No. 19-50178

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GENERAL LAND OFFICE OF THE STATE OF TEXAS,
Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, ACTING SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, in his official capacity as Secretary for the United States of the Interior; UNITED STATES FISH AND WILDLIFE SERVICE; GREG SHEEHAN, in his official capacity as Acting Director of the U.S. Fish and Wildlife Service; AMY LUEDERS, in her official capacity as Southwest Regional Director U.S. Fish and Wildlife Service,
Defendants - Appellees.

On Appeal from the United States District Court for the Western District of Texas, Austin Division, No. 1:17-CV-538 – Hon. Sam Sparks

OPENING BRIEF OF APPELLANT GENERAL LAND OFFICE OF THE STATE OF TEXAS

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CERTIFICATE OF INTERESTED PERSONS

No. 19-50178

General Land Office of the State of Texas
v.
United States Department of the Interior, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Private Parties:
    a. All owners of properties inhabited by a species known as the Golden-Cheeked Warbler
    b. Signatories of the Petition to Delist the Golden-Cheeked Warbler: Texans for Positive Economic Policy, Susan Combs, Texas Public Policy Foundation, Reason Foundation.

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STATEMENT REGARDING ORAL ARGUMENT

This appeal arises out of a district court judgment rendered under the Endangered Species Act involving the interface of law and science in connection with a 90-day petition to delist the Golden-Cheeked Warbler from the list of endangered species.

The case presents important questions of first impression in this Court, including (1) the issue of when the statute of limitations begins to run if a listing decision under the Endangered Species Act is not accompanied by a timely designation of critical habitat, (2) the precise manner in which listing and delisting petitions must be reviewed by the United States Fish and Wildlife Service, and (3) the extent to which the National Environmental Policy Act applies to listing and delisting decisions. The great number of scientific studies set forth in the record and cited by the parties in the district court underscore the complexities inherent in these issues.

Accordingly, Plaintiff-Appellant General Land Office of Texas believes that oral argument will prove helpful to the Court in ensuring full deliberation.

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 on the three claims set forth in the Second Amended Complaint filed by the Plaintiff-Appellant General Land Office of the State of Texas ("GLO") under the Endangered Species Act ("ESA"). The district court's order of November 30, 2017, granted the Defendants-Appellees' (collectively, the "Service's") motion to dismiss the Second Amended Complaint in part, ruling that two of the three claims (Claim 1 and Claim 3) should be dismissed. ROA.951-966. The district court's order of February 6, 2019, denied GLO's motion for summary judgment on the remaining claim (Claim 2) and granted the Service's cross motion for summary judgment on that claim. ROA.1546-1568, Slip Op. at 1-23. The district court entered final judgment in favor of the Service disposing of all three claims on February 6, 2019. ROA.1569-70. GLO timely filed a notice of appeal on March 1, 2019. ROA.1571-73. *See* Fed. R. App. P. 4(a). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Service acted impermissibly by failing to apply the ESA's mandatory standard for reviewing the 90-day Petition to Delist (the "Petition") the Golden-Cheeked Warbler (the "Warbler") from the list of endangered species.
2. Whether the statute of limitations bars actions against the Service for failure to designate critical habitat and failure to comply with the National Environmental Policy Act ("NEPA") in connection with the Warbler listing.
3. Whether NEPA applies to the Service's denial of the Petition.

STATEMENT OF THE CASE

A. Facts

The Warbler, a bird whose habitat includes portions of Texas, Mexico, and Central America, breeds exclusively in certain parts of Texas. *See* Endangered and Threatened Wildlife and Plants; Proposed Rule to List the Golden-cheeked Warbler as Endangered, 55 Fed. Reg. 18846-01, 18846 (May 4, 1990).

The Warbler was first addressed by the Service in a Notice of Review published on December 30, 1982, which characterized the species as "possibly appropriate" for listing under the ESA. 47 Fed. Reg. 251, 58454, 58459. The Warbler remained in that category for both the September 18, 1985, Review of

Vertebrate Wildlife [50 Fed. Reg. 37958] and the January 6, 1989, Animal Notice of Review [54 Fed. Reg. 554].

On May 4, 1990, in response to an administrative petition, the Service published an emergency rule listing the Warbler as endangered, concurrently with a proposed rule to provide for public comment. 55 Fed. Reg. 18844-47. The emergency rule cited habitat loss as an immediate threat to the Warbler. *Id. at* 18845.

In December of 1990, the Service promulgated the final rule listing the Warbler as endangered, 55 Fed. Reg. 53153-02 (Dec. 27, 1990), focusing primarily on loss of habitat. *Id*. at 53157-58. However, the Service did not designate critical habitat, asserting that "[c]ritical habitat for this species remains undeterminable at this time." *Id*. at 53156. Almost thirty years later, the Service has not designated Warbler critical habitat.

The Eventual 5-Year Status Review

Under the ESA, the Service was required but failed to conduct five-year status reviews of the Warbler in 1995, 2000, 2005, and 2010. Only in 2014 did the Service conduct its first five-year review – some twenty-four years after the initial listing. ROA.1265, US Fish and Wildlife Service. 2014. Final Golden-cheeked Warbler Five Year Review, at Bates006774. The record is silent regarding why mandated five-year reviews were not conducted prior to 2014. Nevertheless, the 2014 review

concluded that the Warbler was "in danger of extinction throughout its range" and should remain listed as an endangered species. *Id.* at Bates006789.

The 90-day Petition to Delist the Warbler

On June 29, 2015, the 90-day Petition was filed under the ESA asking the Service to conduct a 12-month review to determine whether the Warbler should be delisted from the list of endangered species. One of the primary sources relied upon by the Petition was a 2015 study of the Warbler conducted by the Texas A&M University Institute of Renewable Natural Resources (the "2015 Texas A&M Study"). ROA.1260, Doc. No. 6, Texas AM IRNR 2015_Conservation status of the federally endangered golden-cheeked warbler.pdf, at Bates000086. The 2015 Texas A&M Study noted that there are approximately five times more Warbler breeding habitats in Texas than had been estimated at the time of the emergency listing in 1990 and approximately 19 times more Warblers than assumed at that time. ROA.1260, Doc. No. 6, Texas AM IRNR 2015_Conservation status of the federally endangered golden-cheeked warbler.pdf, at Bates000089, 000093. Analyzing the extensive body of research before and since 1990, the 2015 Texas A&M Study concluded that the Service's listing of the Warbler was "based upon a fundamental misunderstanding of the . . . abundance and population structure" of the Warbler. ROA.1260, Doc. No. 6, Texas AM IRNR 2015_Conservation status of the federally endangered golden-cheeked warbler.pdf, at Bates000087.

The Petition provided scientific support showing that the Warbler does not currently meet the ESA's definition of "endangered" or "threatened," is not today "in danger of extinction throughout all or a significant portion of its range," and is unlikely to become so in the foreseeable future. ROA.1260, Doc. No. 5, Petition to delist the golden-cheeked warbler 6-29-2015.pdf, at Bates000048. The Petition pointed to research indicating that there is a consensus among the scientific community that breeding Warblers inhabit a much wider range of habitat types than were identified in the early studies on which the Service relied in making its listing determination. ROA. 1260, Doc. No. 5, Petition to delist the golden-cheeked warbler 6-29-2015.pdf, at Bates000049.

The Petition pointed out that "the [2014] Five-Year Review did not . . . take advantage of the work already completed by Groce, et al. (2010) reviewing the state of scientific knowledge concerning the warbler." ROA.1260, Doc. No. 5, Petition to delist the golden-cheeked warbler 6-29-2015.pdf, at Bates000054. The Petition also noted that the 2014 Five-Year Review, which the Service had called the "best available body of science known to the Service pertaining to the status of the warbler," failed to consider a 2012 study by Michael L. Morrison, et al., which estimated a much larger Warbler habitat than originally believed when it was listed in 1990, and ignored at least eight other studies which estimated a larger Warbler habitat, instead relying upon the outdated 1990 Wahl study and the imprecise 2007

SWCA study. ROA.1260, Doc. No. 5, Petition to delist the golden-cheeked warbler 6-29-2015.pdf, at Bates000058-59.

On December 11, 2015, the Petition was supplemented (the "Supplement"). ROA.1260, Doc. No. 10, Supplement to the 6-29-2015 petition to delist the golden-cheeked warbler 12-11-2015.pdf, at Bates000114. The Supplement "identifie[d] actions and events that have addressed the five factors for listing the warbler and identifie[d] the requirements of the 1992 Recovery Plan and draft 1995 Golden-Cheeked Warbler Population and Habitat Viability Assessment Report that have been achieved." ROA.1260, Doc. No. 10, Supplement to the 6-29-2015 petition to delist the golden-cheeked warbler 12-11-2015.pdf,at Bates000115.

The Service's Denial of the Petition

On May 25, 2016, the Service issued a negative 90-day finding denying the Petition (the "90-day Finding"). ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000440 (Petition Review Form); ROA.1260, Doc. No. 18, Golden-cheeked Warbler 90-day Finding; 81 FR 35698; June 3, 2016.pdf, at Bates000458 (Federal Register notice). The Service acknowledged that the Warbler's population size and potential range were larger than originally estimated in the 1990 listing, but noted that "threats of habitat loss and habitat fragmentation are ongoing and expected to impact the continued existence of the warbler in the foreseeable future." ROA.1260, Doc. No. 16, Petition review form

GCW 2016 05 31 signed.pdf, at Bates000449 (Petition Review Form). Asserting that the Petition did "not present substantial information not previously addressed in the 2014 five-year review," the Service opined the Warbler "has not been recovered, and due to ongoing wide-spread destruction of its *habitat*, the species continues to be in danger of extinction . . . ." ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000449 (Petition Review Form) (emphasis added).

B. Proceedings in the District Court

On March 1, 2017, more than 60 days prior to the filing of the initial complaint in this action, GLO provided the Service written notice of violation as required by the ESA. ROA.1332, 1335-1344, Declaration of Mark McAnally ("McAnally Decl."), ¶ 3 & Ex. 1. *See* 16 U.S.C. § 1540(g)(2)(C). On June 5, 2017, Plaintiff GLO filed a lawsuit in the district court challenging the 90-day Finding. ROA.15-236.

On October 20, 2017, GLO filed its Second Amended Complaint alleging three causes of action as follows: that the Service's continued listing of the Warbler as endangered violated the ESA due to the Service's continuing failure to designate critical habitat for the species for approximately three decades ("Claim 1"); that the Service misapplied the mandated statutory and regulatory standards when it denied GLO's 90-day Petition ("Claim 2"); and that the Service's original and continued

listing of the Warbler failed to comply with NEPA ("Claim 3). ROA.828-850; [CORRECTED] Second Amended Complaint at ROA.1010-1228.

The Service moved to dismiss Claims 1 and 3. ROA.851-898. The district court granted the Service's motion on November 30, 2017, ruling that Claims 1 and 3 were barred by the six-year statute of limitations. ROA.960-62. With regard to Claim 3, the district court also ruled, in the alternative, that Claim 3 did not state a claim upon which relief could be granted because NEPA did not apply to decisions under the ESA. ROA.962-65. Accordingly, in due course the parties filed cross-motions for summary judgment on Claim 2 challenging the Service's 90-day Finding. The district court granted the Service's cross-motion for summary judgment and denied GLO's. ROA.1546-1568. The district court entered final judgment in favor of the Service disposing of all three claims on February 6, 2019. ROA.1569-70.

SUMMARY OF ARGUMENT

The district court erred in denying GLO's motion for summary judgment on Claim 2 and erred in granting the Service's motion to dismiss Claims 1 and 3.

The Summary Judgment Order on Claim 2

The standard applicable to the Service's review of a 90-day petition to list or delist a particular species under the ESA is whether the petition provides "substantial scientific or commercial information" that would lead a "reasonable person" to

believe that it "may" be appropriate to grant the petition. At the 90-day stage, it is impermissible for the Service to require conclusive proof that listing or delisting is required. Where there is conflicting scientific or commercial information in the administrative record, the Service must defer to the information supporting the petition unless it shows that such information is unreliable.

Once a 90-day petition is granted, the Service must perform a 12-month review subject to public notice and comment to determine whether listing or delisting is appropriate. At the 12-month review stage, more conclusive information is required to support the petition, and it is appropriate for the Service to make judgments regarding the weight to be given to various studies supporting or detracting from the petition.

Here, the Service denied the 90-day Petition by using criteria applicable to 12-month reviews rather than to 90-day reviews. Although the Service asserted it was applying the 90-day review standard, the administrative record shows that the Service in fact applied the 12-month criteria by downplaying or ignoring substantial, credible evidence in numerous studies showing that the Warbler population is thriving. At the same time, the Service gave undue weight to studies reaching different conclusions. By applying the 12-month criteria to a 90-day review, the Service acted impermissibly.

The district court deferred to the Service and essentially adopted the same impermissible approach. In deferring to the Service, the district court itself asserted that the Service applied the correct standard. But the record shows that the Service in fact applied an incorrect legal standard in denying the Petition and that the district court, in deferring to Service, compounded the error. Accordingly, because the district court abused its discretion by adopting the service's impermissible approach, the district court's denial of GLO's motion for summary judgment (and grant of the Service's cross-motion for summary judgment) should be reversed.

Furthermore, as the Service's briefing in the lower court acknowledged, the chief reason for denying the Petition was the perceived threat to the Warbler's critical habitat, which the Service apparently maintains is still undeterminable, a position that is belied by the administrative record. Given the fact that the threat to Warbler habitat was cited in 1990 as the main reason for the listing, the failure to designate critical habitat for almost three decades is indefensible if in fact the Warbler continues to be endangered due to loss of habitat. The Service's position is particularly untenable in light of Congress's instructions to the Service that designating critical habitat is the premier tool for protecting endangered species under the ESA.

The Service cannot have it both ways. Either critical habitat must be designated to protect the Warbler or the Warbler's habitat does not need protection.

The failure to designate for approximately thirty years in light of the extensive scientific literature dealing with Warbler habitat means either that the Service has violated and continues to violate its nondiscretionary duty under the ESA to designate critical habitat *or* that the Warbler should be delisted. The 90-day Petition met the applicable regulatory standard that required the Service to proceed to a 12-month review of possible delisting. The Service's continued failure to designate critical habitat underscores the severity of the Service's violation of the ESA in not granting the Petition.

The Order on the Motion to Dismiss

For two reasons, the motion to dismiss should have been denied in its entirety. First, the statute of limitations for the "failure to act" violations raised in Claim 1 (failure to designate critical habitat under the ESA concurrently with the listing of the Warbler) and Claim 3 (failure to comply with NEPA at the time of the original listing) has not expired because the violations are renewed each day that the failure to act continues.

Second, contrary to the district court's analysis, the legal issue of the extent to which NEPA applies to ESA listing and delisting decisions has not been definitively addressed by the Fifth Circuit. And there is a split of authority among the circuits regarding the extent to which NEPA applies to the Service's decision making under the ESA. Accordingly, under the applicable standard of review, the

NEPA claim should have survived the motion to dismiss and this Court should review the claim de novo.

STANDARD OF REVIEW

A district court's conclusions regarding standing, the interpretation of a federal statute, and an agency's compliance with the APA are all reviewed de novo. *NAACP v. City of Kyle, Tex.*, 626 F.3d 233, 236 (5th Cir. 2010); *Richard v. Hinson*, 70 F.3d 415, 416 (5th Cir. 1995); *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 219 (5th Cir. 2016). This Court also reviews a district court's grant of summary judgment de novo. *Magee v. Reed*, 912 F.3d 820, 822 (5th Cir. 2019).

Likewise, the grant of a motion to dismiss is reviewed de novo. *See Clyce v. Butler*, 876 F.3d 145, 148 (5th Cir. 2017). Dismissal is inappropriate unless a complaint, construed with all well-pleaded facts accepted as true and viewed in the light most favorable to the plaintiff, *see, e.g., Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009), fails "to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Further, "[a]ll questions of fact and any ambiguities in the current controlling substantive law must be resolved in the plaintiff's favor."

Lewis v. Fresne, 252 F.3d 352, 357 (5th Cir. 2001). In connection with a motion to dismiss, courts are to accept "all well pleaded facts as true, viewing them in the light most favorable to the plaintiff." *SEC v. Cuban*, 620 F.3d 551, 553 (5th Cir. 2010) *(*quoting *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007).

ARGUMENT

I. GLO HAS STANDING TO PURSUE ITS CLAIMS

Article III of the Constitution limits federal judicial power to cases or controversies. U.S. Const., art. III, § 2, cl.1. In order to state an Article III case or controversy, a plaintiff must satisfy three elements to establish standing: (1) injury-in-fact; (2) a causal connection such that the injury is "fairly traceable" to the challenged action of the defendant; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

A. Injury in fact

GLO has been injured in fact due to the continued, unlawful maintenance of the Warbler on the list of endangered species and, most recently, the Service's application of impermissible standards, criteria, and methodology in evaluating and denying the Petition.

GLO, which owns property inhabited by Warblers, ROA.1333, McAnally Decl., ¶ 4, is the oldest state agency in Texas and was established by the Constitution

of the Republic of Texas. Upon annexation by the United States, Texas retained control of its public lands, constitutionally dedicating half of these public lands to the Permanent School Fund, which is maintained for the benefit of the public schoolchildren of the State of Texas. Tx. Const. art. VII §2. GLO is responsible for maximizing revenues from Texas public school lands. Tex. Nat. Res. Code Ann. §31.051. Proceeds from the sale and mineral leasing of public school lands flow to the Permanent School Fund via GLO. Tx. Const. art. VII § 5(g).

Additionally, GLO owns and maintains State Veterans Cemeteries to honor those who have served, as well as State Veterans Homes that provide care and dignity for veterans, their spouses, and Gold Star parents. ROA.1333, McAnally Decl., ¶ 4.

The ability of GLO to maximize revenues from Texas public school lands, and to maintain State Veterans Cemeteries and State Veterans Homes to a high standard, is undermined by the restrictions imposed due to the presence of Warblers or Warbler habitat on GLO properties. ROA.1333, 1345-60, McAnally Decl., ¶¶ 8-10 & Ex. 2.

The presence of Warblers on GLO property subjects certain GLO's actions on its property to the time consuming and costly requirements of Sections 7 and 9 of the ESA. For example, in Bexar and Kendall counties, GLO owns a 2,316.45-acre parcel of land – approximately 84.5% of which contains Warbler habitat.

ROA.1333, McAnally Decl., ¶¶ 9-10. In order to clear or develop the property under the Service's mitigation program, GLO must replace every one acre of cleared land with three acres of Warbler habitat. ROA.1333-34, 1345-60, McAnally Decl., ¶11 & Ex. 2. This encumbrance on the property makes development of the property more expensive and decreases its market value if sold, resulting in less money for the Permanent School Fund, State Veterans Cemeteries, and State Veterans Homes. ROA.1333-34, 1361-67, McAnally Decl., ¶¶ 8, 12-15 & Ex. 3. After conducting three studies on the presence of Warbler habitat on this property, experts concluded that the presence of Warbler habitat decreased the property's value by approximately 35%. ROA.1334, 1361-67, McAnally Decl., ¶ 13 & Ex. 3.

By virtue of the ongoing listing of the Warbler (and the Service's failure to review the Petition in accordance with the mandated standards), as a property owner GLO continues to be subject to regulatory burdens and thus is injured. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F.Supp.3d 744, 757 (E.D. La. 2014) (injury to owner of property inhabited by endangered species self-evident), *aff'd*, 827 F.3d 452 (5th Cir. 2016), vacated on grounds other than standing by *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, —— U.S. ——, 139 S.Ct. 361 (2018). Just as in *Markle*, GLO's injury in this case is self-evident.

B. Causation

There exists a direct causal connection between GLO's injuries and the Service's failure to properly apply the relevant review criteria at the 90-day stage. The Service is the federal agency charged with implementing the ESA, and GLO's injuries are directly attributable to the Service's original listing and erroneous 90-day Finding. ROA.1334, McAnally Decl., ¶ 16. A direct consequence of the flawed 90-day Finding is the continued listing that injures GLO. Accordingly, GLO's injuries are fairly traceable to the 90-day Finding as well as the original listing. *See Lujan*, 504 U.S. at 560-61.

For the same reasons, the Service's failure to designate critical habitat in connection with the original listing, as well as the Service's failure to comply with NEPA in connection with the original listing, the 2014 five-year review, and the denial of the Petition, are fairly traceable to GLO's injuries. *Id.*

C. Redressability

It is likely, as opposed to speculative, that the requested injunctive and declaratory relief directing the Service to reconsider its 90-day Finding, or to hold invalid the initial listing of the Warbler, would redress GLO's injuries. *See Lujan*, 504 U.S. at 561. Judgment in favor of GLO on all claims would require the Service to reconsider the Petition under the proper standards and to publish a new 90-day

finding applying the correct legal standard while also addressing the critical habitat and NEPA issues.

D. Prudential standing

GLO's grievances fall within the zone of interests protected by the ESA, especially under ESA Section 4, which specifically provides that negative 90-day findings on petitions to list, delist, and reclassify species are judicially reviewable. 16 U.S.C. § 1533(b)(3)(C)(ii). Indeed, ESA establishes an expansive zone of interest for parties filing ESA actions, *Bennett v. Spear*, 520 U.S. 154, 162-63 (1997), which is considered "generous" under the APA. *Id.* at 165. Accordingly, GLO has prudential standing in the instant case.

II. THE DISTRICT COURT ERRED IN DENYING GLO'S MOTION FOR SUMMARY JUDGMENT ON CLAIM 2 BY DEFFERING TO THE SERVICE'S APPLICATION OF AN INCORRECT STANDARD IN DENYING THE PETITION

The ESA provides that any person may petition the Service to list or delist a species as threatened or endangered, and:

> [t]o the maximum extent practicable, within 90 days after receiving the petition of an interested person . . . the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action *may* be warranted.

16 U.S.C. § 1533(b)(3)(A) (emphases added). The Service's regulations provide that a petition presents substantial scientific or commercial information if it contains "that amount of information that would lead a reasonable person to believe that the

measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b)(1). At the 90-day finding stage, the Service does not "subject the petition to critical review." 71 Fed. Reg. 66298 (Nov. 14, 2006). Thus, a 90-day petition "need *not* establish a 'strong likelihood' or a 'high probability'" that a 90-day petition will succeed at the 12-month review stage "to support a positive 90-day finding." 79 Fed. Reg. 4877, 4878 (Jan. 30, 2014) (emphasis added).

If the Service issues a "positive" 90-day finding, determining that the petitioned action (listing or delisting) *may* be warranted, then the agency must publish the finding in the Federal Register and commence a "status review" of the species to be completed within one year, sometimes referred to as the 12-month review. 16 U.S.C. § 1533(b)(3)(B). The Service must "solicit information from the public for use in [its 12-month] status reviews," and is required to "consult as appropriate with affected States, interested persons and organizations, [and] other affected Federal agencies" as part of this status review. 50 C.F.R. § 424.13. After the completion of the 12-month review, the agency is required to determine whether the petitioned action is in fact warranted, based on the best scientific and commercial evidence available. 16 U.S.C. § 1533(b)(1)(A) and (b)(3)(A)-(B).

As case law confirms, there is a sharp distinction between the criteria for granting a petition at the 90-day stage (i.e., that the petitioned action *may* be warranted) versus the criteria applicable during a subsequent 12-month review (i.e.,

that the petitioned action *is* warranted), with the 90-day stage presenting a relatively low bar for a petitioner. At issue here is a 90-day petition.

A. Case Law Overwhelmingly Recognizes the Distinction Between the 90-day and 12-month Review Standards.

"[I]t is clear that the ESA does not contemplate that a [90-day] petition contain conclusive evidence . . . [i]nstead, it sets forth a lesser standard by which a petitioner must simply show that the substantial information in the Petition demonstrates that [the relief sought] may be warranted. FWS's failure to apply this appropriate standard renders its findings and ultimate conclusion flawed." *Ctr. for Biological Diversity v. Morgenweck*, 351 F.Supp.2d 1137, 1141 (D. Colo. 2004); *see also Colo. River Cutthroat Trout v. Dirk Kempthorne*, 448 F.Supp.2d 170, 176 (D.D.C. 2006) ("The FWS simply cannot bypass the initial 90-day review and proceed to what is effectively a 12-month status review, but without the required notice and the opportunity for public comment."); *Ctr. for Biological Diversity v. Kempthorne*, 2008 WL 659822, at *9 (D. Ariz. Mar. 6, 2008) (finding that "the application of an evidentiary standard requiring conclusive data in the context of a 90-day review is arbitrary and capricious"); *Moden v. United States Fish & Wildlife Serv.*, 281 F.Supp.2d 1193, 1204 (D. Or. 2003) (addressing a petition to delist at the 90-day stage, "the standard for evaluating whether substantial information has been presented . . . is not overly-burdensome, [and] does not require conclusive information . . ."). *See Likens v. Hartford Life & Acc. Ins. Co.*, 688 F.3d 197, 199

n.1 (5th Cir. 2012) (federal district court decisions are considered for persuasive authority).

If there is conflicting scientific information on the threats presented in a petition, courts have construed the 90-day finding standard in favor of the petitioner and held that the Service "must defer to information that *supports* [the] petition's position" at the 90-day stage. *See Ctr. for Biological Diversity v. Kempthorne*, 2007 WL 163244, at *4 (N.D. Cal. Jan. 19, 2007) (emphasis added). In that case, the court opined that

> the standard requiring consideration of whether a "reasonable person" would conclude that action "may be warranted" *contemplates* that where there is disagreement among reasonable scientists, then the Service should make the "may be warranted" finding and then proceed to the more-searching next step in the ESA process.

Id. at *7 (emphasis added); *see also Humane Society of the United States v. Pritzker*, 75 F.Supp.3d 1, 11 (D.D.C. 2014) (finding that agency acted arbitrarily and capriciously "in applying an inappropriately-stringent evidentiary requirement at the 90-day stage" because the agency had recognized that there was "conflicting scientific evidence," which suggested to the court that "a reasonable person might conclude that a [12-month status review] was warranted").

Thus, numerous courts have held that a reviewing court does not defer to the Service's judgment regarding a 90-day finding, the *Service* defers to a petitioner providing "substantial information" that delisting may be warranted under a

"reasonable person" standard. In the instant case, by misapplying the criteria for reviewing the Petition, the Service did not act "in accordance with law," and the district court erred when it followed the Service's lead.[1] *See* ROA.1563, Slip. Op. at 18.

B. The Record Shows that the Service Incorrectly Applied the 90-day Standard in Denying the Petition and that the District Court Did the Same in Denying GLO's Motion for Summary Judgment.

The record shows that the Service applied an impermissibly heightened evidentiary standard in its review of the Petition, pitting evidence in the Petition against other studies it preferred. *See, e.g.,* ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000442-443 (Petition Review Form) (explicitly using Reidy, et al. (2016) in an effort to refute the Petition's modeling studies of Warbler habitat and population size; ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000444 (Petition Review Form) (stating that the "[i]nformation provided in the petition is refuted by the 2014 5-year review . . ."), and requiring the Petition to provide conclusive evidence; ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000447 (Petition Review Form) ("the research cited in the petition does not allow us to

[1] The parties and the district court agreed that the issue was whether the 90-day standard was correctly applied by the Service. ROA. 1559-60, Slip Op. at 14-15. The record shows that, despite the Service and the district court *citing* the 90-day standard, neither applied it.

conclude that oak wilt, wildfire, vegetation management, and patch size *are not threats* to the species.") (emphases added).

In its cross-motion for summary judgment, the Service continued with its mistaken understanding of the standard of review of a petition at the 90-day stage, conflating it with the subsequent 12-month review that requires the agency to evaluate the studies with other evidence, and to make a definitive conclusion as to whether the Warbler should be delisted. *See, e.g.*, ROA.1394, Def's MSJ at 19 ("The other information regarding habitat fragmentation in the Petition to Delist was *inconclusive*, at best, and *did not refute* the wide-spread consensus that habitat fragmentation harms the Warbler's recovery and remains a significant threat.") (emphases added); ROA.1400, Def's MSJ at 25 ("The Service noted that other studies 'cautioned that this analysis [in Mathewson, et al. (2012), cited in the Petition to Delist], may have over-predicted density estimates, resulting in inflated population estimates."); ROA.1402, Def's MSJ at 27 ("The Petition to Delist did not provide evidence that this criterion *has been achieved*, i.e., that sufficient habitat has been protected to ensure the continued existence of viable, self-sustaining populations of Warblers throughout the breeding range.") (emphasis added); ROA.1411, Def's MSJ at 36 (challenging Yao, et al. (2012), cited in the Petition to Delist, regarding the effects of wildfires on Warbler habitat, with another study by Reemts, et al. (2008)). Yet the Service agreed "with the petitioners that 'there is

some uncertainty regarding the magnitude of threats these activities present to warbler habitat quality (and thus, warbler reproductive success and survival.)'" ROA.1411, Def's MSJ at 36 (citing ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000447(Petition Review Form).

Citing a need to defer to the Service's findings, ROA.1563, Slip Op. at 18, the district court likewise conflated the 12-month review standard with the 90-day standard, thereby using the same impermissible approach used by the Service. For example, the district court observes that "studies demonstrate the Petition . . . *may* have overstated Warbler population . . . despite promising population predictions and a greater known potential range." ROA.1560, Slip Op. at 15 (emphasis added).

The district court further discounts the Petition by stating it merely offered a "differing interpretation of the information" analyzed by the Service in the 2014 five-year review. ROA.1562, Slip Op. at 17. Thus, rather than independently determining whether the Petition set forth the requisite substantial information, satisfying the standard of a "reasonable person," the district court accepted the Service's position, observing that "there is no evidence in the administrative record that Service scientists believed the Petition . . . presented substantial evidence." ROA.1562, Slip Op. at 17. But the issue is not whether the Service's scientists subjectively believed there was "substantial evidence" but whether the Service, in denying the Petition, applied an evidentiary standard not permitted by the ESA. That

issue is a matter of law, which the district court should have addressed squarely rather than deferring to the Service's interpretation. And that is an issue that this Court addresses de novo. *See City of Kyle, Tex.*, 626 F.3d at 236 (district court interpretation of federal statute is reviewed de novo).

The district court justifies its position by stating, "Texas has failed to offer any evidence the Service applied the incorrect standard when it considered the Petition to delist." ROA.1563, Slip Op. at 18. That is false because in its briefing GLO cited directly to the Service's own language as evidence that the Service applied an incorrect standard in reviewing the Petition. *See, e.g.*, ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000442-443 (Petition Review Form) (explicitly using the modeling studies in Reidy, et al. (2016) to refute the Petition's modeling studies of Warbler habitat and population size; ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000444 (Petition Review Form) (stating that the "[i]nformation provided in the petition is refuted by the 2014 5-year review . . ."), and requiring the Petition to provide conclusive evidence; ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000447 (Petition Review Form) ("the research cited in the petition does not allow us to *conclude* that oak wilt, wildfire, vegetation management, and patch size *are not threats* to the species.") (emphases added). All of these studies were cited and argued by GLO in the district court as evidence that

the Service applied an incorrect standard in reviewing the Petition. *See* ROA.1520, GLO Opp. To Def's MSJ at 9.

Contrary to the Service's and the district court's conclusions, the weight of evidence in the administrative record shows that the Petition provided the requisite information required by the ESA at the 90-day review stage.

The district court opines that it could not hold the Service acted arbitrarily or capriciously "simply because the 90-day finding was wrong." ROA.1563, Slip Op. at 18. But it cannot be "right" for the Service to apply an impermissible legal standard in denying the Petition, thereby acting "not in accordance with law." *See* 5 U.S.C. 706(2)(A). Accordingly, it was legal error for the district court to adopt and apply the impermissible legal standard applied by the Service. A court "by definition abuses its discretion when it makes an error of law." *Koon v. United* States, 518 U.S. 81, 100 (2009).

Accordingly, no deference was owed to the Service's denial of the Petition if, as the record reflects, and as summarized in this Section II. B. and in Sections II. C. and D., *infra*, the Service impermissibly played one set of studies against another and required a level of proof that is impermissible at the 90-day stage, while acknowledging that there was conflicting evidence. *See e.g., Pritzker*, 75 F.Supp.3d at 11 (finding that the National Marine Fisheries Service acted arbitrarily and capriciously "in applying an inappropriately-stringent evidentiary requirement at the

90-day stage" because the agency had recognized that there was "conflicting scientific evidence," which led to the court to observe that "a reasonable person might conclude that a [12-month status review] was warranted"); *Ctr. for Biological Diversity v. Kempthorne*, 2008 WL 659822, at *9 (D. Ariz. Mar. 5, 2008) (finding that "the application of an evidentiary standard requiring conclusive data in the context of a 90-day review is arbitrary and capricious").

In effect, the Service made a 12-month finding rather than a 90-day finding, thereby impermissibly cutting off any opportunity for public comment required in connection with 12-month findings. *See* 16 U.S.C. § 1533(b); *see also Colo. River Cutthroat Trout v. Dirk Kempthorne*, 448 F.Supp.2d 170, 175-76 (D.D.C. 2006) ("FWS simply cannot bypass the initial 90-day review and proceed to what is effectively a 12-month status review, but without the required notice and the opportunity for public comment."). Here, the Service applied the wrong evidentiary standard in denying the Petition, and the district court erred by declining to vacate and remand with instructions to evaluate the Petition under the proper standard. *See Buffalo Field Campaign v. Zinke*, 289 F.Supp.3d 103, 112 (D.D.C. 2018).

C. The Service Failed to Credit the Substantial Evidence in the Petition.

The district court held that GLO was required to show "evidence in the administrative record that Service scientists believed the Petition to Delist presented

substantial evidence." ROA.1562, Slip Op. at 17. But the burden of showing the unreliability of studies in a petition is on the Service, not on the petitioners:

> [T]he 90-day standard does not allow the Service to simply discount scientific studies that support the petition or to resolve reasonable extant scientific disputes against the petition. Unless the Service *explains why* the scientific studies that the petition cites are unreliable, irrelevant, or otherwise unreasonable to credit, the Service must credit the evidence presented.

Buffalo Field Campaign, 289 F.Supp.3d at 110 (internal citations omitted) (emphasis added); *Ctr. for Biological Diversity*, 2007 WL 163244, at *4 ("In cases of such contradictory evidence, the Service must defer to information that supports [the] petition's position. . . . [U]nless the Service has *demonstrated* the unreliability of information that supports the petition, that information cannot be dismissed out of hand.") (emphasis added).

Just as the Service did in its review of the Petition, the Service's cross-motion for summary judgment discounted positive research findings on the health of the Warbler population without demonstrating the unreliability of such findings, in the process relying on ipse dixit and requiring an impermissibly high standard of proof at the 90-day stage. *See e.g.*, ROA.1402, Def's MSJ at 27. ("The Petition . . . did not provide evidence that this criterion *has been achieved*, i.e., that sufficient habitat has been protected to ensure the continued existence of viable, self sustaining populations of Warblers throughout the breeding range.") (emphasis added); ROA.1400. Def's MSJ at 25 ("[O]ther studies cautioned that this analysis [in one of

the studies cited in the Petition] may have over-predicted density estimates."). More is needed to discount the Petition's studies at this stage. *See Ctr. for Biological Diversity* 2007 WL 163244, at *4 ("At [the 90-day petition stage], unless the Service has *demonstrated* the unreliability of information that supports the petition, that information cannot be dismissed out of hand.") (emphasis added).

The district court held that the Petition was required to "have 'unquestionably' led a reasonable person to conclude delisting may be warranted." ROA.1561, Slip Op. at 16. But other district courts have rejected that type of stringent evidentiary standard when it comes to a 90-day petition. A petitioner need not present 'conclusive evidence regarding' threats to a species." *Zinke*, 289 F.Supp.3d at 106 (citing *Pritzker*, 75 F.Supp.3d 1, 14 (D.D.C. 2014); *see also Ctr. for Biological Diversity v. Morgenweck*, 351 F.Supp.2d 1137, 1140 (D. Colo. 2004) ("[T]he ESA does not require . . . conclusive evidence . . . to go to the next step."); *Moden*, 281 F.Supp.2d at 1203 ("[T]he standard in reviewing a petition to delist does not require conclusive evidence that delisting is warranted.").

Here, the Service did not show that the studies cited in the Petition lacked bona fides but either ignored them in favor of other studies or resolved any disputes among the literature against granting the Petition. In so doing, the Service conflated the 12-month review standard with the one applicable for 90-day reviews. By deferring to the Service's impermissible approach, the district court erred.

D. The Information Presented in the Petition More Than Satisfied the 90-Day Review Standard.

1. Warbler Population and Habitat

Substantial evidence in the record shows that fragmentation is not of concern because the Warbler is widespread and evolved in a heterogeneous environment where breeding even in small habitat patches is plentiful. *See e.g.,* ROA.1265, at Bates005505; ROA.1261, at Bates000646-649; ROA.1265, at Bates006778; ROA.1264, at Bates004150; ROA.1261, at Bates000936; ROA.1261, at Bates001143; ROA.1261, at Bates001668-69.

Substantial evidence also shows widespread and diverse areas of Warbler breeding habitat with high levels of population density. *See* e.g., ROA.1262, at Bates002504, 2508, 2556; ROA.1262, at Bates001705; ROA.1261, at Bates001595-96; ROA.1265, at Bates005649; *see also* ROA.1265, at Bates005667; ROA.1261, at Bates000661; ROA.1264, at Bates003904.

There is also ample evidence that Warblers disperse great distances among small patches. *See e.g.,* ROA.1261, at Bates001240; ROA.1261, at Bates001377; ROA.1261, at Bates001290; ROA.1263, at Bates003545, 003550; ROA.1263, at Bates003603.

Moreover, abundant evidence shows that Warblers breed successfully in patches of much less tree cover than originally believed because of the limited scope

of early studies. *See e.g.,* ROA.1262, at Bates002147; ROA.1263, at Bates002827; ROA.1263, at Bates003121; ROA.1263, at Bates003640 (P. 3 (410)).

Some studies are especially noteworthy with regard to population and habitat. Thus, recent studies show a wide population of Warblers even in urban and residential areas. Reidy, J. (2009) ("Factors Affecting Golden-cheeked Warbler Nest Survival in Urban and Rural Landscapes") shows that urbanization is not harming Warbler survival: ". . . survival in Austin's urban landscape . . . was similar to survival in Fort Hood's rural landscape . . . . Both landscapes likely support self-sustaining populations based on reasonable assumptions for adult survival and number of nesting attempts." ROA.1264, at Bates004466. Likewise, Coldren, C. (1998) found that ". . . warblers did not select for or against residential development. Once a warbler settled on a patch, placement of a territory was not based on the location of residential development next to the patch." ROA.1261, at Bates001529. The study also concludes roads did not have a pronounced negative impact on Warblers: "Warbler reproductive success did not differ with transportation types." ROA.1261, at Bates001531.

Significantly, Beardmore, C., et al. (1995), created a Population and Habitat Viability Assessment of the Warbler (the "PVA"), which concluded that around 3,000 breeding pairs would sustain the population for around 100 years, *i.e.*, enough to preclude extinction. ROA.1261, at Bates000981-000982; *see also* ROA.1261,

Alldredge, M. (2004), at Bates000535 (supporting this conclusion). Subsequent research, including multiple independent studies—leading up to Mathewson (2012)—showed that Warblers are widely distributed and not isolated across the breeding range, with the actual population size exceeding 200,000 adult males. ROA.1263, at Bates003579. Thus, the total population—even if the 200,000 is an overestimate—is well beyond that established for recovery. *See also* ROA.1263, Lindsay, D. (2008), at Bates003015, 003023 ("[t]he sampled sites do not appear to represent isolated lineages requiring protection as separate management units . . .").

Thus, on the criteria of Warbler population and habitat, the Petition provided substantial evidence meeting the "reasonable person" standard showing that the listing of the Warbler *may* need to be reconsidered. *See. e.g., Buffalo Field Campaign*, 289 F.Supp.3d at 110-111.

2. Disease or Predation

In its analysis of Listing Factor C (disease or predation), the Service states that the claim of the Petition that predation does not constitute a significant threat to the continued existence of the Warbler is refuted by the 2014 five-year status review, which concluded that urbanization and habitat fragmentation "have likely resulted in increased rates of predation of warbler nests by a wide variety of animal predators, especially rat snakes." But the 2014 five-year status review merely lists animals which have been known to prey on Warbler nests, which the Service acknowledges

is a "natural occurrence in [Warbler] habitat," but goes on to extrapolate from these perfectly natural instances of predation the unsupported contention that increased urbanization leads to higher than normal predation levels. ROA.1265, at Bates006785. There is no concrete support given for this analytical leap, which the Service then relied upon in its denial of the delisting petition.

In fact, the administrative record is replete with recent studies concluding that Warbler breeding success is high despite natural predation. *See e.g.*, ROA.1264, at Bates004485; ROA.1265, at Bates005773; ROA.1265, at Bates005831; ROA.1261, at Bates001143.

The Service argued in the district court that because "the Petition acknowledged that predation occurs" on the Warbler, and that because it "put forth no evidence that predation as a whole does not have a significant negative effect on Warbler survival and breeding success," the Petition failed to provide substantial evidence on this factor. ROA.1405, Def's MSJ at 30. In support, the Service cites one study, Stake et al. (2004), conducted on Fort Hood, ROA.1265, at Bates5826-5833, but neglects to mention that the study concluded predation by fire ants and mammals is small, and that predation will vary across the range of any bird species, including the Warbler. *See* ROA.1265, at Bates5829-5833.

The Service also summarily discounts the published papers summarized in the Groce et al. (2010) status review, ROA.1262, at Bates002463-2464, that show

cowbird parasitism to be of no substantial negative impact to the Warbler rangewide. *See* ROA.1404, Def's MSJ at 29. It does this by citing one unpublished paper written 18 years ago that did not undergo independent peer review, Anders 2000, and which simply suggested that Warblers outside of Fort Hood were "susceptible" to natural parasitism. *See* ROA.1261, at Bates000640-654.

Thus, on the criteria of disease or predation, the Petition provided substantial evidence to meet the "reasonable person" standard to indicate that the listing of the Warbler may need to be reconsidered.

3. Adequacy of Existing Regulatory Mechanisms

In its analysis of Listing Factor D (adequacy of existing regulatory mechanisms), the Service contended that "an estimated 29 percent of existing breeding season habitat was lost between 1999-2001 and 2010-2011." ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000446 (Petition Review Form)). But it is a mystery how the Service can trumpet that figure in light of the fact that it still believes Warbler critical habitat is undeterminable.

The Service found that existing regulatory mechanisms like the Migratory Bird Treaty Act of 1918 and the Texas Endangered Species Act were not sufficient to protect the Warbler maintaining that the 2014 5-year status review discussed that "while these regulations do provide some protections for the birds neither 'prohibits habitat destruction, which is an immediate threat to the warbler." ROA.1260, Doc.

No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000445 (Petition Review Form). Again, the Service's continued failure to designate critical habitat for the Warbler makes the Service's disparagement of the critical habitat protections afforded by the Migratory Bird Act and the Texas Endangered Species Act inexplicable.

Additionally, the Service admits in the 90-day Finding that it did not consider existing long-term land protections like wildlife preserves and habitat conservation plans in its consideration of Factor D in the 2014 five-year review, though it refers to its consideration of those efforts under Factor A of the five-year review. ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000446 (Petition Review Form). But the 2014 five-year status review did not analyze their efficacy or provide any support for the conclusion reached on this Factor in the 90-day Finding. *See* ROA.1265, at Bates006784.

4. Other Natural or Manmade Factors Affecting the Warbler

Finally, in its analysis of the catchall Listing Factor E (other natural or manmade factors affecting the species' continued existence), the 90-day Finding failed to address a number of studies adverse to its conclusion that the Warbler should remain listed, which were pointed out in the Petition. The Petition cited to the Groce study on the effects of land conversion and Warbler population expansion, as well as the work by Robinson, Butcher, Magness, Coldren, Arnold, Campomizzi,

and a 2013 study by Peak and Thompson. *See* ROA.1260, Doc. No. 5, Petition to delist the golden-cheeked warbler 6-29-2015.pdf, at Bates000070-71). None of these works are addressed or evaluated in the 90-day finding's discussion on Factor E.

The Service stated that "habitat fragmentation, habitat degradation, inappropriate habitat management practices, and excessive noise all contribute to reductions in overall warbler habitat quality and present a real and significant threat to the long term viability of the species," along with oak wilt and recreation. ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000447-448 (Petition Review Form). In discussing each of these threats, the Service stated that they each have the potential to significantly affect Warbler habitat, but did not cite to any examples of instances where this has actually happened during the almost three decades that the Warbler has been listed.

Reemts, C. (2008), was cited by the Service in its 90-day Finding for the proposition that fire was a threat to the Warbler, ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000447 (Petition Review Form), but that study shows that while Warbler numbers decrease after a fire, they appear to move elsewhere until the trees re-grow: ". . . overall golden-cheeked warbler populations on Fort Hood were not greatly affected by the fires . . . perhaps because the birds relocated to available habitat elsewhere on post . . . ." ROA.1264, at

Bates004443. Further weakening the Service's contention is Yao, J., et al., (2012), which shows the value of fire in actually *promoting* oak development for the Warbler: ". . . we also observed that high-intensity fire was related to higher oak recruitment which has the potential to sustain GCW habitat for the future." ROA.1266, at Bates007503.

Ortega, C. (2012) was the sole authority cited by the Service in its 90-day Finding for its claim that noise could be a threat to the Warbler. ROA.1260, Doc. No. 16, Petition review form GCW 2016 05 31 signed.pdf, at Bates000448 (Petition Review Form). "This review provides general background information, updates on the most current literature, and suggestions for future research that will enhance our comprehensive knowledge and ability to mitigate negative effects of noise." ROA.1264, at Bates003871. But the Ortega study presented no information on the Warbler specifically, and evidence against the proposition that noise is a threat to the Warbler includes Lopez, R. (2012) (concluding, in an experiment on the impacts of military training on Warblers, that "[i]n general, there were no patterns in the noise, movement, or song data to suggest that GCWAs were adjusting their vocalizations to increases in ambient noise."), ROA.1263, at Bates003121, and Lackey, M. (2012) (finding ". . . the majority of Golden-cheeked Warblers have habituated to road and construction noise," ROA.1263, at Bates002945, and that "[t]he broadcast-unit experiment showed that territories located near broadcast units

had similar year-to-year shifts in territory locations as a random sample of territories not located near broadcast units."). ROA.1263, at Bates002952.

The Service's contention that oak wilt was a threat to the Warbler is also belied by substantial contrary evidence in the record. Appel, D., et al., (2010) found that oak wilt did not appear to be a serious threat to Warblers: "Only a small proportion of the oak wilt centers (12 percent) were located in designated GCW habitat," ROA.1261, at Bates000737, and ". . . oak wilt appears to fall in areas where oak densities are greater than those found in preferred GCW habitats." ROA.1261, R000746. Stewart, L., et al., (2014) found that paired male Warblers that do nest in oak wilt affected stands "fledged young as successfully as paired males who only used unaffected forest." ROA.1265, at Bates005840.

The 90-day Finding fares no better in its contention that there was no substantial evidence that refuted findings that recreation was a threat to the Warbler. In fact, Peak, R. (2003) studied the potential impacts of mountain bike recreation on Warblers, and "did not find a difference in abundance or demography of the golden-cheeked warbler . . . ," ROA.1264, at Bates003893, and the City of Austin (2012) commented on a pilot study of the influence of mountain bikes on Warbler breeding that "[m]ajor limitations of the pilot study include small sample sizes (low numbers of warblers) and lack of quantitative data on recreational activities (including

number of recreational users per day, type(s) of activities, pathways taken through the BCP tracts, etc.)." ROA.1261, at Bates001371.

Thus, on the catch-all criteria of natural and man-made factors, the Petition provided substantial evidence that would lead a reasonable person to conclude that the Service should proceed to a 12-month review.

In sum, the Service failed to examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made, especially in light of the Service's failure for almost three decades to designate critical habitat. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). "[W]hen a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999).

Because the Petition presents substantial scientific or commercial information indicating that the Warbler population, including its breeding habitat, is appreciably larger and more widespread than previously understood, leading a reasonable person to believe that delisting *may* be warranted, the Petition should not have been denied. *See* 16 U.S.C. § 1533(b)(3)(A)-(B). By deferring to the Service's impermissible

application of the statutory criteria, the district court erred. *See e.g., Buffalo Field Campaign*, 289 F.Supp.3d at 110-11.

The number, breadth, and depth of the studies, as set forth in detail in the Petition, as described in GLO's summary judgment briefing in the trial court, and as summarized here, are more than adequate to meet the applicable statutory standard at the 90-day stage. The Service picked a side without providing adequate justification that the numerous studies cited in the Petition were unreliable, irrelevant, or otherwise unworthy of credit. Accordingly, because the Service impermissibly conflated the 12-month review standard with the 90-day standard, and because the district court deferred to the Service on this issue, the judgment of the district court in connection with the Service's 90-day Finding should be reversed.

III. THE SERVICE'S DENIAL OF THE PETITION WAS AN ABUSE OF DISCRETION IN LIGHT OF ITS FAILURE TO DESIGNATE WARBLER CRITICAL HABITAT FOR ALMOST THIRTY YEARS

A significant flaw coursing throughout the Service's reasoning is its failure to articulate a rational connection between its primary reason for listing and refusing to consider delisting the Warbler, i.e., critical habitat destruction, on the one hand, and on the other hand, its decision not to designate Warbler critical habitat.

"A major goal of the ESA is the recovery of species to the point at which the protection of the ESA is no longer necessary." *Safari Club Intern. v. Jewell*, 960 F.Supp.2d 17, (D.D.C. 2013) (quoting M. Lynne Corn et al., Cong. Research Serv.,

RL31654, *The Endangered Species Act: A Primer*, at 5 (2012)). The fact that the Warbler has been listed for nearly three decades without a critical habitat designation supports delisting, especially in light of the evidence on species recovery brought to the Service's attention in the Petition. Failing to designate critical habitat is a violation of the mandatory duty set forth in 16 U.S.C. § 1533(a)(3)(A). In addition, refusing to consider delisting under these circumstances defies rationality and, therefore, is arbitrary and capricious and constitutes an abuse of discretion. It also calls into question the validity and necessity of the Warbler's initial listing as an endangered species.

An agency action can be sustained only if it "considered the relevant factors and articulated a *rational connection* between the facts found and the choice made." *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc*., 462 U.S. 87, 105 (1983) (citation omitted; emphasis added). A reviewing court must undertake a "thorough, probing, in-depth review" of the agency's decision and then decide whether it was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971). The Service's reliance on arguments relating to Warbler critical habitat to support its denial of the Petition, while conspicuously failing to designate critical habitat for almost three decades, shows a lack of a "rational connection" between the Service's stated reasons for denying the 90-day Petition and its

continuing neglect to designate habitat, *Baltimore Gas & Electric*, 462 U.S. at 105, evidencing "a clear error of judgment" in denying the Petition. *See Overton Park*, 401 U.S. at 416.

In its briefing in the district court the Service asserted that other provisions of the ESA function to protect habitat even without a critical habitat designation. ROA.1405-07, Def's MSJ at 30-32. But the Service is not free to ignore Congress's instructions to designate critical habitat for endangered species, nor can it excuse its violation of the ESA by in effect using it as a rationale for denying the Petition.[2]

The purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved." 16 U.S.C. §1531(b). To achieve that purpose, under Section 4 of the ESA when listing a species as threatened or endangered the government has a concurrent duty to designate critical habitat for that species "to the maximum extent prudent and determinable." 16 U.S.C. §1533(a)(3)(A); *see also id.* § 1533(b)(6)(C) (permitting the Secretary to extend the deadline for designating critical habitat up to two years after the publication of the proposed rule to list the species if critical habitat is not "determinable" at the time of listing). Designating critical habitat is the most

[2] Additionally, the failure to designate critical habitat leaves a Sword of Damocles hanging over property owners in Central Texas, who may not be able to clearly determine which of their lands are subject to the ESA's prohibitions, thereby potentially inadvertently becoming subject to the ESA's prohibitions and penalties.

effective way of protecting species and was at the forefront of legislators' minds during the initial debates on the ESA: "Often, protection of habitat is the only means of protecting endangered animals which occur on nonpublic lands." S. Rep. No. 307, 93 Cong., 1st Sess. 4 (1973).

In the years since the enactment of the 1978 Amendments, courts have regularly emphasized the central importance of designating critical habitat in a timely fashion. *See, e.g., Catron Cty. Bd. of Com'rs, New Mexico v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1437 (10th Cir. 1996) ("ESA's core purpose is to prevent the extinction of species by preserving and protecting the habitat upon which they depend from the intrusive activities of humans."); *Palila v. Hawaii Dep't of Land & Nat. Res.*, 649 F.Supp. 1070, 1076 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988) ("[O]ne of the main purposes of [the ESA] was conservation and preservation of the ecosystems upon which endangered species depend.").

The Service argued in the district court proceedings that its decades-long failure to designate Warbler critical habitat cannot be used to reverse its denial of the Petition. ROA.1389-91, Def's MSJ at 14-16. But that argument is belied by the Service's drumbeat of assertions that it was *required* to deny the Petition *because* of the threats to Warbler critical habitat, which the Service continues to assert is undeterminable. ROA.1392-1403, ROA.1406-1412, Def's MSJ at 17-28, 31-37. If Warbler critical habitat is geographically undeterminable so too are the threats to

that area, because one cannot protect an area from threats unless one knows its geographic location. Accordingly, the denial was irrational, an abuse of discretion, and accordingly, arbitrary and capricious.

The district court reasoned that "the Service's refusal to designate critical habitat at the 90-day stage was neither arbitrary nor capricious" because the listing decision precludes the Service from considering economic considerations while the critical habitat designation requires the Service to consider such economic considerations. ROA.1566, Slip Op. at 21. But Congress has tied the two processes into a unified requirement. In 1978, Congress amended the ESA to expressly link the timing of the critical habitat designation to the decision to list a species. 16 U.S.C. §1533(a)(3). The duty to designate critical habitat is a "non-discretionary duty" and a "congressional mandate." *Schoeffler v. Kempthorne*, 493 F.Supp.2d 805, 809 (W.D. La. 2007). Accordingly, the Service must act to ensure it complies logically and consistently with the listing and designation mandates. *See Office of Communication of the United Church of Christ v. FCC*, 700 F.2d 1413, 1441-42 (D.C. Cir. 1983) (finding it "seriously disturbing" and "almost beyond belief" that an agency would take rulemaking action undercutting another "concurrent" rulemaking process); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987) (finding agency action arbitrary and capricious because it was "internally inconsistent and inadequately explained"). So too, here, the reason given for the

denial of the Petition (threat to critical habitat) is internally inconsistent with the almost three-decades failure to designate critical habitat. The district court's affirmative nod to this approach should not be approved by this Court.

IV. THE DISTRICT COURT ERRED IN DISMISSING GLO'S CLAIMS 1 AND 3 ON THE GROUND THAT THEY ARE BARRED BY THE STATUTE OF LIMITATIONS

The district court dismissed two of GLO's claims on the basis of the statute of limitations. ROA.951-966. Because neither the ESA nor NEPA contain a limitations period, the default six-year statute of limitations applies. 28 U.S.C. § 2401(a). GLO challenged the Service's initial 1990 listing of the Warbler on the basis of its failure to concurrently designate critical habitat; it also challenged the listing on the basis of the Service not complying with the requirements of NEPA. The district court held that the failure to designate critical habitat did not act to make the listing a continuing violation, because GLO was not seeking to force the Service to designate critical habitat and that, consequently, the limitations period had run. ROA.961-62. The district court also held that the statute of limitations on the NEPA claim had expired. ROA.961-62. Slip op. at 11-12.

Because the arguments for tolling the statute of limitations are almost identical in connection with Claim 1 (ESA) and Claim 3 (NEPA), the following discussion addresses the statute of limitations in the context of both claims, distinguishing the issues per claim as necessary.

The principle of continuing violation has been approved by the Supreme Court and followed by lower courts. Indeed, a federal district court in this Circuit has opined on the specific limitations issue raised in the instant case. In *Schoeffler*, the court held that listing a species under the ESA without concurrently designating critical habitat was a continuing violation of the ESA tolling the statute of limitations. *See* 493 F.Supp.2d at 822. The court noted that each day's failure to comply with the nondiscretionary statutory deadline for designating critical habitat constitutes "independent actionable conduct," a cause of action for which accrues anew every day until the nonfeasance ceases. *Id*. The court also observed that, because the violation continues every day that critical habitat remains undesignated, the statute of limitations runs from the last day of the continuing offense. *Id*. at 821. Accordingly, because critical habitat had not yet been designated, the court held that the plaintiffs' failure to act claim was not time-barred by the six year statute of limitations of 28 USC § 2401(a). *Id*. at 822. Here, as in *Schoeffler*, the "last day" has not yet arrived, because critical habitat has not yet been designated. Accordingly, using the *Schoeffler* standard, Claim 1 in the instant case was filed within the continuing limitations period.

Contrary to the district court's opinion, it matters not whether GLO seeks an order requiring the Service to designate critical habitat or whether it seeks a declaration that listing the Warbler without designating critical habitat is a violation

of the ESA. The relevant issue here is whether the failure to designate critical habitat at the required time tolls the statute of limitations. *See Schoeffler*, 493 F.Supp.2d at 820-821.

The listing requirement and the requirement to designate critical habitat are concurrent and inseparable statutory mandates constituting a unified duty imposed on the Service by Congress. Where, as here, the Service fails to perform one inseparable part of that duty (i.e., designating critical habitat) it should not be permitted to claim that the statute of limitations has run with regard to the other inseparable part of that duty (i.e., listing). Rather, there has been a failure to comply with the singular, inalienable duty of designating critical habitat when listing species. Failure to comply with that duty is not action but inaction.

When the Service listed the Warbler, it became subject to a nondiscretionary duty to designate critical habitat for the species. To this day, the Service has not designated critical habitat. Every five years after listing the Warbler, the ESA required the Service to review the original listing to determine whether the Warbler should continue to be listed. *See* 16 U.S.C. § 1533(c)(2). At each five-year interval, the Service had the opportunity to "act" by designating critical habitat, even though the original statutory deadline had past. But when the time came for each mandated five-year review, the Service failed to designate critical habitat for the Warbler. Accordingly, the failure to act is a continuing violation from the time of the original

listing, through each five-year review, to the present day. The same applies to the Service's failure to comply with NEPA.

Another federal district court has found that the failure to designate critical habitat under the ESA is a continuing violation under the six-year statute of limitations. *See Southern Appalachian Biodiversity Project v. U.S. Fish and Wildlife Services*, 181 F.Supp.2d 883, 887 (E.D. Tenn. 2001). The court held that the six-year statute was tolled and that "the Service's *non-action* logically can only be construed as a continuing violation." *Id.* (emphasis is original).

Schoeffler and *Southern Appalachian Biodiversity Project* are two in a long line of cases stating that a failure to act either does not trigger the statute of limitations or triggers the statute of limitations anew every day that the failure to act continues. *See, e.g., The Wilderness Soc. v. Norton*, 434 F.3d 584, 589 (D.C. Cir. 2006) (claims are not time-barred when they seek to rectify government agency inaction in violation of a nondiscretionary duty because such suits "do [] not complain about what the agency has done but rather about what the agency has yet to do."); *In re United Mine Workers of America International Union*, 190 F.3d 545, 549 (D.C. Cir. 1999) (same); *see also S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1232 (10th Cir. 2002), *reversed on other grounds*, *S. Utah Wilderness Alliance v. Norton*, 301 F. 3d 1217, 1232 (10th Cir. 2002) (agency's failure to act as statutorily mandated "should be considered an ongoing failure to act, resulting in an ever-green cause of action for

failure to act"), judgment vacated on other grounds, *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004). This line of cases supports GLO's position not only with regard to the ESA issues under Claim 1 but also with regard to the NEPA limitations issues under Claim 3, because the failure of the Service to comply with the procedural requirements of NEPA before listing the Warbler constituted a failure to act, i.e., a failure to comply with a statutorily mandated procedural duty.

Because of the weight of authority in connection with failure to act claims, and based on the well pled facts in the complaint that the government failed to designate critical habitat in connection with the Warbler listing at the time required by the statute, the motion to dismiss Claim 1 on statute of limitations grounds should have been denied. *See Iqbal*, 556 U.S. at 679 (complaint stating facts establishing "a plausible claim for relief survives a motion to dismiss").

For the same reasons, the failure to comply with NEPA in connection with the original listing of the Warbler is not time-barred, as it is also a "failure to act" claim which continues through each day that the Service failed to comply with its duties under NEPA. Accordingly, the motion to dismiss should be denied on the NEPA claim (Claim 3) in connection with the statute of limitations issue.

V. THE DISTRICT COURT ERRED IN FINDING THAT NEPA DOES NOT APPLY TO LISTING DECISIONS (AND DECISIONS DENYING 90-DAY PETITIONS) UNDER THE ENDANGERED SPECIES ACT

As an alternative to dismissal on the bases of the statute of limitations, the district court dismissed GLO's Claim 3 on the ground that NEPA did not apply to listing or delisting decisions under the ESA. ROA.962-65. The court reasoned that because NEPA only applies when there is a change affecting the environment, listing decisions which preserve the status quo cannot be required to comply with NEPA. ROA.964.

Until September 21, 1983, the Service prepared Environmental Assessments for all endangered species listing regulations. *See* "Endangered and Threatened Wildlife and Plants," 48 Fed. Reg. 49244-02 (Oct. 25, 1983). After recommendations from the Council on Environmental Quality, the Service adopted the position that Section 4 listing actions are exempt from NEPA review "as a matter of law." *Id*.

In *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma*, the Supreme Court held that compliance with NEPA's procedural requirements by all federal agencies is mandatory unless there is a statutory conflict with the agency's authorizing legislation that prohibits or renders compliance impossible with both NEPA and another statute. 426 U.S. 776, 788 (1976). Courts have varied in their interpretation of what constitutes a "conflict" in the context of the ESA and NEPA, and they have split on whether compliance with NEPA is required in connection with various ESA actions. *See Catron County Bd. of Commissioners, New Mexico v. U.S.*

Fish & Wildlife Service, 75 F.3d 1429, 1435-36 (10th Cir. 1996) (ESA critical habitat mandate does not conflict with NEPA's procedural requirements and both can co-exist); *Douglas County v. Babbitt*, 48 F.3d 1495, 1504 (9th Cir. 1995) (for critical habitat designations, ESA was intended to displace NEPA); *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981) (ESA listing procedures conflict with NEPA).

Accordingly, the question of the extent to which NEPA applies to decisions made under the ESA is a live issue for this Court to examine.

The district court was wrong in ruling in this case that the Service's original listing did not change the status quo or alter the physical environment. Unlike in *Sabine River Authority v. US Dept. of Interior*, 951 F.2d 669, 679-80 (5th Cir. 1992), where a parcel went from being a nature preserve under private ownership to a nature preserve under government ownership via a negative easement, GLO's property in 1990 went from being a parcel that could be used for anything – development, sale, clearance for livestock grazing – to a parcel that cannot be touched except in compliance with the substantial restrictions of the ESA, including but not limited to the prohibitions set forth in 50 C.F.R. §17.21(a)-(f). If the original listing was erroneous because the Service failed to comply with NEPA in 1990, then the error was exacerbated by the Service's failure to comply with NEPA during the 2014 five-year review and in connection with its review of the Petition.

The district court cited *Markle Interests, LLC v. FWS*, 827 F.3d 452, 479 (5th Cir. 2016). But *Markle* has been vacated by the Supreme Court, *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, ––– U.S. ––––, 139 S.Ct. 361 (2018), at least in connection with all ESA issues raised in that case. Regarding NEPA, *Markle* addressed solely whether the Service's designation of critical habitat triggered NEPA review. By contrast, here the issue in Claim 3 is whether NEPA applies to the original listing decision, the 2014 five-year review, and the evaluation of the 90-day delisting petition. None of these issues were before the Court in *Markle.* Accordingly, because the NEPA issues raised in *Markle* are distinguishable from those raised here, *Markle* should not be applied to the NEPA issues in the instant case.

To the extent that this Court chooses to rely on *Markle* in connection with Claim 3, GLO recognizes that "one panel of this court may not overrule the decision of a prior panel in the absence of en banc consideration or a superseding Supreme Court decision." *United States v. Lipscomb*, 299 F.3d 303, 313 n.34 (5th Cir. 2002). Accordingly, if and when appropriate, GLO preserves its right to seek en banc review of *Markle* in the context of the NEPA issues in Claim 3.

CONCLUSION

For the foregoing reasons, the judgment of the district court on all claims in the Second Amended Complaint should be reversed.

DATED: April 22, 2019

Respectfully submitted,

s/Theodore Hadzi-Antich

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on April 22, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Theodore Hadzi-Antich
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Dated: April 22, 2019

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