No. 24A904

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, ET AL.,
Applicants,

v.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL.,
Respondents.

On Application to Stay the Injunction Issued by the United States District Court for the Northern District of California and Request for an Immediate Administrative Stay

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BRIEF OF *AMICI CURIAE* FORMER GOVERNMENT OFFICIALS DONALD B. AYER, TY COBB, MICKEY EDWARDS, JOHN FARMER JR., PETER KEISLER, ET AL. OPPOSING APPLICATION TO STAY INJUNCTION

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are 17 former government officials who have collectively served in career, appointed, and elected positions at both the state and federal levels. They have deep expertise in the administration of federal agencies, and in how state and local governments—as well as everyday Americans—rely on the services the federal government provides. The interest of *Amici* stems from that expertise, as well as *Amici*'s commitment to the rule of law, the U.S. Constitution, and ensuring that groups and individuals can seek redress from Article III courts for legal challenges of national scope and importance. As former government officials, including in the federal civil service, *Amici* have a deep and unique understanding of the services that federal agencies deliver and the importance of maintaining continuity of those services for Americans. *Amici* both understand the importance of federal executive power and believe in preserving its proper scope. *Amici* thus present a unique perspective not represented by the parties.

Amici respectfully submit this brief to caution against adopting one of Applicants' primary arguments: that this Court should extend a doctrine of implied Congressional intent to the Organizational Plaintiffs'[2] claims in this case.

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[1] In accordance with Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *Amici* or their counsel made a monetary contribution to its preparation or submission.

[2] This brief uses the term "Organizational Plaintiffs" to refer to a subset of the plaintiffs in the district court action, specifically: Main Street Alliance, Coalition to Protect America's National

A detailed list of *Amici* and their relevant backgrounds follows:

- **Donald B. Ayer**, Deputy Attorney General in the George H.W. Bush Administration (1989-1990).

- **Ty Cobb**, Special Counsel to the President in the Donald Trump Administration (2017-2018); Assistant United States Attorney (1980-1986).

- **Mickey Edwards**, Representative of the 5th District of Oklahoma (1977-1993) (R).

- **John Farmer Jr.**, New Jersey Attorney General (1999-2002) (R); University Professor, Rutgers University, former Dean Rutgers Law School (2009-2013).

- **Peter Keisler**, Acting Attorney General in the George W. Bush Administration (2007); Assistant Attorney General for the Civil Division in the George W. Bush Administration (2003-2007); Principal Deputy Associate Attorney General and Acting Associate Attorney General in the George W. Bush Administration (2002-2003); Assistant and Associate Counsel to President Ronald Reagan (1986-1988).

- **Philip Allen Lacovara**, Deputy Solicitor General in the Richard M. Nixon Administration (1972-1973); Counsel to the Special Prosecutor, Watergate Special Prosecutor's Office (1973-1974).

- **Judge J. Michael Luttig**, U.S. Circuit Judge, U.S. Court of Appeals for the Fourth Circuit (1991-2006).

- **John McKay**, U.S. Attorney for the Western District of Washington in the George W. Bush Administration (2001-2007).

- **Trevor Potter**, Chairman of the Federal Election Commission (1994); Commissioner of the Federal Election Commission (1991-1995).

Parks, Western Watersheds Project, Vote Vets Action Fund Inc., Common Defense Civic Engagement, the American Public Health Association, the American Geophysical Union, Climate Resilient Communities, and Point Blue Conservation Science. *Amici* take no position on the other plaintiffs' claims, and thus do not address jurisdictional channeling under the Federal Service Labor-Management Relations Statute.

- **Alan Charles Raul**, General Counsel of the Office of Management and Budget in the George W. Bush Administration (1988-1989); Associate Counsel to President Ronald Reagan (1986-1988).

- **Paul Rosenzweig**, Deputy Assistant Secretary for Policy of the Department of Homeland Security in the George W. Bush Administration (2005-2009).

- **Claudine Schneider**, Representative of the 2nd District of Rhode Island (1981-1991) (R).

- **Peter M. Shane**, Jacob E. Davis and Jacob E. Davis II Chair in Law Emeritus at The Ohio State University's Moritz College of Law; Attorney-Adviser in the Office of Legal Counsel in the Jimmy Carter Administration (1978-1981).

- **Robert Shanks**, Deputy Assistant Attorney General for the Office of Legal Counsel in the Ronald Reagan Administration (1981-1984).

- **Christopher Shays**, Representative of the 4th District of Connecticut (1987-2009) (R).

- **Olivia Troye**, Special Advisor, Homeland Security and Counterterrorism to Vice President Mike Pence (2018-2020).

- **Christine Todd Whitman**, Governor of New Jersey (1994-2001) (R); Administrator of the Environmental Protection Agency in the George W. Bush Administration (2001-2003).

INTRODUCTION AND SUMMARY OF ARGUMENT

Applicants United States Office of Personnel Management, et al. (hereinafter, "OPM") ask this Court for the extraordinary relief of an emergency stay of the district court's preliminary injunction—though the Ninth Circuit has not yet ruled on the merits of the pending appeal. This Court should deny that request because OPM fails to meet the standard for such a stay. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *Nken v. Holder*, 556 U.S. 418 (2009). In particular, OPM's argument that the Civil Service Reform Act ("CSRA") divests the district court of jurisdiction is likely to fail. *Amici* focus on one reason why: To justify the extraordinary relief of a stay pending appeal, OPM asks that this Court *extend* a disfavored doctrine, and find that the CSRA implicitly deprives federal district courts of jurisdiction to hear the Administrative Procedure Act ("APA") and *ultra vires* claims of the Organizational Plaintiffs.

Atextual doctrines that imply congressional intent to strip federal district courts of jurisdiction over claims should not be expanded absent evidence of extraordinarily clear congressional intent. This is particularly true here, where a finding of federal court preclusion would bar meaningful judicial review of the Organizational Plaintiffs' claims. Moreover, the statutory text of the APA expressly permits review of the agency actions challenged, and the CSRA could have—but did not—explicitly channel APA claims to an administrative forum. The statutory text and applicable case law both establish that federal district courts have jurisdiction over the Organizational Plaintiffs' claims.

This Court should reject OPM's novel arguments, the acceptance of which would significantly undermine the power of Article III courts to review government action. Ruling in OPM's favor would not only break with precedent and contravene statutory text, it would diminish the role of the judiciary in reviewing consequential government acts. This disruption in the balance between our government's three co-equal branches could improperly insulate the executive branch from judicial scrutiny and erode the rule of law.

ARGUMENT

I. This Court has narrowly applied doctrines of implied congressional intent.

Plaintiffs brought claims in this case under an express cause of action and invoked an express grant of federal jurisdiction. The APA provides that "[a] person . . . aggrieved by agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702. And 28 U.S.C. § 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Plaintiffs' *ultra vires* claim is based on federal courts' longstanding equitable power to review illegal governmental acts, a power that has survived Congress's creation of remedies under the APA and other statutes. *See Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010).

Despite these clear textual provisions and foundations, OPM argues that Plaintiffs' claims cannot be maintained because, in enacting the CSRA, Congress implicitly eliminated federal district court jurisdiction to review these claims. In the

district court and the court of appeals, OPM relied on a line of cases following this Court's decision in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), which apply a multifactor balancing test to determine whether Congress's creation of an administrative review scheme, such as the one in the CSRA, implicitly channels certain claims into administrative review. Now, OPM has gone further. Abandoning *Thunder Basin*, OPM argues that the "structure" of the CSRA precludes by implication *all* federal litigation brought by so-called "end-users of government services" challenging agency action that affects federal personnel. OPM App. at 20. This is a substantial argument to base on such unsubstantial evidence of congressional intent.

Doctrines of implied congressional intent are strongly disfavored. Especially in the context of an application for a stay, where the Court does not have the benefit of full briefing on the merits or oral argument, this Court should decline to extend a disfavored doctrine.

This Court has retreated from the project of searching for implied meaning beyond statutory text. While federal courts used to frequently depart from statutory text in order to effectuate congressional purpose, that jurisprudence is "a relic of the heady days in which this Court assumed common-law powers." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). Today, the Court has "abandoned that power to invent 'implications' in the statutory field." *Id.*; *see Ziglar v. Abbasi*, 582 U.S. 120, 121 (2017) (*Bivens* doctrine of finding implied causes of action is "now considered a 'disfavored' judicial activity") (internal citations

omitted); *Chamber of Com. of the U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (noting the "high threshold" to find federal law has implicitly preempted state law) (internal citations omitted); *West Virginia v. Env't Prot. Agency.*, 597 U.S. 697, 722–24 (2022) (implicit delegations of authority to agencies on major questions considered dubious).

Justice Gorsuch's recent concurrence in *Axon Enterprise* explained some of the reasons for skepticism of doctrines of implied intent generally, and implied jurisdiction stripping specifically:

> [W]hat gives courts authority to engage in this business of jurisdiction-stripping-by-implication? The answer, of course, is nothing. Under our Constitution, "Congress, and not the Judiciary, defines the scope of federal jurisdiction." Federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." That is why we have called it the "true rule" that "statutes clearly defining the jurisdiction of the courts . . . must control . . . in the absence of subsequent legislation equally express." . . . *Thunder Basin* defies these foundational rules.

Axon Enter., Inc. v. Fed. Trade Comm'n, 598 U.S. 175, 207–08 (2023) (Gorusch, J. concurring) (internal citations omitted).

This Court should reject OPM's invitation to strip federal jurisdiction by implication, and decline federal jurisdiction only when Congress or controlling precedent clearly says it must. Here, that "high threshold" has not been met. *Whiting*, 563 U.S. at 607.

II. Granting a stay would require expanding a doctrine that purports to rely on implied congressional intent while ignoring clear statutory text.

A. This Court should hesitate to extend a doctrine of implied congressional intent to bar Organizational Plaintiffs' claims from federal district court.

To justify the extraordinary relief of a stay, OPM must show that this Court is likely to embrace an *expansion* of the implied channeling doctrine. OPM pushes for a broad rule without a basis in law: that parties like the Organizational Plaintiffs cannot bring large-scale challenges claiming the government violated the law in federal district court if those claims are somehow related to a government employment decision—even if this means the plaintiff cannot meaningfully proceed in any forum. *See* 5 U.S.C. § 7703(a)(1) (limiting Federal Circuit jurisdiction to appeals brought by "[a]ny employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board"). Indeed, OPM contends that the CSRA silently reflects "Congress's considered judgment" that such challenges to agency action should be excluded entirely from federal district court. OPM App. at 21. OPM's argument finds no support in statutory text or modern judicial precedent.

No decision of this Court answers the question presented here: Whether organizations harmed by agency action that impacts federal employees can seek redress in federal district court. Though OPM cites this Court's decision in *United States v. Fausto*, 484 U.S. 439 (1988), to support its argument that any party that uses the federal government's services is precluded from challenging agency action

related to employment decisions, OPM App. at 20, that case did not purport to sweep nearly so broadly. *See Fausto*, 484 U.S. at 443–44 (1988) ("The question we face is whether [the CSRA's] withholding of remedy was meant to preclude judicial review for [certain] *employees*.") (emphasis added); *see also Elgin v. Dep't of the Treasury*, 567 U.S. 1, 15 (2012) (explaining that exclusivity of the administrative forum provided by the CSRA turns "on the *type of the employee* and the challenged employment action") (emphasis added). Thus, in order for OPM to prevail, this Court would need to expand the scope of its CSRA channeling doctrine to reach new types of claims.

The question is not whether some claims are precluded from district court under a particular statutory scheme, but whether Congress intended for *these specific claims* to be so precluded. OPM's Application ignores this Court's more recent decisions, which conduct this claim-specific inquiry by applying the multi-factor framework developed in *Thunder Basin*, 510 U.S. at 212. These more recent decisions also proceed with proper caution when the Court has been asked to bar legal claims from federal court absent explicit statutory text to that effect. *See Axon*, 598 U.S. at 189; *Free Enter. Fund*, 561 U.S. at 489. Specifically, OPM relies only on *Fausto* and *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984), both of which predate *Thunder Basin* and thus do not include the claim-specific analysis this Court has demanded.

A "statutory review scheme [that precludes district court jurisdiction] does not necessarily extend to every claim concerning agency action." *Axon*, 598 U.S. at

185. The *Thunder Basin* standard asks three questions that aid in determining "whether the particular claims brought were 'of the type Congress intended to be reviewed within this statutory structure.'" *Axon*, 598 U.S. at 186 (quoting *Thunder Basin*, 510 U.S. at 212). Courts "presume that Congress does not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Free Enter. Fund*, 561 U.S. at 489 (quoting *Thunder Basin*, 510 U.S. at 212–13). Of those three factors, the first weighs heavily, as "Congress rarely allows claims about agency action to escape effective judicial review." *Axon*, 598 U.S. at 186. Here, of course, OPM has effectively conceded that the Organizational Plaintiffs cannot meaningfully proceed outside of federal court.

These claim-specific inquiries help guard against courts being too quick to infer that Article III courts' traditional powers have been silently swept aside by Congress. OPM offers no persuasive reason—let alone a reason with basis in statutory text—for why this Court should find that the implied preclusive effect of the CSRA sweeps so broadly as to include Organizational Plaintiffs' claims challenging government-wide action by OPM. OPM "assumes that plaintiffs like [the Organizational Plaintiffs here] have a lesser interest than" federal employees bringing personnel actions "and so should be precluded *a fortiori*." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 223–24 (2012). But "[w]hether it is lesser . . . ; whether it is greater because

implicating public interests; or whether it is in the end exactly the same—that is for Congress to tell [courts], not for [courts] to tell Congress." *Ibid.* at 224.

This Court, in applying the full *Thunder Basin* standard to a variety of statutory schemes that provide for administrative review, has generally found that individual "run of the mine" claims based in specific statutes belong in those administrative fora, *see Elgin*, 567 U.S. at 22; *Thunder Basin*, 510 U.S. at 205, while broader challenges to agencies or their policies that may implicate constitutional questions should be heard by an Article III district court, *see Free Enter. Fund*, 561 U.S. at 489; *Axon*, 598 U.S. at 189.

OPM asks this Court to break new ground and restrict Article III courts' ability to carry out their longstanding role in evaluating the legality of government action. Particularly at this early stage, statutory text and judicial precedent counsel against such a dramatic doctrinal extension.

B. Statutory text explicitly authorizes federal district court review of Organizational Plaintiffs' claims.

There is additional reason not to adopt OPM's unprecedented interpretation of the CSRA: Such an interpretation would conflict with the explicit statutory text in the APA. The text and structure of both statutes, when read together, indicate that Congress did not intend that the CSRA preclude federal district court jurisdiction over the sort of claims presented here.

At bottom, the Organizational Plaintiffs rely on the explicit statutory terms of the APA and Section 1331, while OPM relies on a claimed implicit intent in a

different statute to limit those express terms. In this matchup, the express statutory terms should control. It is axiomatic that judicial "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). "The most probative evidence of congressional intent is the statutory language used . . . . " *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). And especially in matters of federal jurisdiction, the "jurisdiction conferred by 28 U.S.C. § 1331 should hold firm against 'mere implication flowing from subsequent legislation.'" *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 383 (2012) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 808 (1976)). Reading the APA and the CSRA together indicates that Congress intended for the Organizational Plaintiffs' claims against OPM to be heard in federal district court.

The APA "creates a basic presumption of judicial review for one suffering legal wrong because of agency action." *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 586 U.S. 9, 22 (2018) (internal quotations and citations omitted). This "strong presumption," *ibid. at 23*, is overcome only in two narrow circumstances. The first exception is where "the relevant statute precludes review" (addressed above) and the second is in a circumstance where the action is "committed to agency discretion by law." *Ibid.* (quoting 5 U.S.C. § 701(a)(1)-(2)); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 17 (2020) (agency discretion exception construed "quite narrowly") (citation omitted).

Congress enacted the CSRA in 1978, decades after the APA. Pub. L. No. 95-454, 92. Stat. 1111. Nowhere in the CSRA did Congress explicitly repeal—or even refer to—the provisions of the APA that provide for judicial review of certain agency actions. The text of the CSRA does, however, refer to other provisions of the APA. *See* 5 U.S.C. § 1103(b) (clarifying that the Director of OPM must comply with APA notice and comment rulemaking provisions, notwithstanding the APA's rulemaking exception for rules relating to personnel); 5 U.S.C. § 1105 (noting that "in the exercise of the functions assigned under this chapter, the Director shall be subject" to the APA). Far from impliedly repealing any provision of the APA—and especially a provision as central to the APA's purpose as its provision for judicial review of agency actions—the CSRA actually cross-references parts of the APA and makes them expressly applicable to OPM. The text of the CSRA provides no basis for this Court to skirt the clear commands of the APA.

The argument that the CSRA silently repealed the APA's judicial review provision for third-party plaintiffs "faces a stout uphill climb." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018).

> When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both. A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow.

Ibid. (internal quotations and citations omitted). *See also Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 63 (2024) ("We approach federal statutes

with a 'strong presumption' they can exist harmoniously.") (citation omitted). This "cardinal rule" of statutory interpretation has a long history. *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503, (1936) (discussing longstanding rule and citing cases); *see also United States v. Borden Co.*, 308 U.S. 188, 198–99 (1939) (same); *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (Title VII did not implicitly repeal preferences under the Indian Reorganization Act).

OPM's sweeping argument that the CSRA effectively repeals the APA's judicial review provisions for the Organizational Plaintiffs—leaving them with no avenue for redress—is incompatible with the APA's statutory text and the principles articulated above. OPM App. at 20-21. As nearly all of OPM's rules and actions could be construed as touching on federal employment issues given the nature of the agency, such a rule would insulate OPM's actions from APA review and conflict with the explicit statutory text of the CSRA—which reinforces the APA's applicability to OPM actions. *See* 5 U.S.C. §§ 1103, 1105. The statute cannot bear such an interpretation, nor is it consistent with the case law. Likewise, there is no basis to find that, in this context, the CSRA displaces the long-established judicial power to review governmental action via *ultra vires* claims. *See Free Enter. Fund*, 561 U.S. at 491 & n.2.

CONCLUSION

Particularly in the context of an emergency application, this Court should reject OPM's invitation to bar Organizational Plaintiffs' claims from federal court without sound justification in statutory text or judicial precedent. Proper respect for

Congress and the role of Article III courts demands that federal statutes only bar federal court jurisdiction over a claim when it is overwhelmingly clear that Congress intended that claim to be so barred. Federal district courts have jurisdiction to hear Organizational Plaintiffs' claims challenging OPM's actions.

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Respectfully submitted,

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