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 *AMICI CURIAE* STATE OF WEST VIRGINIA AND 17 OTHER STATES IN SUPPORT OF PETITIONER

PATRICK MORRISEY
Attorney General

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
lindsay.s.see@wvago.gov
(304) 558-2021

LINDSAY S. SEE
Solicitor General
Counsel of Record

MICHAEL R. WILLIAMS
Principal Deputy
Solicitor General

GRANT A. NEWMAN
Assistant Solicitor General

Counsel for Amicus Curiae *State of West Virginia*

[additional counsel listed after signature page]

QUESTION PRESENTED

Does a plaintiff's APA claim "first accrue[]" under 28 U.S.C. § 2401(a) when an agency issues a rule—regardless of whether that rule injures the plaintiff on that date—or when the rule first causes a plaintiff to "suffer[] legal wrong" or be "adversely affected or aggrieved"?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Statutes

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Regulation

Other Authorities

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

Statutes of limitation may not seem like the most exciting of legal subjects—maybe that's why Justice Holmes once observed that they "never have been explained or theorized about in any adequate way." *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897). But they prove to be vital. Many a litigant has seen his or her otherwise solid case stumble at the start because too much time has gone by. At the same time, though, these statutes often seem "difficult to fit … into a completely logical and symmetrical system of law." *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304, 313 (1945). That's especially so when statutes of limitation are applied in an arbitrary and unreasonable way. And as it turns out, it's easier to fall into this time trap than one might expect, as "the law concerning statutes of limitations fairly bristles with subtle, intricate, often misunderstood issues." *Wolin* v. *Smith Barney Inc.*, 83 F.3d 847, 849 (7th Cir. 1996).

The potential for unjustifiable outcomes flowing from a misunderstood statute of limitations is what this case is all about.

For years now, federal agencies have convinced certain courts that 28 U.S.C. § 2401(a) bars an Administrative Procedure Act challenge brought more than six years after an agency issues a rule. As Petitioner has explained, Opening.Br.20-23, that understanding is hard to square with the statute's text. The statute says that the clock starts running only when a claim "accrues"—that is, when the plaintiff "has a complete and present cause of action." *Reed* v. *Goertz*, 598 U.S. 230, 235 (2023) (cleaned up). And a cause of action under the APA does not accrue until the plaintiff has "suffered a sufficient injury in fact," which

doesn't necessarily happen the day the rule issues. *Nat'l Credit Union Admin.* v. *First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 488 (1998). Yet these courts insist that the clock must march ahead anyway, transforming an expressly accrual-based statute of limitations into an impliedly date-based statute of repose. See *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 16 (2014).

By choosing to rewrite Section 2401(a)'s terms in this way, these courts have produced unfair outcomes in many APA challenges. In this case, for example, the agency shut out a convenience store that didn't even exist when the challenged rule was implemented. Pet.App.7-12. Elsewhere, the National Park Service shut down a suit by developers who reacquired mineral interests four years too late. *Dunn-McCampbell Royalty Int., Inc.* v. *NPS*, 112 F.3d 1283, 1288 (5th Cir. 1997). Firearms dealers licensed in the 21st century could not challenge an ATF regulation promulgated during the Vietnam era. *Hire Order Ltd.* v. *Marianos,* 698 F.3d 168, 170 (4th Cir. 2012). Grievances of air-traffic controllers filed against the FAA were too little too late because the controllers were hired after the limitations period expired. *Harris* v. *FAA*, 353 F.3d 1006, 1010-12 (D.C. Cir. 2004). And on and on. Altogether, the majority rule's twisted understanding of the statute of limitations for APA claims has created a sort of "promised land" for regulations, in which otherwise unlawful rules will stand if they can sneak by long enough. *Herr* v. *U.S. Forest Serv.*, 803 F.3d 809, 821 (6th Cir. 2015). Yet "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).

The *amici* States urge the Court to reject this reading of Section 2401(a) as both wrong and wrongheaded. If text is not reason enough to reject the majority rule, then

many background principles that apply to statutes of limitation would be. What's more, by insulating a new batch of regulations each year, the majority rule all but guarantees the administrative state's power will continue to swell. The majority rule also elevates regulations to the top of the hierarchy of law—a backwards result. And by doing so within a scheme that already defers to agency interpretations of their own regulations, the majority rule motivates agencies to craft regulations with an eye for creative enforcement decisions that can be made outside Section 2401(a)'s six-year limitations period. These shifts do not occur in a vacuum. Entire existing doctrines (like preemption) risk pinning the regulated public down indefinitely if agencies are permitted to expand their authority by tweaking their interpretation once the six-year period has lapsed. This get-out-of-jail-after-six-years card chills both current efforts and future growth that would have otherwise occurred in the *amici* States to the direct benefit of their citizens.

The Court has made the right call in giving this sometimes-unexciting topic a little much-needed attention. The Court should now send the majority rule packing and replace it with one that honors both the text of Section 2401(a) and the interests the statute serves. The Court should reverse.

SUMMARY OF ARGUMENT

I. The Court could decide this case on Section 2401(a)'s text alone, but none of the principles, presumptions, and purposes behind statutes of limitation support the Board's reading of Section 2401(a), either. The majority rule does not align with the ordinary accrual rules that must be the presumptive favorite. The Board's approach undermines the interests of justice by limiting

review of actions that implicate important public interests. It does not serve the ordinary purposes of these statutes—nobody is sleeping on their rights here, and evidence preservation is not a material concern in this unique context. And the majority rule does not even advance interests that the Board asserts, such as reliance and definiteness. So even if one ignores the administrative context in which this case arises, the majority rule should *not* prevail.

II. But the administrative context of this case further confirms that the majority rule is the wrong reading of Section 2401(a). Our growing administrative state is nothing if not creative. By swaying a handful of circuit courts to read Section 2401(a) their way, federal agencies have put in place a system where their regulations are insulated from future APA challenges by no more than the passage of time. This elevation of regulation above all else is not compatible with several of our key governing principles. Federalism, separation of powers, and individual liberty suffer and decline.

III. This incompatibility has real consequences for everyday Americans and the *amici* States. The majority rule discourages state litigators from bringing APA actions to protect States' rights. It also discourages lawmakers and enforcers from any effort that could trigger federal preemption or previously dormant federal enforcement authority that has been locked in place under Section 2401(a). And it throttles innovative growth from new and existing business that would have flowed to the States had regulations not already been ushered into the "promised land free from legal challenge." *Herr*, 803 F.3d at 819-21. This Court should level the playing field by eliminating that built-in barrier altogether.

ARGUMENT

I. The Majority Rule Ignores The Principles, Presumptions, and Purposes Behind Statutes of Limitation.

Text is always the starting point when construing a statute, but the Court must also "examine the purposes and policies underlying the limitation provision, the [Administrative Procedure] Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." *Burnett* v. *N.Y. Cent. R. Co.*, 380 U.S. 424, 427 (1965). For instance, the Court has rejected one understanding of tolling in the securities context where that understanding was "*inequitable* and inconsistent with the general purpose of statutes of limitations." *Credit Suisse Sec. (USA) LLC* v. *Simmonds*, 566 U.S. 221, 227 (2012) (emphasis in original). Other times, the Court has considered the "background" principles against which Congress legislates. *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 10 (2014); see also, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 38 (2001) (Scalia, J., concurring) (describing a "background rule" that confirmed the meaning of a statute of limitations). And on still other occasions, the Court has accounted for what it is "reasonable to presume" about Congress's intent for such statutes. *United States* v. *Briggs*, 141 S. Ct. 467, 471 (2020).

The majority rule—which runs the clock from the moment the rule hits the Federal Register—ignores many of these important guides. Far from supporting the Board's reading, "practical considerations" should lead the Court to reject it. Contra BIO.11.

Start with an idea already mentioned: Limitation periods generally won't start running until plaintiffs have everything they need to "file suit and obtain relief." *Green*

v. *Brennan*, 578 U.S. 547, 554 (2016). This general rule is so strong that, where "two plausible constructions of a statute of limitations" exist, the Court will typically "adopt the construction that starts the time limit running when … the plaintiff has a complete and present" claim. *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 360 (2019). The Court will infer the opposite "odd result"—that is, a limitations period starting to run at some earlier time—only when the text mandates it. *Green*, 587 U.S. at 554.

The ordinary presumption is not overcome here. No court embracing the majority rule has said that the Sixth Circuit's contrary (and correct) reading is implausible. And no case has suggested that a plaintiff can jump the gun and "file suit" without an injury. That philosophy would gut the APA—and ordinary rules of standing to boot. As for any text-mandated result, not even the Board can identify something in the statute that would rise to the level of a clear statement endorsing its view. Instead, the Board and most courts prefer broad policy notions. Yet nothing suggests that Section 2401(a) "creates a special accrual rule for suits against the United States." *Franconia Assocs.* v. *United States*, 536 U.S. 129, 145 (2002) (construing analogous limitations provision in 28 U.S.C. § 2501).

The majority-rule courts also forget another central idea behind these statutes: The interests supporting hardline use of statutes of limitation are "frequently outweighed … where the interests of justice require vindication of the plaintiff's rights." *Burnett*, 380 U.S. at 428. True, in a private dispute over private interests, vindicating a single private party's one-off claims might not justify cracking the door to more claims. But the "interests of justice" are more substantial in the public context of APA cases. At the micro-level, agency rules and

regulations most often affect a broader class of regulated entities, so denying a right of review to one often denies a right of review to many. And at the macro-level, the interests of justice are served by ensuring that agencies perform their work consistent with congressional mandates and constitutional constraints. In other words, "[t]he public interest is served by compliance with the APA." *California* v. *Azar*, 911 F.3d 558, 581 (9th Cir. 2018). For reasons like these, the Court should be reluctant to give a narrow gloss to provisions purporting to limit APA review. A "system in which [administrative actions are taken] without a judicial reading of the arguments … seems counterintuitive to the interests of justice." Alexander Avery, *Foreign Corrupt Practices Act: Pleading Parent-Subsidiary Liability*, 35 J. NAT'L ASS'N ADMIN. L. JUDICIARY 131, 133 (2015).

Redefining accrual to mean rule publication here also does not serve "the primary purposes of limitations statutes: preventing surprises to defendants and barring a plaintiff who has slept on his rights." *Artis* v. *District of Columbia*, 583 U.S. 71, 91 (2018) (cleaned up).

As to the former purpose of preventing surprise, agencies should never be surprised to see those affected question their rules—in or out of the six-year window. Perhaps more than any other actor, the federal government (intentionally) operates under intense scrutiny from all quarters, such that challenges are inevitable. Beyond that, the Board itself catalogues how "[j]udicial review remains available [after six years from publication] in numerous ways." BIO.14. It's unclear why a suit like Corner Post's would be any more of a "surprise" to the agency than any of those avenues. Ultimately, "if the [Board] supports judicial review after the initial [six-year] period, then why force review into [other]

convoluted route[s]?" *PDR Network, LLC* v. *Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2065 (2019) (Kavanaugh, J., concurring) (examining the limitations period in the Hobbs Act).

As for the latter justification of punishing sleepy plaintiffs, that rationale is even more unsustainable in cases like this one. Parties like Corner Post cannot reasonably be accused of "sleeping on their rights" when those parties did not even exist at the time that the Board insists that clock began to run. More to the point, the word "right" must be given real meaning—and parties have no "rights" to sleep on until they suffer injury. Cf. *Gen. Inv. Co.* v. *N.Y. Cent. R. Co.*, 271 U.S. 228, 230 (1926) (noting how a plaintiff has "no right to complain" where a "violation of law" "will not injure him"). And if parties are forced to file within the six-year period before they have any claim of injury, then "[t]he Government would thus find itself defending against highly speculative damages claims in a profusion of lawsuits." *Franconia Assocs.*, 536 U.S. at 147.

The Court also should not rewrite Section 2401(a) out of concern that "evidence [might] be[] lost, memories [might] fade[], and witnesses [might] disappear[]." *CTS Corp.*, 573 U.S. at 8; see also BIO.16 (worrying that "the passage of time" might make it hard for agencies to assemble the administrative record). States are experienced APA litigants, so they understand perhaps better than most how these proceedings play out. And in the States' experience, evidence-preservation concerns are lessened in APA review. Because APA review is based on the administrative record, witnesses—particularly on the defense side—are rarely needed at all. See, *e.g.*, *Sierra Club* v. *Flowers*, 276 F. Supp. 2d 62, 69 (D.D.C. 2003). As for fading memories and lost evidence, those

concerns are also less substantial for the federal government. Unlike private parties, federal agencies are required to document and memorialize their decision processes. See 44 U.S.C. § 2901, *et seq.* (Federal Records Act); see also 44 C.F.R. § 1222.22(a) (FRA implementing regulations that provide that agencies must retain sufficient documentation to allow for legal challenges and judicial review). And "once a document achieves the status of a 'record' as defined by the [Record Disposal] Act, it may not be alienated or disposed of without the consent of the Administrator of General Services." *Kissinger* v. *Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 147 (1980). So there's far more assurance that the evidence will still be around in an APA case than in the usual one.

The Board also complains that a traditional accrual rule—rather than the supposed date-certain rule that it favors—could make the filing deadline effectively indefinite. See BIO.11, 16. The Board's gripe is with Congress, as it was Congress that chose to write a plaintiff-focused statute of limitations premised on accrual rather than a defendant-focused statute of repose premised on publication date. See *Underwood Cotton Co.* v. *Hyundai Merch. Marine (Am.), Inc.*, 288 F.3d 405, 409 (9th Cir. 2002) (describing how a statute of limitations is "concerned with the plaintiff's diligence" while a statute of repose is "concerned with the defendant's peace").

It's also hard to see why the Board is more troubled by a degree of "indefiniteness" in the accrual rule but seems fine with "indefiniteness" in the other post-six-year actions to which the Board acquiesces. See BIO.14-15. After all, depending on the flavor of majority rule that we're talking about, courts applying that rule might consider whether a given APA challenge is facial versus

as-applied, substantive versus procedural, or declaratory versus defensive. Those questions don't supply easy, definite answers. "The line between procedural and substantive law is hazy." *Moore* v. *Harper*, 600 U.S. 1, 31 (2023). Likewise, the line between "facial and as-applied" challenges is "hazy at best and incoherent at worst"—although "as-applied" has a slightly different spin here. *Elgin* v. *Dep't of Treasury*, 567 U.S. 1, 15 (2012); see also Pet.17 (explaining what "as-applied" means in this context). As for the defensive versus declaratory line, courts will occasionally find that defenses are "simply time-barred [declaratory] claims masquerading as defenses [that] are likewise subject to the statute of limitations." *City of Saint Paul* v. *Evans*, 344 F.3d 1029, 1035-36 (9th Cir. 2003); see also, *e.g.*, *Alabama* v. *PCI Gaming Auth.*, 801 F.3d 1278, 1292 (11th Cir. 2015) (concluding that a State's response to an affirmative defense was a time-barred collateral APA claim). So the majority rule promises at least as much ambiguity and indefiniteness as the proper reading does.

Truth be told, the rule that Corner Post advances provides more definiteness—for each potential plaintiff. The Board's real complaint is that the correct reading of the statute doesn't provide sufficient definiteness for the entire class of potential plaintiffs—but that broad immunity would be far from the norm for statutes of limitation. See, *e.g.*, *Vispisiano* v. *Ashland Chem. Co.*, 527 A.2d 66, 72 (N.J. 1987) (rejecting an application of a statute of limitations that would "deprive[] "an entire class of plaintiffs … of its claims"). And fundamentally, although agencies might insist that they can operate more freely if they could only stop worrying about what courts think after some time, "such occasional impairments are the price we pay to preserve the integrity of the APA."

N.J. Dep't of Env't Prot. v. *EPA*, 626 F.2d 1038, 1048 (D.C. Cir. 1980).

The Board—and at least some courts applying the majority rule—also fret that the statute of limitations will no longer present any real time limit at all if accrual is to be the trigger. See BIO.15-16; but see, *e.g.*, *Alaska* v. *U.S. Dep't of Agric.*, 772 F.3d 899, 900 (D.C. Cir. 2014) (Kavanaugh, J.) (reversing a decision declaring an APA action untimely even though "it may seem anomalous that a legal challenge to a regulation may be filed considerably after the initial expiration of [the six-year] period"). But remember that neither Corner Post nor the States are asking the Court to ignore (or even toll) that statute of limitations. Corner Post would still be barred from bringing any claims six years *after those claims accrued* even when Section 2401(a) is applied properly.

Recognizing this reality, the district court imagined that a party could get around even that limit by creating a new entity that becomes subject to the rule. The district court supposed that the new entity could restart the clock, an outcome the district court thought was untenable. Pet.App.35-36. Nothing suggests that this case (or any other) presents unusual facts like that. And even if the problem were a real one, plenty of tools are available to suss out sham plaintiffs and claims. See Opening.Br.38-40. But anyway, this Court has resisted the notion that a party's right to sue should hinge on whether "the injury could be described in some sense as willingly incurred." *FEC* v. *Cruz*, 596 U.S. 289, 297 (2022). So courts should not twist limitations statutes like Section 2401(a) into knots to foreclose claims for that same (impermissible) reason.

Lastly, "reliance interests" are no reason to embrace the majority rule. BIO.12. The Board never explains why

these reliance interests will not have already taken hold by years three, four, five, or six after a rule is adopted. Yet Congress allows litigants to sue then. Nor does the Board explain why reliance interests are not a concern for the other "numerous ways" in which judicial review remains available after six years even under the majority rule. BIO.14. And the Board seems to forget that courts can in other ways protect third-party reliance interests in administrative-review actions, such as by shaping a remedy that accounts for those interests, *Buckley* v. *Valeo*, 424 U.S. 1, 142-43 (1976), or allowing reasonable reliance to be presented as a defense, *United States* v. *Pa. Indus. Chem. Corp.*, 411 U.S. 655, 673-75 (1973).

In any case, Section 2401(a)'s language undermines the idea that Congress was deeply concerned with these reliance interests. When Congress wanted to protect those interests in administrative-review statutes, it paired express language starting the limitations period at the agency action with much shorter limitation periods (usually days or weeks). Pet.24; BIO.12-13. It chose to do neither in Section 2401(a). In some of these statutes, Congress even precluded review in enforcement actions. See, *e.g.*, 33 U.S.C. § 1369(b)(2). Again, Congress didn't go that route in Section 2401(a). The Court should thus give effect to Congress's textual signals, which reflect that reliance interests are less substantial in the general APA context. "[D]ifferent terms" and approaches across related statutes should be treated differently. *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 456 (2012).

All in all, these principles, purposes, and "practical consequences likewise support a default rule of allowing review" up to six years from the *actual* accrual date—not the legally fictitious accrual date of publication. *PDR Network*, 139 S. Ct. at 2061 (Kavanaugh, J., concurring)

(describing the unfairness of foreclosing review, particularly as to "entities … [that] may not even have existed back when an agency order was entered").

II. The Majority Rule Improperly Elevates Regulations—and The Administrative State—Above All Else.

Beyond its incongruence with statute-of-limitations principles, the majority rule also threatens to create a permanent reservoir of unreviewable power for agencies. Indeed, the rule elevates broad swaths of the Code of Federal Regulations above the statutes that authorize them to exist. And with the deck already stacked against the regulated public's challenges to agency interpretations of their own regulations, the majority rule makes an untenable situation even worse. The Court should fix that.

Start again with first principles. "The APA … creates a presumption favoring judicial review of administrative action." *Sackett* v. *EPA*, 566 U.S. 120, 128 (2012) (cleaned up); see also *Abbott Lab'ys* v. *Gardner*, 387 U.S. 136, 140 (1967). In the Act, Congress created "a broad spectrum of judicial review of agency action." *Bowen* v. *Massachusetts*, 487 U.S. 879, 903 (1988). Thus, as Corner Post notes, this Court has rejected "agencies' machinations to evade judicial scrutiny of their regulations." See Pet.26. So has Congress. Cf. *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 154 (1970) (noting the "trend" toward "enlarg[ing] … the class of people who may protest administrative action"). In line with those preferences, this Court has said it should generally favor the reading of a statute that provides more review "when [the] statutory provision is reasonably susceptible to divergent interpretation," at

least without "clear and convincing evidence" otherwise. *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1069 (2020) (cleaned up); see also *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977) (explaining that there must be "persuasive reason to believe" that Congress intended to foreclose review).

An overly rigorous reconstruction of Section 2401(a) forecloses review in contravention of the presumption of reviewability. Concerned with that conflict, at least some courts have properly held that "a statutory time limit on judicial review cannot cut off forever all review of administrative decisions." *Ill. Cent. Gulf R. Co.* v. *ICC*, 720 F.2d 958, 961 (7th Cir. 1983). And "[p]roper promulgation does not necessarily render a regulation valid for all time or for all purposes," either. *Nw. Tissue Ctr.* v. *Shalala*, 1 F.3d 522, 530 (7th Cir. 1993). "Because administrative rules and regulations are capable of continuing application, limiting review of a rule to the period immediately following rulemaking would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Graceba Total Commc'ns, Inc.* v. *FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997) (cleaned up). Yet the majority rule at least takes a step—or more accurately, a leap—in that direction.

Right now is a bad time to take a step backwards when it comes to judicial review of administrative actions.

Never in our country's history has "[t]he administrative state wield[ed]" as much "power and touche[d]" as many "aspect[s] of daily life" as it does today. *City of Arlington* v. *FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). This description isn't hyperbole. Regulations "vastly outpace the legislative output of Congress and, together with ordinary statutes, create a web of requirements that regulated parties must

adhere to" without knowing "what the law requires." Alexander Nabavi-Noori, *Agency Control and Internally Binding Norms*, 131 YALE L.J. 1278, 1281 (2022); see CLYDE WAYNE CREWS, JR., COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 7, 45 (2022), https://bit.ly/43WCKaS (documenting how the 40,000 agency rules published over the last decade have outpaced the laws that Congress enacted at a rate of 26-to-1). Quite simply, "[t]he Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state." *Fed. Mar. Comm'n* v. *S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002).

And "judicial review of administrative agency action" is also supposed to be "a fixture of our modern administrative state." *Kirkpatrick* v. *Lenoir Cnty. Bd. of Educ.*, 216 F.3d 380, 386 (4th Cir. 2000). It should be the counterbalance to the "explosive" growth of agencies. *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring); see also John J. Coughlin, *The History of the Judicial Review of Administrative Power and the Future of Regulatory Governance*, 38 IDAHO L. REV. 89, 92-94 (2001). Yet the majority rule undermines that function.

If the majority rule becomes the universal one, then the administrative state won't just keep getting bigger—it'll also grow perpetually more powerful. In 2016, for example, federal agencies placed 3,853 final rules on the books. Crews, *supra*, at 46. Among these rules, "486 were deemed 'significant,'" *id.*, meaning they substantially affected the economy or key government programs, interfered with another agency's ambit, or "raise[d] novel legal or policy issues," Exec. Order No. 12,866 of Sept. 30, 1993, Regulatory Planning and Review, 58 Fed. Reg.

51,735 (Oct. 4, 1993). Yet under the majority's rule, the year 2023 will have sent all of them—the "[t]he highest count … over the past two decades," Crews, *supra*, at 46—to the "promised land free from legal challenge," *Herr*, 803 F.3d at 821.

Now contrast the majority rule's treatment of regulations with how statutes are reviewed. A party can challenge the constitutionality of a statute whenever it's injured—whether it be the day after or the century after the law was put on the books. See David Sandler, *Forget What You Learned in Civics Class: The "Enrolled Bill Rule" and Why It's Time to Overrule* Field *v.* Clark, 41 COLUM. J.L. & SOC. PROBS. 213, 260 (2007). From time to time, a court ruling reminds us that time just isn't a factor for such challenges. See, *e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 760 (1999) (invalidating provisions of the Fair Labor Standards Act of 1938); *Dickerson* v. *United States*, 530 U.S. 428, 442-44 (2000) (holding 18 U.S.C. § 3501 was unconstitutional over 30 years after Congress passed it); *United States* v. *Windsor*, 570 U.S. 744, 752 (2013) (holding amendment of 1 U.S.C. § 7 unconstitutional 17 years later); *In re Trade-Mark Cases*, 100 U.S. 82, 88 (1879) (holding the first federal trademark registration law unconstitutional 9 years after it was passed). And although statutes of limitation might apply to the causes of action that implicate the challenge to a statute, "mere enactment is [still] rarely, if ever, the ripening event or the moment of accrual for a case in which a party mounts a facial challenge to a law." Timothy Sandefur, *The Timing of Facial Challenges*, 43 AKRON L. REV. 51, 52 (2010). So the majority rule for challenges to regulations is a foreign concept as to challenges to statutes.

It makes no sense that the majority rule coats regulations in special protection that isn't even available

to statutory law. Our system of government treats regulations and legislation differently, and rules and regulations are supposed to get *less* respect, not more. "The Constitution is the highest-order law, followed by statutes, then common law and regulations." Kimberly L. Wehle, *Defining Lawmaking Power*, 51 WAKE FOREST L. REV. 881, 915 (2016). The ranking reflects our Constitution's assignment of responsibilities: "Congress makes laws and the President, acting at times through agencies …, faithfully executes them." *Util. Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 327 (2014) (cleaned up). And considering the "distinction between the legislative and administrative function," *United States* v. *George*, 228 U.S. 14, 22 (1913), the majority rule cuts against the hierarchy of law on which our system of government depends.

Agencies can take even more advantage of this role reversal by pairing their time-derived immunity from review with administrative deference. Especially before this Court's decision in *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), agency interpretations of their own regulations received near-complete deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997). And the rule-drafters knew it—39% of them thought about *Auer* deference when drafting regulations. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1065 (2015). Even though *Kisor* tried to fix some of *Auer*'s biggest problems, *Auer* deference still lives on. And when "imprecision, obfuscation, or change[s] of heart" might receive significant deference, agencies have little "incentive to draft clear, straightforward rules when [they] choose[] to engage in rulemaking." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 668-69 (1996).

Quite the opposite: Agencies operating under the majority rule have the incentive to "speak vaguely and broadly" in each new rule, wait for six years to run, and then recast the rule through new interpretations or "clarifications" with "retroactive effect." *Decker* v. *Nw. Env't Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part); see also *Perez* v. *Mortg. Bankers Ass'n*, 575 U.S. 92, 110 (2015) (Scalia, J., concurring in the judgment). No one can be heard to complain because their APA challenge will be time-barred; the agency will insist there's nothing new and use *Auer* to wave away any suggestion otherwise. "[T]he District Court would have to afford the agency not mere *Skidmore* deference or *Chevron* deference, but absolute deference." *PDR Network*, 139 S. Ct. at 2066. The bottom-line result? "Any government lawyer with a laptop could create a new federal crime by adding a footnote to a friend-of-the-court brief." *Carter* v. *Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring). Throw into the mix the reality of "congressional gridlock []elevat[ing] the significance of executive agency rulemaking," Ezra Rosser, *Affirmatively Resisting*, 50 FLA. ST. U. L. REV. 123, 176 (2022), and it's a recipe for disaster.

These problems aren't imagined ones—the States have seen them play out this way before. In *Texas* v. *Rettig*, 987 F.3d 518 (5th Cir. 2021), six States sued the Department of Health and Human Services and the Internal Revenue Service over a rule requiring the States to pay certain "provider fees" to Medicaid managed care organizations. The States maintained that they came to understand that they were required to pay these fees only in 2015. *Id.* at 527; see also *Texas* v. *United States*, 300 F. Supp. 3d 810, 821 (N.D. Tex. 2018) (noting that a 2015 Actuarial Standard of Practice "effectively changed" the

States' prior exemption from paying the fees). Even though the States filed suit the same year, the Fifth Circuit found their suit untimely under Section 2401(a). *Rettig*, 987 F.3d at 529. According to the court, the 2015 standard change changed nothing from a 2002 certification rule—even though nobody seemed to have understood that 2002 rule required States to pay provider fees back when the rule was implemented. *Id.* at 530. So despite having acted diligently, the States were locked out for having filed seven years too late. This kind of outcome is not a fluke, even if one looks no further than other HHS cases. See, *e.g.*, *Cedars-Sinai Med. Ctr.* v. *Shalala*, 177 F.3d 1126, 1129-30 (9th Cir. 1999) (finding that claims were untimely brought even though suit was filed just after HHS began implementing the challenged policy, as policy was purportedly put in place through an ambiguous change in an earlier provider manual).

In other words, the majority rule takes an agency's "power, in future adjudications, to do what it pleases" to a whole new (and permanent) level. *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring). But there's nothing that suggests Congress meant for Section 2401(a) to do that.

III. The Majority Rule Produces Everyday Harms For States and Others.

All this might sound a bit academic. But make no mistake: The majority rule imposes real consequences on the States and our citizens.

A. Most obviously, adopting the majority rule nationwide could stifle the States as litigants; they'll sometimes be prevented from bringing APA suits. Some might dismiss that concern as an self-serving complaint from a disgruntled group of putative plaintiffs—but it's

not. "[S]tate-led litigation against the federal government is valuable." Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. RICH. L. REV. 633, 652 (2018). "States have a unique federalism interest in ensuring that federal executive officers comply with the Constitution and federal laws, and they have the resources and sophistication to bring successful suits of this sort." F. Andrew Hessick & William P. Marshall, *State Standing to Constrain the President*, 21 CHAP. L. REV. 83, 103 (2018). Unsurprisingly, then, States "are increasingly using their collective voices to influence"—though litigation—"the inter-institutional federal conversation about federal policymaking and constitutional meaning." Mark C. Miller, *State Attorneys General, Political Lawsuits, and Their Collective Voice in the Inter-Institutional Constitutional Dialogue*, 48 J. LEGIS. 1, 29 (2021). Most obviously, States, speaking through their Attorneys General, "are uniquely qualified" to call out federalism concerns. Anthony Johnstone, *Hearing the States*, 45 PEPP. L. REV. 575, 599 (2018). Put another way, state-led APA actions, like other slate-led lawsuits against the federal government, "benefit[] the constitutional structure and separation of powers." Jonathan David Shaub, *Delegation Enforcement by State Attorneys General*, 52 U. RICH. L. REV. 653, 656 (2018). They act "as a necessary constitutional check on the modern executive branch." *Id.*

Preserving federalism through state-led litigation is no small thing. "The vertical separation of powers between the national government and the States"—paired with the horizontal separation among the federal branches—"provide[s] the soundest protection of liberty any people has known." JEFFREY SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN

CONSTITUTIONAL LAW 11 (2018). As this Court has explained, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Shelby Cnty.* v. *Holder*, 570 U.S. 529, 543 (2013); accord *Bond* v. *United States*, 572 U.S. 844, 863 (2014). So knocking the legs out from under one of the few "political safeguards of federalism"—a state-led APA action—is undesirable to say the least. Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 117 (2018).

B. The APA also strangles States as lawmaking institutions.

Agencies can struggle to account for States' interests in rulemaking, especially as to preemption. "[U]nlike Congress, administrative agencies are clearly not designed to represent the interests of States." *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting). Rather, the "'political safeguards' that give [S]tates a voice in Congress's lawmaking" do not extend to a "voice in the executive branch's activities." Charles Davant IV, *Sorcerer or Sorcerer's Apprentice?: Federal Agencies and the Creation of Individual Rights*, 2003 WIS. L. REV. 613, 640 (2003). So agencies may be "too quick" to "displace state law" precisely "because, unlike Congress, agencies are not accountable directly to the States." Amanda Frost, *Judicial Review of FDA Preemption Determinations*, 54 FOOD & DRUG L.J. 367, 368 (1999).

The APA gives States one of the few meaningful opportunities to strike back against broad federal preemption resulting from administrative actions. "When states, … conclude that … the President … ha[s] unlawfully and adversely affected state laws, interests, or policy choices in a preemptive manner, it is an appropriate

check for a state to resist that change in federal court." Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955, 1969-70 (2019). And "judicial review of agency decisions" then "ensure[s] that agencies take all preemption policy considerations into account." Jamelle C. Sharpe, *Toward (a) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 429 (2011). Thankfully, "states have been allowed to challenge agency action that preempts state law" through those actions. Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 NOTRE DAME L. REV. 2015, 2021 (2019); see also Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209, 219 (2014) (detailing times when "states have been able to use sovereignty interests as the basis for APA or related actions attacking agency determinations that purport to preempt state law").

If the majority rule takes hold, then it will be harder for States to push back against overly aggressive agency preemption.

Absent internal changes within the federal agency, once the six-year clock runs, all federal views of preemption are etched in stone. State lawmaking will then be hamstrung. Take just a few examples. An agency might, for instance, put a new spin on its rules and regulations after the six-year mark, which gives it an unexpectedly broader reach. States might then find themselves out of luck if they cannot convince a court this reinterpretation constituted a new action. Sometimes, later agency action wouldn't even be needed to trap the States. For example, an agency might write a broad preemption regulation, and a State might conclude at that point that none of its laws are affected (even if the

regulation happens to be unlawful). But seven years later, the State might decide to pass a law that would fall under the agency's preemption provision. The State then has only two choices: abandon its legislative effort or try to mount a futile APA challenge. Most likely, the State will just choose the first option, and legislators will be done with their legislative effort before it even begins.

Even when there's no dead-on-point preemptive regulation or the like, the "stiflingly murky federal law regime" might just dissuade state legislators from approaching a potentially preempted subject area anyway. Harry G. Hutchison, *Protecting Liberty? State Secret Ballot Initiatives in the Shadow of Preemption and Federalism*, 6 NYU J.L. & LIBERTY 409, 419 (2012). Knowing that preemption regulations from more than six years ago are locked in, and knowing that *Auer* deference could empower agencies to construe those regulations broadly, legislators might prefer to avoid the headache entirely. State lawmaking would thus be impeded and effectively preempted, even if only indirectly.

Paving the way for even more administrative preemption would not be a good outcome for anyone. Our "federalist structure of joint sovereigns" is meant to "preserve[] to the people numerous advantages." *Wyeth* v. *Levine*, 555 U.S. 555, 584 (2009) (Thomas, J., concurring in the judgment). That structure includes "a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society" and "increase[d] opportunity for citizen involvement in democratic processes." *Id.* And when it comes to regulation, our nation has likewise employed a "decentralized, overlapping system" for most of its history. S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 719 (1991).

For good reason. Among other things, state regulatory efforts, working alongside their federal counterparts, "function[] as a stabilizing device when federal regulators are 'captured.'" Hoke, *supra*, at 718-19. And they safeguard "the intended functions of republican federalism" by "prevent[ing] the transformation of states and localities into mere administrative instruments of federal political policy." *Id.*

But without tools like APA actions to help police the limits of preemption, all these values are threatened.

C. These problems affect more than litigators and lawmakers. They hurt our economies, too.

As it insulates more regulations from judicial review with each passing year, the majority rule broadly encourages agencies to dig up, dust off, and wield dormant authority—without having to promulgate new rules—covering a host of issues. Last year, the Court noted again the similar danger from an agency's "claim[] to discover in a long-extant statute an unheralded power" to spur "transformative expansion in its regulatory authority." *West Virginia*, 142 S. Ct. at 2610 (cleaned up). Even now, we see agencies invoking "dormant" regulations to constrain entire industries that may not have even existed when the regulations were first implemented. See, *e.g.*, *CFPB Invokes Dormant Authority to Examine Nonbank Companies Posing Risks to Consumers*, CFPB (Apr. 25, 2022), https://bit.ly/3Fzl5fQ (agency announcing that it intended to invoke 2013 implementing regulations for the first time to regulate new "fintech" companies nine years later). If the Court adopts the majority rule, we should expect to see this tactic become more pervasive. If these actions were subject to ordinary judicial review, then the past suggests that courts would strike about a third of them down. See David Zaring, *Reasonable Agencies*, 96

VA. L. REV. 135, 137 (2010). But under the majority rule, all of them would stand.

Greenlighting more aggressive regulatory efforts imposes real costs. Even without the majority rule, these requirements are expensive. See Crews, *supra*, at 6, 33 (estimating $1.9 trillion in overall annual costs due to federal regulations). They also tend to scare investors in regulated industries away, as those investors become spooked by the prospect of "reduce[d] or eliminate[d] ... return[s]" due to "[r]adical and vacillating changes in [the] law." Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91, 92, 99 (1995). And these are only some costs and harms—delay, capriciousness, and "imperiousness" are others. J. Harvie Wilkinson III, *Assessing the Administrative State*, 32 J.L. & POL. 239, 251-55 (2017). In short, as the Department of Justice has recognized before, "an entire [federal] regulatory apparatus lays claim to an extraordinary amount of private resources, imposing costs that are as consequential as the costs of taxes for the private parties who must bear them." U.S. DEP'T OF JUST., MODERNIZING THE ADMINISTRATIVE PROCEDURE ACT 2 (2020), https://bit.ly/3u3x9CA.

By limiting judicial review, the majority rule silences parts of the business community affected by these burdensome costs. Most obviously, businesses looking to open will crash into a brick wall of unassailable federal regulation that came to be before they even arrived on the scene. See NFIB.Pet.Br.11-15. That's an especially bad result given how small businesses already bear the brunt of federal regulation—63% of the total cost by one estimate. See Jeffrey J. Polich, *Judicial Review and the Small Business Regulatory Enforcement Fairness Act*, 41 WM. & MARY L. REV. 1425, 1432 (2000). And the Court

needn't even look beyond this case to see how that will play out day-to-day. Here, a small convenience store in a little North Dakota town says that it must now pay hundreds of thousands of dollars in fees that would be 400% lower if the agency had only acted lawfully. Pet.App.70. But according to the Eighth Circuit—and other majority-rule courts like it—the little store in Watford City now has no way to resist. It purportedly should have sued the Board before the store even opened for business. Business communities deserve a fairer outcome than that.

* * * *

The *amici* States want to see real opportunities for state litigants to seek judicial review, real freedom for state legislators to operate, and real breathing room for economies to function. The Court should put aside the majority rule. It should restore fairness through a reading of Section 2401(a) that serves everyone—not just federal agencies.

CONCLUSION

This Court should reverse.

Respectfully submitted.

PATRICK MORRISEY
Attorney General

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
lindsay.s.see@wvago.gov
(304) 558-2021

LINDSAY S. SEE
Solicitor General
Counsel of Record

MICHAEL R. WILLIAMS
Principal Deputy
Solicitor General

GRANT A. NEWMAN
Assistant Solicitor General

Counsel for Amicus Curiae *State of West Virginia*

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

TIM GRIFFIN
Attorney General
State of Arkansas

ASHLEY MOODY
Attorney General
State of Florida

CHRIS CARR
Attorney General
State of Georgia

RAÚL LABRADOR
Attorney General
State of Idaho

THEODORE E. ROKITA
Attorney General
State of Indiana

BRENNA BIRD
Attorney General
State of Iowa

DANIEL CAMERON
Attorney General
Commonwealth of
Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

ANDREW BAILEY
Attorney General
State of Missouri

AUSTIN KNUDSEN
Attorney General
State of Montana

MICHAEL T. HILGERS
Attorney General
State of Nebraska

DAVE YOST
Attorney General
State of Ohio

ALAN WILSON
Attorney General
State of South Carolina

JONATHAN SKRMETTI
Attorney General and
Reporter
State of Tennessee

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah