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Supreme Court opens the door to more rule challenges by extending accrual date for APA cases

By Shay Dvoretzky, Esq., Parker Rider-Longmaid, Esq., Emily Kennedy, Esq., and Steven Marcus, Esq., Skadden, Arps, Slate, Meagher & Flom LLP*

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In *Corner Post v. Board of Governors of the Federal Reserve System*,[1] the U.S. Supreme Court held the six-year statute of limitations under 28 U.S.C. §2401 for challenging federal agency action under the Administrative Procedure Act only commences when the plaintiff is injured by the challenged action.

In a 6-3 ruling authored by Justice Barrett, the Court rejected the rule adopted by most circuits, which had held that the clock begins to run when the agency publishes the challenged regulation, even if the plaintiff did not exist or had suffered no injury within the limitations period. Instead, the majority held that the limitations period starts when the plaintiff's cause of action accrues — that is, when the plaintiff is injured by the agency action.

Corner Post makes scores of longstanding federal regulations vulnerable to challenge by plaintiffs who have suffered injury for the first time only within the last six years.

In dissent, Justice Jackson predicted that the Court's decision would open the door to a "tsunami of lawsuits against agencies."

By rejecting the previously prevailing rule that a regulation was immune from facial challenge once it was on the books for more than six years, *Corner Post* makes scores of longstanding federal regulations vulnerable to challenge by plaintiffs who have suffered injury for the first time only within the last six years.

Corner Post is likely to have an important impact on the regulatory landscape, especially given the Supreme Court's overruling of *Chevron* deference just a few days earlier in *Loper Bright Enterprises v. Raimondo*.[2]

Precedent upholding agency action based on the *Chevron* doctrine that courts should defer to reasonable agency interpretations of ambiguous statutes is now vulnerable, because courts must decide themselves what ambiguous statutory language means.

Although the Court in *Loper Bright* stated it was not calling into question earlier decisions relying on the *Chevron* framework to uphold particular agency actions, (1) agency *interpretations* underlying those decisions may now be subject to challenge, and (2) challengers may be able to disturb prior circuit precedent if they can point to special justifications, like poor reasoning or unworkability, for overruling those earlier decisions now that *Chevron* itself cannot justify those outcomes.

At the same time, *Corner Post* is notable for what it does *not* decide:

- The Court's holding under §2401 does not address specific statutes that prescribe time limits for challenging particular actions by particular agencies under the APA — like the Hobbs Administrative Orders Review Act of 1950 (Hobbs Act), 28 U.S.C. §2344, which provides a 60-day clock running from publication of final action by some agencies. Thus, the Court also did not address the possibility that exceptions under those statutes (or under §2401) could lengthen the limitations period.
- The Court also reserved the question whether the accrual rule it announced applied to *procedural* APA challenges, like whether the agency issued a deficient notice of proposed rulemaking, noting the argument "that only parties that existed during the rulemaking process can claim to have been injured by a 'procedural' shortcoming."
- The Court assumed without deciding that the APA authorizes vacatur of an unlawful rule — something three other justices have questioned in the past (Justice Gorsuch, concurring in the judgment along with Justice Thomas and Justice Barrett in *United States v. Texas*,[3]). But Justice Kavanaugh addressed that question head on, explaining in a lengthy concurrence that "text, history, precedent, and common sense" support the "straightforward and long-accepted conclusion that the phrase 'set aside' in the APA authorizes vacatur."
- Notably, none of the justices who had expressed doubt about the APA's authorization of vacatur in *Texas* wrote separately to contest Justice Kavanaugh's points. As Justice Kavanaugh explained, vacatur is an important remedy and one without which Corner Post's suit — as well as many other suits by parties that are not directly regulated — would not be possible. Although the government has recently been pressing the notion that vacatur is unavailable under the APA,

at oral argument in *Corner Post*, the government "seemed to backpedal" when confronted with the "extraordinary consequences" of its "extreme stance," which would upend administrative law in favor of the government.

Legal background

Since 1948, Congress has provided 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," unless a more specific time limit in another statute applies.[4]

Section 2401(a) thus applies to many civil actions against the United States and its agencies under the Administrative Procedure Act (APA), which provides a cause of action to challenge federal agency action to any person "suffering legal wrong because of agency action."[5]

For some agencies, however, like the Federal Communications Commission, the Department of Agriculture, and the Department of Transportation, Congress has provided a 60-day time limit running from entry of the challenged order or rule.[6]

The courts of appeals divided on their interpretation of when an APA cause of action "accrues" for purposes of starting §2401(a)'s six-year statute of limitations. Several circuits — including the Eighth Circuit, from which the Court granted certiorari — had held that the limitations period runs from the issuance of the challenged agency action, such as publication of the regulation, and thus begins for *everyone* at that time.

Those courts applied that rule even to plaintiffs, like Corner Post here, that did not exist until more than six years after the agency action, and thus, in their view, after the limitations period had run.

In contrast, the Sixth Circuit alone held that a cause of action accrues when the plaintiff suffers an injury from the challenged agency action, even if that injury did not occur until more than six years after that action.

History and facts of *Corner Post*

The Supreme Court case arose from challenge to the maximum rate set by the Federal Reserve Board (Board) for debit-card interchange fees — the fees set by a payment network like Visa or Mastercard to process transactions between merchants and cardholders.

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, which (among other things) required the Board to set "standards for assessing whether the amount of any interchange transaction fee ... is reasonable and proportional to the cost incurred by the issuer with respect to the transaction." The following year, the Board finalized a rule setting a maximum interchange fee.

Shortly after the rule was finalized, retail industry groups challenged the rule. The D.C. Circuit upheld the rule as a "reasonable construction[] of the statute."

Seven years after the Board finalized the rule, Corner Post, a truck stop and convenience store in North Dakota, opened its doors. Corner Post accepts debit cards that incur card-network interchange fees.

In 2021, Corner Post joined an APA lawsuit that had been filed by the North Dakota Petroleum Marketers Association and the North Dakota Retail Association, arguing that the rule is unlawful because it allows banks and payment networks to charge higher fees than the statute permits. The district court dismissed the suit as untimely.

The interplay between Corner Post *and* Loper Bright *is likely to contribute to the uptick in litigation and the invalidation of agency rules.*

The Eighth Circuit affirmed. The court distinguished between a facial challenge to a rule (a claim that the rule is unlawful in all circumstances) and an as-applied challenge to a rule (a claim that applying the rule to the particular plaintiff in a particular circumstance is unlawful).

In the Eighth Circuit's view, Corner Post's cause of action was a facial challenge to the interchange fee rule that accrued in 2011 when the Board finalized the rule, so the statute of limitations began to run then and expired in 2017, before Corner Post opened.

The Supreme Court's decision

The Court granted certiorari to resolve the circuit split and held that an APA cause of action accrues under §2401, and the statute of limitations begins to run, only when the plaintiff first suffers injury from the challenged agency action — even if that injury occurred more than six years after the agency action.

Justice Barrett wrote the majority opinion, joined by Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh. Justice Kavanaugh penned a concurrence addressing an important question that the majority left unanswered: whether the APA permits vacatur of agency rules. Justice Jackson, joined by Justice Sotomayor and Justice Kagan, dissented.

Majority opinion

Justice Barrett began by focusing on the text of 28 U.S.C. §2401(a). To answer the key question what "accrues" means, the Court looked to the "well-settled meaning" of the term in 1948, when §2401(a) was enacted. Examining contemporaneous dictionaries, the majority explained that a claim accrues when the "plaintiff suffers the injury required to press her claim in court," and reasoned that Congress must have meant to incorporate that background principle.

The Court identified other statutes enacted around the same time as §2401(a) that provide for *different* accrual rules.

For instance, the Hobbs Act, which governs challenges to certain rules and orders from the Federal Communications Commission, Department of Agriculture, and Department of Transportation,

among other agencies, permits petitions for review "within sixty days after entry of" a "final order reviewable under this Act."[7] But §2401(a) adopts the standard accrual language that picks up on the traditional accrual rule that a cause of action accrues when the plaintiff can file suit and obtain relief.

The Court rejected the Board's argument that accrual is governed not just by §2401(a), but by the APA itself. The Board contended that §704 of the APA provides judicial review of "final agency action," so a cause of action must accrue when the agency action becomes final. Under that view, the limitations period depends not on the particular challenger or its injury, but when there is "final agency action."

The Court did not decide whether entities suing more than six years after the final agency action could bring procedural, rather than substantive, APA challenges.

The majority disagreed, pointing to §2401(a)'s plaintiff-centric direction that a claim is timely if "the complaint is filed within six years after the right of action first accrues." The Court explained that it had read §2401 in other cases to begin running the limitations period when the particular plaintiff has a complete and present cause of action. The Court refused to graft an administrative-law-only exception on to that general limitations period for actions against the United States.

The majority also rebuffed policy concerns raised by the Board and the dissent, including the need for finality and the reliance interests that agencies and regulated parties may have placed on existing rules.

The Court held that administrative inconvenience could not justify departing from §2401(a)'s plain text. The Court also disagreed that its rule would cause chaos, noting that a regulated party can always challenge the lawfulness of a regulation in an as-applied proceeding as a defense to the agency action.

Moreover, the Court added, major regulations are typically challenged immediately — as the interchange fee rule was in this case — so courts adjudicating a challenge six years after the agency action was finalized will likely have circuit, if not Supreme Court, precedent that may resolve the question as a matter of *stare decisis*.

Whatever finality concerns raised by the Board and the dissent must be balanced, the majority held, against the benefits of the Court's rule — namely, the vindication of the APA's cornerstone presumption that anyone injured by agency action should have access to judicial review.

Justice Kavanaugh's concurrence

Justice Kavanaugh wrote separately to address a relatively novel and "extreme" argument advanced by the government that the APA does not authorize vacatur of agency rules.

Although the APA's text authorizes courts to "hold unlawful and set aside agency action," including rules, 5 U.S.C. §706(2), the Board contended that the APA authorizes only injunctive relief barring enforcement of rules against the party challenging those rules.

As the majority recognized in a footnote, if the Board's view were right, Corner Post likely would not be able to sue, because it "is not regulated" by the Rule, which instead regulates banks and payment networks. The majority thus assumed without deciding that the APA authorizes vacatur because that was a predicate for resolving the limitations question, but it noted that several years earlier Justice Gorsuch, joined by Justice Thomas and Justice Barrett, had raised doubts about whether the APA authorizes vacatur.

In a detailed, 18-page concurring opinion, Justice Kavanaugh responded to those doubts, explaining that "text, history, precedent, and common sense" support the "straightforward and long-accepted conclusion that the phrase 'set aside' in the APA authorizes vacatur."

Justice Kavanaugh looked to definitions of "set aside" in precedent, other statutes, and legal dictionaries at the time of the APA's enactment, explaining that "[t]he text of §706(2) directs federal courts to vacate agency actions in the same way that appellate courts vacate the judgments of trial courts."

He also said that courts have understood the APA to authorize vacatur for many decades, and that, without the vacatur remedy, many traditional APA lawsuits would be impossible. Unregulated parties (like Corner Post) would not be able to sue, even if they suffered harm as a result of regulations. Businesses likely would lose the ability to sue over regulations favoring their competitors. And groups interested in more stringent regulations would likewise lose the ability to sue.

Under the Board's view, Justice Kavanaugh wrote, the insurance companies who challenged a federal agency's rescission of safety standards for new motor vehicles in the landmark case of *Motor Vehicle Manufacturers Association of United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,[8] could never have brought that APA action. The consequences, he said, would be "extraordinary."

And Justice Kavanaugh noted that the government recognized as much at oral argument, where it "seemed to backpedal and hedge a bit" when confronted with the problems with its "extreme stance."

Notably, none of the three justices who had previously expressed doubt about the APA's authorization of vacatur (Justice Gorsuch, concurring in the judgment along with Justice Thomas and Justice Barrett in *United States v. Texas*,[9]) wrote separately to contest Justice Kavanaugh's points.

Justice Jackson's dissent

Justice Jackson's dissent disputed the majority's reading of §2401(a), opining that accrual rules depend on the nature of the claim. The dissent reasoned that §2401(a) pegs accrual to when "the right of action first accrues," not when "the plaintiff's right of action first accrues." For a facial challenge to a federal rule, the right of action accrues when the agency finalizes its action.

That view is consistent with the APA, Justice Jackson argued, because the APA focuses on agency action, not on the plaintiff. For the dissent, this case proves the point: Corner Post joined this suit after trade associations had already brought suit, and when the plaintiffs amended the complaint to add Corner Post as a party, the complaint remained practically identical to the initial complaint — demonstrating that a facial challenge is really not about the particular plaintiff.

Then, the dissent turned to policy goals, warning that certainty "would *never* exist if any and every newly formed entity can challenge every agency regulation in existence." Justice Jackson linked *Corner Post* with *Loper Bright*'s overruling of *Chevon*, predicting a "tsunami of lawsuits against agencies" that could "devastate the functioning of the Federal Government."[10]

Implications

Corner Post is notable both for the potential consequences of what it decides as well as what the Court did not decide.

Increased litigation challenging agency action is likely. As Justice Jackson's dissent predicts, *Corner Post* may spur new litigation challenging agency regulations where §2401 provides the statute of limitations.

The decision spans across federal rulemaking, so any newly created (or newly affected) entity can bring a challenge to agency rules governed by §2401, no matter how long the regulation has been on the books. But the decision does not affect limitations periods under more specific statutes, like the Hobbs Act.

***Corner Post* will interact with *Loper Bright* as challenges increase.** The interplay between *Corner Post* and *Loper Bright* is likely to contribute to the uptick in litigation and the invalidation of agency rules. Now that the Court has overruled *Chevron* in *Loper Bright*, challengers can argue that courts must resolve statutory ambiguities that courts once left to agencies.

To be sure, the Court noted in *Loper Bright* that it was not "call[ing] into question prior cases that relied on the *Chevron* framework," and stated that "[t]he holdings of those cases that specific agency actions are lawful … are still subject to statutory *stare decisis* despite [its] change in interpretive methodology."

But challengers may be able to show some "special justification" warranting overruling specific circuit precedent. As Justice Kagan predicted in dissent in *Loper Bright*, litigants and courts might point to poor (or absent) reasoning in a prior circuit decision or unworkability of prior circuit precedent.

In addition, in some cases, circuit precedent decided under *Chevron* may have upheld an agency's interpretation of statutory language as to one rule but not another. In those circumstances, parties may be able to argue that, although statutory *stare decisis* may apply in that circuit as to the first rule, the agency can no longer point to circuit precedent decided under *Chevron* to defend its reading of the statute as to other rules or in other contexts.

Corner Post itself illustrates how this process may play out: When the interchange fee rule was challenged months after enactment, the D.C. Circuit deferred under *Chevron* to the Federal Reserve Board's interpretation of the Dodd-Frank Act as a "reasonable construction[] of the statute."

Now, on remand, *Loper Bright* requires the district court and the Eighth Circuit to determine, without deference to the Board's interpretation, whether the statute authorizes the Board's interchange rule. The lower courts could conclude that the Board's "reasonable construction" of the statute is not the best interpretation and invalidate the rule, or they could join the D.C. Circuit in upholding the rule.

Important issues remain unresolved. The Court did not address several questions that businesses may find important going forward:

- Because, as noted, §2401 does not apply where a more specific limitations period does, the court had no reason to address whether there are any circumstances or reasons that may lengthen those other limitations periods. The Court likewise left such a question open in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*,[11] a Hobbs Act case, noting that it was not deciding whether the challenger there had "a 'prior' and 'adequate' opportunity to seek judicial review."
- Similarly, the Court, taking its cue from the Board, left "open the possibility that someone could bring an as-applied challenge to a rule when the agency relies on that rule in enforcement proceedings against that person, even if more than six years have passed since the rule's promulgation." The Court left that question open in *PDR Network* as well.
- The Court did not decide whether entities suing more than six years after the final agency action could bring procedural, rather than substantive, APA challenges. Corner Post's challenge was substantive: It argues that the Board lacks authority for the rule. But many APA challenges are procedural; for example, where the agency did not provide a meaningful opportunity to comment on a proposed rule, or failed to explain why it rejected proposed alternatives. The Court left open whether an entity that did not exist at the time a rule was promulgated could be "injured by a 'procedural' shortcoming, like a deficient notice of proposed rulemaking."
- Finally, the majority assumed without deciding that vacatur is available under the APA. But Justice Kavanaugh argued that the straightforward conclusion is that the default remedy for an unlawful rule under the APA is vacatur. Indeed, Justice Kavanaugh contended that, "[o]ver the decades, th[e] Court has affirmed countless decisions that vacated agency actions, including agency rules." And none of the three justices who took the opposite view in the 2023 case *United States v. Texas* (Justices Gorsuch, Thomas, and Barrett) contested Justice Kavanaugh's reasoning.

Conclusion

Corner Post is likely to make it easier for more parties to challenge agency rules previously considered settled, while also raising

other issues for decision by the courts of appeals and possibly the Supreme Court.

Notes:

[1] https://bit.ly/3W2MTjE

[2] 2024 WL 3208360 (U.S. June 28, 2024), https://bit.ly/3WrhBnV.

[3] 599 U.S. 670, 693-702 (2023).

[4] 28 U.S.C. §2401(a).

[5] 5 U.S.C. §702.

[6] *See* 28 U.S.C. §§2342, 2344; 29 U.S.C. §655(f).

[7] *See* 28 U.S.C. §2344.

[8] 463 U.S. 29 (1983).

[9] 599 U.S. 670, 693-702 (2023).

[10] *See* our July 9, 2024, client alert "Supreme Court's Overruling of *Chevron* Deference to Administrative Agencies' Interpretations of Statutes Will Invite More Challenges to Agency Decisions," https://bit.ly/3WBUxTP

[11] 588 U.S. 1, 7 (2019),

About the authors




(L-R) **Shay Dvoretzky**, head of **Skadden, Arps, Slate, Meagher & Flom LLP**'s Supreme Court and appellate practice, has argued 19 cases before the U.S. Supreme Court and has briefed and argued cases across a range of subject areas in federal and state appellate courts. He can be reached at shay.dvoretzky@skadden.com. **Parker Rider-Longmaid**, also a partner in the firm's Supreme Court and appellate practice, has argued before the U.S. Supreme Court and the 2nd, 4th, 7th, and 9th circuits and led briefing and strategy in the Supreme Court and federal courts of appeals. He can be reached at parker.rider-longmaid@skadden.com. **Emily Kennedy**, a firm counsel in the Supreme Court and appellate practice, has argued cases before multiple federal courts of appeals and has drafted numerous briefs filed in the U.S. Supreme Court, as well as state and federal appellate courts. She can be reached at emily.kennedy@skadden.com. **Steven Marcus**, an associate in the firm's Supreme Court and appellate practice, focuses on complex and high-stakes appeals throughout the country. He can be reached at steven.marcus@skadden.com. The authors, all based in Washington, D.C., would like to thank partner Boris Bershteyn for contributing to this article, which was originally published July 9, 2024, on the firm's website. Republished with permission.

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