No. __-_____

In the Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES POSTAL SERVICE & 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

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

In two landmark suits against prior Postmasters General, this Court set bedrock principles of judicial review of executive action in equity. *Kendall v. U.S. ex rel. Stokes,* 37 U.S. (12 Pet.) 524 (1838); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902). *Kendall* applies only to the district court here, and *McAnnulty* applies to all district courts. The Administrative Procedure Act ("APA") and the Court's APA precedents extend judicial review from those suffering "direct injury" (*i.e.*, violation of *legal rights*) to those arguably within a looser zone of interests. The Postal Reorganization Act of 1970 ("PRA") exempted the Postal Service ("USPS") from some APA applications. *Air Courier Conf. v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991), reserved the question of the scope of PRA's exemption, noting that it "at most" barred APA review. Prior D.C. Circuit precedent holds the PRA to bar *all non-APA* nonstatutory review except *ultra vires* review. The Sixth and Seventh Circuits allow non-APA review to continue, including claims that USPS violated its own rules. The courts below extended the D.C. Circuit precedent – which had involved executive or quasi-legislative USPS action – to USPS *adjudications*, meaning that Article II administrative judges have unreviewable authority to redirect mail and property, in violation of Article III's vesting federal judicial power in the judiciary.

The questions presented are:

1. Whether the PRA impliedly bars non-APA review, including claims of arbitrary-and-capricious conduct or failure to follow USPS's own rules.

2. Whether the PRA violates Article III as applied to bar judicial review of USPS adjudications.

PARTIES TO THE PROCEEDING

Petitioners are Eagle Trust Fund ("ETF"), Eagle Forum Education & Legal Defense Fund ("EFELDF"), and John F. Schlafly, an ETF trustee and EFELDF officer and director, who were plaintiffs in district court and appellants in the court of appeals.

Respondents are the United States Postal Service and its Postmaster General, Louis DeJoy, sued in his official capacity, who were defendants in district court and appellees in the court of appeals.

RULE 29.6 STATEMENT

Petitioners Eagle Trust Fund and Eagle Forum Education & Legal Defense Fund have no parent companies, and no publicly held company owns 10 percent or more of their stock.

RELATED CASES

The following cases relate directly to this case for purposes of this Court's Rule 14.1(b)(iii):

- *Eagle Trust Fund v. U.S. Postal Service,* No. 1:17-cv-02450-KBJ (D.D.C.). Filed Nov. 13, 2017; dismissed Feb. 2, 2019; amendment of judgment denied Mar. 6, 2019.
- *Eagle Trust Fund v. U.S. Postal Service,* No. 19-5090 (D.C. Cir.). Filed Apr. 5, 2019; decided June 23, 2020; rehearing denied Aug. 28, 2020.
- *Eagle Forum and Schlafly*, MD 17-13 (Postal Service administrative mail dispute). Filed Jan. 25, 2017; decided Sept. 15, 2017; appeal denied Oct. 24, 2017.

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PETITION FOR WRIT OF *CERTIORARI*

Eagle Trust Fund (the "Trust"), Eagle Forum Education & Legal Defense Fund ("the 501(c)(3)"), and John F. Schlafly (collectively, "Petitioners") respectfully petition for a writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit to review dismissal of their challenge to the resolution of a mail dispute with non-party Eagle Forum ("the 501(c)(4)"), a formerly allied and co-located entity. In the underlying administrative dispute, a hearing officer and the chief judicial officer of the United States Postal Service ("USPS") ordered the bifurcation of the mail stream to Petitioners' street address and post office box to forward mail addressed to "Eagle Forum."[1] Respondents are USPS and its Postmaster General, in his official capacity.

OPINIONS BELOW

The District of Columbia Circuit's *per curiam* Judgment and Memorandum is reported at 811 F.App'x 669 and reprinted in the Appendix ("App.") at 1a. The district court's Memorandum Opinion is reported at 365 F.Supp.3d 57 and reprinted at App. 7a. The district court's unreported Order denying a post-judgment motion under FED. R. CIV. P. 59(e) is reprinted at App. 35a.

JURISDICTION

On June 23, 2020, the District of Columbia Circuit

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[1] Given that USPS held that the word "Eagle" followed by the word "Forum" can refer to the 501(c)(3), the 501(c)(4), or even the Trust, App. 67a (First Am. Comp. ¶47), Petitioners use designations that correspond to sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code under which the two "Eagle Forum" entities are recognized for federal tax purposes.

issued a *per curiam* Judgment and Memorandum affirming the district court's dismissal. On August 7, 2020, petitioners timely sought rehearing *en banc*. On August 28, 2020, the District of Columbia Circuit denied the petition for rehearing *en banc*. By Order dated April 15, 2020, this Court extended to 150 days the time within which to petition for a writ of *certiorari*. The district court had jurisdiction under 28 U.S.C. §§1331, 1339, and the District of Columbia Circuit had jurisdiction under 28 U.S.C. §1291. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are Article III of the Constitution, 39 U.S.C. §410(a), the enabling legislation for the district court below, and §841.751(a) of USPS's Postal Operations Manual.

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.
>
> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; -to all cases affecting ambassadors, other public ministers and consuls; -to all cases of admiralty and maritime jurisdiction; -to controversies to which

> the United States shall be a party; -to controversies between two or more states; -between a state and citizens of another state; -between citizens of different states; -between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. CONST. art. III, §§1-2.

> Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, 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).

> [T]he laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that state to the United States, and by them accepted as aforesaid.

Organic Act of 1801, Ch. 15, §1, 2 Stat. 103, 104-05.

> That there shall be a court in said district, which shall be called the circuit court of the district of Columbia; and the said court and the judges thereof shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States.

Organic Act of 1801, Ch. 15, §3, 2 Stat. 103, 105-06.

> That said court shall have cognizance of all crimes and offences committed within said district, and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district, and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants ; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States.

Organic Act of 1801, Ch. 15, §5, 2 Stat. 103, 106.

> **Who May File?**
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> a. Organizations. Only the PO Box customer or authorized representatives of the organization listed on the PS Form 1093 may file change-of-address orders. The organization is responsible for forwarding mail to other persons receiving mail at the box.

Postal Operations Manual §841.751(a).

STATEMENT OF THE CASE

The underlying mail dispute arises from a conflict between a rogue group of the 501(c)(4)'s directors and the other Eagle-themed public-interest groups founded by the late Phyllis Schlafly. *See* App. 64a-65a (First Am. Compl. ¶¶33-37). Prior to that rift, the Trust managed the back-office tasks for all Eagle-themed groups that Mrs. Schlafly created. App. 64a (First Am. Compl. ¶32). After the rift, the rival faction opened a new physical office and filed change-of-address notices with USPS for mail addressed to "Eagle Forum" at Petitioners' street address and the Trust's post office box.

The mail forwarded under the change-of-address forms is problematic because all Eagle-themed groups were and are referenced as "Eagle Forum," App. 67a-68a (First Am. Compl. ¶48), as the 501(c)(4) acknowledged and USPS held: "The parties agree that such mail addressed to Eagle Forum can actually be intended for any of Mrs. Schlafly's organizations, including Eagle Trust, Eagle Forum, and Eagle Forum Education and Legal Defense Fund." *Eagle Forum and Schlafly*, MD 17-13, at 5 (P.S.D. Sept. 15, 2017) (App. 44a). A USPS administrative law judge upheld the change-of-address forms, which Petitioners challenge in this action as both illogical and contrary to USPS's own rules.

First, USPS acknowledged that the word "Eagle" followed by the word "Forum" could refer to entities other than the 501(c)(4), *id.*, but then decided that "Eagle Forum" was entitled to mail addressed to "Eagle Forum," App. 46a ("Eagle Forum … should control delivery of mail addressed to Eagle Forum"), which is a *non sequitur*. *See* App. 69a (First Am. Compl. ¶54). Petitioners argued below that an ambiguous phrase cannot provide the basis for deciding the meaning of that same ambiguous phrase. *Guido v. Mount Lemmon Fire Dist.*, 859 F.3d 1168, 1173 (9th Cir. 2017) (*citing* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 391 (2012)). Instead, when faced with ambiguity, one must look to extrinsic evidence. *See*, *e.g.*, *Estate of Black*, 211 Cal.App.2d 75, 85 (Cal App, 1962) (finding a bequeath "To The University of Southern California known as The U.C.L.A." ambiguous); *Frigaliment Importing Co. v. B. N. S. Int'l Sales Corp.*, 190 F. Supp. 116, 117 (S.D.N.Y. 1960) (finding "chicken"

ambiguous).[2] Had USPS looked to extrinsic or parol evidence, USPS would have determined that using Petitioners' street or post office box address along with the ambiguous "Eagle Forum" more likely evidenced an intent to reach Petitioners, especially when other qualifiers were used (*e.g.*, John Schlafly).

Second, even if that resolution could work for mail addressed to Petitioners' *street address*, USPS also bifurcated the mail stream to the Trust's post office box, which violates USPS's own rules on post office boxes. *See* App. 63a (First Am. Compl. ¶28). For organizational boxholders, the rules require, instead of bifurcating the mail stream to a post office box, that the "organization is responsible for forwarding mail to other persons receiving mail at the box." *Id.* (quoting *Postal Operations Manual* §841.751). The question presented here is whether Petitioners can seek review of USPS's administrative decisions in an Article III court, notwithstanding that §410(a) includes an exemption from the APA.

With these failings in what the panel described as a "heartland arbitrary-and-capricious challenge," App. 4a, it is disturbing that the lower courts allowed Article II administrative judges to redirect property and mail, with no oversight or review by an Article III

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[2] In the "notorious case" case of *Frigaliment Importing*, "Judge Friendly first stated that the word 'chicken' standing alone is ambiguous, and then looked to parol evidence – an exchange of cablegrams – and extrinsic evidence – a definite trade usage that 'chicken' meant 'young chicken' – to determine whether the seller breached a written contract for the sale of 'US Fresh Frozen Chicken' by delivering stewing chickens." David G. Epstein, Adam L. Tate & William Yaris, *Fifty: Shades of Grey – Uncertainty About Extrinsic Evidence and Parol Evidence After All These UCC Years*, 45 ARIZ. ST. L.J. 925, 926 (2013).

court. Article III and this Court's precedents allow an initial review by administrative judges but require that final review of legal issues fall to the judiciary. It is perhaps understandable that prior courts did not consider §410(a)'s application to USPS adjudications when they reviewed executive and quasi-legislative action by USPS. It is incomprehensible that the lower courts applied that same analysis to adjudications.

Non-APA Review Generally

All federal district courts have had some form of equity jurisdiction since the Judiciary Act of 1789 conferred jurisdiction over "all suits … in equity." Ch. 20, §11, 1 Stat. 73, 78 (1789); *see also Grupo Mexicano De Desarrollo v. Alliance Bond Fund*, 527 U.S. 308, 318 (1999). The Judiciary Act of 1875, Ch. 137, §1, 18 Stat. 470, added federal-question jurisdiction, and several decisions of this Court extended federal courts' jurisdiction to include review of agency action. *See Ex parte Young*, 209 U.S. 123, 149 (1908) (officer-suit exception to sovereign immunity to enjoin ongoing violation of federal law); *Philadelphia Co. v. Stimson,* 223 U.S. 605, 620 (1912) (*Ex parte Young* doctrine "is equally applicable to a Federal officer acting in excess of his authority"); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) (federal district court has "jurisdiction to grant relief to a party aggrieved by any [federal agency] action … which is unauthorized by the statute under which [the agency] assumes to act"). The District of Columbia Circuit has described *McAnnulty* – which challenged action by USPS's predecessor – as the "the font of the nonstatutory review doctrine." *Trudeau v. FTC*, 456

F.3d 178, 190 n.21 (D.C. Cir. 2006).[3]

While the APA made judicial review broader, *see Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-41 (1967) ("generous review provisions" require "hospitable interpretation"), pre-APA review was also broad. As the D.C. Circuit has explained, "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). Specifically, non-APA review covers several categories of judicial review.

- ***Ultra Vires* Action**. As an offshoot of *McAnnulty*, the "*Larson-Dugan* exception" provides for an equitable action against a federal officer's actions "where the officer's powers are limited by statute, [and] his actions [are] beyond those limitations." *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689 (1949); *Dugan v. Rank,* 372 U.S. 609, 621-23 (1963).
- **Unconstitutional Action.** Courts can review agency action for constitutionality, even if a statute bars review on statutory grounds. *Webster*

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[3] With the advent of general review statutes like the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), the term "nonstatutory" has become a misnomer. *Air New Zealand Ltd. v. C.A.B.,* 726 F.2d 832, 836-37 (D.C. Cir. 1984) (Scalia, J.); *see generally* Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action,* 81 HARV. L. REV. 308 (1967). "Statutory review" means that a statute has its own review provision such as 42 U.S.C. §7607(d), while " nonstatutory review" means review from general authority outside the statute.

v. Doe, 486 U.S. 592, 603-04 (1988) (citing cases); *Belbacha v. Bush*, 520 F.3d 452, 458-59 (D.C. Cir. 2008) (declining to read statute to deprive court of jurisdiction over colorable constitutional claim). If it were otherwise, Congress could unreviewably suspend the Constitution merely by passing a law purporting to suspend the Constitution and denying APA review.

- ***Kyne* Jurisdiction.** Even where a statute affirmatively bars review, review of *ultra vires* action is available under *Leedom v. Kyne,* 358 U.S. 184, 188-90 (1958), unless the plaintiff or petitioner would have a subsequent chance to review the allegedly *ultra vires* action, such as subsequent enforcement of an order. *Board of Governors of the Federal Reserve System v. MCorp Financial,* 502 U.S. 32, 43-44 (1991).
- **Irrational or Arbitrary Action**. Decisions by an agency not covered by the APA remain "subject to 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). In *Texas Rural Legal Aid*, the non-APA agency prevailed on appeal of the plaintiffs' argument that the agency had acted outside its statutory authority, but the District of Columbia Circuit remanded for a determination of whether the agency acted arbitrarily and capriciously. *Id.*
- **Violating an Agency's Own Rules.** The obligation to follow an agency's own rules arises in non-APA cases, *Service v. Dulles*, 354 U.S. 363, 372 (1957) (*citing Accardi v. Shaughnessy*, 347 U.S. 260 (1954)), and predates APA's enactment by more than a century. *U.S. v. Macdaniel*, 32

U.S. (7 Pet.) 1, 15 (1833); *see also FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).

In short, if the APA had never been enacted, much the same form of review that Petitioners seek would be available, provided that the plaintiff or petitioner could satisfy the other facets of equity-based review.

While non-APA review had all the same *categories* of review, the APA is indisputably more "hospitable" and "generous," to plaintiffs. *Abbott Laboratories,* 387 U.S. at 140-41, as the difference between this case and the *Mittleman* case shows. In brief, this case involves the plaintiffs' *property*, which is protected by the Due Process Clause, U.S. CONST. amend. V, whereas the *Mittleman* plaintiffs sought to interfere with how USPS managed *USPS property*.

The APA applies to anyone with Article III standing arguably within the statutory zone of interests. *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). In *Mittleman*, neighbors tried to challenge USPS's decision to relocate a Post Office branch. However traumatic that relocation was for the neighborhood and however commendably transparent the federal sovereign is to allow such bystander suits in some contexts, the neighbor's *aesthetic interest in USPS's real estate* pales in comparison to Petitioners' *property interest* in their mail.[4] While the *Mittleman* plaintiffs may have satisfied modern concepts of Article III standing, they

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[4] *See McAnnulty*, 187 U.S. at 110 ("their letters contained checks, drafts, money orders and money itself, all of which were their property as soon as they were deposited in the various post offices for transmission by mail"); *In re Debs*, 158 U.S. 564, 583-84 (1895), *abrogated in part on other grounds*, *Bloom v. Illinois*, 391 U.S. 194, 208 (1968).

lacked the "direct interest" needed to sue in pre-APA equity:

> It is an ancient maxim, that a damage to one, without an injury in this sense, (damnum absque injuria), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action. The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained.

Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938) (alterations, citations, and interior quotation marks omitted).

Non-APA Review in the District of Columbia

The U.S. District Court for the District of Columbia has unique equity jurisdiction conferred by its enabling legislation, Ch. 15, §§1, 3, 5, 2 Stat. at 104-06, and recognized in a line of cases beginning with *Kendall v. U.S. ex rel. Stokes,* 37 U.S. (12 Pet.) 524 (1838): "The district court for the District of Columbia has a general equity jurisdiction authorizing it to hear the suit," although the "District of Columbia court may also exercise the same jurisdiction of United States district courts generally." *Stark v. Wickard*, 321 U.S. 288, 290 & n.1 (1944); *see also Peoples v. Dep't of Agriculture,* 427 F.2d 561, 564 (D.C. Cir. 1970); *Ganem v. Heckler,* 746 F.2d 844, 851 (D.C. Cir. 1984). Creating a court with such power would have made eminent sense to founding-era

legislators steeped in the common law of England: "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). Even if §410(a) did bar non-APA review generally, no court previously has considered whether §410(a) bars review under the *Kendall* line of cases in the District of Columbia.[5]

The district court's enabling legislation gave it not only the powers of a federal district court, Ch. 15, §3, 2 Stat. at 105-06, but also common-law powers and the law as then present in Maryland, Ch. 15, §1, 3, 5, 2 Stat. at 104-06, from which the District of Columbia, in pertinent part, was ceded as a federal enclave. As the prevailing relator's counsel explained in *Kendall*, "[t]he relations between the subject and the sovereign are the same; the parties between whom these relations subsist are different." *Kendall*, 37 U.S. (12 Pet.) at 608 (Mr. Coxe, for the defendants in error). In other words, notwithstanding sovereign immunity, the district court had the same authority over officers of the new federal sovereign that the state court had over officers of the prior state sovereign.

Under the common law of both England and Maryland, that authority included writs of mandamus over inferior government officers. *See Kendall*, 37 U.S. (12 Pet.) at 620. This unique common-law power was not, however, limited to mandamus. It extended to the common-law power to infer new torts analogously to a state court:

> Defendant urges that neither Blackstone nor any local authority recognizes such a tort. But if we are in one of the "open spaces" in the law

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[5] Like *McAnnulty* and this case, *Kendall* involved a suit against the Postmaster General.

> of this jurisdiction we must fill it as well as we can, with a view to the social interests which seem to be involved and with such aid as we can get from authorities elsewhere and from logic, and history, and custom, and utility, and the accepted standards of right conduct. We cannot evade this duty; for unless we establish a right in the plaintiff we establish a privilege or immunity in the defendant. The fact that the question is novel in this jurisdiction does not mean that the plaintiff cannot recover.

Clark v. Associated Retail Credit Men, 105 F.2d 62, 63-64 (D.C. Cir. 1939). Because the District of Columbia District Court had the common-law power to create torts in 1939, the unique common law power – created by act of Congress – survived the demise of a general federal common law a year earlier in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

PRA Limits on Judicial Review

Enacted as part of the Postal Reorganization Act, PUB. L. NO. 91-375, 84 Stat. 719 (1970) ("PRA"), §410(a) provides 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). In *Air Courier Conf. v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991), this Court declined to decide §410(a)'s scope because USPS had waived the issue. In a series of decisions under §410(a), the District of Columbia Circuit has held that §410(a) displaces not only APA review but also non-APA review other than claims that USPS acted *ultra vires*.

> Indeed, the Postal Service concedes that this Court has found a narrow exception to § 410's preclusion of review, allowing a court to determine whether an agency was acting outside the scope of its statutory authority. Even where Congress is understood generally to have precluded review, the Supreme Court has found an implicit but narrow exception, closely paralleling the historic origins of judicial review for agency actions in excess of jurisdiction.
>
> Following the reasoning of *American School of Magnetic Healing v. McAnnulty*, and its progeny, the case law in this circuit is clear that judicial review is available when an agency acts *ultra vires*. In other words, the APA's stricture barring judicial review "to the extent that statutes preclude judicial review," 5 U.S.C. § 701(a)(1), "does not repeal the review of *ultra vires* actions that was recognized long before, in *McAnnulty*[.] When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority.

Aid Ass'n for Lutherans v. United States Postal Serv., 321 F.3d 1166, 1172-73 (D.C. Cir. 2003); *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 305 (D.C. Cir. 2014) ("non-statutory review" of USPS agency action "is available only to determine whether the agency has acted 'ultra vires'–that is, whether it has '*exceeded its statutory authority*'") (emphasis added).

The Decisions Below

In the district court, USPS relied on §410(a) and the *Mittleman* line of cases for the proposition that

§410(a) blocks all review – even *non-APA* review – except for "*ultra vires*" actions. The district court cited *Mittleman* for the proposition that "non-statutory review" of USPS agency action "is available only to determine whether the agency has acted 'ultra vires'– that is, whether it has '*exceeded its statutory authority*.'" App. 21a (*citing Mittleman*, 757 F.3d at 305 (emphasis added)). The district court misinterpreted the quoted *Mittleman* language to insulate USPS from review for unconstitutionality:

> Plaintiffs assert that, "because USPS's position would violate [various] constitutional provisions, the claims that Plaintiffs raise indeed are '*ultra vires*' claims in the manner that USPS uses that term[.]" (Pls.' Opp'n at 28; *see also id.* (maintaining that USPS has acted *ultra vires* because, "[e]ven if USPS followed the laws of Congress as USPS understands those laws, that would not insulate USPS from review based on the unconstitutionality of USPS's interpretation of those laws")). Such a confused 'hail Mary' contention does not warrant a prolonged response. Simply put, a plausible *ultra vires* claim pertains *solely* to the assertion that an agency has transgressed the will of Congress, not that its actions constitute a constitutional violation.

App. 28a n.6 (italics in original). Petitioners moved to alter the judgment based on the district court's clear error in withholding constitutional review, which the court denied because "[Petitioners] raised the same argument in their prior briefing." App. 36a.

The District of Columbia Circuit affirmed for the same primary reason: Petitioners did not allege that

USPS act *ultra vires* USPS's governing statutes. App. 3a-4a. The panel argued that Petitioners might be able to claim that an agency's failure to follow its own rules might state a due-process claim, the complaint did not assert such a claim. App. 5a. The panel then rejected the Article III judicial-power argument by noting that Petitioners did not "bring an actual Article III challenge," but noted that "one panel may not overrule another even where a party argues that a prior decision raises constitutional concerns." App. 5a (*citing U.S. v. Eshetu*, 898 F.3d 36, 37 (D.C. Cir. 2018)).

Although USPS and the lower courts sought to shoehorn this case into the *Mittleman* line of cases applying §410(a) to review of executive or legislative agency action, this is the first – and unprecedented – extension of the *Mittleman* line to reviewing agency *adjudications*. That extension reveals how §410(a) cannot mean what USPS and *Mittleman* say it means. Specifically, during the briefing of USPS's motion to dismiss, Petitioners argued that §410(a)'s exclusion of judicial review under the APA – as interpreted by this Circuit's *Mittleman* line of cases – would violate Article III of the Constitution by vesting the judicial power of the United States in unreviewable agency adjudications of legal questions. *See* Section II, *infra*.

Petitioners' Article III Standing

Because USPS took the position in district court that Petitioners lack a property interest in their mail and because that interest goes the question of Article III standing, Petitioners emphasize that they have a property and pecuniary interest in their mail, *see McAnnulty*, 187 U.S. at 110 ("their letters contained checks, drafts, money orders and money itself, all of

which were their property as soon as they were deposited in the various post offices for transmission by mail"); *Debs*, 158 U.S. at 583-84. Moreover, Petitioners use the mails to raise funds and to communicate, which makes even delayed receipt of mail an Article III injury. App. 59a (First Am. Compl. ¶¶11-12); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 172 (1998) (loss of even small amounts of interest is a sufficient injury to property rights); *Elrod v. Burns,* 427 U.S. 347, 373 (1976) ("loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Accordingly, an Article III case or controversy exists between the parties.

REASONS TO GRANT THE WRIT

The petition raises important issues of judicial review of USPS actions and provides an ideal vehicle for this Court to resolve those issues. This Court should grant the writ of *certiorari* for four reasons.

1. The District of Columbia Circuit's overbroad construction of §410(a) conflicts with §410(a)'s plain language as signaled in this Court's *Air Courier* decision, *see* Section I.A.1, *infra.*, and it conflicts with the decisions of at least the Sixth and Seventh Circuits. *See* Section I.A.4, *infra.*

2. The District of Columbia Circuit's overbroad construction of §410(a) is inconsistent with the canon against repeals by implication and related canons of construction for extinguishing judicial review granted by statute and found in significant decisions of this Court. *See* Section I.A.2, *infra.* While this rationale is true for all district courts nationwide, it is especially true for the unique equity jurisdiction that Congress conferred on the U.S. District Court for the District of

Columbia, which the lower courts never addressed. *See* Section I.B, *infra.*

3. Either because of the constitutional avoidance canon (Section I.A.3, *infra*) or because of blatant unconstitutionality (Section II, *infra*), the District of Columbia Circuit's overbroad construction of §410(a) should be rejected because it purports to vest the final adjudication of legal issues and rights in an Article II administrative law judge, with no review by an Article III court, in violation of Article III's vesting judicial power in the judiciary.

4. This petition presents an ideal vehicle for this Court to review the purely legal underpinnings of the District of Columbia Circuit's overbroad construction of §410(a). *See* Section III, *infra.*

Petitioners respectfully submit that these important reasons warrant this Court's resolving the important issues left open in *Air Courier* about the availability of judicial review of USPS actions.

I. THE PRA DID NOT EXTINGUISH NON-APA REVIEW.

Two distinct strands of equity jurisdiction allowed judicial review of federal agency actions long before the APA and PRA:

- For all district courts, the general equity jurisdiction conferred on all courts by the Judiciary Act of 1789 and the *McAnnulty* line of agency-review cases; and
- For the U.S. District Court for the District of Columbia, the unique jurisdiction conferred by that court's 1801 enabling legislation and the *Kendall* line of cases.

The PRA's enactment in 1970 neither expressly nor impliedly repealed these forms of judicial review.

A. The PRA did not extinguish non-APA review by *any* district court.

Before the APA's enactment, all district courts had an equity jurisdiction that allowed judicial review of USPS actions. While it is unclear whether the PRA's enactment in 1970 intended to exempt USPS from all APA applications or merely limited APA applications, nothing in the PRA's APA exemption purports to put parties like Petitioners in a worse position than they would have faced if the APA and the PRA had never been enacted. *At most*, the PRA exempted USPS from the APA, which does not include *non-APA* review.

1. USPS's interpretation is inconsistent with the PRA's text and improperly conflates APA and non-APA review.

At the outset, the PRA's APA exemption is quite limited: "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 broad USPS-*Mittleman* interpretation exceeds the bounds of this exemption in two important ways.

First, the PRA does not even purport to exempt USPS from *all APA applications*, but rather only those applications "dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds." 39 U.S.C. §410(a). Eagle Trust's mail dispute does not involve "public or Federal contracts, property, works, officers, employees, budgets, or funds," so §410(a) should be wholly irrelevant here. That should have ended the inquiry into whether the PRA impliedly exempts USPS from

non-APA review in this case. Indeed, the APA itself should apply to Petitioners' claims. This ambiguity may explain this Court's *Air Courier* statement that "Section 410, *at most*, exempts the Postal Service from the APA." *Air Courier*, 498 U.S. at 523 n.3 (emphasis added). The implication is that §410(a) may *do less* than exempt USPS from the APA.

Second, the PRA does not purport to exempt USPS from non-APA review *at all*: "we do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994), *abrogated in part on other grounds*, PUB. L. NO. 103-325, §411, 108 Stat. 2160, 2253 (1994). Equating the PRA's APA exemption with a statute precluding all review assumes that APA and non-APA review are the same and that exempting APA review would be meaningless without also exempting non-APA review. There was simply no need to infer that the exclusion of APA review must have also impliedly meant to exclude non-APA review as well. Instead, in key respects, APA review is broader than non-APA review, and Congress reasonably could have intended to exclude the former but not the latter.

The difference between this case and *Mittleman* aptly shows that the APA and pre-APA review are not two sides of the same coin. The APA applies to anyone with Article III standing arguably within the statutory zone of interests. In *Mittleman*, neighbors tried to challenge USPS's decision to relocate a Post Office branch. However traumatic that relocation was for the neighborhood and however commendably transparent the federal sovereign is to allow such bystander suits in some contexts, the neighbor's interest in USPS's real estate pales in comparison to

Petitioners' *property interest* in their mail.[6] While the *Mittleman* plaintiffs may have satisfied modern concepts of Article III standing, they lacked the "direct interest" needed to sue in pre-APA equity. *Ickes*, 302 U.S. at 479 (quoted *supra*). Because APA review and pre-APA equity review are very different things, a statute that bars the former need not be read to bar the latter. Indeed, given the wide difference between equity review and APA review, one would expect a bar of APA review to *exclude* non-APA review in equity unless the statute included an express indication of the intent to bar both forms of review.

Third, it is worth noting that the *Mittleman* line of cases – incredibly – *relies on the APA* to bar non-APA review:

> [T]he APA's stricture barring judicial review "to the extent that statutes preclude judicial review," 5 U.S.C. § 701(a)(1), "does not repeal the review of ultra vires actions that was recognized long before, in *McAnnulty*[.]

Aid Ass'n for Lutherans, 321 F.3d at 1172-73; *accord Carlin v. McKean*, 823 F.2d 620, 623 (D.C. Cir. 1987) ("Congress intended affirmatively to preclude judicial review of the Governors' decisions to appoint and remove the Postmaster General") (*citing* 5 U.S.C. § 701(a)(1)); *cf. Mittleman*, 757 F.3d at 307 (relying on *Aid Ass'n for Lutherans*). If the PRA eliminated the APA for USPS matters, the PRA did so not only for APA review but also for APA exemptions. *Simmons v. Himmelreich*, 136 S.Ct. 1843, 1848 (2016) (same for Federal Tort Claims Act exemptions). In sum, the *Mittleman* line of cases rests on the contradiction that the APA applies to the PRA to exclude the PRA from

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[6] *See* note 4, *supra*.

the APA.

2. USPS's interpretation violates the canon against repeals by implication and related canons.

Courts should not presume repeals by implication "unless the intention of the legislature to repeal is clear and manifest" and "unless the later statute expressly contradicts the original act or … such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (interior alterations, citations, and quotation marks omitted). A related canon applies to doctrines derived from this Court's decisions: "[A]bsent an expression of legislative will, [courts] are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision." *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 128 (1985). Finally, the canon against "repeals by implication … applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975) (interior quotations omitted). There is no evidence of a congressional intent to bar non-APA review, Section I.A.1, *supra*, much less a clear and manifest intent.

3. USPS's interpretation violates the constitutional-avoidance canon.

If one interpretation of a statute "would raise serious constitutional doubts," a court can – and should – avoid those doubts by adopting a plausible alternate interpretation. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17-18 (2013). Under the most direct reading, §410(a) does not apply to mail

disputes at all, *see* Section I.A.1, *supra*, so Petitioners' interpretation is certainly plausible. As Section II, *infra*, shows, however, the USPS-*Mittleman* reading raises serious constitutional doubt by having USPS's administrative-law judges decide legal issues without any review by an Article III court. The constitutional-avoidance canon thus calls for rejecting the USPS-*Mittleman* reading.

The panel seeks to sidestep the constitutional-avoidance canon and the Article III issue by invoking Circuit precedent as binding on it and by arguing that Petitioners needed to plead the Article III issue in their complaint. App. 5a. Neither argument has merit. The former is simply irrelevant here because Circuit precedent does not bind this Court. The latter improperly seeks to convert a *waivable* affirmative defense into a pleading *requirement*. *See* Section II, *infra* (collecting cases). To the contrary, USPS had the burden to invoke §410(a)'s purported displacement of non-APA review, and Petitioners had the right to negate the defense once raised.

4. USPS's interpretation conflicts with the decisions of other circuits and of this Court.

As applied here, the broad USPS-*Mittleman* reading of §410(a) conflicts with other circuit decisions and even this Court's *Air Courier* decision. This Court should therefore reject the broad reading of §410(a).

First, as indicated in Section I.A.1, *supra*, this Court's *Air Courier* decision – while deferring a final resolution of the scope of §410(a)'s exclusion – puts an outer bound on that exclusion: "Section 410, *at most*, exempts the Postal Service from the APA." *Air Courier*, 498 U.S. at 523 n.3 (emphasis added). This

Court at least implicitly recognized that §410(a) can have no effect on *non-APA* review.

Second, the Sixth and Seventh Circuits have held that the PRA does not preclude federal courts' hearing non-APA claims that USPS violated its own rules. In *Peoples Gas, Light & Coke Co. v. United States Postal Serv.*, 658 F.2d 1182, 1191 (7th Cir. 1981), the Seventh Circuit held that "the exemptions found in section 410 of the Postal Reorganization Act do not manifest a congressional intent to foreclose all judicial review of alleged violations by the Postal Service's procurement regulations." Similarly, in *Booher v. United States Postal Serv.*, 843 F.2d 943, 946 (6th Cir. 1988), the Sixth Circuit indicated that probationary employees who allege violation of USPS's own rules could seek non-APA review, notwithstanding §410(a).

Third, in addition to the restriction on violating USPS's own rules, the Seventh Circuit also addressed judicial review generally, notwithstanding §410(a):

> An exercise of discretion is presumptively reviewable for legal error, procedural defect, or abuse. It goes without saying that the Postal Service may not act in contravention of the legal restrictions contained in its governing regulations.

Peoples Gas, 658 F.2d at 1192. The Seventh Circuit also addressed constitutional violations: "the prohibitions contained in [the PRA] do not prevent adjudication of an alleged constitutional violation." *Id.* at 1191.

In addition to the foregoing instances of court's rejecting the broad USPS-*Mittleman* interpretation of §410(a), several circuits have noted and reserved the issue or otherwise declined to resolve it. *See Morgan*

Assocs. v. United States Postal Serv., 511 F.2d 1223, 1225 n.3 (2d Cir. 1975); *UPS Worldwide Forwarding v. United States Postal Serv.*, 66 F.3d 621, 629 n.8 (3d Cir. 1995); *Harrison v. United States Postal Serv.*, 840 F.2d 1149, 1155-56 (4th Cir. 1988); *cf. Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004) (questioning whether to apply APA review standards to USPS bid protests). One circuit held the PRA to exempt USPS from common law review by citing District of Columbia Circuit precedent without any significant analysis:

> At the same time, the PRA provides that various forms of federal law, including the APA, that normally apply to government entities do not apply to the Service. Thus, the Service is exempt from the APA's general mandate of judicial review of agency actions. Given this statutory backdrop, we are satisfied that the PRA evinces Congress's general intent to withdraw judicial scrutiny of postal regulations. In the face of such clear evidence, we also decline to override the PRA's express removal of APA review of the Service's actions by imputing an implicit Congressional intent to preserve common-law principles of judicial review. *Cf. Carlin v. McKean*, 262 U.S. App. D.C. 212, 823 F.2d 620, 623 (D.C. Cir. 1987) (suggesting without deciding that common-law administrative review may not survive PRA's explicit removal of APA review).

Currier v. Potter, 379 F.3d 716, 725 (9th Cir. 2004) (citations omitted). Significantly, the Ninth Circuit in *Currier* dealt with a regulation, not an adjudication, and did not address canons of statutory construction

against implied repeals or constitutional avoidance.

B. The PRA did not extinguish *Kendall* review by *this* district court.

In 1801, Congress gave what is now known as the U.S. District Court for the District of Columbia equity and common-law jurisdiction equal to Maryland law as was then in effect. 2 Stat. at 104-06. While §410(a) does not limit non-APA review by *any* federal court, *see* Section I.A, *supra*, the lower courts here should not have rejected the unique authority of *this* district court without discussion.

1. *Kendall* review survived the DCCRA.

Congress did not repeal the district court's historic equity jurisdiction by creating the local court system in the District of Columbia Court Reorganization Act of 1970, PUB. L. NO. 91-358, 84 Stat. 605 (1970) ("DCCRA").

First, as indicated in Section I.A.2, *supra*, repeal by implication is disfavored, and courts require clear and manifest congressional intent to find such repeals. USPS cannot credibly argue that the DCCRA transferred jurisdiction over federal officers to the *local* court system in the District of Columbia. That historic jurisdiction either continues to exist in the district court or it vanished *sub silentio*.

Second, since DCCRA's enactment in 1970, both Congress and the District of Columbia Circuit have recognized that the district court's historic equity jurisdiction continues to exist. H.R. REP. NO. 94-1656, at 15-16, *reprinted in* 1976 U.S.C.C.A.N. 6121, 6136 ("in [the] situation [where a plaintiff's claim falls below the then-applicable $10,000 amount-in-controversy threshold for federal-question jurisdiction], the limitation can be circumvented if the

plaintiff brings his action in the District o£ Columbia or if he can cast his action in the form of a mandamus proceeding under 28 U.S.C. section 1361, the Mandamus and Venue Act of 1962"); *Ganem,* 746 F.2d at 851 (recognizing this Court's "common law jurisdiction" derived from the common law of Maryland "continu[ing] in force in that part of the District ceded by Maryland to the United States"). The lower courts should not have rejected the *Kendall* line of cases with no discussion whatsoever.

2. The lower courts improperly applied *Mittleman* to *Kendall* review when *Mittleman* did not consider *Kendall*.

No decisions in the *Mittleman* line of cases even considered the district court's historic jurisdiction over federal agency action, presumably because no plaintiff or petitioner raised the *Kendall* line of cases under that jurisdiction.

Petitioners thus emphasize one important point of agreement: the judicial-review question under §410(a) is waivable, and the results in past litigation that did not consider the present parties' arguments do not control here. *Air Courier*, 498 U.S. at 522-23 (judicial-review arguments are waivable and "declin[ing] to decide whether § 410(a) exempts the Postal Service from judicial review under the APA"). "In no event … can issue preclusion be invoked against one who did not participate in the prior adjudication," *Baker v. General Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998), and *stare decisis* is inapposite to issues reached waiver. *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2320 (2016). Quite simply, "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661,

678 (1994) (plurality), and precedents do not resolve issues that "merely lurk in the record, neither brought to the attention of the court nor ruled upon." *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004) (interior quotation omitted). Under these due-process strands of authority, third-party litigation mistakes do not bind future litigants. The lower courts erred in rejecting *Kendall*-based arguments based on prior precedent that did not consider the *Kendall* line of cases.

II. THE PRA VIOLATES ARTICLE III AS APPLIED HERE TO BAR JUDICIAL REVIEW OF USPS ADJUDICATIONS.

Assuming *arguendo* that the lower courts were correct that Congress intended the PRA to extinguish review of all claims except *ultra vires* claims, the lower courts should have considered Eagle Trust's claim that the PRA unconstitutionally vests judicial power in non-judicial officers.

Because the *Mittleman* line of cases did not involve adjudications, the panels that issued those decisions had no requirement to consider whether their interpretation of §410(a) would work for adjudications. The ability of Congress to bar arbitrary-and-capricious review for rulemakings and other executive or legislative action presents no constitutional issue. By contrast, vesting an administrative adjudicator with unreviewable power to adjudicate legal claims to Petitioners' property without review by an Article III judge violates the vesting of the judicial power in the judiciary.

Misconstruing *Mittleman* to prohibit consideration of constitutional issues, the district court rejected Petitioners' argument that – as argued

by USPS and *Mittleman* – §410(a) unconstitutionally would put Article III judicial power into the hands of an Executive Branch official, with no judicial review. App. 28a n.6. To the extent that §410(a) attempts to place judicial review of USPS's actions wholly with non-Article III adjudicators, §410(a) is unconstitutional. *Stern v. Marshall*, 564 U.S. 462, 469 (2011); *id.* 482-503; *see* U.S. CONST. art. III, §1 (vesting judicial power in Article III courts). By contrast, when courts *uphold* agency adjudications initiated outside of Article III courts, the availability of judicial review is a necessary condition to avoiding an Article III violation. *See Crowell v. Benson*, 285 U.S. 22, 54 (1932) ("reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases"); *Commodity Futures Trading Com v. Schor*, 478 U.S. 833, 852-53 (1986); *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S.Ct. 1365, 1378-79 (2018). If §410(a) is unconstitutional as applied to agency adjudications, §410(a) is void. If so, §410(a) does not bar judicial review of agency adjudications.[7]

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[7] The panel's invocation of *Eshetu* was error. Petitioners have no quarrel with *Eshetu* itself, given that both prior Circuit precedent and the relevant Supreme Court decision that the government claimed should call that Circuit precedent into question considered the issue of a "categorical approach" versus a "case-specific approach" to the question there. *Eshetu*, 898 F.3d at 37. By contrast, Petitioners' argument that §410(a) could bar judicial review of USPS *adjudications* was "neither brought to the attention of the court nor ruled upon" in *Mittleman*. *See Cooper,* 543 U.S. at 170 (interior quotation omitted). As such, the question merely lurked in the record, and so *Mittleman* does not constitute a precedent on that issue. *Id.* As applied to adjudications, *Mittleman* violates Article III by delegating the judicial

For judicial review, the question is not whether Petitioners' complaint raises constitutional claims, App. 5a, but whether §410(a) itself survives constitutional scrutiny. It suffices that the complaint raises pre-APA equity review, App. 60a-61a, 69a-73a, and that USPS's *defense* violates Article III, which is no defense at all. Because §410(a) would be unconstitutional as USPS tries to use it, a federal court should reject §410(a) as a defense to the pre-APA judicial review that the complaint invokes. There are two alternate ways to do so: (1) if indeed Congress intended §410(a) to mean what USPS says, a court could declare §410(a) void; or (2) since there is no evidence that Congress intended that, *see* Section I.A.1, *supra*, a court could rely on constitutional doubt to reject USPS's broad interpretation of §410(a) by confining the statute to its plain language as merely an *APA* exemption that leaves non-APA review intact.

Plaintiffs stated a claim for non-APA review, and nothing in the Federal Rules required their complaint to negate USPS's potential affirmative defense. *See De Csepel v. Republic of Hungary*, 714 F.3d 591, 607-08 (D.C. Cir. 2013) (collecting cases from District of Columbia, Fourth, Sixth, and Seventh Circuits); *accord Jaso v. Coca Cola Co.*, 435 F.App'x 346, 351 (5th Cir. 2011). Simply put, "the burden of pleading [an affirmative defense] rests with the defendant." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Jones v. Bock*, 549 U.S. 199, 212 (2007) ("affirmative defenses that must be pleaded in response"). Moreover, because

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power of the United States on non-Article III judges. As such, *Mittleman* "is clearly an incorrect statement of current law," *U.S. v. Dorcely*, 454 F.3d 366, 373 n.4 (D.C. Cir. 2006), which the District of Columbia Circuit recognizes as a basis to reject a prior three-judge panel's decision. *Eshetu*, 898 F.3d at 37.

USPS's affirmative defense is waivable, *Air Courier*, 498 U.S. at 522-23, there was even less need to rebut that defense until after USPS raised it. Once USPS raised the argument, Petitioners rebutted it, *twice*. App. 36a ("[Petitioners] raised the same argument in their prior briefing") (order denying post-judgment motion). Rebutting USPS's affirmative defense once should have sufficed.

III. THE PETITION IS AN IDEAL VEHICLE TO RESOLVE THESE IMPORTANT ISSUES

This petition presents an ideal vehicle for this Court to resolve the purely legal issues presented here. There are no fact-bound issues or even any facts relevant to the petition.

With respect to bifurcating the mail stream to the Trust's post office box, it is undisputed both that USPS's decision violates USPS's own rules and that Petitioners would have had pre-APA judicial review of those violations if the APA and the PRA never had been enacted. The only question is whether the PRA's express APA exception somehow impliedly nullified *non-APA review*.

With respect to bifurcating the mail stream to Petitioners' street address, it is undisputed that USPS held that a piece of mail addressed to "Eagle Forum" could be intended for the Trust, the 501(c)(3), or the 501(c)(4), but then also held that mail addressed to "Eagle Forum" can be redirected to the 501(c)(4). In fact, the only way to determine the intended recipient is to open the mail, which is the function that the Trust performed before the rift between the 501(c)(4) and Petitioners. App. 64a (First Am. Compl. ¶32). Under these circumstances, Petitioners have a claim that USPS acted arbitrarily and capriciously, without

reasoned decisionmaking. Such claims were subject to pre-APA judicial review and still would exist if the APA and the PRA never had been enacted. Again, the only question is whether the PRA's express APA exception somehow impliedly nullified *non-APA review*.

With respect to bifurcating both mail streams, a further legal question remains: Whether it violates Article III's vesting judicial power in the judiciary to have an Article II administrative law judge make legal determinations – about the plaintiffs' property, no less – that are unreviewable by an Article III court.

For the foregoing reasons, this case presents an ideal vehicle to resolve the legal questions presented.

CONCLUSION

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

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Respectfully submitted,

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