No. _____

In the Supreme Court of the United States

CORNER POST, INC.; NORTH DAKOTA RETAIL ASSOCIATION; NORTH DAKOTA PETROLEUM MARKETERS ASSOCIATION,

Applicants,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Corporate Disclosure Statement

In accordance with Supreme Court Rule 29.6, Applicants Corner Post, Inc., North Dakota Retail Association, and North Dakota Petroleum Marketers Association respectively state that they have no parent corporations and that no publicly held corporation owns 10% of more of their stocks.

TO THE HONORABLE BRETT M. KAVANAUGH, CIRCUIT JUSTICE FOR THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

In accordance with Supreme Court Rule 13(5), Applicants Corner Post, Inc., North Dakota Retail Association, and North Dakota Petroleum Marketers Association respectfully request a 30-day extension of time to file a petition for a writ of certiorari, to and including April 13, 2023. The U.S. Court of Appeals for the Eighth Circuit issued its judgment affirming the district court's dismissal of Applicants' complaint on December 14, 2022. *See* Ex. 1. Unless an extension is granted, the deadline for filing the petition certiorari will be March 14, 2023. Applicants have not previously sought or received an extension of that deadline. This Court has jurisdiction to review the judgment below under 28 U.S.C. §1254(1).

In support of this request, Applicants state as follows:

1. This case implicates critical statute-of-limitations principles under the Administrative Procedure Act. The APA's statute of limitations is in 28 U.S.C. §2401(a), which provides that "every civil action commenced against the United States" must be "filed within six years after the right of action first accrues." A right of action "accrues" under the APA when two things happen: (1) there is a final agency action, 5 U.S.C. §704, and (2) a person "suffer[s] legal wrong" or is "adversely affected or aggrieved by [the] agency action," §702. Thus, the six-year statute of limitations for APA claims doesn't start to run until the agency action adversely affects the plaintiff—regardless of when the agency action was taken. *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 818-19 (6th Cir. 2015) (Sutton, J.) (holding that the "six-year clock starts

ticking" only if "the challenged agency action becomes final and invades a party's legally protected interest").

2. This case involves a challenge to a Federal Reserve Board regulation requiring merchants to pay banks a 21-cent fee—called an "interchange fee"—every time a merchant's customer uses a debit card to pay for goods or services. *See* Regulation II, 76 Fed. Reg. 43394 (July 20, 2011). Debit cards are an enormously popular form of payment; nationwide, consumers use them in more than a third of non-cash transactions, or roughly 80 *billion* transactions every year. That leaves merchants with no practical choice but to accept debit-card payments from their customers. And, under Regulation II, they must pay banks the 21-cent fee for every one of those debit-card transaction.

3. Debit-card interchange fees were not governed by federal regulation until 2010, when Congress passed the Durbin Amendment as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. In the Durbin Amendment, Congress required the Federal Reserve Board to set a debit-card interchange fee, and told the Board what guidelines to follow when doing so. The debit-card interchange fee was to be "reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. §1693o-2(a)(3)(A). Congress further told the Board to "distinguish between" certain costs it "shall" consider and others that it "shall not consider." *Id.* §1693o-2(a)(4)(B).

4. After notice and comment, the Federal Reserve published "Regulation II," which sets the debit-card fee. *See* Regulation II, *supra*. Despite Congress's clear

instruction, the Federal Reserve set the fee at 21 cents per transaction by basing it in part on costs that Congress prohibited the Board from considering. Nor did the Board follow Congress's instructions to set a fee that is reasonable and proportional to the cost of a debit-card transaction; the relevant average costs for processing a debit-card transaction range from only 3.6 to 5 cents per transaction, but the Board set the fee at 21 cents per transaction. This discrepancy between the actual costs to process debit-card transactions and the Board's 21-cent fee continues to yield for big banks a windfall of billions of dollars every year.

5. Corner Post is a truck stop and convenience store in North Dakota that opened for business and began accepting debit-card payments from its customers in March 2018. Corner Post, along with other Applicants, sued the Federal Reserve Board and challenged Regulation II in federal district court in North Dakota in 2021. They alleged that the 21-cent fee was contrary to law because the fee is not reasonable or proportional to the costs of a debit-card transaction, and because the Federal Reserve factored into the fee costs that the Durbin Amendment expressly prohibited it from considering. Based on the text of §2401(a) and the APA, accrual principles, and Judge Sutton's unanimous opinion for the Sixth Circuit in *Herr*, Corner Post argued that its suit was timely because its six-year clock did not begin to run until 2018—the first point in time at which Corner Post accepted debit-card payments and thus became "adversely affected" and "aggrieved" by Regulation II. 5 U.S.C. §702.

6. The district court dismissed Applicants' 2021 suit as untimely, and the Eighth Circuit affirmed. In the Eighth Circuit's view, Corner Post's six-year clock

began running in 2011—when the Federal Reserve published Regulation II—even though Corner Post *did not exist until 2018*. For according to the Eighth Circuit, "liability is fixed and plaintiffs have a complete and present cause of action upon publication of the final agency action." Ex. 1, at 9. The Eighth Circuit's rejection of *Herr* vitiates the text of §2401(a) and the APA and entrenches an existing circuit split about when §2401(a)'s statute of limitations starts to run.

7. Between now and the current due date of the petition, counsel has substantial obligations in other pending cases, including briefing multiple state constitutional questions of first impression on interlocutory review in *League of Women Voters of Utah et al. v. Utah State Legislature et al.*, No. 2022-0991-SC (Utah S. Ct.); responding to a nearly 70-page motion to dismiss in *Garfield County et al. v. Biden et al.*, No. 4:22-cv-00059 (D. Utah), which concerns whether President Biden's designations of the Bears Ears National Monument and Grand-Staircase Escalante National Monument violated the Antiquities Act; and overseeing ongoing discovery in various litigation matters.

8. Applicants request a modest extension to decide whether to file a petition for writ of certiorari and to prepare a petition that fully addresses the important and far-reaching issues and circuit split raised by the decision below.

WHEREFORE, for the foregoing reasons, Applicants respectfully request that their time to file a petition for a writ of certiorari be extended to and including April 13, 2023.

Respectfully submitted,

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