No. 10-1062

In the Supreme Court of the United States

CHANTELL SACKETT and MICHAEL SACKETT,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *et al.,*

Respondents.

On Writ of *Certiorari* to the U.S. Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF APA WATCH IN SUPPORT OF NEITHER PARTY

LAWRENCE J. JOSEPH
1250 Connecticut Ave, NW
Suite 200
Washington, DC 20036
Tel: 202-669-5135
Email: lj@larryjoseph.com

QUESTIONS PRESENTED

1. May petitioners seek pre-enforcement judicial review of the administrative compliance order pursuant to the Administrative Procedure Act, 5 U.S.C. §704?

2. If not, does petitioners' inability to seek pre-enforcement judicial review of the administrative compliance order violate their rights under the due process clause?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative History

Rules and Regulations

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae APA Watch is a nonprofit membership corporation headquartered in McLean, Virginia. On its own and through its membership, APA Watch devotes significant effort to combating federal agencies' exceeding their authority under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), and to seeking the legislatively and constitutionally intended balance for judicial review under the APA, its equity predecessors, and their state-law equivalents. APA Watch has participated as *amicus curiae* before this Court and the Courts of Appeals on issues under the APA, enforcement, and justiciability. *See Stormans Inc. v. Seleky,* No. 07-36039 (9th Cir.); *Envtl. Defense v. Duke Energy Corp.,* No. 05-848 (U.S.); *Astra USA, Inc. v. Santa Clara County, Cal.,* No. 09-1273 (U.S.); *Douglas v. Independent Living Ctr. of S. California, Inc.,* Nos. 09-958, 09-1158 & 10-283 (U.S.). While sympathetic to the petitioners' plight here, *amicus* APA Watch submits this brief in support of neither party in the interests of *future* litigants who choose to pursue similar relief under different APA and pre-APA

---

[1] This *amicus* brief is filed with written consent of all parties; the petitioners' and respondents' written letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief, and no counsel for a party authored this brief in whole or in part, nor did any person or entity other than the *amicus* and its counsel make a monetary contribution to the preparation or submission of this brief.

theories of judicial review. As unfair as the petitioners' burdens under the Clean Water Act may be, it would be more unfair if issues that the petitioners declined to raise in this litigation bound not only the petitioners here but also future litigants in unrelated litigation.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

As amended, APA §12 addresses not only the effect of the APA on review provided (or limited) by other statutes but also the effect of other, post-APA statutes on APA review:

> This subchapter [and] chapter 7 … do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. … Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. *Subsequent statute may not be held to supersede or modify this subchapter [or] chapter 7 … except to the extent that it does so expressly.*

5 U.S.C. §559 (emphasis added). As relevant here, APA §12 provides that subsequent statutes like the Clean Water Act do not supersede or modify APA review unless they do so expressly.

Consistent with APA §12, APA §10(1) recognizes that the APA does not override statutes that preclude review:

> (a) This chapter applies, according to the provisions thereof, except to the extent that -
>
> (1) statutes preclude judicial review[.]

5 U.S.C. §701(a). Similarly, APA §10(a) as amended waives the United States' sovereign immunity for prospective injunctive and declaratory relief but also provides that APA's "right of review" does not trump any statute that "expressly or impliedly forbids the relief which is sought" against the United States:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. *An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.* The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. *Nothing herein* (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) *confers authority to grant relief if any other statute that grants consent to suit*

> *expressly or impliedly forbids the relief which is sought.*

5 U.S.C. §702 (emphasis added).

As amended, APA §10(b) defines the form of review as either the special statutory review proceeding under the relevant statute or, in the absence or the *inadequacy* thereof, any applicable form of legal action – *e.g.,* declaratory or injunctive relief – in any court of competent jurisdiction:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence *or inadequacy thereof,* any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction …, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. §703 (emphasis added). As is most relevant to situations like this litigation, the inadequacy of a special statutory review proceeding entitles litigants

to resort to courts of competent jurisdictions, which typically would mean a U.S. district court.[2]

For agency action not made reviewable by statute or without an adequate remedy in court, APA §10(c) (as amended) provides review of final agency action:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. *A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.* Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

---

[2] While not critical here, APA's 1976 amendments "'*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity.'" *Sea-Land Serv., Inc. v. Alaska R.R.,* 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. Rep. No. 94-996, 8 (1976)) (emphasis added) (Ginsburg, J.).

5 U.S.C. §704 (emphasis added). As relevant here, any preliminary or intermediate action not directly reviewable is subject to review upon review of the final agency action.

Finally, under APA §10(d) as amended, agencies and reviewing courts – including this Court – may grant interim relief from agency action:

> When an agency finds that justice so requires, *it may postpone the effective date of action taken by it, pending judicial review.* On such conditions as may be required and *to the extent necessary to prevent irreparable injury, the reviewing court,* including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, *may issue all necessary and appropriate process to postpone the effective date of an agency action* or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. §705 (emphasis added). Although the respondents here have not done so, some federal agencies require that parties who seek interim relief from agency action first present the request to the agency, with judicial review available of the denial of interim relief, even before a merits decision from the agency (or judicial review of the merits decision from the agency) is available. 21 C.F.R. §§10.35, .45(c); *Bristol-Myers Squibb Co. v. Shalala,* 91 F.3d 1493, 1497 (D.C. Cir. 1996); *cf. Zeneca, Inc. v. Shalala,* 213 F.3d 161, 166 n.7 (4th Cir. 2000) ("denial of Zeneca's administrative petition for a stay of action …

constitutes final agency action for purposes of judicial review under the APA").[3]

STATEMENT OF THE CASE

Amicus curiae APA Watch adopts the facts as reported by the Ninth Circuit and the district court. The only relevant fact is whether a party faces irreparable injury from non-final or otherwise preliminary or intermediate agency action.

SUMMARY OF ARGUMENT

By its terms, the APA allows district-court review of non-final agency action that causes irreparable harm when special forms of statutory review are inadequate to avoid such harms. 5 U.S.C. §703 ("form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence *or inadequacy thereof,* any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction …, in a court of competent jurisdiction") (emphasis added); Section I.A, *infra.* Even without that APA review, pre-APA equity practice allows an action in equity when the action at law comes too late to avoid irreparable harm. *See* Section I.B, *infra.* Although not presented here, judicial review is available even when Congress impliedly intended to

[3] APA expresses no view on whether a federal agency has the authority to promulgate rules that limit a federal court's jurisdiction to hear an action otherwise within the court's jurisdiction.

deny review. *See* Section I.C, *infra.* For all of the foregoing reasons, pre-enforcement review remains available to those irreparably injured by non-final or intermediate agency action, which obviates an answer to the second question presented under the Due Process Clause. *See* Section II, *infra.*

ARGUMENT

I. PARTIES INJURED BY NON-FINAL OR INTERMEDIATE AGENCY ACTION ARE ENTITLED TO JUDICIAL REVIEW

As signaled in the first question presented, the problem here arises if an agency order is neither "made reviewable by statute" nor "final agency action." 5 U.S.C. §704. If indeed the order here is intermediate or otherwise non-final, it might evade *pre-enforcement* APA review under APA §10(c): "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." *Id.* When facing costly compliance if the party acquiesces versus large potential penalties (or any other irreparable harm) if the party does not prevail in post-enforcement judicial review, the denial of pre-enforcement review presents a Hobson's choice: pay the potentially unlawful compliance costs or risk the penalties. While this is indeed an APA problem, it is easily avoided under the APA and in equity.

The following three sections establish that pre-enforcement review is available to avoid irreparable harm from non-final or intermediate agency action under the APA, pre-APA equity practice, and even in some instances where Congress has barred review. *See* Sections I.A-I.C, *infra.* At the outset, it appears

that the Sacketts have not raised some of the arguments that *amicus* APA Watch raises. Although APA Watch expresses no opinion on whether failure to raise these arguments waives them, it is clear that any resulting decision by this Court should not foreclose *future litigants* from raising and prevailing on these arguments.

First, the Sacketts' litigation decisions plainly do not bind future litigants in unrelated litigation. *Baker v. Gen. Motors Corp.,* 522 U.S. 222, 237-38 & n.11 (1998) (due process forbids binding non-parties with collateral estoppel). Indeed, it violates due process to use *stare decisis* to preclude new parties from re-litigating an issue. *South Cent. Bell Tel. Co. v. Alabama,* 526 U.S. 160, 167-68 (1999). Second, unless this Court squarely addresses these issues, the decision in this "case[] cannot be read as foreclosing an argument that [the Court] never dealt with." *Waters v. Churchill,* 511 U.S. 661, 678 (1994). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents," *Cooper Indus., Inc. v. Aviall Serv., Inc.,* 543 U.S. 157, 170 (2004) (*quoting Webster v. Fall,* 266 U.S. 507, 511 (1925)). For both reasons, to avoid uncertainty in the lower courts, this Court should either "deal with" these arguments or make clear that it is not dealing with them.

Similarly, this Court's decision in *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200 (1994), does not – indeed *cannot* – resolve the availability of pre-enforcement review to avoid irreparable harm. Simply put, this Court held that the *Thunder Basin*

petitioner lacked – or at least presented no evidence of – irreparable harm. 510 U.S. at 216-17. Each of the three theories of review presented in Sections I.A-I.C, *infra,* require irreparable harm. Because *Thunder Basin* lacked that prerequisite to review, *Thunder Basin* is inapposite here.

A. APA Allows Pre-Enforcement Review

As explained, the APA does not override any pre-APA statute that *expressly or impliedly* denies review:

> Nothing herein … confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. §702; *id.* §701(a)(1) (same). For post-APA statutes, however, the denial of review must be *express.* 5 U.S.C. §559. Nothing in the Clean Water Act *expressly* precludes pre-enforcement review.

Moreover, the APA expressly allows review even where special forms of statutory review exist but are inadequate to avoid irreparable harm:[4]

---

[4] The Court perhaps should distinguish between nonstatutory review and special forms of statutory review, as the enactment of statutes such as the APA has rendered "nonstatutory" something of a "misnomer." *Air New Zealand Ltd. v. C.A.B.,* 726 F.2d 832, 836-37 (D.C. Cir. 1984) (Scalia, J.); *cf.* 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).

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, *in the absence or inadequacy thereof,* any applicable form of legal action[.]

5 U.S.C. §703 (emphasis added). When statutory review is inadequate, a plaintiff may bring *inter alia* "actions for declaratory judgments or writs of prohibitory or mandatory injunction" in any "court of competent jurisdiction." *Id.*

In the absence of APA §10(d), APA §10(c) indeed might present the Hobson's choice that this case seeks to frame. *Compare* 5 U.S.C. §705 (allowing interim relief from agencies and reviewing courts) *with* 5 U.S.C. §704 (requiring final action). The Senate Judiciary Committee explained §10(d) as necessary to avoid putting parties "at their peril" before those parties can obtain judicial review:

> The second sentence authorizes courts to postpone the effective dates of administrative judgments or rules in cases in which, as by subjection to criminal penalties, parties could otherwise have no real opportunity to seek judicial review except at their peril. There is no reason why such a rule should not be recognized as to administrative agencies, since it is applied in the case of legislation-of Congress itself.

Senate Judiciary Committee Print (June 1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess., at 38 (1946) (hereinafter, "APA LEG. HIST.")

(collecting cases). The Committee also emphasized that APA §10(d) empowered courts (like agencies) to provide every form of interim relief except the power to grant an initial license:

> This section permits *either agencies or courts,* if the proper showing be made, to maintain the status quo. While it would not permit a court to grant an initial license, it *provides intermediate judicial relief for every other situation* in order to make judicial review effective. The authority granted is equitable and should be *used by both agencies and courts to prevent irreparable injury* or afford parties an adequate judicial remedy.

S. REP. NO. 79-752 (1945), *reprinted in* APA LEG. HIST., at 213 (emphasis added); *cf. Scripps-Howard Radio v. F.C.C.,* 316 U.S. 4, 17 (1942) (recognizing courts' authority to stay administrative orders).

Some agencies have promulgated rules that require petitioning the agency for interim relief before seeking interim relief in court. 21 C.F.R. §§10.35, .45(c); *Zeneca,* 213 F.3d at 166 n.7 (denial of administrative stay is reviewable final agency action); *cf.* 28 U.S.C. §1292(a)(1) (allowing interlocutory appeals of denial of interim injunctive relief). In the absence of a formal agency process for seeking interim relief – and thereby obtaining a final agency action that denies interim relief – one can seek interim relief informally under APA §10(d), using the same process (*e.g.,* a demand letter) that one would use when threatened with irreparable harm by a private party. If the agency denies

interim relief, APA §10(d) authorizes judicial review of the denial of interim relief, even if APA §10(c) otherwise would deny such relief.[5]

B. Equity Allows Pre-Enforcement Review

Assuming *arguendo* that the APA neither provides judicial review nor waives sovereign immunity, sovereign immunity poses the question whether plaintiffs can seek relief against an agency officer acting outside his authority. Assuming again *arguendo* that the APA neither provides judicial review nor waives sovereign immunity, review in equity would nonetheless exist because "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689 (1949); *Ex parte Young,* 209 U.S. 123, 160 (1908) (officer acting without valid authority is "stripped of his official or representative capacity and is *subjected in his person* to the consequences of his *individual conduct,*" and suit is "against [him] *personally as a wrongdoer* and not against the State") (emphasis added); *U.S. v. Lee,* 106 U.S. 196, 213 (1882) ("if the person who is the real principal … be himself above the law … it would be subversive of the best established principles to say that the laws could not

---

[5] *Amicus* APA Watch makes these arguments in the alternative to the Sacketts' arguments that the order is final agency action, Pets.' Br. at 54-56, without disputing those finality-based arguments.

afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit") (*quoting Osborn v. U.S. Bank,* 9 Wheat. 738, 842 (1824)). Unlike her agency, Administrator Jackson cannot assert sovereign immunity here.

Under our common-law heritage, "[t]he acts of all [federal] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Am. Sch. of Magnetic Healing v. McAnnulty,* 187 U.S. 94, 108 (1902). "Nothing in the subsequent enactment of the APA altered the *McAnnulty* doctrine of review …. It does not repeal the review of *ultra vires* actions recognized long before, in *McAnnulty*." *Dart v. U.S.,* 848 F.2d 217, 224 (D.C. Cir. 1988); *Harmon v. Brucker,* 355 U.S. 579, 581-82 (1958) (relying on *McAnnulty* for the proposition that "generally, judicial review is available to one who has been injured by an act of a government official which is in excess of his express or implied powers"). "Under the longstanding officer suit fiction …, … suits against government officers seeking prospective equitable relief are not barred by the doctrine of sovereign immunity." A.B.A. Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law,* 54 ADMIN. L. REV. 1, 46 (2002). Thus, provided that the plaintiff alleges an ongoing violation of federal law, longstanding equity practice allows suing federal officers who act beyond their lawful authority.

Equity traditionally required irreparable harm and the inadequacy of legal remedies. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 506-07 (1959). But those threatened by future injury need not await their alternate legal remedy before filing suit in equity, and a *subsequent* legal remedy does not displace equity review: the "settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter." *Am. Life Ins. Co. v. Stewart,* 300 U.S. 203, 215 (1937). A party injured by unlawful agency action need not await the remedy at law provided by Congress when irreparable injury comes before that remedy.

With the advent of the Declaratory Judgment Act, 28 U.S.C. §§2201-2202 ("DJA"), equitable relief in the form of a declaration of the law is even more readily available that traditional equitable relief in the form of injunctions. The federal-question statute, 28 U.S.C. §1331, provides subject-matter jurisdiction for nonstatutory review of federal agency action. *Califano v. Sanders,* 430 U.S. 99, 105 (1977) (1976 amendments to §1331 removed the amount-in-controversy threshold for "any [federal-question] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity") (*quoting* Pub. L. 94-574, 90 Stat. 2721 (1976)), and 28 U.S.C. §2201(a) authorizes declaratory relief "whether or not further relief … could be sought." *Accord Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 70-71 n.15 (1978); *Steffel v. Thompson,* 415 U.S. 452, 471-72 (1974). Since 1976, §1331 has authorized DJA

actions against federal officers, regardless of the amount in controversy. *Sanders,* 430 U.S. at 105 (quoted *supra*). Declaratory relief makes it even easier for parties to obtain pre-enforcement review.[6]

Significantly, the availability of declaratory relief against federal officers predates the APA, WILLIAM J. HUGHES, FEDERAL PRACTICE §25387 (1940 & Supp. 1945); EDWIN BORCHARD, DECLARATORY JUDGMENTS, 787-88, 909-10 (1941), and the APA did not displace such relief, either as enacted in 1946 or as amended in 1976. *See* APA LEG. HIST., at 37, 212, 276; 5 U.S.C. §559; *Darby v. Cisneros,* 509 U.S. 137, 153 (1993) (rejecting argument that 1976 APA amendments expanded

---

[6] In 1980, Congress amended §1331 to its current form, Pub. L. No. 96-486, §2(a), 94 Stat. 2369 (1980), without repealing the 1976 amendment relied on by *Sanders* and its progeny. H.R. REP. NO. 96-1461, at 3-4, *reprinted in* 1980 U.S.C.C.A.N. 5063, 5065; *Bowen v. Massachusetts,* 487 U.S. 879, 891 n.16 (1988); *U.S. v. Mitchell,* 463 U.S. 206, 227 & n.32 (1983); *cf. Morton v. Mancari,* 417 U.S. 535, 550 (1974) (repeal by implication is disfavored). Indeed, "'repeals by implication are disfavored,' and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975). Statutes that foreclose alternate forms of review must do so expressly. *Compare* 42 U.S.C. §405(h) ("[n]o action against the United States… or any officer… thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter") *with Heckler v. Ringer,* 466 U.S. 602, 616-17 (1984) (assuming without deciding that §405(h)'s exclusion of jurisdiction *under 28 U.S.C. §1331* does not foreclose jurisdiction *under 28 U.S.C. §1361*).

APA's preclusion of review) (*citing* 5 U.S.C. §559 *and Dickinson v. Zurko,* 527 U.S. 150, 154-55 (1999)). Thus, even if APA §10(c) precludes declaratory relief *under the APA,* 5 U.S.C. §704, suitable plaintiffs nonetheless can obtain that relief *under the DJA.*

C. When Both the APA and Garden-Variety Equity Review Are Lacking, those Injured by Agency Action Nonetheless Can Have Judicial Review

Although not presented here, this Court has identified instances where due process provides forms of review even in the face of statutes that deny review. *See, e.g., Leedom v. Kyne,* 358 U.S. 184, 188-90 (1958) (allowing nonstatutory equitable review, notwithstanding that the statute in question impliedly prohibits judicial review). In *Board of Governor's of the Federal Reserve System v. MCorp Financial,* 502 U.S. 32, 43 (1991), the Court upheld the "familiar proposition" underlying *Kyne* review: namely, that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." 502 U.S. at 44 (*quoting Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967)). Because the *MCorp* statute *expressly* prohibited judicial review of the regulations at issue and *expressly* authorized a challenge to them only in an enforcement action, this Court withheld the *Kyne* action. 502 U.S. at 43-44. Significantly, *MCorp* found the statutory review adequate, 502 U.S. at 43 ("[t]he cases before us today are entirely different from *Kyne* because [the *MCorp* statute] expressly provides MCorp with a meaningful and adequate opportunity for judicial

review"), which removes *MCorp* (like *Thunder Basin*) from any relevance here.

II. WHEN JUDICIAL REVIEW IS AVAILABLE, DUE PROCESS ISSUES ARE ABSENT

The denial of review would present due-process issues, as the Sacketts and their *amici* ably argue. Because the APA and pre-APA forms of judicial review are available, however, due-process questions do not arise.

CONCLUSION

Whatever this Court decides on the facts and proceedings in this case, the Court should not preclude pre-enforcement judicial review to future plaintiffs: (1) who face irreparable harm from non-final agency action, or (2) for whom special statutory review is either inadequate or unavailable. Both the APA and pre-APA equity practice allow review of unlawful agency action under those circumstances.

October 3, 2011

Respectfully submitted,

Lawrence J. Joseph
1250 Connecticut Ave, NW
Suite 200
Washington, DC 20036
Tel (202) 669-5135
Email lj@larryjoseph.com