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

REPLY BRIEF FOR PETITIONER

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The Board's brief in opposition confirms why this Court should grant certiorari. The Board concedes that a circuit split exists, and its attempt to explain away the split based on the "facial-or-as-applied" distinction doesn't answer the threshold question of when an APA claim first accrues. Beyond that, the Board's effort to defend the majority rule on the merits rests on a view of 28 U.S.C. §2401(a) and 5 U.S.C. §702 that flatly contradicts this Court's precedent. And the Board's effort to manufacture vehicle problems does not withstand scrutiny. This Court should grant plenary review and end the erroneous rule that APA claims accrue upon final agency action regardless of when a plaintiff suffers an injury. *See* 5 U.S.C. §702; 28 U.S.C. §2401(a).

I. The Board concedes a square circuit split.

A. In the decision below, the Eighth Circuit deepened to 6-1 a square circuit split on when an APA claim accrues. *See* Pet.11-20. Although the Board reflexively says it's "incorrect" that a "'square, entrenched circuit split'" exists, BIO.17, the Board's admissions betray that empty statement. The Board admits that "the Sixth Circuit" in *Herr*—unlike other circuits—"found that ***a different accrual rule*** applied when the plaintiff 'does not suffer any injury until *after* the agency's final action.'" BIO.7 (emphasis added) (quoting *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 820 (6th Cir. 2015)); *see* Pet.11-16. The Board further concedes that the Eighth Circuit followed "the decisions of ***other courts of appeals***" and held that "'the limitations period begins to run upon publication of the

regulation.'" BIO.6 (emphasis added) (citing App.11 and other cases); *see also* BIO.17-18.

Confirming the point, the Board's brief in opposition emphasizes the irreconcilable conflict between the Sixth Circuit and other circuits. The Board praises the Ninth Circuit's rule under which the limitations period "'may run against a plaintiff even if it is not injured more than six years after the relevant agency action became final,'" BIO.17 (quoting *Cal. Sea Urchin Comm'n v. Bean*, 828 F.3d 1046, 1050 (9th Cir. 2016)), and highlights the Fifth and Federal Circuits' virtually identical articulation of the accrual rule, *see* BIO.17-18 (discussing *Dunn-McCampbell Royalty Int., Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997), and *Odyssey Logistics & Techs. Corp. v. Iancu*, 959 F.3d 1104, 1111-12 & n.5 (Fed. Cir. 2020)). *See also* BIO.17 (acknowledging similar holdings in *Hire Order Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012), and *Harris v. FAA*, 353 F.3d 1006, 1012-13 (D.C. Cir. 2004)).

In direct contrast, the Sixth Circuit has held that "plead[ing] final agency action" is "another necessary, but not by itself a sufficient, ground for stating a claim under the APA." *Herr*, 803 F.3d at 819. In the Sixth Circuit, the clock runs only if "the challenged agency action becomes final and invades a party's legally protected interest." *Id.* at 818-19. Even the Board admits that this is "a different accrual rule." BIO.7.

This square split—now acknowledged by the Board—is ripe for this Court's review.

B. Despite its concession, the Board tries to explain away this circuit split. *See* BIO.18-20. It asserts that the majority rule distinguishes between "facial challenges" and as-applied challenges. BIO.20. In the Board's view, facial challenges accrue upon final agency action, "without regard to the circumstances of an individual plaintiff," BIO.9, but as-applied challenges can be brought even after the six-year period has run if the agency seeks to apply the challenged rule*, see* BIO.20. The Board's attempt to explain away the acknowledge circuit fails careful scrutiny. *See* Pet.16-19.

First, the facial-or-as-applied distinction doesn't answer the threshold question of when an APA claim *first* accrues. *See* Pet.18-19. The main thrust of this distinction is that: (1) a plaintiff may seek facial relief until the six-year limitations period lapses; but (2) after the six-year limitations period runs, the plaintiff can only "assail [the] regulation as exceeding the agency's statutory authority in enforcement proceedings." *Herr*, 803 F.3d at 821; *see also* Pet.17.

Corner Post acknowledges that the as-applied exception exists, *see* Pet.17, but it is logically subsequent to the question presented here: *when does the six-year period (for facial relief) begin to run in the first place*? *See* Pet.18-19. An as-applied challenge becomes relevant only *after* the six-year period has run—it cannot answer when that six-year period first begins to run. *See* Pet.17-18; *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'" (emphasis added)).

Second, the Board concedes (BIO.7, 20)—as the Eighth Circuit observed below—that the Sixth Circuit "did not distinguish between as-applied and facial challenges." App.10; *see* Pet.16-17. This just highlights the circuits' disagreement on how to determine when an APA claim accrues. The Sixth Circuit's accrual analysis—consistent with §2401(a)'s and §702's language—focuses on when the plaintiff becomes injured by the agency action. *See Herr*, 803 F.3d at 818-19. Other circuits focus on whether a suit was filed within six years of final agency action—regardless of *when* that final action first injured the plaintiff. *See* App. 10-11 (discussing cases holding 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."). Thus, the facial-or-as-applied distinction only highlights the circuit split. It does not resolve it.

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In sum, the Board's response confirms an irreconcilable split between the Sixth Circuit and six other circuits.[1] This split warrants this Court's review.

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[1] The Board also asserts that "the Sixth Circuit in *Herr* had before it only an as-applied challenge." BIO.20. Not true. The *Herr* plaintiffs *did* ask for facial relief, just as Corner Post does here. *Compare* Am. Compl. pp. 18-19, *Herr v. U.S. Forest Serv.*, No. 2:14-cv-105-PLM (W.D. Mich. June 6, 2014), ECF 4 (seeking

II. The Board's merits arguments contradict this Court's precedent.

This Court's review is separately warranted under Rule 10(c) because the majority rule conflicts with this Court's precedent. *See* Pet.20-21. The Board's attempt to defend the majority rule on the merits is not persuasive.

A. Rather than start with the operative text of 28 U.S.C. §2401(a), the Board begins with the text of the neighboring sentence's tolling provision. *See* BIO.9. That neighboring sentence states that "[t]he action of any person under legal disability … at the time the claim accrues may be commenced within three years after the disability ceases." §2401(a). Based on this three-year tolling provision, the Board argues that "a claim can 'accrue[]' even while a specific potential plaintiff is subject to a 'legal disability,'" which, according to the Board, also means that a claim could accrue even if the plaintiff does not satisfy "all legal prerequisites to suit." BIO.9.

But that argument confuses accrual with tolling. The tolling provision upon which the Board relies does not provide any accrual rule. It presupposes that the ordinary accrual would apply (here, the accrual rule

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to "Declare that the … 2007 [regulation] [is]: (a) 'arbitrary, capricious, … or otherwise not in accordance with law,' … (c) 'in excess of statutory … authority' under the APA," and to "set aside the … 2007 [regulation]"), *with* App.84-85 (seeking a declaratory judgment holding that the interchange fee is "contrary to law and exceeds the Board's statutory authority" and "arbitrary and capricious" and to "set[] it aside").

for APA claims, *see* 5 U.S.C. §702). The Board also offers no support for its extraordinary assertion that a claim can accrue even before "all legal prerequisites to suit" are met. BIO.9. That is not the law, and it flatly contradicts this Court's precedent. *See Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 201 (1997) ("limitations period commences when the plaintiff has a complete and present cause of action," which is when "the plaintiff can file suit and obtain relief" (cleaned up)); *see* Pet.20. There is a reason the Board has never highlighted the three-year tolling provision throughout this litigation. It has no bearing on accrual.

B. The Board then adds an even stranger argument based on 5 U.S.C. §702's language that "[n]othing herein … affects other limitations on judicial review." *See* BIO.10-11. The Board suggests (without any support) that this text actually prohibits "delay[ing] the running of the statute of limitations" from final agency action. BIO.11. Not so. That text focuses on "*other* limitations on judicial review." §702 (emphasis added). It does not negate §702's requirement that the plaintiff first "suffer[] legal wrong" or become "adversely affected or aggrieved" by agency action. §702.

The Board's strange interpretation—another one that it has never argued before in this litigation—puts §702 at war with itself and cannot be squared with this Court's decisions. This Court has "interpreted §702 as requiring a litigant to show, at the outset of the case, that he is injured in fact by the agency action." *Dir., Off. of Workers' Comp. Program v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 127

(1995). And as this Court has said, §702 imposes "two separate requirements" to judicial review, one of which is that "the party seeking review under §702 must show that he has 'suffer[ed] legal wrong' because of the challenged agency action." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882, 883 (1990); *see also* Pet.20-21. The Board's contrary view reads that requirement out of §702 and would effectively overrule *Newport News* and *Lujan*.

C. Next, the Board insists that because Congress created *other* filing deadlines that run from final agency action, it is not at all "'absurd'" to apply the same principle to §2401(a) for other run-of-the-mill APA challenges. BIO.12-13. But it *is* absurd because the text of those other deadlines differs from the text here. *See* Pet.24 & n.4. It's a basic rule that "[w]hen interpreting limitations provisions, as always, '[this Court] begin[s] by analyzing the statutory language.'" *Rotkiske v. Klemm*, 140 S.Ct. 355, 360 (2019); *Sackett v. EPA*, 143 S.Ct. 1322, 1344 (2023) ("Textualist arguments that ignore the operative text cannot be taken seriously."). Section 2401(a) starts the clock "after the right of action first accrues," not "after [an order's] entry," 28 U.S.C. §2344; "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 after the regulation is "published in the Federal Register," 16 U.S.C. §7804(d)(1). This obvious textual difference in other provisions matters—indeed, it's dispositive. And the Board doesn't address it. That failure is fatal. *See Rotkiske*, 140 S.Ct. at 361; *Sackett*, 143 S.Ct. at 1344.

The Board also argues that applying §2401(a) as written would allow anyone to "'create a new entity that would be subject to the Rule'" and "'contravene[] the purpose of the statute of limitations.'" BIO.16. But this is not the rule that Corner Post advances. *See Herr*, 803 F.3d at 822 ("When a party *first* becomes aggrieved by a regulation … more than six years after the regulation was promulgated, that party may challenge the regulation without waiting for enforcement proceedings."). And Corner Post is not some entity created for the sole purpose of suing the Board—it's a small business getting hit every day by the exorbitant fees set by the Board. Pet.7-8. Moreover, converting a statute of limitations into a statute of repose equally contravenes the balance of interests struck by Congress. *See* Pet.23-25, 30; *Rotkiske*, 140 S.Ct. at 361.

D. The Board also contends that the Sixth Circuit's approach would "force[] courts "to conduct retrospective analyses to determine when the plaintiff became 'aggrieved' by the challenged action within the meaning of Section 702." BIO.16. Again, a new argument to this litigation, and an unfounded one. Courts conduct retrospective analyses all the time, with ease, to determine when a claim first accrued. *See, e.g.*, *Cal. Pub. Emp'ees' Ret. Sys. v. ANZ Sec. Inc.*, 582 U.S. 497, 504-05 (2017). And as the Board conceded, §702's injury-based zone-of-interest test is already a part of

stating a claim under the APA, which courts analyze routinely. *See* BIO.10.[2]

E. The Board also argues that this Court should deny Corner Post's petition because there are other means of obtaining judicial review, such as petitioning the Board for rulemaking and seeking the review of the denial of the rulemaking petition, or waiting for enforcement proceedings. BIO.14-15. But as Judge Jones explained, the rulemaking petition option is "a waste of time" and a mirage. *Dunn-McCampbell*, 112 F.3d at 1290 (Jones, J., dissenting); *see also* Pet.30-31; Cato.Br.19 (some agencies might not even have petitioning procedures and could simply "delay such action indefinitely"). More to the point, the wait-for-enforcement-proceedings approach is not a serious argument here; even the Board admits that "there is no prospect that [Corner Post] will ever be subject to 'en-

[2] The Board's reliance on *Pennsylvania Department of Public Welfare v. U.S. Department of Health & Human Services*, 101 F.3d 939 (3d Cir. 1996), is misplaced. There, Pennsylvania argued that "the statute of limitations has not run" because Pennsylvania's claim was "not 'ripe.'" *Id.* 945. Ripeness is "largely a prudential doctrine" preventing judicial review "until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* This is different from assessing whether a party "suffer[ed] legal wrong" or became "adversely affected or aggrieved" by agency action. 5 U.S.C. §702.

forcement proceedings'" as it is not a directly regulated party. BIO.21.[3] Corner Post's only meaningful avenue for judicial review is this suit.

III. This petition presents an excellent vehicle for this Court's review.

The Board's vehicle arguments do not withstand scrutiny. Most important, there is a circuit split that both the Eighth Circuit and the Board acknowledge. Pet.11-19; BIO.6-7, 17-18; App.10. A majority of circuits has adopted a rule that contradicts the plain text of §2401 and the APA and this Court's precedent. Pet.20-21. And the statute-of-limitations issue is the sole question presented; no other legal issues or merits arguments will prevent this Court from reaching or deciding the APA-accrual-rule issue.

The Board's contrary arguments invoke *potential* merits issues that have not arisen yet—and might (or might not) arise at some point on remand—but have nothing to do with the sole statute-of-limitations issue presented here. *See* BIO.21-23.

For instance, the Board makes a drive-by contention that Corner Post's suit "raises serious questions about the equity of considering" it because of alleged "coordination with [certain] related parties"—such as non-petitioners NDRA, NDPMA, and the National Re-

[3] Corner Post is unquestionably a "person suffering legal wrong" and "adversely affected [and] aggrieved" by the interchange-fee standard, 5 U.S.C. §702, and thus has Article III and statutory standing to challenge the interchange-fee standard. The Board doesn't argue otherwise.

tail Federation—"for the evident purpose of circumventing the limitations bar" and "preclusive effect" of *NACS*. BIO.21-22.

This argument ignores that Corner Post has always sought to vindicate its rights. Corner Post has openly participated in this lawsuit from day one. In April 2021, when the suit was first filed, Corner Post participated in the lawsuit as a named member and affiant of NDPA and NDPMA. *See* Compl. ¶30 & Decl. of Brady Lund, 1:21-cv-95-CRH (D.N.D. Apr. 29, 2021), ECF 1& 1-2; *see, e.g.*, *Int'l Union v. Brock*, 477 U.S. 274, 290 (1986) ("[T]he primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others."). Later, in July 2021, Corner Post was added as a named plaintiff in the amended complaint. Corner Post had the right not only to amend under Federal Rule of Civil Procedure 15 but also to vindicate its "distinct legal rights" in the way it saw fit. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2087 (2020). And NRF was retained as Corner Post's co-counsel in this case.

This is ultimately neither here nor there. The Board expressly waived the preclusion argument below. *See* Board's Mot. to Dismiss at 25 n.11, No. 1:21-cv-95 (D.N.D. Aug. 6, 2021), ECF 21 ("The Board is not raising the preclusion argument in this motion brought under Federal Rule of Civil Procedure 12."). Nor did it raise any equity-based arguments for dismissal. Perhaps these issues will be litigated on the merits on remand. But they have nothing to do with the statute-of-limitations issue presented here.

The Board also raises premature questions about the scope of the administrative record that would be at issue in this case, *see* BIO.22-23, and what remedy would be available, *id.* at 23. *But see, e.g.*, App.79-80 ¶¶84-89 (raising a "contrary to law" argument that doesn't turn on the administrative record); *NACS v. Bd. of Governors of Fed. Rsrv. Sys.*, 746 F.3d 474, 493 (D.C. Cir. 2014) (showing the availability of remand without vacatur to avoid abrupt regulatory disruption). Again, these merits-related issues can be fully litigated in due course. But they are not obstacles to granting certiorari on the APA-accrual question that's the only one pending in this petition.

CONCLUSION

This Court should grant certiorari.

June 23, 2023

Respectfully submitted,

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