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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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Question Presented

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—or when the rule first causes a plaintiff to "suffer[] legal wrong" or be "adversely affected or aggrieved," 5 U.S.C. § 702?

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Interest of Amicus Curiae[1]

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for limited constitutional government, private property rights, and individual freedom. PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law.

This case concerns the statute of limitations for plaintiffs bringing claims pursuant to the Administrative Procedure Act (APA). PLF has an interest in representing parties in litigation to serve as a check on the administrative state. The APA provides a critical vehicle for pursuing that goal, allowing individuals and entities to challenge agency actions, protecting the constitutional rights and liberties of the people and implementing the Constitution's checks and balances and separation of powers.

Introduction and Summary of Argument

The APA "reinforce[s]" and "embodies" this Court's "basic presumption of judicial review." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 140 (1967). Its provision for judicial review of agency actions and waiver of sovereign immunity for suits against the federal government are among the most powerful instruments Americans have for challenging the

[1] No party's counsel authored any part of this brief. No person or entity, other than Amicus Curiae and its counsel, paid for the brief's preparation or submission. Sup. Ct. R. 37.6.

thousands of agency actions taken every year. Indeed, this Court has recognized that judicial review over agency action is the primary mechanism by which the separation of powers can be maintained. *See, e.g.*, *Kucana v. Holder*, 558 U.S. 233, 237 (2010) ("Separation-of-powers concerns . . . caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain."); *U.S. v. Nourse*, 34 U.S. 8, 28–29 (1835) ("It would excite some surprise if, in a government of laws and of principle . . . a department whose appropriate duty it is to decide questions of right . . . between the government and individuals," a statute might leave that individual "with no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust."). APA plaintiffs thus serve as a necessary check on agency actions that exceed or misapply the authority granted by Congress through statutes as well as a check on impermissible congressional delegations to the executive branch.

Such judicial review is now more important than ever. Since the Federal Register began itemizing them in 1976, agencies have issued more than 200,000 rules. *See* Clyde Wayne Crews, Jr., *Ten Thousand Commandments*, Competitive Enterprise Institute (2022 ed.). But, according to the decision below, the regulated public, even businesses that don't yet *exist*, may challenge any such rule only when it is issued, even when its consequences do not become apparent until years later.

This case presents a vital opportunity for the Court to reject further agency evasion of judicial scrutiny through the misapplication of 28 U.S.C. § 2401(a)'s statute of limitations. It is no secret, of course, that

agencies employ myriad legal arguments to avoid a hard look at their actions from any court. These include aggressive arguments concerning the jurisdictional doctrines of standing, ripeness, and mootness, as well as arguments exploiting statutory gaps in the APA, such as when agencies insist that their coercive conduct isn't really "agency action" to begin with, isn't sufficiently "final" to be subjected to review, or is wholly committed to agency discretion. Regardless of whether such arguments are appropriate in a given case, agencies' ongoing and aggressive reliance on them has limited substantial means of oversight.

This Court should not bless the Federal Reserve Board's attempt to enshrine yet another impediment to judicial scrutiny in the APA's text. Treating the federal statute of limitations as a statute of repose for regulations would result in arbitrarily privileging parties that existed at the time a regulation is issued—parties that, presumably, had an opportunity to engage in the rule's promulgation as stakeholders—over new entrants subject to the same regulation, such as Petitioner here. Absent any evidence that such an arbitrary application of the law was intended—indeed, as Petitioner's brief demonstrates, the text of the relevant statutory provisions are far more susceptible to the opposite construction—this Court should hold that the better reading of the law is the one that functions to achieve the APA's simply stated objective 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.

This brief first addresses several important background principles of judicial review generally and in APA cases, specifically. It then explains why the statutory context favors a reading that avoids arbitrary results.

Argument[2]

I. Judicial Review of Agency Action Is Necessary to Uphold the Separation of Powers

This Court has long acknowledged that administrative rules exist only as a helpful mechanism "to fill up the details" within broader Congressional enactments concerning "important subjects, which must be entirely regulated by the legislature itself[.]" *Wayman v. Southard*, 23 U.S. 1, 43 (1825). But with the dramatic rise of the modern administrative state, the importance of maintaining the line between permissible and impermissible authorizations to agencies becomes paramount. Executive branch agencies naturally seek to maximize their authority and are incentivized to construe narrowly any limitations on that authority. *See* Peter H. Aranson et. al., *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 47–51 (1982) (noting that "Jurisdictional expansion historically has been an important objective of most regulatory agencies" and concluding that "[a]gencies thus enjoy positive

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[2] PLF takes no position on the underlying merits dispute concerning the Federal Reserve Board's Debit Card Interchange Fees and Routing rule. 76 Fed. Reg. 43,394 (July 20, 2011). PLF otherwise concurs, however, with the arguments made by Petitioner with respect to the applicability and interpretation of 28 U.S.C. § 2401(a) and does not repeat those arguments in this amicus brief.

incentives to seek out new regulatory avenues for allocating private goods to those whom they serve and to develop new clients.").

Judicial review, particularly through the mechanisms established by the APA, provides a key limitation on agency action. The Congress that wrote the APA recognized this basic notion. *See* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 Duke L.J. 387, 428 (noting that heightened scrutiny of administrative action is "integrally related" to separation of powers concerns implicated by the delegation of legislative and judicial power to agencies); Cass R. Sunstein, *Factions, Self Interest and the APA: Four Lessons Since 1946*, 72 Va. L. Rev. 271, 287 (1986) (stating that judicial scrutiny under the APA can "'flush out' impermissible motivations . . . [and] guard against the dangers of self-interested representation and of factional tyranny in the regulatory process").

This Court has thus recognized that the more leeway that is given to administrative agencies to exercise legislative power the more vital judicial review becomes.

> As formulated and enforced by this Court, the nondelegation doctrine serves three important functions. First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our government most responsive to the popular will. Second,

> the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring) (cleaned up).

The modern application of the nondelegation doctrine therefore presupposes judicial review of agency decision-making. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring) (noting that "the APA was a 'working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.'" (quoting Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1249 (1982))). Indeed, the whole purpose of the "intelligible principle" test is that it requires some "standards for the guidance of the Administrator's action," which a court can review. *Mistretta v. United States*, 488 U.S. 361, 379 (1989) (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944)); *see also Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218 (1989) ("[S]o long as Congress provides an administrative agency with standards guiding its actions such that a court could

'ascertain whether the will of Congress has been obeyed,' no delegation of legislative authority trenching on the principle of separation of powers has occurred." (quoting *Yakus*, 321 U.S. at 426)). Of course, without any judicial review, the assumption falls apart. As this Court has recently emphasized, effective judicial review of agency action is sometimes the only means to stop "one branch of government arrogating to itself power belonging to another." *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023).

It is against this background that the Court has closely guarded the "basic presumption of judicial review for one suffering legal wrong because of agency action," which the APA established. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020) (cleaned up). Indeed, since the APA's enactment, this Court has emphasized the need for judicial control through the APA's "generous review provisions." *Abbott Lab'ys*, 387 U.S. at 140–41.

II. Agencies Consistently Seek to Preclude Judicial Review

As long as administrative agencies have issued binding rules, those agencies have also zealously attempted to avoid judicial review. *See Abbott Lab'ys*, 387 U.S. at 140–41 (detailing early interpretation of the APA). If such review is the key to judicial control over administrative encroachment into legislative decisions, then it is small wonder that agencies would labor mightily to avoid it.

This case presents an important test about how far agencies can stretch the law to limit accountability in court. The "generous review provisions" found in the

APA have been eroded over the decades by administrative evasions, while administrative action has increased substantially. This case provides an opportunity to reassert the presumption of reviewability of agency action that lower courts should apply to challenges brought pursuant to the APA.

In its opposition to certiorari, the Board dismissed Petitioner's point that the majority rule operates to improperly insulate many agency actions from judicial review. The Board instead asserted that "existing mechanisms provide ample opportunity for" such review. Br. in Opp'n at 14–15 (pointing to "timely" associational challenges, challenges to new final agency action applying a rule, petitions for rulemaking, and judicial review of agency enforcement). Petitioner demonstrates why these are inadequate substitutes for challenging agency action directly under the APA. Pet. Br. at 32–36. But the federal government's own positions in litigation highlight its ongoing and often successful efforts at evading judicial scrutiny.

A. Standing, Ripeness, and Mootness

When plaintiffs challenge the lawfulness of agency regulations the government relies aggressively on other jurisdictional doctrines to persuade courts—including this Court—that review is unavailable. As a threshold matter, to seek injunctive relief, a plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or

redress the injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Even threatened events that are "reasonably likely to occur" have been held "insufficiently imminent" to constitute injury-in-fact. *See Beck v. McDonald*, 848 F.3d 262, 275–76 (4th Cir. 2017) (holding that plaintiffs' allegation that 33% of individuals affected by Veteran Affairs' center's data breaches will become victims of identity theft fell "far short of establishing a substantial risk of harm" necessary for standing). *See also* Jack V. Hoover, *Standing and Student Loan Cancellation*, 108 Va. L. Rev. Online 129, 133 (2022) (noting that standing doctrine under Article III and the APA can "create a null set of litigants with standing to challenge" certain laws, removing judicial constraints on the Executive Branch for actions within the "standing dead zone.").[3]

Moreover, this Court has agreed with the government that cases challenging regulations must meet ripeness requirements that can preclude challenging regulations the day they are issued. *See, e.g.*, *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 810, 812 (2003) (holding that judicial review of regulation the Court deemed a "general statement of policy" "should await a concrete dispute about a particular concession contract"); *see also Toilet Goods*

[3] Of course, this Court does not always adopt agencies' standing arguments. *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355, 2365–68 (2023) (rejecting Secretary of Education's argument that state of Missouri lacked standing). But federal agencies nevertheless continue to assert tenuous standing defenses in the lower courts. *See, e.g.*, *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 757 (E.D. La. 2014) ("Defendants' attack on standing grounds seems utterly frivolous."), *rev'd on other grounds sub nom. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018).

Ass'n v. Gardner, 387 U.S. 158, 162–66 (1967) (holding case was not ripe because, while there could be no question that regulation was final agency action, the impact of the regulation could not "be said to be felt immediately by those subject to it in conducting their day-to-day affairs" and "no irremediabl[y] adverse consequences flow[ed] from requiring a later challenge.").

The government can also opt to strategically moot a case. Congress and the President may do so, of course, by repealing or amending a statute. *See, e.g.*, *U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto*, 477 U.S. 556, 559–60 (1986) (holding that "the equal protection and 'irrebuttable presumption' issues discussed by the District Court are now moot" following amendment to the challenged statute). But mootness is also within the control of agencies, which may simply repeal a challenged regulation—or the application of a regulation—to preclude review. For example, the Environmental Protection Agency (EPA) earlier attempted to moot a case ultimately decided by this Court just last year. In *Sackett v. EPA*, EPA withdrew its amended Clean Water Act compliance order, which had been issued 12 years prior, while the case was on appeal to the Ninth Circuit. 8 F.4th 1075, 1082–83 (9th Cir. 2021).[4] But it refused to concede that it lacked authority to issue the order to begin with—the question being litigated. *See id.* Such efforts exemplify the use of strategic mootness as a litigation tactic, often a successful one given "the general presumption of good faith that the

[4] PLF represented the plaintiffs in *Sackett* throughout the many years of litigation, including twice at the Supreme Court. *See Sackett v. EPA*, 566 U.S. 120 (2012), and 598 U.S. 651 (2023).

government traditionally enjoys in the context of mootness by voluntary cessation." *Id.* at 1085. The Ninth Circuit's rejection of EPA's mootness argument in *Sackett* nevertheless recognized how that strategy can be useful in achieving compliance by (exhausted) regulated parties while limiting the risk to the government of higher-level judicial review. *Id.* at 1086 ("Forcing the Sacketts to engage in years of litigation, under threat of tens of thousands of dollars in daily fines, only to assert at the eleventh hour that the dispute has actually been moot for a long time, is not a litigation strategy we wish to encourage."). Indeed, it is possible that the Board is attempting such an effort in this case, at least in part. *See* "Federal Reserve Board requests comment on a proposal to lower the maximum interchange fee that a large debit card issuer can receive for a debit card transaction" Press Release, Board of Governors of the Federal Reserve System (Oct. 25, 2023) (including link to Federal Register Notice of Proposed Rulemaking stating that "the Board proposes to update all three components of the interchange fee cap based on the latest data reported to the Board by large debit card issuers").[5]

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[5] *Available at* https://www.federalreserve.gov/newsevents/pressreleases/bcreg20231025a.htm#:~:text=The%20Federal%20Reserve%20Board%20on,every%20other%20year%20going%20forward. *See also* Pet. Br. at 10–11 (observing that while the Notice "proposes to lower the *amount* of the cap, it expressly declines to revisit the unlawful *types of allowable costs* upon which the Board bases the cap.").

B. APA-Specific Barriers to Judicial Review

1. Agency Action

The APA has also been construed to limit the types of administrative endeavors that are subject to review. While it is true that APA plaintiffs can challenge only "agency action," 5 U.S.C. §§ 702, 704, that term is defined broadly to "include[ ] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). As this Court has noted, that non-exhaustive definition "is meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). The scope of the definition "evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials." *Califano v. Sanders*, 430 U.S. 99, 104 (1977).

Despite this Court's expansive view, agencies continue to argue that their challenged actions do not constitute reviewable agency action under the APA. *See, e.g.*, *Planned Parenthood of New York City, Inc. v. U.S. Dep't of Health and Human Servs.*, 337 F. Supp. 3d 308, 326–27 (S.D.N.Y. 2018) (rejecting federal agency's argument that its Funding Opportunity Announcements did not constitute agency action); *see also* Mem. in Support of Defs' Mot. to Dismiss for Lack of Subject Matter Jurisdiction at 15–19, *Jake's Fireworks, Inc. v. CPSC*, No. 8:21-cv-02058-TDC, 2023 WL 3058845 (D. Md. 2023) (arguing that Notices of Noncompliance instructing company to destroy fireworks and threatening criminal and civil sanctions

did not constitute agency action and were "simply investigatory communications.").[6] To the extent lower courts have adopted agencies' interpretations, entire categories of what would be considered agency action in common parlance are insulated from review.

2. Finality

The APA also limits judicial review to agency actions that are "final." 5 U.S.C. § 704. This Court has repeatedly made clear, however, that such finality does not require APA plaintiffs to wait for agency enforcement to challenge agency action. *See U.S. Army Corps of Eng'rs v. Hawkes*, 578 U.S. 590, 600 (2016) (unanimously holding regulated parties "need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of serious criminal and civil penalties") (cleaned up); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 490 (2010) ("We normally do not require plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law' . . . .") (citations omitted); *cf. Columbia Broad. Sys. v. United States*, 316 U.S. 407, 417–18 (1942) (holding that a final order "does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations for non-compliance." (citation omitted)). Nor does the "mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions

[6] PLF represents plaintiff Jake's Fireworks, Inc., on appeal of this case in the Fourth Circuit. No. 23-1661.

of inaccuracy . . . suffice to make an otherwise final agency action nonfinal." *Sackett*, 566 U.S. at 127.

Despite this Court's clarity—and Respondent's assertion about the availability of new final agency action challenges, *see* Br. in Opp'n at 14—agencies nevertheless continue to argue that their actions are not final for myriad reasons. *See, e.g.*, *Soundboard Ass'n v. FTC*, 888 F.3d 1261 (D.C. Cir. 2018) (adopting government's argument that agency staff letter reinterpreting scope of agency rule and revoking previous interpretive letter were not final agency action); *Jake's Fireworks, Inc. v. CPSC*, 2023 WL 3058845 at *8 (holding that its reading of agency Notices of Noncompliance to seek only voluntary compliance and the fact that "under the applicable statutory and regulatory regime, the Commission itself or [its Office of General Counsel] must act before any enforcement action may proceed, demonstrate that no final agency action has occurred."); *Doe v. Tenenbaum*, 127 F. Supp. 3d 426, 465 (D. Md. 2012) (noting that Consumer Product Safety Commission's "repeated use of the words 'may' and 'could' demonstrate that it has no serious design on taking future action in connection with the report. . . . Indeed, during oral argument, the Court expressed concern that the Commission's decision 'could never be final' and the Commission conceded that '[t]hat may be.'").

Finality for APA purposes, then, is largely within an agency's ability to define, at least in the lower courts. And, indeed, it is certainly in an agency's interest to avoid a finality determination wherever possible, significantly reducing the likelihood of obtaining pre-enforcement review.

3. Actions Committed to Agency Discretion

Lastly, the APA excludes from its ambit actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This Court has long stated that this exception precludes review only "in those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993).

Nevertheless, federal agencies have urged courts to construe that exclusion from review broadly. *See, e.g.*, *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 990 (9th Cir. 2015) (holding that U.S. Fish and Wildlife Service's decisions not to exclude areas from critical habitat designations are "always discretionary."). Indeed, as in several of the cases described in the preceding sections, this Court had to rein in the government's reliance on this review-thwarting argument. *See Weyerhaeuser*, 139 S. Ct. at 371 (noting and unanimously rejecting the government's argument that the use of the word "may" in the Endangered Species Act's critical habit exclusion provision renders the Interior Secretary's decision wholly discretionary and unreviewable). While the Court can address individual misapplications of this agency discretion argument, until it does so for a given statutory provision agencies are capable of rendering entire categories of agency action unreviewable under the APA.

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As this Court has observed, it is "common experience that men conform their conduct to

regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails." *Columbia Broad.*, 316 U.S. at 418. Agencies can and do exercise a type of soft power over regulated parties, expressing to them the clear views of the agency staff, but insulating those determinations from review in a court by asserting that they are not final, committed to agency discretion, or not agency action at all.

Agencies' many arguments for avoiding judicial review will survive the outcome of this case regardless of when the statute of limitations begins to run on a regulation. But with each successful evasion, the balance of power between agencies and the public becomes increasingly skewed. Without robust judicial review, the public will become no more than a bystander as "one branch of government arrogat[es] to itself power belonging to another." *See Biden*, 143 S. Ct. at 2373.

Moreover, this government track record clarifies the Board's ultimate objective here. While the Board asserts that reading the statute of limitations as essentially a statute of repose is somehow necessary to protect the public, it is clear that the Board is really concerned with avoiding judicial oversight. *See* Br. in Opp'n at 13 ("A belated facial challenge to an agency rule may implicate the reliance interests not only of the agency involved, but also of other private parties . . . that have a practical stake in the rule's validity."). This is especially so since the Board effectively acknowledges that any potentially beneficial repose for an agency is only illusory to the extent that, at a minimum, the subject of an enforcement action can challenge the regulation. *Id.* at 14–15.

The government's record also puts the lie to the Board's insistence that there are multiple viable options for judicial review of a regulation after the limitations period has run. *Id.* at 14–15. Adopting the Eighth Circuit's reading of the statute would only further insulate government action from review, contrary to the APA's "basic presumption of judicial review." *Abbott Lab'ys*, 387 U.S. at 140–41.

III. The APA Is Best Read to Protect Meaningful Judicial Review Whenever a Party Suffers a Wrong from Administrative Action.

Petitioner provides a clear textual demonstration that an APA claim first accrues when a plaintiff suffers legal wrong by, or is adversely affected or aggrieved because of, a rule. Pet. Br. at 14–29. The purpose of the APA, as evidenced in the text and embraced by this Court, provides vital context for that same reading. *See Biden*, 143 S. Ct. at 2378 (Barrett, J., concurring) ("To strip a word from its context is to strip that word of its meaning. . . . [And] [b]ackground legal conventions . . . are part of the statute's context.").

If the Board's reading is adopted, parties who had no claim (or that did not even exist) at the time a regulation was issued would be precluded from challenging the regulation when they are, ultimately, affected by it. The default 28 U.S.C. § 2401(a) federal statute of limitations for civil suits against the United States applies to APA claims, deterring would-be plaintiffs from unduly sitting on existing claims that an agency action is unlawful. But it goes against reason that Congress would have intended—*without saying so*—that newly aggrieved plaintiffs must

submit to such unlawful regulations without the opportunity for redress provided to others. Indeed, this Court has recognized Congress' specific desire to maintain judicial control through the APA's "generous review provisions." *See Abbott Lab'ys*, 387 U.S. at 140–41 (cleaned up).

The effect would be to allow the government to pick and choose when regulations that have survived to their sixth birthdays can be reviewed by deciding when—and to what extent—to enforce them. But, as Judge Jones observed in her dissenting opinion in *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Service*, "a regulation initially unauthorized by statute cannot become authorized by the mere passage of time." 112 F.3d 1283, 1290 (5th Cir. 1997) (Jones, J., dissenting).

Not only would such a conclusion be inherently arbitrary, it would result in fundamental unfairness. Precluding new entrants from challenging regulations entrenches both the regulations and the regulated community in existence at the time of the rulemaking. For instance, while the Board highlights the availability of associational challenges first in its list purporting to show that "[j]udicial review remains available in numerous ways," Br. in Opp'n at 14, existing entities—associations or otherwise—that *could* challenge a rule as improper might not have the incentive to do so if the predominant effect of the regulation is to preclude competition from new entrants. Existing market participants may be motivated to demand regulation, even pursuant to questionable interpretations of authority, and are unlikely to challenge such overreach if the result is to their overall benefit. The APA evinces no purpose to

encourage such gamesmanship by granting repose to agency regulations. *Cf. Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509–10 (1989) (declining to accept a "literal reading" that "would compel an odd result," denying a civil plaintiff the same right to impeach an adversary's testimony as it grants to a civil defendant); *see also Lockhart v. Napolitano*, 573 F.3d 251, 260 (6th Cir. 2009) ("We must assume that when drafting the [Immigration and Nationality Act], Congress did not intend an absurd or manifestly unjust result."); *Neang Chea Taing v. Napolitano*, 567 F.3d 19, 30–31 (1st Cir. 2009) ("Although we rest our holding on entirely legal grounds, we note that our decision comports with common sense. . . . [T]he result the government seeks would create an arbitrary, irrational and inequitable outcome in which approvable petitions will be treated differently depending solely upon when the government grants the approval." (cleaned up)).

Furthermore, if reviewability arises for new entrants only when they face enforcement, the risks of litigation for regulated parties can incentivize more expansive agency action. As noted above, this Court "normally do[es] not require plaintiffs to bet the farm by taking the violative action before testing the validity of the law, and [it does] not consider this a meaningful avenue of relief." *Free Enter. Fund*, 561 U.S. at 490–91 (cleaned up). But to the extent that newly effected parties can only challenge such rules when they find themselves in the crosshairs of agency application of those rules, many, if not most, will simply choose to comply, reluctantly, even with rules that are plainly invalid. That concern is amplified in cases such as this one, where Corner Post will never

be subject to enforcement proceedings because it is not regulated directly. Pet. Br. at 28.[7]

Given the necessity of review, and the absence of any textual indication otherwise, the better reading is that Congress intended what it wrote—that a plaintiff's cause of action first accrues when the plaintiff suffers legal wrong or is adversely affected or aggrieved. *Cf. Abbott Lab'ys*, 387 U.S. at 139–41 (describing Congress' strong preference—both before and after enactment of the APA—for judicial review of agency action).

Conclusion

This Court should hold that a plaintiff's claim under the APA first accrues when a rule first causes a plaintiff to "suffer[] legal wrong" or be "adversely affected or aggrieved." 5 U.S.C. § 702.

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[7] Of course, should an as-applied challenge appear likely to succeed, the agency can always strategically moot an enforcement action. If only those facing jeopardy can attack the foundation of the rule, the agency can still ensure that even the most resolute defendant in an enforcement action loses out on judicial review. This isn't idle speculation. Last term this Court held that certain constitutional challenges to agency action could be heard by district courts in the first instance. *See Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 185 (2023). The merits of those challenges remained unresolved, though. *See id.* They still are—both the FTC and the SEC dismissed the underlying enforcement actions at issue. *See In the Matter of Axon Enterprise and Safariland*, Federal Trade Commission (Oct. 6, 2023) https://www.ftc.gov/legal-library/browse/cases-proceedings/1810162-axon-enterprise-safariland-matter; *In the Matter of Michelle Cochran*, Securities Exchange Commission, Admin. Proc. File No. 3-17228, Exchange Act Release No. 98329 (Sept. 8, 2023).

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