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 SMALL BUSINESS ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF SMALL BUSINESS ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae represent businesses across the nation that recognize the value of a stable and predictable federal regulatory structure to small business growth and competition.

Amicus curiae Small Business Majority is a national small business organization with a network of more than 85,000 small businesses and 1,500 business and community organizations. Small Business Majority aims to empower America's diverse entrepreneurs to build a thriving and equitable economy. To that end, Small Business Majority delivers resources to entrepreneurs and advocates for public policy solutions that promote inclusive small business growth.

Amicus curiae American Sustainable Business Council (ASBC) is building a business association by partnering with business organizations, companies, and investors. ASBC and its association members collectively represent more than 250,000 businesses, many of which are small businesses. ASBC advocates for solutions and policies that support a just, sustainable stakeholder economy. Its mission is to educate, connect, and mobilize business leaders and investors to transform the public and private sectors and the overall economy.

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[1] Pursuant to Rule 37.6, no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than *amici*, their members, and their counsel contributed money to fund this brief.

Amicus curiae South Carolina Small Business Chamber of Commerce is a statewide advocacy organization with more than 5,000 supporters. The Chamber provides leadership in making South Carolina friendlier to small businesses in areas such as taxation, regulation, worker training, workers compensation insurance, utility costs, health insurance, energy/conservation, and economic development. The Chamber has also worked at the federal level on access to capital, federal regulations, health insurance, coastal environmental protection, and democracy.

Amicus curiae Businesses for Conservation and Climate Action (BCCA) is a coalition of Indigenous-led and community-based businesses, many of which are small businesses. BCCA's mission is to establish national policies that recognize sustainable small businesses as compatible with healthy lands and oceans, and to enhance the participation of these sustainable businesses in conversations about resource access.

Amicus curiae Main Street Alliance (MSA) is a national network of small businesses, which represents approximately 30,000 small businesses across 15 states. MSA helps small business owners realize their full potential as leaders for a just future that prioritizes good jobs, equity, and community through organizing, research, and policy advocacy on behalf of small businesses. MSA also seeks to amplify the voices of its small business membership by sharing their experiences with the aim of creating an economy where all small business owners have an equal opportunity to succeed.

Amici have a strong interest in ensuring the right conditions exist for entrepreneurs to grow their small businesses into thriving forces in local economies. Federal regulations can foster such conditions in two

ways. First, federal regulations bring much needed predictability, nationwide consistency, and stability to the business landscape, allowing small business owners to more confidently plan and prepare for the future. Second, regulations play an important role in ensuring small businesses can compete against large corporations: Appropriately tailored regulations can level the playing field to allow *all* businesses to compete and thrive, producing a more equitable and just economy.

Amici recognize that an interpretation of the Administrative Procedure Act's ("APA") statute of limitations that would allow for new facial challenges to longstanding regulatory regimes as urged by Petitioner would needlessly expand regulatory uncertainty and destabilize business expectations. *Amici* write to express their concern about the particularly harmful consequences for small businesses if Petitioner's interpretation of the APA is embraced by the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question before this Court—whether to discard the longstanding interpretation of the Administrative Procedure Act's ("APA") statute of limitations provisions—has profound implications for the nation's small businesses and the country's economy as a whole. Adopting Petitioner's invitation to disregard the APA's six-year statute of limitations for facial challenges to federal regulations as beginning to accrue when a federal agency takes final agency action would create chaos, uncertainty, and inconsistent regulatory regimes for the nation's regulated industries and the American people the regulations

seek to serve. It would enable a host of regulations to be challenged decades after they were finalized, creating an unstable regulatory environment. While such an environment would have negative consequences for all of the nation's regulated industries, much of the burden would fall on small businesses, which rely on regulatory certainty to grow, thrive, and compete in the United States economy. *Amici* therefore urge the Court to reject Petitioner's attempt to undermine the APA's statute of limitations and regulatory certainty and to affirm the lower court's ruling.

Small businesses are critical to the United States economy. The vast majority—99.9 percent—of businesses in the United States are small.[2] Small businesses also employ nearly half of the nation's workers.[3] Likewise, small businesses have created the majority of new jobs in the United States since 1995.[4] Small businesses are especially important for the advancement of women and people of color, who own more than 40 and 30 percent of such businesses, respectively.[5]

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[2] Office of Advoc., U.S. Small Bus. Admin., *2022 Small Business Profile for the United States* 1 (2022), https://tinyurl.com/3u93bxjv.

[3] *Id.*

[4] Office of Advoc., U.S. Small Bus. Admin., *Frequently Asked Questions* 1 (Dec. 2021), https://tinyurl.com/32r2xuuv ("From 1995 to 2020, small businesses created 12.7 million net new jobs while large businesses created 7.9 million (Figure 2). Small businesses have accounted for 62% of net new job creation since 1995.").

[5] *2022 Small Business Profile*, *supra* note 2, at 3.

Opening and sustaining a small business, however, is not easy, particularly in recent years. Small businesses face risk and challenges at every turn, from securing the capital necessary to open their doors to making payroll each month. Many small businesses are unable to surmount these challenges. Less than half survive to the five-year mark.[6] And small businesses' survival can be even more challenging when forced to weather changing economic and political conditions, such as the COVID-19 pandemic, supply chain disruptions, inflation, or a tight labor market.[7]

Stability, predictability, and consistency can enable small businesses to survive and thrive. In a stable environment, entrepreneurs considering opening a business can evaluate likely compliance obligations and build systems and business models that efficiently account for these obligations from the start. Business owners in a stable environment can more confidently allocate scarce resources to the next best strategic investments for their business. And a well-structured regulatory environment can help put small businesses on more even footing with larger corporations, allowing Main Street to compete with Wall Street.

Petitioner's attempt to dramatically expand the use of facial legal challenges to longstanding

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[6] *Frequently Asked Questions, supra* note 4, at 2.

[7] Indeed, the Federal Reserve estimates that there were 130,000 excess small business closures (i.e., above and beyond pre-pandemic rates) between March 2020 and February 2021. Leland D. Crane, et al, Fed. Rsrv. Bd., *Business Exit During the COVID-19 Pandemic: Non-Traditional Measures in Historical Context* 4 (2021), https://tinyurl.com/3kvpwjnp.

regulatory regimes would introduce substantial uncertainty and instability into existing regulatory frameworks. While *amici* certainly believe some federal regulations could be revisited, altered, or strengthened in ways that would be favorable to small businesses, permitting new facial challenges to settled regulatory regimes does not achieve those goals.

On the contrary, expanding judicial review of longstanding regulatory regimes is likely to contribute to the sorts of instability that can be fatal to small businesses. Ruling for Petitioner would subject rules to which small businesses have long adapted (and many that they may have fought for) to challenge and potential vacatur, either inconsistently across different federal jurisdictions, or nationwide, creating sudden and substantial changes in businesses' rights and obligations, and new and uncertain timelines for replacement regulations. Other vehicles for regulatory changes exist that are more deliberative, more tailored, and less disruptive to the needs of small businesses. In contrast to Petitioner's proposed approach, these other vehicles are also consistent with the law. This Court should embrace the rule that controls in a majority of the nation's circuit courts (including all but one of the circuit courts to have examined this issue) and affirm the judgment of the Eighth Circuit that the APA's limitations period for facial challenges begins to run at final agency action.

ARGUMENT

Petitioner urges this Court to reshape the APA and disregard the widely-understood trigger for the law's six-year statute of limitations—the date that an agency took a challenged action. Petitioner instead argues for a rule that would enable new facial challenges

years—even decades— after a regulation has been finalized. Petitioner's interpretation was rightfully rejected by the lower court and a majority of the nation's circuit courts that have considered this issue.

As outlined below, if endorsed by this Court, Petitioner's view would threaten the viability of small businesses throughout the nation and create a chaotic economic and regulatory ecosystem. The Court should, therefore, affirm the Eighth Circuit and reject Petitioner's invitation to unwind the proper limits on facial challenges under the APA.

I. Regulatory certainty is essential for small businesses to grow, thrive, and compete.

Every business must manage its day-to-day operations while also planning for the future, making decisions about investments, savings, growth, and resilience. Small businesses are no exception.

Federal regulation can affect many aspects of a small business's plans and operations, ranging from regulatory lending programs that provide necessary capital to requirements that small businesses report their beneficial owners. Some of these regulations, such as those that implement lending programs, directly facilitate the success of small businesses.[8] Others may impose compliance requirements, which must be designed to be predictable and fair to avoid unduly burdening small businesses.

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[8] *See, e.g.*, Bipartisan Pol'y Ctr., *The Role of Government in Small Business Finance* (Feb. 9, 2023), https://bipartisanpolicy.org/blog/government-role-in-sbf/.

Polling data has shown that small business owners believe in the need for some regulation of business in our modern economy.[9] Many small businesses owners recognize that federal regulation of Wall Street and the financial services industry is necessary to protect their businesses from unfair competition.[10] Regulations—and the certainty they provide—can help all small businesses navigate a complex business environment.

Congress has recognized the need for small businesses to have a voice in federal regulation. To mitigate the disproportionate regulatory burdens on small businesses, Congress passed the 1996 Small Business Regulatory Enforcement Fairness Act ("SBREFA") to better engage small businesses in the regulatory process and find constructive solutions to manage the regulatory burden. Pub. L. No. 104-121 §§ 202-203, 110 Stat. 847, 857 (1996). While regulatory changes can be destabilizing, federal rulemaking at least affords small businesses an important opportunity to shape forthcoming regulations in ways that are thoughtful about different stakeholders' needs. Indeed, *amici* have frequently worked through the comment process provided under federal law to help tailor regulatory changes to account for the particular needs of small businesses, by encouraging, for example, later effective dates to allow small businesses time to adapt to compliance with new regulations, and

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[9] *Small Business Owners Say Commonsense Regulations Needed To Ensure A Modern, Competitive Economy*, Small Business Majority (May 22, 2018), https://tinyurl.com/4kkx5fxn.

[10] *Id.*

greater outreach and education efforts to small businesses to facilitate compliance.[11]

Uncertainty, regulatory or otherwise, hinders the ability of businesses to plan effectively. The impacts of uncertainty are particularly acute for small businesses, which often operate on exceedingly thin margins and lack the resources to hire a stable of experts to monitor and advise on the consequences of every state or federal regulatory action. Research has repeatedly found that the economic and employment effects of uncertainty are higher for small businesses than large ones, in part because small businesses have more constrained access to finance and credit (a particularly acute problem for businesses owned by people of color and women).[12] Businesses with stronger access to capital during periods of uncertainty are less likely to be forced into precautionary behavior that can affect their long-term prospects,

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[11] *See*, *e.g.*, John Arensmeyer, Founder & CEO, Small Business Majority, Comment Letter on Federal Register 1235-AA39, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division (Nov. 7, 2023), https://www.regulations.gov/comment/WHD-2023-0001-25965.

[12] *See* Vivek Ghosal and Yang Ye, *Uncertainty and the Employment Dynamics of Small and Large Businesses*, 1, 8–9, 20–23 (Int'l Monetary Fund, WP/15/4, 2015), https://www.imf.org/external/pubs/ft/wp/2015/wp1504.pdf; Giovanni Favara et al., *Uncertainty, Access to Debt, and Firm Precautionary Behavior*, 141 J. Fin. Econ. 436 (2021), https://tinyurl.com/3ysmp7ss; Small Bus. Majority, *Small Businesses Share Concerns with Recent Banking Closures, Access to Capital Challenges* 2 (May 3, 2023), https://tinyurl.com/4rmphh7f; Robert W. Fairlie and Alicia M. Robb, U.S. Dep't of Com., *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses* 5 (Jan. 2010), https://tinyurl.com/mr94tr82.

such as delaying investments in order to build cash reserves.[13]

While "deregulation" is sometimes portrayed as an unqualified good for businesses,[14] research has shown that hasty or thoughtless deregulation can contribute to uncertainty, and make the business environment *more* challenging for regulated entities.[15] Uncertainty associated with litigation over regulations can have similar negative effects on the abilities of businesses to plan and make long-term investments.[16] And the sudden withdrawal of federal regulations designed to provide national standards can leave businesses newly-subject to a patchwork of inconsistent state and local requirements. *Cf.*, *e.g.*,

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[13] Favara et al., *supra* n. 12, at 438.

[14] *See*, *e.g.*, *A Win for Deregulation: NFIB Defends the President's 2 for 1 Policy*, NFIB (Mar. 5, 2018), https://www.nfib.com/content/legal-blog/regulatory/a-win-for-deregulation-nfib-defends-the-presidents-2-for-1-policy/.

[15] *See*, *e.g.*, Randall S. Billingsley and Carl J. Ullrich, *Regulatory Uncertainty, Corporate Expectations, and the Postponement of Investment: The Case of Electricity Market Deregulation* 1, 12, 22–23 (2011), https://ssrn.com/abstract=1944217 (finding that market deregulation initially decreased investments in energy markets for years until additional rules and guidance concerning implementation were finalized); Seth A. Blumsack et al., *Lessons from the Failure of U.S. Electricity Restructuring* 1 (Carnegie Mellon Elec. Ind. Ctr. Working Paper CEIC-05-09 2009), https://www.cmu.edu/ceic/assets/docs/publications/working-papers/ceic-05-09.pdf (finding that electricity market deregulation caused "a large increase in the cost of capital due to increased uncertainty.").

[16] *See* Maxine Joselow, *'Deregulation is not always helpful for manufacturing jobs,'* E&E News (Nov. 30, 2018), https://www.eenews.net/articles/deregulation-is-not-always-helpful-for-manufacturing-jobs/.

Watters v. Wachovia Bank, N.A., 550 U.S. 1, 11 (2007) (upholding the power of the Office of the Comptroller of the Currency to issue regulations preempting the application of state banking laws to state-based affiliates of national banks, in part to "shield[] national banking from unduly burdensome and duplicative state regulation.").

After a federal agency finalizes a regulation, the APA authorizes challenges to that regulation to ensure that the agency acted reasonably and in accordance with law. These challenges can lead to revisions on remand or regulations being vacated altogether. Under the majority approach and longstanding interpretation of the APA, facial challenges to a regulation may be brought up to six years after the agency takes final action. This statutory limit ensures some stability in the regulatory landscape, enabling judicial review of an agency's action but cabining the opportunity for untimely and destabilizing judicial intervention.

After regulations are finalized and any facial challenges are resolved, businesses can adapt their business models as necessary, with reasonable confidence in future stability. Such adaptations may be significant—for example, implementing training and procedures for handling potentially hazardous substances, displaying legally-required information about employees' labor rights, or collecting and maintaining information that will be required for regulatory filings or tax obligations. Many small businesses prefer to make such changes once, adapting to a stable and known regulatory regime, rather than deal with frequent regulatory whiplash, even if whiplash sometimes results in ostensibly deregulatory results.

The remedies the petitioner in this case seeks to expand undermines the important limits Congress placed on APA litigation. *See Resp. Br.* 15–20 (cataloging Congress's consistent choice of repose for administrative litigation). Petitioner's approach will likely cause more frequent and substantial changes in regulatory regimes by opening up decades of settled law to new facial challenges across the country, resulting in frequent, inconsistent, judicially-driven policy changes that do not involve the sort of careful balancing envisioned in the normal process of regulatory change.

This uncertainty will disproportionately harm small businesses, which by and large lack the resources to identify, understand, and adapt to such sudden and unexpected changes. According to the SBA, 81.7 percent of small businesses (amounting to over 27 million businesses nationwide) have no employees besides their owner,[17] let alone expansive in-house legal or compliance departments to facilitate constant adaptation to changing rules, or armies of lobbyists to continually push for more favorable regimes.

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[17] Office of Advoc., U.S. Small Bus. Admin., *Frequently Asked Questions* (Mar. 2023), https://advocacy.sba.gov/wp-content/uploads/2023/03/Frequently-Asked-Questions-About-Small-Business-March-2023-508c.pdf.

II. The majority rule, as urged by the government, only curbs the most disruptive judicial remedies, leaving in place other possibilities for relief.

The well-established understanding of the APA's time bar for facial challenges has helped provide certainty for businesses and government—certainty that particularly benefits small businesses. Petitioner is asking this Court to undermine that certainty by exposing decades of settled regulations to belated judicial review and asking this Court to bless the use of the judiciary's most disruptive tools—injunctions and vacaturs—against previously settled rules.

Injunctions against, or vacaturs of, agency rules in response to facial challenges can have substantial immediate effects that give businesses and agencies little-to-no time to adapt, even where more modest changes to agency policy may be desirable or legal. For example, in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), this Court reviewed the vacatur of an Animal Plant Health Inspection Service (APHIS)'s decision to deregulate a type of genetically engineered alfalfa called "RRA."). In that case, the effect of the District Court's decision that APHIS's deregulation was improper for failure to prepare an Environmental Impact Statement was that "virtually no RRA can be grown or sold until such time as a new deregulation decision is in place." *Id.* at 164. That disruptive status quo—the wholesale withdrawal of a crop from the market—persisted until APHIS issued a new EIS later that year, clearing renewed sales of

the product early the following year.[18] Similarly, in *N.C. v. EPA,* 531 F.3d 896, 929–930 (D.C. Cir. 2008), the D.C. Circuit vacated the EPA's Clean Air Interstate Rule regulating nitrogen oxide (NOx) and sulfur dioxide (SO2). This remedy "all but crashed the market in NOx and SO2 credits [] [and] frustrated long term planning for electric power,"[19] and was later itself vacated on rehearing. *N.C. v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008).

Depending on how these remedies are crafted, they can create substantial regional variability in regulatory application, as district or circuit courts invalidate regulations within their respective jurisdictions. Similarly, these remedies may leave regulated entities suddenly subject to a patchwork of state and local laws that had previously been displaced by a consistent nationwide regulatory regime.

In some cases, a reviewing court may impose nationwide relief, which raises separate concerns. Indeed, members of this Court have already expressed concerns about the scope and frequency of vacatur as a remedy, and the granting of nationwide injunctions, as such decisions can "stymie the orderly review of important questions, lead to forum shopping, render meaningless rules about joiner and class actions, and facilitate efforts to evade the APA's normal rulemaking process." *See*, *e.g.*, *U.S. v. Tex.*, 599 U.S. 670, 703

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[18] U.S. Dept. of Agric. Off. of Commc'ns., *USDA Announces Decision to Fully Deregulate Roundup Ready Alfalfa* (Feb. 1, 2011), https://tinyurl.com/4a4ybc4a.

[19] McGuireWoods, *Reversal of Fortune: DC Circuit Vacates CAIR Vacatur* (Dec. 23, 2008), https://www.mcguirewoods.com/client-resources/alerts/2008/12/reversal-of-fortune-dc-circuit-vacates-cair-vacatur/.

(2023) (Gorsuch, J., concurring). These concerns are amplified in the context of late challenges to longstanding regulations, inviting challengers to develop legal strategies that could last years across multiple judicial fora, and reducing the incentive to ever shift focus from litigation to the APA's normal rulemaking process. This Court should decline Petitioner's invitation to dramatically widen the playing field for challenges that seek such disruptive relief.

The particular facts of this case effectively illustrate how new retroactive facial challenges can create damaging uncertainty for businesses. While many small businesses are harmed by high interchange fees charged by financial institutions,[20] a victory for the petitioner in this case would not provide swift or certain relief. As the government noted in its brief opposing certiorari, Petitioner seeks to enjoin the Federal Reserve's current standards for reasonable and proportional interchange fees—the "immediate effect" of which "would be to leave interchange fees unregulated, potentially subjecting petitioners" (and every other retailer in the United States) "to higher fees than it currently pays." Br. for Resp't in Opp'n at 23; *see also* Resp. Br. at 5 (noting that the D.C. Circuit in 2014 had declined to vacate Regulation II to avoid such effects).

Indeed, data maintained on interchange fees by the Federal Reserve shows that many interchange fees currently exempted from Regulation II are roughly three times higher than their covered

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[20] And, indeed, *amici* take no position here on the wisdom of Regulation II.

counterparts.[21] Prior to Regulation II, these two classes of transactions had similar rates;[22] enjoining the application of Regulation II may well return interchange fees to the 2011 status quo, sharply increasing fees charged to retailers for these transactions until the Federal Reserve manages to finalize a replacement rule. Small businesses could be subjected to a years-long waiting period for new rules, during which they may pay even higher interchange fees in hopes that a more favorable replacement regulation would result from a new rulemaking and take effect over whatever litigation from the financial industry may follow.

The resulting fluctuations in interchange fees would likely complicate small businesses' contractual relationships and operations in myriad ways. For example, the U.S. Chamber of Commerce recommends that merchants take a number of operational steps to minimize the financial burden of interchange fees, such as selecting credit card processors with surcharge programs, implementing customer discounts for cash purchases (or a convenience fee for card purchases), settling transactions daily to guarantee the lowest rates, collecting more customer ID verification information at the point of sale, or implementing

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[21] *See Average Debit Card Interchange Fee by Payment Card Network*, Bd. Of Governors of the Fed. Rsrv. Sys. (last updated Oct. 25, 2023), https://www.federalreserve.gov/paymentsystems/regii-average-interchange-fee.htm ("dual message" fees).

[22] *See id.*

various best practices for fraud detection.[23] Following these recommendations may become more urgent if interchange fees suddenly spike, and may involve investing time and resources to change vendor contracts, re-train employees, purchase new technologies, or redesign daily workflows.

But uncertainty about the timeline for a replacement rule, and about its substance, will make it more difficult for small businesses to predict the return on any investments of time or resources that they might make to minimize interchange fees. And re-tooling a business to keep up with oscillating interchange rates will compete for a business owner's focus and resources with core tasks like developing new products, hiring employees, or improving customer service. For many of the reasons described in the previous section, the effects of this sort of uncertainty will have disproportionately harmful effects on smaller businesses, who have fewer resources (such as easy access to finance, well-resourced lobbyists, or sophisticated legal and compliance departments) to minimize the harmful effects of uncertainty on their businesses' trajectories. Small businesses would be ill-served by an interpretation of the APA that would open up decades of legacy regulations to such destabilizing changes.

Importantly, declining Petitioner's invitation to expand the six-year time window for bringing facial challenges would not leave regulated entities without recourse to challenge or change regulations they

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[23] Jessica Elliott, *10 Ways to Reduce Your Credit Card Processing Fees*, U.S. Chamber of Comm. (Sept. 13, 2023), https://www.uschamber.com/co/run/finance/how-to-reduce-credit-card-processing-fees.

question. Regulated entities would always be permitted to challenge regulations as applied to them. If they still seek broader changes to the regulatory regime, they have the power to lobby Congress for legislative changes, seek new rulemakings or interpretive guidance from agencies, and work to elect political leaders sympathetic to their preferred policy changes. And all of these tools are more likely to result in more gradual, factually rigorous, consensus-driven, and politically responsive policy changes to longstanding regulatory regimes, with more flexibility in implementation, than the blunt instrument of facial challenges and regional or nationwide injunctions or vacatur of existing regulations.

III. Petitioner's approach would facilitate jurisdictional mischief without meaningfully advancing useful judicial review.

While *amici* strongly believe that this Court should not adopt Petitioner's destabilizing approach to the APA, *amici* also recognize that regulatory certainty is not this Court's only consideration, and in some cases judicial review may be necessary to safeguard other important values. This is not one of those cases. The Petitioner's approach would not meaningfully advance useful judicial review under the APA, and would instead merely create a new tool for litigants to engage in needless gamesmanship and abuse of the judicial process.

The APA is primarily a check on the government's decision-making process. The Court has repeatedly cautioned that, for example, arbitrary and capricious review under the APA must focus only on the administrative record before an agency at the time they

made its decision. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). And a party harmed by an agency's decision generally may not seek review of extra-record evidence in evaluating the decision. *Cf. Camp v. Pitts*, 411 U.S. 138, 142 (1973) (judicial review of an agency decision could not invite petitioners to present "any other relevant evidence," as doing so would improperly "put aside the extensive administrative record already made and presented to the reviewing court.").

The APA provides a snapshot-in-time review of the agency's decision-making and affords potential plaintiffs six years in which to bring a challenge to those decisions. For those six years and forever afterwards, the record subject to judicial review remains exactly the same—that which was before the agency at the time of its decision. No facts developed after or outside that record—such as experience gained from the regulation's implementation or later developed scientific knowledge—are considered legally relevant to evaluating the agency's decision under the APA. Extending that review period indefinitely past six years does not meaningfully advance or serve the APA's purposes.

Instead, the primary effect of an indefinite review period would be to allow entities opposed to certain regulations to test a variety of different venues and an ever-evolving judicial landscape in search of a vacatur decision. Under Petitioner's proposed rule, one could imagine a homeowner who moves into a new neighborhood near an infrastructure project that was once subject to NEPA review deciding to re-litigate a years-old environmental impact statement; new industries like cryptocurrency seeking to invalidate legacy financial regulations because their business model is

predicated on avoiding existing legal regimes; a new consumer advocacy organization calling into question whether the Food & Drug Administration has been legally approving food additives since 2016, *see Ctr. For Food Safety v. Becerra*, 565 F.Supp.3d 519 (S.D.N.Y. 2019) (upholding an FDA regulation creating a streamlined process for introduction of food additives generally recognized as safe into the market); or a new environmental non-profit or energy company seeking to invalidate the Environmental Protection Agency's clarifying guidance on how it will apply clean air regulations in the event of a circuit split. *See Nat'l Env't Dev. Assoc.'s Clean Air Project v. EPA*, 891 F.3d 1041 (D.C. Cir. 2018).

These concerns are not theoretical.[24] This case exists in its current form only because two trade

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[24] One *amicus* brief filed in support of Petitioner argued that concerns about "litigation abuse" should be treated as speculative, because the Sixth Circuit's decision in *Herr v. U.S. Forest Serv.,* 803 F.3d 809 (6th Circ. 2015), has not given rise to a large volume of similar attempts to evade the APA's statute of limitations. *See* Br. of National Federation of Independent Business Small Business Legal Center, Inc. et al. at 21-22. But this argument is far from conclusive, as the rule announced in *Herr* (and contemplated by Petitioner) has not been adopted in any other Circuit, including the D.C. Circuit, the most frequent forum for APA cases. Indeed, even within the Sixth Circuit, District Courts have not consistently embraced an expansive interpretation of *Herr*'s approach, meaning the predictive power of litigation post-*Herr* is limited. *See*, *e.g.*, *Linney's Pizza, LLC v. Bd. of Governors of Fed. Rsrv. Sys.*, 3:22-cv-00071-GVFT, 2023 WL 6050569 at *3 (E.D. Ky. Sep. 15, 2023) (rejecting a challenge to Regulation II similar to the one in this case by a company that was not incorporated until 2021 because "it is evident that [*Herr*] involved an as-applied challenge" and so did not control the APA's statute of limitations for facial challenges.).

associations, which were aware of and commented on a proposed regulation in 2011, inexplicably declined to litigate that regulation for a decade after it was finalized. *See* Pet. App.3–4, 22–23. Faced with the prospect of dismissal for failing to diligently litigate their claims, these trade associations amended their claims to substitute a recently-incorporated member corporation as the lead plaintiff in their lawsuit. *See* Pet. App.23–24.

Importantly, the exact arguments these trade associations and their member corporation raise on the merits were already litigated, in timely fashion, by other similarly-situated trade associations and retailers. *See NACS v. Bd. of Governors of Fed. Rsrv. Sys.*, 746 F.3d 474, 479 (D.C. Cir. 2014), and this Court denied certiorari to review that result, *NACS v. Bd. of Governors of Fed. Rsrv. Sys.*, 574 U.S. 1121 (2015). Even *after* that point, the trade associations in this case had at least another two years to file their own challenge before the six year statute of limitations ran, and did not do so. While Petitioner argues that the government's interpretation of the APA "leaves no meaningful avenue for judicial review of APA claims for parties like Corner Post," Pet'r's Br. at 31, the record in this case shows precisely the opposite—parties making the same arguments as Corner Post obtained judicial review of these claims in federal court. The arguments were tested unsuccessfully. In the time since, businesses have adapted to the rule and continued to do business.

Notably, the courts below found that there were no grounds to excuse the trade associations' failures to diligently pursue their rights and declined to find them eligible for equitable tolling of the APA's time bar. Pet. App.14–15. This Court should not endorse

their workaround of the APA's time bar, particularly for claims that were already fully and diligently litigated in another Federal Court of Appeals.

This Court has often cautioned against adopting rules of review that are more likely to facilitate jurisdictional gamesmanship than promote efficient and evenhanded administration of the law. *See*, *e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending;" otherwise, "an enterprising plaintiff would be able to secure a lower standard for Article III simply by making an expenditure based on a nonparanoid fear."); *Penn. v. N.J.*, 426 U.S. 660, 664 (1976) (declining to find standing where the plaintiff's injuries were "self-inflicted, resulting from decisions by their respective state legislatures."); *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021) (Congressionally-created causes of action do not by themselves create Article III standing). It should again decline to encourage such gamesmanship here, particularly given the destabilizing effects that virtually unlimited retroactive review could have when coupled with potential shifts in administrative law jurisprudence. *See Loper Bright Enters. v. Raimondo*, 45 F.4th 359 (D.C. Cir.), *cert. granted*, 143 S.Ct. 429 (2023) (No. 22-451);, *Relentless Inc. v. Dep't of Comm.*, 62 F.4th 621 (1st Cir.), *cert. granted*, 2023 WL 6780370 (2023) (No. 22-1219) (considering whether to overrule standard of review established in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)); *see also Tex. v. Nuclear Regul. Comm'n*, 78 F.4th 827 (5th Cir. 2023), *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291 (4th Cir. 2023), *Dep't of Fish and Game*

v. Fed. Subsistence Bd., No. 3:20-cv-00195-SLG, 2023 WL 7282538 (D. Ala. Nov. 3, 2023), *W.V. by and through Morrissey v. U.S. Dep't of Treasury*, 59 F.4th 1124 (11th Cir. 2023), *Chamber of Comm. of U.S.A. v. Consumer Fin. Prot. Bureau*, No. 6:22-cv-00381, 2023 WL 5835951 (E.D. Tex. Sep. 8, 2023), *Tex. v. Biden*, No. 6:22-CV-00004, 2023 WL 6281319 (S.D. Tex. 2023), *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022) (lower courts vacating or enjoining various regulatory actions based on the Major Questions Doctrine).

While well-resourced large corporations may be able to withstand, or even cheer, the adoption of a rule that would facilitate more frequent disruptions to longstanding regulatory regimes, small businesses, by and large, must adapt to the regulatory regimes in which they find themselves. A rule of review inviting frequent, needless disruptions to those regimes would be extraordinarily harmful to the needs of American small businesses. Particularly given the underlying facts of this case, this Court should reject Petitioner's destabilizing approach, and instead encourage timely and diligent litigation of APA claims.

CONCLUSION

The Court should affirm the judgment of the Eighth Circuit Court of Appeals.

Respectfully submitted.

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