

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3  
4 August Term, 2018

5  
6 (Argued: October 30, 2018 Decided: March 20, 2020)

7  
8 Docket No. 18-474  
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12 Citizens for Responsibility and Ethics in Washington, Restaurant  
13 Opportunities Centers United, Inc., Jill Phaneuf, and Eric Goode,  
14

15 *Plaintiffs-Appellants,*

16  
17 v.

18  
19 Donald J. Trump, in his official capacity as  
20 President of the United States of America,  
21

22 *Defendant-Appellee.*  
23

24  
25 Before:

26  
27 JOHN M. WALKER, PIERRE N. LEVAL, *Circuit Judges*.<sup>1</sup>

28  
29 DEEPAK GUPTA, Gupta Wessler PLLC,  
30 Washington, D.C. (Jonathan E. Taylor,  
31 Joshua Matz, and Daniel Townsend,  
32 Gupta Wessler PLLC, Washington, D.C.;  
33 Joseph M. Sellers, Daniel A. Small,  
34 Cohen Milstein Sellers & Toll PLLC,

\_\_\_\_\_  
<sup>1</sup> Judge Christopher F. Droney, who was originally part of the panel assigned to hear this case, retired from the Court effective January 1, 2020. The remaining two members of the panel are in agreement regarding this order. *See* 28 U.S.C. § 46(d); 2d Cir. IOP E(b).

1 Washington, D.C.; Norman L. Eisen,  
2 Stuart C. McPhail, Adam J. Rappaport,  
3 Citizens for Responsibility and Ethics in  
4 Washington, Washington, D.C.;  
5 Laurence H. Tribe, Harvard Law School,  
6 Cambridge, MA, on the brief), *for*  
7 *Plaintiffs-Appellants*.

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9 HASHIM M. MOOPPAN, Department  
10 of Justice, Washington, D.C., (Chad A.  
11 Readler, Michael S. Raab, Megan  
12 Barbero, Department of Justice,  
13 Washington, D.C., on the brief), *for*  
14 *Defendant-Appellee*.

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16 PER CURIAM:

17 It is hereby ORDERED that the chapter of the panel opinion of September  
18 13, 2019 captioned “Zone of Interests” is amended by deleting the passage from  
19 its fourth paragraph (beginning “The district court’s analysis erred on the  
20 merits . . .”) to the end of the chapter. The chapter is further amended in the  
21 first and second paragraphs so that they are consistent with the above deletion,  
22 and at the end of the chapter by addition of a footnote acknowledging and  
23 explaining the deletion. The chapter in amended form shall read as follows:

24 ii. Zone of Interests

25 The district court also erred in its reliance on the zone of  
26 interests test as a basis for finding lack of jurisdiction. The

1 Supreme Court has recently clarified that the zone of interests test  
2 is not a test of subject matter jurisdiction. In *Lexmark Int'l Inc. v.*  
3 *Static Control Components*, the Supreme Court, while  
4 acknowledging that past decisions had characterized the zone of  
5 interests test as part of a “‘prudential’ branch of standing,”  
6 reconsidered the question and clarified both that the “prudential”  
7 label is a misnomer and that the test does not implicate Article III  
8 standing. 572 U.S. 118, 126–27 (2014). Rather, the Court explained  
9 that the test asks whether the plaintiff “has a cause of action under  
10 the [law]” on the basis of the facts alleged. *Id.* at 128. The Court  
11 emphasized that the test is not “jurisdictional” because “the  
12 absence of a valid . . . cause of action does not implicate subject-  
13 matter jurisdiction.” *Id.* at 128 n.4 (internal quotation marks  
14 omitted). In *Bank of America v. City of Miami*, 137 S.Ct. 1296 (2017),  
15 the Court reaffirmed that the zone of interests test asks whether  
16 the complaint states an actionable claim under a statute (and not  
17 whether the plaintiff has standing and the court has subject matter  
18 jurisdiction). The *City of Miami* majority reiterated that the Article

1 III standing requirements are injury, causation, and redressability,  
2 and reinforced *Lexmark's* essential point that the zone of interests  
3 question is “whether the statute grants the plaintiff the cause of  
4 action that he asserts.” *Id.* at 1302.

5 Accordingly, while it had previously been appropriate to  
6 consider whether plaintiffs fall within the zone of interests in  
7 deciding whether a plaintiff has standing and the court has subject  
8 matter jurisdiction, the Supreme Court has unambiguously  
9 rejected that approach. The district court thus misconstrued the  
10 nature of the zone of interests doctrine.<sup>FN</sup>

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13 Footnote — The original published version of this opinion  
14 contained, in this chapter, a discussion of the merits of the zone-  
15 of-interests question. That discussion is deleted in order that it not  
16 serve as a precedent on the question whether the Complaint states  
17 a claim upon which relief may be granted. Because, under *Lexmark*,  
18 the merits of the zone-of-interests question do not bear on the  
19 court’s subject matter jurisdiction, that discussion had no  
20 pertinence to whether the district court erred in granting the  
21 President’s motion under Rule 12(b)(1).