No. 22-1008

IN THE

Supreme Court of the United States

CORNER POST, INC.,

Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

Amicus takes interest in this case because the legal and practical implications of the Eighth Circuit's decision, and those circuits adopting the same analysis, are significant and detrimental for small businesses.

INTRODUCTION AND SUMMARY OF ARGUMENT

"To no one will we sell, to no one deny or delay right or justice." – Magna Carta (1215)

Regrettably, numerous federal appellate courts have fashioned a rule of law, the "majority rule," which makes denying justice on procedural grounds a routine practice. Entrepreneurs and new businesses

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Under Supreme Court Rule 37.2(a), *amicus curiae* notified counsel for both parties of its intent to file this brief at least 10 days prior to the due date for the brief.

are denied the ability to challenge agency regulations more than six years old, even if the rule first started affecting them today. Justice continuously and perpetually eludes them.

The majority rule holds that the six-year statute of limitations for challenging agency rules under the Administrative Procedure Act (APA) begins to run against all people and entities everywhere at the exact same moment—the instant the rule is promulgated. By doing so, the majority rule ignores Article III standing and this Court's precedent on when a "complete and present cause of action" exists to begin a statute of limitations. It also conflates the two distinct requirements to bring an APA challenge: 1) "suffering legal wrong" or being "adversely affected or aggrieved by agency action"; and 2) that the agency action be final. *See* 5 U.S.C § 702; 5 U.S.C. § 704.

In at least 24 states and the District of Columbia (those comprising the jurisdiction of the Fourth, Fifth, Eighth, Ninth, and D.C. Circuits) the majority rule operates to deny justice to new small businesses by preventing them from challenging agency rules six years or older, regardless of when the new business was first subject to a regulation's reach. Put differently, the majority rule immunizes government agency rules from constitutional or statutory challenges in certain contexts. The Sixth Circuit has correctly rebuffed the majority rule.

The legal and practical consequences of the majority rule are immense. Legally, the majority rule works to prevent new businesses from vindicating their rights in court. Practically, it disincentivizes entrepreneurship and permits significant financial burdens on small businesses.

Here, the Federal Reserve Board's (Board) Debit Card Interchange Fees and Routing Rule, 76 Fed. Reg. 43395 (July 20, 2011) (hereinafter "debit card-fee rule") imposes significant fees on small businesses, like Corner Post, when customers use debit cards. When Corner Post tried to challenge the debit card-fee rule within six years of first having to pay the fees imposed by the rule, the lower courts prevented it from doing so based on the erroneous majority rule. Thus, only this Court can correct the majority rule and provide relief for Corner Post, entrepreneurs, and the business community.

Amicus urges this Court to grant the Petition.

ARGUMENT

I. The Majority Rule is Egregiously Wrong, Leaving Small Businesses in a No-Win Situation.

The majority rule insulates federal agencies from challenges to the validity of a regulation merely due to the passage of time. *See e.g., Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991) ("The government's interest in finality outweighs a late-comer's desire to protest the agency's action[.]"). *But see Dunn-McCampbell Royalty Int., Inc. v. NPS*, 112 F.3d 1283, 1290 (5th Cir. 1997) (Jones, J. dissenting) ("[A] regulation initially unauthorized by statute cannot become authorized by the mere passage of time.").

The Ninth Circuit, and others adopting the majority rule, punish independent businesses simply based on their date of first operation. Indeed, a "late-comer's desire" to challenge agency action may more appropriately be deemed a new-comer's vindication of legal rights.

The majority rule wrongfully runs the statute of limitations for APA claims from the date of final agency action. Doing so ignores the role of Article III standing for a statute of limitations to commence and conflates the two distinct requirements for an APA action, that a challenger prove: 1) the suffering of a legal wrong, or adverse effect or aggrievement; and 2) a final agency action.

These legal errors of the majority rule force new businesses into a Hobson's choice. They must either: 1) challenge an agency action as a prospective business owner and lose based on lack of Article III standing; 2) challenge an agency action as a new business and lose based on the APA statute of limitations; or 3) give up the right to hold government agencies accountable for unlawful regulations.

A. The Majority Rule is Illogical—a Non-Existent Entity Cannot Have Article III Standing, and Thus, Does Not Have a "Complete and Present Cause of Action."

To begin, a review of basic principles. Federal court jurisdiction extends only to "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. Standing is a guardrail to ensure courts stay within Article III's subject-matter boundaries. *See e.g. TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). To have standing, a plaintiff must demonstrate: 1) an injury in fact that is both (a) "concrete and particularized", and (b) "'actual or imminent, not 'conjectural' or 'hypothetical''" *Lujan*, 504 U.S. at 560 (quoted source omitted); 2) the injury was caused by the Defendant's conduct; and 3) is redressable by a favorable decision. *Id.* at 560-61 (citations omitted).

Where a statute of limitations comes into play, "the limitations period commences when the plaintiff has a 'complete and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Tr. Fund. v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)). The phrase "complete and present cause of action" refers to having a *valid* lawsuit, not merely the *filing* of any lawsuit. *See Bay Area Laundry*, 522 U.S. at 201 ("[A] cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit *and obtain relief*." (emphasis added; quoted source omitted)).

In *Bay Area Laundry*, this Court *unanimously* rejected a similar proposition to the majority rule at issue here:

> The Court of Appeals held that the statute of limitations on a pension plan's action to recover unpaid withdrawal liability runs from the date the employer withdraws from the plan. *On that view, the limitations period commences at a time when the plan could not yet file suit. Such a result is inconsistent with basic limitations principles, and we reject it.* A plan cannot maintain an action until the employer misses a scheduled withdrawal liability payment. The statute of limitations does not begin to run until that time.

Bay Area Laundry, 552 U.S. at 200-01 (emphasis added).

Putting these legal principles together, a plaintiff must demonstrate an injury to have standing. Article III requires standing to obtain federal judicial relief. An ability to obtain relief is necessary for, by this

Court's own words, a "complete and present cause of action." A "complete and present cause of action" must exist for a statute of limitations to commence. Thus, where there is no injury and standing, there is no "complete and present cause of action" for a statute of limitations to commence.

Logic, precedent, and these common-sense standing principles should have decided this case. But instead, the Eighth Circuit held that the statute of limitations began to run in 2011 when the debit card-fee rule was published, as opposed to when Petitioner first suffered harm from the rule. In doing so, the Eighth Circuit joined other federal appellate courts in holding that the statute of limitations begins to run for APA challenges upon promulgation of agency rules. Pet. 11-16.

The majority rule violates the basic legal principles mentioned above and this case perfectly demonstrates how. Petitioner did not open its doors until 2018, seven years after publication of the debit card-fee rule. According to the majority rule, Petitioner would have had to challenge the debit card-fee rule prior to its existence as a business—and before its subjugation to the rule—in order to comply with the statute of limitations. But it could not do so for obvious reasons—standing. Petitioner suffered no personal "concrete and particularized" and "actual or imminent" injury prior to 2018 as a nonexistent business.

Consider the following two hypotheticals to demonstrate Petitioner's lack of concrete harm under the majority rule:

In the first, an existing small business is subject to the Board's debit card-fee rule in 2014. The company sued, alleging that the Board exceeded its statutory authority. In the second, an individual thinking about,

or planning to, one day start a business sued the Board in 2014 challenging the debit card-fee rule.[2]

In the latter hypothetical, the individual suffered no personal harm from the regulation. *See TransUnion, LLC*, 141 S. Ct. at 2205 (using a similar set of hypotheticals to demonstrate why one person lacked concrete harm for standing compared to another). For an APA challenge, the majority rule *requires* Petitioner to be the second hypothetical for statute of limitations compliance, even though *TransUnion* makes clear the second hypothetical plaintiff lacks standing.

Petitioner also would have failed the "particularized" standing inquiry to challenge the debit card-fee rule in the timeframe the majority rule requires, as there would have been no personal harm prior to business existence. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339-40 (2016) (discussing that "particularized" requires a personal and distinct injury to the plaintiff).

Nor could Petitioner satisfy the "actual or imminent" injury requirement for Article III standing prior to opening its business in 2018. Intentions or future plans to engage in an activity, such as one day opening a business that would be forced to pay debit card fees, are not an actual injury. *Lujan*, 504 U.S. at 564 (holding no "actual or imminent" injury where plaintiffs had "'some day' intentions—without any description of concrete plans" to engage in conduct). Nor would an "'[a]llegation[] of *possible* future injury'" based on opening a business be enough to satisfy the imminency requirement. *See Clapper v. Amnesty Int'l*, 568 U.S. 398, 409 (2013) (quoted source omitted; emphasis in

[2] For these hypotheticals, the year 2014 is only relevant to the extent that both are clearly within six years of the debit card-fee rule's promulgation.

original) (no certainly impending injury based on speculative fear of future harm).

Petitioner was not in existence until 2018 and did not suffer an injury sufficient for standing by the debit card-fee rule until then. Without an injury sufficient for standing, Petitioner could not have filed suit and obtained relief. With no ability to obtain relief within six years of 2011, there was no "complete and present cause of action." *Bay Area Laundry*, 522 U.S. at 201. Because there was no "complete and present cause of action" until 2018, the statute of limitations could not commence until then.

Bottom line, the Eighth Circuit's decision below and majority rule that the six-year limitations period begins to run for APA claims upon publication of a regulation requires many small businesses to do something they cannot—sue for relief without Article III standing. This Court should grant the Petition to correct the majority rule and provide clarity for new businesses seeking to enforce their legal rights.

B. The Majority of Circuits Considering the Question Presented Erroneously Conflate Injury and Final Agency Action.

An additional infirmity of the majority rule and Eighth Circuit's holding is that they have jumbled the analysis for an APA challenge. The analysis should be straightforward.

First, a person must have suffered an injury[3] from the agency's action. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely

[3] For conciseness, *amicus* uses the phrase "injury" in this section as a shorthand for "suffering legal wrong" or "adversely affected or aggrieved" as set forth in 5 U.S.C. § 702.

affected or aggrieved by agency action . . . is entitled to judicial review thereof."). Second, when challenging under the general review provisions of the APA, the challenged action must be a "final agency action." 5 U.S.C. § 704; *Sackett v. EPA*, 566 U.S. 120, 125-26 (2012) (discussing that the APA's judicial review provision requires "final agency action").

The majority rule, joined by the Eighth Circuit, conflates these two distinct showings. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 872, 882-83 (1990) (distinguishing between the "two separate requirements" for APA suits—agency action, including "final agency action," and suffering an injury). In essence, the federal appellate courts adopting the majority rule have confused the *"what"* in the analysis—the *injury* from the agency action—with the *"when"*—the *final* agency action. While these two separate showings may be satisfied at the same time, they need not be. Instead of recognizing, as the Sixth Circuit did in *Herr v. U.S. Forest Serv.*, 803 F.3d 809 (6th Cir. 2015), that an *injury may occur* upon final agency action, the majority rule assumes that an *injury always occurs* upon a final agency action. And that is where the majority rule errs. *See* Pet. 11-16 (discussing the circuit split).

Only the Sixth Circuit has provided the correct analysis that final agency action is a "necessary, but not by itself a sufficient, ground for stating a claim under the APA." *Herr*, 803 F.3d at 819; *see also Lujan*, 497 U.S. at 883 ("Second, the party seeking review under § 702 must show that he has 'suffer[ed] legal wrong' because of the challenged agency action, or is 'adversely affected or aggrieved' by that action[.]"). As *Herr* noted, a "right of action [may] happen[] to accrue at the same time that final agency action occur[s]" but "that is not the case when . . . the party does not

suffer any injury until *after* the agency's final action." *Id.* at 819-20 (emphasis in original).

Here, the majority rule cannot work. Petitioner suffered no injury when the Board published the debit card-fee rule in 2011, because Petitioner did not exist at that time and was not regulated by the rule at its promulgation. *See id.* A rule cannot injure a person or entity that is not under the rule's dominion at promulgation. For example, courts would not permit a suit to proceed from a person claiming injury under § 702 against the debit card-fee rule if that person does not pay the debit card fee. Nor could a restaurant claim injury under § 702 to challenge a Nuclear Regulatory Commission rule on nuclear waste disposal.

By conflating the injury and final agency action requirements for an APA claim, the majority rule holds that a final agency action injures all people, everywhere, at the exact same moment. Put in other contexts, the majority rule is akin to saying all baseball players are injured upon the first pitch, instead of when hit by a pitch; the 24-second shot clock in basketball runs against both teams, instead of just the team with possession; or the statute of limitations for a tort claim runs not from the commission of a tort, but instead, from the moment the legislature passes the law giving rise to the tort.

This Court's review is necessary to correct the jumbled analysis of the majority rule and reinforce *Lujan*'s, 497 U.S. at 882-83, distinction between the two separate requirements for APA claims.

II. The Majority Rule Disincentivizes Entrepreneurship and Imposes Significant Financial Burdens on Small Businesses.

To reiterate, the majority rule adopted by the Eighth Circuit below holds that the six-year statute of limitations for general APA claims runs for the entire world from the moment of final agency action. Not only is this rule legally questionable, but it comes with colossal real-world consequences.

Today's "'administrative state with its reams of regulations would leave [the Framers] rubbing their eyes.'" *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quoted source omitted). The federal bureaucracy continues to grow, adding dozens of new agencies in recent years, *id.*, with a Code of Federal Regulations spanning nearly 185,000 pages. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2447 (2019) (Gorsuch, J., concurring) (citations omitted).

The majority rule prevents businesses from challenging the validity of a crushing regulation if more than six years passed between the final rule and the opening of the business. Because of the majority rule, a prospective small business owner must spend days, weeks, or months scouring the Code of Federal Regulations for all regulations that may apply to their new business. Failing to do so could expose them to unforeseen financial costs, like debit card fees. The prospective business owner could hire consultants and lawyers, but these professionals cost money, and a prospective small business owner sits on limited resources. Even for already-existing small businesses, the "Cost of Outside Business Services," such as lawyers and consultants, ranks as a major concern and a significant obstacle to their success. *See* NFIB Rsch.

Ctr., *Small Business Problems & Priorities*, at 10 (2020). https://bit.ly/44np6Oz.

This preliminary burden to opening a business will disincentivize entrepreneurship. Many successful large businesses start small, with the birth of a novel idea. Imagine if Walt and Roy Disney had to comb through over 150,000 pages to determine if a federal government regulation prohibited or burdened the making of animations from a small office. *See Disney History*, https://bit.ly/3LThZ9K (last visited May 15, 2023). Would we have the multinational company employing hundreds of thousands of employees that we know today? Or what if today's biggest tech companies that were reportedly started in a home garage—Microsoft, Apple, and Amazon—faced this preliminary burden that the majority rule imposes on today's tech startups? It is impossible to know which idea currently floating around in one's mind could be the next Disney, Microsoft, Apple, or Amazon, but won't be because of little-known regulatory hurdles. The everyday person who starts a business doesn't inspect the entire Code of Federal Regulations before doing so. Nor should they have to. In this way, the majority rule stifles entrepreneurship.

In addition, the majority rule's prohibition on challenges to the validity of a regulation beyond six years from the date of final agency action forces new businesses to acquiesce to burdensome fees and regulations.

The Federal Reserve permits banks and card networks to unreasonably profit from interchange fees on the backs of small businesses and consumers. While the debit card-fee rule *limits the total fee* issuers can impose, the rule *does not limit the profit* issuers can make when the average per-transaction cost falls below the total fee limit. The rule only requires that

the amount of an interchange fee for debit transactions "be reasonable and proportional to the cost incurred by the issuer with respect to the electronic debit transaction." 76 Fed. Reg. 43394, 43467 (codified at 12 C.F.R. 235.3(a)). But then the rule defines "reasonable and proportional" as "21 cents and[] 5 basis points multiplied by the value of the transaction" regardless of the actual fee cost. *Id.* (codified at 12 C.F.R. 235.3(b)). Thus, whether the average per-transaction cost is 2 cents or 20 cents, banks can charge small businesses the same amount in interchange fees, even though the rule itself says the fee must be "proportional to the cost incurred[.]" *Id.* (codified at 12 C.F.R. 235.3(a)). It strains credulity to say that a fixed fee cap, which never adjusts based on the actual average per-transaction cost, is proportional to that actual cost incurred.

Card processing fees, such as the those imposed by the debit card-fee rule, are a major financial concern for small businesses. For some merchants, interchange fees are the largest operating cost behind payroll. Pet. App. 59. According to the National Retail Federation, which tracks swipe fees, these costs eclipsed $160 billion in 2022. *Swipe Fees*, National Retail Federation, https://bit.ly/3HCwsnE (last visited May 15, 2023). In 2022, the average household paid over $1,000 dollars in swipe fees. Press Release, Merchants Payments Coalition, Merchants Call for Action as Swipe Fees Rise Again (Mar. 21, 2023), https://bit.ly/3Vwhx4s. Worse still, the problem keeps growing—the total amount of swipe fees for debit cards rose by 6% last year. *Id.*

Consider Sol Dias, a Dallas-area ice cream shop. In 2022, Sol Dias paid $25,000 in swipe fees, and expects to pay $30,000 in 2023. Kristina Partsinevelos, et al., *How small businesses are fighting inflated credit card*

swipe fees, CNBC (Feb. 9, 2023 11:14am), https://cnb.cx/42ih9IM. One thousand miles away in Elkhart, Indiana, Stephenson's, a specialty garment store, faces similar burdens from swipe fees. Stephenson's paid 40% more in swipe fees in 2022 than it did in 2020. Luke Goldstein, *Small Businesses Rise to Fight Wall Street*, The Am. Prospect (Feb. 7, 2023), https://bit.ly/3NBGfOF. Swipe fees are the second-largest cost for Stephenson's, beating out business utilities and narrowly trailing labor costs. *Id.* Small businesses providing life necessities like food or gas will pay even greater amounts. Hub Convenience Stores, a small business consisting of six gas stations, paid almost *$400,000* in swipe fees in 2019, representing *over 2% of its total sales*. AnnaMaria Andriotis, *Another Challenge for Small Businesses: Higher Card Fees Could Be on the Way*, Wall St. J. (Apr. 9, 2020 5:30am), https://on.wsj.com/3p3Eu2C.

The debit card-fee rule's burden on entrepreneurship and significant financial costs for businesses further warrant this Court's review.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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