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SCOTUS Expands Opportunities to Challenge Agency Action in Corner Post

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October Term 2023 was one of the most consequential Supreme Court terms for administrative law in living memory. In *Loper Bright Enterprises v. Raimondo*, the Court mothballed the 40-year-old doctrine of *Chevron* deference, liberating courts to "say what the law is" without deference to agency interpretations. And in *SEC v. Jarkesy*, the Court reinvigorated the Seventh Amendment right to trial by jury, curtailing agencies' ability to tilt the odds in their favor by pursuing enforcement actions in their own in-house tribunals. But beyond those blockbusters, one of the Court's less-heralded decisions from last term promises to have major consequences for businesses affected by federal regulations: *Corner Post v. Board of Governors of the Federal Reserve System*.

B.C.P., or Before Corner Post

Corner Post involves one of the more mundane features of our legal architecture: a statute of limitations. More specifically, the case addresses the default statute of limitations that applies to suits against the United States, which must be brought "within six years after the right of action first accrues" under 28 U.S.C. § 2401(a).

The question in Corner Post was when the right to challenge final agency action under the Administrative Procedure Act "first accrues." Is it when the agency first acts — for example, when it adopts a regulation? Or is it when the agency's action first injures the plaintiff — which could be years after the regulation was adopted?

Before *Corner Post*, lower courts were split over the question. At least six federal courts of appeals held that for so-called "facial" challenges — which seek to invalidate final agency action before any enforcement on the plaintiff — the limitations period begins on the date of the agency's action, regardless of when the plaintiff is injured. While those courts would allow plaintiffs to bring "as-applied" challenges to final agency action in enforcement proceedings after that date, preemptive facial attacks would be off limits.

Standing alone, the Sixth Circuit reached the opposite conclusion. It held that the limitations period for facial challenges to final agency action doesn't start until the plaintiff is injured, even if that occurs years after the action. The Supreme Court took up the issue to resolve the conflict.

A New Playing Field

The Supreme Court sided with the Sixth Circuit, holding that a plaintiff's APA claim doesn't accrue until the final agency action first injures the plaintiff. The APA allows a plaintiff to challenge an agency action only after it suffers an injury. And under the traditional understanding, a cause of action "accrues" only when a plaintiff can file suit on it. Putting those points together, the Court concluded that Section 2401(a)'s six-year clock doesn't start to run until the plaintiff experiences the injury that allows it to sue under the APA. So even if the plaintiff didn't encounter the effects of the agen-

cy's action for years after it occurred — for example, if the plaintiff didn't exist at the time a regulation was adopted — it still has a six-year window after first being injured to bring a facial challenge to the action.

Writing in dissent, Justice Ketanji Brown Jackson highlighted the far-reaching consequences of the Court's decision. After *Corner Post*, she explained, "there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face." In her view, Section 2401(a) "now does nothing to prevent agency rules from being forever subjected to legal challenge by newly formed entities."

Implications for Legal Strategy

As Justice Jackson's dissent underscores, *Corner Post* represents a significant change to the legal landscape for businesses affected by federal regulations. In particular, it creates opportunities for newly created entities to bring pre-enforcement facial challenges to certain regulations adopted years before they came into existence.

1) New Entities

Corner Post has important implications for newly created businesses. Before the Court's decision, many entities that came into existence more than six years after a regulation had no way to bring a pre-enforcement challenge to it. If they wanted to test the regulation's legality, they had to "bet the farm" — that is, violate the regulation and invite an agency enforcement proceeding — just to gain the opportunity to challenge the regulation in court. Under *Corner Post*, newly created entities needn't play that dangerous game. They can bring pre-enforcement challenges to regulations that harm them without breaking the law to do so — at least so long as their challenges are governed by the default six-year statute of limitations in Section 2401(a).

2) Non-Regulated Entities

Corner Post's consequences are even more profound for newly created entities that are harmed by agency regulations they aren't directly subject to. For example, *Corner Post* involved a Federal Reserve Board regulation setting the maximum "interchange fee" that payment networks like Visa and Mastercard can charge to process debit card transactions. One of the regulation's challengers was a truck stop and convenience store that wasn't directly regulated by the interchange fee regulation — since it wasn't the one charging the fees — but was nevertheless harmed by it since the higher fees cut into its margins. Since the truck stop didn't even open its doors until more than six years after the board adopted the regulation, before *Corner Post* many courts would've held that it was forever barred from bringing a facial challenge. And because the truck stop wasn't directly regulated by the interchange fee rule, it also couldn't invite an enforcement action by violating the regulation. *Corner Post* solved that problem by allowing newly created non-regulated entities to bring facial challenges to regulations that harm them within six years of the time of their injury.

3) Range of Challenges

Corner Post might also allow new entities to facially challenge regulations on a broader range of grounds than courts have held are available in as-applied challenges. Several courts of appeals have held that when mounting an as-applied challenge to a regulation in an enforcement proceeding, a party is limited to bringing substantive challenges — such as attacks on the agency's interpretation of a statute — and cannot bring procedural challenges to the rule's adoption, such as attacks on an agency's compliance with rulemaking requirements like notice and comment. As a general rule, that limitation does not apply to facial pre-enforcement challenges to agency regulations. In an important footnote, *Corner Post*

expressly left open whether new entities can raise procedural challenges to pre-existing regulations. If future courts hold that they can, that would offer litigants seeking pre-enforcement review still one more advantage over playing defense against an agency enforcement action.

4) New Admin Law Doctrines

By themselves, these effects are enough to make *Corner Post* an exceptionally important case for businesses affected by federal regulations. But, as Justice Jackson emphasized in her dissent, the case's effects are even further magnified when combined with the Court's decision overruling *Chevron* deference in *Loper Bright*. The one-two punch of *Corner Post* and *Loper Bright* means that new entities can now bring facial challenges to regulations adopted long ago without any deference to the agency's statutory interpretation — even if deference would have been required by *Chevron* at the time of the regulation's adoption. That potent combination means that numerous old regulations might now get a hard judicial look that they might have escaped before.

Conclusion

Not all Supreme Court cases are created equal, and not every watershed decision grabs the headlines. But for businesses trying the navigate the ever-multiplying volumes of the Code of Federal Regulations, *Corner Post* might ultimately prove to be one of the most significant cases to emerge from the Supreme Court's last term.

