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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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November 13, 2023

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QUESTION PRESENTED

Petitioner Corner Post, Inc. is a convenience store and truck stop in North Dakota that first opened for business in 2018. In 2021, Corner Post sued the Board of Governors of the Federal Reserve System under the Administrative Procedure Act, challenging a Board rule adopted in 2011 that governs certain fees for debit-card transactions.

The Eighth Circuit held that Corner Post's APA claims were barred by 28 U.S.C. §2401(a)'s six-year statute of limitations. In so doing, it adopted the majority position in an acknowledged circuit split on when APA claims "first accrue[]" under §2401(a). The Eighth Circuit held that Corner Post's APA claims "first accrue[d]" when the Board issued the rule in 2011—even though Corner Post did not open for business until seven years later. As a result, the court held Corner Post's limitations period expired in 2017—a year before it opened for business. The court did not explain how Corner Post could have "suffer[ed] legal wrong" from or been "adversely affected or aggrieved by" the Board's rule—a predicate to stating an APA claim, 5 U.S.C. §702—before Corner Post accepted even one debit-card payment subject to the rule.

The question presented is: Does a plaintiff's APA claim "first accrue[]" under 28 U.S.C. §2401(a) when an agency issues a rule—regardless of whether that rule injures the plaintiff on that date (as the Eighth Circuit and five other circuits have held)—or when the rule first causes a plaintiff to "suffer[] legal wrong" or be "adversely affected or aggrieved," 5 U.S.C. §702 (as the Sixth Circuit has held)?

PARTIES TO THE PROCEEDING, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below are as follows:

Petitioner is Corner Post, Inc. It was a plaintiff in the district court and an appellant in the Eighth Circuit. The North Dakota Retail Association and the North Dakota Petroleum Marketers Association were also plaintiffs and appellants below, but they did not join the petition for a writ of certiorari.

Respondent is Board of Governors of the Federal Reserve System. It was defendant in the district court and appellee in the Eighth Circuit.

The corporate disclosure statement included in Corner Post's petition for a writ of certiorari remains accurate.

The related proceedings below are:

1) *N.D. Retail Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys.*, No. 1:21-cv-95 (D.N.D.) — Judgment entered on March 11, 2022; and

2) *N.D. Retail Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys.*, No. 22-1639 (8th Cir.) — Judgment entered on December 14, 2022.

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JURISDICTION

The Eighth Circuit issued its decision on December 14, 2022. On March 8, 2023, Justice Kavanaugh granted Corner Post's application to extend the time to file a petition for a writ of certiorari to April 13, 2023, *see* 22A783, and Corner Post filed its petition on that date. On September 29, 2023, this Court granted Corner Post's timely filed petition. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions involved are 28 U.S.C. §2401(a) and 5 U.S.C. §702:

28 U.S.C. §2401(a) states: "Except as provided by chapter 71 of title 41, 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."

5 U.S.C. §702 states: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

INTRODUCTION

Congress passed the Administrative Procedure Act to ensure that regulated parties can challenge unlawful regulations. Section 702 implements the APA's "'basic presumption of judicial review,'" *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S.Ct. 361, 370 (2018), by providing that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof," 5 U.S.C. §702.

Congress has paired §702's broad review with ample runway to sue. Any plaintiff can invoke §702 to challenge regulations "within six years after th[at] right of action first accrues." 28 U.S.C. §2401(a). Not surprisingly, however, agencies do not like this generous limitations period. So some agencies have thwarted it by convincing lower courts to incorrectly equate §2401(a)'s "accru[al]" date to the date of final agency action. In those courts, §2401(a)'s clock starts ticking for *everyone* the day the agency acts, no matter when that action first harms a particular plaintiff—even if that means starting the clock for entities that *do not exist*.

Those courts' holdings suffer from two problems: they "contradict[] the text of" §2401(a) and §702 "and Supreme Court precedent to boot." *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 819 (6th Cir. 2015). First, by its plain text, §2401(a)'s limitations period starts when a claim "first accrues"—and "'a right accrues when it comes into existence.'" *Gabelli v. SEC*, 568 U.S. 442, 448 (2013). Section 2401(a)'s accrual rule reflects "the

'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418 (2005). And "[u]nless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997). Second, this Court has already read §2401(a) to follow this standard rule: §2401(a)'s limitations period cannot start before a plaintiff is "legally entitled to ask the courts to adjudicate his claim" because that "result" is not "one that Congress intended." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 514-15 (1967).

Section 2401(a) works the same way for plaintiffs with APA claims. A would-be APA plaintiff who has not been harmed by final agency action lacks a "'complete and present'" APA cause of action, *Ferbar*, 522 U.S. at 21, because the Court has "interpreted §702 as requiring a litigant to show, at the outset of the case, that he is injured in fact by the agency action," *Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Newport News Shipbuilding & Dry Dock Co.,* 514 U.S. 122, 127 (1995). Section 2401(a)'s limitations period thus starts running for an APA plaintiff the day that the final regulation first harms that plaintiff. The court of appeals erred below by holding otherwise. This Court should reverse.

STATEMENT OF THE CASE

A. Section 2401(a) and the APA provide generous judicial review for plaintiffs harmed by unlawful agency action.

This case is about how 28 U.S.C. §2401(a)'s six-year statute of limitations applies to APA claims. Section 2401(a) 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." This limitations period is "the general statute of limitations governing actions against the United States." *United States v. Mottaz*, 476 U.S. 834, 838 (1986). In other words, any claim against the United States not subject to a limitations period specified by another statute must be brought within §2401(a)'s six-year period.

The APA's substantive provisions, in turn, appear in Title 5 of the U.S. Code. Relevant here, Congress created a cause of action in the APA for any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. §702. Because Congress passed the APA in 1946 without an APA-specific limitations period, APA claims under §702 are subject to §2401(a)'s six-year limitations period. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 118-19 (2018); *see also Kannikal v. Att'y Gen.*, 776 F.3d 146, 155 (3d Cir. 2015) (collecting cases).

Congress's choice to leave §702 claims subject to the long six-year limitations period contrasts with the extremely short time limits that Congress has imposed on review of other kinds of agency actions. For

instance, §2401(a)'s six-year limitations period dwarfs the 30-day and 60-day periods in some agencies' organic statutes and in the Administrative Orders Review Act (also known as the Hobbs Act). *See, e.g.*, 28 U.S.C. §2344 ("60 days"); 12 U.S.C. §1848 ("thirty days"). The event that starts §2401(a)'s limitations period running—when a claim "first accrues"—also varies markedly from the events that start those other, shorter limitations periods. Under the Hobbs Act, for example, "[a]ny party aggrieved by the final order may, within 60 days *after its entry*, file a petition to review." 28 U.S.C. §2344 (emphasis added). Other limitations periods similarly run from when a regulation is "promulgated," 29 U.S.C. §655(f), 16 U.S.C. §7804(d)(1); or from an order's "entry," 21 U.S.C. §348(g)(1); *see also* 39 U.S.C. §3663 (requiring a challenge be filed "within 30 days after [the] order or decision becomes final").

B. Debit-Card Interchange Fees, the Durbin Amendment, and Regulation II.

The statute-of-limitations question in this appeal does not turn on the merits of the underlying APA dispute. But Corner Post briefly summarizes that dispute to place the limitations question in context.

American merchants have no real choice but to accept debit cards as a form of payment. Pet.App.46-47. Debit-card transactions account for more than one of every three noncash transactions, with a cumulative annual value of roughly $3.1 trillion. Pet.App.44-45. But every time customers use a debit card, the merchant pays behind-the-scenes fees to move money from the customer's bank account to the merchant's

bank account. *See* Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43394, 43397 (July 20, 2011) ("Regulation II"); Pet.App.57. The largest of those fees is the "interchange fee," which merchants pay to an issuing bank for every swipe of every debit card. Pet.App.58.

Yet merchants and banks do not set interchange fees by negotiating with each other. Until 2010, interchange fees were set exclusively and unilaterally by the card network companies, such as Visa and Mastercard, that process the transactions. Pet.App.59. Those networks also competed for the banks' business by setting the interchange fees as high as possible; those fees were then paid by the merchants to the banks. Pet.App.59. This led unavoidably to a market breakdown. Between 1998 and 2006, those fees ballooned by 234%. Pet.App.58-59. All that time, merchants remained captive to whatever interchange fees the networks set to woo big banks. In 2009 alone, those fees totaled $16.2 billion. Pet.App.47.

Congress found this unacceptable. It sought to fix the problem in 2010 by passing the "Durbin Amendment" as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010). The Durbin Amendment instructs the Board of Governors of the Federal Reserve System to cap interchange fees for debit-card transactions at an amount that is "reasonable and proportional to the cost incurred by the [bank] issuer with respect to the transaction." 15 U.S.C. §1693o-2(a)(2). The general idea was to make debit cards more like checks, which move customers' money to merchants

with no transaction fees. *Id.* §1693o-2(a)(4)(A) (directing the Board to "consider the functional similarity between" debit cards and checks).

Congress specifically required the Board to "distinguish between" two types of costs when setting the fee cap. *Id.* §1693o-2(a)(4)(B). First, Congress mandated that the Board "shall" consider a bank's processing costs for a particular transaction, often called "ACS costs" (for "authorization, clearance, or settlement"). *Id.* §1693o-2(a)(4)(B)(i). Second, Congress mandated that the Board "shall not" consider "other costs incurred by an issuer which are not specific to a particular electronic debit transaction." *Id.* §1693o-2(a)(4)(B)(ii). Consistent with those mandates, the Board proposed a fee cap that included "only those costs that are specifically mentioned for consideration in the statute." Debit Card Interchange Fees and Routing, 75 Fed. Reg. 81722, 81734-35 (Dec. 28, 2010). Relying on "only those costs," the Board's proposed rule set the fee cap at 12 cents per transaction. *Id.* at 81737-38.

In response to overwhelming pressure by big banks, however, the Board incorporated in its final rule—called "Regulation II" (pronounced "eye-eye")—a third, nonstatutory category of allowable costs. Regulation II included four such nonstatutory costs: (1) fixed ACS costs, (2) transaction-monitoring costs, (3) an allowance for an issuer's fraud losses, and (4) network-processing fees. 76 Fed. Reg. at 43433-34. Including those nonstatutory costs allowed the Board to raise the final interchange-fee cap to 21 cents per transaction plus an *ad valorem* component of .05% of

the transaction's value—a total nearly double the proposed rule's 12-cent cap. *See* 76 Fed. Reg. at 43422. The Board's own data, moreover, show that big banks' average costs for processing debit-card transactions were just 5 cents in 2011 when the Board issued Regulation II. Pet.App.50-51. Since then, those costs have dropped to as low as 3.6 cents per transaction. Pet.App.50-51. With the allowable fee so high, big banks have made an average profit of between 16 cents and 17.4 cents on virtually every one of the tens of billions of debit-card transactions each year since 2011—or at least $7 billion per year in profits. Pet.App.45.

C. Proceedings Below

Petitioner Corner Post, Inc. is a truck stop and convenience store in Watford City, North Dakota. Pet.App.52. Incorporated in 2017, it first opened its doors in March 2018. Pet.App.53. That same month it first accepted debit-card payments and thus first started paying the Board's 21-cent interchange fee for every covered debit-card transaction. Pet.App.52-53. Since then, Corner Post has paid hundreds of thousands of dollars in debit-card fees. Pet.App.70.

In 2021—just over three years after opening for business—Corner Post joined other parties as a plaintiff in an APA suit challenging Regulation II in the U.S. District Court for the District of North Dakota. *See* Pet.App.52-54. Corner Post contends that the Board's 21-cent fee cap is not "reasonable and proportional to the cost" that banks "incu[r]" for each debit-card transaction. 15 U.S.C. §1693o-2(a)(2); *see*

Pet.App.79-84. Corner Post argues that the Board exceeded its statutory authority by basing the fee cap on four types of nonstatutory costs that Congress barred the Board from considering. Pet.App.79-84. Corner Post asked the district court to set aside Regulation II as exceeding the Board's authority and as arbitrary and capricious. Pet.App.84-85.[1]

The Board moved to dismiss Corner Post's claims as time barred under 28 U.S.C. §2401(a). The district court granted that motion, holding that "[t]he limitations period under 28 U.S.C. § 2401(a) for bringing a facial challenge to an agency action begins to run at the time of publication of the agency's action." Pet.App.33. That meant that Corner Post's statute of limitations expired in 2017—a year before Corner Post first opened its doors or accepted its first debit-card payment. Pet.App.38.

The Eighth Circuit affirmed. Pet.App.15. It acknowledged that it "ha[d] not explicitly addressed whether a plaintiff which comes into existence more than six years after the publication of a final agency

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[1] Other merchants challenged Regulation II in 2011. A federal district court vacated it, concluding that it was "quite clear that the statute did not allow the Board to consider the additional costs factored into the interchange fee standard." *NACS v. Bd. of Governors of the Fed. Rsrv. Sys.*, 958 F. Supp. 2d 85, 107, 114 (D.D.C. 2013). The court found that the "Board's interpretation is utterly indefensible" and "irreconcilable with the statute." *Id.* at 105-06. The D.C. Circuit reversed, even though it confirmed a defect in the rule and remanded to give the Board a chance to try to fix that defect. *NACS v. Bd. of Governors of the Fed. Rsrv. Sys.*, 746 F.3d 474 (D.C. Cir. 2014). This Court denied certiorari. 574 U.S. 1121 (2015).

action is barred from bringing an APA facial challenge to the agency action." Pet.App.7. It first looked to cases in "[o]ther circuit courts hold[ing] that APA claims accrue, and the statute of limitations begins to run, when an agency publishes the regulation." Pet.App.7-9 (collecting cases). It then contrasted those decisions with the Sixth Circuit's holding "that a challenge to an agency action first accrued upon injury to the plaintiff rather than publication of the agency action." Pet.App.9 (citing *Herr*, 803 F.3d at 822).

The panel ultimately disagreed with the Sixth Circuit and adopted a contrary view—shared by five other circuits—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. According to the Eighth Circuit, "liability is fixed and plaintiffs have a complete and present cause of action upon publication of the final agency action." Pet.App.12. Applying that rule, the court held Corner Post's claims time barred under §2401(a) because the Board issued Regulation II in July 2011 and Corner Post sued in 2021. Pet.App.12.

This Court granted Corner Post's petition for a writ of certiorari on September 29, 2023. Then, almost a month later, the Board issued a notice of proposed rulemaking that—for the first time since 2011—proposes changes to parts of Regulation II. *NPRM*, Debit Card Interchange Fees and Routing, Bd. of Governors of the Fed. Rsrv. Sys. (Oct. 25, 2023) (not yet published in the Federal Register), perma.cc/NAW4-SQTS. Though the NPRM proposes to lower the

amount of the cap, it expressly declines to revisit the unlawful *types of allowable costs* upon which the Board bases the cap. *See id.* at 6, 15-16, 48 n.82.

SUMMARY OF THE ARGUMENT

Section 2401(a) is a typical statute of limitations. Under it, the limitations period for claims against the United States starts running when the claim "first accrues." 28 U.S.C. §2401(a). This Court has interpreted those words several times in various contexts, and its holdings in those cases confirm that §2401(a) operates like a normal statute of limitations: An action "accrues" under it only "'when the plaintiff has a complete and present cause of action.'" *Gabelli v. SEC*, 568 U.S. 442, 448 (2013). In other words, §2401(a) follows the standard rule—its limitations period starts running only once a plaintiff can sue on his underlying claim.

Applying §2401(a)'s accrual rule to APA claims is straightforward. Plaintiffs have a cause of action under the APA only if they "suffer[] legal wrong because of agency action" or are "adversely affected or aggrieved by agency action." 5 U.S.C. §702. That language requires an APA plaintiff to show, "at the outset of the case, that he is injured in fact by agency action." *Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 127 (1995). From both of those valid premises, just one conclusion follows: §2401(a)'s limitations period for an APA claim under §702 starts running when final agency action injures a plaintiff. For at no point before then can a plaintiff challenge the agency action.

The government has no real textual rebuttal to that analysis. It argues that §2401(a)'s limitations period starts running for all APA plaintiffs the day a regulation is issued—including for those plaintiffs who are not yet injured or do not yet even exist. Under the government's rule, then, §2401(a)'s clock starts running for some plaintiffs (like Corner Post) before they can sue, or before they even exist. That is an "odd result" that the Court "will not infer … in the absence of any such indication in the statute." *Reiter v. Cooper*, 507 U.S. 258, 267 (1993). And Congress nowhere indicated in the text of §2401(a) or §702 that it intended that odd result. That is why neither the government nor the courts that have adopted the government's erroneous rule have focused on the statutes' text to justify their departure from the norm.

Instead, the government and those courts have focused largely on policy reasons to justify starting §2401(a)'s clock on the day final agency action occurred, no matter if the plaintiff was actually harmed (or even existed) on that day. Yet properly understood, policy runs against them. This Court has long said that the APA "embodies the basic presumption of judicial review." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 140 (1967). Section 2401(a)'s accrual-based limitations period furthers that goal: it gives plaintiffs six years to sue after they are first injured. The government's rule does the opposite: it closes judicial review even for parties whose challenges have not been adjudicated because they *could not* be adjudicated.

The government tries to ameliorate that harsh result with more policy-laden justifications. It contends

that APA plaintiffs who are foreclosed from filing facial §702 challenges still have other, indirect routes to judicial review. But each falls short of providing the judicial review promised by the APA. The fact that *other* plaintiffs may challenge the same agency action within six years, for example, is no reason to take away a later "person['s]" individual statutory right to do so when an agency action first injures that later plaintiff. 5 U.S.C. §702. Beyond that, the government has previously acknowledged that filing with the agency a petition to review the underlying rule—and then challenging the inevitable denial—does not guarantee adequate judicial review. And finally, forcing a plaintiff to "bet the farm" by intentionally violating a regulation—just to induce an enforcement proceeding to manufacture an "as-applied" challenge—is not something this Court has typically required of APA plaintiffs and would not even be possible here.

The government's remaining policy justifications all suffer from similar issues. At bottom, most stem from the purported practical problems of giving all regulated parties harmed by final agency action their day in court. Those practical problems are all illusory or unfounded on their own terms. But even if they were not, "pleas of administrative inconvenience ... never 'justify departing from the statute's clear text.'" *Niz-Chavez v. Garland*, 141 S.Ct. 1474, 1485 (2021). And the statutes' text here is clear. Section 2401(a)'s clock starts for §702 claims when final agency action first harms the plaintiff—no sooner. The Court should reverse the judgment below holding otherwise.

ARGUMENT

I. The statute of limitations for APA claims starts to run as soon as—but not before—a plaintiff can first sue under §702.

Fifty years of this Court's precedent confirms two premises compelling the conclusion that Corner Post's suit is timely. *First*, under §2401(a)'s plain text, the six-year limitations period starts when a claim "first accrues," which means "'the limitations period commences when the plaintiff has a complete and present cause of action.'" *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson,* 545 U.S. 409, 418 (2005). *Second*, an APA plaintiff has a complete and present cause of action under 5 U.S.C. §702 only once he can "show, at the outset of the case, that he is injured in fact by agency action." *Newport News,* 514 U.S. at 127. It necessarily follows that §2401(a)'s limitations period starts to run for APA claims under §702 only once final agency action injures the plaintiff.

A. Section 2401(a) starts the clock for an APA claim under §702 only when final agency action injures the plaintiff.

1. Start with §2401(a)'s limitations period. "When interpreting limitations provisions, as always," the Court "'begin[s] by analyzing the statutory language.'" *Rotkiske v. Klemm*, 140 S.Ct. 355, 360 (2019). "If the words of a statute are unambiguous, this first step of the interpretive inquiry is [the Court's] last." *Id.*

Section §2401(a) states: "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) (emphasis added). "'In common parlance a right *accrues* when it comes into existence.'" *Gabelli*, 568 U.S. at 448 (emphasis added) (quoting *United States v. Lindsay*, 346 U.S. 568, 569 (1954)). That means "a claim accrues 'when the plaintiff has a complete and present cause of action.'" *Id.* (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)). In other words, "'an action *accrues* when the plaintiff has a right to commence it.'" *Id.* (quoting 1 A. Burrill, A Law Dictionary and Glossary 17 (1850)). "And that definition appears in dictionaries from the 19th century up until today." *Id.*; *see Accrue*, Black's Law Dictionary (4th ed. 1951) ("A cause of action 'accrues' when a suit may be maintained thereon. … Cause of action 'accrues,' on date that damage is sustained and not date when causes are set in motion which ultimately produce injury."). Under §2401(a)'s plain text, then, a limitations period for a claim starts to run when a plaintiff can sue on that claim. *See* 1 H. Wood, Limitations of Actions at Law and in Equity §117, p.613-14 (4th ed. 1916) ("[T]here must be in existence a party to sue and be sued, or the statute does not attach thereto.").

Background interpretive principles confirm that conclusion. This Court presumes "that the limitations period commences when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997). And "[u]nless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and

obtain relief." *Id.* The Court has "repeatedly recognized that Congress legislates against th[is] 'standard rule.'" *Graham Cnty.*, 545 U.S. at 409.

This Court also frowns on the strange notion that a claim's accrual can be split into separate pieces—one date for starting a limitations period and another date for filing suit. Though "it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing a suit," this Court "will not infer such an odd result in the absence of any such indication in the statute." *Reiter*, 507 U.S. at 267; *see also Johnson v. United States*, 544 U.S. 295, 305 (2005) (calling it "highly doubtful" that Congress would intend a statute of limitations to expire before the claim arose).

Thus, the notion that a "limitations period commences at a time when the [plaintiff] could not yet file suit … is inconsistent with basic limitations principles." *Ferbar*, 522 U.S. at 200. Every member of this Court who has addressed this issue in the last 20 years agrees with this standard rule. *See, e.g.*, *Rotkiske*, 140 S.Ct. at 360; *Ferbar*, 522 U.S. at 200-05; *Reiter*, 507 U.S. at 267-70; *TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring in the judgment) ("This is unquestionably the traditional rule: 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.'"). Some members of this Court have even concluded that "it is so unlikely that

a legislature would actually intend such an anomalous design"—"that the limitations period begins to run before the cause of action accrues"—that courts should "presume that the anomaly was the product of a drafting error absent evidence" from Congress to the contrary. *Dodd v. United States*, 545 U.S. 353, 362 n.1 (2005) (Stevens, J., dissenting); *see also Graham Cnty.*, 545 U.S. at 423 (Breyer, J., dissenting) ("[I]t is unusual to find a statute of limitations keyed not to the time of the plaintiff's injury, but to other related events.").

In fact, this Court long ago read §2401(a) to follow the standard rule. In *Crown Coat Front Co. v. United States*, 386 U.S. 503, 511 (1967), the Court held that §2401(a)'s limitations period could not start running before a plaintiff could file suit to challenge an agency's rejection of an equitable contract adjustment. As the Court explained, "the 'right of action' of which § 2401(a) speaks is … the right to file a civil action in the courts against the United States." *Id.* The statute of limitations starts running, then, once a plaintiff's "right to bring a civil action against the United States matures." *Id.* at 514. Before that, the plaintiff "is not legally entitled to ask the courts to adjudicate his claim." *Id.* at 515.

"To hold that the six-year time period" starts running earlier, "as the Government insists, would have unfortunate impact" and could lead the plaintiff to "be barred from the courts by the time" he could sue. *Id.* at 514. "This is not an appealing result, nor in [the Court's] view, one that Congress intended." *Id.*

2. So when does a §702 claim first accrue? That section's plain text definitively answers that question: when a plaintiff "suffer[s] legal wrong because of agency action" or is "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. §702. Eliminating all doubt, this Court has already "interpreted §702 as requiring a litigant to show, *at the outset of the case*, that he is injured in fact by agency action." *Newport News*, 514 U.S. at 127 (emphasis added). It "requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). That means a party can "file suit and obtain relief" under §702, *Ferbar*, 522 U.S. at 201, only after a regulation harms it. As a result, §2401(a)'s statute of limitations cannot start until that time.

Or to put it in the Sixth Circuit's words, "[t]o file a lawsuit under the Administrative Procedure Act," "the challenged agency action" must have "caused [plaintiffs] to suffer a 'legal wrong' or 'adversely affected or aggrieved' them 'within the meaning of a relevant statute.'" *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 818 (6th Cir. 2015) (quoting 5 U.S.C. §702). The plaintiffs in *Herr* sued in 2014 to challenge a 2007 regulation restricting the use of motorboats on a lake abutting property they bought in 2010. *Id.* at 812-13. The Sixth Circuit held that they timely sued because §2401(a)'s six-year clock did not begin to run until 2010, when they "purchased their waterfront property" on the lake subject to the restrictions. *Id.* at 819. "If a party cannot plead a 'legal wrong' or an 'adverse effect,' it has no right of action" under the APA. *Id.* (cleaned up) (collecting cases). And the plaintiffs there

"could not have become 'aggrieved' by the Forest Service's invasion of [their] property right until they became property owners on the lake—until they purchased their waterfront real estate in September 2010." *Id.* Their statute of limitations thus started running in 2010, making their 2014 suit timely.

3. Because both premises are valid—(1) §2401(a)'s limitation period starts only when a plaintiff can sue, and (2) an APA plaintiff can sue under §702 only once final agency action actually harms it—just one conclusion can follow: §2401(a)'s six-year limitations period starts to run for §702 plaintiffs as soon as, but not before, they have been injured or aggrieved by a final agency action.

Applying that conclusion here is straightforward. The statute of limitations for Corner Post's APA challenge to Regulation II started running only when it accepted its first debit-card payment in March 2018. That was when Corner Post first paid Regulation II's interchange fee and became "adversely affected or aggrieved." 5 U.S.C. §702. Before then, Corner Post could not, "with honesty, make the necessary allegations to support an action for review." *Crown Coat*, 386 U.S. at 515. It could not have pleaded allegations showing that it was "injured in fact by agency action," *Newport News*, 514 U.S. at 127, or "satisfy … Article III's standing requirements," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). It didn't even exist to do so. Because §2401(a)'s six-year limitations period started running for Corner Post in March 2018, Corner Post's 2021 lawsuit was timely filed.

B. The government's contrary view flouts statutory text and this Court's precedent.

The government fights that conclusion by eliding basic interpretive principles and this Court's precedent. The government contends—and the Eighth Circuit agreed—that an APA "right of action accrues, and the limitations period beings to run, upon publication of the regulation." Pet.App.11. The Eighth Circuit applied that rule in this case even though Corner Post "[came] into existence more than six years after the publication" of Regulation II. Pet.App.7.

The government's proffered rule suffers from two fundamental problems: (1) it contravenes the text of §2401(a) and §702, along with this Court's established interpretive presumptions; and (2) Congress knows how to adopt a limitations rule like one the government wants but Congress has not done so for §702 claims.

1. Starting §2401(a)'s clock before a plaintiff can sue under §702 ignores those statutes' plain text and the standard limitations rule.

Start again with the statutory text. *Rotkiske*, 140 S.Ct. at 360. Under §2401(a), the limitations period begins to run when "the right of action first accrues." This Court has already said that "'common parlance'" dictates that "'a right accrues when it comes into existence.'" *Gabelli*, 568 U.S. at 448. And it said in *Crown Coat* that §2401(a)'s limitations period cannot start before a plaintiff is "legally entitled to ask the

courts to adjudicate his claim." 386 U.S. at 515. Yet the government asks for precisely that result here.

Neither the courts below nor the government in its briefing to those courts did much to reconcile their view with §2401(a)'s text. *See* Pet.App.7-12, 32-36; Board-CA8-Br. 25-27, 41-49; Board-MTD 14-20 (D.Ct. Dkt. 21). Instead, they based their view on a line of cases holding—based on little more than *ipse dixit* and circular citations—that "[a] cause of action governed by § 2401(a) accrues or begins to run at the time of 'final agency action.'" *Hire Ord. Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012); *see also* Pet.App.7-12, 32-36 (similar). Very little, if any, textual analysis appears in those cases. *See, e.g.*, *Dunn-McCampbell Royalty Int., Inc. v. NPS*, 112 F.3d 1283, 1287 (5th Cir. 1997) ("On a facial challenge to a regulation, the limitations period begins to run when the agency publishes the regulation in the Federal Register.").

Those cases err not just by misinterpreting §2401(a)'s text but also by conflating §702's two textual prerequisites to suit: (1) final agency action, *and* (2) the harm those final actions inflict on regulated parties. They assume that all relevant parties are injured the day a regulation is finalized. To be sure, many—perhaps even most—cases "involve[] settings in which the right of action happened to accrue at the same time that final agency action occurred, because the plaintiff either became aggrieved at that time or had already been injured." *Herr*, 803 F.3d at 819-20. But that is not always true because final agency action and harm are textually, logically, and analytically distinct concepts. Sometimes, "as here, the party

does not suffer any injury until *after* the agency's final action." *Id.* at 820. This conflation of claim accrual and final agency action is the most common mistake courts have made when reaching the same erroneous conclusion as the Eighth Circuit. *See, e.g.*, *Dunn-McCampbell*, 112 F.3d at 1287 ("the limitations period begins to run when the agency publishes the regulation in the Federal Register"); *Hire Ord.*, 698 F.3d at 170 ("When, as here, plaintiffs bring a facial challenge to an agency ruling … 'the limitations period begins to run when the agency publishes the regulation.'").

In its brief in opposition, the government tried to pivot from *ipse dixit* and adopt a new statutory argument. BIO.9. Even then, however, the government didn't focus on §2401(a)'s operative text but on the tolling provision in its next sentence: "The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." 28 U.S.C. §2401(a). Invoking that tolling provision, the government argues that "a claim can 'accrue[]' even while a specific potential plaintiff is subject to a 'legal disability.'" BIO.9. According to the government, that also means that a claim could accrue even if the plaintiff does not satisfy "all legal prerequisites to suit." *Id.*

Here again, this view conflates two distinct topics: accrual and tolling. Section 2401(a)'s second sentence tolls the statute of limitations; it provides no accrual rule. On the contrary, that sentence presupposes that the ordinary accrual applies; a person with a legal disability or who is outside the country at the time the claim *accrues* nevertheless has his limitations period

tolled until three years after those conditions cease. The government has acknowledged this distinction before. *See, e.g.*, *Macklin v. United States*, 300 F.3d 814, 823 (7th Cir. 2002) (recounting government's argument that §2401(a) does not allow "equitable tolling" because it already "contains a tolling provision that establishes special rules for those 'under legal disability or beyond the seas at the time the claim accrues'"); *see also Booth v. United States*, 914 F.3d 1199, 1206 (9th Cir. 2019) ("[T]he statute of limitations for non-tort claims brought against the United States, which is also found under §2401, does contain a tolling provision."). It's no surprise that the government has never before in this litigation highlighted the three-year tolling provision. It is unrelated to initial accrual.

But the text is just the start of the government's interpretive problems. The government wants "the limitations period" to "commence[] at a time when the [plaintiff] could not yet file suit." *Ferbar*, 522 U.S. at 200. That "is inconsistent with basic limitations principles," *id.*, and the Court "will not infer such an odd result in the absence of any such indication in the statute," *Reiter*, 507 U.S. at 267. Yet no such indication appears in §2401(a). Quite the opposite, as this Court has already confirmed: starting §2401(a)'s clock before a plaintiff can sue "is not an appealing result, nor in [the Court's] view, one that Congress intended." *Crown Coat*, 386 U.S. at 511. And the outcome would be the same even if §2401(a) were ambiguous. Where "there are two plausible constructions of a statute of limitations," the Court "adopt[s] the construction that

starts the time limit running when the cause of action … accrues." *Graham Cnty.*, 545 U.S. at 419. So even ambiguity (nonexistent here) cannot get the government what it wants.

The government tries to counter those presumptions by proffering one of its own. It contends that §2401(a) should be "strictly construed" because it implicates a "waiver of sovereign immunity" in suits against the United States. BIO.9. But the Court has already rejected this argument for the materially identical 28 U.S.C. §2501. *Franconia Assocs. v. United States*, 536 U.S. 129, 145 (2002).

Like its neighbor, §2501 also provides that a plaintiff must sue "within six years after such claim first accrues." *Franconia* noted that this shared language "is unexceptional" as many "state statutes of limitations applicable to suits between private parties also tie the commencement of the limitations period to the date a claim 'first accrues.'" *Id.* The Court therefore disagreed that §2501 "creates a special accrual rule for suits against the United States." *Id.* "In line with our recognition that limitations principles should generally apply to the Government 'in the same way that' they apply to private parties,'" the Court concluded that the government's position "presents an 'unduly restrictive' reading of the congressional waiver of sovereign immunity." *Id.* at 145 (cleaned up). There is no basis to treat the phrase "first accrues" in §2401(a) any differently.

2. Congress knows how to adopt a statutory deadline like one the government wants—but it did not do so in §2401(a).

The government has another textual problem. It effectively asks this Court to read §2401(a)'s accrual-based limitations period as either a filing deadline like the Hobbs Act—a statutory deadline that will cut off facial challenges to regulations more than six years old—or a statute of repose that cuts off *all* later challenges. But "[i]t is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'" *Rotkiske*, 140 S.Ct. at 360-61 (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 94 (2012)). "To do so 'is not a construction of a statute, but, in effect, an enlargement of it by the court.'" *Id.* at 361. That principle applies here because Congress could have made §702 claims subject to a filing deadline like the Hobbs Act or a statute of repose instead of a statute of limitations. It did not do so.

a. Consider first the Hobbs Act and similar statutes. The Hobbs Act "force[s] parties who want to challenge agency orders via facial, pre-enforcement challenges to do so promptly." *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S.Ct. 2051, 2059 (2019) (Kavanaugh, J., concurring in the judgment). Under the Hobbs Act, plaintiffs must seek review of an agency order "within 60 days after its entry." 28 U.S.C. §2344. Or consider the OSH Act's judicial-review provision for emergency temporary standards. *See, e.g.*, *NFIB v. OSHA*, 142 S.Ct. 661 (2022). Understandably, Congress wanted emergency measures to

be adjudicated quickly and so required lawsuits to be filed "prior to the sixtieth day" after an emergency standard is "promulgated." 29 U.S.C. §655(f). Or consider the Clean Water Act. Certain challenges against EPA's actions subject to the Clean Water Act's judicial-review provision "must be filed within 120 days after the date of the challenged action." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 118-19 (2018) (citing 33 U.S.C. §1369(b)(1)). Or consider a whole host of similar time restrictions that expressly key the time to sue from final agency action.[2]

APA challenges under §702 stand in stark contrast to all those types of claims. For §702 claims, Congress rejected a short filing period and instead imposed a six-year, accrual-based statute of limitations. 28 U.S.C. §2401(a). Congress could have chosen differently but it didn't. Its choice must control. *See Rotkiske*, 140 S.Ct. at 361.

Resisting that straightforward conclusion, the government contends that "[t]he existence of [these] limitations provisions" does not mean "that applying an identical rule for APA claims would produce 'absurd results.'" BIO.13. Yet it is absurd precisely be-

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[2] *Compare* 28 U.S.C. §2401(a) (time runs "after the right of action first accrues"), *with* 16 U.S.C. §7804(d)(1) (30-day window runs after the regulation is "published in the Federal Register"); 12 U.S.C. §1848 (30-day window runs "after the entry of [agency's] order"); 15 U.S.C. §80b-13(a) (similar); 21 U.S.C. §348(g)(1) (similar); 39 U.S.C. §3663 (similar); 49 U.S.C. §30161(a) (similar); 26 U.S.C. §9041(a) (similar).

cause the statutory text of those other deadlines differs from the text of §2401(a) and §702. "Atextual judicial supplementation is particularly inappropriate when, as here, … Congress has enacted statutes that expressly include the language" that the government "asks" the Court "to read in." *Rotkiske*, 140 S.Ct. at 361. Section 2401(a) starts the clock "after the right of action first accrues," not "after [an order's] entry," 28 U.S.C. §2344, or "within [six years] after the date of the challenged action," *Nat'l Ass'n of Mfrs.*, 583 U.S. at 118 (citing 33 U.S.C. §1369(b)(1)), or after the regulation is "published in the Federal Register," 16 U.S.C. §7804(d)(1). A judicial gloss that would effectively add that sort of language to §2401(a) would contravene this Court's admonishment that "'absent provision[s] cannot be supplied by the courts.'" *Rotkiske*, 140 S.Ct. at 360-61. The government's contrary view flouts bedrock interpretive principles. This Court should reject it.

b. The government's interpretation also would effectively turn §2401(a) into a statute of repose in cases like this—where the agency does not directly enforce the regulations—thus cutting off all judicial review of agency actions six years after they become final.

The distinction between statutes of limitations and repose is an important one. "Statutes of limitations and statutes of repose both are mechanisms used to limit the temporal extent or duration of liability … ." *CTS Corp. v. Waldburger*, 573 U.S. 1, 7 (2014). "But the time periods specified are measured from different points, and the statutes seek to attain different purposes and objectives." *Id.* "In the ordinary course,

a statute of limitations creates 'a time limit for suing in a civil case, based on the date when the claim accrued"—"that is, when 'the plaintiff can file suit and obtain relief.'" *Id.* at 7-8 (quoting Black's Law Dictionary 1546 (9th ed. 2009); *Ferbar*, 522 U.S. at 201)).

In contrast, a statute of repose "puts an outer limit on the right to bring a civil action." *Id.* at 8. It "'bar[s] any suit that is brought after a specified time since the defendant acted … even if this period ends before the plaintiff has suffered a resulting injury.'" *Id.* It "is 'not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered.'" *Id.* For these reasons, "[s]tatutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" *Id.*

All parties here agree that §2401(a) is a "statute of limitations." Pet.App.6; BIO.2 (explaining that §2401(a) is the "general-purpose *statute of limitations* for claims against the United States" (emphasis added)). Rather than applying the standard rules for a statute of limitations, however, the government would effectively convert §2401(a) into a statute of repose for actions like this one—"a cutoff" that applies "even … before the plaintiff has suffered a resulting injury." *CTS Corp.*, 573 U.S. at 8. As a statute of repose, §2401(a) would bar all judicial review of Regulation II. And as the government admits, Corner Post has "no prospect" of challenging Regulation II in an enforcement proceeding because the Board does not *directly* enforce it. BIO.21.

All this to say—"Congress has shown that it knows how to adopt" a statute of repose for challenging agency actions when it wants to do so. *Rotkiske*, 140 S.Ct. at 361; *see PDR Network*, 139 S.Ct. at 2059 (Kavanaugh, J., concurring in the judgment); *Yakus v. United States*, 321 U.S. 414, 428-30 (1944). Unlike §2401(a), those provisions expressly state that agency actions "shall not be subject to judicial review in any civil or criminal proceeding for enforcement" after a certain time. 33 U.S.C. §1369(b)(2); *see also* 42 U.S.C. §9613(a) (similar); *id.* §7607(b)(2) (similar). Because Congress did not adopt such text in §2401(a), the Court should reject the government's attempt to convert that statute of limitations into a statute of repose.

II. Policy considerations also support starting §2401(a)'s limitations period when APA plaintiffs are first injured by final agency action.

A. Starting the clock only when final agency action first injures a §702 plaintiff furthers the APA's goal of expansive judicial review.

Adopting the government's rule would contravene Congress's goal in passing the APA—"to ensure that agencies follow constraints as they exercise their powers." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring). "[T]he APA was a 'working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.'" *Id.* (quoting Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev.

1193, 1248 (1982)). Central to the compromise was "Congress confin[ing] agencies' discretion and subject[ing] their decision to judicial review." *Id.* Thus "agencies under the APA are subject to a 'searching and careful' review by the courts." *Id.*

Put differently, the APA's "basic presumption" is for "judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action.'" *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. §702). The APA's "'generous review provisions' must be given a 'hospitable' interpretation." *Id.* at 140-41. This presumption is necessary because "'legal lapses and violations occur, and especially so when they have no consequence.'" *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S.Ct. 361, 370 (2018). Indeed, judicial review has only become more necessary as the administrative state has expanded to "wield[] vast power and touch[] almost every aspect of daily life." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010). The availability of judicial review, this Court has "insisted," constitutes part of "'[t]he very essence of civil liberty.'" *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986). That's at least partly why "[t]he APA's presumption of judicial review … repudiat[es] … the principle that efficiency of regulation conquers all." *Sackett v. EPA*, 566 U.S. 120, 130 (2012).

Section 2401(a) furthers Congress's policy favoring judicial review. It provides a lengthy, six-year period to sue. And it adopts a plaintiff-friendly accrual rule rather than a defendant-friendly repose period.

See supra 25-29. Those decisions are meant to keep courthouse doors open to APA challenges, not to close them "'after a specified time since the defendant acted.'" *CTS Corp.*, 573 U.S. at 8.

Yet the government asks the Court to "cutoff" judicial review as quickly as possible for as many people as possible. *Id.* The government's rule not only indiscriminately kills plaintiffs' claims before they can bring them but also "unfair[ly]" punishes entities that "may not even have existed back when an agency order was issued." *PDR Network*, 139 S.Ct. at 2062 (Kavanaugh, J., concurring in the judgment). That outcome contravenes the settled presumption of judicial review for agency actions—with no textual basis for doing so. *See supra* 20-24. To that end, this Court's general skepticism toward limiting judicial review has led it repeatedly to reject agencies' various maneuvers to evade scrutiny of their decisions. *See, e.g.*, *Weyerhaeuser Co.*, 139 S.Ct. at 371 (rejecting agency's reliance on discretionary statutory language to avoid judicial review); *CIC Servs., LLC v. IRS*, 141 S.Ct. 1582, 1588-92 (2021) (Anti-Injunction Act); *DHS v. Regents of the Univ. of Cal.*, 140 S.Ct. 1891, 1906 (2020) (prosecutorial discretion); *Trump v. Hawaii*, 138 S.Ct. 2392, 2407 (2018) (consular nonreviewability). It should reject this one too.

B. The government's rule leaves no meaningful avenue for judicial review of APA claims for parties like Corner Post.

When opposing Corner Post's petition, the government assured the Court that under its rule "[j]udicial

review remains available in numerous ways." BIO.14. But each of the alternative options the government proffered is (at best) a route in name only.

The government first argues that cutting off APA review for parties like Corner Post poses no problem because "agency actions that affect significant numbers of individuals or businesses often face timely challenges by associations that represent their members' interests." BIO.14. Corner Post doesn't need to sue, the argument goes, because others will do so. But that contention contradicts "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996). "A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). The government's argument thus flouts the "fundamental" rule that "a litigant is not bound by a judgment to which she was not a party." *Id.* at 898. Perhaps more to the point, Congress also knows how to force all parties into one court for a single decision. *See Nat'l Ass'n of Mfrs.*, 583 U.S. at 118 (consolidating all challenges to a regulation within 120 days into one proceeding). It did not do so for APA claims.

The government's next argument fares no better. The government contends that "entities like petitioner can … petition to the agency for rulemaking, denial of which must be justified by a statement of reasons, and can be appealed to the courts." BIO.15; *see also* Pet.App.11 (proffering same justification).

"The Government's argument is wrong." *PDR Network*, 139 S.Ct. at 2065 (Kavanaugh, J., concurring in the judgment). "To begin with, if the Government supports judicial review … then why force review into that convoluted route rather than just supporting judicial review in [a facial challenge]?" *Id.* It simply "is a waste of time to require as a prerequisite to suit that [the plaintiff] manufacture 'agency action' by petitioning the [agency] to revoke its regulations and suffering—at some time in the possibly remote future—the inevitable rebuff." *Dunn-McCampbell*, 112 F.3d at 1290 (Jones, J., dissenting). That point bears emphasizing: Agencies typically control when they rule on such petitions and thus can (and do) preclude judicial review merely by sitting on them for years. In short, the government's reading couples §2401(a) with Newton's first law—motionless agencies remaining motionless—to make judicial review all but impossible.

The Court need not take Corner Post's word for it. The government has previously "acknowledge[d] that judicial review may not always be available under that route." *PDR Network*, 139 S.Ct. at 2065-66 (Kavanaugh, J., concurring in the judgment). "And even if judicial review is available, it may only be deferential judicial review of the agency's discretionary decision to decline to take new action, not judicial review of the agency's initial interpretation of the statute." *Id.* at 2066. That renders "the Government's promise of an alternative path of judicial review … illusory," so it "does not supply a basis for denying judicial review." *Id.*

Finally, the government suggests that that foreclosing judicial review of "facial challenges" after six years doesn't *really* foreclose judicial review because, after that, a plaintiff can come to court "when an agency relies on a pre-existing regulation in 'civil or criminal proceedings for judicial enforcement.'" BIO.15; *see also* BIO.14 (suggesting a plaintiff may bring an APA claim when "the agency applies an existing regulation to a plaintiff"). This argument suffers from a handful of fatal flaws.

To begin, §2401(a) doesn't distinguish between "facial" and "as-applied" challenges. The Court should not add this distinction to §2401(a) when Congress didn't. *Rotkiske*, 140 S.Ct. at 361. Next, the purported distinction between facial and as-applied challenges runs contrary to the APA's presumption "favor[ing] not merely judicial review 'at some point,' but *preenforcement* judicial review." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 45 (2000) (Thomas, J., dissenting).

What's more, as a practical matter, not all regulated parties can challenge regulations in enforcement proceedings. Corner Post itself cannot do so here: Again, the government itself admits "there is no prospect that [Corner Post] will ever be subject to 'enforcement proceedings' under the regulation." BIO.21. Corner Post "is not a 'regulated party' under Regulation II, which regulates issuers rather than merchants." *Id.* (cleaned up). The government's own concessions thus confirm that this form of judicial review doesn't exist for Corner Post.

Nor does this form of judicial review exist for many others, either. Regulation II is no anomaly; parties often are "adversely affected or aggrieved" by a regulation without ever becoming subject to an enforcement action. Such regulations are common enough to have their own standing rules. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (outlining the standard for when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*").

No wonder this Court has said it "do[es] not consider this a 'meaningful' avenue of relief." *Free Enter. Fund*, 561 U.S. at 490-91. For what "the Government proposes," effectively, is that a regulated party should "*incur* a sanction (such as a sizable fine) by ignoring" the offending regulation so it can "win access to a court … —and severe punishment should its challenge fail." *Id.* at 490. The Court "normally do[es] not require plaintiffs to 'bet the farm … by taking the violative action' before 'testing the validity of the law.'" *Id.*

Even worse, violating regulations can carry criminal penalties. BIO.15 (highlighting that an "as-applied" challenge can come in "criminal proceedings"). A plaintiff should not have to "first expose himself to actual arrest or prosecution to be entitled to challenge" an unlawful regulation. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *accord MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007); *Doe v. Bolton*, 410 U.S. 179, 188 (1973). "[T]hat is not the kind of thing an ordinary person risks, even to contest the most burdensome regulation." *CIC Servs.*, 141

S.Ct. at 1592. "So the criminal penalties … practically necessitate a pre-enforcement" facial challenge. *Id.* Neither §2401(a) nor §702 distinguishes between regulations enforced via civil or criminal penalties; the Court's decision will apply equally to both. And it could create a serious constitutional question to limit litigants' options to only judicial review in enforcement proceedings. *Cf. Ex parte Young*, 209 U.S. 123, 148 (1908) ("[T]he acts … by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face … .").

C. No other policy justifications support starting §2401(a)'s limitations period before a regulation injures an APA plaintiff.

Finding no basis in §2401(a)'s text for its preferred rule, "the government is forced to abandon … the statute's terms and retreat to policy arguments." *Niz-Chavez*, 141 S.Ct. at 1485. But its four policy arguments provide no legitimate basis for rejecting Corner Post's interpretation.

First, the government worries that what it calls a "belated facial challenge to an agency rule" might undermine "reliance interests"—and not just reliance interests "of the agency involved, but also of other private parties … that have a practical stake in the rule's validity." BIO.12. In other words, the government wants to stop facial challenges after six years to "bring finality to the rule's application." Pet.App.36.

This "policy-laden argument cannot overcome the text of the statute and the traditional administrative law practice." *PDR Network*, 139 S.Ct. at 2066 (Kavanaugh, J., concurring in the judgment). It does not even bear its own weight. The government concedes that enforcement-proceeding review must be available, which renders this "argument unpersuasive even on its own terms." *Id.* While many regulations are never used in enforcement proceedings, *see supra* 34-35, many others are. And those that are will *always* be subject indefinitely to invalidation. That is fatal to the government's view that it ever has true reliance interests in a rule's finality.

Nor is the possibility that multiple lawsuits might reach different outcomes about a regulation's legality a reason to adopt the government's rule. Any such conflicting outcomes that become circuit splits will "likely trigger review in this Court." *Id.* "The Government does not like that possibility. The Government would prefer to choke off all litigation at the pass." *Id.* But such "splits and this Court's review happen all the time with all kinds of federal laws." *Id.* "There is no reason to think that Congress wanted to short-circuit that ordinary system of judicial review for the many agencies and multiplicity of agency orders encompassed" by the APA. *Id.*

Rejecting the government's rule also won't open the floodgates to stale regulatory challenges. Most APA challenges "involve[] settings in which the right of action happened to accrue at the same time that final agency action occurred, because the plaintiff either became aggrieved at that time or had already

been injured." *Herr*, 803 F.3d at 819-20. Even the government is forced to admit that it is "relatively uncommon" for "a person who was not injured when the regulation was promulgated [to] become[] injured at a later date." BIO.11. That will remain true long after this Court properly interprets §2401(a) for APA plaintiffs.

Second, the government adopts the reasoning of the district court below that "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." BIO.16 (quoting Pet.App.35-36). That unfounded fear gives no reason to bar APA claims by legitimate businesses like Corner Post who are first injured by a rule more than six years after it becomes final. In any event, the government has other existing tools to combat that unlikely possibility.

Most prominently, Article III prevents suits by so-called sham plaintiffs. Only plaintiffs suffering concrete harms may sue in federal court. *E.g.*, *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2200 (2021) ("No concrete harm, no standing."). Even a newly created shell company must satisfy Article III; it cannot evade that limit by proffering a general intent to enter the regulated field. And in the APA context, Article III precludes parties from challenging a "regulation in the abstract"—an APA plaintiff must plead a "concrete application that threatens imminent harm to [the plaintiff's] interests." *Summers v. Earth Island*

Inst., 555 U.S. 488, 494 (2009). Satisfying that imminence requirement requires more than "'some day' intentions"—at a minimum, the plaintiff must have "specific and concrete plan[s]" demonstrating that the challenged regulation will injure it. *Id.* at 495-96 (quoting *Lujan*, 504 U.S. at 564). The upshot? Only bona fide, concretely injured plaintiffs may challenge agency action. Corner Post itself—a brick-and-mortar small business that serves real people every day, *see* Pet.App.52-53—exemplifies how this works. It is entitled to its day in court.

Beyond Article III, the government has other tools to combat APA suits by sham plaintiffs. Alter egos, for example, are typically subject to the same limitations periods as their creators. *See, e.g.*, *NLRB v. O'Neill*, 965 F.2d 1522, 1529 (9th Cir. 1992) ("Where two parties are alter egos, service on one is sufficient to initiate proceedings against both within the statute of limitations."); *United States v. Clawson Med. Rehab. & Pain Care Ctr.*, 722 F. Supp. 1468, 1471 n.3 (E.D. Mich. 1989) ("The idea that the alter ego and the corporation should be treated as a single entity for limitations purposes is well established."); *City of Almaty v. Ablyazov*, 2019 WL 1430155, at *8 (S.D.N.Y. Mar. 29) ("[A]n alter ego and its principal are 'treated as one entity' for purposes of claim accrual."). So a time-barred company can't avoid §2401(a)'s limitations period just by creating a new alter-ego entity. The government also has acknowledged that "equitable defenses may be interposed" in APA suits. BIO.22 (quoting *Abbott Lab'ys*, 387 U.S. at 155). Nothing stops the government from deploying those defenses in any future lawsuits it deems improper.

This is not an exhaustive list of the government's options should a sham plaintiff materialize. Suffice it to say: adopting the government's rule just to ward off so-called sham plaintiffs is like salting the earth to prevent a weed from growing. Better to let the government use more tailored tools like Article III or appropriate equitable defenses to uproot any sham-plaintiff suits. Indiscriminately killing bona fide claims because a dandelion may someday sprout cannot be the right policy answer.

Third, the government contends that "if the statute of limitations … 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 plaintiffs were first injured. BIO.16. This objection is surprising. Courts routinely conduct retrospective analyses to determine when a claim first accrued. It's a central part of any case involving a statute of limitations. *See, e.g.*, *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec. Inc.*, 582 U.S. 497, 504-05 (2017). And as the government has conceded, §702's injury-based zone-of-interest test is already a part of stating a claim under the APA, which courts analyze routinely with ease. BIO.10.[3]

[3] The government's reliance on *Pennsylvania Department of Public Welfare v. United States Department of Health & Human Services*, 101 F.3d 939 (3d Cir. 1996), is misplaced. There, Pennsylvania argued that "the statute of limitations has not run" because Pennsylvania's claim was "not 'ripe.'" *Id.* at 945. "Ripeness is largely a prudential doctrine" preventing judicial review "until an administrative decision has been formalized and its effects

And fourth, the government complains that "the passage of time … could make it difficult or impossible for an agency to assemble the 'full administrative record.'" BIO.16. That complaint is hard to square with agencies' obligation under the Federal Records Act to "preserve records containing adequate and proper documentation of … policies, decisions, procedures, and essential transactions of the agency … to protect the legal … rights of the Government and of persons directly affected by the agency's activities." 44 U.S.C. §3101. That Act "reflects a congressional intent to ensure that agencies adequately document their policies and decisions." *Armstrong v. Bush*, 924 F.2d 282, 292 (D.C. Cir. 1991). It also "strictly limits the circumstances under which records can be removed from federal custody or destroyed." *Jud. Watch, Inc. v. Kerry*, 844 F.3d 952, 953 (D.C. Cir. 2016). For its part, the APA separately requires federal agencies to publish certain agency records in the Federal Register, including the proposed and final rules that often reflect the agency record. *See, e.g.*, 5 U.S.C. §553(b); 44 U.S.C. §1505(a)-(b). And at any rate, "pleas of administrative inconvenience … never 'justify departing from the statute's clear text.'" *Niz-Chavez*, 141 S.Ct. at 1485.

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felt in a concrete way by the challenging parties." *Id.*; *see, e.g.*, *Texas v. United States*, 523 U.S. 296, 300-01 (1998). This is a different inquiry than whether a party "suffer[ed] legal wrong" or became "adversely affected or aggrieved" by agency action. 5 U.S.C. §702.

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Even if the government's policy-based arguments could bear the weight it puts on them, it wouldn't make any difference. Congress made APA claims subject to §2401(a), and that limitations period starts running when a regulation first injures a party. If that "'decision[]'" was "'mistaken as a matter of policy, it is for Congress to change [it].'" *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 220 (2012). The Court "'should not'" accept the government's invitation to "'legislate for'" Congress. *Id.* It should instead "simply enforce the value judgment[]" that Congress actually "made." *Rotkiske*, 140 S.Ct. at 361.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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November 13, 2023

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