Nos. 19-16102, 19-16300, 19-16299, 19-16336

In the United States Court of Appeals for the Ninth Circuit

SIERRA CLUB, ET AL.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL.,

Defendants-Appellants.

STATE OF CALIFORNIA, ET AL.,

Plaintiffs-Appellees–Cross-Appellants,

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL.,

Defendants-Appellants–Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF *AMICI CURIAE* FEDERAL COURTS SCHOLARS IN SUPPORT OF PLAINTIFFS-APPELLEES

Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
Ashwin P. Phatak
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street, NW, Suite 501
Washington, DC 20036
(202) 296-6889
elizabeth@theusconstitution.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are leading scholars with expertise in the jurisdiction of the federal courts, including expertise pertaining to the government's argument that courts cannot hear this case because Plaintiffs lack a cause of action. *Amici curiae* are:

- Erwin Chemerinsky, Dean, Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley Law
- Michael C. Dorf, Robert S. Stevens Professor of Law, Cornell Law School
- David A. Strauss, Gerald Ratner Distinguished Service Professor of Law, Faculty Director of the Jenner & Block Supreme Court and Appellate Clinic, University of Chicago Law School
- Stephen I. Vladeck, A. Dalton Cross Professor in Law, University of Texas School of Law

INTRODUCTION AND SUMMARY OF ARGUMENT

On February 15, 2019, following months of trying to secure funding from Congress to build a wall along the southern border, President Trump issued an order declaring a "national emergency" and directing that funds Congress appropriated for

[1] No person or entity other than *amici* and their counsel assisted in or made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

other purposes be diverted to build the wall. Plaintiffs challenged that order and its implementation, arguing that this diversion of funds exceeds the President's constitutional and statutory authority. Agreeing with Plaintiffs, the district court granted in part their motions for partial summary judgment. The court entered a permanent injunction preventing the use of funds reprogrammed under Sections 8005 and 9002 of the 2019 Department of Defense Appropriations Act from being used to construct a border wall in specified regions. *Sierra Club v. Trump*, 2019 WL 2715422, at *6 (N.D. Cal. June 28, 2019); *see California v. Trump*, 2019 WL 2715421 (N.D. Cal. June 28, 2019).

Seeking reversal of these decisions, the government argues that Plaintiffs need a statutory cause of action and that they "are not proper parties to enforce Section 8005 because they fall well outside its zone of interests." Appellants' Br. 2. Both arguments are wrong.

First, regardless of whether an injured plaintiff has a statutory cause of action, "equitable relief . . . is traditionally available to enforce federal law," *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385-86 (2015), and the federal courts are empowered to provide injunctive remedies when the executive injures a plaintiff by exceeding its authority. *See, e.g.*, *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.").

From the earliest days of the American Republic, courts have consistently heard claims that executive branch officials exceeded their statutory power or violated the Constitution without requiring a statutory cause of action. This case is no different.

Second, the government is wrong in arguing that a "zone of interests" test limits the ability of injured plaintiffs to pursue equitable remedies for conduct that exceeds lawful authority. The government's argument confuses two distinct types of claims: (1) suits brought under a statutory cause of action to enforce a statutorily created right, and (2) suits brought in equity to halt *ultra vires* or unconstitutional conduct. The zone-of-interests test applies to the former, not the latter. Where plaintiffs rely on a statutory cause of action, the zone-of-interests test is a "tool for determining who may invoke the cause of action" and is thus "a straightforward question of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-30 (2014). But where plaintiffs instead invoke a court's equitable power to enjoin unauthorized government conduct, the question is simply "whether the relief [the plaintiffs] requested . . . was traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). In this case, it plainly was.

ARGUMENT

I. A STATUTORY CAUSE OF ACTION IS NOT NEEDED TO OBTAIN EQUITABLE REVIEW OF UNAUTHORIZED EXECUTIVE CONDUCT.

A. As the Supreme Court has explained, "the equity jurisdiction of the federal courts is the jurisdiction in equity 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*, 527 U.S. at 318 (quotation marks omitted). And at that time, there was already a "long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 135 S. Ct. at 1384.

Indeed, the antecedents to modern equitable review go back to medieval England. Traditionally, common law courts issued a "variety of standardized writs," each of which encompassed a "complete set of substantive, procedural, and evidentiary law, determining who ha[d] to do what to obtain the unique remedy the writ specifie[d] 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.

Against this backdrop, the Framers of the American 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, 791 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 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).

Under these principles, moreover, equitable relief could be granted where "a wrong is done, for which there is no plain, adequate, and complete remedy in the Courts of Common Law." *Id*. § 49, at 53; *see Payne v. Hook*, 74 U.S. 425, 430 (1868) (where a court "ha[s] jurisdiction to hear and determine th[e] controversy, ... [t]he absence of a complete and adequate remedy at law, is the only test of equity jurisdiction"). Among the situations in which equitable review was available because of the inadequacy of common law remedies were cases involving "continuing injuries" and those brought to "prevent a permanent injury from being done" which "cannot be estimated in damages." *Osborn v. Bank of U.S.*, 22 U.S.

738, 842, 841 (1824); *id*. at 844 ("the cases are innumerable, in which injunctions are awarded on this ground").

Emblematic of these principles was the prominent case *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 559 (1851), in which the plaintiff alleged that an illegally built bridge caused it financial injury by obstructing commercial navigation. Observing that "it would be difficult to state a stronger case for the extraordinary interposition of a court of chancery," because "[i]n no case could a remedy be more hopeless by an action at common law," *id*. at 562, the Supreme Court confirmed that where such injury is alleged, "there is no other limitation to the exercise of a chancery jurisdiction by these courts, except the value of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States," *id*. at 563. In such cases, equitable relief could be granted:

> An indictment at common law could not be sustained in the federal courts by the United States, against the bridge as a nuisance, as no such procedure has been authorized by Congress. But a proceeding, on the ground of a private and an irreparable injury, may be sustained against it by an individual or a corporation. . . . If the obstruction be unlawful, and the injury irreparable, by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery.

Id. at 564.

B. From the early days of the Republic, these equitable powers were used to review the lawfulness of executive action. A notable 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 decisions reflect the same principle. For example, in *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), the Court issued a writ of mandamus requiring the Postmaster General to disburse certain credits to which the plaintiffs claimed they were entitled. The Court made clear that so long as it could exercise subject-matter and personal jurisdiction, it could provide a remedy. *Id.* at 623-24. Similarly, in *Carroll v. Safford*, 44 U.S. 441 (1845), the 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. Likewise, 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 the officials' mistaken interpretation of the 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.

C. The merger of law and equity did not alter the requirements for equitable relief. Indeed, the statute authorizing that merger prohibited the Supreme Court from adopting rules that would "abridge, enlarge, [or] modify the substantive rights of any litigant." Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064, 1064 (1934). Thus, the Supreme Court continued to grant equitable relief restraining unlawful executive action without any statutory cause of action. For example, in *Harmon v. Brucker* the Court held that an Army Secretary's discharge decision was "in excess of powers granted him by Congress." 355 U.S. at 581. In doing so, the Court reaffirmed the judiciary's "power to construe the statutes involved to determine whether the respondent did exceed his powers," making clear that if such powers were exceeded, "judicial relief from this illegality would be available." *Id.* at 582.

Indeed, the Supreme Court has consistently decided the merits of equitable challenges to executive action without even addressing the lack of a statutory cause of action. For instance, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court blocked the President's order to seize certain steel mills, which

"was not authorized by an act of Congress or by any constitutional provisions." *Id.* at 583. Although *Youngstown* rested heavily on the President's lack of statutory authority for his actions, nowhere did the Court discuss the absence of a statutory cause of action permitting the mill owners to file suit. Likewise, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court resolved the merits of an action seeking an injunction based on a claim that officials went "beyond their statutory and constitutional powers," *id.* at 667, never once suggesting that the plaintiffs could not seek such equitable relief because they lacked a statutory cause of action.

Most recently, in *Armstrong v. Exceptional Child Center*, although the Court concluded that the Medicaid Act "displace[d] the equitable relief that is traditionally available to enforce federal law," 135 S. Ct. at 1385-86, the Court reiterated that "'in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer,'" *id.* at 1384 (quoting *Carroll*, 44 U.S. at 463).

These are only a few of the many decisions in which the Supreme Court has permitted equitable review of *ultra vires* executive conduct without requiring a statutory cause of action. *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 165, 170 (1993); *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 235, 238-39 (1968); *Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959); *Land v. Dollar*, 330 U.S. 731, 734, 736-37 (1947); *Stark v. Wickard*, 321 U.S. 288, 310 (1944); *Santa Fe Pac. R.R. Co. v. Payne*, 259 U.S. 197, 198-99 (1922). In short, "where [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." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949).[2]

D. The enactment of the Administrative Procedure Act ("APA") did not limit the availability of non-statutory equitable review.

"Nothing in the APA purports to be exclusive or suggests that the creation of APA review was intended to preclude any other applicable form of review." Siegel, *supra*, at 1666. While the APA imposes its own requirements on agencies and provides its own authorizations for judicial review, the statute explicitly "do[es] not limit or repeal additional requirements imposed by statute or otherwise recognized by law." 5 U.S.C. § 559; *see* U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 139 (1947) (this provision was meant "to indicate that the act will be interpreted as supplementing constitutional and legal requirements imposed by existing law"); Preis, *supra*, at 48 (the APA did not "displace[] the federal courts' general power to imply injunctive relief").

"Prior to the APA's enactment, after all, courts had recognized the right of judicial review of agency actions that exceeded authority," and the APA did "not

[2] Likewise, injunctive relief has long been granted, without a statutory cause of action, to remedy violations of the Constitution. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Clinton v. City of New York*, 524 U.S. 417 (1998); *Ex parte Young*, 209 U.S. 123 (1908).

repeal the review of *ultra vires* actions that was recognized long before." *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988) (citations omitted). Thus, the ability to bring an APA claim has no bearing on a plaintiff's ability to seek traditional equitable relief. *See Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1326-27 (D.C. Cir. 1996) (conducting non-statutory *ultra vires* review where plaintiffs did not make use of an available APA cause of action).

II. WHEN PLAINTIFFS SEEK EQUITABLE RELIEF FROM *ULTRA VIRES* OR UNCONSTITUTIONAL CONDUCT, NO ZONE-OF-INTERESTS TEST APPLIES.

Notwithstanding this long tradition of non-statutory review of *ultra vires* and unconstitutional actions, the government argues that Plaintiffs "are not proper parties" to bring this suit because they fall outside the "zone of interests" protected by Section 8005—the statute the government claims authorizes its conduct. Appellants' Br. 2. This argument misunderstands the nature of Plaintiffs' claims and the "zone of interests" test itself.

Fundamentally, the government confuses two distinct types of claims: (1) suits brought under a statutory cause of action to enforce a statutorily created right, and (2) suits brought in equity to enjoin *ultra vires* or unconstitutional conduct. The zone-of-interests test applies to the former, not the latter.

A. The zone-of-interests test governs "statutorily created causes of action," *Lexmark*, 572 U.S. at 129, because its function is to help construe the breadth of

statutes that confer a right to sue. When plaintiffs rely on a statutory cause of action, the test serves as a "tool for determining who may invoke the cause of action," a task that necessitates "[i]dentifying the interests protected by the . . . Act." *Id.* at 130, 131; *see id.* at 129 ("*a statutory cause of action* extends only to plaintiffs whose interests fall within the zone of interests protected *by the law invoked*" (emphasis added) (quotation marks omitted)). The zone-of-interests test therefore has no place in a case like this one—where Plaintiffs' claims are not premised on the deprivation of a statutorily created right and Plaintiffs do not invoke a statutorily conferred cause of action.

This conclusion flows from the basic nature of statutory causes of action and the judiciary's role in interpreting them. In establishing new duties or prohibitions, statutes often create new legal rights corresponding to those duties or prohibitions. *See, e.g.*, *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 174 (2011) (retaliation against employees); *Lexmark*, 572 U.S. at 132 (false advertising that harms competitors). Many such statutes authorize particular classes of persons to sue to enforce the statute's duties or prohibitions and thereby vindicate those newly established rights. *See, e.g.*, *Thompson*, 562 U.S. at 175 (construing 42 U.S.C. § 2000e-5(f)(1)); *Lexmark*, 572 U.S. at 122 (construing 15 U.S.C. § 1125(a)).

"Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in

addition, who may enforce them and in what manner." *Davis v. Passman*, 442 U.S. 228, 241 (1979). Although a statute can provide a cause of action implicitly or explicitly, *Cort v. Ash*, 422 U.S. 66, 78 (1975), the question of whether a statute has done so is one of statutory construction: "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

For those reasons, even when a statute provides a cause of action for the violation of a statutorily created right, plaintiffs are entitled to invoke this cause of action only if the interests they seek to vindicate are the type of interests that Congress enacted the provision to protect. *See Lexmark*, 572 U.S. at 128 ("[T]he question this case presents is whether Static Control falls within the class of plaintiffs whom Congress has authorized to sue under § 1125(a). In other words, we ask whether Static Control has a cause of action under the statute.").

This limitation is known as the zone-of-interests test. The test recognizes that when Congress creates a statutory cause of action, Congress does not necessarily intend it to extend to persons "whose interests are unrelated to the statutory prohibitions." *Thompson*, 562 U.S. at 178. "Whether a plaintiff comes within the zone of interests," therefore, "is an issue that requires [courts] 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 (emphasis added) (quotation marks omitted). Thus, whether "Congress intended to make a remedy available to a special class of litigants" is a "question of statutory construction." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 (1979) (citing *Cort*, 422 U.S. 66); *e.g.*, *id*. at 689 (concluding that "petitioner does have *a statutory right* to pursue her claim" (emphasis added)).

Therefore, the zone-of-interests test—like the broader analysis of whether a statutory cause of action exists and authorizes a particular suit—is simply "a straightforward question of statutory interpretation." *Lexmark*, 572 U.S. at 129. "In cases such as these, the question is which class of litigants may enforce in court *legislatively created rights or obligations*." *Davis*, 442 U.S. at 239 (emphasis added).

B. Equitable actions seeking to enjoin *ultra vires* or unconstitutional conduct are entirely different. They are not premised on the deprivation of a statutory right, and they do not depend on the existence of a statutory cause of action. Instead, they seek equitable relief, "a judge-made remedy," *Armstrong*, 135 S. Ct. at 1384, for injuries that stem from unauthorized government conduct. 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" or "ultra vires conduct." *Dalton v. Specter*,

511 U.S. 462, 472 (1994).

"The substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief . . . depend on traditional principles of equity jurisdiction." *Grupo Mexicano*, 527 U.S. at 318-19 (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2941, at 31 (2d ed. 1995)). They do not depend on whether a statute provides authority to sue. 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.

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 against government conduct that allegedly violates the statute. 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 equitable cases like this one, therefore, the question is simply "whether the relief [Plaintiffs] requested . . . was traditionally accorded by courts of equity." *Grupo Mexicano*, 527 U.S. at 319. And as explained above, "equitable relief . . . is traditionally available to enforce federal law," *Armstrong*, 135 S. Ct. at 1385-86, when jurisdictional requirements are met and when no damages remedy would suffice to ameliorate a plaintiff's injury.

Such relief, moreover, has long been available to enjoin executive action that exceeds statutory limits: "When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." *Reich*, 74 F.3d at 1328 (quotation marks omitted). Likewise, equitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001); *see Bell v. Hood*, 327 U.S. 678, 684 (1946). Thus, 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." *Free Enter. Fund*, 561 U.S. at 491 n.2 (quotation marks omitted) (citing, *inter alia*, *Ex parte Young*, 209 U.S. at 149, 165, 167).

Because no statutory cause of action is needed to enjoin unconstitutional or *ultra vires* executive conduct, there is no "zone of interests" test to apply in this case.

The government mistakenly cites *Clarke v. Securities Industry Association*,

479 U.S. 388 (1987), for the proposition that "[w]here a plaintiff seeks to bring an implied cause of action in equity to enforce a statutory or constitutional provision, the Supreme Court has suggested that a heightened zone-of-interest requirement applies, and the provision must be intended for the '*especial* benefit' of protecting the plaintiff at issue." Appellants' Br. 26-27. Not true: the cited passage actually discusses "cases in which a private right of action under a statute is asserted." *Clarke*, 479 U.S. at 400 n.16 (citing *Cort*, 422 U.S. 66, and *Cannon*, 441 U.S. 677). The government simply fails to acknowledge the difference between "implying" a cause of action in equity and the entirely separate act of concluding—as a matter of statutory interpretation—that a right of action is "implied" in a statute. *See Cort*, 422 U.S. at 78 ("In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,'—that is, does the statute create a federal right in favor of the plaintiff?" (quoting *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916))).

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 *ultra vires* or unconstitutional conduct proceed in equity without a statutory cause

of action, there is no congressional intent to discern and no zone-of-interests test to apply.

C. Refusing to accept these principles, the government argues that plaintiffs who sue in equity to enjoin *ultra vires* executive action must show that they fall within the zone of interests protected by whatever statute the executive cites in defense of its conduct.

As the district court recognized, this argument makes little sense. "The very nature of an *ultra vires* action posits that an executive officer has gone beyond what the statute permits, and thus beyond what Congress contemplated. It would not make sense to demand that Plaintiffs—who otherwise have standing—establish that Congress contemplated that the statutes allegedly violated would protect Plaintiffs' interests." *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 910 (N.D. Cal. 2019). For that reason, as Judge Bork once explained, plaintiffs challenging executive conduct as *ultra vires* "need not . . . show that their interests fall within the zones of interests of the constitutional and statutory powers invoked by the President." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987); *see id.* (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").

Unsurprisingly, therefore, the Supreme Court has never applied a "zone of

interests" test in any case alleging *ultra vires* executive action—much less dismissed a case on that basis.

Because the Court did not even articulate the zone-of-interests test until the 1970s, *see Lexmark*, 572 U.S. at 129, it of course never purported to apply the test before that. But neither did the Court apply any precursor or analog to that test in the many cases it resolved where plaintiffs brought equitable challenges to *ultra vires* executive action. In *Youngstown*, for instance, "the steel mill owners [were] not . . . required to show that their interests fell within the zone of interests of the President's war powers in order to establish their standing to challenge the seizure of their mills as beyond the scope of those powers." *Gracey*, 809 F.2d at 811 n.14.

Even after the Supreme Court announced the zone-of-interests test, it never mentioned that test in any *ultra vires* challenge. In *Dames & Moore*, for example, where the plaintiff "alleged that the actions of the President and the Secretary of the Treasury . . . were beyond their statutory and constitutional powers," 453 U.S. at 667, the Court resolved the case on the merits. The plaintiff's injury consisted of being unable to recover money owed to it under a contract, but the Court did not ask whether this injury fell within the zone of interests protected by the two statutes that the executive claimed authorized its conduct—both of which focused on foreign policy. *Id*. at 675. Neither did the Court ask whether this injury fell within the zone of interests of a third statute that, according to the plaintiff, divested the executive

of whatever power it once had in this area. *Id*. at 684.

So too in *Dalton*, where the plaintiffs' claim was based on alleged violations of procedural requirements in a law governing military base closures. 511 U.S. at 466. With no statutory cause of action available, either in that law or in the APA, *see id*. at 469-70, the Court regarded the plaintiffs' claim as one alleging "ultra vires conduct," specifically that "the President exceeded his statutory authority" by "violat[ing] a statutory mandate," *id*. at 472, 474. Yet the Court did not ask whether any plaintiffs fell within the zone of interests of the base-closure statute. As in *Dames & Moore*, the Court proceeded to address the substance of their claims. *See Dalton*, 511 U.S. at 474-76 (concluding that the President's actions were unreviewable because the statute "commits the decision to the discretion of the President"); *id*. at 477 ("our conclusion that judicial review is not available . . . follows from our interpretation of [the] Act").

Notably, the executive branch sometimes claims that its conduct is authorized by administrative *regulations*, not by a statute. In *Vitarelli v. Seaton*, for instance, the parties disputed whether "the proceedings attendant upon petitioner's dismissal from government service on grounds of national security fell . . . short of the requirements of the applicable departmental regulations." 359 U.S. at 545; *see id.* at 545-46 (siding with the petitioner, holding his dismissal "illegal and of no effect," and ordering injunctive relief in the form of reinstatement). In such cases, under the

government's reasoning, an injured plaintiff would need to show that his injury fell within the zone of interests protected by those regulations—something no court has ever required.

The government similarly contends that the zone-of-interests test "applies to causes of action to enforce constitutional prohibitions." Appellants' Br. 31. This too is wrong, for "the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Davis*, 442 U.S. at 241. The Supreme Court has never dismissed a constitutional claim under the zone-of-interests test, and *Lexmark* makes clear why: constitutional claims do not require a court to probe congressional intent regarding the scope of a remedy that Congress has created.

The government nevertheless insists that pre-*Lexmark* decisions require applying the zone-of-interests test to constitutional claims until the Supreme Court explicitly says otherwise. But neither of the government's two citations supports that proposition.

While a footnote in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), applied a zone-of-interests analysis to a dormant Commerce Clause claim, *id.* at 320 n.3, the Court—critically—explained that it was evaluating whether the plaintiffs "ha[d] standing" under "the two-part test of *Data Processing Service v. Camp*, 397 U.S. 150 (1970)," *id.* As indicated by that quote, the *Data Processing*

test treated the zone-of-interests inquiry as part of prudential "standing." *See Data Processing*, 397 U.S. at 153 ("The question of standing . . . concerns . . . whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."). The Supreme Court explicitly repudiated that framework in *Lexmark*, which "recast the zone-of-interests inquiry as one of statutory interpretation." *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1120-21 (9th Cir. 2015); *see Lexmark*, 572 U.S. at 127 ("'prudential standing' is a misnomer as applied to the zone-of-interests analysis, which asks whether this particular class of persons ha[s] a right to sue under this substantive statute" (quotation marks omitted)); *id*. at 128 ("to determine the meaning of the congressionally enacted provision creating a cause of action . . . we apply traditional principles of statutory interpretation").

As for *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), that opinion simply repeated the same quote from *Data Processing* in the course of summarizing the "prudential principles that bear on the question of standing." *Valley Forge*, 454 U.S. at 474-75. Thus, the opinion's reference to "constitutional" guarantees in that lone quote, which was *dicta* to begin with, has been superseded by *Lexmark*.

Even before *Lexmark* clarified these matters, the Court routinely entertained equitable claims to enjoin unconstitutional actions without applying a zone-of-

interests test. *E.g.*, *Free Enter. Fund*, 561 U.S. at 492 (removal protections for agency heads violated the separation of powers); *Clinton*, 524 U.S. at 421 (line-item veto violated the Presentment Clause); *Franklin v. Massachusetts*, 505 U.S. 788, 806 (1992) (concluding "on the merits" that executive action did not violate the Enumeration Clause).

In short, when a plaintiff brings an equitable claim seeking to halt unconstitutional or *ultra vires* conduct, no zone-of-interests test applies—regardless of whether the executive argues that a statute authorizes its conduct. If, for instance, the executive branch had claimed in *Youngstown* that its seizure of the steel mills were authorized by a wartime emergency statute, the steel-mill owners would not then have had to demonstrate that the financial interests they sought to vindicate fell within the zone of interests protected by such a statute. This case is no different.

D. Undaunted, the government creatively suggests that the zone-of-interests test governs equitable causes of action because "the equitable powers that the lower federal courts exercise are themselves conferred by statute." Appellants' Br. 32. The motions panel generously labeled this argument "a stretch," *Sierra Club v. Trump*, 929 F.3d 670, 702 n.25 (9th Cir. 2019), and there is no support for it.

The power conferred by the Judiciary Act of 1789 "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." *Grupo Mexicano*, 527 U.S. at 318 (quoting *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)). "The 'jurisdiction' thus conferred on the federal courts," the Supreme Court has explained, "prescribes the body of doctrine which is to guide their decisions and enable them to determine whether in any given instance a suit . . . is an appropriate one for the exercise of the extraordinary powers of a court of equity." *Atlas Life*, 306 U.S. at 568. In the absence of statutory limitations, it is this "body of doctrine," *id.*, that determines when injunctive relief is available, rather than a statutory cause of action to which a zone-of-interests test might apply. *Cf. Grupo Mexicano*, 527 U.S. at 329 (distinguishing cases "based on statutory authority" from those based "on inherent equitable power"). And that body of doctrine has long authorized review of *ultra vires* executive conduct without reference to any "zone of interests" test.

The government further notes that "the zone-of-interests requirement itself has common-law 'roots,'" Appellants' Br. 32 (quoting *Lexmark*, 572 U.S. at 130 n.5), but this actually undermines the government's position. The historical precursor of the zone-of-interests test came from *damages actions at common law*, not from suits in equity. The "roots" of that 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.'" *Lexmark*, 572 U.S. at 130 n.5 (quoting W.

Keeton et al., *Prosser and Keeton on Law of Torts* § 36, at 229-30 (5th ed. 1984)). Thus, "[*s*]*tatutory causes of action* are regularly interpreted to incorporate standard common-law limitations on civil liability," including "the zone-of-interests test." *Id*. (emphasis added).

Finally, the government tries to conjure up a separation-of-powers problem—but only confuses things further—by citing case law regarding the appropriateness of judicially inferring a *damages* remedy. *See* Appellants' Br. 32-33 (citing *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017)). The Supreme Court's caution in that area, however, is limited to "recognizing implied causes of action *for damages*," *Ziglar*, 137 S. Ct. at 1855 (emphasis added), based on the unique ramifications of that remedy. *See id*. at 1856 ("When determining whether traditional equitable powers suffice to give necessary constitutional protection—or whether, in addition, a damages remedy is necessary—there are a number of economic and governmental concerns to consider."); *id*. at 1858 ("[I]f equitable remedies prove insufficient a damages remedy might be necessary to redress past harm and deter future violations. Yet the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide."). The Court has made clear that, "unlike the *Bivens* remedy, which we have never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Malesko*, 534 U.S. at 74.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
Ashwin P. Phatak
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street, NW, Suite 501
Washington, DC 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amici Curiae *Federal Courts Scholars*

Dated: August 22, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,472 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 22nd day of August, 2019.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2019, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: August 22, 2019

/s/ Elizabeth B. Wydra