STANDING — FEDERAL COURTS — D.C. CIRCUIT DEMONSTRATES REDUNDANCY BETWEEN THE COMPETITOR STANDING TEST AND THE ZONE OF INTERESTS TEST. — *Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir.), *reh'g denied*, No. 13-5118 (D.C. Cir. Aug. 11, 2014).

To bring a lawsuit, a plaintiff must have both constitutional and prudential standing.[1] Last Term, the Supreme Court clarified that the requirement that the plaintiff be within the "zone of interests" Congress intended to be protected by a given statute, which had previously been understood as a component of prudential standing on which a judge may exercise discretion, is better understood as a question of statutory interpretation.[2] Recently, in *Mendoza v. Perez*,[3] the D.C. Circuit held that would-be U.S. goat, sheep, and cattle herders compete with temporary foreign workers seeking visas as herders, and therefore have constitutional standing under the competitor standing doctrine[4] to challenge Department of Labor guidelines that allow foreign herders to obtain visas more easily than can other agricultural workers.[5] For the same reason, the court also held that the plaintiffs were within the zone of interests protected by the statute.[6] This decision demonstrates lingering ambiguity about the basis of the competitor standing doctrine, and the relationship between that doctrine and the zone of interests test. Specifically, if a competitor's standing stems from a statute protecting the competitor's economic interests, then the inquiry under the competitor standing test appears similar to the statutory inquiry required under the zone of interests test. Opacity regarding whether these two different tests evaluate the same statutory question invites unpredictability for litigants and judges. The courts should clarify the relationship between these two tests.

The Immigration and Nationality Act[7] (INA) allows some U.S. agricultural employers to hire temporary foreign workers if those employers first seek certification from the Department of Labor (Depart-

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[1] *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[2] Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386–88 & 1387 n.3 (2014) ("Whether a plaintiff comes within 'the "zone of interests"' is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id.* at 1387 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 97 (1998))).

[3] 754 F.3d 1002 (D.C. Cir.), *reh'g denied*, No. 13-5118 (D.C. Cir. Aug. 11, 2014).

[4] The competitor standing doctrine recognizes that plaintiffs suffer a constitutionally cognizable injury when a regulatory change increases their economic competition. *See id.* at 1011.

[5] *See id.* at 1015.

[6] *Id.* at 1016–18.

[7] 8 U.S.C. §§ 1101–1537 (2012).

ment).[8] This is known as the H-2A visa program.[9] The Department may only certify an employer as eligible to apply for an H-2A visa for a foreign worker if, first, "there are not sufficient [U.S.] workers . . . able, willing, and qualified" to fill the position, and second, hiring temporary foreign workers "will not adversely affect the wages and working conditions" of "similarly employed" U.S. workers.[10] The Department has issued notice-and-comment rules establishing criteria for certifying employers[11] and has issued two Training and Employment Guidance Letters (TEGLs) regarding H-2A visas for goat, sheep, and cattle herders.[12] The TEGLs create separate H-2A certification processes and establish lower minimum wages and working-condition requirements for herding positions than for other agricultural positions.[13] These letters were not issued through notice-and-comment rulemaking.[14]

Reymundo Zacarias Mendoza and his three coplaintiffs — Francisco Javier Castro, Alfredo Conovilca Matamoros, and Sergio Velásquez Catalán — are lawful residents who are permitted to work in the United States.[15] Each plaintiff stated that he seeks work as a herder but is not currently in a herding job because of the "substandard" wages and poor working conditions.[16]

In October 2011, Mendoza and his coplaintiffs asked the District Court for the District of Columbia to set aside the TEGLs, alleging that they were "legislative rules," which must be promulgated in accordance with the Administrative Procedure Act's (APA's) notice-and-comment procedures.[17] Two trade associations, whose members are employers who use H-2A visas, intervened on behalf of the Department and moved to dismiss the suit for lack of subject matter jurisdiction, alleging that the plaintiffs had no standing to sue.[18] All parties then moved for summary judgment.[19]

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[8] *See id.* § 1188.

[9] *See id.* § 1188(a)(1).

[10] *Id.* § 1188(a)(1)(A)–(B). For the purposes of the Act, a "U.S. worker" is a U.S. citizen or national, lawful permanent resident, or an alien who is authorized to work. *See* 20 C.F.R. § 655.5 (2014).

[11] *Mendoza*, 754 F.3d at 1008.

[12] *Id.* (citing U.S. DEP'T OF LABOR, TRAINING AND EMPLOYMENT GUIDANCE LETTER, Nos. 15–06 & 32–10 (2011)).

[13] *Id.* at 1009.

[14] *Id.* at 1008.

[15] Mendoza v. Solis, 924 F. Supp. 2d 307, 314 (D.D.C. 2013). In fact, each plaintiff initially entered the United States as a temporary foreign worker; all four are now U.S. workers. *Id.*

[16] *Mendoza*, 754 F.3d at 1007.

[17] *Id.* at 1009, 1021; *see also* 5 U.S.C. § 553 (2012).

[18] *Mendoza*, 924 F. Supp. 2d at 315. "[T]ogether [the two trade associations] represent almost all" employers who would be affected by Mendoza's suit. *Id.* (internal quotation mark omitted).

[19] *Id.*

The district court dismissed the suit for lack of subject matter jurisdiction, holding that the plaintiffs did not have constitutional or prudential standing.[20] Judge Howell explained that the Constitution's limitation on the federal judiciary's power to hear actual "Cases" or "Controversies," rather than render advisory opinions,[21] mandates that before a plaintiff can sue, she must have (1) suffered an injury-in-fact; (2) that is "fairly traceable" to the defendant's conduct; and (3) that is likely to be redressed by a favorable decision.[22] Judge Howell recognized that economic competitors "suffer an injury" when an agency's action causes increased competition within their industry,[23] but she held that the plaintiffs were not "competitors" because they were not actively seeking work as herders.[24] The plaintiffs therefore failed to demonstrate a sufficient likelihood of economic injury.[25] Finally, Judge Howell held that the plaintiffs also failed to meet the prudential standing requirement of being within the "zone of interests" that Congress intended to be protected by the INA.[26] Given that the plaintiffs were not adversely affected by the Department's lower standards for herders — because they were not competing for those jobs — their interests were too "marginally related" to the purpose of the INA to be protected by it.[27]

The D.C. Circuit reversed and remanded.[28] Judge Brown,[29] writing for the panel, first held that the plaintiffs had constitutional standing as competitors.[30] The court applied the same three-part test for constitutional standing as did the district court.[31] Because these plaintiffs sought to "enforce procedural (rather than substantive) rights," their main burden was to demonstrate injury by showing that the

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[20] *Id.* at 320.

[21] *See* U.S. CONST. art. III, § 2, cl. 1.

[22] *Mendoza*, 924 F. Supp. 2d at 316 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

[23] *Id.* at 317 (quoting Sherley v. Sebelius, 610 F.3d 69, 72 (D.C. Cir. 2010) (describing the "competitor standing" doctrine)) (internal quotation mark omitted).

[24] *Id.* at 318–19.

[25] *Id.* at 319–20.

[26] *Id.* at 320. The district court issued its decision before *Lexmark*, which clarified that the zone of interests test is not part of "prudential standing." Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 & n.3 (2014). Judge Howell also expressed concern that the doctrine would have no limits if it extended to any potential would-be competitor. *Mendoza*, 924 F. Supp. 2d at 322.

[27] *Mendoza*, 924 F. Supp. 2d at 323 (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987)).

[28] *Mendoza*, 754 F.3d at 1025.

[29] Judge Brown was joined by Judges Tatel and Millett.

[30] *Mendoza*, 754 F.3d at 1015–16. Only three plaintiffs participated in the appeal: Mendoza, Castro, and Catalán. *Id.* at 1009 n.2.

[31] *Id.* at 1010.

"agency['s] action threaten[ed] their concrete interest"[32] rather than merely harmed a "general interest" that is "common to all members of the public."[33] Once they demonstrated such a threat, the court would "assume[]" both the causation and redressability requirements had been met.[34] The plaintiffs need not "establish that correcting the procedural violation would necessarily alter" the effect of the agency's action on the plaintiffs' interests.[35]

The court then held that the plaintiffs had met this threshold burden under the competitor standing doctrine.[36] This doctrine recognizes that "parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors."[37] Thus, the only question was whether the plaintiffs were within the labor market for herding jobs — if so, they would have constitutional standing.[38] Contrary to the district court, the circuit court held that the plaintiffs were plainly within this market because they were "direct and current competitor[s] whose bottom line[s] may be adversely affected" by the TEGLs.[39] The fact that they chose not to apply to positions that advertised unappealing wages and working conditions — precisely the effect that the plaintiffs argue the lax TEGLs caused — did not disqualify them.[40] Their effort to "monitor[] the labor market for acceptable positions" sufficiently demonstrated market participation.[41] Judge Brown explained that the court "do[es] not generally require plaintiffs to engage in a futile act," such as applying for a job with conditions and wages they would not accept, "to prove the sincerity of their injury."[42]

The court was not persuaded by the trade groups' argument that the TEGLs did not affect U.S. herders' wages and that therefore the plaintiffs suffered no injury.[43] The court explained it could "ignore the merits of the TEGLs'" policy because the plaintiffs brought a procedural challenge;[44] thus, the plaintiffs "simply need to show the agency

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[32] *Id.*

[33] *Id.* (quoting Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 664 (D.C. Cir. 1996)).

[34] *Id.* (alteration in original) (quoting Ctr. for Law & Educ. v. Dep't of Educ., 396 F.3d 1152, 1160 (D.C. Cir. 2005)) (internal quotation mark omitted); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992).

[35] *Mendoza*, 754 F.3d at 1010 (citing *Ctr. for Law & Educ.*, 396 F.3d at 1160).

[36] *Id.* at 1013.

[37] *Id.* at 1011 (quoting La. Energy & Power Auth. v. FERC, 141 F.3d 364, 367 (D.C. Cir. 1998)) (internal quotation mark omitted).

[38] *Id.* at 1013.

[39] *Id.* (emphasis omitted) (quoting KERM, Inc. v. FCC, 353 F.3d 57, 60 (D.C. Cir. 2004)).

[40] *Id.* at 1014.

[41] *Id.* at 1013.

[42] *Id.* at 1014 n.6.

[43] *Id.* at 1012–13.

[44] *Id.* at 1012.

action affects their concrete interests."[45] Indeed, any argument that the procedure was sufficient because the policy underlying the TEGLs met the statute's aims is "substantially the same as arguing the omitted procedure would not have affected the agency's decision"[46] — which is not a sufficient response to a procedural challenge.[47]

Having held that the plaintiffs had constitutional standing, the court next considered whether they fell within the zone of interests protected by the INA. The court explained that the term "prudential standing"[48] is now a "misnomer" when describing the role of the zone of interests test.[49] After the Supreme Court's recent decision in *Lexmark International, Inc. v. Static Control Components, Inc.*,[50] courts must now understand the zone of interests test as a statutory inquiry into whether the plaintiffs have a cause of action.[51] Here, the court explained, "for the same reasons we hold the plaintiffs *have* established Article III standing, we also hold they *do* fall within the zone of interests of the INA — the plaintiffs are American workers who would work as herders."[52]

Having disposed of the jurisdictional considerations, the court turned to the merits.[53] It rejected the Department's arguments that the TEGLs were "interpretative rules" or that they were internal departmental policies, neither of which require notice-and-comment rulemaking.[54] The court therefore held that the TEGLs were unlawfully promulgated and remanded the case to the district court to "craft a remedy to the APA violation."[55]

The court's decision in *Mendoza* demonstrates several points of ambiguity and redundancy in the newly revised standing doctrine fol-

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[45] *Id.* at 1013.

[46] *Id.*

[47] *Id.* (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000)).

[48] *Id.* at 1016 (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 (2014)) (internal quotation marks omitted).

[49] *Id.* (quoting *Lexmark*, 134 S. Ct. at 1387) (internal quotation marks omitted). Prudential standing is a series of judicially imposed, rather than constitutional, limitations on when courts will hear suits. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004).

[50] 134 S. Ct. 1377 (2014).

[51] *Mendoza*, 754 F.3d at 1016 (citing *Lexmark*, 134 S. Ct. at 1387).

[52] *Id.* at 1017.

[53] *Id.* at 1020–25. The court also held that the suit was filed within the six-year statute of limitations for civil actions against the United States. *Id.* at 1020; *see also* 28 U.S.C. § 2401 (2012). Although the Department released earlier versions of the TEGLs, the revised versions adopted in 2007 constituted new final agency actions, thus restarting the limitations period. *Mendoza*, 754 F.3d at 1018–20.

[54] *Mendoza*, 754 F.3d at 1021, 1023; *see also* 5 U.S.C. § 553(b)(3)(A) (2012).

[55] *Mendoza*, 754 F.3d at 1025. On remand, the district court established a timeline for the Department's rulemaking, and ordered that the TEGLs be "vacated upon the effective date of the new rule." Mendoza v. Perez, No. 11-1790, 2014 WL 5499576, at *6 (D.D.C. Oct. 31, 2014).

lowing *Lexmark*. The basis for competitor standing is not entirely clear, but the Supreme Court has implied it depends on the existence of a statute protecting a plaintiff's competitive interests. If so, then the competitor standing inquiry turns on the same substantive question as does the zone of interests test: whether the statute allows the plaintiff to protect his or her competitive interest via the courts. Having two distinct tests that potentially evaluate the same statutory question — especially where the relationship between those tests is unclear — invites unpredictability. Courts should elucidate the relationship between these two tests: If the two tests ask the same substantive question of statutory interpretation, courts should clarify that they should be treated identically. If they ask different questions, then courts should clarify the content of each test and how they differ. Or if they differ because competitor standing does not depend on a statute, then the courts should clarify that as well.

The competitor standing doctrine, although well established,[56] exemplifies several of the reasons why standing doctrine is described as both incoherent[57] and political.[58] Standing is a tool to ensure that litigants are sufficiently invested and adverse such that they effectively litigate the case and crisply define the issues before the court.[59] It has a constitutional component — stemming from Article III's requirement that federal courts hear only actual "Cases" or "Controversies"[60] — and a prudential one.[61]

But in demanding that litigants meet these seemingly benign jurisdictional requirements, standing doctrine has substantive effects: among other things, it shapes which of the government's legal obligations can be enforced by private plaintiffs and which cannot.[62] Often

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[56] In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), which is generally acknowledged as establishing modern standing doctrine, the Court recognized competitor standing. *See id.* at 152. That Court had "no doubt" that the plaintiff suffered "injury in fact" because the alleged increased competition "might entail some future loss of profits." *Id.* This opinion has been widely criticized. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988) ("More damage to the intellectual structure of the law of standing can be traced to *Data Processing* than to any other single decision.").

[57] Fletcher, *supra* note 56, at 221.

[58] *See, e.g.*, Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1758–63 (1999).

[59] *See, e.g.*, Fletcher, *supra* note 56, at 222 (citing, inter alia, Baker v. Carr, 369 U.S. 186, 204 (1962); Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 311 (1979); Kenneth C. Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645, 679–81 (1973)).

[60] U.S. CONST. art. III, § 2, cl. 1.

[61] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[62] *Cf.* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 187–88 (1992). *See generally* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1 (1984) (arguing that the Court's standing analysis in *City of Los Angeles v. Lyons*, 461 U.S. 95

the most contested cases concern whether holders of rights not recognized at common law — such as rights to protection of endangered species, or to consideration of competition by a licensing agency when granting new licenses — can sue to enforce those rights.[63] Standing takes on a political valence when courts seem to privilege certain rights holders in ways that appear to reflect policy choices, rather than consistently applied legal rules.

Competitor standing, on which the *Mendoza* plaintiffs relied, therefore demonstrates some of these concerns regarding whose rights can be enforced via private litigation. It allows a broader class of plaintiffs to sue.[64] Yet it only expands standing to plaintiffs who suffer a certain kind of economic injury, rather than to those who suffer other noncommon law injuries. Indeed, demonstrating injury-in-fact as a competitor is easier than showing injury otherwise: such plaintiffs need only show that they are "direct and current competitor[s]" in the market.[65] Moreover, they need not "engage in a futile act,"[66] such as applying for a job they would not accept, to maintain their status as "current" competitors. This stands in stark contrast to the lengths to which plaintiffs who seek to enforce non–common law rights, but not as competitors, must go to show that their injuries are sufficiently "concrete and particularized."[67] This mismatch is especially evident in cases where plaintiffs seek to enforce environmental protection stat-

(1983), makes it harder for public interest litigants to have standing); Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191 (2014) (arguing that, despite doctrine, courts determine standing based on whether there could be a better plaintiff).

63 *See* Sunstein, *supra* note 62, at 183–88; *cf.* Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 266–68 (1961) (analyzing when legal violations create causes of action or standing). Note that plaintiffs claiming injury to common law property or liberty interests almost always have standing. *See* Sunstein, *supra* note 62, at 187–88.

64 This is especially true for those plaintiffs who sue to enforce the general public's right to require the government to comply with APA requirements, given that such plaintiffs need not demonstrate causation or redressability. *See Mendoza*, 754 F.3d at 1010; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1439–42, 1450–51 (1988); *cf.* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, U. CHI. L. REV. (forthcoming) (manuscript at 42–46), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2460822 [http://perma.cc/2K6V-ZUV9]; *supra* p. 1853.

65 *Mendoza*, 754 F.3d at 1013 (emphasis omitted) (quoting KERM, Inc. v. FCC, 353 F.3d 57, 60 (D.C. Cir. 2004)).

66 *Id.* at 1014 n.6 (quoting Settles v. U.S. Parole Comm'n, 429 F.3d 1098, 1102 (D.C. Cir. 2005)) (internal quotation mark omitted). *But cf.* El Paso Natural Gas Co. v. FERC, 50 F.3d 23 (D.C. Cir. 1995) (holding that a gas company in one market, claiming it could become a competitor in a second market, had no standing to challenge actions affecting the second market); Christopher Gallu, Jr., *D.C. Circuit Review, September 1994 – August 1995: Energy Law*, 64 GEO. WASH. L. REV. 1180, 1211–12 (1996) (analyzing "potential competitor" arguments for standing in *El Paso Natural Gas Co.*).

67 *Cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (requiring a "concrete and particularized" "injury in fact").

utes.[68] For example, in *Lujan v. Defenders of Wildlife*,[69] two environmental activists challenging an agency's procedure in changing a regulation were unable to demonstrate that their injury — the lost ability to further research certain species — was sufficiently "concrete and particularized" to constitute injury-in-fact.[70]

This seeming misalignment between how courts treat non–common law claims of competitor injuries, as opposed to non–common law claims of injury to other statutorily conferred rights, makes sense if competitor standing derives from a statute. Then the differing burden of demonstrating injury flows from *Congress's* determination of what harms are legally cognizable, rather than from an anachronistic assumption that common law or the Constitution confers protection from a particular kind of economic harm.[71] It would be a clear example of Congress exercising its "power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[72]

The case law, however, is less than crystal clear as to whether competitor standing is grounded in statute. The Supreme Court has framed it in statutory terms: "[E]conomic injury which results from lawful competition cannot, in and of itself, confer standing . . . to question the legality of . . . [a] competitor's operations."[73] But "when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has

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[68] Scholars have noticed how much easier it is to demonstrate injury-in-fact as a competitor, and have even suggested that environmentalists should therefore frame suits as competitive injuries. *See, e.g.*, Monica Reimer, Comment, *Competitive Injury as a Basis for Standing in Endangered Species Act Cases*, 9 TUL. ENVTL. L.J. 109 (1995). *But cf.* Christopher Warshaw & Gregory E. Wannier, *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 HARV. L. & POL'Y REV. 289 (2011) (finding that environmental cases brought by businesses were more likely to be dismissed on standing grounds than those brought by advocacy groups). Other scholars have also argued competitor standing could be used in a wider range of litigation. *See, e.g.*, Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1346–47 (2000). This seeming mismatch is not limited to environmental cases. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 830 (1997) (holding that members of Congress lack a sufficiently "concrete injury" to challenge the line-item veto).

[69] 504 U.S. 555.

[70] *Id.* at 560–64. Not all citizen environmental suits fail on standing grounds. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000). However, that environmental suits often fail but occasionally succeed has led some scholars to argue standing is *more* incoherent than previously thought. *See, e.g.*, Richard J. Pierce, Jr., *Issues Raised by* Friends of the Earth v. Laidlaw Environmental Services*: Access to the Courts for Environmental Plaintiffs*, 11 DUKE ENVTL. L. & POL'Y F. 207, 243–46 (2001).

[71] *See* Sunstein, *supra* note 62, at 187–88; *id.* at 179 (citing Lochner v. New York, 198 U.S. 45 (1905)).

[72] *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment); *see also* FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940) ("It is within the power of Congress to confer such standing . . . .").

[73] Hardin v. Ky. Utils. Co., 390 U.S. 1, 5–6 (1968).

standing to require compliance with that provision."[74] Yet lower courts have interpreted this seemingly clear statement in multiple ways. Indeed, the D.C. Circuit has, on the one hand, applied this language to hold that plaintiffs have constitutional standing.[75] Yet on the other hand, it has *rejected* a district court's ruling that "competitor standing applies only where the 'particular statutory provision . . . invoked' reflects a purpose 'to protect a competitive interest.'"[76]

Mendoza itself is an example of the continuing murkiness of the basis for competitor standing. The court's decision interpreted the INA, which explicitly protects plaintiffs' competitive interests. The court's analogy to a Ninth Circuit case also demonstrated the extent to which the court relied on the substantive goals of the statute.[77] In that case, the Ninth Circuit recognized that a union representing U.S. workers had standing precisely because the immigration law governed when foreign workers could compete with U.S. workers.[78] But the *Mendoza* court did not specify whether the INA was necessary to the plaintiffs' standing claim because that issue was not raised by the case.

If competitor standing *does* depend on a relevant statute, then the interaction of *Lexmark* and competitor standing creates new ambiguity in standing doctrine: the presence of two separate tests — the direct and current competitor test and the zone of interests test — to answer seemingly the same substantive question of statutory interpretation.[79] In *Lexmark*, the Supreme Court clarified that one element of what was understood as prudential standing — whether the plaintiff has a cause of action — is now better understood as a statutory question.[80] It is because *Lexmark* clarified that this inquiry is statutory that the potential for overlap between the competitor standing inquiry and the zone of interests inquiry arises.

The logical relationship between these tests could take three forms: First, the tests could ask the same statutory interpretation question — in which case courts should explicitly treat them identically. Second,

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[74] *Id.* at 6.

[75] Shays v. FEC, 414 F.3d 76, 85–86 (D.C. Cir. 2005) (holding that electoral candidates have constitutional standing to challenge FEC guidelines because "when a statute 'reflect[s] a legislative purpose to protect a competitive interest, [an] injured competitor has standing to require compliance with that provision,'" *id.* at 85 (alterations in original) (quoting *Hardin*, 390 U.S. at 6)).

[76] Sherley v. Sebelius, 610 F.3d 69, 72 (D.C. Cir. 2010) (alteration in original) (quoting Sherley v. Sebelius, 686 F. Supp. 2d 1, 6 (D.D.C. 2009)).

[77] *See Mendoza*, 754 F.3d at 1011 (citing Int'l Longshoremen's & Warehousemen's Union v. Meese, 891 F.2d 1374, 1376, 1379 (9th Cir. 1989)).

[78] *Id.*

[79] Of course, the two tests serve different practical and doctrinal roles — only competitor standing addresses the constitutional component of standing.

[80] Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 (2014).

they could both be statutory interpretation inquiries, and yet ask different questions — in which case courts should clarify the content of each test and how they differ. Or third, competitor standing may not depend on a statute — in which case these tests answer different questions entirely.

Mendoza neatly demonstrates the overlapping nature of the analyses. The court characterized both the district court's reasoning and its own as treating the two questions identically: "The district court found the plaintiffs did not fall within the zone of interests of the [INA] for the same reasons it found the plaintiffs lacked Article III standing — the plaintiffs were not willing and available to work as herders."[81] It continued, explaining that "for the same reasons we hold the plaintiffs *have* established Article III standing, we also hold they *do* fall within the zone of interests of the INA."[82] In other words, if competitor standing as a method of showing injury-in-fact depends on a relevant statute, then the existence of both constitutional standing and a viable cause of action would depend on the same statutory question: whether the statute protects the plaintiff's interest such that the plaintiff may sue.

Maintaining two ambiguously overlapping inquiries, which use different tests to approach potentially the same question, creates an opportunity for inconsistency and unpredictability for litigants and judges. Standing has been derided as "a word game played by secret rules."[83] Convoluted doctrines, whether due to "secret rules" or ill-defined and potentially redundant tests, lend themselves to unpredictable decisions. Arguably, *Lexmark* can be understood as part of a trend toward curbing the potential for arbitrary decisions that stems from ambiguity in standing doctrine.[84] *Mendoza* is a ripe example of such ambiguity. This unpredictability regarding whether a court will hear a suit can be at odds with the "'court's "obligation" to hear' . . . cases within its jurisdiction."[85] Courts should take the soonest opportunity to clarify the relationship between these tests, and if they are coterminous, to say so explicitly.

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[81] *Mendoza*, 754 F.3d at 1017.

[82] *Id.*

[83] Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

[84] *See, e.g.*, *The Supreme Court, 2013 Term — Leading Cases*, 128 HARV. L. REV. 191, 328–29 (2014); *cf.* Jonathan R. Siegel, *Zone of Interests*, 92 GEO L.J. 317, 319 (2004) (describing the pre-*Lexmark* zone of interests test as providing judges with "no interpretive guideposts").

[85] *Lexmark*, 134 S. Ct. at 1386 (quoting Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013)).