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 JOHN KENDRICK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

John Kendrick is the author of the only scholarly article on Section 2401(a): (*Un)limiting Administrative Review:* Wind River*, Section 2401(a), and the Right to Challenge Federal Agencies*, 103 Va. L. Rev. 157 (2017).

[1] All parties have received timely notice of *amicus*'s intent to file this brief. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* or his counsel made a monetary contribution intended to fund its preparation or submission.

INTRODUCTION

The question presented here is straightforward: When does a plaintiff's "right of action" "first accrue[ ]" under 28 U.S.C. § 2401(a)? The answer is equally simple: A right of action accrues as soon as (but not before) the potential plaintiff has suffered a legally cognizable injury and is entitled to seek relief in court to redress that injury.

That is how every federal court has always interpreted Section 2401(a) in all contexts but one. Starting in the early nineties, several courts of appeals have judicially rewritten this statute of limitations to function like a statute of repose for certain APA challenges. For "facial challenges," these courts hold that the clock always starts on the date of final agency action because "liability is fixed, and plaintiffs have a complete and present cause of action[,] upon publication of the final agency action," even if the individual plaintiff was not in fact injured or did not even exist at that time. App. 12.

This interpretation is wrong: finality is only one of the "two separate requirements" necessary to bring an APA suit—the other being injury. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882–83 (1990). Treating Section 2401(a) as a statute of repose "contradicts the text of the statute and Supreme Court precedent to boot." *Herr v. U.S. Forest Service,* 803 F.3d 809, 819

(6th Cir. 2015) (Sutton, J.); *see also Dunn-McCampbell Royalty Int., Inc. v. NPS*, 112 F.3d 1283, 1290 (5th Cir. 1997) (Jones, J., dissenting).[2]

Petitioner ably explains the well-developed circuit conflict and why this division calls out for this Court's review. *Amicus* agrees and offers this brief to further explain why the majority rule adopted by the Eighth Circuit conflicts with the text of the statute and this Court's precedents.

SUMMARY OF ARGUMENT

In addition to deepening a circuit split, the decision below disregards this Court's decisions in at least two respects.

1. The Eighth Circuit's decision conflicts with this Court's consistent interpretation of the word "accrue" in Section 2401(a) and many other statutes of limitations. From the time Section 2401(a)'s predecessor was enacted in 1887 until today, the word "accrue" has always meant "to come into existence as a claim or right; to arise." *Accrue*, Black's Law Dictionary (11th ed. 2019). A "claim or right to bring a civil action against the United States" under Section 2401(a) thus "accrues" at the point when it is legally actionable—when it "matures"—and not before, as this Court explicitly held in *Crown Coat Front Co. v. United States*, 386 U.S. 503, 514 (1967).

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[2] The Third Circuit, in an opinion by then-Judge Alito, has likewise concluded that timeliness can be measured by considering when an APA claim ripened. *See Pa. Dep't of Pub. Welfare v. U.S. Dep't of Health & Human Servs.*, 101 F.3d 939, 941–42 (3d Cir. 1996) (Alito, J.).

2. The Eighth Circuit's decision also conflicts with this Court's precedents holding that the "Administrative Procedure Act creates a basic presumption of judicial review [for] one suffering legal wrong because of agency action." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (internal quotations omitted). The majority rule turns this presumption on its head, making many regulations completely immune from challenge without any textual justification.

ARGUMENT

I. The Eighth Circuit's Decision Conflicts with Decades of this Court's Precedents on the Meaning of "Accrual."

A. The Distinction Between Statutes of Repose and Statutes of Limitations.

There are two kinds of statutory time limitations that exist in federal law: statutes of limitations and statutes of repose. While both put time limits on litigation, they work in different ways and serve different purposes.

1. ***Statutes of Limitations***. A "statute of limitations" is a "statute establishing 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); *accord Statute of Limitations*, Black's Law Dictionary (1st ed. 1891). "Accrue" in turn means "to come into existence as an enforceable claim or right; to arise." *Accrue*, Black's Law Dictionary (11th ed. 2019); *accord Accrue*, Black's Law Dictionary (1st

ed. 1891). Rights "accrue" when they "come to someone or something as a gain, addition or increment" or "come into existence as a claim that is legally enforceable." *Accrue*, American Heritage Dictionary (5th ed. 2022). When a "right of action" accrues, it "becomes a piece of intangible personal property" belonging to the potential plaintiff. *Herr*, 803 F.3d at 821 (internal quotations omitted). Thus, by definition, accrual cannot occur earlier than when the plaintiff "can file suit and obtain relief." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014).

Significantly, this same understanding of accrual was well established when the original version of Section 2401(a) was enacted in 1887. *See* Kendrick, *supra,* at 180. As the leading treatise of the day explained, "the uniform result of the cases decided on the statute of limitations" was "that it does not deprive a party of his remedy, unless he has been guilty of the laches or default contemplated therein." H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* 11 (1883). "It cannot be said that a cause of action exists unless there be also a person in existence capable of suing." *Id.* at 11 n.4 (quoting *Murray v. East India Co.* (1865) 106 Eng. Rep. 1167; 5 B. & Ald. 204).[3] Similarly, commentator John Kelly's

[3] Wood's analysis was supported by a discussion of cases in numerous different areas of law. Discussing contracts, Wood explained, "the statute of limitations only begins to run from the time when the right of action accrues[,] [and] at the time when a right of action accrues there must be in existence a party to sue and be sued." Wood, *supra*, at 254. And in torts, Wood noted that "the statute usually commences to run from the date of the tort," but clarified that there has not been a tort until the plaintiff can

1903 *Treatise on the Code Limitations of Actions Under All State Codes* devoted an entire chapter to "When the Cause of Action Accrues," explaining that a "cause of action accrues at the time the party is entitled to sue, demand relief, or make the entry." *Id.* at 91. Consequently, "it is logical that the cause accrue when the party has been 'hurt' and not when the other party has violated the contract or the law, unless both concur, because there are cases where the breach or the wrong did not cause the 'hurt.'" *Id.*

2. ***Statutes of Repose***. While statutes of limitations have existed since the thirteenth century, statutes of repose only began to emerge in the 1970s—nearly a century after the original version of Section 2401(a) was enacted. *See* Kendrick, *supra*, at 160–61, 192 & n.220. Unlike statutes of limitations, the time limit imposed by a statute of repose "is measured not from the date on which the claim *accrues* but instead from the date of the last culpable act or omission of the defendant." *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014) (emphasis added).

Statutes of repose are commonly used to limit the window for seeking pre-enforcement review of agency action. These come in two varieties. Some purport to forever foreclose challenge after the window for pre-enforcement review closes, *e.g.*, 42 U.S.C. § 7607(b) (Clean Air Act); 33 U.S.C. § 1369(b)(1) (Clean Water

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legally sue. *Id.* at 362–64. "Every breach of duty does not create an individual right of action." *Id.* "Thus a breach of public duty may not inflict any direct immediate wrong on an individual; but neither his right to a remedy, nor his liability to be precluded by time from its prosecution, will commence till he has suffered some actual inconvenience." *Id.*

Act), while others, such as the Hobbs Act, "are silent on the question whether a party may argue against the agency's legal interpretation in subsequent enforcement proceedings," *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2059–60 (2019) (Kavanaugh, J., concurring in the judgment).

B. This Court Has Correctly Read Section 2401(a) as a Statute of Limitations, Not a Statute of Repose.

Section 2401(a) expressly ties its time limitation to the point at which the plaintiff's "right of action first accrues." This Court has interpreted this according to its plain meaning: a "claim or right to bring a civil action against the United States" under Section 2401(a) accrues at the point when it becomes legally actionable, when it "matures." *Crown Coat Front Co.*, 386 U.S. at 514; *see also Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 418 (2005) ("We have repeatedly recognized that Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'") (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)); *TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring in judgment) ("Absent other indication, a statute of limitations begins to run at the time the plaintiff has the right to apply to the court for relief." (cleaned up)).

Nothing in this Court's precedents or the text of Section 2401(a) justifies a different outcome in the

context of "facial" APA challenges. And, perhaps unsurprisingly, the Eighth's Circuit's decision did not make any arguments on this score beyond observing that the Sixth Circuit's textual analysis in *Herr* "did not distinguish between as-applied and facial challenges." App. 10. Of course, Section 2401(a) does "not distinguish between as-applied and facial challenges," either.

Nor can any historical justification be found. As noted above, "accrue" has had the same meaning since at least 1887. And while there was no late nineteenth century "cause of action like that currently contained in the APA, there were various claims that could be raised against local government officials for violation of their public duties." Kendrick, *supra*, at 185.

The Connecticut Supreme Court's decision in *Bank of Hartford County v. Waterman* is emblematic. That case arose after a bank had sued a debtor and asked the sheriff to attach his property at the outset to ensure that it would still be there when the bank obtained a final judgment. 26 Conn. 324, 324–325 (1857). Several years later the bank won, but to its surprise the sheriff had attached the wrong property, and there was nothing left to satisfy the bank's judgment. *Id.* at 325–326. The bank then sued the sheriff, who raised a statute of limitations as a defense, arguing that the bank's claim against him accrued when he made the error over two years earlier. *Id.*

The court rejected this. While "[t]he duty violated is primarily a duty to the public [and] the violation is therefore unlawful," it is capable of redress by an individual only "when its consequences are the invasion of an individual right, (and then only,) it becomes a

proper subject of redress by him." *Id.* at 336. When "the party is enabled for the first time to ascertain or appreciate the fact of the injury" then only does a "legal wrong exist[ ]." *Id.* at 331. It is at that point "when the statute of limitations shall commence to run. Authorities can hardly strengthen a proposition so manifestly just. If we are wrong, some strictly legal injuries might never for a moment be capable of redress." *Id.* at 331–332.

This is just as true today. And the analogy to "officer suits" and APA actions is plain. Under the APA, a plaintiff may challenge final agency action only when the plaintiff has "suffer[ed] [a] legal wrong because of [that] agency action, or [is] adversely affected or aggrieved by [the] agency action within the meaning of a relevant statute." 5. U.S.C. § 702.

II. The Policy Justifications in Support of the Eighth Circuit's Decision Also Conflict with Decades of this Court's Precedents.

This Court has explained that "[i]f the statutory language is plain, we must enforce it according to its terms." *King v. Burwell*, 576 U.S. 473, 486 (2015). As noted above, the text of Section 2401(a) is unambiguous, and this Court has uniformly adhered to this meaning; consequently, policy concerns should not matter at all. What makes the majority rule at issue here especially pernicious is that its central policy justification for departing from the text of Section 2401(a) is that judicial review would otherwise be too accessible—exactly the opposite of the APA's "basic presumption" that affirmative review *is* available.

While the Eighth Circuit's opinion below doesn't explicitly offer any policy rationale, it relies on a long line of cases which appear to spring from the policy-based holding of *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991). *See* App. 10–11; *see also* Kendrick, *supra*, at 170–79. There, the Ninth Circuit concluded that starting the clock at final agency action for APA challenges alleging "policy-based" errors, for example, "would make the most sense" because "grounds for such challenges will usually be apparent to any interested citizen within a six-year period following promulgation of the decision." *Wind River*, 946 F.2d at 715. The court gave no textual defense of this position, but instead mused that this would "strike[ ] the correct balance between the government's interest in finality and a challenger's interest in contesting an agency's alleged overreaching." *Id.* The Court didn't try to hide the ball: "The government's interest in finality outweighs a late-comer's desire to protest the agency's action as a matter of policy." *Id.* In other words, according to *Wind River*, adhering to the text of Section 2401(a) would allow for more judicial review than the court thought wise or presumed Congress had intended.

This gets things exactly backwards. Even if policy concerns could justify ignoring the text, this Court has long held that there is a "'strong presumption'" *favoring* judicial review of administrative action. *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)); *see also Weyerhaeuser Co.,* 139 S. Ct. at 370 ("The Administrative Procedure Act creates a basic presumption of judicial review [for] one

'suffering legal wrong because of agency action.'"); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) ("[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.").

Cutting off pre-enforcement review in this context turns this presumption on its head, making many regulations more difficult to challenge than the statutes that authorized those regulations in the first place. This isn't even "deference," it's judicial "abdication." *PDR Network*, 139 S. Ct. at 2066 (Kavanaugh, J, concurring).

This case is a remarkable example of just that kind of passivity. The regulation at issue indisputably harms Petitioner, but—because Petitioner is not directly regulated by the challenged rule—it does not even have the opportunity to raise invalidity as a defense in an enforcement action. When Congress has wanted to impose such a severe rule, it has said so explicitly. It did not do so here, and the decision below thus conflicts with the APA's strong presumption of affirmative judicial review.

CONCLUSION

The judgment of the court of appeals should be reversed.

May 17, 2023 Respectfully submitted,

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