No. 22-1008

In the

Supreme Court of the United States

CORNER POST, INC.,
Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF LITTLE TUCKER ACT SCHOLARS IN SUPPORT OF PETITIONER

MICHAEL BUSCHBACHER
Counsel of Record
JAMES R. CONDE
BOYDEN GRAY PLLC
801 17th St. NW, #350
Washington, DC 20006
(202) 955-0620
mbuschbacher@boydengray.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions & Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici John Kendrick, Michael Buschbacher, and James R. Conde are the authors of scholarly works on the original meaning of the Little Tucker Act's statute of limitations: John Kendrick, *(Un)limiting Administrative Review:* Wind River*, Section 2401(a), and the Right to Challenge Federal Agencies*, 103 Va. L. Rev. 157 (2017) (the first scholarly work on the subject), and 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. on Reg., Notice & Comment (Sept. 26, 2023).

[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission.

INTRODUCTION AND SUMMARY

In *Abbott Laboratories v. Gardner (Abbott Labs)*, the Solicitor General raised what has become a familiar refrain in pre-enforcement and other "non-statutory review" cases: "permit[ing] resort to the courts in this type of case may delay or impede effective enforcement" and lead to "a multiplicity of suits in various jurisdictions challenging other regulations." 387 U.S. 136, 155 (1967). In other words, too much judicial review. This Court, however, did "not find the Government's argument convincing," because "the declaratory judgment and injunctive remedies are equitable in nature, and other equitable defenses may be interposed"; specifically, the "defense of laches could be asserted if the Government is prejudiced by a delay." *Id.* That approach worked. *See, e.g.*, *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1338 (10th Cir. 1982) (citing cases).

Nevertheless, starting in the 1980s, lower courts hearing APA pre-enforcement actions began—largely without explanation—to look not to principles of equity as this Court had instructed, but to the Little Tucker Act's statute of limitations. In its current incarnation, that Act provides that "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." 28 U.S.C. § 2401(a).

A "claim or right to bring a civil action against the United States" under Section 2401(a) "accrues" at the point when it is legally actionable—when it "matures"—and not before, as this Court explicitly held in *Crown Coat Front Co. v. United States*, 386 U.S. 503, 514 (1967).

Despite this, several lower courts have held that for APA claims (but no other claims), Section 2401(a)'s time limit should run from the date of final agency action. Their explanation: "liability is fixed, and plaintiffs have a complete and present cause of action[,] upon publication of the final agency action," even if the individual plaintiff was not in fact injured or did not even exist at that time. App. 12. These courts justified their approach as a matter of policy without reference to the text of the statute. Their rule, they said, purportedly "strikes the correct balance between the government's interest in finality and a challenger's interest in contesting an agency's alleged overreaching." *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991).

This whole enterprise was wrong. As we explain below, this Court got these questions right back in 1967: (1) The original meaning of "accrue" is the one this Court adhered to in *Crown Coat Front Co.*; and (2) *Abbott Labs* was correct that the proper way of addressing delay in garden-variety APA declaratory actions is through laches, not any statute of limitations.

This second point is especially important because both Petitioner and the government get it wrong. Many declaratory suits under Section 702 of the APA are "officer suits," *not* suits "against the United States." When the Tucker Act was enacted, and when Section 2401(a) was recodified, suits against officers committing legal wrongs were not considered suits against the sovereign. The Tucker Act's meaning was fixed at the time of its enactment, so that remains true today as well.

The parties have not disputed that Petitioner's suit is one "against the United States." So the Court need not definitively interpret the meaning of that phrase to decide this case. But the Court should not prejudge the issue by assuming that all APA claims are necessarily "against the United States." Rather, at the very least, the Court should make clear that question remains open for another case, another day.

* * *

Amici agree with Petitioner on the bottom line. The Eighth Circuit transmogrified a statute of limitations into a statute of repose, contrary to its plain text. This Court should reverse.

BACKGROUND

The provision now known as Section 2401(a) originated in the 1887 Tucker Act, "which waived some of the federal government's sovereign immunity, authorizing a range of private-party lawsuits against the government for money damages and other relief." *Herr v. U.S. Forest Service*, 803 F.3d 809, 815 (6th Cir. 2015) (Sutton, J.). The Tucker Act vested original jurisdiction in a "Court of Claims" for several types of claims where "the party would be entitled to redress against the United States . . . if the United States were suable." Tucker Act, § 1, 24 Stat. 505, 505 (1887). Section 2, known as the Little Tucker Act, vested "concurrent jurisdiction" for the same types of claims in district and circuit courts, as long as the claims did not exceed a certain monetary amount. *Id.* § 2. The Tucker Act's grant of jurisdiction was, however, subject to a limiting proviso: "*Provided*, That no suit against the Government of the United States, shall be

allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made." Tucker Act, § 1, 24 Stat. at 505. The 1887 proviso was limited to suits "under" the Tucker Act, and the clock began to run only after a particular claim of right "accrued."

"In 1911, Congress reorganized several statutes regulating federal-court procedure. In the process, it created new, separate statutes of limitations for the Big and Little Tucker Acts." *Herr*, 803 F.3d at 816 (citation omitted). The 1911 Act again vested district courts with concurrent jurisdiction over certain types of small-dollar claims that could be brought against the United States "if the United States were suable," and included the same limiting proviso for suits brought "under this paragraph." Act of March 3, 1911, § 24, 36 Stat. 1087, 1093.

The last change happened when the statute was recodified in 1948. *See* Kendrick, *supra* at 193–95. That year, Congress divorced the Little Tucker Act from the statute of limitations and recodified the latter in its current home. Act of June 25, 1948, §§ 1346, 2401(a), 62 Stat. 869, 933, 971. As enacted in 1948, the statute of limitations is not limited to claims brought "under" the Tucker Act. Instead, it reads "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." 28 U.S.C. § 2401(a). The statute, is, therefore, no longer limited to suits brought under the Little Tucker Act. It is still, however, limited to civil actions "against the United States."

ARGUMENT

I. The Eighth Circuit's Decision Contradicts the Text of Section 2401(a)

The question presented is resolved through straightforward statutory interpretation. Section 2401(a) is a statute of limitations, not one of repose, and thus its time limit begins to run when the plaintiff is first injured and their right to sue accrues, not before. This plaintiff-focused understanding of accrual is reflected in cases and commentary from the time the statute was enacted. It is also reflected in this Court's precedents, including a case interpreting Section 2401(a).

In contrast, the government would have claims accrue for the public at large. That novel, collectivist approach contradicts the text of Section 2401(a). The government's approach also contradicts the APA's text, the APA's strong presumption of judicial review, and, most fundamentally, the constitutional role of federal courts in resolving individual cases and controversies.

A. Section 2401(a) is a Statute of Limitations, Not a Statute of Repose

Statutes of limitations and statutes of repose are distinct types of time limits on legal claims. A statute of limitations sets a time limit based on the date when the plaintiff's claim accrued. *Statute of Limitations*, Black's Law Dictionary (11th ed. 2019). "Accrue" in turn means "to come into existence as an enforceable claim or right; to arise." *Accrue*, Black's Law Dictionary (11th ed. 2019). When a claim accrues, it

"becomes a piece of intangible personal property" belonging to the potential plaintiff. *Herr*, 803 F.3d at 821 (quotation marks omitted). That means accrual occurs only once the plaintiff "can file suit and obtain relief." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014). In contrast, statutes of repose set a different type of time limit, "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." *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014) (emphasis added). Thus, a repose time limit may expire "before the plaintiff has suffered a resulting injury." *Id.* (quotation marks omitted).

Section 2401(a) is and always has been a statute of limitations—a time limit based on claim accrual to a particular plaintiff, beginning when "the right of action first accrues."

B. When Congress Enacted Section 2401(a)'s Predecessor, Claims Could Not Accrue Until the Plaintiff Was Capable of Suing

For over a century, courts and legal commentators have understood that claims cannot accrue under a statute of limitations until the particular individual plaintiff is capable of suing.

"Words must be given the meaning they had when the text was adopted." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012). When Section 2401(a)'s predecessor was enacted, "accrue" meant exactly what it means today: "to arise, to happen, to come into force or existence." *Accrue*, Black's Law Dictionary (1st ed. 1891) (emphasis omitted). As stated by the leading

contemporary treatise: "the uniform result of the cases decided on the statute of limitations" was "that it does not deprive a party of his remedy, unless he has been guilty of the laches or default contemplated therein." H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* 11 (1883). Wood supported this plaintiff-focused understanding of accrual with an analysis of hundreds of cases in various areas of the law. *See* Kendrick, *supra* at 181–85. A later (1903) treatise took the same approach. John Kelly's *Treatise on the Code Limitations of Actions* had an entire chapter on "When the Cause of Action Accrues." That began:

> The cause of action accrues at the time the party is entitled to sue, demand relief, or make the entry. . . . it is logical that the cause accrue when the party has been "hurt" and not when the other party has violated the contract or the law, unless both concur, because there are cases where the breach or the wrong did not cause the "hurt."

John F. Kelly, *A Treatise on the Code Limitations of Actions Under All State Codes* 91 (1903).

Courts also took a plaintiff-focused interpretation of accrual in cases against government officials violating their public duties—analogous to modern APA claims. Such claims accrued only once the plaintiff had a legal right to sue. *See* Kendrick, *supra* at 185–89.[2] For example, in *Bank of Hartford County v. Waterman*, a bank sued a sheriff for improperly

---

[2] *See also* Annotation, *When Statute of Limitation Commences to Run Against an Action Based on Breach of Duty by Recording Officer*, 110 A.L.R. 1067 (1937).

attaching a debtor's property. 26 Conn. 324, 325–26 (Conn. 1857). The court held that the bank's claim against the sheriff accrued only when the bank became entitled to that property, not when the sheriff had earlier made the mistake. There, the "consequences"—inability to obtain the property to which the bank had a legal right—were "an indispensable element of the injury itself, and must therefore themselves fix, or may fix, the period when the statute of limitations shall commence to run." *Id.* at 331. The court's decision was dictated by common sense: "Authorities can hardly strengthen a proposition so manifestly just. If we are wrong, some strictly legal injuries might never for a moment be capable of redress." *Id.* at 331–32. A later passage foreshadows this case:

> [W]here the duty is of a public nature, there is no direct relation between the public officer and the party in whose behalf the duty is to be performed. . . . The duty violated is primarily a duty to the public; the violation is therefore unlawful; and when its consequences are the invasion of an individual right, (and then only,) it becomes a proper subject of redress by him.

Id. at 336. *Waterman*, and the cases like it, show that, even for claims arising out of failure to perform public duties, courts took a plaintiff-focused approach to accrual.

C. This Court's Precedents Support a Plaintiff-Focused Interpretation of Section 2401(a)

In keeping with this original understanding, this Court has consistently interpreted statutes of limitations to run from the time the plaintiff may sue.

Start with a case decided the same year the Tucker Act was enacted. In *Rice v. United States*, the Court noted in *dicta* that "[a] claim first accrues, within the meaning of the statute, when a suit may first be brought upon it, and from that day the six-years limitation begins to run." 122 U.S. 611, 617 (1887).

Later cases are of a piece. Most notably, in *Crown Coat Front Co.* the Court interpreted Section 2401(a) as applied to a contract claim. The Court unanimously held that the claim "accrued" against the United States only once the plaintiff could sue. 386 U.S. at 510–11. There, the plaintiff could not sue—and therefore its claim did not accrue—until it had exhausted the applicable administrative appeal process. *Id.* at 512.

The Court has also adopted a plaintiff-focused accrual rule when interpreting other statutes of limitations.[3] And it has repeatedly called this approach "the standard rule." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545

---

[3] *See generally* Kendrick, *supra* at 201–02 (discussing *United States v. Kubrick*, 444 U.S. 111, 113 (1979); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 200–01 (1997); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002)).

U.S. 409, 418 (2005) ("We have repeatedly recognized that Congress legislates against the standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." (quotations marks omitted)); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring in the judgment) ("Absent other indication, a statute of limitations begins to run at the time the plaintiff has the right to apply to the court for relief." (cleaned up)) (collecting cases).

D. The "Majority Rule" is Incoherent

The text and precedent just discussed are not new, nor are they secret. And, as this Court has repeatedly reminded the lower courts, "[i]f the statutory language is plain, the Court must enforce it according to its terms." *King v. Burwell*, 576 U.S. 473, 474 (2015). It is therefore more than a little odd that only the Sixth Circuit has followed the statute's text. Even more puzzling is that the courts who have taken the opposite approach do not ever engage with that text. For example, in the decision below, the Eighth Circuit chided the Sixth for failing to "distinguish between as-applied and facial challenges." App. 10. But Section 2401(a) does not distinguish between them either.

Whence comes the majority rule, then? As best we can tell, it arose at least in part because of an unstated assumption that "facial" APA challenges against a rule are a special kind of private attorney general proceeding against the government, such that—as the Eighth Circuit put it—"liability is fixed and plaintiffs have a complete and present cause of action upon publication of the final agency action,"

even if the plaintiff actually bringing the case was not harmed at that time or—as here—did not even exist. App. 12.

The APA does not work this way. By emphasizing that a "person suffering legal wrong because of agency action . . . is entitled to judicial review," Section 702 of the APA recognized the pre-existing entitlement to so-called "nonstatutory" review for private legal injuries. 5 U.S.C. § 702; *see also* Caleb Nelson, *"Standing" and Remedial Rights in Administrative Law*, 105 Va. L. Rev. 703, 727 (2019) ("Scholars largely agree that rather than expanding judicial review . . . Section 10(a) of the APA was simply meant to codify existing doctrines and to accommodate the variety of forms of review that were already in use."). And the APA left actual "special statutory review" proceedings as it found them. 5 U.S.C. § 703. Suits under the APA may follow "any applicable form of legal action, including actions for declaratory judgments." But in all suits, an individual must first suffer a "legal wrong," or else, be "adversely affected or aggrieved within the meaning of a relevant statute." *Id.* § 702. No injury, no lawsuit.

After all, even—and perhaps *especially*—in cases of official wrongdoing, "the province of the court is, solely, to decide on the rights of individuals." *Marbury v. Madison*, 5 U.S. 137, 170 (1803). Anything else would be incompatible with the "Cases" and "Controversies" requirement of Article III. U.S. Const. art. III, § 2. Collective accrual of rights of action, even for persons that never had a right to walk through the courthouse door, or did not even exist, is fundamentally inconsistent with this limited "province."

The Eighth Circuit's private attorney general modality, therefore, misunderstands Section 702 of the APA and federal jurisdiction under Article III to boot. Certainly, many questions of public interest to the Nation are adjudicated, and often permanently resolved, through APA challenges, but these must always be teed up through a real "case or controversy" involving a "legal wrong," or, at a minimum, an injury in fact that "adversely affect[s]" the person suing. 5 U.S.C. § 702.

This misunderstanding manifests itself in the way the courts following the majority rule have used the terms "facial" and "as applied." These words can have different meanings, depending on the context. Sometimes they just refer to which side of the "v." a party is on. *See, e.g.*, *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2060 (2019) (Kavanaugh, J., concurring) (distinguishing "facial, pre-enforcement challenges" from "as-applied challenge[s] to an agency's interpretation of a statute [raised] in an enforcement proceeding"). But more often the distinction refers to the scope of the remedy. *See United States v. Treasury Emps.*, 513 U.S. 454, 477–78 (1995) (contrasting "a facial challenge" with "a narrower remedy"). But the government—and the APA cases it cites—do not use facial and as-applied in either of these senses.[4] Instead, according to the government, a "facial challenge" here refers to an

[4] As the government never tires to explain, in its view, remedies under the APA are limited to "party-specific" relief, even when a plaintiff's "legal theory could suggest that the agency regulation is invalid in all of its applications and as applied to other parties too." *See* Transcript of Oral Argument 69, *United States v. Texas*, (No. 22-58).

"APA claim[ ] . . . unrelated to a particular plaintiff's circumstances," while an "as-applied" challenge arises "from application" or threatened application "of a pre-existing rule to a specific plaintiff." BIO 20.

The government's notion of a "facial challenge" is a null set. *All* APA challenges are "as applied" under the government's definition because the outcome of the case *always* turns on how the challenged standard applies to the particular circumstances of a plaintiff. As this Court has noted, even when a plaintiff brings a "facial challenge" under the APA, it must nevertheless show that the "application of the regulations by the Government will affect them." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492, 494 (2009) (emphasis omitted). The Court must always ask the question, "What's it to you?" Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 882 (1983).

To prevent continued confusion, the Court should explain that the "facial" and "as applied" labels are irrelevant to when a plaintiff's cause of action accrues. After all, when a statute "never mentions [the government's favored] test," there is "no statutory basis to impose it." *Sackett v. EPA*, 143 S. Ct. 1322, 1342 (2023).

E. The Policy Justifications for the Majority Rule Turn the APA Upside Down

Although the Eighth Circuit's opinion below doesn't explicitly offer any policy rationale, it relies on a long line of cases which appear to spring from *Wind River Mining Corp.*, 946 F.2d at 710; *see also*

Kendrick, *supra* at 170–79. There, the Ninth Circuit concluded that starting the clock at final agency action for APA challenges alleging "policy-based" errors, for example, "would make the most sense" because "grounds for such challenges will usually be apparent to any interested citizen within a six-year period following promulgation of the decision." *Wind River*, 946 F.2d at 715.

That court gave no textual defense of this position, but instead mused that its rule would "strike[ ] the correct balance between the government's interest in finality and a challenger's interest in contesting an agency's alleged overreaching." *Id.* "The government's interest in finality outweighs a late-comer's desire to protest the agency's action as a matter of policy." *Id.* In other words, according to *Wind River*, adhering to the text of Section 2401(a) would allow too much judicial review.

This gets things exactly backwards. As Petitioner explains (at 29–31), there is a strong presumption favoring judicial review of administrative action. *See Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)); *Abbott Labs*, 387 U.S. at 140 ("judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.").

Cutting off pre-enforcement review without any express statutory instruction would turn this presumption on its head, making many regulations more difficult to challenge than the statutes that

authorized those regulations in the first place. For some, perhaps, an "unbound executive," free from legal restraints and accountable only to the will of the people may be beguiling. *See generally* Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (2010). But this is not the system enacted in either our Constitution or in the APA. This Court should not countenance it.

II. Garden-Variety Pre-enforcement Suits Are Not Subject to Section 2401(a)

Setting aside the government's misinterpretation of Section 2401(a), there is a more fundamental problem with circuit precedent. Properly read, the statute does not apply to many pre-enforcement suits at all. Instead, as explained by *Abbott Labs*, such suits are governed by the equitable time limit of laches. Three reasons support this conclusion.

First, Section 2401(a) governs only suits "against the United States." It is a longstanding precept that officers violating public law and committing or threatening to commit a private wrong are not acting as agents of "the United States." *See Philadelphia Co. v. Stimson*, 223 U.S. 605, 619 (1912); *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 699 (1949). For this reason, these suits are not subject to Section 2401(a). They are instead subject to laches, as *Abbott Labs* explained. Courts that have concluded otherwise have impermissibly "updated" the statutory text or overlooked the question entirely.

Second, this reading of "United States" is reinforced by the term "right of action." In suits for pre-enforcement relief brought by regulated parties,

the plaintiff has no "right of action." Rather, the plaintiff is simply seeking to litigate an anticipatory defense in advance of *the government's* enforcement action. These plaintiffs are using the Declaratory Judgment Act and a traditional tool of equity known as an anti-suit injunction, not asserting a "right of action" as that term was understood in 1948, when it was introduced into Section 2401(a).

Third, all of this explains why, in 1967, this Court correctly explained that pre-enforcement suits for declaratory relief were subject to laches, not Section 2401(a). The Court should not depart from *Abbott Labs* and should correct lower courts' departure.

Though the parties have not raised this issue and the Court therefore need not decide it, the Court should at least make clear that this question remains open. The Court must not, however, decide that all suits under the APA are governed by Section 2401(a). That would be wrong.

A. The Term "United States" Does Not Embrace Traditional "Officer Suits"

Section 2401(a) does not, by its terms, apply to any defendant associated with the government. Instead, it applies only in a "civil action commenced against *the United States*." 28 U.S.C. § 2401(a) (emphasis added).

By using that precise term, Congress employed a well-known legal "term of art." *FAA v. Cooper*, 566 U.S. 284, 292 (2012). When the Little Tucker Act was enacted in 1887, and when the statute of limitations was later amended in 1948, a suit commenced against the "United States" was a suit naming the United

States as a party of record, or one in which the United States was considered an indispensable party to the suit because it was the real party in interest, typically because a judgment against the defendant would obligate public funds, command specific performance of a contract, or convey public property. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 29–32 (1963). As the Tucker Act put it, the United States was not "suable," unless Congress said otherwise. This immunity raises no constitutional concerns under Article III: matters implicating claims to the "money, lands, or other things" of the sovereign are not constitutionally committed to the judiciary. *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929).

When Congress used the loaded term "United States" in the Little Tucker Act, it did not depart from this legal usage. It did not, for example, use the term to embrace federal officers committing private wrongs without legal authority. Those suits were routine when the Tucker Act was enacted. As this Court put it: "The acts of all . . . 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).

Officer suits were routine because, unlike the "United States," officers committing private wrongs were suable, *i.e.*, not covered by sovereign immunity. *Philadelphia Co.*, 223 U.S. at 619. An officer who had committed, or had threatened to commit, a legal wrong, such as a trespass, was presumably regarded as a tortfeasor, and was liable at common law and

subject to courts' equity jurisdiction. *Ex parte Young*, 209 U.S. 123, 192 (1908).[5] The officer could, as an affirmative defense, argue that the sovereign was the real party by "produc[ing] a law . . . which constitutes his commission as its agent, and a warrant for his act." *Poindexter v. Greenhow*, 114 U.S. 270, 288 (1885). If the officer could not make that showing, however, then the officer stood "stripped of his official character," and had to answer to the courts, like anyone else. *Id.*

Less routine were suits against federal instrumentalities committing legal wrongs. But here again, not all suits against instrumentalities were against the United States. A case in point is *Sloan Shipyards Corp. v. U.S. Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549 (1922) (Holmes, J.). In that case, the Court considered whether a suit brought against a federal corporation exercising war powers delegated by the President "so far embodies the United States that these suits should have been brought in the Court of Claims." *Id.* at 564. There, a federal corporation "unlawfully took possession of the shipbuilder's property," forcing them to sign a new contract at a loss. *Id.* at 565. The shipbuilder sought a variety of equitable remedies, but the lower court dismissed the complaint on the ground that it was against the United States and so belonged exclusively in the

[5] Although *Ex Parte Young* involved state sovereign immunity, "the question whether a particular suit is one against the state, within the meaning of the constitution, must depend upon the same principles that determine whether a particular suit is one against the United States." *Tindal v. Wesley*, 167 U.S. 204, 213 (1897).

Court of Claims. *Id.*; *see also* Act of July 18, 1918, §§ 13, 14, 40 Stat. 913, 916.

This Court disagreed with this "dangerous departure from one of the first principles of our law": that all persons "are amenable to the law." *Sloan Shipyards Corp.*, 258 U.S. at 566–67. The Court treated the suit the same as one against "a single man," and held that the jurisdiction of the Court of Claims was not mandatory because "[t]he plaintiffs are not suing the United States but the Fleet Corporation." *Sloan Shipyards Corp.*, 258 U.S. at 567–68. In so holding, as relevant here, the Court understood the statutory term "United States" as a legal term of art no different from its use in sovereign immunity jurisprudence. That is how "United States" in Section 2401(a) should be read too.

The government's arguments compel that reading. The government insists that Section 2401(a) applies "exclusively against the United States," and thus "directly implicates the 'general proposition' that a condition to the waiver of sovereign immunity must be strictly construed." BIO 9 (cleaned up). That argument makes no sense unless the meaning of "the United States" in Section 2401(a) is coterminous with the scope of sovereign immunity. The government cannot have it both ways. If the term "United States" embraces officer suits not barred by sovereign immunity, then Section 2401(a) should not be "strictly construed."

So, why have courts overlooked the limited scope of Section 2401(a)? Today, the difference between officer suits and suits against the United States has largely fallen into desuetude. In 1976, Congress

amended the APA to waive federal sovereign immunity in suits for "relief other than money damages." 5 U.S.C. § 702. Parties may now name "the United States" as a party, not just officers. *Id.* The difference has also come under sustained attack from some scholars. *See, e.g.*, Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. Chi. L. Rev. 435 (1962).

It is perhaps for these reasons that modern courts have come to read Section 2401(a) as an all-purpose shield for official wrongdoing. For example, the Fifth Circuit admittedly ignored the contemporaneous meaning of the phrase "against the United States" in Section 2401(a) to avoid "reviv[ing] the technical complexities that Congress sought to eliminate in 1976." *Geyen v. Marsh*, 775 F.2d 1303, 1307 (5th Cir. 1985).[6] Because the law means today what it meant when it was enacted, however, Section 2401(a) does not apply to garden-variety officer suits seeking to redress a legal wrong.

B. The Term "Right of Action" Does Not Include Anticipatory Defenses Raised in Equity

Dovetailing with the above, Section 2401(a) speaks of a plaintiff's "right of action," which is—and was in 1948, when the term was introduced into the

---

[6] *See also Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988) (concluding without explanation that a suit seeking to enjoin an officer is "an action is against the United States"); *Wind River*, 946 F.2d at 713 (overlooking the question); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999) (same).

law—a legal term of art: more narrowly, a "present right to commence and maintain an action at law to enforce the payment or collection of a debt or demand," Ballentine's Law Dictionary (3d ed. 1969), or more broadly, "[a] remedial right affording redress for the infringement of a legal right," *id.*, or a "right that can be enforced by legal action; a chose in action," Black's Law Dictionary (11th ed. 2019).

This "right" or "chose" is most naturally understood in the traditional sense as referring to a personal property right "to bring an action to recover a debt, money, or thing." *Id.*; *accord Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 275 (2008). Anti-suit injunctions against government officials, or similar declaratory suits brought by regulated parties, by definition do not seek that kind of relief.

As Professor John Harrison has explained, in these cases, the plaintiff is not exercising a right to take possession of money or chattels, but is preemptively asserting an affirmative defense against the government's "right of action," often before such a right of action against that party even accrues to the government. *See* John Harrison, *Ex Parte Young*, 60 Stan. L. Rev. 989 (2008).

C. This Reading Harmonizes Section 2401(a)'s Scope with *Abbott Labs*

This takes us back to where this brief began: the Court's statement in *Abbott Labs* that, "because the declaratory judgment and injunctive remedies are equitable in nature," ordinary "equitable defenses may be interposed" and—specifically— the "defense of

laches could be asserted if the Government is prejudiced by a delay." 387 U.S. at 155.

This fits with the text of Section 2401(a) discussed above. It also honors the principle that "statutes of limitation are not controlling measures of equitable relief." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). This Court has recently "confirmed and restated this long-standing rule," holding "in broad terms" that laches "*cannot* be invoked" "in face of a statute of limitations enacted by Congress." *SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC*, 580 U.S. 328, 334, 340 (2017) (quoting *Petrella,* 572 U.S. at 679) (emphasis added). This is because "laches is a gap-filling doctrine, and where there is a statute of limitations, there is no gap to fill." *Id.* at 335.

By directing courts to look to laches, *Abbott Labs* was necessarily foreclosing reliance on any statute of limitations for pre-enforcement suits under the Declaratory Judgment Act and Section 702 of the APA. This is all the more striking because the Court was well aware of Section 2401(a), having decided *Crown Coat Front Co.* only six weeks before.

The *Abbott Labs* Court reached its conclusion because it perceived—correctly—that equitable remedies apply to equitable claims for declaratory relief. 387 U.S. at 155. The lower courts that departed from this approach some twenty years later did not acknowledge this issue or ever explain why *Abbott Labs* was wrong. Their approach should be rejected both because it is incompatible with the text of Section 2401(a) and with *Abbott Labs*.

CONCLUSION

This Court got it right in 1967 when it held that Section 2401(a) operates according to its plain text as an accrual-based statute of limitations. *Crown Coat Front Co.*, 386 U.S. at 514. This Court also got it right that same year when it explained in *Abbott Labs* that laches is the right defense to a plaintiff's unreasonable delay in seeking pre-enforcement relief. 387 U.S. at 155. This Court should reverse in an opinion congruent with both cases and the plain text of the APA and Section 2401(a).

November 20, 2023 Respectfully submitted,

/s/ Michael Buschbacher
MICHAEL BUSCHBACHER
Counsel of Record
JAMES R. CONDE
BOYDEN GRAY PLLC
801 17th St. NW, #350
Washington, DC 20006
(202) 955-0620
mbuschbacher@boydengray.com