Implications of Recent SCOTUS Rulings on Regulatory Authorities

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Recent decisions of the U.S. Supreme Court have reshaped the legal landscape, limiting agency discretion in areas such as administrative deference, enforcement powers, and regulatory interpretation. During this session, panelists will explore the significant implications of these recent rulings, including Chevron, Jarkesy, Loper Bright, and Corner Post, on the scope and authority of regulatory agencies. Attendees will gain insights into the future of agency rulemaking and enforcement in light of these landmark decisions.

CHEVRON, U.S.A., INC. V. NRDC, INC.

467 U.S. 837

Decided June 25, 1984

Decision 6-0

- Majority: Stevens, joined by Burger, Brennan, White, Blackmun, and Powell
- DNP: Marshall, Rehnquist, and O’Connor

CHEVRON, U.S.A., INC. V. NRDC, INC.

Factual Background

- Clean Air Act of 1977
- "nonattainment" States to establish a permit program regulating "new or modified major stationary sources" of air pollution. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 840.
- EPA regulation allowed States to adopt a plantwide definition of “stationary source”

CHEVRON, U.S.A., INC. V. NRDC, INC.

Issue: “whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source."”

Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 840

MAJORITY- STEVENS

Chevron Two-Step

- “First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

    - If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.

- Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.”

- *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-843

MAJORITY- STEVENS

Why should the Court defer to agency interpretations?

- “Considerable weight” to an executive agency responsible for administering a statutory scheme
- Defer to those with “more than ordinary knowledge respecting the matters subjected to agency regulations.”
- Policy arguments should not be waged in the judicial forum

LOPER BRIGHT ENTERS. V. RAIMONDO

144 S. Ct. 2244

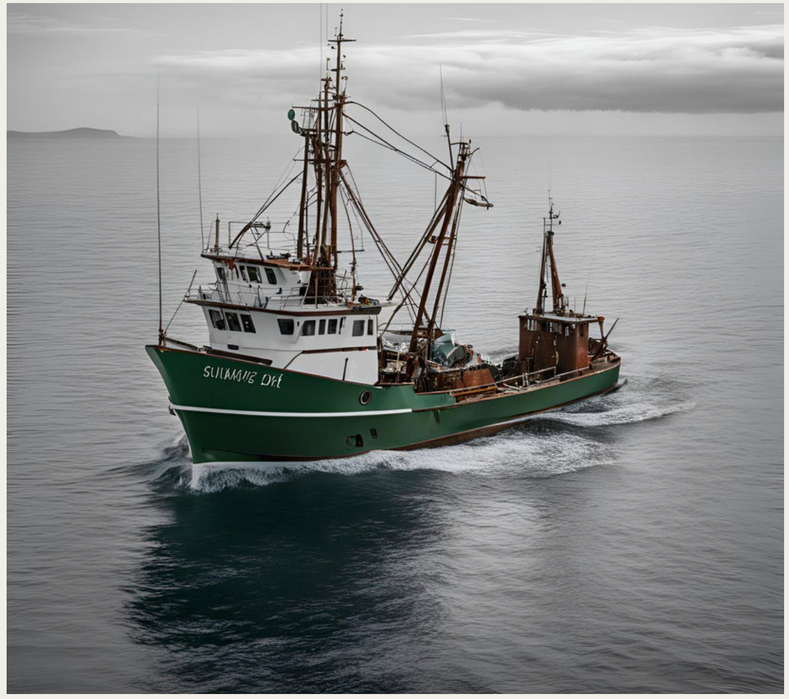
Decided June 28, 2024

Decision 6-3

- Majority: Roberts, joined by Thomas, Alito, Gorsuch, Kavanaugh, and Barrett

Dissent: Kagan joined by Sotomayor, and Jackson

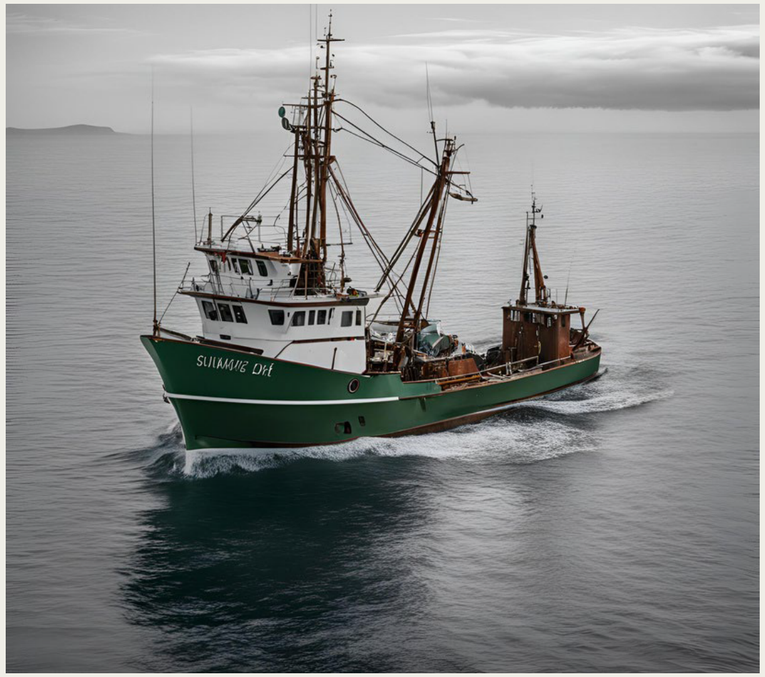
(DNP in *Loper Bright (24-451)*)



LOPER BRIGHT ENTERS. V. RAIMONDO

Background Facts

- Magnuson-Stevens Fishery Conservation and Management Act (MSA)
  - Extended the U.S. jurisdiction 200 nautical miles into the sea
  - Created 8 regional fishery management councils
- National Marine Fisheries Service (NMFS)
  - Administers the MSA
  - Promulgate fishery management plans into rules that were developed by the fishery management councils
- Fishery management plans may require vessels to carry observers onboard
  - MSA explicitly identified three groups that were required to cover the cost of the observer
  - MSA was silent as whether Atlantic herring fisherman were required to cover the cost of observers



LOPER BRIGHT ENTERS. V. RAIMONDO

Loper Bright Enters. v. Raimondo, 45 F.4th 359

- Loper Bright argued the MSA did not authorize the NMFS to mandate vessels to pay for observers
- Lower courts applied *Chevron* deference to uphold the mandate

Relentless, Inc. v. United States DOC, 62 F.4th 621

- Larger vessels that take extended trips on which they may cross through multiple fisheries
- Required to carry an observer through Atlantic herring fisheries even if they caught fewer or no herring
- Relentless challenged the requirement
- Lower courts applied Chevron deference to uphold the mandate

LOPER BRIGHT ENTERS. V. RAIMONDO

“We granted certiorari in both cases, limited to the question whether Chevron should be overruled or clarified.”

Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2257

LOPER BRIGHT ENTERS. V. RAIMONDO

"Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."

Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273

LOPER BRIGHT ENTERS. V. RAIMONDO

- Deep Cuts!
  - Article III gives the Federal Judiciary the power to decide “Cases” and “Controversies”
  - Alexander Hamilton: “interpretation of the laws” would be “the proper and peculiar province of the courts.” The Federalist No. 78, at 525
  - “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison,* 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803).
- Direct and to the Point
  - “Perhaps most fundamentally, *Chevron*’s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do.” *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266

LOPER BRIGHT ENTERS. V. RAIMONDO

Chevron and the APA are incompatible:

“As relevant here, Section 706 directs that “[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U. S. C. §706. It further requires courts to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law.” §706(2)(A).” *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261

LOPER BRIGHT ENTERS. V. RAIMONDO

Justice Gorsuch Concurrence

“Today, the Court places a tombstone on Chevron no one can miss. In doing so, the Court returns judges to interpretive rules that have guided federal courts since the Nation’s founding.”

Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2275

LOPER BRIGHT ENTERS. V. RAIMONDO

Justice Kagan's Dissent

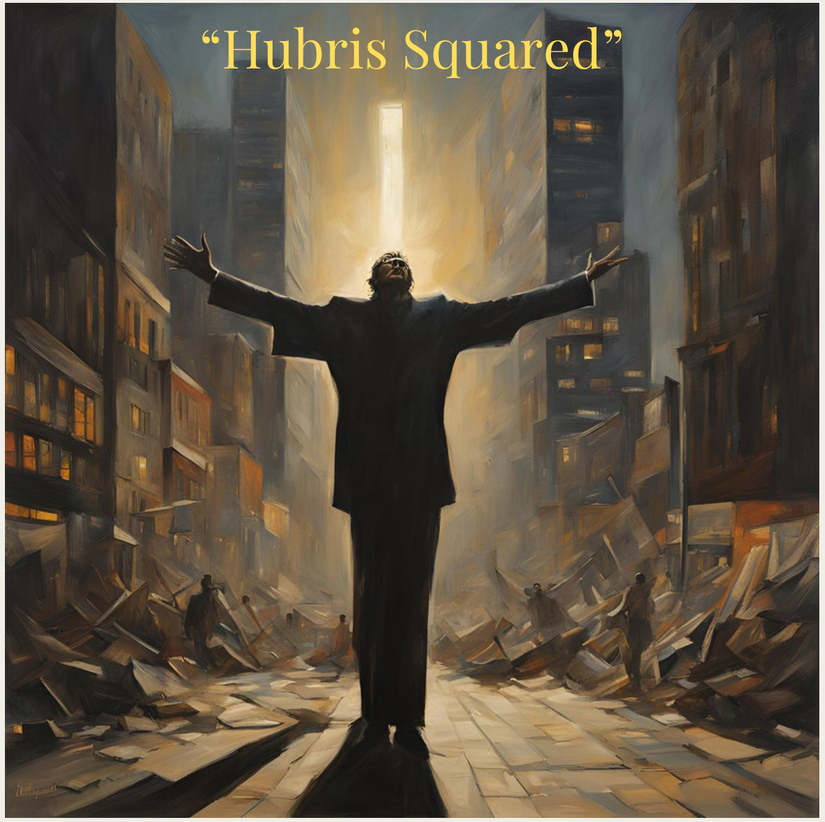
- Agencies are subject matter experts in the statutory areas, courts are not

- Congress has repeatedly adopted the presumption that agencies will receive deference
  - In other words, in any statute, Congress could change the default rule

- For 40 years, and especially in the years after the passage of the APA, the Court never indicated Section 706 did not permit agency deference

- Abandonment of *stare decisis*

- *"*It is now "the courts (rather than the agency)" that will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris." *Loper Bright Enters. v. Raimondo,* 144 S. Ct. 2244, 2294



LOPER BRIGHT ENTERS. V. RAIMONDO

Skidmore Deference aka “In-Law-Deference”

- “interpretations and opinions” of the relevant agency, “made in pursuance of official duty” and “based upon . . . specialized experience,” “constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance,” even on legal questions. *Id.*, at 139-140, 65 S. Ct. 161, 89 L. Ed. 124. .

- “The weight of such a judgment in a particular case,” the Court observed, would “depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.*, at 140, 65 S. Ct. 161, 89 L. Ed. 124.

- *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944)

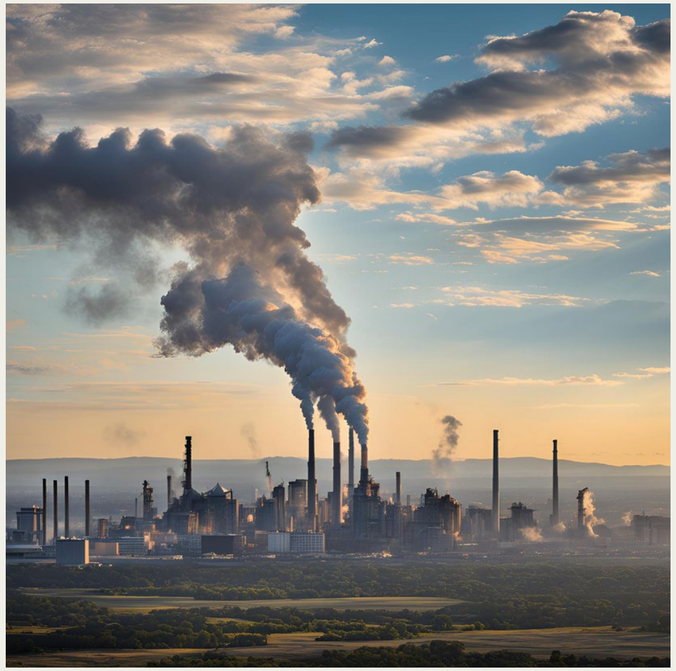
OHIO V. EPA

603 U.S. 279

Decided June 27, 2024

Decision 5-4

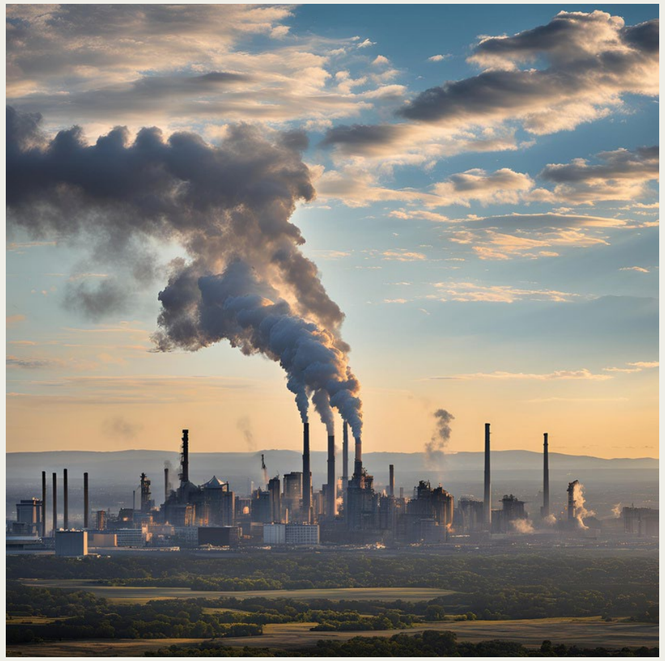
- Majority: Gorsuch, joined by Roberts, Thomas, Alito, and Kavanaugh
- Dissent: Barrett, joined by Sotomayor, Kagan, and Jackson



OHIO V. EPA

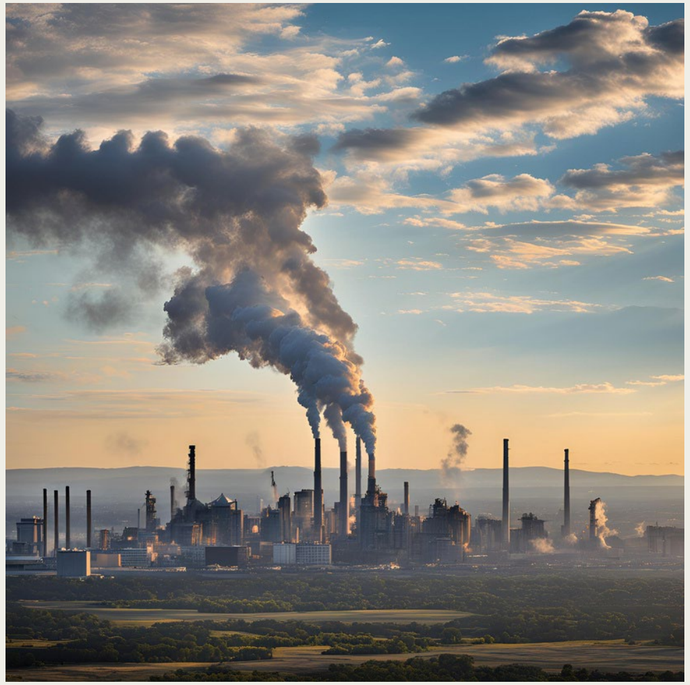
The Clean Air Act

- EPA sets standards for air pollutants
- State Implementation Plan (SIP)
  - States must submit a plan within three years for the “implementation, maintenance, and enforcement” of the standards EPA set
  - States decide how to measure ambient air quality and enforce the limitations on emissions
- “Good Neighbor Provision”
  - States must account for emissions that may drift to downwind states
  - Prohibit emissions “in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State” of the relevant air-quality standard.” 42 U.S.C. §7410(a)(2)(D)(i)(I).
- EPA has 18 months to approve SIPs
- If the SIP fails to comply, EPA shall issue a Federal Implementation Plan (FIP) unless the State cures its SIP first



OHIO V. EPA

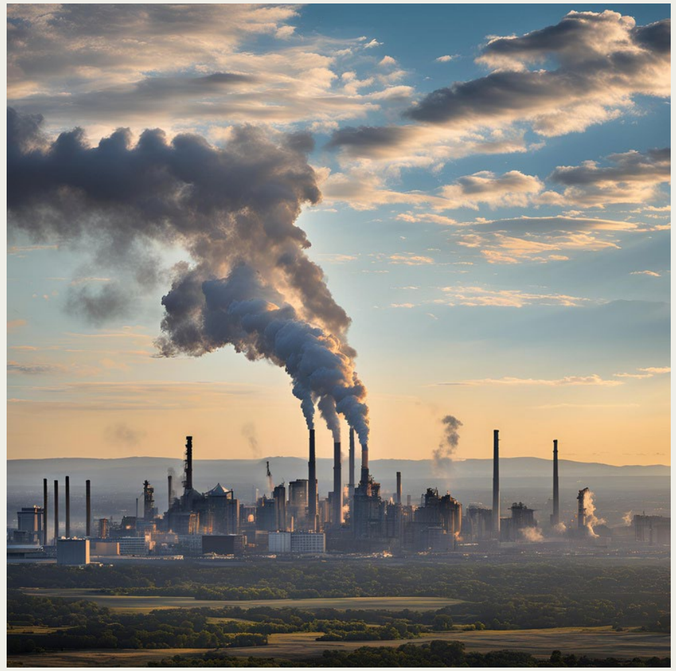
- In 2015 the EPA revised its standards for ozone triggering new SIPS
- EPA rejected 23 SIPs
- In April 2022, the EPA published a rule for comments in the Federal Register. The rule was a FIP to cover the 23 states that failed to submit compliant SIPs.
- The FIP was created by finding the “knee in the curve” or where the point where additional expenditures by upwind states had little effect on improving air quality downwind.
- During the comment period, commenters suggested that the FIP was flawed because if one or more states were released, the original calculations would no longer be correct.
- EPA published its final FIP rule on June 5, 2023, that covered 23 states.



OHIO V. EPA

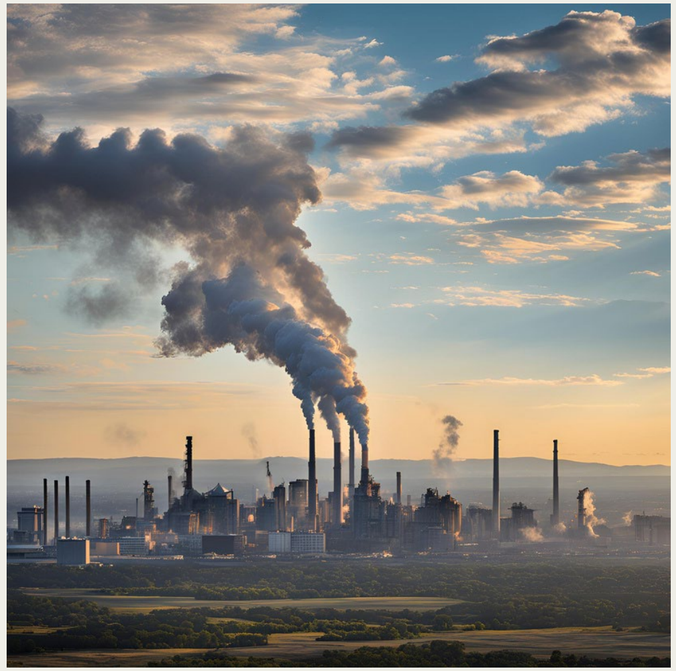
Background Facts

- Almost immediately, states sought stays of the FIP.
  - 12 of 23 states were granted stays in local courts
- The remaining states and some industries challened the FIP rule in the D.C. Circuit court.
  - The D.C. Circuit denied relief.
- These same states and industries filed for an Emergency Application for a Stay with SCOTUS.



OHIO V. EPA

Issue: Whether the EPA complied with terms of The Clean Air Act when it adopted the FIP.



OHIO V. EPA

Justice Gorsuch

- Court found applicants for stay were likely to succeed on the merits and a court would hold the EPA's FIP was "arbitrary" or "capricious" because the EPA failed to reasonably respond to the comment objecting to the FIP's calculations.
  - Procedurally "arbitrary and capricious" not in substance.
- EPA's severability clause was "side-stepping" the issue, not reasonably responding to the comment.
- Determining if a comment was raised with reasonable certainty "doesn't require hairsplitting."

OHIO V. EPA

Justice Barrett- Dissent

- Emergency Docket- Emergency Application for a Stay
  - Shortened briefing and arguing calendars

- Majority cherry picked the comment and dressed it up
  - “The proposed FIP essentially prejudges the outcome of those pending SIP actions and, in the event EPA takes a different action on those SIPs than contemplated in this proposal, it would be required to conduct a new assessment and modeling of contribution and subject those findings to public comment.” *Ohio v. EPA*, 603 U.S. 279, 309

OHIO V. EPA

"The Court, seizing on a barely briefed failure-to-explain theory, grants relief anyway...Given the number of companies included and the timelines for review, the Court's injunction leaves large swaths of upwind States free to keep contributing significantly to their downwind neighbors' ozone problems for the next several years...The Court justifies this decision based on an alleged procedural error that likely had no impact on the plan. So its theory would require EPA only to confirm what we already know: EPA would have promulgated the same plan even if fewer States were covered. Rather than require this years-long exercise in futility, the equities counsel restraint." *Ohio v. EPA*, 603 U.S. 279, 322-323.

SEC V. JARKESY

144 S.Ct. 2117

Decided June 27, 2024

Decision 6-3

- Majority: Roberts, joined by Thomas, Alito, Kavanaugh, Gorsuch and Barrett
- Dissent: Sotomayor, joined by Kagan, and Jackson

SEC V. JARKESY

- In 2010, the Dodd-Frank Act authorized the SEC to hold administrative hearings when seeking civil penalties in enforcement actions.
  - Option: ALG or Federal Court
- Jarkesy was the fund manager for Patriot28. The fund raised $24 million from 120 investors.
- SEC alleged securities fraud and sought civil penalties
- In 2014, an ALJ presided over the hearing and in 2020, the SEC issued its Final Order which included $300,000 in civil penalties.
- Jarkesy appealed to the 5th Circuit which vacated the Final Order because Jarkesy was deprived of his 7th Amendment right to a jury trial, Congress violated the nondelegation doctrine, and that ALJs violated the spearation of powers.

SEC V. JARKESY

“This case poses a straightforward question: whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud.”

SEC v. Jarkesy, 144 S. Ct. 2117, 2127

“The Seventh Amendment therefore applies and a jury is required. Since the answer to the jury trial question resolves this case, we do not reach the nondelegation or removal issues.”

SEC v. Jarkesy, 144 S. Ct. 2117, 2127-2128

SEC V. JARKESY

More Deep Cuts!

- Blackstone- Jury trials are “the glory of the English law.”
- Stamp Act Congress Resolution: Americans condemned Parliament for “subvert[ing] the rights and liberties of the colonists” when it held juryless trials.
- Hamilton argued in Federalist 83 the Constitution was in need of a provision for the right to jury trials.

7th Amendment

“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

SEC V. JARKESY

- What is a suit a common law?
  - It’s not a suit in equity, admiralty, and maritime.

- Court has held the 7th Amendment extends to statutory claims that are “legal in nature.”
  - To determine what is “legal in nature” the Court considers the cause of action and the remedy it provides.

- Chief Justice Roberts: “In this case, the remedy is all but dispositive. For respondents’ alleged fraud, the SEC seeks civil penalties, a form of monetary relief. While monetary relief can be legal or equitable, money damages are the prototypical common law remedy.”
  - SEC v. Jarkesy, 144 S. Ct. 2117, 2129

SEC V. JARKESY

- Public Rights Exception
  - Congress creates public rights and can assign adjudication of those rights to an agency, for example, as long as it is not inconsistent with the 7th Amendment.

- What qualifies under the Public Rights Exception?
  - “Our opinions governing the public rights exception have not always spoken in precise terms.” *SEC v. Jarkesy*, 144 S. Ct. 2117, 2133
  - “The Court “has not ‘definitively explained’ the distinction between public and private rights,” and we do not claim to do so today.” *SEC v. Jarkesy*, 144 S. Ct. 2117, 2133

- Chief Justice Roberts is certain this case does not qualify.

SEC V. JARKESY

Justice Gorsuch- Concurrence

- Agency proceedings are biased and unfair
- ALJs aren’t real judges and have ulterior motives
- 5th Amendment Due Process Clause
  - Founders knew that novel suits would arise which may not squarely fit under the 7th Amendment, therefore these novel suits will have the protections of 5th Amendment Due Process Clause.
  - Justice Gorsuch opens the door to challenge administrative hearings on 5th Amendment grounds

SEC V. JARKESY

Justice Sotomayor- Dissent

“Rather than acknowledge the earthshattering nature of its holding, the majority has tried to disguise it. The majority claims that its ruling is limited to “civil penalty suits for fraud” pursuant to a statute that is “barely over a decade old,” an assurance that is in significant tension with other parts of its reasoning. That incredible assertion should fool no one. Today’s decision is a massive sea change. Litigants seeking further dismantling of the “administrative state” have reason to rejoice in their win today, but those of us who cherish the rule of law have nothing to celebrate.”

“Today’s ruling is part of a disconcerting trend: When it comes to the separation of powers, this Court tells the American public and its coordinate branches that it knows best…The Court tells Congress how best to structure agencies, vindicate harms to the public at large, and even provide for the enforcement of rights created for the Government. It does all of this despite the fact that, compared to its political counterparts, “the Judiciary possesses an inferior understanding of the realities of administration” and how “political power . . . operates.”

“Make no mistake: Today’s decision is a power grab. Once again, “the majority arrogates Congress’s policymaking role to itself.” It prescribes artificial constraints on what modern-day adaptable governance must look like. In telling Congress that it cannot entrust certain public-rights matters to the Executive because it must bring them first into the Judiciary’s province, the majority oversteps its role and encroaches on Congress’s constitutional authority. Its decision offends the Framers’ constitutional design so critical to the preservation of individual liberty: the division of our Government into three coordinate branches to avoid the concentration of power in the same hands. Judicial aggrandizement is as pernicious to the separation of powers as any aggrandizing action from either of the political branches.”

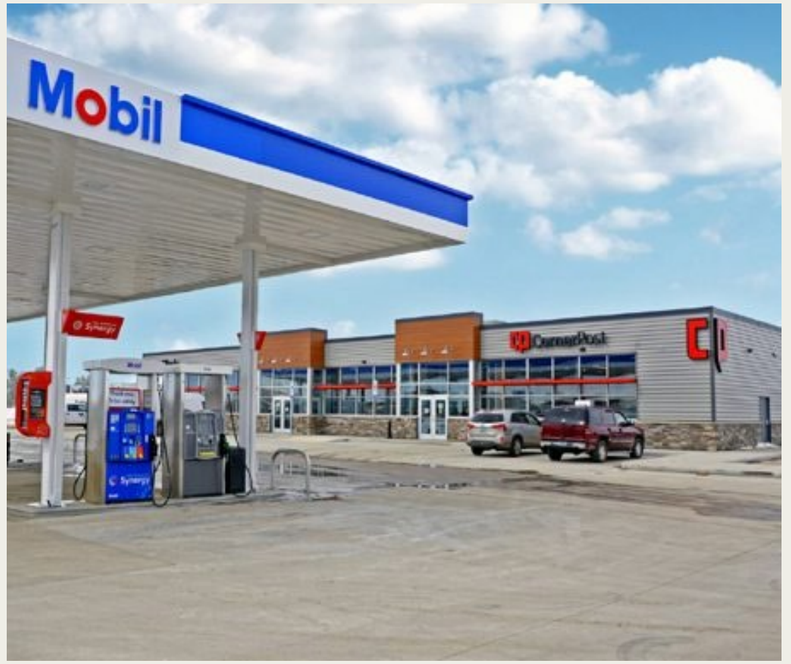
CORNER POST, INC. V. BD. OF GOVERNORS OF THE FED.RSRV. SYS.

144 S.Ct. 2440

Decided July 1, 2024

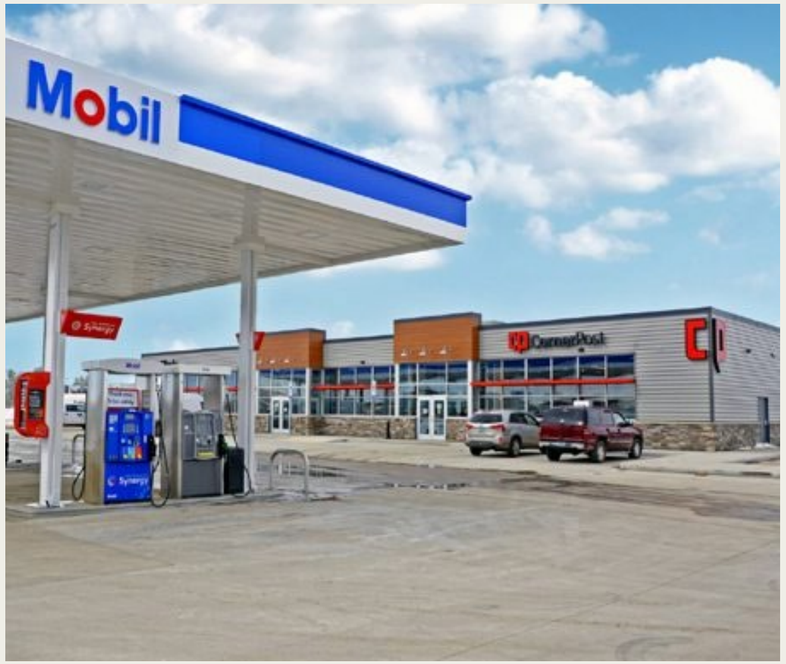
Decision 6-3

- Majority: Barrett, joined by Roberts, Thomas, Alito, Kavanaugh, and Gorsuch
- Dissent: Jackson, joined by Sotomayor, and Jackson



CORNER POST, INC. V. BD. OF GOVERNORS OF THE FED.RSRV. SYS.

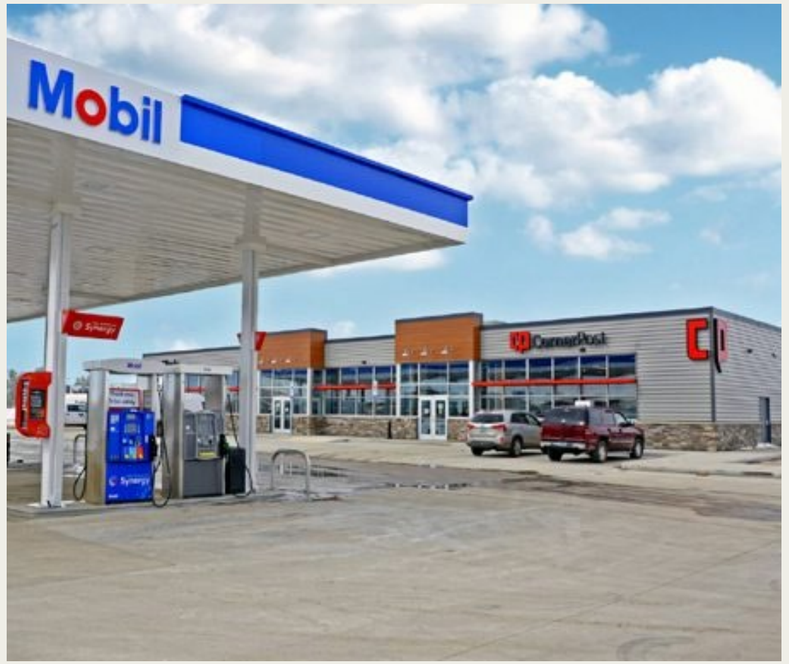
- The Dodd-Frank Act authorized the Federal Reserve to set interchange fees.
  - Fees the retailer pays when you swipe a debit card.
- 2011 the Federal Reserve published a final rule capping the interchange fees.
- Two North Dakota trade associations filed suit in 2021 challenging the rule.
  - Corner Post opened in 2018 and joined the 2021 suit.
- The 8th Circuit held the suit was time barred because the 6-year statute of limitations had run.



CORNER POST, INC. V. BD. OF GOVERNORS OF THE FED.RSRV. SYS.

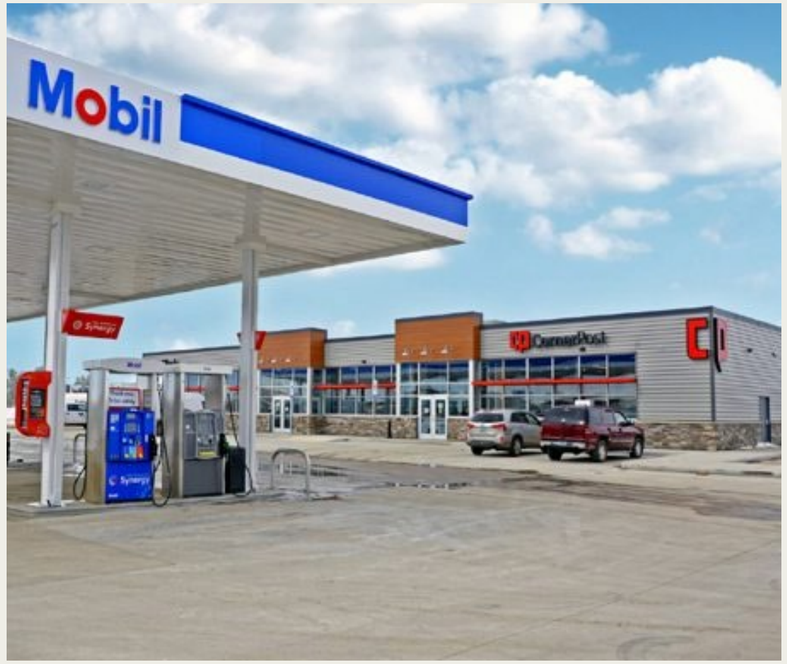
- The issue for the Court to decide was when the statute of limitations begins to run.

- The majority held, “An APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured.”



CORNER POST, INC. V. BD. OF GOVERNORS OF THE FED.RSRV. SYS.

- 5 U.S.C. §702 “requires a litigant to show, at the outset of the case, that he is injured in fact by agency action.”
- 5 U.S.C. §704 states that “judicial review is available only for ‘final agency action’”
- 28 U.S.C. §2401(a) “Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of the action first accrues.”



CORNER POST, INC. V. BD. OF GOVERNORS OF THE FED.RSRV. SYS.

Justice Barrett

- Legal meaning of “Accrue”: “the right accrues when it comes into existence.”
- Odd result to create a limitation period that begins before plaintiff could ever file suit
- The statute of limitations should only start once a plaintiff has a complete and present cause of action.
- Congress could have written the statute of limitations differently and it clearly chose not to.
- “Under the Board’s finality rule, only those fortunate enough to suffer an injury within six years of a rule’s promulgation may bring an APA suit. Everyone else—no matter how serious the injury or how illegal the rule—has no recourse.”
  - *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2459

CORNER POST, INC. V. BD. OF GOVERNORS OF THE FED.RSRV. SYS.

“Moreover, the opportunity to challenge agency action does not mean that new plaintiffs will always win or that courts and agencies will need to expend significant resources to address each new suit. Given that major regulations are typically challenged immediately, courts entertaining later challenges often will be able to rely on binding Supreme Court or circuit precedent. If neither this Court nor the relevant court of appeals has weighed in, a court may be able to look to other circuits for persuasive authority. And if no other authority upholding the agency action is persuasive, the court may have more work to do, but there is all the more reason for it to consider the merits of the newcomer’s challenge.”

- *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2459

CORNER POST, INC. V. BD. OF GOVERNORS OF THE FED.RSRV. SYS.

Justice Jackson- Dissent

“In one fell swoop, the Court has effectively eliminated any limitations period for APA lawsuits, despite Congress’s unmistakable policy determination to cut off such suits within six years of the final agency action. The Court has decided that the clock starts for limitations purposes whenever a new regulated entity is created. This means that, from this day forward, administrative agencies can be sued in perpetuity over every final decision they make.”

“After today, even the most well-settled agency regulations can be placed on the chopping block. And please take note: The fallout will not stop with new challenges to old rules involving the most contentious issues of today. Any established government regulation about any issue—say, workplace safety, toxic waste, or consumer protection—can now be attacked by any new regulated entity within six years of the entity’s formation. A brand new entity could pop up and challenge a regulation that is decades old; perhaps even one that is as old as the APA itself. No matter how entrenched, heavily relied upon, or central to the functioning of our society a rule is, the majority has announced open season.”

“It is profoundly destabilizing—and also acutely unfair—to permit newcomers to bring legal challenges that can overturn settled regulations long after the rest of the competitive marketplace has adapted itself to the regulatory environment.”

“Seeking to minimize the fully foreseeable and potentially devastating impact of its ruling, the majority maintains that there is nothing to see here, because not every lawsuit brought by a new industry upstart will win, and, at any rate, many agency regulations are already subject to challenge. But this myopic rationalization overlooks other significant changes that this Court has wrought this Term with respect to the longstanding rules governing review of agency actions. The discerning reader will know that the Court has handed down other decisions this Term that likewise invite and enable a wave of regulatory challenges—decisions that carry with them the possibility that well-established agency rules will be upended in ways that were previously unimaginable. Doctrines that were once settled are now unsettled, and claims that lacked merit a year ago are suddenly up for grabs.”

NEW CASES

Loper Bright Enterprises v. Raimondo

- Yes, it’s the same case!

Garland v. VanDerSok

- Did the ATF exceed its statutory authority in promulgating its Final Rule purporting to regulate so-called “ghost guns”?

McLaughlin Chiropractic Association v. McKesson Corp.

- Whether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act.

Nuclear Regulatory Commission v. Texas

- Whether the Hobbs Act, 28 U.S.C. 2341 et seq., which authorizes a "party aggrieved" by an agency's "final order" to petition for review in a court of appeals, 28 U.S.C. 2344, allows nonparties to obtain review of claims asserting that an agency order exceeds the agency's statutory authority.
- Whether the Atomic Energy Act of 1954, 42 U.S.C. 2011 et seq., and the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 et seq., permit the Nuclear Regulatory Commission to license private entities to temporarily store spent nuclear fuel away from the nuclear-reactor sites where the spent fuel was generated.

NEW CASES

Seven County Coalition v. Eagle County Colorado, the Surface Transportation Board

- Whether the National Environmental Policy Act requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority.

FDA v. R.J. Reynolds Vapor Company

- Whether a manufacturer may file a petition for review in a circuit (other than the D.C.Circuit) where it neither resides nor has its principal place of business, if the petition is joined by a seller of the manufacturer's products that is located within that circuit.

FDA v. Wages and White Lion Investments

- Whether the court of appeals erred in setting aside FDA's denial orders as arbitrary and capricious.

360 Virtual Drone Services v. Ritter

- *W*hether, in an as-applied First Amendment challenge to an occupational-licensing law, the standard for determining whether the law regulates speech or regulates conduct is this Court’s traditional conduct-versus-speech dichotomy.

OBSERVATIONS AND TRENDS

Judicial Power Grab

Weakened Agencies

Uncertainty

Unusual Vehicles

Questions?
Comments?
Wild speculations?
Commiseration?

Thank you!

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