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 *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER

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November 20, 2023

QUESTION PRESENTED

Does a plaintiff's claim under the Administrative Procedure Act "first accrue[]" under 28 U.S.C. § 2401(a) when an agency issues a rule, without regard to whether the rule has injured the plaintiff on that date (as the Eighth Circuit and five other circuits have held), or when the rule first causes the plaintiff to "suffer[] legal wrong" or be "adversely affected or aggrieved" (as the Sixth Circuit has held)?

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INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, freedom of speech, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

The Administrative Procedure Act creates a right to judicial review of "final agency action for which

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[1] Pursuant to Supreme Court Rule 37.6, NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

there is no other adequate remedy in a court." 5 U.S.C. § 704. Despite that statutory right, federal government administrators persist in doing whatever they can to prevent individuals aggrieved by agency action from obtaining judicial review of their grievances. The federal government has taken its obstructionism to new heights in this case. It seeks to block judicial review by contending that Petitioner Corner Post, Inc.'s claims were time-barred as of 2017—long before Corner Post opened for business and long before it was adversely affected by the agency action it seeks to challenge. NCLA is concerned that a decision upholding Respondent's position would create a major gap in the right to judicial review.

NCLA takes little comfort from the alternative procedure suggested by Respondent. It suggests that Corner Post can file a rulemaking petition seeking amendment of the challenged regulation and then seek federal-court relief if the petition is denied. Rulemaking petitions provide no assurance that Corner Post would ever have its day in court. Such petitions can languish for years; indeed, no statute specifically requires Respondent to respond to such petitions. Moreover, the federal government has taken the position that even denial of a rulemaking petition does not guarantee a right to judicial review.

NCLA is filing this brief because it agrees with Corner Post that its claims did not accrue until it was injured by the regulation it challenges. NCLA takes no position on the merits of those claims.

STATEMENT OF THE CASE

The facts of this case are largely uncontested. Respondent Board of Governors of the Federal Reserve System (the Board) adopted the challenged Regulation II in 2011. Regulation II establishes maximum interchange fees that debit card issuers may charge merchants in connection with debit card transactions.

Corner Post opened for business in 2018, seven years after adoption of Regulation II. Its complaint against the Board, filed in 2021, alleges that Regulation II is arbitrary and capricious, in violation of the APA, because it authorizes interchange fees in excess of those mandated by the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. *See* 15 U.S.C. § 1693o-2(a)(1), (2). Corner Post alleges injury in the form of excessive interchange fees it has been paying on debit card transactions since 2018, fees it claims it would not have incurred but for the excessive interchange fees authorized by Regulation II.

The district court granted the Board's motion to dismiss under Fed.R.Civ.P. 12(b)(1) and 12(b)(6). It ruled that Corner Post's complaint was time-barred by 28 U.S.C. § 2401(a), which provides that "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." App.36. The court held that Corner Post's claim "first accrue[d]" in 2011 when the Board published Regulation II in the Federal Register, not in 2018 when Corner Post commenced operations and first became subject to Regulation II. App.33-36. The court held that, to be

timely, Corner Post's complaint needed to be filed by 2017, six years after publication of Regulation II, App.36—notwithstanding that Corner Post did not suffer any injury-in-fact (and thus lacked standing to file an APA suit) until 2018.

The Eighth Circuit affirmed. App.1-15. The court held, "[W]hen plaintiffs bring a facial challenge to a final agency action, the right of action accrues, and the limitations period begins to run, upon publication of the regulation." App.11. The court stated that "[t]he government's interest in finality outweighs a late comer's desire" to bring a facial challenge to a long-standing regulation. *Ibid.* (quoting *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991)). It "declin[ed] 'to accept [Corner Post's] suggestion that standing to sue is a prerequisite to the running of the limitations period' because '[t]o hold otherwise would render the limitation on challenges to agency orders we adopted ... meaningless.'" App.8 (quoting *Shiny Rock Mining Corp v. United States*, 906 F.2d 1362, 1365 (9th Cir. 1990)).

SUMMARY OF ARGUMENT

For purposes of the six-year statute of limitations applicable to APA claims, the limitations period does not begin to run until the plaintiff's claim "first accrues." 28 U.S.C. § 2401(a) (stating that claims against the United States are barred "unless the complaint is filed within six years after the right of action first accrues"). It is uncontested that Corner Post could not have challenged Regulation II before it commenced operations in 2018; before that date it was not adversely affected by the regulation. Corner Post

filed suit against the Board in 2021, significantly less than six years later. To accept the Board's contention that Corner Post's claims are nonetheless time-barred, one must accept the Eighth Circuit's counter-intuitive holding that Corner Post's claims "first accrued" in 2011, seven years before it suffered the injury that was a prerequisite to maintaining an APA suit. That holding cannot be squared with "the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

The Board asserts that there is an alternative means by which Corner Post can challenge Regulation II in court: it can petition the Board to initiate a rulemaking proceeding, and then challenge a denial of the petition. BIO.23. That policy argument cannot justify ignoring the text and context of § 2401(a). Moreover, the argument vastly oversells the utility of such petitions. The petition rights created by APA § 553(e) have been so severely circumscribed by the courts or obstructed by the agencies that they fail to provide meaningful and timely judicial review.

The federal government's efforts to prevent Corner Post from having its claims heard on the merits follows an all-too-familiar pattern. In case after case, attorneys representing the United States have raised every possible argument for dismissing administrative claims on procedural grounds, no matter how insubstantial the argument and no matter how decisively this Court has rejected similar arguments in previous cases. Its argument that Corner Post's claims are barred by § 2401(a) is based on a mangled reading of that statute—that the claims somehow "accrued"

seven years before Corner Post opened for business and seven years before it was aggrieved by Regulation II. That argument and similarly insubstantial efforts by the United States to dismiss claims on procedural grounds are unwarranted when, as here, it cannot point to any statutory language that rebuts the presumption of reviewability.

ARGUMENT

I. CORNER POST'S CLAIM DID NOT "ACCRUE" UNTIL 2018, WHEN IT COMMENCED OPERATIONS AND WAS ADVERSELY AFFECTED BY REGULATION II FOR THE FIRST TIME

Corner Post's opening brief explains at length why its claim did not accrue until 2018—and thus that its 2021 complaint was filed well within the six-year limitations period. NCLA will not repeat those arguments here. We write separately to focus on two points that make Corner Post's position particularly compelling.

Most importantly, the Eighth Circuit's ruling runs counter to the APA's promise of a right to judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. In light of § 704, this Court recognizes a "strong presumption that Congress intends judicial review of administrative action." *Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019). While that presumption can be rebutted, the government bears a "heavy burden" in attempting to do so. *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015). The presumption can be overcome only by "'clear and convincing evidence' of

congressional intent to preclude judicial review." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (quoting *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 64 (1993)). The Board contends that Congress intended to deprive Corner Post of *any* opportunity to contest Regulation II—that Corner Post's APA claim was time-barred under § 2401(a) one year before it first acquired standing to file suit—but it has provided no evidence (let alone clear and convincing evidence) that Congress so intended.[2]

Second, the Eighth Circuit justified its decision to deny Corner Post an opportunity to seek judicial review by stating that "[t]he government's interest in finality outweighs late-comers' desire" to bring a facial challenge to a long-standing regulation. App.11 (quoting *Wind River Mining*, 946 F.2d at 715). That rationale misunderstands § 2401(a). The provision is not a statute of repose that protects the Board's interest in finality by precluding all review of a regulation after a specified number of years have elapsed. Rather, as the Sixth Circuit explained:

> A federal regulation that makes it six years without being contested does not enter a promised land free from legal challenge [by virtue of § 2401(a)]. Regulated parties may always assail a

[2] The Board does not contest that Corner Post could not have stated an APA claim until such time as it had been aggrieved by Regulation II. *See* 5 U.S.C. § 702 ("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").

> regulation as exceeding the agency's statutory authority in enforcement proceedings against them. ... That is true of old and new regulations. *See Horne v. Dep't of Agriculture*, 576 U.S. 350, 354-57 (2015) (regulatory regime dating back to 1937).

Herr v. U.S. Forest Service, 803 F.3d 809, 821-22 (6th Cir. 2015) (Sutton, J.).

Because § 2401(a) provides no special protections for long-standing regulations, the Eighth Circuit erred when it assigned controlling weight to the Board's "interest in finality." In determining the date of "accrual" of Corner Post's cause of action, courts should focus solely on Corner Post's circumstances. And because Corner Post could not have stated an APA claim before it began to be adversely affected by Regulation II in 2018, the 2021 filing of its lawsuit occurred well before the six-year limitations period expired.

II. CORNER POST'S RIGHT TO PETITION THE BOARD IS HOLLOW AND CANNOT SERVE AS AN ALTERNATE PATHWAY TO JUDICIAL REVIEW

In theory, the right to petition the government is clearly protected by both the First Amendment and APA Section 553(e). But in practice, these straightforward petition rights have been so severely circumscribed by the courts or obstructed by the agencies that they merely provide the public with the right to scream into the void of government bureaucracy but not necessarily to receive a response,

let alone meaningful and timely judicial review. Accordingly, Corner Post's theoretical right to petition the Board cannot serve as a rationale for rejecting Corner Post's claim as time-barred.

The First Amendment provides a right to petition the government: "Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of grievances." U.S. Const. amend. I. The right to petition traces its roots to Magna Carta. *See* Julie M. Spanbauer, *The First Amendment Right to Petition Government for A Redress of Grievances: Cut from A Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 22 (1993) (Spanbauer) ("By signing the Magna Carta in 1215, King John granted the right to petition the crown to his barons."); *see also* Norman B. Smith, *"Shall Make No Law Abridging…": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1155 (1986) (Smith) ("Petitioning as a right was specifically recognized in Magna Carta"). Over time, the limited right to petition the crown expanded. "By the time of the American Revolution, Delaware, New Hampshire, North Carolina, Pennsylvania, and Vermont [in addition to Massachusetts] provided explicit protection for the right of colonists to petition local governing bodies for redress of both individual and collective grievances." Spanbauer at 28.

Indeed, King George III's failure to address "Petitions" was a central indictment against the crown, and the Declaration of Independence's language bears striking resemblance to the First Amendment's later formulation of the right, stating "We have Petitioned for Redress[.]" The Declaration of Independence para.

1 (U.S. 1776) ("In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury."); *see also* Smith at 1173-74 (colonists' "claim" was not that "petitioning itself had been punished, only that the petitions had not met with favorable response").

Historically, the right to petition included the right to a response, and that understanding was "firmly embedded in pre-Revolutionary colonial America." Spanbauer at 34; Smith at 1174. At the time the First Amendment was ratified, Congress understood that the right to petition included "a concomitant right to receive a response." Spanbauer at 38, 49.

But this Court—never having received briefing on the "contemporary historical understanding" of the Petition Clause—has circumscribed the petition right by declining to find that it encompasses a right to a response or even the government's consideration. *We the People Found., Inc. v. United States*, 485 F.3d 140, 149 (D.C. Cir. 2007) (Rogers, J., concurring); *see also id.* at 145 (noting that existing Supreme Court precedent regarding the right to a response "does not refer to the historical evidence and we know from the briefs in [*Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984)] that the historical argument was not presented to the Supreme Court"). And while some commentators take the opposing view—that historically the First Amendment right did not include a right to consideration or a response—this Court has never been presented with the historical materials. The D.C. Circuit, despite receiving extensive briefing

on whether the Framers intended the First Amendment to encompass a right to receive a response to one's petition, declined to "resolve this debate" over history—concluding that "binding Supreme Court precedent" required rejection of the First Amendment claim. *Id.* at 144 (Kavanaugh, J.).

The APA codified the right to petition in 5 U.S.C. § 553(e), which provides that "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." The APA's statutory "right to petition" reflects the constitutional right. Jason A. Schwartz and Richard L. Revesz, *Petitions for Rulemaking, Final Report to the Administrative Conference of the United States* 9 (Nov. 5, 2014) (ACUS Report).[3] However, the § 553(e) "right is distinct from the constitutional right in some key ways that may more clearly obligate agencies to consider and respond to petitions[.]" *Id.* Importantly, the statutory right shows that "Congress clearly intended that, under the APA, agencies would consider and respond to public petitions for rulemaking." *Id.* at 11. Thus, even though the constitutional right may have been limited in such a way as to not require a response, the APA and the courts have recognized a petitioner's right to a response. *Id.* at 13 n.55 (collecting cases).

But having a statutory right to a response and receiving a timely, meaningful response are different things entirely, and federal agencies have routinely shown they are incapable of providing either.

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[3] https://www.acus.gov/projects/petitions-rulemaking.

A. Agencies Often Avoid Review of Petitions Through Delay

The APA contemplates, indeed encourages, interested parties to directly petition agencies to change regulations that they deem problematic or propose new ones. But the ability to petition means nothing when agencies can, and often do, systematically ignore the petitions they receive in an apparent attempt to avoid judicial scrutiny.

The agencies' processes to review, consider, and respond to § 553(e) petitions they receive are not widely known or understood outside the agencies themselves. The most recent comprehensive study of how agencies handle petitions is nearly a decade old but indicates that, at most agencies, the process is opaque at best. One commentator has likened the process to a "black hole." ACUS Report at 56. Few agencies, including the Federal Reserve System, have any formalized processes for handling the § 553(e) petitions they receive. *Id.* at 47-48, Appendix C1. Fewer publish the petitions they receive—making it nearly impossible, in real time, to understand how many petitions agencies receive or to determine how long they linger.[4]

[4] The ACUS Report suggests that "many [agencies] receive relatively few [petitions] or none at all" and that "among [the] agencies with moderate or high numbers of petitions," many of the petitions can be categorized as "specific requests" rather than "policy-oriented petitions for legislative rules[.]" *Id.* at 41, Appendix C3.

The Securities and Exchange Commission (SEC), to its credit, is the only agency (to NCLA's knowledge) that publishes a public docket of all the § 553(e) petitions it receives. But the accolades stop there; information one can glean from SEC's petition docket does not reflect favorably on SEC's handling of the petitions it receives. *See* Kara McKenna Rollins, *Have the SEC's Delay Tactics Made Its Petition for Rulemaking Process Vulnerable to Challenge? A Look at In re Coinbase Inc. and SEC's Nullification of 5 U.S.C. § 553(e) by Inaction*, YALE NOTICE & COMMENT BLOG (May 3, 2023).[5] A review of SEC's practices suggests that the Commission routinely ignores petitions for rulemaking. Between January 1, 2018 and May 3, 2023, SEC only substantively responded to five of the 77 petitions for rulemaking (6.5%) that it received. *Id.* Even excluding petitions filed in 2023, SEC's numbers do not improve much, as SEC only substantively responded to five of the 72 petitions (6.9%) filed in 2018-2022. *Id.*

The cases addressing claims that agencies unreasonably delayed their responses to petitions suggest that SEC is not an outlier in its gamesmanship. When an agency fails to respond to a petition, petitioners may bring a suit "seeking to 'compel agency action unlawfully withheld or unreasonably delayed,' 5 U.S.C. § 706(1), when the agency has failed to act within a 'reasonable time,' *id.* § 555(b)[.]" *In re Nat. Res. Def. Council*, 645 F.3d 400,

[5] https://www.yalejreg.com/nc/have-the-secs-delay-tactics-made-its-petition-for-rulemaking-process-vulnerable-to-challenge-a-look-at-in-re-coinbase-inc-and-secs-nullification-of-5-u-s-c-%C2%A7-553e-by-inacti/.

406 (D.C. Cir. 2011); *see also* ACUS Report at 12 n.48 (collecting cases). But what constitutes "unreasonable delay" in this context "is ever evolving, is not always crystal clear, and is based on so many vague factors as to allow courts to support virtually any conclusion they want to reach." ACUS Report at 14.

Generally, courts seem to apply the D.C. Circuit's six-prong test articulated in *Telecommunications Research & Action Center (TRAC) v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984). *See* ACUS Report at 14; *but see Li v. Jaddou*, No. 22-50756, 2023 WL 3431237, at *1 (5th Cir. May 12, 2023) (Fifth Circuit has never adopted the *TRAC* factors). The *TRAC* factors are not without their own complications, including the fact that there has been no consistent, reasoned approach to how the factors interact with each other or are weighed. *See* ACUS Report at 14-15; *see*, *e.g.*, *Da Costa v. Immigr. Inv. Program Off.*, 80 F.4th 330, 340 (D.C. Cir. 2023) (indicating that the D.C. Circuit sometimes affords two of the six "non-exclusive *TRAC* factors" special weight when undertaking an unreasonable-delay analysis).

Thus, it comes as no surprise that how long a delay must last to become "unreasonable" is entirely unpredictable. As the ACUS Report highlights, courts have found that five months was unreasonable when the agency has been studying the issue for two years. ACUS Report at 15 (discussing *Public Citizen v. Heckler*, 602 F. Supp. 611, 613 (D.D.C. 1985)). But another court found a 20-month delay "disturbing" but not unreasonable. *Id.* (discussing *Nat'l Tank Truck Carriers, Inc. v. Fed. Highway Admin.*, No. 96-1339, 1997 WL 150088 (D.C. Cir. Feb. 27, 1997) (per

curiam)). One court found a delay of more than six years "nothing less than egregious," while a different court ruled that an equally long delay was reasonable. *Id.* at 16 (discussing *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004), and *Oil, Chem. & Atomic Workers Union v. Occupational Safety & Health Admin.*, 145 F.3d 120, 124 (3d Cir. 1998)).

These findings and the cases reviewing delayed responses to § 553(e) petitions track with NCLA's own experience filing such petitions with multiple government agencies.[6] Since 2018, NCLA has filed over 20 petitions with more than 20 agencies, seeking either adoption of new rules or amendments to existing ones. Most of those petitions are still unanswered. These delays persist despite Judges Jones and Duncan of the Fifth Circuit chiding SEC for four years of inaction on a petition to review and revoke the agency's policy of imposing perpetual gag orders on settling defendants. *See SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., joined by Duncan, J., concurring).

B. Review from Denial of a § 553(e) Petition Is Not Equivalent to the Direct Review Corner Post Seeks

As Justice Kavanaugh has observed, petition processes are "convoluted[.]" *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2065 (2019) (Kavanaugh, J., concurring in the judgment). And, given the history of agency inaction

[6] https://nclalegal.org/petitions/

and delay, the petition process cannot possibly provide the "ample" opportunity for review that the government suggests, BIO.15. But filing a § 553(e) petition to access judicial review rings hollow for another reason: The standard of review of an agency's decision to deny a petition is limited and deferential, and denials are virtually never overturned. *See* ACUS Report at 18.

"[R]efusals to institute rulemaking proceedings" are subject to an "extremely limited, highly deferential scope of ... review." *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989). That is because "[courts] will overturn an agency's decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency." *Id.* at 96-97. And, "it is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking." *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981). The Government has admitted as much in the past. *See PDR Network*, 139 S. Ct. at 2065-66 (Kavanaugh, J., concurring in the judgment). As the § 553(e) pathway to judicial review is hollow, it cannot "supply a basis for denying judicial review" here. *Id.* at 2066.

III. THE GOVERNMENT PERSISTENTLY RAISES INSUBSTANTIAL PROCEDURAL DEFENSES TO APA CLAIMS TO PREVENT MERITS-BASED RULINGS ON SUCH CLAIMS

Despite Congress's determination that APA review of final agency action should be broadly available, federal government attorneys persistently seek to prevent such review. Indeed, government attorneys routinely invoke alleged procedural bars to APA review even after this Court has rejected the very same defense under substantially similar circumstances. The Board's reliance on a statute-of-limitations defense in this case continues that pattern; the Board can seek dismissal under § 2401(a) only by advancing a mangled interpretation of that statute.

NCLA urges the Court to admonish government attorneys to temper their reflexive efforts to prevent aggrieved litigants from obtaining the judicial review promised them by 5 U.S.C. § 704. The litany of cases that follows well illustrates the need for government attorneys to deliberate more carefully before asserting all potential procedural defenses in every APA case.

A. Final Agency Action

The APA grants a right to judicial review of "final" agency action for which there is no other adequate remedy in a court—that is, an agency action that determines the claimant's "rights or obligations" or marks the "consummation" of the agency's decision-making process. *Bennett v. Spear*, 520 U.S. 154, 178 (1997). The Court has repeatedly rejected government

assertions that challenged administrative action is not subject to APA review because it is not "final."

In *Sackett v. EPA*, 566 U.S. 120 (2012), the Court *unanimously* rejected EPA's argument that it did not engage in "final" agency action when it issued a compliance order to Idaho property owners. The order: (1) determined that the property was a wetland subject to restrictions imposed by the Clean Water Act (CWA); (2) directed the property owners to stop a construction project on the site and to restore the site to its pre-construction condition; and (3) threatened enhanced fines for any violations of the order. *Id.* at 124-25. The Court had no difficulty determining that the compliance order determined the owners' rights and obligations and marked the consummation of EPA's decision-making process—and thus that EPA had engaged in "final" agency action. *Id.* at 126-27.

Despite the *Sackett* ruling, government attorneys—in an effort to prevent review of administrative action under the APA—continued to assert lack of finality in factually analogous circumstances. Four years later, the Court again *unanimously* rejected the government's challenge to finality in *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590 (2016). The Army Corps of Engineers had issued a "jurisdictional determination" (JD) that property owned by the respondent contained "waters of the United States," as defined by the CWA. Adopting the identical approach to finality employed in *Sackett*, the Court rejected the government's contention that issuance of the JD did not satisfy 5 U.S.C. § 704's "final agency action" requirement. 578 U.S. at 597-600. The Court held that issuance of the JD marked the

consummation of the Corps's decision-making process and had direct and immediate legal consequences for the property owner. *Id.* at 597-98.

B. Committed to Agency Discretion

Although the APA establishes a "basic presumption of judicial review [for] one suffering legal wrong because of agency action," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), that presumption can be rebutted by a showing that the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Court has repeatedly held that the § 701(a)(2) exception to judicial review should he read very narrowly. The government nonetheless reflexively invokes § 701(a)(2) in an effort (almost always unsuccessful) to prevent review of administrative action.

In *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 139 S. Ct. 361 (2018), a landowner challenged the Fish and Wildlife Service's (FWS) decision to designate its land as "critical habitat" for an endangered species of frog. Citing § 701(a)(2), FWS argued that its decision was not subject to judicial review because it was "committed to agency discretion" by the Endangered Species Act. The Court *unanimously* rejected that argument. It explained that it has read the committed-to-agency-discretion exception "quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Id.* at 370 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). The Court concluded that the

issue raised by the landowner's claim—whether its land was properly designated as critical habitat—"involves the sort of routine dispute the federal courts regularly review." *Ibid.*

Despite its *Weyerhaeuser* setback, the federal government continues to assert § 701(a)(2) defenses in factually analogous circumstances. For example, in *Dep't of Homeland Security v. Regents of University of California*, 140 S. Ct. 1891 (2020), the Department of Homeland Security (DHS) argued that its decision to rescind the Deferred Action for Childhood Arrivals (DACA) program was "committed to agency discretion" and thus not subject to challenge under the APA. In rejecting that contention, the Court simply reiterated what it said in *Weyerhaeuser*: the § 701(a)(2) exception to APA judicial review must be read "quite narrowly" and only "rare[ly]" applies. 140 S. Ct. at 1905. The Court explained that because DACA was not "simply a non-enforcement policy" but rather granted substantial benefits to eligible individuals, neither DACA nor the subsequent decision to repeal DACA could be categorized as an unreviewable action committed to agency discretion. *Id.* at 1906-07.

C. The Anti-Injunction Act

Court injunctions that prevented the collection of income tax seriously disrupted the flow of revenue to the federal government during the Civil War and threatened to undermine government operations. In response, Congress in 1867 adopted the Anti-Injunction Act; only slightly modified in subsequent years, the Act as currently written states, "[N]o suit for the purpose of restraining the assessment or collection

of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a).

The Court has repeatedly made clear that the Anti-Injunction Act applies *only* to IRS efforts to assess or collect taxes. It does not apply to suits seeking to restrain other activities of taxing authorities, such as information gathering. *See, e.g., Direct Marketing Assn. v. Brohl*, 575 U.S. 1 (2015). The IRS has nonetheless regularly invoked the Act in an effort to dismiss lawsuits that do not seek to prevent tax assessment and collection. For example, in *CIC Services, LLC v. IRS*, 141 S. Ct. 1582 (2021), the Court *unanimously* rejected the IRS's claim that the Act required dismissal of a challenge to an IRS regulation that required taxpayers to report information about certain types of insurance agreements. The Court explained:

> A reporting requirement is not a tax, and a suit brought to set aside such a rule is not one to enjoin a tax's assessment or collection. That is so even if the reporting rule will help the IRS bring in future tax revenue—here, by identifying sham insurance transactions.

Id. at 1588-89.

The IRS apparently did not take *CIC Services* to heart. Only months after issuance of that decision, the IRS argued in the First Circuit that the Anti-Injunction Act required dismissal of a suit that sought to limit the use of John Doe summonses for information-gathering purposes. *Harper v. Rettig*, 46

F.4th 1 (1st Cir. 2022). The First Circuit *unanimously* ruled against the IRS; it held that IRS summonses issued for the purpose of determining whether taxpayers are properly reporting their income "clearly fall within the category of information gathering, which the Supreme Court has distinguished from acts of assessment and collection." *Id.* at 8.

The IRS sought to distinguish *CIC Services* by asserting that the relief sought by the taxpayer (an injunction requiring the IRS to return to the taxpayer information that it could use to determine his tax liability) showed that the purpose of his suit was to prevent the assessment and collection of taxes. *Ibid.* The First Circuit rejected that argument out of hand, finding that the two case were indistinguishable. *Ibid.* It noted that in both cases, the IRS's information-gathering functions were at least several steps removed from a decision to assess additional taxes on the plaintiff. *Id.* at 8-9. As illustrated by its efforts to dismiss *Harper* under the Anti-Injunction Act, the IRS repeatedly invokes the Act to seek dismissal of any claim for injunctive relief against the agency, without regard to whether the claim seeks to prevent "assessment or collection" of a tax.

D. Statutory Limitations on Jurisdiction

As a general matter, federal district courts possess subject-matter jurisdiction over any claims "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Congress has created limited statutory exceptions to that grant when a party seeks review of a final decision of a federal administrative agency. For example, 15 U.S.C. § 78y(a)(1) provides that subject-matter jurisdiction over petitions for review of an SEC final order reside in the federal appeals courts, not the district courts.

Administrative agencies have frequently sought to bootstrap those statutory exceptions into an argument that Congress has implicitly stripped the district courts of § 1331 jurisdiction over constitutional challenges to ongoing administrative proceedings, even when the challenge is wholly collateral to the subject matter of the administrative proceeding. The Court rejected that argument in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477 (2010), ruling that such implicit repeals of district-court jurisdiction should not be recognized when, among other things, the party raising constitutional objections to administrative proceedings would be deprived of a "meaningful avenue of relief" if its access to federal courts were limited to an appeals-court petition following an adverse determination by the administrative agency. *Id.* at 490.

Undeterred by *Free Enterprise Fund,* federal agencies have repeatedly sought dismissal of constitutional challenges to ongoing proceedings, based on an argument that Congress has somehow implicitly

eliminated district courts' § 1331 subject-matter jurisdiction over such claims. The Court *unanimously* rejected that argument in *Axon Enterprise, Inc. v. FTC* and *SEC v. Cochran*, 598 U.S. 175 (2023). The Court held that when a plaintiff challenges the constitutional legitimacy of administrative proceedings, she is suffering a "here-and-now injury" that, Congress understood, could be remedied only by making judicial review immediately available in the district courts. *Id.* at 191. It explained:

> [The Petitioner's] claim ... is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker. And as to that grievance, the court of appeals can do nothing: A proceeding that has already happened cannot be undone. Judicial review of Axon's (and Cochran's) structural claims would come too late to be meaningful.

Ibid.

* * *

The federal government's record in these and other cases demonstrates its commitment to raising every possible procedural defense that even arguably precludes judicial review of the merits of claims filed against the government. The Board's invocation of 28 U.S.C. § 2401(a) in this case should be viewed as just the latest example of the federal government's assertion of a procedural defense without regard whether it is meritorious.

CONCLUSION

The Court should reverse the judgment of the Eighth Circuit that Petitioner's challenge to Regulation II is time-barred. It should hold that Petitioner's claims under the APA first accrued in 2018, when Petitioner opened for business and was first adversely affected by Regulation II.

Respectfully submitted,

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Dated: November 20, 2023