

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

CORNER POST, INC.,)
)
) Petitioner,)
)
) v.) No. 22-1008
)
BOARD OF GOVERNORS OF THE)
)
FEDERAL RESERVE SYSTEM,)
)
) Respondent.)

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-1008, Corner Post versus the Board of Governors of the Federal Reserve System.

Mr. Weir.

ORAL ARGUMENT OF BRYAN K. WEIR
ON BEHALF OF THE PETITIONER

MR. WEIR: Mr. Chief Justice, and may it please the Court:

Corner Post opened for business in 2018. Since then, it's paid several hundred thousand dollars in debit card fees that it thinks are unlawful. But the government says that Corner Post's clock to challenge those fees actually started in 2011, seven years before Corner Post pumped a single gallon of gas.

The government is wrong. Corner Post's clock started when it swiped its first debit card and paid its first fee. That is the right outcome here for three main reasons.

First and most importantly, the text. Section 2401's limitations period starts when a claim "first accrues." This Court has said that

1 phrase means the clock starts only once a
2 plaintiff can sue, and this Court has also said
3 that an APA plaintiff can sue only once it's
4 first harmed by regulation. We just want the
5 Court to apply those settled principles.

6 By contrast, the government wants a
7 special rule that contradicts how accrual
8 statutes have worked since at least the 1830s.
9 That government-only carveout would convert
10 Section 2401 into a repose-based statute like
11 the Hobbs Act. But Congress knows exactly how
12 to craft repose-based statutes when it wants to,
13 and it hasn't done so for APA claims.

14 Second, with no textual foothold, the
15 government resorts to policy arguments. It says
16 that siding with Corner Post will undermine
17 reliance interests because it will let
18 plaintiffs challenge rules that are older than
19 six years. But challenges to those rules
20 already happen all the time in the as-applied
21 context, and the government admits that
22 as-applied challenges have no time limit.

23 Third, if Congress's textual choice
24 leads to outcomes that the government doesn't
25 like, this Court has said that those concerns

1 should be addressed to Congress, not to this
2 Court. This Court's role is simply to enforce
3 the value judgments that Congress has already
4 made. We ask that it do so here.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Do you have any
7 examples of accrual cases or questions where the
8 injury and the unlawful conduct are on different
9 dates?

10 MR. WEIR: Well, that -- that's really
11 any typical accrual statute. For example, there
12 are torts where a -- where a -- where a tort is
13 committed and -- and the cause of action is not
14 complete until later, until the harm is felt.
15 So that's a basic. We think there's nothing
16 remarkable about -- about that fact pattern.

17 JUSTICE THOMAS: Well, but how many
18 cases are like yours, where the regulation has
19 been adopted, it's final, and you are not yet in
20 business, so it can't apply to you and -- so are
21 there any cases like yours --

22 MR. WEIR: So --

23 JUSTICE THOMAS: -- where the injury
24 is later?

25 MR. WEIR: -- so we -- we think that

1 -- so, certainly, there are -- there are
2 repose-based statutes that would -- that would
3 cut off review for someone like us, but the APA
4 is the background rule, and that --

5 JUSTICE THOMAS: No. Do you have --
6 so do you have any other cases like yours?

7 MR. WEIR: So the question being if
8 there -- are there any other accrual-based
9 statutes for agency-specific --

10 JUSTICE THOMAS: Where you -- where
11 the -- the injury occurs long after the rule is
12 adopted.

13 MR. WEIR: So there's -- there's the
14 Herr case in the Sixth Circuit, which -- which
15 starts the circuit split in -- in -- in this --
16 in this context. That's one case where it
17 happened. But I think the question, unless I'm
18 misunderstanding it, Justice Thomas, is are
19 there any other statutes of limitations that
20 operate the way we say that 2401 --

21 JUSTICE THOMAS: Yes.

22 MR. WEIR: So we think that 20 --
23 we're not aware of any --

24 JUSTICE THOMAS: Actually, I'm more
25 interested in the fact pattern that we have

1 here. Your business -- you have a rule that's
2 adopted. It's final. It's been challenged.
3 Then you go into business, you begin to operate
4 under these rules, and you claim, of course,
5 that's the beginning of your injury, and then,
6 of course, you say that restarts the statute of
7 limitations.

8 That's what I'm interested in.

9 MR. WEIR: So in the -- in the -- in
10 the regulatory context or --

11 JUSTICE THOMAS: Yes.

12 MR. WEIR: And so, in the regulatory
13 context, as far as we know, the APA -- 2401 is
14 the only rule that applies that way.

15 JUSTICE THOMAS: Okay. So --

16 MR. WEIR: But that --

17 JUSTICE THOMAS: -- if that's the
18 case, do you have an example that is similar to
19 yours?

20 MR. WEIR: I think the Herr -- the
21 Herr family in the Sixth Circuit --

22 JUSTICE THOMAS: So that's the only
23 one?

24 MR. WEIR: Well, every -- the lower
25 courts have rejected our reading of 2401.

1 JUSTICE THOMAS: Yeah.

2 MR. WEIR: And so there wouldn't be
3 other cases because they would have been
4 time-barred under that rule.

5 JUSTICE SOTOMAYOR: Counsel, there --
6 there is something about this that plagues at
7 the back of my mind, which is, how can someone
8 be injured who goes into a business knowing its
9 structure? Meaning this is the business that
10 you've accepted. The rule was passed whatever
11 number of years ago. There's no enforcement
12 against you.

13 I understand injury when the
14 government's seeking to compel you to do
15 something or to stop doing something. But
16 there's no injury in my mind when you enter a
17 business knowing its structure and accepting
18 rules that have been final.

19 So explain to me what makes sense in
20 -- this has often been called a facial challenge
21 as opposed to an as-applied challenge, and I
22 think that for valid reasons, which is, if you
23 go in, you accept the regulatory conditions of
24 the business, and you're not burdened because
25 you knew it going in.

1 MR. WEIR: Well, I think that assumes
2 that -- that small business owners understand
3 the entire regulatory regime that they're
4 entering before they actually go into business.
5 And I think this Court has recognized that it is
6 -- that is a tall task to ask of any small
7 business owner like Corner Post.

8 But the first time Corner Post was
9 ever actually injured is the time that they --
10 they did pay the actual debit card fees that --
11 that they had to pay whenever they swiped a
12 debit card. So that's the first time there is
13 any injury.

14 And so accrual-based statutes, this
15 Court has -- has, I think, recognized throughout
16 history, are necessarily plaintiff-specific, and
17 that's exactly what we have here. The first
18 time the plaintiff here was harmed is when that
19 plaintiff's cause of action accrues to challenge
20 that particular rule.

21 JUSTICE KAGAN: But I think what
22 Justice Thomas's question suggested is that this
23 is a context in which this would be a quite
24 novel rule. There are no other statutes of
25 limitations that work this way. And with

1 respect to this statute of limitations, the
2 consensus view of all the circuits, until the
3 Herr case -- case came along, which was fairly
4 recently in a little bit different context, but
5 the consensus view of all the circuits was that
6 the statute of limitations began to run when you
7 had final agency action.

8 Of course, what typically would
9 happen, a rule like this, is that there would be
10 that final agency action, many people would
11 challenge the rule, trade associations of the
12 same kind that are in back of this case, that
13 that challenge would go forward. You would get
14 a decision. It would be final. It would create
15 the legal background rule sometimes for an
16 entire industry, and that was the end of the
17 matter.

18 And, you know, what you're suggesting
19 is a very different rule than the administrative
20 sphere has worked under for many, many years.

21 MR. WEIR: So we don't think so. I --
22 I think that the -- the 29 examples that the
23 government points out in its brief of
24 agency-specific repose-based statutes shows that
25 Congress intended to have a different rule for

1 the APA. It has not subjected --

2 JUSTICE KAGAN: Well, it doesn't show
3 that. I mean, the APA, you're right, it's
4 different language. It says "accrues." Now,
5 you know, "accrues" just means arises. There's
6 nothing in the language itself that -- that
7 would suggest that your principle is mandated.

8 We do, you're quite right, have a
9 general principle that when we see something
10 that says "accrues," what that usually means is
11 that there's a -- a -- a full cause of action
12 that can be brought.

13 But this is a very different context
14 in which the rule has operated differently for
15 decades and decades and decades, where no court
16 has ever suggested your solution until, again,
17 the Herr case. And I guess I would suggest
18 there's nothing in the word "accrues" that
19 suggests that every court for decades and
20 decades and decades has been wrong.

21 MR. WEIR: So -- so two responses,
22 Justice Kagan. The first is, if you look at the
23 lower court decisions applying this statutory
24 scheme, not a single one of them actually looked
25 at the text of 2401 or 702. None of them did.

1 And then the pathmarking decision I --

2 JUSTICE KAGAN: Well, but what I'm
3 suggesting, Mr. Weir, is that there's not much
4 in the text to look at. "Accrues" just means
5 arises. Now we do have precedent, but that
6 precedent arose in a very different context as
7 to what "accrues" meant, so you wouldn't find a
8 lot looking at this text.

9 MR. WEIR: So I -- I disagree with
10 that as well. I think this Court definitively
11 interpreted the phrase "first accrues" in
12 Gabelli versus SEC just 11 years ago, and it
13 said, in common parlance, a right first accrues
14 when it comes into existence. And that was
15 under the administrative --

16 JUSTICE KAGAN: We made very clear
17 that that was a default rule, a general rule
18 that could be, of course, countermanded by
19 Congress but that also could be countermanded by
20 different circumstances, that if you look at the
21 Crown Coat opinion, for example, there's a very
22 explicit recognition by this Court -- and I'm
23 just reading -- the hazards inherent in
24 attempting to define for all purposes when a
25 cause of action first accrues what are those

1 hazards, you know, a word like that should be
2 interpreted in the light of the general purposes
3 of the statute, with due regard to those
4 practical ends which are to be served by any
5 limitation of the time within which an action
6 may be brought.

7 And what the -- you know, you couldn't
8 find better language to point to. This is a
9 really different context with really different
10 interests, including reliance interests of many,
11 many parties who are not before the Court.

12 And -- and courts have responded to
13 that and created a different rule which has
14 lasted -- I -- I -- I -- I mean, this is kind of
15 a revolutionary ask.

16 MR. WEIR: So we disagree. On Crown
17 Coat, the top-line holding from Crown Coat as we
18 read it is that Congress would not want under
19 2401 the under -- the -- the -- the statute of
20 limitations to start running until the plaintiff
21 had the opportunity to sue.

22 And that language that you just quoted
23 that the government relies on, we see that as a
24 recognition that obviously the underlying cause
25 of action accrues -- differs between causes of

1 action. Torts accrue at different times than
2 breaches of contract. Different torts can
3 accrue differ -- at different times. And so we
4 just see that language as just recognizing that.

5 And as far as if you -- the purposes
6 of the statute, this Court said in Abbott Lab'ys
7 the purpose of the APA was it embodies a
8 presumption of judicial review. So, if we're
9 going to look at the underlying statute and its
10 purposes, I think that cuts our way, not the
11 government's way.

12 JUSTICE JACKSON: Mr. -- Mr. Weir,
13 I -- I thought that we had sort of basic first
14 principles governing statutes of limitations,
15 and it sort of goes to what Justice Kagan
16 pointed out, but I thought that we ordinarily
17 say that a cause of action arises, which is
18 accrues, it arises, when all of the facts that
19 are necessary to establish the elements of that
20 cause of action have occurred.

21 You know, in a tort situation, when
22 there's a duty, if there's a breach and injury
23 as a result of the breach, those facts have
24 occurred, the cause of action has arisen, and we
25 say the clock starts running at that point

1 because a claim against the defendant can be
2 sustained in court when those facts exist.

3 All right. So, if that's right as a
4 first principle, I guess I don't understand your
5 argument that the cause of action is arising
6 here when the plaintiff can bring the claim.

7 I think the law regarding to -- you
8 know, when a plaintiff can bring a claim is
9 something different. But we have here a cause
10 of action arising out of the final agency action
11 because that is the point at which a person can
12 sustain a claim against the agency under the
13 APA.

14 Why am I wrong about that?

15 MR. WEIR: So this -- this Court has
16 identified the elements of an APA claim and it
17 requires a plaintiff who is injured and injured
18 by agency action. So those are the elements.

19 JUSTICE JACKSON: Where -- where --
20 where have we said that that was an element? I
21 thought that was just a statement of the statute
22 as to who can bring the claim, not the element,
23 not -- not like the element of the claim, when
24 has the defendant violated the law.

25 MR. WEIR: So I would point the Court

1 to the Lujan decision, 1990, where it outlines
2 the elements of an APA claim.

3 JUSTICE JACKSON: Mm-hmm.

4 MR. WEIR: The Court -- Court dealt
5 with it there. But you can look at the statute
6 itself. Section 702 identifies who, a person.
7 That who has -- that's who has the cause of
8 action, a person.

9 JUSTICE JACKSON: Right. Who has the
10 cause of action. I'm talking about what are the
11 elements of the cause of action, and I thought
12 it was the agency has enacted a final rule that
13 you claim is arbitrary and capricious or not in
14 accordance with the law, that once the agency
15 has done that, we have a cause of action, it has
16 arisen, and then these other elements or these
17 other aspects of the statute say who is the
18 person who can bring such a claim.

19 MR. WEIR: So I disagree with that.
20 This Court has said that certainly final agency
21 action is an element of an APA claim, but the
22 other element, as this Court noted in Lujan and
23 I think in Newport News, is somebody who is
24 actually harmed by it, a plaintiff who was
25 harmed by it.

1 And accrual-based statutes are
2 necessarily plaintiff-specific. They are --
3 that's in an accrual -- that's in their DNA.
4 We're not aware of a -- a statute that uses
5 accrual language or accrual-like language where
6 the statute of limitations starts on the first
7 day and ends on the first day for everyone, and
8 we think that's because that's not an accrual
9 statute, that's a statute of repose.

10 And Congress certainly knows how to
11 pass those, and Congress knew how to pass those
12 when it passed the APA. In 1940 -- in 1934,
13 there -- there -- Congress passed a -- a sort of
14 Hobbs Act-like statute for the SEC. It did so
15 in 1938 for the FTC. And in 1950, it actually
16 passed the Hobbs Act.

17 Between those bookends, it passed the
18 APA, did not subject the APA to a -- a
19 repose-based statute of limitations, and it
20 passed 2401 two years later. So we think that
21 necessarily must be an intentional choice that
22 APA claims are not subject to the type of repose
23 as other types of cause of action.

24 CHIEF JUSTICE ROBERTS: Well, but
25 repose is a little bit different in this

1 context. I mean, you're talking about sort of
2 establishing the ground rules for how a
3 particular regulatory regime is going to
4 operate, and, you know, you've got six years to
5 do that. And, you know, you often see trade and
6 other associations bringing fundamental
7 challenges to the, you know, structure of the
8 market or -- or the -- or the agency.

9 And under your system, those -- that
10 sort of challenge as to how everything is
11 structured are going to be -- could be -- are
12 going to be brought 10 years later, 20 years
13 later.

14 And -- and it seems to me that you
15 sort of have to create the universe, you know,
16 repeatedly, as opposed to just taking those are
17 the ground rules and here's how -- how they're
18 going to work.

19 MR. WEIR: So we think challenges to
20 -- to regulations like that are happening
21 already in the as-applied context. You can
22 always have an as-applied challenge. Those
23 happen to broad sets of regulations already.
24 And so we don't see that really as an issue.

25 And -- and -- and there -- I just want

1 to be clear there's no incentive to challenge
2 valid regulations or anything like that. We're
3 talking about challenges only to regulations
4 that presumably have some defects, and those are
5 exactly the type of challenges that Congress
6 would want people to bring. That's why it
7 passed the APA.

8 CHIEF JUSTICE ROBERTS: How does,
9 like, stare decisis and rules like that, how do
10 they work under this regime? You have, you
11 know, presumably fundamental challenges to the
12 new regulatory regime that starts up and they
13 get decisions and maybe they, you know, force
14 the agency to change things.

15 And then every time somebody brings a
16 new facial challenge, they basically have to
17 litigate that same question over again?

18 MR. WEIR: So I -- I'm not sure stare
19 decisis would apply unless it was an
20 interpretation of this Court, of course. But,
21 in the lower courts --

22 CHIEF JUSTICE ROBERTS: The agency,
23 whatever they call agency common law.

24 MR. WEIR: You know, I think anybody
25 that was bringing a subsequent lawsuit, of

1 course, they have to run up against the fact
2 that there's apparently, you know, a
3 well-reasoned decision that's already ruled
4 against them, so there is an uphill climb to
5 start with, I think. But -- but that is what's
6 commanded by -- we think that's what's commanded
7 by the text of 2401 and the APA.

8 And we -- we want to be clear, even
9 for people that have valid claims --

10 JUSTICE SOTOMAYOR: There's no res
11 judicata or collateral estoppel, correct?

12 MR. WEIR: I'm sorry, Your Honor?

13 JUSTICE SOTOMAYOR: There's no res
14 judicata or collateral estoppel?

15 MR. WEIR: Well, the government has
16 argued in the district court below here that
17 there are res judicata principles at play. And
18 so, if -- if we prevail on remand, they're
19 welcome to raise those or any other equitable --

20 JUSTICE SOTOMAYOR: Is that your --

21 JUSTICE GORSUCH: For --

22 JUSTICE SOTOMAYOR: I'm sorry.

23 JUSTICE GORSUCH: No, please.

24 JUSTICE SOTOMAYOR: Is that your
25 answer to the list of examples on page 39 of the

1 government's brief of all of the -- I want to --
2 I don't want to be dismissive because I'm not.
3 There's a whole list of parade of horrors that
4 I see as potentially true that the government
5 lists at page 39.

6 And your response has been, don't
7 worry about it, it's not going to happen. But
8 tell me why they aren't real possibilities.

9 MR. WEIR: Well, we think --

10 JUSTICE SOTOMAYOR: Tell me what
11 guardrails there are in the law that would
12 prevent those kinds of challenges, the ones that
13 the Chief said 10, 20, 30, 40 years ago. What
14 stops those from re-occurring constantly?

15 MR. WEIR: So we think there's a
16 number of things that do. First, there are --
17 there are many defenses the government can raise
18 to what -- what some call, you know,
19 manufactured plaintiffs that are creating an
20 injury to challenge regulations. We outline
21 those in our blue brief. We don't see the
22 government as contesting those.

23 But even if --

24 JUSTICE SOTOMAYOR: That's very hard
25 to prove.

1 MR. WEIR: So -- so -- so it's the
2 government's own position at the cert stage that
3 parties like Corner Post who are harmed for the
4 first time more than six years after a
5 regulation is issued are relatively uncommon.
6 That's the government's position. And we think
7 there's a reason why.

8 Vast swaths of the regulatory state
9 are already carved out by repose-based statutes,
10 the 29 that -- that the government cites. So
11 those wouldn't even be subject to -- to -- to --
12 to this Court's decision here. They're already
13 time-barred. They're -- they're out.

14 But even what's left for the APA, for
15 APA claims, the vast majority of the country is
16 already time-barred from bringing challenges to
17 old regulations under the APA. The only ones
18 that have those -- that have the ability to
19 bring those challenges are those who are harmed
20 for the first time in the last six years. So,
21 if this Court sided --

22 JUSTICE KAGAN: Well, that doesn't
23 seem very hard. I mean, you can always find a
24 new company, a new regulated entity. You can
25 create a new company or a new regulated entity.

1 If the same trade association that has had its
2 first bite at the apple doesn't like the answer
3 10 years later and looks around and thinks: You
4 know, the environment is more hospitable, the
5 judges have changed, let's try again. Just
6 create a new entity.

7 MR. WEIR: Well, I think just creating
8 a new entity won't -- won't get you there, but I
9 think, to get to the heart of -- of -- of -- of
10 your point, if that were true, we would have
11 seen that in the Sixth Circuit. We would have
12 seen sophisticated litigants bringing challenges
13 to old regulations in the Sixth Circuit. And it
14 just didn't happen. There was no uptick --

15 JUSTICE GORSUCH: Counsel --

16 MR. WEIR: -- to old -- old reg --

17 JUSTICE GORSUCH: -- counsel, if I --
18 if I understand your point, and I just want to
19 make sure I do, we're talking about a facial
20 challenge here. If -- if there were circuit
21 precedent that would bar you, as a matter of
22 stare decisis, that would be a winner on the
23 merits. You'd lose. You just -- you'd have a
24 timely claim, but you'd lose, is that right?

25 MR. WEIR: That's correct.

1 JUSTICE GORSUCH: And the government
2 may be able to use non-mutual collateral
3 estoppel or some other res judicata principle to
4 say the matter is decided effectively against
5 you anyway, right?

6 MR. WEIR: That's correct.

7 JUSTICE GORSUCH: So we're just
8 talking about the timing of the suit.

9 And then you -- you mentioned that
10 nobody contests that as-applied challenges could
11 go forward. But how could that be? I mean, if
12 you lose, why wouldn't as-applied challenges
13 also be barred because they too accrued back
14 when -- if the accrual rule turns on the
15 adoption of the rule, that would seem to bar all
16 future claims, whether as-applied or facial.

17 MR. WEIR: Well, certainly, that's
18 possible. The lower court precedent now, I'm
19 not sure this Court's addressed -- directly
20 addressed it --

21 JUSTICE GORSUCH: I understand lower
22 court precedent has distinguished between the
23 two, but they haven't discussed what "accrual"
24 means and how -- how that word might be a
25 chameleon and differ between as-applied and

1 facial challenges.

2 And if -- if you were to lose and we
3 were to hold "accrual" means the time of the
4 adoption of the rule, it would seem to upset and
5 undermine all of those decisions too, wouldn't
6 it?

7 MR. WEIR: I think I agree with that.

8 JUSTICE GORSUCH: Okay. And then I
9 have --

10 JUSTICE KAGAN: Mr. Weir, how could
11 that be because --

12 JUSTICE GORSUCH: I'm sorry. I just
13 have one -- one more question, and -- and -- and
14 this is the last sentence of 702, which the
15 government draws our attention to, and it says
16 that nothing herein shall -- affects other
17 limitations on judicial review. And I didn't
18 see your response to that argument. Do you
19 understand what I'm getting at?

20 MR. WEIR: I do.

21 JUSTICE GORSUCH: Can you -- can you
22 give me your thoughts on that?

23 MR. WEIR: I -- I can. So -- so two
24 -- two responses. First, this Court already
25 dealt with that issue in Darby versus Cisneros.

1 What happened in 1976 is Congress waived
2 sovereign immunity and -- under 702, and what
3 Congress wanted to do was make clear that that
4 waiver did not affect any other limitation on
5 judicial review that already existed. So it's
6 the -- the -- the waiver of sovereign immunity
7 that's not affecting anything else.

8 But even on its own terms, on the
9 government's own terms, we think that argument
10 doesn't work because all accrual-based statutes
11 necessarily depend on the underlying cause of
12 action. So they work together. So 702 -- so
13 applying 702 in the way we think it should be
14 applied is merely an application of 2401.

15 JUSTICE GORSUCH: So you're saying, in
16 other words, that your view -- I just want to
17 make sure I understand it -- doesn't affect any
18 other limitation; it just interprets the word
19 "accrual"?

20 MR. WEIR: That's correct.

21 JUSTICE GORSUCH: Is that a fair
22 summary of it?

23 MR. WEIR: That's -- that's -- it's --
24 it's an -- it's an application of an accrual
25 statute.

1 JUSTICE GORSUCH: Okay. All right.

2 Thank you.

3 MR. WEIR: And, again, this Court
4 dealt with that in Darby versus Cisneros.

5 JUSTICE GORSUCH: Thank you.

6 JUSTICE KAGAN: If -- if I could go
7 back, Mr. Weir, to what you suggested about
8 accrual would operate the same way in an action
9 where there was an as-applied defense in an
10 enforcement action, you know, I don't think it
11 could. 2401(a) just talks about civil actions
12 commenced against the United States. It has no
13 application to -- to -- to places where there's
14 an enforcement action and this functions as a
15 defense.

16 MR. WEIR: So there are different
17 types of contexts for as-applied. If -- if --
18 if you are denied a permit, for example, you
19 usually take that to court in -- in federal
20 district court and you sue the United States.
21 And so, on its face, 2401 would apply in that
22 context.

23 JUSTICE GORSUCH: So the distinction
24 there is between an enforcement action against
25 you by the government, in which case you'd have

1 the ability to -- to -- to make your challenges,
2 but, if you sought an as-applied challenge
3 affirmatively yourself, you might be barred? Is
4 that -- is that --

5 MR. WEIR: I think that's right.

6 JUSTICE GORSUCH: Yeah.

7 MR. WEIR: I just want to -- I just
8 want to point out what the government is asking
9 for is -- is several carveouts. It's asking for
10 a carveout for how general accrual rules have
11 had -- have worked since the 1830s. It's asking
12 for a carveout for how this Court has actually
13 interpreted the phrase "first accrues" from
14 Gabelli. It's actually asking for a carveout of
15 how this Court has applied 2401 in the past.

16 We think Crown Coat supports us, but
17 the Court had applied 2401's predecessors in the
18 1900s. The Chamber brief outlines several
19 examples where -- where -- where "first accrues"
20 is applied just how we want.

21 And -- and so what the government is
22 asking for is a special rule just for it. And
23 this Court rejected the special -- that exact
24 same argument in the Franconia case when it was
25 leading --

1 JUSTICE JACKSON: What do you do with
2 the "first" in the actual statute? I mean, you
3 seem to be asking us to read the statute as if
4 it says a complaint is barred from the time in
5 which the plaintiff is first aggrieved. But
6 that's not what it says.

7 So how is it that every new company
8 that is created in the aftermath of the creation
9 of a rule can claim that this is the first time
10 that the cause of action has arisen under the
11 APA?

12 MR. WEIR: Because, under
13 accrual-based statutes, the -- the -- the -- the
14 claim is plaintiff-specific. So, if you look
15 at, like, the Hobbs Act, the Hobbs Act --

16 JUSTICE JACKSON: All right. But
17 you're just assuming away the question at the
18 beginning by saying this is an accrual-based
19 statute. What I'm suggesting is that it's not.
20 Just because it says the cause of action accrues
21 doesn't make it an accrual-based statute in the
22 way that you are interpreting, and I don't
23 understand how it can be when it says "first
24 accrues."

25 MR. WEIR: So the way we interpret

1 "first accrues" is that the first time you
2 suffer a harm, that is when your statute of
3 limitations starts running.

4 JUSTICE JACKSON: Right. But isn't
5 that reading words into the statute in a way
6 that doesn't make a whole lot of sense? You're
7 suggesting that this statute is the first time
8 anybody is harmed by the United States, they
9 have six years, anybody, for any reason.

10 MR. WEIR: That's how 2401 reads and
11 is applied. And to be clear, it applies to not
12 just APA claims. It applies to FOIA actions.
13 It applies to government decisions that are not
14 -- that are not covered by Title VII. And the
15 government's rule doesn't make sense in those
16 contexts.

17 You can imagine an agency that had an
18 unlawful employment policy, and under the
19 government's rule, the first employee that was
20 harmed by that policy, that would start the
21 statute of limitations for everybody at the same
22 time, including --

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 Justice Alito?

2 JUSTICE ALITO: The government says
3 that late-arising objectors like Corner Post can
4 get relief by petitioning for new rulemaking.
5 Why isn't that sufficient for you?

6 MR. WEIR: So we don't think that's a
7 -- a -- a -- a -- a viable path to judicial
8 review for a couple reasons.

9 First, the government gets to decide
10 when it rules on a petition for rulemaking, and
11 it can sit on it for years. But even the
12 government acknowledged I think in PDR Network
13 that this is not a guaranteed path to judicial
14 review.

15 Typically, a denial of a petition for
16 rulemaking gets very deferential review that
17 doesn't allow the -- the plaintiff to actually
18 get at the merits of the underlying regulation
19 they're trying to -- they're trying to -- trying
20 to challenge.

21 And -- and -- and -- and we know what
22 would have happened in this case if we filed a
23 petition for review. The -- the Board itself
24 issued a -- a -- an NPRM after we -- after the
25 Court granted cert and is not going to revisit

1 the part of the rule that we want it to revisit,
2 and so it wouldn't have mattered even if we did.

3 JUSTICE ALITO: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor?

6 Justice Kagan?

7 Justice Gorsuch, any?

8 Justice Kavanaugh?

9 JUSTICE KAVANAUGH: Just so I'm clear
10 on Justice Gorsuch's questions, in an as-applied
11 enforcement action against you, I think you and
12 the government agree that you can always raise a
13 legal challenge to the -- the rule or the
14 regulation?

15 MR. WEIR: That's correct. That's --
16 that's how lower courts have interpreted it.

17 JUSTICE KAVANAUGH: Okay. Second
18 question, and this is looking down the road and
19 is really a tangential issue, but it interests
20 me. So what relief can you get here --

21 MR. WEIR: So in -- in --

22 JUSTICE KAVANAUGH: -- if -- if you
23 can't get vacatur of the rule?

24 MR. WEIR: If we can't get vacatur?
25 We -- we can't imagine a situation where our

1 client can get relief from this rule absent
2 vacatur. But that's not true in -- in most
3 cases. In most cases --

4 JUSTICE KAVANAUGH: Right.

5 MR. WEIR: -- directly regulated
6 parties can --

7 JUSTICE KAVANAUGH: Directly -- but --
8 but, on the vacatur issue, which is always
9 lurking, a party who's not regulated would be
10 able to get no relief in a situation like this?

11 MR. WEIR: I think it would depend on
12 the context.

13 JUSTICE KAVANAUGH: I think you -- I
14 think you just said that.

15 MR. WEIR: Yeah. There are some
16 instances where you might be able to do it but
17 --

18 JUSTICE KAVANAUGH: Yeah.

19 MR. WEIR: -- but not -- not in this
20 one.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: I just have one
25 question and it's about your point about

1 procedural challenges not being the kind of
2 challenges that you could bring or, and you say,
3 I think, that that's part of the explanation for
4 why the government's parade of horrors on page
5 39 of its brief is not so horrible.

6 The procedural challenges are out, am
7 I right?

8 MR. WEIR: That's -- that's what we
9 think is the -- is the best reading of -- of how
10 injury occurs in that context. It doesn't need
11 -- the Court doesn't need to reach it in this --

12 JUSTICE BARRETT: Are --

13 MR. WEIR: -- case because we don't
14 have procedural challenges.

15 JUSTICE BARRETT: So are arbitrary and
16 capricious challenges procedural or not?

17 MR. WEIR: Those are substantive. And
18 -- and you --

19 JUSTICE BARRETT: So those would be
20 substantive in your view?

21 MR. WEIR: That's correct. And --
22 and -- and you can raise those in as-applied
23 enforcement contexts as well.

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: So can I just be
3 clear, injury, you're saying that injury is an
4 element of an APA claim?

5 MR. WEIR: It is.

6 JUSTICE JACKSON: Okay. And can I
7 also be clear on the consequences of your
8 decision because I guess I worry that if you
9 win, every agency rule in existence today would
10 be subject to some sort of a challenge in this
11 way. So I'm trying to understand that argument.

12 MR. WEIR: Sure. So I think, first,
13 many of those regulations are already subject to
14 challenge in the as-applied context, as -- as
15 I've already said, but -- but we don't think
16 that there's going to be any opening of the
17 flood gates or parade of horrors because even
18 the government said that parties that can bring
19 this type of claim are relatively uncommon, and
20 we think that's because most parties are harmed
21 the day a regulation is actually issued.

22 And I think you also have vast -- vast
23 swaths --

24 JUSTICE JACKSON: But why wouldn't
25 this be extraordinarily destabilizing in the way

1 that Justice Sotomayor suggested? I mean, we
2 have settled rules that govern all sorts of
3 industries, the healthcare industry, the finance
4 industry, and people have adjusted themselves
5 around them. There are experts who understand
6 how the law works and companies follow suit.

7 If I understand you correctly, each
8 new company that is created in an industry can
9 suddenly bring a challenge that might risk or
10 undermine valid -- invalidation of the entire
11 basis of the industry, each new company, because
12 you say each new company that's created can
13 bring such a lawsuit.

14 Now, whether or not it will succeed, I
15 understand, but aren't you risking
16 destabilization of the industry in this way?

17 MR. WEIR: We don't think so. We --
18 we think the experience in the Sixth Circuit is
19 what you'll see. There -- there was no uptick
20 in challenges to old regulations in the Sixth
21 Circuit, and we would have seen them there in
22 the last --

23 JUSTICE JACKSON: Is -- is that
24 possible because we had other doctrines that
25 prevented, so, you know, for example, Chevron

1 existed and so there were lots of things that
2 already -- you know, right? Like, there are
3 reasons why you might not have an uptick. I'm
4 just wondering, in a world in which you could
5 bring these actions, why wouldn't you have this
6 problem?

7 MR. WEIR: Well, I -- I think that
8 because most regulations are -- are valid,
9 there's -- there's no argument that they're
10 unlawful. So you would -- so you wouldn't see
11 them. It's only the ones that have defects that
12 you're going to see challenges to or potential
13 defects.

14 JUSTICE JACKSON: And going back to
15 Justice Thomas's question, we had already had a
16 challenge on this very set of regulations, so
17 why is that not enough to satisfy this scenario?

18 MR. WEIR: Well, because our client
19 was first injured by this -- that same rule and
20 has its -- has its own challenge to bring under
21 the APA. It's the -- the American tradition is
22 everyone gets their day in court, and the APA
23 itself provides for a presumption of judicial
24 review.

25 JUSTICE JACKSON: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Snyder.

4 ORAL ARGUMENT OF BENJAMIN W. SNYDER
5 ON BEHALF OF THE RESPONDENT

6 MR. SNYDER: Mr. Chief Justice, and
7 may it please the Court:

8 For decades, the courts of appeals
9 have consistently recognized that the six-year
10 statute of limitations on an APA claim accrues
11 at the time of the challenged agency action, not
12 the time when a particular plaintiff comes
13 within the relevant statute's zone of interests.

14 In asking this Court to reject that
15 settled practice, Corner Post argues that the
16 word "accrues" in Section 2401(a) invariably
17 refers to the time at which a specific plaintiff
18 obtains a complete and present cause of action
19 and that every newly formed entity therefore has
20 six years to challenge any prior agency actions
21 that affect its business or other interests,
22 even if those actions occurred decades ago.
23 Nothing in the APA or Section 2401(a) requires
24 that destabilizing result.

25 In Crown Coat Front Company, this

1 Court explicitly rejected Corner Post's
2 one-size-fits-all definition of "accrues,"
3 warning of the hazards of attempting to devise a
4 single accrual rule for all purposes.

5 Instead, the Court explained that to
6 apply the general word "accrues," a court has to
7 consider the particular type of claim at issue
8 and how the practical purposes of a statute of
9 limitations apply in that context.

10 In conducting that necessary analysis,
11 courts should give primary weight to evidence
12 about the accrual rule that Congress itself has
13 adopted when it has specifically focused on
14 other claims of the same type.

15 Doing so ensures that courts are not
16 just engaged in their own policy balancing about
17 the respective costs of review and repose but
18 instead are faithfully following Congress's
19 lead.

20 Here, Congress's standard practice
21 when it's focused on the time for challenging
22 agency action has been to run the limitations
23 period for that type of claim from the date of
24 the agency action at issue.

25 It would, therefore, reasonably have

1 expected courts to follow the same approach when
2 applying Section 2401(a)'s catch-all statute of
3 limitations to claims under the APA, and because
4 that's what the court of appeals did here, the
5 decision below should be affirmed.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: So when did the --
8 the claim accrue for this Petitioner?

9 MR. SNYDER: So this Court has -- has
10 said that a claim can accrue for different
11 purposes or can -- can accrue for purposes of
12 the statute of limitations at a point that's
13 different from the point at which a plaintiff
14 can bring suit.

15 And so Corner Post could not have sued
16 until some point after it was incorporated, it's
17 not exactly clear when, but when it had formed
18 an intent to accept debit cards, but for statute
19 of limitations purposes, its claim accrued at
20 the time the regulation was adopted in 2011.

21 JUSTICE THOMAS: Is that normal to
22 have two different times?

23 MR. SNYDER: So, in the context of
24 administrative law challenges to agency action,
25 that's absolutely the standard rule. My -- my

1 friend acknowledged that he can't point to
2 another statute that doesn't treat accrual that
3 way.

4 In other contexts, in the contract
5 context or the tort context, it's true that that
6 sort of rule is unusual. But, in the context of
7 administrative law challenges, it's entirely
8 typical, and it would be strange to say that the
9 rule should apply at some other time -- at some
10 other time here.

11 JUSTICE GORSUCH: Counsel --

12 CHIEF JUSTICE ROBERTS: So I have a --
13 a -- I think I must be missing something
14 fundamental. You have an individual or an
15 entity that is harmed by something the
16 government is doing, and you're saying, well,
17 that's just too bad, you can't do anything about
18 it because other people had six years to do
19 something about it and maybe another person, a
20 business organization or whatever, did do
21 something about it.

22 I -- I mean, your friend on the other
23 side said everybody is entitled to their day in
24 court, and it doesn't say unless somebody else
25 had a day in court or unless the government gave

1 other people or anybody six years, but you
2 didn't -- you weren't injured in six years, you
3 were injured -- injured in seven years.

4 I -- I just -- I guess I am -- must be
5 missing something because I don't understand why
6 this wasn't settled 60 years ago. It seems
7 pretty fundamental.

8 MR. SNYDER: So, Mr. Chief Justice, I
9 understand that -- that intuition, but I think
10 the available evidence shows that Congress
11 doesn't share it. I mean, my friend pointed out
12 that we've -- we've identified 29 other
13 limitations periods on challenges that are
14 substantively the same as his.

15 CHIEF JUSTICE ROBERTS: Okay, yeah,
16 Congress doesn't share it, but, I mean, it
17 has -- it's not exactly an uninterested party.
18 It has set up an agency and they'd just as soon
19 not -- it not be challenged.

20 We don't say when there's a legal
21 challenge to something else that Congress is
22 happy with it, so go home.

23 MR. SNYDER: So, Mr. Chief Justice, I
24 don't think there's any dispute that Congress
25 can say that facial challenges are not available

1 after a certain point. My friend is not here
2 suggesting that the Hobbs Act or the dozens of
3 other special statutory review provisions that
4 we've pointed to are unconstitutional.

5 And there are in the APA -- APA
6 context other ways in which parties can raise
7 challenges to agency action, and --

8 CHIEF JUSTICE ROBERTS: Like what?

9 MR. SNYDER: So --

10 CHIEF JUSTICE ROBERTS: Like what one
11 is going to help Corner Post? I mean, they're
12 not injured by direct enforcement of the
13 regulation, so don't tell me, well, they can
14 object to enforcement.

15 What else is there?

16 MR. SNYDER: So the other option is
17 that they can petition for rulemaking. That's
18 something that Congress set out in Section
19 553(e) of the APA itself. In 555(e), it
20 required the agency to respond in a reasonable
21 time.

22 My friend --

23 CHIEF JUSTICE ROBERTS: Well, but --
24 but maybe they don't want a rule. They want the
25 government to stop what it's doing to them.

1 MR. SNYDER: Well, I mean, we were --
2 we were talking in this case about Corner Post's
3 interests. I think it's relevant that Corner
4 Post is not relevant or, excuse me, is not
5 regulated. And so it's true that Corner Post
6 can't assert these types of claims in an
7 enforcement action, but that's because this rule
8 doesn't apply to Corner Post.

9 CHIEF JUSTICE ROBERTS: But you don't
10 doubt that it has standing, right?

11 MR. SNYDER: No, we don't doubt that
12 it has standing. And so it could have brought a
13 suit within six years after the regulation was
14 adopted, just as --

15 CHIEF JUSTICE ROBERTS: Well, but they
16 weren't -- they weren't in existence six years
17 after the regulation was adopted.

18 MR. SNYDER: So that's true. It's
19 also true in the Hobbs Act context, it's true in
20 dozens of other contexts as well --

21 CHIEF JUSTICE ROBERTS: Well, we have
22 a whole bunch of things that are illegal.

23 MR. SNYDER: I -- I don't think anyone
24 has suggested that those are illegal, I mean --

25 CHIEF JUSTICE ROBERTS: Well, I --

1 MR. SNYDER: -- except for the Chief
2 Justice of the United States.

3 (Laughter.)

4 MR. SNYDER: So --

5 CHIEF JUSTICE ROBERTS: Thanks.

6 MR. SNYDER: -- with -- with that
7 caveat, let me put it this way. I don't think
8 the -- the entity with the strongest interest in
9 making that kind of argument has made any
10 serious suggestion that the Hobbs Act is
11 unconstitutional or that those other special
12 statutory review provisions are
13 unconstitutional. So I think --

14 CHIEF JUSTICE ROBERTS: I didn't mean
15 to suggest it either, but you do have a specific
16 injury inflicted by the government, the
17 individual has standing, and your argument is,
18 well, Congress doesn't want people to sue, or
19 somebody else had the chance to sue and you
20 could have joined that trade association.

21 MR. SNYDER: So, Mr. Chief Justice, I
22 do want to push back a little bit on the idea
23 that this injury is inflicted by the government.
24 I think the reason that they cannot assert this
25 claim in an enforcement proceeding is because

1 the government is not applying this regulation
2 to them directly.

3 What their argument is, is that the
4 government should be regulating someone else
5 more aggressively. And so, in that context,
6 it's true that they have fewer rights to
7 judicial process when what they want is for the
8 government to go and regulate someone else. If
9 they were the one regulated, they would have
10 additional rights, and that's true in the
11 context of dozens of other special statutory
12 regime questions as well.

13 JUSTICE GORSUCH: But, counsel, I
14 mean, you mention the enforcement action
15 possibility, but why would banks challenge this
16 rule? They benefit from it. So that avenue
17 doesn't seem to be very helpful to you.

18 MR. SNYDER: So, I mean, I think the
19 banks probably think the rule should be higher,
20 but --

21 JUSTICE GORSUCH: Right.

22 MR. SNYDER: But I do want --

23 JUSTICE GORSUCH: Right. If anything,
24 they want more money.

25 MR. SNYDER: I do want to get to my

1 friend's suggestion that the Board has been
2 unresponsive to petitions for rulemaking.

3 JUSTICE GORSUCH: Well, no, that --
4 that -- that wasn't my question. And -- and --
5 and just to pick up on the Chief Justice's, I --
6 I can certainly understand Congress might want
7 to pass statutes of repose with respect to
8 rulemaking in a variety of contexts, as it did
9 before the APA and it did after the APA with
10 respect to specific statutory schemes.

11 But the APA was passed 80 years ago as
12 the background rule, the kind of minimum, the
13 floor, and it was with a presumption of judicial
14 review, and it uses the word "accrue," which had
15 a lot of encrusted meaning, and we have a lot of
16 precedent about it that suggests, yes, an
17 injury, that's when it starts, okay?

18 Why wouldn't -- and just as a matter
19 of sense -- your whole argument is it doesn't
20 make sense to interpret it differently than
21 those agency-specific statutes, the Hobbs Act
22 and others. But -- but is that so? Why
23 wouldn't it be also perfectly rational for
24 Congress to have adopted as the background rule
25 the norm, the traditional common law rule?

1 MR. SNYDER: So, Justice Gorsuch, I
2 disagree that that's the traditional rule in
3 this context. Both before and after the
4 adoption of the APA and --

5 JUSTICE GORSUCH: I'm talking about
6 the word "accrue."

7 MR. SNYDER: And that's what I'm
8 talking about too. In Reading Company, this
9 Court adopted an interpretation of the word
10 "accrues" in which the -- the statute of
11 limitations started to run before the plaintiff
12 could recover on the claim.

13 And then, in Crown Coat Front Company,
14 the Court, pointing back to --

15 JUSTICE GORSUCH: Certainly, there are
16 statutes where that's done, and, again, I don't
17 dispute that. But the normal rule -- and I
18 think you'd have to concede it -- is that the
19 plaintiff's injury is the moment of accrual,
20 that that's the normal rule.

21 MR. SNYDER: So I think that is the
22 norm --

23 JUSTICE GORSUCH: And if we're looking
24 at what the APA was trying to do as a -- as --
25 as a floor -- again, I'm not disputing that

1 there are other examples -- but why would it be
2 irrational to think that that's what Congress
3 had in mind? That's my question.

4 MR. SNYDER: So just as a point of
5 clarification, in Reading Company, the statute
6 just used the word "accrues."

7 JUSTICE GORSUCH: I understand.

8 MR. SNYDER: And so it doesn't just
9 have this single meaning. Now --

10 JUSTICE GORSUCH: If you could answer
11 my question.

12 MR. SNYDER: So my friend pointed out
13 that at the time the APA and Section 2401(a)
14 were adopted, there were other statutes dealing
15 with administrative review provisions, and those
16 statutes ran from the time of agency action.

17 If you look at 21 U.S.C. 37 -- or 371
18 --

19 JUSTICE GORSUCH: Okay. I got it. I
20 got it. And just flipping back to the question
21 that we had earlier with your friend on the
22 other side, if we were to interpret the word
23 "accrue" to mean the moment of the agency's
24 action, what's the consequence for as-applied
25 challenges? Put aside, again, enforcement

1 because that's, you know, in a criminal
2 proceeding or an enforcement proceeding. Here,
3 it's an APA challenge, and there's no
4 distinction in the statutory text between
5 as-applied and facial challenges.

6 And I understand courts of appeals for
7 years have said as-applied challenges may
8 proceed without carefully looking at the word
9 "accrue" either.

10 MR. SNYDER: So I think the difference
11 is which action is being challenged. The reason
12 you can raise a challenge in the as-applied
13 context is that the final agency -- the final
14 agency action that you're challenging is the
15 agency action actually applying the regulation.
16 And so you're bringing your challenge less than
17 six years after the final agency action
18 occurred.

19 What you can't do is go back and
20 challenge a regulation that was adopted decades
21 ago.

22 JUSTICE GORSUCH: I -- I --

23 JUSTICE KAGAN: Mr. Snyder, may I ask,
24 what is the coverage of this provision? In
25 other words, you've noted that there are many

1 statutes that deal with particular kinds of
2 agency action. So what's left over other than
3 this regulation? What's the world of things
4 that this decision will matter to? Is it small,
5 is it medium-sized, is it large? What's in it?

6 MR. SNYDER: So I think it is
7 relatively large in the sense that a general APA
8 cause of action applies to a broad range of
9 government claims. Is that -- I'm not -- I
10 don't know exactly how to quantify that, but I
11 think it is true that --

12 JUSTICE KAGAN: But what kinds of
13 claims? From what kind of agencies? What is
14 not -- what are we -- what is not at issue here?

15 MR. SNYDER: I -- I can't give you a
16 precise answer on that. I mean, I -- I can
17 point you to the special statutory review
18 provisions that we've identified in Footnote 4
19 of our brief. Candidly, we got to a page-long
20 footnote and stopped, so there are a lot of
21 other special statutory review provisions that
22 all use "accrual" in exactly the same way.

23 I mean, I think looking at a survey of
24 this Court's cases and thinking about how often
25 the Court encounters challenges in the context

1 of an APA claim indicates that it's a pretty
2 broad category of cases, but I don't have sort
3 of precise contours I can draw.

4 JUSTICE KAVANAUGH: But how much will
5 it matter kind of in the real world? Because,
6 when you have a regulation that has some
7 defects, it's probably going to be challenged
8 sooner rather than later by someone. And then,
9 if it's held invalid, it usually will get to
10 this Court, which will provide, you know, a
11 final answer on that question.

12 So coming in more than six years later
13 is not typically a winning strategy for
14 challenging a rule. So just kind of real-world
15 implications, picking up on Justice Kagan's
16 point.

17 MR. SNYDER: So I think one of the
18 real-world implications to highlight is that
19 this doesn't just apply in the context of
20 regulations. I mean, their rule would apply in
21 the context of a permit issued to operate a dam.
22 And on their theory, someone who travels out
23 west for the first time to go see the snail
24 darter can say, I've never been here before,
25 I've never been affected by this dam, and so I'm

1 going to mount an APA challenge to that permit
2 that was issued 20 years ago to allow the -- the
3 dam to continue operating.

4 I think that type of application
5 extrapolated across the entire federal
6 government and all of the final agency actions
7 that the government engages in outside of the
8 context of rulemaking, it's pretty hard to
9 overstate the significance of allowing those
10 challenges to be brought more than six years
11 later.

12 JUSTICE KAVANAUGH: And then thinking
13 about what Congress was getting at here, I'm not
14 sure it was really getting at this issue at all
15 because six years is an extremely long time to
16 begin with to challenge a regulation. So, I
17 mean, I don't -- I don't know that they were
18 thinking about this context. We just have to
19 apply the text as it is, but I -- I'm --

20 MR. SNYDER: So, Justice Kavanaugh, I
21 think I agree with you in the sense that 2401(a)
22 is a catch-all statute of limitations. Congress
23 adopted it as a backstop. It erred on the side
24 of caution in setting a lengthy six-year term.

25 But, in understanding how to apply

1 that catch-all statute of limitations to
2 particular types of claims, I think the way to
3 show fidelity to Congress's intent and
4 Congress's expectations is to look at how
5 Congress has approached accrual when it's dealt
6 with similar claims of the same type.

7 JUSTICE KAVANAUGH: But -- but
8 Congress could easily -- this is an obvious
9 point, but Congress could easily do that across
10 the board for agency actions and certainly would
11 do something shorter than six years if it did
12 because repose has been thrown around here.

13 Six years doesn't give you much repose
14 to begin with if you're the government, at least
15 unless this Court has -- has ruled on the issue.

16 MR. SNYDER: So I -- I mean, I think,
17 of course, six years is better than six decades,
18 which, I mean, that's not even a limit on my
19 friend's rule. So I do think that six years
20 meaningfully -- meaningfully protects repose
21 interests.

22 And that lengthy term accounts, again,
23 for the fact that this covers a broad range of
24 claims. Even outside the administrative law
25 context, I mean, there are any number of other

1 types of claims that are subject to Section
2 2401.

3 JUSTICE KAVANAUGH: Right. Okay. One
4 other question, on a petition for rulemaking
5 that you mentioned, would you acknowledge that
6 the standard of judicial review for the denial
7 of that would be not the same as in a direct
8 challenge to the rule?

9 MR. SNYDER: Yes, I think that's
10 right. And that's by --

11 JUSTICE KAVANAUGH: And that's the
12 problem.

13 MR. SNYDER: One would -- one from my
14 position would say that's what Congress has
15 chosen.

16 JUSTICE KAVANAUGH: Yeah.

17 MR. SNYDER: And to say that because
18 Congress has chosen a petition for rulemaking
19 process that is deferential, the Court should
20 instead allow challenges to things that happened
21 decades ago, I don't think that really follows.

22 And I do think that this case is a
23 good illustration of the odd fit that this sort
24 of claim is in a context brought a decade after.
25 If you look at the complaint, it's full of

1 references to, you know, cost data from 2013,
2 2015, 2017, 2019. But all of that data is
3 completely irrelevant if they're right that --
4 that they can go forward on a challenge to the
5 rule as it was adopted in 2011.

6 It makes far more sense to handle this
7 kind of challenge in the context of a petition
8 for rulemaking, where the agency can actually
9 take account of experience with the rule and
10 decide what makes sense going forward.

11 JUSTICE ALITO: Well, that just --

12 JUSTICE BARRETT: Mr. --

13 JUSTICE ALITO: -- suggests that the
14 claim would fail on the merits, right? It's not
15 -- it doesn't go to the issue of accrual.

16 MR. SNYDER: I -- I -- I -- so my
17 point is not that the claim would fail. I mean,
18 they -- they have other arguments about the law.
19 We -- we think those arguments would fail too.

20 But my point about the intervening
21 information is that they have thought that
22 information is relevant to showing something
23 about this rule, and yet, in the procedural
24 mechanism they are using here, that information
25 is completely irrelevant. That suggests that

1 maybe it's not the right procedural mechanism.

2 JUSTICE ALITO: When -- when I read
3 your brief in opposition, I came away with the
4 impression that this case would not have a broad
5 practical effect. You say on page 11 that --
6 that it's relatively uncommon -- it's a
7 relatively uncommon circumstance for a person
8 who was not injured when the rule was
9 promulgated to become injured at a later date.

10 But then I got a very different
11 message from your brief on the merits when you
12 say that accrual -- the Petitioner's approach to
13 accrual under 2401(a) would substantially expand
14 the class of potential challengers and thereby
15 increase the burdens on agencies and courts.

16 So what accounts for this different
17 message?

18 MR. SNYDER: So I think it's a -- a
19 difference in the -- the focus. At the -- at
20 the cert stage, the -- the point we were making
21 was --

22 JUSTICE ALITO: That we shouldn't take
23 the case because it wasn't a big deal. But
24 after we took it --

25 (Laughter.)

1 MR. SNYDER: Our point was that there
2 aren't a lot of -- of plaintiffs in Petitioner's
3 position as compared to plaintiffs who can bring
4 the challenge. I think that is empirically a
5 correct statement.

6 If you think about this case, for
7 example, the challenge that was brought to
8 Regulation II back in 2011 was brought on behalf
9 of tens of thousands of merchants.

10 My friend is here at this point
11 representing just one plaintiff. So it's true
12 that the numbers are different, but my friend,
13 as he said, is seeking exactly the same relief
14 that those entities sought back in 2011. And
15 so, from the government's perspective, allowing
16 this exception, even though it's only going to
17 benefit a relatively small number of plaintiffs,
18 would have really far-reaching effects.

19 JUSTICE KAGAN: But does that --

20 JUSTICE ALITO: I mean, 2401 -- 2401
21 is a very broad statute that applies to every
22 civil action against the United States, and as I
23 understand your argument, you want us to say
24 that the term "accrue" means something different
25 in different contexts.

1 Have we ever said anything like that?

2 MR. SNYDER: So I think the Court said
3 basically that in Crown -- Crown Coat Front
4 Company, interpreting 2401. It said that
5 "accrues" is a general word, that it's hazardous
6 to try to give it one definition for all
7 purposes and that instead you have to interpret
8 it in -- in the light of the specific statute at
9 issue.

10 And if I could point you to Section
11 2401(b), which is the provision governing tort
12 claims against the United States, that similarly
13 uses the word "accrues," and the Court has
14 acknowledged in that context that different
15 claims are subject to different accrual rules.

16 So, in United States versus Kubrick,
17 the Court said that most tort claims against the
18 United States accrue at the time of injury but
19 that some accrue at the time the injury is
20 discovered in the context of medical
21 malpractice, for example.

22 So the Court has acknowledged that
23 "accrues" can lead to different accrual rules
24 for different kinds of claims.

25 JUSTICE KAGAN: An argument that Mr.

1 Weir makes is that if this were all so
2 destabilizing, as you suggest, we would have
3 seen that already because there can always be
4 enforcement actions in which a party can defend
5 itself by saying that the rule is invalid.

6 So why hasn't that -- why is this so
7 much more destabilizing than that sort of
8 regime?

9 MR. SNYDER: Because, first of all,
10 this applies in contexts where there aren't
11 going to be enforcement proceedings, so, for
12 example, the permit context that I mentioned.
13 His rule would apply in that context, and I
14 think that alone would make it pretty
15 destabilizing.

16 But I also think it's just the case
17 that there are far fewer enforcement actions
18 than there are regulated entities, and so
19 allowing every -- every new regulated entity to
20 bring a facial challenge would significantly
21 expand the number of claims that you would see.

22 The other -- the other point that my
23 friend has made about why you shouldn't think
24 this is going to lead to bad results is that
25 there's been experience in the Sixth Circuit. I

1 do want to address that.

2 The Sixth Circuit, courts in the Sixth
3 Circuit have not understood Herr to adopt the
4 rule that my friend is arguing for, and the best
5 evidence I can give you of that is that a newly
6 incorporated pizzeria filed suit against
7 Regulation II in Kentucky in 2022, and the
8 court, applying Herr, said that claim,
9 materially identical to this one, is untimely
10 because Herr dealt with as-applied challenges as
11 opposed to facial challenges like this one.

12 So there's just nowhere in the country
13 that you can look to see what my friend's rule
14 would look like.

15 JUSTICE JACKSON: And, Mr. --

16 JUSTICE BARRETT: Mr. Snyder --

17 JUSTICE JACKSON: Oh. Go ahead.

18 JUSTICE BARRETT: -- is -- is your
19 rule of accrual completely disaggregated from
20 injury? Because you agree, right, as a matter
21 of the APA and Article III that a plaintiff
22 can't actually even bring a suit unless the
23 plaintiff has been injured, right?

24 MR. SNYDER: Yes. That -- that's
25 true. I mean, our accrual rule is the same

1 accrual rule that Congress has called for in the
2 context of the Hobbs Act.

3 JUSTICE BARRETT: I know, I know, I
4 know. But we're talking about 2401. And -- and
5 in Crown Point, the entitlement to payment
6 didn't arise until at the point where we said it
7 accrued. So, you know, there's language in
8 Crown Point that helps you, but on the actual
9 facts of the case, that was when the injury was
10 complete.

11 And so -- but -- but what I want to
12 know is, would this be the only time for
13 purposes of 2401, as -- as opposed to things
14 like the Hobbs Act, where we would have
15 interpreted "accrue" to be separate from injury?
16 Like, what if the government delayed enforcement
17 and there wasn't an injury yet, for example?

18 MR. SNYDER: So I -- I'm not aware of
19 another case in which this Court has interpreted
20 2401(a) to sort of go in either direction. I
21 mean, in Crown Coat Front Company, the -- the
22 accrual point was both the point of injury and
23 the time of agency action. So we're not
24 suggesting that Crown Coat Front Company by its
25 holding resolves it between those two.

1 JUSTICE BARRETT: Mm-hmm.

2 MR. SNYDER: As to a case where there
3 was no -- where there was delayed enforcement, I
4 mean, I think the whole idea of pre-enforcement
5 review is that a -- a plaintiff can bring suit
6 even if they are not yet subject to enforcement
7 actions. And so I don't think that that would
8 prevent someone from bringing a challenge when
9 the regulation was first adopted.

10 JUSTICE BARRETT: But injury isn't
11 part of the calculus. It's really just
12 finality?

13 MR. SNYDER: So, yes, we -- we think
14 that's true for the APA just as it's true for
15 other --

16 JUSTICE JACKSON: And doesn't it have
17 to be that way? Because I guess I'm trying to
18 understand when the injury would occur under
19 their theory with respect to the promulgation of
20 the rule, right? I mean, the claim under an APA
21 case in this way is that the rule was
22 promulgated in an invalid way.

23 So I'm trying to understand when the
24 plaintiff would be injured if we're going to go
25 with an injury theory. I don't even know when

1 that would happen really.

2 Can you speak to that?

3 MR. SNYDER: I mean, I think they
4 would say that they were injured for the first
5 time when they felt the effects of the rule. So
6 I think they would say, I mean, what the --

7 JUSTICE JACKSON: When they came into
8 the environment, the rule was already in
9 existence. So I guess it was the day they were
10 incorporated?

11 MR. SNYDER: So they have -- they have
12 said it's not the date they were incorporated.
13 They've said it's the day they opened the doors
14 for business. I don't know why on their --
15 their understanding of the accrual rule it
16 wouldn't be the day that we say --

17 JUSTICE JACKSON: But don't we have to
18 pin that down if we're going to go with their
19 rule? I mean, we've got to figure out when the
20 clock starts. So is it --

21 MR. SNYDER: I -- I'm with you. I --
22 I mean, I don't understand what the -- the right
23 point would be for their rule.

24 JUSTICE JACKSON: And it's because
25 their claim is about the promulgation of the

1 rule, which happened before they existed,
2 whereas an as-applied claim, as I understand
3 your argument to be, would be that, you know,
4 it's when the rule was applied to them. Then
5 everybody has a clear date and we understand
6 that the clock starts at that point.

7 But this is a different kind of claim,
8 so I don't understand when the injury would
9 occur in this situation.

10 MR. SNYDER: I -- I think that's
11 right. I think it would be really difficult to
12 figure out exactly at what point on their theory
13 they could actually bring suit.

14 JUSTICE ALITO: Well, Mr. Snyder, I'm
15 not --

16 JUSTICE KAVANAUGH: Isn't it when the
17 --

18 JUSTICE ALITO: I -- I'm having a
19 little trouble understanding your answer, but
20 probably I'm -- I'm not understanding it
21 correctly. Is it your argument that a facial
22 challenge to a statute or a rule always accrues
23 at the time of the adoption of the statute or
24 rule and that once the statute of limitations
25 has passed, no one can bring a facial challenge

1 to that statute or rule?

2 MR. SNYDER: So I -- I think the
3 statutory context is different because there is
4 no --

5 JUSTICE ALITO: All right. Forget the
6 statute. A regulatory context.

7 MR. SNYDER: So, in the regulatory
8 context, yes. Our position is, once the
9 regulation has been adopted, there is a six-year
10 period to challenge the final agency action
11 adopting the regulation. And after that point,
12 there's -- there's not an opportunity to bring a
13 facial challenge. It can be challenged in the
14 context of enforcement proceedings.

15 JUSTICE ALITO: All right. Let's say
16 there was a regulation that said that only men
17 can be admitted to one of the military
18 academies, and after the statute of limitations
19 has run, a woman applies, wants to be admitted
20 to a military academy, and you would say it's
21 too late for -- for her to bring a facial
22 challenge to that?

23 MR. SNYDER: We would say that if she
24 applies to the military academy and is denied
25 admission, that at that point there is an

1 application of the regulation to her and that
2 she can raise substantive challenges to the
3 regulation in that context.

4 JUSTICE ALITO: What's the difference
5 between that and the situation of Corner Post,
6 other than the fact that they are indirectly
7 hurt rather than being directly hurt?

8 MR. SNYDER: I -- I mean, I think the
9 difference is that in that case, there is a
10 subsequent final agency action that provides
11 the -- the focus and that is within the last six
12 years, whereas, on their theory, there's no
13 final agency action that they're pointing to.

14 JUSTICE KAVANAUGH: In Justice
15 Jackson's questions, I would have thought it
16 starts running the day they open the business.

17 MR. SNYDER: So, Justice Kavanaugh, I
18 don't think --

19 JUSTICE KAVANAUGH: Just compared to
20 usual APA suits, which start the day the rule is
21 adopted and you're an ongoing business.

22 MR. SNYDER: So I think that if they
23 wanted to challenge suit before they opened
24 business -- the doors for business, what they'd
25 say is, we have concrete plans to accept debit

1 cards.

2 JUSTICE KAVANAUGH: Okay. So they --
3 yeah, I take that point.

4 MR. SNYDER: I mean, I think, like,
5 I'm not saying it's impossible to figure that
6 out.

7 JUSTICE KAVANAUGH: Maybe a little bit
8 before. Maybe a little bit before, but you'd
9 have to make a showing there, I think, to -- to
10 get in the door in that context, right?

11 MR. SNYDER: Well, I -- I think more
12 problematically, it's not they would who have
13 have to make that showing. I mean, ordinarily,
14 in an APA case, they would come forward and say
15 we have concrete plans to accept debit cards as
16 of today and so we can bring the challenge.
17 That's easy.

18 The problem here is that we would have
19 to come in and say they formed concrete plans to
20 accept debit cards sometime before they opened
21 their doors, but how do we know when that was?

22 Again, I'm not saying that's
23 impossible.

24 JUSTICE KAVANAUGH: Yeah. That's --

25 MR. SNYDER: I'm just saying --

1 JUSTICE KAVANAUGH: I mean, that's a
2 pretty in-the-weeds debate, but -- and -- and I
3 don't think that arises -- that would -- would
4 arise that often, but maybe I'm wrong about
5 that.

6 Let me ask a question about the
7 Article III standing point that was raised just
8 to make sure we're on the same page on that. My
9 understanding is the day a rule is adopted and
10 you're a regulated party, even if nothing's
11 happened to you by the agency, you have standing
12 to go in to sue. That happens all the time,
13 right?

14 MR. SNYDER: That's my understanding
15 too, yes.

16 JUSTICE KAVANAUGH: Okay. And if
17 you're not a regulated party but, you're an
18 affected party, which is a big swath of ad law,
19 you also, if you can show you're an affected
20 party in some way, have standing to sue an
21 injury on the day the rule is promulgated?

22 MR. SNYDER: I agree with that too.

23 JUSTICE KAVANAUGH: Okay.

24 CHIEF JUSTICE ROBERTS: What -- what
25 do you -- how -- how do those -- your answers

1 apply if it's a corporation that wasn't
2 incorporated until seven years, you know, rather
3 than six years? Would you still say they --
4 they have standing?

5 MR. SNYDER: Yes. We -- we don't
6 dispute that they have standing. We just think
7 that their -- their claim is untimely.

8 I do, if -- if I could, want to come
9 to the final sentence of --

10 JUSTICE BARRETT: Can I just follow up
11 on the Chief's question? What if they were
12 thinking about incorporating, but they haven't
13 yet incorporated and they're still within the
14 six-year period, and part of whether they
15 incorporate and go into business depends on the
16 structure of the industry and whether this rule
17 is going to help? No standing, right?

18 MR. SNYDER: I think that's right. I
19 mean, there -- there's no case law I can point
20 you to on this because no court in the country
21 has applied their rule. I mean, I think
22 adopting their rule would open the Court up to
23 all sorts of really thorny questions, however
24 far down in the weeds they might be. I think
25 those questions just haven't been explored.

1 JUSTICE KAVANAUGH: But those
2 questions -- I mean, those questions come up in
3 other contexts. Where is the business really
4 operating? Is it a phony challenge to an -- I
5 mean, I've seen that before, so, I mean, maybe.

6 JUSTICE BARRETT: Mr. Snyder, would
7 this rule have effects -- Justice Alito in his
8 hypothetical started to ask you about a statute
9 and then switched and was focused on rule. So
10 2401 is the all-purpose statute of limitations.

11 I'm just wondering, is your argument
12 that we should interpret "accrue" this way
13 because, in the administrative law context and
14 because of the Hobbs Act and all these
15 specialized statutes, a statute of repose-style
16 accrual is -- makes more sense? Would there be
17 spillover effects in, say, you know, hey, I'm
18 sure Congress would prefer all challenges to a
19 statute to be adjudicated right away. Would
20 there be spillover effects?

21 MR. SNYDER: I don't think there would
22 be spillover effects. You're right that a
23 primary part of our argument, the primary part
24 of our argument is the Hobbs Act and the other
25 special statutory review -- review provisions

1 establishing the standard rule in this context.

2 And so it -- it applies sort of here as well.

3 We also have an argument about the
4 final sentence of Section 702 that we haven't
5 discussed.

6 But the -- the last reason that I
7 don't think it would spill over to statutes is
8 the challenges to statutes are -- are
9 necessarily -- may I finish the sentence?

10 CHIEF JUSTICE ROBERTS: Sure.

11 MR. SNYDER: -- are necessarily
12 constitutional, and so the Court has allowed
13 claims against the validity of statutes outside
14 of the context of a final agency action
15 requirement, as in the APA.

16 CHIEF JUSTICE ROBERTS: Thank you.

17 Justice Thomas?

18 Justice Alito?

19 JUSTICE SOTOMAYOR: Just a couple
20 follow-up.

21 You mentioned the permitting process
22 as being one that would be unraveled by this new
23 rule. Are there other areas that you haven't
24 mentioned?

25 MR. SNYDER: I -- I -- I mean, I think

1 similar areas like that, so land management
2 plans, other things like that that are not
3 regulations but are instead actions that the
4 government has taken in carrying out all of the
5 -- the many functions that Congress has
6 entrusted to it. Land sales, land leases,
7 things like that.

8 I don't know exactly how their rule
9 would apply in those circumstances, but I think
10 it's at least plausible to think that it would
11 apply to all of those. I don't know why it
12 wouldn't on its logic. Again, I think that
13 would be destabilizing.

14 JUSTICE SOTOMAYOR: And, number two,
15 opposing counsel, in answering Justice Barrett,
16 said that procedural challenges would not
17 happen. But, in your brief, you suggested they
18 would. Could you tell me why their concession
19 is not convincing to you?

20 MR. SNYDER: Well, I mean, we said our
21 brief -- we said it in our brief before they had
22 made that concession. They -- they hadn't said
23 that until the reply brief. And their complaint
24 includes procedural challenges. If you look at
25 paragraphs 93 and 95 of their complaint, they

1 include arguments that the agency failed to
2 provide a reasoned explanation of Regulation II
3 and that the record before the agency wasn't
4 sufficient to support it.

5 So I -- I'm glad that they're willing
6 to give up procedural challenges, but we hadn't
7 anticipated that before.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: Mr. -- Mr. Snyder, I
10 want to emphasize that I'm asking you a
11 hypothetical question. It's an "if" question.

12 There is obviously another big
13 challenge to the way courts review agency action
14 before this Court. Has the -- has the Justice
15 Department and the agencies considered whether
16 there is any interaction between these two
17 challenges? And, again, you know, if Chevron
18 were reinforced, were affirmed, if Chevron were
19 reversed, how does that affect what you're
20 talking about here?

21 MR. SNYDER: So I want to be careful
22 here. I mean, we, of course, have thought about
23 it. I think what I'd say is that a decision for
24 Petitioner here would magnify the effect of any
25 other decisions changing the way that this Court

1 or other courts have approached administrative
2 law questions, because it would -- it would
3 potentially mean that those changes would then
4 be applied retroactively to every regulation
5 that an agency has adopted in the last, I don't
6 know, 75 years or something.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch?

9 Justice Kavanaugh?

10 JUSTICE KAVANAUGH: One follow-up
11 question on something you said earlier. This is
12 also about future effects on standing.

13 They asked in this suit to set aside
14 the rule. Your position, the Solicitor
15 General's position, is that that can't be done
16 under the APA. If you can't set aside the rule
17 and you're not a regulated party, how is their
18 injury redressable in this suit and why do they
19 have standing?

20 MR. SNYDER: So I -- I think our
21 position has been that courts are only able to
22 provide relief to the party before them and that
23 ordinarily they --

24 JUSTICE KAVANAUGH: How would that be
25 done in a circumstance like this?

1 MR. SNYDER: So I think -- and I'm --
2 I'm a little hesitant to say this -- but I think
3 that in this circumstance, it's possible that
4 the only way to provide this party relief would
5 be vacatur. I -- I'm not certain that that's
6 right, but I think that's possible.

7 JUSTICE KAVANAUGH: I think that's
8 probably right, which was why I was surprised
9 when you said what you said, that if you don't
10 have the set-aside remedy, they probably don't
11 have standing here.

12 MR. SNYDER: So I think the reason is
13 that the -- the power that the Court has under
14 the APA is to provide relief to the party before
15 it, not more broadly. And it's possible that in
16 circumstances where the only way to give the
17 party before the court relief is vacatur, that
18 that would be consistent with traditional
19 equitable considerations in a way that providing
20 vacatur in other cases is not.

21 JUSTICE KAVANAUGH: Well, that's a new
22 twist.

23 MR. SNYDER: I -- I don't intend that
24 to be a new twist.

25 (Laughter.)

1 MR. SNYDER: So, to the extent that is

2 --

3 JUSTICE KAVANAUGH: Okay. I'll --

4 I'll review the transcript. Thank you.

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: Justice

7 Barrett?

8 JUSTICE BARRETT: No.

9 CHIEF JUSTICE ROBERTS: Justice

10 Jackson?

11 JUSTICE JACKSON: So just one

12 question. The Chief mentioned the sort of

13 common intuition that everybody gets their day

14 in court, and I understand that and agree in a

15 general sense.

16 But there's also the intuition that

17 the Court sometimes talk about the importance of

18 finality, and it seems to me that in this

19 particular scenario, finality principles should

20 be playing a significant role.

21 So can you just speak to -- this has

22 comes up a couple times, but why a new company

23 that has been born into a particular regulatory

24 environment, why should they be entitled to

25 appear on the scene and potentially unsettle all

1 of the long-established rules and expectations
2 that govern all of the other companies that
3 exist in that space?

4 MR. SNYDER: So, of course, we don't
5 think they should. And I think -- I mean, any
6 statute of limitations is always balancing the
7 interest in judicial review on the one hand and
8 the interest in repose on the other.

9 And I think, in the context of
10 administrative law challenges to agency action,
11 both of those considerations sort of point in
12 the direction of accrual at the time of agency
13 action because the new entrant to the market
14 knows what it's getting into. So its interest
15 in having its day in court is less than it might
16 be in some other contexts.

17 And on the other hand, because there
18 are so many new entrants every day in a market,
19 if you don't cut off the limitations period at
20 that point, then the -- the time for bringing
21 challenges would extend to decades. And this
22 Court has consistently rejected readings of
23 limitations provisions that would allow suits to
24 be brought decades after the thing that's being
25 challenged occurred.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Rebuttal, Mr. Weir?

5 REBUTTAL ARGUMENT OF BRYAN K. WEIR
6 ON BEHALF OF THE PETITIONER

7 MR. WEIR: Thank you. Just a few
8 points. At the outset, the challenges that --
9 that my friend discussed are not procedural.
10 Those are State Farm substantive challenges that
11 we have in our complaint. Those are available
12 in as-applied contexts. We think they will be
13 available if -- if the Court sides with us.

14 On the question of when an APA claim
15 first accrues, we think the statute tells you.
16 It says in the past tense or you're already
17 being affected, you're already harmed. We think
18 that when you first are harmed by the regulation
19 is when it starts.

20 But even if it starts at imminence, we
21 don't think it really matters that much. This
22 Court dealt with when an -- when an injury is
23 imminent in Lujan. It's an objective test. You
24 have to do more than just say I want to go
25 somewhere. And so we would say you can look at

1 Lujan.

2 But, in any event, the difference
3 between when an injury is imminent and when it's
4 actual is -- is typically very small, and six
5 years into the future, it's really not going to
6 matter when the statute of limitations runs. We
7 think it's a rare case where that's going to
8 actually matter.

9 As far as the -- the -- the concern
10 about the APA being the only accrual-based
11 statute in the regulatory context, we think that
12 makes sense. The APA is the background rule.
13 You would only pass an agency-specific rule to
14 deviate from that background, so there would be
15 no real -- no real reason to pass an
16 agency-specific rule.

17 And, again, Congress knows exactly how
18 to -- to -- to pass a repose-based statute. It
19 did it before the APA. It did it after the APA.
20 We think that's an intentional choice, and it's
21 done it many times since.

22 And -- and the idea that because
23 Congress has done it that way for some
24 regulations that we should apply that rule to --
25 to -- to 2401(a) I think upsets basic

1 interpretive principles. When Congress makes
2 different choices, it expects different rules.

3 Finally, I -- I think the government
4 is asking really for a special exception that
5 would upset a lot of this Court's precedent.
6 You would have to either undermine -- it would
7 undermine the reasoning or flatly overrule the
8 Court's precedents applying accrual-based
9 statutes of limitations, including this Court's
10 decision in Gabelli, where it interpreted this
11 exact same language as -- as meaning what we say
12 it means, and also undermine this Court's
13 holding in Franconia, where the -- where the
14 Court -- where the government asked for special
15 rules under, again, the exact same language in
16 the "Big" Tucker Act under first accrues and --
17 and the government -- and this Court said that
18 it should apply the exact same as it does to
19 private parties.

20 And to the extent there -- there is
21 some problem here, this Court said in Rotkiske
22 just five years ago it is Congress's job to
23 change the text of this statute, not this
24 Court's.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel. The case is submitted.
3 (Whereupon, at 11:12 a.m., the case
4 was submitted.)
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