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' REPLY BRIEF

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TABLE OF CONTENTS

Table of Contents i
Table of Authorities iii
Appendix vi
Supplemental Appendix vi
Petitioners' Reply Brief 1
Reasons to Grant the Writ 1
I. The PRA does not exempt USPS from non-APA review. 1
II. Nonstatutory review is broader than *ultra vires* review. 2
A. Constitutional review is at least as available as *ultra vires* review. 2
1. The Due Process Clause is not a "law" exempted by §410(a). 3
2. USPS's interpretation of §410(a) violates Article III's vesting judicial power in Article III courts. 3
B. Nonstatutory review includes follow-own-rules and arbitrary-and-capricious review. 4
C. Remand would not be futile. 5
D. Cabining §410(a) to its express terms would not make §410(a) superfluous. 5
III. The arguments against *Kendall* review are a *non sequitur*. 6
IV. The public-rights doctrine does not aid USPS. 8
A. Petitioners' entitlement to their mail is not a public right. 8
B. If applicable, the public-rights doctrine has a presumption of judicial review. 8

C. USPS cannot assert congressional latitude for resolving public rights. 9
V. USPS does not credibly dispute that the Circuits are split on the scope of non-APA review of USPS action. 9
VI. The issues presented here are extraordinarily important. 10
A. The scope of APA review *vis-à-vis* equity review is extremely important. 11
B. The availability of "safety-valve" review in the District of Columbia is extremely important. 12
Conclusion 12

TABLE OF AUTHORITIES

Cases

Air Courier Conf. v. Am. Postal Workers Union, 498 U.S. 517 (1991) 1-2, 9

Alabama Power Co. v. Ickes, 302 U.S. 464 (1938) 11

Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902) 2

Baltimore Sun Co. v. Mayor & City Council of Baltimore, 359 Md. 653, 755 A.2d 1130 (Md. 2000) 12

Blessing v. Freestone, 520 U.S. 337 (1997) 11

Booher v. USPS, 843 F.2d 943 (6th Cir. 1988) 4, 10

Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281 (1974) 5

City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005) 11

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 6

Crowell v. Benson, 285 U.S. 22 (1932) 8-9

Currier v. Potter, 379 F.3d 716 (9th Cir. 2004) 4, 9

Cutter v. Wilkinson, 544 U.S. 709 (2005) 6

Douglas v. Indep. Living Ctr. of S. Cal., Inc., 565 U.S. 606 (2012) 11

Emery Worldwide Airlines, Inc. v. U.S., 264 F.3d 1071 (Fed. Cir. 2001) 3

Ex parte Young,
209 U.S. 123 (1908) 11

Fields v. Runyon,
No. 93-3230, 1993 U.S. App. LEXIS 26298
(6th Cir. Oct. 4, 1993) 10

FPC v. Nat. Gas Pipeline Co.,
315 U.S. 575 (1942) 5

Harrison v. USPS,
840 F.2d 1149 (4th Cir. 1988) 3-4, 9

J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124 (2001) 6

Kendall v. U.S. ex rel. Stokes,
37 U.S. (12 Pet.) 524 (1838) 2, 6-7, 10

Mittleman v. Postal Regulatory Comm'n,
757 F.3d 300 (D.C. Cir. 2014) ..... 2-3, 6-7, 10=11

Mostyn v. Fabrigas,
98 Eng. Rep. 1021 (K.B. 1774) 12

N. Pipeline Constr. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982) 4, 8

Old Town Trolley Tours v. Wash. Metro. Area Transit Comm'n, 129 F.3d 201
(D.C. Cir. 1997) 4-5

Peoples Gas, Light & Coke Co. v. USPS,
658 F.2d 1182 (7th Cir. 1981) 10

Salinas v. Railroad Retirement Bd.,
141 S.Ct. 691 (2021) 2

Schuster v. U.S. Postal Serv.,
No. 98-3217, 1999 U.S. App. LEXIS 15145
(7th Cir. July 1, 1999) 10

Texas Rural Legal Aid, Inc. v. Legal Services Corp., 940 F.2d 685 (D.C. Cir. 1991) 34-5

U.S. v. Macdaniel,
32 U.S. (7 Pet.) 1 (1833) 5
U.S. v. Williams,
504 U.S. 36 (1992) 6
U.S. Bulk Carriers, Inc. v. Arguelles,
400 U.S. 351, 356-58 (1971) 7
Webster v. Fall,
266 U.S. 507 (1925) 7
Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 3

Statutes

U.S. CONST. art. II, § 2, cl. 2 5
U.S. CONST. art. II 4
U.S. CONST. art. III 3-4, 8, 11
U.S. CONST. amend. V, cl. 4 ..... 3, 9
Administrative Procedure Act,
5 U.S.C. §§551-706 ..... 1-6, 9-12
39 U.S.C. §410(a) 1-5, 9-10
Ch. 15, §1, 3, 5,
2 Stat. 103, 104-06 (1801) 7, 12
Postal Reorganization Act, PUB. L. NO. 91-375,
84 Stat. 719 (1970) 1-3

Rules, Regulations and Orders

FED. R. CIV. P. 15(d) 5
39 C.F.R. §211.2(a)(2) 1
Mailing Standards of the United States Postal Service, §2.1.1 1
Mailing Standards of the United States Postal Service, §2.1.2 1

APPENDIX

Eagle Trust Fund v. U.S. Postal Service, No. 19-5090 (D.C. Cir. June 23, 2020 (panel decision) 1a
Eagle Trust Fund v. U.S. Postal Service, No. 1:17-cv-02450-KBJ (D.D.C. Feb. 2, 2019) (decision) 7a
Eagle Trust Fund v. U.S. Postal Service, No. 1:17-cv-02450-KBJ (D.D.C. Mar. 6, 2019) (denial of post-judgment motion) 35a
Eagle Trust Fund v. U.S. Postal Service, No. 19-5090 (D.C. Cir. Aug. 28, 2020) (rehearing denial) 38a
Eagle Forum and Schlafly, MD 17-13 (Sept. 15, 2017) (hearing officer) 39a
Eagle Forum and Schlafly, MD 17-13 (Oct. 24, 2017) (appeal) 49a
Eagle Forum and Schlafly, MD 17-13 (Oct. 24, 2017) (order) 54a
First Amended Complaint 55a

SUPPLEMENTAL APPENDIX

Mailing Standards of the United States Postal Service, §2.1.1 Normal Time Limit 76a
Mailing Standards of the United States Postal Service, §2.1.2 Time Limit Extension 76a

PETITIONERS' REPLY 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 reply to the brief in opposition by the Postmaster General and U.S. Postal Service (collectively, "USPS"). USPS offers no good reason to read an express exemption from the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA") to extend beyond the APA. 39 U.S.C. §410(a); *Air Courier Conf. v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991) ("Section 410, *at most*, exempts the Postal Service from the APA.") (emphasis added). Pre-APA review would suffice to vacate the challenged mail-forwarding order. Pet. 18-28. While this litigation has been pending, moreover, the time limit on mail-forwarding orders expired, so USPS's continued reliance on its mail-forwarding order here violates USPS's own rule that limits mail-forwarding orders to two and a half years,[1] which provides a new basis for *vacatur*. That basis was not previously available and—because the decisions below deem such USPS violations unreviewable—would be futile to raise first below.

REASONS TO GRANT THE WRIT

I. THE PRA DOES NOT EXEMPT USPS FROM NON-APA REVIEW.

By its express terms, the Postal Reorganization Act, PUB. L. NO. 91-375, 84 Stat. 719 (1970) ("PRA"), exempts USPS only from parts of the APA. *See* 39

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[1] *See Mailing Standards of the United States Postal Service*, §§2.1.1 (normal time limit of 18 months), 2.1.2 (extension of up to an additional year) (Suppl. App. 76a); 39 C.F.R. 211.2(a)(2) (manual is a USPS regulation).

U.S.C. §410(a). With the presumptions against *sub silentio* overturning this Court's decisions and repeals by implication, *see* Pet. 22, legislative ambiguity must resolve in favor of review under the "well-settled," "strong presumption favoring judicial review of administrative action," against which "Congress is presumed to legislate." *Salinas v. Railroad Retirement Bd.*, 141 S.Ct. 691, 698 (2021) (internal quotations omitted). As signaled in *Air Courier*, *supra*, courts should read §410(a) to mean what is says.

II. NONSTATUTORY REVIEW IS BROADER THAN *ULTRA VIRES* REVIEW.

USPS argues that the claim to non-APA review—whether unique to the District of Columbia under *Kendall v. U.S. ex rel. Stokes,* 37 U.S. (12 Pet.) 524 (1838), or generally under *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902)—is no greater than the *ultra vires* review available under *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 305 (D.C. Cir. 2014). USPS Br. 9. 11. Because nonstatutory review is broader than *Mittleman* or *ultra vires* review in several respects, USPS is wrong.

A. Constitutional review is at least as available as *ultra vires* review.

In enacting §410(a), the PRA meant to exempt *some* USPS actions from the APA, but the PRA could not suspend constitutional review. Petitioners have argued consistently below that—if §410(a) means what USPS and *Mittleman* say §410(a) means—§410(a) violates the Constitution. App. 28a n.6, 36a. *Mittleman* defines "*ultra vires*" in reference to the agency's statutory authority, App. 4a, without regard to whether that statute—as interpreted—violates the

Constitution. *Id.* 5a. Constitutional review is available even when other review is not.

1. The Due Process Clause is not a "law" exempted by §410(a).

The Due Process Clause is not a "law" that this Court should read §410(a) as having suspended. If the power to suspend the Constitution "exists, it need submit to no legal restraint." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952). The better reading is that §410(a) merely means what it expressly says: the APA does not apply to some USPS actions. USPS argues that Congress intended PRA to make USPS "more like" a private carrier, USPS Br. 8, but "more like" does not mean "exactly alike." USPS remains a federal entity and cannot escape the Constitution.

2. USPS's interpretation of §410(a) violates Article III's vesting judicial power in Article III courts.

USPS would avoid petitioners' Article III question by arguing that it was not raised below, USPS Br. 13, but petitioners raised it in both courts below. *See* Pet. 15 (quoting App. 28a n.6, 36a); Opening Br. No. 19-5090, at 7-8, 28-29 (D.C. Cir.); Reply Br., No. 19-5090, at 16-18 (D.C. Cir.). USPS has no valid rebuttal.

In support of its claim, USPS cites a string of appellate decisions, USPS Br. 10, but they all dealt with executive or quasi-legislative USPS action (*i.e.*, none involved review of ALJ decisions). *Mittleman*, 757 F.3d at 305 (siting of USPS branch); *Emery Worldwide Airlines, Inc. v. U.S.*, 264 F.3d 1071, 1084 (Fed. Cir. 2001) (challenge to award of government contract); *Harrison v. USPS*, 840 F.2d 1149, 1155 (4th Cir. 1988) (employment dispute in the form of

decertifying a contractor); *Booher v. USPS*, 843 F.2d 943, 945 (6th Cir. 1988) (employment dispute); *Currier v. Potter*, 379 F.3d 716, 725 (9th Cir. 2004) (challenge to USPS policies on delivery of mail and provision of no-fee postal boxes to homeless persons). As such, none of those cases presented the issue that petitioners present: whether §410(a) constitutionally can bar review of ALJ decisions in an Article III court.

Petitioners are not aware of such a decision, and this Court's decisions point against allowing Article II ALJs to exercise judicial power conclusively (*i.e.*, without judicial review): "Congress cannot 'withdraw from [Art. III] judicial cognizance *any* matter which, *from its nature*, is the subject of a suit at the common law, or in equity, or admiralty.'" *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (1982) (plurality) (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)) (emphasis and alterations in *Marathon*). The issue warrants a definitive ruling.

B. Nonstatutory review includes follow-own-rules and arbitrary-and-capricious review.

USPS cannot credibly argue that all pre-APA review involved *ultra vires* agency action: "it is worth remembering that subsections (a) through (d) of [5 U.S.C. §706(2)] contained no innovations" and "merely restated the present law as to the scope of judicial review" at the time of APA's enactment. *Old Town Trolley Tours v. Wash. Metro. Area Transit Comm'n*, 129 F.3d 201, 205 (D.C. Cir. 1997) (interior quotations omitted). In arguing otherwise, USPS ignores not only "the pre-APA requirement that administrative decisions be rationally based," *Texas Rural Legal Aid,*

Inc. v. Legal Services Corp., 940 F.2d 685, 696-97 (D.C. Cir. 1991) (collecting cases); *accord Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 290 (1974) (equating arbitrary-and-capricious review with rational-basis review), but also the pre-APA decisions on an agency's failure to follow its own rules. *U.S. v. Macdaniel*, 32 U.S. (7 Pet.) 1, 15 (1833); *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 586 (1942). Nonstatutory review is not limited to *ultra vires* review.

C. Remand would not be futile.

USPS suggests that this litigation is a poor vehicle for this Court to consider because petitioners did not raise the USPS rules against splitting the mailstream to post-office boxes before the administrative law judge ("ALJ"), USPS Br. 18, implying that petitioners would not prevail on remand. USPS is likely wrong because exhaustion is not jurisdictional and is itself waivable—USPS raises it for the first time here—but USPS is certainly wrong to suggest remand would be futile. First, the mail-forwarding order has lasted longer that USPS's rules allow and could be vacated by a supplemented pleading. *See* FED. R. CIV. P. 15(d). Second, remand would also provide the opportunity to amend the pleading to raise petitioners' Appointment Clause arguments against USPS's entire ALJ process. *See* App. 6a.

D. Cabining §410(a) to its express terms would not make §410(a) superfluous.

USPS's strongest argument is illusory: what role would PRA's APA exemption serve if non-APA review continued to apply? USPS Br. 11. While petitioners acknowledge *overlap*, Pet. 8 (citing *Old Town Trolley*, 129 F.3d at 205), that is not enough for USPS to argue

superfluity. Mere "overlap" is not enough if "each … confers jurisdiction over cases that the other … does not reach." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001). As petitioners explained, equity review is far narrower in its reach, requiring an actual right. *See* Pet. 10. This case (petitioners' property) and *Mittleman* (neighbors' second-guessing USPS branch-office siting decisions) ably demonstrates the difference. *See* Section VI.A, *infra* (distinguishing APA and non-APA review).

III. THE ARGUMENTS AGAINST *KENDALL* REVIEW ARE A *NON SEQUITUR*.

USPS seeks to evade the District Court's unique equity jurisdiction with *non sequitur* arguments that the lower courts did not consider the issue.

Quoting *Cutter v. Wilkinson*, 544 U.S. 709 (2005), USPS makes the *non sequitur* argument that "this Court is a 'court of review, not of first view.'" USPS Br. 13 (quoting *Cutter*, 544 U.S. at 718 n.7)). That argues for summary reversal and a remand for reconsideration in light of the *Kendall* argument that petitioners pressed in their complaint, App. 60a-61a, and at every stage of the proceedings below. *Id.* 28a n.6, 36a *Cutter* does not argue for denying summary reversal, given that petitioners pressed the argument below. *U.S. v. Williams*, 504 U.S. 36, 41 (1992) ("we will not review a question not pressed or passed on by the courts below") (interior quotation omitted). If lower courts could deny review by ignoring arguments, this Court's jurisdiction and supervision would be illusory.

Further, USPS seeks to pit the District Court against the D.C. Circuit, presumably intending to suggest that the latter trumps the former:

> Petitioners fail to explain why specific features of the D.C. district court's equity jurisdiction would require review that is broader in scope than that permitted by D.C. Circuit precedent.

USPS Br. 13. What USPS actually means is that petitioners fail to explain why *Kendall* review would be broader than *Mittleman* review. Two obvious rebuttals suffice. First, *Kendall* is a decision of this Court, based on an act of Congress. *Compare Kendall*, 37 U.S. (12 Pet.) at 620 *with* Ch. 15, §1, 3, 5, 2 Stat. 103, 104-06 (1801); *cf. U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 356-58 (1971) (leaving it to Congress to speak more clearly when a new review provision arguably supersedes a longstanding one). Second, *Mittleman* did not even consider *Kendall*, and the panel found itself bound by *Mittleman* even if wrong. App. 4a-5a. *Mittleman* in no way limited—or could limit—the power of the District Court granted by Congress and recognized by this Court.

In short, USPS's argument is a *non sequitur* because decisions of this Court trump those of lower courts, and—for good measure—*Mittleman* did not even consider the issue:

> Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.

Webster v. Fall, 266 U.S. 507, 511 (1925). It would violate due process for lower courts to bind new

parties—such as petitioners here—with mistakes made by past litigants.

IV. THE PUBLIC-RIGHTS DOCTRINE DOES NOT AID USPS.

Quoting *dicta* from *Crowell v. Benson*, 285 U.S. 22, 50 (1932), USPS claims that the public-rights doctrine applies to "the exercise of the congressional power as to … *the facilities of the post office*." USPS Br. 14-15 (USPS's emphasis). The public-right doctrine does not aid USPS here.

A. Petitioners' entitlement to their mail is not a public right.

The public-rights doctrine cannot negate property interests in mail. *See* Pet. 10 n.4. Specifically, "Congress cannot 'withdraw from [Art. III] judicial cognizance *any* matter which, *from its nature*, is the subject of a suit at the common law, or in equity, or admiralty.'" *Marathon*, 458 U.S. at 69 n.23 (plurality) (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 284) (emphasis and alterations in *Marathon*). While the doctrine may apply to terms on which USPS makes post office boxes available, it does not apply to one's right to one's mail.

B. If applicable, the public-rights doctrine has a presumption of judicial review.

Even if the public-rights doctrine applied, it has a presumption of judicial review: "even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Art. III courts." *Marathon Pipe Line Co.*, 458 U.S. at 69 n.23 (plurality) (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 548-549 & n.21 (1962) (opinion of Harlan, J.)). Indeed, while USPS would reject what it

calls *dicta* in one decision, USPS Br. 16-17, USPS would take the *Benson dicta* at face value, without disputing petitioners' argument that the decisions *Benson* cites all *allowed* judicial review as relevant here. Pets.' Suppl. *Arthrex* Br. 5. If it applies, the public-rights doctrine does not support USPS.

C. USPS cannot assert congressional latitude for resolving public rights.

Even if the public-rights doctrine applied, USPS could not rely on the *congressional* latitude that this Court has found for resolving such issues. USPS Br. 14. As indicated in Sections I and IV.B, *supra*, canons of construction support a narrow reading of §410(a). USPS can prevail only based on what Congress *did*, not on what Congress may have had the power to do. Whatever power Congress has, §410(a) did not give USPS an exemption from non-APA review.

V. USPS DOES NOT CREDIBLY DISPUTE THAT THE CIRCUITS ARE SPLIT ON THE SCOPE OF NON-APA REVIEW OF USPS ACTION.

As to non-APA review of USPS's failure to follow its own rules, USPS attempts to distinguish the split in Circuit authority, but makes the split even more pronounced. USPS Br. 8-9, 15-18. This Court should resolve the split in authority on the question that the Court left open in *Air Courier*:

- The Ninth Circuit precludes review. *Currier*, 379 F.3d at 724-726
- The Fourth Circuit allows constitutional review of USPS action under the Due Process Clause. *Harrison*, 840 F.2d at 1153-55.
- The Seventh Circuit found failures to follow USPS

rules reviewable in its jurisdictional analysis but dismissed for lack of prudential standing. *Peoples Gas, Light & Coke Co. v. USPS*, 658 F.2d 1182, 1189-90 (7th Cir. 1981). Although USPS considers the follow-own-rules portion *dicta*, the Seventh Circuit has treated it as precedent that failure to follow an agency's rules provides review. *Schuster v. U.S. Postal Serv.*, No. 98-3217, 1999 U.S. App. LEXIS 15145, at *6 (7th Cir. July 1, 1999) (citing *Peoples*, 658 F.2d at 1189)).

- The Sixth Circuit recognized non-APA review of USPS actions against both USPS's rules and the Constitution, *Booher*, 843 F.2d at 946, but that court rejected the constitutional claims as baseless. *Id.* Although USPS considers the follow-own-rules portion *dicta*, the Sixth Circuit has treated it as §410(a) precedent. *See Fields v. Runyon*, No. 93-3230, 1993 U.S. App. LEXIS 26298, at *5 (6th Cir. Oct. 4, 1993) (citing *Booher*, 843 F.2d at 946).
- The DC Circuit—the only circuit in which *Kendall* review would arise—allows only review of claims that USPS violated its governing statutes, *Mittleman*, 757 F.3d at 307, with the panel here feeling bound by that result even if wrong. App. 5a.

This Court should resolve this longstanding split.

VI. THE ISSUES PRESENTED HERE ARE EXTRAORDINARILY IMPORTANT.

Because the Sixth and Seventh Circuits decided *Booher* and *Peoples* in 1988 and 1981, respectively, USPS argues that the question presented arises too infrequently to warrant this Court's review. USPS Br. 17. The question of non-APA review of USPS action in

the District of Columbia presents two extraordinarily important questions, above and beyond the question of review of USPS action.

A. The scope of APA review *vis-à-vis* equity review is extremely important.

As petitioners explained, Pet. 20-21, equity review differs in important ways from APA review:

- Pre-APA review requires "direct interest," which is the same concept as the need to assert a violation of a federal *right*, as distinct from merely a violation of federal *law* in other right-of-action contexts. *See Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938) (quoted Pet. 11); *cf. Blessing v. Freestone,* 520 U.S. 337, 340 (1997) ("plaintiff must assert the violation of a federal *right,* not merely a violation of federal *law*") (emphasis in original); *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 119-20 (2005) (same).
- APA review, by contrast, requires merely Article III standing and claims *arguably* within the zone of interests of the statute. Pet. 10, 20-21.

The gap between the two types of actions would also help resolve the slipperiness of the plaintiffs' claim to a cause of action that vexed the Chief Justice's dissent in *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 616-24 (2012) (Roberts, C.J., dissenting). The same direct-interest issue that divides petitioners here from Ms. Mittleman also should have denied the plaintiffs there an action under *Ex parte Young*, 209 U.S. 123 (1908). *Douglas*, 565 U.S. at 620 (Roberts, C.J., dissenting). This issue is recurring and vitally important to the separation of powers. Unless this Court reiterates the direct-injury limitation on equity review under cases like *Young*, the lower courts may

allow plaintiffs to sidestep APA claims where the plaintiff cannot meet the zone-of-interest test and instead seek to sue under the Constitution. Equity applies here to petitioners' mail, but it cannot apply to anything arguably within statutory zones of interests.

B. The availability of "safety-valve" review in the District of Columbia is extremely important.

The District Court has unique jurisdiction over federal actors partly because *some* court must, which would have made sense to the founding generation: "if there is no other mode of trial, that alone will give the King's courts a jurisdiction." *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021, 1028 (K.B. 1774); Ch. 15, §1, 3, 5, 2 Stat. at 104-06 (giving court the common law then existing Maryland); *Baltimore Sun Co. v. Mayor & City Council of Baltimore*, 359 Md. 653, 661, 755 A.2d 1130, 1134 (Md. 2000) (Maryland adopted English common law). This safety valve remains essential to protect the rule of law when the APA does not apply.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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