No. 23-1059

In the Supreme Court of the United States

PETER WILLIAMS,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE U.S. COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8, petitioner Peter Williams respectfully files this supplemental brief on *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 2024 U.S. LEXIS 2885 (July 1, 2024) (No. 22-1008), which came out a week after Williams petitioned this Court to rehear the denial of his petition of a writ of *certiorari* based on *Harrow v. DOD*, 144 S.Ct. 1178 (2024). *Harrow* establishes the Clean Air Act's 60-day window for judicial review, 42 U.S.C. § 7607(b)(1), is not jurisdictional, contrary to the Court of Appeals' decision. The timeliness issues raised by *Corner Post* heighten the rationale for issuing a "GVR" to allow the Court of Appeals to analyze the Clean Air Act's 60-day window, now that this Court has reversed 40 years of Circuit precedent.[1] Because the Clean Air Act confines judicial review of most major Clean Air Act issues to the D.C. Circuit, 42 U.S.C. § 7607(b)(1); *Adamo Wrecking Co. v. U.S.,* 434 U.S. 275, 283-84 (1978), it is important for the Court of Appeals—and ultimately this Court—to address justiciability under a statute that reaches so many areas of the national economy. Because the issue was not addressed below, a grant-vacate-remand ("GVR") order would be appropriate.

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[1] *Natural Resources Defense Council v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981) (Hobbs Act); *Grp. Against Smog & Pollution, Inc. v. U.S. Envtl. Prot. Agency*, 665 F.2d 1284, 1290 n.45 (D.C. Cir. 1981) (Clean Air Act); *Edison Electric Institute v. EPA*, 996 F.2d 326, 331 (D.C. Cir. 1993) (Resource Conservation and Recovery Act); *Motor & Equipment Manufacturers Association v. EPA*, 142 F.3d 449, 460 (D.C. Cir. 1998) (Clean Air Act); *Am. Rd. & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1114 (D.C. Cir. 2009) (Clean Air Act); *Nat'l Mining Ass'n v. United States Dep't of the Interior*, 70 F.3d 1345, 1349-50 (D.C. Cir. 1995) (Surface Mining Control and Reclamation Act).

STATEMENT OF THE CASE

The factual and legal circumstances of Williams' administrative petition for reconsideration to the Environmental Protection Agency ("EPA") and the Clean Air Act context of that petition are unique and raise multiple important issues under the Court's *Corner Post* decision.

Factual Background

At best for EPA, this is a case of mistaken identity.[2] Although Williams expressly applied to enter EPA's new-market entrant in the hydrofluorocarbon ("HFC") allocation program as an unincorporated individual, EPA interpreted elements of his application—namely, his email's internet domain, a logo, and his trade name "New Era Group"—to mean that he applied as a defunct Georgia corporation—New Era Group, Inc.—that EPA viewed an ineligible for the program. Williams quickly petitioned EPA administratively through counsel to correct EPA's misunderstanding, but EPA has not acted on that petition (or on follow-up correspondence) in more than two years, costing Williams hundreds of thousands of dollars.

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[2] Williams has also introduced evidence that the EPA staff who decided against him and subsequently failed to act on his administrative petition for reconsideration were biased against him based on various unlawful criteria including his ethnicity, his advocating for communities of color in the challenged program, and his functioning as a whistleblower *vis-à-vis* EPA's implementation of the program at issue here. *Garcia v. Veneman*, 224 F.R.D. 8, 12 (D.D.C. 2004) ("a pattern of notice and refusal to correct can serve as proof of the intent element in [a] … discrimination case"). Williams thus argues in the alternative that EPA staff intentionally acted unlawfully.

EPA's denial of Williams' application meant that he did not receive HFC allocations in the initial 2022 year. When EPA issued its 2023 allocations without addressing Williams' pending administrative petition, Williams petitioned for review of that allocation as a constructive denial of his administrative petition. In seeking review, Williams cites new evidence and new circumstances, as well as argues that this challenge to EPA's initial denial of his initial application was not ripe when the Clean Air Act's initial 60-day window to challenge EPA's initial denial closed in June of 2022.

Legal Background

The Clean Air Act provides for judicial review within 60 days of certain EPA action:

> Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

42 U.S.C. § 7607(b)(1). This language is a variant of the review provisions of the Hobbs Act, which provides for review within a similar 60-day period: "Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344.

Prior to the Clean Air Act Amendments of 1977 and 1990, the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), governed petitions for review under the Clean Air Act. *Amoco Oil Co. v. EPA*, 501 F.2d 722, 731 (D.C. Cir. 1974); *Ethyl Corp. v. EPA*, 541

F.2d 1, 33-35 (D.C. Cir. 1976); *Nat'l Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 786 (D.C. Cir. 1976). The two rounds of amendments make Williams' legal issue relatively unique under the Clean Air Act, such that prior Clean Air Act decisions in the D.C. Circuit and this Court do not address the procedural context at issue here.

First, the 1977 amendments added a "mini-APA" to—and thus exempted certain APA provisions from—§ 307(d) for review of major Clean Air Act actions:

> The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies.

42 U.S.C. § 7607(d)(1). Because this mini-APA review applies to most major Clean Air Act programs and actions, *see* 42 U.S.C. § 7607(d)(1)(a)-(u) (listing the EPA actions subject to § 307(d)), there is little if any directly applicable precedent on how the APA applies to EPA action *outside* § 307(d).

Second, the 1990 amendments supplemented the review provisions to provide that filing a petition for administrative reconsideration would not extend the time within which to seek review:

> The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

42 U.S.C. § 7607(b)(1). This amendment abrogated *West Penn Power Co. v. United States Envtl. Prot. Agency*, 860 F.2d 581, 588 (3d Cir. 1988), which held that the Court of Appeals jurisdictionally *could not review* an otherwise final EPA action while a petition for administrative reconsideration was pending.

Significantly, the APA allows petitioning agencies to reconsider rules or orders. *See* 5 U.S.C. §§ 553(e), 555(b). Although those APA provisions do not apply to major EPA action subject to § 307(d), *see* 42 U.S.C. § 7607(d)(1), the mini-APA provisions of § 307(d) allow analogous processes. First, EPA must keep the record open for 30 days of its action to allow supplementing the record with materials that were not anticipated to be necessary to EPA's proposed action. 42 U.S.C. § 7607(d)(5). Second, for objections that were impractical to raise during the public-comment period, EPA must convene a reconsideration process for issues raised within the window for judicial review. 42 U.S.C. § 7607(d)(7)(B).

Under the APA provisions that apply *outside* § 307(d), an interested person seeking reconsideration of orders under 5 U.S.C. § 555(b) can review an agency's denial of an administrative petition for reconsideration that raises new evidence or new circumstances that were not available when the agency first acted. *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 284-85 (1987); *cf. Nat'l Labor Relations Bd. Union v. Fed. Labor Relations Auth.,* 834 F.2d 191, 195-96 (D.C. Cir. 1987) (similar for rules).

REASONS TO GRANT REHEARING

Corner Post bolsters the rationale for this Court to grant the writ of *certiorari*, summary vacate the Court

of Appeals' decision, and remand for reconsideration based on both *Harrow* and *Corner Post*.

I. *CORNER POST* CLARIFIED WHEN AN APA CLAIM ARISES.

Corner Post establishes that APA claims do not accrue until final agency action. Slip Op. 5-6 (citing 5 U.S.C. §§ 702, 704). That holding is relevant to Williams' administrative petition for reconsideration in two respects. First, unlike most Clean Air Act litigation, the APA applies to EPA's response to Williams' administrative petition. *Compare* 5 U.S.C. § 555(b) *with* 42 U.S.C. § 7607(d)(1). Second, while having the APA apply to the Clean Air Act is unique, a further unique aspect of Williams' case is that the EPA program at issue operates on an annual basis (*i.e.*, each new year provides a new final EPA action). *See* 42 U.S.C. § 7675(e)(2)(D)(i). As such, EPA's failure to grant his still-pending administrative petition for the new 2023 year at issue here constitutes final agency action. *See Friedman v. FAA*, 841 F.3d 537, 541-42 (D.C. Cir. 2016) ("practical effect" of inaction constitutes a "constructive denial"); *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) ("agency inaction may represent effectively final agency action that the agency has not frankly acknowledged"), *abrogated in part on other grounds*, PUB. L. NO. 101-549, § 707(f), 104 Stat. 2399, 2683 (1990). Thus, Williams could—as he did—seek review of EPA's constructive denial of his administrative petition when EPA failed to act on the administrative petition by the next annual distribution.

II. *CORNER POST* RAISES QUESTIONS OF TIMELINESS FOR THE COURT OF APPEALS TO ANSWER IN THE FIRST INSTANCE.

In *dicta*, *Corner Post* discusses the Hobbs Act's 60-day window as a statute or repose in contrast to the general statute of limitations in 28 U.S.C. § 2401(a). *See* Slip Op. 9-10. The lower courts—or this Court—will need to address how this *dicta* should apply not only to interpreting the Hobbs Act's 60-day window but also to interpreting the Clean Air Act's 60-day window.

Statutes of repose have an element of "speak now or forever hold your peace" to them, *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014) ("statute of repose … puts an outer limit on the right to bring a civil action"); *id.* at 17 ("'repose period is fixed and its expiration will not be delayed by estoppel or tolling'") (quoting 4 WRIGHT, FEDERAL PRACTICE & PROCEDURE §1056, at 240), but the lower courts have held that the Hobbs Act limitation does not run against agency actions not ripe for review. *Baltimore Gas & Elec. Co. v. ICC,* 672 F.2d 146, 149-50 (D.C. Cir. 1982). The D.C. Circuit has similarly interpreted the Clean Air Act. *Louisiana Envtl. Action Network v. Browner*, 87 F.3d 1379, 1385 (D.C. Cir. 1996). Courts will need to assess whether *Corner Post* limits that flexibility by deeming the Hobbs Act—and thus perhaps also § 307(b)(1) of the Clean Air Act—a statute of repose for comparison purposes.

For his part, Williams respectfully submits that *dicta* in *Corner Post* may not limit the administrative-law aspects of renewed review under the Hobbs Act or the Clean Air Act: "Statutes of repose effect a legislative judgment that a defendant should 'be free

from *liability* after the legislatively determined period of time.'" *CTS Corp.*, 573 U.S. at 9 (quoting 54 C.J.S., Limitations of Actions §7, at 24) (emphasis added). Renewed or deferred review under administrative-law principles differs inherently from delayed liability under tort, property, or contract law. Unlike liability, the administrative action measured against the Clean Air Act's 60-day window for review "is not instantly carved in stone" and agencies "must consider varying interpretations and the wisdom of [their] policy on a continuing basis." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 863-64 (1984), *overruled in part on other grounds*, *Loper Bright Enters. v. Raimondo*, 2024 U.S. LEXIS 2882, at *61-62 (June 28, 2024) (Nos. 22-451, 22-1219). The *Corner Post* discussion of the Hobbs Act as a statute or repose in *dicta* that might not require all claims to end on the sixty-first day.

Even if *Corner Post* limits the Hobbs Act, the Clean Air Act may have evolved differently through Congress. As compared to the Hobbs Act, judicial review under the Clean Air Act includes both the above-quoted favorable language for after-arising grounds and unfavorable language for reconsideration petitions' not altering the time for judicial review. *See* 42 U.S.C. § 7607(b)(1) (quoted *supra*). In *Olijato Chapter, Navajo Tribe v. Train,* 515 F.2d 654 (D.C. Cir. 1975) ("*Navajo Tribe*"), the D.C. Circuit addressed the interplay between § 553(e) and § 307(b)(1). There, the petitioner sought to challenge an EPA rule outside § 307(b)(1)'s window based on new information. The petitioner had filed suit in district court and, based on that court's determining it lacked jurisdiction, also filed a belated petition for review in the court of appeals. 515 F.2d at 658-59. *Navajo Tribe* held that—to present new information to EPA in a manner that

the court of appeals could review—petitioners first must petition EPA administratively under § 553(e). 515 F.2d at 666.

In broadening § 307(b)'s scope in the 1977 amendments, Congress ratified the *Navajo Tribe* approach. H.R. REP. 94-1175, 264 (1976); S. REP. 95-294, 323 (1977). In addition, Congress rejected *dicta* from *Investment Co. Inst. v. Bd. of Governors, Fed'l Reserve Sys.,* 551 F.2d 1270, 1280-81 (D.C. Cir. 1977), that would allow avoiding § 307(b)'s time bar for "an undefined legitimate excuse." S. REP. 95-294, at 322. By negative implication, Congress did not reject the *Investment Company* holding that such petitions are *required* for a party to challenge a rule that it lacked a ripe claim to challenge within the 60-day window. To the extent that *dicta* in *Corner Post* would narrow flexibility to reopen review under the Hobbs Act, the Courts of Appeals and ultimately this Court will need to determine whether that analysis also applies to the Clean Air Act.

Given this Court's role as "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005), the flexibility to reopen review or to present new information via a petition for reconsideration should be taken up—in the first instance—in the Court of Appeals. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (describing the GVR process).

CONCLUSION

The petition for rehearing should be granted and the case remanded for reconsideration under both *Harrow* and *Corner Post*.

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Respectfully submitted,

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