SUPREME COURT
OF THE UNITED STATES

IN THE 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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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.

C O N T E N T S

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

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

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

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

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

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

I welcome the Court's questions.

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

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

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

MR. WEIR: So --

JUSTICE THOMAS: -- where the injury is later?

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

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

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

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

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

JUSTICE THOMAS: Yes.

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

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

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

That's what I'm interested in.

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

JUSTICE THOMAS: Yes.

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

JUSTICE THOMAS: Okay. So --

MR. WEIR: But that --

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

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

JUSTICE THOMAS: So that's the only one?

MR. WEIR: Well, every -- the lower

courts have rejected our reading of 2401.

JUSTICE THOMAS: Yeah.

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

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

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

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

you knew it going in.

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

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

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

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

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

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

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

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

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

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

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

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

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

actually looked at the text of 2401 or 702. None of them did.

And then the pathmarking decision I --

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

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

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

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

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

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

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

And that language that you just quoted

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

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

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

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

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

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

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

Why am I wrong about that?

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

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

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

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

JUSTICE JACKSON: Mm-hmm.

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

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

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

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

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

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

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

as other types of cause of action.

JUSTICE GORSUCH: Counsel --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: Is that your --

JUSTICE GORSUCH: For --

JUSTICE SOTOMAYOR: I'm sorry.

JUSTICE GORSUCH: No, please.

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

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

MR. WEIR: Well, we think --

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

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

government as contesting those.

But even if --

JUSTICE SOTOMAYOR: That's very hard to prove.

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

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

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

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

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

JUSTICE GORSUCH: Counsel --

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

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

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

MR. WEIR: That's correct.

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

MR. WEIR: That's correct.

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

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

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

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

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

MR. WEIR: I think I agree with that.

JUSTICE GORSUCH: Okay. And then I have --

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

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

MR. WEIR: I do.

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

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

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

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

MR. WEIR: That's correct.

JUSTICE GORSUCH: Is that a fair summary of it?

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

JUSTICE GORSUCH: Okay. All right. Thank you.

JUSTICE KAGAN: If -- if --

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

JUSTICE GORSUCH: Thank you.

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

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

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

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

MR. WEIR: I think that's right.

JUSTICE GORSUCH: Yeah.

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

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

is applied just how we want.

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

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

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

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

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

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

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

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

Justice Kagan?

Justice Gorsuch, any?

Justice Kavanaugh?

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: Right.

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

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

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

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

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

JUSTICE KAVANAUGH: Yeah.

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

The procedural challenges are out, am I right?

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

JUSTICE BARRETT: Are --

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

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

MR. WEIR: Those are substantive. And

-- and you --

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

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

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

MR. WEIR: It is.

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Snyder.

ORAL ARGUMENT OF BENJAMIN W. SNYDER

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

instead are faithfully following Congress's lead.

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

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

I welcome the Court's questions.

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

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

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

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

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

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

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

JUSTICE GORSUCH: Counsel --

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Like what?

MR. SNYDER: So --

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

What else is there?

MR. SNYDER: So the other option is

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

My friend --

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

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

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

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

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

after the regulation was adopted.

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

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

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

CHIEF JUSTICE ROBERTS: Well, I --

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

(Laughter.)

MR. SNYDER: So --

CHIEF JUSTICE ROBERTS: Thanks.

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

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

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

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

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

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

doesn't seem to be very helpful to you.

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

JUSTICE GORSUCH: Right.

MR. SNYDER: But I do want --

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

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

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

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

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

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

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

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

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

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

JUSTICE GORSUCH: Certainly, there are

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

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

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

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

JUSTICE GORSUCH: I understand.

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

JUSTICE GORSUCH: If you could answer my question.

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

statutes ran from the time of agency action.

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

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

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

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

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

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

JUSTICE GORSUCH: I -- I --

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

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

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

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

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

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

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

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

point.

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: And that's the problem.

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

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

JUSTICE KAVANAUGH: Yeah.

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

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

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

JUSTICE ALITO: Well, that just --

JUSTICE BARRETT: Mr. --

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

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

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

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

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

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

So what accounts for this different message?

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

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

(Laughter.)

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

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

My friend is here at this point

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

JUSTICE KAGAN: Mr. Snyder --

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

Have we ever said anything like that?

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

And if I could point you to Section

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

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

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

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

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

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

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

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

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

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

opposed to facial challenges like this one.

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

JUSTICE JACKSON: And, Mr. --

JUSTICE BARRETT: Mr. Snyder --

JUSTICE JACKSON: Oh. Go ahead.

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

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

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

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

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

JUSTICE BARRETT: Mm-hmm.

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

JUSTICE BARRETT: But injury isn't

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

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

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

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

Can you speak to that?

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

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

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

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: Isn't it when the --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

get in the door in that context, right?

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

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

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

JUSTICE KAVANAUGH: Yeah. That's --

MR. SNYDER: I'm just saying --

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

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

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

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

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

MR. SNYDER: I agree with that too.

JUSTICE KAVANAUGH: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

necessarily -- may I finish the sentence?

CHIEF JUSTICE ROBERTS: Sure.

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

CHIEF JUSTICE ROBERTS: Thank you.

Justice Thomas?

Justice Alito?

JUSTICE SOTOMAYOR: Just a couple follow-up.

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

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

I don't know exactly how their rule

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

Justice Kavanaugh?

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

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

(Laughter.)

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: No.

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

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

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

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

other.

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

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

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Mr. Weir?

REBUTTAL ARGUMENT OF BRYAN K. WEIR

ON BEHALF OF THE PETITIONER

MR. WEIR: Thank you. Just a few

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

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

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

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

actually matter.

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

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

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

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

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

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

Thank you.

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

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