

# Lawyer Insights

## Forecasting The Impact Of High Court Debit Card Rule Case

By John Delionado and Aidan Gross  
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On Sept. 29, the [U.S. Supreme Court granted](#) certiorari in *Corner Post Inc. v. Board of Governors of the Federal Reserve System*. The court's decision in the case will affect businesses across the country.

Three plaintiffs, two business associations and Corner Post Inc. sued the Board of Governors of the Federal Reserve in the [U.S. District Court for the District of North Dakota](#).<sup>1</sup>

The plaintiffs argued that an Administrative Procedure Act rule, which set processing fees for debit card transactions at 21 cents per transaction,<sup>2</sup> is arbitrary and capricious under the APA<sup>3</sup> and violates the Durbin Amendment of the Dodd-Frank Act.<sup>4</sup>

The Durbin Amendment requires that transaction fees be reasonable and proportional to the cost of the good sold.<sup>5</sup>

The district court dismissed the case without considering the validity of the APA rule, because the court found that the plaintiffs' claims were barred by the statute of limitations under Title 28 of the U.S. Code, Section 2401(a), which states that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."<sup>6</sup>

The parties' dispute focused on when a "right of action first accrues" under the statute. The plaintiffs appealed the decision to the [U.S. Court of Appeals for the Eighth Circuit](#).<sup>7</sup>

On appeal, the plaintiffs argued that a right of action first accrues when a plaintiff suffers a legal wrong and, accordingly, the statute of limitations begins running when a plaintiff becomes subject to and is harmed by an agency rule.

Thus, a business has six years from the time it first becomes subject to a government regulation to bring suit challenging the regulation.

In contrast, the government argued that a right of action first accrues at the time the agency rule is published. Under this theory, a business can only challenge a government regulation within six years of the regulation's publication.

A later-formed business has essentially two options: (1) comply with the rule, or (2) intentionally violate the rule and invite government enforcement so that the rule can be challenged.

The Eighth Circuit ultimately sided with the government.<sup>8</sup>

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Specifically, the court held that: "[W]hen plaintiffs bring a facial challenge to a final agency action, the right of action accrues, and the limitations period begins to run, upon publication of the regulation."<sup>9</sup>

The Eighth Circuit further held that the plaintiffs did not qualify for "equitable tolling," a legal doctrine that allows a party to toll the statute of limitations if it can show it exercised due diligence, but exceptional circumstances prevented timely filing.<sup>10</sup>

Corner Post appealed the Eighth Circuit's decision, and the Supreme Court granted certiorari. The court will hear oral argument sometime in the next few months.

### Practical Implications

If the court reverses and sides with Corner Post, then individuals and businesses alike will be able to challenge allegedly unlawful government regulations — so long as they bring suit within six years of first being subject to and harmed by the regulation.

However, if the court affirms the decision of the Eighth Circuit and finds in favor of the government, the ability of businesses to challenge unlawful government regulations would be severely undermined. Any company formed six years after an agency rule is published could not challenge the rule — no matter how unlawful or harmful the rule is.

This is particularly troubling given the growing number of federal agencies and regulations. Over the past few years, dozens of new agencies have been created.<sup>11</sup> And there are now over 185,000 pages of federal regulations.<sup>12</sup>

Moreover, when considering the nature of regulations, a ruling in favor of the government has the potential to create barriers to entry, stifle market competition, create conflicts with state and local laws, and end challenges to existing regulations.

For example, consider Title 12 of the Code of Federal Regulations, Section 3.10, which became effective on April 1, 2021.<sup>13</sup>

The regulation imposes minimum capital requirements, which include a total capital ratio of 8% and a leverage ratio of 4%, on national banks and federal savings associations.<sup>14</sup>

The regulation acts as a barrier to entry by requiring banks to have more capital and less risk-weighted assets.

Existing banks have little incentive to challenge the regulation's requirements, as it may signal to the public — including its deposit holders — that it is less than well capitalized. Any new bank federally chartered after April 1, 2027, would be unable to challenge the regulation's capital requirements.

Next, consider Title 23 of the Code of Federal Regulations, Section 680.106, which became effective on March 30, 2023.<sup>15</sup>

The regulation sets minimum standards for electric vehicle charging station construction projects under the federal government's National Electric Vehicle Infrastructure Formula Program.<sup>16</sup>

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Under the program, the federal government provides funding to states, which may then enter into contracts with private companies for the construction of EV charging stations.

The regulation requires that each EV charging station contain four charging ports, certain voltage levels, various payment methods and various security measures.<sup>17</sup>

The regulation's requirements could increase project costs, and, consequently, act as a barrier to entry. Any company formed after March 30, 2029, looking to participate in the NEVI program would be unable to challenge the federal regulation.

Moreover, the regulation's requirements could create conflicts with state and local laws. For example, if a local law provides for the construction of EV charging stations in densely concentrated areas, the federal requirement of four charging ports could be unduly restrictive.

This would create a conflict between the local initiative that encourages development in dense areas and the unduly restrictive federal requirement that discourages such development.

Lastly, Title 28 of the U.S. Code, Section 2401, is at issue in several federal cases. Some of these cases involve challenges to major federal regulations, including challenges to offshore wind energy regulations,<sup>18</sup> banking regulations,<sup>19</sup> and agency actions related to pharmaceuticals.<sup>20</sup>

A ruling in favor of the government has already resulted in dismissal in these cases, and the court's affirmance in the Corner Post case would end any potential appeals.

The court's decision will affect businesses, of all kinds, across the country. And the ability of later-formed businesses to hold the government accountable hangs in the balance.

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### Notes

1. [Corner Post, Inc. v. Bd. of Governors of Fed. Reserve Sys.](#), 1:21-CV-00095, 2022 WL 909317, at \*1 (D.N.D. Mar. 11, 2022).
2. See Debit Card Interchange Fees and Routing, 76 FR 43394-01 (July 20, 2011).
3. A provision of the APA codified in 5 U.S.C. § 706(2)(A) allows courts to invalidate agency rules that are arbitrary and capricious.
4. The Durbin Amendment is codified in 15 U.S.C. § 1693o-2.
5. See 15 U.S.C. § 1693o-2.
6. See [Corner Post, Inc.](#), 1:21-CV-00095, 2022 WL 909317, at \*10.
7. [N. Dakota Retail Ass'n v. Bd. of Governors of the Fed. Reserve Sys.](#), 55 F.4th 634 (8th Cir. 2022).
8. *Id.* at 641.
9. *Id.*
10. *Id.* at 642-43.
11. Brief for [National Federation of Independent Business Small Business Legal Center](#), Inc. as Amicus Curiae Supporting Petitioner, [Corner Post, Inc. v. Bd. of Governors](#), FRS, 22-1008, 2023 WL 6319653 at \*11 (U.S. Sept. 29, 2023).
12. *Id.*
13. 12 C.F.R. § 3.10.
14. *Id.*
15. 23 C.F.R § 680.106.
16. *Id.*
17. *Id.*
18. [Seafreeze Shoreside, Inc. v. United States Dep't of the Interior](#), No. 1:22-CV-11091-IT, 2023 WL 6691015, at \*19 (D. Mass. Oct. 12, 2023).
19. [Linney's Pizza, LLC v. Bd. of Governors of Fed. Rsrv. Sys.](#), No. 3:22-CV-00071-GFVT, 2023 WL 6050569, at \*1 (E.D. Ky. Sept. 15, 2023).
20. [All. for Hippocratic Med. v. U.S. Food & Drug Admin.](#), No. 2:22-CV-223-Z, 2023 WL 2825871, at \*9 (N.D. Tex. Apr. 7, 2023), *aff'd in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023).

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