Upcoming Supreme Court Decisions Could Change the Landscape for Challenging Federal Agency Regulations

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Three cases, all argued this term before the United States Supreme Court and likely to be decided in June, carry major implications for litigation between federal agencies and regulated entities. Depending on the Court's decisions, these cases may overturn one longstanding doctrine of administrative law, and substantially alter the landscape of another. In both areas, private litigants subject to federal regulations may have new arguments and even new claims available to them as a result.

The first doctrine under review is "*Chevron* deference," the federal courts' standard for when an administrative agency's interpretation of a federal statute prevails. In a pair of cases, the Court may abandon or modify this framework to reduce the deference accorded by courts to agencies' legal interpretations. The second doctrine governs the time at which claims accrue for purposes of the Administrative Procedure Act's statute of limitations. There, the Court may decide that a claim accrues when a potential plaintiff has a complete cause of action, including injury to itself, and not simply (as almost all courts of appeals have held so far) upon final agency action.

Importantly, while the cases arise from specific areas of regulation—monitoring of commercial Atlantic herring fishing operations and debit-card transaction fees, respectively—the Court's decisions will have implications for almost all areas of federal regulation. The first two could place the validity of certain rules across various industries in question. The other could functionally extend the time period in which regulations could be challenged. Regulated entities should monitor these cases for their potential impact on the entities' rights.

I. *Relentless* and *Loper Bright* pose challenges to *Chevron* deference.

The Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* (1984) governs how federal courts review challenges to an administrative agency's interpretation of a federal statute. Typically, these challenges arise when an agency interprets a statute to authorize a particular regulation, which is then challenged by a private party, such as a business subject to the regulation. *Chevron* sets forth a two-step test. First, a court will determine "whether Congress has directly spoken to the precise question at issue." Second, the court will determine whether the agency's interpretation is a reasonable construction of the statute. Because this second step allows an agency to prevail in defense of a "reasonable" statutory interpretation—even if the agency's reading is not the *best* one, in a court's judgment—this test is known as "*Chevron* deference."

Two cases implicating this framework (*Relentless, Inc. v. U.S. Department of Commerce* and *Loper Bright Enterprises, Inc. v. Raimondo*) challenge a regulation of the Atlantic herring fishing industry, adopted in 2020 by the National Marine Fisheries Service (NMFS). The rule sets a target for how many Atlantic herring trips should be monitored, how monitoring works in practice, and the extent to which fishing vessels are responsible for funding their own monitors. The NMFS maintains that Congress delegated authority to NMFS to regulate these areas under the Magnuson-Stevens Act.

Two groups of regulated herring fishers challenged the monitor-funding aspects of the rule in federal district courts in Rhode Island and the District of Columbia. They argued that the Magnuson-Stevens Act does not authorize industry-funded monitoring and that the NMFS therefore exceeded its statutory authority in promulgating the rule. Both district courts upheld the agency's rule, and the First Circuit and D.C. Circuit affirmed those judgments, holding that under *Chevron* and the Magnuson-Stevens Act, the NMFS's interpretation of its authority to require at-sea monitors who are paid by owners of regulated vessels was

reasonable.

Both sets of plaintiffs have now argued that the Supreme Court should reverse the judgments below by overturning the *Chevron* framework. Developments leading up to these cases have created a realistic possibility that the Court will do so.

For one, the Court has already limited the reach of *Chevron* deference in subsequent cases. For example, *Chevron* only applies to circumstances where it appears that Congress delegated authority to the agency generally to make rules, and that the agency interpretation claiming deference was promulgated in exercise of that authority. And *Chevron* is inapplicable to rules that touch upon a "question of deep 'economic and political significance' that is central to [a] statutory scheme," without express statutory indication. Individual justices (both current and former) have also voiced criticisms of *Chevron* deference, as affording agencies an unwarranted advantage in litigation and abdicating the courts' duties of judicial review. And in recent years, the Court itself has repeatedly declined to rely on *Chevron* deference, even where it would seem applicable, and instead opted to resolve cases on other grounds.

If the Court decides not to maintain the *Chevron* framework in its current form, it will have multiple options for how to proceed. It could abolish *Chevron* deference entirely. In that event, federal courts reviewing agency action pursuant to a statute would be required to apply (in their own view) the best interpretation of the statute, even if the agency had proposed a "reasonable" alternative view. An agency's view would still receive consideration, to be sure—but likely only the "weight" due to the agency based on its (as the Court put it in a pre-*Chevron* case) overall "power to persuade."

Another possible outcome might be a clarification of *Chevron* deference that narrows the circumstances in which lower courts can defer to agencies. This outcome could resemble the Court's 2019 decision in *Kisor v. Wilkie*, in which the Court reviewed its framework for deference to agency interpretations of regulations (not statutes). Instead of overruling that framework (known as "*Auer* deference"), the Court upheld it while emphasizing its limits—for example, that it only applied when a regulation is "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation[.]" The Court could opt for such an approach here: tightening the application of *Chevron* deference without overruling it completely.

Either approach, however, has the potential to render federal regulations across all industries vulnerable to challenges as exceeding the authority that Congress has delegated to the relevant agency. Each rule, of course, will require its own analysis. Not all will be equally subject to question in a world without *Chevron*. But if the petitioners in *Relentless* and *Loper Bright* prevail, regulated entities could have additional options to pursue when considering whether to bring legal challenges to federal rules.

II. *Corner Post* may change when claims accrue under the Administrative Procedure Act.

A separate case from this Supreme Court term (*Corner Post, Inc. v. Board of Governors of the Federal Reserve System)* carries major implications for the statute of limitations for challenges to agency actions. That limitations period is set by federal statute at six years after the right of action first accrues. Most federal courts of appeals to decide the question—six in all—have held that for challenges to an agency rule, this period runs from the time of the agency's action, i.e., the time at which the rule goes into effect. But one court—the Sixth Circuit—has held that the period does not run until a second condition has occurred as well as the agency action: namely, an injury to the complaining party. The First Circuit (which hears cases from Rhode Island and Massachusetts) has yet to weigh in.

Petitioner Corner Post has urged the Supreme Court to adopt the Sixth Circuit's holding. A convenience store in North Dakota, Corner Post brought a challenge in the Eighth Circuit Court of Appeals to a rule regarding debit-card transaction fees issued in 2011 by the Federal Reserve Board. Corner Post sued in 2021 and argued its challenge was timely because it has only been in business since 2018, and the limitations period only began to run with its injury. The Eighth Circuit rejected this argument, and the Supreme Court granted *certiorari* to resolve this questions that has divided the lower courts six-to-one.

Corner Post contends that injury is a requirement for the running of a limitations period. It notes that the Administrative Procedure Act (APA) provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Based on that language, Corner Post argues that a claim against an agency's action cannot "accrue," and therefore start running the statutory limitations period, until that action harms the party bringing the challenge. Ergo, because "suffering legal wrong" is a requirement for maintaining an APA challenge, the majority rule that the limitations period begins when a rule becomes effective has the effect of starting the clock on potential claims before—perhaps long before—the plaintiff would be able to sue. That is the case for Corner Post. It did not even exist when the six year limitations period began to run when the rule became effective in 2011 or when the six years lapsed in 2017.

Unlike the cases on *Chevron* deference, *Corner Post* does not invite the Supreme Court to reconsider any of its own precedents. But the case is still of substantial consequence, as the implications are likely to be significant, if Corner Post prevails and the majority rule is overturned. For regulated entities across industries, particularly those that have entered a new line of business within the last six years, the case could open up new viable APA challenges to regulations which were previously time-barred (in the six circuits to hold as much squarely) or presumed to be time-barred (in circuits, like the First Circuit, where the question has not been addressed, but where the majority rule might be presumed to prevail).

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The Supreme Court heard oral argument in *Relentless, Inc.* and *Loper Bright* in January and *Corner Post* in February. Decisions will likely be handed down in June. Stay tuned.

Partridge Snow & Hahn's Litigation Practice Group is ready to answer questions regarding the implications of these decisions. For more information, contact Christopher M. Wildenhain or James P. McGlone.

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