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 OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., RESTAURANT LAW CENTER, THE BUCKEYE INSTITUTE, AND MANHATTAN INSTITUTE, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI 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.

The Restaurant Law Center (Law Center) is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing nearly 16 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the second largest private sector employers in the United States. Through amicus participation, the Law Center provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry. The Law Center's amicus briefs have been cited favorably by state and federal courts.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing them for implementation in Ohio and replication nationwide. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Manhattan Institute for Policy Research (MI) is a nonpartisan public policy research foundation whose mission is to develop and disseminate ideas that foster greater economic choice and individual responsibility. MI's constitutional studies program aims to preserve the Constitution's original public meaning. To that end, it has historically sponsored scholarship regarding quality-of-life issues, property rights, and economic liberty.

Amici file this brief because the legal and practical implications of the Eighth Circuit's decision, and those circuits adopting the same analysis, undermine due process and significantly harm businesses.

INTRODUCTION AND SUMMARY OF ARGUMENT

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

Multiple federal appellate courts have fashioned a rule of law, the "majority rule," which routinely denies justice on procedural grounds. These courts deny entrepreneurs and new businesses the ability to challenge agency regulations more than six years old, even if the rule first started affecting them today. In doing so, these courts deny justice by preventing new entities from vindicating their legal rights.

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. 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 are not always.

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 immunizes agency rules from constitutional or statu-

tory 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. For some regulations, including the Federal Reserve Board's (Board) Debit Card Interchange Fees and Routing Rule, 76 Fed. Reg. 43394 (July 20, 2011) (hereinafter "debit card-fee rule"), the conduct regulated is against manufacturers of products, or middle entities in the supply chain. Though these types of regulations significantly impact merchants, end sellers, and consumers, they will never face enforcement actions in which to challenge the rule. Such enforcement actions would be against financial institutions only. Under the majority rule, and without the ability to challenge through enforcement actions, new entities injured by these types of regulations are denied their day in court.[2]

Practically, the majority rule permits financial burdens on small businesses. Here, the 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.

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[2] Concerns about allowing new entities to challenge regulation paving the road for perpetual challenges are unfounded. If a challenge is successful, then there would be no additional challenges to that regulation. If the challenge is unsuccessful and the rule sustained, that affirmance would be persuasive authority for dismissal of future challenges. *See also infra* IV.B (addressing litigation abuse concerns from Petitioner's theory).

Rejecting the majority rule will not overburden district courts or lead to abusive litigation against agency regulation. District courts already conduct retrospective analyses to determine when a party suffered harm under the standing analysis. Running the statute of limitations from the time a new entity was first "aggrieved," as the Sixth Circuit did, requires nothing more. There is also no evidence to suggest that a favorable holding for Corner Post will lead to increased litigation or litigation abuse.

Only this Court can correct the majority rule and provide relief for Corner Post, entrepreneurs, and the business community.

The Court should reverse the judgment below.

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 Interest, Inc. v. National Park Service*, 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 is more appropriately 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 potential 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'""; 2) the injury was caused by the Defendant's conduct; and 3)

is redressable by a favorable decision. *Lujan*, 504 U.S. 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 id.* 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; citation 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.

Id. 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—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

one day starting a business sued the Board in 2014 challenging the debit card-fee rule.[3]

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 the 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. Potential 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 original) (no

[3] 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.

certainly impending injury based on speculative fear of future harm).

Petitioner did not open until 2018 and did not suffer an injury sufficient for standing by the debit card-fee rule until then when it began paying the debit card fees. *Cf. Lowenberg v. City of Dallas*, 168 S.W.3d 800, 802 (Tex. 2005) (per curiam) (holding, in an action challenging the imposition of a fee, that a claim accrued for statute of limitations purposes when the fee was paid instead of when it was enacted). 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.

The Government concedes that its position, and the majority rule, runs the statute of limitations prior to plaintiffs having a justiciable cause of action, conflicting with this Court's precedent. Resp't Br. in Opp. to Cert. 16 ("[I]f the statute of limitations on an APA claim began to run only when a particular plaintiff possessed a justiciable cause of action . . . ."). *But see Bay Area Laundry*, 522 U.S. at 201 ("[T]he limitations period commences when the plaintiff has a 'complete and present cause of action.'").

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 business owners to do something they cannot—sue for relief prior to having Article III standing. This Court should 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[4] from the agency's action. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely 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. 871, 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

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[4] For conciseness, *amici* use 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.

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.

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 should 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. For Some Regulations, Like the Debit Card-Fee Rule, Enforcement Proceedings are a Mirage for Judicial Review.

Enforcement proceedings are not a realistic option for new entities to seek judicial review of agency regulation. This is so because agencies do not primarily enforce some regulations, such as the debit card-fee rule, against the seller of products.

The debit card-fee rule imposes a cap on the "interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction[.]" 76 Fed. Reg. at 43467 (codified at 12 C.F.R. § 235.3(a)). Issuers are those who authorize the use of debit cards to perform electronic debit transactions. *Id.* (codified at 12 C.F.R. § 235.2(k)). The amount of the fee must be "reasonable and proportional to the cost incurred by the issuer", which the rule defines as not exceeding the sum of 21 cents, plus 5 basis points multiplied by the value of the transaction. *Id.* (codified at 12 C.F.R. § 235.3 (a)-(b)). The debit card-fee rule gives authority to enforce the fee caps to different agencies, *based solely on the type of issuer involved*. *Id.* at 43468–69 (codified at 12 C.F.R. § 235.9). For example, enforcement against banks is from the "appropriate federal banking agency" under

the Federal Deposit Insurance Act;[5] against credit unions from the Administrator of the National Credit Union Administration;[6] against air carriers from the Secretary of Transportation;[7] against brokers or dealers from the Securities and Exchange Commission;[8] and against all other issuers not specifically listed from the Federal Trade Commission.[9]

Enforcement of the debit card-fee rule is not against merchants[10] like Corner Post and other small businesses. Corner Post and similarly situated new entities are unlikely to face enforcement proceedings where courts can review the rule. Instead, the fee caps set forth in the rule are enforced against the issuers themselves. If issuers charge fees in excess of the caps set forth in the rule, merchants can report those issuers to the Board or appropriate federal agency, and any enforcement action would be brought by the agency against the issuer bank, credit union, etc. Likewise, if merchants such as Corner Post wanted to dispute the amount of the fees applied to them, they would have to do so with the issuer, not the agency. The hierarchical structure created by the debit card-fee rule, wherein the Board and governing agencies are at the top, issuers regulated in the middle, and merchants like Corner Post at the bottom, insulates agencies from rule review in enforcement proceedings, and prevents

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[5] 76 Fed. Reg. 43394, 43468 (codified at 12 C.F.R. § 235.9(a)(1)(i)).

[6] *Id.* at 43468–69 (codified at 12 C.F.R. § 235.9(a)(1)(ii)).

[7] *Id.* at 43469 (codified at 12 C.F.R. § 235.9(a)(1)(iii)).

[8] *Id.* at 43469 (codified at 12 C.F.R. § 235.9(a)(1)(iv)).

[9] *Id.* at 43469 (codified at 12 C.F.R. § 235.9(c)).

[10] The debit card-fee rule defines merchant as "any person that accepts debit cards as payment." *Id.* at 43467 (codified at 12 C.F.R. § 235.2(l)).

rule challenges by new entities through enforcement proceedings.

The debit card-fee rule is not alone.

Another example is the Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks, 87 Fed. Reg. 25710 (May 2, 2022). In this rule, the National Highway Traffic Safety Administration (NHTSA) regulates vehicle manufacturers, imposing mandatory fuel standards 8% higher for model year 2024–2025 vehicles and 10% higher for 2026 vehicles. *Id.* The rule imposes standards on and regulates only vehicle manufacturers. Like the debit card-fee rule, this regulation imposes a regime where enforcement proceedings will be against a middleman, instead of the final sellers.

Under the majority rule and Government's arguments, a new automotive sales business in 2029, forced to charge higher prices on vehicles due to the downstream impacts of the fuel standard regulation on manufacturers,[11] would be foreclosed from challenging the regulation. They could not wait for an enforcement proceeding to do so, because the agency's enforcement proceeding would be against the manufacturer of the vehicle, not the seller.

Similarly, enforcement proceedings would be bad avenues for challenging the Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards, 86 Fed. Reg. 74434 (Dec. 30, 2021). This Environmental Protection Agency (EPA) rule imposes "more stringent national greenhouse gas

[11] NHTSA concedes that the rule will lead to higher upfront costs for consumers. Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks, 87 Fed. Reg. 25710, 25731 (May 2, 2022).

(GHG) emissions standards for passenger cars and light trucks" in model years 2023–2026. *Id.* at 74435. Like the NHTSA rule above, EPA imposes these GHG standards on the manufacturers of vehicles. Downstream sellers or users of the regulated products (for this rule, sellers and users of passenger cars and light duty trucks; for the debit card-fee rule, businesses like Corner Post and consumers who pay swipe fees) will not have enforcement actions taken against them because the rules regulate an entity higher in the supply chain.

In sum, enforcement proceedings are not always viable options for judicial review of agency regulations. This is the case here, and with other regulations where the agency's regulation targets entities higher in the supply chain than end sellers and consumers. In these situations, end sellers and users are not the target of enforcement proceedings and are unable to substantively challenge the rule via that mechanism.

III. The Majority Rule Imposes Significant Burdens on Business.

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.

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's interchange fees regulation illustrates the resulting harm to small businesses. The Federal Reserve purports to regulate these fees to provide fairness in the market. But instead, it permits banks and card networks to unreasonably profit from interchange fees on the backs of both small businesses and all 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 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. at 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. And so the federal regulation, which can no longer be challenged according to the majority rule, harms small businesses without any available recourse in this highly regulated field.

This is no small problem. Card processing fees, such as 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. App. 59. According to the National Retail Federation, which tracks swipe fees, these costs eclipse $160 billion per year. *Swipe Fees*, Nat'l Retail Fed'n, https://bit.ly/3HCwsnE (last visited November 14, 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. The problem keeps growing—the total amount of swipe fees for debit cards rose by nearly 6% last year. *Id.* For the convenience retailing industry, credit card swipe fees rose by 82% between 2020 and 2022. *Visa and Mastercard to Increase Swipe Fees*, NACS (Aug.

31, 2023), https://tinyurl.com/5k3asxae. To make matters worse, Visa and Mastercard recently announced plans to again increase card fees. Angel Au-Yeung, *Visa, Mastercard Prepare to Raise Credit-Card Fees*, Wall. St. J. (Aug. 30, 2023 3:23pm), https://tinyurl.com/mkj8ezmf (recognizing that credit card fees have increased from under $33 billion in 2012 to over $93 billion in 2022).

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 pays 40% more in swipe fees than they did two years ago. 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. These high fees not only harm existing businesses, but they dissuade new businesses from starting. Equally important, consumers are harmed with no way to challenge the regulations.

Amici urge this Court to consider the debit card-fee rule's significant financial burden on businesses—especially new businesses—and consumers.

IV. The Government's Reliance on Practical Policy Considerations to Prevent Newly Formed Entities From Vindicating Their Legal Rights is Incorrect, Speculative, and Unpersuasive.

For whatever value the Court gives to policy considerations at issue in this case, it should ensure they are not exaggerated or misstated. Beyond the detriment to businesses discussed above, *amici* address two policy considerations below.

A. Courts Are Well-Positioned to Conduct Retrospective Analyses to Determine When a Party Suffers Harm from Government Action.

In opposing certiorari, the Government claimed that running the six-year statute of limitations from when a party first suffers harm from government action would force courts to "conduct retrospective analyses to determine when the plaintiff became 'aggrieved' by the challenged action[.]" Resp't Br. in Opp. to Cert. 16–17.

Exactly. Courts across the country conduct retrospective standing analyses every day. Part of the standing inquiry is to determine whether a party suffered or suffers an injury in fact, or concrete harm, from the alleged wrongful government action. The Government itself cites a case where the courts did exactly that. *See* Resp't Br. in Opp. to Cert. 16–17 (citing to *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)); *see also Lujan*, 504 U.S. at 562–67 (discussing

factual allegations in affidavits to determine injury). Moreover, parties alleging harm from agency regulation will still need to present enough facts to demonstrate a plausible claim for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677–80 (2009).

Courts can and do engage in retrospective analyses to determine when and how a party was harmed by government action. Running a statute of limitations from the time a newly formed entity was first "aggrieved" by agency action under 5 U.S.C. § 702 will not require courts to engage in novel or unusual determinations.

B. It is Unfounded to Suggest that a Favorable Holding for Corner Post Will Lead to Litigation Abuse or Unmanageable Dockets.

The district court held that the statute of limitations for Corner Post to challenge the debit card-fee rule began to run prior to Corner Post's existence and payment of debit card fees under the rule. In doing so, the court relied on speculative concerns, noting that "Plaintiffs' theory" could lead to parties "creat[ing] a new entity that would be subject to the Rule" anytime they "wanted to bring a facial challenge against an agency rule or regulation beyond the six-year statute of limitations[.]" App. 36. The Government also cited this concern in opposing certiorari. Resp't Br. in Opp. to Cert. 16. With respect to the district court and Government, this concern over litigation abuse is unfounded.

As previously discussed, the Sixth Circuit in *Herr* held that 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." *Herr*, 803 F.3d at 819-20 (emphasis in original).

Amici performed a Westlaw search to see whether the district court and Government's speculation had merit. In the 8 years since *Herr*, only 50 cases, in all federal courts of appeals and federal district courts, cited to that decision for *any* proposition. In another search with a start date of October 9, 2015 (*Herr*'s decision), only 23 cases, in all federal courts of appeals and district courts, cited 28 U.S.C. § 2401 and referenced *Herr*. Any challenge to agency regulation post-six years assuredly would cite the statute of limitations and the seminal case supporting review.

Even if the speculation were to come to fruition, courts could easily weed out those cases through the traditional standing inquiry. To have an injury in fact, an entity would likely need to purchase or rent a location for its business, hire employees, buy inventory, and begin operating to the public as a business before it could challenge an agency regulation on business activity, such as the debit card-fee rule. For many businesses, the upfront *assured costs* to put itself in a position to challenge long-ago agency action would not be worth the *possibility* of a favorable outcome against that entrenched agency regulation.

Moreover, there should be little concern that a ruling for Corner Post will lead to unmanageable court dockets from legitimate challenges to agency action. As the Government acknowledges, Corner Post's situation is "relatively uncommon." Resp't Br. in Opp. to Cert. 11 (conceding it is "relatively uncommon" for a circumstance to exist "where a person who was not injured when the rule was promulgated becomes injured at a later date"). Holding that an APA claim may first accrue on the date of final agency action, but

does not always do so, will not overburden courts with challenges to long-ago regulation. Instead, it will merely provide the ability for newcomers to vindicate their legal rights when the "uncommon" situation occurs.

Without evidence, or something more than mere speculation, the Court should be skeptical of claims that a favorable outcome for Corner Post will lead to gamesmanship, litigation abuse, or unmanageable dockets.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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