No. ______

In the Supreme Court of the United States

CORNER POST, INC.,

Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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

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

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

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

The related proceedings below are:

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

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

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, Petitioner Corner Post, Inc. states that it has no parent corporation and that no publicly held corporation owns 10% of more of its stock.

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Corner Post, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 55 F.4th 634 and is reproduced in the Appendix ("App.") at 1-15. The District of North Dakota's opinion is not reported but is available at 2022 WL 909317 and is reproduced at App. 16-40.

JURISDICTION

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

STATUTORY PROVISION INVOLVED

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

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

28 U.S.C. §2401(a) states: "Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

INTRODUCTION

The Administrative Procedure Act ensures that regulated parties can challenge unlawful regulations. This Court has long said that the Act "embodies the basic presumption of judicial review" and that its "'generous review provisions' must be given a 'hospitable' interpretation." **Abbott Lab'ys v. Gardner**, 387 U.S. 136, 140 (1967). Section 702 is the cornerstone of that mandate. It provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. §702.

Congress gave the APA's generous review provisions plenty of runway by allowing plaintiffs to file an APA challenge "within six years after the right of action first accrues." 28 U.S.C. §2401(a). Those six years dwarf the shorter 30-day or 60-day periods in some agencies' organic statutes and the Hobbs Act. And unlike those limitations periods, §2401(a)'s six-year period runs from when an APA claim "first accrues"—not from the date of the final agency action. By design, then, it is easier to file timely lawsuits for run-of-the-mill APA challenges.

This review regime is essential for regulated parties seeking judicial recourse against the administrative state, "which now wields vast power and touches almost every aspect of daily life." **Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.**, 561 U.S. 477, 499 (2010).

Not surprisingly, federal agencies do not like the broad review that the APA's plain text provides. So

some agencies have tried to thwart it by convincing lower courts—now including the Eighth Circuit—to erroneously interpret the accrual rule for APA claims. Those courts have held that the statute of limitations for APA claims starts running for **everyone** the day that an agency takes a final action—no matter when (or whether) that action harms the plaintiff. Indeed, some of those courts (including the Eighth Circuit) have held that the limitations period starts running on the day of final agency action even for entities that **do not exist** when a regulation is issued. By so holding, those courts have effectively turned the statute of limitations for APA claims into a statute of repose—a permanent "obstacle[] to judicial review." **Shaughnessy v. Pedreiro**, 349 U.S. 48, 51 (1955).

Those circuits' decisions run headlong into the Sixth Circuit's contrary view. As that court explained, an agency's argument "that a right of action under the APA accrues upon final agency action regardless of whether that action aggrieved the plaintiff … contradicts the text of the statute and Supreme Court precedent to boot." **Herr v. U.S. Forest Serv.**, 803 F.3d 809, 819 (6th Cir. 2015) (Sutton, J.). After **Herr**, the APA's "six-year clock starts ticking" in the Sixth Circuit only when the agency action actually "invades a party's legally protected interest," because "a party [who] cannot plead a 'legal' wrong or an 'adverse[] [e]ffect[] … has no right of action" under the APA. **Id.** (quoting 5 U.S.C. §702). A dissenting opinion in a split Fifth Circuit decision takes the same view. **See Dunn-McCampbell Royalty Int., Inc. v. NPS**, 112 F.3d 1283, 1290 (5th Cir. 1997) (Jones, J., dissenting). According to Judge Jones, "[l]imitations on certain challenges to

regulations [do] not begin to run" until the plaintiff "could … sue[] the [agency]." **Id.** at 1289.

The Eighth Circuit's decision below squarely conflicts with the Sixth Circuit's opinion (and Judge Jones's view) and joins the wrong side of an entrenched circuit split on this question. The Eighth Circuit now aligns with the Fourth, Fifth, Ninth, D.C., and Federal Circuits' holdings that the APA's statute of limitations starts to run for a plaintiff on the day the agency issues a rule—"even if" the plaintiff "is not injured until more than six years after the relevant agency action became final." **Cal. Sea Urchin Comm'n v. Bean**, 828 F.3d 1046, 1050 (9th Cir. 2016). This Court's review is needed to resolve this entrenched, square split.

Compounding that problem, the majority position in this square split conflicts with this Court's precedent. A statutory "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. of Cal.**, 522 U.S. 192, 201 (1997). A plaintiff who has not been harmed by agency action does not have a "complete and present [APA] cause of action," **id.**, because the Court has "interpreted §702 as requiring litigants to show, at the outset of the case, that he is injured in fact by the agency action." **Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Newport News Shipbuilding & Dry Dock Co.,** 514 U.S. 122, 127 (1995). The majority position cannot be reconciled with those cases; it starts a plaintiff's clock even before he can state an APA claim.

Of course, agencies love how the majority rule insulates their actions from review after six years. In effect, the majority rule conflates §2401(a) with a statute of repose or other filing deadlines that expressly run from final agency action. That is error, for "[a] federal regulation that makes it six years without being contested does not enter a promised land free from legal challenge." **Herr**, 803 F.3d at 821; **see also Dunn-McCampbell**, 112 F.3d at 1290 (Jones, J., dissenting) ("[A] regulation initially unauthorized by statute cannot become authorized by the mere passage of time."). The conflation needs to be corrected.

Time and time again, this Court has fixed lower courts' errors in applying statutes of limitations. **See, e.g.**, **Wilkins v. United States**, 142 S.Ct. 870 (2023); **Boechler, PC v. Comm'r of Internal Revenue**, 142 S.Ct. 1493 (2022); **Rotkiske v. Klemm**, 140 S.Ct. 355 (2019); **McDonough v. Smith**, 139 S.Ct. 2149 (2019). This well-developed statute-of-limitations error in the APA context raises a "heighten[ed]" concern that the ever-growing administrative state may further "slip from" judicial review. **Free Enter. Fund**, 561 U.S. at 499. The error in this case warrants plenary review. The Court should grant the petition.

STATEMENT OF THE CASE

A. Background

Though the question presented here concerns only a square split on a statute-of-limitations issue, Corner Post briefly describes the underlying merits dispute to put the limitations issue in context.

Almost every merchant in the country accepts debit cards as a form of payment because they are enormously popular with customers. App. 46-47. But every time customers use a debit card, the merchant pays behind-the-scenes transaction fees to transfer the money from the customer's bank account to the merchant's bank account. **See** Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43394, 43397 (July 20, 2011) ("Rule"); App. 57. The largest of those fees is called an "interchange fee," and the merchants pay that fee to the banks that issue debit cards as compensation for the banks' role in those transactions. App. 58. But merchants and banks do not set the interchange fee amounts. Rather, until 2010, interchange fees were set by the network companies that process the transactions, such as Visa and Mastercard. App. 59. Those networks also competed for the banks' business by setting the interchange fees as high as possible—then passing those fees on to merchants to pay. App. 59. And because merchants have little choice but to accept debit cards and pay the fees no matter their amount, this led to a market breakdown. App. 59.

Congress tried to address this problem in 2010 by passing the "Durbin Amendment" as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010). The Durbin Amendment instructs the Federal Reserve Board to regulate interchange fees for debit-card transactions with the largest banks—that is, banks with over $10 billion in assets. App. 48. Congress directed the Board to cap interchange fees for those largest banks at an amount that is "reasonable and proportional to the cost incurred by the [bank] issuer

with respect to the transaction." 15 U.S.C. §1693o-2(a)(2).

As the Durbin Amendment required, the Board started a rulemaking in 2010 to set an interchange-fee cap. 75 Fed. Reg. 81722 (Dec. 28, 2010). The Board's proposed rule set the cap at 12 cents per transaction. **Id.** at 81737-38. But in response to pressure from big banks, the Board changed course in its final rule. **See** App. 64. In July 2011, the Board set the interchange-fee cap at 21 cents per transaction and an **ad valorem** component of .05% of the transaction's value. **See** Rule, 76 Fed. Reg. at 43422. Since then, the Board has gathered and published data showing that big banks' average costs for processing debit-card transactions have ranged from just 3.6 to 5 cents per transaction. App. 50-51. That means big banks have made an average profit of between 16 cents and 17.4 cents for virtually every one of 80 billion debit-card transactions every year since 2011—or at least $12 billon per year in profits. App. 45. The Board has never explained how a fee cap resulting in bank profits of between 320% and 483% per transaction is "reasonable and proportional to the cost incurred by the [bank] issuer with respect to the transaction." 15 U.S.C. §1693o-2(a)(2).

B. Proceedings Below

Petitioner Corner Post, Inc. is a truck stop and convenience store in Watford City, North Dakota. App. 52-53. It opened in March 2018 and first began accepting debit cards (and thus paying the Board's 21-cent interchange fees) that month. App. 52-53. Just over three years later, in 2021, Corner Post joined

other plaintiffs in an APA suit in the U.S. District Court for the District of North Dakota challenging the Rule. **See** App. 52-54. Corner Post contends that the Board's fee is contrary to law and exceeds the Board's statutory authority because it is not "reasonable and proportional to the cost incurred" by banks for each debit-card transaction. 15 U.S.C. §1693o-2(a)(2); **see** App. 79-84. In particular, Corner Post argues that the Board set the fee standard at 21 cents by basing it on four types of costs that Congress statutorily barred the Board from considering. App. 79-84. Corner Post asked the district court to set aside the Rule as exceeding the Board's statutory authority. App. 84-85.[1]

The Board moved to dismiss Corner Post's claims on multiple grounds. Relevant here, the district court granted the Board's motion and dismissed Corner Post's claim as time barred, holding that "[t]he limitations period under 28 U.S.C. § 2401(a) for bringing a facial challenge to an agency action begins to run at

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[1] The Rule was previously challenged in the U.S. District Court for the District of Columbia in 2011. That district court vacated the Rule, concluding that it was "quite clear that the statute did not allow the Board to consider the additional costs factored into the interchange fee standard." **NACS v. Bd. of Governors of Fed. Rsrv. Sys.**, 958 F. Supp. 2d 85, 107, 114 (D.D.C. 2013) (Leon, J.). The court found that the "Board's interpretation is utterly indefensible" and "irreconcilable with the statute." **Id.** at 105, 107. The D.C Circuit employed **Chevron** deference and reversed, even though it confirmed a defect in the rule and remanded to give the Board a chance to try to fix that defect. **NACS v. Bd. of Governors of Fed. Rsrv. Sys.**, 746 F.3d 474 (D.C. Cir. 2014). And this Court denied certiorari. 574 U.S. 1121 (2015). Corner Post was not a party to that lawsuit (it did not yet exist) and the lawsuit was litigated in a circuit where Corner Post does not exist.

the time of publication of the agency's action." App. 38. That meant that Corner Post's statute of limitations expired in 2017, a year before Corner Post first opened its doors or accepted a debit-card payment. App. 38.

The Eighth Circuit affirmed. App. 15. It acknowledged that it previously "ha[d] not explicitly addressed whether a plaintiff which comes into existence more than six years after the publication of a final agency action is barred from bringing an APA facial challenge to the agency action." App. 7. To resolve this issue, it first looked to cases in "[o]ther circuit courts hold[ing] that APA claims accrue, and the statute of limitations begins to run, when an agency publishes the regulation." App. 7; **see also** App. 10-11 (citing **Hire Order Ltd. v Marianos**, 698 F.3d 168, 170 (4th Cir. 2021); **Dunn-McCampbell**, 112 F.3d at 1287; **Citizens Alert Regarding the Env't v. EPA**, 102 F. App'x 167, 168-69 (D.C. Cir. 2004); **Wind River Mining Corp. v. United States**, 946 F.2d 710, 715 (9th Cir. 1991)).

The panel then contrasted those decisions with the Sixth Circuit's holding in **Herr** "that a challenge to an agency action first accrued upon injury to the plaintiff rather than publication of the agency action." App. 9 (citing **Herr**, 803 F.3d at 822). The panel ultimately rejected the Sixth Circuit's view and joined the circuits on the other side of the split. It 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." App. 11. According to the Eighth Circuit, "liability is fixed and plaintiffs have a complete and

present cause of action upon publication of the final agency action." App. 12.

Applying its view of the statute of limitations, the Eighth Circuit held Corner Post's claims time barred under §2401(a) because the Board issued its Rule in July 2011 and Corner Post—which did not even open and begin paying regulated interchange fees until 2018—sued in 2021. App. 12.

REASONS FOR GRANTING THE PETITION

By holding that the statute of limitations for APA claims starts to run when an agency first issues a regulation—regardless of when that regulation first "adversely affected or aggrieved" the plaintiff, 5 U.S.C. §702—the Eighth Circuit deepened to 6-1 an entrenched, square circuit split on the question of when a plaintiff's APA claim "first accrues" under 28 U.S.C. §2401(a). This square split warrants plenary review. Sup. Ct. R. 10(a).

The erroneous majority position also "decide[s] an important federal question in a way that conflicts with the relevant decisions of this Court." Sup. Ct. 10(c). A "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. of Cal.**, 522 U.S. 192, 201 (1997). A plaintiff who has not yet been harmed by a rule does not have a "complete and present [APA] cause of action" because this Court has "interpreted §702 as requiring litigants to show, at the outset of the case, that he is injured in fact by the agency action." **Dir., Off. of Workers' Comp.**

Programs, Dep't of Lab. v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 127 (1995). Yet the majority rule starts the statute of limitations even for plaintiffs who cannot state a claim challenging the agency's action. That conflicts with how this Court applies statutes of limitations. That departure from this Court's precedent provides an independent ground for plenary review.

I. The Eighth Circuit's opinion deepens a square, entrenched circuit split about when APA claims "first accrue[]."

A. Plaintiffs alleging APA claims must file their complaint "within six years after the right of action first accrues." 28 U.S.C. §2401(a). And an APA claim accrues when a plaintiff "suffer[s] legal wrong," or becomes "adversely affected" or "aggrieved" by, a final agency action. 5 U.S.C. §702; **Newport News**, 514 U.S. at 127; **Lujan v. Nat'l Wildlife Fed'n**, 497 U.S. 871, 882-83 (1990). Only upon suffering such an injury, or being adversely affected or aggrieved, does a plaintiff have "'a complete and present cause of action'" under the APA. **Ferbar**, 522 U.S. at 201.

Despite this plain statutory text, the circuits are squarely split on when an APA "right of action first accrues," §2401(a)—and thus when the six-year limitations clock starts running. The circuits themselves recognize this split between the Sixth Circuit and six other circuits that follow the erroneous majority rule.

Start with the Sixth Circuit, which holds that §2401(a)'s six-year limitations clock begins to run only when a plaintiff first suffers an injury as required by

§702—**not** simply when a rule is first promulgated. **Herr v. U.S. Forest Serv.**, 803 F.3d 809, 818-22 (6th Cir. 2015) (Sutton, J.). The plaintiffs in **Herr** sued in 2014 to challenge a 2007 regulation restricting the use of motorboats on a lake abutting property they purchased in 2010. **Id.** at 813. They argued that they timely filed their suit because §2401(a)'s six-year clock did not begin to run until 2010, when they "purchased their waterfront property" on a lake subject to the restrictions. **Id.** at 818. The agency, in contrast, "argue[d] that a right of action under the APA accrues upon final agency action regardless of whether that action aggrieved the plaintiff." **Id.** at 819. The agency thus contended that the plaintiffs' statute of limitations expired in 2013, six years after the agency issued the regulation in 2007, making the plaintiffs' 2014 suit untimely. **Id.** at 818.

The Sixth Circuit sided with the plaintiffs. "To file a lawsuit under the Administrative Procedure Act," the court explained, the plaintiffs "must know or have reason to know that the challenged agency action caused them to suffer a 'legal wrong' or 'adversely affected or aggrieved' them 'within the meaning of a relevant statute.'" **Id.** at 818 (quoting 5 U.S.C. §702). On that question, the plaintiffs "could not have become 'aggrieved' by the invasion of [their] property right until they became property owners on the lake—until they purchased the waterfront real estate in September 2010." **Id.** at 819. Their statute of limitations thus started running in 2010.

That holding did not excuse the plaintiffs from "**also** plead[ing] final agency action, **see** 5 U.S.C. §704."

Id. at 819. But pleading final agency action "is another necessary, but by itself not a sufficient, ground for stating a claim under the APA." **Id.** In other words, the APA imposes "two requirements" to state a claim: a plaintiff must "plead[] final agency action **and** injury to [the plaintiffs'] rights." **Id.** at 818, 819. And in many cases, "the right of action happen[s] to accrue at the same time that the final agency action occurred, because the plaintiff either became aggrieved at that time or had already been injured." **Id.** at 819-20. "But that is not the case when, as here, the party does not suffer any injury until **after** the agency's final action." **Id.** at 820. The agency's contrary position—"that a right of action under the APA accrues upon final agency action regardless of whether that action aggrieved the plaintiff"—"contradicts the text of the statute and Supreme Court precedent to boot." **Id.** at 819.

The Eighth Circuit's decision below squarely acknowledges and rejects the Sixth Circuit's holding "that a challenge to an agency action first accrued upon injury to the plaintiff rather than publication of the agency action." App. 9 (citing **Herr**, 803 F.3d at 822). Instead, the Eighth Circuit 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." App. 11.

The Eighth Circuit's holding mirrors holdings in at least five other circuits. A leading early decision in this line is the Fifth Circuit's split panel opinion holding that "the limitations period begins to run when the

agency publishes the regulation in the Federal Register." **Dunn-McCampbell Royalty Int., Inc. v. NPS**, 112 F.3d 1283, 1287 (5th Cir. 1997). There, mineral developers reacquired mineral interests on a tract of land in 1989. **Id.** at 1285-86. Five years later, they challenged a 1979 National Park Service regulation that affected those mineral interests. **Id.** at 1286. The majority held that the suit was untimely because the developers "failed to mount a facial challenge to the regulations within six years of their publication in 1979." **Id.** at 1287. The only recourse for the time-barred mineral developers, the panel said, was to wait until the agency "applies [the] rule"—such as in an enforcement action or the agency's denial of a rulemaking petition seeking to rescind the rule—which would "create[] a new, six-year cause of action." **Id.** (cleaned up).

Judge Jones dissented. She did not think "that the statute of limitations ha[d] run against [the mineral developers]." **Id.** at 1289 (Jones, J., dissenting). She reasoned that the mineral developers "could not have sued the Park Service before [they] began to reacquire [their] leases in 1986-89." **Id**. Thus, the "[l]imitations on certain challenges to regulations could not begin to run against [them] until that time." **Id**. "The point that divides the majority and me," she explained, "is their insistence that the agency's lack of statutory authority could be raised by [the developer] only in defense against an agency enforcement action or if the company petitions to rescind or amend the Park Service regulations and receives an adverse decision." **Id.** at 1290. Rather, if the mineral developers "ha[d] sued

within six years" of when they "effectively reacquir[ed] leases," she would have "allow[ed] the suit to go forward." **Id.**

The Fourth Circuit has agreed with the Fifth Circuit that "'the limitations period begins to run when the agency publishes the regulation.'" **Hire Order Ltd. v. Marianos**, 698 F.3d 168, 170 (4th Cir. 2012) (quoting **Dunn-McCampbell**, 112 F.3d 1287). There, the court rejected two firearms dealers' 2010 lawsuit challenging a 1969 ATF regulation that limited their ability to sell firearms out of state. **Id.** The court held that the plaintiffs' challenge was untimely even though they did not become federally licensed firearms dealers until 2008: "The contention of Hire Order and Privott that their cause of action did not accrue until they became federally licensed firearms dealers in 2008 utterly fails." **Id.**

The Ninth Circuit also has held that "a statute of limitations may run against a plaintiff even if it is not injured until more than six years after the relevant agency action became final." **Cal. Sea Urchin Comm'n v. Bean**, 828 F.3d 1046, 1050 (9th Cir. 2016) (citing **Shiny Rock Mining Corp. v. United States**, 906 F.2d 1362, 1363 (9th Cir. 1990)). In **Shiny Rock**, the plaintiff "contended that the statute of limitations period should not begin to run until a plaintiff is injured and acquires standing." **Bean**, 828 F.3d at 1050 (citing **Shiny Rock**, 906 F.2d at 1364-66). The Ninth Circuit "disagreed, holding that the statute of limitations period runs from when the agency action becomes final and is published in the Federal Register." **Id.**

The D.C. Circuit has likewise held that "[t]he right of action" under the APA "first accrues on the date of the final agency action." **Sendra Corp. v. Magaw**, 111 F.3d 162, 165 (D.C. Cir. 1997). That court's precedent leaves no room for plaintiffs who begin suffering a harm only after that six-year period. For instance, in **Harris v. FAA**, the D.C. Circuit rejected a 2001 challenge to a 1993 FAA recruitment notice by air-traffic controllers who were hired between 1995 and 1998. 353 F.3d 1006, 1010-12 (D.C. Cir. 2004). It held that the limitations period for **all** air-traffic controllers began to run when the FAA issued the notice in 1993—even for air traffic controllers who were not hired until two and five years later. **Id.**; **see Peri & Sons Farms, Inc. v. Acosta**, 374 F. Supp. 3d 63, 72 n.5 (D.D.C. 2019) ("[A]s the D.C. Circuit has made clear, there is a 'six-year window to directly challenge the statutory authority' of a regulation, which 'accrues on the date of the final agency action.' … That a party did not become subject to a regulatory scheme until a later date does not, on its own, restart the statute of limitations clock for such challenges.").

The Federal Circuit, in turn, has expressly stated that its precedent "accords with **Hire Order**." **Odyssey Logistics & Tech. Corp. v. Iancu**, 959 F.3d 1104, 1111 (Fed. Cir. 2020) (citing **Hyatt v. USPTO**, 904 F.3d 1361, 1372 (Fed. Cir. 2018)); **see id.** ("Under **Hire Order** … 'the limitations period begins to run when the agency publishes the regulation.'").

B. This square split cannot be explained as a distinction between facial and as-applied challenges. **Compare** App. 10 (stating "other circuits distinguish

between as-applied and facial challenges under the APA"), **with** App. 10 (stating "**Herr** did not distinguish between as-applied and facial challenges"). To start, the term "as-applied challenge" here should not be confused with an as-applied **remedy**—that is, the "breadth of remedy" issue this Court has discussed in cases like **Citizens United v. FEC**, 558 U.S. 310 (2010). **See, e.g.**, **id.** at 330 (discussing facial and as-applied remedies). Rather, in this context, the term refers to the unobjectionable practice of allowing a party to challenge a rule's legality after the limitations period has admittedly run—but as a defense if an agency tries to enforce the allegedly illegal rule against the party, or if an agency denies a petition to reconsider a rule. **See, e.g.**, **PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.**, 139 S.Ct. 2051, 2059 (2019) (Kavanaugh, J., concurring in the judgment) (noting that "a party traditionally has been able to raise an as-applied challenge to an agency's interpretation of a statute in an enforcement proceeding"); **CREW v. FEC**, 971 F.3d 340, 348 (D.C. Cir. 2020) ("'[T]hose affected' when an agency 'seeks to apply [a] rule' **after the statute of limitations has passed** 'may challenge that application on the grounds that it conflicts with the statute from which its authority derives.'" (emphasis added)).

By definition, this "as-applied" exception—whether called an as-applied exception, an as-applied challenge, or an enforcement exception[2]—becomes

[2] The D.C. Circuit calls this "the **Weaver** exception." **CREW**, 971 F.3d at 348 (discussing **Weaver v. FMCSA**, 744 F.3d 142, 145 (D.C. Cir. 2014)).

relevant only after the limitations period has expired. It does not answer when the statute of limitations starts running in the first place.

Herr itself acknowledged the as-applied exception's role in an APA statute-of-limitations inquiry: "Regulated parties may always assail a regulation as exceeding the agency's statutory authority" as a defense "in enforcement proceedings against them." 803 F.3d at 821. In addition, "[r]egulated parties may always petition an agency to reconsider a longstanding rule and then appeal the denial of that petition (as the denial counts as final agency action)." **Id.** at 822.

And while acknowledging this exception, **Herr** further confirms that its holding does not rest on it. Rather, **Herr** "adds" to this as-applied "regime": "When a party **first** becomes aggrieved by a regulation that exceeds an agency's statutory authority more than six years after the regulation was promulgated, that party may challenge the regulation **without waiting for enforcement proceedings**." **Herr**, 803 F.3d at 822 (second emphasis added). In other words, **Herr**'s holding harmonizes prior caselaw about the as-applied exception with its main holding about when APA claims accrue for parties first injured more than six years after an agency adopts a rule.

Those statements are fatal to any contention that **Herr's** holding about when APA claims accrue turns on any facial-versus-as-applied distinction. It does not, and the Eighth Circuit below recognized as much. App. 10 ("**Herr** did not distinguish between as-applied

and facial challenges").[3] Rather, **Herr** turns on the plain language of 28 U.S.C. §2401(a), 5 U.S.C. §702, and this Court's precedent. **See Herr**, 803 F.3d at 819 (requiring both "final agency action **and** an injury"). Indeed, if the **Herr** plaintiffs had raised their APA claims as a defense to an as-applied enforcement action after the statute of limitations had expired, the Sixth Circuit would not have needed to analyze when their APA claim first accrued. But it did—and the Sixth Circuit meticulously clarified that "§2401(a)'s six-year clock starts ticking" only if a final agency action "invades a party's legally protected interest." **Id.** at 818-19.

In short, there is no basis to explain away this split as a purported distinction between facial and as-applied challenges. The Sixth Circuit in Herr didn't apply the as-applied exception because it didn't need to. And if Corner Post had brought its claims in the Sixth Circuit, they would have been timely under **Herr**.

* * *

The decision below deepens to 6-1 a square, acknowledged circuit split about when an APA claim

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[3] The Second Circuit has also recognized that the Sixth Circuit's rule does not hinge on a facial-versus-as-applied distinction. That court noted that **Herr** "offered qualifications to the general rule" for facial challenges by "delaying accrual when the plaintiff 'does not suffer any injury until **after** the agency's final action." **DeSuze v. Ammon**, 990 F.3d 264, 270 n.7 (2d Cir. 2021) (quoting **Herr**, 803 F.3d at 820-22).

"first accrues" under §2401(a). This entrenched split merits plenary review.

II. The majority rule contradicts this Court's precedent.

The majority rule that the Eighth Circuit adopted below also "contradicts … Supreme Court precedent to boot." **Herr**, 803 F.3d at 819.

This Court has held that a "limitations period commences when the plaintiff has 'a complete and present cause of action.'" **Ferbar**, 522 U.S. at 201; **see also Rotkiske v. Klemm**, 140 S.Ct. 355, 360 (2019). And "a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." **Ferbar**, 522 U.S. at 201.

An APA plaintiff who has not been harmed by agency action cannot "file suit and obtain relief." **Id.** That's because this Court has "interpreted §702 as requiring litigants to show, at the outset of the case, that he is injured in fact by the agency action." **Newport News,** 514 U.S. at 127; **see also Lujan**, 497 U.S. at 883, 885 ("The burden is on the party seeking review under §702 to set forth specific facts … showing that he satisfied [§702's] terms."). Thus, to state a claim under the APA, the plaintiff must suffer legal wrong or be adversely affected or aggrieved by a final agency action. 5 U.S.C. §702.

The majority rule contradicts those cases. The Eighth Circuit now holds that for APA claimants, "the right of action accrues, and the limitations period begins to run, upon publication of the regulation." App.

7. But under this Court's correct interpretation of the APA, "§702 … require[s] a litigant to show, at the outset of the case, that he is injured in fact by agency action." **Newport News**, 514 U.S. at 127; **see also Herr**, 803 F.3d at 819 ("[O]nly 'a person suffering legal wrong because of agency action … is entitled to judicial review thereof.'" (quoting 5 U.S.C. §702)). "If a party cannot plead a 'legal wrong' or an adverse effect,' it has no right of action." **Herr** 803 F.3d at 819 (cleaned up) (citing **Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak**, 567 U.S. 209, 224 (2012)). And because an uninjured party's APA claim has not accrued, the statute of limitations cannot begin to run. **Id.** Yet the majority rule still starts the statute of limitations for those plaintiffs even though they do not have an APA right of action. That cannot be squared with the Court's precedent.

III. The Eighth Circuit's decision is wrong.

A. The majority rule effectively reads ⁄702 out of the APA.

The majority rule, adopted in the decision below, reads §702's injury-or-aggrievement requirement out of the statute. That requirement is indispensable to answering the limitations-period question because under 28 U.S.C. §2401(a), APA claims must be "filed within six years after the right of action first accrues." And §702 makes clear when a right of action "first accrues": "A person **suffering legal wrong** because of an agency action, or **adversely affected or aggrieved by agency action** within the meaning of the relevant statute, is entitled to judicial review thereof." 5 U.S.C. §702 (emphasis added). Section 702's import is self-

evident: A plaintiff bringing an APA claim becomes "entitled to judicial review" when he "suffer[s] legal wrong because of agency action" or is "adversely affected or aggrieved by agency action." The plaintiff has six years from that date to sue.

The Sixth Circuit recognizes this straightforward reading. "The limitations period in §2401(a) begins to run when a party's 'right of action first accrues'—'as soon as (but not before) the person challenging the agency action can institute and maintain a suit in court.'" **Herr**, 803 F.3d at 818. That "comports with the general rule that 'a statute of limitations begins to run … when the plaintiff can file suit and obtain relief.'" **Id.** (quoting **Heimeshoff v. Hartford Life & Accident Ins. Co.**, 574 U.S. 99, 105 (2013)). For lawsuits under the APA, that happens when the agency action "invades a party's legally protected interest." **Id.** at 819. A rule that starts the statute of limitations before the plaintiff is injured "contradicts the text of the statute" because "[i]f a party cannot plead a 'legal wrong' or an 'adverse effect,' it has no right of action.'" **Id.** (cleaned up).

The Eighth Circuit, in contrast, did not analyze §702's text, or acknowledge how §702 interacts with §2401(a)'s accrual rule. **See** App. 6-12. Instead, it pointed to other circuits' cases holding that the statute of limitations begins to run when the regulation is issued and adopted that position as its own. **See** App. 7-9, 10-11 (collecting cases). The Eighth Circuit thus perpetuated the same analytical failure apparent in all the other majority-side circuits. **See, e.g.**, **Hire Order**, 698 F.3d at 170 (quoting **Dunn-McCampbell**, 112

F.3d at 1287). In fact, Corner Post has not found any circuit opinion adopting the majority rule that meaningfully engages the statutes' text.

Those circuits' failure to abide the text has led them to effectively convert §2401(a) from a statute of limitations into a statute of repose. It is true that "[s]tatutes of limitations and statutes of repose both are mechanisms used to limit the temporal extent or duration for liability." **CTS Corp. v. Waldburger**, 573 U.S. 1, 7 (2014). "But the time periods specified are measured from different points, and the statutes seek to attain different purposes and objectives." **Id.** A statute of limitations "establish[es] a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." **Statute of Limitations**, Black's Law Dictionary (11th ed. 2019). In contrast, a statute of repose "bar[s] any suit that is brought after a specified time since the defendant acted … even if this period ends before the plaintiff has suffered a resulting injury." **Statute of Repose**, Black's Lack Dictionary (11th ed. 2019).

Congress "knows exactly how to specify" whether it wants a statute of limitations or a statute of repose. **Epic Sys. Corp. v. Lewis**, 138 S.Ct. 1612, 1617 (2018); **see also Cal. Pub. Emps. Ret. Sys. v. ANZ Sec., Inc.**, 137 S.Ct. 2042, 2049-50 (2017) (differentiating between "accrual"-based statutes of limitations from "last culpable act"-based statutes of repose). The majority rule disobeys Congress's command by treating §2401(a), an accrual-based statute of limitations, like a statute of repose.

This error is all the more confounding because Congress also knows how to specify that a filing deadline runs from the date of final agency action. In fact, Congress has specifically done so in various contexts. Consider the Hobbs Act, which "force[s] parties who want to challenge agency orders via facial, pre-enforcement challenges to do so promptly and to do so in a court of appeals." **PDR Network**, 139 S.Ct. at 2059 (Kavanaugh, J., concurring in the judgment). Under the Hobbs Act, plaintiffs must seek review of agency orders "within 60 days after its entry." 28 U.S.C. §2344. Or consider the OSH Act's judicial-review provision for emergency temporary standards. **See, e.g.**, **NFIB v. OSHA**, 142 S.Ct. 661 (2022). Understandably, Congress wanted emergency measures to be adjudicated quickly and required lawsuits to be filed "prior to the sixtieth day" after an ETS is "promulgated." 29 U.S.C. §655(f). Or consider the Clean Water Act. Certain challenges against EPA's actions subject to the Clean Water Act's judicial-review provision "must be filed within 120 days after the date of the challenged action." **Nat'l Ass'n of Mfrs. v. Dep't of Def.**, 138 S.Ct. 617, 626 (2018) (citing 33 U.S.C. §1369(b)(1)). Or consider a whole host of similar time restrictions that run from final agency action.[4]

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

But for APA challenges, Congress eschewed a repose period that runs from final agency action and instead imposed an accrual-based statute of limitations. 28 U.S.C. §2401(a). Congress's decision to start the clock from accrual—rather than upon final agency action—is significant. **See Nat'l Ass'n of Mfrs.**, 138 S.Ct. at 626-27 (differentiating between Clean Water Act challenges that "must be filed within 120 days after the date of the challenged action" and APA challenges that "must be filed within six years after the claim accrues").

Just recently, this Court confirmed the obvious point that Congress's decision to start the limitations clock "'from the date on which [a] violation occurs'" means the clock does not run from "the date of discovery of such violation." **Rotkiske**, 140 S.Ct. at 358, 361 (emphasis removed) (interpreting Fair Debt Collection Practices Act). Likewise here, because Congress chose to start the six-year clock for APA challenges "when the right of action first accrues," 28 U.S.C. §2401(a), it **really** means that it starts when the action first accrues—not from the date a rule is issued.

* * *

The majority rule reads the accrual requirement out of 28 U.S.C. §2401(a), and it reads 5 U.S.C. §702's injury requirement out of the APA. The Court should grant plenary review and correct these errors.

B. The majority rule improperly insulates agency actions from APA challenges.

The majority rule also improperly insulates agency actions from judicial review. "The APA," this Court "ha[s] said, creates a 'presumption favoring judicial review of administrative action.'" **Sackett v. EPA**, 566 U.S. 120, 128 (2012) (quoting **Block v. Cmty. Nutrition Inst.**, 467 U.S. 340, 345 (1984)). That is because "'legal lapses and violations occur,'" which has led the Court to be "skeptical" of arguments that an agency's decision is "unreviewable." **Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.**, 139 S.Ct. 361, 370 (2018).

As a result, the Court has repeatedly rejected agencies' machinations to evade judicial scrutiny of their regulations. **See, e.g.**, **CIC Servs., LLC v. IRS**, 141 S.Ct. 1582, 1588-92 (2021) (rejecting agency's reliance on the Anti-Injunction Act to avoid judicial review); **Dep't of Homeland Sec. v. Regents of the Univ. of Cal.**, 140 S.Ct. 1891, 1906 (2020) (prosecutorial discretion); **Trump v. Hawaii**, 138 S.Ct. 2392, 2407 (2018) (consular nonreviewability).

This review regime has become critical to safeguarding individual liberty from the administrative state, which "wields vast power and touches almost every aspect of life." **Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.**, 561 U.S. 477, 499 (2010). In fact, this Court has "insisted" that the availability of judicial review of executive action constitutes part of "'[t]he very essence of civil liberty.'" **Bowen v. Mich. Academy of Fam. Physicians**, 476 U.S. 667, 670 (1986). That's at

least partly why the APA "repudiat[es] … the principle that efficiency of regulation conquers all" and provides recourse for regulated parties before agencies "drop the hammer." **Sackett**, 566 U.S. at 127, 130-31

The majority rule—which short-circuits §2401(a)'s accrual-based statute of limitations—thwarts those goals while indulging agencies' tactics to avoid judicial review. For example, agencies protest that if courts actually apply 28 U.S.C. §2401(a) and 5 U.S.C. §702 as written, then "agency regulations will never be safe from attack." **Herr**, 803 F.3d at 821. That complaint is both wrong and irrelevant.

To start, this "theory of repose"—that a "federal regulation that makes it six years" somehow "enter[s] a promised land free from legal challenge"—is a mirage. **Id.** at 821-22. "[A] regulation initially unauthorized by statute cannot become authorized by the mere passage of time." **Dunn-McCampbell**, 112 F.3d at 1290 (Jones, J., dissenting). In that sense, agency actions are never safe from legal challenge because "[r]egulated parties may always assail a regulation as exceeding the agency's statutory authority in enforcement proceedings against them." **Herr**, 803 F.3d at 821; **see also PDR Network**, 139 S.Ct. at 2060 (Kavanaugh, J., concurring in judgment).

In any event, the APA was designed to foster expedient pre-enforcement review of questionable agency action and to require lawful agency rulemaking. **See Abbott Lab'ys v. Gardner**, 387 U.S. 136, 140-41 (1967). Under the majority rule, that promise is illusory for parties who first become subject to unlawful

agency action more than six years after it occurs. Those parties face an impossible choice. They can lower their heads and "incur the costs" of "compliance." **Abbott Lab'ys**, 387 U.S. at 152. Or they can intentionally violate the regulation and invite an enforcement action where the regulation can be challenged. **Id.** at 152-53. But "[w]e normally do not require plaintiffs to 'bet the farm' … by taking the violative action' before 'testing the validity of the law.'" **Free Enter. Fund**, 561 U.S. at 490.

All this is why the purported "enforcement" or "as-applied" distinction has always been understood as an "exception" for "when an agency 'seeks to apply' [a] rule **after** the statute of limitations has passed." **CREW**, 971 F.3d at 348 (emphasis added); **Herr**, 803 F.3d at 821-22 (noting the same). Regulated entities who have been "adversely affected" or "aggrieved" by an "agency action" for more than six years can challenge that agency action as a defense in an enforcement action. But that distinction does not answer the initial question of when the limitations period **starts** to run. On that question, only one rule gives effect to §2401(a)'s and §702's text and this Court's cases: "When a party **first** becomes aggrieved by a regulation that exceeds an agency's statutory authority more than six years after the regulation was promulgated, that party may challenge the regulation without waiting for enforcement proceedings." **Herr**, 803 F.3d at 822.

The "enforcement" or "as-applied" exception is also little help for parties dealing with regulations like

the one here—a rule that regulates a third party's conduct in a way that harms the plaintiff. Such regulations can never be the source of an enforcement or as-applied action against harmed parties like Corner Post. The Board does not "enforce" its 21-cent standard against Corner Post; it merely authorizes private card issuers to charge Corner Post 21 cents per transaction. Regulations like this are common (they have their own standing rules). **See Lujan v. Defs. of Wildlife**, 504 U.S. 555, 562 (1992) (outlining the standard for when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of **someone else**"). But the majority rule effectively insulates them from challenge six years after agencies issue them.

The majority rule also leads to absurd results. This case is the classic example. The Board issued the Rule in 2011, but Corner Post did not open its doors and start paying regulated interchange fees until 2018. Yet according to the Eighth Circuit—and the five circuits that have adopted the same approach—Corner Post still should have challenged the Rule by 2017. **See** App. 11; **see also Hire Order**, 698 F.3d at 170 (rejecting challenge to 1969 ATF regulation by parties who did not exist until 2010). How can an uninjured (and non-existent) entity be an APA plaintiff?

Compounding the problem, the majority rule upsets Congress's choice that APA review should be broadly available and subject to a lengthy, accrual-based statute of limitations. "The length of a limitations period"—and when that limitations period starts—"'reflects a value judgment concerning the

point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'" **Rotkiske**, 140 S.Ct. at 361. Sometimes, Congress wants agency challenges to be subject to an accrual rule. **See Nat'l Ass'n of Mfrs.**, 138 S.Ct. at 626-27. And sometimes, Congress wants to "force parties who want to challenge agency orders … to do so promptly." **PDR Network**, 139 S.Ct. at 2059 (Kavanaugh, J., concurring in judgment). As explained above, Congress knows how to specify what it wants. **Supra** at 25. In the end, "[i]t is Congress, not this Court, that balances those interests." **Rotkiske**, 140 S.Ct. at 361.

Here, Congress subjected agency actions like the Board's 21-cent-fee standard to an accrual-based limitations period of six years. 28 U.S.C. §2401(a). The majority rule voids that policy choice by starting the clock upon final agency action **before** an APA claim could even accrue.

Judge Jones explained the majority rule's practical ramifications. **See Dunn-McCampbell**, 112 F.3d at 1290 (Jones, J., dissenting). It is "a waste of time to require as a prerequisite to suit that [plaintiffs] manufacture 'agency action' by petitioning the [agency] to revoke its regulations and suffering—at some time in the possibly remote future—the inevitable rebuff." **Id.**; **see also** Wright & Miller, 33 Fed. Prac. & Proc. §8367 (2d ed.) (describing "extremely deferential" judicial review following denials of rulemaking petitions). Such waiting games are especially devastating for small

businesses like Corner Post, which has to pay hundreds of thousands of dollars year after year in unlawful debit-card fees. App. 70.

In sum, Corner Post "seeks declaratory relief from the regulation's onerous effect," and "it definitely alleges injury occasioned by agency action." **Dunn-McCampbell**, 112 F.3d at 1290 (Jones, J., dissenting). The Court should grant the petition, reverse the judgment below, and "allow this suit to go forward." **Id.**

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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