

On July 1, 2024, the Supreme Court issued a 6-3 decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, holding that 28 U.S.C. § 2401(a)'s six-year statute of limitations, which governs claims under the Administrative Procedure Act (APA), does not begin to run until the plaintiff is injured by final agency action, as opposed to the date of final agency action. *Corner Post*, in combination with *Loper Bright*, opens the door for new entities to now bring facial challenges in court to federal regulations that have been in effect for decades.

It has long been generally accepted among most circuit courts that section 2401(a) permits a facial challenge to an agency action only within six years of the action; after that time, only an as-applied challenge, such as a defense to enforcement, is possible. The difference matters, because, for example, in general an as-applied challenge could contest only whether the application of a regulation was lawful, but not whether the long ago adoption of the regulation was arbitrary and capricious or lacked notice-and-comment procedure. Those kinds of arguments were available only in facial challenges, and only within the six years after a regulation was issued.

But the Supreme Court had not previously weighed in. Now it has, and *Corner Post* changes all of that. In writing for the Court, Justice Amy Coney Barrett reasoned that while the APA generally limits judicial review to final agency action, it also requires a plaintiff to show injury-in-fact, "so the statute of limitations does not begin to run until she is injured." Justice Barrett emphasized that the APA's injury requirement and finality requirement "work hand-in-hand" and both are necessary to trigger the general six-year statute of limitations governing civil actions against the US. The court specifically said that the time limit for facial challenges starts at that point—not just as-applied challenges.

The Corner Post Claim Illustrates the New Playing Field for Regulatory Litigation

Corner Post is a convenience store in North Dakota. As a retailer, it accepts debit cards, and like all merchants it pays its bank an "interchange fee" on each debit card transaction. The Durbin Amendment in the Dodd-Frank Act had instructed the Fed to issue a cap on debit card interchange fees, and the Fed carried that out in a rulemaking over a decade ago. That rule was litigated in the D.C. Circuit, and after the dust settled the cap is 21 cents per transaction.

Corner Post said the cap is too high because it accounts for costs that should be impermissible under the Durbin Amendment. Under the traditional understanding of section 2401(a) in the lower courts, Corner Post would be too late. The rule was adopted much more than six years before Corner Post filed suit in 2021. So, to the extent Corner Post wanted to contest the reasoning in the rule, it would not be able to do that because no facial challenge would be timely.

An "as-applied" challenge might also be difficult because the rule does not directly apply to Corner Post; it is not a bank being restricted in what fees it can charge, but rather a merchant, claiming as a third party it is injured by what the Fed is allowing Corner Post's bank to do.

But a key fact about this particular convenience store is that it opened its doors in 2018. So, it had not paid any allegedly excessive debit card fees before then. That fact turns out to be crucial, because the Supreme Court held that Corner Post was not injured by the Fed's rule when it became final in 2011. That injury is part of an APA claim, according to the court, so the claim does not accrue until the plaintiff is injured, which for Corner Post was no sooner than 2018. Therefore, the Supreme Court concluded, Corner Post had six years from that point, in which it could bring a facial challenge to the 2011 rule.

Corner Post can now, in principle, contest any aspect of the Fed's 2011 rule, under the full suite of APA standards (arbitrary or capricious, abuse of discretion, etc.). And it can do so in the district where it is located (North Dakota), where its case will go up to the Eighth Circuit, not the D.C. Circuit which had comprehensively reviewed the rule a decade ago.

Corner Post Magnifies the Effect of Loper Bright

As this case illustrates, for any action that is subject to the section 2401(a) time limit, there can no longer be any certainty. Many banks and merchants had probably taken for granted that for the rule on debit-card fees issued in 2011 and litigated in 2014, by a decade later the rule was settled. The Fed might amend it, or Congress could of course legislate. But there would be no further prospect of a litigant persuading a court to throw the rule out. Under *Corner Post*, there can always be such a future litigant. New companies are started all the time, and new people come to life, leading eventually to their having new professions and new interactions with government. For any challenge that could conceivably be brought against an agency action today, it is easy to imagine a plaintiff arising at some future date.

In addition, for agency actions that are susceptible to claims directly under the APA, those plaintiffs could arise anywhere in the country. *Corner Post* illustrates the dynamic: The D.C. Circuit addressed the Fed's rule in 2014, but this new plaintiff is in North Dakota, where it appealed its case to the Eighth Circuit.

That D.C. Circuit precedent will be of cold comfort to any person relying on the Fed's rule, if the District of North Dakota vacates the rule.

Loper Bright downplayed the impact of its decision that courts are not required to defer to agencies' statutory interpretations, and instead should exercise independent judgment. The court said past decisions are still binding precedent because of *stare decisis*. But for most agencies, that pronouncement has limited value beyond the precedents of the Supreme Court itself. Returning to the *Corner Post* example, whatever the D.C. Circuit held about the Durbin Amendment and the Fed's interpretation of it is not binding precedent in the Eighth Circuit. This dynamic could well play out for many other agency actions. A decision from years ago that was settled in one circuit, can now be revisited in a different circuit, in a post-*Chevron* landscape, so long as there is a plaintiff with fresh injuries.

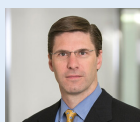
Some Rules Are Still Secure

Corner Post does not allow brand-new challenges to every kind of agency action, because section 2401(a) is not the governing time limit for certain kinds of rules. In several regulatory statutes, Congress required lawsuits to be filed within 60 days. The Supreme Court recognized, in *Corner Post*, that the language in those statutes is typically different, and usually makes the 60 days start at the time of the agency action—not, as in section 2401(a), when the claim accrues. Examples of these include the Clean Air Act, the Communications Act (governing most FCC decisions), and the Occupational Safety and Health Act (OSHA standards).

In addition, for some of these regulatory programs, the statute mandates that challenges go to the D.C. Circuit, such as for nationally applicable Clean Air Act rules, or appeals from certain FCC decisions. For these, a fresh challenge (if that were possible beyond the 60-day limit) would be subject to D.C. Circuit precedent.

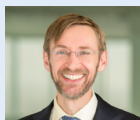
These "special review" statutes cover some major regulatory programs. But a very wide range of agency decisions, from decades past, are subject to regular APA claims, for which the statute of limitations is now, practically, very little limit at all. The decisions at risk could include FDA drug approvals, DEA scheduling, CFPB regulations and more.

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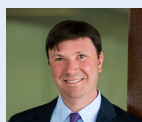
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