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 AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization with members in all fifty states. Public Citizen regularly appears before Congress, administrative agencies, and courts to advocate for laws and policies that protect consumers, workers, and the general public. Because Public Citizen frequently takes a role in proposing, defending, or challenging agency regulations, Public Citizen has a strong interest in the proper application of the Administrative Procedure Act (APA), and it often participates as a party or as amicus curiae in cases that involve the APA.

Public Citizen submits this brief to explain that petitioner Corner Post's interpretation of the APA, if adopted, would undermine the functioning of regulations that protect public health, safety, and consumer finances, among other things, by rendering regulations forever open to lawsuits raising facial challenges. While judicial review of final agency action is a critical feature of the APA's procedural framework, the APA also reflects Congress's understanding that both regulated entities and the public at large depend on stable regulatory regimes and an orderly, predictable process for updating, amending, or repealing existing rules. Public Citizen has a strong interest in supporting a sensible interpretation of the APA that honors the statute's promise of judicial review while ensuring that the availability of such review does not open the door to the regulatory

[1] This brief was not written in any part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of the brief.

instability that the APA's procedures are designed to prevent.

SUMMARY OF ARGUMENT

I. As all but one of the courts of appeals to have addressed the issue have recognized, the right to bring a facial challenge to agency action under the APA accrues when the action becomes final. This conclusion flows from the text and structure of the APA and from the practical considerations that inform the accrual analysis under this Court's precedents. By creating a generous six-year window within which interested persons can seek judicial review of final agency action, the APA provides an avenue to hold the agency accountable for its decision-making process. After that window has closed, the APA promotes regulatory stability and safeguards the public's reliance interests by requiring persons who believe the regulatory landscape should change to petition the agency for a new rulemaking, giving the agency an opportunity to invite public comments and review a full record of up-to-date evidence. Corner Post's view of accrual would upend this statutory plan and create instability that Congress designed the APA to avoid.

II. Nothing in the relevant statutory text establishes the perpetual-accrual rule that Corner Post proposes. Instead of pointing to statutory language that states when "the right of action" to bring a facial challenge to an agency regulation "first accrues" within the meaning of the limitations provision, 28 U.S.C. § 2401(a), Corner Post asserts that a right of action cannot accrue before a plaintiff seeking to invoke it has satisfied the legal prerequisites to filing a lawsuit. This Court, though, has rejected that assertion, instead holding that

accrual is context-dependent and requires careful attention to congressional purpose and practical realities. Here, those factors establish that accrual does not occur anew every time a new person or other entity is first affected by an agency regulation. Rather, accrual occurs when the regulation becomes final.

ARGUMENT

I. The right of action to mount a facial challenge to an agency regulation accrues at the time the regulation becomes final.

The APA provides that certain "final agency action," including the promulgation of a regulation, shall be subject to judicial review. 5 U.S.C. § 704; *see id.* § 551(13) (defining "agency action"). Because the APA does not itself specify the time limit for seeking judicial review, the general statute of limitations for claims against the government applies, absent a special statutory review scheme that specifies a different limitations period. Where the general limitations statute applies, a claim under the APA must be filed "within six years after the right of action first accrues." 28 U.S.C. § 2401(a).

Neither the APA nor section 2401(a), however, expressly states when any particular "right of action first accrues." To resolve that question, this Court must construe the statutory reference to accrual "in the light of the general purposes of the statute and its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967) (quoting *Reading Co. v. Koons*, 271 U.S. 58, 62 (1926)). As the overwhelming majority of the courts of appeals to have considered the issue have

recognized, both of these considerations support the conclusion that the right of action in a facial challenge to a regulation accrues at the time the regulation becomes final.

A. The majority accrual rule furthers the dual goals of agency accountability and regulatory stability that are manifest in the APA's text and structure.

1. Congress enacted the APA in 1946 to create a "basic and comprehensive regulation of procedures in many agencies." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36 (1950). Responding to the "[m]ultiplication of federal administrative agencies" capable of taking action that could have a "serious impact on private rights," *id.* at 36–37, Congress sought to "introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies," *id.* at 41. The standardized procedures that Congress accordingly enacted in the APA operate to ensure that agencies conduct "reasoned decision-making" and remain "accountable to the public." *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1905 (2020) (first quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015), then quoting *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992)).

As relevant here, the APA sets out a detailed process that an agency must generally follow when promulgating a rule that is intended to "have the 'force and effect of law,'" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979)), or when "amending[ ] or repealing" an existing rule, 5 U.S.C. § 551(5); *see id.* § 553. First, the agency must publish a notice that describes the substance of the proposed

regulatory action. *See* 5 U.S.C. § 553(b). The agency must then give "interested persons" the opportunity to respond with "written data, views, or arguments" and must consider and address any significant comments it receives. *Perez*, 575 U.S. at 96 (quoting 5 U.S.C. § 553(c)). Lastly, upon concluding the rulemaking, the agency must issue a "concise general statement" explaining the "basis and purpose" of the regulatory action it has taken. *Id.* (quoting 5 U.S.C. § 553(c)).

In carrying out this process, an agency "must examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The agency may not "fail[ ] to consider an important aspect of the problem" or "offer[ ] an explanation for its decision that runs counter to the evidence before the agency." *Id.* And where an agency amends or repeals an existing rule, it must "take[ ] into account" any "serious reliance interests" that the prior rule created. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Taken together, the procedural and substantive requirements that the APA imposes on agency rulemaking ensure that the public has ample notice of potential changes to the regulatory landscape and the opportunity to bring relevant considerations to the agency's attention. The APA thus promotes "notice and predictability" in the regulatory process. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012) (quoting *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)). And it guards against "unfair surprise" that could accompany abrupt shifts in the governing law. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007); *see also NLRB v. Wyman-Gordon Co.*, 394 U.S.

759, 764 (1969) (plurality opinion) (observing that "[t]he rule-making provisions of [the APA] … were designed to assure fairness and mature consideration of rules of general application").

2. The APA also provides that agency action—including the final output of a rulemaking—is subject to judicial review and shall be "h[e]ld unlawful and set aside" if successfully challenged. 5 U.S.C. § 706(2). Absent a special statutory requirement to the contrary, any person "suffering legal wrong" or otherwise "adversely affected or aggrieved" by an agency rule may bring an APA action seeking review of the rule, irrespective of whether that person participated in the rulemaking process. *Id.* § 702. Nonetheless, "the focal point for judicial review" is the substantive and procedural validity of the rulemaking in light of "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam); *see Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43–44 (noting the significance of the fact that "Congress required a record of the rulemaking proceedings to be compiled and submitted to a reviewing court"). Accordingly, judicial review of a rulemaking is "confined to 'consideration of the decision of the agency … and of the evidence on which it was based.'" *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (omission in original; quoting *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714–15 (1963)). As a result of this principle, "a party will normally forfeit an opportunity to challenge an agency rulemaking on a ground that was not first presented to the agency for its initial consideration." *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1150 (D.C. Cir. 2005);

see id. ("[I]t is unsurprising that parties rarely are allowed to seek 'review' of a substantive claim that has never even been presented to the agency for its consideration.").

If a party believes that changed circumstances or other considerations that are not reflected in the original rulemaking record undermine the basis for an existing rule, "[t]he proper procedure," which is "set forth explicitly in the APA," is to submit "a petition to the agency for rulemaking." *Auer v. Robbins*, 519 U.S. 452, 459 (1997) (citing 5 U.S.C. § 553(e)). Following that path allows the agency to revise the rule by initiating a new rulemaking, during which it can provide public notice of a potential regulatory change, seek input from interested parties, and compile a fresh administrative record. And if the agency denies a petition requesting a new rulemaking, the petitioner can seek judicial review of that agency decision. *See id.*

The APA thus offers two distinct mechanisms for ensuring that the regulatory landscape develops in a deliberate and predictable way through collaboration between the agency and the public. On the one hand, it offers a backward-looking avenue for parties to hold an agency accountable for a procedurally or substantively flawed rulemaking process by seeking judicial invalidation of the process's output on the basis of the administrative record compiled during that process. On the other hand, it provides a forward-looking avenue for parties to advocate for regulatory change by requesting initiation of a notice-and-comment process during which interested members of the public have an opportunity to submit evidence and arguments that the agency must consider.

3. From this statutory context, it follows that "the right of action" in a facial APA challenge to an agency rule "first accrues" when the rule is issued. 28 U.S.C. § 2401(a). At that time, the agency's regulatory action has become part of the governing law that binds the public, and the administrative record against which the action will be assessed is complete. The validity of the action is thus ascertainable, and the action is open to APA challenges seeking to have it set aside. As the vast majority of the courts of appeals that have considered the issue have agreed, this understanding of accrual honors the APA's purposes. It honors the APA's goal of agency accountability by recognizing that Congress provided an ample six-year window within which any member of the public injured by the rule can obtain judicial review of its substantive and procedural validity. And at the same time, it honors the APA's goal of regulatory stability by requiring parties seeking to unwind or revisit a regulation after that window has closed to invoke the right afforded any "interested person … to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C, § 553(e).

In contrast, Corner Post's view of accrual would upend the balance Congress struck more than 75 years ago between agency accountability and regulatory stability. Rather than measuring accrual from the time at which members of the public can "first" invoke "the right of action" through which the APA holds a completed rulemaking open to judicial review, 28 U.S.C. § 2401(a), Corner Post claims that Congress intended to open a fresh six-year limitations window each and every time an additional member of the public newly gains an interest in invoking that right of action. Beyond resting on a flawed view of background accrual principles, *see infra* Part II, this

argument would leave every agency regulation forever open to facial challenge, given that new entities are continually entering regulated domains or otherwise becoming affected by existing agency rules. An interpretation that would create this prospect of perpetual review, however, would place the APA's judicial-review provision at odds with the notice-and-comment process through which the statute otherwise channels regulatory amendment or repeal. Rather than petitioning the agency to initiate a new rulemaking that would foster public dialogue and invite the submission of up-to-date evidence, any person or entity newly affected by or subject to the regulations governing a particular sector—such as an individual who has reached age 18 or entered a new profession, or a business that has newly incorporated or changed its business model—could circumvent the notice-and-comment process by filing a facial challenge against any feature of the relevant regulatory landscape, no matter how longstanding and no matter how settled the industry's and the public's expectations.

Indeed, Corner Post's 2021 challenge to a 2010 Federal Reserve rule underscores why Congress built the ability to petition for a new rulemaking into the APA's design. In arguing that the 2010 rule is arbitrary and capricious, Corner Post has cited evidence from as late as 2019. *See, e.g.*, Pet. App. 51a (discussing data "since 2011"). That evidence is obviously not in the administrative record of the 2010 rule, and a court resolving Corner Post's APA claim thus cannot properly consider it. Had Corner Post petitioned for a new rulemaking, however, the Federal Reserve would have had the opportunity to consider Corner Post's contention that this evidence supports an amendment to the rule, as well as evidence and

arguments from any other interested members of the public and any reliance interests that might counsel retention of the existing rule.

Although the APA allows a party the option to seek judicial review of a past rulemaking rather than to petition for a new rulemaking before the statute of limitations has run, judicial review on a facial challenge becomes increasingly less sensible over time. Absent some temporal limit on mounting a facial challenge, courts would have to ignore the reliance interests of regulated parties and the public, as well as any contemporary considerations gleaned from the years of intervening experience, and instead assess the challenge based on an administrative record compiled many years earlier.

Congress did not write such a self-defeating statutory scheme. Rather, as court after court has held, the APA creates a generous but finite six-year period for challenging an existing agency rule. Once that period is over, a party seeking to challenge the rule must rely on the processes that Congress provided to govern new rulemakings.

B. The accrual rule adopted below avoids the practical dangers of leaving longstanding regulations forever open to facial attack.

In addition to honoring the "general purposes" of the APA, the accrual rule around which the courts of appeals have coalesced respects "those practical ends which are to be served" by having a statute of limitations in the first place. *Crown Coat*, 386 U.S. at 517 (citation omitted). As this Court has explained, "the basic policies of all limitations provisions" include "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a

defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). Under Corner Post's perpetual-accrual theory, though, the APA's six-year limitations period would be essentially meaningless. As a result, agencies and courts could be forced to return repeatedly to an ever-older administrative record to defend against and adjudicate repetitive attacks. And regulated parties and members of the public would live under the risk that longstanding regulatory rights and duties might be set aside at any time, without notice or an opportunity to participate in a public-comment process in which their interests could be taken into account.

It is not difficult to imagine how a facial challenge to a settled regulatory regime could threaten the reliance interests of the people and entities that have organized their personal or business affairs around that regime. For example, courts have relied on section 2401 to reject a facial challenge to a then-thirty-year-old Department of Health and Human Services rule governing the calculation of nursing home residents' Medicaid benefits, *Wong v. Doar*, 571 F.3d 247, 262–63 (2d Cir. 2009); a then-eight-year-old Department of Homeland Security rule governing employers' eligibility to secure work visas for certain temporary foreign workers, *Outdoor Amusement Bus. Ass'n v. Dep't of Homeland Sec.*, 983 F.3d 671, 678, 681–82 (4th Cir. 2020); a nearly twenty-year-old National Park Service rule governing oil and gas rights within national parklands, *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997); and a then-nine-year-old Department of Labor rule establishing the methodology for calculating the minimum wage for certain agricultural workers, *Peri & Sons Farms, Inc.*

v. Acosta, 374 F. Supp. 3d 63, 72 (D.D.C. 2019). Had a court upheld any of these facial challenges, it would have "h[e]ld unlawful and set aside," 5 U.S.C. § 706(2), a rule that had been in effect for many years.

To be sure, some regulations will remain under the continued threat of effective facial invalidation irrespective of when the right of action to bring a facial challenge accrues. Under 5 U.S.C. § 703, "agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement" unless "prior, adequate, and exclusive opportunity for judicial review is provided by law." And when an agency seeks to enforce a regulation against a party, the party can generally attempt to defend itself by arguing that the regulation (and thus the enforcement action) "exceed[s]" the agency's "constitutional or statutory authority." *Dunn-McCampbell Royalty Interest*, 112 F.3d at 1287.

As Corner Post notes, however, "many regulations are never used in enforcement proceedings." Pet'r Br. 37. Moreover, research shows that cases in which an agency rule is held arbitrary, capricious, or in violation of law as a result of a challenge in an enforcement proceeding are rare. Thus, the instability created by the risk that a regulated party might successfully defend itself in a particular enforcement action on grounds that impugn a regulation's validity is orders of magnitude less than the instability created by a perpetual-accrual rule that would permit any person or entity with a new interest in a regulation to bring a new lawsuit many years—even decades—after completion of the rulemaking.

Moreover, it is no answer to say that judicial precedent would eventually settle the issue of a

regulation's validity and thus end the potential for additional lawsuits. Even if a court of appeals were to uphold a challenged rule on the merits, Corner Post's rule would allow a new plaintiff to mount a new challenge in a different circuit, perhaps decades later. Indeed, that is what Corner Post has done here. *See* Pet'r Br. 9 n.1 (acknowledging that the D.C. Circuit upheld the rule at issue in 2014). And even within a circuit that has upheld a particular regulation, a new challenger could evade the adverse precedent by making arguments that the original challenger did not present and that the court of appeals accordingly did not address.

The APA mitigates this potential for perpetual instability by placing a six-year limit on the public's ability to bring affirmative litigation testing the soundness of an agency rulemaking. Casting this limit aside would imperil the longstanding reliance interests of the senior citizen who has made hard financial choices to ensure that she can receive the healthcare she needs, the farm owner who has carefully budgeted for the current growing season, and countless other people and businesses across any number of diverse sectors of American life.

If Congress had written the APA to require this result, this Court would be required to enforce the statute as written. But as the court below and numerous others have concluded, nothing in section 2401(a) or the APA evinces a congressional intent to undermine the reliance that members of the public justifiably place in well-established agency rules addressing health and safety, consumer and investor protections, the environment, and all sorts of other important subjects.

II. Corner Post's view of accrual rests on faulty assumptions about common-law background principles.

Brushing aside the untenable consequences of its perpetual-accrual rule, Corner Post claims that the text of the APA and section 2401(a) "clear[ly]" compel it. Pet'r Br. 13. Corner Post is wrong. Section 2401(a) states that its six-year limitations period begins to run when "the right of action" that is being invoked "first accrues," but nothing in the text of either the APA or section 2401(a) states when accrual takes place. Corner Post attempts to sidestep this statutory silence by applying what it characterizes as "the standard rule": that accrual occurs at the time a given plaintiff "can sue on his underlying claim." Pet'r Br. 11. Based on this belief that accrual must always and everywhere be plaintiff-specific, Corner Post asserts that "the right of action" to bring a facial challenge against a generally applicable regulation must accrue anew whenever that regulation "adversely affect[s] or aggrieve[s]" an entity for the first time. *Id.* (quoting 5 U.S.C. § 702). But the one-size-fits-all approach to accrual that Corner Post purports to find in common-law background principles (and not in any statutory text) runs headlong into this Court's precedents.

This Court has recognized "the hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues,'" *Crown Coat*, 386 U.S. at 517, and has warned against subjecting the issue of accrual to a "mechanical analysis" that risks "thwart[ing] the congressional purpose," *Urie v. Thompson*, 337 U.S. 163, 169 (1949). This caveat is particularly potent in connection with the APA, which creates a right of action to challenge a wide range of agency actions in a wide range of contexts. *Cf. Int'l Tel. & Tel. Corp.*,

Commc'ns Equip. & Syst. Div. v. Local 134, Int'l Bhd. of Elec. Workers, 419 U.S. 428, 439 (1975) (noting that "[b]ecause [the APA] was designed to regulate administrative proceedings throughout a wide spectrum of agency activities, its language is necessarily abstract in many places," and its general provisions must be applied in a context-specific way to "the particular agency proceeding" at issue). Given the diverse range of cases to which section 2401(a) and the APA's cause of action apply, it is hardly surprising that the statutes use broad language that must be interpreted contextually and do not mimic the statutes Corner Post cites as examples of Congress explicitly specifying precisely when a statute of limitations begins to run. *See* Pet'r Br. 25–27.

Misreading *Crown Coat*, Corner Post claims that the opinion interpreted section 2401(a) to hold that a claim cannot accrue until a particular plaintiff is "legally entitled to ask the courts to adjudicate his claim." Pet'r Br. 3 (quoting *Crown Coat*, 386 U.S. at 515). Again, however, *Crown Coat* expressly *rejected* the idea that a single notion of accrual applies inflexibly to all causes of action. *See* 386 U.S. at 517. Rather, *Crown Coat*'s analysis was specific to the cause of action at issue in the case, and it looked to the "congressional purpose" of the statute creating that cause of action and the real-world "impact" of the competing accrual rules proposed by the parties. *Id.* at 514. Indeed, belying Corner Post's contention that a claim always accrues at the time a given plaintiff's cause of action is complete, this Court has explicitly noted that "the answer is not always so simple." *McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019).

For example, in *Reading Co.*, the Court addressed the limitations provision of the Federal Employers'

Liability Act, which at that time provided that a claim must be brought "within two years from the day the cause of action accrued." Pub. L. No. 60-100, § 6, 35 Stat. 65, 66 (1908). Specifically, the Court considered whether a wrongful-death claim under the statute accrues "at the time of death or on the appointment of [an] administrator, who is the only person authorized by the statute to maintain the action." *Reading Co.*, 271 U.S. at 60. The Court took the former view, holding that the cause of action accrues "when all of the events have occurred which determine the liability of the [defendant]." *Id.* at 61. Central to the Court's determination that "the [limitations] period should begin to run from the definitely ascertained time of death rather than the uncertain time of the appointment of an administrator" were the "practical consideration[s] which would lead to the imposition of any period of limitation" in the first place: the assurance that "there may be, at some definitely ascertained period, an end to litigation." *Id.* at 64–65.

In *McMahon v. United States*, 342 U.S. 25 (1951), the Court considered a statute that gave seamen employed on government-owned vessels the right to bring certain admiralty claims against the United States "within two years after the cause of action ar[ose]," if those claims had first been "disallowed" during a prior administrative process. *Id.* at 26 (citations omitted). The petitioner in *McMahon* had filed suit more than two years after the government's "actionable wrongs" but within two years of the end of his administrative proceedings. *Id.* The Court held that the petitioner's lawsuit was untimely, finding it "clear that the proper construction of the [statutory] language" was that the cause of action accrued at the time of the underlying injury and not at the time the

administrative tribunal disallowed the claims. *Id.* at 27. Certainly, as the Court explained, the petitioner "could not sue until his claim had been administratively disallowed." *Id.* at 26. But because claimants were not required to initiate administrative proceedings within any particular timeframe, reading the statute to link accrual to the conclusion of the administrative process could risk "delay[ing] indefinitely knowledge by the Government that a claim existed." *Id.* at 27; *see also Wallace v. Kato*, 549 U.S. 384, 391 (2007) (rejecting a view of accrual that would cause a limitations period to "begin to run only after a plaintiff became satisfied that he had been harmed enough" because this view would place accrual "in the sole hands of the party seeking relief").[2]

Contrary to Corner Post's argument, then, accrual in some contexts occurs before all the statutory prerequisites that would enable a particular plaintiff to file a lawsuit have been satisfied. Rather than look to the statutory "purposes" and "practical ends" that establish that a facial APA challenge to an agency regulation presents one such context, *Crown Coat*, 386 U.S. at 517 (citation omitted), Corner Post simply declares that it does not. The courts of appeals have overwhelmingly declined to follow the analytical shortcut that Corner Post proposes. This Court should do the same.

CONCLUSION

The decision below should be affirmed.

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[2] *Wallace* at one point refers to the time bar at issue as a "statute of repose," 549 U.S. at 391, but the opinion otherwise correctly identifies it as a "statute of limitations," *id.* at 391, 397.

Respectfully submitted,

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