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 OF *AMICI CURIAE* GOVERNOR HENRY MCMASTER AND THE SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING & REGULATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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" (as the Sixth Circuit has held)?

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INTERESTS OF *AMICI CURIAE*

Henry McMaster is Governor of the State of South Carolina.[1] He has at least two distinct interests in this case. *First*, he has sworn to "preserve, protect, and defend" both the South Carolina Constitution and the United States Constitution, S.C. Const. art. VI, § 5, and to "take care that the laws be faithfully executed," *id.* art. IV, § 15. He therefore has a strong interest in ensuring that an unlawful federal mandate does not usurp South Carolina's sovereign authority to enforce its duly enacted laws.

Second, Governor McMaster is the lead plaintiff in a lawsuit challenging the U.S. Department of Labor Occupational Safety and Health Administration's recent attempt to force States with state plans to increase their statutory civil penalties to match federal civil penalties without complying with the Administrative Procedure Act. *See McMaster v. U.S. Dep't of Labor*, No. 3:22-cv-2603 (D.S.C.) (*McMaster I*); *McMaster v. U.S. Dep't of Labor*, No. 3:23-cv-1038 (D.S.C.) (*McMaster II*). One issue directly raised in this litigation is when § 2401(a)'s six-year limitations period begins to run. The facts of this litigation provide an excellent illustration of the dangers of holding that a claim accrues when an agency issues a rule, rather than when a plaintiff suffers a harm.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

The South Carolina Department of Labor, Licensing & Regulation ("LLR") is a department within the executive branch of state government and is part of the Governor's Cabinet. S.C. Code Ann. § 1-30-10(A)(12). LLR's director "supervise[s] the department under the direction and control of the Governor" and "exercise[s] other powers and perform[s] other duties as the Governor requires." *Id.* § 40-1-40(D).

LLR has successfully administered South Carolina's state OSHA plan for decades. It is a plaintiff with the Governor in these lawsuits, and it has a special interest in ensuring that federal OSHA cannot enforce mandates that exceed federal OSHA's authority on South Carolina's state OSHA plan.

SUMMARY OF ARGUMENT

Corner Post presents a compelling fact pattern showing why the decision below makes no sense. After all, how could a plaintiff possibly sue when the plaintiff doesn't even exist?

This amicus brief presents another persuasive fact pattern for reversal: An agency can promulgate a rule, take no action to enforce it, and then—when the limitations period to challenge the rule has almost expired—begin enforcing the rule.

For the Governor and LLR, this fact pattern arose in the OSHA context. In a 2016 interim final rule, OSHA announced that state plans must increase their state civil penalties to meet (or exceed) increased federal civil penalties. Yet years went by without OSHA enforcing that mandate. Only as the

limitations period was set to expire did OSHA take the first step to begin enforcing the mandate.

First principles and well-established case law require rejecting such a result. As a matter of constitutional theory, government should be responsive and accountable to the People, so administrative agencies (and their unelected officials) ought not have any incentive to run out the clock on challenges to their rules before enforcing them. And as a matter of constitutional law, this Court has "often explained that federal courts are courts of limited jurisdiction." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019) (cleaned up). Part of that limited jurisdiction under Article III is a plaintiff showing that he has suffered a "concrete and particularized" injury. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). A plaintiff cannot suffer an injury either when a plaintiff does not exist or when government officials have not taken steps to enforce a particular rule.

ARGUMENT

I. Based on the decision below, federal agencies can delay enforcement of a rule to avoid legal challenges to that rule.

South Carolina's recent experience with OSHA demonstrates the perverse incentive structure that the decision below creates.

A. South Carolina has successfully administered its state OSHA plan for decades.

As part of the Occupational Safety and Health Act of 1970, Pub. L. 91-596, 84 Stat. 1590 (Dec. 29,

1970), Congress gave States two options for regulating workplaces. States could permit workplaces in their borders to be governed directly by federal standards and OSHA, or States could create and administer their own plans for workplace safety and health. *See* 29 U.S.C. § 667. If a State chooses the latter option, its plan must meet certain criteria, including providing "for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and *the enforcement of which standards*) are or will be *at least as effective* in providing safe and healthful employment and places of employment as the standards promulgated" by OSHA. *Id.* § 667(c)(2) (emphasis added).

Like many other States, South Carolina chose to create its own state plan, which received final approval from the Secretary of Labor. *See* South Carolina State Plan: Final Approval Determination, 52 Fed. Reg. 48,103 (Dec. 18, 1987); *see also* South Carolina Developmental Plan, 37 Fed. Reg. 25,932 (Dec. 6, 1972); South Carolina: Certification of Completion of Developmental Steps, 41 Fed. Reg. 32,424 (Aug. 3, 1976). LLR has successfully administered the state plan for decades. In South Carolina, the civil penalties for violating the state plan are set by statute and are the same as those found in 29 U.S.C. § 666. *See* S.C. Code Ann. § 41-15-320.

B. In 2016, OSHA promulgated a rule requiring that state plans increase their civil penalties to match federal civil penalties.

Federal civil penalties for violations of the OSH Act and related regulations were set originally by the

OSH Act in 1970. *See* OSH Act, § 17, 84 Stat. at 1606–07. Congress increased these penalties in 1990. *See* Omnibus Reconciliation Act of 1990, Title III, § 3101, Pub. L. 101-508, 104 Stat. 1388, 1388-29 (Jan. 23, 1990). These penalty levels remain codified today. *See* 29 U.S.C. § 666.

But despite being part of the U.S. Code, those are not actually the maximum penalty amounts that OSHA uses today and now seeks to impose on States. Instead, the amounts of federal civil penalties are found in the Code of Federal Regulations after Congress required annual updates to these federal penalties in the Federal Civil Penalties Inflation Adjustment Act of 2015, Pub. L. 114-74, Title VII, 129 Stat. 584, 599 (Nov. 2, 2015) (2015 Federal Penalties Act). This legislation required a one-time adjustment to the federal civil penalties "through an interim final rulemaking" process. *Id.* § 701(b)(1)(D), 129 Stat. at 599.

OSHA issued an interim final rule in July 2016. *See* Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments, 81 Fed. Reg. 43,430 (July 1, 2016). In that rule, OSHA demanded that state plans "increase their penalties to reflect the federal penalty increases at the state levels in order to maintain this 'at least as effective' status." *Id.* at 43,446. OSHA further declared that "State Plans will also be required to increase their penalties regularly in the future to maintain at least as effective penalty levels."[2] *Id.* at 43,447.

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[2] The OSH Act requires only that "the enforcement" of a state plan's standards "be at least as effective in providing safe and healthful employment and places of employment as the

OSHA used the 2017 annual adjustment to address comments it received on the 2016 interim final rule. OSHA claimed that its new rule reflected its "long-standing position" "that 'at least as effective,' in this context, means that State Plans must have maximum and minimum penalty levels that are at least as high as OSHA's maximum and minimum penalty levels."[3] Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2017, 82 Fed. Reg. 5373, 5375 (Jan. 18, 2017).

C. For years, OSHA made no attempt to enforce this mandate.

In addition to the 2016 interim final rule, the 2015 Federal Penalties Act also requires OSHA to make annual adjustments to these federal penalties for inflation, and it exempts these adjustments from

standards promulgated" by OSHA. 29 U.S.C. §667(c)(2). That's a results-oriented requirement. The 2016 interim final rule, however, included no discussion of how this statutory text implicitly mandates matching penalties without any regard for whether those penalties result in safer and healthier workplaces or whether lower penalty amounts might accomplish the same goal. The only rationale in the 2016 interim final rule for requiring increased penalties was a "deterrence principle[]" that "rational actors are less likely to commit violations when faced with higher penalties," 81 Fed. Reg. at 43,445 (emphasis omitted), yet it fails, for example, to account for things like cost-of-living differences across the country or why South Carolina's workplaces have been safer than the national average over the past seven years, despite lower civil penalties than the federal ones.

[3] Once again, OSHA did not engage with the statutory text in the 2017 annual adjustment. This matters because "to the extent later history contradicts what the text says, the text controls." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022).

the APA's notice-and-comment requirements. § 701(b)(1)(D), 129 Stat. at 599. Every year since 2017, OSHA has issued that annual adjustment. *See, e.g.*, Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2023, 88 Fed. Reg. 2210 (Jan. 13, 2023). Each of these annual adjustments has included the claim that "State Plans are required to increase their penalties in alignment with OSHA's penalty increases to maintain at least as effective penalty levels." *E.g.*, 88 Fed. Reg. at 2213.

Despite these annual adjustments and repeated declarations, OSHA did not take any steps to require state plans to increase their civil penalties or risk loss of their state plans.[4] Significantly, OSHA did not make the failure to increase civil penalties a "finding" in South Carolina's Federal Annual Monitoring Evaluation Report (better known as a FAME Report) in FY 2016. Or FY 2017. Or FY 2018. Or FY 2019. Or FY 2020.

Only in the FY 2021 FAME Report (issued in August 2022) did OSHA determine that South Carolina's statutory civil penalties constitute a "finding." *See* OSHA, *FY 2021 South Carolina FAME Report*, at 18, https://tinyurl.com/26dfz8s2. Findings in a FAME Report are significant because they are "limited to those

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[4] The increases in civil money penalties that OSHA is forcing on state plans are significant. Just the jump in federal civil penalties from 2022 to 2023 was more than 7%. Since the first annual adjustment in 2016 to 2023, the increase is more than 20%. And if South Carolina were required to increase its state civil penalties from the interim final rule to align with federal civil penalties, South Carolina would initially have to raise its statutory penalties on employers by more than 120% (and do so annually thereafter).

issues that warrant corrective action by the State Plan to ensure it is [at least as effective]" as the federal standards. OSHA, *State Plan Policies and Procedures Manual* 74 (May 6, 2020), https://tinyurl.com/2p93wtfv.

This was also the time period in which OSHA began to take action against other state plans. Most notably, OSHA published a notice that it was reconsidering final approval of Arizona's state plan, based in part on the fact that Arizona had not increased its civil penalties since the 2016 interim final rule. *See* Arizona State Plan for Occupational Health and Safety; Proposed Reconsideration and Revocation, 87 Fed. Reg. 23,783, 23,786–87 (Apr. 21, 2022). OSHA withdrew this notice only after Arizona passed a state law to increase those penalties. *See* OSHA, *U.S. Department of Labor Announces Plan to Withdraw Proposal to Reconsider, Revoke Arizona State OSHA Plan's Final Approval* (Feb. 14, 2023), https://tinyurl.com/3z2vpjns.

D. OSHA argues that challenges to the mandate on state civil penalties are time barred.

Just days after OSHA included this finding in the FY 2021 Fame Report, Governor McMaster and LLR sued in the District of South Carolina. In *McMaster I*, the Governor and LLR took a narrow focus and challenged the 2022 annual adjustment, which, like previous adjustments, included the language claiming that state plans must increase their civil penalties to align with federal civil penalties to comply with the OSH Act. *See* Compl., *McMaster I* (D.S.C. Aug. 8, 2022), ECF No. 1; *see also* Department of Labor Federal Civil

Penalties Inflation Adjustment Act Annual Adjustments for 2022, 87 Fed. Reg. 2328, 2331–32 (Jan. 14, 2022). Ultimately, the district court concluded that the "mandate" that the Governor and LLR challenged in 2022 annual adjustment was not a final agency action under § 702 of the APA because it was simply restating OSHA's position from the 2016 interim final rule. Order 8–9, *McMaster I* (D.S.C. Mar. 2, 2023), ECF No. 34.

Accepting the district court's conclusion for the sake of focusing on the merits of OSHA's argument, the Governor and LLR filed a second lawsuit less than two weeks later—this time challenging OSHA's mandate in the 2016 interim final rule that state civil penalties had to match the federal ones. *See* Compl., *McMaster II* (D.S.C. Mar. 14, 2023). OSHA moved to dismiss again, arguing that certain claims were untimely under § 2401(a). OSHA argued that it had responded to the public comments to the 2016 interim final rule in the 2017 annual adjustment on January 18, 2017, and *McMaster II* was filed in March 2023—a little more than six years later. *See* Mot. to Dismiss 13–15, *McMaster II* (D.S.C. May 22, 2023), ECF No. 12.

The Governor and LLR responded to this argument in two ways. First, they explained why that limitations period should be equitably tolled. *See* Resp. to Mot. to Dismiss 8–12, *McMaster II* (D.S.C. June 5, 2023), ECF No. 14. Second, they sought leave to reopen *McMaster I* and file an amended complaint that related back to the August 2022 filing date. *See* Rule 60(b) Mot., *McMaster I* (D.S.C. June 5, 2023), ECF No. 36. After this Court granted cert in this case, the

Governor and LLR moved to stay both *McMaster I* and *McMaster II*. Those motions are pending.

Notwithstanding the procedural complexities of *McMaster I* and *McMaster II*, a critical issue is the same as the issue in this case. Are the Governor and LLR precluded from challenging OSHA's mandate on state civil penalties because their "APA claim first accrue[d] under 28 U.S.C. §2401(a) when [OSHA] issued its rule?" Pet. 1 (cleaned up). Or may they challenge the rule now that OSHA has decided to enforce it, causing the Governor and LLR to "suffer legal wrong" and be "adversely affected or aggrieved"? *Id.* (cleaned up).

OSHA's delayed enforcement has resulted in a situation that, absent correction of the decision below, prevents a direct challenge to OSHA's belated enforcement of the mandate on state plans. This leaves the Governor and LLR in a position either to capitulate to OSHA's mandate or to refuse to comply and face revocation of the state plan (only at which point, says OSHA, can the mandate be challenged). But this latter option does not provide a meaningful chance for judicial review. This Court has refused to allow the only avenue to the courthouse to be "bet[ting] the farm," "incur[ring] a sanction," and facing "severe punishment should its challenge fail."[5] *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010).

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[5] To be sure, the Governor and LLR don't know why OSHA decided to start enforcing the mandate in the 2016 interim final rule when it did, but they have no reason to believe that OSHA's nonenforcement was driven by § 2401(a).

This fact pattern is not limited to OSHA and state plans. Any federal agency could delay, ignore, or somehow put off enforcing a new rule until the limitations period for challenging it expires. During that time, if anyone challenged the rule, an agency could insist the claim was not ripe because it was not clear whether or how the agency would enforce the rule, *see Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 163 (1967), particularly if, for instance, a few years had already elapsed since the rule was published, thereby undermining any argument that the rule was "felt immediately by those subject to it in conducting their day-to-day affairs," *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 810 (2003). Then, after six years had passed, an agency could begin enforcing the rule. And when the next lawsuit was filed, the agency could insist that § 2401(a) barred that claim. The law should not create such a perverse incentive nor deny a plaintiff the ability to pursue meaningful review of a ripe claim.

II. First principles and well-established Article III case law support reversal.

A. A core principle of our constitutional design is that "government in general should have a common interest with the people" and, when it comes to making law and policy, government "should have an immediate dependence on, and an intimate sympathy with, the people." *The Federalist* No. 52, p. 324 (A. Hamilton or J. Madison) (C. Rossiter & C. Kelser eds. 2003); *see also id.*, No. 37, p. 223 (J. Madison) (frequent elections keep government accountable to the People).

Agencies can be the least responsive part of the federal government. No one elects them, and only top-level officials are appointed by the President, who is politically accountable. When agencies have the power to promulgate rules "more or less at whim," "[i]ntrusions on liberty" are "easy and profuse." *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring).

Judicial review of agency action ensures that agencies utilize only the authority that Congress has given them. "We the People" gave the power to write laws to Congress—not to federal agencies. U.S. Const. preamble; *see also id.* art. I. To the extent Congress continues to delegate lawmaking power to those agencies, the People must have a way to hold agencies accountable. And the most direct way is for courts to use their "province and duty . . . to say what the law is" and avoid agencies escaping having to defend their rules. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

B. This Court's standing jurisdiction points in the same direction. Article III's "bedrock requirement" of standing, *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982), includes "an injury in fact," *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021). Such an injury must be "a concrete and imminent harm to a legally protected interest" that gives a plaintiff a "personal stake in the case." *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023) (internal quotation mark omitted).

This is—and has been—black-letter law for decades. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–

61 (1992) (explaining old case law in the now-familiar three-element test). There is no reason to depart from this rule now. Indeed, it works as well in a challenge to an agency rule as in any other case: A plaintiff can sue when a plaintiff has suffered a harm. True, the APA may impose additional requirements for a plaintiff to meet (such as an "agency action," 5 U.S.C. § 702), but nothing in the APA does—or can—supplant constitutional requirements. The Court should therefore reject the decisions by the circuit courts that have created what amounts to a departure from normal constitutional rules. Such ventures rarely prove successful. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275 (2022) (lamenting how *Roe* and *Casey* had "led to the distortion of many important but unrelated legal doctrines").

CONCLUSION

For these reasons, the Court should reverse the judgment below.

Respectfully submitted,

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