

William Crowther

Associate
907.865.2619
Anchorage
WRCrowther@hollandhart.com



Andrew Wheeler

Partner and Head of Federal Affairs
202.654.6936
Washington, DC
arwheeler@hollandhart.com

SCOTUS Curbs Agency Power, Empowering Businesses in Four Admin Law Cases

Insight — July 24, 2024

In the final days of the US Supreme Court's session, the Court issued four rulings taking the side of the regulated community against federal agencies. While the implications of these cases could take several years to fully ascertain, the Court has systematically pushed back against the authority of federal regulatory agencies and this could have significant ramifications for both regulations and enforcement actions. Together these four cases have realigned the dynamic between the regulated community and federal agencies.

Here are the key takeaways:

1. *SEC v. Jarkesy* gives the right to a jury trial to the accused in certain agency civil enforcement proceedings, allowing regulated parties to avoid the home court advantage agencies arguably have during in house enforcement proceedings.
2. *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* establishes a business-friendly approach to the Administrative Procedure Act (APA) default statute of limitations, allowing new entities to challenge many old rules on their face.
3. *Loper Bright Enters. v. Raimondo* overrules *Chevron* deference, instead requiring judges to give statutes their best reading, defaulting emphatically to the APA while opening challenges to many agency-favorable rules based only on a “permissible” reading of statutory text.
4. *Ohio v. Environmental Protection Agency* chastised the EPA for not providing a reasoned explanation to relevant public comments, making agencies more likely to grapple with future comments and empowering rule challengers when agencies fail to adequately respond. Additionally, the Supreme Court's close review of the merits of the case, while granting a stay of the rule, signals an increasing judicial willingness to pause suspect agency rules.
5. Each of these cases curbs agency power while giving the regulated community additional leverage. *Corner Post* and *Loper Bright* in particular have a synergistic effect by expanding the universe of potential challengers while requiring courts to hold agencies to their statutory text.

Jarkesy

In *SEC v. Jarkesy*, the Court held that a U.S. Securities and Exchange Commission (SEC) enforcement action seeking civil penalties under the

SEC's antifraud provisions implicated the Seventh Amendment and required that Jarkesy be given a right to a jury trial. Historically, the SEC had been required to bring these antifraud actions in federal court. However, the Dodd-Frank Act, passed in 2010, allowed these potent civil penalties to be pursued in "in-house proceedings," often in front of Administrative Law Judges (ALJs). Many commentators have criticized these ALJs as being biased in the SEC's favor, giving the SEC a "home court advantage." One study, quoted in the concurrence by Justice Gorsuch and Justice Thomas, reported that the SEC prevailed in 90% of contested in-house proceedings compared to 69% in courts.

The reach of this ruling beyond the SEC's antifraud provisions is uncertain, as the "public rights" exception to the Seventh Amendment remains, and the Court declined to clearly explain its reach, while suggesting that government enforcement actions which are rooted in "common law soil" such as fraud, are "private rights" implicating the right to a jury trial. To the extent *Jarkesy* applies, individuals and businesses targeted by government enforcement could take agencies out of their home courts and potentially gain leverage by demanding a jury of their peers, which may lead to more settlements tilted towards defendants.

Corner Post

In *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, the Court held that the right to bring a facial challenge to an agency rule under the APA accrues when the plaintiff has the right to pursue relief, aiding new plaintiffs seeking to challenge old rules. *Corner Post* involved a recently incorporated North Dakota truck stop's attempt to challenge a Federal Reserve Board rule published in 2011 as inconsistent with its governing statute. The Rule, which in Corner Post's view allowed debit card payment processors like Visa or Mastercard to gouge merchants with impermissibly high processing fees, had previously been challenged, and upheld by the D.C. Circuit as resting on a "reasonable construction" of the statute. Corner Post's facial challenge ran into a roadblock when the Eighth Circuit held that it was barred by the statute of limitations because six years had passed since the promulgation of the rule in 2011, deepening a circuit split.

In response, the Supreme Court held that the text of the default statute of limitations provision clearly reflected the standard approach to statute of limitations, and that the clock does not begin to run when the rule in question is finalized, but instead when the alleged injury begins harming the potential challenger. While regulated parties have long had the ability to challenge older rules in enforcement proceedings, *Corner Post* expands the availability of more convenient facial challenges for newly created businesses.

Loper Bright

In *Loper Bright Enters. v. Raimondo*, the Court turned away from one of the most consequential doctrines in administrative law, *Chevron* deference. *Chevron* instructed courts to defer to permissible interpretations of ambiguous statutes by agencies (at least if certain not-altogether-clear

prerequisites were met). After many years of avoiding the doctrine, including multiple invocations of the "major questions doctrine," which requires clear statutory authorization for questions of "vast economic and political significance," the Court finally overruled *Chevron*.

According to the Court, this doctrine was founded on fiction, specifically the assertion that Congress intended to delegate issues to the agency when there was a gap or ambiguity in the statute. Instead, the Court turned to the plain language of the APA itself, which instructs courts to decide "all relevant questions of law" and instructed all courts to find the "best" meaning of a statute, even when the statute is ambiguous or confusing.

The Court was careful to limit the immediate effect of the decision by noting that:

(1) "respect" for agency interpretations, especially longstanding and consistent ones, still existed and could guide courts in their search for the "best" reading;

(2) Congress still had the option to delegate statutory details to agencies by, for example, allowing the agency to define terms or by using terms like "appropriate" or "reasonable" and

(3) *stare decisis* still applied to prior decisions which relied on *Chevron* deference.

Despite these limitations, the end of the *Chevron* era creates the opportunity for the regulated community to constrict agencies to the "best" reading of their empowering statutes.

Ohio v. EPA

In *Ohio v. Environmental Protection Agency*, the Supreme Court stayed the application of the EPA's Federal Implementation Plan ("FIP") which would displace the recently updated ozone pollution control State Implementation Plans of 23 states. The FIP was promulgated under the Clean Air Act's "Good Neighbor Provision," which allows the federal government to step in when, in its view, a particular state or states are inadequately controlling air pollution to the detriment of downwind states' plans, *i.e.* being bad neighbors. The agency provided a severability provision allowing the rule to move forward regardless of states "falling out" of the FIP. Lower courts stayed the rule for 12 of the 23 states, which accounted for 70 percent of the emissions.

The Court agreed with the remaining states that the EPA failed to provide a reasonable explanation in response to public comments criticizing the agency's severability plan and the impact on its modelling, rendering it arbitrary and capricious. This case is noteworthy for strictly enforcing the requirement that agencies reasonably explain their rules in the context of responding to relevant public comments. This will empower businesses to challenge rules and give well-crafted comments more weight with the agency in the first instance.

Opportunities for the Regulated Community Going Forward

The subject matter of these four recent Supreme Court cases, securities fraud enforcement, credit card processing fees, Atlantic fisheries, and interstate air pollution, could not be more different. However, the link between these decisions is that they all sap power from administrative agencies, and, in turn, incrementally empower businesses and regulated parties. *Jaresky* allows defendants to take away any home court advantage that agencies like the SEC possess in enforcement proceedings, at least for certain common law-type penalties. *Corner Post* expands the universe of potential challengers to existing rules. *Loper Bright* refocuses judges on the best reading of agency statutes and restricts agencies' ability to receive deference for adventurous and often expansive readings of their statutory mandate. *Ohio v. EPA* requires agencies to provide reasonable explanations to salient public comments by regulated parties.

Further, *Corner Post* and *Loper Bright* have a synergizing effect. *Loper Bright's* overruling of Chevron deference calls many rules old rules into question, and *Corner Post's* interpretation of the limitations period for challenging rules allows old rules to be challenged facially by new entities. Importantly, the caveats within *Loper Bright*, respect for agencies and the delegation theory, will potentially still protect many agency rules, but regulated parties and their trade associations should conduct a careful analysis of the regulations which govern their behavior. Recent rulemakings which seem most at risk under *Loper Bright* are those which pivot away from long-standing agency interpretations. Parties should keep the above four cases in mind as they respond to regulations and enforcement actions.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.