case fail to meet even that bar. *Id.*

government would intercept at least *some* of the plaintiffs' communications.[80]

1. The Recognition of Imminent Threat of Prosecution as an Injury

In some standing disputes, the claimed injury stems from the possible enforcement of a statute that the plaintiff believes is unconstitutional.[81] For example, *Babbitt v. United Farm Workers Nat'l Union*[82] discussed when threat of prosecution rises to the level of imminent injury needed for a claim to be justiciable as a case or controversy.[83] In *Babbitt*, a farmworker's union sued over certain provisions of Arizona's Farm Labor Statute.[84] In finding that the plaintiffs had standing, the Supreme Court outlined when imminent prosecution rises to the level needed to establish an injury in fact.[85] The Court held "it is not necessary

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[80] *Id.* at 1156–57 (Breyer, J., dissenting) (noting that "there is a very high likelihood that Government . . . will intercept at least some of the communications"). However, Justice Breyer reached this decision without citing to any expert testimony or studies, instead subscribing to the plaintiffs' argument that, because they frequently communicate with individuals living in the Middle East, there is a higher likelihood that their communications will be intercepted. *Id.* at 1157–60. Further, Justice Breyer felt that the claimed injury in *Clapper* was almost tangentially identical in Monsanto Co. v. Geerston Seed Farms, 561 U.S. 139 (2010), where the plaintiff had to take steps in order to avoid harm. *Id.* at 1163–64; *see also* Bradford C. Mank, *Clapper v. Amnesty International: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211 (discussing the implications of the *Clapper* decision and how its disposition will affect future cases).

[81] Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979) (analyzing standing where plaintiffs feared prosecution under Arizona's farm labor statute); *see also* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014) (analyzing standing as stemming from threatened prosecution of a statute); Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (holding the same).

[82] 442 U.S. 289 (1979).

[83] *Id.* at 298–314 (discussing when threat of prosecution can amount to imminent injury sufficient to find Article III standing).

[84] *Id.* at 292–97.

[85] *Id.* at 298–99 (noting that "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statutes operation or enforcement").

that the plaintiff first expose himself to actual . . . prosecution to be entitled to challenge the statute that he claims deters the exercise of his constitutional rights."[86] However, the Court reasoned that this lower standard of determining standing should apply only when the plaintiff's *conduct* contains a constitutional interest.[87] In regards to the statute in *Babbitt*, the Court found that the threat of prosecution was an imminent injury in fact because "the State has not disavowed any intention of invoking the [statute's] criminal penalt[ies]."[88] Thus, the Court concluded that this imminent threat of prosecution was sufficient to warrant Article III jurisdiction as a case or controversy.[89]

B. HOW THEY FIGHT IN THE BIG APPLE: THE STANDING DOCTRINE ACCORDING TO THE SECOND CIRCUIT

The Second Circuit has also decided a number of cases pertaining to the standing doctrine.[90] Generally, the Second Circuit has rejected a rigid test when analyzing standing.[91] In

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[86] *Id.* at 298 (quoting Steffel v. Thompson, 415 U.S. 452, 459 (1974)). The Court elaborated on standing with reference to constitutional interests, claiming that when a constitutional interest is involved and an actual threat of prosecution exists, the plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Id*. (quoting Doe v. Bolton, 410 U.S. 179, 188 (1973)). Additionally, the Court went on to explain that the threat of prosecution must be objectively credible and cannot be abstract or uncertain. *Id.* at 298–99. *See also* MedImmune v. Genetech, 549 U.S. 118, 129 (2007) (discussing the threat of prosecution standard generally).

[87] *See Babbitt,* 442 U.S. at 298–99.

[88] *Id.* at 302 (finding that parties in this case are objectively contrary to each other, thereby warranting the credible threat of prosecution standard).

[89] *Id.* at 302–03 (finding sufficient standing for plaintiffs to bring claim).

[90] *See, e.g.*, Fulton v. Goord, 591 F.3d 37 (2d. Cir. 2009) (finding standing for plaintiff who claimed injury based on failure to accommodate under the Americans with Disabilities Act); Lamar Advert. of Penn., LLC v. Town of Orchard Park, 356 F.3d 365 (2d Cir. 2004) (discussing standing and aspects of concreteness of plans for injury); Aguilar v. Immigration & Customs Enforcement Div. of the U.S. Dep't of Homeland Sec., 811 F. Supp. 2d 803 (S.D.N.Y. 2011) (discussing standing to seek injunctive relief by plaintiffs).

[91] *See, e.g.*, NRDC, Inc. v. United States FDA, 710 F.3d 71, 81 (2d Cir. 2013) (noting that the "injury-in-fact analysis is highly

Lafleur v. Whitman,[92] petitioners brought a suit challenging the construction of a waste management facility, alleging that the new facility would harm them by releasing noxious gasses harmful to petitioners' health.[93] The respondents countered by arguing that the injury would be too attenuated in order to meet standing requirements because there was only a chance that the petitioners would come in contact with the gasses.[94] The Second Circuit, however, found that the petitioners had standing in this case because of the "likely exposure" petitioners may have to the gasses released from the facility.[95] This decision is relevant because it seems to impose a more liberal interpretation of the injury requirement. The Second Circuit even stated that "[t]he injury-in-fact necessary for standing 'need not be large, an identifiable trifle will suffice.'"[96]

In 2004, the Second Circuit further elaborated on its interpretation of the standing doctrine in *Lamar Adver. of Penn., LLC v. Orchard Park*.[97] In *Lamar*, the petitioner claimed that a town ordinance banning certain sizes of signs was unconstitutional.[98] The respondents argued that petitioner could

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case-specific, and the risk of harm necessary to support standing cannot be defined according to a universal standard.") (internal quotations omitted) (quoting Baur v. Veneman, 352 F.3d 625, 637 (2d Cir. 2003)).

[92] 300 F.3d 256 (2d. Cir. 2002).

[93] *Id.* at 262–63, 269–72. Specifically, petitioners complained that the waste management facility will release sulfur dioxide into their breathing air, which has a foul odor. *Id.* at 270. Further, the court, relying on a decision from another circuit, noted that increased levels of sulfur dioxide "directly impairs human health." *Id.* (internal quotations omitted) (quoting American Lung Ass'n v. EPA, 134 F.3d 388, 389 (D.C. Cir. 1998)).

[94] *Lafleur*, 300 F.3d at 271–72.

[95] *Id.* at 270 "Petitioner's likely exposure to additional [sulfur dioxide] in the air where she works is certainly an 'injury-in-fact' sufficient to confer standing."). Further, the court noted that this injury will be specific enough to the petitioner in order to survive scrutiny under the test set forth in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). *Lafleur*, 300 F.3d at 269–71.

[96] *Lafleur*, 300 F.3d at 270 (internal quotations omitted) (quoting Sierra Club v. Cedar Point Oil Co., Inc., 73 F.3d 546, 557 (5th Cir. 1996)).

[97] 356 F.3d 365 (2d. Cir. 2004).

[98] *Id.* at 368–71.

not have been injured by the ordinance because he had yet to file and be approved for a permit for his planned signs.[99] In finding that the petitioner did have standing and had in fact been injured, the court noted "[petitioner] need not have first sought and been denied any permit prior to filing a facial challenge."[100] Thus, the court did not focus on the concreteness of the alleged injury, but instead looked only to the likeliness that the injury would occur.[101] These cases seem to suggest that the Second Circuit has a more relaxed interpretation of the standing doctrine, as suggested in the *Clapper* dissent.[102]

1. Float Like a Butterfly, Sting Like a Bee: The Second Circuit's Interpretation of the Threat of Prosecution Standard

The Second Circuit has also dealt with cases premised on the applicability of the credible threat of prosecution standard.[103] For example, in *Hedges v. Obama*,[104] the court struggled with determining what standard should be applied to the immanency of injury prong of the standing analysis.[105] The *Hedges* decision stemmed from a lawsuit against the government

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[99] *Id.* at 374. (explaining that the defendant argued that petitioner would not have been approved for the permits, so there is no way that he could say he was injured without first having sought approval).

[100] *Id.*; *see also* MacDonald v. Safir, 206 F.3d 183, 189 (2d. Cir. 2000) ("There is no need for a party actually to apply or to request a permit in order to bring a facial challenge to an ordinance. . . .").

[101] *Lamar*, 356 F.3d at 375.

[102] *See Clapper*, 133 S. Ct. 1138.

[103] *See, e.g.*, Hedges v. Obama, 724 F.3d 170 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1936 (2014) (discussing potential prosecution under federal allowing detention of United States citizens); Pac. Cap. Bank, N.A. v. Connecticut, 542 F.3d 341 (2d Cir. 2008) (discussing potential prosecution under statute that limits interest rates for banks); Int'l Longshoremen's Assoc. v. Waterfront Comm'n of N.Y. Harbor, 495 F. Supp. 1101 (S.D.N.Y. 1980), *aff'd in relevant part* 642 F.2d 666 (2d Cir. 1981) (discussing specificity required for threats to amount to credible threat of prosecution); Linehan v. Waterfront Comm'n, 116 F. Supp. 401, 404 (S.D.N.Y. 1953).

[104] 724 F.3d 170 (2d Cir. 2013), *cert. denied,* 134 S. Ct. 1936 (2014).

[105] *Id.* at 195–204 (discussing the applicability of "fear based standing" and "credible threat of prosecution" standards).

over a law that allowed detention of American citizens.[106] The plaintiffs argued that a more permissive standard should be used for determining standing because this case dealt with the constitutionality of a law.[107] Specifically, the court analyzed case law suggesting that the credible threat of prosecution standard is lax because it assumes that the law in question will be enforced "as long as the relevant statute is 'recent and not moribund.'"[108] The court remarked, however, that a crucial aspect to attaining this lower standard for standing is that the statute in question must clearly and unequivocally proscribe the activity that the plaintiff wishes to perform.[109] In *Hedges,* because the statute in question did not clearly proscribe the activity, the court determined that the plaintiffs lacked standing to challenge the ban.[110]

Even though the plaintiffs in *Hedges* were unsuccessful, the Second Circuit has upheld this lower bar for standing in other decisions. For instance, it has held that "if a plaintiff's interpretation of a statute is reasonable enough and under that interpretation the plaintiff may legitimately fear that it will face enforcement of the statute, then the plaintiff has standing to challenge the statute." [111] In *Pac. Capital Bank, N.A. v.*

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[106] *Id.* at 173–86. (dealing with the constitutionality of the National Defense Authorization Act of 2012, codified at 50 U.S.C. § 1541).

[107] *Id.* at 195–97.

[108] *Id.* at 197 (internal quotations omitted) (quoting Doe v. Bolton, 410 U.S. 179, 188 (1973)).

[109] *Id.* (noting that, if the statute at issue clearly proscribes what plaintiff plans to do, then there is no burden on plaintiff to show that government intends to enforce statute against plaintiff).

[110] *Id.* at 204–05 (finding that plaintiffs lack Article III standing because the statute at issue does not clearly allow government to detain citizens).

[111] Pac. Capital Bank, N.A. v. Connecticut, 542 F.3d 341, 350 (2nd Cir. 2008); *see also, e.g.*, Hedges v. Obama, 724 F.3d 170, 199–200 (2nd Cir. 2013), *cert. denied*, 134 S. Ct. 1936 (2014) ("A plaintiff has standing when it may legitimately fear that it will face enforcement under its reasonable interpretation of the statute."); Vermont Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 382 (2nd Cir. 2000) ("A plaintiff bringing a pre-enforcement facial challenge against a statute need not demonstrate to a certainty that it will be prosecuted under the

Connecticut, [112] the court found standing based on this lax standard even though the dispute at issue did not stem from conduct with a constitutional interest. [113] The issue in *Pac. Capital Bank* stemmed from a dispute of applying federal or state law, and involved a claim under the supremacy clause.[114] Thus, even though the court found standing under the low standard of the *Babbitt* test, it was the claim that engendered a constitutional interest, not the conduct of the parties.[115]

Another important aspect for claiming impending prosecution as an injury is the specificity of the threatened prosecution. [116] In *Int'l Longshoremen's Assoc. v. Waterfront Comm'n of New York Harbor*, [117] a section of the waterfront commission act was challenged as unconstitutional.[118] The court found a credible threat of imminent prosecution because the plaintiffs received actual warning letters from the commission alleging that their conduct was illegal.[119] However, in *Linehan v. Waterfront Comm'n,* [120] the threat of prosecution was very

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statute to show injury, but only that it has an actual and well-founded fear that the law will be enforced against it.").

[112] 542 F.3d 341 (2nd. Cir. 2008).

[113] *Id.* at 346–49. In *Pac. Capital Bank*, Connecticut passed a statute, Conn. Gen. Stat. § 42-480(a)(2), that would regulate the refund anticipation loans of all banks within its borders. Generally, the claim asserted by Pacific Capital Bank was that, pursuant to the supremacy clause, they did not have to follow Connecticut's state law because they were a national bank. *Id.* at 346–49. Thus, the constitutional aspect is rooted in their claim, not their conduct. *Id.*

[114] *Id.* at 346–49.

[115] *Pac. Capital Bank*, 542 F.3d at 346.

[116] *See, e.g.*, Int'l Longshoremen's Ass'n v. Waterfront Comm'n of N.Y. Harbor, 495 F. Supp. 1101 (S.D.N.Y. 1980), *aff'd in relevant part*, 642 F.2d 666 (2nd. Cir. 1981) (discussing specificity required for threatened prosecution to amount to injury for purposes of standing); Linehan v. Waterfront Comm'n, 116 F. Supp. 401 (S.D.N.Y. 1953).

[117] 495 F. Supp. 1101 (S.D.N.Y. 1980), *aff'd in relevant part*, 642 F.2d 666 (2nd. Cir. 1981).

[118] *Id.*

[119] *Id.* at 1110, n.7 (holding that, without specific warning letters directed at plaintiffs, standing to state claim may have not been found).

[120] 116 F. Supp. 401, 404 (S.D.N.Y. 1953).

general.[121] By comparing these two cases, the specificity required for injury via threat of prosecution is illuminated.[122]

C. FIGHT WEEK: WHAT FACTS CAN BE USED TO SHOW STANDING AND WHAT STANDARDS ARE EMPLOYED BY COURTS?

Another crucial aspect in analyzing standing is determining what facts can come into the record in order to show standing.[123] In a litany of cases, it has been conclusively determined that "standing is to be determined as of the commencement of suit."[124] Thus, after a lawsuit has been filed in federal court, only facts up to that date can be utilized to show standing.[125] Further, because the Standing Doctrine can be very fact specific, and the case law on the topic is massive, a few different paths of analysis have surfaced, specifically in regards to the imminence of injury prong.[126] Various standards have

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[121] *Id.* ("[T]he district attorneys of the five counties in New York City and the attorney general intend to enforce the law promptly and vigorously . . . .").

[122] *Compare id.* (finding that general statement of intent to enforce law vigorously is not sufficient to amount to threat of prosecution) *with Int'l Longshoreman*, 495 F. Supp. at 1110, n.7 (finding credible threat of prosecution where plaintiffs received warning letters informing them that their conduct would be illegal under governing statute). Thus, a threat of prosecution must be specific towards the plaintiff in order to support a finding of injury by imminent prosecution. *See also* Wolfson v. Brammer, 616 F.3d 1045 (9th Cir. 2010). *Wolfson* enumerated the requirements for showing a genuine threat of imminent prosecution as (1) the plaintiff has concrete plans to break the law, (2) the prosecuting authorities have given the plaintiff a specific warning or threat to initiate proceedings, and (3) there is a history of prosecution under the statute. *Id.* at 1058.

[123] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 566–67 (1992) (proposing that facts to prove standing must stem from actions taking place prior to commencement of lawsuit).

[124] *Id.* at 570, n.5; *see also, e.g.*, Fenstermaker v. Obama, 354 F. App'x 452, 455, n.1 (2d Cir. 2009) (noting that only facts prior to commencing lawsuit can be used to show standing); Comer v. Cisneros, 37 F.3d 775, 791 (2d Cir. 1994) (noting that only facts prior to commencing lawsuit can be used to show standing).

[125] *See Linehan*, 116 F. Supp. at 404.

[126] *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1143 (2013) (adopting a "certainly impending" standard). In *Clapper*, the

developed in order to evaluate whether a claimant's injury meets the constitutional minimum needed for standing.[127] As discussed previously, courts have applied a "substantial risk" standard, a "certainly impending" standard, and a "credible threat of prosecution" standard, among others, when evaluating the injury claimed by a plaintiff.[128] Although all three of these standards are grounded and applied to specific niches of the standing doctrine, all three become relevant in the disposition of *Jones III*.[129]

III. NARRATIVE ANALYSIS: STEPPING INTO THE CAGE: HOW STANDING WAS THE DETERMINATIVE FACTOR IN *JONES III*

In finding that the plaintiffs lacked standing to present their claim, the court utilizes a highly nuanced discussion and analysis of the various facets of the Standing Doctrine.[130] First, the court framed the discussion by outlining the basis for standing and identifying Article III as the constitutional basis for granting judicial power.[131] The court further identified three separate standards for satisfying the injury-in-fact element of the irreducible constitutional minimum of standing that could apply in *Jones III*: (1) a "certainly impending" injury, (2) a "substantial risk" that injury will surface, and (3) a "credible threat of prosecution."[132]

A. STAND AND TRADE, OR GO FOR THE TAKEDOWN: DETERMINING WHAT STANDARD SHOULD APPLY IN *JONES III*

1. Knocking Out the "Credible Threat of Prosecution" Standard

At the outset, the court identified the need to determine which of the three above-mentioned standards should apply to

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Court also pointed out that in some instances, a "substantial risk" standard will be the proper bar to assess standing. (quoting Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 298 (1979) (adopting a 'credible threat of prosecution' standard)). *See Clapper* at 1150, n.5.

[127] *See, e.g.*, *Clapper*, 133 S. Ct. at 1150, n.5.

[128] *Id.*

[129] *See* Jones v. Schneiderman, 101 F. Supp. 3d 283, 289 (S.D.N.Y. 2015).

[130] *Id.* at 289–93.

[131] *Id.* at 289.

[132] *Id.* at 289, nn.4–5.

the plaintiffs in *Jones III*.[133] First, in a footnote, the court determined that the "credible threat of prosecution" standard, the laxest standard, should not be applied here.[134] In support of this determination, the court noted that the "credible threat of prosecution" standard should only be utilized when a constitutional interest is at stake.[135] Although the plaintiffs had asserted a vagueness challenge, which implicates constitutional due process, courts have held that the constitutional interest must stem from the plaintiff's conduct, not their claims, in order to invoke the "credible threat of prosecution" standard.[136] Here, because the Combative Sports Ban did not prohibit speech or conduct, the court determined that the "credible threat of prosecution" standard should not be applied.[137]

The court did, however, reason that standing may be found even if the threatened conduct does not have a constitutional interest.[138] However, a distinction between the conduct and a claim still controls.[139] The Court reasoned that, even if conduct threatened by prosecution does not have a constitutional interest inherent in it, a claim alone is insufficient

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[133] *Id.* at 289.

[134] *Id.* at 289 n.4 (stating that plaintiffs failed to show that the conduct is affected with a constitutional interest) (citing Babbit v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (holding that the credible threat of prosecution standard is used to establish injury in fact when the plaintiff has alleged an intention to engage in conduct affected with a constitutional interest)).

[135] *Id.*

[136] *Id.*; *cf.* Knife Rights, Inc. v. Vance, 802 F.3d 377, 384 (2d Cir. 2015) (applying "certainly impending" standard to a claim that did not deal with constitutionally protected conduct).

[137] *Jones*, 101 F. Supp. 3d at 289 n.4.

[138] *Id.* at 289, n.5; *cf.* MedImmune, Inc. v. Genetech, Inc., 549 U.S. 118, 128–29 (2007) (holding that "where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced," and citing as examples several cases in which the threatened enforcement at issue did not target constitutionally protected conduct).

[139] *Jones,* 101 F. Supp. 3d at 289, nn.4–5 (stating that for the lower standard of "credible threat of prosecution" to control, the plaintiff must assert that his constitutionally protected conduct is at risk, not merely the constitutional interest of his claim); *see also MedImmune*, 549 U.S. at 128–29.

grounds for applying the credible threat of prosecution standard.[140]

2. In the Opponents Corner: Analysis Under "Substantially Certain" and "Certainly Impending"

Before jumping into an analysis under either the "substantially certain" standard or the "certainly impending" standard, the court further elaborated on the imminent injury prong of a standing analysis.[141] Specifically, the court noted that an imminent prosecution amounts to harm only when the party has concrete plans to perform.[142] As discussed earlier in this article, several cases laid out the level of certainty needed to establish concrete plans – they must amount to more than an intent to "'some day' . . . commit an act, without 'any specification of *when* the some day will be.'"[143]

The court also discussed the amount of specificity needed before a threatened prosecution can amount to "imminent harm."[144] Specifically, the court explained that general promises to uphold a law are not enough to amount to imminent harm.[145] Before a threatened prosecution can be categorized as an imminent injury, targeted and specific threats must be made against the plaintiff.[146]

B. ANALYZING ZUFFA'S STANDING

1. Professional Sanctioned MMA

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[140] *Jones*, 101 F. Supp. 3d at 289, nn.4–5.

[141] *Id.* at 290 ("The concept of imminent injury warrants further elaboration specific to the claims in this case.").

[142] *Id.* at 291 (finding that in order for prosecution to be imminent plaintiff must have concrete plans to perform allegedly illegal conduct); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992) (discussing the level of concreteness required for plans in analyzing standing).

[143] *Jones*, 101 F. Supp. 3d at 291 (quoting *Lujan*, 504 U.S. at 564).

[144] *Id.* at 292 (noting that threat of imminent prosecution must be targeted and specific in order to amount to injury).

[145] *Id.* at 291 ("A government official's statement that a statute prohibits a type of conduct in the abstract . . . is usually insufficient to, without more, to establish that prosecution is imminent against a particular plaintiff.").

[146] *Id.*

Before analyzing Zuffa's standing, the court noted that it almost exclusively relied on facts that occurred after the commencement of the lawsuit in order to show standing.[147] Because standing is an inherently jurisdictional issue, the court emphasized that only facts that occurred before the commencement of the lawsuit can be used to show standing.[148] Zuffa's proclaimed injury was that the New York Attorney General's office threatened to prosecute even if it attempted to promote an MMA event with an organization that was exempt from the Combative Sports Ban.[149] However, because Zuffa was never contacted about possible prosecution prior to this lawsuit's filing, the court found this fact to be irrelevant to standing.[150]

However, the court found that Zuffa asserted other injuries relevant to standing.[151] For instance, it claimed that the NYSAC would not "provide assurances that a hypothetical sanctioned professional MMA event would not be shut down."[152] Nevertheless, the court found this reasoning unpersuasive for several reasons.[153] First, the NYSAC does not have prosecutorial authority, and therefore any failure to "provide assurances"

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[147] *Jones*, 101 F. Supp. 3d at 294.

[148] *Jones*, 101 F. Supp. 3d at 294. For further discussion of the law surrounding this specific topic, *see supra* notes 119 to 125 and accompanying text.

[149] *Jones*, 101 F. Supp. 3d at 294. Specifically, the court looked to the drastic change of position taken by the New York Attorney General during the litigation of this claim. *Id.* After the commencement of this suit, the New York Attorney General suggested that Zuffa could promote a professional MMA event with one of the exempt organizations listed in the Combative Sports Ban. *Id.* However, during the litigation, the New York Attorney General indicated that any and all professional MMA events would be illegal under the law, even those which were promoted by an exempt organization. *Jones*, 101 F. Supp. 3d at 294. This change of stance was directly catalyzed by the UFC and Zuffa beginning to plan an MMA event with an exempt organization. *Id.*

[150] *Id.*

[151] *Id.* at 294.

[152] *Id.*

[153] *Id.* at 294–95.

cannot be misinterpreted as a threat of prosecution.[154] Secondly, the court found that the NYSAC never claimed that professional MMA was illegal in New York State.[155] Rather, it believed the NYSAC's stance was a "justifiably cautious approach" to "promises of immunity for prospective conduct."[156] Finally, the court stated that even if the NYSAC had prosecutorial authority and stated that MMA was illegal, an imminent threat of prosecution could not be found because there was no specific targeting of Zuffa.[157] Zuffa argued that this should be irrelevant because they had purposefully avoided planning professional MMA in New York in fear of being prosecuted.[158] However, the court opined that Zuffa's choice to refrain from activity in New York could not be equated with an injury.[159]

2. Professional MMA on Tribal Land

The court also held that Zuffa failed to show an imminent threat of prosecution when promoting professional MMA on tribal land.[160] Similarly, the court found that Zuffa was not the specific target of the threat for legal action.[161] The court further reasoned that Zuffa lacked any concrete plans to even

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[154] *Id.* at 294 (noting that prosecutorial authority in this instance was with the New York State Attorney General and law enforcement agencies).

[155] *Id.* at 294.

[156] *Id.* at 295.

[157] *Id.*; *see supra* notes 112–119 for a discussion of the specificity required for threatened prosecution to amount to injury for purposes of standing.

[158] *Id.*

[159] *Jones v. Schneiderman*, 101 F. Supp. 3d 283, 295 (S.D.N.Y. 2015) ("[Zuffa's] decision to refrain from economic activity, however, is not alone sufficient to demonstrate an injury in fact in this case."); *see also* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1151 (2013) ("[plaintiffs] cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."). The Majority in *Clapper* elaborated on this point by reasoning that if manufactured injury by the plaintiffs could be used to prove injury for standing, then "an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a [sic] nonparanoid fear." *Id.*

[160] Jones v. Schneiderman, 101 F. Supp. 3d 283, 295 (S.D.N.Y. 2015).

[161] *Id.*

promote MMA on tribal land, and therefore lacked any real threat of imminent prosecution.[162] This analysis echoes the thematic overtones of the previous analysis – Zuffa's inactivity and concurrent lack of a prosecutorial threat disqualified its standing under Article III.[163]

IV. CRITICAL ANALYSIS: DID THE REFEREE MISS AN ILLEGAL BLOW BY NEW YORK STATE?

A. *JONES III* UNDER THE 'SUBSTANTIALLY CERTAIN' AND 'CERTAINLY IMPENDING' STANDARDS

As *Jones III* demonstrates the standard applied in a standing analysis has a huge impact on the outcome of a case.[164] In eliminating the possibility of analyzing standing based on a "credible threat of prosecution," the court made it much more difficult for a plaintiff to show standing.[165] Under both the "substantially certain" and "certainly impending" standards, nothing is assumed to be in favor of the plaintiff.[166] Instead, each prong in the standing analysis must be conclusively proven to the same extent as other assertions made by a moving party.[167]

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[162] *Id.*

[163] *See id.* The Court also observed that Zuffa does not participate in the business of promoting amateur MMA, so the Court did not analyze Zuffa's standing in that regard because it was not applicable to Zuffa. *Id.* Further, because there were a number of plaintiffs in this case, the Court analyzed the standing claims of only some of them. *Id.* at 292–93. A large portion of the plaintiffs stipulated to give no additional testimony at the outset of the litigation, and thus they were easily found to lack standing. *Id*. Further, two of the other plaintiffs, Don Lilly and Shannon Miller, who are also fight promoters, were found to lack standing for the same reasons Zuffa was found to lack standing. *Id.* at 295–99.

[164] *See, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147–49 (2013) (discussing what standard should apply when evaluating standing); *see also, e.g.*, Hedges v. Obama, 724 F.3d 170, 199–200 (2d. Cir. 2013), *cert. denied*, 134 S. Ct. 1936 (2014) (discussing what standard should apply when evaluating standing); Pacific Capital Bank, N.A. v. Connecticut, 542 F.3d 341, 350 (2d. Cir. 2008) (discussing what standard should apply when evaluating standing).

[165] *See* Jones, 101 F. Supp. 3d at 289.

[166] *Id.*, n.4.

[167] *Id.*

In *Jones III*, the plaintiffs could have met this burden if some aspects of the analysis were decided in their favor.[168] For example, under a liberal interpretation found in some cases, Zuffa's interaction with the NYSAC could have amounted to a threat of imminent injury.[169] In *MedImmune v. Gennetech*, the Court noted that there is no need to expose oneself to prosecution when the potential threat is "action by *government*."[170] A literal reading of this passage makes it seem that the NYSAC would fit this description because the NYSAC is an arm of New York State's government.[171] Thus, fearing prosecution because of a failure of assurances by the NYSAC seems to fit squarely within the language of *MedImmune*.[172] Further, because the NYSAC reports violations of the Combative Sports Ban directly to the Attorney General,[173] the NYSAC effectively acts as a proxy prosecutor for the Combative Sports Ban.

Even under the most conservative reading of the Combative Sports Ban there is no conceivable way that MMA would *not* be illegal. The statute plainly outlaws any event in which the contestants deliver blows to one another that is not sanctioned by an exempt organization.[174] Thus, the fact that the NYSAC didn't specify that MMA was illegal should not be controlling on the outcome of analyzing Zuffa's standing.[175]

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[168] *See* notes 163 to 177.

[169] *See, e.g.*, MedImmune v. Genetech, 549 U.S. 118, 128–29 (2007) (noting that plaintiff need not expose himself to liability when plaintiff faces action by government).

[170] *Id.* at 128.

[171] NEW YORK STATE ATHLETIC COMMISSION, http://www.dos.ny.gov/athletic/about.html (last visited Oct. 8, 2015) (noting that the New York State Athletic Commission is authorized to regulate professional boxing and wrestling contests, matches, and exhibitions within the State of New York pursuant to Title 25 of the Unconsolidated Laws).

[172] *See MedImmune*, 549 U.S. at 128–29.

[173] Jones v. Schneiderman, 101 F. Supp. 3d 283, 287 (S.D.N.Y. Mar. 31, 2015) ("The NYSAC . . . may refer potential statutory violations to the [Attorney General] for investigation").

[174] *Id.*

[175] *See* Pac. Capital Bank v. Connecticut, 542 F.3d 341, 350 (2d Cir. 2008) ("If a plaintiff's interpretation of a statute is 'reasonable enough' and under that interpretation that plaintiff 'may legitimately

Lastly, by looking to cases decided in the Second Circuit, it is possible to find the specific threats required to find injury under the imminent threat of prosecution standard.[176] One of the problems facing Zuffa in proving specificity is that it failed to inquire about the legality of a specific event.[177] However, when viewed through the rose colored glasses of *Lamar*, a more abstract inquiry like Zuffa's may be sufficient.[178] Like in *Lamar*, where the plaintiff lacked permits for the signs he wanted, the lack of concrete plans and a subsequent inquiry of those plans' legality should not amount to a lack of injury.[179] When Zuffa inquired about the legality of MMA generally in New York State and was not provided with assurances that it would not be prosecuted, there seems to be some grounds to show an injury for purposes of standing.[180] However, even though such a reading does not contradict case law, it requires a liberal interpretation.[181] Thus, under the standard applied, it

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fear that it will face enforcement of the statute,' then the plaintiff has standing to challenge the statute.").

[176] *See, e.g.*, Lamar Advert. of Penn., LLC v. Orchard Park, 356 F.3d 365 at 374 (2d Cir. 2004) (noting plaintiffs never inquired specifically about the legality of their potential signs and never obtained permits for them); *see also infra* notes 178–85.

[177] *See* Jones v. Schneiderman, 101 F. Supp. 3d 283, 295 (S.D.N.Y. 2015) ("Zuffa appears to have inquired only about sanctioned professional MMA in the abstract, and not about a particular event.").

[178] *See Lamar*, 356 F.3d at 374. The *Lamar* court found that even though the plaintiff did not have permits for the signs he sought, he still had standing. *Id.* However, the plaintiff's failure to show he had been approved for a sign was not a bar to facial challenge of the sign. *Id.*

[179] *Id.*

[180] *Compare id.* at 375 (noting that standing was found for plaintiff even where plaintiff did not have concrete plans to erect signs because plaintiff did not have permits for said signs), *with* Jones, 101 F. Supp. 3d at 296 (noting that standing was not found in part because the plaintiff failed to present concrete plans of breaking the law).

[181] *See MedImmune*, 549 U.S. 118, 128–29 (2007) (noting language used suggests threatened action by government generally not only government entities with prosecutorial authority); *see also* Lamar, 356 F.3d at 374. Because the court found standing for the plaintiff in *Lamar* even without permits for the signs at issue, it suggests that the concreteness of future plans may be a lower bar than that which was

seems that the court reached the safest and most logical conclusion.[182]

B. THE KNOCKOUT SHOT: THE 'CREDIBLE THREAT OF PROSECUTION' STANDARD AND *JONES III*

1. Should Jones III have been analyzed under the 'credible threat of prosecution' standard?

Zuffa tried to persuade the court to adopt the more lax standard for the injury analysis, requiring only a "credible threat of prosecution."[183] The court, however, found that this standard should not apply because only Zuffa's claim, and not its conduct, had a constitutional interest.[184] The court drew this distinction between claim and conduct based on where the constitutional interest of the plaintiff lies.[185] For example, if the plaintiff asserted a violation of the First Amendment, its conduct would have a constitutional interest because the First Amendment

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utilized in *Jones III*. *See id.* For more on the topic of liberal construction of case law and its impact on the standing doctrine, see Daniel Ho & Erica Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591 (2010) (suggesting liberal justices in high courts developed the Standing Doctrine).

One of the theories on the origins of the Standing Doctrine suggests that standing was developed to protect administrative agencies from the federal courts' power of judicial review. *See id.* at 597–603. This is referred to as the Insulation Thesis. *Id.*; *see also* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432, 1436–38 (1988). Recently, this theory gained some credence by way of an empirical study. *See* Daniel Ho, *supra*. Specifically, prior to 1940, liberal Justices asymmetrically denied standing to plaintiffs challenging the actions of administrative agencies. *Id.* at 634–55. However, after 1940, liberal justices were found to be more likely to find standing for plaintiffs. *Id.* This suggests that perhaps standing is *not* used to evaluate the merits of a plaintiffs' claim prior to actually evaluating the merits of a claim. *Id.* at 647–48.

[182] *See* Jones, 101 F. Supp. 3d at 295–96.

[183] *Id.* at 289, n.4 ("Plaintiffs suggest, unpersuasively, that *Babbitt's* credible threat of prosecution standard should apply to their as-applied vagueness challenges.") (internal quotations omitted).

[184] *Id.* (noting that it is conduct that must be affected with constitutional interest).

[185] *Id.*

protects free speech, a conduct that is inherently constitutional.[186] A vagueness challenge, like the one in *Jones III*, is merely a claim based on constitutional principles. No conduct protected by the constitution – like free speech – is at issue.[187] *Pac. Capital Bank*, though, may provide an argument that Zuffa's claim is sufficient to warrant the credible threat of prosecution standard, or that there was conduct with a constitutional interest underlying it.

Zuffa could argue that even though only their claim has a constitutional interest, it is still sufficient to find standing based on the Second Circuit's interpretation of the Standing Doctrine.[188] For example, in *Pac. Capital Bank*, the court found injury when the bank could not offer refund anticipation loans at a desired interest rate which caused the plaintiff financial hardship.[189] The plaintiff violated no laws.[190] But, the potential prosecution alone was sufficient to find standing.[191]

Similarly, in *Jones III*, the plaintiffs violated no laws – they chose to avoid doing business in New York because they

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[186] *See* Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 298, 302 (1979) (suggesting that the "credible threat of prosecution standard" should only apply if plaintiffs claim is "affected with a constitutional interest"); *see also* Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 393 (1988) (allowing pre-enforcement lawsuit where proscribed conduct was affected by the First Amendment). However, this contention does not seem to be strictly adhered to in the Second Circuit. *See, e.g.*, Pac. Capital Bank, N.A. v. Connecticut, 542 F.3d 341, 350 (2d Cir. 2008) (applying credible threat of prosecution standard for standing analysis where claim was brought under supremacy clause).

[187] *See Jones*, 101 F. Supp. 3d at 289, nn. 4–5.

[188] *See id.* at 283.

[189] *Pac. Capital Bank*, 542 F.3d at 347–51 (finding that the plaintiffs have standing to challenge a law based on their supremacy clause claim).

[190] *Id.* at 347.

[191] *Id.* at 350. Specifically, the court even went so far as to write: "The State Officials' suggestion that Pacific lacks standing on the theory that its reduction of its [refund anticipation loan] interest rates in Connecticut below its nationwide standard to the levels permitted by [statute] in the wake of that enactment was purely a matter of choice, untraceable to [statute], is thus untenable." *Id.*

did not want to expose themselves to criminal prosecution.[192] Thus, the injury sustained by Zuffa in *Jones III* is analogous to the injury in *Pac. Capital Bank*.[193] Further, like the law in *Jones III*, nobody had ever been prosecuted under the law in *Pac. Capital Bank*.[194] The fact that a law has not been enforced should not be a bar to showing that there is still a sincere threat of prosecution.[195] Thus, under *Pac. Capital Bank*, it is entirely possible that the "credible threat of prosecution" standard could apply to Zuffa in *Jones III*.[196]

Moreover, under this relaxed standard, Zuffa probably would have been able to set forth facts sufficient to establish standing.[197] If a court applies the credible threat of prosecution standard, then it is assumed that the law in question will be enforced against the plaintiff should they conduct a course of conduct in direct violation of the law.[198] However, Zuffa would need to show that their fear of prosecution was actual and reasonable, which wouldn't be difficult because, as discussed previously, virtually any reading of the Combative Sports Ban would outlaw the promotion of a professional MMA event.[199]

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[192] *Jones*, 101 F. Supp. 3d at 283 (finding that "Zuffa's briefing emphasizes that before this lawsuit began, the company refrained from involvement with professional MMA in New York because of its concerns about the [Combative Sports] Ban.").

[193] *Compare Pac. Capital Bank*, 542 F.3d at 347–51 (noting injury sustained by plaintiff was inaction stemming from potential prosecution), *with Jones*, 101 F. Supp. 3d at 295 (noting that Zuffa claimed they refrained from business in New York because of potential prosecution).

[194] *Pac. Capital Bank*, 542 F.3d at 350 (noting that the state had never enforced the statute against any bank in the state).

[195] *See id.*; s*ee also Lujan*, 504 U.S. at 566–67. *But see* Wolfson v. Brammer, 616 F.3d 1045 (9th Cir. 2010) (noting that to meet the credible threat of prosecution standard, the law at issue must have some history of enforcement).

[196] *See Pac. Capital Bank*, 542 F.3d at 350; *see also Lujan*, 504 U.S. at 566–67.

[197] *See Jones*, 101 F. Supp. 3d at 294.

[198] Hedges v. Obama, 724 F.3d 170, 197 ("[I]n numerous preenforcement [sic] cases where the Supreme Court has found standing on a showing that a statute indisputably proscribed the conduct at issue, it did not place the burden on the plaintiff to show an intent by the government to enforce the law against it . . . it presumed such intent . . . .").

[199] *See* N.Y. UNCONSOL. LAW § 8905-a(3)(d).

Because Zuffa likely could have shown an injury under the credible threat of prosecution standard, it would probably be found to have standing. The injury prong of the standing analysis was the biggest hurdle for Zuffa to surmount, as it could have easily show that the injury is traceable to New York State and that a favorable decision would remedy the injury.[200] Thus, Zuffa could most likely establish standing if its claimed injury was analyzed under a credible threat of prosecution standard.

V. HOW NEW YORK'S VICTORY BECAME A NO CONTEST AFTER ALL

Given the prominence of the UFC and MMA, *Jones III* brought an array of attention to the Southern District of New York Court System.[201] In light of the continued climb in popularity of MMA in the world of sports, New York Legislature finally overturned the combative sports ban in the spring of 2016.[202] However, because standing impacts every case brought in federal court, the disposition of *Jones III* is still relevant in the legal world.[203] Because the Standing Doctrine

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[200] *Jones*, 101 F. Supp. 3d 283, 294 (S.D.N.Y. 2015) (finding that Zuffa's claim was dismissed because they failed to show substantial risk of prosecution or that prosecution was certainly impending in regards to analyzing injury in the context of standing).

[201] *See, e.g.*, Paul Gift, *UFC Loses Challenge to New York's MMA Ban for Lack of Standing*, SB NATION (Apr. 1, 2015, 11:00 AM), http://www.bloodyelbow.com/2015/4/1/8324843/ufc-loses-new-york-lawsuit-ban-lack-of-standing-mma; Kevin Iole, *Judge Throws Out UFC Suit, But it's Far From a Total Defeat for MMA in New York*, YAHOO! SPORTS (Mar. 31, 2015, 5:23 PM), http://sports.yahoo.com/blogs/mma-cagewriter/judge-throws-out-ufc-suit--but-it-s-far-from-a-total-defeat-for-mma-in-new-york-002312374.html; Luke Thomas, *Court Dismisses UFC's Lawsuit Challenging New York's Ban on Mixed Martial Arts*, MMA FIGHTING (Mar. 31, 2015, 10:15 PM), http://www.mmafighting.com/2015/3/31/8323759/court-dismisses-ufcs-lawsuit-challenging-new-yorks-ban-on-mixed.

[202] *Governor Cuomo Signs Legislation Legalizing Mixed Martial Arts in New York State,* NEW YORK STATE (April 14, 2016), https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-legalizing-mixed-martial-arts-new-york-state.

[203] *See, e.g.*, *Amnesty Int'l U.S.*, 568 U.S. ___, ___, 133 S. Ct. 1138, 1146 (2013) ("One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue.") (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)).

involves a fact specific analysis, each new case analyzing and interpreting aspects of standing becomes a useful instrument in deciphering the mixed opinions of the federal courts.[204]

The court also refused to comply with the criticism of commentators who suggested that standing is a way to evaluate the merits of a case before actually evaluating the merits of a case.[205] In two passages of the opinion, the court indicated that the conduct of the Attorney General during the litigation could support a finding of standing.[206] This suggests that Zuffa would have been successful in at least taking its fight to the later rounds in a subsequent lawsuit or appeal.[207] In two passages of the opinion, the court indicated that the conduct of the Attorney General during the litigation could support a finding of standing.[208] This suggests that Zuffa may have been successful in its fight at the later rounds through a subsequent lawsuit or appeal.[209] And even though Zuffa did file a new lawsuit and began the appeal process through *Jones III*, the pursuit of these

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[204] Gene R. Nichol, *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 303–04, 306 (2002) (discussing how facts of injury decide whether a case meets standing requirements).

[205] *Compare Jones*, 101 F. Supp. 3d at 294, 299 (suggesting that if Zuffa filed new lawsuit they would potentially have standing), *with supra* note 15 and accompanying text.

[206] *Jones*, 101 F. Supp. 3d at 299 ("Zuffa [] may consider filing new vagueness claims based on events that occurred after this lawsuit commenced, including the [Attorney General's] recent statements that the [combative Sports Ban] prohibits sanctioned professional MMA[.]").

[207] *See* Jim Genia, *Despite Finding that New York is Misapplying its MMA Law, Court Dismisses on a Technicality UFC's lawsuit Challenging the Law*, THE MMA JOURNALIST (Mar. 31, 2015, 7:54 PM), http://www.themmajournalist.com/search?updated-min=2015-03-01T00:00:00-05:00&updated-max=2015-04-01T00:00:00-04:00&max-results=35 (noting plaintiffs are considering appealing decision and filing new lawsuit).

[208] *Jones*, 101 F. Supp. 3d at 299.

[209] *See* Jim Genia, *Despite Finding that New York is Misapplying its MMA Law, Court Dismisses on a Technicality UFC's lawsuit Challenging the Law*, THE MMA JOURNALIST (Mar. 31, 2015, 7:54 PM), http://www.themmajournalist.com/search?updated-min=2015-03-01T00:00:00-05:00&updated-max=2015-04-01T00:00:00-04:00&max-results=35 (noting plaintiffs are considering appealing decision and filing new lawsuit).

measures was unnecessary after the Combative Sports ban was overturned.[210]

Jones III also showcased why the standing doctrine needs the attention of the Supreme Court more now than ever.[211] Standing has generally been classified as one of the most expansive—and criticized—areas of the law, which can be regarded as an implicit cry for guidance from the Supreme Court.[212] For example, as discussed *infra*, some cases that could

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[210] Stephen Rex Brown, *UFC Sues to Overturn State Law Banning Events in New York*, NYDAILYNEWS.COM (Sept. 28, 2015, 12:52 PM), http://www.nydailynews.com/new-york/ufc-sues-overturn-ban-events-new-york-article-1.2377077; Tristen Critchfield, *UFC Hires Former U.S. Solicitor General to Appeal New York's MMA Ban*, SHERDOG (Apr. 21, 2015), http://www.sherdog.com/news/news/UFC-Hires-Former-US-Solicitor-General-to-Appeal-New-Yorks-MMA-Ban-85033. For information regarding New York overturning the Combative Sports Ban, see *Governor Cuomo Signs Legislation Legalizing Mixed Martial Arts in New York State*, NEW YORK STATE (April 14, 2016), https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-legalizing-mixed-martial-arts-new-york-state.

[211] *See Jones*, 101 F. Supp. 3d at 283 nn.4–5 (noting various standards that could be potentially applicable in analyzing plaintiffs' claims); *see also* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1160–61 (2013) (Breyer, J., dissenting) (showcasing various standards utilized in standing by the court); Bradford C. Mank, *Clapper v. Amnesty International: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211, 215 (2014) (noting how fractured the Court seemed in determining what standard to apply in *Clapper*); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002) (noting complexity and incoherence of injury analysis for standing).

[212] Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of [Article III] standing has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it…."); Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 300 (2015) ("Scholars have long criticized the incoherence of standing doctrine…."); John Paredes, *The Lawlessness of Standing*, 26 LOY. CONSUMER L. REV. 247, 248 (2014) (noting that "no one is happy with the standing doctrine."); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1426 (1995) ("The law of standing is in a state of notorious disarray."); Christian B. Sundquist, *The First Principles of Standing: Privilege, System Justification, and*

have changed the disposition of *Jones III* received no mention in the opinion of the court.[213] This suggests that the jurisprudence surrounding standing is too voluminous to be workable.[214] Perhaps, then, it is time for the Supreme Court to rule on another "landmark" standing case in order to clarify the standing doctrine. Another option is that courts should heed the suggestions of commentators and completely overhaul the standing doctrine in order to better serve its judicial purpose.[215]

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the Predictable Incoherence of Article III, 1 COLUM. J. RACE & L. 119, 134 (2011) ("The indeterminate nature of standing doctrine is well-documented."); Michael A. Wolff, *Standing to Sue: Capricious Application of Direct Injury Standard*, 20 ST. LOUIS U. L. J. 663, 663 (1976) ("The confusing and inconsistent nature of [standing] decisions has been the subject of judicial and scholarly comment.").

[213] *See, e.g.*, Pac. Capital Bank, N.A. v. Connecticut, 542 F.3d 341, 347, 350–51 (2d Cir. 2008) (utilizing credible threat of prosecution standard for analysis under tangentially similar facts); Lamar Advert. Of Penn, LLC v. Orchard Park, 356 F.3d 365, 374 (2d Cir. 2004) (suggesting threshold of 'concrete plans' aspect of imminence may be lower than applied in *Jones III*).

[214] F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 57 (2012) (noting large amount of scholarly commentary on Standing Doctrine); Nichol, Jr., *supra* note 215, at 302 n.4 ("The literature critical of the Supreme Court's treatment of the standing requirement is voluminous."); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221, 223 (1988) (suggesting "that we abandon the attempt to capture the question of who should be able to enforce legal rights in a single formula, abandon the idea that standing is a preliminary jurisdictional issue, and abandon the idea that Article III requires a showing of 'injury in fact.'").

[215] Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73 (2007). Professor Siegel suggests that standing and justiciability concerns "should serve to enhance the performance of the judicial function." *Id.* at 138. However, this is very difficult to do because the constitution does not elaborate on the goals of justiciability doctrines. *Id.* at 86. Thus, most doctrines of justiciability, particularly standing, are left underdeveloped, misguided, and in need of reform *after* clear purposes of the doctrines have been determined. *Id.* at 129. With that in mind, Professor Siegel suggests that the Standing Doctrine "be refocused in light of what little it can do to further the purpose of enhancing the judicial function." *Id.* at 135.

Other commentators have limited the bulk of their critiques to certain aspects of standing, like the injury analysis. *See* Nichol Jr., *supra* note 215. Professor Nichol suggests "standing rulings of the past three decades demonstrate that the injury standard is not only unstable

A wide array of standing law can be a good thing, especially for such a fact specific analysis.[216] However, many scholars would agree that the standing doctrine has surpassed a point of helpful breadth and reached a point of incomprehension and confusion.[217] Thus, courts are left with too much discretionary power to pick and choose what aspects of standing should be applied, and what standards should be utilized in determining the standing of plaintiffs.[218]

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and inconsistent, but that it also systematically favors the powerful over the powerless." *Id.* at 304. As a result, Professor Nichol suggests the adoption of a much more general interpretation of the injury requirement, and "a significant presumption in favor of the plaintiff's claim of harm." *Id.* at 337–38. Further, Professor Nichol suggests that adopting such general guidelines and presumptions would "dismantle . . . one of the most manipulated, result-oriented arenas of constitutional law." *Id.* at 339.

Some critics have suggested that standing is highly manipulated, and employed to avoid the adjudication of claims that judges see as meritless. Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–42 (1999) (arguing judges use standing to further their political ideologies in courts); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977) (suggesting standing decisions are manipulated based on claims' merits). For other discussions of how and why the standing doctrine should be overhauled, *see* Fletcher, *infra* note 218, at 290–91 (suggesting that standing should hinge on whether or not plaintiff has right to enforce legal duty); Saul Zipkin, *Democratic Standing*, 26 J. L. & POL. 179, 236–37 (2011) (suggesting adopting new guidelines and framework for analyzing standing). *But see* Ernest A. Young, *In Praise of Judge Fletcher – and of General Standing Principles*, 65 ALA. L. REV. 473, 498–99 (2013) (arguing that standing should remain unchanged).

[216] *See Jones*, 101 F. Supp. 3d at 293–99.

[217] *See id.* at 289 nn.4–5, 299.

[218] *See* Mank, *supra* note 213, at 215 (noting various standards to be applied for analyzing standing); *see also Clapper*, 133 S. Ct. at 1160–62 (2013) (Breyer, J., dissenting) (noting different language utilized by Supreme Court analyzing similar aspects of standing).