No. 20-1026

In the Supreme Court of the United States

EAGLE TRUST FUND, JOHN F. SCHLAFLY, AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND,

PETITIONERS,

V.

UNITED STATES POSTAL SERVICE AND LOUIS DEJOY, POSTMASTER GENERAL, IN HIS OFFICIAL CAPACITY,

RESPONDENTS.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Petitioners Eagle Trust Fund ("ETF"), Eagle Forum Education & Legal Defense Fund ("EFELDF"), and John F. Schlafly, an ETF trustee and EFELDF officer and director, respectfully file this supplemental brief pursuant to this Court's Rule 15.8 to address the impact of this Court's post-petition decision in *Salinas v. Railroad Retirement Bd.*, 28 Fla. L. Weekly Fed. S. 657 (U.S. Feb. 3, 2021) (No. 19-199), on the decision of the lower courts. Respondent United States Postal Service ("USPS") waived its opposition to the petition.

INTRODUCTION

The Postal Reorganization Act, PUB. L. NO. 91-375, 84 Stat. 719 (1970) ("PRA"), provides in pertinent part that "no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service." 39 U.S.C. §410(a). The District of Columbia Circuit has read §410(a) to bar not only review under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), but also pre-APA judicial review other than "*ultra vires*" review. The D.C. Circuit then defines "ultra vires" narrowly as acting in violation of only *the PRA* (*i.e.*, *the statute*), but not the Constitution or USPS's own rules.

By contrast, this Court noted that "[§410(a)], *at most*, exempts the Postal Service from the APA," *Air Courier Conf. v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991) (emphasis added), and the Sixth and Seventh Circuits have recognized that §410(a) does not bar non-APA review of USPS's failure to follow its own rules. *Booher v. United States Postal Serv.*, 843 F.2d 943, 946 (6th Cir. 1988); *Peoples Gas,*

Light & Coke Co. v. United States Postal Serv., 658 F.2d 1182, 1191 (7th Cir. 1981); *see* Pet. at 20, 24. The strong presumption of judicial review in this Court's post-petition *Salinas* decision sheds light on this mature split in circuit authority. Under that strong presumption, Congress should not be read to have intended to bar non-APA judicial review *sub silentio*.

REASONS TO GRANT THE WRIT

Salinas supports granting the writ of *certiorari* here because courts read statutes under a strong presumption of judicial review, and there is no reason to read the PRA to bar pre-APA or non-APA review. As the petition explains, the two forms of review are different enough that one need not read an express bar on APA review to include an implied bar on non-APA review. *See* Pet. 20-21.

Salinas concerned the intersection of judicial review under the Railroad Retirement Act of 1974, 45 U.S.C. §§231-231v, and the Railroad Unemployment Insurance Act, 45 U.S.C. §§351-369, which depended on the scope of the statutory phrase "any final decision" in 45 U.S.C. §355(f):

> To the extent there is ambiguity in the meaning of "any final decision," it must be resolved in Salinas' favor under the strong presumption favoring judicial review of administrative action. This default rule is well-settled, and Congress is presumed to legislate with it in mind. To rebut the presumption, the Board bears a heavy burden of showing that the statute's language or structure forecloses judicial review.

Salinas, 28 Fla. L. Weekly Fed. S. 657 (Slip Op. 8-9) (internal quotations and citations omitted). Insofar as

the PRA's plain language exempts USPS only from the APA, Petitioners do not concede that the PRA is ambiguous. *See Air Courier*, 498 U.S. at 523 n.3. But if the PRA were ambiguous, *Salinas* would require a court to read the PRA under the strong presumption that Congress did not intend to foreclose judicial review.

Nor can USPS show that the PRA's "language or structure forecloses judicial review" under *Salinas*. If this case involved either executive or quasi-legislative action, USPS's reading might make sense, as the D.C. Circuit had found in its prior line of cases. *See* Pet. 28. But using the rationale of that line of cases to bar judicial review of an agency *adjudication* would unconstitutionally vest the judicial power of the United States in an Article II administrative law judge, redirecting Petitioners' property with no recourse to an Article III court. *See* Pet. 28-31. That implicates the canon of constitutional doubt, which holds that courts should reject interpretations that raise serious constitutional doubts and should instead adopt plausible alternate interpretations. *See* Pet. 22-23. Here, the plausible alternate interpretation is that the PRA means what the PRA says: only APA review is barred. Finally, the D.C. Circuit's precedents rely on *an APA subsection* about vesting agency authority to bar *non-APA review*, *compare* 39 U.S.C. §410(a) (PRA) *with* 5 U.S.C. §701(a)(1) (APA), which makes no sense if the PRA makes the APA inapplicable. *See* Pet. 21 (collecting cases). That pretzel logic is the antithesis of "language or structure forecloses judicial review" under *Salinas*. If the PRA makes the APA inapplicable, the APA cannot apply to make non-APA review inapplicable.

CONCLUSION

Salinas and its "strong presumption favoring judicial review of administrative action" reinforce the necessary conclusion that the PRA does no more than it says and no more than this Court said in *Air Courier*: the PRA merely displaces APA review, with no effect whatsoever on non-APA review. Accordingly, the petition for a writ of *certiorari* should be granted.

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Respectfully submitted,

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