GOVERNING FOR IMPACT

Nonstatutory Review

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Issue Brief

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I. INTRODUCTION

Litigants often invoke the Administrative Procedure Act to challenge actions by the federal executive branch. Sometimes, though, neither the APA nor any other statute expressly authorizing judicial review applies. In that situation, courts may nevertheless possess the equitable power to enjoin unlawful action by government officials. This so-called "nonstatutory review" might remain available to litigants confronted with the limitations of judicial review statutes.

This Issue Brief discusses nonstatutory review. First, it outlines the occasionally murky relationship between nonstatutory review and other threshold doctrines of federal litigation. Then, it digs deeper into the nature and history of nonstatutory review, also sometimes called "ultra vires" review. In short: Nonstatutory review can be a powerful tool to challenge presidential action and raise constitutional claims. But as a vehicle to bring at least certain kinds of challenges to agency action, it has significant drawbacks—according to the D.C. Circuit, it is available only for "extreme" agency errors in interpreting statutes. Litigants might nevertheless consider nonstatutory review's usefulness as one tool among several to challenge executive action. Indeed, in light of its longstanding usage as a means to challenge the President's actions, nonstatutory review might be especially useful in targeting the executive orders on which the Trump administration has come to rely to advance its agenda.

II. NONSTATUTORY REVIEW AND THRESHOLD ISSUES GENERALLY

To successfully sue the federal government in federal court, a plaintiff needs (among other things) to:

- Invoke the court's subject matter jurisdiction,[1]
- Evade the government's sovereign immunity to suit,[2] and
- Identify a cause of action.[3]

In many challenges to executive action, the APA (or another subject- or agency-specific judicial review statute) furnishes a cause of action,[4] and the APA generally waives sovereign immunity for non-monetary claims.[5] But statutory causes of action are not always available. For instance, the Supreme Court has determined that the President is not an "agency" under the APA,[6] meaning that by their terms the APA's cause of action and its waiver of sovereign immunity may not be available to challenge the President himself. And some agency actions are beyond the APA's reach. Among other things, the APA authorizes suit only as to "final agency action"[7] and does not waive sovereign immunity "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."[8] Moreover, Congress has made APA review unavailable as to particular agencies or agency actions, as discussed below.

But when no statutory cause of action is available, courts nevertheless "may in some circumstances grant injunctive relief … with respect to violations of federal law by federal officials,"[9] pursuant to a doctrine sometimes called nonstatutory review.[10]

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[1] *See Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) ("Subject matter jurisdiction defines the court's authority to hear a given type of case" and "represents the extent to which a court can rule on the conduct of persons or the status of things." (quotations omitted)).

[2] *See United States v. Miller*, 145 S. Ct. 839, 849 (2025) ("[S]overeign immunity is jurisdictional in nature and deprives courts of the power to hear suits against the United States absent Congress's express consent." (quotation omitted)).

[3] *See Int'l Refugee Assistance Proj. v. Trump* ("*IRAP*"), 883 F.3d 233, 283 (4th Cir.) (Gregory, C.J., concurring) ("A 'cause of action'—often referred to synonymously (and confusingly) as a 'private right of action'—is a term of art employed specifically to determine who may judicially enforce certain 'statutory rights or obligations." (quotation omitted)), *vacated on other grounds*, 585 U.S. 1028 (2018).

[4] *See, e.g.*, 5 U.S.C. § 704 (APA).

[5] *See id.* § 702.

[6] *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

[7] 5 U.S.C. § 704; *see Final Agency Action*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

[8] *Id.* § 702.

[9] *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326–27 (2015).

[10] *See, e.g.*, *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996).

Courts have described nonstatutory review in various ways, some conflicting. Some cases treat it as a reflection of the federal courts' inherent equitable authority to issue a remedy in certain cases involving executive action,[11] whereas others describe it as a cause of action.[12] And some cases refer to nonstatutory review as implicating courts' jurisdiction.[13] Certainly, the availability of nonstatutory review can turn on whether or not Congress has deprived a district court of authority to adjudicate a claim, as discussed more in the next section.[14] But while using different terms, the cases generally treat nonstatutory review as a question of reviewability — that is, of the plaintiff's cause of action[15] — rather than subject-matter jurisdiction.[16] Instead, the general federal question jurisdiction statute, 28 U.S.C. § 1331, should provide subject matter jurisdiction for every nonstatutory claim against executive action.[17] In any event, the function of nonstatutory review — to allow plaintiffs to assert a claim in court — is clear. Whether or not it *is* a cause of action, it effectively functions as one.

Sovereign immunity also should not be a hurdle in nonstatutory review cases. Under the so-called *Larson-Dugan* doctrine, "if the federal officer, against whom injunctive relief is sought, allegedly acted in excess of his legal authority, sovereign immunity

[11] *See Armstrong*, 575 U.S. at 326–27.

[12] *See Reich*, 74 F.3d at 1327.

[13] *See, e.g.*, *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902); *Leedom v. Kyne*, 358 U.S. 184, 189 (1958); *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998) (observing, in distinguishing statutes conferring subject matter jurisdiction from those creating causes of action and defining courts' remedial authority, that jurisdiction "is a word of many, too many, meanings" (quotation omitted)).

[14] *See, e.g.*, *Changji Esquel Textile Co. Ltd. v. Raimondo*, 40 F.4th 716, 722 (D.C. Cir. 2022) (ultra vires review is available only if, among other things, "the statutory preclusion of review is implied rather than express").

[15] *Cf. Abhe & Svoboda, Inc. v. Chao*, 2005 WL 8165039, No. 04-1973, at *1 n.1 (D.C. Cir. Sept. 21, 2005) ("Reviewability under the APA is generally not a jurisdictional matter but rather a question of whether a cause of action exists." (quotation omitted)).

[16] *See, e.g.*, *Barlow v. Collins*, 397 U.S. 159, 166 (1970); *Griffith v. FLRA*, 842 F.2d 487, 490–92 (D.C. Cir. 1988); *see generally, e.g.*, *Federal Express Corp. v. Dep't of Commerce*, 39 F.4th 756, 763 (D.C. Cir. 2022) (treating nonstatutory review as an alternative cause of action to the APA, as many other cases do).

[17] *See Five Flags Pipe Line Co. v. Dep't of Transp.*, 854 F.2d 1438, 1439 (D.C. Cir. 1988).

does not bar a suit."[18] "[T]here is no sovereign immunity to waive—it never attached in the first place."[19]

Putting these principles together: nonstatutory review provides litigants seeking to challenge unlawful executive action with what the Supreme Court has called an "ability to sue."[20] And litigants bringing nonstatutory claims should have little trouble invoking the courts' subject matter jurisdiction and defeating sovereign immunity.

III. THE HISTORY AND FUNCTION OF NONSTATUTORY REVIEW

The Supreme Court long ago held—and has consistently maintained—that federal courts have the equitable authority to enjoin unlawful actions by federal officials. In *American School of Magnetic Healing v. McAnnulty*, decided in 1902, the Postmaster General "pronounced a fraud" material mailed by the American School of Magnetic Healing asserting "'that the human race does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to.'"[21] The Court rejected the government's contention that this determination was unreviewable. "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."[22]

Time and again, the Court has reinforced that principle. For instance, in 1958's *Leedom v. Kyne*, the Court affirmed that a district court could review an order of the National Labor Relations Board improperly certifying a bargaining unit, even though such orders were generally not reviewable under the National Labor Relations Act's

[18] *Reich*, 74 F.3d at 1329 (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690–91 (1949), and *Dugan v. Rank*, 372 U.S. 609, 621–22 (1963)).

[19] *Id.*; *accord Strickland v. United States*, 32 F.4th 311, 363–64 (4th Cir. 2022).

[20] *Armstrong*, 575 U.S. at 327.

[21] 187 U.S. at 96–97, 103.

[22] *Id.* at 108.

judicial review provision.[23] That was because the Board had acted "in excess of its delegated powers and contrary to a specific prohibition in the Act."[24] "Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given."[25]

More recently, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, a constitutional challenge to the structure of an administrative body, the Court brushed away the government's assertion that the plaintiffs had failed to identify "an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles."[26] The Court did not understand the government "to dispute such a right to relief as a general matter," quoting prior holdings to the effect that "equitable relief has long been recognized as the proper means for preventing entities from acting unconstitutionally" and that courts have "jurisdiction … to issue injunctions to protect the rights safeguarded by the Constitution."[27] And the government had "offer[ed] no reason and cite[d] no authority" why "Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim."[28]

A few years later, in *Armstrong v. Exceptional Child Center, Inc.*, the Court expanded on that discussion, explaining (in reliance on *Magnetic Healing*, among other cases) that "federal courts may in some circumstances grant injunctive relief against" federal officials for violating federal law.[29] "The ability to sue to enjoin unconstitutional actions by … federal officers is the creation of courts of equity, and

[23] 358 U.S. at 187–88.

[24] *Id.* at 188.

[25] *Id.* at 188–89.

[26] 561 U.S. 477, 491 n.2 (2010) (quotation omitted).

[27] *Id.* (quotations omitted).

[28] *Id.* (quotations omitted).

[29] *Armstrong.*, 575 U.S. at 326–27. The Court was unanimous on this point. *See id.* at 339 (Sotomayor, J., dissenting).

reflects a long history of judicial review of illegal executive action, tracing back to England."[30]

"[T]he precise scope and contours of [courts'] equitable powers of this nature are ill-defined,"[31] but this Issue Brief seeks to distill some basic principles that litigants might bear in mind.

A. Constitutional Claims and Challenges to Presidential Action

Courts have most freely allowed nonstatutory review as a means to challenge presidential action on constitutional or statutory grounds, and to bring constitutional challenges to agency action. *Free Enterprise Fund*, described above, is an example of the Supreme Court entertaining a nonstatutory claim concerning the constitutionality of a federal agency.

Litigants may also use nonstatutory review to challenge presidential acts on constitutional grounds. In *Franklin v. Massachusetts* — the case holding that the President is not an "agency" within the meaning of the APA's judicial review provisions — the Supreme Court was explicit that "the President's actions may still be reviewed for constitutionality."[32] That can happen through a nonstatutory action (or, as noted below, an APA action) naming subordinate officials as defendants. A canonical nonstatutory review decision is the Steel Seizure Case, *Youngstown Sheet & Tube Co v. Sawyer*, in which the Supreme Court reviewed the legality of President Truman's "order directing the Secretary of Commerce to take possession of most of the Nation's steel mills."[33] The Court did not discuss the challengers' cause of action, but since it proceeded directly to the merits of the companies' "charge[] that the seizure was not authorized by an act of Congress or by any constitutional provisions," that omission suggests that the ability to sue was not in dispute.[34]

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[30] *Id.* at 327 (majority opinion).

[31] *Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 133 (2d Cir. 2020).

[32] 505 U.S. at 801 (collecting cases, including *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579 (1952)).

[33] 343 U.S. at 582.

[34] *Id.* at 583. While the Court has cautioned against reading into "drive-by" jurisdictional rulings, *Steel Co.*, 523 U.S. at 91, the Court itself has cited *Youngstown* for the proposition that courts can review the

Nonstatutory review is also a vehicle for challenging presidential action on statutory grounds. "[T]he Supreme Court and other courts have repeatedly recognized the judiciary's role in reviewing executive action for compliance with statutory authority."[35] For instance, in *Zivotofsky ex rel. Zivotofsky v. Kerry*, a family challenged the "[t]he President's position[,] … reflected in State Department policy," that the passports of American citizens born in Jerusalem should list the place of birth as "Jerusalem" as inconsistent with a statute permitting such passports to instead list the place of birth as "Israel."[36] As in *Youngstown*, the Court proceeded to the merits without questioning the Zivotofskys' cause of action.[37]

The D.C. Circuit, in *Chamber of Commerce v. Reich*, provided a lengthy discussion of nonstatutory review. There, plaintiffs challenged an executive order "barring the federal government from contracting with employers who hire permanent replacements during a lawful strike" as contrary to the National Labor Relations Act.[38] And they expressly disclaimed reliance on the APA.[39] The court held they had a cause of action. "The message of this line of cases"—including *Magnetic Healing* and *Leedom*—"is clear enough: courts will 'ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.'"[40]

Litigants have used nonstatutory review to challenge Trump administration actions. Perhaps most prominently, during President Trump's first term, in *Trump v. Hawaii* the

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President's actions for constitutionality, *Franklin*, 505 U.S. at 801, and *Youngstown* skipping over threshold matters is consistent with the long history, sketched above, of cases emphasizing federal courts' equitable authority to review the legality of executive action.

[35] *IRAP*, 883 F.3d at 288 (Gregory, C.J., concurring) (surveying cases).

[36] 576 U.S. 1, 6–7 (2015).

[37] *Zivotofsky* is fairly categorized as a nonstatutory review case. The complaint did not specify any statutory right of action, yet sought enforcement of the statute by injunction and declaratory judgment. Complaint, *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, No. 03-cv-1921 (D.D.C. Sept. 16, 2003), ECF No. 1. To be sure, the D.C. Circuit said "[t]hat Congress took a position on the status of Jerusalem and gave Zivotofsky a statutory cause of action." *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1233 (D.C. Cir. 2009), *vacated*, 566 U.S. 189 (2012). But it appears to have used that term not to refer to an authorization to sue—which the relevant statute does not include, *see* Pub. L. 107-228, § 214, 116 Stat. 1365–66—but rather to a substantive legal right, *see Cause of Action*, Black's Law Dictionary (12th ed. 2024) (sense 2: "A legal theory of a lawsuit").

[38] 74 F.3d at 1324.

[39] *Id.* at 1326.

[40] *Id.* at 1328 (quoting *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 (1986)).

Supreme Court entertained both constitutional and statutory claims against a presidential proclamation imposing entry restrictions on nationals of certain countries.[41] The Court did not identify the plaintiffs' cause of action, but the circuit courts had below. The Ninth Circuit held that the plaintiffs had an APA claim "against the entities charted with carrying out [the President's] instructions," and also that

> [e]ven if there were no 'final agency action' review under the APA, courts have also permitted judicial review of presidential orders implemented through the actions of other federal officials. This cause of action, which exists outside of the APA, allows courts to review *ultra vires* actions by the President that go beyond the scope of his statutory authority.... When, as here, Plaintiffs challenge the President's statutory authority to issue a proclamation, we are provided with an additional avenue by which to review these claims.[42]

And in the Fourth Circuit, Chief Judge Gregory explained that the proclamation could be challenged both through APA claims against "'the officers who attempt to enforce the President's directive'"[43] and pursuant to the court's "inherent authority to review allegations that an executive action has exceeded the Constitution or a congressional grant of authority."[44] That power, Judge Gregory concluded, "is inherent in the separation of powers established by the Founders" and reflects the "'strong presumption' that 'Congress intends judicial review of administrative action.'"[45]

Likewise, during President Trump's second term, in *PFLAG, Inc. v. Trump* a group of plaintiffs have challenged on constitutional and statutory grounds two executive orders purporting to block federal funding for gender-affirming care and "promot[ing] gender ideology."[46] In granting a preliminary injunction, the district court held that the plaintiffs had a nonstatutory cause of action after a lengthy

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[41] 585 U.S. 667, 675–76 (2018).

[42] *Hawaii v. Trump*, 878 F.3d 662, 681–83 (9th Cir. 2017), *overruled on other grounds*, 585 U.S. 667 (footnote and citations omitted).

[43] *IRAP*, 883 F.3d at 284 (Gregory, C.J., concurring) (quoting *Franklin*, 505 U.S. at 828 (Scalia, J., concurring)).

[44] *Id.* at 287.

[45] *Id.* at 287–88 (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991)).

[46] — F. Supp. 3d —, 2025 WL 685124, at *2 (D. Md. Mar. 4, 2025).

analysis of nonstatutory review's history and scope.[47] "[B]ased on the reasoning in [*Magnetic Healing*] and its progeny," the court concluded that it could review the executive orders "to determine whether they were issued within the President's constitutional powers or any powers delegated to him by Congress."[48] A union challenging President Trump's executive order removing collective bargaining rights from "approximately two-thirds of the federal workforce" also brought a nonstatutory claim.[49] On its way to granting a preliminary injunction, the district court recognized that "[w]hile a party has different bases by which to challenge Presidential actions that may exceed the scope of the President's power, one such claim is that the President's action was *ultra vires.*"[50]

To be clear, though, the APA also generally remains available as a means to challenge presidential action—as several of these cases demonstrate. While the President himself cannot be sued under the APA, "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive."[51] "[C]ourts have power to compel subordinate executive officials to disobey illegal Presidential commands."[52] Indeed, in *Zivotofsky*, *Youngtown*, and *Reich*, cabinet secretaries were named defendants.

Nonstatutory review "is subject to express or implied statutory limitations."[53] For example, "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right," the Supreme Court has, "in suits against federal officers, refused to supplement that scheme with one created by the judiciary."[54] So, in *Armstrong*, the Court held that plaintiffs could not bring a nonstatutory claim

[47] *Id.* at *9–12.

[48] *Id.* at *11.

[49] *Nat'l Treasury Emps. Union v. Trump*, — F. Supp. 3d —, 2025 WL 1218044, at *1 (D.D.C. Apr. 28, 2025), *stay granted*, No. 25-5157 (D.C. Cir. May 16, 2025) (granting a stay on irreparable injury grounds).

[50] *Id.* at *12.

[51] *Franklin*, 505 U.S. at 828 (Scalia, J., concurring in part and in the judgment).

[52] *Soucie v. David*, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971). Nonstatutory review and the APA are both vehicles by which litigants might seek the invalidation of presidential actions through equitable relief against subordinate officials. It is less likely that an injunction can run against the President himself. *See Remedies*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

[53] *Armstrong*, 575 U.S. at 327.

[54] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996); *see also Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanism for constitutional violations that may occur in the course of its administration, we have not created additional … remedies.").

challenging a state Medicaid program's compliance with federal standards. "[T]he sole remedy Congress provided for a State's failure to comply with Medicaid's requirements" was "the withholding of Medicaid funds by the Secretary of Health and Human Services."[55] And "the judicially unadministrable nature" of the relevant provision of the Medicaid Act, which set a "broad[]" and "judgment-laden standard" that the agency was best suited to enforce, was evidence that "Congress wanted to make the agency remedy that it provided exclusive" and thereby bar nonstatutory review.[56]

B. Statutory Challenges to Agency Action

Litigants may obtain nonstatutory review of agency action alleged to be "ultra vires"—that is, in excess of an agency's statutory authority or contrary to law. Litigants might bring these "ultra vires" claims when Congress has made APA review of a particular agency action unavailable. For instance, Congress might have expressly excluded certain agency actions from the APA's reach. That was the case in *Changji Esquel Textile Co. Ltd. v. Raimondo*, where the Export Control Reform Act of 2018 provided that the Secretary of Commerce's placement of a foreign corporation on a list of those "who have been 'determined to be a threat to the national security and foreign policy of the United States" was exempted, by statute, from "the judicial-review provisions of the Administrative Procedure Act."[57] Or the existence of a special statutory scheme for adjudicating certain claims might be understood to bar an APA action in district court, as in *Nyunt v. Chairman, Broadcasting Board of Governors*, where the D.C. Circuit held that the Civil Service Reform Act precluded a federal employee from bringing his employment discrimination claim under the APA.[58]

But "[e]ven where Congress is understood generally to have precluded review, the Supreme Court has found an implicit but narrow exception": ultra vires review in the

[55] *Armstrong*, 575 U.S. at 328.

[56] *Id.* (quotation omitted).

[57] 40 F.4th at 720 ((quoting 50 U.S.C. § 4813(a)(2)); *see* 50 U.S.C. § 4821(a) ("the functions exercised under this subchapter shall not be subject to sections 551, 553 through 559, and 701 through 706 of Title 5.").

[58] 589 F.3d 445, 448 (D.C. Cir. 2009).

tradition of *Leedom*.[59] That exception, though, "is intended to be of extremely limited scope."[60] "To prevail on an ultra vires claim, the plaintiff must establish three things: (i) the statutory preclusion of review is implied rather than express; (ii) there is no alternative procedure for review of the statutory claim; and (iii) the agency plainly acts in excess of its delegated powers and contrary to a specific prohibition in the statute that is clear and mandatory."[61] *Ultra vires* claims are thus "confined to extreme agency error where the agency has stepped so plainly beyond the bounds of its statutory authority, or acted so clearly in defiance of it, as to warrant the immediate intervention of an equity court."[62] While it is not clear how grave an agency's error must be to count as "extreme," the D.C. Circuit has explained that "routine error[s]" are not subject to ultra vires review; only "blatant" errors are.[63] And the other circuits agree that ultra vires review of agency action is strictly limited.[64]

This exacting standard may be understood as the result of an "implied statutory limitation[]" on nonstatutory review similar to the sort *Armstrong* discussed.[65] "[*U*]*ltra vires* review seeks the intervention of an equity court where Congress has not authorized judicial review."[66] To prevail, a challenger must identify something more than the type of "error in statutory interpretation or challenged findings of fact that would" suffice "if Congress had allowed APA review."[67]

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[59] *Griffith*, 842 F.2d at 492.

[60] *Id.*

[61] *Changji Esquel Textile*, 40 F.4th at 722 (quotation omitted).

[62] *FedEx*, 39 F.4th at 764 (quotations omitted).

[63] *Id.* at 765, 767.

[64] *See, e.g.*, *Eastern Bridge, LLC v. Chao*, 320 F.3d 84, 91 (1st Cir. 2003); *Goethe House N.Y., German Cultural Ctr. v. NLRB*, 869 F.2d 75, 77 (2d Cir. 1989); *Solar Turbines, Inc. v. Seif*, 879 F.2d 1073, 1077 (3d Cir. 1989); *Scottsdale Cap. Advisors Corp. v. FINRA*, 844 F.3d 414, 421 (4th Cir. 2016); *U.S. Anesthesia Partners of Texas, P.A. v. HHS*, 126 F.4th 1057, 1064 (5th Cir. 2025); *Shawnee Coal Co. v. Andrus*, 661 F.2d 1083, 1093 (6th Cir. 1981); *Am. Soc. of Cataract & Refractive Surgery v. Thompson*, 279 F.3d 447, 456 (7th Cir. 2002); *Key Medical Supply, Inc. v. Burwell*, 764 F.3d 955, 962–63 (8th Cir. 2014); *Pac. Maritime Ass'n v. NLRB*, 827 F.3d 1203, 1208 (9th Cir. 2016); *U.S. Dep't of Interior v. Fed. Labor Relations Auth.*, 1 F.3d 1059, 1061 (10th Cir. 1993); *Florida Bd. of Bus. Reg. Dep't of Bus. Reg., Div. of Pari-Mutuel Wagering v. NLRB*, 686 F.2d 1362, 1368 n.12 (11th Cir. 1982).

[65] 575 U.S. at 327.

[66] *FedEx*, 39 F.4th at 765.

[67] *Id.* (quotation omitted). Ultra vires review is thus similar to mandamus, a remedy that can issue only when a litigant demonstrates "(1) a clear and indisputable right to relief, (2) that the government agency or official is violating a clear duty to act, and (3) that no adequate alternative remedy exists." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). There may be some formal differences

Because of the "nearly insurmountable limitations on [*Leedom*] jurisdiction," successful ultra vires claims are rare.[68] *Federal Express Corp. v. Department of Commerce* is a typical case. There, FedEx claimed that the Department of Commerce acted ultra vires in holding FedEx "strictly liable for aiding and abetting violations of the 2018 Exports Control Act."[69] The court rejected FedEx's claim. Even though its argument might have had more purchase under APA review—the court acknowledged that "[c]ertainly some jurisdictions do require 'actual knowledge' of the primary wrongdoer's tortious activity for civil aiding and abetting liability"[70]—it was not enough to "demonstrate the type of blatant error necessary for an *ultra vires* claim to succeed."[71]

But *Leedom* is an example of a successful ultra vires claim. There, the Supreme Court held that the plaintiff could challenge the NLRB's certification of a bargaining unit containing both professional and non-professional employees given the National Labor Relations Act's express provision that "'the Board shall not … decide that any unit is appropriate … if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit.'"[72] That was so even though the Court had previously interpreted the NLRA to say that a certification order was not a final order subject to judicial review under the Act.[73] The Court asked: "Does the

between mandamus and ultra vires review. Mandamus is a prerogative writ, the issuance of which is now authorized by statute, 28 U.S.C. § 1651, and is frequently used as a vehicle to obtain interlocutory appellate review of district court actions, *see Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367 (2004). Ultra vires review is not authorized by statute and is associated with the remedy of injunction. *FedEx*, 39 F.4th at 763. But they are practically very similar. *Cf.* David Driesen, *Judicial Review of Executive Orders' Rationality*, 98 B.U. L. Rev. 1013, 1036–37 (2018) (categorizing both "review pursuant to the common-law writ of mandamus and other remedial customs predating the APA" as "non-statutory review").

[68] *U.S. Dep't of Justice v. FLRA*, 981 F.2d 1339, 1343 (D.C. Cir. 1993).

[69] 39 F.4th at 759. FedEx also argued that its claim was not subject to the "demanding standard for judicial intervention" associated with ultra vires claims because the 2018 Exports Control Act withdrew only APA review, not all statutory judicial review. *Id.* at 766. The D.C. Circuit rejected that argument, "reemphasiz[ing]" that the "rigorous standard for *ultra vires* review" applies "even in cases in which Congress has only expressly withdrawn APA review." *Id.*

[70] *Id.* at 771.

[71] *Id.* at 767.

[72] *Leedom*, 358 U.S. at 185 (quoting 29 U.S.C. § 159(b)(1)).

[73] *Id.* at 187.

law, apart from the review provisions of the Act, afford a remedy?"[74] And the Court answered: "We think the answer surely must be yes."[75] The Court reasoned that "[t]his suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act," which was "clear and mandatory" on the relevant point.[76] *Leedom* thus demonstrates that litigants might be able to use nonstatutory review when the APA is not available, including to circumvent the APA's final agency action requirement and obtain review of nonfinal or interlocutory agency actions.[77]

More recently, an ultra vires claim against the U.S. DOGE Service survived a motion to dismiss. Plaintiffs in *AFL-CIO v. Department of Labor* argued that DOGE has, without any statutory authorization, "sought and obtained unprecedented access to information systems across numerous federal agencies."[78] The district court found that the plaintiffs plausibly alleged that DOGE had no statutory authority for its actions, in violation of the principle that "the Executive Branch must act based on authority that stems either from an act of Congress or from the Constitution itself"[79]—even as it "acknowledge[d] that *ultra vires* claims are 'extremely limited in scope.'"[80]

[74] *Id.* at 188 (quotation omitted).

[75] *Id.*

[76] *Id.*

[77] *See Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 233 (4th Cir. 2008) ("In *Leedom*, the Supreme Court recognized a nonstatutory exception to the § 704 finality requirement in cases in which agencies act outside the scope of their delegated powers and contrary to clear and mandatory statutory prohibitions." (quotation omitted)); *Public Citizen v. Office of U.S. Trade Rep.*, 970 F.2d 916, 922 (D.C. Cir. 1992) ("A federal court … may take jurisdiction before final agency action … only … in a case of clear right such as outright violation of a clear statutory provision." (quotation omitted)); *see also Final Agency Action*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

[78] 2025 WL 1129227, at *2 (D.D.C. Apr. 16, 2025) (quotation omitted).

[79] *Id.* at *22 (quotation omitted).

[80] *Id.* (quoting *Griffith*, 842 F.2d at 493).

IV. CONCLUSION

Litigants might consider the utility of nonstatutory review as one of multiple different bases by which to challenge executive action. However, litigants might also be aware of its limitations, particularly when compared to the mechanism for judicial review provided by the APA.