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# ***Loper Bright, Jarkesy, Corner Post, and Cantero – Reconciling the Supreme Court’s Overhaul of Agency Action in the Financial Services Industry***

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# Overview

- Examination of recent Supreme Court decisions
  - *Loper Bright Enterprises v. Raimondo*
  - *Securities and Exchange Commission v. Jarkesy*
  - *Corner Post, Inc. v. Board of Governors of the Federal Reserve*
  - *Cantero v. Bank of America*
- Impact of the overhaul of agency action
  - Litigation
  - Agency rulemaking
  - Agency enforcement
  - Other considerations
- Questions and answers



Increased litigation



Increased judicial scrutiny



Increased enforcement activity



Lengthier rulemakings;  
more specificity from  
Congress

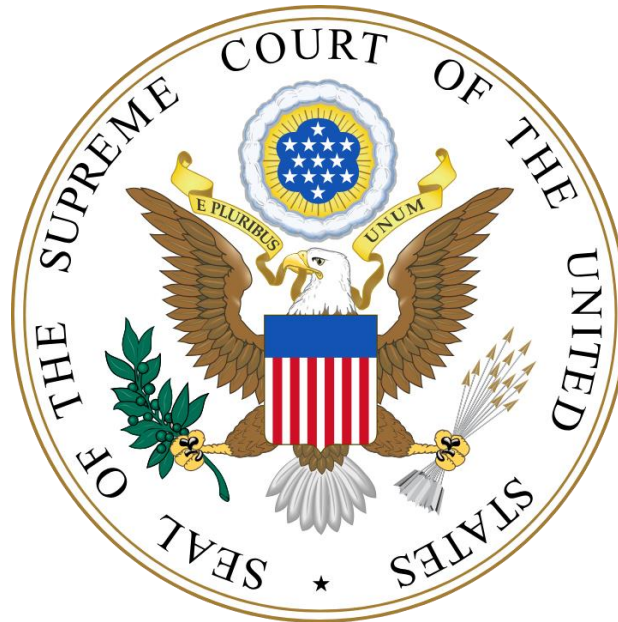


Less rulemaking, in some  
but not all circumstances

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# ***Loper Bright, Jarkesy, Corner Post, and Cantero:*** **An Overview of Recent Supreme Court Decisions**

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# ***Loper Bright Enterprises v. Raimondo***, 144 S. Ct. 2244 (2024)



- **Holding:** Deference to an agency’s interpretation of a statute is contrary to the Administrative Procedure Act (APA) and the judiciary’s responsibility to interpret statutes and decide questions of law.
- *Chevron* cannot be “squared with the APA,” which requires courts to decide questions of law and statutory interpretation.
- Applying *Chevron* proved to be “unworkable,” arbitrary, and inconsistent; *stare decisis* does not prevent its overruling, although decisions applying *Chevron* endure.

# ***Loper Bright Enterprises v. Raimondo***, **144 S. Ct. 2244 (2024)**



- Courts can still consider an agency's interpretation along with other sources of expertise and guidance, such as *amici*.
- Courts *cannot*, as *Chevron* requires, ignore traditional methods of statutory interpretation in favor of determining whether an agency's interpretation is "permissible."
- Courts may also not assume that statutory ambiguity was Congress's implicit delegation of authority or discretion to an agency.



# ***SEC v. Jarkesy*, 144 S. Ct. 2117 (2024)**



- **Holding:** The Seventh Amendment guarantees a defendant a jury trial when the SEC seeks civil penalties against the defendant for committing securities fraud, and the use of an ALJ is unconstitutional to decide such cases.
- All future SEC cases alleging fraud and seeking civil penalties will need to be brought in federal district court, where the defendant will have a right to a jury trial.
- Beyond the SEC, *Jarkesy* calls into question the ability of any federal agency to rely on an ALJ to decide a case where civil monetary penalties are at issue that is “akin to” a common law fraud claim.

# ***Corner Post, Inc. v. Board of Governors of the Federal Reserve, 144 S. Ct. 2440 (2024)***



- **Holding:** An APA claim accrues when a plaintiff is injured by final agency action, even when the government action being challenged occurred earlier.
  - The 6-year statute of limitations (28 U.S.C. § 2401(a)) is “accrual-based,” and a cause of action does not accrue “until the plaintiff can file suit and obtain relief,” which requires that the plaintiff suffer an injury.
  - The focus is on the plaintiff’s injury, not the agency’s actions.
- The *Corner Post* decision is not limited to rulemaking. Agency actions can include other undertakings that harm a party.
- Congress may specify other statutes of limitations and how they run.



# Cantero v. Bank of America, 144 S. Ct. 1290 (2024)



- **Holding:** The National Bank Act (NBA) does not enjoy “field preemption” over state laws that may conflict with the NBA; instead, analysis under *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner et al.* is required to determine if a state law is preempted by the NBA.
  - National banks, among others, will now need to determine if a state law is preempted by employing a *Barnett Bank* analysis.
  - “A court applying that *Barnett Bank* standard must make a practical assessment of the nature and degree of interferences caused by a state law.”
  - If a state law prevents or significantly interferes with the bank’s exercise of its powers, the law is preempted. If state law does not prevent or significantly interfere with the national bank’s exercise of its powers, the law is not preempted.

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# Impacts

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# Litigation

- How are courts responding?
  - New briefing
  - Vacate and remand to reassess
  - Appellate court performs a *de novo* statutory analysis
  - Persuasiveness of agency's reasoning

# Litigation

- Amicus briefing
  - Expand and develop the record
- Affirmative challenges may increase.
  - Forum shopping and circuit splits
  - Coalition litigation
- Enforcement may increase, leading to more defensive challenges.
  - Fact-finding still enjoys deference
  - Possibility of increased preemptive challenges, reexamination of *Thunder Basin* line of cases (continuing from *Axon* in previous term)

# Agency Enforcement in the Courts

- Federal financial regulators with the option will now have to decide when instituting an enforcement action: use an ALJ or go right to federal district court?
- CFPB and SEC have already moved such actions to district court.
- FDIC uses administrative proceedings.
- While many aspects of internal adjudication explored in *Jarkesy* have analogues in bank supervision, bank supervision is different.

# Litigation

- Long-term predictions and possibilities
  - Increased constitutional challenges
    - Takings
    - Separation of powers
  - New and “New-to-You” doctrines and frameworks
    - Major Questions
    - Nondelegation
    - Statutory interpretation
  - Experts



# Litigation

- Two other cases from this term considered common challenges to agency actions and both resulted in favorable decisions for the challenger:
  - *Ohio v. EPA*, 144 S. Ct. 2040 (2024):
    - Arbitrary and capricious challenge stay request
    - **Holding:** Agency decision was arbitrary and capricious because the agency failed to explain why its conclusion was correct, even if certain presumptions were no longer true.
      - “Good neighbor” Clean Air Act Rule assumed all 23 at-issue states would follow the EPA’s plan.
  - *National Rifle Association of America v. Vullo*, 144 S. Ct. 1316 (2024):
    - First Amendment challenge motion to dismiss
    - **Holding:** Agency cannot use enforcement actions or the risk of enforcement actions to promote or suppress a particular viewpoint.
      - This is true even if certain actions being investigated are indisputably illegal.

# Statutory Delegations

*Loper Bright* is not expected to have an outsized effect on clear delegations from Congress to federal agencies.

For example, the Truth in Lending Act expressly permits the CFPB to adopt rules containing:

“[s]uch additional requirements, classifications, differentiations, or other provisions, and ... provid[ing] for such adjustments and exceptions for all or any class of transactions, **as in the judgment of the Bureau are necessary or proper** to effectuate the purposes of [the statute] to prevent circumvention or evasion thereof, or to facilitate compliance therewith.”

15 U.S.C. § 1691b (Promulgation of regulations by the Bureau).

# Rulemaking

- Longer process with more developed record
- More explicit reference to APA requirements
- Longer time for rules to come into effect
- Potentially ...
  - less pendulum-swing with new administrations
  - less rulemaking overall
  - less ambitious agendas
  - more OMB or congressional oversight

# Rulemaking—Overview of Possible Challenges

- Federal Banking Agencies
- CFPB
- SEC
- FTC



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