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11
12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
14 **OAKLAND DIVISION**

15 STATE OF CALIFORNIA, *et al.*,

16 Plaintiffs,

17 v.

18 DONALD J. TRUMP, in his official capacity
19 as President of the United States, *et al.*,

20 Defendants.

Case Nos. 4:19-cv-00872-HSG,
4:19-cv-00892-HSG

Motion Hearing Date: Nov. 20, 2019
Time: 10:00 AM

21 SIERRA CLUB and SOUTHERN BORDER
22 COMMUNITIES COALITION,

23 Plaintiffs,

24 v.

25 DONALD J. TRUMP, in his official capacity
26 as President of the United States, *et al.*,

27 Defendants.

**BRIEF OF AMICI CURIAE
FEDERAL COURTS SCHOLARS
IN OPPOSITION TO
DEFENDANTS' MOTIONS FOR
PARTIAL SUMMARY JUDGMENT
REGARDING BORDER BARRIER
PROJECTS UNDERTAKEN
PURSUANT TO 10 U.S.C. § 2808**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are leading scholars with expertise in the jurisdiction of the federal courts, including expertise pertaining to the government’s argument that courts cannot hear this case because Plaintiffs 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
- Michael C. Dorf, Robert S. Stevens Professor of Law, Cornell Law School
- David A. Strauss, Gerald Ratner Distinguished Service Professor of Law, Faculty Director of the Jenner & Block Supreme Court and Appellate Clinic, University of Chicago Law School
- Stephen I. Vladeck, A. Dalton Cross Professor in Law, University of Texas School of Law

INTRODUCTION AND SUMMARY OF ARGUMENT

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 authority. Agreeing with Plaintiffs, this Court granted in part their motions for partial summary judgment, and it entered a permanent injunction preventing the use of funds reprogrammed under Sections 8005 and 9002 of the 2019 Department of Defense Appropriations Act from being used to construct a border wall in specified regions.

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.

1 *California v. Trump*, 2019 WL 2715421 (N.D. Cal. June 28, 2019); *Sierra Club v. Trump*, 2019
2 WL 2715422, at *6 (N.D. Cal. June 28, 2019).

3 Plaintiffs and the government have now filed cross-motions for partial summary judgment
4 on whether 10 U.S.C. § 2808 grants the executive branch the power to pay for the President’s
5 border wall. That statute authorizes the Secretary of Defense “to undertake military construction
6 projects,” using funds that have been appropriated for military construction, in the event of a war
7 or national emergency “that requires use of the armed forces.” *Id.* § 2808(a). Plaintiffs maintain
8 that § 2808 does not authorize the use of military construction funds to build the President’s border
9 wall, and that the unauthorized use of such funds for this purpose violates the Consolidated
10 Appropriations Act of 2019 (“CAA”), Pub. Law No. 116-6, 133 Stat. 13, which Plaintiffs argue
11 limited the funding, location, and other features of border-barrier construction.
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14 Still seeking to have this case dismissed on procedural grounds, the government argues that
15 Plaintiffs lack an equitable cause of action and that they are outside the “zone of interests”
16 protected by § 2808 and the CAA. Both arguments are wrong.
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18 First, contrary to the government’s arguments, “equitable relief . . . is traditionally
19 available to enforce federal law,” *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378,
20 1385-86 (2015), and the federal courts may provide injunctive remedies when the executive injures
21 a plaintiff by exceeding its constitutional or statutory authority. *See, e.g., Harmon v. Brucker*, 355
22 U.S. 579, 581-82 (1958) (“Generally, judicial relief is available to one who has been injured by an
23 act of a government official which is in excess of his express or implied powers.”). From the
24 earliest days of the American Republic, courts have consistently heard claims that executive
25 branch officials exceeded their statutory power or violated the Constitution without requiring a
26 statutory cause of action. This case is no different.
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1 Second, the government is wrong in arguing that a “zone of interests” test limits the ability
2 of injured plaintiffs to pursue equitable remedies for conduct that exceeds lawful authority. The
3 government’s argument confuses two distinct types of claims: (1) suits brought under a statutory
4 cause of action to enforce a statutorily created right, and (2) suits brought in equity to halt
5 *ultra vires* or unconstitutional conduct. The zone-of-interests test applies to the former, not the
6 latter. Where plaintiffs rely on a statutory cause of action, the zone-of-interests test is a “tool for
7 determining who may invoke the cause of action” and is thus “a straightforward question of
8 statutory interpretation.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118,
9 129-30 (2014). But where plaintiffs instead invoke a court’s equitable power to enjoin
10 unauthorized government conduct, the question is simply “whether the relief [the plaintiffs]
11 requested . . . was traditionally accorded by courts of equity.” *Grupo Mexicano de Desarrollo S.A.*
12 *v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). In this case, it plainly was.

15 **ARGUMENT**

16 **I. Equitable Relief Is Traditionally Available To Prevent Injuries From Unauthorized**
17 **Executive Conduct.**

18 **A.** As the Supreme Court has explained, “the equity jurisdiction of the federal courts is the
19 jurisdiction in equity exercised by the High Court of Chancery in England at the time of the
20 adoption of the Constitution and the enactment of the original Judiciary Act.” *Grupo Mexicano*,
21 527 U.S. at 318 (quotation marks omitted). And at that time, there was already a “long history of
22 judicial review of illegal executive action, tracing back to England.” *Armstrong*, 135 S. Ct. at
23 1384.

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25 Indeed, the antecedents of modern equitable review go back to medieval England.
26 Traditionally, common law courts issued a “variety of standardized writs,” each of which
27 encompassed a “complete set of substantive, procedural, and evidentiary law, determining who
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1 ha[d] to do what to obtain the unique remedy the writ specific[d] for particular circumstances.”
2 John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 Wm. & Mary
3 Bill of Rts. J. 1, 9 (2013) (quoting H. Brent McKnight, *How Then Shall We Reason? The Historical*
4 *Setting of Equity*, 45 Mercer L. Rev. 919, 929 (1994)). As these writs ossified over time, failing
5 to cover many injustices, the Court of Chancery began issuing “new and distinct remedies for the
6 violation of preexisting legal rights,” often “creat[ing] a cause of action where none had existed
7 before.” *Id.* at 12, 20. “At the time of the American Founding,” therefore, “it was not uncommon
8 for Chancery to enforce the common law through equitable remedies even where the common law
9 might not itself make damages available.” *Id.* at 15.

12 Those equitable remedies were often exercised to correct illegal official action, including
13 by the Crown itself—a practice that began with the device of seeking relief through petitions for
14 redress. James E. Pfander, *Sovereign Immunity and the Right To Petition*, 91 Nw. U. L. Rev. 899,
15 909 (1997); *cf.* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77
16 Harv. L. Rev. 1, 6 (1963) (discussing the ability to bring “claims against the state” that would have
17 been unavailable at common law). These so-called “petitions of right” sought royal consent to
18 bring claims that were investigated by the Chancery, which would “hear the case, . . . decide it on
19 legal principles, and . . . render a judgment against the Crown.” Pfander, *supra*, at 909.

21 Against this backdrop, the Framers of the American Constitution conferred on the federal
22 courts the “judicial Power” to decide “all Cases, in Law and Equity,” U.S. Const. art. III, § 2, cl. 1,
23 and the First Congress gave the federal courts diversity jurisdiction over suits “in equity,” *see*
24 Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. In doing so, the Framers and First Congress
25 incorporated the established understanding about the power of equitable courts to provide redress
26 for unlawful government action in the absence of a common law remedy. Indeed, Congress in
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1 1792 confirmed that “the forms and modes” of equitable proceedings were to follow “the
2 principles, rules and usages which belong to courts of equity.” Act of May 8, 1792, ch. 36, § 2,
3 1 Stat. 275, 276; see Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 Iowa L. Rev.
4 777, 791 n.52 (2004). Soon after, the Supreme Court under Chief Justice John Jay declared: “The
5 Court considers the practice of the courts of King’s Bench and Chancery in England, as affording
6 outlines for the practice of this court” *Case of Hayburn*, 2 U.S. 408, 410 (1792). As Joseph
7 Story explained, “in the Courts of the United States, Equity Jurisprudence embraces the same
8 matters of jurisdiction and modes of remedy, as exist in England.” 1 Joseph Story, *Commentaries*
9 *on Equity Jurisprudence: As Administered in England and America* § 57, at 64-65 (1836).

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11
12 Under these principles, moreover, equitable relief could be granted where “a wrong is done,
13 for which there is no plain, adequate, and complete remedy in the Courts of Common Law.” *Id.*
14 § 49, at 53; see *Payne v. Hook*, 74 U.S. 425, 430 (1868) (where a court “ha[s] jurisdiction to hear
15 and determine th[e] controversy, [t]he absence of a complete and adequate remedy at law, is
16 the only test of equity jurisdiction”). Among the situations in which equitable review was available
17 because of the inadequacy of common law remedies were cases involving “continuing injuries”
18 and those brought to “prevent a permanent injury from being done” which “cannot be estimated in
19 damages.” *Osborn v. Bank of U.S.*, 22 U.S. 738, 841-42 (1824); *id.* at 844 (“the cases are
20 innumerable, in which injunctions are awarded on this ground”).

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23 Emblematic of these principles was the prominent case *Pennsylvania v. Wheeling &*
24 *Belmont Bridge Co.*, 54 U.S. 518, 559 (1851), in which the plaintiff alleged that an illegally built
25 bridge caused it financial injury by obstructing commercial navigation. Observing that “it would
26 be difficult to state a stronger case for the extraordinary interposition of a court of chancery,” *id.*
27 at 562, the Supreme Court confirmed that where such injury is alleged, “there is no other limitation
28

1 to the exercise of a chancery jurisdiction by these courts, except the value of the matter in
2 controversy, the residence or character of the parties, or a claim which arises under a law of the
3 United States,” *id.* at 563. In such cases, equitable relief could be granted:
4

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

9 *Id.* at 564.

10 **B.** From the early days of the Republic, these equitable powers were used to review the
11 lawfulness of executive action. A notable example is *Marbury v. Madison*, 5 U.S. 137 (1803).
12 After determining that William Marbury had “a right to the commission” as Justice of the Peace,
13 *id.* at 154, the Supreme Court concluded that he was entitled to a remedy, *id.* at 163-71, even
14 though no “statute provide[d] an express cause of action for review of the Secretary of State’s
15 decision not to deliver up a document he possessed in his official capacity,” Jonathan R. Siegel,
16 *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612, 1630 (1997). The
17 Court reasoned that if “a specific duty is assigned by law, and individual rights depend upon the
18 performance of that duty, it seems equally clear that the individual who considers himself injured,
19 has a right to resort to the laws of his country for a remedy.” *Marbury*, 5 U.S. at 166.
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22 Other decisions reflect the same principle. For example, in *Kendall v. United States ex rel.*
23 *Stokes*, 37 U.S. 524 (1838), the Court issued a writ of mandamus requiring the Postmaster General
24 to comply with an act of Congress by disbursing certain funds to the plaintiffs as required by that
25 act. *Id.* at 608-09. The Court made clear that so long as it could exercise subject-matter and
26 personal jurisdiction, it could provide a remedy. *Id.* at 623-24. Similarly, in *Carroll v. Safford*,
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1 44 U.S. 441 (1845), the Court expressed “no doubt” that “relief may be given in a court of equity . . .
2 to prevent an injurious act by a public officer, for which the law might give no adequate redress,”
3 if that officer has exceeded his statutory authority. *Id.* at 463. Likewise, in *American School of*
4 *Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), the Court enjoined federal officials from
5 retaining the plaintiffs’ mail based on the officials’ mistaken interpretation of the fraud statutes,
6 explaining: “The acts of all [the government’s] officers must be justified by some law, and in case
7 an official violates the law to the injury of an individual the courts generally have jurisdiction to
8 grant relief.” *Id.* at 108.
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11 C. The merger of law and equity did not alter the requirements for equitable relief. Indeed,
12 the statute authorizing that merger prohibited the Supreme Court from adopting rules that would
13 “abridge, enlarge, [or] modify the substantive rights of any litigant.” Rules Enabling Act, Pub. L.
14 No. 73-415, 48 Stat. 1064, 1064 (1934). Thus, the Supreme Court continued to grant equitable
15 relief restraining unlawful executive action without any statutory cause of action. For example, in
16 *Harmon v. Brucker* the Court held that an Army Secretary’s discharge decision was “in excess of
17 powers granted him by Congress.” 355 U.S. at 581. In doing so, the Court reaffirmed the
18 judiciary’s “power to construe the statutes involved to determine whether the respondent did
19 exceed his powers,” making clear that if such powers were exceeded, “judicial relief from this
20 illegality would be available.” *Id.* at 582.
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22
23 Indeed, the Supreme Court has consistently decided the merits of equitable challenges to
24 executive action where, as here, the executive was alleged to be acting outside its statutory
25 authority. For instance, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the
26 Court blocked the President’s order to seize certain steel mills, which “was not authorized by an
27 act of Congress or by any constitutional provisions.” *Id.* at 583. In *Dames & Moore v. Regan*,
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1 453 U.S. 654 (1981), the Court resolved the merits of an action seeking an injunction based on a
2 claim that the President and the Treasury Secretary went “beyond their statutory and constitutional
3 powers.” *Id.* at 667. Although the President “purported to act under authority of” two federal
4 statutes, *id.* at 675, and although the decision required interpreting those and other statutes, *see id.*
5 at 675-88, the Court never suggested that this prevented the plaintiffs from seeking equitable
6 relief—indeed, the Court implicitly rejected that notion by resolving the case on the merits. It did
7 the same in *Dalton v. Specter*, 511 U.S. 462 (1994), where the plaintiffs alleged violations of a law
8 governing military base closures. *Id.* at 466. The Court resolved that claim while making clear
9 that it was “not a constitutional claim, but a statutory one,” and that “our conclusion . . . follows
10 from our interpretation of an Act of Congress.” *Id.* at 476-77. In doing so, the Court again
11 demonstrated that equitable review does not become unavailable whenever “[a] case raises purely
12 statutory, not constitutional issues.” Defs. Mot. 12.

15 It did so again in *Armstrong v. Exceptional Child Center*. There too, the plaintiffs sought
16 an injunction based on a claim that public officials injured them by violating the terms of a federal
17 statute. 135 S. Ct. at 1382. Although that statute provided no cause of action, *id.* at 1387, the
18 Court confirmed that “equitable relief . . . is traditionally available to enforce federal law,” *id.* at
19 1385-86. To be sure, Congress may “displace” the equitable relief that is otherwise available, *id.*
20 at 1385, because “[t]he power of federal courts of equity to enjoin unlawful executive action is
21 subject to express and implied statutory limitations,” *id.*; *e.g., id.* (concluding based on statutory
22 interpretation that “the Medicaid Act implicitly precludes private enforcement” of the relevant
23 provision). But in order for Congress to foreclose equitable relief, “its intent to do so must be
24 clear.” *Webster v. Doe*, 486 U.S. 592, 603 (1988); *accord Porter v. Warner Holding Co.*, 328 U.S.
25 395, 398 (1946). Where that is not the case, “relief may be given in a court of equity . . . to prevent
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1 an injurious act by a public officer.” *Armstrong*, 135 S. Ct. at 1384 (quoting *Carroll*, 44 U.S. at
2 463).

3 These are only a few of the many cases in which the Supreme Court has permitted equitable
4 review of *ultra vires* executive conduct. *See, e.g., Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S.
5 155, 165, 170 (1993); *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 235,
6 238-39 (1968); *Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959); *Land v. Dollar*, 330 U.S. 731, 734,
7 736-37 (1947); *Stark v. Wickard*, 321 U.S. 288, 310 (1944); *Santa Fe Pac. R.R. Co. v. Payne*, 259
8 U.S. 197, 198-99 (1922). In short, “where [an] officer’s powers are limited by statute, his actions
9 beyond those limitations . . . are *ultra vires* his authority and therefore may be made the object of
10 specific relief.” *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949).
11 Likewise, injunctive relief has long been granted, without a statutory cause of action, to remedy
12 violations of the Constitution. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*,
13 561 U.S. 477 (2010); *Ex parte Young*, 209 U.S. 123 (1908).

14 **D.** The enactment of the Administrative Procedure Act (“APA”) did not limit the
15 availability of non-statutory equitable review.

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

2 “Prior to the APA’s enactment, after all, courts had recognized the right of judicial review
3 of agency actions that exceeded authority,” and the APA did “not repeal the review of *ultra vires*
4 actions that was recognized long before.” *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir.
5 1988) (citations omitted). Thus, the ability to bring an APA claim has no bearing on a plaintiff’s
6 ability to seek traditional equitable relief for unconstitutional or *ultra vires* conduct. *See Franklin*
7 *v. Massachusetts*, 505 U.S. 788, 801 (1992) (although President’s actions are not reviewable under
8 the APA, they “may still be reviewed for constitutionality”); *id.* at 803-06 (conducting such
9 review); *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1326-27 (D.C. Cir. 1996)
10 (conducting non-statutory *ultra vires* review where plaintiffs did not make use of an available APA
11 cause of action).
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14 **E.** Despite all this, the government insists that equitable review is unavailable here because
15 “Plaintiffs identify no history or tradition of courts of equity inferring an analogous equitable cause
16 of action directly under the Appropriations Clause in such circumstances.” Defs. Mot. 12. Not
17 only does this argument ignore the possibility of reviewing the government’s conduct here as *ultra*
18 *vires*, apart from any constitutional violation, it also misunderstands the nature of equitable review
19 when a constitutional violation is alleged.
20

21 “[I]njunctive relief has long been recognized as the proper means for preventing entities
22 from acting unconstitutionally.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001); *see Bell*
23 *v. Hood*, 327 U.S. 678, 684 (1946). As the Supreme Court has made clear, plaintiffs need not
24 show a “tradition” of reviewing alleged violations of the same constitutional provision in the same
25 circumstances. In *Free Enterprise Fund*, the government similarly emphasized that the Court had
26 never “recognized an implied private right of action . . . to challenge governmental action under
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1 the Appointments Clause or separation-of-powers principles.” 561 U.S. at 491 n.2 (quoting
2 government’s brief). The Court explained, however, that equitable review is available “as a
3 general matter, without regard to the particular constitutional provisions at issue,” and seemed
4 puzzled by the contrary argument: “If the Government’s point is that an Appointments Clause or
5 separation-of-powers claim should be treated differently than every other constitutional claim, it
6 offers no reason and cites no authority why that might be so.” *Id.*

8 The government seems to be invoking the rule that equity cannot provide “a type of relief
9 that has never been available before.” *Grupo Mexicano*, 527 U.S. at 322. But that rule is about
10 the *type* of relief. *Grupo Mexicano*, for instance, involved a particular kind of preliminary
11 injunction “specifically disclaimed by longstanding judicial precedent.” *Id.* While courts may not
12 “create remedies previously unknown to equity jurisprudence,” *id.* at 332, the remedy sought in
13 this case—an injunction preventing government officials from causing injury by exceeding their
14 lawful authority—is as traditional as it gets.

16 **II. When Plaintiffs Seek Equitable Relief From *Ultra Vires* Or Unconstitutional Conduct,
17 No Zone-Of-Interests Test Applies.**

18 Notwithstanding this long tradition of non-statutory review of *ultra vires* and
19 unconstitutional actions, the government argues that Plaintiffs cannot bring this suit because their
20 injuries “fall outside the zone of interests protected by the limitations in § 2808 and the CAA.”
21 Defs. Mot. 9. This argument misunderstands the nature of Plaintiffs’ claims and the “zone of
22 interests” test itself.

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

1 A. The zone-of-interests test governs “statutorily created causes of action,” *Lexmark*, 572
2 U.S. at 129, because its function is to help construe the breadth of statutes that confer a right to
3 sue. When plaintiffs rely on a statutory cause of action, the test serves as a “tool for determining
4 who may invoke the cause of action,” a task that necessitates “[i]dentifying the interests protected
5 by the . . . Act.” *Id.* at 130, 131; *see id.* at 129 (“a statutory cause of action extends only to
6 plaintiffs whose interests fall within the zone of interests protected by the law invoked” (emphasis
7 added) (quotation marks omitted)). The zone-of-interests test therefore has no place in a case like
8 this one—where Plaintiffs’ claims are not premised on the deprivation of a statutorily created right
9 and Plaintiffs do not invoke a statutorily conferred cause of action.
10

11 This conclusion flows from the basic nature of statutory causes of action and the judiciary’s
12 role in interpreting them. In establishing new duties or prohibitions, statutes often create new legal
13 rights corresponding to those duties or prohibitions. *See, e.g., Thompson v. N. Am. Stainless, LP*,
14 562 U.S. 170, 174 (2011) (retaliation against employees); *Lexmark*, 572 U.S. at 132 (false
15 advertising that harms competitors). Many such statutes authorize particular classes of persons to
16 sue to enforce the statute’s duties or prohibitions and thereby vindicate those newly established
17 rights. *See, e.g., Thompson*, 562 U.S. at 175 (construing 42 U.S.C. § 2000e-5(f)(1)); *Lexmark*, 572
18 U.S. at 122 (construing 15 U.S.C. § 1125(a)).
19

20 “Statutory rights and obligations are established by Congress, and it is entirely appropriate
21 for Congress, in creating these rights and obligations, to determine in addition, who may enforce
22 them and in what manner.” *Davis v. Passman*, 442 U.S. 228, 241 (1979). Although a statute can
23 provide a cause of action implicitly or explicitly, *Cort v. Ash*, 422 U.S. 66, 78 (1975), the question
24 of whether a statute has done so is one of statutory construction: “The judicial task is to interpret
25 the statute Congress has passed to determine whether it displays an intent to create not just a private
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1 right but also a private remedy.” *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

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

8
9 This limitation is known as the zone-of-interests test. The test recognizes that when
10 Congress creates a statutory cause of action, Congress does not necessarily intend it to extend to
11 persons “whose interests are unrelated to the statutory prohibitions.” *Thompson*, 562 U.S. at 178.
12 “Whether a plaintiff comes within the zone of interests,” therefore, “is an issue that requires
13 [courts] to determine, using traditional tools of statutory interpretation, whether *a legislatively*
14 *conferred cause of action* encompasses a particular plaintiff’s claim.” *Lexmark*, 572 U.S. at 127
15 (emphasis added) (quotation marks omitted). Thus, whether “Congress intended to make a remedy
16 available to a special class of litigants” is a “question of statutory construction.” *Cannon v. Univ.*
17 *of Chicago*, 441 U.S. 677, 688 (1979) (citing *Cort*, 422 U.S. 66); *e.g., id.* at 689 (concluding that
18 “petitioner does have *a statutory right* to pursue her claim” (emphasis added)).

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21 Therefore, the zone-of-interests test—like the broader analysis of whether a statutory cause
22 of action exists and authorizes a particular suit—is simply “a straightforward question of statutory
23 interpretation.” *Lexmark*, 572 U.S. at 129. “In cases such as these, the question is which class of
24 litigants may enforce in court *legislatively created rights or obligations*.” *Davis*, 442 U.S. at 239
25 (emphasis added). The issue is simply “whether the statute grants the plaintiff the cause of action
26 that he asserts.” *Bank of Am. Corp. v. Miami*, 137 S. Ct. 1296, 1302 (2017).

1 **B.** Equitable actions seeking to enjoin *ultra vires* or unconstitutional conduct are entirely
2 different. They are not premised on the deprivation of a statutory right, and they do not depend on
3 the existence of a statutory cause of action. Instead, they seek equitable relief, “a judge-made
4 remedy,” *Armstrong*, 135 S. Ct. at 1384, for injuries that stem from unauthorized government
5 conduct. Rather than invoking a legislatively conferred cause of action to vindicate a legislatively
6 created right, such actions rest on the historic availability of equitable review to obtain prospective
7 injunctive relief from “unconstitutional” or “ultra vires conduct.” *Dalton*, 511 U.S. at 472.

8
9 The power conferred by the Judiciary Act of 1789 “is an authority to administer in equity
10 suits the principles of the system of judicial remedies which had been devised and was being
11 administered by the English Court of Chancery at the time of the separation of the two countries.”
12 *Grupo Mexicano*, 527 U.S. at 318 (quoting *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563,
13 568 (1939)). “The ‘jurisdiction’ thus conferred on the federal courts,” the Supreme Court has
14 explained, “prescribes the body of doctrine which is to guide their decisions and enable them to
15 determine whether in any given instance a suit . . . is an appropriate one for the exercise of the
16 extraordinary powers of a court of equity.” *Atlas Life*, 306 U.S. at 568. In the absence of statutory
17 limitations, it is this “body of doctrine,” *id.*, that determines when injunctive relief is available,
18 rather than a statutory cause of action to which a zone-of-interests test might apply. *Cf. Grupo*
19 *Mexicano*, 527 U.S. at 329 (distinguishing cases “based on statutory authority” from those based
20 “on inherent equitable power”). And that body of doctrine has long authorized review of *ultra*
21 *vires* executive conduct without reference to any “zone of interests” test.

22
23 Accordingly, “[t]he substantive prerequisites for obtaining an equitable remedy as well as
24 the general availability of injunctive relief . . . depend on traditional principles of equity
25 jurisdiction.” *Id.* at 318-19 (quoting 11A Charles Alan Wright et al., *Federal Practice and*
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1 *Procedure* § 2941, at 31 (2d ed. 1995)). They do not depend on whether a statute provides
2 authority to sue. And because no statute is being invoked for that purpose, there is no occasion to
3 consider the “zone of interests” that any such statute is meant to cover.²
4

5 The Supreme Court reaffirmed these distinctions most recently in *Armstrong*. There, the
6 Court recognized that whether a statute provides a cause of action for its violation is a different
7 question than whether an equitable challenge may be brought against government conduct that
8 allegedly violates the statute. Accordingly, the Court separately analyzed, as distinct inquiries,
9 two different questions: (1) whether the Medicaid Act provided a statutory cause of action, and
10 (2) whether the Act foreclosed the equitable relief that would otherwise be available to enforce
11 federal law. *Compare* 135 S. Ct. at 1385 (“We turn next to respondents’ contention that . . . this
12 suit can proceed against [the defendant] in equity.”), *with id.* at 1387 (“The last possible source of
13 a cause of action for respondents is the Medicaid Act itself.”); *see also Grupo Mexicano*, 527 U.S.
14 at 326 (distinguishing “the Court’s general equitable powers under the Judiciary Act of 1789” from
15 its “powers under [a] statute”).
16
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18 In equitable cases like this one, therefore, the question is simply “whether the relief
19 [Plaintiffs] requested . . . was traditionally accorded by courts of equity.” *Grupo Mexicano*, 527
20 U.S. at 319. And as explained above, “equitable relief . . . is traditionally available to enforce
21 federal law,” *Armstrong*, 135 S. Ct. at 1385-86, when jurisdictional requirements are met and when
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24 ² Significantly, the historical precursor of the zone-of-interests test came from damages
25 actions at common law, not from suits in equity. The “roots” of that test “lie in the common-law
26 rule that a plaintiff may not recover under the law of negligence for injuries caused by violation of
27 a statute unless the statute ‘is interpreted as designed to protect the class of persons in which the
28 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).

1 no damages remedy would suffice to ameliorate a plaintiff’s injury.

2 Such relief, moreover, has long been available to enjoin government action that exceeds
3 statutory limits: “When an executive acts *ultra vires*, courts are normally available to reestablish
4 the limits on his authority.” *Reich*, 74 F.3d at 1328 (quotation marks omitted). Relief is likewise
5 available “as a general matter” when the government violates the Constitution. *Free Enter. Fund*,
6 561 U.S. at 491 n.2. In short: “Prevention of impending injury by unlawful action is a well-
7 recognized function of courts of equity.” *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus*
8 & *Mary*, 268 U.S. 510, 536 (1925).

9
10 Because no statutory cause of action is needed to enjoin unconstitutional or *ultra vires*
11 executive conduct, there is no “zone of interests” test to apply in this case.

12
13 The government mistakenly cites *Clarke v. Securities Industry Association*, 479 U.S. 388
14 (1987), for the proposition that “[w]here a plaintiff invokes an implied cause of action in equity,
15 the Supreme Court has suggested that a heightened zone-of-interest requirement applies, and the
16 provision must be intended for the ‘*especial* benefit’ of the plaintiff.” Defs. Mot. 10. Not true:
17 the cited passage actually discusses “cases in which *a private right of action under a statute* is
18 asserted.” *Clarke*, 479 U.S. at 400 n.16 (emphasis added) (citing *Cort*, 422 U.S. 66, and *Cannon*,
19 441 U.S. 677). The government simply fails to acknowledge the difference between “implying” a
20 cause of action in equity and the entirely separate act of concluding—as a matter of statutory
21 interpretation—that a right of action is “implied” in a statute. *See Cort*, 422 U.S. at 78 (“In
22 determining whether a private remedy is implicit in a statute not expressly providing one, several
23 factors are relevant. First, is the plaintiff ‘one of the class for whose *especial* benefit the statute
24 was enacted,’—that is, does the statute create a federal right in favor of the plaintiff?” (quoting
25 *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916))).
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1 In sum, when plaintiffs invoke a statutorily created remedy, congressional intent regarding
2 the scope of that remedy is paramount, and the zone-of-interests test helps maintain fidelity to
3 Congress’s intent. But not all “interests” that a plaintiff may vindicate in court are created by
4 statute. When plaintiffs directly harmed by *ultra vires* or unconstitutional conduct proceed in
5 equity without a statutory cause of action, there is no congressional intent to discern and no zone-
6 of-interests test to apply.
7

8 C. Refusing to accept these principles, the government argues that plaintiffs who sue in
9 equity to enjoin *ultra vires* executive action must show that they fall within the zone of interests
10 protected by whatever statute the executive cites in defense of its conduct.
11

12 As this Court has already recognized, that argument makes little sense. “The very nature
13 of an *ultra vires* action posits that an executive officer has gone beyond what the statute permits,
14 and thus beyond what Congress contemplated. It would not make sense to demand that Plaintiffs—
15 who otherwise have standing—establish that Congress contemplated that the statutes allegedly
16 violated would protect Plaintiffs’ interests.” *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 910 (N.D.
17 Cal. 2019). For that reason, plaintiffs challenging executive conduct as *ultra vires* “need not . . .
18 show that their interests fall within the zones of interests of the constitutional and statutory powers
19 invoked by the President.” *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir.
20 1987); *see id.* (a “litigant’s interest normally will not fall within the zone of interests of the very
21 statutory or constitutional provision that he claims does not authorize action concerning that
22 interest”).
23
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25 Unsurprisingly, therefore, the Supreme Court has never applied a “zone of interests” test
26 in any case alleging *ultra vires* executive action—much less dismissed a case on that basis.
27

28 Because the Court did not even articulate the zone-of-interests test until the 1970s, *see*

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

8 Even after the Supreme Court announced the zone-of-interests test, it never mentioned that
9 test in any *ultra vires* challenge. In *Dames & Moore*, for example, where the plaintiff “alleged
10 that the actions of the President and the Secretary of the Treasury . . . were beyond their statutory
11 and constitutional powers,” 453 U.S. at 667, the Court resolved the case on the merits. The
12 plaintiff’s injury consisted of being unable to recover money owed to it under a contract, but the
13 Court did not ask whether this injury fell within the zone of interests protected by the two statutes
14 that the executive claimed authorized its conduct—both of which focused on foreign policy. *Id.*
15 at 675. Nor did the Court ask whether this injury fell within the zone of interests of a third statute
16 that, according to the plaintiff, divested the executive of whatever power it once had in this area.
17 *Id.* at 684.

20 So too in *Dalton*, where the plaintiffs’ claim was based on alleged violations of procedural
21 requirements in a law governing military base closures. 511 U.S. at 466. With no statutory cause
22 of action available, either in that law or in the APA, *see id.* at 469-70, the Court regarded the
23 plaintiffs’ claim as one alleging “*ultra vires* conduct,” specifically that “the President exceeded his
24 statutory authority” by “violat[ing] a statutory mandate,” *id.* at 472, 474. Yet the Court did not
25 ask whether any plaintiffs fell within the zone of interests of the base-closure statute. As in *Dames*
26 & *Moore*, the Court proceeded to address the substance of their claims. *See Dalton*, 511 U.S. at
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1 474-76 (concluding that the President’s actions were unreviewable because the statute “commits
2 the decision to the discretion of the President”).

3 Notably, the executive branch sometimes claims that its conduct is authorized by
4 administrative *regulations*, not by a statute. In *Vitarelli v. Seaton*, for instance, the parties disputed
5 whether “the proceedings attendant upon petitioner’s dismissal from government service on
6 grounds of national security fell . . . short of the requirements of the applicable departmental
7 regulations.” 359 U.S. at 545; *see id.* at 545-46 (siding with the petitioner, holding his dismissal
8 “illegal and of no effect,” and ordering injunctive relief in the form of reinstatement). In such
9 cases, under the government’s reasoning, an injured plaintiff would need to show that his injury
10 fell within the zone of interests protected by those regulations—something no court has ever
11 required.
12

13
14 **D.** The government has similarly contended that the zone-of-interests test applies to
15 equitable claims based on constitutional violations. This too is wrong. The Supreme Court has
16 never dismissed a constitutional claim under the zone-of-interests test, and *Lexmark* makes clear
17 why: constitutional claims do not require a court to probe congressional intent regarding the scope
18 of a remedy that Congress has created.
19

20 None of the cases on which the government relies, all of which predate *Lexmark*, suggest
21 otherwise. While a footnote in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318
22 (1977), applied a zone-of-interests analysis to a dormant Commerce Clause claim, *id.* at 320 n.3,
23 the Court—critically—explained that it was evaluating whether the plaintiffs “ha[d] standing”
24 under “the two-part test of *Data Processing Service v. Camp*, 397 U.S. 150 (1970),” *id.* As
25 indicated by that quote, the *Data Processing* test treated the zone-of-interests inquiry as part of
26 prudential “standing.” *See Data Processing*, 397 U.S. at 153 (“The question of standing . . .
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1 concerns . . . whether the interest sought to be protected by the complainant is arguably within the
2 zone of interests to be protected or regulated by the statute or constitutional guarantee in
3 question.”).

4
5 The Supreme Court explicitly repudiated that framework in *Lexmark*, which “recast the
6 zone-of-interests inquiry as one of statutory interpretation.” *Ray Charles Found. v. Robinson*, 795
7 F.3d 1109, 1120-21 (9th Cir. 2015); *accord Collins v. Mnuchin*, 938 F.3d 553, 574 (5th Cir. 2019)
8 (en banc) (“The Supreme Court once considered the zone of interests a matter of ‘prudential
9 standing,’ but now calls it one of statutory interpretation.”); *see Lexmark*, 572 U.S. at 127
10 (“‘prudential standing’ is a misnomer as applied to the zone-of-interests analysis, which asks
11 whether this particular class of persons ha[s] a right to sue under this substantive statute” (quotation
12 marks omitted)); *id.* at 128 (“to determine the meaning of the congressionally enacted provision
13 creating a cause of action . . . we apply traditional principles of statutory interpretation”).

14
15 As for *Valley Forge Christian College v. Americans United for Separation of Church &*
16 *State, Inc.*, 454 U.S. 464 (1982), that opinion simply repeated the same quote from *Data*
17 *Processing* in the course of summarizing the “prudential principles that bear on the question of
18 standing.” *Valley Forge*, 454 U.S. at 474-75. Thus, the opinion’s reference to “constitutional”
19 guarantees in that lone quote, which was *dicta* to begin with, has been superseded by *Lexmark*.
20

21
22 Even before *Lexmark* clarified these matters, the Court routinely entertained equitable
23 claims to enjoin unconstitutional actions without applying a zone-of-interests test. *E.g., Free Enter.*
24 *Fund*, 561 U.S. at 492 (removal protections for agency heads violated the separation of powers);
25 *Franklin*, 505 U.S. at 806 (concluding “on the merits” that executive action did not violate the
26 Enumeration Clause).

27
28 In short, when a plaintiff brings an equitable claim seeking to halt unconstitutional or

1 *ultra vires* conduct, no zone-of-interests test applies—regardless of whether the executive argues
2 that a statute authorizes its conduct. If, for instance, the executive branch had claimed in
3 *Youngstown* that its seizure of the steel mills were authorized by a wartime emergency statute, the
4 steel-mill owners would not then have had to demonstrate that the financial interests they sought
5 to vindicate fell within the zone of interests protected by such a statute. This case is no different.
6

7 **CONCLUSION**

8 For the foregoing reasons, this Court should reject Defendants’ arguments that Plaintiffs
9 lack a cause of action and that the zone-of-interests test precludes their claims.
10

11 Respectfully submitted,

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