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 ON *UNITED STATES v. ARTHREX, INC.*

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Ave. NW
Suite 700-1A
Washington, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules, Regulations and Orders

PETITIONERS' 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 *United States v. Arthrex, Inc.*, 141 S.Ct. 1970 (June 21, 2021) (Nos. 19-1434, 19-1452, 19-1458), on their pending petition for a writ of *certiorari*. Respondents are the Postmaster General and U.S. Postal Service (collectively, "USPS"). Petitioners seek judicial review of an administrative adjudication of a mail dispute by USPS's "judicial officer."

Arthrex was a challenge under the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, to *inter partes* review of patents by administrative patent judges ("APJs") in the Patent and Trademark Office ("PTO").[1] As relevant here, *Arthrex* involved four issues that this Court should consider in resolving the dispute here:

- ***Agency Adjudicators Take Executive Action***. Although called administrative judges, Executive-Branch adjudicators exercise executive power. Slip Op. at 13.
- ***Judicial Review Does Not Supervise Inferior Officers***. The availability of judicial review is not sufficient to cure an agency structure that violates the Appointments Clause. Slip Op. at 12-13.
- ***Agency Heads Supervise Inferior Officers***.

---

[1] PTO is an agency within the Department of Commerce and thus, like USPS, part of the Executive Branch *See* 35 U.S.C. § 1 (PTO); 5 U.S.C. § 101 (Commerce); 39 U.S.C. § 201 (USPS).

> The head of an agency presumptively exercises review of the actions of inferior officers, including adjudicators. Slip Op. at 19-23 (plurality).

- ***Appellate Courts May Review Appointments Clause Issues Not Raised Below***. Claims under the Appointments Clause can be raised for the first time on appeal. Slip Op. at 5.

Taken together, these facets of *Arthrex* support the granting of the petition for a writ of *certiorari*.

By way of background, the Postal Reorganization Act, PUB. L. NO. 91-375, 84 Stat. 719 (1970) ("PRA"), exempts some—but not all—USPS action from the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"):

> 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). In addition to other statutes, USPS rules and regulations can bypass this exemption and, thereby subject USPS to an otherwise-exempted law.

As relevant to *Arthrex* and the Appointments Clause, the Postmaster General appoints USPS's Judicial Officer, 39 U.S.C. § 204, who decides the appeals—if any—of decisions by USPS's administrative-law judges. 39 C.F.R. §§ 965.11-.12; *cf.* 39 C.F.R. § 957.3(c) (defining "judicial officer" for USPS adjudications as "the Postal Service's Judicial

Officer, Associate Judicial Officer, and Acting Judicial Officer"). When acting under the APA, the Judicial Officer is arguably the head of a department: "The Judicial Officer *shall be the agency* for the purposes of the requirements of chapter 5 of title 5, to the extent that functions are delegated to him by the Postmaster General." 39 U.S.C. § 204 (emphasis added).

REASONS TO GRANT THE WRIT

I. ALTHOUGH USPS'S "JUDICIAL OFFICER" WIELDS EXECUTIVE POWER, GRANTING THAT POWER CAN VIOLATE ARTICLE III.

Arthrex clarifies that when quasi-judicial officers in the Executive Branch take agency action, they wield executive—not judicial—power:

> The activities of executive officers may take "legislative" and "judicial" forms, but they are exercises of—indeed, under our constitutional structure they *must* be exercises of—the "executive Power," for which the President is ultimately responsible.

Slip Op. at 13 (interior quotations and citations omitted, emphasis in original). Taken out of context, this *Arthrex* excerpt suggests that this wielding of executive power cannot violate Article III—contrary to Petitioners' second question presented—because the agency action is not judicial. For two distinct reasons, this Court should reject that facile parsing of the divide between Article II and III powers as inconsistent with precedent on adjudications outside Article III courts.

A. This Court should recognize that the right to one's mail is a *private* right.

Arthrex concerned the purportedly "public right" of a patentee's keeping a patent that PTO previously

had issued. However the Court ultimately resolves the *inter partes* review of patents, the public-rights doctrine at issue in *Arthrex*—and in *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S.Ct. 1365 (2018) before that—is inapposite to Petitioners' *property* interest in their mail. *See Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) ("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"). Petitioners' asserting private rights distinguishes the above-quoted *Arthrex* excerpt in two important ways.

First, where it applies, "the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that could be conclusively determined by the Executive and Legislative Branches, the danger of encroaching on the judicial powers is reduced." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (interior quotations omitted). In essence, the public rights doctrine allows Congress to direct that legislative or executive matters be resolved in a quasi-judicial manner—without violating Article III—because those matters are not judicial matters in the first place. They are "matters … which from their nature do not require judicial determination and yet are susceptible of it." *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). But "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*). *Oil States* held that patents were subject to the public-rights doctrine, and *Arthrex* appears willing to ignore Article III for executive matters in the public-rights sphere. But that cannot stretch to Petitioners' suit in equity or common law under the *McAnnulty* line of cases.[2]

Second, for private rights, adjudicating private rights outside an Article III court must include review by an Article III court on at least the legal aspects of the dispute. *Thomas*, 473 U.S. at 587-89; Pet. 28-31.

B. Even if Petitioners asserted public rights here, the presumption would still lie with Article III review.

In *dicta*, this Court has listed "the facilities of the post office" among the congressional powers that can be delegated to administrative agencies. *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932). But the examples on which *Crowell* relied nonetheless allowed judicial review as relevant here. *Bates & Guild Co. v. Payne*, 194 U.S. 106, 108-10 (1904); *cf. Silberschein v. United States*, 266 U.S. 221, 225 (1924) (allowing judicial review if "the decision is wholly unsupported by the evidence, or is wholly dependent upon a question of law or is seen to be clearly arbitrary or capricious"). Thus, even if the public-rights doctrine under *Oil States* and *Arthrex* applied here (*e.g.*, for USPS's policies on Post Office Boxes), Congress enacted §

---

[2] Indeed, *Oil States*, 138 S.Ct. at 1379, withheld the question: "because the Patent Act provides for judicial review by the Federal Circuit, we need not consider whether *inter partes* review would be constitutional 'without any sort of intervention by a court at any stage of the proceedings.'" *Id.* (citations omitted, quoting *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U. S. 442, 455, n.13 (1977)).

410(a) against a presumption of review by an Article III court: "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*, 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.)). Under that presumption, USPS's interpretation of § 410(a) is too steep a climb when the statute is best read as barring only APA review but preserving non-APA review.

II. THE *ARTHREX* APPOINTMENTS CLAUSE VIOLATION RAISES CONSTITUTIONAL DOUBT AGAINST THE LOWER COURTS' INTERPRETATION OF § 410.

Arthrex clarifies that the availability of review by an Article III court does not cure an Appointments Clause violation:

> Review outside Article II—here, an appeal to the Federal Circuit—cannot provide the necessary supervision.

Slip Op. at 12. Insofar as the authorities cited for this proposition—namely, 1 Annals of Cong., at 611-612 (J. Madison) and *Oil States*, 200 L.Ed.2d 671, 680 (2018)), *id.*—do not expressly *hold* that an Article III court cannot provide an inferior officer's supervision, the issue appears to have arisen for the first time in the *Arthrex* decision.[3]

Under the circumstances, the same constitutional doubt that Petitioners invoked under *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17-18 (2013),

---

[3] *See Marathon*, 458 U.S. at 69 n.23 ("when Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review") (plurality).

for USPS's and the lower courts' interpretation of § 410(a) applies even more so to an interpretation of § 410(a) that would allow an inferior officer to decide an issue of property rights—the disposition of one's mail—with no review by either a principal officer within USPS *or* a reviewing Article III court.

III. THE POSTMASTER GENERAL CAN REVIEW NON-APA ADJUDICATIONS BY USPS'S JUDICIAL OFFICER.

Arthrex explained that—where the APA applies to an agency adjudication—the APA, "from its inception, authorized agency heads to review such decisions," Slip Op. at 15 (citing 5 U.S.C. § 557(b)), and that non-APA adjudications follow the same basic course: "higher-level agency reconsideration by the agency head is the standard way to maintain political accountability and effective oversight for adjudication that takes place outside the confines of § 557(b)." *Id.* at 15-16. Although the remedy of review by the agency head garnered only four justices in *Arthrex*, *compare id.* at 19-23 (opinion of Roberts, C.J.) *with id.* at 4-12 (Gorsuch, J., concurring in part and dissenting in part), review by the Postmaster General may well garner five justices' votes in this matter. Unlike in *Arthrex*, this Court would not need to reject any part of a law enacted by Congress to allow the Postmaster General's review or reconsideration. The Court would need only to reject USPS's *regulation* that "[t]he Judicial Officer's decision on appeal or his or her final order is the final agency decision with no further agency review or appeal rights." 39 C.F.R. § 965.12.[4]

---

[4] 39 C.F.R. § 965.12 may be accurate for the subset of USPS adjudications to which the APA applies because the Judicial Officer is "the agency for the purposes of the requirements of

The availability of reconsideration based on changed circumstances was an issue argued below, Pet. App. 3a, 15a-16a, 30a, 32a, and reconsideration based on new information would aid Petitioners in this action.

IV. THIS COURT COULD REVIEW USPS'S ADMINISTRATIVE ADJUDICATIONS UNDER THE APPOINTMENTS CLAUSE.

Appellate courts may consider claims under the Appointments Clause raised for the first time on appeal. Slip Op. at 5; *accord Freytag v. C.I.R.*, 501 U.S. 868, 879 (1991) ("disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome … the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers") (interior quotations omitted). Petitioners sought to raise an Appointments Clause claim in the Court of Appeals, but that court rejected the attempt. Pet. App. 6a. Even if this Court does not allow Petitioners to challenge USPS's regime under the Appointments Clause directly, however, the Court should nonetheless entertain the argument that Congress is unlikely to have intended for *inferior adjudicative officers* to render decisions on behalf of the United States without judicial review in an Article III court. While *Arthrex* holds that judicial review does not cure a violation of the Appointments Clause, *see* Section II, *supra*, USPS's interpretation of § 410(a) entails two violations—under Articles II and III—that together

---

chapter 5 of title 5, to the extent that functions are delegated to him by the Postmaster General." 39 U.S.C. § 204. Where (as here) the APA does not apply to USPS adjudications, "chapter 5 of title 5" also does not apply.

raise cumulative doubt about what Congress meant in enacting § 410(a) in the first place.

CONCLUSION

This Court should grant the petition for a writ of *certiorari* and reverse the lower court's dismissal of Petitioners' challenge to USPS's action on the underlying mail dispute.

July 16, 2021

Respectfully submitted,

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Ave. NW
Suite 700-1A
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for Petitioners