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

REPLY BRIEF FOR PETITIONER

Stephanie A. Martz
NATIONAL RETAIL FEDERATION
1101 New York Ave., NW
Suite 1200
Washington, DC 20005

Tyler R. Green
Counsel of Record
CONSOVOY MCCARTHY PLLC
222 S. Main St., 5th Fl.
Salt Lake City, UT 84101
(703) 243-9423
tyler@consovoymccarthy.com

Bryan Weir
Frank H. Chang*
Seanhenry VanDyke*
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209

*Supervised by principals of the firm who are members of the Virginia bar.

January 12, 2024

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The government's arguments confuse what statute this case is about. It's about 28 U.S.C. §2401(a), an accrual-based statute of limitations that governs APA claims. But in trying to construe §2401(a), the government looks not to its operative text—"first accrues"—but to *other* limitations periods in statutes like the Hobbs Act. It does so no fewer than seven times. *See* U.S.Br.15, 18, 20, 29, 30, 31, 34. Those other statutes, however, do not contain the word "accrue." Rather, Congress specifically started those limitations periods on the date of agency action. Despite those plain textual differences, the government now wants this Court to construe §2401(a)'s accrual rule to work like those limitations periods.

That gets things backwards. Two bedrock rules of statutory construction confirm that the textual differences mean Congress wanted a *different* rule for APA claims than for claims under statutes like the Hobbs Act. First, "absent provisions cannot be supplied by the courts," and doing so is "particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision." *Rotkiske v. Klemm*, 140 S.Ct. 355, 360-61 (2019) (cleaned up). Second, "Congress expresses its intentions through statutory text" and, "[a]s this Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any statutory text." *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2496 (2022). No matter how hard the government tries, it cannot escape Congress's choice to make

§2401(a) an accrual rule. That means standard accrual rules—not date-of-agency-action rules—govern the limitations period for APA claims.

The rest of the government's brief, reduced to its essence, amounts to little more than fearmongering—a warning that applying §2401(a) according to its text will unleash a flood of regulatory challenges. The problem with that argument? The government urged the exact opposite view when opposing certiorari, saying then that it was "relatively uncommon" for "a person who was not injured when the rule was promulgated [to] become[] injured at a later date." BIO.11. So it is. No evidence exists—the government cites none—that applying §2401(a) according to its text will substantially burden agencies or courts. And if that happens, it's up to Congress—not this Court—to decide whether that warrants a new limitations rule. The Court should reverse the judgment below and hold that §2401(a)'s clock starts for an APA plaintiff no sooner than the day a regulation first harms that plaintiff.

ARGUMENT

I. The statute of limitations for APA claims does not start until a plaintiff can sue under §702.

A. Because §2401(a) is an accrual-based limitations period, it starts only when a plaintiff has a "complete and present cause of action."

The government and Corner Post agree on this much: "[A]ll APA suits are subject to Section 2401(a)'s

general limitation on claims against the United States." U.S.Br.12. But that's where our agreement ends. The rest of the government's brief offers a good-for-this-case-only view of §2401(a)'s limitations period that bears no resemblance to modern statutory construction.

1. Under §2401(a), plaintiffs must file their APA claims "within six years after the right of action first accrues." The question presented here is when do APA claims "first accrue[]" for purposes of §2401(a). And attempts to "interpret[] limitations provisions" must "always" "begin by analyzing the statutory language." *Rotkiske*, 140 S.Ct. at 360.

Corner Post did so and explained (Petr.Br.14-17) that since the nineteenth century—when Congress first passed the text now recodified in §2401(a), *see Herr v. U.S. Forest Service*, 803 F.3d 809, 815-16 (6th Cir. 2015)—it has been commonly understood that "an action *accrues* when the plaintiff has a right to commence it." 1 A. Burrill, A Law Dictionary and Glossary 17 (1850). This Court's precedent confirms that general understanding: "In common parlance a right accrues when it comes into existence." *Gabelli v. SEC*, 568 U.S. 442, 448 (2013) (citing dictionaries and treatises "from the 19th century up until today"). The Court has thus interpreted "accrue" in §2401(a)'s predecessors to mean that a "claim" must be filed "within six years after suit could be commenced thereon against the government." *United States v. Lippitt*, 100 U.S. 663, 668 (1879); Chamber.Br.6-8 (collecting cases). That also comports with the background inter-

pretive principle "that 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.*, 522 U.S. 192, 201 (1997). And "a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Id.*

2. The government, however, all but ignores §2401(a)'s operative text—"right of action first accrues." The closest the government comes to analyzing §2401(a)'s text is an argument halfway through its brief faulting Corner Post's rule for being "inconsistent with the second sentence of Section 2401(a)." U.S.Br.23. On its terms, that does not answer Corner Post's arguments (Petr.Br.14-17) about what "first accrues" means, effectively conceding the point.

Nor does Corner Post's textual analysis of "first accrues" conflict with §2401(a)'s second sentence. That sentence tolls the limitations period for "any person under legal disability or beyond the seas *at the time the claim accrues*." 28 U.S.C. §2401(a) (emphasis added). Even the government agrees: "[T]he direct effect of that sentence is to 'toll the statute of limitations,' not to 'provide an accrual rule.'" U.S.Br.24 (cleaned up).

But the government still insists that under the second sentence "a claim can 'accrue[]' for purposes of Section 2401(a) at a time when a person … is unable to 'sue on that claim'" or "is legally unable to sue." U.S.Br.24. That contention simply fails to "distinguish between the *accrual* of the plaintiff's claim and

the *tolling* of the statute of limitations." *Holland v. Florida*, 560 U.S. 631, 647 (2010) (quoting *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990)). "Accrual is the date on which the statute of limitations begins to run." *Cada*, 920 F.2d at 450. "Tolling doctrines stop the statute of limitations from running even if the accrual date has passed." *Id.*

Contrary to the government's view, a plaintiff under "disability" or "beyond the seas" *can* "legally" sue when he is first harmed; his "personal handicap or impediment" simply "prevent[s] him from bringing a timely suit." *Goeway v. United States*, 612 F.2d 539, 544 (Ct. Cl. 1979). So although his claim "accrues," Congress has tolled the limitations period until his impairment ceases. *Id.* Corner Post, on the other hand, wasn't harmed until 2018. Because it was "legally unable to sue" until then, that is when its claim "first accrue[d]."

3. With no analysis of §2401(a)'s operative text, what does the government rest its affirmative case on? This theory: That because Congress has in *other* statutes—such as the Hobbs Act—adopted limitations periods that expressly run from the date of agency action, this Court should hold that §2401(a)'s accrual-based limitations period *also* runs from the date of agency action. *See* U.S.Br.15-18, 29-31. This theory flouts bedrock interpretive principles and fails for at least four reasons.

First, accepting the government's theory would violate the "fundamental principle of statutory interpretation that absent provisions cannot be supplied by

the courts.'" *Rotkiske*, 140 S.Ct. at 360-61 (cleaned up). Over two pages of text and a 38-line footnote, the government identifies 29 examples of limitations periods that run from the "entry" or "promulgation" or "publication" or "issu[ance]" of an agency action. U.S.Br.15-16 & n.4. But not one of those 29 statutes contains the word "accrue." And §2401(a) does not contain the words "entry" or "promulgation" or "publication" or "issu[ance]."

As a result, reading those absent words into §2401(a) as the government urges "'is not a construction of [§2401(a)], but, in effect, an enlargement of it by the court." *Rotkiske*, 140 S.Ct. at 361. Such "[a]textual judicial supplementation is particularly inappropriate when, as here, Congress has shown"—at least 29 times—"that it knows how to adopt the omitted language or provision." *Id.*

The government's repeated reliance on *Coal River Energy, LLC v. Jewell*, 751 F.3d 659 (D.C. Cir. 2014), fails for the same reason. U.S.Br.29-30, 34, 36 n.9. In the statute at issue in *Coal River*, Congress said that "[a] petition for review of any action … shall be filed in the appropriate Court within sixty days from the date of such action." 30 U.S.C. §1276(a)(1). Because that limitations period runs from a rule's promulgation, *Coal River* sheds no light on what "accrue" means under §2401(a). So too for *JEM Broadcasting Co. v. FCC*, 22 F.3d 320 (D.C. Cir. 1994) (discussing agency action subject to Hobbs Act).

The government's second error is a variant of its first. It contends that because "Congress has rejected"

the standard accrual rule "in the Hobbs Act and other statutes," that rule should not apply to §2401(a). U.S.Br.30. But that is not how the standard accrual rule works. Only if "Congress has told us otherwise *in the legislation at issue*," *Ferbar*, 522 U.S. at 201 (emphasis added), will the Court reach the "odd result" of starting the limitations period before a plaintiff can sue, *Reiter v. Cooper*, 507 U.S. 258, 267 (1993). The legislation at issue here is §2401(a)—not the Hobbs Act or other statutes. And nothing in §2401(a) indicates that Congress wanted its accrual-based limitations period to start before a plaintiff could sue. In fact, this Court already stated that Congress intended the *opposite* with §2401(a). *See Crown Coat Front Co. v. United States*, 386 U.S. 503, 514 (1967).

Third, the government asks for a special exemption from the Court's background accrual rules. The government acknowledges (U.S.Br.25-32) that the Court has "repeatedly recognized that Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 418 (2005). But those precedents shouldn't apply here, the government contends, because they are "accrual rules" from "different contexts." U.S.Br.25. "None of those decisions involved administrative-law claims like the one at issue here." U.S.Br.26 & n.8.

That argument can't clear the starting blocks. *Crown Coat* itself was an administrative-law case. It

applied §2401(a) to a dispute over whether an equitable contract adjustment "was arbitrary, capricious, or not supported by substantial evidence." 386 U.S. at 513. And the Court applied the presumption that a limitations period cannot start before a plaintiff can sue. A contrary outcome was "not an appealing result, nor in [the Court's] view, one that Congress intended." *Id.* at 514.

Beyond that, the government errs by suggesting that the Court has applied the "standard rule" only in narrow circumstances. U.S.Br.26, 28. The Court has applied it to ERISA claims, *Ferbar*, 522 U.S. at 201; to claims under the False Claims Act, *Graham Cnty.*, 545 U.S. at 419; to Title VII claims, *Green v. Brennan*, 578 U.S. 547, 554-55 (2016); and to an inmate's collateral attack on his sentence, *Johnson v. United States*, 544 U.S. 295, 305 (2005), among others, U.S.Br.26 n.8. This breadth of contexts only further underscores that the government is seeking a special rule just for it.[1]

And this Court has already said that the phrase "first accrues" does not "create[] a special accrual rule for suits against the United States." *Franconia Assocs. v. United States*, 536 U.S. 129, 145 (2002). Section 2501(a) uses that exact language for other claims

[1] The government also misreads *Reading Co. v. Koons*, 271 U.S. 58 (1926). *Reading* followed the standard rule, holding that the limitations period for a wrongful-death claim accrued on the decedent's death because the cause of action really belonged to the beneficiaries: "At the time of death there are identified persons for whose benefit the liability exists and who can start the machinery of law in motion to enforce it." *Id.* at 62.

against the United States. 28 U.S.C. §2501. In *Franconia* the government argued that "the 'first accrues' qualification ensures that suits against the United States are filed on 'the earliest possible date,' thereby providing the Government with 'reasonably prompt notice.'" 536 U.S. at 144 (internal citation omitted). This Court disagreed, finding that text "unexceptional: A number of contemporaneous state statutes of limitations applicable to suits between private parties also tie the commencement of the limitations period to the date a claim 'first accrues.'" *Id.* at 145. And the Court said that "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties." *Id.*

Undeterred, the government repeats its *Franconia* arguments here. The government wants "prompt resolution of disputed issues." U.S.Br.15. And it thinks its policy arguments "have special force in the context of challenges to agency action," which is a "distinct context." U.S.Br.17, 26. So, the government contends, it deserves a different rule than "whatever the usual accrual rule may be in suits between private parties." U.S.Br.29.

Adopting those arguments here after rejecting them in *Franconia* would flout the longstanding rule "that when Congress uses the same language in two statutes having similar purposes … it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233 (2005). *Franconia* forecloses the government's view that it deserves spe-

cial rules for claims against it. *Franconia* also forecloses the argument that §2401(a) should be read narrowly because it is a waiver of sovereign immunity. U.S.Br.32; *see* Petr.Br.24.

Finally, the government's rule would result in the meaning of "accrue" changing based on the *type* of underlying claim. According to the government, "accrue" in §2401(a) could take its established meaning "[o]utside of the administrative-law context," but mean something entirely different when applied to "facial challenges to agency regulations." U.S.Br.31. But nothing in §2401(a)'s text suggests that the meaning of "accrue" varies based on the nature of the claim subject to it. Instead, the government's theory (again) invokes what "Congress has enacted" in separate "special judicial-review schemes governing discrete categories of agency action" and pleads with this Court to "[a]pply[] that same approach" to §2401(a). U.S.Br.15; *see also, e.g.*, U.S.Br.31 ("consideration of more specific review provisions"). No case from this Court, however, supports that rudderless approach to construing "accrue" in §2401(a). Contrary to the government's suggestion, U.S.Br.28, 31, *Crown Coat* did the opposite and adopted Corner Post's view by holding that §2401(a)'s limitations period starts only once a plaintiff can sue. 386 U.S. at 514. At bottom, then, the government's theory is that "any result consistent with [its] account of the statute's overarching goal must be the law." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017). Not so.

* * * * *

Corner Post doesn't want "to delay the running of Section 2401(a)'s limitations period" (U.S.Br.10) or a "delayed-accrual approach" (U.S.Br.31). It only wants this Court to interpret §2401(a) like every other accrual statute. The government's few additional reasons why the Court should interpret "accrue" in §2401(a) differently than it has interpreted "accrue" in every other statute do not change that. Perhaps "[k]eying the deadline for seeking judicial review to the date on which the challenged agency action occurs" does "serve[] important purposes." U.S.Br.17. And Congress might well have wanted to serve those purposes when it enacted other limitations periods expressly tied to the date of agency action. U.S.Br.29-31. But in the APA, "Congress chose not to do so." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 128 (2018). That irrefutable textual difference amply justifies rejecting the discredited purpose-driven, "functional interpretive approach" the government invokes. *Id.* The Court should "decline[] the Government's invitation to override Congress' considered choice by rewriting the words of the statute." *Id.*

B. An APA claim is not complete and present until the plaintiff "suffer[s] legal wrong" or is "adversely affected or aggrieved" by agency action.

1. Accrual-based statutes of limitations like §2401(a) do not work in a vacuum. Because "a right accrues when it comes into existence," *Gabelli*, 568 U.S. at 448, an accrual-based limitations period's start date depends on the specific underlying claim.

Here, §702 provides the cause of action for APA claims. It entitles a plaintiff "suffering legal wrong" or "adversely affected or aggrieved by agency action" to "judicial review thereof." 5 U.S.C. §702. This Court has "interpreted §702 as requiring a litigant to show, at the outset of the case, that he is injured in fact by agency action." *Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 127 (1995). An APA plaintiff thus can "file suit and obtain relief," *Ferbar*, 522 U.S. at 201, only after a regulation harms it. Only then does §2401(a)'s limitations period start.

2. The government now contends that the APA's cause of action arises from 5 U.S.C. §704, and that §702 is a mere "statutory restriction[] that Congress has imposed on that cause of action." U.S.Br.2. Without expressly saying so, the government's pivot implies that if an APA claim arises from §704, then an APA claim is complete—meaning §2401(a)'s clock starts running—upon final agency action alone. The only problems with the government's apparent new view—which it did not press below—are that it contradicts the statutes' text, this Court's precedent, and the government's prior arguments to this Court.

Start with the statutes' text. Section 702 is titled "[r]ight of review" and provides that "[a] *person* suffering legal wrong because of agency action, or adversely affected by agency action …, is *entitled* to judicial review thereof." 5 U.S.C. §702 (emphasis added). Section 704, in contrast, is titled "[a]ctions reviewable" and provides that only "[a]gency action made reviewable by statute and final agency action for which there

is no other adequate remedy in a court are *subject* to judicial review." 5 U.S.C. §704 (emphasis added). Section 704 is primarily an exhaustion requirement that prevents a plaintiff "aggrieved" by a "preliminary, procedural, or intermediate agency action" from filing a premature challenge. *Id.* That is why "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.

Next review this Court's cases. They repeatedly recognize §702 as "a general cause of action" for those "'adversely affected or aggrieved by agency action.'" *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984) (quoting 5 U.S.C. §702); *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 882-83 (1990) (outlining the elements of §702's cause of action). In other words, §702 "provides the general right to judicial review of agency actions under the APA." *Darby v. Cisneros*, 509 U.S. 137, 146 (1993). In turn, this Court has recognized that §704 requires the "'agency action' in question must be 'final agency action.'" *Lujan*, 497 U.S. at 882; *see also Darby*, 509 U.S. at 146 (stating that §704 "establishes when such review [under §702] is available").

Finally, the government's prior briefs in this Court have argued that the "APA … provide[s] a cause of action to persons aggrieved by final agency action. 5 U.S.C. 702." U.S.Br. 13, *Health Care Serv. Corp. v. Pollitt* (No. 09-38), 2010 WL 360215 (Feb. 2010) (Kagan, S.G.). That's no accident; government briefs over the last twenty-five years repeatedly say the same thing. *See, e.g.*, U.S.Br. 34, *Mach Mining, LLC v.*

EEOC (No. 13-1019), 2014 WL 5464087 (Oct. 2014) (Verrilli, S.G.) (identifying §702 as a "cause of action"); U.S.Br. 42, *U.S. Dep't of Army v. Blue Fox, Inc.* (No. 97-1642), 1998 WL 541980 (Aug. 1998) (Waxman, S.G.) (identifying §702 as the APA's "cause of action").

The upshot? The government's *ipse dixit* here does nothing to undermine the textual conclusion—borne out by precedent and the government's own prior briefing—that §702 provides the "right of action" to discern when an APA challenge "first accrues." 28 U.S.C. §2401(a). And §702 means what it says: APA claims cannot accrue before a plaintiff is injured or aggrieved by final agency action.

3. The government offers just two brief textual arguments on §702 itself. First, the government points out that statutes like the Hobbs Act have an "aggrieve[ment]" requirement too. U.S.Br.21. "Congress thus has perceived no inconsistency between requiring a party-specific showing of aggrievement and treating the date of the challenged agency action as triggering the limitations period for all plaintiffs." *Id.* But this argument conflates a cause of action with a limitations period, and (again) ignores the intentional textual differences between §2401(a) and statutes like the Hobbs Act.

Unlike the APA, the statutes the government cites house both the cause of action *and* the limitations period. The Hobbs Act, for example, provides the cause of action: "Any party aggrieved by the final order may … file a petition to review the order in the court of

appeals." 28 U.S.C. §2344. And it provides the limitations period: Filing must occur by "60 days after [the final order's] entry." *Id*. The "aggrievement" requirement appears in the cause of action, not the limitations period. Because the Hobbs Act's limitations period is expressly tied to the agency action, the cause of action's "aggrievement" requirement plays no role in when that limitations period starts.

The APA works differently. Like the Hobbs Act, its cause of action has an "aggrievement" requirement. 5 U.S.C. §702. But unlike the Hobbs Act (and the government's other examples), its limitations period is *not* tied to the date of agency action. Instead, Congress tied it to when the "right of action first accrues." 28 U.S.C. §2401(a). That link between claim accrual and the date a party is "aggrieved" means no one can know the date of the former without first knowing the date of the latter. *See supra* 11-12. Again, Congress could have adopted an APA limitations period that runs like the Hobbs Act's. But it chose an accrual-based rule instead.

The government's second argument about §702's text fares no better. U.S.Br.21-23. It begins by pointing to §702's text that "[n]othing herein … affects other limitations on judicial review." It then argues (correctly) that §2401(a) is a "limitation on judicial review." U.S.Br.22. But the conclusion the government tries to draw—that §2401(a)'s accrual rule cannot be tied to §702's aggrievement requirement because §702 itself would then "affect[]" §2401(a)—does not follow.

To start, Congress added the "[n]othing herein" proviso when it amended the APA in 1976 to "eliminat[e] the defense of sovereign immunity in APA cases." *Darby*, 509 U.S. at 152. The phrase was meant to ensure that "[t]he elimination of the defense of sovereign immunity did not affect any other limitation on judicial review that would otherwise apply under the APA." *Id.* It was not meant to alter §2401(a)'s standard accrual rule or §702's aggrievement requirement.

Perhaps more to the point, the APA does not alter how §2401(a) works. Like all accrual-based limitations periods, §2401(a) starts running when a plaintiff has a "complete and present cause of action" and can sue. *Supra* 2-4. That analysis necessarily turns on the underlying cause of action. For example, a FOIA "cause of action first accrues when the plaintiff has actually or constructively exhausted his administrative remedies and therefore 'can institute and maintain a suit in court.'" *Porter v. CIA*, 579 F. Supp. 2d 121, 126 (D.D.C. 2008). That doesn't mean a FOIA claim somehow "affects" how 28 U.S.C. §2401(a) works. It is an *application* of that statute of limitations. So too with §702 claims and §2401(a).

II. Policy considerations support starting §2401(a)'s limitations period when APA plaintiffs are first injured by final agency action.

The government does not openly dispute this Court's teachings that the APA "embodies the basic presumption of judicial review," *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 140 (1967) (citing 5 U.S.C.

§702), and that the APA's "'generous review provisions' must be given a 'hospitable' interpretation," *id.* at 141. But almost every one of the government's policy arguments contradicts those principles.

A. The government primarily worries that ruling against it will "impose substantial burdens on agencies and reviewing courts" and "allow a far broader set of potential plaintiffs to pursue belated challenges to agency regulations." U.S.Br.39-40. That represents a "change[]" in the government's "argument between the certiorari and merits stages." *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 434 (2016). In opposing certiorari, the government told the Court that it is a "*relatively uncommon* … circumstance where a person who was not injured when the rule was promulgated becomes injured at a later date." BIO.11 (emphasis added and parenthesis removed). The Court should see this opportunistic change of heart for what it is.

As the government's original position implicitly acknowledges, most APA challenges "involve[] settings in which the right of action happened to accrue at the same time that final agency action occurred." *Herr*, 803 F.3d at 819-20. That will still be true under Corner Post's rule. And experience has shown that challenges like Corner Post's will remain "relatively uncommon." It has been almost ten years since the Sixth Circuit rejected the government's preferred accrual rule in *Herr*, yet there has been no escalation in challenges to old regulations in that circuit. NFIB.Br.21-22. And the government doesn't dispute

that rules governing standing, alter egos, and equitable defenses will stop end-runs around expired limitations periods. *See* Petr.Br.38-40.

B. The government's remaining policy complaints purport to show examples of its flawed overarching premise—how ruling for Corner Post will substantially burden agencies and reviewing courts. U.S.Br.39-46. Those examples fail on their own terms too.

1. The government laments that siding with Corner Post "would give *every* newly aggrieved regulated party a six-year window for pursing such a challenge, whether or not that entity is ever actually made a defendant in an enforcement action." U.S.Br.40. But the government lost that battle in *Abbott Labs.* The "key aim of [that] decision … was to expand the opportunities for judicial review by allowing *both* facial, pre-enforcement challenges *and* as-applied challenges to agency action." *PDR Network, LLC v Carlton & Harris Chiropractic, Inc.*, 139 S.Ct. 2051, 2060 (2019) (Kavanaugh, J., concurring in the judgment). The question presented here gives this Court no basis to revisit *Abbott Labs*, no matter how much the government would like to do so.

2. The government also worries that adopting Corner Post's rule will open the doors to substantive *and procedural* attacks on agency rules more than six years after they become final. *See* U.S.Br.41 (collecting cases). Even under Corner Post's rule, however, the procedural attacks mentioned in the government's cases will likely still be barred six years after a rule

becomes final. Such "procedural" challenges address "the method used in promulgating the regulation, such as that it was issued without adequate notice, or that the government inadequately responded to comments." *Coal River*, 751 F.3d at 664. Those types of procedural failures necessarily harm only those parties that could have participated in that process.

For example, "[t]he function of notice and comment rulemaking is to give interested parties 'an opportunity to participate' in the rulemaking process," *WJG Tel. Co. v. FCC*, 675 F.2d 386, 389 (D.C. Cir. 1982); 5 U.S.C. §553(c). It "is designed to ensure that affected parties can influence agency decision making at an early stage." *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979). If an agency ignores that requirement, existing members of the public suffer a "procedural" injury because "they have been denied the ability to file comments." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).

But it is hard to see how nonexistent entities could be deemed "interested parties" whose procedural rights were violated. They cannot "demonstrat[e] that they experienced any harm" because they could not have submitted comments. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S.Ct. 2367, 2385 (2020). What's more, nonexistent parties cannot satisfy the APA's harmless error rule because nothing would change for them had the agency acted properly; again, they still could not have submitted comments. *Id.*

That fact also answers the government's concerns that "procedural challenges to agency actions taken decades ago would also create a[n] … evidentiary problem." U.S.Br.44. And even if procedural objections could proceed after six years, any evidentiary problems would be the agency's own making for disregarding its obligations under the Federal Records Act. Petr.Br.41. The government incorrectly suggests (without citation) that the Federal Records Act "has never entailed the permanent retention of all the materials that agencies consider in determining whether to take particular actions." U.S.Br.44. Such materials are *precisely* the type of records that the Act requires the government to preserve. *See* 44 U.S.C. §3101. Whatever types of "federal records are" properly "deemed 'temporary' and can be destroyed after a certain period approved by the National Archives and Records Administration," U.S.Br.44-45, rulemaking records fall outside that list. The National Archives has provided "granular categories of records that should be permanently retained," including "records that … '[p]rovide evidence of significant policy formulation and business processes of the Federal Government'; and '[p]rovide evidence of Federal deliberations, decisions, and actions relating to major social, economic, and environmental issues." *Citizens for Resp. & Ethics in Washington v. NARA*, No. 20-739, 2021 WL 950142, at *2 (D.D.C. Mar. 12, 2021) (quoting Nat'l Archives, Appraisal Policy §8 (Sept. 2007)). In particular, the National Archives "seeks to retain that portion" of records "containing significant documentation of Government activities and essential to *understanding* and *evaluating* Federal actions." Appraisal Policy §7 (emphasis added). At any rate, this

argument has no relevance in cases like this one, which hinge on the meaning of statutory text and the scope of agency authority.

3. The government also complains that starting §2401(a)'s accrual-based limitations period from the date of injury or aggrievement would "require courts to perform backward-looking inquiries about when a plaintiff first became sufficiently aggrieved by agency action to be entitled to sue." U.S.Br.43. But courts do that sort of analysis all the time. The "discovery rule," for example, requires courts to look back to discern when "a plaintiff *actually* discovers the facts" underlying his claim and "also when a hypothetical reasonably diligent plaintiff would have discovered them." *Merck & Co. v. Reynolds*, 559 U.S. 633, 646-47 (2010). This Court rejected the notion that such a "discovery rule" was "too complicated for judges to undertake." *Id.* at 652. That sort of retrospective and "hypothetical" analysis is far more difficult than asking when a regulation first "aggrieved" a plaintiff.

Undeterred, the government again points to *Pennsylvania Department of Public Welfare v. HHS*, 101 F.3d 939 (3d Cir. 1996), for support. As Corner Post already explained (Petr.Br.40-41 n.3), that case addressed ripeness, not when a plaintiff first suffered an injury. The inquiries are distinct and employ different analyses. 101 F.3d at 945-46 (outlining the ripeness factors). And the *Public Welfare* court had no trouble pinpointing when the plaintiff in that case was first "aggrieved" by the agency action. *Id.* at 947.

The government's real problem is this: As the defendant in APA cases, it wants the limitations period to start as early as possible—when the injury is "imminent" rather than when it becomes "actual." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992). Yet as the government seems to acknowledge (U.S.Br.43), distinguishing between those two moments would be necessary only in an exceptionally rare case—if the short time between when an injury matures from "imminent" to "actual" would be outcome determinative. And in that rare instance—when the limitations period would expire when measured from "imminent" injury but not from "actual" injury—the government has all the discovery tools it needs to make its case.

4. That leaves a final point on fairness. The government agrees that Corner Post "will never be a defendant" in an enforcement action related to Regulation II because Regulation II does not directly regulate merchants. U.S.Br.38. The government thinks that fact makes it "more reasonable, not less, to require petitioner to use the petition-for-rulemaking mechanism." U.S.Br.38-39. That the government continues to take this position after previously "acknowledg[ing] that judicial review may not always be available under that route" is extraordinary. *PDR Network*, 139 S.Ct. at 2065-66 (Kavanaugh, J., concurring in the judgment).

Look no further than this case to see why petitioning for a rulemaking is futile. After the Court granted certiorari, the Board issued an NPRM proposing to amend Regulation II. The Board has proposed changes to many parts of the rule, but it apparently is

refusing to revisit the part that Corner Post challenges. Petr.Br.10-11; U.S.Br.8. Why the Board is striving to avoid that part of the rule is no secret: It wants to avoid changes to the most vulnerable part of Regulation II that would trigger a new statute of limitations for new challenges under the "reopening" doctrine. *See CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 109-10 (D.C. Cir. 2006). Whether the Board's gambit succeeds, it still shows that the Board exercises control over every path to judicial review *except* this one—and the Board wants to kill even this one to prevent Corner Post from receiving its own day in court.

Members of this Court have long highlighted the unfairness inherent in cutting off all avenues to judicial review this way. *See, e.g.*, *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289-91 (1978) (Powell, J., concurring). And "that unfairness raises a serious constitutional issue." *PDR Network*, 139 S.Ct. at 2062 (Kavanaugh, J., concurring in the judgment). For example, "[b]arring defendants in as-applied enforcement actions from raising arguments about the reach and authority of agency rules enforced against them raises significant questions under the Due Process Clause." *Id.* Those same questions exist here too. Corner Post is subject to Regulation II every day via the debit-card interchange fees it pays. But the government would have this Court bar Corner Post from seeking any relief from Regulation II solely because it did not "exist[] back when [the] agency order was issued." *Id.* Not even federal statutes enjoy that kind of repose. *See* States.Br.13-19 (explaining how the government's rule elevates regulations above statutes).

Trying to ameliorate that unfairness, the government cites other statutes like the Hobbs Act where Congress actually cut off facial challenges to some regulations after a specific set time. U.S.Br.33-34. If those statutes are fair, the government's argument goes, then it is fair to foreclose review here. The government's premise is questionable; even where Congress has expressly cut off facial challenges for "a new … company that was not in existence at the time the regulation was promulgated," that choice is at least "superficially troubling" and the arguments against doing so are "by no means insubstantial." *Coal River*, 751 F.3d at 662-63. Courts enforce those limits, however, because Congress made that express choice in the statute. And allowing later facial challenges would "frustrate Congress's objective that facial challenges to the regulation be confined to a limited period." *Id*. at 663.

But Congress made no such express choice with APA claims. And because the APA "creates a basic presumption of judicial review for one suffering legal wrong because of agency action," *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S.Ct. 361, 370 (2018) (cleaned up), the Court should not impose that unfairness on Corner Post when Congress has declined to do so.

Indeed, "[i]t is not [the Court's] role to second-guess Congress' decision to include a[n accrual-based] provision, rather than a[n] [agency-action based] provision." *Rotkiske*, 140 S.Ct. at 361. "The length of a limitations period 'reflects a value judgment concern-

ing the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Id.* "It is Congress, not this Court, that balances those interests." *Id.* For statutes like the Hobbs Act, Congress has chosen repose over litigation of "valid claims." For the APA, Congress has chosen the opposite. All that's left for this Court to do is enforce that "value judgment[]." *Id.*

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

Stephanie A. Martz
NATIONAL RETAIL FEDERATION
1101 New York Ave., NW
Suite 1200
Washington, DC 20005

Tyler R. Green
Counsel of Record
CONSOVOY MCCARTHY PLLC
222 S. Main St., 5th Fl.
Salt Lake City, UT 84101
(703) 243-9423
tyler@consovoymccarthy.com

Bryan Weir
Frank H. Chang*
Seanhenry VanDyke*
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209

*Supervised by principals of the firm who are members of the Virginia bar.

January 12, 2024

Counsel for Petitioner