No. 20-138

In The Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Rutherford Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed, and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the resolution of this case because it concerns the ability of citizens and civic organizations to hold their government accountable for apparent violations of the Constitution and breaches of the public trust. The Rutherford Institute writes in support of Respondents on this issue.

SUMMARY OF ARGUMENT

1. The zone-of-interests test should not limit whether a party may bring an equitable cause of action to challenge Executive action as *ultra vires*.

[1] This *amicus* brief is filed with the parties' consent. Petitioners filed a blanket consent on January 6, 2021; Respondents Sierra Club and Southern Border Communities Coalition consented on January 7, 2021; Respondents California and New Mexico consented on January 5, 2021. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

First, neither the historical origins of, nor the first principles underlying, the zone-of-interests test support applying that test to equitable causes of action. Simply put, the zone-of-interests test derives from statutory text and is informed by rules and presumptions regarding how Congress drafts statutory language; those premises are not valid when applied to a cause of action rooted in equity rather than statutory text.

Second, a number of other protections already applicable to cases involving equitable *ultra vires* challenges adequately serve the interests advanced by the zone-of-interests test. For example, Article III standing (which is unquestioned here) ensures that each putative plaintiff has an adequately substantial, concrete, and personal stake in the outcome of a particular case or controversy. And, the class of persons who can meet Article III standing is further narrowed by the much more rigorous standard of proximate causation. Finally, even the claims of those who survive these two inquiries must still not present a political question beyond the ken of the federal judiciary.

2. The zone-of-interests test, even if it applies to constitutional claims, is easily satisfied in this case.

The zone of interests to be considered in a given case depends upon the provision of law or, in this case, constitutional guarantee, at issue. The Framers at the time the Constitution was drafted, and the courts since, have recognized that the separation of powers is essential to the maintenance of individual liberty in

our Union. The Appropriations Clause is one of the many structural provisions of the Constitution that effects this separation to protect the liberty of all Citizens. The most permissive formulation of the zone-of-interests test should therefore apply to claims for violations of the Appropriations Clause. And it supports a finding that Respondents are entitled to seek protection in this case.

ARGUMENT

I. The Zone-of-Interests Test Does Not Apply to Equitable Claims.

Respondents ably demonstrate why an equitable cause of action exists that allows parties other than the National Legislature to challenge Acting Secretary Shanahan's reallocation of $2.5 billion as *ultra vires*. See Br. of Sierra Club, et al. ("Sierra Club Br."), at 24–30; Br. of Cal., et al. ("State Resp'ts' Br."), at 39–43. Those arguments will not be repeated here.

Instead, this discussion addresses the related question of what role (if any) the zone-of-interests test plays in determining who may assert such a cause of action. The simple answer is that the zone-of-interests test should have no role in that determination. At least two reasons support that conclusion.

1. To begin with, applying the zone-of-interests test to an equitable cause of action is in tension with both the origins and first principles of the test itself.

From its modern origin as a gloss on the judicial review provisions of the Administrative Procedure Act, see *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150 (1970), through the Court's comprehensive doctrinal re-grounding of it nearly a half-century later in *Lexmark International, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 126–127, 129–131 (2014) [hereinafter *Lexmark*], the zone-of-interests test has consistently been framed as a rule of law that informs both the drafting and application of *statutory* causes of action. See *Bennett* v. *Spear*, 520 U.S. 154, 163 (1997) (presuming that Congress "legislates against the background of" the test); *ibid.* (explaining "that the breadth of the zone of interests varies according to the provisions of law at issue").

The circumstances here are of course quite different, given that the cause of action arises as a matter of equity rather than express congressional authorization.

Moreover, the driving rationale for the test is the belief that courts can draw inferences, based on statutory language conferring a right to sue, regarding Congress's intent as to the relative scope of the enforcement power it intended to confer. See, *e.g.*, *Lexmark*, *supra*, at 127 ("Whether a plaintiff comes within 'the zone of interests' is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim" (internal quotation marks omitted)); 572 U.S., at 126 (describing the zone-of-interests analysis as an attempt to

"'ascertain,' as a matter of statutory interpretation, the 'scope of the private remedy created by' Congress . . . and the 'class of persons who could maintain a private damages action under' that legislatively conferred cause of action" (brackets omitted) (quoting *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U.S. 519, 529, 532 (1983))).

That reasoning, however, does not map neatly onto causes of action that are rooted not in a specific grant of statutory authority but rather are recognized by courts as an outgrowth of their historical powers of equity.

2. In addition to doctrinal considerations, the main functional purpose served by the zone-of-interests test—confining to a reasonable universe the number and type of litigants who may seek to enforce particular dictates of federal law—is amply served by other protections already built into the standards governing cases involving an equitably based *ultra vires* challenge to actions of the federal government.

First, and perhaps foremost, the strictures of Article III standing ensure that each litigant has an adequately substantial, concrete, and personal stake in the outcome of a particular case or controversy such that the federal judiciary will not be conscripted into service as referees for abstract legal disputes. See *Bond* v. *United States*, 564 U.S. 211, 225 (2011) (prospective litigants have "no standing to complain simply that their Government is violating the law" (quoting *Allen* v. *Wright*, 468 U.S. 737, 755 (1984))), abrogated

on other grounds, *Lexmark*, *supra*, at 118; *Frothingham* v. *Mellon*, 262 U.S. 447, 488 (1923) (requiring something more than that an individual "suffers in some indefinite way in common with people generally").

Second, the requirement that a challenger be able to satisfy not merely the "fairly traceable" requirement of Article III, see *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992), but the much more rigorous standard of proximate causation, see *Lexmark*, *supra*, at 133,[2] will substantially narrow the class of putative litigants who may pass the courthouse doors, weeding out those with only an attenuated connection to the challenged government action and reinforcing Article III's insistence that only those who have actually suffered a meaningful deprivation as a result of the government action in question may obtain relief.

Third, a ruling that no zone-of-interests assessment need be undertaken here would in no way undermine or prejudge the distinct analysis whether a particular case involves a political question beyond the ken of the federal judiciary. See, *e.g.*, *Nixon* v. *United States*, 506 U.S. 224 (1993). That doctrine thus remains as yet another meaningful safeguard against the entanglement of the judicial branch in disputes

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[2] Unlike the zone-of-interests test, the proximate cause inquiry is neither a recent innovation nor rooted in the art of statutory construction. To the contrary, it is deeply rooted in the law and used to assess legal responsibility both in law and at equity. *Lexmark*, 572 U.S., at 132.

appropriately resolved by—and between—the political branches alone.

Engrafting another requirement on top of those discussed above would serve little, if any, practical purpose. At best, the zone-of-interests test would largely overlap with these other threshold requirements; at worst, its addition would risk injecting needless confusion into an area of the law that already brims over with fine distinctions separating complex, sometimes even abstruse, questions concerning justiciability and capacity to sue.

For all of these reasons, neither doctrinal principles nor functional necessity support the application of the zone-of-interests test to the type of action presently before the Court.

II. Even if the Zone-of-Interests Test Applies to Constitutional Claims, It Is Satisfied Here.

Both the decision below and the briefs submitted by Respondents in this Court argue that the zone-of-interests test should not be held to apply to claims that rest ultimately on an alleged violation of the federal Constitution. *Sierra Club* v. *Trump*, 963 F.3d 874, 893–894 (9th Cir. 2020); Sierra Club Br., at 18–24; State Resp'ts' Br., at 41–42.

The Rutherford Institute agrees with that contention, but does not repeat the argument here. Instead, it writes separately to emphasize that, even assuming

the zone-of-interests test *does* apply to such claims, it would easily be satisfied both here and in the mine-run of cases alleging conduct by the federal government that exceeds the authority granted to it by the Constitution.

That is because, as this Court has recognized, "the breadth of the zone of interests varies according to the provisions of law at issue. . . ." *Lexmark*, 572 U.S., at 130 (quoting *Bennett*, 520 U.S., at 163). In addition, courts also vary with the circumstances the degree of "fit" they demand between a particular litigant's asserted interests and the zone of interests protected by the law at issue. Thus, when dealing with the review-favoring provisions of the Administrative Procedure Act, a litigant need only "arguably" come within the statute's zone of interests, whereas for more narrowly drawn enforcement rights, greater congruence between the litigant's interests and those guarded by the statute may be required. *Lexmark*, 572 U.S., at 130.

Without attempting to define a one-size-fits-all rule to govern every claim of a constitutional violation, it is clear that claims for violations of the Appropriations Clause specifically, and structural constraints on federal governmental power generally, should be subjected to the most permissive formulation of the zone-of-interests test.

That standard is appropriate for claims invoking the structural provisions of the Constitution because the Framers intended those provisions to advance two distinct, but related, categories of interests. First,

and at a purely operational level, they intended the structural provisions of the Constitution to enable the government to function. At the same time, however, those provisions were intended to serve a higher, derivative purpose: to subdivide the coercive power of the national government into multiple different departments so as to secure against federal encroachment on the private liberty of the governed. See The Federalist No. 51, p. 269 (Gideon ed. 2001) (J. Madison) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; *and in the next place oblige it to control itself*" (emphasis added)).

The structural provisions of the Constitution give effect to this purpose. See *id.*, No. 47, p. 249 (J. Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."); *id.*, No. 51, p. 270 (discussing the "double security [that] arises to the rights of the people" as a result of the Constitution's federalist structure and separation of powers).

Accordingly, the separation of powers was important "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to *save the people from autocracy*." *Myers* v. *United States*, 272 U.S. 52, 293 (1926) (emphasis added), overruled in part on other grounds, *Humphrey's Ex'r* v. *United States*,

295 U.S. 602 (1935); see also *N.L.R.B.* v. *Noel Canning*, 573 U.S. 513, 525 (2014) (explaining "that the separation of powers can serve to safeguard individual liberty"); The Federalist No. 51, *supra*, p. 268 (explaining separation of powers "is admitted on all hands to be essential to the preservation of liberty").

The Appropriations Clause is one of the many structural provisions of the Constitution that serves this power-separating—and, thus, liberty-securing—function. *U.S. Dept. of Navy* v. *Fed. Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) ("The Appropriations Clause is thus a bulwark of the Constitution's separation of powers among the three branches of the National Government.") (Kavanaugh, J.).

The Court's analysis in *Bond* v. *United States*, 564 U.S. 211 (2011), is instructive. There, the Court was called upon to determine whether a criminal defendant had standing to challenge the constitutionality of a federal statute on grounds that it violated the structural protections of federalism enshrined in the Tenth Amendment. *Id.*, at 214. Analogous to the separation of powers, "The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Id.*, at 221. Thus, the Court concluded, "federalism secures to the citizens the liberties that derive from the diffusion of sovereign power." *Ibid.* (quoting *New York* v. *United States*, 505 U.S. 144, 181

(1992)). Translating those abstract principles into concrete rules of law, the Court concluded that, "[i]f the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." *Id.*, at 223.

The conduct of the Government in this case infringes on the individual liberties of Respondents and their members. *Sierra Club*, 963 F.3d, at 894 ("The unconstitutional transfer of funds here infringed upon Sierra Club's members' liberty interests, harming their environmental, aesthetic, and recreational interests"); see also Sierra Club Br. 33–34. Respondents therefore fall squarely within the zone of interests of the constitutional guarantee they seek protection from in this case.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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