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 THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because the decision below deprives persons newly injured by old agency action of access to the federal courts in clear contravention of the pertinent statutory text, and thus allows unlawful agency action to evade judicial correction. The Federal Reserve argues that the limitations period to challenge the rule at issue in this case ended before Corner Post even existed. On that view, Corner Post (and many small businesses like it) never had a chance to challenge the rule. The Federal Reserve argues that Corner Post ran out of time before it even opened its doors. The question presented is whether the limitations period began running when the rule was issued (seven years before Corner Post opened) or when Corner Post was injured. And the answer is clear: Corner Post's clock did not start until it was injured by the rule.[1]

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

SUMMARY OF ARGUMENT

Statutory interpretation must "heed . . . what a statute actually says," *Groff v. DeJoy*, 600 U.S. 447, 468 (2023), and that makes this case easy. Section 2401(a) says that its limitations period starts when a right of action "first accrues." 28 U.S.C. § 2401(a). No one has ever disputed that as originally understood, that language connoted a limitations period starting at plaintiff's injury. Instead, the court below and the Federal Reserve have asserted that Section 2401(a)'s limitations period *no longer* starts at injury with respect to certain APA claims and, for those claims, instead starts at final agency action. *See* Gov't BIO 8. Because no one has ever suggested that the APA explicitly says anything about a limitations period, the Federal Reserve must be arguing that the APA *implicitly* modified Section 2401(a)'s accrual rule. But the Federal Reserve's theory comes nowhere near this Court's demanding standard for implicit modification.

The Federal Reserve's position has been sustained by lower courts only through inattention to statutory text. For a time, federal courts were quick to read statutes as "implying" legal rules that were absent from the text but perceived as sensible policy. This Court has long since renounced that "freewheeling approach." *Hernandez v. Mesa*, 140 S. Ct. 735, 751 (2020) (Thomas, J., concurring). But as this case illustrates, not all lower-court doctrines have caught up. For policy reasons—when reasons are given at all—six circuit courts have interpreted the APA as modifying Section 2401(a)'s statute of limitations. These courts have read the APA to start the clock at the defendant's last act for certain administrative-law

claims. But that "read[s] much into nothing," *Albernaz v. United States*, 450 U.S. 333, 341 (1981), because the APA implies nothing of the sort.

Perhaps recognizing the need to cite some statutory text somewhere to support their policy-driven conclusion, these lower courts have asserted that APA Section 704's limitation on the APA cause of action to "final agency action" converts Section 2401(a) into a statute of repose for certain APA claims. *See also* Gov't BIO 8 (same). That is indefensible. To the extent Section 704 implies anything about accrual of the APA right of action, it creates an additional condition necessary to start the clock (that the agency action be final) on top of the normal accrual rules. Section 704 cannot conceivably be understood to *subtract* from the centuries-old understanding that a right of action does not accrue before the plaintiff has been injured. These lower courts have never explained their invocation of Section 704, probably because it can only be explained as a fig leaf for policymaking.

The lower courts' policy arguments, moreover, are unpersuasive. In the (rare) instances lower-court analysis has extended beyond *ipse dixit*, the courts have reasoned that the textual approach leaves federal agencies without repose because their actions might be challenged by newly injured parties for perpetuity. But it is undisputed that agency action is forever vulnerable to judicial invalidation *regardless* of whose interpretation prevails in this case. Agency action—no matter how old—often can be challenged in an enforcement proceeding. An action never reaches any "promised land" on anyone's position. *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 821 (6th Cir. 2015); *see also Functional Music, Inc. v. FCC*, 274 F.2d 543, 546–47 (D.C. Cir. 1958).

If the lower court's approach stands, the Americans who are newly injured by old agency action each year will have no meaningful opportunity to contest the lawfulness of the injurious action unless the agency brings an enforcement action against them. And this Court has explained time and again that the potential opportunity to defend an enforcement action is an inadequate remedy. Particularly because of the immense and growing reach of the administrative state, the APA cause of action authorizing direct review by any newly injured party is essential to ensure that Americans are not unlawfully injured by overzealous bureaucrats.

ARGUMENT

I. THE DECISION BELOW DISREGARDS FUNDAMENTAL PRINCIPLES OF STATUTORY INTERPRETATION.

At bottom, this case presents a pure question of statutory interpretation: whether the APA implicitly modifies Section 2401(a)'s accrual rules. Under Section 2401(a)'s original meaning, the limitations clock starts when the plaintiff is injured.[2] *See* John

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[2] Section 2401(a)'s original meaning dates to a statute of limitations enacted in 1863. *See Herr v. U.S. Forest Serv.*, 803 F.3d 809, 815–16 (6th Cir. 2015) (recounting Section 2401(a)'s history). In the time since, Congress has made "minor changes in the wording and relocated [the statute of limitations] to 28 U.S.C. § 2401(a)." *Auction Co. of Am. v. FDIC*, 132 F.3d 746, 749 (D.C. Cir. 1997). But these organizational changes were meant to "continu[e] . . . existing law." Act of June 25, 1948, ch. 646, § 2680, sec. 2(b), 62 Stat. 869, 985 (1948). And at any rate, statutory language "obviously transplanted from another legal source" "brings the old soil with it." *George v. McDonough*, 142 S. Ct. 1953, 1959 (2022).

Kendrick, *(Un)limiting Administrative Review:* Wind River*, Section 2401(a), and the Right to Challenge Federal Agencies*, 103 Va. L. Rev. 157, 180–192 (2017). Indeed, no party, court, or commentator has ever disputed that Section 2401(a)'s limitations period started at injury when Section 2401(a) was enacted and in the decades that followed.

Yet the Eighth Circuit, following other circuits, has concluded that this accrual rule no longer applies to certain administrative-law claims after the APA's enactment. Because the APA nowhere says that a claim can accrue before injury, the Eighth Circuit's position requires the view that the APA modified Section 2401(a)'s accrual rules implicitly.

One would expect a careful parsing of text to precede such a determination of partial repeal by implication. After all, "repeals by implication" are "not favored." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982); *see also, e.g.*, *United States v. Madigan,* 300 U.S. 500, 506 (1937) ("[T]he modification by implication of the settled construction of an earlier and different section is not favored.").[3] Implied modification occurs only when (1) "provisions in the two acts are in irreconcilable conflict," or (2) "the later act covers the whole subject of the earlier one and is clearly intended as a substitute." *Kremer*, 456 U.S. at 468.

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[3] It "does not matter" whether the implied alteration "is characterized as an amendment or a partial repeal" because "[e]very amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands," and this Court has "repeatedly recognized that implied amendments are no more favored than implied repeals." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 n.8 (2007).

In "either case," "the intention of the legislature to repeal must be clear and manifest." *Id.*

That demanding standard is even more demanding when court access is at stake, because the federal courts have a "virtually unflagging" "obligation" to "hear and decide cases within [their] jurisdiction." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quotation marks omitted); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."). Courts therefore "restrict access to judicial review" "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967). And this Court has repeatedly explained that "[t]he best evidence of congressional intent . . . is the statutory text that Congress enacted." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 392 n.4 (2013) (Sotomayor, J., dissenting) (citing *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991)).

But the circuits' consideration of statutory text has ranged from cursory to nonexistent. They have instead balanced interests and settled on a framework that to them "make[s] the most sense." *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991). The court below, for example, did not merely reach the wrong interpretive answer—it failed even to ask the pertinent interpretive questions. The court below never inquired into Section 2401(a)'s original meaning, or what specific part of the APA might implicitly modify that meaning (a question clearly antecedent to any implicit-modification conclusion), or

whether evidence of implicit modification is "clear and convincing." Instead, the court below simply announced that "[t]his court concludes that . . . [Petitioner's] right of action accrue[d] . . . upon publication of the regulation." App. 11.

When these lower courts have cited any statutory text at all, they have pointed to the APA's limitation of its cause of action to "final agency action" in Section 704 without explaining that provision's relevance. *See, e.g.*, *Wong v. Doar*, 571 F.3d 247, 263 & n.15 (2d Cir. 2009) ("Under the APA, the statute of limitations begins to run at the time the challenged agency action becomes final. *See* 5 U.S.C. § 704."); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999) (holding without analysis that the APA right of action accrues "upon 'final agency action,' 5 U.S.C. § 704"); *Harris v. FAA*, 353 F.3d 1006, 1010 (D.C. Cir. 2004) ("The right of action first accrues on the date of the final agency action." (citing 5 U.S.C. § 704)). And the Federal Reserve has resorted to the same sort of unexplained *ipse dixit* before this Court. Opposing certiorari, it simply noted that "the APA establishes a cause of action to challenge 'final agency action'" and then stated its conclusion: "Accordingly, when an agency makes a final decision that [satisfies this Court's test for finality], the 'right of action' established by the APA 'accrues.'" Gov't BIO 8.

This bare observation that the APA limits its cause of action to final agency action does nothing to support a conclusion that accrual occurs at final agency action rather than at injury. Section 704 plainly does not alter the longstanding rule that a right of action cannot accrue until the plaintiff has been injured. Rather, Section 704 simply states that an APA claim cannot be brought until the plaintiff is

injured *and* the agency action is final—in other words, finality "is another necessary, but not by itself a sufficient, ground for stating a claim under the APA." *Herr*, 803 F.3d at 819. The APA largely "restate[d] the law governing judicial review of administrative action," DOJ, Attorney General's Manual on the Administrative Procedure Act 124 (1947);[4] it certainly did not upend centuries-old accrual rules by providing that only final agency action is reviewable.

The Federal Reserve has also discussed APA Section 702, *see* Gov't BIO 10–11, but this Court should not lose sight of the fact that in this discussion the Federal Reserve is playing only defense. Because Section 702 creates a cause of action that can be brought only when a person is "aggrieved" by final agency action, if anything it indicates that the normal accrual rules *do* apply to APA claims. The APA's judicial-review provisions cannot conceivably be understood as establishing a *break* from accrual norms. Far from clearly and manifestly altering the original understanding of Section 2401(a) accrual, the APA says nothing that even plausibly could alter it. At best for the Federal Reserve, the APA is silent on accrual.

The APA's limitations-period "silence" "means that ordinary background law applies." *New Jersey v. New York*, 523 U.S. 767, 813 (1998) (Breyer, J., concurring); *see also, e.g.*, *Albernaz*, 450 U.S. at 341–42 ("[I]f anything is to be assumed from the congressional silence . . . , it is that Congress was aware of the [background] rule and legislated with it in mind."); *id.* at 341 (Congress is "predominantly a lawyer's body," and it is appropriate "to assume that our elected representatives . . . know the law."). This background law

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[4] *Available at* tinyurl.com/4nu4mtxw.

includes both the original semantic meaning of the phrase "right of action first accrues" and the "cluster of ideas that were attached to [the phrase]" "accumulated [in] the legal tradition and meaning of centuries of practice." *Sekhar v. United States*, 570 U.S. 729, 733 (2013); *see also, e.g.*, *Staples v. United States*, 511 U.S. 600, 605 (1994) ("[W]e must construe the statute in light of the background rules of the common law."). Statutory silence signals congressional "satisfaction with widely accepted definitions, not a departure from them." *Beck v. Prupis*, 529 U.S. 494, 501 (2000); *see also PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2061 (2019) (Kavanaugh, J., concurring in the judgment) (congressional "silence" "should not be read to preclude judicial review").

As Petitioner and academic commentary have shown, "[e]very source" reflecting the cluster of ideas attached to nineteenth-century accrual "points the same way": "[a] party's right of action cannot accrue until he or she has actually been harmed by the defendant." Kendrick, *(Un)limiting Administrative Review*, 103 Va. L. Rev. at 159; *see also id.* at 180–192 (examining enactment-era cases, dictionaries, and treatises). And even under the view of the court below, that holds true to this day in all other contexts. *See id.* at 199 (courts apply the textual approach in "every other type of claim that [Section 2401(a)] covers").

Even the leading commentary defending the Eighth Circuit's approach concedes that "the text of 28 U.S.C. § 2401(a) . . . suggests . . . that accrual should begin separately for each specific plaintiff's claim" and thus further concedes that accrual based on "when a specific plaintiff can sue" "does apply to

cases first contemplated by 28 U.S.C. § 2401(a)." Susan C. Morse, *Old Regs*, 31 Geo. Mason L. Rev. (forthcoming 2023) (manuscript at 4);[5] *see also id.* at 4–5 (conceding that under the Eighth Circuit's approach "accrual is triggered by an action of the defendant, not a claim of the plaintiff, contrary to the plaintiff-focused approach taken when interpreting 28 U.S.C. § 2401(a)'s application [in other contexts]"). Because that commentary fares no better than the circuit courts at identifying any text in the APA implying modification of that background rule, those concessions are fatal.[6]

The lower courts' "atextual judicial supplementation" is "particularly inappropriate," moreover, because "Congress has shown that it knows how to adopt the omitted language." *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) (capitalization altered). Congress has shown that "it knows exactly how to specify" the kinds of limitations rules that the lower courts have written into the APA. But Congress chose to do "nothing like that" in the APA. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1617 (2018). Congress easily could have provided that the limitations period for APA claims starts once the regulation is "published in the Federal Register," for example, as it did in 16 U.S.C. § 7804(d)(1). *See also* Gov't BIO 11 (recognizing that "[i]n a variety

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[5] *Available at* ssrn.com/abstract=4191798.

[6] This commentator rests her defense of the Eighth Circuit's approach on her unsubstantiated assertion that APA claims are different because the unlawful action "arises at promulgation (or other final agency action), then exists and continues, waiting unchanged for any eligible plaintiff to come along and raise it." Morse, *Old Regs*, 31 Geo. Mason L. Rev. at 5. That does not, in fact, make APA claims different—it is true any time there is a temporal gap between unlawful conduct and injury.

of circumstances, Congress has established deadlines for suit that run from the defendant's allegedly unlawful conduct"). The "omission of any such provision is strong, and arguably sufficient, evidence that Congress had no such intent." *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990).

Because there is no indication—let alone one that is clear and manifest—that Congress intended to implicitly modify Section 2401(a) through the APA, the Eighth Circuit's approach is textually indefensible. This Court should reverse and instruct lower courts to "ask only what the statute means," *Epic Sys. Corp.*, 138 S. Ct. at 1631, when interpreting Section 2401(a).

II. THE LOWER COURTS' POLICY ARGUMENTS ARE UNFOUNDED.

Though the lower courts have taken a much closer look at policy than text, their policy arguments reflect fundamental misunderstandings of both statutes of limitation and the APA. The lower courts' primary policy concern is that under the textual approach "there effectively would be no statute of limitations." *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1307 (Fed. Cir. 2008) (citing *Wind River*, 946 F.2d at 714). That is undeniably incorrect—if Petitioner had filed this lawsuit more than six years after its alleged injury, Section 2401(a) would bar the suit just like any other statute of limitations. What these courts really mean is that there effectively is no *repose* for the defendant. And that is indeed true—because Section 2401(a) is not a statute of repose.

A statute of repose does exactly what the lower courts want Section 2401(a) to do: it provides the defendant with "freedom from liability" and the assurance that "past events [are] behind him." *CTS Corp.*

v. Waldburger, 573 U.S. 1, 9 (2014). An "absolute . . . bar on a defendant's temporal liability," a statute of repose "puts an outer limit on the right to bring a civil action" that is "measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *Id.* at 8 (internal quotation marks omitted). That is, a statute of repose bars suit even if its limitations period "ends before the plaintiff has suffered a resulting injury." *Id.*

Because a statute of repose limit is "not related to the accrual of any cause of action," *id.*, and Section 2401(a) *is* related to accrual, 28 U.S.C. § 2401(a) (limit based on when right of action "accrues"), Section 2401(a) is not a statute of repose. Rather, because it is based on accrual, Section 2401(a) is a "statute of limitations." *Id.* at 7. And a statute of limitations begins to run "when the injury occurred or was discovered." *Id.* at 8. That means statutes of limitation purposely do *not* provide a defendant with "freedom from liability" and the assurance that "past events [are] behind him." *Id.* at 9; *see also Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 505 (2017) (statutes of repose give "more explicit and certain protection to defendants" than statutes of limitation). A statute cannot ensure both repose for defendants and remedy for plaintiffs because there is sometimes a temporal gap between the last culpable act and the injury; statutes of limitation like Section 2401(a) accept some loss of repose to ensure that all injured plaintiffs are able to bring suit. *See Spannaus v. DOJ*, 824 F.2d 52, 56 n.3 (D.C. Cir. 1987) (it is "virtually axiomatic" that "a statute of limitations cannot begin to run against a plaintiff *before* the plaintiff can maintain a suit" even though that is not true of statutes of repose). To say that Section 2401(a) must provide federal agencies

with repose ignores that Congress chose the other side of that tradeoff.

Federal agencies do not have absolute repose, moreover, even under the Eighth Circuit's approach. No matter what, so long as the agency enforces its action, the action never "enter[s] a promised land" because "[r]egulated parties may always assail a regulation as exceeding the agency's statutory authority in enforcement proceedings against them." *Herr*, 803 F.3d at 821; *see also PDR Network*, 139 S. Ct. at 2060 (Kavanaugh, J.). And the scope of judicial review under the APA is the same regardless whether the issue arises in a declaratory-judgment action or as an enforcement defense. *Cf. Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 262 (2011) (Kennedy, J., concurring) (pre-enforcement review is "nothing more than the pre-emptive assertion in equity of a defense that would otherwise have been available in . . . enforcement proceedings at law."). In both situations, judicial review considers the purely legal question of the agency action's validity based on the law and the closed universe of the agency's action and record of decision. *See, e.g.*, *PDR Network*, 139 S. Ct. at 2066–67 (Kavanaugh, J.); *Functional Music*, 274 F.2d at 546–47. Any judicial decision in an enforcement proceeding, therefore, is just as sweeping as in an APA lawsuit. That means there is little daylight between the degree of agency repose under the Eighth Circuit's approach and under the textual approach.

The Eighth Circuit's approach, moreover, itself has policy problems. For one, it eliminates certain rights of action before they even arise, as this case illustrates. That contravenes the central purpose for enacting a statute of limitations rather than a statute

of repose. *See Spannaus*, 824 F.2d at 56 n.3 (it is "virtually axiomatic" that a statute of limitations "cannot begin to run against a plaintiff *before* the plaintiff can maintain a suit"). Americans should not be shut out of court because, for example, they failed to be born within six years of unlawful agency action that harms them.

The Eighth Circuit's approach also jettisons a uniform standard and creates bifurcation in multiple ways. Under the textual approach, the Section 2401(a) limitations period operates uniformly across all claims. Under the Eighth Circuit's approach, by contrast, the limitations period operates differently inside the APA versus outside, and also depends on what sort of APA claim is brought. *See Wind River*, 946 F.2d at 715; Kendrick, *(Un)limiting Administrative Review*, 103 Va. L. Rev. at 199 (courts apply the textual approach in "every other type of claim that [Section 2401(a)] covers"). That violates this Court's admonition that statutory language cannot be given "different meanings in different factual contexts." *United States v. Santos*, 553 U.S. 507, 522 (2008) (plurality) (emphasis omitted); *see also Clark v. Martinez*, 543 U.S. 371, 386 (2005) (the notion that "judges can give the same statutory text different meanings in different cases" is a "dangerous principle"). The lower courts have impermissibly "render[ed]" Section 2401(a) "a chameleon." *Clark*, 543 U.S. at 382. Their policy arguments are both methodologically improper and substantively ineffective.

III. THE ADMINISTRATIVE STATE SHOULD NOT BE PERMITTED TO ELUDE JUDICIAL OVERSIGHT WHEN UNLAWFULLY IMPOSING NEW INJURIES.

The APA is a "bill of rights" for "the hundreds of thousands of Americans whose affairs are controlled or regulated" by federal agencies. 92 Cong. Rec. 2149 (1946) (statement of Sen. McCarran). It was designed to serve as "a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950)); *see also* S. Rep. No. 79-752, at 212 (1945) (APA judicial review is designed to prevent Congress's statutes from becoming "blank checks drawn to the credit of some administrative officer or board"); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955) (APA was intended in part to "remove obstacles to judicial review of agency action").

The APA's guarantees have become all the more critical as the administrative state has transformed into leviathan. Today, "the Executive Branch . . . wields vast power and touches almost every aspect of daily life." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499 (2010). Much of the federal government's operation now consists of "hundreds of federal agencies poking into every nook and cranny of daily life." *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting); *see also* Clyde Wayne Crews, Jr., *How Many Federal Agencies Exist?*, Forbes (July 5,

2017)[7] (government estimates of the number of federal agencies in existence vary from 71 to 454). Our Constitution's founders "could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities." *City of Arlington*, 569 U.S. at 313 (Roberts, C.J.). These agencies "produce[] reams of regulations—so many that they dwarf the statutes enacted by Congress." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2446–47 (2019) (Gorsuch, J., concurring in the judgment) (quotations marks omitted). The Code of Federal Regulations contained 18,000 pages near the close of the New Deal in 1938 but now contains more than 175,000 pages. Paul J. Larkin, Jr. & GianCarlo Canaparo, *Gunfight at the New Deal Corral*, 19 Geo. J.L. & Pub. Pol'y 477, 488 (2021). And agencies "add thousands more pages of regulations every year." *Kisor*, 139 S. Ct. at 2447 (Gorsuch, J.).

Unfortunately, the administrative state's rapid expansion has not led agencies to exercise greater care in respecting constitutional boundaries. To the contrary, in recent years agencies have aggressively pushed the limits of their authority in ways that impact every aspect of American society. For example, the CDC—an agency tasked with preventing "communicable diseases"—recently claimed power to "impose[] a nationwide moratorium on evictions" in counties covering "[a]t least 80% of the country." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2486, 2489 (2021). The EPA claimed that the "vague language of an ancillary provision of the [Clean Air Act]" granted it authority to unilaterally demand "a shift throughout the

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[7] *Available at* bit.ly/2HyrFrP.

power grid from one type of energy source to another." *West Virginia v. EPA*, 142 S. Ct. 2587, 2610–12 (2022) (quotation marks and alterations omitted). After stating "[f]or years" that bump stocks are not machine guns, ATF "changed its mind" and has placed the specter of criminal sanctions on scores of law-abiding citizens. *Guedes v. ATF*, 140 S. Ct. 789, 789 (2020) (statement of Gorsuch, J.). OSHA—"tasked with ensuring *occupational* safety"—imposed a vaccine mandate on approximately 84.2 million employees during the Covid-19 pandemic. *NFIB v. OSHA*, 595 U.S. 109, 114 (2022). The Department of Education "canceled roughly $430 billion of federal student loan balances" and "created a novel and fundamentally different loan forgiveness program" by invoking "a few narrowly delineated situations specified by Congress" and then "rewrit[ing] that statute from the ground up." *Biden v. Nebraska*, 143 S. Ct. 2355, 2362, 2368, 2369 (2023).

In light of the administrative state's rapidly expanding scope, "the cost of . . . deny[ing] citizens an impartial judicial hearing" when injured by agency action "has increased dramatically." *Kisor*, 139 S. Ct. at 2447 (Gorsuch, J.); *see also Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986) (citing this Court's "insist[ence]" that the availability of judicial review of executive action is part of "[t]he very essence of civil liberty"). And while unlawful agency action often imposes immediate injury, agencies should not escape judicial oversight whenever their action causes injury more than six years later.

While aggrieved persons always can challenge agency action when defending an enforcement action, *see supra*, nothing in Section 2401(a) or the APA suggests that persons newly injured by old agency action should be confined to defense review. And this Court

does not "consider" the availability of defense review "a 'meaningful' avenue of relief," *Free Enter. Fund*, 561 U.S. at 490–91. That is for good reason—the time, cost, and reputational ruin accompanying enforcement actions often "practically necessitate a pre-enforcement . . . suit" "if there is to be a suit at all." *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582, 1592 (2021); *see also Free Enter. Fund*, 561 U.S. at 490 ("We normally do not require plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law.'"); *cf. Ex parte Young*, 209 U.S. 123, 148 (1908) (forcing a business to risk penalties to challenge a rule in court violates due process).

In *Sackett v. EPA*, for example, this Court rejected an attempt by the EPA to duck the APA cause of action after issuing an administrative compliance order by arguing that the plaintiffs could contest the order in an enforcement action. 566 U.S. 120, 124–25, 127 (2012). The plaintiffs would have "accrue[d], by the Government's telling, an additional $75,000 in potential liability" "each day they wait[ed] for the Agency to [bring an enforcement action]." *Id.* at 127. In that case and many others, "the potential fines" could "easily . . . reach[] the millions." *Id.* at 132 (Alito, J., concurring). Defense review, in many instances, is simply unrealistic.

The SEC, for example, has been able to coerce settlement in the "vast majority of [its] cases" just by threatening an enforcement action. *Tilton v. SEC*, 824 F.3d 276, 298 n.5 (2d Cir. 2016) (Droney, J., dissenting); *see also* Luis A. Aguilar, Comm'r, SEC, *A Stronger Enforcement Program to Enhance Investor Protection* (Oct. 25, 2013) (98 percent of those threatened with enforcement settle). That is partly because, according to a former SEC Deputy General Counsel,

most defendants' "business, job, or personal relationships will not survive sustained adverse publicity repeating the SEC's allegations over and over during the long life of litigation." Comments of Andrew N. Vollmer on Office of Mgmt. & Budget Request for Information, OMB-2019-0006, at 4 (Mar. 9, 2020).[8] "[E]ndless battling depletes the spirit along with the purse," especially when interacting with "a series of public officials bent on making life difficult." *Wilkie v. Robbins*, 551 U.S. 537, 555 (2007).

Many persons aggrieved by unlawful agency action, moreover, will never have the *opportunity* to participate in an enforcement action. In this case, for example, there will never be an enforcement action because Petitioner's injury is caused by private persons regulated by Respondent's 21-cent standard. *See* Corner Post Br. 34. And this case is no fluke—injurious agency action will not involve enforcement in many contexts, for example when persons are aggrieved by "rules requiring that employers receive a favorable labor certification . . . before obtaining a[n] [H-2B] visa," *Outdoor Amusement Bus. Ass'n, Inc. v. DHS*, 983 F.3d 671, 675–76 (4th Cir. 2020) (dismissing as time-barred), or an agency's decision "to subsidize a portion of tenants' rents," *Trafalgar Cap. Assocs., Inc. v. Cuomo*, 159 F.3d 21, 24 (1st Cir. 1998) (same); *see also* Corner Post Br. 35 (agency actions that injure one person by regulating someone else are so common that they have their own Article III standing rules). The possibility of "filing [a] petition to rescind regulations" and then "appealing the denial of the petition," *Wind River*, 946 F.2d at 714, does not solve the problem be-

[8] *Available at* tinyurl.com/y5qcknzx.

cause the agency may not have a procedure for a petition to rescind the action at issue, and even if it does, it may simply decline to issue a decision on the petition or delay such action indefinitely. When an agency takes injurious action outside the enforcement context, therefore, the APA's cause of action is usually the only mechanism to contest the action.

* * *

The Eighth Circuit's approach deprives many Americans of access to the federal courts in the face of a behemothic and ever-growing administrative state. And this injustice is a creation of the courts—a relic of a time when judges read their own policy judgments into the white spaces of the U.S. Code. This Court should reaffirm that those days are gone and the federal courts must simply apply the law as written.

CONCLUSION

This Court should reverse.

Respectfully submitted.

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