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* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF is committed to ensuring federal agency rulemaking is subject to appropriate checks and balances. AFPF believes judicially created barriers to meaningful Article III review of allegedly unlawful regulations are inconsistent with the separation of powers. Nor should federal agencies be allowed to use the threat of massive penalties and imprisonment as a weapon to force businesses to submit to unlawful administrative demands. Due process requires that regulated parties not face an unconstitutional Hobson's choice: comply with an administrative requirement they believe is unlawful or violate the

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[1] *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

law, bet their liberty, and risk imprisonment. The courthouse doors should not be barred to parties, like Petitioner, who suffer substantial downstream pocketbook harm because of unlawful regulations, which are void ab initio.

SUMMARY OF ARGUMENT

The resolution of the question presented by this case begins and ends with the statutory text. As Petitioner ably explains, *see* Pet. Br. 14–19, a plaintiff's Administrative Procedure Act ("APA") claim "first accrues" under 28 U.S.C. § 2401(a) when an agency regulation first causes *that* plaintiff to "suffer[] legal wrong" or be "adversely affected or aggrieved" under 5 U.S.C. § 702. That is, an APA claim accrues separately for each individual plaintiff—and the statute of limitations begins to run—when *that* plaintiff is injured by an agency action or regulation. Causes of action do not accrue as to the world; they must be analyzed on a party-by-party basis. The focus, for statute of limitations purposes, is on when the plaintiff was harmed, as opposed to when the agency finalized its regulation; 28 U.S.C. § 2401(a) does not morph into a statute of repose for these APA claims. Section 702's plain text compels this commonsense result, making pellucidly clear that, to the extent a statute of limitations applies, the six-year clock for bringing an APA claim challenging a regulation begins to run when a person suffers cognizable injury because of an agency rule.

Petitioner's plight illustrates why this must be the case. The Board regulation at issue was issued in July 2011. *See* App. 6. Petitioner, "a truck stop and convenience store," "opened for business in March

2018." App. 52 (Compl. ¶ 19). Petitioner did not suffer monetary harm because of the Board's regulation until 2018, when it first began accepting debit cards and paying the Board's interchange fee. *See* Pet. App. 54 (Compl. ¶ 22); *see also* Pet. Br. 19. It was at that time (not before) when Corner Post first had a complete and ripe APA cause of action. And that is when its claim "first accrued" and the six-year clock began to run. *See* App. 56 (Compl. ¶ 32).

The decision below found, however, that the statute of limitations ran for Corner Post in 2017. Before Corner Post could even challenge the regulation! This analysis mistakenly decoupled the statute of limitations from harm to the plaintiff, thereby effectively reading 5 U.S.C. § 702 out of the APA. *See* App. 6–12. That cannot be right. If allowed to stand, the decision below severely curtails, for all practical purposes, the ability of newly created or harmed businesses and individuals to challenge regulations, no matter how ultra vires and unconstitutional those regulations might be. It is fundamentally unfair to close the courthouse doors on businesses and individuals newly harmed by long-extant regulations imposing burdensome and expensive compliance requirements or other costs.

Although not directly at issue here, businesses should not be forced into a Hobson's choice of either submitting to unlawful regulations or betting the farm by defying the regulations and thereby risking draconian civil and often criminal consequences. Raising invalidity as a defense in an enforcement action is neither a safe nor realistic pathway for an injured business to obtain judicial review. And a person aggrieved by unlawful agency action should

not be forced to bet his liberty as a condition of challenging it in court. Instead, companies recently injured by agency action of any vintage should be able to bring pre-enforcement APA challenges.

Unlike fine wine, unlawful regulations do not become better with age. "[A] regulation initially unauthorized by statute cannot become authorized by the mere passage of time." *Dunn-McCampbell Royalty Interest v. Nat'l Park Serv.*, 112 F.3d 1283, 1289–90 (5th Cir. 1997) (Jones, J., dissenting). "An agency, after all, literally has no power to act—including under its regulations—unless and until Congress authorizes it to do so by statute. An agency's regulation cannot operate independently of the statute that authorized it." *FEC v. Ted Cruz for S.*, 142 S. Ct. 1638, 1649 (2022) (cleaned up). This means that an ultra vires regulation does not gain legitimacy and morph into a binding law merely by the happenstance that it has been on the books for six years. Instead, unlawful regulations are not law at all and remain void ab initio.

Nor can atextual policy considerations justify a judicial transmogrification of Section 2401(a) from a garden-variety statute of limitations into a selective statute of repose that means something different than what it says only in the context of certain APA claims. Statutes are not chameleons that can change meaning in this way. Concerns about the government's interest in regulatory finality and judicial efficiency involve complex value judgements the Constitution tasks Congress, not the courts, with resolving.

For the foregoing reasons, this Court should reverse the decision below.

ARGUMENT

I. It Is an Open Question Whether 28 U.S.C. § 2401(a) Applies to Pre-enforcement APA Claims.

The decision below mistakenly relied on an atextual policy-laden judicial gloss to conclude that an APA claim "first accrues" under 28 U.S.C. § 2401(a) when an agency issues a rule, irrespective of when a plaintiff suffers harm. *See* App. 10–12; *see also* Pet. Br. 12, 21. But the gloss on 28 U.S.C. § 2401(a) may well run far deeper, going beyond the question presented in this case.

For several decades, courts have concluded that Section 2401's six-year limitations period applies to APA claims. *See, e.g.*, *Wind River Mining Corp. v. United States,* 946 F.2d 710, 713 (9th Cir. 1991); *Impro Prods., Inc. v. Block*, 722 F.2d 845, 850 n.8 (D.C. Cir. 1983); *see also Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997) ("Numerous courts have held . . . that a complaint under the APA for review of an agency action is a 'civil action' within the meaning of section 2401(a)."). This "Court has [also] once assumed the statute of limitations applied generally" in passing. James R. Conde & Michael Buschbacher, *The Little Tucker Act's Statute of Limitations Does Not Govern Garden-Variety Pre-enforcement Suits Under the APA*, Yale Notice & Comment (Sept. 26, 2023) (citing *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct.

617, 626–27 (2018)).[2] *But cf. Abbott Labs. v. Gardner,* 387 U.S. 136, 155 (1967) (noting "defense of laches," as opposed to a statute of limitations, "could be asserted if the Government is prejudiced by a delay" in pre-enforcement challenge). But that interpretation may not be right.

As an original matter, it appears likely that there is *no* statute of limitations for garden-variety pre-enforcement APA challenges to regulations.[3] Section 2401(a) applies to non-tort "civil action[s] commenced *against the United States*[.]" 28 U.S.C. § 2401(a) (emphasis added). Some courts have assumed that APA claims against federal agencies are "against the United States." *See, e.g., Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999) ("Because an action against a federal agency is an action against the United States, a complaint under the APA for review of an agency action is a 'civil action' within the meaning of section 2401(a)." (cleaned up)). But that construction appears to overread the key phrase "against the United States,"

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[2] https://www.yalejreg.com/nc/the-little-tucker-acts-statute-of-limitations-does-not-govern-garden-variety-pre-enforcement-suits-under-the-apa-by-james-r-conde-michael-buschbacher/.

[3] Importantly, "[t]his does not mean the Little Tucker Act does not apply to any suits under the APA." Conde & Buschbacher, *supra.* 5 U.S.C. § 702 does not appear to "authorize broad statutory standing to vindicate public rights. Those suits raise tough questions, as they are not analogous to traditional officer suits brought by the objects of a regulation." *Id.* (citing Caleb Nelson, *"Standing" and Remedial Rights in Administrative Law*, 105 Va. L. Rev. 703 (2019)).

conflating suits against federal officers with suits against the United States.

"When the Little Tucker Act was enacted in 1887, and when the statute of limitations was later amended in 1948, . . . a tort action against a federal official acting without authority was not a suit 'against the United States.' Similarly, a suit in equity against a government official seeking to prevent an enforcement action or tortious conduct was not a suit 'against the United States.'" Conde & Buschbacher, *supra*; *see Phila. Co. v. Stimson*, 223 U.S. 605, 619–20 (1912). This suggests 28 U.S.C. § 2401(a) does not cover APA claims involving these types of circumstances, including pre-enforcement challenges to regulations seeking declaratory or injunctive relief.[4]

This Court "has yet to decide this question on the merits." Conde & Buschbacher, *supra*. This Court should take a closer look and address this issue in an appropriate case.

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[4] The 1947 Attorney General's Manual on the Administrative Procedure Act indicates that laches would apply to a subset of general APA claims. *See* Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 96 (1947) ("[T]ime within which review must be sought will be governed, as in the past, by relevant statutory provisions or by judicial application of the doctrine of laches."). This, too, suggests a subset of APA claims are instead governed by laches, which typically does not apply "in face of a statute of limitations enacted by Congress[.]" *Petrella v. MGM*, 572 U.S. 663, 679 (2014).

II. An APA Challenge To a Regulation Is Not Time-Barred If Brought Within Six Years of When The Plaintiff Was Injured.

At bottom, the present question is straightforward and turns on the interplay between two provisions of the APA, 5 U.S.C. § 702 and 5 U.S.C. § 704, with 28 U.S.C. § 2401(a)'s general six-year statute of limitations for bringing lawsuits against the government, to the extent that it applies at all. The plain language of those provisions requires that the decision below be reversed.

A. 28 U.S.C. § 2401(a) Is a Plaintiff-Focused Statute of Limitations.

"This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020); *see Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) ("[O]ur job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" (citation omitted)). "As in all such cases, . . . [this Court] begin[s] by analyzing the statutory language, 'assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (quoting *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175 (2009)). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

That proposition holds true here. "28 U.S.C. § 2401(a) [is] the general statute of limitations governing actions against the United States." *United States v. Mottaz*, 476 U.S. 834, 838 (1986). It provides, in relevant part, "every 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." 28 U.S.C. § 2401(a). By its plain terms, the clock begins to run when the "right of action first accrues." *Id.*

"[T]he 'right of action' of which § 2401 (a) speaks is not the right to administrative action but the right to file a civil action in the courts against the United States." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 511 (1967). *Cf. Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1874) ("All statutes of limitation begin to run when the right of action is complete[.]"); *Wilcox v. Plummer's Ex'rs*, 29 U.S. 172, 181 (1830) ("When might this action have been instituted, is the question; for from that time the statute [of limitations] must run."). That is, "'a legal right to maintain an action, growing out of a *given transaction or state of facts and based thereon*.'" *Herr v. United States Forest Serv.*, 803 F.3d 809, 820 (6th Cir. 2015) (quoting Black's Law Dictionary 1560 (3d ed. 1933) (emphasis added)). In essence, "right of action" means that a particular plaintiff has a completed cause of action. That is the point at which a claim "accrues," and the statute of limitations begins to run for that plaintiff. *See Gabelli v. SEC*, 568 U.S. 442, 448 (2013) ("[T]he standard rule is that a claim accrues when the plaintiff has a complete and present cause of action." (cleaned up)); *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 105 (2013) ("As a general matter, a

statute of limitations begins to run when the cause of action "'accrues'"—that is, when 'the plaintiff can file suit and obtain relief.'" (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997)).

This is the most natural reading of Section 2401(a), reflecting its plaintiff-focused approach. "In common parlance a right accrues when it comes into existence[.]" *United States v. Lindsay*, 346 U.S. 568, 569 (1954). Dictionaries underscore this basic point. "A cause of action 'accrues' when a suit may be maintained thereon." *Accrue*, Black's Law Dictionary 37 (4th ed. 1951) (citation omitted). That is, "[w]henever one person may sue another." *Id.* (citation omitted); *see id.* ("Cause of action 'accrues,' on date that damage is sustained and not date when causes are set in motion which ultimately produce injury." (citation omitted)); *see also id.* at 38 ("Accrued Right. As used in the Constitution, a matured cause of action, or legal authority to demand redress." (citing *Morley v. Hurst*, 49 P.2d 546, 548 (Okla. 1935)). Not before then. This was true when the Little Tucker Act's predecessor statute, the Tucker Act, was enacted in 1897 and remains so today. *See* John Kendrick, *(Un)limiting Administrative Review: Wind River, Section 2401(a), and the Right to Challenge Federal Agencies*, 103 Va. L. Rev. 157, 179–91 (2017).

"'Accrual' means, and has always meant, the same thing. A party's right of action cannot accrue until he or she has actually been harmed by the defendant." *Id.* at 159. The Constitution requires no less. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021) ("No concrete harm, no standing."); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) ("Injury in fact is

a constitutional requirement[.]"). And just like every other type of claim against the government subject to Section 2401(a)'s six-year limitation period, this holds true for APA claims.[5] *Cf. Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 56 n.3 (D.C. Cir. 1987) ("That a statute of limitations cannot begin to run against a plaintiff *before* the plaintiff can maintain a suit in court seems virtually axiomatic.").

B. Two Requirements Must Be Met Before a Person Has an APA Cause of Action.

For a plaintiff to bring a cause of action under the APA, two conditions must be met: there must be both "final agency action," 5 U.S.C. § 704, and the plaintiff must have "suffer[ed] legal wrong because of agency action, or [be] adversely affected or aggrieved by agency action," 5 U.S.C. § 702.[6] These are two distinct requirements that perform different functions: the former is agency-focused, identifying the types of agency decisions subject to general APA review; the

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[5] This Court "ha[s] 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. United States ex rel. Wilson*, 545 U.S. 409, 418 (2005) (cleaned up). There is no evidence, textual or otherwise, that the Congress that enacted the APA into law in 1946 intended to depart from this standard rule.

[6] "The judicial review provisions of the APA are not jurisdictional[.]" *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991). "[W]hat its judicial review provisions do provide is a limited cause of action for parties adversely affected by agency action." *Trudeau v. FTC*, 456 F.3d 178, 185 (D.C. Cir. 2006) (citing 5 U.S.C. §§ 701–06).

latter is plaintiff-focused, imposing a harm requirement akin to Article III's injury-in-fact requirement for constitutional standing.

1. Section 704 Governs The Types of Agency Decisions Subject to Review Under The APA .

First, the "final agency action" requirement. Section 704, titled "Actions reviewable," provides that "[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."[7] 5 U.S.C. § 704. As both its title and text make clear, Section 704's focus is on what *types of agency decisions* must be pled to state a cause of action under the APA. This Court's precedent underscores Section 704's focus: "to be 'final' . . . the action must mark the consummation of the agency's decisionmaking process" and "be one by which rights or obligations have been determined, or from which legal consequences will flow."[8] *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (cleaned up). Agency regulations governing private conduct are plainly within the universe of agency decisions that meet this test. *See,*

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[7] "Titles can be useful devices to resolve doubt about the meaning of a statute." *Yates v. United States*, 574 U.S. 528, 552 (2015) (Alito, J., concurring); *see INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 189 (1991) ("[T]itle of a statute or section can aid in resolving an ambiguity in the legislation's text.").

[8] *Bennett*'s conjunctive two-part test may well reflect an unduly cramped reading of Section 704. *Cf. United States Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 n.2 (2016); *id.* at 604 n.* (Ginsburg, J., concurring in part, concurring in judgment).

e.g., Abbott Labs., 387 U.S. at 149 ("[T]he regulations in issue we find to be 'final agency action[.]'").

But while "final agency action" is a "necessary" condition to sue, it is "not by itself a sufficient, ground for stating a claim under the APA." *Herr*, 803 F.3d at 819. A "final agency action," standing alone, does not create a free-floating APA cause of action for anyone in the world to bring; instead, a plaintiff must also be harmed by the agency's decision within the meaning of Section 702.

2. Section 702 Sets Forth The Requirements a Plaintiff Must Meet to Have an APA "Right of Review."

When an APA claim accrues thus depends on when a plaintiff suffers an *injury because of* a final agency action. Section 702's title, "Right of review," underscores that for APA causes of action the "right of action" 28 U.S.C. § 2401(a) references belongs to and travels with plaintiffs who are individually harmed by agency decisions, not the public at large. *Cf. Herr*, 803 F.3d at 821 ("Once a right of action accrues, it becomes a 'piece' of intangible personal property called a 'chose in action.'" (quoting *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 275 (2008)). Section 702's plain text likewise underscores this basic point: "*A person suffering legal wrong because of* agency action, or *adversely affected or aggrieved by* agency action within the meaning of a relevant statute, is entitled to

judicial review thereof."[9] 5 U.S.C. § 702 (emphasis added); *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882–83 (1990) (discussing required showing of individualized harm to a plaintiff). In the APA, "Congress created a general right of judicial review for individuals injured by agency action." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1077 (2020) (Thomas, J., dissenting) (citing 5 U.S.C. § 702).

"If a party cannot plead a 'legal wrong' or an 'adverse[] [e]ffect[],' it has no right of action." *Herr*, 803 F.3d at 819 (quoting 5 U.S.C. § 702). Section 702 thus operates as a rough proxy for Article III's injury-in-fact requirement. *Cf. Director v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 127 (1995) ("We have thus interpreted § 702 as requiring a litigant to show, at the outset of the case, that he is injured in fact by agency action[.]"); *Air Courier*, 498 U.S. at 523 ("To establish standing to sue under the APA, respondents must establish that they have

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[9] The second sentence of Section 702 broadly waives sovereign immunity for suits against the government "seeking relief other than money damages[.]" 5 U.S.C. § 702. That waiver of sovereign immunity extends to nonstatutory ultra vires and constitutional claims, *see Trudeau*, 456 F.3d at 187, and is not limited by Section 704's "final agency action" requirement for APA claims. *See Hanson v. Wyatt*, 552 F.3d 1148, 1173 n.11 (10th Cir. 2008) (Gorsuch, J., concurring) ("Section 702 is a waiver of sovereign immunity, but we have not treated Section 704 as a limit on that waiver." (citation omitted)); *Nation v. DOI*, 876 F.3d 1144, 1172 (9th Cir. 2017). Nor is this waiver contingent on "agency action." *See Trudeau*, 456 F.3d at 187; *see also Walmart Inc. v. United States DOJ*, 21 F.4th 300, 307 (5th Cir. 2021) (noting majority rule). This case provides an opportunity for this Court to clarify the scope of Section 702's sovereign immunity waiver.

suffered a legal wrong because of the challenged agency action, or are adversely affected or 'aggrieved by agency action within the meaning of a relevant statute.'" (quoting 5 U.S.C. § 702)); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (APA "grants standing to a person 'aggrieved by agency action within the meaning of a relevant statute'" (quoting 5 U.S.C. § 702)).

C. The Six-Year Clock For APA Claims Begins to Run When a Plaintiff Is First Harmed By Final Agency Action.

The upshot is that a plaintiff's APA cause of action cannot exist—and thus cannot "accrue"—until both Section 702's and Section 704's distinct requirements have been met. This means that the statute of limitations cannot begin to run for a plaintiff until *that* plaintiff is harmed by the underlying "final agency action," such as the rule at issue here. *See Herr*, 803 F.3d at 818–19 (holding that the "six-year clock starts ticking" only if "the challenged agency action becomes final and invades a party's legally protected interest").

To be sure, in the mine run of cases Section 704's "final agency action" requirement travels with Section 702's plaintiff-harm requirement. *See* Kendrick, 103 Va. L. Rev. at 169–70; *see also Herr*, 803 F.3d at 818–20. But this is not invariably true, as there is no necessary temporal link between the agency's decision and the harm to private parties flowing from it. For example, "[a] final agency regulation only causes injury to a party once he or she is actually affected by it, and this could first happen decades after the regulation became final." Kendrick, 103 Va. L. Rev. at

170. Indeed, a "final agency action" under Section 704 may not harm anyone at the time it occurs, as required by Section 702 and Article III to challenge it. IRS tax regulations are one example. *See* Susan C. Morse, *Old Regs*, 31 Geo. Mason L. Rev. (forthcoming 2023) (manuscript at 6).[10] Or consider, as a thought experiment, if a government agency issued regulations purporting to govern a nascent or nonexistent industry—for example, if the FTC promulgated a suite of regulations governing the use of artificial intelligence ("AI") technology in 1985 or the FCC issued Net Neutrality rules in the early 1990s.[11] In such cases, a party's right of review under the APA accrues long after the agency acted, when *that* party first suffers harm because of that agency action.[12] That makes sense. The APA does not require "potentially affected parties to predict the future." *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2062 (2019) (Kavanaugh, J., concurring).

"Some courts, it is true, have suggested that an APA claim 'first accrues 'on the date of the final agency action.' But these cases show why [courts]

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[10] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4191798.

[11] A related scenario is where an agency issues informal guidance interpreting a long-extant regulation to apply to conduct or parties that were thought to be outside its scope.

[12] A "final agency action" will either occur contemporaneously with or precede legally cognizable injury to a private party. For this practical reason, the timing of when a particular plaintiff meets the requirements of Section 702 and thus has a right of review under the APA governs when Section 2401(a)'s six-year clock for bringing APA claims starts ticking.

don't read precedents like statutes."[13] *Herr*, 803 F.3d at 819 (citations omitted). Section 2401(a) "contains no language suggesting that the limitations period starts when a plaintiff's predecessor in interest could first file a lawsuit." *Id.* at 821. The notion "that a right of action under the APA accrues upon final agency action regardless of whether that action aggrieved the plaintiff . . . contradicts the text of the statute and Supreme Court precedent to boot." *Id.* at 819.

III. Newly Harmed Parties Should Not Have to Risk Prosecution to Challenge Old Regulations Carrying Criminal Penalties.

A. Many Untested Regulations Carry Criminal Penalties.

The broader context and implications of this case also warrant discussion. "Today . . . most federal law is not made by Congress. It comes in the form of rules issued by unelected administrators." *Biden v. Missouri*, 142 S. Ct. 647, 659 (2022) (Alito, J., dissenting). To put this in perspective, "[i]n contrast to the roughly 200 to 400 laws passed by Congress, the federal administrative agencies adopt approximately 3,000 to 5,000 final rules each year." Ronald A. Cass, *The Umpire Strikes Back: Expanding Judicial Discretion for Review of Administrative Action*, 73 Admin. L. Rev. 553, 559 (2021). There are untold

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[13] Respondent erroneously embraces this case law. *See* BIO 8–9; *see also* Pet. Br. 21–22. The decision below made the same mistake, apparently linking Section 2401(a)'s six-year limitations period with Section 704's finality requirement, instead of Section 702's plaintiff-harm requirement. *See* App. 6.

thousands of regulations governing private conduct in the Code of Federal Regulations, which is over 180,000 pages. *See id.*; *see also* Total Pages Published in the Code of Federal Regulations (1951–2021), George Washington Regulatory Studies Center.[14]

Although Petitioner here suffers from downstream pocketbook harms flowing from the regulation at issue, it bears considering that violations of regulations frequently carry draconian civil and criminal penalties. Indeed, "virtually every regulatory scheme, . . . includes felony criminal enforcement provisions to add 'teeth' to the costs of noncompliance, covering such diverse areas as environmental safety, securities markets, employment practices, consumer protection, public benefits, and international trade." Stuart P. Green, *Why It's a Crime to Tear the Tag Off A Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 Emory L.J. 1533, 1544 (1997). "By one estimate, there are over 300,000 federal regulations that may be enforced criminally." John C. Coffee Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B. U. L. Rev. 193, 216 (1991).

B. Ultra Vires Regulations, However Stale, Are Mere Nullities.

Here's the rub: some proportion of these agency rules of any vintage may well be mere nullities with no legal force or effect. "An agency, after all, literally

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[14]https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2022-11/totalpagescodefedreg_11-01-2022.pdf.

has no power to act—including under its regulations—unless and until Congress authorizes it to do so by statute." *Ted Cruz for S.*, 142 S. Ct. at 1649 (cleaned up). It follows that "a regulation initially unauthorized by statute cannot become authorized by the mere passage of time." *Dunn-McCampbell*, 112 F.3d at 1290 (Jones, J., dissenting). *Cf. Kuhnle Bros., Inc., v. County of Geauga,* 103 F.3d 516, 521–22 (6th Cir. 1997) ("A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment."). Put another way, "an agency's 'regulation which . . . operates to create a rule out of harmony with the statute, is a mere nullity.'" *George v. McDonough*, 142 S. Ct. 1953, 1966 (2022) (quoting *Dixon v. United States*, 381 U.S. 68, 74 (1965)). The same holds true for regulations out of harmony with the Constitution. *Cf. Collings v. Yellen*, 141 S. Ct. 1761, 1788–89 (2020).

Yet many regulations have never been subject to legal challenge. Regulated entities may decline to challenge regulations they believe to be unlawful for a variety of reasons, such as resource constraints, fear of angering their regulator, or naked self-interest. And of the subset of regulations that have been tested in court, it is often the case, as here, that only a single circuit has weighed in. For that matter, some regulations are rarely, if ever, enforced or may otherwise fly under the radar of regulated entities for decades, some of which may not have even existed when the regulation was promulgated. *See* Morse, *supra*, 6. *Cf. PDR Network*, 139 S. Ct. at 2062 (Kavanaugh, J., concurring) ("On some occasions, the entities against whom an enforcement action is

brought may not even have existed back when an agency order was issued."). Put simply, there is a vast body of administrative law promulgated by unelected agency officials that may well be unlawful, including regulations backed by hefty civil and even criminal penalties.

This raises the practical and recurring question how are law abiding citizens and businesses newly harmed by burdensome requirements or prohibitions imposed by long-extant regulations supposed to determine whether these proclamations are valid binding rules or, alternatively, nullities? *Cf. Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958) ("[L]imiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.").

C. Pre-enforcement Review Is Often The Only Safe Pathway to Judicial Review.

As discussed above, and explained by Petitioner, *see* Pet. Br. 18–19, 30–31, the APA's plain text supplies the answer, generally granting newly harmed persons meeting the requirements of 5 U.S.C. § 702 the right to seek declaratory and injunctive relief from unlawful federal regulations of any vintage without first risking an enforcement action. In other words, "[w]hen a party *first* becomes aggrieved by a regulation that exceeds an agency's statutory authority more than six years after the regulation was promulgated, that party may challenge the regulation

without waiting for enforcement proceedings."[15] *Herr*, 803 F.3d at 822.

This makes sense. After all, "[i]n this country, people should not have to risk prison time in order to challenge the lawfulness of government action." *CIC Servs., LLC v. IRS*, 936 F.3d 501, 505 (6th Cir. 2019) (Thapar, J., dissenting from the denial of rehearing en banc). "Ordinarily, administrative law does not intend to leave regulated parties caught between a hammer and an anvil." *CIC Servs., LLC v. IRS*, 925 F.3d 247, 259 (6th Cir. 2019) (Nalbandian, J., dissenting) (cleaned up), *rev'd*, 141 S. Ct. 1582 (2021). And courts "normally do 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. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007)). The APA's generally applicable strong presumption of judicial review of agency action underscores this point. *See Sackett v. EPA*, 566 U.S. 120, 128 (2012); *Abbott Labs.*, 387 U.S. at 140; *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (noting "strong presumption" in favor of judicial review under the APA that is only rebutted by "clear and convincing evidence").

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[15] As the decision below recognized, "*Herr* did not distinguish between as-applied and facial challenges." App. 10; *see also DeSuze v. Ammon*, 990 F.3d 264, 270 n.7 (2d Cir. 2021) (quoting *Herr*, 803 F.3d at 820–22). In any event, as here, *see* App. 84–85, *Herr* involved claims seeking facial relief, *see* Am. Compl. pp. 18–19, Dkt. No. 4, *Herr v. U.S. Forest Serv.*, No. 2:14-cv-105-PLM (W.D. Mich. June 6, 2014).

If it were otherwise, a broad corpus of long-extant regulations would be effectively insulated from judicial scrutiny—no matter how ultra vires or otherwise unlawful. Regulations backed up by "criminal penalties . . . practically necessitate a pre-enforcement . . . suit—if there is to be a suit at all." *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582, 1592 (2021). As this Court has long recognized, to impose on a party "the burden of obtaining a judicial decision . . . only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines . . . is, in effect, to close up all approaches to the courts."[16] *Ex parte Young*, 209 U.S. 123, 148 (1908) (holding unconstitutional the provisions of an act precluding pre-enforcement judicial review of rates and associated penalties for failure to comply). The right to judicial review "is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." *Wadley S. Ry. Co. v. Georgia*, 235 U.S. 651, 661 (1915); *see also Okla. Operating Co. v. Love*, 252 U.S. 331, 336–37 (1920) (forcing party to violate regulation and trigger contempt proceeding to obtain judicial review violates due process).

In other words, "[t]he price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment

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[16] *Cf. Herr*, 803 F.3d at 822 ("[T]he Forest Service has threatened criminal action against the Herrs. Does anyone really think that the Herrs would not be allowed to challenge the Forest Service's administrative authority . . . ? That is a steep climb.").

of a court. In that event, the Constitution intervenes and keeps the court room open." *Life & Cas. Ins. Co. v. McCray*, 291 U.S. 566, 574–75 (1934) (Cardozo, J.); *see also United States v. Nourse*, 34 U.S. 8, 28–29 (1835) (Marshall, C.J.). In sum, the Constitution requires that "judicial review must be substantial, adequate and safely available[.]" *Wadley*, 235 U.S. at 661 (emphasis added).

Against this backdrop, this Court has repeatedly held a party "need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of serious criminal and civil penalties." *Hawkes*, 136 S. Ct. at 1815 (cleaned up). The question of statutory interpretation this case presents should be answered consistent with these principles to keep the courthouse doors open to parties newly harmed by old regulations. *Cf. Cal. Sea Urchin Comm'n v. Bean*, 828 F.3d 1046, 1051 (9th Cir. 2016) ("[A]n agency should not be able to sidestep a legal challenge to one of its actions by backdating the action to when the agency first published an applicable or controlling rule.").

IV. Policy Considerations Cannot Trump Statutory Text.

Policy-based concerns about finality and government efficiency cannot justify ignoring the statute. Policy-based parade-of-horribles arguments cannot override statutory text. Statutes are not chameleons that can change meaning to accommodate atextual public policy concerns nowhere to be found in the words Congress enacted into law. *But cf*. Lewis Carroll, Through the Looking Glass ("'When I use a word,' Humpty Dumpty said in rather a scornful tone,

'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.'"). 28 U.S.C. § 2401(a)'s "accrual" language is plaintiff-harm-focused in all contexts and does not magically change meaning for a subset of APA claims.[17]

Balancing the government's interest in finality, or repose, against the citizenry's right to challenge government decisions adversely affecting their lives or livelihoods in court and resolving this tension between competing interests is a legislative choice, subject, of course, to constitutional constraints. "It is Congress, not this Court, that balances those interests." *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019); *see Azar v. Allina Health Servs.,* 139 S. Ct. 1804, 1815 (2019) ("[C]ourts aren't free to rewrite clear statutes under the banner of . . . policy concerns."). Whatever the wisdom of a judicially created APA-only carve-out from Section 2401(a)'s plaintiff-harm-focused accrual rule, it has no basis whatsoever in the statute's text. Whatever the policy merits a statute of repose for challenges to regulations, Congress chose instead to write a traditional statute of limitations subject to the normal rules. That choice should be respected.

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[17] Section 2401(a)'s text does not distinguish between facial and as-applied claims or otherwise draw distinctions between types of APA claims. *See* Pet. Br. 34. And an unlawful regulation that violates the APA is an unlawful regulation and thus a nullity, regardless of the reason why.

CONCLUSION

For these reasons, this Court should reverse the decision below.

Respectfully submitted,

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