Nos. 19-17501, 19-17502, 20-15044

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

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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 arguments that courts cannot hear this case because Plaintiffs lack a cause of action and fail a "zone of interests" test. *Amici curiae* are:

- Erwin Chemerinsky, Dean, Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley Law
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INTRODUCTION AND SUMMARY OF ARGUMENT

In February 2019, after 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 implementation, arguing that this diversion of funds exceeds the President's

[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.

constitutional and statutory authority. Agreeing with Plaintiffs, the district court granted in part their motions for partial summary judgment, and it entered a permanent injunction against border-wall construction in specified regions using funds derived from 10 U.S.C. § 2808, a statute that enables the Secretary of Defense to undertake "military construction projects" in the event of a war or national emergency "that requires use of the armed forces." *Id*. § 2808(a). *See* ER 47-48. In previous orders, the district court had similarly enjoined the use of funds transferred under Section 8005 of a Department of Defense appropriations statute. ER 10.

Still seeking to have this case dismissed on procedural grounds, the government argues that Plaintiffs lack an equitable cause of action and that they are outside the "zone of interests" protected by § 2808. Both arguments are wrong.

First, contrary to the government's arguments, "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 may provide injunctive remedies when the executive injures a plaintiff by exceeding its constitutional or statutory 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. Equitable Relief Is Traditionally Available to Prevent Injuries from 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). This power "reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 135 S. Ct. at 1384.

Indeed, the antecedents of modern equitable review stretch back to the medieval period. Traditionally, English 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) (quotation marks omitted). But as these writs ossified over time, failing to provide recourse in many situations, the Court of Chancery began ordering "new and distinct remedies for the violation of preexisting legal rights," in effect "creat[ing] a cause of action where none had existed before." *Id.* at 12, 20; *see* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 Wash. L. Rev. 429, 437-45 (2003).

From an early date, equitable relief was available against the Crown and its officers. This began with the development of the "petition of right," which "sought royal consent to the litigation of legal claims in the courts of justice" in cases where a "remedy against the Crown" was necessary. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue*

Judicial Claims Against the Government, 91 Nw. U. L. Rev. 899, 909 & n.36 (1997). Royal consent, when given, "authorized the court to hear the case, to decide it on legal principles, and to render a judgment against the Crown." *Id.*; *see* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 5-6 (1963). This device soon expanded "into other, more routinely available remedies" with no "requirement that the subject first obtain leave from the King." Pfander, *supra*, at 912-13.

By the seventeenth century, therefore, English courts had come to grant injunctive relief "against the King on general equitable principles without insisting on the King's prior consent." *Id.* at 914. The courts also developed various "prerogative writs," such as the writ of mandamus, that could be used to obtain relief against government officers "before the damage was done." Jaffe, *supra*, at 16-17; *see Rex v. Barker*, 3 Burr. 1265, 1267, 97 Eng. Rep. 823, 824-25 (K.B. 1762). Among other things, these prerogative writs were available to rein in "[o]fficials who acted in excess of jurisdiction." Jaffe, *supra*, at 19.

B. 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 those 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 the First Congress incorporated the established

understanding that equitable courts had the power to order prospective relief from unlawful government action. *See* Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (directing that "the forms and modes" of equitable proceedings in federal court were to follow "the principles, rules and usages which belong to courts of equity"); *Case of Hayburn*, 2 U.S. 408, 410 (1792) (formally adopting "the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court"). 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 the equitable principles adopted by American courts, injunctive relief was available 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 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, 841-42 (1824).

Emblematic of these rules was the prominent case *Pennsylvania v. Wheeling*

& Belmont Bridge Co., 54 U.S. 518 (1851), where it was alleged that an illegally built bridge caused financial injury by obstructing commercial navigation, *id.* at 557, 559-60. Where such injury is alleged, the Supreme Court explained, "there is no other limitation to the exercise of a chancery jurisdiction . . . 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. Equitable review was therefore available, without any specific statutory authorization, "on the ground of a private and an irreparable injury." *Id.* at 564.

From the early days of the Republic, federal courts used their equitable powers 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 his commission as Justice of the Peace, *id.* at 154, the Supreme Court concluded that he was entitled to a mandamus remedy, *id.* at 163-71, even though no "statute provide[d] an express cause of action for review of the Secretary of State's decision not to deliver up a document he possessed in his official capacity," Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612, 1630 (1997). The Court reasoned that if "a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Marbury*, 5 U.S. at 166.

Other early decisions reflected 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 comply with a federal statute by disbursing certain funds to the plaintiffs as required by the law. *Id.* at 608-09. The Court made clear that it could provide such a remedy so long as it had personal and subject-matter jurisdiction. *Id.* at 623-24.

Similarly, in *Carroll v. Safford*, 44 U.S. 441 (1845), the Court expressed "no doubt" that "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," if that officer has exceeded his statutory authority. *Id.* at 463.

Likewise, in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), the Court enjoined federal officials from confiscating the plaintiffs' mail based on the officials' mistaken interpretation of the fraud statutes. As the Court explained: "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 availability of equitable review. *See* Main, *supra*, at 474. 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). The Supreme Court therefore continued granting equitable relief to restrain unlawful executive action without any statutory cause of action. *See infra* at 10-14.

Nor did the later enactment of the Administrative Procedure Act ("APA") 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. Thus, the APA did "not 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), or preclude equitable review of unconstitutional actions outside the APA framework, *see Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (although the President's actions are not reviewable under the APA, they "may still be reviewed for constitutionality"). After all, the APA explicitly states that it "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"); *see also Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326-27 (D.C. Cir. 1996) (conducting *ultra vires* review where an APA cause of action was not pled); *Franklin*, 505 U.S. at 803-06 (conducting constitutional review

where final action was that of the President).

D. Ignoring this long tradition of equitable review, the government maintains that whenever it claims statutory authority for its actions, injured parties may not seek injunctive relief unless the statute cited by the government gives them a private right of action. Appellants' Br. 15-16. Supreme Court precedent forecloses that notion.

As the Court explained in *Harmon v. Brucker*, "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." 355 U.S. at 581-82. Applying that principle, the Court held that an Army Secretary's discharge decisions concerning two servicemembers were "in excess of powers granted him by Congress." *Id.* at 581. As here, the Secretary claimed his actions were authorized by statute, *id*. at 580, and his assertion required the courts "to construe the statutes involved to determine whether [he] did exceed his powers," *id.* at 582. But the Court did not even suggest that the servicemembers could proceed only if the statutes cited by the Secretary gave them a private right of action. Instead, the Court made clear that if the plaintiffs "alleged judicially cognizable injuries," then "judicial relief from this illegality would be available." *Id.*

As in *Harmon*, the Supreme Court has consistently decided the merits of equitable challenges to executive actions that were alleged to exceed statutory and

constitutional authority. The Court has never required plaintiffs in such cases to have a statutory cause of action.

Most famously, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court blocked the implementation of the President's executive order to seize certain steel mills because his order "was not authorized by an act of Congress or by any constitutional provisions." *Id.* at 583. Nowhere in the Court's opinion, or in any concurring or dissenting opinion, is there any hint that the suit was defective because the steel mill owners lacked a statutory cause of action. And that is not because the owners' right to judicial review was conceded. On the contrary, the government argued without success that the standards described above for "equity's extraordinary injunctive relief" were not met. *Id.* at 584.

Similarly, 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 the President and the Treasury Secretary went "beyond their statutory and constitutional powers." *Id.* at 667. Unlike in *Youngstown*, in *Dames & Moore* the President "purported to act under authority of" two federal statutes, *id*. at 675, which the Court had to interpret to resolve the case, *see id.* at 675-88. But the Court never suggested that the plaintiffs needed to identify a cause of action in those statutes to obtain equitable relief. By resolving the case on the merits, the Court implicitly rejected that notion.

The Court did the same in *Dalton v. Specter*, 511 U.S. 462 (1994), where plaintiffs alleged violations of a law governing military base closures. *Id*. at 466. Although the Court emphasized that this was a "claim alleging that the President exceeded his statutory authority," *id.* at 474, the Court did not hold that the plaintiffs could sue only if the base-closure statute provided them with a cause of action. Rather, citing *Dames & Moore*, the Court interpreted the statute and held that review was not available because the statute committed the decision "to the discretion of the President." *Id.* at 474-76; *see id*. at 477 ("our conclusion . . . follows from our interpretation of an Act of Congress"). In doing so, the Court demonstrated that equitable review does not become unavailable whenever "[a] case raises purely statutory, not constitutional, issues." Appellants' Br. 30.

The Court did so again in *Armstrong v. Exceptional Child Center*. There too, the plaintiffs sought an injunction based on a claim that officials injured them by violating the terms of a federal statute. 135 S. Ct. at 1382. Although that statute provided no cause of action, *id*. at 1387, the Court confirmed that "equitable relief . . . is traditionally available to enforce federal law," *id*. at 1385-86. Congress may "displace" the equitable review that is presumptively available, because "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Id*. at 1385; *e.g.*, *id.* (concluding based on statutory interpretation that "the Medicaid Act implicitly precludes private

enforcement" of the relevant provision). But for Congress to foreclose equitable review this way, "its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988); *accord Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Otherwise, "relief may be given in a court of equity . . . to prevent an injurious act by a public officer." *Armstrong*, 135 S. Ct. at 1384 (quoting *Carroll*, 44 U.S. at 463).

These are only a few of the many cases in which the Supreme Court has permitted equitable review of *ultra vires* executive conduct without any 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).

Likewise, equitable review is traditionally available, without a statutory cause of action, to prevent injuries by officials whose actions violate the Constitution. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Ex parte Young*, 209 U.S. 123 (1908). As the Court has noted, "injunctive 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). If a party seeks prospective relief from an injury

caused by a constitutional violation, "an implied private right of action directly under the Constitution" exists "as a general matter." *Free Enter. Fund*, 561 U.S. at 491 n.2. A statutory cause of action has never been required.

II. When Plaintiffs Seek Equitable Relief from *Ultra Vires* or Unconstitutional Conduct, No Zone-of-Interests Test Applies.

Notwithstanding the traditional availability of non-statutory review of *ultra vires* and unconstitutional actions, the government argues that Plaintiffs cannot bring this suit because their injuries "fall outside the zone of interests protected by the limitations on the statutory authority granted to DoD by 10 U.S.C. § 2808." Appellants' Br. 18. This argument misunderstands 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." *Id.* at 130; *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.

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) (statute protecting employees from retaliation by employers); *Lexmark*, 572 U.S. at 132 (statute protecting businesses from false advertising by 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 (discussing 42 U.S.C. § 2000e-5(f)(1)); *Lexmark*, 572 U.S. at 122 (discussing 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 cause of action may be "implicit in a statute not expressly providing one," *Cort v. Ash*, 422 U.S. 66, 78 (1975), the question of whether a statute implicitly creates a cause of action is a matter of statutory interpretation: "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).

Even when a statute provides a cause of action to enforce 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, e.g.*, *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).

Therefore, the zone-of-interests test, like the broader analysis of whether a statutory cause of action exists, 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 official 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 harm caused by "unconstitutional" or "ultra vires conduct." *Dalton*, 511 U.S. at 472.

"The substantive prerequisites for obtaining an equitable remedy . . . 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)). That is because the equitable 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." *Id.* at 318 (quoting *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)). In the absence of statutory limitations, this equitable "body of doctrine" is what determines whether injunctive relief is available, rather than a statutory cause of action. *Atlas Life*, 306 U.S. at 568; *cf. Grupo Mexicano*, 527 U.S. at 329 (distinguishing cases "based on statutory authority" from those based "on inherent equitable power").

As explained, that body of doctrine has long authorized review of *ultra vires* and unconstitutional executive conduct without a statutory cause of action. And because no statutory cause of action is needed, there is no occasion to consider the "zone of interests" that any such statute is meant to cover.[2]

The Supreme Court reaffirmed these distinctions most recently in *Armstrong*. There, the Court recognized that whether a statute provides a cause of action to enforce its terms is a different question than whether an equitable challenge may be brought to stop injurious conduct that violates the statute. Accordingly, the Court

[2] Significantly, 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).

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." *Id.* at 319. And as discussed 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 government 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). And when the executive violates the Constitution, equitable review is likewise available "as a general matter." *Free Enter. Fund*, 561 U.S. at 491 n.2.

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 cites *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), for the proposition that when equitable relief is sought and "a statutory or constitutional provision" is involved, that provision must be "intended for plaintiff's *especial* benefit." Appellants' Br. 20 (quotation marks omitted). But that is not right. 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 (emphasis added) (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))).

The government confuses things further by quoting the Supreme Court's cautionary remarks about judicially crafting *damages* remedies. *See* Appellants' Br. 28 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017)). But the Supreme Court's caution about "recognizing implied causes of action for damages," *Ziglar*, 137 S. Ct. at 1855, is based on the novelty and distinctive nature 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."). Unlike a judicially created damages remedy, "redress designed to halt or prevent [a] constitutional violation" is a "traditional form[] of relief" that "d[oes] not ask the Court to imply a new kind of cause of action." *United States v. Stanley*, 483 U.S. 669, 683 (1987) (quotation marks omitted); *see Malesko*, 534 U.S. at 74 (contrasting injunctive relief with "the *Bivens* remedy, which we have never considered a proper vehicle for altering an entity's policy").

In sum, when plaintiffs invoke a statutorily created remedy to enforce a statutorily created right, the zone-of-interests test helps maintain fidelity to congressional intent about the scope of that remedy. But not all "interests" that one 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.

That argument makes little sense: a "litigant's interest normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987). For that reason, 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." *Id.*

Unsurprisingly, therefore, the Supreme Court has never applied the "zone of interests" test (or any analog to that test) in any case alleging *ultra vires* executive action—much less dismissed a case on that basis. 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." *Id.*

Likewise, in *Dames & Moore*, 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. Nor 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 (finding the President's actions unreviewable because the statute "commits the decision to the discretion of the President").

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.

D. The government similarly contends that the zone-of-interests test applies to equitable claims based on constitutional violations. Appellants' Br. 27. This too is wrong. 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.

None of the cases on which the government relies, all of which predate *Lexmark*, suggests otherwise. 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); *accord Collins v. Mnuchin*, 938 F.3d 553, 574 (5th Cir. 2019) (en banc); *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)).

The government also cites *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), but 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. Thus, the opinion's passing reference to "constitutional" guarantees in that lone quote 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); *Franklin*, 505 U.S. at 806 (concluding "on the merits" that executive action did not violate the Enumeration Clause).

Nor does it matter whether or not there is a "tradition of courts of equity inferring an analogous equitable cause of action directly under the Appropriations

Clause." Appellants' Br. 31. The government similarly argued in *Free Enterprise Fund* that the Supreme Court had never "recognized an implied private right of action . . . to challenge governmental action under the Appointments Clause or separation-of-powers principles." 561 U.S. at 491 n.2 (quoting government's brief). The Court explained, however, that equitable review is available "as a general matter, without regard to the particular constitutional provisions at issue." *Id.* While courts may not "create remedies previously unknown to equity jurisprudence," *Grupo Mexicano*, 527 U.S. at 332, the remedy sought in this case—an injunction stopping officials from exceeding their constitutional and statutory authority—is as traditional as it gets. *See supra* Part I.

In short, when a plaintiff brings an equitable claim seeking to halt injuries from 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 was 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.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: February 20, 2020

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 6,448 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 20th day of February, 2020.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2020, 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: February 20, 2020

/s/ Elizabeth B. Wydra
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