No. 17-641

In The Supreme Court of the United States

CAREFIRST, INC., et al.,

Petitioners,

v.

CHANTAL ATTIAS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether a victim of a known data breach who has sufficiently alleged a substantial risk of future harm has standing to pursue her claim in federal court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

Despite efforts to characterize the application of Article III to data breaches as unique, the law of standing is neither novel nor unique in data breach contexts. More importantly, contrary to Petitioners' representations, confusion does not reign supreme throughout the circuit courts. For decades the circuits have established that they are more than capable of applying this Court's standing jurisprudence to cases and controversies. Their rulings in data breach cases are no different. Different outcomes between application of law to data breach matters among the various circuits is due to different facts, and do not constitute a genuine circuit split.

"Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.' The doctrine of standing gives meaning to these constitutional limits by 'identify[ing] those disputes which are appropriately resolved through the judicial process.'" *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341, 189 L.Ed.2d 246, 82 USLW 4489 (2014); U.S. Const., art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136 (1992).

The Petition is based on a misunderstanding of the law of standing, and the corresponding burdens imposed upon plaintiffs in adequately demonstrating standing at the various stages of litigation. At its core, the Petition begs the Court to drastically and profoundly alter the doctrine of standing. Further, the Petition professes a circuit split on a legal question, but does not identify any circuits that are applying varied law.

CareFirst contends that the outcome of this case would differ depending on the federal circuit in which it was heard. Petition for Writ of Certiorari at 10-15. This is not true. Federal circuits have held where one class member alleges injury, the putative class survives the motion to dismiss stage of litigation. *See, e.g., In re SuperValu, Inc.*, 870 F.3d 763, 768 (8th Cir. 2017). The Petitioners greatly exaggerate the reality of federal circuit disagreement. There is, in fact, no circuit which would grant CareFirst its motion to dismiss at this pleading stage when presented with these facts. Furthermore, CareFirst misrepresents relevant case law which employs the same "plausibility" standard at the motion to dismiss stage of litigation which it derides the D.C. Circuit Court for utilizing in its analysis. *Id.; see also In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 629 (3d Cir. 2017); *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 212 (4th Cir. 2017); *Schuchardt v. President of the United States*, 839 F.3d 336, 349 (3d Cir. 2016).

Therefore, because a) the Court of Appeals' decision was based squarely in this Court's precedent; b) there is no circuit split regarding the application of law to these facts; and, c) the Respondents' Complaint sufficiently alleges that an inarguably concrete injury occurred to at least one named putative class member as a result of the data breach, this is clearly not the right case for the Supreme Court of the United States to decide the issue as to whether data breaches automatically confer Article III standing upon victims.

For these reasons and as stated below, the Petition should be denied.

A. Factual Background

Petitioners CareFirst, Inc., Group Hospitalization and Medical Services, Inc., CareFirst of Maryland, Inc., and CareFirst BlueChoice (hereinafter collectively referred to as "CareFirst" or "Petitioners") is a network of for-profit health insurers which provide health insurance coverage to individuals in the District of Columbia, the State of Maryland and the Commonwealth of Virginia. Collectively, CareFirst insures in excess of one million individuals with health coverage in the relevant geographic area. Chantal Attias, Andreas Kotzur, Richard and Latanya Bailey, Curt and Connie Tringler, and Lisa Huber (hereinafter "Respondents") are the customers and insureds of CareFirst in the District of Columbia, Maryland and Virginia.

In June of 2014, the sensitive and personal information of Respondents was obtained by data thieves

who conducted a sophisticated cyberattack on CareFirst's servers. CareFirst failed to recognize the attack had even occurred – given the apparent expertise of the attackers – until April of 2015. On May 20, 2015, Respondents and the members of the putative class were first notified that personal and sensitive information in the custody and care of CareFirst had been attacked and taken by data thieves.

CareFirst admits that it was attacked and breached by a data thief. CareFirst offered to purchase identity theft protection – though not comprehensive – for the putative class. CareFirst warned the victims about their need to seek identity theft protection. And CareFirst admitted that names, birthdays, email addresses, and subscriber identification numbers were stolen.[1, 2]

Respondents each received a notification letter from CareFirst. After reviewing the letters and their

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[1] The district court wrongfully believed that "account numbers" were not lost in this case, and the matter was distinguishable from *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688 (7th Cir. 2015):"Without a hack of information such as social security numbers, account numbers, or credit card numbers, there is no obvious, credible risk of identity theft that risks real, immediate injury." *Attias v. CareFirst, Inc.*, 199 F. Supp. 3d 193, 201 (D.D.C. 2016), *rev'd*, 865 F.3d 620 (D.C. Cir. 2017) (quoting *Antman v. Uber Techs. Inc.*, No. 3:15-cv-01175, 2015 WL 6123054, at *11 (N.D. Cal. Oct. 19, 2015). It is not disputed that health account numbers were taken.

[2] The named Plaintiffs alleged that social security numbers were taken as well based upon the nature of the attack and expert opinion that data thieves do not leave tracks without gaining such valuable information.

options, Respondents purchased more comprehensive identity theft protection to mitigate their harm, having determined that the risk of identity theft would not be adequately addressed by the protection offered by CareFirst. Each then filed suit for the damages they sustained.

B. The Circuit Court Opinion

The D.C. Circuit analyzed the Complaint by applying the appropriate Supreme Court precedent and found that it had adequately alleged standing under Article III. The Circuit Court properly recognized that the gravamen of the issue for it was determining generally whether "injury-in-fact" was present, and more specifically whether the allegations of injury are "actual or imminent." Opinion, pp. 8-9 ("The principal question, then, is whether the plaintiffs have plausibly alleged a risk of future injury that is substantial enough to create Article III standing."). There is no serious contention in the Circuit Court, nor in the Petition, that injury-in-fact was unsupported due to a lack of either "concreteness" or "particularization."

The Circuit Court relied upon the well-established jurisprudence of standing and the Supreme Court's recent holding in *Susan B. Anthony List v. Driehaus* (*SBA List*), 134 S.Ct. 2334 (2014). Opinion, p. 10. The Petition incorrectly argues that the circuit court failed to analyze the matter in light of *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), but the court of appeals addressed *Clapper* at length, and distinguished it on

the pleaded facts. Opinion, pp. 13-16. The circuit court also correctly considered *SBA List*, an opinion subsequent to *Clapper*, to find that plaintiffs had adequately alleged standing under the "substantial risk" test. Opinion, p. 10 (citing *SBA List v. Driehaus*, 134 S.Ct. 2334, 2341, 189 L.Ed.2d 246, 82 USLW 4489 (2014)) ("An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur.") (citing *Clapper*, 568 U.S. at 414, n.5, 133 S.Ct., at 1147, 1150, n.5).

The court of appeals did not fail to consider any test; instead, it correctly applied the settled jurisprudence from the Court and appropriately applied precedent to find the Complaint alleged each required element of standing.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Found Article III Standing Based Upon Settled Supreme Court Precedent.

Petitioners ask this Court to discard its recent *SBA List* opinion and limit the jurisdiction of the federal courts to only those matters in which past damage already sustained has been alleged, thereby discarding decades of precedent recognizing "imminent" injury as a basis for standing.

SBA List has settled the question presented, and the Petition has offered no basis to revisit it: "An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *SBA List v. Driehaus*, 134 S.Ct. 2334, 2341, 189 L.Ed.2d 246, 82 USLW 4489 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130 (1992)) (some internal question marks omitted in original). Under *SBA List*, a plausible allegation of a substantial risk of future harm continues to satisfy the "imminent" prong of injury-in-fact, just as the Court has held for *decades*. *See Lujan*, 504 U.S. at 560 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983))).

Despite Petitioners' implicit assertion, *SBA List* acknowledged the "certainly impending" language in *Clapper* and reconciled it as consistent with the Court's extensive history accepting "substantial risk" as a sufficient allegation of imminent harm. *SBA List* at 2341 (quoting *Clapper*, 568 U.S. 398, 414, n.5, 133 S.Ct., at 1147, 1150, n.5). As *SBA List* stated, *Clapper* did not purport to alter the "substantial risk" standard as a sufficient means for alleging future harm; *Clapper*, itself, merely acknowledged that the future injury alleged therein met neither the "substantial risk" nor the "certainly impending" standard:

> Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In

> some instances, we have found standing based on a "substantial risk" that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm. But to the extent that the "substantial risk" standard is relevant and is distinct from the "clearly impending" requirement, respondents fall short of even that standar. . . .

Clapper v. Amnesty Int'l United States, 133 S.Ct. at 1150, n.5 (citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, ___, 130 S.Ct. 2743, 2754-55, 177 L.Ed.2d 461 (2010); *Pennell v. City of San Jose*, 485 U.S. 1, 8, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988); *Blum v. Yaretsky*, 457 U.S. 991, 1000-01, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982); *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)).

The Petition ignores *SBA List* and asserts that it does not apply to data breach cases. But the Court has never applied different thresholds for various types of actions; instead, it has examined any action, regardless of the nature of the cause of action, with consistent Article III requirements of injury in fact. The Court has never endorsed varied standards for Article III courts in addressing trademark infringement claims versus tort actions versus breach of contract actions, and so on. Petitioners provide no explanation why the Court should create a new body of constitutional limitations for "data breach actions" because there is no valid explanation.

To the extent *Clapper* is controlling and *distinct* from this Court's consistent requirements of alleging

imminent injury, the Petitioners wrongly claim that the court of appeals did not consider the plaintiffs' allegations in light of *Clapper*. Pet., p. 8. The court of appeals exhaustively considered the allegations in light of *Clapper*, accepting it as "the leading case on claims of standing based on risk of future injury," *Attias v. CareFirst, Inc.*, 865 F.3d 620, 626 (D.C. Cir. 2017), and ultimately finding that the court's opinion was "bolstered" by a factual comparison to *Clapper*. *Attias v. CareFirst, Inc.*, 865 F.3d at 628; *see generally id*. at 626, 628-29 (discussing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398). The D.C. Circuit found that the harm in the instant case is decidedly *more* substantial because, while the plaintiffs in *Clapper* were at risk only if an attenuated series of events occurred in a certain order, in the instant case "an unauthorized party has already accessed personally identifying data . . . " *Id.* at 628. This factual distinction consistently (and conveniently) eludes Petitioners; but this is the critical divergence in allegations from *Clapper* that confers standing. Further, the allegations of the operative complaint detailed that the information was stolen by "data thieves" who will plausibly use the stolen information to commit identity theft and "medical identity theft."

The Petition makes a second request to diverge from well-settled precedent, which may be more radical than asking the Court to overturn decades of standing jurisprudence. Petitioners ask this Court to hold complaining plaintiffs to a standard other than plausibility at the pleading stage. Pet., p. 10 (quoting

Clapper, 568 U.S. at 410) (internal citations omitted) ("By holding the respondents to a plausibility standard and a 'light burden of proof * * * at the pleading stage,' the court of appeals failed to heed the Court's warning that standing does not exist where a future injury relies entirely on a 'highly attenuated chain of possibilities.'"); *see also generally* Pet., pp. 9-10. While not suggesting what standard applies at the pleading stage, the Petitioners repeatedly emphasize that the court of appeals' application of a plausibility standard at the motion to dismiss stage was allegedly error. However, the Court has already held that at the motion to dismiss stage, the burden of establishing standing is consistent with any other pleading requirement.

> [E]ach element of Article III standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Thus, while a plaintiff must "set forth" by affidavit or other evidence "specific facts" to survive a motion for summary judgment, and must ultimately support any contested facts with evidence adduced at trial, [a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim."

Bennett v. Spear, 520 U.S. 154, 167-68, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (quoting *Lujan v. Defenders of*

Wildlife, 504 U.S. at 561, 112 S.Ct. at 2136; Fed. Rule Civ. Proc. 56(e); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889, 110 S.Ct. 3177. 3189, 111 L.Ed.2d 695 (1990)); *see also Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 212 (4th Cir. 2017) ("By relying so heavily on *Clapper*, the district court blurred the line between the distinct burdens for establishing standing at the motion-to-dismiss and summary-judgment stages of litigation. Put another way, what may perhaps be speculative at summary judgment can be plausible on a motion to dismiss."); *Schuchardt v. President of the United States*, 839 F.3d 336, 344 (3d Cir. 2016) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2009)).

The Petition offers no reason why this tenet has been altered, or how the court of appeals failed by examining the question of standing under the federal plausibility standard at the motion to dismiss stage.

The Petitioners make much of the D.C. Circuit's finding of plausibility to determine that the Plaintiffs overcame their burden of Article III standing in this case. Pet., 7-10. However, it is obvious that at least one of the circuits which the Petitioners contend would split the issue uses the very same analysis to determine similarly that a complaint's allegations survive a facial motion to dismiss, and – just as the D.C. Circuit did in the instant case – found that there was nothing speculative about the injury; the interception of the data was an actual injury which had already occurred. *Wikimedia Found.*, at 210. The Fourth Circuit panel stated that:

> " . . . the district court characterized Wikimedia's allegations as 'speculative' based upon its own observation that it's unclear whether the NSA is "using [its] surveillance equipment to its full potential" to intercept "all communications passing through" chokepoints upon which the NSA has installed surveillance equipment. J.A. 190, 198-99. **That observation might be appropriate with the benefit of an evidentiary record at summary judgment, but coming as it did on a motion to dismiss, it had the effect of rejecting Wikimedia's well-pleaded allegations and *impermissibly injecting an evidentiary issue into a plausibility determination.*** *See Schuchardt*, 839 F.3d at 347-48 (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955); *SD3*, 801 F.3d at 431."

Id. at 212. (emphasis added).

Further establishing that this issue is not split amongst the sister circuits, the Fourth Circuit's *Wikimedia* opinion includes an analysis of and reference to another Third Circuit opinion which was factually similar to *Wikimedia* and which reached a like conclusion. *Id*. The Third Circuit, in *Schuchardt v. President of the United States*, in which the plaintiffs alleged that the government had impermissibly intercepted individuals' data but in which again the plaintiffs alleged no further action taken, analyzed "the 'factual matter' that must be considered in assessing the **plausibility** of [the plaintiff's] allegations." 839 F.3d 336, 349 (3d

Cir. 2016). (emphasis added). In support, the Third Circuit's opinion specifically stated that:

> "Another critical distinction between this case and *Clapper* is that the district court entered summary judgment, a procedural posture that required the plaintiffs to identify a triable issue of material fact supported by an evidentiary record. *See id*. at 1146, 1149. **In contrast, Schuchardt sought to avoid dismissal in a facial jurisdictional challenge raised under Rule 12(b)(1), which *requires him only to state a plausible claim*, a significantly lighter burden.**"

Id. at 351. (emphasis added).

It bears emphasis that *Clapper* regarded an inquiry into Article III standing *at the summary judgment stage*, discovery having been completed, while the instant case is merely at the initial, motion to dismiss stage of litigation. The Petition fails to recognize this distinction in asserting that *Clapper* fundamentally altered the standing requirements to demand more than plausibility. *Clapper* made no such alteration to pleading requirements as it found a lack of standing after discovery and a ripe motion for summary judgment. No such discovery has been conducted here, and plaintiffs cannot be asked to meet more than the traditional requirements of pleading any other matter.

The Petitioners' conflation of the requirement to show an "imminent threat of harm" with the federal rules pleading standard of plausibility exposes Petitioners' confusion. These two concepts are not at odds

with one another. Petitioners are wrong that the plausibility standard employed by the D.C. Circuit "lower[ed the] Article III threshold for threatened injury. . . ." Pet., p. 10. The threat of future injury has always been examined based on plausibility at the motion to dismiss stage. *Supra Bennett v. Spear* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. at 561, 112 S.Ct., at 2136; *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695 (1990)). *Clapper* did not alter any pleading burden, but identified one sufficient basis for demonstrating the threat of imminent harm.

Only by misunderstanding the court of appeals' opinion can the Petitioners claim that the D.C. Circuit erroneously found standing based on allegations of future injury. Petitioners seek to carve out and create standing requirements particular to data breach cases, though it offers no reason why data breach cases require unique treatment. More objectionable, only by mistaking the procedural posture of *Clapper* can the Petitioners claim that the Supreme Court altered the burden of proof at the pleading stage.[3] In reality, the Circuit Court appropriately relied upon and applied the Court's law on standing to find that plaintiffs had met their burden of plausibly alleging injury in fact

[3] The Petitioners' argument places on a foundational pillar that "[t]he court of appeals did not consider that respondents have not suffered any identity theft or other harm in more than three years since the breach." Pet., p. 6. This is factually incorrect as two named plaintiffs, *i.e.,* "the Tringlers" whom the D.C. Circuit identified as having already alleged identity theft and tax fraud due to the breach.

because *past* acts have already exposed them to a substantial risk of future harm.

II. Petitioners Have Not Identified a True Circuit Split.

Petitioners identify three federal circuit opinions as evidence of a circuit split. But a "circuit split" does not exist merely because some actions have been dismissed and others have not. The Third, Fourth, and Eighth Circuits would all almost certainly have decided this as did the D.C. Circuit. A review of these opinions does not demonstrate a split, but only that the courts are applying the facts to the appropriate precedent to weed out only those cases that do not meet the Article III standards the Court has long identified.

Petitioners cite the Third Circuit's opinion in *Reilly v. Ceridian Corp.*, 664 F.3d 38 (3d Cir. 2011). *Reilly* found a lack of standing *because* the plaintiffs could not allege that personal information had been read, copied or understood; that anyone intended to commit future crimes with the information; or that anyone would be able to use the information to the detriment to the plaintiffs. *Id*. at 42. These facts would not confer standing under the D.C. Circuit's opinion wherein plaintiffs *did allege* the information was obtained and understood by "data thieves"; that the purpose of the hack was to commit crimes against plaintiffs; and explained that the information could be used to commit identity theft and/or medical identity

theft. *Attias v. CareFirst, Inc.*, 865 F.3d 620, 628 (D.C. Cir. 2017).

But Petitioners' reliance on *Reilly* is more dubious for a simpler reason: *Reilly* pre-dates both *Clapper* and *SBA List*, which have both confirmed that a plausibly alleged "substantial risk of future injury" satisfies federal court standing requirements. Since *Reilly*, the Third Circuit has reexamined this issue in the context of another data breach and properly applied *SBA List* and *Clapper* to find standing. As illustrated in another health insurer's data breach, the facts of which are strikingly similar to the instant case, the Third Circuit found in favor of the plaintiffs on the issue of Article III standing in a motion to dismiss by the defendant. *In re Horizon Healthcare Servs.*, 846 F.3d 625, 629. In that case, Circuit Judge Kent Jordan explained that:

> "In light of the congressional decision to create a remedy for the unauthorized transfer of personal information, a violation of FCRA gives rise to an injury sufficient for Article III standing purposes. **Even without evidence that the Plaintiffs' information was in fact used improperly, the alleged disclosure of their personal information created a de facto injury. Accordingly, all of the Plaintiffs suffered a cognizable injury, and the Complaint should not have been dismissed under Rule 12(b)(1).**"

Id. (emphasis added).[4]

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[4] While the Respondents did not bring FCRA claims, they do allege violations of similar statutes and common laws designed to

Horizon Healthcare cannot be meaningfully distinguished from the instant case. Now, with the benefit of the Court's guidance in *SBA List*, the Third Circuit stands shoulder-to-shoulder with the D.C. Circuit in its opinion that allegations of a data breach by data thieves creates a substantial risk of future injury which is enough to survive a motion to dismiss. *Id*. at 630 ("The Complaint alleges that '[t]he facts surrounding the Data Breach demonstrate that the stolen laptop computers were targeted due to the storage of Plaintiffs' and Class Members' highly sensitive and private [personal information] on them.' ").

The Petition also highlights the Fourth Circuit as one which would decide this case in its favor by relying upon *Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017). *Beck* presents only a slightly more complex scenario because it involved the consolidation of two matters: 1) the "Beck matters" which resulted in summary judgment for defendants after discovery; and 2) the "Watson matters," which resulted in dismissal on the pleadings. The Fourth Circuit expressed "Critically, the procedural posture of the case dictates the plaintiff's burden as to standing. Here, the district court dismissed Watson on the pleadings and Beck at summary judgment." *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)) ("[E]ach element [of standing] must be supported in the same way as any other matter on which the

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protect individuals' sensitive data (i.e., HIPAA, HITECH, various consumer laws).

plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation."). Applying the proper individual standards, the *Beck* court affirmed summary judgment on the "Beck matters" because "after extensive discovery, the Beck plaintiffs have uncovered no evidence that the information contained on the stolen laptop has been accessed or misused or that they have suffered identity theft, nor, for that matter, that the thief stole the laptop with the intent to steal their private information." *Id*. at 274.

The Watson matters were dismissed at the pleading stage, under the appropriate plausibility standard because the allegations of fact were lacking, in contrast to the allegations before the D.C. Circuit. The *Beck* court considered what allegations its sister circuits had considered sufficient to confer standing based on a risk of future injury:

> "Underlying the cases are common allegations that sufficed to push the threatened injury of future identity theft beyond the speculative to the sufficiently imminent. In *Galaria*, *Remijas*, and *Pisciotta*, for example, the data thief intentionally targeted the personal information compromised in the data breaches . . . in *Remijas* and *Krottner*, at least one named plaintiff alleged misuse or access of that personal information by the thief."

Beck, at 274.

The "Watson matters" failed to make these allegations. "Here, the Plaintiffs make no such claims. This

in turn renders their contention of an enhanced risk of future identity theft too speculative." *Id*. In *Attias*, the named plaintiffs alleged both that a "data thief intentionally targeted the personal information," *Attias* at 628-29, *and* two named plaintiffs "alleged misuse or access of that personal information by the thief." *Id*. at 626, n.2 ("Two of the plaintiffs, Curt and Connie Tringler, alleged that they had already suffered identity theft as a result of the breach. Specifically, they claimed that their anticipated tax refund had gone missing."). Under the Fourth Circuit's reasoning, the *Attias* plaintiffs have sufficient alleged standing at the motion to dismiss stage, and there is no split with the D.C. Circuit on the law.

As to the appropriate burden at the motion to dismiss stage, the Fourth Circuit has also addressed a case with a fact pattern nearly identical to that of *Clapper* (actually, the cases shared six (6) plaintiffs), and found there to be sufficient injury alleged to survive a motion to dismiss. *See Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193 (4th Cir. 2017). The Fourth Circuit considered both *SBA List* and *Clapper* in its finding that allegations of several of the named plaintiffs plausibly alleged a substantial risk of future harm. *Id*. at 207. The Fourth Circuit correctly acknowledged that *Clapper* involved a summary judgment standard, where in *Wikimedia*, plausible allegations of substantial risk of future injury conferred standing at the motion to dismiss stage. *Supra Wikimedia,* at 212; *see also id.* at 210 ("coming as it did on a motion to dismiss, it had the effect of rejecting Wikimedia's

well-pleaded allegations and impermissibly injecting an evidentiary issue into a plausibility determination.") (citing *Schuchardt v. President of the United States*, 839 F.3d 336, 347-48 (3d Cir. 2016)) (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 431 (4th Cir. 2015).[5] Regarding *Clapper*, the Fourth Circuit stated that:

> "By relying so heavily on *Clapper*, the district court blurred the line between the distinct burdens for establishing standing at the motion-to-dismiss and summary-judgment stages of litigation. **Put another way, what may perhaps be speculative at summary judgment can be *plausible* on a motion to dismiss**."

Wikimedia Found. v. Nat'l Sec. Agency, 857 F.3d 212. (emphasis added).

Even the Eighth Circuit, seemingly the Petitioners' strongest champion, would have found standing on the allegations in the instant case. In *In re SuperValu, Inc.*, 870 F.3d 763 (8th Cir. 2017), the only decision in which the Eighth Circuit explored this issue, held that no Article III standing existed based on the operative complaint's allegations. *Id*. at 768. But *SuperValu* specifically rejected the notion that a Circuit split on the law existed.

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[5] The Fourth Circuit's citation to and reliance on a Third Circuit opinion further establishes the Third Circuit's jurisprudence's congruence with the D.C. Circuit.

> [S]everal circuits have applied *Clapper* to determine whether an increased risk of future identity theft constitutes an injury in fact. These cases came to differing conclusions on the question of standing. **We need not reconcile this out-of-circuit precedent because the cases ultimately turned on the substance of the allegations before each court. Thus, we begin with the facts pleaded by plaintiffs here.**

Id. at 769 (citing *Attias*, 865 F.3d at 625-29) (emphasis added).

Dispositive to the Eighth Circuit was that "the allegedly stolen Card Information does not include any personally identifying information, such as social security numbers, birth dates, or driver's license numbers." *Id*. at 770. The D.C. Circuit was faced with a far more extensive loss of information that included "specific allegations in the complaint that CareFirst collected and stored 'PH/PHI/Sensitive Information,' a category of information that includes credit card and social security numbers; that PII, PHI, and sensitive information were stolen in the breach; and that the data 'accessed on Defendants' servers' place plaintiffs at a high risk of financial fraud." *Attias*, at 628. The suggestion that the Eighth Circuit would have decided *Attias* differently than the D.C. Circuit amounts to nothing more than wishful speculation because the allegations of fact are so disparate.[6]

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[6] Further, in *SuperValu*, one of the named plaintiffs alleged that, as a result of that breach, fraudulent activity was

Petitioners have not demonstrated a split in the circuits as to any important federal legal issue. *See* Supreme Court Rule 10. Instead, the Petitioners' citation to various circuits shows that each circuit is applying the same standards, namely those presented by *SBA List*, *Clapper*, and *Lujan*. Not a single case cited by Petitioners suggest a split on the *legal issue* of whether sufficient allegations of a "substantial risk of future harm" satisfy the imminent threat harm. In fact, both *Beck* and *SuperValu* found that *either* allegations of "certainly impending harm" *or* a "substantial risk of future harm" satisfy the imminent requirement of Article III. *SuperValu*, at 769 ("In future injury cases, the plaintiff must demonstrate that 'the threatened injury is "certainly impending" *or* there is a "substantial risk" that the harm will occur.' "); *Beck,* at 275 ("our inquiry on standing is not at an end, for we may also find standing based on a 'substantial risk' that the harm will occur. . . .").[7]

The different outcomes cited by Petitioners are nothing more than the circuits properly applying the

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perpetrated on his identity. *SuperValu,* at 772. Because of this actual injury, the Eighth Circuit reasoned, that named plaintiff had Article III standing to bring suit. *Id*. at 774. Following from this analysis, the court ruled that the district court erred in dismissing the plaintiffs' complaint, since, as stressed, *infra*, if one named plaintiff has standing to sue, a putative class action may proceed. *Id.* at 768, 774 (citing *Horne v. Flores*, 557 U.S. 433, 446 and *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264).

[7] *Reilly*, as stated previously, was decided before the Court's *SBA List* opinion clarified that a plaintiff may show either that the harm is "certainly impending" *or* that there is a substantial risk of future harm.

same law to different factual allegations, or to the fact that some cases were adjudicated at later stages in litigation, neither of which demonstrate a circuit split on a legal issue.

III. The Issue is Not Clearly Presented Because Respondent Has Also Alleged Injury In Fact Based Upon Actual Injury Already Sustained.

Accepting the errors in the Petition's question presented, the purported question in this case is still far from clearly presented. Petitioners wish for this case to turn on one issue – whether Article III standing is conferred by data breaches absent any showing of such data being harmfully used against the victims. But that is not the reality of this case. Respondents have alleged injury-in-fact that satisfies the "actual" harm prong for at least one putative class member, whose standing allows the entire class to proceed beyond the motion-to-dismiss phase of litigation. *See Horne v. Flores*, 557 U.S. 433, at 446; *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, at 264. Specifically, Respondents have alleged that social security numbers were lost in the breach, which "CareFirst does not seriously dispute that [Respondents] would face a substantial risk of identity theft if their social security and credit card numbers were accessed by a network intruder. . . ." *Attias v. CareFirst, Inc.*, 865 F.3d 620, 627 (D.C. Cir. 2017). And Respondents have alleged a number of other claims which spring not from harm occurring from the breach itself, but rather from CareFirst's

breach of its contractual business relationship with the Respondents. *See* Pl.'s 2d Am. Compl. at ¶¶ 26, 31, 39-45, 64-75, 76-84, 85-91, 92-99, 100-116, 117-123, 124-130, 131-137, 138-145 and 146-154.

In the Second Amended Class Complaint, Respondents clearly and unequivocally allege that at least some of the members of the class suffered actual economic injury in the form of tax-refund fraud. Pl.'s 2d Am. Compl. ¶ 57. Specifically, the Respondents' Complaint alleges that at least two members of the putative class, the Tringlers, suffered tax refund fraud owing to CareFirst's failure to protect their sensitive information. *Id.* This observable injury obviously bestows Article III standing. In fact, this single allegation, by itself, renders the Respondents' Complaint wholly discrete from those in *Clapper* or *Spokeo*. *See generally* Petition for Writ of Certiorari; *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S.Ct. 1138, 1140, 185 L.Ed.2d 264 (2013); *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016), *as revised* (May 24, 2016). Petitioners simply avoid the allegations of two plaintiffs who alleged to have been victims of identity theft during the relevant time period because there is surely no circuit split on the issue as to whether an individual who has had his or her tax refund check stolen has suffered the kind of concrete, particularized, actual injury outlined by this Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351. There is not a federal court in the United States which would hold that this type of injury alleged fails the low threshold of Article III standing.

The Court's analysis of certiorari for this case can realistically end here. This stark fact is dispositive. A putative class action can proceed as long as one named plaintiff has standing. *See Horne v. Flores*, 557 U.S. 433, 446, 129 S.Ct. 2579, 174 L.Ed.2d 406 (2009); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Yet this is not the only incontestably concrete injury alleged in Respondents' Complaint. The Petition distortedly highlights for the Court the claim that Respondents' Complaint "does not allege that the thieves accessed Social Security numbers or such other [Personal Identifiable Information]," which was erroneously stated by the overturned district court in this case. Pet., 4; *See also Attias v. CareFirst, Inc.*, 865 F.3d 620, 627 (D.C. Cir. 2017). The D.C. Circuit Court recognized this in saying:

> The district court concluded that the plaintiffs had 'not demonstrated a sufficiently substantial risk of future harm stemming from the breach to establish standing.' *Attias*, 199 F. Supp. 3d at 201, in part because they had 'not suggested, let alone demonstrated, how the CareFirst hackers could steal their identities without access to their social security or credit card numbers.' *id.* **But that conclusion rested on an incorrect premise: that the complaint did not allege the theft of social security or credit card numbers in the data breach. In fact, the complaint did.**

Id. (emphasis added).

To the contrary, the D.C. Circuit Court explicitly stated that Respondents' Complaint "alleges that the CareFirst data breach exposed customers' social security and credit card numbers." *Id*. The circuit court also specifically noted that "CareFirst does not seriously dispute that [Respondents] would face a substantial risk of identity theft if their social security and credit card numbers were accessed by a network intruder, and, drawing on 'experience and common sense,' [the panel] agree[s]." *Id.* at 628 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). It is undeniable that the Respondents' well-plead Complaint alleges just that, yet the Petitioners would have the Court rely on CareFirst's own affidavit to the contrary submitted with its motion to dismiss to decide *as a matter of law* that no such harm occurred.

Furthermore, Respondents' operative complaint alleges a number of injuries which exist separate from the harm of the identity theft. Other counts in the Complaint include breach of contract (Pl.'s 2d Am. Compl. at ¶¶ 26, 31, 64-75, 124-130), negligence based on CareFirst's failing in its duty to safeguard sensitive information (*Id.* at ¶¶ 76-84), violations of breach notification statutes (*Id.* at ¶¶ 92-99), violations of the various states' consumer protection laws (*Id.* at ¶¶ 85-91, 100-116), fraud (*Id.* at ¶¶ 117-123, 146-154), CareFirst's breach of the duty of confidentiality to its customers (*Id.* at ¶¶ 138-145), and unjust enrichment sounded in the fact that some part of CareFirst's revenues from customers was meant to go toward the protection of sensitive data, and CareFirst did not do so (*Id.* at ¶¶ 131-137). These alleged injuries spring not

from the data breach, but from the plaintiffs' business relationship with CareFirst.

Additionally, it is important to be ever conscious of the fact that CareFirst deals in health insurance. Therefore, its failure to protect against this breach is also a violation of both the Healthcare Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health (HITECH) Act, which was likewise well-pled in the Respondents' Complaint (*Id. at* ¶¶ 39-45). These last two well-pled allegations (violations of HIPAA and the HITECH Act), as well as allegations of CareFirst's violations of various state consumer codes, are especially important because, it is a long standing and consistent principle that "[t]he actual or threatened injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

Petitioners' belief that the issue is clearly presented is simply incorrect. Even assuming the Court accepts Petitioners' invitation to uproot decades of the Court's own jurisprudence on the issue presented, the lower courts will then have to consider numerous other allegations of standing, including several that demonstrate the presence of concrete, particularized and *actual* harm already sustained.

CONCLUSION

The petition for a writ of certiorari should be DENIED.

Respectfully submitted,

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