No. 22-1008

In the Supreme Court of the United States

CORNER POST, INC., PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

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

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on December 14, 2022. On March 8, 2023, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including April 13, 2023. The petition was filed on that date, and was granted on September 29, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

1. The Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, authorizes "suit in a federal district court to obtain review of any 'final agency action for which there is no other adequate remedy in a court.'" *National Association of Manufacturers* v. *Department of Defense*, 583 U.S. 109, 118-119 (2018) (quoting 5 U.S.C. 704). This case implicates two statutory restrictions that Congress has imposed on that cause of action.

The first restriction is 28 U.S.C. 2401(a), the default six-year statute of limitations for civil suits against the United States. That provision states that, except in certain government-contracting disputes, civil actions against the United States are "barred unless the complaint is filed within six years after the right of action first accrues." *Ibid.* As a result of Section 2401(a), APA "suits generally must be filed within six years after the claim accrues." *National Association of Manufacturers*, 583 U.S. at 119.

The second restriction is imposed by the APA itself. See 5 U.S.C. 702. Section 702 limits the class of persons eligible to invoke the APA's judicial-review provisions to "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." *Ibid.* Section 702 requires a plaintiff to "establish that the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 883 (1990) (citation and emphases omitted). Section 702 further provides that "[n]othing herein * * * affects other limitations on judicial review or the power or duty of the

court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702.

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

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

Until 2010, each network had complete discretion to determine the amount of the interchange fee for transactions it processed, as well as an incentive to increase that amount in order to compete for business from the issuing banks. See *NACS* v. *Board of Governors of the Federal Reserve System*, 746 F.3d 474, 479 (D.C. Cir. 2014), cert. denied, 574 U.S. 1121 (2015). Merchants had little power to resist rising interchange fees short of refusing to accept a network's debit cards altogether. *Ibid.* As a result, by 2009, the average interchange fee for all debit-card transactions had grown to 44 cents per transaction, or 1.15% of the average transaction amount. 76 Fed. Reg. at 43,397.

To address rising interchange fees for debit transactions, Congress enacted the "Durbin Amendment" as

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

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

3. Shortly thereafter, several merchant groups, including NACS (formerly the National Association of Convenience Stores) and the National Retail Federation, brought an APA challenge to Regulation II in the United States District Court for the District of Columbia. Contending that the fee cap was too high, those plaintiffs alleged that Regulation II violated the Durbin Amendment and was arbitrary, capricious, and an abuse of discretion. See *NACS*, 746 F.3d at 481-482;

5 U.S.C. 706(2)(A). As relevant here, the district court agreed with the merchant groups that the interchange-fee portion of Regulation II violated the APA, and held that the proper remedy was to vacate that portion of the rule (though the court stayed its judgment pending appeal). *NACS* v. *Board of Governors of the Federal Reserve System*, 958 F. Supp. 2d 85, 99, 116 (D.D.C. 2013); see Mem. Order, *NACS*, *supra*, No. 11-cv-2075 (Sept. 19, 2013) (granting stay pending appeal).

The D.C. Circuit reversed, holding that "the interchange fee rule generally rests on a reasonable interpretation of the statute." *NACS*, 746 F.3d at 493. The court "remand[ed] one minor issue—the Board's treatment of so-called transactions-monitoring costs—to the Board for further explanation." *Id.* at 477; see *id.* at 492-493. The court recognized, however, that "vacatur of the rule would be disruptive" because it "would lead to an entirely unregulated market, allowing the average interchange fee to once again reach or exceed 44 cents per transaction." *Id.* at 493. Anticipating that the Board on remand might "well be able to articulate a sufficient explanation" on transactions-monitoring costs, the court determined that vacatur was unnecessary. *Ibid.* On remand, the Board issued an additional explanation of its reasoning on that issue. See *Debit Card Interchange Fees and Routing*, 80 Fed. Reg. 48,684 (Aug. 14, 2015) (Clarification). The plaintiffs that had previously challenged Regulation II did not challenge that explanation, and Regulation II accordingly has remained in effect for more than a decade.

4. a. In April 2021, the North Dakota Retail Association (NDRA) and the North Dakota Petroleum Marketers Association (NDPMA) filed a new APA suit challenging Regulation II in the United States District

Court for the District of North Dakota. Pet. App. 18 n.2, 23-24. NDRA and NDPMA, which had both submitted comments in response to the Board's 2010 notice of proposed rulemaking, asserted claims "nearly identical to the claims" the D.C. Circuit had previously considered in *NACS*. *Id.* at 23; see *id.* at 14.

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

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

The district court held, *inter alia*, that in an APA challenge to an agency regulation, Section 2401(a)'s six-year statute of limitations "begins to run on the publication date" of the regulation in the Federal Register. Pet. App. 32. The court determined that, because Regulation II was published on July 20, 2011, "all facial challenges must have been brought before July 20, 2017." *Ibid.* The court explained that, although Corner Post "did not exist as a legal entity until June 26, 2017," that fact had "no bearing on when the statute of limitations runs." *Id.* at 32-33. The court noted that Section 2401(a) would not foreclose challenges to "further [agency] action applying" Regulation II to particular circumstances, but pointed out that the challenge here is not of that nature. *Id.* at 35 n.8 (citation omitted).

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

The court of appeals held that, "when plaintiffs bring a facial challenge to a final agency action, the right of action accrues, and the limitations period begins to run, upon publication of the regulation." Pet. App. 11.[1] Under that approach, "[f]or facial challenges, liability is fixed and plaintiffs have a complete and present cause of action upon publication of the final agency action." *Id.* at 12. The court observed that this result comported with its own precedent, *id.* at 11 (citing *Izaak Walton League of America, Inc.* v. *Kimbell*, 558 F.3d 751, 761 (8th Cir. 2009)), and with the decisions of other courts of appeals, *id.* at 7-11 (citing decisions of the First, Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, D.C., and Federal Circuits).

In urging a later accrual date, the plaintiffs relied in part on *Herr* v. *United States Forest Service*, 803 F.3d 809 (2015), in which the Sixth Circuit found that a different accrual rule applied when the plaintiff "does not suffer any injury until *after* the agency's final action." Pet. App. 10 (quoting *Herr*, 803 F.3d at 820). But the court of appeals determined that *Herr* did not aid the plaintiffs' case here. The court explained that, while the Sixth Circuit's general statement in *Herr* "did not distinguish between as-applied and facial challenges," *ibid.*, courts confronted with facial challenges—which go to the agency's adoption of a regulation in general, as opposed to its application of the regulation to a particular party—have consistently required that such

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

suits be brought within six years after the date of adoption. See *id.* at 10-12.

The court of appeals also rejected several case-specific arguments that the plaintiffs had offered in defending the timing of their suit. The court explained that, because "[t]he Clarification did nothing to change Regulation II," the statute of limitations did not "renew[] when the Board published the Clarification in 2015." Pet. App. 4-5. And the court found that the plaintiffs were "not eligible for equitable tolling" of the statute of limitations because they had "fail[ed] to show that they have been pursuing their rights diligently." *Id.* at 15. Petitioner did not seek this Court's review of those case-specific determinations. See Pet. i.

5. In November 2023, the Board issued a notice of proposed rulemaking requesting comments on possible changes to Regulation II. See *Debit Card Interchange Fees and Routing*, 88 Fed. Reg. 78,100 (Nov. 14, 2023). The proposed revisions had been under consideration for more than two years, see *Debit Card Interchange Fees and Routing*, 86 Fed. Reg. 26,189, 26,190 (May 13, 2021), and—as petitioner observes (Br. 10-11)—would not address petitioner's specific legal objections to Regulation II. The comment period is currently scheduled to close in February 2024. See 88 Fed. Reg. at 78,100.

SUMMARY OF ARGUMENT

The six-year statute of limitations applicable to APA claims bars petitioner's 2021 challenge to the Board's adoption of Regulation II in 2011.

Section 704 of the APA provides a cause of action allowing plaintiffs to challenge final agency action that is not otherwise made reviewable through a special statutory review proceeding. Under Section 2401(a), suits asserting that cause of action are barred "unless the

complaint is filed within six years after the right of action first accrues." 28 U.S.C. 2401(a).

The lower courts have correctly recognized for decades that Section 704's general cause of action accrues at the time the final agency action occurs. That is the date on which the agency has made a final decision that determines legal rights or obligations in alleged violation of law. As of that date, any proper plaintiff can assert the right of action established by Section 704. And commencing the limitations period on that date accords with Congress's practice in scores of provisions governing challenges to particular types of agency action. In those special statutory review provisions, Congress has sought to further interests in clarity, repose, and administrability by keying the time for filing suit to the date of agency action. Those considerations apply with equal force in the context of Section 704's general cause of action for final agency action that is not addressed elsewhere.

Petitioner identifies no sound basis for instead applying a challenger-by-challenger approach to calculate the limitations period on APA claims. Petitioner's argument hinges on Section 702, which limits the class of plaintiffs to those who "suffer[] legal wrong" or are "adversely affected or aggrieved" as a result of the challenged agency action. 5 U.S.C. 702. But many of the special statutory review provisions discussed above have materially identical aggrievement requirements. Those provisions demonstrate that limits on *who* can challenge agency action do not ordinarily operate to extend the deadline for *when* such challenges may be brought. Moreover, petitioner's approach ignores the final sentence of Section 702, which provides that "[n]othing herein"—that is, nothing in Section 702—

"affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702. Employing Section 702 to delay the running of Section 2401(a)'s limitations period would give it the very effect that Section 702's final sentence disclaims.

Petitioner's approach is likewise inconsistent with Section 2401(a). Contrary to petitioner's core premise, the text of that provision makes clear that claims sometimes accrue for purposes of Section 2401(a) at a time when the plaintiff is legally unable to sue. Petitioner relies on decisions that have suggested that such a result would be "odd" in the context of contract or tort claims, *Reiter* v. *Cooper*, 507 U.S. 258, 267 (1993), but it is commonplace in the context of provisions allowing for challenges to agency action.

Indeed, it is petitioner's approach that would be anomalous in the administrative-law context at issue here. While petitioner offers various arguments about the supposed unfairness of allowing the time for bringing facial challenges to expire before a particular plaintiff can sue, all of those arguments are equally applicable to the numerous special statutory review provisions discussed above—demonstrating that Congress does not share petitioner's view of the equities. Petitioner's approach, meanwhile, would frustrate reliance interests of regulated entities and the general public, and would allow exactly the sorts of stale, decades-old claims that statutes of limitations are intended to prevent. The Court should reject that novel theory and affirm.

ARGUMENT

UNDER 28 U.S.C. 2401(a), THE STATUTE OF LIMITATIONS FOR AN APA CHALLENGE TO FINAL AGENCY ACTION BEGINS TO RUN AT THE TIME OF THE CHALLENGED AGENCY ACTION

For decades, the courts of appeals have recognized that the six-year period within which plaintiffs may bring an APA challenge begins to run when the challenged agency action occurs. That understanding aligns the APA with "a whole host of similar time restrictions," Pet. Br. 26, that key the time for bringing a pre-enforcement challenge to an agency regulation to the promulgation of the regulation itself.

A. The Occurrence Of Final Agency Action Triggers The Statute Of Limitations For An APA Challenge To That Action

The APA authorizes judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action." 5 U.S.C. 703. Because Congress has not created a special statutory review mechanism covering the Board regulation at issue here, petitioner invoked the general cause of action created by Section 704.

In order to qualify as final agency action subject to Section 704's cause of action, "two conditions must be satisfied." *Bennett* v. *Spear*, 520 U.S. 154, 177 (1997). "First, the action must mark the 'consummation' of the agency's decisionmaking process," rather than a

"tentative or interlocutory" step. *Id.* at 177-178 (citation omitted). "And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (citation omitted).

From the time of its enactment, the APA's cause of action was understood to allow review of agency regulations in connection with "proceedings for their enforcement" against a particular party. United States Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* 102 (1947); see, *e.g.*, *Sackett* v. *Environmental Protection Agency*, 598 U.S. 651, 662-663, 679-683 (2023) (reviewing APA challenge to a compliance order directing specific landowners to undertake modifications to their property required by agency regulation). In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), this Court held that in appropriate cases, plaintiffs may also bring facial pre-enforcement challenges to agency rules.

Whether a particular plaintiff challenges specific enforcement measures or more general agency rules, all APA suits are subject to Section 2401(a)'s general limitation on claims against the United States. Under Section 2401(a), "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). Congress has exempted certain government-contracting disputes from that requirement, but it has not exempted APA claims. See *ibid.* Accordingly, APA "suits generally must be filed within six years after the claim accrues." *National*

Association of Manufacturers v. *Department of Defense*, 583 U.S. 109, 119 (2018).[2]

This Court has recognized "the hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues.'" *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 517 (1967). Instead, "[s]uch words are to be 'interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought.'" *Ibid.* (quoting *Reading Co.* v. *Koons*, 271 U.S. 58, 62 (1926)).

Consistent with that principle, the D.C. Circuit and other courts of appeals have long held that, in the context of administrative-review claims, "the 'right of action first accrues on the date of the final agency action.'" *Hardin* v. *Jackson*, 625 F.3d 739, 743 (D.C. Cir. 2010) (quoting *Harris* v. *Federal Aviation Administration*, 353 F.3d 1006, 1010 (D.C. Cir.), cert. denied, 543 U.S. 809 (2004)).[3] By definition, that is the date on which the

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[2] Some of petitioner's amici assert that before 1976, Section 2401(a)'s "application to claims under the APA was debatable" because those claims were often asserted against federal officers, rather than directly against the United States or its agencies. Profs. Bamzai & Duffy Amicus Br. 12. In 1976, however, Congress amended Section 702 to waive sovereign immunity for APA claims "seeking relief other than money damages." Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721. That amendment clarified that APA suits are properly brought against the government (as petitioner's suit was) and thus are "plainly subject to [S]ection 2401(a)." Profs. Bamzai & Duffy Amicus Br. 14.

[3] See, *e.g.*, *Wong* v. *Doar*, 571 F.3d 247, 263 (2d Cir. 2009) ("Under the APA, the statute of limitations begins to run at the time the challenged agency action becomes final."); *Hire Order Ltd.* v. *Marianos*, 698 F.3d 168, 170 (4th Cir. 2012) ("When, as here, plaintiffs bring a

agency has made a final decision that determines legal rights or obligations, or that gives rise to legal consequences, in alleged violation of law. See *Bennett*, 520 U.S. at 177-178. As of that date, any proper plaintiff can assert "the right of action" established by the APA. 28 U.S.C. 2401(a). For that reason, "a party challenging final agency action must commence his suit within six years after * * * 'the date of the final agency action.'" *Hardin*, 625 F.3d at 743 (citation omitted).

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facial challenge to an agency ruling * * * 'the limitations period begins to run when the agency publishes the regulation.'") (citation omitted); *Dunn-McCampbell Royalty Interest, Inc.* v. *National Park Service*, 112 F.3d 1283, 1287 (5th Cir. 1997) ("On a facial challenge to a regulation, the limitations period begins to run when the agency publishes the regulation in the Federal Register."); *Sierra Club* v. *Slater*, 120 F.3d 623, 631 (6th Cir. 1997) ("Under the APA, a right of action accrues at the time of 'final agency action.'") (quoting 5 U.S.C. 704); Pet. App. 11 ("[W]hen plaintiffs bring a facial challenge to a final agency action, the right of action accrues, and the limitations period begins to run, upon publication of the regulation."); *Shiny Rock Mining Corp.* v. *United States*, 906 F.2d 1362, 1366 (9th Cir. 1990) ("Once notice of the land withdrawals was given by publication in the Federal Register, the six-year limitation period * * * was triggered, for at that time any interested party acquired a 'right to file a civil action in the courts against the United States.'") (quoting *Crown Coat Front Co.*, 386 U.S. at 511); *United States Steel Corp.* v. *Astrue*, 495 F.3d 1272, 1280 (11th Cir. 2007) ("The statute of limitations period begins to run once the agency has issued a 'final action.'") (citation omitted); *Odyssey Logistics & Technology Corp.* v. *Iancu*, 959 F.3d 1104, 1112 (Fed. Cir. 2020) (six-year limitations period for a "facial challenge" to an agency regulation begins to run "when the agency promulgates the final regulation"); see also Pet. 13-16 (acknowledging that the decision below "mirrors holdings in at least five other circuits" and identifying examples from the Fourth, Fifth, Ninth, D.C., and Federal Circuits).

B. Running The Statute Of Limitations From The Date Of Agency Action Is Commonplace In Administrative Law

When Congress has enacted special judicial-review schemes governing discrete categories of agency action, it has consistently directed that the time for seeking judicial review will run from the date of the challenged action. Applying that same approach to the general cause of action for review of final agency action under Section 704 appropriately accounts for the strong public interest in prompt resolution of disputed issues raised in connection with agency decisionmaking.

1. Petitioner acknowledges (Br. 26) that running the statute of limitations on APA claims from the date of the challenged agency action is consistent with practice under "a whole host of similar time restrictions that expressly key the time to sue from final agency action."

The Administrative Orders Review Act (Hobbs Act), ch. 1189, 64 Stat. 1129 (28 U.S.C. 2341 *et seq.*), for example, provides the "exclusive" mechanism for reviewing certain actions of the Secretary of Agriculture, Secretary of Housing and Urban Development, Secretary of the Interior, Secretary of Transportation, Board of Immigration Appeals, Federal Communications Commission, Federal Maritime Commission, Nuclear Regulatory Commission, and Surface Transportation Board. 28 U.S.C. 2342; see 8 U.S.C. 1252(a)(1); 50 U.S.C. 167h(b); see also 42 U.S.C. 5841(f). All Hobbs Act challenges must be filed "within 60 days after * * * entry" of the agency action in question. 28 U.S.C. 2344.

Other, more targeted provisions are to like effect. Under the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, challenges to certain standards adopted by the Environmental Protection Agency (EPA) must be filed "within 120 days from the date of * * * promulgation."

33 U.S.C. 1369(b)(1). The Federal Food, Drug, and Cosmetics Act, 21 U.S.C. 301 *et seq.*, requires that challenges to certain orders of the Food and Drug Administration must be filed "within sixty days after the entry of such order." 21 U.S.C. 348(g)(1). A challenge to an order of the National Highway Traffic Safety Administration "prescribing a motor vehicle safety standard * * * must be filed not later than 59 days after the order is issued." 49 U.S.C. 30161(a). And so on.[4]

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[4] See, *e.g.*, 15 U.S.C. 57a(e)(1)(A) ("Not later than 60 days after a rule is promulgated"); 15 U.S.C. 78y(b)(1) ("within sixty days after the promulgation of the rule"); 15 U.S.C. 766(c) ("within thirty days from the date of promulgation of any such rule, regulation, or order"); 15 U.S.C. 1193(e)(1) ("any time prior to the sixtieth day after such standard or regulation or amendment thereto is issued"); 15 U.S.C. 2060(a) ("Not later than 60 days after a consumer product safety rule is promulgated"); 15 U.S.C. 2060(g)(2) ("Not later than 60 days after the promulgation * * * of a rule or standard to which this subsection applies"); 15 U.S.C. 2064(j)(2) ("Not later than 60 days after promulgation of a rule under paragraph (1)"); 15 U.S.C. 2618(a)(1)(A) ("not later than 60 days after the date on which a rule is promulgated * * * or the date on which an order is issued"); 15 U.S.C. 2618(a)(1)(C)(i) ("Not later than 60 days after the publication of a designation"); 16 U.S.C. 1855(f)(1) ("within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable"); 16 U.S.C. 7704(e)(1) ("not later than 30 days after the date on which the regulations are promulgated"); 16 U.S.C. 7804(d)(1) ("not later than 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable"); 21 U.S.C. 360kk(d)(1) ("at any time prior to the sixtieth day after such regulation is issued"); 21 U.S.C. 371(f)(1) ("at any time prior to the ninetieth day after such order is issued"); 26 U.S.C. 9041(a) ("within 30 days after the agency action * * * for which review is sought"); 29 U.S.C. 655(f) ("at any time prior to the sixtieth day after such standard is promulgated"); 30 U.S.C. 811(d) ("at any time prior to the sixtieth day after such standard is promulgated"); 33 U.S.C. 2717(a) ("within 90 days from the date of promulgation of such regulations");

2. Keying the deadline for seeking judicial review to the date on which the challenged agency action occurs serves important purposes.

Using the date of agency action, rather than some later date identified on a challenger-by-challenger basis, ensures that calculating the limitations period will "be an uncomplicated task for judges, lawyers, and litigants," avoiding "useless litigation on collateral matters." *Wilson* v. *Garcia*, 471 U.S. 261, 275 (1985).

Commencing the limitations period as soon as agency action occurs also facilitates "prompt[]" resolution of challenges to administrative decisions, "avoid[ing] the delays and uncertainty that otherwise would result." *PDR Network, LLC* v. *Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2059 (2019) (Kavanaugh, J., concurring in the judgment). While "all limitations provisions" are intended to further the "basic policies of * * * repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities," *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000), those considerations have special force in the context of challenges to agency action. Such challenges often implicate interests not only of the plaintiff and the defendant agency, but also of other regulated parties and the general public. See *JEM Broadcasting Co.* v. *Federal Communications Commission*, 22 F.3d 320,

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42 U.S.C. 2022(c)(2) ("within sixty days after * * * promulgation" of challenged rule); 42 U.S.C. 6306(b)(1) ("at any time within 60 days after the date on which such rule is prescribed"); 42 U.S.C. 9613(a) ("within ninety days from the date of promulgation of such regulations"); 49 U.S.C. 30161(a) ("not later than 59 days after the order is issued"); 49 U.S.C. 32503(a) ("not later than 59 days after the standard is prescribed"); 49 U.S.C. 32909(b) ("not later than 59 days after the regulation is prescribed"); 49 U.S.C. 60119(a) ("not later than 89 days after the regulation is prescribed or order is issued").

326 (D.C. Cir. 1994) ("'Strict enforcement of the statutory time limit is necessary to preserve finality in agency decisionmaking and to protect justifiable reliance on agency rules.'") (quoting *Raton Gas Transmission Co.* v. *Federal Energy Regulatory Commission*, 852 F.2d 612, 615 (D.C. Cir. 1988)) (brackets omitted).

In addition, many challenges to administrative action turn on whether an agency's decision was "reasonable * * * based on the evidence it had" before it at the time it acted. *Federal Communications Commission* v. *Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021). As the Administrative Conference of the United States has explained, "[s]ound principles of administrative law" weigh in favor of resolving those claims soon after a rulemaking concludes because "reopening a rulemaking proceeding to correct any defects will become increasingly difficult as the original record grows stale over time and the situation of the interested parties changes." *Recommendation 82-7: Judicial Review of Rules in Enforcement Proceedings* 2 (adopted Dec. 17, 1982), http://www.acus.gov/sites/default/files/documents/82-7.pdf.

C. Petitioner Offers No Sound Basis For Calculating The Date Of Claim Accrual In Cases Like This One On A Challenger-By-Challenger Basis

Petitioner does not dispute that the approach described above is the one Congress has consistently mandated in establishing "special statutory review proceeding[s]" governing discrete categories of agency action. 5 U.S.C. 703. Petitioner contends, however, that when no such special review provision covers a particular type of agency conduct, and a plaintiff instead invokes the general cause of action provided by the APA, reviewing courts should apply a fundamentally different approach

in determining the date of claim accrual under Section 2401(a).

On petitioner's view, the limitations period for challenging agency action under the APA runs not from the date the challenged action occurred, but from the date (which may be years or decades later) when the plaintiff was first injured by that action. Petitioner argues that a particular plaintiff's claim can never "'accrue[]'" under Section 2401(a) until *that plaintiff* "can sue on that claim." Pet. Br. 15 (citation omitted). Petitioner emphasizes that 5 U.S.C. 702 limits the class of plaintiffs who can bring APA claims to those who have "'suffer[ed] legal wrong because of agency action' or [been] 'adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" Pet. Br. 18 (citation omitted). Petitioner argues that Section 2401(a)'s limitations period therefore does not commence for a particular plaintiff until that plaintiff has "been injured or aggrieved by a final agency action." *Id.* at 19.

That reasoning is flawed in multiple respects, and—with one arguable exception—petitioner identifies no court that has ever embraced it.[5] Petitioner's theory is inconsistent with the text of both Section 702 and Section 2401(a), and it relies on a "default rule" of accrual,

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[5] Petitioner relies (*e.g.*, Br. 18-19, 21-22) on the Sixth Circuit's decision in *Herr* v. *United States Forest Service*, 803 F.3d 809 (2015). The court of appeals here distinguished *Herr* as an "as-applied" challenge subject to a different accrual rule. Pet. App. 10. Consistent with that analysis, a district court within the Sixth Circuit recently dismissed as untimely a challenge to Regulation II materially identical to this one, brought by a plaintiff that, like petitioner, had filed suit less than six years after it was incorporated. See *Linney's Pizza, LLC* v. *Board of Governors of the Federal Reserve System*, No. 22-cv-71, 2023 WL 6050569 (E.D. Ky. Sept. 15, 2023), appeal pending, No. 23-5993 (6th Cir. docketed Nov. 9, 2023).

Graham County Soil & Water Conservation District v. *United States ex rel. Wilson*, 545 U.S. 409, 418 (2005), that would be ill-suited for the administrative-law context. Given Congress's consistent directives that the time for invoking special statutory review provisions should run from the date of the challenged agency action, it would be anomalous to suppose that Congress mandated a fundamentally different approach to claim accrual under the APA's general cause of action. This Court should affirm the approach to calculating the limitations period for APA claims that has prevailed in the lower courts for decades.

1. Petitioner's reliance on the first sentence of Section 702 is misplaced

Petitioner argues that, because the first sentence of Section 702 limits the class of permissible plaintiffs to persons who "suffer[] legal wrong" or are "adversely affected or aggrieved," 5 U.S.C. 702, petitioner's APA cause of action did not accrue until petitioner's own economic interests were affected by Regulation II. That argument is unsound for two reasons.

a. As explained above, when Congress has enacted limitations periods for challenging specific categories of agency regulations, it has consistently directed that the relevant limitations period run from the date of promulgation. Petitioner invokes the first sentence of Section 702 as the principal justification for adopting a different accrual rule in suits for which no special review provision exists. But the requirement that persons who seek to challenge federal agency action must show injury resulting therefrom is not unique to the APA's general cause of action. To the contrary, such requirements are a characteristic feature of special statutory review provisions. The Hobbs Act, for example, authorizes

"[a]ny party aggrieved by the [agency's] final order" to seek review in the court of appeals. 28 U.S.C. 2344; see, *e.g.*, 15 U.S.C. 78y(b)(1) ("person adversely affected"); 15 U.S.C. 1193(e)(1) ("Any person who will be adversely affected"); 15 U.S.C. 2064(j)(2) ("any person adversely affected"); 21 U.S.C. 371(f)(1) ("any person who will be adversely affected").

Congress thus has perceived no inconsistency between requiring a party-specific showing of aggrievement and treating the date of the challenged agency action as triggering the limitations period for all plaintiffs. And the accrual rule that petitioner advocates for its own APA suit is fundamentally different from the rule that Congress has consistently incorporated into special statutory review provisions. It would be especially odd to treat Section 702's "aggrieve[ment]" requirement, 5 U.S.C. 702, as a textual justification for that extreme departure from Congress's usual practice, since such aggrievement requirements are typical features of special review provisions as well.

b. Petitioner's argument is also inconsistent with Section 702's final sentence, which provides as follows:

> Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. 702. Although petitioner relies heavily on Section 702's *first* sentence, it ignores the final sentence altogether. That sentence forecloses petitioner's theory that Section 702 delays the running of the statute of

limitations until a particular plaintiff has been "adversely affected or aggrieved by agency action." 5 U.S.C. 702.

Section 2401(a) is clearly one of the "other limitations on judicial review" to which the final sentence of Section 702 refers. 5 U.S.C. 702. The core purpose of a limitations provision is to limit judicial review by providing a "legal * * * ground" that requires "the court to dismiss an[] action" if it is filed after a specified time. *Ibid.* It is likewise clear that the phrase "[n]othing herein," *ibid.*, covers the contents of Section 702. "[H]erein" means "[i]n this thing (such as a document, section, or paragraph)." *Black's Law Dictionary* 873 (11th ed. 2019) (emphasis omitted). Because Section 702 contains just a single paragraph, the only plausible referent for "nothing herein" is Section 702 as a whole.

Finally, delaying the commencement of Section 2401(a)'s limitations period until a particular plaintiff has been "adversely affected or aggrieved by [the challenged] agency action" would "affect[]" Section 2401(a)'s "other limitation[] on judicial review." 5 U.S.C. 702. To "affect" is to "produce an effect on; to influence in some way." *Black's Law Dictionary* 70 (emphasis omitted). Allowing Section 702 to control the time at which a claim accrues for purposes of Section 2401(a) would obviously "influence in some way" the application of that limitations provision. *Ibid.*

Although petitioner's opening brief attempts to address the other merits arguments identified in the government's brief in opposition (see, *e.g.*, Pet. Br. 22, 24, 31-32, 34-36, 38-41), it does not address this one. See Br. in Opp. 10-11. At the certiorari stage, petitioner argued that, because the final sentence of Section 702 "focuses on '*other* limitations on judicial review,'" "[i]t does not negate [Section] 702's requirement that the plaintiff

first 'suffer[] legal wrong' or become 'adversely affected or aggrieved' by agency action." Pet. Cert. Reply Br. 6 (quoting 5 U.S.C. 702) (third set of brackets in original). That misses the point. Although Section 702's last sentence does not "negate" the first sentence's aggrievement requirement, *ibid.*, it makes clear that the aggrievement requirement cannot be used to "affect[] other limitations on judicial review." 5 U.S.C. 702. That is enough to preclude petitioner's theory of the case, under which (as petitioner put it at the certiorari stage) "[Section] 702's injury-or-aggrievement requirement * * * is indispensable to answering the limitations-period question." Pet. 21.[6]

2. Petitioner's approach is inconsistent with the text of Section 2401(a)

Separately, petitioner's theory also conflicts with the text of Section 2401(a). Petitioner's core premise (*e.g.*, Br. 3, 15) is that a "right of action" cannot "first accrue[]" under Section 2401(a) until a particular plaintiff is legally entitled to file suit. That premise is inconsistent with the second sentence of Section 2401(a),

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[6] In *Darby* v. *Cisneros*, 509 U.S. 137 (1993), which concerned the implications of Section 704 for administrative-exhaustion requirements, the Court cited legislative history from the 1976 amendment of Section 702 for the proposition that "the proviso was added * * * simply to make clear that 'all other than the law of sovereign immunity remain unchanged.'" *Id.* at 153 (quoting S. Rep. No. 996, 94th Cong., 2d Sess. 11 (1976)) (brackets omitted). But neither the Court in *Darby* nor the authors of the 1976 Senate Report had any occasion to consider the relationship between the final sentence of Section 702 and the theory that Section 702 delays the running of the statute of limitations under Section 2401(a) because that theory was not first conceived until decades later. See Little Tucker Act Scholars Amicus Br. 1 (describing the 2017 student note of one of the amici as "the first scholarly work on the subject").

which states that "[t]he action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." 28 U.S.C. 2401(a).

As petitioner observes (Br. 22), the direct effect of that sentence is to "toll[] the statute of limitations," not to "provide[] [an] accrual rule." But the sentence necessarily reflects Congress's understanding that a claim can "accrue[]" for purposes of Section 2401(a) at a time when a person is "under legal disability," 28 U.S.C. 2401(a), and thus is unable to "sue on that claim," Pet. Br. 15. That understanding is irreconcilable with petitioner's view that accrual under Section 2401(a) cannot occur while a plaintiff is legally unable to sue. If petitioner were correct, a claim would never accrue "at the time" a plaintiff was "under legal disability," 28 U.S.C. 2401(a), and there would be no need for a tolling rule to address that scenario.

Petitioner's reliance (Br. 17) on this Court's decision in *Crown Coat Front Co.*, *supra*, is misplaced. In that case, the Court held that Section 2401(a) did not bar a government-contracting suit that was brought more than six years after delivery of the goods required by the contract, but less than six years after the Armed Services Board of Contract Appeals (Board of Contract Appeals) affirmed the refusal of the government's contracting officer to make an equitable adjustment in price. 386 U.S. at 508, 522.[7] The Court's decision reflected the fact that, "[u]ntil that Board ha[d] acted, the contractor's claim [was] not subject to adjudication in the courts." *Id.* at 511; see *id.* at 513-514.

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[7] Congress later amended Section 2401(a) to exempt certain government-contracting claims. See Contract Disputes Act of 1978, Pub. L. No. 95-563, § 14(b), 92 Stat. 2389.

The Court in *Crown Coat Front Co.* thus held that, so long as the plaintiff's right of action arose under the contract (see 386 U.S. at 522), that right of action did not accrue for purposes of Section 2401(a) until the Board of Contract Appeals issued the final administrative decision that was a prerequisite to, and would serve as the focus of, judicial review. See *id.* at 513-514 (explaining that "[t]he focus of the court action is the validity of the administrative decision," and that "[u]ntil that decision is made, the contractor cannot know what claim he has or on what grounds administrative action may be vulnerable"). Consistent with the government's position here, the Court thus held that the plaintiff's claim accrued when the agency issued its reviewable final action. To be sure, because the plaintiff in *Crown Coat Front Co.* was aggrieved by the Board of Contract Appeals' decision as soon as it was issued, the Court had no occasion to apply Section 2401(a) to circumstances like those presented here, where the agency's reviewable action and the plaintiff's aggrievement occurred at different times. But the Court's identification of the accrual date in *Crown Coat Front Co.* is in no way inconsistent with the government's position in this case. See *id.* at 517 (disclaiming any "attempt[] to define for all purposes when a 'cause of action' first 'accrues'").

3. This Court's precedents regarding accrual rules in materially different contexts cannot support petitioner's approach

Petitioner argues that, in applying Section 2401(a) to APA claims, the Court should follow decisions that have construed other limitations provisions to establish a "standard rule," Pet. Br. 3 (citation omitted), that a claim does not accrue "for limitations purposes until the plaintiff can file suit and obtain relief," *ibid.* (quoting

Bay Area Laundry & Dry Cleaning Pension Trust Fund v. *Ferbar Corp.*, 522 U.S. 192, 201 (1997)); see *id.* at 14-17. None of those decisions involved administrative-law claims like the one at issue here, and their "standard rule" should not be extended to this distinct context.

a. Nearly all of the limitations decisions on which petitioner relies involved individualized claims for money damages sounding essentially in contract or tort, with the cause of action at issue providing the plaintiff's only opportunity to obtain review.[8] Even in that context, the Court has recognized that "the standard rule can be displaced such that the limitations period begins to run before a plaintiff can file a suit." *Green* v. *Brennan*, 578 U.S. 547, 554 (2016).

For example, in *Reading Co.* v. *Koons*, *supra*, this Court held that the time for filing a wrongful-death suit under the federal Employers' Liability Act began to run at "the time when the events ha[d] occurred which determine[d] that the carrier [wa]s liable," even though no plaintiff could bring suit on the claim at that time. 271 U.S. at 64. The statute of limitations at issue there was

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[8] See *Rotkiske* v. *Klemm*, 140 S. Ct. 355 (2019) (damages claim for abusive debt-collection practices); *Bay Area Laundry*, 522 U.S. 192 (claim for payments owing after withdrawal from joint pension plan); *Wallace* v. *Kato*, 549 U.S. 384 (2007) (suit under 42 U.S.C. 1983 governed by state limitations period for personal-injury torts); *Graham County Soil & Water Conservation District*, 545 U.S. 409 (claim of unlawful retaliation); *Reiter* v. *Cooper*, 507 U.S. 258 (1993) (damages claim based on charging of unreasonable shipping rates); *Crown Coat Front Co.*, 386 U.S. 503 (government-contracting dispute); *United States* v. *Lindsay*, 346 U.S. 568 (1954) (breach-of-contract claim); see also *Gabelli* v. *Securities & Exchange Commission*, 568 U.S. 442 (2013) (claim for civil penalties based on securities fraud); *Johnson* v. *United States*, 544 U.S. 295 (2005) (post-conviction challenge to federal criminal sentence).

similar to Section 2401(a), barring any claim not filed "within two years from the day the cause of action accrued." *Id.* at 60 (citation omitted); Employers' Liability Act (1908), ch. 149, § 6, 35 Stat. 66. The plaintiff—the administrator of the decedent's estate—maintained that the period for bringing suit could not begin to run until "the appointment of the administrator, who is the only person authorized by statute to maintain the action." 271 U.S. at 60. He argued that, because "the cause of action is * * * given exclusively to the administrator of the decedent, no cause of action can arise or accrue until there is an administrator." *Id.* at 61. The Court rejected that argument.

The Court explained that "[e]very practical consideration which would lead to the imposition of any period of limitation, would require that the period should begin to run from the definitely ascertained time of death rather than the uncertain time of the appointment of the administrator." *Reading Co.*, 271 U.S. at 64. Because the "beneficiaries of the right of action" were "[t]he only persons who can procure the appointment of an administrator," running the limitations period from that appointment would have allowed them to "choose their own time for * * * setting the statute running." *Id.* at 64-65. Such an interpretation would "leave defendants subject indefinitely to actions for the wrong done," and thereby "defeat [the limitations provision's] obvious purpose." *Id.* at 65.

b. Petitioner identifies no decision in which this Court has applied petitioner's preferred limitations rule, under which a claim accrues at the time of the plaintiff's injury even if that postdates the defendant's alleged unlawful conduct, to an administrative-law challenge akin to the one brought here. Assessing the

appropriate accrual standard "in the light of the general purposes of the statute * * * and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought," *Crown Coat Front Co.*, 386 U.S. at 517 (citation omitted), the Court should hold that the time for challenging agency action under the APA begins to run at the time of the challenged agency action.

In cases involving what were essentially contract or tort claims, the Court has indicated that it would be an "odd result" for the limitations period on such claims to commence before a plaintiff could sue. *Reiter* v. *Cooper*, 507 U.S. 258, 267 (1993); see, *e.g.*, *Green*, 578 U.S. at 554 (same); *Bay Area Laundry*, 522 U.S. at 201 (same); see also *Johnson* v. *United States*, 544 U.S. 295, 305 (2005) ("highly doubtful" that "Congress would have meant" that result). Petitioner relies heavily on the supposed "strange[ness]" of that result in arguing for delayed accrual here. Pet. Br. 16; see *id.* at 12, 15-17, 23-24. That is wrong for two reasons.

First, in many of the cases where the Court has linked accrual to the plaintiff's ability to sue, the impediment to filing suit at an earlier date was that the *defendant* had not yet taken the action that subjected it to potential liability. See, *e.g.*, *Graham County*, 545 U.S. at 419 (holding that a cause of action for unlawful retaliation, in violation of the False Claims Act, accrues "when the retaliatory action occurs"); *Bay Area Laundry*, 522 U.S. at 202 (holding that a claim under the Multiemployer Pension Plan Amendments Act of 1980 does not accrue until the defendant employer "default[s] * * * under the trustees' schedule," because "[o]nly then has the employer violated an obligation owed the plan under the Act"). Petitioner identifies no decision

of this Court that has specifically addressed the choice between the two potential accrual rules—*i.e.*, the date of the plaintiff's injury, or the date of the defendant's alleged unlawful conduct—in circumstances where the two dates are different.

Second, whatever the usual accrual rule may be in suits between private parties, there is nothing strange or anomalous about the idea that a claim challenging federal agency action can accrue when that action takes place, even if a particular plaintiff is not injured until later. As discussed above, pp. 15-16 & n.4, *supra*, many special review provisions authorize members of the public to bring facial challenges to agency regulations, outside of enforcement actions or applications of the regulations to particular parties. Those statutes consistently require that challenges be brought within a specified period after the date a rule is promulgated. The necessary effect is that "companies that * * * come into existence over a period of time after the initial * * * period [has] passed" will be unable to bring facial challenges. *Coal River Energy, LLC* v. *Jewell*, 751 F.3d 659, 663 (D.C. Cir. 2014) (discussing requirement under 30 U.S.C. 1276(a)(1) that challenges to certain orders of the Secretary of the Interior be brought within 60 days); see *PDR Network*, 139 S. Ct. at 2062 (Kavanaugh, J., concurring in the judgment) (explaining that, once the Hobbs Act period for seeking review expires, that Act denies pre-enforcement review to entities that "may not even have existed back when an agency order was issued").

Congress's acceptance of that result in the administrative-law context is neither odd nor ill-considered. Closing the window for facial, pre-enforcement challenges at a clearly defined point after an agency acts

reflects the "heavy weight" that Congress places on the "interest * * * in prompt review of agency regulations," as well as the "high value [placed] on finality in administrative processes" given the need to "'conserv[e] administrative resources and protect[] the reliance interests of regulatees who conform their conduct to the regulations.'" *JEM Broadcasting Co.*, 22 F.3d at 325 (citations omitted). To make an exception for any "company that was not in existence at the time the regulation was promulgated * * * would essentially nullify the [statutory] limitation for challenges to rules," especially in contexts where "industry might take advantage of such a situation to fund new litigation, perhaps for a smaller company." *Coal River Energy*, 751 F.3d at 662-663; see pp. 5-6, *supra* (discussing addition of petitioner as a plaintiff). Just as this Court in *Reading Co.* rejected an approach that would "leave defendants subject indefinitely to [suit]" for wrongful-death claims, 271 U.S. at 65, Congress has rejected such an approach in the Hobbs Act and other statutes that specifically authorize pre-enforcement review of agency action.

c. Petitioner cannot dispute that, under the various federal statutes that govern judicial review of specific categories of agency action, applicable limitations periods consistently begin to run before particular "plaintiff[s] can sue on that claim." Pet. Br. 15. Petitioner argues, however, that because those other provisions explicitly identify the date of agency action as the date when the period for seeking review commences, it would be "absurd" to give the same meaning to Section 2401(a)'s more general reference to the date when "'the right of action first accrues.'" *Id.* at 26-27 (citation omitted).

That argument gives inadequate weight to Section 2401(a)'s status as a catch-all provision applicable to a wide variety of "civil action[s] commenced against the United States," 28 U.S.C. 2401(a), which courts must apply "in the light of the general purposes" of the particular substantive claim at issue. *Crown Coat Front Co.*, 386 U.S. at 517. In conducting that inquiry, courts can appropriately consider the approach to accrual that Congress has employed in limitations provisions specifically addressed to similar substantive claims. Outside of the administrative-law context, that may sometimes lead courts to adopt the delayed-accrual approach that petitioner advocates. But in identifying the point in time when facial challenges to agency regulations accrue, consideration of more specific review provisions reinforces the conclusion that the limitations period should run from the date of the challenged agency action.

d. That inference is further supported by the "general proposition" that "'a condition to the waiver of sovereign immunity . . . must be strictly construed.'" *Wilkins* v. *United States*, 598 U.S. 152, 162 (2023) (citation omitted); see *id.* at 167 (Thomas, J., dissenting) ("[W]hen Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed.") (citation omitted); *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 94 (1990) ("Respondents correctly observe that [a statute of limitations on claims against the government] is a condition to the waiver of sovereign immunity and thus must be strictly construed."). To the extent Section 2401(a)'s reference to the date when "the right of action first accrues" is ambiguous in the context of facial

challenges like this one, that principle counsels in favor of the earlier accrual date. 28 U.S.C. 2401(a).

Petitioner's reliance (Br. 24) on *Franconia Associates* v. *United States*, 536 U.S. 129 (2002), is misplaced. That decision rested on the principle that, "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Id.* at 141 (citation omitted). It did not purport to overrule the Court's many earlier decisions holding that conditions on the waiver of sovereign immunity in other contexts, including statutes of limitations for non-contractual claims, must be applied "strictly." *Block* v. *North Dakota ex rel. Board of University & School Lands*, 461 U.S. 273, 287 (1983). And petitioner's claim that the Board should have imposed more stringent regulatory limits on the interchange fees that networks may charge bears no evident resemblance to any claim that one private party could assert against another.

4. Petitioner's remaining arguments lack merit

a. Petitioner argues (Pet. Br. 27-29) that, because Section 2401(a) has been described as a "statute of limitations" rather than a "statute of repose," it cannot run from a fixed point. But Section 2401(a) does not contain either the phrase "statute of limitations" or the phrase "statute of repose"; it is entitled simply "Time for commencing action against United States," 28 U.S.C. 2401(a) (emphasis omitted). Petitioner's reliance on the taxonomic distinction between statutes of limitations and statutes of repose therefore sheds no light on how Congress intended Section 2401(a) to operate. In any event, as the decision on which petitioner chiefly relies explains, "the term 'statute of limitations' is sometimes used in a less formal way" to "refer to any provision

restricting the time in which a plaintiff must bring suit." *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 13 (2014). See, *e.g.*, *id.* at 14. (observing that "an entry in Black's Law Dictionary from 1979 describes a statute of limitations as follows: 'Statutes of limitations are statutes of repose.'") (citation omitted); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 210 (1976) ("Section 13 specifies a statute of limitations of one year from the time the violation was or should have been discovered, in no event to exceed three years from the time of offer or sale.").

Moreover, the government has never argued that Section 2401(a) provides complete repose. The APA establishes a general rule that "agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. 703. As petitioner emphasizes (Br. 29), Section 2401(a) imposes no explicit temporal restriction on a regulated party's ability to obtain review of agency action in such proceedings. That reflects the fact that Section 2401(a) applies by its terms only to "civil action[s] commenced *against* the United States," 28 U.S.C. 2401(a) (emphasis added), and therefore does not directly limit the defenses that can be asserted in enforcement suits brought *by* the government. But the recognition that Section 2401(a) does not apply to the assertion of such defenses does not mean that newly aggrieved parties may commence their own *affirmative suits* more than six years after the challenged agency action occurred.

b. Petitioner argues that running the limitations period on APA claims from the time of agency action "'unfair[ly]' punishes entities that 'may not even have existed back when an agency order was issued.'" Pet. Br. 31 (quoting *PDR Network*, 139 S. Ct. at 2062 (Kavanaugh, J., concurring in the judgment)). But as

discussed above, see pp. 15-18, *supra*, and as petitioner concedes (Br. 25-26), the Hobbs Act and numerous other statutes limit the time for bringing facial challenges to agency regulations in exactly the manner that petitioner decries here. (Indeed, those special review provisions typically specify much shorter deadlines than the six-year period for filing suit that Section 2401(a) affords.) Petitioner makes no effort to reconcile its view of fairness with Congress's consistent contrary determinations across a wide range of federal statutes.

Legislative judgments about statutes of limitations necessarily weigh plaintiffs' interests in pursuing their claims against countervailing interests in "repose, elimination of stale claims, and certainty." *Rotella*, 528 U.S. at 555. In striking that balance, Congress has appropriately taken account of the fact that, unlike timeliness bars on contract or tort claims, a timeliness bar on facial challenges to agency regulations does not deprive aggrieved persons of all opportunity for review. Except where Congress has made pre-enforcement challenges the "exclusive opportunity for judicial review," such persons may contest the substantive validity of regulations in later enforcement proceedings. 5 U.S.C. 703; see *Coal River Energy*, 751 F.3d at 664 (explaining that a limitations bar on facial challenges "does not preclude a challenge when the government actually applies its regulation against a party").

"[T]raditionally," a party's *only* option often was "to raise an as-applied challenge to an agency's interpretation of a statute in an enforcement proceeding." *PDR Network*, 139 S. Ct. at 2060 (Kavanaugh, J., concurring in the judgment). "[T]his Court's decision in *Abbott Laboratories* * * * revolutionized administrative law by *also* allowing facial, pre-enforcement challenges to

agency orders." *Ibid.*; see Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 377 (describing the establishment in *Abbott Laboratories* "of the principle that rules could be challenged in court directly rather than merely in the context of an adjudicatory enforcement proceeding against a particular individual" as a "post-APA development"). But it is not "unfair[]," Pet. Br. 31, to subject that additional opportunity for judicial review, which goes beyond the traditionally available options, to such time limits as Congress deems necessary to "preserve finality in agency decisionmaking and * * * protect justifiable reliance on agency rules." *JEM Broadcasting Co.*, 22 F.3d at 326 (citation omitted). While those limits mean that "some parties—such as those not yet in existence when the rule is promulgated—never will have the opportunity" to invoke that additional review option, "the law countenances this result because of the value of repose." *Ibid.*

Contrary to petitioner's contention (Br. 31-33), Justice Kavanaugh's concurring opinion in *PDR Network*, *supra*, does not suggest that each newly aggrieved person must be given its own post-aggrievement window of time to file suit to challenge agency regulations on their face. To the contrary, Justice Kavanaugh's separate writing took as its starting point the premise that facial challenges under the Hobbs Act, even if filed by newly created entities, would be barred after the time specified by Congress had expired. See 139 S. Ct. at 2062. The concurrence argued that any potential "unfairness" that might result from barring facial challenges after that point should be alleviated by permitting "judicial review of agency legal interpretations in enforcement

actions." *Ibid.*[9] The disputed (and ultimately unresolved) question in *PDR Network* was whether the Hobbs Act "preclude[d] judicial review of agency interpretations of statutes in enforcement actions" *as well as* in facial challenges. *Ibid.*; see *id.* at 2056 (opinion of the Court) (declining to resolve that question). The government's proposed interpretation of Section 2401(a) is consistent with Justice Kavanaugh's *PDR Network* concurrence because our reading would restrict facial challenges to a specified period after promulgation, without imposing any temporal limit on regulated parties' ability to challenge agency regulations during enforcement proceedings.[10]

Petitioner also suggests (Br. 36) that "to limit litigants' options to only judicial review in enforcement proceedings" could "create a serious constitutional question." But like the concurring Justices in *PDR Network*, petitioner appears to accept (Br. 25-26) the express time limits on pre-enforcement review under the Hobbs Act and the numerous other statutes discussed

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[9] As Judge Silberman put it in an opinion joined by then-Judge Kavanaugh, any "superficially troubling" concerns about the inability of newly formed companies to bring pre-enforcement challenges are overcome by the reality that, "if each [new] company could challenge the regulations at any time, it would certainly frustrate Congress's objective that facial challenges to the regulation be confined to a limited period." *Coal River Energy*, 751 F.3d at 663.

[10] The government continues to believe that the Hobbs Act precludes collateral as-applied challenges to agency actions that come within its scope, instead giving the courts of appeals "exclusive jurisdiction" to "determine the validity of" those covered agency actions through the pre-enforcement review mechanism specified by the Act. 28 U.S.C. 2342; see U.S. Amicus Br. at 11-34, *PDR Network*, *supra* (filed Feb. 14, 2019). But Section 704 confers no such exclusive jurisdiction.

above. If the Constitution permits those limits, it does not forbid the much longer six-year limit that Section 2401(a) imposes on facial challenges brought under the APA.

c. Petitioner further argues that delayed accrual is necessary to provide a "meaningful avenue for judicial review of APA claims for parties like" petitioner, who object not to government regulation of themselves, but rather to insufficiently stringent government regulation of others. Pet. Br. 31 (emphasis omitted). Here again, Congress's policy judgment is demonstrably different. Now that Section 2401(a)'s six-year window for pursuing a facial challenge has expired, petitioner has exactly the same avenue for judicial review that a similarly situated party aggrieved by purported agency under-regulation of others would have under statutes like the Hobbs Act. Petitioner can follow the "procedure * * * set forth explicitly in the APA: a petition to the agency for rulemaking, denial of which must be justified by a statement of reasons and can be appealed to the courts." *Auer* v. *Robbins*, 519 U.S. 452, 459 (1997) (citations omitted).

Channeling late-arising objections like petitioner's into agency consideration of new rulemaking, rather than judicial review of old rulemaking, serves important interests. A court's review of the original rule would be limited to the administrative record that was before the agency when it promulgated the rule, and to the reasons for adopting the rule that the agency gave at that time. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971); *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943). In deciding whether to change or rescind an existing rule, by contrast, an agency can appropriately consider any

relevant changes that may have occurred since the rule was promulgated. Here, for example, the amended complaint identifies information from "2009, 2011, 2013, 2015, 2017, and 2019" that allegedly "pro[ves] that Regulation II has given issuers a decade-long, government-sanctioned windfall." Pet. App. 69, ¶ 60; see *id.* at 67-70, ¶¶ 58-64. But information that postdates 2011 would be legally relevant only in the context of a request for new rulemaking; a court could not consider it in determining whether the Board acted lawfully when it promulgated the rule.

Ostensibly quoting Justice Kavanaugh's *PDR Network* concurrence, petitioner asserts that the Court should not require it to follow "that convoluted route rather than just supporting judicial review in [a facial challenge]." Pet. Br. 33 (quoting *PDR Network*, 139 S. Ct. at 2065) (brackets in petitioner's brief). But what the concurrence actually asked was why the government would require a petition for rulemaking "rather than just supporting judicial review *in an enforcement proceeding?*" *PDR Network*, 139 S. Ct. at 2065 (emphasis added). The concurrence took as given that even newly created entities would be barred from pursuing facial challenges under the Hobbs Act once the Act's deadline had passed. See *id.* at 2062. As already discussed, the government agrees that judicial review of the substance of Regulation II would be available in connection with a proceeding brought to enforce it. See 12 C.F.R. 235.9 (providing for administrative enforcement of Regulation II). The fact that petitioner will never be a defendant in such a proceeding (because Regulation II governs the conduct of networks and debit-card issuers rather than merchants) makes it more reasonable, not less, to require petitioner to use

the petition-for-rulemaking mechanism "set forth explicitly in the APA." *Auer*, 519 U.S. at 459.

D. Petitioner's Approach Would Impose Substantial Burdens On Agencies And Reviewing Courts

For the foregoing reasons, no sound basis exists for jettisoning the approach to the accrual of APA claims that has long prevailed in the lower courts. Doing so would also create serious problems for agency and judicial administration.

1. Under petitioner's view, a local environmental organization that was injured by a factory or dam could recruit an out-of-state plaintiff to challenge federal operating permits issued decades earlier on the ground that the agency's response to comments had been insufficient. If the plaintiff had never before visited the area, see *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 889 (1990), but plausibly alleged that he had a newly formed intent to do so, his challenge would be timely on petitioner's theory. So too with a newly formed property management company that wished to challenge the interests that the Department of Housing and Urban Development considered in 1973 when it issued regulations barring racial discrimination in federally funded housing. See 24 C.F.R. 1.4; 38 Fed. Reg. 17,949 (July 5, 1973). Or a recently chartered bank that wished to challenge the reasoned explanation that the Federal Deposit Insurance Corporation gave in 1974, when it adopted regulations establishing safety and soundness principles for certain banking practices. See 12 C.F.R. Pt. 337; 39 Fed. Reg. 29,178, 29,179 (Aug. 14, 1974).

Petitioner disclaims none of that. Instead, it argues (Pet. Br. 37) that even under current doctrine, agencies, regulated parties, and the general public can "[n]ever

ha[ve] true reliance interests in a rule's finality" because regulations "will *always* be subject indefinitely to invalidation" in enforcement proceedings. For two principal reasons, the availability of review during enforcement actions does not support adopting petitioner's interpretation of Section 2401(a).

First, petitioner's approach would allow a far broader set of potential plaintiffs to pursue belated challenges to agency regulations. The only entities that can challenge agency regulations during enforcement proceedings are regulated parties that are subjected to such proceedings. Petitioner, by contrast, would give *every* newly aggrieved regulated party a six-year window for pursuing such a challenge, whether or not that entity is ever actually made a defendant in an enforcement action. Petitioner would also allow such belated challenges to be brought by entities (like itself) that are not regulated by the disputed rule, and therefore have no prospect of being subjected to enforcement actions, but allege that the agency has not adequately regulated *others*. Thus, while the potential for as-applied challenges in enforcement proceedings may prevent the agency from ever obtaining *complete* repose, petitioner's approach to accrual under Section 2401(a) would substantially expand the class of potential challengers and thereby increase the burdens on agencies and courts.

Second, petitioner is wrong to equate the scope of review that courts provide in timely facial challenges with the review that is available during enforcement proceedings. Under existing practice, "a party against whom a rule is applied may, at the time of application, pursue *substantive* objections to the rule, including claims that an agency lacked the statutory authority to adopt the rule." *Independent Community Bankers of*

America v. *Board of Governors of the Federal Reserve System*, 195 F.3d 28, 34 (D.C. Cir. 1999) (emphasis added). "By contrast, * * * procedural attacks on a rule's adoption are barred even when it is applied." *Ibid.*; see, *e.g.*, *Coal River Energy*, 751 F.3d at 664 ("[W]hen the government actually applies its regulation against a party * * * , [the party] can mount a substantive rather than a 'procedural' defense against the regulation."); *Dunn-McCampbell Royalty Interest, Inc.* v. *National Park Service*, 112 F.3d 1283, 1287 (5th Cir. 1997) (similar); *Wind River Mining Corp.* v. *United States*, 946 F.2d 710, 715-716 (9th Cir. 1991) (similar); see also *PDR Network*, 139 S. Ct. at 2060 (Kavanaugh, J., concurring in the judgment) ("[A] party traditionally has been able to raise an as-applied challenge *to an agency's interpretation of a statute* in an enforcement proceeding.") (emphasis added).[11]

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[11] While not directly at issue here, that contrasting treatment appropriately reflects the different nature of substantive and procedural objections. Where a court is reviewing an agency enforcement order that applies a regulation adopted more than six years earlier, the only "final agency action" properly before the court is the enforcement order itself. 5 U.S.C. 704. If the underlying regulation reflected an unreasonable interpretation of the governing statute, however, the order will ordinarily be "not in accordance with law" because it, too, will conflict with the statute. 5 U.S.C. 706(2)(A). Unless Congress has provided otherwise, therefore, the reviewing court appropriately evaluates a challenger's substantive objections to the regulation in the course of reaching a judgment about the lawfulness of the enforcement order before it. The same is not true for procedural objections to an underlying regulation. In the ordinary course, an agency does not act "arbitrar[ily]" or "capricious[ly]" by enforcing an extant regulation, *ibid.*, even if a challenger could have raised procedural objections to the regulation when it was originally adopted. Arguments about the procedural invalidity of the underlying regulation therefore provide no basis for setting aside

To be sure, the extent of the burdens on agencies that petitioner's approach would entail would depend in part on the remedies that courts applied when particular private suits were successful. The United States has maintained, for example, that a district court hearing a challenge to a rule under Section 704 lacks authority to vacate the rule universally and should instead grant appropriate declaratory or injunctive relief limited to the parties before it. See, *e.g.*, U.S. Br. at 40-44, *United States* v. *Texas*, 599 U.S. 670 (2023) (No. 22-58). That view accords with the traditional principle that, "when a federal court finds a remedy merited, it provides party-specific relief, directing the defendant to take or not take some action relative to the plaintiff." *United States* v. *Texas*, 599 U.S. 670, 693 (2023) (Gorsuch, J., concurring in the judgment); but see *Griffin* v. *HM Florida-ORL, LLC*, 2023 WL 7928928, No. 23A366, at *1 n.1 (Nov. 16, 2023) (Kavanaugh, J., respecting the denial of the application for stay) (arguing that the APA authorizes district courts to grant universal vacatur).

If courts appropriately limit the relief granted in pre-enforcement challenges, they would reduce the burdens of allowing such challenges long after the relevant rule was issued. Courts could likewise reduce disruption by giving weight to sunk costs and other reliance interests in deciding whether (and to what extent) various forms of injunctive relief should be awarded. But adoption of petitioner's proposed accrual rule would have an obvious tendency to increase the number of belated challenges that the government would be required to defend on the merits. And fashioning appropriate "party-specific relief," *Texas*, 599 U.S. at 693 (Gorsuch,

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an enforcement order that was itself the product of proper agency procedures.

J., concurring in the judgment), would be especially challenging in cases like this one, where the plaintiff alleges that an agency should have regulated other private parties more aggressively.

2. Petitioner's approach would also create serious difficulties of judicial administration.

a. As petitioner acknowledges (Br. 40), its approach would require courts to perform backward-looking inquiries about when a plaintiff first became sufficiently aggrieved by agency action to be entitled to sue. To decide whether a conservation organization's challenge to the construction of a dam was timely, for example, a court might need to determine whether any of the organization's members had first formed "concrete plans" to "observe an animal species" threatened by construction of the dam more than six years before the suit was filed. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562, 564 (1992). Here, petitioner contends (Pet. Br. 19) that the limitations period on its claim "started running only when it accepted its first debit-card payment in March 2018," the month it opened for business. But petitioner presumably formed concrete plans to accept debit cards at some point before that time, and could therefore have challenged the rule at that earlier date. If petitioner had joined this suit more than six years after its incorporation, but less than six years after opening for business, a court would need to determine when within that intervening period petitioner's plans to accept debit cards became sufficiently concrete to support a suit.

Petitioner asserts (Br. 40) that courts apply Section 702's "injury-based zone-of-interest test * * * routinely with ease." But it is one thing for a plaintiff to attest to its own concrete plans today; it is quite another for a defendant to attempt to prove exactly when the plain-

tiff's plans hardened years in the past. "As a general matter, courts are not well suited to decide" that sort of "*retrospective* ripeness analysis," and requiring them to do so could "'wreak havoc with the congressional intention that repose be brought to final agency action.'" *Commonwealth of Pennsylvania Department of Public Welfare* v. *United States Department of Health & Human Services*, 101 F.3d 939, 945 (3d Cir. 1996) (Alito, J.) (citation omitted).

b. Allowing procedural challenges to agency actions taken decades ago would also create a second evidentiary problem. Courts reviewing such challenges must consider "the full administrative record that was before the [agency] at the time [it] made [its] decision." *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 420. But it would often be difficult, if not impossible, to reconstruct all of the materials the agency relied on in reaching a decision "twenty, thirty, or even forty years" after the fact. *Natural Resources Defense Council* v. *Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981).

Petitioner asserts that this objection "is hard to square with agencies' obligation under the Federal Records Act to 'preserve records containing adequate and proper documentation of . . . policies, decisions, procedures, and essential transactions of the agency . . . to protect the legal . . . rights of the Government and of persons directly affected by the agency's activities.'" Pet. Br. 41 (quoting 44 U.S.C. 3101). But that requirement has never entailed the permanent retention of all the materials that agencies consider in determining whether to take particular actions. The vast majority of federal records are deemed "temporary" and can be destroyed after a certain period approved by the National

Archives and Records Administration. See Wendy Ginsberg, Congressional Research Service, *Common Questions About Federal Records and Related Agency Requirements* 4 (Feb. 2, 2015) ("[O]nly 2%-3% of all federal records are transferred to NARA for permanent retention."). And even if all of an agency's physical records are preserved, reconstructing which of those records the agency actually considered in reaching a decision decades earlier could be very difficult.

Petitioner observes (Br. 41) that agencies publish "certain agency records in the Federal Register, including the proposed and final rules that often reflect the agency record." But the administrative record for a typical regulation is far more extensive than just those two documents. And petitioner's approach would allow challenges to many other types of final agency action, such as the issuance of permits, that are never reflected in the pages of the Federal Register.

Petitioner minimizes the government's invocation of these practical concerns as a "plea[] of administrative convenience." Pet. Br. 41 (citation omitted). But one of the core purposes of statutes of limitations is "to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Gabelli* v. *Securities & Exchange Commission*, 568 U.S. 442, 448 (2013) (quoting *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944)). The time limits that the lower courts have long imposed on APA claims appropriately serve that purpose. Petitioner's rule would not.

* * * * *

This Court has repeatedly rejected accrual rules that could "extend[] the limitations period to many decades, and so beyond any limit that Congress could have contemplated." *Rotella*, 528 U.S. at 554. The Court should do so again here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

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APPENDIX

1. 5 U.S.C. 702 provides:

Right of review

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. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. 5 U.S.C. 703 provides:

Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject

matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

3. 5 U.S.C. 704 provides:

Actions reviewable

Agency 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. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

4. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a

party, and due account shall be taken of the rule of prejudicial error.

5. 28 U.S.C. 2401 provides:

Time for commencing action against United States

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. 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.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.