No. 19A60

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Applicants,

v.

SIERRA CLUB, ET AL.,

Respondents.

On Application for Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* FEDERAL COURTS SCHOLARS IN SUPPORT OF MOTION TO LIFT STAY

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July 28, 2020

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* FEDERAL COURTS SCHOLARS

Amici curiae respectfully move this Court for leave to file the accompanying brief supporting the motion of respondents Sierra Club and the Southern Border Communities Coalition to lift the stay granted by this Court on July 26, 2019, and to reinstate the district court's injunction prohibiting border-wall construction in specified regions using funds transferred under Section 8005 of the Defense Department appropriations statute of 2019.[1]

Amici are leading scholars with expertise in the jurisdiction of the federal courts, including expertise pertaining to the defendants' arguments that Plaintiffs cannot bring this suit because they lack a cause of action and fail a "zone of interests" test. In staying the district court's injunction, this Court stated that "the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." App. 185a. *Amici* are thus particularly well-situated to provide insight into an issue that was central to this Court's decision to grant a stay.

Amici therefore seek leave to file the attached brief explaining why Plaintiffs may indeed seek equitable relief from the defendants' allegedly unlawful conduct. In their proposed brief, *amici* explain that equitable relief has long been available without a statutory cause of action to prevent injuries caused by government officials who exceed their statutory and constitutional authority. The brief also explains why the zone-of-interests test—which is a tool for determining the

[1] Respondents have consented to the filing of this brief. *Amici* sought consent from the government on July 24, 2020, but did not receive a response before the filing of this motion on July 28, 2020.

scope of statutory causes of action that protect statutorily created rights—has no place in cases like this one, where plaintiffs who are injured by *ultra vires* or unconstitutional conduct seek equitable relief from those injuries.

Respectfully submitted,

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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
- James E. Pfander, Owen L. Coon Professor of Law, Northwestern University Pritzker School of 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 constitutional and statutory

[1] Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

authority. Agreeing with Plaintiffs, the district court entered a permanent injunction against border-wall construction in specified regions using funds transferred under Section 8005 of the 2019 Department of Defense appropriations statute. App. 188a.

Defendants sought a stay of that injunction from this Court, arguing that Plaintiffs lack an equitable cause of action and that they "are not within the zone of interests protected by Section 8005." Application for Stay Pending Appeal at 22, *Trump v. Sierra Club*, No. 19A60 (July 12, 2019) [hereinafter "Stay Appl."]. This Court granted a stay, explaining that, among other things, "the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." App. 185a.

Contrary to the arguments that Defendants have made in this case, Plaintiffs are entitled to judicial review of their claims. First, "equitable relief . . . is traditionally available to enforce federal law," *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385-86 (2015), and the courts may provide injunctive remedies when officials injure a plaintiff by exceeding their 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 reviewed claims that officials exceeded their statutory power or violated the Constitution without requiring a statutory cause of action. This case is no different. While courts may not "create remedies previously unknown to equity jurisprudence," *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 332 (1999), there is nothing novel about the remedy

sought here—an injunction "to prevent an injurious act by a public officer" that is being taken without statutory authority, *Carroll v. Safford*, 44 U.S. 441, 463 (1845).

Second, no zone-of-interests test limits the ability of injured plaintiffs to pursue equitable remedies for conduct that exceeds lawful authority. Defendants' contrary argument confuses two 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 and injurious official conduct, the question is simply "whether the relief [the plaintiffs] requested . . . was traditionally accorded by courts of equity." *Grupo Mexicano*, 527 U.S. at 319. In this case, it plainly was.

ARGUMENT

I. Equitable Relief Is Traditionally Available to Prevent Injuries from Unauthorized Executive Conduct.

A. As this 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). The use of this equitable jurisdiction to review injurious

official conduct "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, 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 of law and equity 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 used to rein in "[o]fficials who acted in excess of jurisdiction." Jaffe, *supra*, at 19.

B. Against this backdrop, the Framers of the Constitution conferred on the federal courts the "judicial Power" to decide "all Cases, in Law and Equity," U.S. Const. art. III, § 2, cl. 1, and the First Congress gave 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 official action. *See also* 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) (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 64-65 (1836).

Under the equitable principles administered 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*. 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).

Although equity was often employed "to provide remedies for the violation of rights . . . recognized in courts of law" that "could not be adequately remedied in those courts," its role was broader. Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 Duke L.J. 249, 280 (2010). In many areas, the rules of equity defined "the primary rights and liabilities of litigants." *Id*. at 254. As Joseph Story explained, "equitable rights and equitable injuries" were distinct from "legal rights and legal injuries," and the courts of equity could "administer remedies for rights, which [the] Courts of Common Law do not recognize at all." 1 Story, *supra*, at 25-26, 28. For instance, there were "many cases of impending irreparable injuries, or meditated mischiefs" over which "Courts of Equity will interfere and grant redress; but which the Common Law takes no notice of." *Id*. at 29; *see Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 447 (1830) (contrasting "suits in which *legal* rights were to be

ascertained and determined" with "those where equitable rights alone were recognized, and equitable remedies were administered").

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. Granting injunctive relief, this Court explained that "where a special and an irremediable mischief is done to an individual" through unlawful conduct, "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 566, 563. Equitable relief was therefore available, without specific statutory authorization, "on the ground of a private and an irreparable injury." *Id.* at 564. And that was true even though "no state law . . . provided an analogous right or liability." Collins, *supra*, at 286; *see id.* (citing "the absence of a statutory or common law basis for [the] assertion that the bridge constituted a nuisance warranting an injunction"). As with many other equity cases brought in the lower courts, this Court "was not simply determining whether the infringement of a right could be remedied, but also was ascertaining the rights of [the plaintiff] to be free of the alleged nuisance that would be caused by the bridge." *Id.* at 287 n.170.

C. From the early days of the Republic, the judiciary used its remedial powers to review the lawfulness of conduct by federal officials, without requiring a statutory cause of action, when such conduct was alleged to injure a plaintiff. Thus, after determining that William Marbury was entitled to his commission as Justice of the Peace, *Marbury v. Madison*, 5 U.S. 137, 154

(1803), this Court concluded that he was also 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). In *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), this Court ordered 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. And in *Carroll v. Safford*, 44 U.S. 441 (1845), this 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 exceeded his statutory authority. *Id.* at 463.

As federal power and the jurisdiction of the lower federal courts expanded, later decisions entrenched the availability of equitable review when federal officials were alleged to exceed their statutory authority. In *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), this Court enjoined federal officials from confiscating the plaintiffs' mail based on a mistaken interpretation of the fraud statutes. "The acts of all [federal] officers must be justified by some law," this Court explained, "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; *see also, e.g.*, *Santa Fe Pac. R. Co. v. Payne*, 259 U.S. 197, 198-99 (1922) ("the position of the Railroad Company is that the Secretary went beyond the powers conferred upon him by the statute," and "the Company is entitled to bring that question into court"). No statutory cause of action was required.

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 new 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). This Court therefore continued to affirm that "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." *Harmon*, 355 U.S. at 581-82. And that remained true when officials claimed statutory authority for their actions—requiring the courts to construe those statutes and, if necessary, enforce their limits.

In *Harmon*, for instance, this Court held that an Army Secretary's mode of discharging two servicemembers was "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 judiciary "to construe the statutes involved to determine whether [he] did exceed his powers," *id.* at 582. But this 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, this Court made clear that if the plaintiffs "alleged judicially cognizable injuries," then "judicial relief from this illegality would be available." *Id.*

Most famously, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this 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), this 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 this 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, this Court implicitly rejected that notion.

This 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, it 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, this Court again demonstrated that equitable review does not become unavailable whenever a case hinges on statutory limits.

This 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, this 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 as long as Congress has not foreclosed review, then "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 this 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).

Likewise, this Court has recognized that 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 this 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, a "private right of action directly under the Constitution" exists "as a general matter, without regard to the particular constitutional provisions at issue." *Free Enter. Fund*, 561 U.S. at 491 n.2. A statutory cause of action has never been required.[2]

D. Despite this long tradition of equitable review, Defendants have argued that "[t]he availability of an express cause of action under the [Administrative Procedure Act] precludes judicial resort to any implied equitable cause of action." Stay Appl. 23 n.3 (citing *Sierra Club v. Trump*, 929 F.3d 670, 715-17 (9th Cir. 2019) (N.R. Smith, J., dissenting)). But the APA does not limit the scope or availability of traditional equitable relief.

While equitable review is subject to "express and implied statutory limitations," *Armstrong*, 135 S. Ct. at 1385, Congress's intent to foreclose such review "must be clear." *Webster v. Doe*, 486 U.S. 592, 603

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[2] Providing equitable relief from constitutional violations differs, of course, from "recognizing implied causes of action for damages" under the *Bivens* doctrine. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017); *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").

(1988). "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018) (reaffirming "the strong presumption in favor of judicial review" of agency action, which "require[s] clear and convincing indications that Congress meant to foreclose review" (quotation marks omitted)).

The APA contains no indication, much less a clear one, that Congress sought to foreclose traditional equitable review or confine it to situations in which the APA itself makes review available. "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. To the contrary, the APA expressly 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 language was meant "to indicate that the act will be interpreted as supplementing constitutional and legal requirements imposed by existing law"). And consistent with the statutory text, no intent to limit traditional equitable review is evident in the legislative history of the APA or its 1976 amendments. *See* Siegel, *supra*, at 1665-69.

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); *see Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326-27 (D.C. Cir. 1996) (conducting *ultra vires* review where an apparently available APA cause of action was not pled); *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321

F.3d 1166, 1168, 1173 (D.C. Cir. 2003) (explaining that regardless of whether APA review is available, claims that an agency "exceeded its statutory authority in purporting to apply [a] statute" are "clearly" reviewable (quotation marks omitted)); *see, e.g.*, *Dames & Moore*, 453 U.S. at 675-88 (resolving claim for injunctive relief from *ultra vires* action without reference to the availability of APA review).

Nor does the APA preclude equitable relief from constitutional violations outside of the Act's framework of review. *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"); *id.* at 803-06 (conducting such review).

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

Although judicial review of *ultra vires* and unconstitutional actions has long been available, Defendants maintain that Plaintiffs cannot bring this suit because their injuries "are not within the zone of interests protected by Section 8005" of the defense appropriations statute. Stay Appl. 22. This 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 enjoin *ultra vires* or unconstitutional conduct. The zone-of-interests test applies to the former, not the latter. No such test limits review here.

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 meant 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, known as the zone-of-interests 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); *see Bank of Am. Corp. v. City of Miami*, 137 S.

Ct. 1296, 1302-03 (2017) ("The question is whether the statute grants the plaintiff the cause of action that he asserts. . . . an issue that requires us to determine . . . whether *a legislatively conferred cause of action* encompasses a particular plaintiff's claim." (emphasis added) (quotation marks omitted)).

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 prospective relief from *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.[3]

This Court reaffirmed these distinctions most recently in *Armstrong*. There, this 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, this 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 Armstrong*, 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

[3] Significantly, the historical precursor of the zone-of-interests test came from damages actions at common law, not from suits in equity. As this Court has explained, 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).

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 ameliorate a plaintiff's injury. Such relief, moreover, has long been available to enjoin actions by officials that exceed statutory limits. *See supra* at 7-11 (citing cases). And when officials violate the Constitution, equitable review is likewise available "as a general matter." *Free Enter. Fund*, 561 U.S. at 491 n.2; *see supra* at 11-12.

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. Defendants simply fail to acknowledge the difference between what they call "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 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. Resisting these principles, Defendants have argued 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—here the funds-transfer statute. Stay Appl. 2.

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, this 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, this 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 this Court did not ask whether that 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, this 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 this 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").

D. Defendants have similarly contended that the zone-of-interests test applies to equitable claims based on constitutional violations. Stay Appl. 30. That too is wrong. This 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 Defendants rely, 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, this 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.").

This 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)).

Defendants have also cited *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, this 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).

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, Applicants' motion to lift the stay should be granted.

Respectfully submitted,

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