CORNER POST AND 28 U.S.C. § 2401(a): NOT MUCH TO LOOK AT?*

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This term the U.S. Supreme Court will decide *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, a statutory-interpretation case concerning the time limit on suits brought against the federal government under the Administrative Procedure Act (APA). The six-year limitations period of 28 U.S.C. § 2401(a), which applies to actions against the United States, begins when "the right of action first accrues." The question presented is whether the APA right of action first accrues upon injury to the plaintiff or instead upon final agency action. In addition to its implications for APA suits, the case implicates fundamental and far-reaching questions of interpretive methodology.

The question presented is inconsequential in a typical case because injury and final agency action typically occur simultaneously, but in this case it matters greatly. Corner Post, a convenience store that started in 2018, sued under the APA to challenge a 2011 Federal Reserve regulation that increases its fees for debit-card transactions. If the limitations period started in 2011 with final agency action, it expired before Corner Post even existed. On the other hand, if the limitations period started in 2018 when Corner Post first was injured, the Federal Reserve's 2011 rule is vulnerable to suit even after the passage of six years.

This highlights that a legislature's choice about when to start a limitations period involves a tradeoff that is consequential whenever there is a temporal gap between the defendant's allegedly unlawful act and the plaintiff's injury. If the limitations period starts at injury, some defendants will never have

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complete repose—at any time someone could be newly injured by the defendant's unlawful act and file suit. If the limitations period starts with the defendant's unlawful act, on the other hand, it can deprive some plaintiffs of their day in court—it may expire before they have been injured.

In *Corner Post*, the Eighth Circuit held that Section 2401(a) bars Corner Post's suit because it starts the clock at final agency action. But like the several other circuit courts that have reached that conclusion, the Eighth Circuit did not even perfunctorily examine Section 2401(a)'s linguistic meaning. That contravenes the marching orders of the Supreme Court, which has "stressed over and over again in recent years" that statutory interpretation must "heed . . . what a statute actually says."[1] It is safe to predict that whatever the outcome, the Supreme Court's Justices will pay closer attention to statutory text than these circuit courts have.

Their votes might turn on differences in their interpretive methodologies. Some judges and commentators believe that statutory text sometimes "runs out"—i.e., the text's meaning or application is unclear—and that when that becomes apparent, policy-laden choice is all that is left.[2] Others believe that judges must apply the "best reading" of the statutory text even when they are not completely certain about what the right answer is.[3] This difference in methodology can create dissent any time a portion of a court believes the interpretive question presents uncertainty.

Corner Post may ultimately provide an example. At oral argument, Justice Elena Kagan asserted that when it comes to Section 2401(a), "there's not much in the text to look at."[4] But other Justices may think there is enough evidence of original understanding to conclude that one statutory reading is superior to the other. Justice Neil Gorsuch, for example, observed that *accrue* has "a lot of encrusted meaning" and the Court has "a lot of precedent about it."[5] The Justices' votes may hinge on how quick they are to declare uncertainty and what standard of proof they demand for interpretive assertions.

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[1] Groff v. DeJoy, 600 U.S. 447, 468 (2023).

[2] *Cf.* Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) (Kagan, J.).

[3] *See, e.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) ("[C]ourts should seek the best reading of the statute."); *see also, e.g.*, Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1663 (2017) (deciding statutory-interpretation case by discerning "the best reading of the statute").

[4] Tr. of Oral Arg. at 12, Corner Post, Inc. v. Bd. of Govs. of the Fed. Res. Sys., No. 22-1008 (Feb. 20, 2024) ("Corner Post Tr.").

[5] *Id.* at 47.

Corner Post also highlights that there is sometimes more evidence of the law than first meets the eye. While an interpreter may not immediately know whether accrual begins at injury or final agency action from a glance at Section 2401(a), the traditional tools of interpretation reveal quite a lot about the original semantic meaning of the phrase "right of action first accrues" and the cluster of ideas surrounding it. All agree that *accrue* meant "to arise" or "to come into existence," so we know that Section 2401(a)'s limitations period begins only when the right of action comes into existence.[6] And we know from enactment-era dictionaries that *right of action* meant the right to bring suit. A right to bring suit belongs to individual plaintiffs, of course, not the world. Putting the definitions together, Section 2401(a)'s original semantic meaning conveys that its limitations period starts "when the plaintiff's right to bring suit comes into existence."

That alone gets us a long way, and the background rules and cluster of ideas surrounding Section 2401(a) get us even further. At the time of enactment, rights of action *accrued* when the plaintiff was injured and could bring suit. The Federal Reserve acknowledges that this was the "standard rule" for accrual (and still is today). The Federal Reserve argues that claims of administrative injury are different, but it has not identified anything in the text of Section 2401(a) or the APA that indicates as much. Indeed, the Federal Reserve has advanced no theory of the original understanding of Section 2401(a)'s operative phrase. Instead, the Federal Reserve has pointed to a host of *other* administrative-law statutes that do not use accrual language and instead peg their limitations periods to final agency action. (A Hobbs Act suit, for example, must be filed "within 60 days after … entry" of the agency action in question.) According to the Federal Reserve, these statutes indicate that Congress prefers to begin limitations periods at final agency action in the administrative context. But the Supreme Court treats variation in statutory language as indicating *difference* in operation, not sameness.

If anything has "run out" by failing to provide clear answers, it is the policy. As Chief Justice John Roberts observed when questioning Corner Post, "under your system, [a] challenge as to how everything is structured [can be] brought 10 years later, 20 years later."[7] But as Chief Justice Roberts also observed when questioning the Federal Reserve, under its position "[y]ou have an individual or an entity that is harmed by something the government is doing, and you're saying, well, that's just too bad, you can't do anything

[6] *See id.* at 12; *infra* Part III.

[7] Corner Post Tr. at 18.

about it because other people had six years."[8] There is policy downside either way. There is no clear and indisputable answer as to when an APA limitations period *should* start.

As the Chief Justice's questions indicate, the outcome in *Corner Post* will have serious real-world implications. The Eighth Circuit decision deprives persons newly injured by old agency action of access to the federal courts and allows certain unlawful agency action to evade judicial correction. Particularly given the administrative state's expansion and its increasingly aggressive assertions of power, it should not be assumed that Congress intended that result.

I. TIME LIMITS ON LAWSUITS

Some background on statutory limitations periods is needed to understand the interpretive dispute in *Corner Post*. A legislature can limit the time to file suit with either a statute of limitations or a statute of repose.[9] The Supreme Court has explained that both types of limitations period "operate to bar a plaintiff's suit," for both "time is the controlling factor," and there is "considerable common ground in the policies underlying the two types of statute."[10] But they "seek to attain different purposes and objectives," and—importantly here—"the time periods specified are measured from different points."[11]

A statute of limitations creates a limitations period that starts "on the date when the claim accrued."[12] A claim accrues "when the injury occurred or was discovered."[13] A statute of limitations, therefore, looks at the suit from the plaintiff's vantage point.

A statute of repose, "on the other hand," "puts an outer limit on the right to bring a civil action."[14] The limit is measured "not from the date on which the claim accrues" but instead "from the date of the last culpable act or omission of the defendant."[15] That is so even if the limitations period "ends

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[8] *Id.* at 41.

[9] *See* CTS Corp. v. Waldburger, 573 U.S. 1, 7 (2014) ("Statutes of limitations and statutes of repose both are mechanisms used to limit the temporal extent or duration of liability for [unlawful] acts.").

[10] *Id.*

[11] *Id.*

[12] *Id.* (quoting BLACK'S LAW DICTIONARY 1546 (9th ed. 2009)).

[13] *Id.* at 8.

[14] *Id.*

[15] *Id.*

before the plaintiff has suffered a resulting injury."[16] A statute of repose "is not related to the accrual of any cause of action."[17] As an "absolute . . . bar on a defendant's temporal liability,"[18] a statute of repose looks at the suit from the defendant's vantage point.

Because last culpable act and injury often occur simultaneously, a statute of limitations and statute of repose will often start the clock at the same time. But when there is a temporal gap between last culpable act and injury, the limit's starting point depends on which kind of limitations period it is. And a temporal gap between last culpable act and injury raises the possibility that a limitations period will create hardship for one of the parties. A statute of limitations can cause hardship to defendants because it can allow suits for new injuries that occur long after the defendant's last culpable act. A statute of repose, meanwhile, can cause hardship to plaintiffs because it can eliminate the opportunity to sue by extinguishing the time to file suit before the plaintiff has been injured. When deciding between a statute of limitations and a statute of repose, then, a legislature must make a tradeoff. The legislature must decide which is the lesser evil for a given cause of action; it cannot avoid both.

II. STATUTORY TEXT AND HISTORY

The question in *Corner Post* is whether with respect to APA claims Section 2401(a)'s limitations period starts at injury (as a statute of limitations) or at final agency action (as a statute of repose). Section 2401(a)'s first predecessor was enacted in 1863, when Congress provided that certain claims against the United States, "cognizable by the court of claims," are barred unless filed "within six years after the claim first accrues."[19] Then, in the 1887 Tucker Act, Congress provided for district court jurisdiction over claims

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[16] *Id.*

[17] *Id.* While "general *usage* of the [two] legal terms has not always been precise," *id.* at 14 (emphasis added), and the term *statute of repose* was not used in the 19th century, *CTS Corp.*'s discussion makes clear that statutes of limitation and statutes of repose carry real *conceptual* distinction. Some limitations periods are based on accrual (in what the *CTS Corp.* Court calls statutes of limitation) while others set an outer bound of temporal liability regardless of accrual date (in what the Court calls statutes of repose). The Federal Reserve's assertion that the "distinction between statutes of limitations and statutes of repose . . . sheds no light" on this case is unfounded. Brief for the Respondent at 32, Corner Post, Inc. v. Bd. of Govs. of the Fed. Res. Sys., No. 22-1008 (Dec. 13, 2023) ("Resp. Br.").

[18] *CTS Corp.*, 573 U.S. at 8.

[19] Act of Mar. 3, 1863 § 10, 12 Stat. 765, 767.

against the United States for $10,000 or less (the Little Tucker Act) and Court of Federal Claims jurisdiction over claims against the United States for more than $10,000 (the Big Tucker Act).[20] Like the 1863 statute, the Tucker Act barred suits against the United States "under this act" unless brought "within six years after the right accrued for which the claim is made."[21] In 1911, Congress separated the Big and Little Tucker Acts and codified respective statutes of limitation in different places. For the Big Tucker Act, Congress used the language from the 1863 statute; for the Little Tucker Act, Congress used the 1887 language.[22]

Congress enacted the APA in 1946 and did not include a limitations period in that statute. The DOJ Attorney General's Manual published in 1947 observed that "the time within which review must be sought will be governed, as in the past, by relevant statutory provisions or by judicial application of the doctrine of laches."[23] In 1948, Congress moved the Little Tucker Act statute of limitations to 28 U.S.C. § 2401(a) and removed the words "under this act."[24] By removing those words, Congress made Section 2401(a) a "catch-all limit for non-tort actions against the United States."[25] Here is the full text of Section 2401(a) as currently enacted:

> Except as provided by [a chapter not relevant here], every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

In the decades following the APA's enactment, no one thought that Section 2401(a) applied to APA suits. In a 1967 case, the Supreme Court assumed (like the 1947 Attorney General Manual) that APA suits are subject

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[20] *See* Act of Mar. 3, 1887, ch. 359, § 2, 24 Stat. 505, 505.

[21] *Id.* § 1, 24 Stat. at 505.

[22] *See* Herr v. U.S. Forest Serv., 803 F.3d 809, 815 (6th Cir. 2015).

[23] Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 93 (1947), *available at* tinyurl.com/4nu4mtxw ("DOJ APA Manual").

[24] Act of June 25, 1948, 62 Stat. 869, 971 (codified at 28 U.S.C. § 2401(a)).

[25] Auction Co. of Am. v. FDIC, 132 F.3d 746, 749 (D.C. Cir. 1997); *see also* Werner v. United States, 188 F.2d 266, 268 (9th Cir. 1951) (Section 2401(a) "created a general statute of limitations insofar as suits against the United States are concerned."); United States v. Mottaz, 476 U.S. 834, 838 (1986) (Section 2401(a) provides "the general statute of limitations governing actions against the United States.").

to laches, not Section 2401(a) or any other statute of limitations.[26] But beginning in the 1980s, the circuit courts began to assume that Section 2401(a) applies to suits brought under the APA.[27] Section 702 of the APA provides a cause of action for persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[28] Section 704 provides that a plaintiff may only challenge "final agency action for which there is no other adequate remedy in a court."[29]

While courts subject APA claims to Section 2401(a)'s six-year limitations period, other administrative-injury claims are subject to much shorter limitations periods. The Administrative Orders Review Act (also known as the Hobbs Act), for example, provides a limitations period of 60 days.[30] Some agencies' organic statutes provide even shorter limitations periods.[31] And these shorter limitations periods do not start at accrual. The Hobbs Act limitations period starts upon "entry" of the agency's "final order."[32] Other statutes' limitations periods similarly run from when a regulation is "promulgated"[33] or from an order's "entry"[34] or from when an "order or decision becomes final."[35] While the Federal Reserve has repeatedly referred to these limitations periods as accrual-based, it has offered no justification for that description.[36] These limitations periods do not use the word *accrual* and appear to pay no attention to when any claim accrues.[37]

III. SECTION 2401(a)'S ORIGINAL UNDERSTANDING

Bedrock principles of statutory interpretation guide the inquiry into the meaning of the Section 2401(a) phrase "right of action first accrues." For one,

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[26] *See* James R. Conde & Michael Buschbacher, *The Little Tucker Act's Statute of Limitations Does Not Govern Garden-Variety Pre-enforcement Suits Under the APA*, YALE J. REG. NOTICE & COMMENT at n.18 & accompanying text (Sept. 26, 2023), tinyurl.com/y9bcvd7f (citing Abbott Labs. v. Gardner, 387 U.S. 136, 155 (1967)).

[27] *See id.* at n.4 & accompanying text; *but see generally id.* (arguing that this is incorrect).

[28] 5 U.S.C. § 702.

[29] *Id.* § 704.

[30] 28 U.S.C. § 2344.

[31] *E.g.*, 12 U.S.C. § 1848 (thirty days).

[32] 28 U.S.C. § 2344.

[33] 29 U.S.C. § 655(f); 16 U.S.C. § 7804(d)(1).

[34] 21 U.S.C. § 348(g)(1).

[35] 39 U.S.C. § 3663.

[36] *See, e.g.*, Resp. Br. at 20; Corner Post Tr. at 39, 41, 51.

[37] *See* Resp. Br. at 16 n.4 (string-citing a long list of limitations periods).

because Section 2401(a)'s text is "obviously transplanted from another legal source," i.e., a statutory provision dating to the 19th century, it "brings the old soil with it."[38] Second, interpreting Section 2401(a) requires analysis not only of the original semantic meaning of the phrase "right of action first accrues" but also of the "background rules" associated with accrual.[39] That is, the interpreter must look to the "cluster of ideas that were attached to [the phrase]" "accumulated [in] the legal tradition and meaning of centuries of practice."[40] Staring at the words "right of action first accrues" might not be terribly enlightening to a modern interpreter. But using the traditional tools of interpretation—dictionaries, enactment-era background rules, the canons, and so on—an interpreter can discern a great deal about the meaning and application of that phrase.

To start, the linguistic meaning of the phrase "right of action first accrues" is probative on its own. Enactment-era dictionaries defined that phrase's terms, *right of action* and *accrue*, and their meaning is not meaningfully contested. A *right of action* was a "right to bring suit."[41] Although implicit in that definition, it is uncontested that the right to bring suit belonged to individual plaintiffs, not to the world, just like it does today.[42] *Accrue* meant "to arise, to happen, to come into force or existence."[43] Putting those definitions together, Section 2401(a) provides that its limitations period begins when the plaintiff's right to bring suit comes into existence.

That presents a challenge for the Federal Reserve—it is difficult to argue that Corner Post's right to bring suit came into existence in 2011, years before it existed. Even the leading commentator defending the Federal Reserve's position, Professor Susan Morse, has conceded that "the text of 28 U.S.C. § 2401(a) . . . suggests . . . that accrual should begin separately for each specific plaintiff's claim."[44] Morse has for that reason further conceded that accrual based on "when a specific plaintiff can sue" "does apply to cases first contemplated by 28 U.S.C. § 2401(a)."[45] And Morse has acknowledged that

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[38] George v. McDonough, 142 S. Ct. 1953, 1959 (2022).

[39] Staples v. United States, 511 U.S. 600, 605 (1994).

[40] Sekhar v. United States, 570 U.S. 729, 733 (2013).

[41] Right of Action, BLACK'S LAW DICTIONARY 1560 (3d ed. 1933).

[42] *See, e.g.*, 5 U.S.C. § 702 (APA right of action belongs to "[a] person").

[43] Accrue, BLACK'S LAW DICTIONARY, *supra* note 41, at 18; *see also, e.g.*, Gabelli v. SEC, 568 U.S. 442, 448 (2013) (citing dictionaries and treatises "from the 19th century up until today" for the proposition that "[i]n common parlance a right accrues when it comes into existence").

[44] Susan C. Morse, *Old Regs*, 31 GEO. MASON L. REV. No. 1 (2023) (manuscript at 4), *available at* ssrn.com/abstract=4191798, perma.cc/MW42-WFCZ.

[45] *Id.*

under the Federal Reserve's position, "accrual is triggered by an action of the defendant, not a claim of the plaintiff," which is "contrary to the plaintiff-focused approach taken when interpreting 28 U.S.C. § 2401(a)'s application [in other contexts]."[46]

Next, the background rules and cluster of ideas surrounding accrual shed substantial light on Section 2401(a)'s original understanding.[47] As the Federal Reserve concedes, and John Kendrick has detailed, "[e]very source" reflecting the rules of 19th-century accrual indicates that a right of action could not accrue before injury.[48] Dictionaries explained that "an action *accrues* when the plaintiff has a right to commence it."[49] As an "invariable rule," according to an 1883 treatise on statutes of limitation, neither a person's "right to a remedy" nor "his liability to be precluded by time from its prosecution" "will commence till he has suffered some actual inconvenience."[50] Another treatise explained that a right of action "accrue[s] when the party has been 'hurt' and not when the other party has violated the contract or the law."[51] Cases said the same: "All" statutes of limitation "begin to run when the right of action is complete."[52]

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[46] *Id.* at 4–5. Professor Morse rests her defense of the Federal Reserve's position on her assertion that APA claims are different because the "[t]he administrative procedure right of action arises at promulgation (or other final agency action), then exists and continues, waiting unchanged for any eligible plaintiff to come along and raise it." *Id.* at 5. But that is question-begging—the time at which the right of action arises is what is in dispute. Professor Morse does not explain why APA claims are different than other claims for which there is a temporal gap between unlawful conduct and injury—in any case like that, the unlawful conduct "exists and continues, waiting unchanged" for a plaintiff to be injured. And Professor Morse does not explain how a plaintiff's right to bring suit can exist at a time the plaintiff does not exist itself.

[47] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text.").

[48] John Kendrick, *(Un)limiting Administrative Review:* Wind River*, Section 2401(a), and the Right to Challenge Federal Agencies*, 103 VA. L. REV. 157, 159 (2017); *see also id.* at 180–92 (examining enactment-era cases, dictionaries, and treatises).

[49] 1 A. Burrill, A Law Dictionary and Glossary 17 (1850).

[50] H.G. WOOD, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY 363–64 (Boston, Soule & Bugbee Law Publishers 1883). This remained true when the APA was enacted. *See, e.g.*, Accrue, BLACK'S LAW DICTIONARY (4th ed. 1957) ("[a] cause of action 'accrues' when a suit may be maintained thereon," specifically "on [the] date that damage is sustained").

[51] JOHN F. KELLY, A TREATISE ON THE CODE LIMITATIONS OF ACTIONS UNDER ALL STATE CODES 91 (1903).

[52] Clark v. Iowa City, 87 U.S. (20 Wall.) 583, 589 (1874); *see also, e.g.*, Wilcox v. Plummer's Ex'rs, 29 U.S. 172, 181 (1830) ("When might this action have been instituted, is the question; for from that time the statute [of limitations] must run."); Rice v. United States, 122 U.S. 611, 617 (1887) ("A claim first accrues . . . when a suit may first be brought upon it, and from that day the . . . limitation begins to run.").

The Supreme Court has repeatedly affirmed these principles in the decades since. Under the "standard rule," a claim accrues "when the plaintiff has a complete and present cause of action"; a limitations period cannot run "before a plaintiff can file a suit."[53] The Court has "repeatedly recognized" that "Congress legislates against [that] standard rule."[54] That standard rule, according to the Supreme Court, cannot be displaced "in the absence of any [contrary] indication in the text of the limitations period."[55] Here, Section 2401(a) "reads like an ordinary, run-of-the-mill statute of limitations."[56]

While the standard rule can be rebutted with textual evidence, moreover, the Federal Reserve has not identified anything suggesting that an accrual-based limitations period ever can run before the plaintiff has been *injured*. The Federal Reserve cites *Reading Co. v. Koons* as a counter to the standard rule,[57] but accrual did not precede injury in that case. Rather, the Supreme Court simply rejected a plaintiff's attempt to game a limitations period through its control of the date on which it could bring suit. *Reading* involved a wrongful-death claim under the Employers' Liability Act, under which only the administrator of the decedent could sue.[58] The question was whether the Act's three-year limitations period began at death or at the appointment of the administrator.[59] If the latter, the decedent's beneficiaries could delay accrual by "choos[ing] their own time for applying for the appointment of an administrator and consequently for setting the statute running."[60] In *Reading*, for example, the appointment was not made until six years after death.[61] Unsurprisingly, the Court rejected this gamesmanship and held that accrual began at "the time of injury," i.e., death.[62] The Court emphasized that the right of action really belonged to the beneficiaries, not the administrator, and "at the death of decedent there are real parties in interest

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[53] *Gabelli*, 568 U.S. at 448; Green v. Brennan, 578 U.S. 547, 554 (2016).

[54] United States ex rel. Wilson, 545 U.S. 409, 418 (2005) (cleaned); *see also* Spannaus v. DOJ, 824 F.2d 52, 56 n.3 (D.C. Cir. 1987) ("virtually axiomatic" that "a statute of limitations cannot begin to run against a plaintiff before the plaintiff can maintain a suit").

[55] *Green*, 578 U.S. at 554 (cleaned).

[56] United States v. Wong, 575 U.S. 402, 411 (2015) (referring to similar wording in Section 2401(b)).

[57] Resp. Br. at 26–27 (citing Reading Co. v. Koons, 271 U.S. 58 (1926)).

[58] 271 U.S. at 60.

[59] *Id.*

[60] *Id.* at 65.

[61] *Id.* at 64.

[62] *Id.* at 63.

[i.e., the beneficiaries] who may procure the action to be brought."[63] The beneficiaries could "start the machinery of the law in motion to enforce it" by appointing an administrator, and could even file suit themselves and later amend to name the administrator as plaintiff.[64] *Reading* is only arguably an exception to the standard rule that accrual occurs only when there is a complete and present cause of action, and it certainly is not an exception to the seemingly ironclad rule that accrual cannot precede injury.

The Federal Reserve argues that Section 2401(a) is unique as applied to APA suits because they involve a claim of administrative injury. According to the Federal Reserve, the "default rule for accrual" is "ill-suited for the administrative-law context."[65] But when the APA was enacted, and for decades after, it was understood that APA claims were not subject to any limitations period at all.[66] Rather, they were subject to laches, a doctrine that would not bar the suit of a newly opened business.[67] As for accrual, the Federal Reserve has not pointed to a single example of an accrual-based limitations period in the administrative context that started before injury. Indeed, as noted, the Federal Reserve has not pointed to any exception in any context at any time in which accrual could precede injury. Nineteenth century Americans understood that accrual is plaintiff-focused and cannot precede injury as a general matter, whatever the claim.[68]

The Federal Reserve emphasizes that *other* administrative statutory limitations periods begin at final agency action. According to the Federal Reserve, these provisions suggest that Congress prefers to start the clock at final agency action in the administrative context.[69] But that is the opposite of

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[63] *Id.* at 62–63.

[64] *Id.* at 62.

[65] *See* Resp. Br. at 19–20 (cleaned).

[66] *See* DOJ APA Manual, *supra* note 23, at 93; *Abbott Labs.*, 387 U.S. at 155; Conde & Buschbacher, *supra* note 26.

[67] *See* Laches, BLACK'S LAW DICTIONARY (1st ed. 1891) (defining "laches" as "[n]egligence, consisting in the omission of something which a party might do, and might reasonably be expected to do, towards the vindication or enforcement of his rights").

[68] The Federal Reserve invokes a 1967 statement of the Supreme Court that there are "hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues.'" Resp. Br. at 13 (quoting Crown Coat Front Co. v. United States, 386 U.S. 503, 517 (1967)). But that is simply because the time at which a right of action comes into existence must be determined for each kind of action. Defining when a contract claim comes into existence might not determine when another type of claim comes into existence. That does not change the rules about what accrual means and how it operates. For all purposes, accrual-based limitation periods focus on the plaintiff, not the defendant, and never does accrual precede injury.

[69] Resp. Br. at 15.

how courts interpret statutes. Under the "well-settled" meaningful-variation canon, a "materially different term . . . denotes a different idea."[70] Unlike Section 2401(a), the other statutory provisions are not accrual-based.[71] That Congress used different language in Section 2401(a) than in other statutes of limitation covering claims of administrative injury suggests that Section 2401(a) operates differently, not the same.

That inference is especially strong in *Corner Post* because, as the Supreme Court explained in *Rotkiske v. Klemm*, "atextual judicial supplementation" is "particularly inappropriate" when "Congress has shown that it knows how to adopt the omitted language."[72] In other words, it is not merely that Section 2401(a)'s language varies from that of the other provisions—it is that the other provisions contain exactly the language the Federal Reserve wishes to read into Section 2401(a). In *Rotkiske*, the Court rejected a limitations-period argument because Congress has "enacted statutes that expressly included the language [the litigant] asks us to read in"—they "set[] limitations periods to run" in exactly the way the litigant proposed.[73] The Court concluded that it is "not our role to second-guess Congress' decision" to create a different type of limitations period in the provision at issue.[74]

That logic seems equally applicable in *Corner Post*. Congress easily could have provided that the limitations period for APA claims starts once the regulation is "published in the Federal Register," for example, as it did in 16 U.S.C. § 7804(d)(1).[75] The limitations periods pegged to final agency action show that Congress "knows exactly how to specify" such a limitations period though it chose to do "nothing like that" with respect to the APA.[76]

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[70] Sw. Airlines Co. v. Saxon, 596 U.S. 450, 458–59 (2022).

[71] The Federal Reserve argues that Section 2401(a) should not be read to adopt a "different accrual rule" than the other statutory provisions such as the Hobbs Act. Resp. Br. at 20. But that argument rests on a flawed premise—none of the other statutory provisions have accrual rules. They are not accrual-based limitations periods. *See id.* at 16 n.4 (string-citing a long list of limitations periods, none of which are pegged to accrual of the plaintiff's right of action).

[72] 140 S. Ct. 355, 361 (2019) (capitalization altered).

[73] *Id.*

[74] *Id.*

[75] *See also* Brief for the Respondent in Opposition at 11, Corner Post, Inc. v. Bd. of Govs. of the Fed. Res. Sys., No. 22-1008 (June 16, 2023) ("Gov't BIO") (recognizing that "[i]n a variety of circumstances, Congress has established deadlines for suit that run from the defendant's allegedly unlawful conduct").

[76] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1617 (2018).

The "omission of any such provision is strong, and arguably sufficient, evidence that Congress had no such intent."[77]

Even though the phrase "right of action first accrues" in Section 2401(a)'s first sentence is undisputedly the decisive phrase in this appeal, the Federal Reserve has not advanced any argument about its meaning. The Federal Reserve's merits brief mentions that phrase seven times, and in none of those instances does the Federal Reserve state a position about what those words mean or when a right of action first accrued at the time of enactment.[78]

The Federal Reserve instead argues that Corner Post's reading "is inconsistent with the *second* sentence of Section 2401(a)."[79] That sentence provides that "[t]he action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." According to the Federal Reserve, that "necessarily reflects Congress's understanding that a claim can 'accrue[]' for purposes of Section 2401(a) at a time when a person is 'under legal disability,' 28 U.S.C. 2401(a), and thus is unable to sue on that claim."[80] And that, the Federal Reserve continues, "is irreconcilable with [Corner Post's] view that accrual under Section 2401(a) cannot occur while a plaintiff is legally unable to sue."[81]

But Section 2401(a)'s second sentence is entirely consistent with the view that Section 2401(a) accrual starts at injury. The term "legal disability" refers to "a mental derangement precluding a person from comprehending rights which he would be otherwise bound to understand."[82] A legally disabled person's cause of action accrues at injury just like anyone else's; Section 2401(a) simply tolls the time to bring suit in light of the disability. The same goes for persons beyond the seas—their cause of action accrues at injury and the time to sue is tolled while they are beyond the seas. Indeed, the second sentence indicates exactly that by envisioning persons disabled or beyond the seas "at the time the claim accrues."[83] A claim can accrue even while the

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[77] Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823 (1990).

[78] *See* Resp. Br. at 2, 9, 12, 13, 23, 30, 31.

[79] *Id.* at 23 (emphasis added).

[80] *Id.* at 24 (cleaned).

[81] *Id.*

[82] Sabree v. United States, 409 F. App'x 339, 341 (Fed. Cir. 2011); *see also* BLACK'S LAW DICTIONARY, *supra* note 12, at 528 (defining "disability" as "[t]he inability to perform some function; esp., the inability of one person to alter a given relation with another person").

[83] 28 U.S.C. § 2401(a).

plaintiff is disabled or overseas because the plaintiff can be injured while disabled or overseas. A plaintiff cannot, by contrast, be injured before it exists.

IV. THE CIRCUIT COURTS' APPROACH

In light of the APA's "generous review provisions," courts "restrict access to judicial review" "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent."[84] And the Supreme Court has repeatedly explained that "[t]he best evidence of congressional intent . . . is the statutory text that Congress enacted."[85]

But aside from the Sixth Circuit,[86] the circuit courts have not examined statutory text. They have instead balanced interests and settled on a framework that to them "make[s] the most sense."[87] The Eighth Circuit, for example, did not even ask the pertinent interpretive questions. The Eighth Circuit never inquired into Section 2401(a)'s original meaning, or how the APA might implicitly modify that meaning. Instead, the Eighth Circuit simply announced that "[t]his court concludes that . . . [Petitioner's] right of action accrue[d] . . . upon publication of the regulation."[88]

When the circuit courts have cited any statutory text at all, they have pointed to the APA's limitation of its cause of action to "final agency action" in Section 704 without explaining that provision's relevance.[89] Similarly, in opposing certiorari, the Federal Reserve simply noted that "the APA establishes a cause of action to challenge 'final agency action'" and then stated its conclusion: "Accordingly, when an agency makes a final decision that [satisfies the Supreme Court's test for finality], the 'right of action' established by the APA 'accrues.'"[90]

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[84] *Abbott Labs.*, 387 U.S. at 141.

[85] Marx v. Gen. Revenue Corp., 568 U.S. 371, 392 n.4 (2013) (Sotomayor, J., dissenting) (citing W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991)).

[86] *Herr*, 803 F.3d 809.

[87] Wind River Mining Corp. v. United States, 946 F.2d 710, 715 (9th Cir. 1991).

[88] N. Dakota Retail Ass'n v. Bd. of Govs. of the Fed. Res. Sys., 55 F.4th 634, 641 (8th Cir. 2022).

[89] *See, e.g.*, Wong v. Doar, 571 F.3d 247, 263 & n.15 (2d Cir. 2009) ("Under the APA, the statute of limitations begins to run at the time the challenged agency action becomes final. *See* 5 U.S.C. § 704."); Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 186 (4th Cir. 1999) (holding without analysis that the APA right of action accrues "upon 'final agency action,' 5 U.S.C. § 704"); Harris v. FAA, 353 F.3d 1006, 1010 (D.C. Cir. 2004) ("The right of action first accrues on the date of the final agency action." (citing 5 U.S.C. § 704)).

[90] Gov't BIO at 8.

But the observation that the APA limits its cause of action to final agency action does not support a conclusion that accrual occurs at final agency action rather than at injury. Section 704 simply states that an APA claim cannot be brought until the plaintiff is injured *and* the agency action is final—in other words, finality "is another necessary, but not by itself a sufficient, ground for stating a claim under the APA."[91] And APA Section 702 does not alter those accrual rules either. Because Section 702 authorizes judicial review only when a person is "aggrieved" by final agency action, if anything it indicates that the normal accrual rules apply to APA claims. The APA largely "restate[d] the law governing judicial review of administrative action;"[92] it did not upend centuries-old accrual rules. At most, the APA is silent on accrual. And the APA's limitations-period "silence" "means that ordinary background law applies."[93] Statutory silence signals congressional "satisfaction with widely accepted definitions, not a departure from them."[94]

Rather than focusing on statutory text, the circuit courts have focused on policy implications. They have invoked the concern that under Corner Post's approach "there effectively would be no statute of limitations."[95] That is incontestably incorrect—if Corner Post had filed its lawsuit more than six years after its alleged injury, Section 2401(a) would bar the suit just like any other statute of limitations. What these courts really mean is that there effectively is no *repose* for the defendant.

That is indeed true—because Section 2401(a) is not a statute of repose. A legislature's choice of limitations period "reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."[96] Most pertinent here, anytime a legislature enacts a limitations period, it must decide whether to enact a statute of limitations or a statute of repose. Because

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[91] *Herr*, 803 F.3d at 819.

[92] DOJ APA Manual, *supra* note 23, at 124.

[93] New Jersey v. New York, 523 U.S. 767, 813 (1998) (Breyer, J., concurring); *see also, e.g.*, Albernaz v. United States, 450 U.S. 333, 341–42 (1981) ("[I]f anything is to be assumed from the congressional silence . . . , it is that Congress was aware of the [background] rule and legislated with it in mind."); *id.* at 341 (Congress is "predominantly a lawyer's body," and it is appropriate "to assume that our elected representatives . . . know the law.").

[94] Beck v. Prupis, 529 U.S. 494, 501 (2000); *see also* PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2061 (2019) (Kavanaugh, J., concurring in the judgment) (congressional "silence" "should not be read to preclude judicial review").

[95] Preminger v. Sec'y of Veterans Affairs, 517 F.3d 1299, 1307 (Fed. Cir. 2008) (citing *Wind River*, 946 F.2d at 714).

[96] *Rotkiske*, 140 S. Ct. at 361.

each option may carry negative consequences when there is a temporal gap between last culpable act and injury, the choice between them involves a tradeoff.

The parties' respective arguments illuminate that tradeoff. The Federal Reserve has emphasized that under Corner Post's reading, the limitations period would "leave defendants subject indefinitely to actions for the wrong done."[97] Corner Post, meanwhile, has emphasized that under the Federal Reserve's reading, the limitations period for APA suits would expire before some plaintiffs have any opportunity to sue.[98] Corner Post has described this result as absurd.[99] The Federal Reserve has countered that the result is not absurd because many federal statutes contain limitations periods that unambiguously entail that result.[100] And it is true that the result is not absurd in the sense of having consequences that no legislature could tolerate. A company is in fact statutorily barred from bringing Hobbs Act challenges outside of that statute's limitations period even if it expires before the company exists.

But this exchange simply highlights the tradeoff inherent in the choice between a statute of limitations versus a statute of repose. What Corner Post emphasizes is the downside of a statute of repose—some injured plaintiffs will have no opportunity to sue. What the Federal Reserve emphasizes is the downside of a statute of limitations—a loss of repose for defendants because newly injured plaintiffs can bring suit long after last culpable act. The question, then, is simply which side of that tradeoff Congress picked when it enacted Section 2401(a). In other words, the question is whether Section 2401(a) is a statute of limitations or a statute of repose.

Under Supreme Court precedent, Section 2401(a) is a statute of limitations and not a statute of repose. A statute of repose limit is "not related to the accrual of any cause of action."[101] Section 2401(a) obviously *is* related to accrual—it uses that very word. That means Section 2401(a) is not a statute of repose. And unlike statutes of repose, statutes of limitation *are* related to accrual. They are "based on the date when the claim accrued."[102] The Federal Reserve points out that Section 2401(a) "does not contain either

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[97] Gov't BIO at 12 (quotation marks omitted).

[98] Petition for Certiorari at 29, Corner Post, Inc. v. Bd. of Govs. of the Fed. Reserve Sys., No. 22-1008 (Apr. 13, 2023).

[99] *Id.*

[100] Resp. Br. at 10.

[101] *CTS Corp*, 573 U.S. at 9.

[102] *Id.* at 7; *see also id.* ("a statute of limitations begins to run when the cause of action 'accrues'").

the phrase 'statute of limitations' or the phrase 'statute of repose,'"[103] but because Section 2401(a)'s limit is "based on the date when the claim accrued,"[104] there is no doubt about which it is.

Because Section 2401(a) is a statute of limitations, it "begins to run when the injury occurred or was discovered."[105] That means it purposely does *not* provide a defendant with "freedom from liability" and the assurance that "past events [are] behind him."[106] Because a legislature cannot ensure both repose for defendants and remedy for plaintiffs, statutes of limitation like Section 2401(a) accept some loss of repose to ensure that all injured plaintiffs are able to bring suit.[107] To say that Section 2401(a) must provide federal agencies with date-based repose ignores that Congress chose the other side of that tradeoff.

V. MATTERS OF INTERPRETATION

At oral argument, Corner Post's lawyer observed that "if you look at the lower court decisions applying this statutory scheme, not a single one of them actually looked at the text of 2401 or 702."[108] Justice Kagan responded: "Well, but what I'm suggesting . . . is that there's not much in the text to look at."[109] This colloquy implicates a broader issue concerning indeterminacy and the standard of proof applicable to an interpretive assertion.

In a different oral argument a month prior, Justice Kagan asserted that "sometimes law runs out."[110] She elaborated that assertion in a 2019 opinion, writing that "sometimes the law runs out, and policy-laden choice is what is left over."[111] The law runs out, according to Justice Kagan, when the law does

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[103] Resp. Br. at 32.

[104] *CTS Corp.*, 573 U.S. at 7.

[105] *Id.* at 8.

[106] *Id.* at 9; *see also* Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 582 U.S. 497, 505 (2017) (statutes of repose give "more explicit and certain protection to defendants" than statutes of limitation).

[107] *See Spannaus*, 824 F.2d at 56 n.3 (It is "virtually axiomatic" that "a statute of limitations cannot begin to run against a plaintiff *before* the plaintiff can maintain a suit" even though that is not true of statutes of repose.).

[108] Corner Post Tr. at 11.

[109] *Id.* at 12.

[110] Tr. of Oral Arg. at 12, Relentless, Inc. v. Department of Com., No. 22-1219 (Jan. 17, 2024).

[111] *Kisor*, 139 S. Ct. at 2415. Justice Kagan made this assertion in the context of interpretation of agency regulations, but in *Relentless* she stated that statutory text sometimes "runs out," *see supra*

not "give[] an answer."[112] And the law does not give an answer, she continued, when there is more than one "reasonable construction."[113] When a judge has employed the tools of interpretation and "the interpretive question still has no single right answer," the judge "can . . . conclude that it is more one of policy than of law."[114] In sum, policy-laden choice is warranted when reasonable people can disagree about the answer to an interpretive question.

Justice Brett Kavanaugh, on the other hand, has argued that judges should simply "determine the best reading of the statute."[115] While "[f]iguring out the best reading of the statute is not always an easy task," Justice Kavanaugh believes that it is the judge's job to do so: statutory texts "are not just common law principles or aspirations to be shaped and applied as judges think reasonable."[116] And judges "should not be diverted by an arbitrary initial inquiry into whether the statute can be characterized as clear or ambiguous."[117] In other words, judges should apply what they perceive as the best reading regardless whether there might be reasonable disagreement about what that is.

Justice Clarence Thomas, similarly, has argued that "even in difficult cases," when "original meaning is not obvious at first blush," judges must nonetheless "diligently pursu[e] that meaning."[118] That discerning the original meaning of a text may "require[] a taxing inquiry" does not make the text "capable of multiple permissible interpretations."[119] For Justice Thomas, like Justice Kavanaugh, this is about the judicial role in the separation of powers: "Stopping the [interpretive] inquiry short—or allowing personal views to color it—permits courts to substitute their own preferences over the text."[120]

At bottom, this disagreement is largely about standard of proof. As Professor Gary Lawson has explained, an assertion of interpretive indeterminacy (such as the assertion that law has run out) requires

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note 110 & accompanying text, and appeared to defend the circuit courts' "policy-laden choice" on this ground in *Corner Post*, *see infra* note 126 & accompanying text.

[112] *Kisor*, 139 U.S. at 2415.

[113] *Id.*

[114] *Id.* (cleaned).

[115] Kavanaugh, *supra* note 3, at 2144 (capitalization altered).

[116] *Id.* at 2121, 2135.

[117] *Id.* at 2144.

[118] Gamble v. United States, 139 S. Ct. 1960, 1987 (2019) (Thomas, J., concurring).

[119] *Id.*

[120] *Id.*

specification of a standard of proof.[121] A proposition is indeterminate "only if there is so much uncertainty about the right answer that the applicable standard of proof cannot be satisfied for either the proposition or its negation."[122] Justice Kagan is implicitly applying something akin to a clear-and-convincing standard of proof to interpretive propositions—if the evidence of the law is not clear and convincing, the law does not give an answer. Justices Kavanaugh and Thomas, on the other hand, are applying something more like a preponderance standard—if the evidence suggests that one interpretation is better than another, the superior interpretation prevails. With that standard, indeterminacy exists only when "the evidence is in complete and precise equipoise," and "[t]here are almost always better or worse answers."[123] The law virtually never "runs out."

Whatever standard of proof is used, it should be identified and justified. Justices Kavanaugh and Thomas, for example, have articulated reasons why they think their best-reading approach best conforms to the judicial role in the Constitution's separation of powers. In the academy, Professors John O. McGinnis & Michael B. Rappaport have argued that under our country's "original interpretive rules," interpreters "were required to select the interpretation of ambiguous and vague terms that had the stronger evidence in its favor."[124]

A related question, when a court uses a clear-and-convincing standard, is what happens next when no interpretation meets that standard. In Justice Kagan's formulation, policy takes over—a "policy-laden choice" is all an interpreter is "left" with.[125] That is why when Corner Post's lawyer accused the circuit courts of focusing on policy rather than text, Justice Kagan defended them by asserting that "there's not much in the text to look at."[126] It seems that Justice Kagan meant that Section 2401(a)'s text provides no clear answer to the question presented, and that justifies the circuit courts' turn to policy.

Normally, of course, "[i]t is Congress, not [the Supreme] Court, that balances [policy] interests;" the Court "simply enforce[s] the value judgments

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[121] GARY LAWSON, EVIDENCE OF THE LAW 114 (2017) ("It is literally impossible to evaluate claims about indeterminacy when the standard of proof is not specified.").

[122] *Id.* at 111.

[123] *Id.* at 112, 122.

[124] John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 774 (2009).

[125] *Kisor*, 139 S. Ct. at 2415.

[126] Corner Post Tr. at 12.

made by Congress."[127] It is not obvious that the Constitution permits departure from this division of labor when an interpretive question does not have a clear and convincing answer. Policy judgments, moreover, often cannot themselves meet a clear-and-convincing standard. In *Corner Post*, for example, the tradeoffs inherent in legislating Section 2401(a)'s limitations period do not allow a "single right answer" that stands beyond reasonable disagreement. And when a legal question is contested on both interpretation and policy, it is not obvious why judicial decisionmaking should turn on the latter.

VI. REAL-WORLD IMPLICATIONS

These theoretical interpretive issues could have substantial real-world implications in *Corner Post*. The APA is a "bill of rights" for "the hundreds of thousands of Americans whose affairs are controlled or regulated" by federal agencies.[128] It was designed to serve as "a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices."[129]

The APA's guarantees have become all the more critical as the administrative state has grown. Today, "the Executive Branch . . . wields vast power and touches almost every aspect of daily life."[130] Much of the federal government's operation now consists of "hundreds of federal agencies poking into every nook and cranny of daily life."[131] Our Constitution's founders "could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities."[132] These agencies "produce[] reams of regulations—so many that they dwarf the statutes enacted by Congress."[133] The Code of Federal Regulations contained 18,000 pages near the close of

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[127] *Rotkiske*, 140 S. Ct. at 361.

[128] 92 Cong. Rec. 2149 (1946) (statement of Sen. McCarran).

[129] Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 109 (2015) (Scalia, J., concurring) (quoting United States v. Morton Salt Co., 338 U.S. 632, 644 (1950)); *see also* S. Rep. No. 79-752, at 212 (1945) (APA judicial review is designed to prevent Congress's statutes from becoming "blank checks drawn to the credit of some administrative officer or board"); Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955) (APA was intended in part to "remove obstacles to judicial review of agency action").

[130] Free Enter. Fund v. PCAOB, 561 U.S. 477, 499 (2010).

[131] City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

[132] *Id.* at 313 (Roberts, C.J.).

[133] *Kisor*, 139 S. Ct. at 2446–47 (Gorsuch, J., concurring in the judgment) (quotations marks omitted).

the New Deal in 1938, but now contains more than 175,000 pages.[134] And agencies "add thousands more pages of regulations every year."[135]

In light of the administrative state's expanded scope, "the cost of . . . deny[ing] citizens an impartial judicial hearing" when injured by agency action "has increased dramatically."[136] And while unlawful agency action often imposes immediate injury, under the Eighth Circuit's approach, agencies may escape judicial oversight when their action causes injury more than six years later. While aggrieved persons always can challenge agency action when defending an enforcement action, the Supreme Court does not usually consider the availability of defense review "a 'meaningful' avenue of relief."[137] The time, cost, and reputational ruin accompanying enforcement actions often "practically necessitate a pre-enforcement . . . suit" "if there is to be a suit at all."[138]

Many persons aggrieved by unlawful agency action, moreover, will never have the opportunity to participate in an enforcement action. In *Corner Post*, for example, there will never be an enforcement action because Corner Post's injury is caused by private persons regulated by the Federal Reserve's 21-cent standard.[139] The possibility of "filing [a] petition to rescind regulations" and then "appealing the denial of the petition,"[140] does not solve the problem because the agency may not have a procedure for a petition to rescind the action at issue, and even if it does, it may simply decline to issue a decision on the petition or delay such action indefinitely. When an agency takes injurious action outside the enforcement context, therefore, the APA's cause of action is usually the only mechanism to contest the action.

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[134] Paul J. Larkin, Jr. & GianCarlo Canaparo, *Gunfight at the New Deal Corral*, 19 GEO. J.L. & PUB. POL'Y 477, 488 (2021).

[135] *Kisor*, 139 S. Ct. at 2447 (Gorsuch, J.).

[136] *Id.*; *see also* Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 670 (1986) (citing the Supreme Court's "insist[ence]" that the availability of judicial review of executive action is part of "[t]he very essence of civil liberty").

[137] *Free Enter. Fund*, 561 U.S. at 490–91.

[138] CIC Servs., LLC v. IRS, 141 S. Ct. 1582, 1592 (2021); *see also* Sackett v. EPA, 566 U.S. 120, 124–25, 127 (2012) (plaintiffs would have "accrue[d], by the Government's telling, an additional $75,000 in potential liability" "each day they wait[ed] for the Agency to [bring an enforcement action]").

[139] *See* Brief for the Petitioner at 34, Corner Post, Inc. v. Bd. of Govs. of the Fed. Reserve Sys., No. 22-1008 (Nov. 13, 2023).

[140] *Wind River*, 946 F.2d at 714.

VII. CONCLUSION

While the Supreme Court almost certainly will examine Section 2401(a)'s text more closely than the circuit courts have, its Justices may disagree on whether the interpretive inquiry should end with that text. That disagreement could stem not only from different readings of Section 2401(a)'s text but also different standards of proof for interpretive assertions. In *Corner Post*, this theoretical disagreement could have significant implications for a very real-world question: whether Americans newly injured by old agency action have a day in court.

Other Views:

- Brief for Respondent, Corner Post, Inc. v. Board of Governors of the Federal Reserve System, No. 22-1008 (Feb. 20, 2024), https://www.supremecourt.gov/DocketPDF/22/22-1008/269285/20230616132214160_22-1008%20-%20Corner%20Post%20v.%20Board%20of%20Governors%20of%20the%20Federal%20Reserve%20System.pdf.
- Susan C. Morse, *Old Regs*, 31 GEO. MASON L. REV. No. 191 (2023), *available at* https://lawreview.gmu.edu/print_issues/old-regs/.
- Sydney Bryant and Devon Ombres, Corner Post v. Federal Reserve*: The Supreme Court Could Open a Pandora's Box for Federal Regulation*, CENTER FOR AMERICAN PROGRESS (Feb. 12, 2024), https://www.americanprogress.org/article/corner-post-v-federal-reserve-the-supreme-court-could-open-a-pandoras-box-for-federal-regulation/.
- Charles P. Pierce, *The Corner Post Case Could Do to New Deal Regulations What Citizens United Did to Campaign Finance*, ESQUIRE (Feb. 20, 2024), https://www.esquire.com/news-politics/politics/a46872722/supreme-court-corner-post-suit/.