No. 19-35460
(Consolidated with Nos. 19-35461 and 19-35462)

In the United States Court of Appeals for the Ninth Circuit

LEAGUE OF CONSERVATION VOTERS, *et al*.,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States
District Court for the District of Alaska

BRIEF OF *AMICI CURIAE* FEDERAL COURTS SCHOLARS IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are leading scholars with expertise in the jurisdiction of the federal courts, including expertise pertaining to the government's arguments that courts cannot hear this case because Plaintiffs lack a cause of action and because the relief they seek is impermissible. *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
- Stephen I. Vladeck, A. Dalton Cross Professor in Law, University of Texas School of Law

INTRODUCTION AND SUMMARY OF ARGUMENT

Acting pursuant to Section 12(a) of the Outer Continental Shelf Lands Act ("OCSLA"), which provides that the President "may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf," 43 U.S.C. § 1341(a), President Obama protected vast coastal areas along the Arctic and Atlantic Oceans from oil and gas development. Although nothing in the text

[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.

of the OCSLA gives presidents the authority to undo prior withdrawals of land, President Trump nonetheless issued an executive order in 2017 purporting to rescind this federal protection "to encourage energy exploration and production." Exec. Order No. 13795, § 2, 82 Fed. Reg. 20,815, 20,815 (May 3, 2017).

President Trump's order created an incentive to conduct oil and gas exploration in the affected areas, and industry began moving forward with efforts to conduct seismic surveying, threatening serious harm to a host of "marine mammals and other wildlife" meant to be protected by President Obama's withdrawals. ER 35-36. Plaintiffs filed suit, alleging that the new executive order was *ultra vires* and unconstitutional, and the district court agreed that the order "exceeded the President's authority under Section 12(a) of OCSLA." ER 30. The court "vacated" the relevant portion of the executive order. ER 32.

Seeking reversal of that decision, the government argues that Plaintiffs need a statutory cause of action to bring this suit and that the remedy they seek falls outside the courts' equitable authority. DOJ Br. 30-45. These arguments are wrong.

Regardless of whether a plaintiff has a statutory cause of action, "equitable relief . . . is traditionally available to enforce federal law," *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385-86 (2015), and courts may provide injunctive remedies when officials injure a plaintiff by exceeding their

lawful 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 nation's earliest days, federal courts have entertained claims for injunctive relief where executive branch officials allegedly exceeded their statutory or constitutional authority, without ever requiring a statutory cause of action.

The government's argument to the contrary confuses two distinct types of cases: (1) suits brought in equity to enjoin harmful conduct that is *ultra vires* or unconstitutional, and (2) suits brought under a statutory cause of action to enforce a statutorily created right. In the former category, no statutory cause of action is needed, and review is available if the relief requested has been "traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). That standard is plainly satisfied here.

Moreover, none of the government's objections to the particular relief sought in this case withstands scrutiny. First, sovereign immunity is no bar here: the claim that President Trump's order was "beyond [his] statutory authority" and "constitutionally void" implicates both of the exceptions to sovereign immunity long recognized by the Supreme Court. *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963). Second, equitable review of constitutional violations is available "as a general matter, without regard to the particular constitutional provisions at issue,"

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 491 n.2 (2010), so it makes no difference that this suit involves "violations of the Property Clause," DOJ Br. 41. Third, the Supreme Court's caution against judicially fashioning *damages* remedies is irrelevant here, where only traditional equitable relief is sought. Finally, the district court's order does not unconstitutionally require the President to do anything or refrain from doing anything; it is the functional equivalent of an injunction or a declaratory judgment preventing lower-level officials from implementing his executive order. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952).

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

ARGUMENT

I. Equitable Review Is Traditionally Available to Prevent Injuries from Official Conduct that Exceeds Statutory and Constitutional Limits.

A. As the Supreme Court has explained, "the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act." *Grupo Mexicano*, 527 U.S. at 318 (quotation marks omitted). This power "reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 135 S. Ct. at 1384.

Indeed, the antecedents of modern equitable review stretch back to the medieval period. Traditionally, English common law courts issued a "variety of

standardized writs," each of which encompassed a "complete set of substantive, procedural, and evidentiary law, determining who ha[d] to do what to obtain the unique remedy the writ specifie[d] for particular circumstances." John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 Wm. & Mary Bill of Rts. J. 1, 9 (2013) (quotation marks omitted). But as these writs ossified over time, failing to provide recourse in many situations, the Court of Chancery began ordering "new and distinct remedies for the violation of preexisting legal rights," in effect "creat[ing] a cause of action where none had existed before." *Id.* at 12, 20; *see* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 Wash. L. Rev. 429, 437-45 (2003).

From an early date, equitable relief was available against the Crown and its officers. This began with the development of the "petition of right," which "sought royal consent to the litigation of legal claims in the courts of justice" in cases where a "remedy against the Crown" was necessary. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. Rev. 899, 909 & n.36 (1997). Royal consent, when given, "authorized the court to hear the case, to decide it on legal principles, and to render a judgment against the Crown." *Id.*; *see* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 5-6 (1963). This device soon expanded "into other, more

routinely available remedies against the Crown," which had no "requirement that the subject first obtain leave from the King." Pfander, *supra*, at 912-13.

By the seventeenth century, therefore, English courts had come to grant injunctive relief "against the King on general equitable principles without insisting on the King's prior consent." *Id.* at 914; *see Pawlett v. Attorney Gen.*, Hardres 465, 145 Eng. Rep. 550 (Ex. 1668). The courts also developed various "prerogative writs," such as the writ of mandamus, that could be used to obtain relief against government officers "before the damage was done." Jaffe, *supra*, at 16-18; *see Rex v. Barker*, 3 Burr. 1265, 1267, 97 Eng. Rep. 823, 824-25 (K.B. 1762). Among other things, these prerogative writs were available to rein in "[o]fficials who acted in excess of jurisdiction." Jaffe, *supra*, at 19.

B. Against this backdrop, the Framers of the American Constitution conferred on the federal courts the "judicial Power" to decide "all Cases, in Law and Equity," U.S. Const. art. III, § 2, cl. 1, and the First Congress gave those courts diversity jurisdiction over suits "in equity," *see* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. In doing so, the Framers and the First Congress incorporated the established understanding that equitable courts had the power to order prospective relief from unlawful government action. *See* Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (directing that "the forms and modes" of equitable proceedings in federal court were to follow "the principles, rules and usages which belong to

courts of equity"); *Case of Hayburn*, 2 U.S. 408, 410 (1792) (formally adopting "the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court"). As Joseph Story explained, "in the Courts of the United States, Equity Jurisprudence embraces the same matters of jurisdiction and modes of remedy, as exist in England." 1 Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America* § 57, at 64-65 (1836).

Under the equitable principles adopted by American courts, injunctive relief was available where "a wrong is done, for which there is no plain, adequate, and complete remedy in the Courts of Common Law." *Id*. § 49, at 53; *see Payne v. Hook*, 74 U.S. 425, 430 (1868) (where a court "ha[s] jurisdiction to hear and determine th[e] controversy, ... [t]he absence of a complete and adequate remedy at law, is the only test of equity jurisdiction"). Among the situations in which equitable review was available were cases involving "continuing injuries" and those brought to "prevent a permanent injury from being done" which "cannot be estimated in damages." *Osborn v. Bank of U.S.*, 22 U.S. 738, 841-42 (1824); *id*. at 844 ("the cases are innumerable, in which injunctions are awarded on this ground").

Emblematic of these rules was the prominent case *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518 (1851), where it was alleged that an illegally

built bridge caused financial injury by obstructing commercial navigation, *id*. at 557, 559-60. Where such injury is alleged, the Supreme Court explained, "there is no other limitation to the exercise of a chancery jurisdiction . . . except the value of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States." *Id*. at 563. Equitable review was therefore available, without any specific statutory authorization, "on the ground of a private and an irreparable injury." *Id*. at 564.

From the early days of the Republic, federal courts used their equitable powers to review the lawfulness of executive action. A notable example is *Marbury v. Madison*, 5 U.S. 137 (1803). After determining that William Marbury had a right to his commission as Justice of the Peace, *id.* at 154, the Supreme Court concluded that he was entitled to a mandamus remedy, *id.* at 163-71, even though no "statute provide[d] an express cause of action for review of the Secretary of State's decision not to deliver up a document he possessed in his official capacity," Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612, 1630 (1997). The Court reasoned that if "a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Marbury*, 5 U.S. at 166.

Other early decisions reflected the same principle. For example, in *Kendall*

v. United States ex rel. Stokes, 37 U.S. 524 (1838), the Court issued a writ of mandamus requiring the Postmaster General to comply with a federal statute by disbursing certain funds to the plaintiffs as required by the law. *Id*. at 608-09. The Court made clear that it could provide such a remedy so long as it had personal and subject-matter jurisdiction. *Id.* at 623-24.

Similarly, in *Carroll v. Safford*, 44 U.S. 441 (1845), the Court expressed "no doubt" that "relief may be given in a court of equity . . . to prevent an injurious act by a public officer, for which the law might give no adequate redress," if that officer has exceeded his statutory authority. *Id.* at 463.

Likewise, in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), the Court enjoined federal officials from confiscating the plaintiffs' mail based on the officials' mistaken interpretation of the fraud statutes. As the Court explained: "The acts of all [the government's] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Id.* at 108.

C. The merger of law and equity did not alter the availability of equitable review. *See* Main, *supra*, at 474. Indeed, the statute authorizing that merger prohibited the Supreme Court from adopting rules that would "abridge, enlarge, [or] modify the substantive rights of any litigant." Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064, 1064 (1934). The Supreme Court therefore continued

granting equitable relief to restrain unlawful executive action without any statutory cause of action. *See infra* at 11-14.

Nor did the later enactment of the Administrative Procedure Act ("APA") limit the availability of non-statutory equitable review. "Nothing in the APA purports to be exclusive or suggests that the creation of APA review was intended to preclude any other applicable form of review." Siegel, *supra*, at 1666. Thus, the APA did "not repeal the review of *ultra vires* actions that was recognized long before," *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988), or preclude equitable review of unconstitutional actions in situations where the APA does not apply, *see Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (although the President's actions are not reviewable under the APA, they "may still be reviewed for constitutionality"). After all, the APA explicitly states that it "do[es] not limit or repeal additional requirements imposed by statute or otherwise recognized by law." 5 U.S.C. § 559; *see* U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 139 (1947) (this provision was meant "to indicate that the act will be interpreted as supplementing constitutional and legal requirements imposed by existing law").

In short, equitable review of *ultra vires* and unconstitutional actions remains available "in cases where the APA fails to provide a plaintiff with a remedy." Siegel, *supra*, at 1668; *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322,

1326-27 (D.C. Cir. 1996) (conducting *ultra vires* review where an APA cause of action was not pled); *Franklin*, 505 U.S. at 803-06 (conducting constitutional review where the final action was that of the President).

D. Ignoring this long tradition of equitable review, the government maintains that whenever it claims statutory authority for its actions, injured parties may not seek injunctive relief unless the statute cited by the government gives them a private right of action. *See* DOJ Br. 38. Supreme Court precedent forecloses that notion.

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

As in *Harmon*, the Supreme Court has consistently decided the merits of equitable challenges to executive actions that were alleged to exceed statutory and constitutional authority. The Court has never required plaintiffs in such cases to have a statutory cause of action.

Most famously, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Court blocked the implementation of the President's executive order to seize certain steel mills because his order "was not authorized by an act of Congress or by any constitutional provisions." 343 U.S. 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 maintained that the standards for equitable review described above were not satisfied, arguing without success that "equity's extraordinary injunctive relief should have been denied because (a) seizure of the companies' properties did not inflict irreparable damages, and (b) there were available legal remedies adequate to afford compensation for any possible damages." *Id.* at 584-85.

Similarly, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court resolved the merits of an action seeking an injunction based on a claim that the President and the Treasury Secretary went "beyond their statutory and constitutional powers." *Id.* at 667. Unlike in *Youngstown*, in *Dames & Moore* the

President "purported to act under authority of" two federal statutes, *id*. at 675, which the Court had to interpret to resolve the case, *see id.* at 675-88. But the Court never suggested that the plaintiffs needed to identify a cause of action in those statutes to obtain equitable relief. By resolving the case on the merits, the Court implicitly rejected that notion.

The Court did the same in *Dalton v. Specter*, 511 U.S. 462 (1994), where plaintiffs alleged violations of a law governing military base closures. *Id*. at 466. Although the Court emphasized that this was a "claim alleging that the President exceeded his statutory authority," *id.* at 474, the Court did not hold that the plaintiffs could sue only if the base-closure statute provided them with a cause of action. Rather, citing *Dames & Moore*, the Court interpreted the statute and held that review was not available because the statute committed the decision "to the discretion of the President." *Id.* at 474-76; *see id.* at 477 ("our conclusion . . . follows from our interpretation of an Act of Congress"). Once again, the Court eschewed any notion that "[p]rivate parties may bring suits to vindicate federal statutory provisions only if Congress creates a private cause of action." DOJ Br. 38.

The Court did so again in *Armstrong v. Exceptional Child Center*. There, too, the plaintiffs sought an injunction based on a claim that officials injured them by violating the terms of a federal statute. 135 S. Ct. at 1382. Although, as here,

"nothing in [the statute] provide[d] private parties with a cause of action," DOJ Br. 38; *see Armstrong*, 135 S. Ct. at 1387, the Court confirmed that "equitable relief . . . is traditionally available to enforce federal law," *id*. at 1385-86.

Congress may "displace" the equitable review that is presumptively available, because "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Id*. at 1385; *e.g.*, *id.* (concluding based on statutory interpretation that "the Medicaid Act implicitly precludes private enforcement" of the relevant provision). But for Congress to foreclose equitable review this way, "its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988); *accord Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Otherwise, "relief may be given in a court of equity . . . to prevent an injurious act by a public officer." *Armstrong*, 135 S. Ct. at 1384 (quoting *Carroll*, 44 U.S. at 463).

These are only a few of the many cases in which the Supreme Court—without ever requiring a statutory cause of action—has permitted equitable review of executive conduct that was alleged to exceed statutory limits. *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 165, 170 (1993); *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 235, 238-39 (1968); *Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959); *Land v. Dollar*, 330 U.S. 731, 734, 736-37 (1947); *Stark v. Wickard*, 321 U.S. 288, 310 (1944); *Santa Fe Pac. R.R. Co. v. Payne*, 259 U.S.

197, 198-99 (1922).

Likewise, equitable review is traditionally available, without a statutory cause of action, to prevent injuries by officials whose actions violate the Constitution. *See, e.g.*, *Free Enter. Fund*, 561 U.S. 477; *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Ex parte Young*, 209 U.S. 123 (1908). As the Court has noted, "injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001). If a party seeks prospective relief from an injury caused by a constitutional violation, "an implied private right of action directly under the Constitution" exists "as a general matter." *Free Enter. Fund*, 561 U.S. at 491 n.2. A statutory cause of action has never been required.

II. Seeking Equitable Relief from Harmful Conduct that Exceeds an Officer's Authority Is Different from Enforcing Statutorily Created Rights under a Statutory Cause of Action.

The government cannot dispute that equitable review has always been available when officials are alleged to have exceeded their statutory and constitutional authority and no other remedy will ameliorate a plaintiff's injuries. So the government confuses matters by citing precedent about a fundamentally different issue: when it is appropriate to infer a *statutory* cause of action from legislation that does not explicitly provide one. DOJ Br. 38-40 (citing *Alexander v. Sandoval*, 532 U.S. 275 (2001)).

This argument misunderstands Plaintiffs' claims, as well as the cases the government cites. Fundamentally, the government conflates two distinct types of cases: (1) suits brought in equity to enjoin harmful conduct that is *ultra vires* or unconstitutional, and (2) suits brought under a statutory cause of action to enforce a statutorily created right. This case concerns the former category; *Sandoval* concerns the latter. Because Plaintiffs are not claiming deprivation of a statutorily created right, they do not need a statutorily created 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 Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014) (statute protecting businesses from false advertising by competitors). Many such statutes authorize classes of persons to sue to enforce these duties and prohibitions, thereby vindicating their 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." *Sandoval*, 532 U.S. at 286 (citation omitted); *see Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 (1979).

In *Sandoval*, for instance, the Supreme Court examined whether Section 602 of Title VI of the Civil Rights Act of 1964 evinced a "congressional intent to create new rights" that could "be enforced through a private cause of action." 532 U.S. at 289, 284. Although a related statute, Section 601, had been held to create new rights against discrimination in certain public programs, the Court found that Section 602, by contrast, lacked "the rights-creating language so critical to the Court's analysis . . . of § 601." *Id*. at 288 (quotation marks omitted). Because the text of Section 602 "focus[ed] on the person regulated rather than the individuals protected," it "create[d] no implication of an intent to confer rights on a particular class of persons." *Id*. at 289 (quotation marks omitted). And because Section 602 revealed no "congressional intent to create new rights," *id*., it could not be construed as implicitly providing a cause of action. *Cf. Cannon*, 441 U.S. at 694 (recognizing an implicit cause of action because "Title IX explicitly confers a benefit on persons discriminated against on the basis of sex").

As *Sandoval* illustrates, when a plaintiff seeks to enforce new rights created by legislation, the question is whether the statute "reveals [a] congressional intent to create a private right of action" or contains "the sort of rights-creating language needed to imply a private right of action." *Armstrong*, 135 S. Ct. at 1387 (quotation marks omitted). "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).

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 relying on 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.

As the Supreme Court has explained, "[t]he 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)). They

do not depend on whether a statute provides authority to sue. 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").

The Supreme Court reaffirmed these distinctions most recently in *Armstrong*. There, the Court recognized that whether a statute provides a cause of action to enforce its terms is a different question than whether an equitable challenge may be brought against injurious conduct that violates the statute. Accordingly, the 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* 135 S. Ct. at 1385 ("We turn next to respondents' contention that . . . this suit can proceed against [the defendant] in equity."), *with id.* at 1387 ("The last possible source of a cause of action for

respondents is the Medicaid Act itself."); *see also Grupo Mexicano*, 527 U.S. at 326 (distinguishing "the Court's general equitable powers under the Judiciary Act of 1789" from its "powers under [a] statute").

In equitable cases like this one, therefore, the question is simply "whether the relief [Plaintiffs] requested . . . was traditionally accorded by courts of equity." *Id.* at 319. And as explained above, "equitable relief . . . is traditionally available to enforce federal law." *Armstrong*, 135 S. Ct. at 1385-86. When jurisdictional requirements are met and no damages remedy is adequate, equity has long authorized review of injurious executive conduct that exceeds statutory and constitutional limits.

In sum, when plaintiffs seek to enforce statutorily created rights and remedies, the question is whether Congress has (explicitly or implicitly) conferred such rights and remedies on those plaintiffs. But not all interests that one may vindicate in court are created by statute. Plaintiffs directly harmed by *ultra vires* or unconstitutional conduct may proceed in equity without a statutory cause of action.

III. The Relief Sought Does Not Bar This Suit.

Apart from erroneously insisting on a statutory cause of action, the government offers up several reasons for denying equitable review in this case based on the relief Plaintiffs are seeking. None of these objections is persuasive.

First, the government's assertion that sovereign immunity precludes this suit

is perplexing. The Supreme Court has long recognized that sovereign immunity is no bar when plaintiffs allege that officers are taking actions that are "beyond their statutory authority" or "constitutionally void," *Dugan*, 372 U.S. at 621-22, because when "the conduct against which specific relief is sought is beyond the officer's powers," it is "not the conduct of the sovereign," *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949). Here, Plaintiffs argue that presidents lack the power to revoke prior OCSLA withdrawals, and their claims plainly implicate both of the long-established exceptions to sovereign immunity.

Second, the government appears to concede that equitable review of constitutional claims does not require a statutory cause of action, but it suggests that review is inappropriate here because of the specific types of constitutional claims at issue—that is, because this case involves "alleged violations of the Property Clause" and "general separation-of-powers notions." DOJ Br. 41. The Supreme Court has rejected such arguments.

In *Free Enterprise Fund*, the government similarly argued that the Court had never "recognized an implied private right of action . . . to challenge governmental action under the Appointments Clause or separation-of-powers principles." 561 U.S. at 491 n.2 (quoting government's brief). The Court explained, however, that equitable review is available "as a general matter, without regard to the particular constitutional provisions at issue," and seemed puzzled by the contrary argument:

"If the Government's point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so." *Id.*

Third, the government quotes the Supreme Court's cautionary remarks about judicially crafting damages remedies. *See* DOJ Br. 41 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017)). But those remarks are aimed at "recognizing implied causes of action *for damages*," *Ziglar*, 137 S. Ct. at 1855 (emphasis added), and the Court's caution is based on the novelty and unique ramifications of implied damages actions. *See id*. at 1856 ("When determining whether traditional equitable powers suffice to give necessary constitutional protection—or whether, in addition, a damages remedy is necessary—there are a number of economic and governmental concerns to consider.").

Unlike the fashioning of a 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").

Fourth, the government asserts that this suit falls outside "the broad boundaries of traditional equitable relief," DOJ Br. 41 (quoting *Grupo Mexicano*,

527 U.S. at 322), because it does not involve "potential defendants in legal actions . . . rais[ing] in equity a defense available at law," *id.* at 42 (quotation marks omitted). As the government acknowledges, however, *see id.*, equitable review has never been limited to that situation. *See, e.g.*, *Franklin*, 505 U.S. at 801; *Santa Fe Pac. R.R. Co.*, 259 U.S. at 198-99; *Kendall*, 37 U.S. at 608-09. The government then proposes more nebulously that equity protects only certain types of legal interests: "personal property" and what it calls "liberty interests." DOJ Br. 42. Yet the government cites not a single case drawing its proposed distinction, much less dismissing a claim because of it.

Contrary to these arguments, the Supreme Court has rejected the idea that equitable review is an "expansion of past practice," *Grupo Mexicano*, 527 U.S. at 329, whenever it involves a type of legal interest not addressed in previous cases. "[A]lthough the precise case may never have occurred, if the same principle applies, the same remedy ought to be afforded." *Osborn*, 22 U.S. at 841. While courts may not "create remedies previously unknown to equity jurisprudence," *Grupo Mexicano*, 527 U.S. at 332, the remedy sought in this case—an injunction stopping officials from causing injury by exceeding their lawful authority—is as traditional as it gets. *See supra* Part I.

Finally, the government argues that the district court's order is tantamount to enjoining the President, which the government claims is unconstitutional. DOJ Br.

43. Not so.

To start, the government's premise is shaky: the Supreme Court has not held that courts may never enjoin the President. That idea traces back to the Court's enigmatic opinion in *Mississippi v. Johnson*, 71 U.S. 475 (1866), but "[t]he single point" decided there was whether the President could "be restrained by injunction from carrying into effect an act of Congress," *id*. at 498. While the Court stated more broadly that it could not enjoin the President "in the performance of his official duties," *id*. at 501, scholars and courts have long recognized that *Johnson* may have been an application of the political question doctrine. *See, e.g.*, *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 614 (D.C. Cir. 1974). And while a plurality of Justices in *Franklin v. Massachusetts* faulted a district court judge for enjoining the President without evaluating whether doing so was appropriate, 505 U.S. at 802-03 (citing *Johnson*), the plurality concluded that it "need not decide" whether such relief is categorically impermissible, *id*. at 803.

Moreover, *Franklin* and *Johnson* both "explicitly left open" whether courts may require the President "to perform a ministerial duty," that is, one "that admits of no discretion, so that the official in question has no authority to determine whether to perform the duty." *Swan v. Clinton*, 100 F.3d 973, 977-78 (D.C. Cir. 1996); *see Johnson*, 71 U.S. at 498 ("It is a simple, definite duty . . . imposed by law."). And "a duty to comply with . . . restrictions contained in [a] statute," such

as the OCSLA, "is ministerial and not discretionary, for the President is bound to abide by the requirements of duly enacted and otherwise constitutional statutes." *Swan*, 100 F.3d at 977.

That does not change merely because the OCSLA's meaning is subject to debate: "a ministerial duty can exist even where the interpretation of the controlling statute is in doubt, provided that the statute, once interpreted, creates a peremptory obligation." *Id.* at 978 (quotation marks omitted). Every legal mandate "to some extent requires construction by the public officer whose duties may be defined therein." *Wilbur v. Krushnic*, 280 U.S. 306, 318 (1930) (quoting *Roberts v. United States ex rel. Valentine*, 176 U.S. 221, 231 (1900)). "But that does not . . . make the duty of the officer anything other than a purely ministerial one," nor render the courts "powerless to give relief." *Id.* at 318-19 (quoting *Roberts*, 176 U.S. at 231). "No case holds that an act is discretionary merely because the President is the actor." *Nixon v. Sirica*, 487 F.2d 700, 712 (D.C. Cir. 1973).[2]

In any event, the district court did *not* enjoin the President here. By "vacating" Section 5 of the executive order, the court did not order the President to do anything or to refrain from doing anything. *Cf. Franklin*, 505 U.S. at 791 (the

[2] Notably, *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010), cited by the government, involved "no statutory power, but rather a decision committed to the executive discretion of the President or the personal discretion of the President-elect," namely, whether and how to hold an inauguration ceremony. *Id*. at 1012.

district court "directed the President to recalculate the number of Representatives per State and transmit the new calculation to Congress"); *Johnson*, 71 U.S. at 499 (the plaintiff sought to prevent the President from "assign[ing] generals to command in the several military districts" in the South "under [his] supervision . . . . as commander-in-chief"). The government is wrong, therefore, to portray the court's order as "essentially the equivalent" of an injunction *against the President*. DOJ Br. 43. At most, it is the equivalent of an injunction (or a declaratory judgment) preventing *other* officials from implementing that section of the executive order. Although the upshot is that the President will not be able to enforce his preferred policy, there is nothing constitutionally suspect about that. *See, e.g.*, *Youngstown*, 343 U.S. at 589 ("this seizure order cannot stand"); *Sirica*, 487 F.2d at 709 (in *Youngstown* "the Court understood its affirmance effectively to restrain the President").

From a separation-of-powers perspective, the district court's order differs little in substance from decisions like *Youngstown*, which recognize that injunctive and declaratory relief may be used to restrain lower-level officials from implementing unlawful presidential orders. *See, e.g.*, *Franklin*, 505 U.S. at 803 (injury could be redressed by declaratory relief against the Commerce Secretary, because it is "likely that the President and other executive . . . officials would abide by an authoritative interpretation of the census statute"); *Swan*, 100 F.3d at 979

(injury could be redressed by injunctive relief against lower-level executive officials); *Reich*, 74 F.3d at 1324 (injury from an executive order that violated a statute could be redressed by relief against the Labor Secretary). "That the . . . action here is essentially that of the President does not insulate the entire executive branch from judicial review . . . . for courts have power to compel subordinate executive officials to disobey illegal Presidential commands." *Id.* at 1328 (quotation marks omitted).

CONCLUSION

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

Respectfully submitted,

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Dated: February 20, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,425 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 20th day of February, 2020.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2020, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: February 20, 2020

/s/ Elizabeth B. Wydra
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