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 FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

[1] No counsel for a party authored this brief in whole or in part and no person or entity other than *amicus* and its counsel made a monetary contribution to its preparation or submission. S. Ct. Rule 37.6.

One of the Chamber's important functions is to represent the interests of its members in matters before Congress, the Executive, and the Judiciary. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community, including cases involving administrative law. *See, e.g.*, *SEC* v. *Jarkesy*, No. 22-859 (2023); *Axon Enter., Inc.* v. *FTC*, 598 U.S. 175 (2023); *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020).

This case is about the six-year statute of limitations for bringing lawsuits against the United States, including lawsuits challenging federal administrative action. *See* 28 U.S.C. § 2401(a). The Court's decision will affect businesses' ability to initiate pre-enforcement challenges against old—but unlawful—administrative rules, when the rule applies to a business that has not had the ability to challenge it within the six years following its promulgation. This issue is of paramount importance to the Chamber's members, because businesses need a way to challenge unlawful regulations that may unfairly burden them.

The Chamber takes no position regarding the lawfulness or wisdom of the rule underlying the statutory issues in this case, the Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43394, 43397 (July 20, 2011). The only question addressed herein is the timeliness of the challenge.

SUMMARY OF ARGUMENT

This Court's recent jurisprudence has emphasized the primacy of text in statutory interpretation. When the plain text of a statute, read in context, yields a clear answer, the Court need not and does not resort to other interpretive tools such as legislative history or policy.

By construing and applying the actual text that Congress wrote and enacted, this Court ensures that policy decisions are made by the political branches—the appropriate policymakers—and not by the judiciary.

Here, the statute is clear: A party suing the United States must file its complaint "within six years after the right of action first accrues." 28 U.S.C. § 2401(a). The Administrative Procedure Act is also clear that a "right of action" does not "accrue" until the plaintiff "suffer[s] [a] legal wrong" because of, or is "adversely affected" or "aggrieved by," the agency action. 5 U.S.C. § 702. In the context of an agency rule challenge, a right of action for a particular plaintiff may not arise until many years after the promulgation of the rule, such as where the plaintiff enters a new line of business or where, as here, the plaintiff entity does not even exist until many years later. Under the plain text, the six-year statute of limitations begins to run from the date the plaintiff's claim accrues (i.e., when the plaintiff is personally injured or its statutory cause of action ripens), not the date of the rule's promulgation.

Several courts of appeals have nonetheless interpreted Section 2401(a)'s six-year time-bar as beginning to run automatically from the time of the promulgation of the agency regulation. These decisions largely grew out of two Ninth Circuit opinions, written more than thirty years ago, in which the court relied on policy considerations instead of statutory text. *See Wind River Mining Corp.* v. *United States*, 946 F.2d 710 (9th Cir. 1991); *Shiny Rock Mining Corp.* v. *United States*, 906 F.2d 1362 (9th Cir. 1990). Those cases were wrongly reasoned at the time and certainly cannot stand under this Court's current approach to statutory interpretation. This Court should not put any weight on either of

these decisions or similar ones in which lower courts have improperly allowed abstract policy considerations to override the statutory text.

The government, too, relies on policy to justify its atextual interpretation of the limitations provision. But even if policy could overcome text (it cannot), that consideration only bolsters the plain-text reading. The goal of the Administrative Procedure Act is to provide a structured process for challenging unlawful agency action, not to freeze agency regulations in amber after a six-year window.

Contrary to the government's insistence, there are not always other avenues for challenging unlawful rules after the six-year period following promulgation. Most businesses cannot afford the drawn-out process of violating a regulation and awaiting a criminal or civil enforcement action to challenge the rule defensively. Likewise, petitioning an agency for a new rulemaking will often be inadequate because of the high standard for prevailing on such efforts. And forcing businesses and agencies to navigate that process solely to trigger a new six-year window would be a waste of their limited resources. Nor can the government's anti-textual position be justified by the mere possibility that other parties will sue to enjoin agency rules: Our system of litigation generally affords each injured party their own day in court.

For these reasons, and others, the Court should reverse the decision below and hold that an APA claim first "accrues" for purposes of Section 2401(a) when the plaintiff suffers a legal wrong because of, or is aggrieved or adversely affected by, an agency rule, regardless of whether the agency promulgated the rule more than six years earlier.

ARGUMENT

I. Section 2401(a) by Its Terms Runs from the Time that the Plaintiff's Claim Accrues

The text of 28 U.S.C. § 2401(a) could not be clearer: "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The statute does *not* state that the time-bar begins to run based on when the government (or agency) acts, as the government now argues it should.

A. The Statutory Text Is Clear

"Right of action" and "accrual" are the key terms in the statute. As this Court has held, a right of action accrues based on the *plaintiff's* rights and injuries, and not based on the timing of the defendant's actions. For example, in *Bay Area Laundry & Dry Cleaning Pension Tr. Fund* v. *Ferbar Corp. of Cal.*, 522 U.S. 192 (1997), this Court held that the traditional "accrual" rule means that a limitation period does not start to run until the plaintiff has a "complete and present cause of action," which in turn means that the plaintiff "can file suit and obtain relief." *Id.* at 201 (citation omitted). *Bay Area Laundry* involved employer liability for withdrawing from an underfunded pension plan, and the Court rejected the petitioner's argument that the pension withdrawal triggered the statute of limitations; instead, it held that the limitations period began to run after the employer missed installment payments, which was when the plaintiff's cause of action "ripened" under the applicable statute. *Id.* at 202–03; *see also Heimeshoff* v. *Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 105 (2013) (a cause of action "accrues" when "the plaintiff can file suit and obtain relief" (quoting *Bay Area Laundry*, 522 U.S.

at 201)); *accord CTS Corp.* v. *Waldburger*, 573 U.S. 1, 8 (2014); *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 418 (2005); *Reiter* v. *Cooper*, 507 U.S. 258, 267 (1993).

The accrual-based reading of Section 2401(a) also finds support in historical practice. Under the longstanding, common-law tradition, a statute of limitations began to run at the time of claim-accrual. *See TRW Inc.* v. *Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring) (the accrual rule is "unquestionably the traditional rule"). The seminal statute of limitations—the statute of James I—was a general time-bar for claims at law, and it did not run during the time the plaintiff was unable to sue because he or she was "within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the seas." An Act for Limitation of Actions, and for Avoiding of Suits in Law, 21 Jam., c. 16 (1623). Many States adopted general statutes of limitations modeled after the statute of James I. *See Hanger* v. *Abbott*, 73 U.S. (6. Wall.) 532, 538 (1867) ("When our ancestors immigrated here, they brought with them the statute of 21 Jac I, c. 16, entitled 'An act for limitation of actions, and for avoiding of suits in law,' known as the statute of limitations."); *see also* Donna A. Boswell, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action*, 136 U. Pa. L. Rev. 1447, 1461 (1988).

Early cases and treatises supported this traditional accrual rule as the default. In *Clark* v. *Iowa City*, 87 U.S. (20 Wall.) 583 (1875), for example, this Court recognized that the standard accrual-based time-bar "begin[s] to run when the right of action is complete." *Id.* at 589. In *Clark*, the Court held that an Iowa statute

of limitations, as applied to a cause of action on an interest coupon, did not begin to run until the coupon matured, as that was the time when the right of action was fully ripened. *Ibid.*; *see also Campbell* v. *United States*, 28 Ct. Cl. 512, 516–17 (1893) ("[T]he statute of limitations only runs against a right of action."). The first edition of Black's Law Dictionary (1st ed. 1891) defined a "statute of limitations" as barring suits "unless brought within a specified period after the right accrued." And Professor H.G. Wood's treatise on statutes of limitations similarly explained that "at the time when a right of action accrues[,] there must be in existence a party to sue and be sued, or the statute does not attach thereto." 1 H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* § 117, at 254 (1st ed. 1883); *see also id.* § 54, at 95 (noting that most statutes of limitations begin to run "from the time of the accrual of the cause of action"); *id.* § 252, at 495 (same).[2] There is no indication that Congress intended to depart from the standard, common-law rule of claim accrual for claims against the government.

This Court interpreted predecessor statutes of limitations the same way. Before Section 2401(a), there were the Act of March 3, 1863 (47 Cong. ch. 92, 12 Stat. 765 (March 3, 1863)), and the Tucker Act of 1887 (49 Cong. ch. 359, 24 Stat. 505 (March 3, 1887)), both of which provided for a six-year statute of limitations for claims against the government, keyed from the date the

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[2] *See also* 2 H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* § 122a, at 684 (4th ed. 1916) (a claim first accrues for purposes of a statute of limitations only when the plaintiff first "has the right to apply to a court for relief, and to commence proceedings to enforce his rights")

plaintiff's claim "accrues."[3] With respect to both statutes, this Court has confirmed that a claim must be brought "within six years after suit *could be commenced* thereon against the government." *Finn* v. *United States*, 123 U.S. 227, 231 (1887) (emphasis added); *see also United States* v. *Lippitt*, 100 U.S. 663, 668 (1879) (same). In another case, the Court held that because the plaintiff was "'beyond the seas' at the time his demand first accrued, and had not returned to this country prior to the institution of this suit, his claim was not barred by limitation." *United States* v. *Greathouse*, 166 U.S. 601, 606 (1897). The claim accrued when the plaintiff could file suit, not when the abstract procedural or substantive violation of law occurred.

Within this context, it is apparent that the six-year statute of limitations to challenge rules under the APA does not necessarily begin to run from the time of promulgation. A plaintiff's right to sue under the APA does not accrue until the plaintiff "suffer[s] [a] legal wrong," or is "adversely affected" or "aggrieved by" the agency action. 5 U.S.C. § 702. A "legal wrong" is "[t]he invasion of a legally protected right." *Gonzalez* v. *Freeman*, 334 F.2d 570, 575–76 (D.C. Cir. 1964); *accord Pa. R.R.* v. *Dillon*, 335 F.2d 292, 294 (D.C. Cir. 1964). The promulgation of a regulation plainly cannot invade the "legally protected right" of an entity that did not exist at the time. Likewise, to be "aggrieved" under APA § 702, plaintiffs must "show that they are *personally* injured

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[3] The Tucker Act has since been amended several times, maintaining its accrual-based language. *See* June 25, 1948, ch. 646, 62 Stat. 971; Apr. 25, 1949, ch. 92, § 1, 63 Stat. 62; Pub. L. 86–238, § 1(3), Sept. 8, 1959, 73 Stat. 472; Pub. L. 89–506, § 7, July 18, 1966, 80 Stat. 307; Pub. L. 95–563, § 14(b), Nov. 1, 1978, 92 Stat. 2389; Pub. L. 111–350, § 5(g)(8), Jan. 4, 2011, 124 Stat. 3848.

by the challenged action and that their injury is caused by that action." *Wilderness Soc'y* v. *Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987) (emphasis added); *see also Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 59 n.8 (1976) (an "aggrieved" person under APA § 702 is a person "whose interest is adversely affected in fact"). Again, a plaintiff cannot be "personally injured" or "adversely affected in fact" by a regulation until that regulation actually applies to the plaintiff. *See also Dir., Off. of Workers' Comp. Programs, Dep't of Labor* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 127 (1995) (APA § 702 "require[es] a litigant to show, at the outset of the case, that he is injured in fact by agency action").

B. The Courts of Appeals Have Improperly Elevated Policy Over Text

Despite the clear text and history, a majority of circuits have held that Section 2401(a)'s limitations period is triggered not by the plaintiff's claim accrual under the APA, but by the agency's conduct. Those decisions arise out of a misguided focus on policy rather than text.

1. The majority position largely arises out of two decisions from the Ninth Circuit: *Shiny Rock Mining Corp.* v. *United States*, 906 F.2d 1362 (9th Cir. 1990), and *Wind River Mining Corp.* v. *United States*, 946 F.2d 710 (9th Cir. 1991).

In *Shiny Rock*, a mining company sought to challenge a public land order that prevented use of certain lands for mining. 906 F.2d at 1363. The petitioner applied for a mineral permit more than a decade after the order was adopted, but the Bureau of Land Management denied its application under the earlier order. *Ibid.* To avoid the six-year limitations period under Section 2401(a) in a subsequent lawsuit challenging that

order for procedural defects, the petitioner argued in relevant part that it had not suffered an injury (or obtained Article III standing) until its application was denied. *Id.* at 1365–66. The Ninth Circuit rejected that argument and held that "the statute of limitations began to run when [the order] was published in the Federal Register." *Id.* at 1363.

Shiny Rock's reasoning is not persuasive. First and foremost, the court of appeals undertook no meaningful analysis of the actual text of Section 2401(a). *Id.* at 1365. The court also did not address claim accrual based on the APA's reference to "legal wrong," or being "aggrieved" or "adversely affected," nor did it evaluate whether the plaintiff actually could have filed its claim any earlier than it did. Instead, the court relied on an earlier decision (which did not even involve APA claim accrual) for the proposition that courts should not adopt an interpretation under which "'claimants . . . could challenge regulations . . . when administered by the federal agency, rather than when adopted.'" *Id.* (quoting *Sierra Club* v. *Penfold*, 857 F.2d 1307, 1316 (9th Cir. 1988)).[4] But that circular statement does nothing to explain or justify *why* claimants should not be allowed to challenge regulations when applied—it simply restates the consequence of ruling in favor of the plaintiff. And of course, "considerations of policy divorced from the statute's text and purpose [can]not override its meaning." *United States* v. *Tohono O'Odham Nation*, 563 U.S. 307, 317 (2011); *see also, e.g.*, *United States ex rel. Schutte* v. *SuperValu Inc.*, 598 U.S. 739, 758–58 (2023)

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[4] *Penfold* merely held that under Federal Rule 15(c), a plaintiff cannot circumvent the six-year statute of limitations by amending its complaint to address different conduct or transactions not challenged in the initial complaint. *See Penfold*, 857 F.2d at 1316.

("policy arguments . . . cannot supersede the clear statutory text" (citation omitted)).

In any event, the *Shiny Rock* court did not actually disagree that the statute of limitations does not run until the plaintiff suffers an injury. In the facts of the case before it, the court assumed that the only "injury required for the statutory period to commence was that incurred by all persons when, in 1964 and 1965 [i.e., when the order was published], the amount of land available for mining claims was decreased." *Shiny Rock*, 906 F.2d at 1365–66. This reasoning might have made sense in the context of the case, where the plaintiff was pursuing a regulatory takings claim under the Fifth Amendment, and thus any impairment of property interests or "distinct investment-backed expectations" arguably occurred at the time the regulation made the land unavailable for mining (and thus less valuable). *See Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104, 105 (1978). But that does not lead to the conclusion that *every* regulation likewise must be challenged within six years of its promulgation.

The Ninth Circuit's later decision in *Wind River* has been cited and relied upon even more than *Shiny Rock*, but it is no more persuasive. *Wind River* likewise involved a BLM decision classifying certain land as unavailable for mining. 946 F.2d at 711. Unlike in *Shiny Rock*, however, the mining company sought to challenge the BLM decision, not for procedural deficiencies, but as exceeding the agency's substantive authority. *Id.* at 712. The plaintiff brought its challenge more than six years after the land classification decision, but within six years of the BLM's denial of its application for development of the land. *Id.* at 711–12.

The Ninth Circuit held that the plaintiff's claim was timely, *agreeing* that the claim did not accrue (and the statute of limitations did not begin to run) until the agency denied the plaintiff's application. *Wind River*, 946 F.2d at 715. But, the court continued, the same was not true for procedural challenges to an agency decision or regulation, which had to be brought within six years of issuance. *Ibid.* In its view, the grounds for a procedural challenge will "usually be apparent to any interested citizen," and thus "[t]he government's interest in finality outweighs a late-comer's desire to protest the agency's action as a matter of policy or procedure." *Ibid.* This approach, the court of appeals urged, "strikes the correct balance between the government's interest in finality and a challenger's interest in contesting an agency's alleged overreaching." *Ibid.*[5]

Although the Ninth Circuit reached the correct ultimate outcome, the errors in the rationale it used to reach that result are manifest. Under well-settled practice and interpretation, it is the plaintiff's *injury* that triggers accrual and the running of the statute of limitations. Nonetheless, the Ninth Circuit ignored that inquiry altogether and focused its analysis only on competing policy interests. It is not the role of the judiciary to "balance" competing interests—Congress already struck that balance in providing for an accrual-based limitations period in Section 2401(a). *See Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014) ("This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language

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[5] The Ninth Circuit purported to find support in *Oppenheim* v. *Campbell*, 571 F.2d 660 (D.C. Cir. 1978), but that case did not draw any such distinction between substantive and procedural challenges. *See generally ibid.*

simply on the view that . . . Congress must have intended something broader" (quotation marks omitted)).

2. Since those decisions, several other circuits have held that a plaintiff's claim accrues for purposes of Section 2401(a) at the time of the final agency action, not the time the plaintiff's claim becomes "complete and present" under APA § 702. Often those decisions rely on *Wind River* and/or *Shiny Rock* directly or indirectly, though others rely on different cases that have made similar errors.

The Fifth Circuit, for example, followed *Wind River* in *Dunn-McCampbell Royalty Interest, Inc.* v. *National Park Service*, 112 F.3d 1283 (5th Cir. 1997), simply assuming, without regard to statutory text, that the established "rule" is that Section 2401(a) begins to run at the date of publication of a rule, but that "[i]t is possible . . . to challenge a regulation after the limitations period has expired, provided that the ground for the challenge is that the issuing agency exceeded its constitutional or statutory authority." *Id.* at 1287. Other circuits likewise have treated the *Wind River* rule as established law, without any substantial independent analysis. *See Hire Ord. Ltd.* v. *Marianos*, 698 F.3d 168, 170 (4th Cir. 2012); *Trafalgar Cap. Assocs.* v. *Cuomo*, 159 F.3d 21, 34 (1st Cir. 1998); *see also U.S. Steel Corp.* v. *Astrue*, 495 F.3d 1272, 1280 (11th Cir. 2007) (relying on the First Circuit's decision in *Trafalgar*, which in turn relied on *Wind River*).

Other cases erroneously rely on dicta to justify a publication-based accrual rule. In *Wong* v. *Doar*, 571 F.3d 247 (2d Cir. 2009), for example, the Second Circuit dispensed with the traditional accrual rule in the context of the APA, but did so primarily by relying on *Harris* v. *FAA*, 353 F.3d 1006 (D.C. Cir. 2004), in which the D.C.

Circuit rejected claims that were brought more than six years after the plaintiffs' APA claims had first ripened, discussed the function of the accrual rule only in dicta, and resolved the case on narrower grounds. *Harris*, 353 F.3d at 1011–13.

Courts have also adopted the erroneous rule that the six-year statute of limitations runs from the date of promulgation in cases where the accrual question was immaterial because—as is often true—the plaintiffs' claims *had* accrued at the same time of the final agency action. *See, e.g.*, *Hardin* v. *Jackson*, 625 F.3d 739, 743 (D.C. Cir. 2010); *Latin Ams. for Soc. & Econ. Dev.* v. *Adm'r of the Fed. Highway Admin.*, 756 F.3d 447, 464 (6th Cir. 2014). Subsequent decisions nonetheless follow that precedent in cases where the claim had ripened and the action had occurred at separate times, leading one judge to note "that these cases show why we don't read precedents like statutes." *Herr* v. *U.S. Forest Serv.*, 803 F.3d 809, 819 (6th Cir. 2015) (Sutton, J.). In short, all roads lead back to erroneous circuit precedent, but none seem to find their way back to the plain text and history of the statute.

3. In the decision below, the Eighth Circuit followed other courts of appeals down the garden path by 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." Pet. App. 11a. Like its predecessors, the Eighth Circuit did not grapple with the text or history of Section 2401(a) or APA § 702, and instead relied exclusively on flawed or unpersuasive circuit precedent, including *Shiny Rock, Wind River*, and other cases described above. Pet. App. 7–9, 10–11.

The Eighth Circuit also relied heavily on its own, earlier decision in *Izaak Walton League* for the proposition "that facial challenges to agency actions accrue upon the publication of the agency action in the Federal Register." Pet. App. 7a (quoting *Izaak Walton League of Am., Inc.* v. *Kimbell*, 558 F.3d 751, 761 (8th Cir. 2009)). But that case held nothing of the sort: The issue in *Izaak Walton League* was whether the "continuing violations doctrine" served to excuse the untimeliness of a plaintiff's challenge to an agency order that the agency continued to act under years later. 558 F.3d at 759–61; *see also* Response & Reply Brief, *Sierra Club N. Star Chapter* v. *Kimbell*, 2008 WL 3285537 (8th Cir. July 10, 2008). The Eighth Circuit rejected that argument, but in doing so, confirmed that it had previously "held that a right 'first accrues' when the plaintiff knows or has reason to know of the *injury* complained of." *Izaak Walton League*, 558 F.3d at 759 (quoting *Stupak–Thrall* v. *Glickman*, 346 F.3d 579, 584 (6th Cir. 2003)) (emphasis added); *see also Stupak-Thrall*, 346 F.3d at 585 (plaintiffs' claims accrued at the time of agency action because they "knew that their riparian rights to the use of the lake were impaired" by that action).[6]

Thus, the Eighth Circuit's decision is premised on a departure from statutory text and reliance on inapposite case law. The so-called "majority rule" in this area

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[6] None of the other cases on which the Eighth Circuit relied offer any more support. *See, e.g.*, *Paucar* v. *Att'y Gen. of U.S.*, 545 F. App'x 121, 124 (3d Cir. 2013) (challenge untimely because the plaintiff was "capable of challenging the regulation in district court since at least 2004, but failed to do so"); *Ctr. for Biological Diversity* v. *Hamilton*, 453 F.3d 1331, 1335 (11th Cir. 2006) (continuing violations doctrine not applicable to agency inaction)

is not built on any sturdy jurisprudential foundation and should carry no weight in this Court's analysis.

II. The Government's Proposed Alternatives Are Inadequate

Eschewing text, the government has relied on policy arguments to justify its position. Primarily, it argues that even if direct judicial review is unavailable to aggrieved parties like petitioner, agency rules will not be "insulated" from scrutiny, because regulated entities can always challenge a rule as a defense in an enforcement action and affected parties can always petition the agency for a new rulemaking. Gov't Br. in Opp'n 14–15. Even if policy could override text (it cannot), the government's policy arguments fail to do so.

1. There are myriad reasons why a firm might not be "aggrieved" by a regulation when it is first promulgated. For example, sometimes, firms move into new lines of business and thereby come under the purview of new regulations, or even new agencies. *See* Giles Bruce, *Amazon Launches One Medical for Prime*, Becker's Healthcare (Nov. 8, 2023), https://perma.cc/8RVK-YEGH (describing Amazon's expansion into healthcare industry); Todd Haselton, *Apple Unveils Streaming TV Services*, CNBC (Mar. 25, 2019), https://www.cnbc.com/2019/03/25/apple-tv-channels-streaming-tv-service-announced.html (launch of Apple TV+ streaming services). Sometimes, agencies issue new interpretive guidance that clarifies the scope of existing regulations or changes the practical impact of those regulations in a way that gives rise to the type of real world harm necessary to support a claim. *See, e.g.*, *Perez* v. *Mortg. Bankers Ass'n*, 575 U.S. 92, 100–01 (2015) (agency may issue new interpretation of regula-

tion without going through notice-and-comment rulemaking); Fed. Trade Comm'n, CFPB, Truth in Lending (Regulation Z); Earned Wage Access Programs, 85 Fed. Reg. 79,404 (Dec. 10, 2020) (offering interpretation of decades-old regulation). Similarly, an agency may claim that existing regulations cover new technology. *See* FTC Comment, Artificial Intelligence and Copyright, Docket No. 2023-6 (Oct. 30, 2023), https://perma.cc/KP8M-NLQF ("[T]he FTC has been using its existing legal authorities to take action against illegal practices involving AI"). And sometimes, as here, a firm may not even exist at the time a regulation is promulgated.

In such situations, violating a regulation and then waiting for agency enforcement action in order to challenge a rule is not a viable option. This Court "normally do[es] not require plaintiffs to bet the farm by taking the violative action before testing the validity of the law." *Free Enter. Fund* v. *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490–91 (2010) (alteration and quotation marks omitted); *see also MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat . . ."). And neither did Congress. *See CIC Servs., LLC* v. *IRS*, 141 S. Ct. 1582, 1588, 1591 (2021). The APA provides an express opportunity for regulated parties to challenge agency action *before* they incur compliance costs (*see id.* at 1591) and without exposing themselves to an enforcement action that could injure or even end their business.

That choice is all the more important because the costs and burdens of an administrative enforcement action are significant. Administrative proceedings can be

drawn out for many months or years. For example, the FTC's "cumbersome and tedious" in-house adjudication process allows for five to eight months of discovery, followed by a trial of two to three months. J. Robert Robertson, *Administrative Trials at the Federal Trade Commission in Competition Cases*, 14 Sedona Conf. J. 101, 101 (2013). A decision may not be rendered for another three months, after which the losing party can appeal to the full FTC, which can take several months before issuing its decision. *See id.* at 102, 111–12. As another example, in a case pending before this Court, the Securities and Exchange Commission took seven years to render a final decision in an in-house administrative proceeding. *See* Brief for Respondents at 3–7, *SEC* v. *Jarkesy*, No. 22-859 (Oct. 11, 2023). And all of this is *before* the party ever has an opportunity to challenge the underlying regulation before an Article III court.

This avenue simply is not practical for the great majority of regulated parties. The cost of the proceedings themselves and the cost of an adverse enforcement decision at their conclusion are simply too much for most businesses to bear. By locking entities in administrative purgatory—especially where the in-house administrative law judge is likely to favor the agency—the agency can forestall judicial scrutiny and force early settlement, foreclosing judicial review as a matter of economic reality.

The APA avoids this very problem by allowing for a pre-enforcement challenge. Removing that option for regulated entities that could not challenge the rule within six years of its promulgation—without any textual basis for doing so—is contrary to Congress's intent

and puts these regulated entities at an unfair disadvantage. The government's proposed post-enforcement alternative is no alternative at all.

2. The government's second proposal—that regulated parties may petition for a new rulemaking—is similarly inadequate. Like administrative enforcement actions, petitions for rulemaking can take years to resolve, as agencies have little incentive to act promptly. As of May 2023, the SEC had responded to just 6.5% of the petitions for rulemaking submitted to it between January 2018 and May 2023. *See* Kara McKenna Rollins, *Have the SEC's Delay Tactics Made Its Petition for Rulemaking Process Vulnerable to Challenge?*, Yale J. Reg. (May 3, 2023), https://perma.cc/GK54-KJGS. In one ongoing litigation, a petition for rulemaking has been pending for 16 months, and the agency has not committed to providing a response this calendar year. *See generally In re Coinbase, Inc.*, No. 23-1779 (3d Cir.); *see also Oil, Chem. & Atomic Workers Union* v. *OSHA*, 145 F.3d 120, 124 (3d Cir. 1998) (six-year delay not unreasonable). Once the agency finally acts, that will be the *start* of the petitioner's opportunity to challenge the legal basis for the agency's action. All the while, regulated parties will continue to incur substantial and unrecoverable compliance costs. *Cf. CIC Servs.*, 141 S. Ct. at 1591.

If and when an agency finally does respond, it is likely to deny any request for rulemaking—particularly if the request challenges an existing regulation—prompting a request for judicial review. *See* Rollins, *supra.* But judicial review of an agency's decision not to initiate a rulemaking is "extremely limited and highly deferential." *Massachusetts* v. *EPA*, 549 U.S. 497, 527–28 (2007) (quotation marks omitted); *see also WWHT,*

Inc. v. *FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981) ("It is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking"). Regulated parties proceeding under this path thus start at a significant disadvantage, and as a result, petitions for rulemaking are generally a disfavored means of spurring agency action or obtaining judicial review. *See* Jason A. Schwartz & Richard L. Revesz, *Petitions for Rulemaking*, Admin. Conf. of the U.S. 41–43 (Nov. 5, 2014).

And even if the agency chooses to grant the request for a rulemaking, both the petitioner and the agency will have expended unnecessary resources, all so that the petitioner can trigger a new six-year limitations period to mount a challenge. This inefficiency is entirely avoidable and only highlights the flaws in the government's promulgation-based standard.

3. Finally, the government contends that industry associations and other interested parties are likely to challenge any rules likely to affect significant numbers of individuals and businesses. Gov't Br. in Opp'n 14. The government offers no empirical support for this assertion and points only to the fact that merchant groups sued in this case. *Ibid.* In reality, the federal government issues thousands of broadly-applicable rules every year, and those rules remain on the books as new ones are promulgated. Cong. Rsch. Service, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register* (Sept. 3, 2019), https://sgp.fas.org/crs/misc/R43056.pdf. Industry associations and other interested parties do not (and cannot) challenge every unlawful agency rule as it is promulgated, or even within six years.

Even if industry associations and other interested parties did have the capacity to comb through the pages of the Federal Register and mount a challenge to every unlawful regulation, that would still not be sufficient. Our Anglo-American system of justice has a "deep-rooted historic tradition that *everyone* should have his own day in court." *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996) (emphasis added). Thus, a fundamental premise of American litigation is that parties to a prior action are bound by the judgment while nonparties are not. *Smith* v. *Bayer Corp.*, 564 U.S. 299, 307–08 (2011); *see also Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008) ("A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit."). Each party has its own unique interests and can be affected by the rule differently. Each therefore has its own incentives in deciding how best to litigate a case, which arguments to raise, and if and when to settle. And litigation is "fallible," often leading to different outcomes based on "the very identity of the parties." 18A Wright & Miller, *Fed. Prac. & Proc. Juris.* § 4449 (3d ed. April 2023 update).

Congress made a deliberate judgment to provide for a robust right of judicial review of agency action. The APA sets forth the "basic presumption" for "judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action.'" *Abbott Lab'ys* v. *Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702). The alternatives for judicial review the government offers are inadequate substitutes. There is no basis for distinguishing between parties who are immediately injured by an unlawful regulation from those who incur no harm until several years later.

* * *

If Congress believes a different time limitation is better as a matter of policy for certain rules, agencies, industries, entities, or types of claims, it is free to amend the law to reflect that preference. But Congress enacted (and has repeatedly amended) Section 2401(a) with text that is clear on its face. Any subsequent policy-based adjustments in specific situations should be evaluated and made by Congress, not the judiciary.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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