Supreme Court: Claims First Accrue Under the Administrative Procedure Act when a Plaintiff Is Injured by Final Agency Action

July 22, 2024

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Shortly after issuing its decision in *Loper Bright Enterprises v. Raimondo* overruling the *Chevron* doctrine, the Supreme Court issued its decision in *Corner Post Inc. v. Board of Governors of the Federal Reserve System*, which held that a plaintiff can raise a facial challenge to an agency rule under the catchall federal statute of limitations within six years of being injured by a final rule. The *Corner Post* decision overturned a relatively well-established consensus among the circuit courts of appeal that the six-year period ran from the publication of the final rule, regardless of when a plaintiff was injured.

Corner Post, in combination with *Loper*, has altered the fundamental underpinnings of administrative law by reducing the power of agencies to say what statutes mean while simultaneously increasing the ability of plaintiffs to challenge agency interpretations—including agency rules previously validated under *Chevron* deference. Further, *Corner Post*'s plaintiff-centric approach to the catchall limitation at issue may prove to have implications for some specific environmental statutes of limitations periods.

Prior State of the Law

The provision directly at issue in *Corner Post* was 28 U.S.C. § 2401(a), the default statute of limitations for suits against the United States (including suits under the Administrative Procedure Act ("APA")), which provides that, generally, "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."[1] Of course, the time at which the six-year period begins under the statute depends on when a claim "first accrues." Prior to *Corner Post*, virtually every circuit court of appeals to consider the issue had held that, at least for facial challenges to a regulation (*i.e.*, for broad challenges to the validity of a rule rather than to its application to a particular plaintiff),[2] the six-year period ran from the publication

[1] 28 U.S.C. § 2401(a).
[2] *See, e.g.*, *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2454 (2024).

of the regulation rather than the date the plaintiff is "injured" by it.[3] By contrast, only one circuit court of appeals had arguably adopted the interpretation later confirmed in *Corner Post*.[4]

Some circuit courts, in reaching conclusions contrary to *Corner Post*, reasoned that because a facial challenge does not depend on allegations of any specific adverse application to a plaintiff, the point at which the claim accrues must be when an agency action is final.[5] Others appeared motivated more by practical or policy concerns, noting for example that the "government's interest in finality outweighs a late-comer's desire to protest th[e] agency's action as a matter of policy or procedure."[6] None engaged at any depth with the type of textualist approach that would later prove dispositive to the Supreme Court's decision on the issue.

The Underlying Litigation

The litigation that resulted in *Corner Post* arose originally from a suit filed in 2021 by two trade associations challenging a Federal Reserve Board (the "Board") regulation setting maximum debit-card transaction fees for merchants, which had been published a decade earlier.[7] After the Board moved to dismiss based on the statute of limitations, the trade associations amended their complaint to add as a plaintiff Corner Post, Inc., a convenience-store business which had been incorporated in 2017.[8] Although the plaintiffs argued that the statute of limitations had not run because Corner Post could not have been injured before it was incorporated, the district court, relying on Fourth and Ninth Circuit precedent, dismissed the case, finding that the period ran from the rule's publication in 2011.[9]

Plaintiffs appealed, and the Eighth Circuit Court of Appeals affirmed, relying on the circuit court consensus and on its own consistent precedents without engaging with the text of section 2401(a).[10] Corner Post alone petitioned the Supreme Court for a writ of certiorari, presenting the question: "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 (as the Eighth Circuit and five

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[3] *N.D. Retail Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys.*, 55 F.4th 634, 639–42 (8th Cir. 2022), *rev'd sub nom. Corner Post*, 144 S. Ct. 2440; *Harris v. FAA*, 353 F.3d 1006, 1012–13 (D.C. Cir. 2004); *Odyssey Logistics & Tech. Corp. v. Iancu*, 959 F.3d 1104, 1111–12 (Fed. Cir. 2020); *Hire Order Ltd. v. Marianos*, 698 F.3d 168, 170–71 (4th Cir. 2012); *Dunn–McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713–716 (9th Cir. 1991).

[4] *See Herr v. U.S. Forest Serv.*, 803 F.3d 809, 920–22 (6th Cir. 2015). Whether *Herr* really adopted the *Corner Post* rule is debated. Although the majority opinion describes the state of the law on this point prior to *Corner Post* as a circuit split, the dissent contends that because *Herr* only dealt with an as-applied challenge its holding was not applicable to facial challenges. *Compare Corner Post*, 144 S. Ct. at 2449 ("The Eight Circuit's decision deepened a circuit split . . . ."), *with id.* at 2472 n.2 (Jackson, J., dissenting) (noting *Herr* "did not discuss whether [its] accrual rule would apply to facial challenges. Since *Herr*, neither the Sixth Circuit nor any district court within it has extended *Herr*'s rule to facial challenges to final agency actions . . . ."); *see also N.D. Retail Ass'n*, 55 F.4th at 640 ("*Herr* did not distinguish between as-applied and facial challenges.").

[5] *See Odyssey*, 959 F.3d at 1112 (citations omitted).

[6] *See Wind River*, 946 F.2d at 715.

[7] *N.D. Retail Ass'n*, 55 F.4th at 637; *Corner Post*, 144 S. Ct. at 2471 (Jackson, J., dissenting); *see also Corner Post*, 144 S. Ct. at 2448.

[8] *N.D. Retail Ass'n*, 55 F.4th at 637–38; *Corner Post*, 144 S. Ct. at 2471 (Jackson, J., dissenting).

[9] *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, No. 1:21-cv-00095, 2022 WL 909317, at *7–10 ¶¶ 28–35, 43 (D.N.D. Mar. 11, 2022), *rev'd sub nom. Corner Post*, 144 S. Ct. 2440; *see also N.D. Retail Ass'n*, 55 F.4th at 638.

[10] *See N.D. Retail Ass'n*, 44 F.4th at 639–43.

other circuits have held)—or when the rule first causes a plaintiff to 'suffers legal wrong' or be 'adversely affected or aggrieved' (as the Sixth Circuit has held)?"[11]

The Court's Decision

Granting certiorari,[12] the Supreme Court reversed the Eighth Circuit in a 6–3 decision penned by Justice Barrett, holding that an APA claim does not accrue under section 2401 until a final agency action causes injury to the plaintiff, and that Corner Post's claim was therefore not barred.[13] In so holding the Court relied primarily on the statutory text as illuminated by contemporary definitions and supported by Supreme Court precedents.[14]

The majority first laid out the relevant statutes.[15] In addition to section 2401(a), the majority discussed the relevant APA provisions, reasoning that 5 U.S.C. § 702, which makes judicial review available to parties injured by agency actions, and 5 U.S.C. § 704, which allows such review only for "final agency action," work "hand in hand."[16] In the majority's conception, sections 702 and 704 (and their respective "injury" and "finality" requirements) are each necessary elements of an APA cause of action.[17]

The majority next discussed the meaning of the statutory term "accrue," to determine when an APA claim first accrues for purpose of section 2401(a). The majority noted that the text of § 2401 was adapted from the limitations provision of a pre-existing act that gave federal district courts jurisdiction over certain monetary claims against the United States, and which was understood at the time to focus on the plaintiff's injury.[18] Similarly, the majority noted that Supreme Court precedent and contemporaneous legal dictionaries indicated that "'accrue had a well-settled meaning: A right accrues when it comes into existence," or, in other words, "when the plaintiff has a complete and present cause of action," which cannot occur before damage is actually sustained.[19]

Taking this well-settled meaning as a "strong background presumption," the majority reasoned that the presumption controlled the meaning of section 2401 because nothing in the statute's text contradicted it.[20] The majority noted in particular that Congress "knew how to depart from the traditional rule to create a limitations period that begins with the defendant's action," for example by requiring actions to be filed "[w]ithin a period of sixty days after the issuance of any regulation," but had instead chosen to use "the standard accrual language."[21]

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[11] Petition for Writ of Certiorari, *Corner Post*, 2023 WL 3006876, at *i, II (No. 22-1008).
[12] *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 478, 478 (2023).
[13] *Corner Post*, 144 S. Ct. at 2460. All Republican-appointed justices joined Justice Barrett in the majority, while all Democratic-appointed justices joined Justice Jackson's dissent. *See id.* at 2446, 2470. Justice Kavanaugh wrote a concurring opinion arguing that vacatur is an available remedy under the APA, an ancillary point that the majority assumed without deciding to be true. *See id.* at 2459 n. 9; *id.* at 2460–70 (Kavanaugh, J., concurring).
[14] *See id.* at 2449–2453.
[15] *Id.* at 2449–2451.
[16] *Id.*
[17] *Id.*
[18] *See id.* at 2451–55 (citing § 24, 36 Stat. 1093).
[19] *Id.* at 2451 (cleaned up).
[20] *Id.* at 2452–53.
[21] *Id.* at 2452.

Having made its affirmative case, the majority then devoted roughly equal time to rebutting arguments urged by the dissent and the defendant. The majority and dissent sparred, for example. over whether "finality-focused" as opposed to "plaintiff-centric" limitations provisions were the accepted practice for administrative statutes prior to enactment of section 2401(a), and whether relevant precedents supported the majority's "background presumption" or showed, as the dissent contended, a flexible and claim-specific definition of "accrual."[22]

Although the majority engaged with the dissent's policy concerns, the majority rested most strongly on its textual analysis, writing for example that the dissent's "argument hits the immutable obstacle of § 2401(a)'s text."[23] Similarly, while the dissent confronted the majority on its own turf, arguing that section 2401(a)'s direction to consider when "the right of action *first* accrues" is an instruction "to start the clock at the earliest possible opportunity," the dissent is at its most persuasive in pointing out practical concerns with the *Corner Post* rule that appear to have underpinned the lower-court consensus that accrual occurs upon rule publication.[24]

Impact of the Court's Decision

The dissent's principal concern was that, in its view, the majority's rule "means that . . . administrative agencies can be sued in perpetuity over every final decision they make."[25] As the dissent explained, this is because section "2401(a) now does nothing to prevent agency rules from being forever subjected to legal challenge by newly formed entities" or "by old entities that can find or create new entities to graft onto their complaint."[26] As the dissent pointed out,[27] this potential consequence is amplified by the Court's overruling of *Chevron* deference in *Loper Bright Enterprises v. Raimondo*.[28] Considered together, these decisions act as a sort of "one-two punch" against the administrative state: as long as the challenge is brought by a newly formed entity, "[a]ny new objection to any old rule must be entertained and determined *de novo* by judges who can now apply their own unfettered judgment as to whether the rule should be voided."[29] It seems likely that this effect will also produce increased forum shopping, with litigants choosing to file in jurisdictions whose judges' may be viewed as more likely to exercise their "unfettered judgment" to overturn established agency rules.[30]

Whether the "tsunami of lawsuits" and "coming chaos" the dissent predicted[31] will truly come to pass remains to be seen. The dissent asserted that *Corner Post* "means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face."[32] But this is something of a simplification. To get around the limitations period, existing entities will need to either recruit plaintiffs to participate in their facial challenges, or create new sham subsidiaries. And

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[22] *Compare id.* at 2454, 2456–57, *with id.* at 2474–75, 2477 (Jackson, J., dissenting).
[23] *Id.* at 2453.
[24] *See id.* at 2474, 2479–83 (emphasis in original).
[25] *Id.* at 2480 (Jackson, J., dissenting).
[26] *Id.*
[27] *Id.* at 2482 (citations omitted).
[28] 144 S. Ct. 2244 (2024).
[29] *See Corner Post*, 144 S. Ct. 2482 (Jackson, J., dissenting).
[30] *Cf.* Nate Raymond, *Texas Federal Court Will Not Adopt Policy Against 'Judge Shopping,'* REUTERS (Apr. 1, 2024), https://www.reuters.com/legal/texas-federal-court-will-not-adopt-policy-against-judge-shopping-2024-03-30/ (describing "a tactic used by conservative litigants of filing cases in small divisions in Texas' four federal districts whose one or two judges were appoint by Republican presidents and often rule in their favor").
[31] *Corner Post*, 144 S. Ct. at 2482 (Jackson, J., dissenting).
[32] *Id.* at 2470 (Jackson, J., dissenting).

genuinely new entities will generally need to have the wherewithal to identify harmful regulations and challenge them within six years of entity formation. Further, as the majority noted (and as is discussed briefly below), late challenges to agency regulations are already possible, including through as-applied challenges by regulated entities or by petitioning an agency to reconsider an existing rule and then appealing the petition's denial.[33] So whether an avalanche of litigation will materialize depends not only on how widespread the willingness and ability to take those necessary measures really is, but also on the number of instances in which the *Corner Post* route offers a comparative advantage over existing options. Of course, these considerations will offer little comfort to observers who view *Loper* and *Corner Post* merely as component parts of a greater scheme on the part of the conservative legal movement to hobble or dismantle the regulatory apparatus of the federal government.[34]

Aside from possibly resulting in more lawsuits and, consequently, more vacated agency rules, *Corner Post* could also have the indirect effect of encouraging greater agency use of interpretive rules, opinion letters, and policy statements, which did not receive deference prior to *Chevron* and are generally less susceptible to legal challenge because they are less likely to be found sufficiently binding to establish plaintiffs' standing to sue.[35]

Application to Federal Environmental Statutes

The impact *Corner Post* will have specifically on plaintiffs seeking to bring challenges to rules promulgated under federal environmental statutes likewise remains to be seen, although it is certain that any effect will be, for the most part, indirect. The notable exception to this rule is the Endangered Species Act (the "ESA"), to which section 2401 and *Corner Post* apply because the ESA lacks its own statute of limitations provision.[36]

Corner Post's relaxation of the time period to bring suit under section 2401 is not directly relevant to challenges under most environmental statutes, which typically have their own specific (and shorter) statute of limitations.[37] Further, federal environmental statutes do not use the "accrual" language that was critical to the outcome of *Corner Post*. Rather, they are among the "many specific statutory review provisions that start the clock at finality," *i.e.*, when a final agency action occurs rather than when a plaintiff is injured.[38] Because the majority distinguished section 2401's language from the

[33] *Id.* at 2459–60.

[34] *See, e.g.*, Harry Blain, *SCOTUS Wants to Kill the Administrative State*, JACOBIN (July 11, 2024), https://jacobin.com/2024/07/scotus-administrative-state-conservative-federal.

[35] *See* Varu Chilakamarri, et al., *Corner Post Magnifies Regulatory Uncertainty After Loper Bright*, K&L GATES LLP (July 12, 2024), https://www.klgates.com/Corner-Post-Magnifies-Regulatory-Uncertainty-After-Loper-Bright-7-12-2024.

[36] *See, e.g.*, *Ctr. for Biological Diversity v. EPA*, 2013 WL 1729573, at * (N.D. Cal. Apr. 22, 2013) (citations omitted) ("The ESA does not contain its own statute of limitations. Thus, the six-year statute of limitations in 28 U.S.C. § 2401(a) applies.").

[37] *See* 33 U.S.C. § 1369(b)(1) (Clean Water Act ("CWA")); 42 U.S.C. § 7607(b)(1) (Clean Air Act ("CAA")); 42 U.S.C. § 6976(a)(1) (Resource Conservation and Recovery Act ("RCRA")); 15 U.S.C. § 2618(a)(1)(C) (Toxic Substances Control Act ("TSCA")); 7 U.S.C. § 136n(b) (Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA")); 42 U.S.C. § 9613(a) (Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")); *but see Corner Post*, 144 S. Ct. at 2473 (Jackson, J., dissenting) (noting that section 2401 applies to claims under the Endangered Species Act).

[38] *Cf. Corner Post*, 144 S. Ct. at 2453 (citing 28 U.S.C. §§ 2342, 2344; 29 U.S.C. § 655(f)) ("The Hobbs Act, for example, requires persons aggrieved by certain final orders and regulations . . . to petition for review 'within 60 days after [the] entry' of the final agency action.").

language in most environmental statutes of limitations, if anything *Corner Post* only confirms that the latter set of limitations runs from finality rather than injury. This is especially true for environmental statutes of limitations that are completely unqualified—reading, for example, that "[n]ot later than sixty days after . . . *publication* . . . any person may commence a civil action."[39]

But *Corner Post*'s implications for a second set of provisions is less certain. The CWA, CAA, and RCRA all provide limitations periods which run for a certain number of days after a final agency action, unless the challenge "is based solely on grounds" that arose after that period.[40] New injuries would facially appear to fit within the rubric of "grounds arising after." But the D.C. Circuit has long held that, unless the agency has implicitly reopened the proceedings, such language only permits "a substantive attack on a regulation as originally promulgated" to be filed after the limitations period to the extent "post-rulemaking events . . . have fatally undermined the original justification of the rule," but not when a challenger seeks review of "defects extant at the time of the original rulemaking."[41] On the other hand, the D.C. Circuit has also suggested that a claim "arises after" the limitations period (and causes the period to run anew) where a newly formed company was not "in existence at the time the regulation was promulgated."[42] And claimants have also been permitted to sue where a new agency action extends an original rule to previously unregulated parties, providing them with newly ripened claims.[43] Even these exceptions, however, have been carefully guarded and narrowed by circuit panels apparently wary of the consequences of allowing unlimited facial challenges to long-established agency rules.[44]

Further, at least in the context of the CAA, the Supreme Court has held that the limitations exception only applies where the new grounds are "such that, had they been known at the time," the agency action "would have been an abuse of discretion," suggesting that injury to a particular plaintiff would not be relevant.[45] While existing law thus seems generally unfavorable to the proposition that fresh injuries from old regulations would necessarily constitute "grounds arising after" under this second set of limitations periods, it remains to be seen whether *Corner Post*'s plaintiff-centric approach and relative disregard for practical consequences will encourage litigants to urge and courts to accept such an argument.

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[39] 15 U.S.C. § 2618 (a)(1)(C) (TSCA) (emphasis added); *see also* 15 U.S.C. § 2618(a)(1)(A) (TSCA) ("Except as otherwise provided in this subchapter, not later than 60 days after the date on which a rule is promulgated under this subchapter, subchapter II, or subchapter IV, or the date on which an order is issued under section 2603, 2604(e), 2604(f), or 2605(i)(1) of this title, any person may file a petition for judicial review of such rule or order . . . ."); 7 U.S.C. § 136n(b) (FIFRA) ("[A]ny person who will be adversely affected by [an administrative] order and who had been a party to the proceedings may obtain judicial review by filing . . . within 60 days after the entry of such order . . . ."); 42 U.S.C. § 9613(a) (CERCLA) ("Review of any regulation promulgated under this chapter may be had upon application by any interested person . . . . Any such application shall be made within ninety days from the date of promulgation of such regulations.").

[40] 33 U.S.C. § 1369(b)(1) (CWA); 42 U.S.C. § 7607(b)(1) (CAA); 42 U.S.C. § 6976(a)(1) (RCRA).

[41] *E.g.*, *Pub. Emps. for Env't Resp. v. EPA*, 77 F.4th 899, 910–11 (D.C. Cir. 2023).

[42] *Coal River Energy, LLC v. Jewell*, 751 F.3d 659, 662–63 (D.C. Cir. 2014).

[43] *See Nat'l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1016 (D.C. Cir. 2016) (discussing *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 130 (D.C. Cir 2012)

[44] *See Sierra Club de Puerto Rico v. EPA*, 815 F.3d 22, 27 (D.C. Cir. 2016) (discussing *Coal River*, 751 F.3d at 662–63); *see also Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 458 (D.C. Cir. 2013) ("[I]f the mere application of a regulation . . . were sufficient to constitute an after-arising ground and trigger a new 60–day statute of limitations period, . . . concerns about preserving 'the consequences' of failing to bring a challenge within 60 days of a regulation's promulgation would be meaningless.").

[45] *Union Elec. Co. v. EPA*, 427 U.S. 246, 255–56 (1976). This appears to be the only Supreme Court case to directly address this language or similar language in the CWA and RCRA—or any other statute.

Conclusion

Although it is certain that *Corner Post* tilts the playing field, at least to some degree, in favor of regulated entities and against regulators, it is unclear whether the wave of litigation the dissent predicts will materialize. In any case, because most federal environmental statutes provide their own statute of limitations, any effects will be felt most strongly in other areas of the law.

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