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 PROFESSORS ADITYA BAMZAI AND JOHN DUFFY AS *AMICI CURIAE* 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," 5 U.S.C. § 702 (as the Sixth Circuit has held)?

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INTEREST OF *AMICI CURIAE*[*]

Aditya Bamzai and John Duffy are professors at the University of Virginia School of Law. They teach and write about administrative law and have an interest in the sound development of the field. In addition, they are coauthors of a forthcoming study for the Administrative Conference of the United States on *Timing of Judicial Review of Agency Action*. *See* https://www.acus.gov/research-projects/timing-judicial-review-agency-action. The views expressed in this brief are theirs alone and do not represent the views of the Administrative Conference of the United States or its members.

SUMMARY OF ARGUMENT

Section 2401(a) of title 28 provides that, except in certain government-contracting disputes, "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). The question presented in this case is whether "the right of action" to challenge a rulemaking under the Administrative Procedure Act

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[*] No party or party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. The University of Virginia School of Law provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amici curiae*.) Otherwise, no person or entity other than the *amici curiae* has made a monetary contribution intended to fund the preparation or submission of this brief.

("APA") "first accrues" on the date the rule is published or on the date when the plaintiff suffers a relevant injury. Section 2401(a)'s text and drafting history establish that the latter date—when the plaintiff suffers a relevant injury—governs the question of "first accrual." Nothing in the APA, moreover, suggests a different result than the plain text of section 2401(a) and relevant background principles require.

The United States, however, argues that the APA's "final agency action" requirement, 5 U.S.C. § 704, changes the general accrual rule such that the statute of limitations begins to run on the publication of a regulation, even for plaintiffs who have yet to suffer injury. That is incorrect. Interpreting section 2401(a) to run from the publication of a rule would convert it from a statute of limitations (which runs from the time the plaintiff can file suit) to a statute of repose (which runs from the time the defendant took the challenged action). As the Court explained in *CTS v. Waldburger*, 573 U.S. 1 (2014), a "statute of limitations" creates "'a time limit for suing in a civil case, based on the date when the claim accrued,'" and the time when the cause of action "accrues" is "when 'the plaintiff can file suit and obtain relief.'" *Id.* at 7–8 (2014) (quoting, respectively, Black's Law Dictionary 1546 (9th ed. 2009) and *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U. S. 99, 105 (2013)). By contrast, a statute of repose imposes a time limit "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. For that reason, a statute of repose "is not related to the *accrual* of any cause of action." *Id.* (quotation marks and citation omitted). As the backdrop against

which Congress enacted section 2401(a) demonstrates, Congress's use of the word "accrual" in section 2401(a)—rather than use of language starting the limitations period from "entry" or "issuance" of an agency order, *see* 28 U.S.C. § 2344 (starting limitations period on "entry")—is strong textual evidence that Congress intended to create a statute of limitations. *See Herr v. United States Forest Service*, 803 F.3d 809, 819 (6th Cir. 2015).

BACKGROUND

Section 2401(a) originated in statutes creating the court of claims, applying initially solely to claims under the "Little Tucker Act." Congress converted the predecessor to section 2401(a) into a "catch-all" statute of limitations in the recodification of 1948. Even then, it was unclear whether section 2401(a) applied to APA claims, because they were brought as suits against officers, rather than "against the United States," before Congress added a waiver of sovereign immunity to the APA in 1976.

A. Section 2401(a)'s origins and the law-equity distinction.

1. Section 2401(a)'s origins in the statutes establishing the Court of Claims.

Before 1855, Congress did not enact a general waiver of sovereign immunity for money-damage lawsuits against the United States; instead, private parties with damages claims against the United States were required to petition Congress for relief in an individual case. *See Meridian Investments, Inc. v. Fed. Home Loan Mortg. Corp.*, 855 F.3d 573, 578 n.2

(4th Cir. 2017); *United States v. Mitchell*, 463 U.S. 206, 212 (1983). To reduce the administrative burden this system imposed on its claims committees, Congress created the Court of Claims in 1855 to hear some money-damages suits against the United States. *See generally* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861, at 194–203 (2d ed. 2014). In 1863, Congress revised the court's jurisdiction and added a six-year statute of limitations. *See* Act of Mar. 3, 1863 §§ 2, 10, 12 Stat. 765, 765, 767. The new statute of limitations provided that "[e]very claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition . . . is filed in the court, or transmitted to it . . . within six years after the claim first accrues." *Id.* § 1, 12 Stat. at 765. Much like the current version of section 2401(a), the 1863 statute of limitations also included a proviso for persons under legal disability or "beyond the seas at the time the claim accrued," who would "not be barred if the petition be filed in the court or transmitted . . . within three years after the disability has ceased." *Id.*; *see* 28 U.S.C. § 2401(a) ("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.").

In 1887, in the "Tucker Act," Congress reformed the jurisdiction over claims against the United States, partly by waiving sovereign immunity, and thereby conferring concurrent jurisdiction on district courts, over claims not more than $10,000 in what became known as the "Little Tucker Act." *See* Act of Mar. 3, 1887, ch. 359, § 2, 24 Stat. 505, 505; *see also* H.R. Rep. No. 6974, 49th Cong., 1st Sess. (1886); *Mitchell*, 463 U.S. at 213–14 (first quoting H.R. Rep. No. 1077, 49th

Cong., 1st Sess. 1 (1886), then quoting 8 Cong. Rec. 2680 (1887) (remarks of Rep. Bayne)). Like the 1863 statute creating the court of claims, the Tucker Act contained a statute of limitations barring suits "against the Government of the United States . . . *under this act* unless the same shall have been brought within six years after the right accrued for which the claim is made." Act of Mar. 3, 1887, § 1, 24 Stat. at 505 (emphasis added). By its terms, the statute applied solely to claims "under this act"—*i.e.*, the Tucker Act, whether the Big Tucker Act (permitting claims in the Court of Claims) or the Little Tucker Act (permitting claims in federal district court).

In 1911, as part of a reorganization of statutes pertaining to procedure in federal courts, Congress separated the "Big" from the "Little" Tucker Act. *See* Act of Mar. 3, 1911, 36 Stat. 1087, codified as amended at 28 U.S.C. § 1346(a)(2) ("Little Tucker Act") and *id.* § 1491 ("Big Tucker Act"). The 1911 reorganization also codified statutes of limitations for the Big and Little Tucker Acts in different provisions. *See* Act of Mar. 3, 1911, § 156, 36 Stat. at 1139 (Big Tucker Act); *id.* § 24(2), 36 Stat. at 1093 (Little Tucker Act). Notably, the statute of limitations for the Little Tucker Act retained the "under this act" language and, thus, could not have been understood to apply to non-Tucker Act claims. *See id.*

Thus, before the passage of the APA, the predecessor version of section 2401(a), by its terms, applied solely to claims under the Little Tucker Act. The Supreme Court understood the Little Tucker Act to do "no more than authorize the District Court to sit as a court of claims . . . to adjudicate claims against

the United States" that could "be maintained in the Court of Claims." *United States v. Sherwood*, 312 U.S. 584, 591 (1941). Such claims were "confined to the rendition of money judgements in suits brought for relief against the United States." *Id.* at 587–88. As a result, other kinds of claims against the United States were subject to other limitations periods, rather than the limitations period contained in the predecessor to section 2401(a).

2. Limitations and the distinction between law and equity.

In general, jurisprudence during the pre-APA era distinguished between law and equity when establishing the appropriate limitations period. As already discussed, suits at law were generally subject to statutes of limitations—either those supplied by Congress or borrowed from another statute. *See Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946); *Cope v. Anderson*, 331 U.S. 461, 464 (1947) (borrowing a state limitations statute); *Rawlings v. Ray*, 321 U.S. 96, 98 (1941) (emphasizing that whether a cause of action has accrued so as to trigger the start of the borrowed state statute of limitations is a federal question).

By contrast, absent congressional action, suits in equity were subject to the doctrine of laches: "the principle that equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant." *Russell v. Todd*, 309 U.S. 280, 287–88 (1940). To be sure, in cases of "concurrent jurisdiction," equity courts were "bound by the statutes of limitations which govern courts of law in like cases." *Wagner v. Baird*, 48 U.S. (7 How.) 234, 258 (1849); *Cope*, 331 U.S. at 463–64; *O'Brien v.*

Wheelock, 184 U.S. 450, 493 (1902) ("Courts of equity usually consider themselves bound by the statutes of limitation which govern courts of law in like cases. . . But courts of equity go farther in the promotion of justice, and where laches exist, deny the relief sought even though the statutory period may not have run under the applicable statute.").

In *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), for example, the Supreme Court addressed a suit in equity by creditors of a Bank to enforce the liability of bank shareholders for debts owed under the Federal Farm Loan Act. *Id.* at 393. The Court noted that, if Congress explicitly provides a "limit upon the time for enforcing a right which it created, there is an end of the matter." *Id.* at 395. If "Congress is silent," the Court continued, "[a]s to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation." *Id.* By contrast, when "enforcing an equitable right created by Congress," for which Congress has not provided a statute of limitations, "statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive . . . namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair." *Id.* at 395–96.

B. The passage of the Administrative Procedure Act and the 1948 Recodification.

Two events relevant to this litigation occurred in quick succession in the period immediately following World War II. First, Congress enacted the APA in 1946, which creates the claim at issues in this litigation. Second, Congress recodified sections of the judicial code, with implications for section 2401(a).

1. The Administrative Procedure Act.

When Congress passed the Administrative Procedure Act in 1946, it did not establish a general statute of limitations for APA claims. *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). The APA expressly provided that injury was required for a lawsuit. In what is now section 702 of the statute, Congress provided 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. The APA separately provided that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704.

One year after the APA's passage, Attorney General Tom Clark—later a Justice of this Court—released a manual addressing the Act's interpretation. *See* Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act (1947). Although one might question some of the Attorney General's Manual's conclusions, the

Manual's statement on timing is revealing. The Manual explained that "the time within which review must be sought will be governed, as in the past, by relevant statutory provisions or by judicial application of the doctrine of laches." *Id.* at 93. For this proposition, the Manual cited section 5(c) of the Federal Trade Commission Act, 15 U.S.C. § 45(c) (providing a review period from an FTC cease-and-desist order), and *United States ex rel. Arant v. Lane*, 249 U.S. 367 (1919) (applying the doctrine of laches to a writ of mandamus).

To reiterate, at the time of the APA's adoption in 1946, the predecessor to section 2401(a) would have applied solely to claims "under this Act"—*i.e.*, the Tucker Act. As a result, it is unsurprising that the authors of the Attorney General's Manual did not immediately turn to that provision to establish the limitations period, but rather believed that the limitations period would be governed *either* by specific statutory provisions *or* (as in equity cases) by laches.

2. The 1948 Recodification

Just two years after the APA's passage—in 1948—Congress recodified title 28 of the United States Code. In doing so, Congress separated the substantive conferral of jurisdiction under the Little Tucker Act (*see* 28 U.S.C. § 1346(a)(2)) and its statute of limitations (*see* 28 U.S.C. § 2401(a)). The 1948 codification also modified the text of the provision. Before 1948, the relevant text read that "no suit against the Government of the United States shall be allowed *under this act* unless the same shall have been brought within six years after the right accrued for which the claim is made." Act of Mar. 3, 1911, 36 Stat. 1087, 1093 (unofficially codified at 28 U.S.C.

§ 41(20) (1947)) (emphasis added); Act of Mar. 3, 1887, § 1, 24 Stat. at 505. After the 1948 codification, the provision read: "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." Act of June 25, 1948, 62 Stat. 869, 971.

Although one might hesitate before presuming that the 1948 recodification's subtle changes to statutory text intended to alter statutory meaning, *see Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957), Congress's elimination of the "under this act" language can fairly be understood to have altered the scope and applicability of section 2401(a)'s statute of limitations. By excising that phrase, the 1948 recodification transformed section 2401(a) from a provision focused solely on claims brought under the Little Tucker Act into "a catch-all limit for non-tort actions against the United States." *Werner v. United States*, 188 F.2d 266, 268 (9th Cir. 1951); *see United States v. Mottaz*, 476 U.S. 834, 838 (1986) (noting that section 2401(a) provides "the general statute of limitations governing actions against the United States"); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 118–19 (2018).

The 1948 recodification thus changed the text of section 2401(a) in this respect, but it retained the preexisting text in a more significant respect: Congress set the statute of limitations to run from the time a right of action "first accrues." That language was significant because Congress had in several agency statutes of the pre-APA and pre-1948-recodification era used the concept of "accrual" to begin statutes of limitations. *See, e.g.*, 49 U.S.C.

§ 16(3)(a) (1934) (providing that, under the Interstate Commerce Act, "[a]ll actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action *accrues*, and not after") (emphasis added); *Mid State Horticultural Co. v. Penn. R. Co.*, 320 U.S. 356, 362 n.15 (1943) (discussing the history of the amendments to this limitations period); Railway Labor Act of 1934, § 3, 48 Stat. 1189, codified at 45 U.S.C. § 153(q) (1934) ("All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action *accrues* under the award of the division of the Adjustment Board, and not after.") (emphasis added); *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342 (1944) (considering this provision).

By contrast, the Emergency Price Control Act of 1942 ("EPCA"), Pub. L. No. 77-421, 56 Stat. 23, conspicuously did not contain a limitations period that ran from when the right of action "accrues." Instead, the EPCA permitted administrative protests to be filed "within a period of sixty days after the issuance of any regulation or order" by the World War II–era Office of Price Administration. EPCA § 203(a), 56 Stat. at 31; *see Yakus v. United States*, 321 U.S. 414 (1944) (addressing the constitutionality of the EPCA). The EPCA thus made "issuance" and not "accrual" the key moment that began the limitations period. Moreover, a few years after the 1948 recodification, Congress enacted the Administrative Orders Review Act—sometimes referred to as the "Hobbs Act"—which, similar to the EPCA, began its limitations period at the "entry" of an agency order. Pub. L. No. 81-901, § 4, 64 Stat. 1129, 1130 (1950), codified as amended at 28 U.S.C. § 2344. Neither the text of the

1948 recodification, nor any provision of the APA, ran from the "issuance" or "entry" of a government order or regulation.

C. The 1976 waiver of sovereign immunity.

Even after the 1948 recodification, however, section 2401(a)'s application to claims under the APA was debatable. That is because, before 1976, plaintiffs in ordinary APA suits might well have been barred from suing either the United States or an agency by name. Such suits were traditionally barred by sovereign immunity, and the APA prior to 1976 included no waiver of sovereign immunity. Unless some other statute waived sovereign immunity, plaintiffs instead would have to resort to the "officer suit" fiction under which plaintiffs could sue federal officers and obtain equitable relief running against the officers in their official capacity. *See generally* Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 387, 398–99 (1970); *see also* John F. Duffy, *Sovereign Immunity, the Officer Suit Fiction, and Entitlement Benefits*, 56 U. Chi. L. Rev. 295, 302–10 (1989) (tracing the history of the officer suit doctrine). Under traditional doctrine, such suits against officers were not considered as being against the United States for purposes of sovereign immunity. *See*, *e.g.*, *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619–20 (1912) (noting that, "[t]he exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded" and "the officer cannot

claim immunity from injunction process"); *see also United States v. Lee,* 106 U.S. 196 (1882).

Thus, in the absence of a waiver of sovereign immunity, APA claims were regularly brought against the relevant official, rather than against an agency or the "United States." But by its terms, section 2401(a) applied to a "civil action commenced *against the United States*."

In 1976, Congress eliminated the need for a lawsuit against the officer by waiving sovereign immunity for suits seeking nonmonetary relief. *See* Act of Oct. 21, 1976, § 1, 90 Stat. 2721, 2721 (codified at 5 U.S.C. § 702); *see also* Kathryn E. Kovacs, *Scalia's Bargain*, 77 Ohio St. L. J. 1155, 1158–70 (2016) (detailing the history of the 1976 Amendment and the crucial role of then-Assistant Attorney General Antonin Scalia in the passage of the amendment). (For the views of the then-Associate Professor Scalia at the University of Virginia School of Law, see Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 Mich. L. Rev. 867, 869, 922 (1970) (discussing federal sovereign immunity's effects on "the expanding and increasingly important field of federal administrative law," and noting the uncertainty about whether the APA as originally written contains a waiver of sovereign immunity because "the legislative history" of the statute "does not establish such an intent").)

The 1976 amendment to section 702 of the APA waived the sovereign immunity of the United States in cases "seeking relief other than money damages." 5 U.S.C. § 702. That amendment permitted the United

States and its agencies to be sued by name in cases, like this one, that sought only equitable relief. Whether intentionally or not, this amendment rendered many APA claims brought against agencies plainly subject to section 2401(a), because they were "*against the United States*."

ARGUMENT

"[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). In this case, the transplanted word is "accrual." For the reasons set forth above, section 2401(a) is best interpreted to establish a generic limitations period for non-tort actions against the United States—including actions "against the United States" under the APA. *Amici* believe that the phrase "first accrues," as used in section 2401(a), should be given its ordinary legal meaning—the meaning that it had in its "old soil." Under that meaning, a "right of action first accrues" under section 2401(a) when the plaintiff can file suit and obtain relief. Moreover, Congress did not alter that ordinary legal framework when it enacted the APA in 1946.

I. A right of action does not "accrue" under section 2401(a) until the plaintiff can file suit and obtain relief.

A. The common understanding of "accrual"—both now and at the time Congress adopted section 2401(a)—requires some showing that the individual can bring suit.

Start with modern caselaw. As this Court noted in *CTS v. Waldburger*, a cause of action "accrues" "when the plaintiff can file suit and obtain relief." 573 U.S. at 7–8 (quotation marks and citations omitted). Or, as the Court put it in *Gabelli v. SEC*, 568 U.S. 442 (2013), "a right accrues when it comes into existence." *Id.* at 448. The "hallmark of accrual" in section 2401(a) is the "right to bring a civil action against the United States." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 514–15 (1967) (reasoning that a contract claim against the government "accrued" within the meaning of section 2401(a) when the plaintiff was first able to bring suit); *see also Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418 (2005) (remarking on "the 'standard rule 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) ("Unless 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.").

Turn next to sources roughly contemporaneous with the 1948 recodification of section 2401(a). A prominent legal dictionary explained that "[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." *Accrue*, Black's Law Dictionary (4th ed. 1951). In *United States v. Dickinson*, 331 U.S. 745 (1947), this Court interpreted the predecessor version of section 2401(a) in the context of a claim for taking of physical property

due to the government's construction of a dam to raise a river's water level and thereby make the river more navigable. The dam was completed and began to impound water in 1936; the plaintiffs' lands began to be submerged in early 1937; and suit was filed in 1943. The government argued that the plaintiffs' claims accrued either when the dam was completed or when the plaintiffs' lands began to be submerged. The Court rejected the government's argument, reasoning that *even if* "a landowner might be allowed to bring suit as soon as inundation threatens," that was "not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him." *Dickinson*, 331 U.S. at 749. The Court thus deemed the causes of action to accrue not when the government had completed its actions that would produce the eventual harm to the plaintiffs (the building of a dam and the commencement of the dam's impounding of water), but when the plaintiffs had suffered the harm giving them the right to sue (the final inundation of their lands due to the gradual rising of the waters). *See id.* at 746–49.

Older sources set forth the same rule. *See, e.g.*, 1 A. BURRILL, A LAW DICTIONARY AND GLOSSARY 17 (1850) ("an action *accrues* when the plaintiff has a right to commence it"); 1 H.G. WOOD, LIMITATIONS OF ACTIONS AT LAW AND IN EQUITY § 117, at 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.").

B. The inclusion of the word "first" does not significantly affect how to analyze the accrual of a claim under section 2401(a). In *Franconia Associates v. United States*, 536 U.S. 129 (2002), this Court interpreted the phrase "first accrues" as

"unexceptional" language that does not "create[] a special accrual rule for suits against the United States." *Id.* at 145. *Franconia* involved the statute of limitations in 28 U.S.C. § 2501. That provision, using wording similar to section 2401(a), requires any claim subject to the jurisdiction of the Court of Federal Claims to be filed "within six years after such claim first accrues." 28 U.S.C. § 2501.

In *Franconia*, the plaintiffs brought a breach-of-contract claim against the government, and the Court accepted as settled law that such claims accrue, and statutes of limitation on such actions begin to run, at the time of the breach. *See id.* at 141. The government had "repudiated" a future contractual obligation at an early date, but technically there was no "breach" of the contract until the government refused performance at the contractual time for performance. *See id.* at 148. Under standard principles of contract law, a party's repudiation of contractual obligations "ripens into a breach prior to the time for performance only if the promisee 'elects to treat it as such.'" *Id.* at 143. The plaintiffs in the case chose not to treat the anticipatory repudiation as a breach but instead waited for the time of performance and then brought suit within six years of the refusal to perform. The government argued that "first accrues" should refer to the "earliest possible date" on which suit could be brought and that, because the plaintiffs *could have chosen* to treat the repudiation as a breach and bring suit immediately, the plaintiffs' cause of action should be viewed as accruing at the time of repudiation. *See id.* at 144. The Court rejected the government's argument and adhered to the standard rule for breach-of-contract actions—that the statute of limitations on the plaintiffs' breach claims first

accrued at the time of breach, not at the earlier time of the anticipatory repudiation if the plaintiff chose not to treat repudiation as a breach.

Franconia thus demonstrates that the word "first" does not change the ordinary rules of accrual—by somehow converting the statute to a requirement that suit be brought on the "earliest possible date."

II. The Administrative Procedure Act did not change section 2401(a)'s accrual rules.

Given that section 2401(a) generally requires a legal entitlement to seek judicial relief, it follows that a plaintiff's APA claim would accrue only when the plaintiff met the standard set forth in section 702. *See* 5 U.S.C. § 702 ("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."); *Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 127 (1995) (noting that 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"). Some lower courts adopting a contrary test for "accrual" of APA claims, however, have pointed to section 704 of the APA. That provision subjects "final agency action for which there is no other adequate remedy in a court . . . to judicial review." 5 U.S.C. § 704. These courts jump from the premise that "final agency action" is required before judicial review to the conclusion that a claim accrues under section 2401(a) upon such "final agency action." *See, e.g.*, *North Dakota Retail Ass'n v. Bd. of Governors of the Federal Reserve System*, 55 F.4th 634, 641 (8th

Cir. 2022) (reasoning that, at least in "facial challenges" to a final agency action, "the right of action accrues, and the limitations period begins to run, upon publication of the regulation"); *Hire Order Ltd v. Marianos*, 698 F.3d 168, 170 (4th 2012); *Sierra Club v. Slater*, 120 F. 3d. 623, 631 (6th Cir. 1997). But the conclusion does not follow from the premise.

A. A simple analogy can make the point clear. Consider a party who might be interested in bringing a constitutional challenge to a measure under consideration in Congress. Anticipating the measure's adoption, the party brings a claim to enjoin it in federal court. Such a claim would, of course, be premature. Until the bill's passage and the President's signature, no "final" governmental action has occurred that might give rise to a cause of action. But that does not mean that a claim "accrues" for all parties when the bill becomes a statute. To the contrary, the ordinary rules of accrual would apply, such that passage of the bill would not trigger the statute of limitations until a party suffered sufficient injury to constitute standing to sue.

The APA's concept of "final agency action" works in a similar fashion. It prevents unduly premature lawsuits by requiring a party to wait for "final agency action." *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (observing that "final agency action" occurs when (1) an action "mark[s] the 'consummation' of the agency's decisionmaking process," rather than a "tentative or interlocutory" step, and (2) the action is "one by which 'rights or obligations [will] have been determined,' or from which 'legal consequences will flow'"); *see also* Jerry L. Mashaw *et al.*, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW

SYSTEM: CASES AND MATERIALS 1123 (8th ed. 2019) ("The requirement of 'finality' serves quite obvious purposes of avoiding premature judicial evaluation of agency decision making."). But "final agency action" no more begins the clock on a statute of limitations than the President's signature begins the clock in the example above. In both instances, something more—namely, a relevant showing of injury *by the plaintiff*—is necessary for a cause of action to accrue. Under the APA, the relevant standard for injury is set forth in section 702, which entitles a party to judicial review only if that party has "suffer[ed] legal wrong because of agency action" or been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Thus, section 704's "final agency action" language does not alter section 2401(a)'s backdrop accrual rules. Instead, those rules continue to apply, as they do in non-APA cases.

Indeed, on the United States' interpretation of section 2401(a), it is entirely possible for the entire six-year period to run even before a right of action accrues to any party. The six-year period, in other words, could expire before any party could bring suit. For example, in *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967), this Court held that the agency rulemaking (which governed the access to manufacturing facilities that regulated entities were required to grant to FDA inspectors) constituted "final agency action," but that nonetheless judicial review was not available under the Court's judicially-created "test of ripeness." *Id.* at 162, 164. Applying a "final agency action" test to section 2401(a) might start the time period for seeking judicial review prior to any party's ability to seek judicial review.

B. Perhaps for that reason, some lower courts have sought to manufacture a less harsh statute of repose out of section 2401(a)'s text. For example, in *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991), the Ninth Circuit determined that the section 2401(a) limitations period commenced at the time of "final agency action" for some issues but not others. The *Wind River* court concluded that challenges to agency decisions "must be brought within six years of the decision" if the party "wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action" or "to bring a policy-based facial challenge to the [agency's] decision." *Id.* at 715. But if "a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger." *Id.*

But the Ninth Circuit's approach suffers from a significant flaw: It cannot make sense of the actual text of section 2401(a). Contra *Wind River*, section 2401(a) does not distinguish among procedural, substantive, or other forms of challenges. It simply makes no sense of section 2401(a) to treat it as a statute of repose for some issues and a statute of limitations for others. Nothing in the text of section 2401(a) suggests that the six-year time period should be calculated in different ways for different issues. *See* John Kendrick, *(Un)limiting Administrative Review:* Wind River*, Section 2401(a), and the Right to Challenge Federal Agencies*, 103 Va. L. Rev. 157 (2017).

Nor would it make sense to interpret section 2401(a) as beginning the statute of limitations for *all parties* when the right to seek judicial review "first accrues" for *one party*. *Cf.* Brief in Opposition 14 (seeming to suggest this approach by noting that "agency actions that affect significant numbers of individuals or businesses often face timely challenges by associations that represent their members' interests"). On its face, 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." 28 U.S.C. § 2401(a) (emphasis added). The use of the definite article "the" naturally refers back to the "civil action" that belongs to the party bringing suit, rather than the accrual of a right of action by any other party who might have sought to challenge the same regulation. That is no doubt why cases applying the similarly worded statute of limitations in 28 U.S.C. § 2501 have taken an individualized approach to applying the concept of accrual. *See, e.g.*, *Boling v. United States*, 220 F.3d 1366, 1368, 1369 n.2, 1373 (Fed. Cir. 2000) (addressing when property owners' takings claims accrued for statute of limitations purposes where the government's construction of a canal gradually eroded properties lying along the banks of the canal and holding that, although the government completed building the canal decades before the plaintiffs filed suit, the owners' "takings claims accrued when the erosion had substantially encroached the parcels at issue" and recognizing that accrual would "vary from parcel to parcel").

Moreover, a "collective" approach to accrual would require speculation about the rights of parties not before the court. Thus, for example, a court trying

to determine whether a party could challenge an administrative decision issued six and a half years ago would need to determine whether a cause of action accrued to any person in the first six months after the administrative decision. In a sense, a reviewing court would have to determine if a cause of action accrued at some earlier date by a "representative" plaintiff. But the notion of "virtual representation" of this sort is itself fraught—and contradicts the rule that a "litigant is not bound by a judgment to which she was not a party." *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008). One would certainly expect Congress to have left some sort of textual clue in section 2401(a) before altering the law of party representation in such a significant fashion. But no such clue exists.

C. *Amici* certainly appreciate that an ordinary meaning approach to the concept of "accrual" under section 2401(a) does not give a government agency perfect repose for agency actions, such as rulemakings, that broadly affect a changing population. For such regulations, section 2401(a) might well bar suits against the United States brought by entities subject to the regulations for more than six years, but there might be recent entrants into the regulated sphere (such as a new company) that will have accrued their causes of action only recently.

But it is important to recognize that the APA, by its terms, would not provide for any sort of perfect repose. Section 703 of the APA authorizes judicial review in "civil or criminal proceedings for judicial enforcement" unless "prior, adequate, and *exclusive* opportunity for judicial review is provided by law." 5 U.S.C. § 703 (emphasis added). Nothing in section 2401(a) or the APA provides that a pre-enforcement

suit against the United States is the "exclusive" way for a party to obtain judicial review. Thus, even if the United States prevailed in its interpretation of section 2401(a)—thereby foreclosing APA suits six years after an agency action—all must agree that parties could obtain judicial review of the same regulation in enforcement proceedings. *See* Brief in Opposition 15. In a nutshell, even on the United States' interpretation, no perfect repose would be possible.

At any rate, the interpretation described in this brief is a consequence of the language that Congress employed in section 2401(a) and the history that resulted in that provision establishing the statute of limitations for APA claims. Against the relevant backdrop, there is no reason to construe section 2401(a) against its plain text.

III. The Court need not address two issues not presented here.

The petition deals exclusively with the time of accrual under section 2401(a) for an APA action asserted against a governmental agency. The case does not present the quite distinct issues (1) whether section 2401(a) would be the proper statute of limitations where a plaintiff sues officers acting in their official capacity; and (2) what the appropriate remedies might be in an APA action where one party is not barred by the statute of limitations but others are. The Court need not address either question here. *Amici* address them merely to highlight for the Court how the different parts of the APA might fit together.

A. The Court need not address whether section 2401(a) applies to officer suits.

By its terms, section 2401(a) applies to a "civil action commenced *against the United States*." 28 U.S.C. § 2401(a) (emphasis added). In those APA cases where the plaintiff expressly names the United States as a defendant, section 2401(a) applies by its plain text. The same is true in cases like this one—where the plaintiff has sued an agency of the United States, such as the Board of Governors of the Federal Reserve System, *see* 12 U.S.C. § 241. *See Auction Co. of Am. v. FDIC*, 132 F.3d 746, 749 (D.C. Cir. 1997) (holding that section 2401(a) applies where "a federal instrumentality acts within its statutory authority to carry out the government's purposes") (internal quotations omitted); *compare Meridian Investments, Inc. v. Fed. Home Loan Mortg. Corp.*, 855 F.3d 573, 578 (4th Cir. 2017) (holding that "Freddie Mac" is not the United States for purposes of section 2401(a)); *Stevens v. Tennessee Valley Auth.*, 712 F.2d 1047, 1051 (6th Cir. 1983) (similar).

A somewhat more complex question—unlike the question here—is raised if a plaintiff relies solely on the traditional device of suing an officer. Such a lawsuit would not have been considered "against the United States" for purposes of sovereign immunity. *See, e.g., Philadelphia Co. v. Stimson*, 223 U.S. 605, 629–20 (1912) (noting that, "[t]he exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded" and "the officer cannot claim immunity from injunction process"); *United States v. Lee,* 106 U.S. 196 (1882). On the one hand, suits against officers arguably are

also not "against the United States" under section 2401(a) and, therefore, not subject to section 2401(a)'s statute of limitations. Such suits might be subject only to timeliness restrictions of the equitable doctrine of laches. *See supra*, Background Part A.2. On the other hand, some lower courts and litigants have deemed suits against officers as "against the United States" for purposes of the applicability of section 2401(a). *See, e.g.*, *Hire Ord. Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012) (noting that the plaintiffs made "make no claim before us that the statute relied on by the district court, 28 U.S.C. § 2401(a), does not supply the governing limitations period here"); *Mason v. Judges of U.S. Ct. of Appeals for D.C. Cir. in Regular Active Serv. Acting in Their Off. Capacities*, 952 F.2d 423, 425 (D.C. Cir. 1991); *Geyen v. Marsh*, 775 F.2d 1303, 1307 (5th Cir. 1985); *Portsmouth Redevelopment and Hous. Auth. v. Pierce*, 706 F.2d 471, 474 (4th Cir. 1983). That conclusion might rest on the theory that, although officer suits were not considered to be "against the United States" for purposes of sovereign immunity, such suits should nevertheless be viewed as in substance "against the United States" within the meaning of section 2401(a). *See Geyen*, 775 F.2d at 1307 (relying on the legislative history of the 1976 Amendment to the APA to hold that suits against officers should be treated as "against the United States . . . for all practical purposes") (quotation marks omitted). *Cf. Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 494 (1983) (noting the well-known jurisdictional rule that the concept of "arising under" federal law has a different meaning in Article III of the Constitution than in 28 U.S.C. § 1331).

The Court need not decide the officer-suit issue in this case.

B. The Court need not address the scope of appropriate remedies in APA actions.

The possibility that some plaintiffs would be able to challenge regulations (because their APA injury arises later), whereas other plaintiffs would not (because of earlier-arising injury), might raise the question whether a plaintiff within the statute of limitations can obtain "universal" relief. As the Court is aware, there is a robust debate about the propriety of universal vacatur under the APA. *Compare United States v. Texas*, 599 U.S. 670, 693–703 (2023) (Gorsuch, J., concurring in the judgment), *with Griffin v. HM Florida-ORL, LLC*, No. 23A366, 2023 WL 7928928 (Nov. 16, 2023) (statement of Kavanaugh, J.). The Court need not resolve this question in this case. But because the statute-of-limitations question interacts with the remedial question, *amici* address the issue here.

If the APA generally authorizes universal vacatur, then a party bringing a lawsuit within the statute of limitations might be able, depending on the circumstances, to obtain relief even for those parties whose claims are outside the statute of limitations.

On the other hand, if the APA generally does not authorize universal vacatur, then a party bringing a lawsuit within the statute of limitations might not be able to vacate the rule on behalf of others. That might appear to raise the problem that the combination of the accrual rule in section 2401(a) and the rule in favor of party-specific relief results in a "patchwork"

form of relief—with some parties still subject to the rule and other parties not. Put differently, a remedy tailored to provide one party with relief might well raise the issue of different regulated entities subject to different regulatory burdens.

There are at least three responses to this issue. First, the possibility of a "patchwork" form of relief can arise under any remedial framework. Consider, for example, the United States's claim—which *amici* believe is incorrect—that the statute of limitations begins to run under section 2401(a) upon publication of a regulation. The United States nevertheless concedes that a party generally can challenge a regulation in a civil or criminal enforcement action. *See* Brief in Opposition 15. If a party successfully establishes a regulation is invalid in such an enforcement proceeding, and the APA claims for other parties are outside the six-year statute of limitations, that would raise a similar "patchwork" issue to the one just described.

Second, the agency itself might believe that a favorable judgment for one party would create an uneven competitive playing field that could not be tolerated for long. The agency could choose to vacate its action for all regulated parties. Alternatively, it could seek appellate and Supreme Court review while tolerating the limited relief to a single party for a time during the litigation. If the agency eventually prevailed on the matter, it could seek to have the equitable relief vacated by the courts that previously granted it.

Third, if the agency continued to lose on the issue, but refused to vacate its own action, a party could eventually force vacatur of the challenged action

through "a petition to the agency for rulemaking, denial of which must be justified by a statement of reasons, and can be appealed to the courts." *Auer v. Robbins*, 519 U.S. 452, 459 (1997) (citing 5 U.S.C. §§ 553(e), 555(e), 702, 706). To be sure, *amici* agree with petitioner that a petition for rulemaking is no substitute for an APA claim brought within section 2401(a)'s statute of limitations, in no small part because judicial review of a petition denial might be deferential. *See* Brief for Petitioners 33; *PDR Network, LLC v. Carlton & Harris Chiropractice, Inc.*, 139 S. Ct. 2051, 2066 (2019) (Kavanaugh, J., concurring in the judgment) ("[E]ven if judicial review is available, it may be only deferential judicial review of the agency's discretionary decision to decline to take new action . . ."). But in the contemplated hypothetical—where the agency has lost on an issue to a party within the statute of limitations and has capitulated on the question—it might be considered per se "arbitrary and capricious" for the agency not to extend the relief to parties whose claims were now outside the statute of limitations. 5 U.S.C. § 706(2)(A).

Amici raise the foregoing points about the APA's remedial scheme so that the Court can understand how it fits with the statute of limitations. The Court need not address the question of remedy in this case.

CONCLUSION

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

Respectfully submitted,

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