Endangered Justice? Exploring Corner Post's Ripple Effects on Endangered Species Act Litigation

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When the Supreme Court handed down Corner Post, Inc. v. Board of Governors of the Federal Reserve System*—holding that the statute of limitations for challenging a regulation does not begin to run until the plaintiff is injured by it—alongside two other cases impacting administrative agencies, much of the commentary suggested that these decisions heralded the demise of agencies and the end of protections for important issues, including the environment. Part of this commentary appears correct. It is likely that* Corner Post *will introduce significant challenges for agencies. Agencies will be required to defend regulations using an outdated record, often with the loss of institutional knowledge and while combatting the influence of hindsight bias. Increased litigation could destabilize agencies' long-term conservation efforts, as more time and resources spent in court divert attention away from protecting vulnerable species.*

However, this Note argues that the Corner Post *principle presents a transformative shift in environmental litigation, particularly under the Endangered Species Act, by extending the date for claim accrual and enabling plaintiffs to challenge longstanding agency regulations and decisions that continue to harm vulnerable species. This principle facilitates an opportunity for environmental plaintiffs to litigate for greater accountability and protection of species. This Note emphasizes that the* Corner Post *principle offers environmental plaintiffs an essential mechanism for advancing protections for endangered species and holding agencies accountable for past regulatory decisions, and advocates for employing this mechanism right away.*

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INTRODUCTION

The Endangered Species Act (ESA), enacted in 1973, is a landmark piece of legislation aimed at conserving vulnerable species and their habitats. Since its enactment, it has safeguarded 2,375 listed species identified as endangered or threatened.[1] The responsibility for listing these species lies with two federal agencies: the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. Once a species is listed, the ESA triggers an array of protections.[2] These protections extend to actions by private individuals as well as government agencies, requiring all activities to align with the ESA's stringent conservation mandates. This comprehensive framework ensures that listed species and their habitats are shielded from harm.

Because the ESA is tethered to multiple agencies, the number of regulations related to the ESA is immense. A search in the Federal Register reveals that there are over two thousand regulations associated with the ESA.[3] This extensive regulatory framework translates into significant administrative responsibilities for agencies. Agencies must consistently monitor regulations and species populations and fulfill their obligations to ensure compliance with the ESA. When agencies fail to adhere to these regulations, the ESA, in conjunction with the Administrative Procedure Act (APA), provides a mechanism for citizens to hold agencies accountable through legal action.[4]

To prevent indefinite vulnerability to these ESA lawsuits, this litigation framework is constrained by 28 U.S.C. § 2401(a)'s six-year statute of limitations, which prevents any civil actions against the U.S. government if they are not filed

1. U.S. FISH & WILDLIFE SERV., ESA BASICS: 50 YEARS OF CONSERVING ENDANGERED SPECIES 1 (2023), https://www.fws.gov/sites/default/files/documents/endangered-species-act-basics-february-2023.pdf. An "endangered species" means "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened species" is one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

2. *See, e.g.*, Nat. Res. Def. Council, Inc. v. Coit, 597 F. Supp. 3d 73, 79 (D.D.C. 2022) ("Listed species receive heightened protections."); Rocky Mountain Wild v. Walsh, 216 F. Supp. 3d 1234, 1254 (D. Colo. 2016) (highlighting that once a species is listed, efforts to delist the species must show that the species' population numbers will continue to be protected).

3. As of December 15, 2024. *Document Search*, FED. REG., https://www.federalregister.gov/documents/search (last visited Dec. 15, 2024) (search for keyword "Endangered Species Act" then filter by "Rule").

4. *See, e.g.*, Yurok Tribe v. U.S. Bureau of Reclamation, 231 F. Supp. 3d 450, 467-71 (N.D. Cal. 2017); Ctr. for Biological Diversity v. Bernhardt, 595 F. Supp. 3d 890, 908, 919 (D. Ariz. 2022).

within six years of when the plaintiff's right of action first accrued.[5] To highlight the effect of a statute of limitations provision[6] on the ESA, the following Subpart discusses the U.S. Fish and Wildlife Service's (USFWS) failure to protect the Goldline Darter and Blue Shiner, two species of fish that exist in southeastern states.

A. The Case About Two Fish: Center for Biological Diversity v. Hamilton

In 1992, the USFWS listed both species of fish as threatened under the Endangered Species Act.[7] In its final rule designating these fish as threatened, the USFWS stated that, while it "may be prudent" to designate areas of critical habitat for the fish, it was "not now determinable" what habitat to set aside for protection.[8] By 2004, the USFWS still had not listed any critical habitat for the two fish species—twelve years after the listing of the two fish species and eleven years after the ESA's statutory deadline, which requires listing agencies to designate critical habitat within one year of listing a species as threatened or endangered.[9]

In 2004, given USFWS's inaction and apparent lack of motivation to comply with the ESA's mandates, the Center for Biological Diversity, along with other plaintiffs, filed suit against the USFWS for its failure to designate critical habitat for the two fish species. Surprisingly, the USFWS admitted in its briefing that it had not complied with the ESA because it did not list critical habitat for the two fish species.[10]

But, the USFWS contended that, despite its non-compliance, the Center for Biological Diversity's claim was time-barred by 28 U.S.C. § 2401(a)'s six-year statute of limitations.[11] It argued that the statute of limitations began to run when it failed to designate critical habitat within one year of listing the species, as required by the ESA. Since the lawsuit was filed eleven years after this alleged failure, the USFWS argued that the claim was untimely. The court agreed with the USFWS's reasoning, finding that the plaintiff's claim accrued when the

5. *See* 28 U.S.C. § 2401(a).

6. A statute of limitations is a "statute establishing a time limit for suing in a civil case, based on the date when the claim accrued." *Statute of Limitations*, BLACK'S LAW DICTIONARY (12th ed. 2024). When the affected party fails to bring an action within the timeframe, the action becomes time-barred and it can no longer be litigated, regardless of the claim's merits.

7. Ctr. for Biological Diversity v. Hamilton, 385 F. Supp. 2d 1330, 1332 (N.D. Ga. 2005), *aff'd*, 453 F.3d 1331 (11th Cir. 2006).

8. Endangered and Threatened Wildlife and Plants; Threatened Status for Two Fish, the Goldline Darter (Percina Aurolineata) and Blue Shiner (Cyprinella Caerulea), 57 Fed. Reg. 14786, 14789 (Apr. 22, 1992) (to be codified at 50 C.F.R. pt. 17).

9. *Hamilton*, 385 F. Supp. 2d at 1334; *see* 16 U.S.C. § 1533(b)(6)(C)(ii).

10. Federal Defendants' Motion to Dismiss at 20, Ctr. for Biological Diversity v. Hamilton, 385 F. Supp. 2d 1330 (N.D. Ga. 2005) (No. 1:04 CV-2573-JTC), 2004 U.S. Dist. Ct. Motions LEXIS 32077.

11. *See id.* at 14; 28 U.S.C. § 2401(a) (providing 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").

agency failed to list critical habitat at the one-year deadline and that the action was therefore time-barred by 28 U.S.C. § 2401(a)'s six-year statute of limitations.[12]

The case illustrates the significant impact a statute of limitations can have, even on seemingly meritorious claims. Although both parties agreed that USFWS failed to comply with its statutory duty to designate critical habitat, the court ruled that Center for Biological Diversity was nonetheless time-barred from bringing its claim.

But, on July 1, 2024, the Supreme Court, in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, provided crucial guidance on how to measure the accrual of claims under 28 U.S.C. § 2401(a).[13] Specifically, it clarified that the six-year statute of limitations begins to run when the plaintiff is *harmed* by the regulation, not when the regulation is finalized.

B. Corner Post, Inc. v. Board of Governors of the Federal Reserve System

The story of *Corner Post* began in 2011, when the Federal Reserve Board published a final rule that set the maximum interchange fees[14] that could be assessed when customers paid with a debit card.[15] In 2018, Corner Post, a truck stop and convenience store in North Dakota, was constructed and began operation. Concerned with the Reserve Board's 2011 regulation assessing interchange fees, in 2021, ten years after the final rule's publication date, Corner Post filed suit against the Reserve Board. In its suit Corner Post argued that the agency violated the APA when it published the final rule because it was contrary to the Reserve Board's enabling statute.[16]

Without getting to the merits of Corner Post's claim, the case of the two fish and other precedent on 28 U.S.C. § 2401(a) suggested that a court would rule that Corner Post's claim was time-barred. In fact, the district court and the Eighth Circuit held just that.[17] Because Corner Post filed suit ten years after the agency published its rule and four years after the six-year statute of limitations deadline, the courts ruled it was clear that the claim was time-barred. But, on July 1, 2024, the Supreme Court ruled in favor of Corner Post on the question of whether its claim was time-barred. The Supreme Court held that 28 U.S.C. § 2401(a)'s statute of limitations provision does not begin to run until the plaintiff is harmed (i.e., when Corner Post was first subject to the interchange fees—here,

12. *Hamilton*, 385 F. Supp. 2d at 1336-37.

13. *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 804 (2024).

14. An interchange fee is the fee assessed by the bank to the merchant's bank for acceptance and processing of electronic payments. *See Understanding Interchange*, MASTERCARD, https://www.mastercard.ca/en-ca/business/overview/interchange.html (last visited Dec. 16, 2024).

15. *See* Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43394, 43420 (July 20, 2011) (to be codified at 12 C.F.R. pt. 235).

16. *Corner Post*, 603 U.S. at 805-06.

17. *See id.* at 806.

when Corner Post began operation in 2018) and not when the final rule was issued (i.e., when the Federal Reserve Board issued its final rule).[18]

The Supreme Court's ruling in *Corner Post* fundamentally changes the calculation for when a claim is time-barred for claims governed by 28 U.S.C. § 2401(a). When *Corner Post* was handed down, many commentators reflected that *Corner Post* created a "whole new ball game," where the litigation environment is now "fertile" for "challeng[ing] regulations."[19] Because the ESA protects species through regulations governed by § 2401(a), the ability to challenge more regulations makes those protections, in turn, vulnerable. For example, longstanding listing decisions could be challenged by a new business that was not around when the listing decision first took place.

Despite that danger, this Note argues that *Corner Post* is not all bad news for the ESA. It's likely that *Center for Biological Diversity* would have come out differently had the *Corner Post* principle been in existence because the Center for Biological Diversity could have argued that its claim first accrued not when the USFWS failed to take any action a year after the agency first listed the two fish species, but far more recently when the organization's members were newly harmed by the failure to designate habitat. For parties seeking to provide further protection for endangered species, *Corner Post* provides a renewed opportunity to sue agencies in order to compel compliance.

In making this argument, this Note proceeds in four Parts. Part I outlines the doctrines and statutes necessary to understand the argument, including statutes of limitations, the doctrine of facial and as-applied challenges, and the statutes involved in ESA litigation. Part II then discusses how the *Corner Post* principle will likely be applied to ESA claims, describing its likely effects on different stakeholders involved in ESA litigation and raising considerations that stakeholders should be aware of in ESA claims brought post-*Corner Post*.

I. THE MOVING PIECES: LITIGATION AND THE STATUTE OF LIMITATIONS

This Part provides the basic doctrine and vocabulary needed to understand the legal frameworks that intersect the issues discussed throughout this Note. It begins with a discussion about statutes of limitations and about how commentators view their effects on litigation. Then this Part explains facial and as-applied claims. The distinction between claims is necessary because facial and as-applied claims accrue differently with respect to the same statute of limitations. Next, it provides an in-depth explanation of *Corner Post* and the

18. *Id.* at 806, 809, 825.

19. Rob Fowler, *'Whole New Ball Game'—SCOTUS Delivers Another Hit to Federal Agencies in Corner Post Decision*, FED. NEWS NETWORK (Aug. 15, 2024), https://federalnewsnetwork.com/commentary/2024/08/whole-new-ball-game-scotus-delivers-another-hit-to-federal-agencies-in-corner-post-decision; *The Supreme Court's Double Hammer to Agencies: Loper Bright and Corner Post Set New Precedents for Challenging Federal Agency Action*, CROWELL, https://www.crowell.com/en/insights/client-alerts/the-supreme-courts-double-hammer-to-agencies-loper-bright-and-corner-post-set-new-precedents-for-challenging-federal-agency-action (last visited Dec. 15, 2024).

principle it provides. Then, this Part concludes with a discussion on the basics of APA and ESA claims.

A. Statutes of Limitations

A statute of limitations is a statutory provision that restricts "the time within which legal proceedings may be brought, usually to a fixed period after the occurrence of the events that gave rise to the cause of action."[20] Simply put, statutes of limitations put an expiration date on claims.

In general, the commentary on statutes of limitations tends to favor them. California Supreme Court Justice Wiley Manuel wrote that statutes of limitations are a desirable tool because they are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[21] Statutes of limitations are the tool used to prevent the effects of forgetfulness, a stale record, and, in general, passed time from having an outsized role in the legal process, which relies on there being accurate facts to apply.[22] Thus, statutes of limitations encourage plaintiffs to bring their claims without delay.

Critics of statutes of limitations focus on the fact that statutes of limitations mandate a result not based on merits. In California, the state legislature focused on just that policy concern when it articulated a state policy that noted that "trial or other disposition of an action on the merits [is] generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action."[23] When statutes of limitations are strictly enforced, courts do not inquire into the merits of the claim; rather, courts dismiss the claims outright. Thus, the rationale against statutes of limitations lies in the fear that meritorious claims could be swept up and dismissed without providing any mechanism to give a tardy, but otherwise deserving, party relief.[24]

This Note focuses on one statute of limitations: 28 U.S.C. § 2401(a). This statute of limitations provides 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."[25] It is clear that § 2401(a) provides for a six-year measuring stick between action accrual and claim expiration, but the issue lies in the text of the statute. Section 2401(a) is silent as to when "the right of

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20. *Statute of Limitations*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/statute-of-limitations (last updated July 25, 2025).

21. Wood v. Elling Corp., 572 P.2d 755, 760 (Cal. 1977).

22. *See* Tyler T. Ochoa & Andrew Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L. J. 453, 454, 481 (1997).

23. CAL. CIV. PROC. CODE § 583.130.

24. Ochoa & Wistrich, *supra* note 22, at 500, 504. And, in the case of *Corner Post*, the Court's concern was that the "limitations period begins to run before a plaintiff can file a suit." Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 779, 818 (2024) (quoting Green v. Brennan, 578 U.S. 547, 554 (2016)).

25. 28 U.S.C. § 2401(a).

action first accrues."[26] The starting point for when a claim "accrues" depends upon whether the claim is classified as a facial or an as-applied challenge.[27] The next section discusses both types of challenges and how claims accrue under each.

B. As-Applied and Facial Challenges

The distinction between as-applied and facial challenges is critical in determining whether a specific statute of limitations has run because the categorization provides the formula for how to calculate claim accrual.[28]

1. As-Applied Challenges

An as-applied challenge is a claim focused on the legality of applying the law to a particular plaintiff. Plaintiffs making as-applied challenges argue that the law is unconstitutional as applied to that plaintiff's particular set of facts.[29] Should the plaintiff prevail in an as-applied challenge, the court finds the law invalid *as applied* to the plaintiff's specific set of facts. Thus, the court allows the law to remain intact except for that particular application.

When it comes to claim accrual in as-applied challenges, courts have ruled that claims accrue at the moment the plaintiff was first injured. For example, the Eleventh Circuit held that when there is an as-applied challenge, "the limitations period commenced only when the claim became or should have become apparent to a person with a reasonably prudent regard for his rights."[30] Because the issue giving rise to the claim is personal to the plaintiff, the claim accrues when the plaintiff is harmed.

2. Facial Challenges

Facial challenges, on the other hand, focus on the legality of applying the law in all facts and circumstances. A plaintiff bringing a facial challenge argues that the law is invalid when applied in all circumstances, not just in the plaintiff's own application.[31] Since these claims are much broader and often address more

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26. *Id.*

27. *See Corner Post*, 603 U.S. at 806-07.

28. While there is a distinction for calculation purposes, some legal experts argue that the distinction is largely a legal fiction because "there is no single distinctive category of facial, as opposed to as-applied, litigation. Rather, all challenges to statutes arise when a particular litigant claims that a statute cannot be enforced against her." Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1324 (2000).

29. Timothy Sandefur, *The Timing of Facial Challenges*, 43 AKRON L. REV. 51, 56 (2010).

30. Nance v. Comm'r, Ga. Dep't of Corr., 59 F.4th 1149, 1151-52 (11th Cir. 2023); *see also* Sisseton-Wahpeton Oyate of the Lake Traverse Rsrv. v. U.S. Corps of Eng'rs, 888 F.3d 906, 917 (8th Cir. 2018) ("A plaintiff's claim accrues for purposes of 28 U.S.C. § 2401(a) when the plaintiff 'either knew, or in the exercise of reasonable diligence should have known, that [he or she] had a claim.'") (citation omitted).

31. Sandefur, *supra* note 29, at 53.

serious harms, courts use more aggressive remedies: When a plaintiff prevails in a facial challenge, the court strikes the law.[32]

In facial challenges prior to *Corner Post*, courts often ruled that facial claims accrued when the unconstitutional law or improper regulation first took effect. Courts also probe into the nature of the claim, categorizing it as either a property injury claim or constitutional claim, for purposes of determining whether to make an exception to that general rule for claim accrual.

a. Facial Challenges: Property Injury Claims

In property injury claims, the facial claim accrues at the time the regulation or statute becomes effective, just as the general rule states. For example, the First Circuit held that "a facial takings challenge accrues at the time the offending statute or regulation is enacted or becomes effective."[33] Courts typically do not provide for an exception to this rule if they find that the nature of the claim alleges property injury because "any facial injury to any right should be apparent upon passage and enactment of a statute."[34]

b. Facial Challenges: Constitutional Claims

In the context of constitutional claims, courts often provide an exception to the general rule because of the gravity of such a claim. Oftentimes, a plaintiff who argues that a law is facially unconstitutional is arguing against a law that has existed for many years. Especially in the civil rights context, courts took decades to declare laws motivated by racism facially unconstitutional. Thus, the seriousness of a constitutional claim tends to be the factor that pushes courts to look past any issues of timeliness.

Loving v. Virginia provides an example of when the Court declared a law facially unconstitutional, even when the law was passed three decades before the challenge.[35] The Lovings, an interracial married couple, brought a facial challenge to Virginia's ban on interracial marriages.[36] Virginia's Racial Integrity Act made it a crime for different-race couples to marry, and the Lovings were convicted under this law.[37] The Lovings argued that the law was facially unconstitutional, not solely that the law was unconstitutional as applied to them.[38] Therefore, the Court had to consider both the time at which the Lovings'

32. *Id.* at 61-62.

33. Asociación de Suscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Juarbe-Jiménez, 659 F.3d 42, 50-51 (1st Cir. 2011). Other circuits also follow this general rule. *See* Colony Cove Props., LLC v. City of Carson, 640 F.3d 948, 956 (9th Cir. 2011).

34. *See, e.g.*, Action Apartment Ass'n v. Santa Monica Rent Control Op. Bd., 509 F.3d 1020, 1027 (9th Cir. 2007).

35. *See* Loving v. Virginia, 388 U.S. 1, 3-6, 12 (1967).

36. *See id.* at 2-3.

37. *Id.* at 3, 6.

38. *See id.* at 3 (noting that the Lovings "filed a motion in the state trial court . . . on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment").

claim accrued and when the alleged unconstitutional law took effect. The Racial Integrity Act was enacted in 1924, and the Lovings were convicted thirty-four years later in 1958. Here, the Court reached the question presented without considering whether the claim was time-barred. This is likely because of the nature and gravity of such a constitutional claim.

At the circuit court level, the courts developed a general policy of not allowing time to shield claims when the claim alleges that a law was facially unconstitutional. The Ninth Circuit stated that principle outright when it ruled that time should not serve to "completely insulate[]" unconstitutional laws "from facial challenges."[39] The Ninth Circuit used that policy in a line of cases about the constitutionality of laws and ordinances, including *Desertrain v. City of Los Angeles*.[40] In *Desertrain*, the plaintiffs challenged a 1983 Los Angeles Municipal Ordinance that made it a crime to use a vehicle as living quarters.[41] The plaintiffs argued that the ordinance was facially unconstitutional.[42] The Ninth Circuit still addressed the constitutional question despite the ordinance having been on the books for twenty-seven years.

c. Facial Challenges Applied to Agency Regulations

Prior to *Corner Post*, the circuit courts had developed two approaches for determining when a facial challenge to an agency regulation accrues.

Of the seven circuit courts that considered the issue, six circuits treated facial challenges to agency regulations like property injury claims. The Fourth Circuit, quoting a Fifth Circuit case, made this clear when it held that the statute of limitations for a "facial challenge to an agency ruling" begins accruing "when the agency publishes the regulation."[43] The Ninth Circuit also has clear case law that follows that same approach. In *Wind River Mining Corp. v. United States*, it held that "if the person wishes to bring a policy-based facial challenge to the government's decision, that . . . must be brought within six years of the decision."[44] In sum, six of the thirteen Circuit Courts treat facial challenges to agency regulations in that way.[45]

However, the Sixth Circuit applied a different rule for claim accrual. In *Herr v. United States Forest Service*, the court stated that claims against agency

39. *See* Scheer v. Kelly, 817 F.3d 1183, 1188 (9th Cir. 2016).

40. 754 F.3d 1147, 1149 (9th Cir. 2014).

41. *Id.* at 1149-50, 1152.

42. *See id.* at 1155.

43. Hire Ord., Ltd. v. Marianos, 698 F.3d 168, 170 (4th Cir. 2012) (quoting Dunn-McCampbell Royalty Int., Inc. v. Nat'l Park Serv., 112 F.3d 1283, 1287 (5th Cir. 1197)).

44. Wind River Mining Corp. v. United States, 946 F.2d 710, 715 (9th Cir. 1991).

45. *See, e.g.*, N.D. Retail Ass'n. v. Bd. of Governors of the Fed. Rsrv. Sys., 55 F.4th 634, 640-41 (8th Cir. 2022); Harris v. Fed. Aviation Admin., 353 F.3d 1006, 1009-10 (D.C. Cir. 2004); Odyssey Logistics & Tech. Corp. v. Iancu, 959 F.3d 1104, 1111-12 (Fed. Cir. 2020). Taken with the case citations in footnotes 43 and 44, this makes six circuit courts (the Fourth, Fifth, Eighth, Ninth, D.C., and Federal Circuits) using that rule statement.

regulations accrue "[w]hen a party first becomes aggrieved by a regulation that exceeds an agency's statutory authority . . . ."[46] The Sixth Circuit treated facial claims to agency regulations like constitutional claims, where a party can bring a challenge many years after the regulation became effective.

In conclusion, there was no uniform rule among the circuits with regard to when a claim accrues for facial challenges against agency regulations. While there was a clear majority as to when the claim accrues, the Supreme Court took up *Corner Post* to provide a uniform rule amongst the circuits. In *Corner Post*, the Court sided with the Sixth Circuit's view.[47]

C. Corner Post, Inc. v. Board of Governors of the Federal Reserve System

In *Corner Post*, the Supreme Court held that "[a] claim accrues when the plaintiff has the right to assert it in court—and in the case of the APA, that is when the plaintiff is injured by final agency action."[48]

1. Facts and Procedural Posture

The facts of *Corner Post* began in 2010 with disagreements about interchange fees—the fee assessed by the bank to the merchant for acceptance and processing of electronic card payments.[49] During this time, payment networks could set their own fee amount.[50] Merchants often felt pressured to pay those fees, even if they thought the fees were too high. If the merchant opted not to pay these fees, it meant that the merchant could not accept certain forms of payment, like debit cards, from its customers.[51] Congress responded to this issue when it passed the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[52] In the Durbin Amendment, Congress tasked the Federal Reserve Board with setting "standards for assessing whether the amount of any interchange transaction fee . . . is reasonable and proportional to the cost incurred by the issuer with respect to the transaction."[53]

In July of 2011, the Federal Reserve Board fulfilled its congressional mandate when it promulgated Regulation II.[54] Regulation II set the maximum interchange fee at a fixed rate.[55] Within four months of Regulation II's publication, a group of retail industry trade associations sued the Board and

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46. 803 F.3d 809, 820-22 (6th Cir. 2015) (emphasis omitted).

47. *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 779, 804-07 (2024).

48. *Id.* at 804.

49. *See Understanding Interchange*, MASTERCARD, https://www.mastercard.ca/en-ca/business/overview/interchange.html (last visited Dec. 16, 2024).

50. *Corner Post*, 603 U.S. at 805.

51. *Id.*

52. *Id.*; *see also* 15 U.S.C. § 1693o-2(a)(3)(A).

53. 15 U.S.C. § 1693o-2(a)(3)(A).

54. *See* Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43394, 43420 (July 20, 2011) (to be codified at 12 C.F.R. pt. 235).

55. *Id.*

claimed that Regulation II surpassed its statutory authority.[56] This litigation eventually reached the D.C. Circuit Court of Appeals, which upheld the regulation and held that "the Board's rules generally rest on reasonable constructions of the statute."[57] Before *Corner Post*, the D.C. Circuit's ruling was assumed to be the last of the challenges to the legality of Regulation II.[58]

But, in 2018, Corner Post, a truck stop and convenience store, opened its doors for business.[59] Corner Post accepted debit card payments, which made it subject to the interchange fees allowable under Regulation II. Three years later, and ten years after Regulation II became final, Corner Post joined a suit brought against the Federal Reserve Board that once again challenged Regulation II.[60] Specifically, Corner Post made a facial challenge to Regulation II when it argued that "Regulation II is unlawful because it allows payment networks to charge higher fees than the statute permits."[61]

The district court ruled on Corner Post's claim without ever getting to the argument's merits. The district court dismissed the suit as time barred under 28 U.S.C. § 2401(a), the general statute of limitations provision for suits against the United States, because the statute of limitations provides only a six-year time period.[62]

On appeal, the Eight Circuit affirmed the district court. The Eighth Circuit held that Corner Post was bringing a "facial challenge to a final agency action" and so the "right of action accrues, and the limitations period begins to run, upon publication of the regulation."[63] Consistent with that view, the Eight Circuit explained that the accrual period began in 2011, when Regulation II was published, and any claim against Regulation II expired in 2017—all prior to Corner Post existing as a business.[64] Corner Post then appealed its case to the Supreme Court.

2. The Parties' Arguments

At issue in the Supreme Court was how section 2401(a) should be interpreted. More specifically, the question presented was: "Does a plaintiff's APA claim 'first accrue[]' under 28 U.S.C. §2401(a) when an agency issues a

56. *Corner Post*, 603 U.S. at 805-06; *see also* NACS v. Bd. of Governors of the Fed. Rsrv. Sys., 958 F. Supp. 2d 85, 95-96 (D.D.C. 2013). Specifically, the plaintiffs argued that the fee set by the FRB was not in line with the Durbin Amendment's mandate that the fees be "reasonable and proportional to the cost incurred by the issuer." *Corner Post*, 603 U.S. at 805-06; *see also* 15 U.S.C. § 1693o-2(a)(3)(A).

57. NACS v. Bd. of Governors of the Fed. Rsrv. Sys., 746 F.3d 474, 477 (D.C. Cir. 2014).

58. As an aside, the challenges to Regulation II were all within the statute of limitations period set by 28 U.S.C. 2401(a). Regardless of the characterization of the challenge to Regulation II, those suits were brought well within the six-year period. *See* 28 U.S.C. 2401(a).

59. *Corner Post*, 603 U.S. at 805.

60. *Id.* at 805-06.

61. *Id.* at 806.

62. *See id.*

63. *Id.*

64. *Id.*

rule—regardless of whether that rule injures the plaintiff on that date (as the Eighth Circuit and five other circuits have held)—or when the rule first causes a plaintiff to 'suffer[] legal wrong' or be 'adversely affected or aggrieved' (as the Sixth Circuit has held)?"[65]

a. Corner Post

In Corner Post's briefing, it made three main arguments as to why the Supreme Court should grant *certiorari* and reverse the Eighth Circuit's interpretation of claim accrual under section 2401(a). First, Corner Post argued that the Eight Circuit's holding created an absurd result because, to be within the limitations period, it would have required Corner Post to file a suit before the business had ever existed.[66] Second, Corner Post argued that the Eighth Circuit's holding ran contrary to the presumption that the APA is meant to provide a "presumption favoring judicial review of administrative action."[67] It explained that the APA is meant to provide a mechanism for judicial review, and that the Eight Circuit's holding counteracted that policy. Third, and finally, Corner Post argued that the Eight Circuit's holding permitted the passage of time to shield agency regulations that may otherwise be unlawful or invalid.[68]

b. The Board of Governors of the Federal Reserve System

The Federal Reserve Board argued that the Eighth Circuit's holding was correct, and it offered four reasons as to why the Supreme Court should affirm the Eighth Circuit. First, the Board argued that a claim accrues on "the date on which the agency has made a final decision that determines legal rights or obligations, or that gives rise to legal consequences, in alleged violation of law."[69] The Board explained that this view is consistent with Supreme Court and the majority of circuit courts' case law. Second, the Board argued that running the statute of limitations from the time an agency regulation is final is also consistent with the "strong public interest in prompt resolution of disputed issues raised in connection with agency decisionmaking [*sic*]."[70] Third, the Board argued that deciding when a claim accrues should be context-specific, based on the type of dispute, because the Sixth Circuit's interpretation for claim accrual was not within the context of administrative disputes.[71] More clearly, the concern here was that because 28 U.S.C. § 2401(a) is a catchall statute of limitations provision, affixing the meaning in this case would disrupt administrative claims

65. Brief for Petitioner at i, Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799 (2024) (No. 22-1008).

66. *See id.* at 29-32.

67. *Id.* at 30 (quoting Sackett v. EPA, 566 U.S. 120, 128 (2012)).

68. *Id.* at 28-29.

69. Brief for the Respondent at 13-14, Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799 (2024) (No. 22-1008).

70. *Id.* at 15.

71. *See id.* at 26, 32, 40.

that must take this provision into account even while it is reasonable to think of accrual differently for claims brought in other contexts.[72] Fourth, and finally, the Board contended that the use of Corner Post's interpretation would "create serious problems for agency and judicial administration."[73] The Board explained that holding opposite to the Eighth Circuit would allow a "far broader set of potential plaintiffs to pursue belated challenges to agency regulations."[74] Thus, more plaintiffs could bring suit against longstanding and settled agency rules.

3. The Holding

The Court held that the Sixth Circuit provided the proper interpretation for when a claim begins accruing for purposes of suits subject to section 2401(a)'s statute of limitations. The Court instructed that a right of action "'accrues' when the plaintiff has a 'complete and present cause of action'—*i.e.*, when she has the right to 'file suit and obtain relief.'"[75] Therefore, "[a]n APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured."[76]

To explain its holding, the Court took a variety of analytical steps. First, the Court analyzed what "accrue" means under section 2401(a). The Court stated that accrue has a "well-settled meaning," where the right accrues "when the plaintiff has a complete and present cause of action."[77] It reasoned that a cause of action cannot be "complete and present" until the plaintiff "can file suit and obtain relief."[78] Given that understanding and definition, the Court then analyzed whether there might be reasons to displace that understanding.

Second, the Court concluded that there were no reasons persuasive enough to override its presumption about when a claim accrues. The Court explained that "[n]othing 'in the text of [section 2401(a)'s] limitations period' gives any indication that it begins to run before the plaintiff has a complete and present cause of action."[79] The Court highlighted that 2401(a)'s text only refers to a plaintiff and her right of action, and it does not include any mention in regard to agencies or defendants. Because of that, the Court concluded that section 2401(a) was meant to be "plaintiff-centric," and that this interpretation provides a plaintiff-centric rule.[80] The Court explained that if it had sided with the Eighth

72. *Id.* at 30-31.
73. *Id.* at 39.
74. *Id.* at 40.
75. Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 809 (2024).
76. *Id.*
77. *Id.* at 810.
78. *Id.* (internal citation omitted).
79. *Id.* at 811-12.
80. *See id.* at 812-13.

Circuit and the Reserve Board, that would have created a defendant-centric rule.[81]

Third, the Court addressed the Board's argument that this conclusion would make for bad policy—namely, that this would prevent finality for any agency regulations. The Court brushed this argument aside when it reasoned that "[p]leas of administrative inconvenience . . . never 'justify departing from the statute's clear text.'"[82] It also characterized that concern as "overstated" because even when a regulation survives its first six years it has never meant that the regulation has entered the "promised land free from legal challenge."[83]

In sum, the Court's holding dramatically shifted most circuits' understanding of when a claim accrues under 28 U.S.C. § 2401(a). While the fate of Regulation II is still unknown, the Court made clear that future "claim[s] do[] not accrue for purposes of §2401(a)'s 6-year statute of limitations until the plaintiff is injured by final agency action."[84]

4. The Dissent

The dissent reasoned that the *Corner Post* holding is contrary to the common understanding of how facial challenges to agency regulations accrue.[85] The dissent argued that the Court should not have defined "accrue" with a fixed meaning, as it creates a loophole for plaintiffs to exploit the courts and undermine the finality of agency regulations.[86]

Justice Ketanji Brown Jackson argued that the *Corner Post* principle should have been that "the meaning of accrue for the purpose of a statute of limitations is determined by the particular 'right of action' at issue" and that facial administrative law claims are not "plaintiff specific."[87] Thus, as applied to *Corner Post*, the limitation period began to run "not when a plaintiff is injured, but when a rule is finalized."[88]

The dissent highlighted that the Court had previously expressed concern for defining "accrue" because a fixed definition lends no flexibility in its application.[89] Relying on *Crown Coat Front Co. v. United States*, the dissent argued that there are "hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues.'"[90] The dissent also pointed out that this

81. *Id.* at 815.

82. *Id.* at 823 (internal citations omitted).

83. *Id.* (internal quotation marks and citation omitted). For example, "[r]egulated parties may always assail a regulation as exceeding the agency's statutory authority in enforcement proceedings against them." Herr v. U.S. Forest Serv., 803 F.3d 809, 821 (6th Cir. 2015).

84. *Corner Post*, 603 U.S. at 825.

85. *Id.* at 843 (Jackson, J., dissenting).

86. *See id.* at 843-44, 847.

87. *Id.* at 847.

88. *Id.* at 847-48.

89. *Id.* at 849. "Far from imposing a one-size-fits-all definition of the word 'accrue,' this Court has traditionally taken a claim-specific view." *Id.* at 850.

90. Crown Coat Front Co. v. United States, 386 U.S. 503, 517 (1967).

rigidity now prevents courts from exercising the longstanding practice of first understanding "the context" in which the claim arose for purposes of determining "when Congress meant for [the claim] to accrue."[91] Directly responding to Corner Post's argument that the Eighth Circuit's holding created an absurd result, the dissent noted that Corner Post should have viewed itself as a business "formed against the backdrop of a long-settled rule."[92] In sum, the dissent would have sided with the majority of circuits, including the Eighth Circuit, and ruled that Corner Post's claim was time-barred.

D. The Laws Governed by 28 U.S.C. §2401(a)'s Statute of Limitations Provision

Corner Post establishes a principle for determining when a claim accrues pursuant to the catch-all statute of limitations provision set out in section 2401(a). In *Corner Post*, the particular claim arose from the APA. The APA provides a right of action against many agencies. Indeed, environmental law practitioners often work in APA claims when bringing various forms of litigation. But, because section 2401(a) is the catch-all for federal statutes that do not include its own statute of limitations, it applies to many other statutes that also provide a right of action. This section discusses two such statutes: the APA and the ESA. This Subpart gives a general overview of both statutes and the types of claims brought under each. Becoming familiar with these claims is necessary to understand how the *Corner Post* principle affects these claims.

1. The Administrative Procedure Act

Congress enacted the APA in 1946 as a response to concerns about the vast expansion of agency powers after the New Deal era.[93] The APA is applicable to all federal agencies and governs most aspects of administrative law, including rulemaking, adjudications, investigations, and judicial review.[94] The APA requires generally that "regulations be grounded in statutory law and an administrative record that includes public notice-and-comment."[95] The APA also provides a right of action against agencies that promulgate rules and regulations.[96] APA claims are governed by 28 U.S.C. § 2401(a).[97]

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91. *Corner Post*, 603 U.S. at 844 (Jackson, J., dissenting).

92. *See id.* at 846.

93. Soojin Jeong et al., *Celebrating the 75th Anniversary of the APA*, THE REGUL. REV. (June 26, 2021), https://www.theregreview.org/2021/06/26/saturday-seminar-celebrating-75th-anniversary-apa.

94. *See* Dickinson v. Zurko, 527 U.S. 150, 154-55 (1999).

95. Susan Dudley, *A Brief History of Regulation and Deregulation*, THE REGUL. REV. (Mar. 11, 2019), https://www.theregreview.org/2019/03/11/dudley-brief-history-regulation-deregulation.

96. *See, e.g.*, 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof.").

97. *See, e.g.*, Texas v. Rettig, 987 F.3d 518, 529 (5th Cir. 2021) ("APA challenges are governed by 28 U.S.C. § 2401(a)."); Hells Canyon Pres. Council v. U.S. Forest Serv., 593 F.3d 923, 930 (9th Cir. 2010) ("APA claims are subject to a six-year statute of limitations.").

a. APA Provisions

There are two sections of the APA relevant to this Note: section 702 and section 704. Section 702 authorizes persons injured by agency action, or who suffered a legal wrong because of agency action, to obtain judicial review by suing a government party or agency.[98] Section 704 limits the types of agency actions that are judicially reviewable. Section 704 provides that "[a]gency action[s] made reviewable by statute and final agency action[s]" are the actions subject to judicial review.[99] Thus, a party seeking to file suit against an agency because the party is suffering a legal wrong (using section 702) must wait until the agency action is final (section 704).

In *Corner Post*, the Court explained that section 702 gave Corner Post the right to judicial review, but the issue was whether the claim was time-barred.[100] Furthermore, the Court stressed that Regulation II was reviewable because it was a "final agency action" when it impacted Corner Post.[101]

b. APA Impacts

The APA provides a mechanism for affected parties to obtain judicial review of agency actions. The APA is often considered a useful statute because it provides transparency to administrative processes.[102] Despite the benefits the APA brings to the administrative process, some commentators believe agencies still need further oversight and the amount of cases that can be brought under the APA should be expanded.[103] In fact, Corner Post's brief acknowledged this policy point when it argued that "agencies love how the [Eighth Circuit's ruling] insulates their actions from review . . . ."[104] Because of the importance of the

98. *See* Abbott Lab'ys. v. Gardner, 387 U.S. 136, 140 (1967).

99. 5 U.S.C. § 704.

100. *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 807-09 (2024).

101. *See id.* at 808.

102. *See* Virginia Huth, *Celebrating the 75th Anniversary of the Administrative Procedure Act*, U.S. GEN. SERVS. ADMIN. BLOG (June 11, 2021), https://www.gsa.gov/blog/2021/06/11/celebrating-the-75th-anniversary-of-the-administrative-procedure-act.

103. *See, e.g.*, Amy Howe, *Supreme Court Strikes Down Chevron, Curtailing Power of Federal Agencies*, SCOTUSBLOG (June 28, 2024), https://www.scotusblog.com/2024/06/supreme-court-strikes-down-chevron-curtailing-power-of-federal-agencies ("Friday's ruling came in one of three cases during the 2023-24 term seeking to curtail the power of federal agencies—a conservative effort sometimes dubbed the 'war on the administrative state.'"); John Kruzel, *Explainer: How Is the 'War on the Administrative State' Faring at the Supreme Court?*, REUTERS (Jan. 19, 2024), https://www.reuters.com/legal/how-is-war-administrative-state-faring-supreme-court-2024-01-19 ("The fishermen, supported by billionaire Charles Koch's network and other conservative groups, urged the justices to overturn or at least rein in the legal [*Chevron*] doctrine."); Andrew Grossman & Sean Sandoloski, *The End of Independent Agencies? Restoring Presidential Control of the Executive Branch*, THE FEDERALIST SOC'Y (July 26, 2021), https://fedsoc.org/fedsoc-review/the-end-of-independent-agencies-restoring-presidential-control-of-the-executive-branch ("If the Court is inclined to take Humphrey's Executor head-on, stare decisis should be no barrier to overruling it.").

104. Petition for Writ of Certiorari at 5, Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799 (2024) (No. 22-1008).

APA in challenging agency action and the Court's expansion of APA claims in *Corner Post*, it is likely that future tactics to force agency action, either to take action or undo agency actions, will be done by way of the APA. This point proves important for environmental organizations because plaintiff-centric rules in APA cases also give environmental plaintiffs an edge.

2. The Endangered Species Act

Congress enacted the ESA in 1973 to protect endangered and threatened species and their habitats.[105] In furtherance of this objective, the ESA directs the U.S. Fish & Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) to: (1) list species as "threatened" or "endangered" and designate critical habitat, (2) prohibit the "take" of listed species, and (3) require other federal agencies to consult with the USFWS and NMFS to "ensure their actions will not jeopardize the continued existence of listed species or result in destruction of adverse modification of designated critical habitat."[106]

While the APA is a procedural law, the ESA is a law of substance and procedure. Those substantive and procedural elements mean that the ESA provides a right of action and causes of action.[107] Thus, in endangered species litigation, a plaintiff may sue under both the APA and ESA rights of action, and the ESA can also provide a substantive cause of action. Relevant to these claims are three sections of the ESA: sections 4, 7, and 9.

a. ESA Provisions

Section 4 of the ESA requires USFWS and NMFS to determine whether a species is "threatened" or "endangered" for purposes of listing it.[108] The section outlines various factors for the USFWS and NMFS to consider when determining if a species qualifies for listing to trigger ESA protections.[109] Typically, the two agencies conduct their own research to determine whether to list a species, but the ESA also provides an avenue for citizens to petition for the listing of a species.[110] The allowance for petition provides the ESA's first cause of action.

When a citizen petitions an agency to list a species, the agency has specific responsibilities that must be met, all within statutory deadlines. Failure to complete those responsibilities, or failure to meet them within the deadline,

105. *Celebrating 50 Years of Success in Wildlife Conservation*, U.S. DEP'T OF THE INTERIOR (Feb. 13, 2023), https://www.doi.gov/blog/endangered-species-act-celebrating-50-years-success-wildlife-conservation.

106. MICHAEL B. WIGMORE ET. AL., *Effects of the Endangered Species Act on Oil & Gas Operations: Current and Emerging Issues*, *in* 63 CAIL ANNUAL INSTITUTE ON ENERGY LAW § 13.01(1) (2025).

107. *See, e.g.*, 16 U.S.C. § 1540 (establishing penalties and enforcement procedures); 16 U.S.C. § 1538 (establishing prohibited acts against listed species, a substantive provision).

108. 16 U.S.C. § 1533.

109. 16 U.S.C. § 1533(a)(1)(A)-(E).

110. *See* 16 U.S.C. § 1533(b)(1)(A), (b)(3)(A).

provides citizen groups with a cause of action against the agency. For example, in *Friends of Animals v. Haaland*, the Ninth Circuit stated that section 4 clearly mandates that the agency is "*required* to conduct a review of the species" when a citizen petitions the agency to list a species.[111]

In addition to the section 4 requirements, section 9 prohibits the take of a listed species.[112] Take is prohibited unless the party has authorization by an incidental take permit or a recovery permit.[113] An incidental take permit allows for incidental takings of listed species through the occurrence of an otherwise lawful activity.[114] A recovery permit allows takings for scientific purposes or for the enhancement of the listed species.[115] When an agency engages in the take permit process, the ESA provides standards and deadlines that govern the agency action.

Interested parties can use ESA section 9 and any regulations promulgated under it, in connection with the APA, to sue agencies who fail to comply with section 9's requirements. For example, applicants seeking incidental take permits who are denied can seek judicial review of the agency's denial.[116] However, beyond just parties whose permit applications are denied under section 9, other individuals and organizations can also be party to a take permit lawsuit. For example, interested citizen groups can also use ESA section 9 to sue agencies when they allege that the agency failed to ensure that a take permit applicant would "minimize and mitigate the take."[117]

Finally, section 7 of the ESA requires other federal agencies to consult with the USFWS and NMFS to ensure that any agency action "is not likely to jeopardize the continued existence" of listed species.[118] This section mandates that all agencies that could potentially affect a listed species perform procedural functions to help the USFWS and NMFS better understand how a listed species will be impacted. Typically, this procedure involves the preparation of a biological assessment, which outlines how the agency will minimize the impacts

111. *See* Friends of Animals v. Haaland, 997 F.3d 1010, 1017 (9th Cir. 2021) (quoting H.R. REP. NO. 95-1625, at 5 (1978)).

112. 16 U.S.C. § 1538(a)(1)(B), (C).

113. *See* 16 U.S.C. § 1539(a)(1)(A).

114. *See, e.g.*, Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 10 (D.C. Cir. 2005) ("Section 10 of the ESA does permit landowners and other non-federal entities to obtain a permit to 'take' a listed species 'if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.'" (quoting 16 U.S.C. § 1539(a)(1)(B))); Union Neighbors United, Inc. v. Jewell, 831 F.3d 564, 569 (D.C. Cir. 2016) ("Although taking is prohibited, the Service may issue a permit to allow for an 'incidental' taking.").

115. 16 U.S.C. § 1539(a)(1)(A); *see, e.g.*, *Nat'l Ass'n of Home Builders*, 415 F.3d at 10-11 ("[T]he ESA authorizes the grant of a 'recovery' permit, which enables a researcher to engage in actions 'for scientific purposes' that could result in a taking." (quoting 16 U.S.C. § 1539(a)(1)(A))).

116. *See* Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 279 F.3d 1229, 1233 (9th Cir. 2001).

117. *See* Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin., 99 F. Supp. 3d 1033, 1037, 1042 (N.D. Cal. 2015).

118. 16 U.S.C. § 1536(a)(2).

on listed species.[119] The preparation of biological assessments provides fuel for claims brought under the ESA and APA. Section 7 claims often arise when plaintiffs believe that the agency failed to consult with the USFWS or NMFS, or that the agency's actions do not adequately protect the listed species.[120]

b. ESA Claims

Given the ESA's statutory mandates and functions, this Subpart describes the broad categories of claims that can be brought through the ESA. Understanding these claims is necessary to understand how the *Corner Post* principle enables interested parties to revive these claims after they would have previously been time-barred.

ESA claims broadly fit into three categories: (1) claims against an agency for failure to comply with the ESA, (2) citizen suit claims against the Secretary of the Interior for failing to perform non-discretionary duties, and (3) substantive ESA claims brought through the APA. Each of those three claims are governed by 28 U.S.C. §2401(a). But, per the discussion on as-applied and facial challenges, those three claims accrue differently.

The first two claims both can be categorized generally as failure to comply claims. Each is considered to be an as-applied challenge because the claims accrue from the moment the agency does not comply with the ESA's mandates. Put simply, the plaintiffs were harmed as soon as the agency failed to comply. For example, in *NRDC v. Haaland*, the Ninth Circuit stated the general rule that when a "plaintiff alleges that an agency failed to comply with the ESA's procedural requirements, we apply the general six-year statute of limitations."[121] In that case, NRDC argued that the Secretary had a duty to reinitiate consultation when the agency issued a biological opinion.[122] The government argued that NRDC was too late because the claim accrued when the opinion was issued in 2009, fifteen years before NRDC filed suit. The Ninth Circuit accepted the government's reasoning that the six-year statute of limitations applied.[123]

Similarly, *Center for Biological Diversity v. Hamilton* provides another example of the statute of limitations at work in a failure to act claim. In *Center for Biological Diversity*, the plaintiffs argued that USFWS did not comply with the ESA when it did not designate critical habitat for the two listed fish

119. 16 U.S.C. §§ 1536(c)(1), (h)(1)(B).

120. *See, e.g.*, Coal. of Ariz./N.M. Stable Econ. Growth v. U.S. Fish & Wildlife Serv., No. CIV 03-508, 2005 U.S. Dist. LEXIS 61734, at *4, *19 (D.N.M. Jan. 31, 2005) (discussing section 7 claims with respect to Mexican gray wolf reintroduction programs); White v. U.S. Army Corps of Eng'rs, No. 22-cv-06143, 2023 U.S. Dist. LEXIS 190274, at *9-12 (N.D. Cal. Oct. 23, 2023) (discussing an alleged failure to consult in regard to dam activities).

121. Nat. Res. Def. Council, Inc. v. Haaland, 102 F.4th 1045, 1074 (9th Cir. 2024).

122. *Id.* at 1073.

123. *See id.* at 1074. The only reason the claim was not time-barred was because the court held that new information emerged in 2014 and 2015 that carried the injury closer to NRDC's filing time and within the statute of limitations. *See id.*

species.[124] In that case, the court ruled that the claim was time-barred because the claim began to accrue on the "date by which Defendants must designate critical habitat."[125]

In the rarest of instances, courts have ruled that the failure to act represents an ongoing violation.[126] In those cases, the statute of limitations was suspended because the agency was considered to have continued to injure. However, these cases tend to be in the minority for failure to act claims.[127]

The third type of ESA claims, substantive ESA claims brought through the APA, can be categorized as facial challenges. Typically, this type of claim alleges that the regulation promulgated pursuant to the ESA is unconstitutional or not compliant with the statute (like the claim in *Corner Post*). For example, in *American Stewards of Liberty v. Department of Interior*, the Fifth Circuit explained that "the law distinguishes between facial challenges to agency regulations and challenges to a subsequent agency action applying the regulation for purposes of determining when an APA claim accrues."[128] This case came prior to *Corner Post* so it is no longer guiding, but the case makes clear that these types of challenges are facial claims.[129]

c. ESA Impacts

Given the ESA's sweeping mandates on all agencies and its specific directives for the USFWS and NMFS, the ESA greatly impacts many stakeholders. In the Pacific Northwest, the ESA is often blamed as the law responsible for the loss of lumber jobs and the decline of timber harvests on federal lands after the Northern spotted owl was listed.[130] Similarly, Senator John Barrasso advocated against the ESA because he thought the law is too demanding on "[s]tates, counties, wildlife managers, home builders, construction

124. Ctr. for Biological Diversity v. Hamilton, 385 F. Supp. 2d 1330, 1338 (N.D. Ga. 2005), *aff'd*, 453 F.3d 1331 (11th Cir. 2006).

125. *See id.* at 1338-39.

126. *Compare* Ctr. for Biological Diversity v. Hamilton, 453 F.3d 1331, 1336 (11th Cir. 2006) (declining to recognize failure to act as extending the statute of limitations), *with* S. Appalachian Biodiversity Project v. U.S. Fish & Wildlife Serv., 181 F. Supp. 2d 883, 887 (E.D. Tenn. 2001) (recognizing failure to act as extending the statute of limitations).

127. *See, e.g.*, Schoeffler v. Kempthorne, 493 F. Supp. 2d 805, 820, 822 (W.D. La. 2007) (ruling that the failure to designate critical habitat constitutes an "ongoing and continuous" violation that extends the statute of limitations).

128. Am. Stewards of Liberty v. Dep't of Interior, 960 F.3d 223, 228 (5th Cir. 2020).

129. *See id.*

130. *See, e.g.*, Kale Williams, *Owl in the Old Growth: The Species That Sparked a Reckoning on Oregon's Federal Forestlands*, KGW8, https://www.kgw.com/article/news/local/the-story/northern-spotted-owl-oregon-timber-habitat-endangered-species-act/283-33c8a857-668c-4058-abfb-b536a584968a (last updated Dec. 12, 2023) ("Between 1989 and 1995, timber harvests on federal land fell by roughly 90%.").

companies, farmers, ranchers, and other stakeholders."[131] Furthermore, the first Trump administration believed that the impacts of listing species was too costly. In a proposed rule, the USFWS and NMFS had proposed to revise portions of their regulations so that the agencies would have listed the costs and benefits for listing a species—an attempt to use costs to justify not extending ESA protections to an otherwise qualifying species.[132]

On the other hand, the ESA is responsible for successfully sustaining populations of listed species. For example, the bald eagle was listed in 1976, and the special protections articulated under the ESA enabled its population to recover, leading to its delisting in 2007.[133] The peregrine falcon is another success story, with population numbers rising enough after listing that it was able to be delisted.[134] Today, over 1,300 species are listed and receive protection under the ESA.[135]

The tension between conservative political talking points that paint the ESA as too onerous (and the general mood to curb agency powers) and the fact that the ESA is quite successful in protecting species has created a sustained pressure that could result in significant ESA litigation.[136] Therefore, environmental organizations should be aware of this growing tension surrounding the ESA and the agencies that administer it. Given the possibility of harm coming from actions to dismantle agencies, it is even more important that environmental plaintiffs use *Corner Post* to their and the environment's advantage.

II. THE *CORNER POST* PRINCIPLE APPLIED TO ENDANGERED SPECIES ACT CLAIMS

Negative sentiment about the ESA's function, especially considering the negative discourse surrounding the economic consequences of the Act's

131. Justin Worland, *The Endangered Species Act Is Criticized for Its Costs. But It Generates More than $1 Trillion a Year*, TIME MAG. (July 25, 2018), https://time.com/5347260/endangered-species-act-reform.

132. *See* Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35193, 35194 (July 25, 2018) (to be codified at 50 C.F.R. pt. 424); Gretchen Frazee, *What is an Endangered Species Worth? Trump Rule Sparks Debate*, PBS NEWS (Aug. 22, 2019), https://www.pbs.org/newshour/economy/what-is-an-endangered-species-worth-trump-rule-sparks-debate.

133. *Success Stories*, ENDANGERED SPECIES COAL., https://www.endangered.org/success-stories (last visited Dec. 14, 2024).

134. Final Rule to Remove the American Peregrine Falcon From the Federal List of Endangered and Threatened Wildlife, and to Remove the Similarity of Appearance Provision for Free-Flying Peregrines, 64 Fed. Reg. 46542, 46542 (Aug. 25, 1999) (to be codified at 50 C.F.R. pt. 17).

135. *Endangered Species: Species Information (Factsheets)*, EPA, https://19january2017 snapshot.epa.gov/endangered-species/endangered-species-species-information-factsheets_.html (last updated Jan. 19, 2017).

136. But, for example, a study conducted in areas affected by the listing of the Northern spotted owl found that the owl's listing led to a smaller number (only about 14 percent) of lost jobs in the region than projected by the timber industry. Ann E. Ferris & Eyal G. Frank, *Labor Market Impacts of Land Protection: The Northern Spotted Owl*, 109 J. ENV'T ECON. & MGMT., Sept. 2021, at 1, 3.

comprehensive protections, is only likely to grow. Similar to commentary calling for limits on agency power, these critiques could be used to weaken the ESA and the agencies enforcing it. Therefore, understanding how the *Corner Post* principle impacts both new and potentially time-barred claims will be essential to advancing species protections.

This Part consists of three Subparts. Subpart A predicts whether the *Corner Post* principle will be applied to ESA claims. Subpart B offers a normative assessment of whether the principle should apply, focusing on policy rationales both for and against its application. Subpart C predicts what stakeholders in ESA litigation can expect if the *Corner Post* principle is applied.

A. Predictive: Will the Corner Post Principle be Applied to ESA Claims?

It is extremely likely that the *Corner Post* principle will be applied to claims brought under the ESA. No part of the *Corner Post* opinion provides any evidence that would suggest that judges should inquire into the statute providing the basis for the claim in order to determine when the claim accrues under § 2401(a). Instead, *Corner Post*'s holding rejects the notion that "accrues" should not have a fixed definition.[137] In addition, there appears to be no textual or legislative history arguments that would provide meaningful reasons to justify treating the accrual of an ESA claim differently than APA claims. Therefore, it appears clear that the *Corner Post* principle will apply to ESA claims.

B. Normative: Should the Corner Post Principle Apply to ESA Claims?

This Subpart provides a normative assessment on whether the *Corner Post* principle should apply to ESA claims. It examines various policy rationales, weighing the pros and cons of its application. This Subpart concludes that applying the principle will enhance species protections and promote uniformity between the two often interrelated statutes (the ESA and APA).

1. ESA's Statutory Purpose as a Policy Rationale

The purpose of the ESA is to "conserve endangered and threatened species and their ecosystems."[138] To do so, the ESA imposes specific obligations on agencies to protect listed species and to be sure that agency actions do not jeopardize the existence of listed species.[139] Should *Corner Post* be applied, the "plaintiff-centric" rule will allow plaintiffs to revisit past agency actions—that may have been previously shielded by the statute of limitations—to bring those agencies back into compliance with ESA mandates.[140]

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137. *See* Corner Post, Inc., 603 U.S. at 821-22.

138. *Laws & Policies: Endangered Species Act*, NOAA FISHERIES, https://www.fisheries.noaa.gov/topic/laws-policies/endangered-species-act (last visited Dec. 14, 2024).

139. 16 U.S.C. § 1536(a)(2).

140. *See Corner Post*, 603 U.S. at 816-17.

In the very first case example of this Note, the USFWS had clearly acted without regard to its ESA mandate to list critical habitat for the two species of fish.[141] Because the claim was time-barred, there was nothing the court nor the plaintiffs could do to bring the agency back into compliance. Now, under *Corner Post*, a new environmental organization that then becomes injured by the agency action or inaction would not be time-barred from filing suit. This principle offers a unique opportunity for concerned citizens to identify ways to bring about new injuries caused by agencies, enabling renewed efforts to challenge old agency actions and to advance species protection.

While the *Corner Post* principle may enable parties to bring agencies into compliance with the ESA more frequently, it could also undermine the legislative intent behind the ESA. If actors seek to overturn regulations that protect species by revisiting past, time-barred rules, the *Corner Post* principle offers a pathway to do so.[142] Repealing ESA protections by way of the courts contradicts the ESA's purpose, which is to safeguard listed species and their habitats.[143] For example, a new logging company could plausibly challenge protections for an endangered bird on their property that would have been precluded under the previous rule. Allowing such litigation risks creating regulatory instability, putting protected species at greater risk. Thus, by redefining accrual, the *Corner Post* principle may leave regulations vulnerable beyond their initial six years, likely encouraging more legal challenges claiming ESA regulations are unlawful.

2. Uniformity, Certainty, and Stability as Policy Rationales

A second policy rationale emphasizes the importance of uniformity among laws, particularly when they are often intertwined in the same action. Uniformity, especially under a shared statute of limitations, simplifies the process for parties to understand their rights and the expiration of claims. Adopting the *Corner Post* principle would ensure that ESA claims accrue at the same time as APA claims. Since these claims are frequently linked, treating them consistently would establish a clear and predictable rule for determining when the statute of limitations precludes litigation.[144]

Even so, this justification could be outweighed by the concern that applying this principle uniformly across all agencies dealing with environmental statutes

141. *See* Ctr. for Biological Diversity v. Hamilton, 385 F. Supp. 2d 1330, 1332 (N.D. Ga. 2005), *aff'd*, 453 F.3d 1331 (11th Cir. 2006).

142. *See Corner Post*, 603 U.S. at 845-46 (Jackson, J., dissenting) ("[T]his case is the poster child for the type of manipulation that the majority now invites—new groups being brought in (or created) just to do an end run around the statute of limitations.").

143. *See* 16 U.S.C. § 1531.

144. In a similar vein, applying the *Corner Post* principle would promote uniformity across different environmental laws. For instance, section 2401(a) also governs Clean Water Act section 404 claims. By extending *Corner Post* to both, courts would achieve greater uniformity in calculating accruals of rights of action within the realm of environmental law.

could be overly burdensome. Agencies would likely need to preserve their records indefinitely to ensure that they could provide evidence to defend against claims that may arise many years after a final rule is published. However, even if an agency retained those records forever, a challenge to a regulation a decade or more later might present another issue: the individuals responsible for explaining the record on behalf of the agency may no longer be familiar with it. This situation directly conflicts with the principal rationale for statutes of limitations, which is to provide repose.[145]

Furthermore, uniformity may not be as desirable as certainty and stability. Both regulated parties and agencies depend on predictability to implement effective compliance measures. For example, consider a scenario where a developer intends to begin construction but is halted by the discovery of an endangered plant, listed for over six years, on her property. Ordinarily, the developer would initiate the process of applying for an incidental take permit. However, this discovery could provide the catalyst for the court to deem the situation an injury, completing her cause of action, and allowing the developer to pursue delisting the plant species. The delisting would likely, in turn, trigger litigation from environmental groups seeking to have the species relisted. Such regulatory uncertainty, compounded by increased litigation and shifting requirements, might make it challenging for parties.[146] It also makes it challenging for parties to determine whether they are in compliance with the ESA as regulations might shift years after they were first enacted.

3. 28 U.S.C. § 2401(a) Should Be Plaintiff-Centric as a Policy Rationale

Third, the Court stressed in *Corner Post* that section 2401(a) is a plaintiff-centric statute of limitations.[147] Under this principle, courts should more often find that a plaintiff's claim is not time-barred. This ensures plaintiffs have a fair opportunity to bring meritorious claims against agencies, even when they might have otherwise been time-barred.

Similarly, plaintiffs may not always know when they are injured. For instance, they might rely on an agency's assurance that action is forthcoming, only to later discover no action was taken. Prior to *Corner Post*, their claim could expire before they realized their injury. Consider again *Center for Biological Diversity v. Hamilton*. Applying the *Corner Post* principle here, Center for Biological Diversity could have argued that their claim did not accrue until it was harmed by final agency action—such as the agency denying a new petition to designate critical habitat for the fish. This approach contrasts with the earlier

145. *See* Ochoa & Wistrich, *supra* note 22, at 460.

146. *See* Neil Bradley, *How Excessive Regulation Hurts the Economy*, U.S. CHAMBER OF COM. (Jan. 16, 2025), https://www.uschamber.com/economy/how-excessive-regulation-hurts-the-economy (arguing that the "cost to the economy is compounded when the rules are constantly being changed" because the "uncertainty make it difficult to plan and invest for the future").

147. *See Corner Post*, 603 U.S. at 813.

requirement that the claim accrues at the moment the agency initially failed to list critical habitat and shielded forever once the inaction reaches the six-year mark. By adopting the *Corner Post* framework, agency errors and failures can no longer evade accountability simply because they were not discovered within the first six years.

To summarize, applying the *Corner Post* principle to ESA claims presents a complex policy tradeoff. On the one hand, it offers a powerful tool for enforcing the ESA's conservation mandate, allowing newly injured plaintiffs to challenge past agency failures and potentially bring regulations back into compliance with the statute. It also promotes uniformity between the ESA and the APA, statutes that are frequently invoked together. On the other hand, this expanded window for litigation could destabilize settled regulations, expose agencies to stale claims, and frustrate both regulated parties and conservationists with ongoing legal uncertainty.

C. Predictive: How Will the Corner Post Principle Affect ESA Stakeholders?

This Subpart predicts the effects that the *Corner Post* principle will have on different stakeholders involved in ESA litigation. These stakeholders include plaintiffs, federal agencies, regulated entities, the environment, and the courts.

1. Impacts on Environmental Plaintiffs

The application of the *Corner Post* principle to ESA claims could extend the timeframe for plaintiffs to file their claims. However, this extended period may still be curtailed depending on how judges assess the plaintiff's cause of action in relation to claim accrual.

For most ESA claims, which are often characterized as as-applied challenges, the *Corner Post* principle would not impact when a plaintiff's claim accrues. But, for facial challenges, the *Corner Post* principle would likely prevent these claims from being time-barred, even if they would otherwise be considered stale. This will likely enable environmental plaintiffs to bring renewed challenges to adverse agency regulations that have been in place for more than a decade.

The *Corner Post* principle is grounded in its plaintiff-centric policy justification, allowing plaintiffs to fully experience the effects of agency action and the resulting injury before initiating a lawsuit.[148] This approach benefits plaintiffs by giving them additional time to develop stronger, more compelling claims supported by well-developed facts of injury that could be persuasive to a court. Furthermore, the extended timeline enables plaintiffs to "test the waters" of a regulation to evaluate its impact—positive or negative—on their interests. As a result, and with a holistic view, an environmental community that takes more time to gather facts and build a convincing story is likely to be able to

148. *See id.* at 824.

present more persuasive narratives that encourage courts to rule in their favor without a pressing concern in bringing claims against rules within six years of issuance.

As demonstrated in *Corner Post*, where the plaintiff revived a previously unsuccessful claim, this extended timeframe also incentivizes plaintiffs to be inventive.[149] It opens the door for the creation of new organizations designed to challenge regulations whose adverse effects may only surface years after implementation.[150]

While some might argue that claim or issue preclusion might present an obstacle to newly-formed organizations seeking to relitigate against agency regulations, this point likely does not stand.[151] Despite the claim in *Corner Post* having already been litigated, this was not an issue for the Court.[152] This is likely because the Court saw the injury as personal to Corner Post, as the question in the case came down to when Corner Post's own claim accrued. Thus, newly formed environmental organizations would likely not be precluded from bringing similar claims. In conclusion, it is likely that new environmental organizations will form with the strategic purpose of targeting and litigating adverse agency regulations.

2. Impacts on Federal Agencies

The extension of the *Corner Post* principle to ESA claims will likely impose a greater burden on agency operations than existed before *Corner Post*.

First, the *Corner Post* principle will most likely increase the administrative burden on agencies. Because litigation can now be brought against regulations older than six years, agencies like USFWS and NMFS will face greater demands for record keeping and record building. Further, defending regulations enacted years earlier will expose agencies to the influence of hindsight bias.[153] Research on negligence claims shows that "judges with outcome knowledge perceived the

149. *See id.* at 845-46 (Jackson, J., dissenting).

150. Newly formed organizations will need to be able to prove standing. Standing requires demonstration that the plaintiff has an injury in fact, causation, and redressability. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992). In addition, the organization must also prove organizational standing. Usually, the organization can show that one of its members was injured and that the interests at stake are "germane to the organization's purpose." *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977). Thus, organizations will likely need to become creative with canvassing efforts and organizing to submit petitions to agencies to begin creating new injuries for purposes of creating new claims that are not time-barred.

151. Claim preclusion "prevents relitigation of entire claims," while issue preclusion prevents "relitigation of specific issues." Grande v. Eisenhower Med. Ctr., 512 P.3d 73, 79 (Cal. 2022).

152. *See Corner Post*, 603 U.S. at 805-06 (describing previous claims against Regulation II).

153. *See* Doron Teichman, *The Hindsight Bias and the Law in Hindsight*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 354, 355-56 (Eyal Zamir & Doron Teichman eds., 2014).

occurred harm as significantly more foreseeable."[154] Similarly, if plaintiffs present a compelling factual record, judges may be swayed by hindsight reasoning to question or alter the regulation. Additionally, agencies will face the challenges of defending stale claims on stale records. Thus, it is likely that agencies will have a difficult time defending older regulations.

Second, the *Corner Post* principle will likely result in increased litigation for the USFWS and NMFS. Statutes of limitations act as filters to block claims after a certain time period.[155] By removing that filter, *Corner Post* opens the door for more claims to proceed. A relevant parallel exists here with habeas corpus petitions: when restrictions were loosened on habeas filings starting in 1953 because of *Brown v. Allen*, the volume of yearly petitions by state prisoners increased "from 1,020 in 1961 to 8,059 in 1982."[156] Similarly, agencies should expect to face more frequent litigation under the ESA, which will consume time and resources.

Third, increased litigation could disrupt long-term conservation planning conducted by agencies. Effective species protection often requires agencies to implement comprehensive, long-term plans.[157] Litigation that challenges regulations many years after implementation could destabilize these plans, undermining the agencies' ability to protect listed species. For example, the NMFS recently listed the queen conch as a threatened species.[158] As part of that listing, the NMFS explained that it will now "work with regional stakeholders to foster collaborations" to address the threats to the species and it will develop "a recovery plan" that will guide efforts to recover population numbers.[159] These two plans require long-term and strategic planning. Should regulations make it past the six-year mark, the actions carried out under the plan would have likely been less vulnerable to litigation challenges prior to *Corner Post* because the plan was protected by the statute of limitations. However, now that litigation may arise more than six years after implementation, litigation could disrupt these long-term plans and hinder the agency's ability to protect the queen conch effectively.

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154. Aileen Oeberst & Ingke Goeckenjan, *When Being Wise After the Event Results in Injustice: Evidence for Hindsight Bias in Judges' Negligence Assessments*, 22 PSYCH., PUB. POL'Y, & L. 271, 271 (2016).

155. *See* Ochoa & Wistrich, *supra* note 22, at 499.

156. Nicholas Beekhuizen, *Post-AEDPA Compromise: Increased Habeas Corpus Relief for Capital Cases and Tighter Restrictions for Noncapital Cases*, 10 IND. J. L. & SOC. EQUAL. 321, 325, 330 (2022); *see* Brown v. Allen, 344 U.S. 443 (1953).

157. *See, e.g.*, Endangered and Threatened Species; Recovery Plan for Main Hawaiian Islands Insular False Killer Whale Distinct Population Segment, 86 Fed. Reg. 60615, 60616 (Nov. 3, 2021).

158. Endangered and Threatened Wildlife and Plants: Listing the Queen Conch as Threatened Under the Endangered Species Act, 89 Fed. Reg. 11208, 11208 (Feb. 14, 2024) (to be codified at 50 C.F.R. pt. 223).

159. *Id.* at 11216, 11218.

3. Impacts on Regulated Entities

The application of the *Corner Post* principle to ESA claims will also significantly impact regulated entities. First, regulated entities acting as plaintiffs in ESA litigation may benefit from this new opportunity to challenge longstanding regulations that hinder their ability to derive economic value from land and waterways. However, for entities primarily focused on understanding the regulatory landscape, the increased frequency of litigation on the merits of regulations will likely create uncertainty.[160] Should agency regulations be frequently blocked or overturned, it may become difficult for regulated entities to determine which rules apply to them. This uncertainty would also impede regulated entities' ability to develop long-term plans for compliance or economic activities. The regulatory flip-flopping that is likely to come will force regulated entities to allocate additional resources to adapt to shifting rules, creating economic inefficiencies and significant planning costs.

Second, regulated entities may find themselves entangled in litigation more frequently, leading to increased costs not otherwise associated with ESA compliance.[161] Take, for instance, the Snake River salmon and steelhead. The extensive network of dams on the Columbia and Snake rivers creates complex regulatory regimes ripe for lawsuits by both environmental groups seeking further protection for the fish and regulated entities seeking less regulation.[162] Regulated entities along these rivers may need to invest further in legal strategies to ensure compliance or to seek favorable outcomes in courts.

Third, tribes that rely on listed species for cultural, subsistence, or economic purposes will likely face disproportionate impacts from shifting ESA interpretations.[163] Frequent litigation—whether aimed at conservation efforts or development projects—could undermine environmental justice initiatives and exacerbate inequities for tribal communities. The use of ESA litigation to strike down protections for species has the potential to either support or undermine tribal interests, depending on how protections for species align or conflict with tribal sovereignty, land use, or cultural practices. For example, the ESA has been interpreted to extend to protecting species on tribal land, which, in some instances, has prevented development that tribes have sought.[164] This has also

160. *See* Bradley, *supra* note 146 (arguing that the "cost to the economy is compounded when the rules are constantly being changed" because the "uncertainty make it difficult to plan and invest for the future").

161. *Cf.* Ochoa & Wistrich, *supra* note 22, at 480-81 (arguing that statutes of limitations work to reduce litigation costs).

162. *Endangered Species Act, Columbia River Salmon and Steelhead, and the Biological Opinion*, NW. POWER & CONSERVATION COUNCIL, https://www.nwcouncil.org/reports/columbia-river-history/endangeredspeciesact (last visited Dec. 16, 2024).

163. *See id.*

164. Anna V. Smith, *The Endangered Species Act's Complicated Legacy in Indian Country*, HIGH COUNTRY NEWS (Dec. 1, 2023), https://www.hcn.org/issues/55-12/endangered-species-the-endangered-species-acts-complicated-legacy-in-indian-country.

been true in instances where the species protections have threatened to restrict tribes from exercising other treaty rights, like the fishing of listed salmon species.[165]

Even so, tribes may also use the ESA to bring about the tribe's own desired protections and changes. For example, tribes may use the ESA as a "shield" whereby the tribe can use their own land and management plans to reintroduce listed species on tribal land through federal funding.[166] Similarly, tribes may also use the ESA as a "sword," whereby the tribe can use ESA litigation to bring about desired changes that would positively impact listed species. Most notably, tribes have used ESA litigation to force settlements to remove the dams on the Klamath River.[167] Thus, the *Corner Post* principle could also be used by tribes to litigate older ESA regulations to bring about better protections for species.

In sum, while some regulated entities will likely benefit from the opportunity to challenge older regulations, others will face heightened uncertainty, increased litigation involvement, and rising compliance costs due to the *Corner Post* principle. For tribes, the *Corner Post* principle may either create new opportunities to bring pressure to better protect listed species, or it could increase the risk of exclusion from critical decisions that impact their lands, livelihoods, and cultural practices.

4. Impacts on Environmental Conservation

The *Corner Post* principle will likely have both positive and negative effects on conservation efforts under the ESA.

On the positive side, the *Corner Post* principle will likely enable more meritorious claims to proceed, allowing plaintiffs to hold agencies accountable more often. For example, in the context of *Center for Biological Diversity v. Hamilton*, a newly formed citizen group or an individual recently exposed to injury caused by the USFWS's failure to designate critical habitat could bring a timely claim. Litigating older yet valid claims would ensure greater accountability for agency action or inaction, which is particularly relevant in cases where agencies have historically failed to designate critical habitat.[168] Over

165. Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543, 544 (1991).

166. Sage Van Wing, *Tribes Have Complicated Relationship with Endangered Species Act*, OR. PUB. BROAD. (Dec. 19, 2023), https://www.opb.org/article/2023/12/19/endangered-species-act-tribes-sovereignty-hunting-fishing; *see also Yurok Condor Restoration Program*, THE YUROK TRIBE, https://www.yuroktribe.org/yurok-condor-restoration-program (last visited Aug. 22, 2025).

167. Van Wing, *supra* note 166; *see also* Smith, *supra* note 164.

168. When an agency lists an endangered species, it is quite common for the agency to not list critical habitat for it. In fact, even the queen conch discussed earlier in this Note was listed but no critical habitat was set aside for it. *See* Endangered and Threatened Wildlife and Plants: Listing the Queen Conch as Threatened Under the Endangered Species Act, 89 Fed. Reg. at 11208; *see also Closing the "Critical Habitat" Loophole Was the Right Thing to Do*, MOUNTAIN STATES LEGAL FOUND. (Dec. 18, 2020), https://mslegal.org/2020/12/closing-the-critical-habitat-loophole-was-the-right-thing-to-do

time, the ability to litigate will likely help curb longstanding agency practices that make listed species vulnerable, like the failure to designate habitat after species have been listed.

On the negative side, extending the *Corner Post* principle to ESA claims may disrupt conservation efforts by undermining long-term planning and regulatory stability. Protected species often require decades of sustained effort to recover. For example, the bald eagle remained listed for forty years before it had recovered enough to be delisted, and the Northern spotted owl has been listed for the past thirty-four years.[169] Effective conservation demands durable and consistent planning and protection. Frequent litigation stemming from the *Corner Post* principle, coupled with the already existent sentiment of mistrust of agency regulations, will likely impede such long-term efforts. Further, because there may be more frequent ESA litigation after *Corner Post*, the USFWS and NMFS may face more ongoing legal challenges that divert time and resources away from implementing conservation programs. This challenge is exacerbated by the fact that listing a species already takes, on average, twelve years or more.[170] Any additional delays caused by litigation could further extend this timeline, ultimately jeopardizing species survival and recovery.

In sum, while the *Corner Post* principle may strengthen accountability and allow plaintiffs to address agency failures, it could also hinder conservation efforts by destabilizing long-term plans and delaying critical protections for listed species.

5. Impacts on the Courts

The *Corner Post* principle will also likely lead to an increase in ESA-related litigation in federal courts, despite the majority arguing the opposite. While the Court in *Corner Post* wrote that the new principle will not mean that "courts and agencies will need to expend significant resources to address each new suit," history suggests otherwise.[171] Just as the Warren Court's expansion of eligibility for habeas petitions significantly increased the number of such petitions filed in federal courts (a trend that persists today), allowing more claims to be brought under the *Corner Post* principle will similarly result in an uptick in litigation.[172]

(discussing support for the habitat rule change because the rule change means that the agency can designate less critical habitat for listed species).

169. *Bald Eagle Wins 40-year Fight for Survival*, THE GUARDIAN (June 29, 2007), https://www.theguardian.com/environment/2007/jun/29/usnews.conservation; *Spotted Owl Observations Database Information*, CAL. DEP'T OF FISH & WILDLIFE, https://wildlife.ca.gov/Data/CNDDB/Spotted-Owl-Info (last visited Dec. 16, 2024).

170. Shreya Dasgupta, *Endangered Species Often Wait 12 Years or More to Be Listed for Protection*, MONGABAY (Aug. 25, 2016) https://news.mongabay.com/2016/08/endangered-species-often-wait-12-years-or-more-to-be-listed-for-protection.

171. *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 823-24 (2024).

172. *See* Beekhuizen, *supra* note 156, at 325, 327.

Moreover, this increase in claims will place a heavier administrative burden on courts. Courts will be required to evaluate challenges based on administrative records that are not contemporaneous with the litigation. This task will likely fall on agencies, which must provide justifications for decisions made years, or even decades ago—decisions that may have been developed under entirely different administrations, priorities, and regulatory frameworks. Courts may find this process especially challenging, as it runs counter to the very rationale behind statutes of limitations: promoting finality, fairness, and efficiency.[173] Parsing outdated records and assessing decisions through the lens of hindsight could make adjudicating these claims significantly more complex and time consuming.

In sum, while the *Corner Post* principle expands access to litigation, it will likely increase both the volume of ESA claims and the administrative burden on courts, creating practical challenges for judicial review.

CONCLUSION

The application of the *Corner Post* principle to ESA claims will significantly shape the landscape of environmental litigation and regulatory practices. By extending the statute of limitations and enabling plaintiffs to challenge longstanding agency decisions, the principle introduces a dramatic shift in how environmental protection will occur and how agency accountability is approached. The principle may provide plaintiffs with a crucial means to hold federal agencies accountable, but it could also undermine the stability and effectiveness of long-term conservation efforts, increase the burden on agencies, and create uncertainty for regulated entities.

First and foremost, the *Corner Post* principle will likely benefit environmental plaintiffs by offering them an opportunity to challenge longstanding regulations that may have been harmful to listed species. The extension of the ESA's statute of limitations provides plaintiffs with a more substantial window to develop stronger and more compelling claims. With additional time to gather facts and assess the effects of regulations, plaintiffs can bring forth more nuanced, evidence-driven cases that are likely to resonate with courts. Furthermore, the new accrual formula allows plaintiffs to form new organizations focused on challenging outdated regulations whose impacts may only become apparent years after their implementation. This opportunity should lead to an increase in the number of public interest groups dedicated to protecting endangered species.

At the same time, this extension will introduce significant challenges for federal agencies. In particular, the USFWS and NMFS will likely face an increased administrative burden as they must defend old regulations. Specifically, agencies will likely be forced to work with outdated records to defend against litigation, which is made more difficult by the loss of institutional

173. Ochoa & Wistrich, *supra* note 22, at 460.

knowledge as the record ages. Agencies could also be exposed to the influence of hindsight bias, where past regulatory decisions are judged by the knowledge available at present instead of the context in which those decisions were originally made. This could result in the overturning of beneficial regulations, and it could create a patchwork regulatory regime.

Moreover, agencies will likely experience a surge in litigation against them as a result of the *Corner Post* principle. This will likely divert resources and attention away from other crucial regulatory and conservation tasks. With no clear date on when a claim expires, agencies will likely face a continuous cycle of litigation that may undermine their ability to implement long-term conservation strategies effectively. The constant threat of lawsuits could destabilize comprehensive recovery plans. Thus, it is imperative that environmental groups use the *Corner Post* principle to their advantage and compel agency action to protect species.

Furthermore, regulated entities—especially those in industries like energy, agriculture, and infrastructure—will find themselves with increased legal costs. Because the principle could destabilize regulations, regulated entities will need to pay special attention to their compliance measures. Tribes will also be affected by the principle, whether it be through increased limitations on tribal sovereignty in the name of species protection or through expanded opportunities to use ESA litigation to advance protections that align with their interests.

Environmental conservation efforts will likely experience both positive and negative effects as a result of the *Corner Post* principle. While the principle allows for meritorious claims safeguarding conservation efforts to proceed, it could also undermine long-term conservation goals. Legal challenges that disrupt regulatory continuity and delay the implementation of listing species or recovery plans could jeopardize the recovery of already-vulnerable species.

Finally, the courts themselves will likely bear an increased burden caused by the *Corner Post* principle and its application to the ESA. As more claims are filed, courts will need to dedicate significant time and resources to evaluating challenges based on administrative records that are outdated. This will place an additional strain on an already slow judicial system, and it could create a backlog that could delay critical decisions in ESA claims.

In conclusion, while the *Corner Post* principle will likely create significant risks for both regulatory stability and effective conservation under the ESA, it also provides the potential to enhance accountability and expand opportunities for environmental plaintiffs. Its application will likely lead to an increase in litigation, placing burdens on federal agencies, regulated entities, and the courts. But that is not to say that environmental plaintiffs should not bring their challenges to harmful, outdated agency actions. Environmental plaintiffs should do just that, utilizing an important tool to safeguard endangered species. While many had seen the *Corner Post* principle as an extended invitation to dismantle agency regimes in the furtherance of business-related goals, the principle also

provides a unique opportunity for environmental plaintiffs to advance environmental protection and accountability.