

SUPREME COURT OF THE UNITED STATES

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

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BOARD OF GOVERNORS OF THE)
FEDERAL RESERVE SYSTEM,)
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Washington, D.C.
Tuesday, February 20, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:
BRYAN K. WEIR, ESQUIRE, Arlington, Virginia; on behalf of the Petitioner.
BENJAMIN W. SNYDER, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the 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 --
11 that's really any typical accrual statute. For
12 example, there are torts where a -- where a --
13 where a tort is committed and -- and the cause
14 of action is not complete until later, until the
15 harm is felt. So that's a basic. We think
16 there's nothing remarkable about -- about --
17 about that fact pattern.

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

23 MR. WEIR: So --

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

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

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

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

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

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

22 JUSTICE THOMAS: Yes.

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

25 JUSTICE THOMAS: Actually, I'm -- I'm

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

9 That's what I'm interested in.

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

12 JUSTICE THOMAS: Yes.

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

16 JUSTICE THOMAS: Okay. So --

17 MR. WEIR: But that --

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

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

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

25 MR. WEIR: Well, every -- the lower

1 courts have rejected our reading of 2401.

2 JUSTICE THOMAS: Yeah.

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

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

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

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

1 you knew it going in.

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

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

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

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

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

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

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

22 MR. WEIR: So we don't think so. I --
23 I think that the -- the -- the 29 examples that
24 the government points out in its brief of
25 agency-specific repose-based statutes shows that

1 Congress intended to have a different rule for
2 the APA. It has not subjected --

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

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

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

22 MR. WEIR: So -- so two responses,
23 Justice Kagan. The first is, if you look at
24 those lower court decisions applying this
25 statutory scheme, not a single one of them

1 actually looked at the text of 2401 or 702.

2 None of them did.

3 And then the pathmarking decision I --

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

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

18 JUSTICE KAGAN: We made very clear
19 that that was a default rule, a general rule
20 that could be, of course, countermanded by
21 Congress but that also could be countermanded by
22 different circumstances, that if you look at the
23 Crown Coat opinion, for example, there's a very
24 explicit recognition by this Court -- and I'm
25 just reading -- "the hazards inherent in

1 attempting to define for all purposes when a
2 cause of action first accrues," what are those
3 hazards, you know, a word like that should be
4 "interpreted in the light of the general
5 purposes of the statute, with due regard to
6 those practical ends which are to be served by
7 any limitation of the time within which an
8 action may be brought."

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

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

19 MR. WEIR: So we disagree. On Crown
20 Coat, the top-line holding from Crown Coat as we
21 read it is that Congress would not want under
22 2401 the under -- the -- the -- the statute of
23 limitations to start running until the plaintiff
24 had the opportunity to sue.

25 And that language that you just quoted

1 that the government relies on, we see that as a
2 recognition that obviously the underlying cause
3 of action accrue -- is -- differs between causes
4 of action. Torts accrue at different times than
5 breaches of contract. Different torts can
6 accrue differ -- at different times. And so we
7 just see that language as just recognizing that.

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

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

24 You know, in a tort situation, when
25 there's a duty, if there's a breach and injury

1 as a result of the breach, those facts have
2 occurred, the cause of action has arisen, and we
3 say the clock starts running at that point
4 because a claim against the defendant can be
5 sustained in court when those facts exist.

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

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

17 Why am I wrong about that?

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

22 JUSTICE JACKSON: Where -- where --
23 where have we said that that was an element? I
24 thought that was just a statement of the statute
25 as to who can bring the claim, not the element,

1 not -- not like the element of the claim, when
2 has the defendant violated the law.

3 MR. WEIR: So I would point the Court
4 to the Lujan decision, 1990, where it outlines
5 the elements of an APA claim.

6 JUSTICE JACKSON: Mm-hmm.

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

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

22 MR. WEIR: So I disagree with that.
23 This Court has said that certainly final agency
24 action is an element of an APA claim, but the
25 other element, as this Court noted in Lujan and

1 I think in Newport News, is somebody who is
2 actually harmed by it, a plaintiff who was
3 harmed by it.

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

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

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

1 as other types of cause of action.

2 JUSTICE GORSUCH: Counsel --

3 CHIEF JUSTICE ROBERTS: Well, but --
4 but repose is a little bit different in this
5 context. I mean, you're talking about sort of
6 establishing the ground rules for how a
7 particular regulatory regime is going to
8 operate, and, you know, you've got six years to
9 do that. And, you know, you often see trade and
10 other associations bringing fundamental
11 challenges to the, you know, structure of the
12 market or -- or the -- or the -- or the agency.

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

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

23 MR. WEIR: So we think challenges to
24 -- to regulations like that are happening
25 already in the as-applied context. You can

1 always have an as-applied challenge. Those
2 happen to broad sets of regulations already.
3 And so we don't see that really as an issue.

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

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

19 And then every time somebody brings a
20 new facial challenge, they basically have to
21 litigate that same question over again?

22 MR. WEIR: So I -- I'm not sure stare
23 decisis would apply unless it was an
24 interpretation of this Court, of course. But,
25 in the lower courts --

1 CHIEF JUSTICE ROBERTS: The agency,
2 whatever they call agency common law.

3 MR. WEIR: You know, I -- I think
4 anybody that was bringing a subsequent lawsuit,
5 of course, they have to run up against the fact
6 that there's apparently, you know, a
7 well-reasoned decision that's already ruled
8 against them, so they -- there is an uphill
9 climb to start with, I think. But -- but that
10 is what's commanded by -- we think that's what's
11 commanded by the text of 2401 and the APA.

12 And we -- we want to be clear, even
13 for people that have valid claims --

14 JUSTICE SOTOMAYOR: There's no res
15 judicata or collateral estoppel, correct?

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

17 JUSTICE SOTOMAYOR: There's no res
18 judicata or collateral estoppel?

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

24 JUSTICE SOTOMAYOR: Is that your --

25 JUSTICE GORSUCH: For --

1 JUSTICE SOTOMAYOR: I'm sorry.

2 JUSTICE GORSUCH: No, please.

3 JUSTICE SOTOMAYOR: Is that your
4 answer to the list of examples on page 39 of the
5 government's brief of all of the -- I want to --
6 I -- I don't want to be dismissive because I'm
7 not. There's a whole list of parade of
8 horrors that I see as potentially true that
9 the government lists at page 39.

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

13 MR. WEIR: Well, we think --

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

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

1 government as contesting those.

2 But even if --

3 JUSTICE SOTOMAYOR: That's very hard
4 to prove.

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

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

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

1 JUSTICE KAGAN: Well, that doesn't
2 seem very hard. I mean, you can always find a
3 new company, a new regulated entity. You can
4 create a new company or a new regulated entity.
5 If the same trade association that has had its
6 first bite at the apple doesn't like the answer
7 10 years later and looks around and thinks: You
8 know, the environment is more hospitable, the
9 judges have changed, let's try again. Just
10 create a new entity.

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

20 JUSTICE GORSUCH: Counsel --

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

22 JUSTICE GORSUCH: -- counsel, if I --
23 if I understand your point, and I just want to
24 make sure I do, we're talking about a facial
25 challenge here. If -- if there were circuit

1 precedent that would bar you, as a matter of
2 stare decisis, that would be a winner on the
3 merits. You'd lose. You just -- you'd have a
4 timely claim, but you'd lose, is that right?

5 MR. WEIR: That's correct.

6 JUSTICE GORSUCH: And the government
7 may be able to use non-mutual collateral
8 estoppel or some other res judicata principle to
9 say the matter is decided effectively against
10 you anyway, right?

11 MR. WEIR: That's correct.

12 JUSTICE GORSUCH: So we're just
13 talking about the timing of the suit.

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

22 MR. WEIR: Well, certainly, that's
23 possible. The lower court precedent now, I'm
24 not sure this Court's addressed -- directly
25 addressed it --

1 JUSTICE GORSUCH: I understand lower
2 court precedent has distinguished between the
3 two, but they haven't discussed what "accrual"
4 means and how -- how that word might be a
5 chameleon and differ between as-applied and
6 facial challenges.

7 And if -- and if you were to lose and
8 we were to hold "accrual" means the time of the
9 adoption of the rule, it would seem to upset and
10 undermine all of those decisions too, wouldn't
11 it?

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

13 JUSTICE GORSUCH: Okay. And then I
14 have --

15 JUSTICE KAGAN: Mr. Weir, how could
16 that be because --

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

25 MR. WEIR: I do.

1 JUSTICE GORSUCH: Can you -- can you
2 give me your thoughts on that?

3 MR. WEIR: I -- I can. So -- so two
4 -- two responses. First, this Court already
5 dealt with that issue in Darby versus Cisneros.
6 What happened in 1976 is Congress waived
7 sovereign immunity and -- under 702, and what
8 Congress wanted to do was make clear that that
9 waiver did not affect any other limitation on
10 judicial review that already existed. So it's
11 the -- the -- the waiver of sovereign immunity
12 that's not affecting anything else.

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

20 JUSTICE GORSUCH: So you're saying, in
21 other words, that your view -- I -- I just want
22 to make sure I understand it -- doesn't affect
23 any other limitation; it just interprets the
24 word "accrual"?

25 MR. WEIR: That's correct.

1 JUSTICE GORSUCH: Is that a fair
2 summary of it?

3 MR. WEIR: That's -- that's -- it's --
4 it's an -- it's an application of an accrual
5 statute.

6 JUSTICE GORSUCH: Okay. All right.
7 Thank you.

8 JUSTICE KAGAN: If -- if --

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

11 JUSTICE GORSUCH: Thank you.

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

22 MR. WEIR: So there are different
23 types of contexts for as-applied. If -- if --
24 if you are denied a permit, for example, you
25 usually take that to court in the -- in federal

1 district court and you sue the United States.
2 And so, on its face, 2401 would apply in that
3 context.

4 JUSTICE GORSUCH: So you -- the
5 distinction there is between an enforcement
6 action against you by the government, in which
7 case you'd have the ability to -- to -- to make
8 your challenges, but, if you sought an
9 as-applied challenge affirmatively yourself, you
10 might be barred? Is that -- is that --

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

12 JUSTICE GORSUCH: Yeah.

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

22 We think Crown Coat supports us, but
23 the Court had applied 2401's predecessors in the
24 1900s. The Chamber brief outlines several
25 examples where -- where -- where "first accrues"

1 is applied just how we want.

2 And -- and so what the government is
3 asking for is a special rule just for it. And
4 this Court rejected the special -- that exact
5 same argument in the Franconia case when it was
6 leading --

7 JUSTICE JACKSON: But what do you do
8 with the "first" in the actual statute? I mean,
9 you seem to be asking us to read the statute as
10 if it says a complaint is barred from the time
11 in which the plaintiff is first aggrieved. But
12 that's not what it says.

13 So how is it that every new company
14 that is created in the aftermath of the creation
15 of a rule can claim that this is the first time
16 that the cause of action has arisen under the
17 APA?

18 MR. WEIR: Because, under
19 accrual-based statutes, the -- the -- the -- the
20 -- the claim is plaintiff-specific. So, if you
21 look at, like, the Hobbs Act, the Hobbs Act --

22 JUSTICE JACKSON: All right. But
23 you're just assuming away the question at the
24 beginning by saying this is an accrual-based
25 statute. What I'm suggesting is that it's not.

1 Just because it says the cause of action accrues
2 doesn't make it an accrual-based statute in the
3 way that you are interpreting, and I don't
4 understand how it can be when it says "first
5 accrues."

6 MR. WEIR: So the way we interpret
7 "first accrues" is that the first time you
8 suffer a harm, that is when your statute of
9 limitations starts running.

10 JUSTICE JACKSON: Right. But that
11 doesn't -- isn't that reading words into the
12 statute in a way that doesn't make a whole lot
13 of sense? You're suggesting that this statute
14 is the first time anybody is harmed by the
15 United States, they have six years, anybody, for
16 any reason.

17 MR. WEIR: That's how 2401 reads and
18 is applied. And -- and to be clear, it applies
19 to not just APA claims. It applies to FOIA
20 actions. It applies to government decisions
21 that are not -- that are not covered by Title
22 VII. And the government's rule doesn't make
23 sense in those contexts.

24 You can imagine an agency that had an
25 unlawful employment policy, and under the

1 government's rule, the first employee that was
2 harmed by that policy, that would start the
3 statute of limitations for everybody at the same
4 time, including --

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 Justice Alito?

9 JUSTICE ALITO: The government says
10 that late-arising objectors like Corner Post can
11 get relief by petitioning for new rulemaking.
12 Why isn't that sufficient for you?

13 MR. WEIR: So we don't think that's a
14 -- a -- a -- a -- a viable path to judicial
15 review for a couple of reasons.

16 First, the government gets to decide
17 when it rules on a petition for rulemaking, and
18 it can sit on it for years. But even the
19 government acknowledged I think in PDR Network
20 that this is not a guaranteed path to judicial
21 review.

22 Typically, a denial of a petition for
23 rulemaking gets very deferential review that
24 doesn't allow the -- the plaintiff to actually
25 get at the merits of the underlying regulation

1 they're trying to -- they're trying to -- trying
2 to challenge.

3 And -- and -- and -- and we know what
4 would have happened in this case if we filed a
5 petition for review. The -- the Board itself
6 issued a -- a -- an NPRM after we -- after the
7 Court granted cert and is not going to revisit
8 the part of the rule that we want it to revisit,
9 and so it wouldn't have mattered even if we did.

10 JUSTICE ALITO: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor?

13 Justice Kagan?

14 Justice Gorsuch, any?

15 Justice Kavanaugh?

16 JUSTICE KAVANAUGH: Just so I'm clear
17 on Justice Gorsuch's questions, in an as-applied
18 enforcement action against you, I think you and
19 the government agree that you can always raise a
20 legal challenge to the -- the rule or the
21 regulation?

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

24 JUSTICE KAVANAUGH: Okay. Second
25 question, and this is looking down the road and

1 is really a tangential issue, but it interests
2 me. So what relief can you get here --

3 MR. WEIR: So in -- in this --

4 JUSTICE KAVANAUGH: -- if -- if you
5 can't get vacatur of the rule?

6 MR. WEIR: If we can't get vacatur?
7 We -- we can't imagine a situation where our
8 client can get relief from this rule absent
9 vacatur. But that's not true in -- in most
10 cases. In most cases --

11 JUSTICE KAVANAUGH: Right.

12 MR. WEIR: -- directly regulated
13 parties can --

14 JUSTICE KAVANAUGH: Direct -- but --
15 but, on the vacatur issue, which is always
16 lurking, a party who's not regulated would be
17 able to get no relief in a situation like this?

18 MR. WEIR: I think it would depend on
19 the context.

20 JUSTICE KAVANAUGH: I think you -- I
21 think you just said that.

22 MR. WEIR: Yeah. I -- I -- there are
23 some instances where you might be able to do it
24 but --

25 JUSTICE KAVANAUGH: Yeah.

1 MR. WEIR: -- but not -- not in this
2 one.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett?

6 JUSTICE BARRETT: Just have one
7 question and it's about your point about
8 procedural challenges not being the kind of
9 challenges that you could bring or, and -- and
10 you say, I think, that that's part of the
11 explanation for why the government's parade of
12 horrors on page 39 of its brief is not so
13 horrible.

14 The procedural challenges are out, am
15 I right?

16 MR. WEIR: That's -- that's what we
17 think is the -- is the best reading of -- of how
18 injury occurs in that context. It doesn't need
19 -- the Court doesn't need to reach it in this --

20 JUSTICE BARRETT: Are --

21 MR. WEIR: -- case because we don't
22 have procedural challenges.

23 JUSTICE BARRETT: So are arbitrary and
24 capricious challenges procedural or not?

25 MR. WEIR: Those are substantive. And

1 -- and you --

2 JUSTICE BARRETT: So those would be
3 substantive in your view?

4 MR. WEIR: That's correct. And --
5 and -- and you can raise those in as-applied
6 enforcement contexts as well.

7 JUSTICE BARRETT: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?

10 JUSTICE JACKSON: So can I just be
11 clear, injury, you're saying that injury is an
12 element of an APA claim?

13 MR. WEIR: It is.

14 JUSTICE JACKSON: Okay. And can I
15 also be clear on the consequences of your
16 decision because I guess I worry that if you
17 win, every agency rule in existence today would
18 be subject to some sort of a challenge in this
19 way. So I'm trying to understand that argument.

20 MR. WEIR: Sure. So I think, first,
21 many of those regulations are already subject to
22 challenge in the as-applied context, as -- as
23 I've already said, but it -- but we don't think
24 that there's going to be any opening of the
25 flood gates or parade of horrors because even

1 the government said that parties that can bring
2 this type of claim are relatively uncommon, and
3 we think that's because most parties are harmed
4 the day a regulation is actually issued.

5 And I think you also have vast -- vast
6 swaths --

7 JUSTICE JACKSON: But why wouldn't
8 this be extraordinarily destabilizing in the way
9 that Justice Sotomayor suggested? I mean, we
10 have settled rules that govern all sorts of
11 industries, the healthcare industry, the finance
12 industry, and people have adjusted themselves
13 around them. There are experts who understand
14 how the law works and companies follow suit.

15 If I understand you correctly, each
16 new company that is created in an industry can
17 suddenly bring a challenge that might risk or
18 undermine valid -- invalidation of the entire
19 basis of the industry, each new company, because
20 you say each new company that's created can
21 bring such a lawsuit.

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

25 MR. WEIR: We don't think so. We --

1 we think the experience in the Sixth Circuit is
2 what you'll see. There -- there was no uptick
3 in challenges to old regulations in the Sixth
4 Circuit, and we would have seen them there in
5 the last ten --

6 JUSTICE JACKSON: Is -- is that
7 possible because we had other doctrines that
8 prevented, so, you know, for example, Chevron
9 existed and so there were lots of things that
10 already -- you know, right? Like, there are
11 reasons why you might not have an uptick. I'm
12 just wondering, in a world in which you could
13 bring these actions, why wouldn't you have this
14 problem?

15 MR. WEIR: Well, I -- I think that
16 because most regulations are -- are valid,
17 there's -- there's no argument that they're
18 unlawful. So you would -- so you wouldn't see
19 them. It's only the ones that have defects that
20 you're going to see challenges to or potential
21 defects.

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

1 MR. WEIR: Well, because our client
2 was first injured by this -- that same rule and
3 has its -- has its own challenge to bring into
4 the -- under the APA. It's the -- the -- the
5 American tradition is everyone gets their day in
6 court, and then the APA itself provides for a
7 presumption of judicial review.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Snyder.

12 ORAL ARGUMENT OF BENJAMIN W. SNYDER

13 ON BEHALF OF THE RESPONDENT

14 MR. SNYDER: Mr. Chief Justice, and
15 may it please the Court:

16 For decades, the courts of appeals
17 have consistently recognized that the six-year
18 statute of limitations on an APA claim accrues
19 at the time of the challenged agency action, not
20 the time when a particular plaintiff comes
21 within the relevant statute's zone of interests.

22 In asking this Court to reject that
23 settled practice, Corner Post argues that the
24 word "accrues" in Section 2401(a) invariably
25 refers to the time at which a specific plaintiff

1 obtains a complete and present cause of action
2 and that every newly formed entity therefore has
3 six years to challenge any prior agency actions
4 that affect its business or other interests,
5 even if those actions occurred decades ago.
6 Nothing in the APA or Section 2401(a) requires
7 that destabilizing result.

8 In Crown Coat Front Company, this
9 Court explicitly rejected Corner Post's
10 one-size-fits-all definition of "accrues,"
11 warning of the hazards of attempting to devise a
12 single accrual rule for all purposes.

13 Instead, the Court explained that to
14 apply the general word "accrues," a court has to
15 consider the particular type of claim at issue
16 and how the practical purposes of a statute of
17 limitations apply in that context.

18 In conducting that necessary analysis,
19 courts should give primary weight to evidence
20 about the accrual rule that Congress itself has
21 adopted when it has specifically focused on
22 other claims of the same type.

23 Doing so ensures that courts are not
24 just engaged in their own policy balancing about
25 the respective costs of review and repose but

1 instead are faithfully following Congress's
2 lead.

3 Here, Congress's standard practice
4 when it's focused on the time for challenging
5 agency action has been to run the limitations
6 period for that type of claim from the date of
7 the agency action at issue.

8 It would, therefore, reasonably have
9 expected courts to follow the same approach when
10 applying Section 2401(a)'s catch-all statute of
11 limitations to claims under the APA, and because
12 that's what the court of appeals did here, the
13 decision below should be affirmed.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: So when did the --
16 the claim accrue for this Petitioner?

17 MR. SNYDER: So this Court has -- has
18 said that a claim can accrue for different
19 purposes or can -- can accrue for purposes of
20 the statute of limitations at a point that's
21 different from the point at which a plaintiff
22 can bring suit.

23 And so Corner Post could not have sued
24 until some point after it was incorporated, it's
25 not exactly clear when, but when it had formed

1 an intent to accept debit cards, but for statute
2 of limitations purposes, its claim accrued at
3 the time the regulation was adopted in 2011.

4 JUSTICE THOMAS: Is that normal to
5 have two different times?

6 MR. SNYDER: So, in the context of
7 administrative law challenges to agency action,
8 that's absolutely the standard rule. My -- my
9 friend acknowledged that he can't point to
10 another statute that doesn't treat accrual that
11 way.

12 In other contexts, in the contract
13 context or the tort context, it's true that that
14 sort of rule is unusual. But, in the context of
15 administrative law challenges, it's entirely
16 typical, and it would be strange to say that the
17 rule should apply at some other time -- at some
18 other time here.

19 JUSTICE GORSUCH: Counsel --

20 CHIEF JUSTICE ROBERTS: Counsel I have
21 a -- a -- I -- I think I must be missing
22 something fundamental. You have an individual
23 or an entity that is harmed by something the
24 government is doing, and you're saying, well,
25 that's just too bad, you can't do anything about

1 it because other people had six years to do
2 something about it and maybe other -- another
3 person, a business organization or whatever, did
4 do something about it.

5 I -- I mean, your friend on the other
6 side said -- said everybody is entitled to their
7 day in court, and it doesn't say unless somebody
8 else had a day in court or unless the government
9 gave other people or anybody six years, but you
10 didn't -- you weren't injured in six years, you
11 were injured -- injured in seven years.

12 I -- I just -- I -- I guess I am --
13 must be missing something because I don't
14 understand why this wasn't settled 60 years ago.
15 It seems pretty fundamental.

16 MR. SNYDER: I -- so, Mr. Chief
17 Justice, I -- I understand that -- that
18 intuition, but I think the available evidence
19 shows that Congress doesn't share it. I mean,
20 my friend pointed out that we've -- we've
21 identified 29 other limitations periods on
22 challenges that are substantively the same as
23 his.

24 CHIEF JUSTICE ROBERTS: Okay, yeah,
25 Congress doesn't share it, but, I mean, it

1 has -- it's not exactly an uninterested party.
2 It has set up an agency and they'd just as soon
3 not -- it not be challenged.

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

7 MR. SNYDER: So, Mr. Chief Justice, I
8 don't think there's any dispute that Congress
9 can say that facial challenges are not available
10 after a certain point. My friend is not here
11 suggesting that the Hobbs Act or the dozens of
12 other special statutory review provisions that
13 we've pointed to are unconstitutional.

14 And there are in the APA -- APA
15 context other ways in which parties can raise
16 challenges to agency action, and --

17 CHIEF JUSTICE ROBERTS: Like what?

18 MR. SNYDER: So --

19 CHIEF JUSTICE ROBERTS: Like what one
20 is going to help Corner Post? I mean, they're
21 not injured by direct enforcement of the
22 regulation, so don't tell me, well, they can
23 object to enforcement.

24 What else is there?

25 MR. SNYDER: So the other option is

1 that they can petition for rulemaking. That's
2 something that Congress set out in Section
3 553(e) of the APA itself. In 555(e), it
4 required the agency to respond in a reasonable
5 time.

6 My friend --

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

10 MR. SNYDER: Well, I mean, we were --
11 we were talking in this case about Corner Post's
12 interests. I -- I think it's relevant that
13 Corner Post is not relevant or, excuse me, is
14 not regulated. And so it's true that Corner
15 Post can't assert these types of claims in an
16 enforcement action, but that's because this rule
17 doesn't apply to Corner Post.

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

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

24 CHIEF JUSTICE ROBERTS: Well, but they
25 weren't -- they weren't in existence six years

1 after the regulation was adopted.

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

5 CHIEF JUSTICE ROBERTS: Well, yeah, a
6 whole bunch of things that are illegal.

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

9 CHIEF JUSTICE ROBERTS: Well, I --

10 MR. SNYDER: -- except for the Chief
11 Justice of the United States.

12 (Laughter.)

13 MR. SNYDER: So --

14 CHIEF JUSTICE ROBERTS: Thanks.

15 MR. SNYDER: -- with that -- with that
16 caveat, let me put it this way. I don't think
17 the -- the entity with the strongest interest in
18 making that kind of argument has made any
19 serious suggestion that the Hobbs Act is
20 unconstitutional or that those other special
21 statutory review provisions are
22 unconstitutional. I --

23 CHIEF JUSTICE ROBERTS: I didn't mean
24 to suggest it either, but you do have a specific
25 injury inflicted by the government, the -- the

1 individual has standing, and your argument is,
2 well, Congress doesn't want people to sue, or
3 somebody else had the chance to sue and you
4 could have joined that trade association.

5 MR. SNYDER: So, Mr. Chief Justice, I
6 do want to push back a little bit on the idea
7 that this injury is inflicted by the government.
8 I think the reason that they cannot assert this
9 claim in an enforcement proceeding is because
10 the government is not applying this regulation
11 to them directly.

12 What their argument is, is that the
13 government should be regulating someone else
14 more aggressively. And so, in that context,
15 it's true that they have fewer rights to
16 judicial process when what they want is for the
17 government to go and regulate someone else. If
18 they were the one regulated, they would have
19 additional rights, and that's true in the
20 context of dozens of other special statutory
21 review provisions as well.

22 JUSTICE GORSUCH: But, counsel, I
23 mean, you -- you mention the enforcement action
24 possibility, but why would banks challenge this
25 rule? They benefit from it. So that avenue

1 doesn't seem to be very helpful to you.

2 MR. SNYDER: So, it -- I mean, I -- I
3 think the banks probably think the rule should
4 be higher, but --

5 JUSTICE GORSUCH: Right.

6 MR. SNYDER: But I do want --

7 JUSTICE GORSUCH: Right. If anything,
8 they want more money.

9 MR. SNYDER: I do want to get to my
10 friend's suggestion that the Board has been
11 unresponsive to petitions for rulemaking.

12 JUSTICE GORSUCH: Well, no, I'm --
13 that -- that -- that wasn't my question. And --
14 and -- and just to pick up on the Chief
15 Justice's, I -- I can certainly understand
16 Congress might want to pass statutes of repose
17 with respect to rulemaking in a variety of
18 contexts, as it did before the APA and it did
19 after the APA with respect to specific statutory
20 schemes.

21 But the APA was passed 80 years ago as
22 the background rule, the kind of minimum, the
23 floor, and it was with a presumption of judicial
24 review, and it uses the word "accrue," which had
25 a lot of encrusted meaning, and we have a lot of

1 precedent about it that suggests, yes, an
2 injury, that's when it starts, okay?

3 Why wouldn't -- and I'm -- just as a
4 matter of sense -- your -- your whole argument
5 is it doesn't make sense to interpret it
6 differently than those agency-specific statutes,
7 the Hobbs Act and others. But -- but is that
8 so? Why wouldn't it be also perfectly rational
9 for Congress to have adopted as the background
10 rule the norm, the traditional common law rule?

11 MR. SNYDER: So, Justice Gorsuch, I
12 disagree that that's the traditional rule in
13 this context. Both before and after the
14 adoption of the APA and Section --

15 JUSTICE GORSUCH: I'm talking about
16 the word "accrue."

17 MR. SNYDER: And -- and that's what
18 I'm talking about too. In Reading Company, this
19 Court adopted an interpretation of the word
20 "accrues" in which the -- the statute of
21 limitations started to run before the plaintiff
22 could recover on the claim.

23 And then, in Crown Coat Front Company,
24 the Court, pointing back to --

25 JUSTICE GORSUCH: Certainly, there are

1 statutes where that's done, and, I -- I again, I
2 don't dispute that. But the normal rule -- and
3 I think you'd have to concede it -- is that the
4 plaintiff's injury is the moment of accrual,
5 that that's the normal rule.

6 MR. SNYDER: So I think that is the
7 norm --

8 JUSTICE GORSUCH: And if we're looking
9 at what the APA was trying to do as a -- a -- as
10 a -- as a floor -- again, I'm not disputing that
11 there are other examples -- but why would it be
12 irrational to think that that's what Congress
13 had in mind? That's my question.

14 MR. SNYDER: I -- so just as a point
15 of clarification, in Reading Company, the
16 statute just used the word "accrued."

17 JUSTICE GORSUCH: I understand.

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

20 JUSTICE GORSUCH: If you could answer
21 my question.

22 MR. SNYDER: So my friend pointed out
23 that at the time the APA and Section 2401(a)
24 were adopted, there were other statutes dealing
25 with administrative review provisions, and those

1 statutes ran from the time of agency action.

2 If you look at 21 U.S.C. 37 -- or 371
3 --

4 JUSTICE GORSUCH: Okay. I got it. I
5 got it. And -- and just flipping back to the
6 question that we had earlier with your friend on
7 the other side, if we were to interpret the word
8 "accrue" to mean the moment of the agency's
9 action, what's the consequence for as-applied
10 challenges? Put aside, again, enforcement
11 because that's, you know, in a criminal
12 proceeding or an enforcement proceeding. Here,
13 it's an APA challenge, and there's no
14 distinction in the statutory text between
15 as-applied and facial challenges.

16 And I understand courts of appeals for
17 years have said as-applied challenges may
18 proceed without carefully looking at the word
19 "accrue" either.

20 MR. SNYDER: I -- so I think the
21 difference is which action is being challenged.
22 The reason you can raise a challenge in the
23 as-applied context is that the final agency --
24 the final agency action that you're challenging
25 is the agency action actually applying the

1 regulation. And so you're bringing your
2 challenge less than six years after the final
3 agency action occurred.

4 The -- what you can't do is go back
5 and challenge a regulation that was adopted
6 decades ago.

7 JUSTICE GORSUCH: I -- I --

8 JUSTICE KAGAN: Mr. Snyder, may -- may
9 I ask, what is the coverage of this provision?
10 In other words, you've noted that there are many
11 statutes that deal with particular kinds of
12 agency action. So what's left over other than
13 this regulation? What's the world of things
14 that this decision will matter to? Is it small,
15 is it medium-sized, is it large? What's in it?

16 MR. SNYDER: So I think it is
17 relatively large in the sense that the general
18 APA cause of action applies to a -- a broad
19 range of government claims. Is that -- I'm not
20 -- I don't know exactly how to quantify that,
21 but I think it is true that --

22 JUSTICE KAGAN: But what kinds of
23 claims? From what kind of agencies? What is
24 not -- what are we -- what is not at issue here?

25 MR. SNYDER: I -- I can't give you a

1 precise answer on that. I mean, I -- I can
2 point you to the special statutory review
3 provisions that we've identified in Footnote 4
4 of our brief. Candidly, we got to a page-long
5 footnote and stopped, so there are a lot of
6 other special statutory review provisions that
7 all use "accrual" in exactly the same way.

8 I -- I mean, I think looking at a
9 survey of this Court's cases and thinking about
10 how often the Court encounters challenges in the
11 context of an APA claim indicates that it's a
12 pretty broad category of cases, but I don't have
13 sort of precise contours I can draw.

14 JUSTICE KAVANAUGH: But how much will
15 it matter kind of in the real world? Because,
16 when you have a regulation that has some
17 defects, it's probably going to be challenged
18 sooner rather than later by someone. And then,
19 if -- if it's held invalid, it usually will get
20 to this Court, which will provide, you know, a
21 final answer on that question.

22 So coming in more than six years later
23 is not a -- typically a winning strategy for
24 challenging a rule. So just kind of real-world
25 implications, picking up on Justice Kagan's

1 point.

2 MR. SNYDER: So I -- I think one of
3 the real-world implications to highlight is that
4 this doesn't just apply in the context of
5 regulations. I mean, their rule would apply in
6 the context of a permit issued to operate a dam.
7 And on their theory, someone who travels out
8 west for the first time to go see the snail
9 darter can say, I -- I've never been here
10 before, I've never been affected by this dam,
11 and so I'm going to mount an APA challenge to
12 that permit that was issued 20 years ago to
13 allow the -- the dam to continue operating.

14 I think that type of application
15 extrapolated across the entire federal
16 government and all of the final agency actions
17 that the government engages in outside of the
18 context of rulemaking, it's pretty hard to
19 overstate the significance of allowing those
20 challenges to be brought more than six years
21 later.

22 JUSTICE KAVANAUGH: And then thinking
23 about what Congress was getting at here, I'm not
24 sure it was really getting at this issue at all
25 because six years is an extremely long time to

1 begin with to challenge a regulation. So, I
2 mean, I don't -- I don't know that they were
3 thinking about this context. We just have to
4 apply the text as it is, but I -- I'm --

5 MR. SNYDER: I -- so -- I -- Justice
6 Kavanaugh, I think I agree with you in the sense
7 that 2401(a) is a catch-all statute of
8 limitations. Congress adopted it as a backstop.
9 It erred on the side of caution in setting a
10 lengthy six-year term.

11 But, in understanding how to apply
12 that catch-all statute of limitations to
13 particular types of claims, I think the way to
14 show fidelity to Congress's intent and
15 Congress's expectations is to look at how
16 Congress has approached accrual when it's dealt
17 with similar claims of the same type.

18 JUSTICE KAVANAUGH: But -- but
19 Congress could easily -- this is an obvious
20 point, but Congress could easily do that across
21 the board for agency actions and certainly would
22 do something shorter than six years if it did
23 because repose has been thrown around here.

24 The -- six years doesn't give you much
25 repose to begin with if you're the government,

1 at least unless this Court has -- has ruled on
2 the issue.

3 MR. SNYDER: So I -- I mean, I think,
4 of course, six years is better than six decades,
5 which, I mean, that's not even a limit on my
6 friend's rule. So I -- I do think that six
7 years meaningfully -- meaningfully protects repose
8 interests.

9 And that lengthy term accounts, again,
10 for the fact that this covers a broad range of
11 claims. Even outside the administrative law
12 context, I mean, there are any number of other
13 types of claims that are subject to Section
14 2401.

15 JUSTICE KAVANAUGH: Right. Okay. One
16 other question, on a -- the petition for
17 rulemaking that you mentioned, would you
18 acknowledge that the standard of judicial review
19 for the denial of that would be not the same as
20 in a direct challenge to the rule?

21 MR. SNYDER: Yes, I think that's
22 right. And that's by --

23 JUSTICE KAVANAUGH: And that's the
24 problem.

25 MR. SNYDER: I -- one would -- one

1 from my position would say that's what Congress
2 has chosen.

3 JUSTICE KAVANAUGH: Yeah.

4 MR. SNYDER: And to say that because
5 Congress has chosen a petition for rulemaking
6 process that is deferential, the Court should
7 instead allow challenges to things that happened
8 decades ago, I -- I don't think that really
9 follows.

10 And I do think that this case is a
11 good illustration of the odd fit that this sort
12 of claim is in a context brought a decade after.
13 If you look at the complaint, it's full of
14 references to, you know, cost data from 2013,
15 2015, 2017, 2019. But all of that data is
16 completely irrelevant if they're right that --
17 the -- that they can go forward on a challenge
18 to the rule as it was adopted in 2011.

19 It makes far more sense to handle this
20 kind of challenge in the context of a petition
21 for rulemaking, where the agency can actually
22 take account of experience with the rule and
23 decide what makes sense going forward.

24 JUSTICE ALITO: Well, that just --

25 JUSTICE BARRETT: Mr. --

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

4 MR. SNYDER: I -- I -- I'm not -- I --
5 so my point is not that the claim would fail. I
6 mean, they -- they have other arguments about
7 the law. We -- we think that -- those arguments
8 would fail too.

9 But my point about the intervening
10 information is that they have thought that
11 information is relevant to showing something
12 about this rule, and yet, in the procedural
13 mechanism they are using here, that information
14 is completely irrelevant. That suggests that
15 maybe it's not the right procedural mechanism.

16 JUSTICE ALITO: When -- when I read
17 your brief in opposition, I came away with the
18 impression that this case would not have a broad
19 practical effect. You say on page 11 that --
20 that "it's relatively uncommon" -- "it's a
21 relatively uncommon circumstance for a person
22 who was not injured when the rule was
23 promulgated to become injured at a later date."

24 But then I got a very different
25 message from your brief on the merits when you

1 say that accrual -- "the Petitioner's approach
2 to accrual under 2401(a) would substantially
3 expand the class of potential challengers and
4 thereby increase the burdens on agencies and
5 courts."

6 So what accounts for this different
7 message?

8 MR. SNYDER: So I think it's a -- a
9 difference in the -- the focus. At the -- at
10 the cert stage, the -- the point we were making
11 was --

12 JUSTICE ALITO: That we shouldn't take
13 the case because it wasn't a big deal. But
14 after we took it --

15 (Laughter.)

16 MR. SNYDER: Our point was that there
17 aren't a lot of -- of plaintiffs in Petitioner's
18 position as compared to plaintiffs who can bring
19 the challenge. I think that is empirically a
20 correct statement.

21 If you think about this case, for
22 example, the challenge that was brought to
23 Regulation II back in 2011 was brought on behalf
24 of tens of thousands of merchants.

25 My friend is here at this point

1 representing just one plaintiff. So it's true
2 that the numbers are different, but my friend,
3 as he said, is seeking exactly the same relief
4 that those entities sought back in 2011. And
5 so, from the government's perspective, allowing
6 this exception, even though it's only going to
7 benefit a relatively small number of plaintiffs,
8 would have really far-reaching effects.

9 JUSTICE KAGAN: Mr. Snyder --

10 JUSTICE ALITO: But 2401 -- 2401 is a
11 very broad statute that applies to every civil
12 action against the United States, and as I
13 understand your argument, you want us to say
14 that the term "accrue" means something different
15 in different contexts.

16 Have we ever said anything like that?

17 MR. SNYDER: So I think the Court said
18 basically that in Crown -- Crown Coat Front
19 Company, interpreting 2401. It said that
20 "accrues" is a general word, that it's hazardous
21 to try to give it one definition for all
22 purposes and that instead you have to interpret
23 it in -- in the light of the specific statute at
24 issue.

25 And if I could point you to Section

1 2401(b), which is the provision governing tort
2 claims against the United States, that similarly
3 uses the word "accrues," and the Court has
4 acknowledged in that context that different
5 claims are subject to different accrual rules.

6 So, in United States versus Kubrick,
7 the Court said that most tort claims against the
8 United States accrue at the time of injury but
9 that some accrue at the time the injury is
10 discovered in the context of medical
11 malpractice, for example.

12 So the Court has acknowledged that
13 "accrues" can lead to different accrual rules
14 for different kinds of claims.

15 JUSTICE KAGAN: An argument that Mr.
16 Weir makes is that if this were all so
17 destabilizing, as you suggest, we would have
18 seen that already because there can always be
19 enforcement actions in which a party can defend
20 itself by saying that the rule is invalid.

21 So why hasn't that -- what -- why is
22 this so much more destabilizing than that sort
23 of regime?

24 MR. SNYDER: Because I -- first of
25 all, this applies in contexts where there aren't

1 going to be enforcement proceedings, so, for
2 example, the permit context that I mentioned.
3 His rule would apply in that context, and I
4 think that alone would make it pretty
5 destabilizing.

6 But I also think it's just the case
7 that there are far fewer enforcement actions
8 than there are regulated entities, and so
9 allowing every -- every new regulated entity to
10 bring a facial challenge would significantly
11 expand the number of claims that you would see.

12 The other -- the other point that my
13 friend has made about why you shouldn't think
14 this is going to lead to bad results is that
15 there's been experience in the Sixth Circuit. I
16 do want to address that.

17 I -- the Sixth Circuit, courts in the
18 Sixth Circuit have not understood Herr to adopt
19 the rule that my friend is arguing for, and the
20 best evidence I can give you of that is that a
21 newly incorporated pizzeria filed suit against
22 Regulation II in Kentucky in 2022, and the
23 court, applying Herr, said that claim,
24 materially identical to this one, is untimely
25 because Herr dealt with as-applied challenges as

1 opposed to facial challenges like this one.

2 So there's just nowhere in the country
3 that you can look to see what my friend's rule
4 would look like.

5 JUSTICE JACKSON: And, Mr. --

6 JUSTICE BARRETT: Mr. Snyder --

7 JUSTICE JACKSON: Oh. Go ahead.

8 JUSTICE BARRETT: -- is -- is your
9 rule of accrual completely disaggregated from
10 injury? Because you agree, right, as a matter
11 of the APA and Article III that a plaintiff
12 can't actually even bring a suit unless the
13 plaintiff has been injured, right?

14 MR. SNYDER: Yes. That -- that's
15 true. I mean, our accrual rule is the same
16 accrual rule that Congress has called for in the
17 context of the Hobbs Act.

18 JUSTICE BARRETT: I know, I know, I
19 know, I know. But we're talking about 2401.
20 And -- and in Crown Point, the entitlement to
21 payment didn't arise until at the point where we
22 said it accrued. So, I -- I -- you know,
23 there's language in Crown Point that helps you,
24 but on the actual facts of the case, that was
25 when the injury was complete.

1 And so -- but -- but what I want to
2 know is, would this be the only time for
3 purposes of 2401, as -- as opposed to things
4 like the Hobbs Act, where we would have
5 interpreted "accrue" to be separate from injury?
6 Like, what if the government delayed enforcement
7 and there wasn't an injury yet, for example?

8 MR. SNYDER: I -- so -- I -- I'm not
9 aware of another case in which this Court has
10 interpreted 2401(a) to sort of go in either
11 direction. I mean, in Crown Coat Front Company,
12 the -- the accrual point was both the point of
13 injury and the time of agency action. So we're
14 not suggesting that Crown Coat Front Company by
15 its holding resolves it between those two.

16 JUSTICE BARRETT: Mm-hmm.

17 MR. SNYDER: As to a case where there
18 was no -- where there was delayed enforcement, I
19 mean, I think the whole idea of pre-enforcement
20 review is that a -- a plaintiff can bring suit
21 even -- even if they are not yet subject to
22 enforcement actions. And so I don't think that
23 that would prevent someone from bringing a
24 challenge when the regulation was first adopted.

25 JUSTICE BARRETT: But injury isn't

1 part of the calculus. It's really just
2 finality?

3 MR. SNYDER: So, yes, we -- we think
4 that's true for the APA just as it's true for
5 other --

6 JUSTICE JACKSON: And -- and doesn't
7 it have to be that way? Because I guess I'm
8 trying to understand when the injury would occur
9 under their theory with respect to the
10 promulgation of the rule, right? I mean, the
11 claim under an APA case in this way is that the
12 rule was promulgated in an invalid way.

13 So I'm trying to understand when the
14 plaintiff would be injured if we're going to go
15 with an injury theory. I don't even know when
16 that would happen really.

17 Can you speak to that?

18 MR. SNYDER: I mean, I think they
19 would say that they were injured for the first
20 time when they felt the effects of the rule. So
21 I think they would say, I mean, what the --

22 JUSTICE JACKSON: But they came into
23 the environment, the rule was already in
24 existence. So I guess it was the day they were
25 incorporated?

1 MR. SNYDER: I -- so they have -- they
2 have said it's not the date they were
3 incorporated. They've said it's the day they
4 opened the doors for business. I don't know why
5 on their -- their understanding of the accrual
6 rule it wouldn't be the day in which they --

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

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

14 JUSTICE JACKSON: And it's because
15 their claim is about the promulgation of the
16 rule, which happened before they existed,
17 whereas an as-applied claim, as I understand
18 your argument to be, would be that, you know,
19 it's when the rule was applied to them. Then
20 everybody has a clear date and we understand
21 that the clock starts at that point.

22 But this is a different kind of claim,
23 so I don't understand when the injury would
24 occur in this situation.

25 MR. SNYDER: I -- I think that's

1 right. I think it would be really difficult to
2 figure out exactly at what point on their theory
3 they could actually bring suit.

4 JUSTICE ALITO: Well, Mr. Snyder, I'm
5 not --

6 JUSTICE KAVANAUGH: Isn't it when the
7 --

8 JUSTICE ALITO: I -- I -- I'm having a
9 little trouble understanding your answer, but
10 probably I'm -- I'm not understanding it
11 correctly. Is it your argument that a facial
12 challenge to a statute or a rule always accrues
13 at the time of the adoption of the statute or
14 rule and that once the statute of limitations
15 has passed, no one can bring a facial challenge
16 to that statute or rule?

17 MR. SNYDER: So I -- I think the
18 statutory context is different because there is
19 no --

20 JUSTICE ALITO: All right. Forget the
21 statute. A regulatory context.

22 MR. SNYDER: So, in the regulatory
23 context, yes. Our position is, once the
24 regulation has been adopted, there is a six-year
25 period to challenge the final agency action

1 adopting the regulation. And after that point,
2 there's -- there's not an opportunity to bring a
3 facial challenge. It can be challenged in the
4 context of enforcement proceedings.

5 JUSTICE ALITO: All right. Well,
6 let's say there was a regulation that said that
7 only men can be admitted to one of the military
8 academies, and after the statute of limitations
9 has run, a woman applies, wants to be admitted
10 to a military academy, and you would say it's
11 too late for -- for her to bring a facial
12 challenge to that?

13 MR. SNYDER: We would say that if she
14 applies to the military academy and is denied
15 admission, that at that point there is an
16 application of the regulation to her and that
17 she can raise substantive challenges to the
18 regulation in that context.

19 JUSTICE ALITO: What's the difference
20 between that and the situation of Corner Post,
21 other than the fact that they are indirectly
22 hurt rather than being directly hurt?

23 MR. SNYDER: I -- I -- I -- I mean, I
24 think the difference is that in that case, there
25 is a subsequent final agency action that

1 provides the -- the focus and that is within the
2 last six years, whereas, on their theory,
3 there's no final agency action that they're
4 pointing to.

5 JUSTICE KAVANAUGH: In Justice
6 Jackson's questions, I would have thought it
7 starts running the day they open the business.

8 MR. SNYDER: I -- so, Justice
9 Kavanaugh, I don't think --

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

13 MR. SNYDER: So I think that if they
14 wanted to challenge suit before they opened
15 business -- the doors for business, what they'd
16 say is, we have concrete plans to accept debit
17 cards.

18 JUSTICE KAVANAUGH: Okay. So they --
19 yeah, I take that point.

20 MR. SNYDER: I mean, I think, like,
21 I'm not saying it's impossible to figure that
22 out.

23 JUSTICE KAVANAUGH: Maybe a little bit
24 before. Maybe a little bit before, but you'd
25 have to make a showing there, I think, to -- to

1 get in the door in that context, right?

2 MR. SNYDER: Well, I -- I think more
3 problematically, it's not they who would have to
4 make that showing. I mean, ordinarily, in an
5 APA -- case, they would come forward and say we
6 have concrete plans to accept debit cards as of
7 today and so we can bring the challenge. That's
8 easy.

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

13 Again, I'm not saying that's
14 impossible.

15 JUSTICE KAVANAUGH: Yeah. That's --

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

17 JUSTICE KAVANAUGH: I mean, that's a
18 pretty in-the-weeds debate, but -- and -- and I
19 don't think that arises -- that would -- would
20 arise that often, but maybe I'm wrong about
21 that.

22 Let me ask a question about the
23 Article III standing point that was raised just
24 to make sure we're on the same page on that. My
25 understanding is the day a rule is adopted and

1 you're a regulated party, even if nothing's
2 happened to you by the agency, you have standing
3 to go in to sue. That happens all the time,
4 right?

5 MR. SNYDER: That's my understanding
6 too, yes.

7 JUSTICE KAVANAUGH: Okay. And if
8 you're not a regulated party but, you're an
9 affected party, which is a big swath of ad law,
10 you also, if you can show you're an affected
11 party in some way, have standing to sue an
12 injury on the day the rule is promulgated?

13 MR. SNYDER: I agree with that too.

14 JUSTICE KAVANAUGH: Okay.

15 CHIEF JUSTICE ROBERTS: What -- what
16 do you -- how -- how do those -- your answers
17 apply if it's a corporation that wasn't
18 incorporated until seven years, you know, rather
19 than six years? Would you still say they --
20 they have standing?

21 MR. SNYDER: Yes. We -- we don't
22 dispute that they have standing. We just think
23 that their -- their claim is untimely.

24 I do, if -- if I could, want to come
25 to the final sentence of --

1 JUSTICE BARRETT: Can I just follow up
2 on the Chief's question? What if they were
3 thinking about incorporating, but they haven't
4 yet incorporated and they're still within the
5 six-year period, and part of whether they
6 incorporate and go into business depends on the
7 structure of the industry and whether this rule
8 is going to help? No standing, right?

9 MR. SNYDER: I think that's right. I
10 mean, there -- there's no case law I can point
11 you to on this because no court in the country
12 has applied their rule. I mean, I think
13 adopting their rule would open the Court up to
14 all sorts of really thorny questions, however
15 far down in the weeds they might be. I think
16 those questions just haven't been explored.

17 JUSTICE KAVANAUGH: But those
18 questions -- I mean, those questions come up in
19 other contexts. Where is the business really
20 operating? Is it a phony challenge to an -- I
21 mean, I've seen that before, so, I -- I mean,
22 maybe.

23 JUSTICE BARRETT: Mr. Snyder, would
24 this rule have effects -- Justice Alito in his
25 hypothetical started to ask you about a statute

1 and then switched and was focused on rule. So
2 2401 is the all-purpose statute of limitations.

3 I'm just wondering, is your argument
4 that we should interpret "accrue" this way
5 because, in the administrative law context and
6 because of the Hobbs Act and all these
7 specialized statutes, a statute of repose-style
8 accrual is -- makes more sense? Would there be
9 spillover effects in, say, you know, hey, I'm
10 sure Congress would prefer all challenges to a
11 statute to be adjudicated right away. Would
12 there be spillover effects?

13 MR. SNYDER: I don't think there would
14 be spillover effects. You're right that a
15 primary part of our argument, the primary part
16 of our argument is the Hobbs Act and the other
17 special statutory review -- review provisions
18 establishing the standard rule in this context.
19 And so it -- it applies sort of here as well.

20 I -- we also have an argument about
21 the final sentence of Section 702 that we
22 haven't discussed.

23 But the -- the last reason that I -- I
24 don't think it would spill over to statutes is
25 the challenges to statutes are -- are

1 necessarily -- may I finish the sentence?

2 CHIEF JUSTICE ROBERTS: Sure.

3 MR. SNYDER: -- are necessarily
4 constitutional, and so the Court has allowed
5 claims against the validity of statutes outside
6 of the context of a final agency action
7 requirement, as in the APA.

8 CHIEF JUSTICE ROBERTS: Thank you.

9 Justice Thomas?

10 Justice Alito?

11 JUSTICE SOTOMAYOR: Just a couple
12 follow-up.

13 You mentioned the permitting process
14 as being one that would be unraveled by this new
15 rule. Are there other areas that you haven't
16 mentioned?

17 MR. SNYDER: I -- I -- I mean, I think
18 similar areas like that, so land management
19 plans, other things like that that are not
20 regulations but are instead actions that the
21 government has taken in carrying out all of the
22 -- the many functions that Congress has
23 entrusted to it. Land sales, land leases,
24 things like that.

25 I don't know exactly how their rule

1 would apply in those circumstances, but I think
2 it's at least plausible to think that it would
3 apply to all of those. I don't know why it
4 wouldn't on its logic. And I -- again, I think
5 that would be destabilizing.

6 JUSTICE SOTOMAYOR: And, number two,
7 opposing counsel, in answering Justice Barrett,
8 said that procedural challenges would not
9 happen. But, in your brief, you suggested they
10 would. Could you tell me why their concession
11 is not convincing to you?

12 MR. SNYDER: Well, I mean, we said our
13 brief -- we said it in our brief before they had
14 made that concession. They -- they hadn't said
15 that until the reply brief. And their complaint
16 includes procedural challenges. If you look at
17 paragraphs 93 and 95 of their complaint, they
18 include arguments that the agency failed to
19 provide a reasoned explanation of Regulation II
20 and that the record before the agency wasn't
21 sufficient to support it.

22 So I -- I'm glad that they're willing
23 to give up procedural challenges, but we hadn't
24 anticipated that before.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

4 There is obviously another big
5 challenge to the way courts review agency action
6 before this Court. Has the -- has the Justice
7 Department and the agencies considered whether
8 there is any interaction between these two
9 challenges? And, again, you -- you know, if
10 Chevron were reinforced, were affirmed, if
11 Chevron were reversed, how does that affect what
12 you're talking about here?

13 MR. SNYDER: So I want to be careful
14 here. I mean, we, of course, have thought about
15 it. I think what I'd say is that a decision for
16 Petitioner here would magnify the effect of any
17 other decisions changing the way that this Court
18 or other courts have approached administrative
19 law questions, because it would -- it -- it
20 would potentially mean that those changes would
21 then be applied retroactively to every
22 regulation that an agency has adopted in the
23 last, I don't know, 75 years or something.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch?

1 Justice Kavanaugh?

2 JUSTICE KAVANAUGH: One follow-up
3 question on something you said earlier. This is
4 also about future effects on standing.

5 You -- they ask in this suit to set
6 aside the rule. Your position, the Solicitor
7 General's position, is that that can't be done
8 under the APA. If you can't set aside the rule
9 and you're not a regulated party, how is their
10 injury redressable in this suit and why do they
11 have standing?

12 MR. SNYDER: So I -- I think our
13 position has been that courts are only able to
14 provide relief to the party before them and that
15 ordinarily they --

16 JUSTICE KAVANAUGH: How would that be
17 done in a circumstance like this?

18 MR. SNYDER: So I -- I think -- and
19 I'm -- I'm a -- little hesitant to say this --
20 but I think that in this circumstance, it's
21 possible that the only way to provide this party
22 relief would be vacatur. I -- I'm not certain
23 that that's right, but I think that's possible.

24 JUSTICE KAVANAUGH: I -- I think
25 that's probably right, which was why I was

1 surprised when you said what you said, that if
2 you don't have the set-aside remedy, they
3 probably don't have standing here.

4 MR. SNYDER: So I -- I think the
5 reason is that the -- the power that the Court
6 has under the APA is to provide relief to the
7 party before it, not more broadly. And it's
8 possible that in circumstances where the only
9 way to give the party before the court relief is
10 vacatur, that that would be consistent with
11 traditional equitable considerations in a way
12 that providing vacatur in other cases is not.

13 JUSTICE KAVANAUGH: Well, that's a new
14 twist.

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

17 (Laughter.)

18 MR. SNYDER: So, to the extent that is
19 --

20 JUSTICE KAVANAUGH: Okay. I'll --
21 I'll review the transcript. Thank you.

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: No.

1 CHIEF JUSTICE ROBERTS: Justice
2 Jackson?

3 JUSTICE JACKSON: So just one
4 question. The Chief mentioned the sort of
5 common intuition that everybody gets their day
6 in court, and I understand that and agree in a
7 general sense.

8 But there's also the intuition that
9 the Court sometimes talks about the importance
10 of finality, and it seems to me that in this
11 particular scenario, finality principles should
12 be playing a significant role.

13 So can you just speak to -- this has
14 come up a couple times, but why a new company
15 that has been born into a particular regulatory
16 environment, why should they be entitled to
17 appear on the scene and potentially unsettle all
18 of the long-established rules and expectations
19 that govern all of the other companies that
20 exist in that space?

21 MR. SNYDER: So, of course, we don't
22 think they should. And -- and I think -- I
23 mean, any statute of limitations is always
24 balancing the interest in judicial review on the
25 one hand and the interest in repose on the

1 other.

2 And I think, in the context of
3 administrative law challenges to agency action,
4 both of those considerations sort of point in
5 the direction of accrual at the time of agency
6 action because the new entrant to the market
7 knows what it's getting into. So its interest
8 in having its day in court is less than it might
9 be in some other contexts.

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

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Rebuttal, Mr. Weir?

23 REBUTTAL ARGUMENT OF BRYAN K. WEIR

24 ON BEHALF OF THE PETITIONER

25 MR. WEIR: Thank you. Just a few

1 points. At the outset, the challenges that --
2 that my friend discussed are not procedural.
3 Those are State Farm substantive challenges that
4 we have in our complaint. Those are available
5 in as-applied contexts. We think they will be
6 available if -- if the Court sides with us.

7 On the question of when an APA claim
8 first accrues, we think the statute tells you.
9 It says in the past tense or you're already
10 being affected, you're already harmed. We think
11 that when you first are harmed by the regulation
12 is when it starts.

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

20 But, in any event, the difference
21 between when an injury is imminent and when it's
22 actual is -- is typically very small, and six
23 years into the future, it's really not going to
24 matter when the statute of limitations runs. We
25 think it's a rare case where that's going to

1 actually matter.

2 As far as the -- the -- the concern
3 about the APA being the only accrual-based
4 statute in the regulatory context, we think that
5 makes sense. The APA is the background rule.
6 You would only pass an agency-specific rule to
7 deviate from that background, so there would be
8 no real -- no real reason to pass an
9 agency-specific rule.

10 And, again, Congress knows exactly how
11 to -- to -- to pass a repose-based statute. It
12 did it before the APA. It did it after the APA.
13 We think that's an intentional choice, and it's
14 done it many times since.

15 And -- and the idea that because
16 Congress has done it that way for some
17 regulations that we should apply that rule to --
18 to -- to 2401(a) I think upsets basic
19 interpretive principles. When Congress makes
20 different choices, it expects different rules.

21 Finally, I -- I think the government
22 is asking really for a special exception that
23 would upset a lot of this Court's precedent.
24 You would have to either undermine -- it would
25 undermine the reasoning or flatly overrule the

1 Court's precedents applying accrual-based
2 statutes of limitations, including this Court's
3 decision in Gabelli, where it interpreted this
4 exact same language as -- as meaning what we say
5 it means, and also undermine this Court's
6 holding in Franconia, where the -- where the
7 Court -- where the government asked for special
8 rules under -- under, again, the exact same
9 language in the "Big" Tucker Act under first
10 accrues and -- and the government and -- and
11 this Court said that it should apply the exact
12 same as it does to private parties.

13 And to the extent there -- there is
14 some problem here, this Court said in Rotkiske
15 just five years ago it is Congress's job to
16 change the text of this statute, not this
17 Court's.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. The case is submitted.

21 (Whereupon, at 11:12 a.m., the case
22 was submitted.)

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24

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