No. 22-1008

# In the Supreme Court of the United States

CORNER POST, INC., PETITIONER

*v.*

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's freestanding challenge to a rule adopted by the Board of Governors of the Federal Reserve System in 2011 was untimely under the six-year statute of limitations in 28 U.S.C. 2401(a) because petitioner had brought that challenge more than six years after the rule was adopted.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page



Statutes and regulations:

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 55 F.4th 634. The order of the district court (Pet. App. 16-40) is not published in the Federal Supplement but is available at 2022 WL 909317.

## JURISDICTION

The judgment of the court of appeals was entered on December 14, 2022. On March 8, 2023, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including April 13, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Administrative Procedure Act (APA), Pub. L. No. 89-554, 80 Stat. 392 (5 U.S.C. 551 *et seq.*, 701 *et seq.*),

authorizes "suit in a federal district court to obtain review of any 'final agency action for which there is no other adequate remedy in a court.'" *National Ass'n of Mfrs.* v. *Department of Def.*, 138 S. Ct. 617, 626 (2018) (quoting 5 U.S.C. 704). "Those suits generally must be filed within six years after the claim accrues," *id.* at 626-627, because of the general-purpose statute of limitations for claims against the United States. That provision states that, except in certain government-contracting disputes, civil actions against the United States are "barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. 2401(a).

2. This case involves an APA suit brought in 2021 to obtain judicial review of a regulation adopted in 2011 by the Board of Governors of the Federal Reserve System (Board). Pet. App. 1-4; see *Debit Card Interchange Fees and Routing*, 76 Fed. Reg. 43,394 (July 20, 2011).

The rule in question addresses certain fees charged in connection with the use of debit cards. When a consumer uses a debit card to make a purchase from a merchant, the merchant typically bears the cost of, *inter alia*, an "interchange fee" received by the bank that issued the debit card. 76 Fed. Reg. at 43,394 n.2, 43,396. The interchange fee "compensat[es] [the] issuer for its involvement" in the transaction. *Id.* at 43,394 n.2; see 15 U.S.C. 1693*o*-2(c)(8) (defining "interchange transaction fee"). Its amount is set by the networks, such as Visa and Mastercard, that process debit-card transactions. 76 Fed. Reg. at 43,396.

Until 2010, networks had complete discretion to determine the interchange-fee amount, as well as an incentive to increase that amount in order to compete for business from the issuing banks. See *NACS* v. *Board of Governors of Fed. Res. Sys.*, 746 F.3d 474, 479 (D.C. Cir.

2014), cert. denied, 574 U.S. 1121 (2015). Merchants had little power to resist rising interchange fees short of refusing to accept Visa and Mastercard debit cards altogether. *Ibid.* As a result, by 2009, the average interchange fee for all debit-card transactions had grown to 44 cents per transaction, or 1.15% of the average transaction amount. 76 Fed. Reg. at 43,397.

To address rising interchange fees, Congress enacted the "Durbin Amendment" as part of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376; see *NACS*, 746 F.3d at 479-480; Pet. App. 2. The amendment modified the Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, to require, *inter alia*, that "[t]he amount of any interchange transaction fee * * * be reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. 1693*o*-2(a)(2). The amendment also directed the Board to promulgate regulations implementing that requirement. 15 U.S.C. 1693*o*-2(a)(3)(A).

In late 2010, the Board issued a notice of proposed rulemaking. *Debit Card Interchange Fees and Routing*, 75 Fed. Reg. 81,722 (Dec. 28, 2010). The Board received thousands of comments on the proposed rule, including comments from issuers, networks, merchants, consumers, consumer advocates, trade associations, and Members of Congress. In July 2011, after evaluating those comments, the Board issued a final rule known as Regulation II. 76 Fed. Reg. 43,394. Regulation II capped the interchange fee at 21 cents per transaction, plus 0.05% of the transaction's value. *Id.* at 43,422; see 12 C.F.R. 235.3(b). Eligible issuers may also receive a one-cent addition known as the fraud-prevention adjustment. See 12 C.F.R. 235.4.

3. Shortly thereafter, several merchant groups, including NACS (formerly the National Association of Convenience Stores) and the National Retail Federation, brought an APA challenge to Regulation II in the United States District Court for the District of Columbia. Contending that the fee cap was too high, those plaintiffs alleged that Regulation II violated the Durbin Amendment and was arbitrary, capricious, and an abuse of discretion. See *NACS*, 746 F.3d at 481-482; 5 U.S.C. 706(2). As relevant here, the district court agreed with the merchant groups that the interchange-fee portion of Regulation II violated the APA, and held that the proper remedy was to vacate that portion of the rule (though the court stayed its judgment pending appeal). *NACS* v. *Board of Governors of Fed. Res. Sys.*, 958 F. Supp. 2d 85, 99, 115-116 (D.D.C. 2013); see Mem. Order, *NACS*, *supra*, No. 11-cv-2075 (Sept. 19, 2013) (granting stay pending appeal).

The D.C. Circuit reversed, holding that "the interchange fee rule generally rests on a reasonable interpretation of the statute." *NACS*, 746 F.3d at 493. The court did "remand one minor issue—the Board's treatment of so-called transactions-monitoring costs"—to the Board for further explanation. *Id.* at 477, 492-493. The court recognized, however, that "vacatur of the rule would be disruptive" because it "would lead to an entirely unregulated market, allowing the average interchange fee to once again reach or exceed 44 cents per transaction." *Id.* at 493. Anticipating that the Board might "well be able to articulate a sufficient explanation" on remand, the court determined that vacatur was unnecessary. *Ibid.* On remand, the Board issued an additional explanation of its reasoning on transactions-monitoring costs. See *Debit Card Interchange Fees and*

*Routing*, 80 Fed. Reg. 48,684 (Aug. 14, 2015) (Clarification). The plaintiffs that had previously challenged Regulation II did not challenge that explanation, and the rule has accordingly remained in effect for more than a decade.

4. a. In April 2021, the North Dakota Retail Association (NDRA) and the North Dakota Petroleum Marketers Association (NDPMA) filed a new APA suit challenging Regulation II in the United States District Court for the District of North Dakota. Pet. App. 18 n.2, 23-24. NDRA and NDPMA, which had both submitted comments in response to the Board's 2010 notice of proposed rulemaking, asserted claims "nearly identical to the claims" previously considered in *NACS*. *Id.* at 23; see *id.* at 14.

In July 2021, after the Board moved to dismiss based on the statute of limitations, NDRA and NDPMA amended their complaint to add petitioner, Corner Post, Inc., as a plaintiff. Pet. App. 3. Petitioner operates a truck stop and convenience store in Watford City, North Dakota, and is a member of both NDRA and NDPMA. *Id.* at 52-53. It incorporated on June 26, 2017, and commenced operations in March 2018. *Id.* at 52. Petitioner asserted the same claims and requested the same relief as NDRA and NDPMA. *Id.* at 84-85.

b. The district court granted the government's renewed motion to dismiss. Pet. App. 16-40.

The district court held, *inter alia*, that in an APA challenge to an agency regulation, Section 2401(a)'s six-year statute of limitations "begins to run on the publication date" of the regulation in the Federal Register. Pet. App. 32. The court concluded that, because Regulation II was published on July 20, 2011, "all facial challenges must have been brought before July 20, 2017."

*Ibid.* The court explained that, although Corner Post "did not exist as a legal entity until June 26, 2017," that fact had "no bearing on when the statute of limitations runs." *Id.* at 32-33. The court noted that Section 2401(a) would not foreclose challenges to "further [agency] action applying" Regulation II to a particular party, but pointed out that the challenge here is not of that nature. *Id.* at 35 n.8 (citation omitted).

c. The court of appeals affirmed. Pet. App. 1-15.

The court of appeals held that, "when plaintiffs bring a facial challenge to a final agency action, the right of action accrues, and the limitations period begins to run, upon publication of the regulation." Pet. App. 11.[1] Under that approach, "[f]or facial challenges, liability is fixed and plaintiffs have a complete and present cause of action upon publication of the final agency action." *Id.* at 12. The court observed that this result comported with its own precedent, *id.* at 11 (citing *Izaak Walton League of America, Inc.* v. *Kimbell*, 558 F.3d 751, 761 (8th Cir. 2009)), and with the decisions of other courts of appeals, *id.* at 7-11 (citing, *inter alia*, *Trafalgar Capital Assocs., Inc.* v. *Cuomo*, 159 F.3d 21, 34 (1st Cir. 1998), cert. denied, 527 U.S. 1035 (1999); *Wong* v. *Doar*, 571 F.3d 247, 263 (2d Cir. 2009); *Paucar* v. *Attorney Gen.*, 545 Fed. Appx. 121, 124 (3d Cir. 2013); *Outdoor Amusement Bus. Ass'n* v. *Department of Homeland Sec.*, 983 F.3d 671, 681-682 (4th Cir. 2020), cert. denied, 142 S. Ct. 425 (2021); *Dunn-McCampbell Royalty Interest, Inc.* v. *National Park Serv.*, 112 F.3d 1283, 1287

[1] The court of appeals used the term "facial challenge" to refer to a challenge to an agency's adoption of a generally applicable regulation, as distinct from an "as-applied" challenge brought with respect to an agency's application of an existing regulation to a particular party. See Pet. App. 10-11; Pet. 17.

(5th Cir. 1997); *Sierra Club* v. *Slater*, 120 F.3d 623, 631 (6th Cir. 1997); *Shiny Rock Mining Corp.* v. *United States*, 906 F.2d 1362, 1363 (9th Cir. 1990); *Center for Biological Diversity* v. *Hamilton*, 453 F.3d 1331, 1334-1335 (11th Cir. 2006) (per curiam); *Harris* v. *FAA*, 353 F.3d 1006, 1010 (D.C. Cir.), cert. denied, 543 U.S. 809 (2004); *Preminger* v. *Secretary of Veterans Affairs*, 498 F.3d 1265, 1272 (Fed. Cir. 2007), withdrawn and superseded on reh'g, 517 F.3d 1299 (Fed. Cir. 2008)).

In urging a later accrual date, the plaintiffs relied in part on *Herr* v. *United States Forest Service*, 803 F.3d 809 (2015), in which the Sixth Circuit found that a different accrual rule applied when the plaintiff "does not suffer any injury until *after* the agency's final action." Pet. App. 10 (quoting *Herr*, 803 F.3d at 820). The court of appeals observed, however, that while the *Herr* decision "did not distinguish between as-applied and facial challenges," *ibid.*, treating the two differently was consistent with the precedents of other circuits, see *id.* at 10-12. The court also rejected the plaintiffs' argument that "the statute of limitations renewed when the Board published the Clarification in 2015." *Id.* at 4. The court explained that "[t]he Clarification did nothing to change Regulation II, which remains the final agency action since its publication in 2011." *Id.* at 5.[2]

**ARGUMENT**

Petitioner contends (Pet. 20-31) that, under Section 2401(a), a newly incorporated entity has six years to file APA challenges against any pre-existing agency regulations that might affect its interests, regardless of how

[2] Petitioner does not seek review of the court of appeals' determination with respect to the 2015 Clarification. See Pet. i.

long ago those agency regulations were adopted and regardless of whether the agency has taken any steps to enforce the regulations against the newly incorporated entity. The court of appeals correctly rejected that contention, and its decision is consistent with other circuits' decisions concerning the time limits for pursuing facial challenges to agency rules. This case would in any event be a poor vehicle in which to address the question presented. The petition for a writ of certiorari should be denied.

1. a. Subject to certain exceptions, the APA establishes a cause of action to challenge "final agency action" that, as relevant here, is "arbitrary," "capricious," "in excess of statutory * * * authority," or "short of statutory right." 5 U.S.C. 704, 706(2)(A) and (C); see 5 U.S.C. 704 (providing that "final agency action for which there is no other adequate remedy in a court" is "subject to judicial review"). In order to qualify as final agency action subject to challenge under that cause of action, "two conditions must be satisfied." *Bennett* v. *Spear*, 520 U.S. 154, 177 (1997). "First, the action must mark the 'consummation' of the agency's decisionmaking process," rather than a "tentative or interlocutory" step. *Id.* at 177-178 (citation omitted). "And second, the action must be one by which 'rights or obligations [will] have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (citation omitted).

Accordingly, when an agency makes a final decision that determines legal rights or obligations, or that gives rise to legal consequences, the "right of action" established by the APA "accrues." 28 U.S.C. 2401(a). Under Section 2401(a), a challenger must then bring suit within six years, or its claim "shall be barred." *Ibid.*; see, *e.g.*, *Hardin* v. *Jackson*, 625 F.3d 739, 743 (D.C. Cir.

2010) ("Under this statute, a party challenging final agency action must commence his suit within six years after the right of action accrues and the 'right of action first accrues on the date of the final agency action.'") (quoting *Harris* v. *FAA*, 353 F.3d 1006, 1010 (D.C. Cir.), cert. denied, 543 U.S. 809 (2004)); see also *National Ass'n of Mfrs.* v. *Department of Def.*, 138 S. Ct. 617, 626-627 (2018) (applying 28 U.S.C. 2401(a) to APA claim). And because that time limit applies exclusively to suits "against the United States," 28 U.S.C. 2401(a), it directly implicates the "general proposition" that "'a condition to the waiver of sovereign immunity . . . must be strictly construed.'" *Wilkins* v. *United States*, 143 S. Ct. 870, 879 (2023) (citation omitted).

Under this approach, an APA challenge to an agency regulation "first accrues" when the regulation becomes final and therefore subject to judicial review, without regard to the circumstances of an individual plaintiff. That reading is supported by a limited tolling rule incorporated into Section 2401(a). The last sentence of Section 2401(a) states 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." 28 U.S.C. 2401(a). That language presupposes that a claim can "accrue[]" even while a specific potential plaintiff is subject to a "legal disability." *Ibid.* Petitioner's view of the statute, under which a claim cannot accrue until the plaintiff satisfies all legal prerequisites to suit (see Pet. 20, 22), is inconsistent with that premise.

NDRA and NDPMA filed this suit in April 2021, and petitioner was added as a plaintiff in July 2021, more than ten years after the Board finalized Regulation II.

See Pet. App. 3, 43. Section 2401(a) accordingly barred the suit from going forward. See *id.* at 4-15.

b. Petitioner contends (Pet. 21-25) that Section 1 of the APA, 5 U.S.C. 702, requires a different result. That argument is incorrect.

Under the first sentence of Section 702, a plaintiff must be "adversely affected or aggrieved" by final agency action in order to maintain an APA challenge to that action. 5 U.S.C. 702. A plaintiff thus "must establish that the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990) (citation and emphases omitted). "[T]his Court has often construed statutes of limitations to commence when the plaintiff is permitted to file suit." *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 106 (2013). Based on that line of authority, petitioner argues (Pet. 20-25) that the statute of limitations on a particular plaintiff's APA claim cannot begin to run until that plaintiff has been adversely affected or aggrieved within the meaning of Section 702.

Petitioner's argument reflects a misunderstanding of Section 702's role in the statutory scheme. As explained above, at least in the context of facial challenges to agency rules, a "right of action first accrues" within the meaning of Section 2401(a) when the relevant agency rule becomes final and thus reviewable under 5 U.S.C. 704. Section 702 performs the distinct function of identifying the class of persons who can sue at that time. Nothing in Section 702's text suggests that the provision is also intended to establish an alternative

deadline for filing suit in the (relatively uncommon) circumstance where a person who was not injured when the rule was promulgated becomes injured at a later date. To the contrary, Section 702's final sentence states that "[n]othing herein"—*i.e.*, nothing within Section 702—"affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702.

Section 702 therefore cannot delay the running of the statute of limitations once the other predicates to APA review are complete—*i.e.*, once the agency finalizes a decision that establishes legal rights or obligations. See *Bennett*, 520 U.S. at 177. At that point, affected parties have six years to bring suit in cases governed by Section 2401(a), as NACS and the National Retail Federation did with respect to Regulation II. See pp. 4-5, *supra*. But once the limitations period expires, plaintiffs cannot bring new challenges years or decades later on the ground that Section 702 precluded them from doing so at an earlier date.

c. The approach described above, which petitioner acknowledges (Pet. 13-16) has been applied in the lower courts for decades, is hardly anomalous. See Pet. App. 7-11 (collecting lower-court cases). In a variety of circumstances, Congress has established deadlines for suit that run from the defendant's allegedly unlawful conduct, without regard to any circumstances peculiar to the plaintiff. That choice generally reflects "practical considerations" that "require that the period should begin to run from [a] definitely ascertained" time, "rather than the uncertain time" that would result if commencement of the limitations period remained in the control of, or dependent upon, potential plaintiffs.

*Reading Co.* v. *Koons*, 271 U.S. 58, 64 (1926); see *id.* at 65 ("An interpretation of a statute purporting to set a definite limitation * * * which would, nevertheless, leave defendants subject indefinitely to actions for the wrong done, would, we think, defeat its obvious purpose.").

Such considerations are especially pronounced in the context of broadly applicable agency regulations. See, *e.g.*, *Coal River Energy, LLC* v. *Jewell*, 751 F.3d 659, 663 (D.C. Cir. 2014). A belated facial challenge to an agency rule may implicate the reliance interests not only of the agency involved, but also of other private parties (such as the networks whose interchange fees are governed by Regulation II) that have a practical stake in the rule's validity. It is therefore commonplace for Congress to provide that challenges to agency action are untimely if they are not brought within a specified period after the agency acts, even if a particular plaintiff did not yet have "a complete and present cause of action." Pet. 4 (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 201 (1997)).

Challenges under the Administrative Orders Review Act (Hobbs Act), ch. 1189, 64 Stat. 1129 (28 U.S.C. 2341 *et seq.*), for example, must be brought "within 60 days after * * * entry" of the order in question. 28 U.S.C. 2344. Challenges to certain standards adopted by the Environmental Protection Agency under the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, must be filed "within 120 days from the date of" the agency order. 33 U.S.C. 1369(b)(1). And as petitioner recognizes (Pet. 24), other administrative-review statutes contain "a whole host of similar time restrictions" that commence to run

upon the occurrence of specified agency actions, without regard to a particular plaintiff's capacity to sue at that time. See, *e.g.*, 12 U.S.C. 1848; 16 U.S.C. 7804(d)(1); 21 U.S.C. 348(g)(1); 29 U.S.C. 655(f); 39 U.S.C. 3663; 49 U.S.C. 30161(a). The existence of such limitations provisions disproves petitioner's assertion (Pet. 29) that applying an identical rule for APA claims would produce "absurd results."

Petitioner observes (Pet. 2, 25) that those other administrative-review statutes explicitly refer to the date of the agency action, while Section 2401(a) does not. But that difference simply reflects Section 2401(a)'s status as a "catch-all limit for non-tort actions against the United States." *Auction Co. of America* v. *FDIC*, 132 F.3d 746, 749 (D.C. Cir. 1997); see 28 U.S.C. 2401(a) (providing rule under which "every civil action commenced against the United States shall be barred," with one narrow exception). It therefore would make no sense for Section 2401(a) to specify the date of any particular type of agency action as the point at which its limitations period begins to run. Cf. *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 517 (1967) ("The Court has pointed out before * * * the hazards * * * in attempting to define for all purposes when a 'cause of action' first 'accrues.'"). Instead, Congress specified in the APA that the injury-or-aggrievement requirement in Section 702 would not "affect[] other limitations on judicial review." 5 U.S.C. 702. Because all of the other prerequisites to judicial review under the APA are necessarily satisfied on the date of the challenged agency action, that restriction ensures that the limitations period in Section 2401(a) begins to run on that date without any need for Section 2401(a) itself to refer to agency action.

d. Contrary to petitioner's contention (Pet. 26), interpreting the limitations period for APA challenges to operate in the same manner as the limitations periods applicable to other administrative-review provisions does not "improperly insulate[] agency actions from judicial review." Judicial review remains available in numerous ways. First, agency actions that affect significant numbers of individuals or businesses often face timely challenges by associations that represent their members' interests, as the 2011 suit by NACS, the National Retail Federation, and other merchant groups illustrates. See *NACS* v. *Board of Governors of Fed. Res. Sys.*, 746 F.3d 474, 480-481 (D.C. Cir. 2014), cert. denied, 574 U.S. 1121 (2015). There is no reason to believe that petitioner would have filed its own challenge if it had existed when *NACS* was proceeding. Petitioner did not even join *this* suit until the government moved to dismiss as untimely the claims brought by NDRA and NDPMA (of which petitioner was already a member), and petitioner ultimately pressed claims that were "nearly identical" to those asserted in *NACS* a decade earlier. Pet. App. 23.

Second, when an agency takes new final agency action, adversely affected parties may bring a timely APA challenge to that new action. That includes (but is not limited to) circumstances in which the agency applies an existing regulation to a plaintiff that chose not to challenge, or was unable to challenge, the rule when it was first adopted. See *Dunn-McCampbell Royalty Interest, Inc.* v. *National Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) (stating that cases allowing such challenges "do not create an exception from the general rule that the limitations period begins to run from the date of publication in the Federal Register," but "merely

stand for the proposition that an agency's application of a rule to a party creates a new, six-year cause of action to challenge * * * the agency's constitutional or statutory authority").

Third, entities like petitioner can pursue another course "set forth explicitly in the APA: a petition to the agency for rulemaking, denial of which must be justified by a statement of reasons, and can be appealed to the courts." *Auer* v. *Robbins*, 519 U.S. 452, 459 (1997) (citing 5 U.S.C. 553(e), 555(e), 702, 706).

Fourth, when an agency relies on a pre-existing regulation in "civil or criminal proceedings for judicial enforcement," the regulation is generally "subject to judicial review" in that proceeding even if the time for bringing a freestanding challenge has passed. 5 U.S.C. 703; see *PDR Network, LLC* v. *Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2062 (2019) (Kavanaugh, J., concurring in the judgment) (explaining that Congress ordinarily allows for "as-applied review in enforcement proceedings").

Those existing mechanisms provide ample opportunities for judicial review. Policy concerns about agencies engaging in "machinations to evade judicial scrutiny," Pet. 26, accordingly do not support petitioner's approach to Section 2401(a).

e. Indeed, to the extent policy considerations are relevant, the practical problems with petitioner's approach weigh against imputing it to Congress. See *California Pub. Emps.' Ret. Sys.* v. *ANZ Sec., Inc.*, 582 U.S. 497, 514 (2017) (rejecting a proffered interpretation of a particular statute of limitations in part because "[t]he limitless nature of [the] argument * * * reveals its implausibility").

As the district court observed, "[u]nder [petitioner's] theory, anytime an individual wanted to bring a facial challenge against an agency rule or regulation beyond the six-year statute of limitations, all a party would need to do is create a new entity that would be subject to the Rule." Pet. App. 35-36. That understanding "plainly contravenes the purpose of the statute of limitations," *id.* at 36, which is "to protect defendants against stale or unduly delayed claims," *Credit Suisse Sec. (USA) LLC* v. *Simmonds*, 566 U.S. 221, 227 (2012) (citation omitted) (describing "the general purpose of statutes of limitations").

Petitioner's rule would also present serious problems of judicial administration. The present suit was filed a decade after the Board adopted the challenged regulation, and petitioner's approach would allow for challenges to regulations that have been on the books for far longer—indeed, it has no logical stopping point. Under that approach, the passage of time between the challenged agency action and the filing of the complaint could make it difficult or impossible for an agency to assemble "the full administrative record that was before the Secretary at the time he made his decision," *Citizens to Pres. Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971), which ordinarily provides the basis for judicial review.

Moreover, if the statute of limitations on an APA claim began to run only when a particular plaintiff possessed a justiciable cause of action, courts could be forced to conduct retrospective analyses to determine when the plaintiff became "aggrieved" by the challenged action within the meaning of Section 702. To decide whether a conservation organization's challenge to the construction of a new dam was timely, for example,

a court might need to determine whether any of the organization's members had first formed "concrete plans" to "observe an animal species" threatened by construction of the dam more than six years before the suit was filed. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562, 564 (1992). "[C]ourts are not well suited" to that sort of "hypothetical *retrospective* ripeness analysis." *Commonwealth of Pa. Dep't of Pub. Welfare* v. *United States Dep't of Health & Human Servs.*, 101 F.3d 939, 945 (3d Cir. 1996) (Alito, J.). Routinely requiring such analyses "would wreak havoc with the congressional intention that repose be brought to final agency action." *Ibid.* (citation omitted).

2. Petitioner contends that the decision below implicates a "square, entrenched circuit split." Pet. 11 (emphasis omitted). That too is incorrect.

Petitioner recognizes (Pet. 13-16) that most courts of appeals to address the question presented have rejected petitioner's approach. See, *e.g.*, *California Sea Urchin Comm'n* v. *Bean*, 828 F.3d 1046, 1050 (9th Cir. 2016) (noting longstanding holdings that the applicable limitations period "runs from when the agency action becomes final and is published in the Federal Register" and "may run against a plaintiff even if it is not injured until more than six years after the relevant agency action became final"); *Hire Order Ltd.* v. *Marianos*, 698 F.3d 168, 170 (4th Cir. 2012) (rejecting argument that challenge to 1969 firearms regulation "did not accrue until [plaintiffs] became federally licensed firearms dealers in 2008"); *Harris*, 353 F.3d at 1012-1013 (D.C. Cir.) (holding that six-year statute of limitation started to run when the agency published its 1993 notice, "notwithstanding [plaintiffs'] pocketbooks did not feel it until years later"); *Dunn-McCampbell Royalty Interest,*

*Inc.*, 112 F.3d at 1287 (5th Cir.) ("On a facial challenge to a regulation, the limitations period begins to run when the agency publishes the regulation in the Federal Register."); see also *Odyssey Logistics & Tech. Corp.* v. *Iancu*, 959 F.3d 1104, 1111-1112 & n.5 (Fed. Cir. 2020) (observing that the Federal Circuit's rule for facial challenges "accords with" the consensus approach).

Petitioner argues that the Sixth Circuit's decision in *Herr* v. *United States Forest Service*, 803 F.3d 809 (2015), conflicts with the approach taken in other circuits, but that argument disregards the specific claim at issue in *Herr*. The claim there arose under the Michigan Wilderness Act of 1987, Pub. L. No. 100-184, 101 Stat. 1274, which authorizes the Forest Service to regulate motorboat use on Crooked Lake in Michigan's Upper Peninsula, "[s]ubject to valid existing rights." § 5, 101 Stat. 1275-1276. In 2006, the Forest Service added to its management plan for the region a provision that banned motorboat use on most of the lake, with an exception limited to boats using electric motors with less than four horsepower. *Herr*, 803 F.3d at 812. But the agency did not initially enforce that restriction against lakefront landowners, who had a state-law right to use "the entire surface of the lake for boating and sailing." *Id.* at 813.

In 2010, David and Pamela Herr purchased lakefront property at the site after being assured that the prior owner had been able to "boat[] 'on the entire surface of Crooked Lake without hindrance by the Forest Service.'" *Herr*, 803 F.3d at 813 (citation and emphasis omitted). They were initially permitted to use a Forest Service boat launch for their gas-powered motorboat. *Ibid.* But "[t]hings changed in 2013," when the Forest Service "informed the Herrs by letter" that it would

begin enforcing the 2006 restriction against lakefront landowners, apparently for the first time. *Ibid.*

The Herrs brought an APA challenge, asserting that the Forest Service's restrictions on motorboat use violated their "existing rights" as lakefront landowners under state law and seeking "to enjoin the Forest Service from enforcing the motorboat restriction against them." *Herr*, 803 F.3d at 813 (citation omitted). The Sixth Circuit held that the claim was timely, even though it implicated a policy the Forest Service had originally adopted more than six years earlier. *Id.* at 818-823. Emphasizing that "[d]ifferent legal wrongs give rise to different rights of action," the court explained that the specific "legal wrong" that formed the basis for the Herrs' suit was the Forest Service's "infringement of a property right in violation of the Michigan Wilderness Act." *Id.* at 820. That violation could not have occurred until the Herrs acquired lakefront property (with an accompanying state-law right to use the lake for boating) in 2010, and the court held that the statute of limitations on their claim accordingly could not have begun to run before then. *Ibid.*

Petitioner's challenge differs in fundamental respects from the *Herr* plaintiffs' claim. The *Herr* plaintiffs did not contend that the Forest Service's restrictions on motorboat use were facially invalid, only that they were invalid as applied to lakefront landowners. See *Herr*, 803 F.3d at 819. That conflict between agency policy and the landowners' state-law rights did not exist until 2013, when the agency first expressed its intent to enforce its motorboat restrictions against the Herrs. See *id.* at 813 ("Things changed in 2013."). Here, in contrast, the alleged legal wrong occurred in 2011, when the Board authorized interchange fees in

Regulation II that petitioner contends were higher than the Durbin Amendment permits. See Pet. App. 70-79 (amended complaint). While petitioner did not feel the *effects* of that regulation until 2017 or 2018, that delay was not attributable to any change in the Board's own conduct or policies. Rather, any violation the Board may have committed was complete in July 2011, and the statute of limitations accordingly started to run at that time. See pp. 8-17, *supra*.

As petitioner emphasizes (Pet. 12), the court in *Herr* identified the plaintiffs' acquisition of the relevant lakefront property, rather than the Forest Service's 2013 change in enforcement policy, as the event that triggered a new six-year period for filing suit. See *Herr*, 803 F.3d at 819. The Sixth Circuit also did not distinguish between APA claims (like the claim in *Herr*) that arise from application of a pre-existing rule to a specific plaintiff, and APA claims (like petitioner's) that present facial challenges unrelated to a particular plaintiff's circumstances. See Pet. App. 10. Other courts of appeals have consistently drawn that distinction, however, recognizing that the limitations period on as-applied challenges begins to run when the rule is applied to the plaintiff, while the period for bringing facial challenges begins to run when the rule is adopted. See *id.* at 10-11 (collecting cases from the Fourth, Fifth, Ninth, and D.C. Circuits). Because the Sixth Circuit in *Herr* had before it only an as-applied challenge for which the plaintiffs' status as lakefront landowners was crucial, it had no occasion to decide how Section 2401(a) would apply to a facial challenge. See *id.* at 9-10.

The court in *Herr* also stated that "[r]egulated parties may always assail a regulation as exceeding the

agency's statutory authority in enforcement proceedings against them," and that allowing the Herrs to pursue such a challenge "without waiting for enforcement proceedings" would "add[] only a modest wrinkle to this regime." 803 F.3d at 821-822. But petitioner is not a "[r]egulated part[y]" under Regulation II, *id.* at 821, which regulates issuers rather than merchants. See Pet. 29. For the same reason, there is no prospect that petitioner will ever be subject to "enforcement proceedings" under the regulation. *Herr*, 803 F.3d at 821. And while petitioner asserts that Regulation II "exceeds the Board's statutory authority" (Pet. 8), the substance of its challenge is that the Board should have restricted interchange fees *more stringently* than it did. See p. 5, *infra*.

3. Even if the question presented otherwise warranted review, this case would be a poor vehicle in which to address it.

a. This case involves an atypical fact-pattern in which petitioner joined a pre-existing suit filed by other plaintiffs whose own claims were untimely at the time the suit was commenced. Pet. App. 14-15. Even on petitioner's theory, this civil action as first filed in 2021 was time-barred because the original plaintiffs (NDRA and NDPMA) could have brought suit in 2011 when the Board adopted Regulation II. See *ibid.* Petitioner is a member of those plaintiff associations and joined the case only when the timeliness of their claims was contested, and all of the plaintiffs were represented below by the National Retail Federation, itself one of the challengers in the *NACS* litigation. See *id.* at 3, 52, 86. Petitioner's coordination with those related parties for the evident purpose of circumventing the limitations bar to

their own claims—and the preclusive effect of the decision in *NACS*—raises serious questions about the equity of considering petitioner's challenge. See *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 155 (1967) (observing that "equitable defenses may be interposed" in APA suits); cf. *Taylor* v. *Sturgell*, 553 U.S. 880, 895 (2008) ("[A] party bound by a judgment may not avoid its preclusive force by relitigating through a proxy.").

b. Some of the allegations in petitioner's complaint highlight the Board's failure to engage in *new* rulemaking during the years since Regulation II was adopted. The amended complaint alleges that, "[s]ince adopting Regulation II," the Board has "refuse[d] to revise the interchange fee" despite repeated meetings with "merchants and retailers" who "rais[ed] concerns about (and provid[ed] evidence of) how Regulation II's fee cap far exceeds covered issuers' average [authorization, clearance, or settlement] costs." Pet. App. 67 (emphasis omitted). The amended complaint also invokes reports issued by the Board in "2013, 2015, 2017, and 2019" as further evidence that Regulation II's authorized interchange fee is too high. *Id.* at 69. And in this Court, petitioner asserts (Pet. 7) that "[t]he Board has never explained how [the] fee cap" established by Regulation II is reasonable given the data the Board has gathered "since 2011."

None of those post-2011 considerations, however, provides a proper basis for challenging the agency's original adoption of Regulation II. See *Citizens to Pres. Overton Park, Inc.*, 401 U.S. at 420. If petitioner's current suit were allowed to go forward, the only question properly before the reviewing court would be whether the Board in 2011 acted reasonably given the infor-

mation in the administrative record at that time. Instead, "[t]he proper procedure for pursuit" of a claim that the agency has been "'capricious' not to conduct amendatory rulemaking" in light of intervening events is the one "set forth explicitly in the APA"—*i.e.*, seeking review of the agency's denial of a petition for rulemaking. *Auer*, 519 U.S. at 459.

That is particularly so given that the gravamen of petitioner's challenge is that the maximum interchange fee specified by Regulation II is too high. Having framed its challenge as one to the original adoption of Regulation II, petitioner has sought declaratory and injunctive relief "finding the standard for reasonable and proportional interchange fees in Regulation II * * * invalid and setting it aside." Pet. App. 85. But the immediate effect of such a remedy would be to leave interchange fees unregulated, potentially subjecting petitioner to higher fees than it currently pays. Given petitioner's view (Pet. 7) that interchange fees should be *more stringently* limited, the appropriate course is to petition the Board for a regulatory amendment reducing the cap on permissible interchange fees, see 5 U.S.C. 553(e), and to seek judicial review if the Board declines.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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