No. 19-16102

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.

On Appeal from the United States District Court
for the Northern District of California
Case No. 19-cv-00092-HSG

BRIEF OF *AMICI CURIAE* FEDERAL COURTS SCHOLARS IN OPPOSITION TO DEFENDANTS' MOTION FOR A STAY

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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 have not pointed to a statutory 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 other purposes be diverted to build the wall. Plaintiffs challenged that order and its

[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.

implementation, arguing that this diversion of funds exceeds the President's authority under various federal laws. They also sought a preliminary injunction, which the district court granted in part. Order 55.

The government now seeks a stay pending appeal and argues, among other things, that Plaintiffs may not sue because the statute at issue "contains no express cause of action." Mot. 9. It further argues that even if "an implied cause of action in equity" were available, "these plaintiffs fall outside the zone of interests protected" by the statute at issue. *Id.* Both arguments are wrong.

First, "equitable relief . . . is traditionally available to enforce federal law," *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385-86 (2015), and even in the absence of a statutory cause of action, the federal courts are empowered to provide redress where the executive illegally exceeds its authority. *See, e.g.*, *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986) ("We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.").

Second, the government's "zone of interest" argument conflates two distinct types of suits: (1) actions brought under a statutory cause of action to enforce statutory rights, and (2) actions brought in equity to halt *ultra vires* government action. The zone-of-interests test applies to the former, not to the latter. In the latter,

the question is simply "whether the relief [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. COURTS MAY GRANT EQUITABLE RELIEF WHERE PLAINTIFFS CHALLENGE EXECUTIVE ACTION AS *ULTRA VIRES*.

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); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 563 (1851) (same). 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 (citing Louis Jaffe & Edith Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. Rev. 345 (1956)).

Indeed, the antecedents to modern equitable review go back to medieval England. By the seventeenth century, the King's Bench had developed equitable remedies that were analogous to today's remedies against illegal government action, and "[a]t the time of the American Founding, 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." John F. Preis, *In Defense of Implied*

Injunctive Relief in Constitutional Cases, 22 Wm. & Mary Bill Rts. J. 1, 15 (2013). Those equitable remedies were often exercised in response to illegal official action, including by the Crown itself. *See* James E. Pfander, *Sovereign Immunity and the Right To Petition*, 91 Nw. U. L. Rev. 899, 909 (1997).

When the Constitution's Framers 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 when 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, they incorporated this established understanding about the power of equitable courts to provide redress for illegal state action in the absence of a common law remedy.

From the early days of the Republic, that equitable power was used to evaluate the lawfulness of executive action. The most prominent 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 Court concluded that he was entitled to a remedy in the form of a *mandamus* writ, *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. The case is therefore an early example of the Supreme Court devising a remedy—*mandamus* relief in equity—for a legal wrong committed by an executive officer despite the absence of a statutory cause of action permitting review.

Other Supreme Court cases 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 by statute. The Court's decision made clear that so long as the Court 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. The Court had "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 exercised its equitable powers to enjoin unauthorized conduct by federal officials, 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.

More recent cases have similarly permitted equitable relief in the face of illegal executive action, without any statutory cause of action. For example, in *Harmon v. Brucker*, 355 U.S. 579 (1958), the Court held that an Army Secretary's decision was "in excess of powers granted him by Congress" and that the district court erred by concluding it lacked the power to hear the case: "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." *Id.* at 581-82.

Indeed, the Court has consistently decided the merits of challenges to executive action without even addressing the lack of a statutory cause of action permitting such a suit. For instance, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court struck down the President's executive order seizing certain steel mills, which "was not authorized by an act of Congress or by any constitutional provisions." *Id.* at 583. Importantly, although *Youngstown* rested heavily on the President's lack of statutory authority for his actions, nowhere in the opinion did the Court discuss the absence of a statutory cause of action permitting the mill owners to file suit challenging the President's action. Likewise, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court addressed the merits of an action seeking an injunction based on a claim that officials "were 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), and that this equitable power "reflects a long history of judicial review of illegal executive action, tracing back to England," *id.*

These are only a few examples 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); *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).

II. PLAINTIFFS SEEKING TO ENJOIN *ULTRA VIRES* ACTION NEED NOT SATISFY A ZONE-OF-INTERESTS TEST.

Notwithstanding this long tradition of *ultra vires* review, the government argues that Plaintiffs cannot maintain this suit because they "fall outside the zone of

interests protected by Section 8005." Mot. 9. This argument misunderstands the nature of Plaintiffs' claims and the "zone of interests" test itself.

To start, the government's argument conflates two distinct types of suits: (1) actions brought under a statutory cause of action to enforce statutory rights, and (2) actions brought in equity to halt *ultra vires* government action. The zone-of-interests test applies to the former, not to the latter. That is, the zone-of-interests test is a "tool for determining who may invoke the cause of action in [a statute]," a task that necessitates "[i]dentifying the interests protected by the . . . Act." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130, 131 (2014); *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 limits statutory causes of action for a reason. Statutes commonly establish new legal rights and corresponding legal prohibitions, *e.g.*, *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 174 (2011) (employer retaliation); *Lexmark*, 572 U.S. at 122 (false advertising), as well as causes of action to enforce those rights and prohibitions, *see id.* 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. "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." *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1120 (9th Cir. 2015) (quoting *Lexmark*, 572 U.S. at 127 (emphasis added & quotation marks omitted)).

Ultra vires actions are entirely different. They are not premised on the deprivation of a statutory right, and they do not rely on a statutory cause of action. Instead, they seek equitable relief, "a judge-made remedy," *Armstrong*, 135 S. Ct. at 1384, for injuries suffered as a result of government actions that are unauthorized by any law, *see id.* Rather than depending on a statutory cause of action, "[t]he 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)).

In cases like this one, therefore, the question is simply "whether the relief [Plaintiffs] requested . . . was traditionally accorded by courts of equity." *Id.* at 319. And as explained above, "equitable relief . . . is traditionally available to enforce federal law," *Armstrong*, 135 S. Ct. at 1385-86, including by enjoining *ultra vires* executive action. *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C.

Cir. 1996) ("When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." (quotation marks omitted)); *Hawaii v. Trump*, 878 F.3d 662, 682 (9th Cir. 2017) (an equitable cause of action "allows courts to review *ultra vires* actions by the President that go beyond the scope of the President's statutory authority"), *rev'd on other grounds*, 138 S. Ct. 2392 (2018).[2]

Failing to acknowledge these fundamental distinctions, 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

[2] As the district court noted, "Congress may displace federal courts' equitable power to enjoin unlawful executive action," Order 29 n.14, but whether Congress has done so is a different question than whether Congress has created a statutory cause of action. That is why the Supreme Court in *Armstrong* separately analyzed, as distinct inquiries, two different questions: (1) whether the Medicaid Act provides a statutory cause of action, and (2) whether the Act forecloses 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."). As the district court also noted, no party contends that Section 8005 expressly forecloses equitable relief or satisfies the criteria for finding an implicit foreclosure of such relief. *See* Order 29 n.14.

allegedly violated would protect Plaintiffs' interests." Order 30. 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). "Otherwise, a meritorious litigant, injured by *ultra vires* action, would seldom have standing to sue since the 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." *Id.*

The government nonetheless insists that the test also "encompasses equitable causes of action" because these actions "are inferred from Congress's statutory grant of equity jurisdiction." Mot. 11. But the government's citations do not support this assertion. To the contrary, 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)). That system of judicial remedies included review of *ultra vires* executive action without reference to any "zone of interests" test. And for two centuries the Supreme Court has permitted judicial review of *ultra vires* executive action without

invoking a "zone of interests" test. *See supra* at 4-7.

According to the government, "it makes no sense to hold that the zone-of-interests requirement applies where Congress has provided a cause of action, but that, where Congress has not expressly authorized suit *at all*, any injured persons can sue, *even if* their interests are entirely unrelated to the interests protected by the statute." Mot. 11. It makes perfect sense, however. Where plaintiffs invoke a statutorily created remedy, congressional intent is paramount, and the zone-of-interests test helps maintain fidelity to that intent. But not all "interests" that a plaintiff may vindicate in court are created by statute. Where plaintiffs are directly harmed by *ultra vires* government action, there is no congressional intent to discern, except to the extent that the government claims its action is authorized by a statute.

The government further argues that the zone-of-interests test applies to claims for equitable relief based on constitutional violations, Mot. 12, but constitutional claims are also different than *ultra vires* claims. Moreover, all of the government's citations predate the Supreme Court's decision in *Lexmark*, which "recast the zone-of-interests inquiry as one of statutory interpretation." *Ray Charles Found.*, 795 F.3d at 1120-21. For instance, in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), the Court was evaluating whether the plaintiffs "ha[d] standing under the two-part test of *Data Processing Service v. Camp*, 397 U.S. 150 (1970)." *Boston*, 429 U.S. at 321 n.3. The *Camp* framework, which treated the zone-of-

interests inquiry as part of prudential standing, has been repudiated. *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").

Finally, the government confuses things even further by discussing case law concerning *damages* remedies judicially inferred from statutes or the Constitution. *See* Mot. 13 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017)). All this is irrelevant. The Supreme Court's caution in this area is limited to "recognizing implied causes of action *for damages*," *Ziglar*, 137 S. Ct. at 1855 (emphasis added), based on the unique ramifications of such actions. *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.").[3]

[3] Notably, the historical precursor of the zone-of-interests test came from damages actions at common law, not from suits in equity. The "roots" of the modern zone-of-interests test "lie in the common-law rule that a plaintiff may not recover

* * *

Given this history and precedent, Plaintiffs clearly have a cause of action to bring their claims.

CONCLUSION

For the foregoing reasons, this Court should reject Defendants' stay request.

Respectfully submitted,

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Dated: June 11, 2019

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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)). "Statutory causes of action are regularly interpreted to incorporate standard common-law limitations on civil liability," including "the zone-of-interests test." *Id.* That historical distinction further illustrates why the zone-of-interests test has no place in equitable suits seeking to enjoin *ultra vires* conduct.

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) and this Court's Order of June 7, 2019, because the brief contains 3,481 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 11th day of June, 2019.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 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: June 11, 2019

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra