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The lack of a clearly articulated standard for the use of informal communications in achieving standing and ripeness in First Amendment proceedings has had a negative impact on one blogger's fight against a state agency. After a serious health incident, Warren Cooksey decided to ignore his doctors' dietary advice and use his own eating plan, eschewing traditional dieting for a low-carbohydrate, high-protein "paleo" diet. After experiencing dramatic weight loss and significant health improvement, he began to advocate this unconventional plan via his own personal website and give personalized advice on how to follow this plan. Due to these activities, Cooksey soon came into conflict with the administrative state, specifically the North Carolina Board of Dietetics/Nutrition which told him through informal phone calls, emails, and letters that his activities were unacceptably close to the unlicensed practice of dietetics. Rather than meekly accepting this pronouncement, Cooksey has sought to challenge the legality of this restriction on First Amendment grounds. However, Cooksey's challenge has been troubled by the unclear standards that plague standing issues in First Amendment jurisprudence.

This Note analyzes some of the standing issues raised by *Cooksey*: the use of "informal" government communications to establish Article III standing and ripeness in First Amendment speech proceedings. *Cooksey* eventually followed the trend of similar cases, maintaining that informal government communications were sufficient to establish standing and ripeness for a First Amendment challenge because the communications at issue met certain criteria. Namely, the communication gave a well-founded basis for Cooksey to fear a future individualized harm if he continued his expressive activities and

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constituted a sufficient chill on his activity to create a ripe issue for the courts to consider. However, this Note also finds that there has not been a clear statement by courts as to when an "informal" communication with regulated entities is sufficient to establish standing in "pre-enforcement" First Amendment free speech cases.[1] Because the case at hand deals with the constitutionality of a state law as it applies to the plaintiff, this Note does not consider the topic of "overbreadth" standing.[2]

Because of difficulties encountered in *Cooksey* and other cases where plaintiffs had to deal with unclear standing and ripeness issues in First Amendment cases involving informal government action, this Note proposes a framework that fits within the jurisprudence surrounding this issue to date.[3] Once a plaintiff has met this framework, he has shown both standing and ripeness for the purposes of First Amendment cases.

Simply stated, a plaintiff bringing a First Amendment action must show that an agency or official has communicated with her through unofficial or informal means about the consequences of expressive activity. This direct communication shows an individualized, directed threat to the plaintiff. The plaintiff can then use that communication to establish both standing and ripeness, but only if that communication would convey to a reasonable person that the plaintiff's activity would attract future adverse action from the government. This potential future adverse action establishes an objectively reasonable chill on the plaintiff's speech and allows him to establish both an injury in fact and a

1. Within this paper, the term "informal" is used in a somewhat similar fashion to "informal agency action," which is defined by Black's Law Dictionary as agency "activity other than adjudication or rulemaking, such as investigation, publicity, or supervision." *See* INFORMAL AGENCY ACTION, BLACK'S LAW DICTIONARY 849 (9th ed. 2009). However, because the scope of this paper includes actions outside of agency activity as well as agency activity that is not expressly authorized by statute or other regulation, a more accurate definition for the term "informal" as used in this context comes from the Random House dictionary: "not according to the prescribed, official, or customary way or manner; irregular; unofficial." *See* INFORMAL, RANDOM HOUSE DICTIONARY (2013).

2. For insight into the Supreme Court's stance on "overbreadth" standing, see Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

3. Standing and ripeness analysis often blend together in First Amendment cases due to the interlocking issues and the relaxed standards for each in freedom of speech cases compared to normal standards. *See* Doe v. Duling, 782 F.2d 1202, 1206 n.2 (4th Cir. 1986).

ripe challenge. Although never officially articulated by the courts, this Note establishes that this test is in line with previous decisions.

Analysis proceeds in five parts. Part I will present the factual and procedural background of *Cooksey*. Part II will explore Article III requirements generally and in the context of the First Amendment. Part III will analyze related cases which have dealt with issues of informal or hypothetical government actions and will propose a test for the usefulness of informal communication. Part IV will analyze different approaches and establish why the proposed test is useful for understanding *Cooksey*. Finally, Part V will briefly synthesize Parts I-IV and conclude the analysis.

I. BACKGROUND

A. Factual Background: Cooksey*'s "Cave Man" Conversion*

Like many Americans, Steve Cooksey had an inactive, sedentary lifestyle that caused significant health issues.[4] Cooksey's poor health habits pushed him to an unhealthy weight, which he claims reached nearly 235 lbs. at his heaviest point.[5] His lifestyle had consequences for his health in 2009, when Cooksey was rushed to the hospital because his insulin levels were so unhealthy that he was nearly in a state of diabetic shock.[6] He was placed on a daily insulin injection program in order to get his diabetic issues under control, and he was advised to adopt a high carbohydrate, low protein diet.[7] Rejecting the path advised by his doctors, Cooksey instead adopted a high protein, low carbohydrate diet along with a strenuous exercise regime.[8]

Cooksey's diet plan undeniably produced dramatic results: he claimed to have lost 78 lbs. and he was cleared by his doctor to stop daily insulin injections.[9] Still tinkering with his meal plans, Cooksey eventually adopted one version of a low-carb, high-protein diet known as the Paleolithic or "caveman" diet which is named after its alleged

4. *See* Cooksey v. Futrell, 721 F.3d 226, 229–30 (4th Cir. 2013).
5. *Id.*
6. *See id.*
7. *Id.*
8. *Id.* at 230.
9. *Id.*

resemblance to the diet available to early humans.[10] Cooksey became a zealous advocate of this meal plan through his "Diabetes Warrior" website.[11] This website had several sections.[12] In part, the website was diet-related advocacy. It also included his personal testimonial regarding the effects of his "caveman" diet and an advice column addressing readers' specific dietary concerns. Cooksey also offered a fee-based service where he would advise dieters and give personal encouragement.[13]

Cooksey's advocacy attracted the attention of the North Carolina Board of Dietetics/Nutrition (the "State Board"), the official state body regulating and licensing the practice of dietetics.[14] The State Board's executive director contacted Cooksey, informing him that a complaint had been filed against him for violating North Carolina's laws regulating nutritionists and the practice of dietetics. The relevant statute prohibits the practice of dietetics/nutrition without a license from the State Board.[15] Unlicensed individuals cannot practice "[a]ssessing the nutritional needs of individuals and groups, and determining resources and constraints in the practice setting" or "[e]stablishing priorities, goals, and objectives that meet nutritional needs and are consistent with available resources and constraints."[16] The State Board is charged with enforcing these provisions.[17]

Instead of pursuing the complaint through adjudication methods, the State Board and its subsidiary complaints committee contacted Cooksey in a variety of informal ways to state that they considered his actions to be in violation of the North Carolina Dietetics Statute.[18] This informal action included a "red pen" review, where the Executive

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* Notably, it is unclear from the opinion whether or not Cooksey actually attracted any customers.

14. *Id.*

15. *See* N.C. GEN. STAT. § 90-365 (2013).

16. N.C. GEN. STAT. § 90-352(4)(a-b) (2013).

17. N.C. GEN. STAT. § 90-356 (2013).

18. *See* N.C. GEN. STAT. § 90-356(5) (2013) (providing that the State Board shall "[c]onduct investigations, subpoena individuals and records, and do all other things necessary and proper to discipline persons licensed under this Article and to enforce this Article.").

Director showed Cooksey printed off pages from his website and marked various sections of the website that she found problematic.[19] Cooksey appears to have complied with the suggestions, at least to some extent.[20] Yet, at no time did the State Board proceed with any type of formal adjudication of the complaint against Cooksey.[21]

B. The Cave Man Dieter Goes to Court

Cooksey's issues attracted the attention of several libertarian organizations.[22] The Raleigh, North Carolina, based John Locke Foundation and its *Carolina Journal* publication shed a public light on Cooksey's situation.[23] The Institute for Justice, a public interest law firm focusing on economic liberty issues, agreed to represent Cooksey in a First Amendment-based challenge to the State Board's actions.[24]

Assisted by the Institute for Justice, Cooksey filed suit in federal court. His complaint alleged that the North Carolina statute regulating nutritionists and dietary advice violated the First Amendment's Speech Clause, both on the statute's face and as-applied to him.[25] The case was filed in federal court in the Western District of North Carolina.[26] However, Cooksey's case was not initially successful.[27] The district court granted the State Board's motion to dismiss Cooksey's challenge on the grounds of lack of injury and ripeness. [28]

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19. *See* Cooksey v. Futrell, 721 F.3d 226, 23–32 (4th Cir. 2013).

20. Cooksey alleged that he had "reluctantly complied with this request 'because he feared civil and criminal action against him.'" *Id.* at 231.

21. *See id.* at 231–32.

22. *See* Sara Burrows, *State Threatens to Shut Down Nutrition Blogger*, CAROLINA JOURNAL ONLINE (April 23, 2012), http://www.carolinajournal.com /exclusives/display_exclusive.html?id=8992; Brian Balfour, *Not So Free Speech*, CIVITAS REVIEW (Sept. 27, 2012), http://civitasreview.com/miscellaneous/not-so-free-speech/.

23. *See* Burrows, *supra* note 22.

24. *See id.*

25. *See Cooksey*, 721 F.3d at 233.

26. *Id.* at 232.

27. *See* Cooksey v. Futrell, 3:12-CV-336-MOC-DSC, 2012 WL 4756069 (W.D.N.C. Aug. 29, 2012), *aff'd*, 3:12CV336, 2012 WL 4756065 (W.D.N.C. Oct. 5, 2012), *vacated*, 721 F.3d 226 (4th Cir. 2013).

28. *See id.*

C. The District Court's Analysis

In dismissing Cooksey's complaint, the district court found the lack of formal action significant to its analysis.[29] The court elaborated that "the Board made no formal determination concerning whether Plaintiff's conduct constituted the unlicensed practice of dietetics/nutrition. Plaintiff merely received informal guidance from a Board committee and the executive director based on their review of his website."[30] Making no mention of the Board's "red-line" mark-through analysis and edits, the Court stated that Cooksey "volunteered" to edit his website to comply with the Board's orders.[31]

The district court found that none of the Board's actions "suggested any limitation on [Cooksey's] expression of his opinions," saying that he "voluntarily complied with the suggestions made by the Complaint Committee and removed parts of his website that were problematic."[32] The district court also noted that Cooksey had not taken advantage of a procedure in the North Carolina dietetics/nutritionists law that allowed the board to give advisory opinions at the request of the applicant.[33] As a result, the district court found that Cooksey had not established an injury in fact or a ripe claim; thus, he did not have a basis for a challenge in the federal courts.[34]

The district court's repeated use of terms such as "suggestions" and "voluntarily," along with its characterizations of both the Board's and Cooksey's actions, showed the court's disregard for the impact of informal actions on expressive activity.[35] The district court apparently could not see how phone calls and emails could impact the exercise of First Amendment rights.[36] Remarkably, the court's analysis does not discuss First Amendment doctrine, failing to mention "chill" or the generally lowered standards for these types of cases.[37]

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29. *See id.* at *3–4.
30. *Id.* at *3.
31. *Id.* at *4.
32. *Id.*
33. *See id.* at *4 (citing N.C. GEN. STAT. § 150B-4 (2011)).
34. *Id.* at *4.
35. *See id.* at *3.
36. *See id.* at *1–4.
37. *Id.* These issues will be discussed in Parts II and III of the Note.

D. The Fourth Circuit Reverses the District Court

Cooksey appealed the district court's ruling.[38] A three-judge panel of the Fourth Circuit Court of Appeals reversed the decision, finding that Cooksey had standing to challenge and that the issues of his case were ripe.[39] Unlike the district court, the Fourth Circuit's analysis explicitly considered Cooksey's claim under the "somewhat relaxed" standards utilized in First Amendment cases.[40]

The court declined to discuss the merit of the non-Article III issues of Cooksey's claim, despite the State Board's contentions that regulation of Cooksey's speech was clearly within the bounds of its authority.[41] The court stated that the State Board's arguments "put the merits cart before the standing horse" and thus could not be used to support dismissing the case for lack of justiciability.[42]

Cooksey had sufficiently met the burden of showing a justiciable "injury in fact" due to his self-censorship after being contacted by the board.[43] His injuries were thus more than merely "hypothetical."[44] The court also analyzed the ripeness question in a similar method, reasoning that "[o]ur ripeness inquiry, however is inextricably linked to our standing inquiry," and also found for Cooksey on this element.[45]

The court looked to three specific actions of the State Board in making its determination: the phone call directly from the "highest executive official" who referenced her statutory authority to bring action against Cooksey if he did not comply; the "red-pen mark-up" and its accompanying statement; and the letter from the State Board informing

38. *See* Cooksey v. Futrell, 721 F.3d 226, 234 (4th Cir. 2013). Retired Supreme Court Justice Sandra Day O'Connor was part of the three judge panel. *Id.* at 229.

39. *See id.* at 241.

40. *See id.* at 235 ("[S]tanding requirements are somewhat relaxed in First Amendment cases . . . .").

41. *See id.* at 239.

42. *Id.* (quoting Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1093 (10th Cir. 2006)).

43. *Id.* at 235.

44. *Id.* at 237 ("A person of ordinary firmness would surely feel a chilling effect—as Cooksey did.").

45. *Id.* at 240.

Cooksey that his situation would continue to be "monitor[ed]."[46] The court thus concluded that Cooksey had faced "a non-speculative and objectively reasonable chilling effect of his speech due to the actions of the State Board."[47] Since it found that Cooksey had sustained an injury in fact, the court quickly dispensed with the requirements of causation and redressability.[48]

Moving on to the ripeness of the claim, the court disagreed with the State Board's argument that, because it had not taken any actions against Cooksey yet, it had not determined whether the state statute applied to his online activity.[49] Utilizing analysis as it did with standing, the court looked to the language of the State Board's communication with Cooksey and found that the State Board had used threatening language against him.[50]

The court stated that the Board had "already, through its executive director, manifested its views that the Act applies to Cooksey's website, and that he was required to change it in accordance with the red-pen review or face penalties."[51] The court said that this use of threatening language meant that the Board had actually already determined that Cooksey's actions were prohibited under the statute, and thus found Cooksey's claim ripe for adjudication.[52] Having found both standing and ripeness, the court concluded that Cooksey's claim met the requirements for judiciability and remanded the case for review on the merits by the district court.[53]

II. ARTICLE III ISSUES

To better understand the issues that were relevant in *Cooksey*, it is helpful to explore the background of Article III standing and ripeness requirements in federal courts. There are looser requirements for both

46. *Id.* at 236–37.
47. *Id.* at 236.
48. *Id.* at 238.
49. *See id.* at 240.
50. *See id.* at 241.
51. *Id.*
52. *Id.*
53. *Id.* At the time of this Note's publication, the district court has not ruled on the substance of Cooksey's complaint.

standing and ripeness in First Amendment cases that complicate this analysis. Since this jurisprudence is somewhat unclear about how to handle informal communications from agencies (like the situation in Cooksey), this section will also look at how analogous situations were treated in the courts.

A. Standing in First Amendment Jurisprudence

Article III of the United States Constitution provides for federal jurisdiction only where disputes have matured into "cases" and "controversies."[54] This "case-or-controversy" doctrine "identifies disputes appropriate for judicial resolution."[55] The Supreme Court has referred to this as a "fundamental" and "bedrock" principle of the federal judiciary.[56] As part of this principle, federal courts place the burden on the plaintiff to establish standing in his or her case.[57] A plaintiff's case will not be heard if his or her claims are "imaginary or speculative."[58]

The Supreme Court's decision in *Lujan v. Defenders of Wildlife*[59] explicitly lays out a tripartite test for meeting this standing requirement.[60] According to this test, the plaintiff must first establish that he has sustained an "injury in fact."[61] This injury must be "an invasion of a legally protected interest" which is both "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'"[62] Secondly, there must be a causal link between the conduct complained of and the injury sustained by the plaintiff. This injury must be "fairly traceable" to

54. U.S. CONST. art. III. *See also* Baker v. Carr, 369 U.S. 186, 198 (1962) ("In the instance of lack of jurisdiction the cause either does not 'arise under' the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2), or is not a 'case or controversy' within the meaning of that section; or the cause is not one described by any jurisdictional statute.").

55. Miller v. Brown, 462 F.3d 312, 316 (4th Cir. 2006).

56. *See* Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir. 1996).

57. *See* Cooksey v. Futrell, 721 F.3d 226, 234 (4th Cir. 2013).

58. *See* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979).

59. 504 U.S. 555 (1992).

60. *Id.* at 560.

61. *Id.*

62. *Id.*

the defendant's alleged actions.[63] The actions must not be those of outside parties other than the defendant.[64] Third and finally, it must be likely (as opposed to merely speculative) that the injury sustained by the plaintiff will be remedied by the court's favorable decision.[65]

However, in cases involving First Amendment claims, courts have a more relaxed view of standing requirements.[66] The Supreme Court applies this lower standard because government actions have the potential of "chilling" expressive activity in our democratic society.[67] The Supreme Court has held that "the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged."[68] This relaxed standard primarily affects the first prong of the standing test: "an invasion of a legally protected interest," also known as the "injury in fact" requirement.[69]

In order to satisfy this element in First Amendment cases, a plaintiff must generally show "self-censorship, which occurs when a claimant is chilled from exercising her right to free expression."[70] Although this relaxes the strictness of normal, federal standing doctrine, it is not a *carte blanche* for First Amendment plaintiffs to use hypothetical situations as a basis for federal subject matter jurisdiction. Plaintiffs must show that the government threat to their speech presents a "specific present objective harm or a threat of specific future harm."[71] The Supreme Court has specifically and emphatically stated that mere "subjective chill" is not a basis for standing.[72]

In order for a plaintiff to have standing to challenge government actions in First Amendment cases, she must show self-censorship which was caused by a specific governmental threat of future or actual

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63. *Id.* at 590 (Blackmun, J., dissenting) (citing Allen v. Wright, 468 U.S. 737, 751 (1984)).

64. *Id.* at 562.

65. *Id.* at 560.

66. *See* Secretary of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947, 956 (1984).

67. *See* Laird v. Tatum, 408 U.S. 1, 11 (1972).

68. *See Joseph H. Munson Co.*, 467 U.S. at 956.

69. *See* Benham v. City of Charlotte, N.C., 635 F.3d 129, 135 (4th Cir. 2011).

70. *Id.*

71. *Laird*, 408 U.S. at 14.

72. *Id.* at 13–14.

government activity. Since standing is a threshold question, courts do not consider the merits of the underlying complaint or the likelihood of the plaintiff's success, because doing so would be putting "the merits cart before the standing horse."[73]

B. Ripeness

Ripeness analysis considers "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration."[74] Like standing, ripeness analysis is relaxed in the First Amendment context.[75] Because of these relaxed requirements, the *Cooksey* court stated that in its case, "standing and ripeness should be viewed through the same lens."[76] "First Amendment rights . . . are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment claims ripe, often commenting directly on the special need to protect against any inhibiting chill." [77]

C. Using "Informal" Communication

While this First Amendment framework seems relatively straightforward at first blush, its application can be somewhat confusing, especially in the context of government enforcement activity that has not yet occurred. In fact, the first Supreme Court case to identify the inadequacy of a mere "chilling effect," *Laird v. Tatum*,[78] dealt with precisely this issue. In *Laird*, several American groups that were under military surveillance brought a class action suit, stating that the military activity had a chilling effect on the exercise of their First Amendment rights.[79] There, the Court held that a subjective fear of future action was

73. *See* Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1093 (10th Cir. 2006).

74. Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003).

75. *Cooksey*, 721 F.3d at 240.

76. *Id.*

77. *Id.* (citing New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1500 (10th Cir.1995)).

78. 408 U.S. 1 (1972).

79. *Id.* at 3.

not enough to establish standing under the "case or controversy" requirement of the Constitution.[80] These subjective 'chills' are not sufficient to replace a "specific present objective harm or a threat of specific future harm," because "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions."[81] By analyzing subjective chills, the courts would be inappropriately crossing the line into those forbidden advisory opinions.

In Fourth Circuit courts, two other cases involving these "informal" government actions have reached two very different decisions despite factual similarities to the issues presented in *Cooksey*.[82] While initially discordant, the results point toward the existence of something of a test for similar cases dealing with informal government actions. To summarize this test: First, the plaintiffs must show that they are in the class of individuals that could be harmed by the future government action.[83] Second, the plaintiff must show that they are under an individualized threat for the law's enforcement.[84]

In the first case, *North Carolina Right to Life, Inc. v. Bartlett*,[85] the Fourth Circuit faced the question of whether a North Carolina state law regulating electioneering activities unconstitutionally infringed upon the rights of an issue advocacy group.[86] The challenged law stated that groups seeking to influence elections must register with the state and file certain reports or face legal consequences.[87] A pro-life group that distributed voting guides based on politicians' views on abortion issues utilized a provision in the law that allowed interested parties to ask for guidance from the state authority.[88] The group asked whether its planned voter guide mailings would fall under the scope of forbidden activities.[89] After the head of the elections authority replied that the asked-about

80. *See id.* at 13–14.

81. *See id.*

82. *See* N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999); Int'l Acad. of Oral Med. & Toxicology v. N.C. State Bd. of Dental Exam'rs, 451 F. Supp. 2d 746 (E.D.N.C. 2006).

83. *See Bartlett*, 168 F.3d at 710.

84. *See Int'l Acad. Of Oral Med. & Toxicology*, 451 F. Supp. 2d at 753.

85. 168 F.3d 705 (4th Cir. 1999).

86. *Id.* at 705–06.

87. *Id.* at 712 (citing N.C. GEN. STAT. § 163-278.7(b) (2009)).

88. *Id.* at 709.

89. *Id.*

actions appeared to be within the scope of the statute, the group filed suit in federal court, challenging the law on First Amendment grounds.[90]

There, as in *Cooksey*, the Fourth Circuit quickly rejected the state's argument that there was no case or controversy at hand.[91] North Carolina claimed that it had not yet formally interpreted the plaintiff's actions to be illegal and disclaimed any intentions of prosecuting the theoretical activity.[92] However, the court found that the plaintiffs fell within the scope of regulated activity within the terms of the statute.[93] Furthermore, there was evidence of an individualized harm or threat to the group.[94] Significantly, they had written to the state board, and stated that their correspondence established a well-founded threat against their planned activities.[95] As a result of that threat, there was an actual chilling of speech, despite the lack of formal enforcement of the law against North Carolina Right to Life.[96]

The Fourth Circuit was not impressed with North Carolina's argument that it did not interpret the statute to encompass North Carolina Right to Life's activity.[97] The court found that this argument was "nothing more than the State's promise" that North Carolina would pursue the group for violating of the law.[98] Without a statutory, regulatory, or judicial guarantee, the group would "suffer from the reasonable fear that it can and will be prosecuted."[99] Thus, the Fourth Circuit found that North Carolina Right to Life was a group within the regulated class, and had experienced a particularized threat that had chilled its expressive activity.[100]

In this analysis, the state regulator's "informal" opinion served as substantial proof that they considered the group's activities to be within the reach of its authority because the informal opinion was aimed at stopping their activity. If the state authorities had not determined

90. *Id.*
91. *See id.* at 711.
92. *See id.* at 710.
93. *See id.*
94. *Id.*
95. *See id.* at 711.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *See id.* at 710–11.

whether or not they considered the expressive activity to be within the scope of their authority, they would not have sent a letter that stated otherwise.[101] Since the state authorities believed that they could regulate the group's activity, the letters then served to prove that an objective person would view this as a credible government threat.[102]

On the other hand, in *International Academy of Oral Medicine & Toxicology v. North Carolina State Board of Dental Examiners*,[103] a dental group's First Amendment challenge to a North Carolina prohibition on certain types of dental advertisements failed. [104] There, the North Carolina dental regulator had published a list of "Do's and Don'ts" regarding dental advertising in one of its periodical publications.[105] This list in part contained several statements such as "Don't advertise that you practice 'Mercury–Free Dentistry,' 'Metal–Free Dentistry,' or that you should 'Eliminate your exposure to Mercury,' or that 'Silver fillings contain mercury that may leak into your body and cause health problems,' or make any reference that mercury fillings are harmful."[106] Mercury related advertisements were not banned by statute or regulation, and the dental regulators had never issued any formal prohibition against this type of activity.[107] However, a broader regulation did give the regulator authority to prohibit false or misleading advertising through regulations and enforcement actions.[108]

A group of dentists who practiced mercury- and metal-free dentistry then wrote to the state regulator, asking whether their advertisements would be prohibited.[109] The head of the regulating body stated that the agency had never prosecuted a dentist who had advertised that he had a mercury- or metal-free practice as long as that statement was accurate.[110] Unlike the communication in *Cooksey* or *North Carolina*

101. *Id.*
102. *Id.*
103. 451 F. Supp. 2d 746 (E.D.N.C. 2006).
104. *Id.*
105. *Id.* at 749.
106. *Id.*
107. *See id.* at 750.
108. *See* 21 N.C. ADMIN. CODE 16P.0101 (2013).
109. *See Int'l Acad. of Oral Med.*, 451 F. Supp. 2d at 751.
110. *Id.*

Right to Life, the regulator did not threaten any regulatory action or indicate that it considered the dentists' activity to be problematic.[111]

The dentists then filed suit in federal court, which rejected their claims for a lack of ripeness.[112] The district court decided to give the North Carolina regulator time to interpret the statute before ruling on the constitutionality of its application to the plaintiffs.[113] The court reasoned that: "[p]ostponing consideration in this case has the advantage of permitting North Carolina authorities to construe governing North Carolina statutes and regulations."[114] Further, "[h]ow the state authorities construe these provisions could 'materially alter the question to be decided.'"[115]

Thus, the court gave different weights to the regulators' two different informal communications.[116] The "Do's and Don'ts" list was treated dismissively, while the letter from the regulating agency was treated with deference.[117] Despite the fact that the plaintiffs were dentists, and thus within the scope of the statute, the letter established that they were not under any particular threat of enforcement action from the regulator.[118] As a result, the plaintiffs could not demonstrate a harm, which then prevented them from establishing ripeness.[119]

The Sixth Circuit Court of Appeals' decision in *Berry v. Schmitt*[120] shows that a plaintiff can beat back standing and ripeness challenges if government communications are directed at her individually and threaten her harm if she continues her expressive activity. In *Berry*, an attorney had received a "warning letter" from the Kentucky Bar Association Inquiry Commission after the attorney had publicly criticized the handling of an investigation by a legislative ethics commission.[121] The Commission communicated to the plaintiff that it believed that he had violated rules governing professional conduct by

111. *See id.*
112. *See id.* at 752.
113. *See id.* at 751–52.
114. *Id.*
115. *Id.* at 752.
116. *See id.* at 746–51.
117. *See id.*
118. *See id.* at 751.
119. *See id.* at 755.
120. 688 F.3d 290, 295 (6th Cir. 2012).
121. *See id.* at 294–95.

attorneys.[122] The regulation at hand prevented attorneys from making "[a] statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer."[123]

That letter, as well as a second "supplemental" letter, also warned the plaintiff against continuing his criticisms.[124] The letter was apparently not a method of formal discipline, and would be destroyed after one year in the attorney's file.[125] In his complaint challenging the Bar's actions, the attorney alleged that he wished to continue in his critiques of the legislative commission, but the letter from the Bar Association had chilled his speech.[126]

The Sixth Circuit determined that Berry had sustained an injury in fact because he "received what amounts to a credible threat of enforcement" in the form of the warning letter.[127] Much like in *North Carolina Right to Life*,[128] the Sixth Circuit rejected the Kentucky Bar Association's claims that it would not pursue enforcement despite its letter indicating the contrary.[129] The Sixth Circuit also rejected the Kentucky Bar's contention that it had not issued a formal determination about the plaintiff, stating that "[t]he injury here is not actual discipline, but rather chill caused by the threat of discipline."[130] Again, the court never stated this rationale in the form of a test, but merely utilized the communications as part of an analysis of whether there had been an objectively reasonable "chill" of the plaintiff's speech.[131] In sum, the Sixth Circuit used the Kentucky Bar Association's warning letters to

122. *Id.*

123. *Id.* at 295 (quoting Ky. Sup. Ct. R. 3.130(8.2(a))).

124. *See id.* at 297.

125. *Id.* at 295.

126. *Id.* at 297–300.

127. *Id.* at 297.

128. *See* North Carolina Right v. Bartlett, 168 F.3d 705, 711 (4th Cir. 1999) ("NCRL is left, therefore, with nothing more than the State's promise that NCRL's officers will face no criminal penalties if NCRL distributes its voter guide without registering as a political committee. NCRL's First Amendment rights would exist only at the sufferance of the State Board of Elections.").

129. *See Berry*, 688 F.3d at 297.

130. *Id.* at 298.

131. *See id.* at 297 ("Given the current KBA position, it would be reasonable for Berry not to rely on the KBA's promises regarding future enforcement.").

establish that the plaintiff's expressive conduct would result in future disciplinary action if continued, an "injury in fact."[132]

III. FIRST AMENDMENT "RETALIATION" CLAIMS WITH ANALOGOUS SITUATIONS

Considering the relative paucity of similar cases, it may be helpful to look at First Amendment retaliation jurisprudence for guidance. These cases involve retaliatory government action in response to a critic's expressive activity.[133] Unlike *Cooksey,* these cases are not generally about the questionable extent of a statute or regulation.[134] Instead, these cases are about persons in power who will use other retaliatory mechanisms in the government's arsenal to retaliate against the speaker.[135] In both retaliation cases and in cases like *Cooksey*, government officials often convey their retaliatory intent through informal or "off the cuff" comments.

In retaliation cases, the Fourth Circuit utilizes a three-pronged test to analyze the validity of the claim.[136] First, there must be a showing that the expressive activity is protected.[137] Second, the plaintiff must show that the alleged retaliation negatively affected his or her expressive activity.[138] Analysis of the second element utilizes a reasonableness test to see whether a plaintiff's expressive activity was chilled due to a government official's actions.[139] Third, there must be a causal relationship between the plaintiff's expressive activity and the government's retaliation.[140]

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132. *See id.* at 296–98.

133. *See* Blankenship v. Manchin, 471 F.3d 523, 528 (4th Cir. 2006) (discussing the three-part standard for retaliatory government action claims).

134. *See id.*

135. *See id.* at 528 ("Rather, because the alleged retaliation is in the nature of speech, we must first determine whether Manchin's remarks were threatening, coercive, or intimidating so as to intimate that punishment, sanction, or adverse regulatory action will imminently follow.") (footnote omitted) (internal quotation marks omitted).

136. *See* Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 686 (4th Cir. 2000).

137. *Id.*

138. *Id.*

139. *See* Blankenship v. Manchin, 471 F.3d 523, 528 (4th Cir. 2006).

140. *Id.*

In *Blankenship v. Manchin*,[141] the Fourth Circuit considered a claim brought by a coal mining executive, Don Blankenship, who had spent a considerable amount of his personal funds opposing a major bond initiative that was supported by West Virginia's Governor Joe Manchin.[142] At a public appearance supporting his initiative, Manchin made a public statement, recorded in a local paper, that he thought increased government scrutiny of Blankenship would occur as a result of his activity against the bond measure, saying "I think that [additional scrutiny] is justified now, since [Blankenship] has jumped in there [the bond debate] with his personal wealth trying to direct public policy."[143]

Blankenship brought a claim in federal court alleging that his companies were being targeted by West Virginia regulators as a result of these comments.[144] The Court of Appeals for the Fourth Circuit found it reasonable to view Manchin's statement as a threat of imminent adverse regulatory action against Blankenship in retaliation for his expressive activity. The specific alleged retaliation was heightened regulatory scrutiny of Blankenship's business.[145] Despite the "off the cuff" nature of Manchin's remarks, the court found that Manchin's words confirmed that his opponent was targeted as a result of his expressive activities.[146]

Conversely, in *Baltimore Sun Co. v. Ehrlich*,[147] the *Baltimore Sun* unsuccessfully brought suit alleging retaliatory action from the Maryland Governor's Office as a result of its investigative pieces.[148] There, the only alleged injury was that state communications officials refused to return the plaintiff's phone calls and declined to speak with the newspaper outside of public press conferences and public records

141. 471 F.3d 523 (4th Cir. 2006).

142. *See id.* at 525.

143. *Id.* (alteration in original) (quoting Ken Ward Jr., *Manchin Still Sparring over Pension Bond Bid*, CHARLESTON GAZETTE, June 18, 2005, at 6C).

144. *Id.* at 527.

145. *See id.* at 526–27 ("On June 30, 2005, the West Virginia Department of Environmental Protection (DEP) approved a Massey permit application to build a coal silo in Raleigh County, West Virginia. Despite the approval, Manchin allegedly ordered members of his staff to meet with DEP and other regulatory officials to investigate possible safety concerns with regard to the silo site.").

146. *See id.* at 530.

147. 437 F.3d 410 (4th Cir. 2006).

148. *Id.* at 421.

requests.[149] Because the Tenth Circuit found the Governor's retaliation a "de minimis inconvenience," it refused to let the claim go forward since the plaintiff could not show an actionable claim.[150] While this is not exactly the same as the "injury in fact" in the previously discussed cases, the analysis is similar because there has to be more than a "de minimis" inconvenience to the party involved.[151]

Outside of official press releases and press conferences, reporters depend on relationships with government officials for information. However, the court refused to find that these relationships and the privileges they bring are a "right" belonging to reporters; the end of a productive relationship is not actionable.[152] The reporters here could not show that they had been denied access to public events or that the government had used any regulatory mechanisms against them.[153] The Tenth Circuit also found that the reporters had "not been chilled from expressing themselves," determining that an ordinary person would not have been chilled in that situation either.[154]

Blankenship and *Baltimore Sun* illustrate two things about how informal government communication can be used to establish standing and ripeness.[155] First, as in *Blankenship* with Manchin's comments directed at the business leader, the government's informal communications must be targeted at the individual plaintiff.[156] However, as *Baltimore Sun* illustrates in an analogous situation, individual targeting is not sufficient, in and of itself, to establish Article III standing because the actions taken by the government must be sufficient to cause

149. *Id.* at 413–14.

150. *Id.* at 419 ("[W]e also conclude that the adverse impact of such conduct is objectively de minimis. It would be inconsistent with the journalist's accepted role in the 'rough and tumble' political arena to accept that a reporter of ordinary firmness can be chilled by a politician's refusal to comment or answer questions on account of the reporter's previous reporting.").

151. *See id.* at 418.

152. *See id.* at 414.

153. *See id.* The governor's retaliatory actions seemed limited to refusing to return phone calls or call on the journalists at press conferences, as the journalists continued to receive information about public events and their requests for public records were still fufilled as required under Maryland law. *See id.*

154. *Id.* at 419.

155. *See* Baltimore Sun Co. v. Ehrlich, 437 F.3d 410, 419 (4th Cir. 2006); Blankenship v. Manchin, 471 F.3d 523 (4th Cir. 2006).

156. *See Blankenship* , 471 F.3d at 532.

a chilling effect.[157] Once targeting is established, the plaintiffs must be able to point towards some threatened regulatory or other government action that would come as a consequence of their speech.[158]

In *Blankenship*, the plaintiff could demonstrate that Governor Manchin's actions were backed up with official, consequential government action through increased scrutiny of the speaker's highly regulated coal mining interests.[159] However, the *Baltimore Sun* reporters could not point towards a non- "*de minimis*" official government action that was taken or threatened against them.[160] This principle can be taken into account in cases such as *Cooksey*. The informal speech must be targeted towards the speaker, and it should implicitly or explicitly include a threat that would chill the speaker from continuing his or her expressive activity.

IV. PROPOSED ANALYTICAL FRAMEWORK AND ANALYSIS

Tying together the strands of thought from previous cases, in cases such as *Cooksey*, a plaintiff bringing a First Amendment action must show that an agency or official has communicated with her through unofficial or informal means about the consequences of expressive activity. The plaintiff can then use that communication to establish standing and ripeness, but only if that communication would convey to a reasonable person that the plaintiff's activity would attract future adverse action from the government, chilling his expressive activity.

A. The Proposed Framework

Although never formally stated, courts consistently use informal communications as a basis for meeting Article III requirements where these government communications give a well-founded basis for a future individualized harm against the plaintiff were they to continue their expressive activities. For example, in *North Carolina Right to Life*, the court used the election agency's informal opinions and communications

157. *See Baltimore Sun*, 437 F.3d at 418–19.
158. *See* Cooksey v. Futrell, 721 F.3d 226, 236 (4th Cir. 2013).
159. *See Blankenship*, 471 F.3d at 530.
160. *Baltimore Sun*, 437 F.3d at 419.

to establish that the government considered the plaintiff's contemplated actions to be unlawful, and as a result, the plaintiff would likely suffer prosecution if it continued with its planned voter-guide distribution.[161] In *Berry*, the court used the Kentucky Bar Association's letters to the plaintiff to establish that the plaintiff was under the threat of further sanction from the KBA were he to continue criticizing the actions of the legislative committee.[162] In both cases, the courts rejected the authorities' later contentions that they did not intend to enforce any measures against the plaintiffs in the future.[163]

Blankenship is also illustrative even though it does not involve a challenge to laws or statutes.[164] While simply an "off the cuff" remark, Governor Manchin's prediction of government scrutiny of the plaintiff's business interests gave the plaintiff a reasonable and established belief that the subsequent government action was due to his expressive activity.[165] Again, it was difficult to backtrack and state that this subsequent action was not based on Blankenship's speech activities.[166]

Cooksey fits appropriately into this framework. There, the State Board's communications directly established that the plaintiff's Paleolithic dietary advocacy was under the regulatory scope of the State Board's authority.[167] Communications from the Board repeatedly stated that certain portions of Cooksey's diabetes website, specifically a "Dear Abby"-style[168] advice column, the paid mentoring program, and the act of putting his Paleo-style "meal plan" on his website, were counseling services which could not be provided in North Carolina without a license from the State Board.[169] The court rejected the State Board's later claim that it had not yet determined the regulatory extent of its powers over online blogs.[170] The Fourth Circuit found that the State Board's

161. *See* N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 710 (4th Cir. 1999).

162. *See* Berry v. Schmitt, 688 F.3d 290, 298 (6th Cir. 2012).

163. *See id; N.C. Right to Life, Inc.*, 168 F.3d at 705.

164. *Blakenship*, 471 F.3d at 527–28.

165. *See id.* at 529.

166. *Id.*

167. *See* Cooksey v. Futrell, 721 F.3d 226, 237 (4th Cir. 2013).

168. Referring to a column where readers write to the columnist with individual problems, which the author attempts to solve with a short, published response.

169. *Id.* at 232–33.

170. *See id.* at 231.

communications to Cooksey showed that they considered his actions to be within their regulatory scope and created a ripe claim for adjudication.[171]

The Fourth Circuit also pointed towards the specific future harm that Cooksey could expect if he did not halt his expressive activity.[172] Namely, the State Board repeatedly told Cooksey that his actions were being monitored for future compliance.[173] Cooksey was never informed in these communications about the uncertainty of his case or any prospect for his activities to avoid future scrutiny due to regulatory determinations.[174] Rather, he was simply told, in no uncertain terms, that his activities were not allowed under North Carolina law.[175] As such, he could point towards an objectively reasonable future harm if he continued his activity, and as a result, he self-censored.[176]

B. Rationale for Establishing a Formal Framework

Formally adopting this, or a similar framework, would have two distinct benefits. First, there would be faster adjudication of underlying issues, as illustrated in *Cooksey*, where there has not, as of the time of publication, been a determination of the underlying issues of the plaintiff's complaint. Cooksey, who may or may not have a valid claim, has had to wait in legal limbo for years while standing issues are addressed.[177] Second, by making a clear statement of how to deal with informal government actions, the courts prevent the erosion of First Amendment standing that comes from unclear caselaw. The North Carolina branch of the American Civil Liberty Union's amicus brief in

171. *Id.* at 236–37.

172. *Id.* at 236.

173. *Id.* at 237.

174. *See id.* at 236.

175. *Id.* at 232 (quoting an email from the Board to Cooksey: "You should not be addressing diabetic's specific questions. You are no longer just providing information when you do this, you are assessing and counseling, both of which require a license.").

176. *See id.* at 235.

177. Cooksey's issues with the board began two years ago. *See id.* at 231.

Cooksey succinctly described the future consequences of adopting the *Cooksey* district court's strict standing analysis.[178]

As explained in the brief, an adverse ruling would have the effect of encouraging regulators and other state entities to act similarly to the regulators in Cooksey's case.[179] Regulators could act outside the bounds of the law by threatening potentially protected activity with legal consequences. To many individuals, this would seem like formal government activity, and a large number of people would likely be frightened by the prospect of government enforcement. Even if a targeted individual were inclined to challenge the government, the potential costs of a legal case would be a high barrier to plaintiffs who, unlike Cooksey, were unable retain pro bono legal services. However, even if a plaintiff was able to retain counsel, the government would be able to use supposedly informal activity to block them from having the standing necessary to access the adjudicative power of Article III courts.

These effects would be keenly felt in North Carolina, which explicitly encourages informal conflict resolution between agencies and citizens in its Administrative Procedures Act.[180] In its relevant part, the Act states that it "is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through *informal* procedures."[181] By not firmly stating how to treat informal government actions, courts risk allowing this type of unchecked administrative power to undermine expressive activity. In effect, this stricter mode of analysis would encourage more informal, quiet government acts such as the one experienced by Cooksey.

C. Potential Critiques of the Proposed Framework

A reasonable question arises from the above analysis: if the above cases were decided using the same objective person, "more than a subjective chill" framework, then why should courts abandon that

178. Brief for ACLU of North Carolina Legal Foundation as Amicus Curiae Supporting Plaintiff-Appellant at 13–14, Cooksey v. Futrell, 721 F.3d 226 (4th Cir. 2013) (No. 12-2084).

179. *Id.*

180. *See* N.C. GEN. STAT. § 150B-22 (1991).

181. *Id.* (emphasis added).

method of analysis for a new test? Indeed, an entire legal movement, Legal Realism, sprung up in rebellion to what its supporters viewed as "mechanical jurisprudence," the methodical application of tests.[182]

However, this Note does not advocate for mere "mechanical" application of any sort of test. This is simply a proposed analytical framework that would allow future courts to quickly proceed through analysis of First Amendment standing issues involving hypothetical government actions, advisory letters and opinions, and other informal measures that are present in cases such as *Cooksey*. The broader scope of First Amendment jurisprudence is not touched or affected because this proposed framework is a logical extension of First Amendment jurisprudence. Additionally, by leaving an "objective person" test within the framework, courts will retain a considerable amount of freedom to reject cases that might otherwise fit the framework but are facially ridiculous.

Other critiques are possible. In a law review article discussing the challenges surrounding pre-enforcement standing generally, David Hardy nicely stated the dilemma posed by these standing issues:

> When courts adopt too broad a view of standing, there arises a risk that they will become enmeshed in a debate over statutes that have no real effect. Too narrow a view poses the danger that statutes of dubious constitutionality will chill the exercise of rights because no one will risk incurring criminal penalties to test them.[183]

This proposed analytical framework is certainly vulnerable to the charge that it does not encompass enough types of government communications in its consideration of what constitutes an objectively

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182. *See, e.g.*, Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 620–21 (1908) ("The nadir of mechanical jurisprudence is reached when conceptions are used, not as premises from which to reason, but as ultimate solutions. So used, they cease to be conceptions and become empty words.").

183. *See* David T. Hardy, *Standing to Sue in the Absence of Prosecution: Can A Case Be Too Controversial for Case or Controversy?*, 30 T. JEFFERSON L. REV. 53, 53–54 (2007).

reasonable fear of future government action.[184] For example, consider *International Academy of Oral Medicine & Toxicology v. North Carolina Board of Dental Examiners*,[185] which likely would continue to result in the denial of standing under this framework. It seems incongruous to admit standing to individuals such as Cooksey, who have been told that their communication is forbidden and could result in regulatory action,[186] while denying standing for plaintiffs such as the one in *International Academy of Oral Medicine & Toxicology*, where a list of "Do's and Don'ts" was published with the reminder that "failure to comply with the advertising Rules will result in disciplinary action by the Board."[187]

The list included a "Don't" that directly involved the plaintiff: "Don't advertise that you practice 'Mercury–Free Dentistry,' 'Metal–Free Dentistry,' or that you should 'Eliminate your exposure to Mercury,' or that 'Silver fillings contain mercury that may leak into your body and cause health problems,' or make any reference that mercury fillings are harmful."[188] However, because the warning was in a magazine that was apparently sent to the entire North Carolina dental practice and not to the plaintiffs specifically, plaintiffs still would not have an objective pre-enforcement fear because the dentist himself was not targeted specifically for enforcement or informal communication, and the advertisement was in the form of a generalized warning.[189] The result for the plaintiffs seems unjust, considering that, as in *Cooksey*,[190] *North Carolina Right to Life*,[191] and *Berry*,[192] the state regulator had effectively concluded that the practice in question (using the terms

184. *See supra* notes 2–4 and accompanying text.

185. 451 F. Supp. 2d 746 (E.D.N.C. 2006).

186. *Cooksey*, 721 F.3d at 236–37 (4th Cir. 2013) ("Cooksey *was told*, in effect, that he would remain under the watchful eye of the State Board . . . . A person of ordinary firmness would surely feel a chilling effect . . . .") (emphasis added).

187. *Int'l Acad. of Oral Med. & Toxicology*, 451 F. Supp. at 749 (quoting The Dental Forum 11 (First Quarter 2005)).

188. *Id.* (quoting The Dental Forum 11 (First Quarter 2005)).

189. *See id.* at 751.

190. *See* Cooksey, 721 F.3d at 236–37.

191. *See* N. C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 711 (4th Cir. 1999).

192. *See* Berry v. Schmitt, 688 F.3d 290, 297 (6th Cir. 2012) ("[T]he warning letter implied a threat of future enforcement that elevated the injury from subjective chill to actual injury.").

"metal-free" or "mercury-free" in dental advertisements) was a clear enough violation of state law to inform the plaintiffs of that decision via the newsletter.[193] However, because the regulator informally communicated with the entire practice of dentistry in North Carolina—not just the plaintiffs—and had not threatened enforcement, the plaintiffs did not have a valid claim.[194] This seems to preclude a ripe challenge and an injury in fact by making enforcement much more hypothetical.

Publicizing the determination to this extent would logically have a much broader impact on more speakers than just one individual targeted for particular scrutiny from a regulator, as in *Cooksey* and some of the other cases. However, under past case law and the current framework, the plaintiff would not be able to have standing or ripeness because he had no particularized fear that the requirement would prospectively be enforced against him. Thus, the dental regulator was able to escape judicial scrutiny simply by giving vague replies to the plaintiffs in their communications. This might have given some assurance to the specific plaintiffs in this instance, but the rest of the practice of dentistry in the state could have operated under the assumption that the "Dos and Don'ts" list was a statement of official policy that needed to be followed, potentially chilling expressive activity.[195]

This effectively allows the scenario warned about by the American Civil Liberties Union's amicus brief in *Cooksey*, where regulators escape scrutiny by "clearly communicating that individual speech runs afoul of the law, requesting its removal, and identifying legal consequences in the absence of compliance, all without the check of judicial review."[196] However, this is more of a function of the nature of Article III issues than a particular flaw of this analytical framework. By requiring "cases or controversies" before adjudication of issues, hypothetical questions are avoided and real justiciable harms are addressed.[197] The approach undoubtedly has problems, but because the proposed test is a clarification rather than modification of existing

193. *Int'l Acad. of Oral Med. & Toxicology*, 451 F. Supp. 2d at 749 (describing the nature of *The Dental Forum* publication).

194. *See id.* (describing the nature of *The Dental Forum* publication).

195. *See id.*

196. *See supra* note 173.

197. *See* Laird v. Tatum, 408 U.S. 1, 12–14 (1972).

jurisprudence, its critique is beyond the scope of this Note. Allowing less "targeted" communication to pass the standing threshold may be worth discussing elsewhere.

Again, the proposed framework in this Note does not change precedent; it merely clarifies it and allows faster adjudication of standing issues in these informal communication scenarios. Although it can be argued that the courts should adopt a more inclusive concept of First Amendment standing, that argument is beyond the scope of this Note. The purpose of this framework is to have a clear statement, consistent with current jurisprudence, of how to analyze unofficial or informal government communications. The purpose of the test is two-fold. First, it enables courts to move beyond the initial issues in these scenarios in a faster manner and to the heart of the substantive issues. Instead of hearing arguments from the government on the official nature of their actions, the courts can more quickly move on to the underlying First Amendment issues of complaints. Second, it prevents courts from accidentally creating misleading standards that undermine the First Amendment, as Cooksey's case could have done had he not appealed.

This proposed analytical framework can also be criticized from the opposite approach—that it improperly allows standing where a regulatory body or authority has not yet made a final decision about the applicability of existing regulations to the topic. Generally, courts tend to give "considerable weight . . . to an executive department's construction of a statutory scheme it is entrusted to administer."[198] However, this proposed test arguably turns this deference on its head by allowing the courts to make a determination about the constitutionality of enforcing a law on a plaintiff where the relevant agency has not yet decided if the law applies. This could go against the very core of the Article III "case or controversy" requirement.[199]

Since *Laird*, the Supreme Court has not allowed "the federal courts established pursuant to Article III of the Constitution" to "render advisory opinions."[200] By ruling when a government agency has not yet determined whether the statute is applicable, courts could be effectively

198. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

199. *See Laird*, 408 U.S. at 14.

200. *Id.*

rendering those forbidden advisory opinions.[201] In a different reading of the State Board's actions in Cooksey's case, the informal communications issued by the government were not threats against an individual's freedom of speech. Instead, they were an agency's attempts to guide citizens and entities through complex regulatory fields or to warn them about from potentially problematic areas.[202] For example, the communications between the State Board and the plaintiff in *Cooskey* could truly have been the State Board's attempt to guide an individual through a potentially problematic area without resorting to a formal enforcement procedure.[203]

Not only could this test undermine the traditional deference to agency interpretations of statutes, it could also discourage prompt and inexpensive resolution of claims. Instead of trying to settle issues quickly and informally, this test would encourage regulators to bring formal claims against individuals like Cooksey to avoid unnecessary hassle around pre-enforcement First Amendment claims. This would result in increased costs to the state and to individuals, an inefficient outcome, and would also make more cut-and-dry cases take much longer to resolve.

However, these potential concerns are somewhat allayed by several factors. First, by retaining an "objective person" reasonableness test to prove injury and ripeness, the test would not permit a flood of hypothetical claims based on illogical fears of enforcement. Second, since the communications must be directed at individuals, regulatory agencies could avoid most claims simply by being careful with these types of communications. Where the agency has not made a final interpretation regarding whether a particular activity is forbidden or not, as is the case in *Cooksey*[204] and *International Academy of Oral Medicine & Toxicology*,[205] the regulatory agency could refrain from issuing letters in the first place and avoid these types of claims.

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201. *Id.*

202. This is basically what the State Board in *Cooksey* alleged. *See* Cooksey v. Futrell, 721 F.3d 226, 235 (4th Cir. 2013).

203. *See id.*

204. *See id.* at 241.

205. *See* 451 F. Supp. 2d 746, 751 ("In short, the Dental Board's official policy in relation to dentists discussing mercury-related issues in dentistry (whether in an advertisement or in a direct patient-dentist consultation) is not final.").

Additionally, this potential critique places an undue value on informal government actions. While these communications could save parties time and money, they undermine a culture of transparency in administrative agencies. Better to adjudicate claims in the open than to silently pressure and intimidate private persons into settling cases. This is especially true where it is unclear whether a statute even prohibits the targeted activity. If a particular activity is not banned, government activity that proscribes that activity is simply not going to be necessary in the first place. The courts have no reason to encourage government actions that curtail expressive activity.[206] This is especially true since the government's action in pressuring individuals illustrates that the government considers the activity to be prohibited.[207] Government agencies should not on one hand pressure, warn, and advise individuals on the consequences of their activity, and then be able to turn around and deny the finality of those informal or advisory opinions.[208]

V. CONCLUSION

In conclusion, the analyzed case law, including *Cooksey*, supports the proposition that courts have effectively been using an informal test when analyzing informal government actions in pre-enforcement cases. This test looks to how the informal communication is used. That pre-enforcement communication must establish that the government agency considers the questioned action to be within the scope of prohibited or regulated activity. The communication must also convey to the reasonable person that continuing that activity would result in government enforcement action, and as a result, the plaintiff has refrained from continuing his activity. Once the plaintiff establishes these elements, standing and ripeness are met.

Formally announcing this test would be a benefit to both plaintiffs and the courts by allowing a quicker adjudication of the underlying issue instead of repeatedly dealing with the nature of the government's activity. The test would also encourage government agencies to avoid discouraging activity that was not explicitly prohibited

206. *See supra* note 173.
207. *See Cooksey*, 721 F.3d at 236.
208. *Id.* at 236–37.

by statutes or regulations. Although the test is subject to criticism, it fits within the broader framework of First Amendment jurisprudence and is a viable framework going forward.