No. 19-1778

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FEDERAL DEFENDERS OF NEW YORK, INC., on behalf of itself and its clients detained at the Metropolitan Detention Center-Brooklyn,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF PRISONS and WARDEN HERMAN QUAY, in his official capacity,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, CONSTITUTIONAL ACCOUNTABILITY CENTER, AND THE RUTHERFORD INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amici curiae* American Civil Liberties Union, New York Civil Liberties Union, Constitutional Accountability Center, and The Rutherford Institute state that they do not have parent corporations and have no stock. Thus, no publicly held corporation owns 10% or more of stock in any of the *amici curiae*.

Dated: August 21, 2019

By: */s/ Dror Ladin*
Dror Ladin

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The New York Civil Liberties Union ("NYCLU") is a state affiliate of the ACLU. For nearly a century, the ACLU and its affiliates have been at the forefront of efforts nationwide to protect the full array of civil rights and civil liberties. The ACLU and NYCLU therefore have a longstanding interest in enforcing constitutional constraints on the federal government's activities, whether they take place in jails or prisons, within our communities, or at the border. Because this case raises important questions regarding the availability of equitable relief to constrain unconstitutional conduct, its proper resolution is a matter of great concern to the ACLU, its affiliates, and its members. This case also presents important issues related to the Sixth Amendment right to counsel, a constitutional safeguard the ACLU and NYCLU have long sought to protect, both as direct counsel and as *amici curiae*. *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (ACLU as *amicus curiae*); *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010)

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for *amici curiae* certify that all parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amici curiae* further certify that no counsel for a party authored this brief in whole or in part and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

(NYCLU class action successfully challenging failure to provide counsel to indigent defendants).

Constitutional Accountability Center ("CAC") is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and in ensuring that, consistent with constitutional text, history, and values, there is meaningful access to the courts, so that constitutional violations can be remedied.

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties and filed numerous *amicus curiae* briefs in the federal Courts of Appeals and Supreme Court. The Rutherford Institute works to protect citizens against the abuse of authority by the government and its agents and to ensure that the courts are open to citizens to obtain redress for such abuse.

SUMMARY OF ARGUMENT

This case presents the issue of whether counsel for the accused—who have demonstrated Article III standing—have a cause of action to enjoin the government's violation of the Sixth Amendment. Plaintiff Federal Defenders of New York has alleged that, following an electrical fire at the Metropolitan Detention Center ("MDC"), Defendants Federal Bureau of Prisons and MDC Warden Herman Quay have suspended and restricted legal visits, depriving Plaintiff's clients of their counsel during the critical pre-trial period. In an effort to remedy this ongoing and unlawful interference with the right to counsel under the Sixth Amendment, Plaintiff sued to obtain an injunction requiring Defendants to permit regular attorney access at the MDC.

Despite finding that Plaintiff had suffered cognizable injury as a result of Defendants' conduct, the district court held that Plaintiff lacked a cause of action under the Sixth Amendment. The district court's reasoning is difficult to parse, relying on a citation to *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), and repeated assertions that "the right to counsel is a right that is personal to the accused." Order at 3-5, *Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons*, No. 19-cv-660 (E.D.N.Y. May 20, 2019), ECF No. 33. In its brief, Plaintiff addresses one possible explanation for the district court's

conclusion—that the court applied the zone-of-interests test set forth in *Lexmark*—and why dismissal of the Sixth Amendment claim on that basis is wrong.

Amici write to provide the Court with two additional bases for why the district court erred in dismissing the Plaintiff's Sixth Amendment claim. First, Plaintiff may sue to enjoin a violation of the Sixth Amendment because this constitutional claim sounds in equity. The equity jurisdiction of the federal courts—that is, their power to order injunctive relief—traces its history back to the English courts of equity. That pre-Founding equity jurisdiction, which was wholly inherited by our federal courts, included the power to order injunctive relief to restrain unlawful executive action. Consistent with this history, the Supreme Court has long recognized the federal courts' equitable power to enjoin unconstitutional government conduct.

Second, *amici* submit that the district court's repeated assertions that "the right to counsel is a right that is personal to the accused" indicate that it misapplied a prudential standing inquiry to the question of whether Plaintiff has a cause of action. In *Lexmark*, the Supreme Court explicitly distinguished between prudential standing and the existence of a cause of action, while noting that confusion on this point has long bedeviled the courts. The district court's conflation of these two distinct inquiries commits the very mistake that the Supreme Court sought so deliberately to prevent in *Lexmark*.

Amici also write to provide the Court with additional support for Plaintiff's argument that the district court's application of the zone-of-interests test to Plaintiff's Sixth Amendment claim was in error. The Supreme Court's jurisprudence—both before and after *Lexmark*—demonstrates that the federal courts have long exercised their equity jurisdiction to enjoin unconstitutional executive action without imposing a zone-of-interests test. *Lexmark* reinforces this principle, clarifying that the zone-of-interests test applies only to statutory causes of action, by requiring the courts "to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." 572 U.S. at 127. The test therefore ensures that plaintiffs bringing statutory claims are not vindicating interests unrelated to those Congress intended the statutory cause of action to protect. Constitutional rights, however, are fundamentally different, in both their origin and nature. A plaintiff seeking to enjoin a constitutional violation does not have to demonstrate that it is a specific intended beneficiary of the provision under which it sues.

Finally, *amici* illustrate the potentially broad and dangerous consequences of applying a zone-of-interests test to constitutional claims. Doing so would destabilize the traditional availability of equitable relief to protect rights safeguarded by the Constitution and sow confusion among the courts. It could also constrict and perhaps eliminate the availability of other causes of action in equity

challenging unlawful executive conduct, such as *ultra vires* actions. As a result, many plaintiffs may be barred from accessing the courts to seek judicial enforcement of the Constitution. It is therefore imperative that this Court reverse the district court's order and reaffirm the well-established principle that injured plaintiffs may seek equitable relief to enforce constitutional mandates.

ARGUMENT

I. THE EQUITY JURISDICTION OF THE FEDERAL COURTS HAS LONG INCLUDED THE POWER TO ENJOIN UNCONSTITUTIONAL EXECUTIVE ACTION.

The Supreme Court has explained that the equity jurisdiction of the federal courts is the same as the jurisdiction "exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quoting A. Dobie, *Handbook of Federal Jurisdiction and Procedure* 660 (1928)); *see also id*. ("We have long held that '[t]he jurisdiction thus conferred [by the Judiciary Act] . . . is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.'" (quoting *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939))). Thus, the "'substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief . . . depend on traditional principles of equity jurisdiction.'" *Id*. at 318–19 (quoting 11a Charles Alan Wright et al., *Federal Practice & Procedure* § 2941, at 31 (2d ed. 1995)). Those traditional principles include "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers," which "reflects a long history of judicial review of illegal executive action, tracing back to England."

Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015) (citing Louis Jaffe & Edith Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. Rev. 345 (1956)).

A. The English Courts of Equity Developed Causes of Action to Enjoin Unlawful Executive Conduct.

The antecedents to modern equitable review go back to medieval England. Traditionally, common law courts issued a "variety of standardized writs," each of which specified a "complete set of substantive, procedural, and evidentiary law, determining who has to do what to obtain the unique remedy the writ specifies for particular circumstances." John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 Wm. & Mary Bill of Rts. J. 1, 9 (2013) (quoting H. Brent McKnight, *How Then Shall We Reason, The Historical Setting of Equity*, 45 Mercer L. Rev. 919, 929 (1994)). As these writs ossified over time, failing to cover many injustices, the Court of Chancery began issuing "new and distinct remedies for the violation of preexisting legal rights," often "creat[ing] a cause of action where none had existed before." *Id*. at 12, 20. "At the time of the American Founding," therefore, "it was not uncommon for Chancery to enforce the common law through equitable remedies even where the common law might not itself make damages available." *Id*. at 15.

Those equitable remedies were often exercised to correct illegal official action, including by the Crown itself—a practice that began with the device of seeking relief through petitions for redress. James E. Pfander, *Sovereign Immunity and the Right to Petition*, 91 Nw. U.L. Rev. 899, 909 (1997); *cf*. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 6 (1963) (discussing the ability to bring "claims against the state" that would have been unavailable at common law). These so-called "petitions of right" sought royal consent to bring claims that were investigated by the Chancery, which would "hear the case, . . . decide it on legal principles, and . . . render a judgment against the Crown." Pfander, *supra*, at 909.

B. Federal Courts Inherited the Equitable Powers Developed by the English Courts and Have Consistently Used Them to Review Unlawful Executive Action.

Against this backdrop, the Framers of the Constitution conferred on the federal courts the "judicial Power" to decide "all Cases, in Law and Equity," U.S. Const. art. III, § 2, cl. 1, and the First Congress gave the federal courts diversity jurisdiction over suits "in equity," *see* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. In doing so, the Framers and First Congress incorporated the established understanding about the power of equitable courts to provide redress for unlawful government action in the absence of a common law remedy. Indeed, Congress in 1792 confirmed that "the forms and modes" of equitable proceedings were to

follow "the principles, rules, and usages which belong to courts of equity." Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276; *see* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 Iowa L. Rev. 777, 862 n.52 (2004). Soon after, the Supreme Court under Chief Justice John Jay declared: "The Court considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court." *Case of Hayburn*, 2 U.S. 408, 410 (1792). As Joseph Story explained, "in the Courts of the United States, Equity Jurisprudence generally embraces the same matters of jurisdiction and modes of remedy, as exist in England." 1 Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America* § 57, at 64–65 (1836).

From the early days of the Republic, these equitable powers were used to evaluate the lawfulness of executive action. A notable early example is *Marbury v. Madison*, 5 U.S. 137 (1803). After determining that William Marbury had "a right to the commission" as Justice of the Peace, *id*. at 154, the Supreme Court concluded that he was entitled to a remedy, *id*. at 163–71, even though no "statute provide[d] an express cause of action for review of the Secretary of State's decision not to deliver up a document he possessed in his official capacity," Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612, 1630 (1997). The Court reasoned that if "a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems

equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Marbury*, 5 U.S. at 166.

Other early decisions reflect the same principle. For example, in *Carroll v. Safford*, 44 U.S. 441 (1845), the Supreme Court permitted an equitable claim where other legal remedies were inadequate, expressing "no doubt, that, in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer, for which the law might give no adequate redress." *Id.* at 463. Similarly, in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), the Court enjoined federal officials from retaining the plaintiffs' mail based on a mistaken interpretation of certain fraud statutes, explaining: "The acts of all [the government's] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Id.* at 108. Likewise, in *Ex parte Young*, 209 U.S. 123 (1908), the Court confirmed that

> there is a remedy that the parties interested may resort to, by going into a Federal court of equity, in a case involving a violation of the Federal Constitution, and obtaining a judicial investigation of the problem, and, pending its solution, obtain freedom from suits, civil or criminal, by a temporary injunction, and, if the question be finally decided favorably . . . , a permanent injunction restraining all such actions or proceedings.

Id. at 149.

The Supreme Court has unflaggingly exercised its equitable power to remedy unconstitutional government action. It recently reaffirmed this principle in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), which concerned a constitutional challenge to the Sarbanes-Oxley Act under the Appointments Clause and the separation-of-powers. The Court rejected the government's argument that plaintiffs lacked a cause of action under either theory, citing *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001), for the proposition that equitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Free Enter. Fund*, 561 U.S. at 491 n.2. Thus, the Court continues to recognize the vitality of the principle that the federal courts have the equitable power to enjoin unconstitutional executive conduct. *See Armstrong*, 135 S. Ct. at 1384 ("What our cases demonstrate is that, 'in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer.'" (quoting *Carroll*, 44 U.S. at 463)).

Here, where Plaintiff seeks equitable relief for violations of the Sixth Amendment that have caused Plaintiff cognizable injury, the question is simply whether that relief "was traditionally accorded by courts of equity." *Grupo Mexicano*, 527 U.S. at 319. As demonstrated above, "equitable relief . . . is traditionally available to enforce federal law," *Armstrong*, 135 S. Ct. at 1385–86, and in particular, "to enjoin unconstitutional actions by . . . federal officers," *id*. at

1384 (citing "a long history of judicial review of illegal executive action, tracing back to England"); *see also Free Enter. Fund*, 561 U.S. at 491 n.2 (when a plaintiff is injured by a constitutional violation, equitable review "directly under the Constitution" is available "as a general matter," absent some reason the claim "should be treated differently than every other constitutional claim"). Plaintiff therefore has a cause of action for its Sixth Amendment claim.

II. THE DISTRICT COURT ERRED BY MISAPPLYING A PRUDENTIAL STANDING INQUIRY TO THE QUESTION OF WHETHER PLAINTIFF HAS A CAUSE OF ACTION.

Notwithstanding this long tradition of judicial review of unconstitutional executive action, the district court concluded that Plaintiff lacks a cause of action for its Sixth Amendment claim. The court's reasoning in support of this conclusion appears to fundamentally confuse certain elements of prudential standing with the separate question of whether Plaintiff has a cause of action. The court repeatedly asserted that Plaintiff lacks a cause of action because "the right to counsel is a right that is personal to the accused." Order at 4, *Fed. Defs.*, No. 19-cv-660, ECF No. 33. But this statement is relevant, if at all, to whether Plaintiff's claim is barred by the doctrine of third-party standing, which is an element of prudential standing. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (describing third-party standing as "the rule that a party 'generally must assert his own legal rights and interests, and

cannot rest his claim to relief on the legal rights or interests of third parties'" (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975))).

The district court's confusion on this point is also apparent from the transcript of the oral hearing, in which the court cited this Court's decision in *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 38–42 (2d Cir. 2015). Transcript of Oral Argument at 30, 34, *Fed. Defs.*, No. 19-cv-660 (E.D.N.Y., Mar. 1, 2019). But *Keepers* does not address whether the plaintiff has a cause of action. Rather, it addresses in depth whether the plaintiff has established third-party standing. 807 F.3d at 38–42 (corporation plaintiff's "challenge hinges on . . . constitutional and prudential standing to assert the rights of its owners and officers").

In *Lexmark*, the Supreme Court recognized confusion about the concept of "prudential standing." In an attempt to resolve this confusion, the Court drew a clear distinction between the elements of prudential standing and the zone-of-interests test, an aspect of statutory construction that concerns "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim."[2] 572 U.S. at 127 (citations omitted); *see id*. ("'prudential standing' is a misnomer as applied to the zone-of-interests analysis, which asks whether this particular class of

[2] The Court acknowledged some difficulty with classifying the "limitations on third-party standing" but noted that most of its cases have recognized those limitations as falling under prudential standing. *Lexmark*, 572 U.S. at 127 n.3. It further noted that *Lexmark* itself "does not present any issue of third-party standing" and thus, "consideration of that doctrine's proper place in the standing firmament can await another day." *Id*.

persons ha[s] a right to sue under this substantive statute" (quotation marks omitted)). This Court should therefore correct the district court's error and clarify that prudential standing concepts such as third-party standing have no bearing on whether Plaintiff has a cause of action under the Sixth Amendment.

III. PLAINTIFFS SEEKING TO ENJOIN UNCONSTITUTIONAL EXECUTIVE ACTION NEED NOT SATISFY A ZONE-OF-INTERESTS TEST.

The district court's ruling also cites, without explanation, to *Lexmark* in support of its conclusion that Plaintiff lacks a cause of action for its Sixth Amendment claim. *See* Order at 3, *Fed. Defs.*, No. 19-cv-660, ECF. No. 33; *id*. at 1–2 ("[P]ursuant to the Supreme Court's decision in *Lexmark* . . . , Plaintiff does not have a cause of action under the Sixth Amendment."). This invocation of *Lexmark* is not merely inapposite but also risks creating dangerous confusion regarding the application of the zone-of-interests test. To the extent that the district court sought to apply the zone-of-interests test to Plaintiff's constitutional claim—whether in the guise of a prudential standing inquiry or otherwise—it erred.

A. The Supreme Court Has Consistently Adjudicated Constitutional Claims for Equitable Relief Without Imposing a Zone-Of-Interests Test.

Consistent with an enduring tradition of judicial review of unconstitutional executive action, the Supreme Court has long adjudicated claims alleging constitutional violations by the executive without invoking a zone-of-interests test.

Ex parte Young addresses no such test. Nor does *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), where the Court considered a challenge to a wartime presidential order directing the Secretary of Commerce to seize and operate a majority of the nation's steel mills. There, the Court held that the President had unlawfully intruded on Congress's "exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution" without discussing whether plaintiffs asserted interests falling within the zone of interests protected by the structural provisions of Article II. *Id*. at 588.

The Supreme Court has also declined to entertain a zone-of-interests inquiry in more recent cases challenging unconstitutional executive action. In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Court adjudicated an Establishment Clause challenge to a presidential proclamation restricting the entry of foreign nationals from certain countries into the United States. Plaintiffs were individuals alleging injury due to their separation from relatives barred from entering the country. The Court proceeded directly to the merits of the plaintiffs' constitutional claim, without questioning whether they had a valid cause of action or asserted an interest falling within the zone of interests protected by the Establishment Clause.[3]

[3] Notably, the government asserted in *Trump v. Hawaii* that "plaintiffs' Establishment Clause claims are not justiciable because the Clause does not give them a legally protected interest in the admission of particular foreign nationals." 138 S. Ct. at 2416. The Court rejected application of any such bar to review and instead considered the constitutional claim on the merits. *Id*. (explaining that the

Similarly in *Free Enterprise Fund*, the plaintiffs were not required to establish an interest falling within the zone of interests safeguarded by the Appointments Clause. 561 U.S. at 491 n.2.

Clinton v. City of New York, 524 U.S. 417 (1998), illustrates the same point. There, plaintiffs brought a Presentment Clause challenge to the Line Item Veto Act, which authorized the President to strike particular provisions of appropriations bills. The plaintiffs—which included the City of New York, hospital associations, unions, and a cooperative of Idaho potato growers—each alleged injury on the basis that the President's veto of particular "line items" had cancelled financial benefits that would have accrued to them. The Supreme Court held that the Act violated the Presentment Clause without requiring any of the plaintiffs to establish that their respective interests fell within the zone of interests of that constitutional safeguard.

Lexmark reinforces that the zone-of-interests test applies only to statutory causes of action. There, the Supreme Court explained that the "modern 'zone of interests' formulation originated in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), as a limitation on the cause of action for judicial review conferred by the Administrative Procedure Act."

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government's argument "depends upon the scope of plaintiffs' Establishment Clause rights" and thus "concerns the merits rather than the justiciability of plaintiffs' claims").

Lexmark, 572 U.S. at 129. The Court then clarified that the test "applies to all statutorily created causes of action" because "Congress is presumed to 'legislat[e] against the background of' the zone-of-interests limitation, 'which applies unless it is expressly negated.'" *Id*. (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)). *Lexmark* therefore establishes why the test governs only "statutorily created" causes of action: applying the test is "a straightforward question of statutory interpretation."[4] *Id*.

B. Equitable Claims Under the Constitution Are Not Amenable to a Zone-Of-Interests Test.

The zone-of-interests test governs "statutorily created causes of action" because its function is to help construe the breadth of statutes that confer a right to

[4] It is true that during the four decades between *Association of Data Processing Service* and *Lexmark*, the Supreme Court on one occasion applied the zone-of-interests test to a constitutional claim under the dormant Commerce Clause. *See Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977). But as the Supreme Court explained in *Lexmark*, prior cases mistakenly invoked the zone-of-interests test as part of the prudential standing inquiry. 572 U.S. at 127 ("Although we admittedly have placed [the zone-of-interests] test under the 'prudential' rubric in the past, it does not belong there." (citation omitted)). *Lexmark* thus explicitly extricates the zone-of-interests test from the prudential standing rubric. In doing so, *Lexmark* "recast the zone-of-interests inquiry as one of statutory interpretation, holding that the question is whether a plaintiff 'has a cause of action under the statute.'" *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1120–21 (9th Cir. 2015) (quoting *Lexmark*, 572 U.S. at 128). This conclusion is further buttressed by post-*Lexmark* Supreme Court cases, which clearly do not apply the zone-of-interests test to constitutional causes of action. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392. Critically, the Supreme Court made no mention of the zone-of-interests test in its most recent examination, just this year, of a dormant Commerce Clause challenge. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019).

sue. *Lexmark*, 572 U.S. at 129. This conclusion flows from the basic nature of statutory causes of action and the judiciary's role in interpreting them. Statutes commonly establish new legal rights and corresponding legal prohibitions, as well as causes of action to enforce those rights and prohibitions. *See, e.g.*, *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1300–01 (2017) (fair housing); *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 173–74 (2011) (employer retaliation); *Lexmark*, 572 U.S. at 122 (false advertising). The zone-of-interests test recognizes that when Congress creates a statutory cause of action, it does not necessarily intend this cause of action to extend to every person who might be injured by a violation of the statute "but whose interests are unrelated to the statutory prohibitions." *Thompson*, 562 U.S. at 178. Accordingly, the purpose of the test is to determine, "using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark*, 572 U.S. at 127. Or, put another way, it is designed to answer the question "whether 'this particular class of persons ha[s] a right to sue under this substantive statute.'" *Id*. (citation omitted).

Constitutional claims seeking equitable relief are an entirely different species of action. They are not premised on the deprivation of a statutory right and do not rely on a statutory cause of action. Instead, they seek equitable relief, a "judge-made remedy," for injuries suffered as a result of executive action that

violates the Constitution. *Armstrong*, 135 S. Ct. at 1384. Rather than invoking a legislatively conferred cause of action to vindicate a legislatively created right, such actions rest on the historic availability of equitable review to obtain prospective injunctive relief from unconstitutional conduct. *See id.* ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity." (citation omitted)). And because no statute is being invoked for that purpose, there is no occasion to consider the zone of interests that any such statute is meant to cover.

Notably, the historical precursor of the zone-of-interests test came from damages action at common law, not from suits in equity. *See Lexmark*, 572 U.S. at 130 n.5 (observing that the "roots" of the zone-of-interests test "lie in the common-law rule that a plaintiff may not recover under the law of negligence for injuries caused by violation of a statute unless the statute 'is interpreted as designed to protect the class of persons in which the plaintiff is included'" and that "[s]tatutory causes of action are regularly interpreted to incorporate standard common-law limitations on civil liability" (quoting W. Keeton et al., *Prosser and Keeton on Law of Torts* § 36, at 229–30 (5th ed. 1984))). This historical distinction further illustrates why the zone-of-interests test has no place in equitable suits seeking to enjoin unconstitutional conduct.

The Supreme Court reaffirmed these distinctions most recently in

Armstrong. There, the Court recognized that whether a statute provides a cause of action for its violation is a different question from whether an equitable challenge may be brought to enjoin unlawful government conduct. Accordingly, the Court separately analyzed, as distinct inquiries, two different questions: (1) whether the Medicaid Act provided a statutory cause of action, and (2) whether the Act foreclosed the equitable relief that would otherwise be available to enforce federal law. *Compare* 135 S. Ct. at 1385 ("We turn next to respondents' contention that . . . this suit can proceed against [the defendant] in equity."), *with id.* at 1387 ("The last possible source of a cause of action for respondents is the Medicaid Act itself."); *see also Grupo Mexicano*, 527 U.S. at 326 (distinguishing "the Court's general equitable powers under the Judiciary Act of 1789" from its "powers under [a] statute").

In sum, when plaintiffs invoke a statutorily created remedy, congressional intent regarding the scope of that remedy is paramount, and the zone-of-interests test helps maintain fidelity to Congress's intent. But not all "interests" that a plaintiff may vindicate in court are created by statute. When plaintiffs directly harmed by unconstitutional action proceed in equity, there is no congressional intent to discern and no zone-of-interests test to apply.

IV. SUBJECTING CONSTITUTIONAL CLAIMS TO A ZONE-OF-INTERESTS TEST WOULD BE DESTABILIZING AND INSULATE UNLAWFUL EXECUTIVE ACTION FROM JUDICIAL REVIEW.

Grafting a zone-of-interests test onto a constitutional cause of action would produce dangerous results. Accepting such a test would work a sea change in constitutional litigation, upending the long-standing presumptive availability of constitutional causes of action and reliance upon that presumption as a fixed principle in the law. The application of a zone-of-interests test to other equitable causes of action to restrain unlawful executive conduct, such as *ultra vires* actions, would unduly constrict their availability as well. The consequence would be to insulate many different kinds of unlawful government conduct from judicial review.

Subjecting constitutional claims to the zone-of-interests test would sow confusion in the courts and could result in the wrongful dismissal of such claims at the very outset of litigation. Constitutional cases might not be able to proceed even where parties demonstrate their justiciability, including through concrete injury redressable by judicial decision. The district court's ruling itself presages the jurisprudential turbulence that awaits plaintiffs seeking to protect against immediate or ongoing threats to core constitutional rights. Assuming the district court intended to apply the zone-of-interests test, its conclusion was that Plaintiff failed this test, despite finding it had demonstrated "Article III constitutional

standing to bring this case." Order at 1-2, *Fed. Defs.*, No. 19-cv-660, ECF No. 33. But it is clear that this case would pass muster even if a zone-of-interests test were applied to Plaintiff's Sixth Amendment claim. The interests asserted by Plaintiff—which seeks to prevent arbitrary interference with the "Assistance of Counsel" guaranteed by the Sixth Amendment—satisfy such a test. *See* Brief and Special Appendix for Plaintiff-Appellant at 30–41, ECF No. 36 (Aug. 14, 2019). The district court's order illustrates how introducing a novel zone-of-interests test to the constitutional cause-of-action context could have a destabilizing effect, including by improperly barring injured plaintiffs from seeking injunctive relief to safeguard constitutional rights.

The expansion of the statutory zone-of-interests test to constitutional claims could also encompass other causes of action in equity to enjoin unlawful executive conduct, with potentially profound consequences. Equitable claims involving *ultra vires* conduct are one critical example. As explained in Part I, *supra*, the equity jurisdiction of the federal courts, writ large, traces its history back to the English courts of equity, *see Grupo Mexicano*, 527 U.S. at 318. There is an accordingly "long history of judicial review of illegal executive action," which also encompasses *ultra vires* actions. *Armstrong*, 135 S. Ct. at 1384 (citation omitted); *see also Harmon v. Brucker*, 355 U.S. 579, 581–82 (1958) ("Generally, judicial relief is available to one who has been injured by an act of a government official

which is in excess of his express or implied powers." (citations omitted)). That history makes clear that the federal courts have long permitted judicial review of *ultra vires* executive action without invoking a zone-of-interests test. *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187–88 (1993) (addressing merits of challenge seeking to enjoin executive order issued under asserted statutory authority); *Dames & Moore v. Regan*, 453 U.S. 654, 667 (1981) (addressing merits of action seeking injunction based on claim that officials "were beyond their statutory and constitutional powers"); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) ("[W]here [an] officer's powers are limited by statute, his actions beyond those limitations . . . are ultra vires his authority and therefore may be made the object of specific relief."); *Harmon*, 355 U.S. at 582 (finding district court had "power to construe the statutes involved to determine whether the respondent did exceed his powers" and if so, "judicial relief from this illegality would be available").

The application of the zone-of-interests test to *ultra vires* actions could stifle and perhaps even permanently extinguish their availability. As Judge Bork explained decades ago, a zone-of-interests test in the *ultra vires* context would make little sense: "[A] litigant's interest normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest." *Haitian Refugee Ctr. v. Gracey*, 809

F.2d 794, 811 n.14 (D.C. Cir. 1987). Certainly, a case like *Youngstown*, in which the Supreme Court struck down an executive order based on the President's lack of authority to issue it, might have come down differently under this test. "[W]ere a case like *Youngstown* to arise today, the steel mill owners would not be required to show that their interests fell within the zone of interests of the President's war powers in order . . . to challenge the seizure of their mills as beyond the scope of those powers." *Id*.

As an example like *Youngstown* illustrates, imposing a zone-of-interests test in *ultra vires* actions would radically curtail the ability to obtain relief from injuries caused by unlawful government conduct—even in cases where the courts' role in preserving the separation of powers is most critical. It would permit the government to defeat an *ultra vires* claim simply by making an assertion of statutory authority, however misplaced, and then arguing that the challenger does not fall within that statute's zone of interests. Expanding the zone-of-interests test would therefore fundamentally constrict the availability of equitable review where the executive acts unlawfully—and thus the courts' ability to remedy those violations.

CONCLUSION

For the reasons stated above, the judgment of the district court should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,891 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point type.

Dated: August 21, 2019

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 21, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All counsel for appellants and appellee in this case are registered CM/ECF users, so they will be served by the appellate CM/ECF system.

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