No. 19-50321

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN YEARWOOD; WILLIAMSON COUNTY, TEXAS,
Intervenors Plaintiffs-Appellants-Cross Appellees,

v.

DEPARTMENT OF INTERIOR; UNITED STATES FISH AND WILDLIFE SERVICE; DAVID BERNHARDT, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, in his official capacity; MARGARET E. EVERSON, in her official capacity as Director of the U.S. Fish and Wildlife Service; AMY LUEDERS, in her official capacity as the Southwest Regional Director of the U.S. Fish and Wildlife Service,
Intervenor Defendants–Appellees–Cross Appellants,

CENTER FOR BIOLOGICAL DIVERSITY; TRAVIS AUDUBON; DEFENDERS OF WILDLIFE,
Intervenor Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
No. 1:15-CV-1174

APPELLANTS' OPENING BRIEF

CERTIFICATE OF INTERESTED PERSONS

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Intervenor Defendants–Appellees–Cross Appellants,

CENTER FOR BIOLOGICAL DIVERSITY; TRAVIS AUDUBON; DEFENDERS OF WILDLIFE,
Intervenor Defendants-Appellees.

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. Parties: American Stewards of Liberty (district court); Charles Shell; Cheryl Shell; Walter Sidney Shell Management Trust; Kathryn Heidemann; Robert V. Harrison, Sr.; John Yearwood; Williamson County, Texas; Department of the Interior; U.S. Fish and Wildlife Service; David Bernhardt;

Margaret E. Everson; Amy Lueders; Center for Biological Diversity; Travis Audubon; Defenders of Wildlife.

2. Counsel of record and other interested persons:

   a. Attorney for Plaintiffs-Cross Appellees: Paul Stanley Weiland, Rebecca Barho, Brooke Marcus Wahlberg, Alan M. Glen (district court).

   b. Attorneys for Intervenor Plaintiffs-Appellants-Cross Appellees: Robert Henneke, Theodore Hadzi-Antich, Chance Weldon, Chad Ennis (district court), Kevin D. Collins (district court).

   c. Attorneys for Intervenor Defendants-Appellees-Cross Appellants: Jeffrey Bossert Clark, Eric Grant, Andrew M. Mergen, Varu Chilakamarri, Jeffrey H. Wood (district court), Seth Barsky (district court), Meredith Flax (district court), Lesley Karen Lawrence-Hammer (district court), Jeremy Hessler (district court), Frank Lupo and Joan Goldfarb.

   d. Attorneys for Intervenor Defendants-Appellees: Jason Craig Rylander, Charles W. Irvine (district court), Jared Michael Margolis (district court), John Jeffrey Mundy (district court), Ryan Adair Shannon (district court).

/s/Chance Weldon
CHANCE WELDON
Counsel for Appellants

STATEMENT REGARDING ORAL ARGUMENT

This case raises complex and timely questions involving a host of important legal issues among which are justiciability and the constitutionality of the Endangered Species Act. Accordingly, Appellants believe oral argument will prove helpful to the Court in ensuring full deliberation.

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STATEMENT OF JURISDICTION

This case centers on a constitutional challenge to a federal regulation. The district court had subject matter jurisdiction under 28 U.S.C. § 1331; 5 U.S.C. § 706; 28 U.S.C. § 2201 and § 2202. The district court issued an order disposing of the case on universal cross-motions for summary judgment on March 28, 2019. ROA 19-50321.7192. The district court ruled against Appellants on all of their summary judgment claims and granted the Appellee's motion for summary judgment against Appellants on every issue except one: the district court held that Appellant John Yearwood had standing to intervene in the lawsuit. ROA 19-50321.7226. The same day, the district court entered a "final judgment" noting that "nothing further remains to resolve" and that the "case is hereby closed." ROA 19-50321.7228. Appellants timely filed a notice of appeal on April 11, 2019, on all issues other than the standing of Appellant John Yearwood. *See* Fed. R. App. P. 4(a). Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Is this appeal justiciable?
2. Did the district court err by denying Appellant Williamson County's right to intervene in the proceedings?
3. Does the federal government have authority to regulate the Bone Cave Harvestman, a purely intrastate non-commercial species?

a. Did the district court err by refusing to apply the heightened scrutiny required by the Necessary and Proper Clause to determine whether the federal government has constitutional authority to regulate an intrastate, non-commercial species on Appellants' private property?

b. Did the district court err by refusing to apply the record-based form of rational basis scrutiny mandated by this Court in *St. Joseph Abbey v. Castille* to determine whether the federal government has sufficient basis supported by the record to regulate a purely intrastate, non-commercial species on Appellant's private property?

STATEMENT OF THE CASE

A. *Background*

This case involves a constitutional challenge to federal regulation of the Bone Cave Harvestman (the "Harvestman"). The Harvestman is a small arachnid that lives in only two counties in Texas and does not have any measurable impact on interstate commerce. ROA 19-50321.7194,7221. Appellants John Yearwood and Williamson County, Texas (the "County") own property inhabited by the Harvestman. ROA 19-50321.1748-52. Because the Harvestman is listed as endangered under the Endangered Species Act (the "ESA" or the "Act"), federal law places significant restrictions on how Appellants may use their properties. ROA 19-50321.1723, 1748-52.

Appellants filed suit by intervening in the district court proceedings. They argued that the federal regulation of the Harvestman pursuant to the ESA exceeds Congress' authority under the Commerce Clause and the Necessary and Proper Clause because the Harvestman exists in only one state and has no measurable effect on interstate commerce. The district court rejected these claims, observing that it was bound by *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), which specifically held that federal regulation of the Harvestman is a constitutional exercise of Congress' authority under the Commerce Clause. ROA 19-50321.7224-25.

Appellants argue that holdings of the Supreme Court and Fifth Circuit, made before and after *GDF Realty*, show that the *GDF Realty* panel applied an impermissible standard of review of the constitutional claims, and that, accordingly, *GDF Realty* is not dispositive here.

B. *Facts*

The Harvestman is a small, sightless arachnid that is found only in certain cracks and karst caves in two counties in central Texas. *See* 53 Fed. Reg. 36,029-30; *GDF Realty*, 326 F.3d at 625. The species has "little or no ability to move appreciable distances on the surface." 53 Fed. Reg. 36,032. Because the Harvestman is limited to isolated caves, it does not have any appreciable impact on or relationship to the ecosystem. *See* 53 Fed. Reg. 36,030 (Harvestman isolated habitat "developed their own, highly localized faunas.").

There is no commercial market for the Harvestman. *See GDF Realty*, 326 F.3d at 638 ("Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture."). The Harvestman has never been bought or traded, nor does the species generate tourism. *Id*. at 638 ("[T]here is no historic trade in the Cave Species, nor do tourists come to Texas to view them."). Indeed, the Service has consistently held that commercial utilization is not a threat to the Harvestman. *See* 53 Fed. Reg. 36,031.

In 1988, the Harvestman was listed by the United States Fish and Wildlife Service (the "Service") as an endangered species under the ESA, making it a federal crime to "take" the Harvestman or disturb its habitat. *See* 16 U.S.C. § 1538(a)(1)(B); *see also* 50 C.F.R. § 17.21(c) (2016). A "take" is broadly defined as "harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting, or attempting to engage in any such conduct." *See* 16 U.S.C. § 1532(19).

Appellants own property inhabited by the Harvestman. Because of the continued listing of the species, Appellants may not engage in basic maintenance like clearing brush on their properties without risking a Harvestman take, which is punishable by up to $50,000 in penalties and a year of incarceration. ROA 19-50321.1723; 16 U.S.C. § 1540. If Appellants wish to develop their properties near Harvestman habitat, they must pay as much as $400,000 in mitigation fees up front. ROA 19-50321.1748. Appellant John Yearwood, who previously opened his property to the local 4-H Club and church groups for camping, horseback riding and shooting sports, no longer does so because of the risk of Harvestman "takes." In addition, the current federal recovery plan for the Harvestman places daily obligations on Appellant Williamson County to maintain eleven separate Harvestman preserves on County property. ROA 19-50321.1748. Among other things, these preserves require the County to spend approximately $19,000 per year in fire ant mitigation to protect the Harvestman. ROA 19-50321.1748.

C. ***The Delisting Petition***

Under the ESA, a person seeking to remove a species from the endangered species list does so by filing an administrative petition with the Service to delist the species. 16 U.S.C. § 1533(b)(3)(A). The Service then has 90 days to decide whether "delisting"—i.e. removal from the endangered species list—"may be warranted." *Id*. If the Service decides that delisting "may be warranted," a second twelve-month review period (the "12-month review") is triggered, including a public notice and comment period, at the end of which the Service decides whether or not to delist. 16 U.S.C. § 1533 (b)(3)(B), (b)(6). If, on the other hand, the Service determines at the end of the initial 90-day period that the species is still endangered (a "negative 90-day finding"), that is a final agency action subject to judicial review. 16 U.S.C. § 1533(b0(3)(C)(ii).

In 2014, several farmers, including John Yearwood, filed an administrative petition (the "Delisting Petition") with the Service to remove the Harvestman from the endangered species list. ROA 19-50321.59, 7199. The County was not a party to the Delisting Petition. *Id*. The Delisting Petition was denied by the Service. *Id.*

D. ***Proceedings in the District Court***

In late 2015, several signatories of the Delisting Petition (the "Plaintiffs"), other than Appellant John Yearwood, filed a lawsuit under the Administrative Procedure Act (APA) for review of the denial of the Delisting Petition. ROA 19-

50321.1372. That lawsuit sought to have the 90-day finding vacated and remanded on the statutory ground that the Service used an impermissible standard under the ESA to deny the Delisting Petition.

Appellants intervened in that lawsuit on the separate and distinct ground that regulation of the Harvestman as an endangered species under the ESA was unconstitutional. ROA 19-50321.1081. Accordingly, Appellants opposed any remand to the Service because it lacked constitutional authority to regulate the species. *See* ROA 19-50321.815. Instead, Appellants asked for a declaration that regulation of the Harvestman under the ESA was unconstitutional and for an order enjoining the Service from enforcing the Harvestman regulation on their properties. ROA 19-50321.1085.

After Appellants moved for summary judgment, the Service requested a voluntary remand to reconsider the Delisting Petition. ROA 19-50321.736. Over the Appellants' opposition, the court concurred. ROA 19-50321.974. After six months, the Service once again concluded that the Harvestman should remain listed, and the litigation resumed in the district court.

In due course, the parties filed cross motions for summary judgment. Plaintiffs argued that there was sufficient evidence to justify another reconsideration of the negative 90-day finding and that the issue should again be remanded. ROA 19-50321.1456. The Service countered that its negative 90-day finding should be

upheld. ROA 19-50321.1799. By contrast, Appellants argued that the federal regulation of the Harvestman exceeds Congress' and the Service's authority under the Commerce Clause and the Necessary and Proper Clause, because the Harvestman exists in only one state and has no measurable effect on interstate commerce. ROA 19-50321.1718. The Service countered that Appellants' claims were precluded by *GDF Realty*, and that, in any event, Appellants' claims were barred by the statute of limitations because the Harvestman had been listed for more than six years. ROA 19-50321.3087.

E. ***The Final Judgment of the District Court***

Nearly three years after Appellants initially moved for summary judgment, and four years after the complaint in intervention was filed, the district court entered its opinion and order. ROA 19-50321.7192.

The district court rejected Appellants' constitutional arguments, essentially without analysis, stating that it was bound by the decision of the *GDF Realty* panel. The court then noted that while Appellant John Yearwood had standing to pursue his claims under *Dunn-McCampbell Royalty Interest v. Nat'l Park Serv.*, 112 F.3d 1283 (5th Cir. 1997), Appellant Williamson County's claims were time barred because it had failed to sign the petition to delist the species in 2015. Appellants duly appealed the adverse decision on the constitutional claims and the adverse ruling on the County's standing.

F. *The Appeal*

The appeal was filed on April 11, 2019. Thereafter, on July 9, 2019, the Appellees filed a Motion to Dismiss asserting that the Appellants' appeal is not justiciable, that no further relief is available to them in this action, and that the Court should decline review because of constitutional avoidance principles. After a full briefing on the motion to dismiss, this Court ordered the parties to incorporate their arguments into the merits briefing. Doc. 00515073504.

STANDARD OF REVIEW

Regarding the Motion to Dismiss made pursuant to under Fed. R. App. P. 27, which attacks justiciability, including subject matter jurisdiction, the standard of review is the same as that set forth in Fed. R. Civ. P. 12(b)(1), which requires denial of the motion unless "without a doubt" the Court "lacks statutory or constitutional power to adjudicate the case." *See Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998).

Orders on summary judgment are reviewed *de novo*. *Horton v. City of Houston*, 179 F.3d 188, 191 (5th Cir. 1999), *cert. denied*, 528 U.S. 1021, 145 L.Ed.2d 411, 120 S.Ct. 530 (1999). A summary judgment is proper only if "there is no genuine issue as to any material fact and … the [movant] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986).

SUMMARY OF THE ARGUMENT

The merits of this constitutional appeal address the level of scrutiny that courts must apply when evaluating the federal government's assertion of authority to regulate purely intrastate, non-commercial activities under its authority to regulate interstate commerce. Because of the pending motion to dismiss, two threshold issues, involving justiciability and intervention, must be addressed.

First, regarding justiciability, the ESA places significant restrictions on the property rights of those who own property inhabited by species protected under the Act. Because Appellants own property inhabited by the Harvestman, this appeal on constitutional grounds should be recognized as justiciable. Even though the lower court, following entry of its final judgment, returned the case to the Service for further administrative action pursuant to the purely statutory prayers for relief of the Plaintiffs, those Plaintiffs are not Appellants here, and the return does not provide any relief requested by the Appellants, who continue to be burdened by the restrictions placed on their properties by the ESA. In every respect relevant to the declaratory and injunctive relief requested by the Appellants, the decision of the lower court constitutes an unfavorable, final outcome. Accordingly, the Appellants have Article III standing, and the district court's judgment cannot reasonably be viewed as interlocutory insofar as the Appellants are concerned. Moreover, contrary to the assertions of the Service, the canon of constitutional avoidance does not apply

here because the *only* claims filed by the Appellants are constitutional ones, all of which were rejected by the district court. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (quoting The Federalist No. 78, p 526 (J. Cooke ed. 1961) (A. Hamilton)) ("constitutional avoidance is not an excuse for a court to "shrink from [its] duty 'as the bulwark[k] of a limited constitution against legislative encroachments'".)

Second, regarding intervention, the district court erred when it held that Williamson County lacked standing to intervene while concurrently holding that John Yearwood had standing. It is well established that if one of several petitioners (or intervenors) establishes standing, the others may continue in the case without independently establishing standing. *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998). Furthermore, the solely *constitutional* challenges made by Williamson County cannot be summarily dismissed based upon the Service's assertion that the statute of limitations has run on those challenges. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 626–27 (2001) (Unconstitutional restrictions "do not become less so through passage of time."). Moreover, although there is no dispute that the County's intervention was timely under Fed. R. Civ. Proc. 24, the district court impermissibly held that the County's claims were time-barred because the County did not file the delisting petition itself. Such a holding, if affirmed, would make it effectively impossible for anyone to intervene in any lawsuit to delist a species on constitutional

grounds if the species has been listed for more than six years and the aggrieved party did not personally file a delisting petition. Such a result would thwart the constitutional foundations of limited federal government, as well as the intervention standards established under Fed. R. Civ. P. 24, and should not be countenanced by this Court.

With regard to the merits of this appeal, the district court incorrectly held that it was bound by *GDF Realty* to hold that federal regulation of Harvestman takes is justified under the Commerce Clause. In *GDF Realty*, a panel of this Court concluded that Harvestman takes have no effect on interstate commerce. Nonetheless, applying a highly deferential form of rational basis scrutiny, the panel held that it was bound to accept the government's claim that federal regulation of Harvestmen takes were a necessary part of the regulation of interstate commerce, because all species could be "interconnected" and therefore any activity that affects any species hypothetically could affect all species and therefore could affect interstate commerce.

But decisions of the Supreme Court and this Court issued after *GDF Realty* have clarified that the hyper-deferential, no-evidence approach applied in that case is not appropriate for cases testing the outer bounds of federal authority to regulate interstate commerce. First, in *Gonzales v. Raich*, 545 U.S. 1, 5 (2005), the Supreme Court clarified that the regulation of intrastate, non-economic activity should be

analyzed under the Necessary and Proper Clause, not the Commerce Clause alone. This approach was later adopted by this Court in *United States v. Whaley*, 577 F.3d 254, 260 (5th Cir. 2009). This is significant, because, at a minimum, the Necessary and Proper Clause requires a record-based evaluation of whether the regulation is necessary to a broader regulation of interstate commerce and whether allowing federal regulation in that area would be contrary to the principles of federalism.

Second, in *St. Joseph Abbey v. Castille*, 700 F.3d 154, 162 (5th Cir. 2012), this Court clarified that even under rational basis scrutiny, the Court's analysis may not be based solely on "abstraction for hypothesized ends [,]" or be based solely on "post hoc hypothesized facts." Some evaluation of the record is required. *Id*.

Applying either of Appellants' claims, federal regulation of Harvestman takes cannot survive. This Court has already acknowledged that the record evidence shows that Harvestman takes have no effect on interstate commerce, even in the aggregate. Any connection to interstate commerce may only be assumed by piling post hoc hypothetical upon post hoc hypothetical to create a jenga theory of ecology where anything that affects any species affects interstate commerce. This fact-free, hypothetical approach to the commerce power has now been roundly rejected by this court. Moreover, such a broad view of the commerce power would greatly expand federal authority into the traditional land use powers of the states. Accordingly, the judgment of the district court should be reversed on the merits.

ARGUMENT

I. BECAUSE THIS APPEAL IS JUSTICIABLE, THE MOTION TO DISMISS SHOULD BE DENIED.

The question before this Court, is whether Appellants have maintained their standing on appeal. They have. A party may appeal a decision vacating and remanding a challenged agency action if the party had also requested relief in addition to vacatur and remand and that relief was not granted. *See, e.g., Forney v. Apfel*, 524 U.S. 266, 271 (1998) (upholding standing to appeal after remand to an administrative agency); *Bordelon v. Barnhart*, 161 F. Appx. 348, 351 (5th Cir. 2005) (same). Such appeals are allowed because the Court has recognized that a vacatur and remand does not provide the same relief as an injunction. *Forney*, 524 U.S. at 271. As the Supreme Court has explained, a remand to the agency is really only "half a loaf." *Id*.[1] It necessarily involves "further delay and risk" that the party will receive no relief at all. *Id*. Therefore, a party who requests declaratory and injunctive relief and only receives a vacatur and remand is still "aggrieved" and may generally appeal. *Id*.

Here, as in *Forney*, 524 U.S. at 271 and *Bordelon*, 161 F. Appx. at 351, Appellants, as Intervenors, raised separate claims and requests for relief in the district court that were all denied. In fact, Appellants' constitutional claims were

[1] Because the Intervenors did not receive any relief in connection with their constitutional claims, they did not obtain even half a loaf.

entirely separate and stand alone from Plaintiffs' statutory claims. Because that relief was denied, Appellants continue to suffer ongoing injuries. Accordingly, this Court has jurisdiction to hear their claims.

The Service argued in the Motion to Dismiss that the vacatur and remand of the negative 90-day finding has rendered Appellants' claims non-justiciable and that several prudential concerns justify denying jurisdiction in this case. Those arguments are without merit.

A. Appellants Meet the Requirements of Article III Standing.

"[C]ourts should not be austere in granting standing under the APA to challenge agency action." *White Oak Realty, L.L.C. v. United States Army Corps of Eng'rs*, 746 F. Appx. 294, 299 (5th Cir. 2018). To establish Article III standing, a plaintiff must only show: (1) an injury in fact that is (2) fairly traceable to the defendant's allegedly unlawful conduct and that is (3) likely to be redressed by the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). Intervenors meet this three-pronged test.

1. Appellants are injured in fact.

Appellants' standing to challenge the federal regulation of their property is well established. *Weyerhaeuser Co. v. United States Fish & Wildlife Service*, 139 S.Ct. 361, 368 (2018) (ESA restrictions on property are sufficient to establish standing); *Contender Farms, L.L.P. v. United States Dep't of Agric.*, 779 F.3d 258,

264 (5th Cir. 2015) (If a plaintiff is "an object of a regulation…" he generally has standing because "…there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it."); *People for the Ethical Treatment of Prop. Owners v. United States Fish & Wildlife Serv.*, 852 F.3d 990, 997, n. 1 (10th Cir. 2017) (property owners who submitted affidavits that ESA regulation prevented them from using their properties as desired had established sufficient injuries to challenge constitutionality of the listing of a species); *see also, Ala.-Tombigbee Rivers Coal. v. Norton*, 338 F.3d 1244, 1253 (11th Cir. 2003) (plaintiffs had standing to challenge the ESA listing of the sturgeon, because their desired activities took place in sturgeon habitat and might be limited by the listing.)

The question is whether remand in this case has somehow removed those injuries. It has not. Despite the vacatur and remand, the Harvestman is still listed. As a result, Appellants continue to suffer injuries from the Service's challenged decision not to delist the species. Because of the continued listing, Appellants may not clear brush on their property without risking a Harvestman take, which is punishable by up to $50,000 in penalties and a year in jail. ROA 19-50321.1723; 16 U.S.C. § 1540. If Intervenors wish to develop their properties near Harvestman habitat, they must pay as much as $400,000 in mitigation fees up front. ROA 19-50321.1748. Additionally, Williamson County is currently required to maintain

eleven separate Harvestman preserves on County property. ROA 19-50321.1728. These preserves require approximately $19,000 per year in fire ant mitigation to protect the Harvestman. ROA 19-50321.1748. These are *per se* injuries for Article III purposes. *See*, *Weyerhaeuser*, 139 S. Ct. at 368 (ESA restrictions on property are "a sufficiently concrete injury for Article III purposes."); *Ecosystem Inv., Partners v. Crosby Dredging, L.L.C.*, 729 Fed. Appx. 287, 292 (5th Cir. 2018) ("bread-and-butter economic injuries still support Article III standing"); *Louisiana v. Sprint Commc'ns Co.*, 892 F.Supp. 145, 148 (M.D. La. 1995) ("It cannot be disputed that an owner of property has standing to [challenge] interference with property rights.").

Furthermore, property owners need not await prosecution or a permit denial before challenging the validity of an agency's jurisdiction over their properties in court. *See, e.g.*, *United States Army Corps of Eng'rs v. Hawkes Co.*, 136 S.Ct. 1807, 1815 (2016) ("The Corps contends that respondents have two such alternatives: either discharge fill material without a permit, risking an EPA enforcement action during which they can argue that no permit was required, or apply for a permit and seek judicial review if dissatisfied with the results. Neither alternative is adequate.") There is nothing in the text of the APA or the jurisprudence of this Court that requires this Court or Appellants to wait potentially years for the Service to decide whether it might delist the species and thereby provide Appellants with relief. As the Supreme Court long ago explained in response to similar arguments, "there is no

question . . . that the petitioners have standing as plaintiffs" because the Harvestman regulation requires Appellants "to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions." *See Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967). Given these circumstances, "access to the courts under the Administrative Procedure Act and the Uniform Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here." *Id.* As explained in Appellants' Response to the Service's Motion to Dismiss, there are no statutory bars to jurisdiction in this case.

2. Appellants' injuries are fairly traceable to the Service's conduct.

The Service argues in its Motion to Dismiss that Appellants' injuries are not traceable to the failure to delist the Harvestman, but to the Harvestman's original listing in 1988, which may not be challenged under the APA's six-year statute of limitations. This claim was raised and rejected at the district court and should be rejected here.

Under the APA, regulations adopted by an administrative agency are "final agency actions" that must be challenged within six years. *Dunn-McCampbell Royalty Interest v. Nat'l Park Serv.*, 112 F.3d 1283, 1286 (5th Cir. 1997). But unconstitutional restrictions "do not become less so through passage of time." *Palazzolo v. Rhode Island*, 533 U.S. 606, 626–27 (2001). Accordingly, to avoid

potentially immunizing older regulations from constitutional scrutiny, this Court has held that an individual can challenge the constitutional authority of a regulation more than six-years after its adoption "by filing a petition to rescind regulations and appealing the denial of the petition." *Dunn*, 112 F.3d at 1287–88. The theory behind this holding is that the agency's refusal to rescind the prior regulation is a new final agency action reaffirming the agency's position that the existing regulation is valid. This new action restarts the six-year statute of limitations. *Id*. If this were not the case, this Court has warned that the statute of limitations would "deny many parties ultimately affected by a rule an opportunity to question its validity." *State of Tex. v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985).

The Harvestman was originally listed in 1988. Following this Court's instructions in *Dunn*, Appellant John Yearwood filed a Petition to Delist the species and that petition was denied in 2017. According to *Dunn*, the denial of that Petition was final agency action that reaffirmed the Service's original listing decision. Accordingly, the statute of limitations clock for the original listing restarted on the date of the final denial, and the limitations period will not expire until 2023.

Furthermore, contrary to the Service's position in the briefing on the Motion to Dismiss, the lower court's decision to vacate and remand the 90-day finding cannot, of itself, remove the traceability component of standing. *See e.g., Forney*, 524 U.S. at 271 (upholding standing after remand to administrative agency);

Bordelon v. Barnhart, 161 F. Appx. 348, 351 (5th Cir. 2005) (same). The Service's refusal to delist the Harvestman continues to injure the Appellants because the Harvestman is still listed notwithstanding the vacatur and remand. *See Dunn*, 112 F.3d at 1287–88. Those ongoing injuries are sufficient for standing. *Contender Farms, L.L.P. v. United States Dep't of Agric.*, 779 F.3d 258, 264 (5th Cir. 2015) (If a plaintiff is "an object of a regulation…" he generally has standing because "…there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.").

3. Appellants' injuries are redressable by granting the requested relief.

The Service argued in its Motion to Dismiss that Intervenors' injuries are not redressable because the only relief available under the APA is vacatur of the challenged agency action—which has already happened. But this is an unduly cramped reading of the APA, which also grants the court authority to grant declaratory and injunctive relief. *See* 5 U.S.C. 706 (granting authority to "compel agency action," and "declare unlawful *and* set aside" agency actions.) (emphasis added). Moreover, the Service's argument ignores the constitutional claims pled in Appellants' complaint. In addition to the APA, Appellants brought this action under 28 U.S.C. § 2201 and § 2202. Once a case or controversy exists, those statutes provide authority for this Court to enter declaratory and injunctive relief. *See* 28 U.S.C. § 2201 ("In a case of actual controversy within its jurisdiction…any court of

the United States… may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."); 28 U.S.C. § 2202 (courts can grant injunctive relief "based on a declaratory judgment"). The Service's redressability argument therefore fails.

B. Contrary to the Service's Assertion in the Motion to Dismiss, the "Posture' of this Appeal Does Not Make Appellate Review Inappropriate.

The Service asserts that the "posture of this appeal" requires this Court to grant its motion to dismiss because the district court's ruling is not final, because the decision was a "favorable outcome" for Appellants, and because the decision of the lower court was "interlocutory." The arguments are without merit.

1. The decision of the district court is final.

28 U.S.C. § 1291 grants this Court mandatory jurisdiction of "appeals from all final decisions of the district courts." The term "final," is given "a practical rather than a technical construction." *Occidental Chem. Corp. v. La. PSC*, 810 F.3d 299, 306 (5th Cir. 2016). "[W]hen a plaintiff's action is effectively dead, the order which killed it must be viewed as final." *Hines v. D'Artois*, 531 F.2d 726, 730 (5th Cir. 1976).

A district court order is final and appealable "if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Sierra Club v. City of San Antonio*, 115 F.3d 311, 313 (5th Cir. 1997). An order resolving

universal cross motions for summary judgment on the merits of all issues qualifies as a final decision. *Cohen v. Perales*, 412 F.2d 44, 48 (5th Cir. 1969).

Here, the Appellants' motion for summary judgment and all the relief requested therein was denied, while the Plaintiff's motion was granted along with the relief requested by the Plaintiff. The district court's "Final Judgment" explicitly states that "nothing further remains to resolve" and that the "case is hereby closed." ROA 19-50321.7228. There is "nothing for the [district]court to do..." *Sierra Club*, 115 F.3d at 313. The district court's decision is therefore final with Appellants' claims "effectively dead" following the trial court's final judgment. *Hines*, 531 F.2d at 730.

2. The district court's decision was not a "favorable outcome" for intervenors.

Appellants did not receive any favorable outcome at the trial court. A judgment is "favorable" only if it provides all the relief that the party requested. *See*, *United States v. Fletcher*, 805 F.3d 596, 602 (5th Cir. 2015) ("[a] party who receives *all that he has sought* generally is not aggrieved by the judgment affording the relief and cannot appeal from it.") (emphasis added). If the decision merely "grant[s] in part and den[ies] in part the remedy requested," however, this Court "has clearly stated that a party is 'aggrieved' and ordinarily can appeal." *Id*. Applying that standard, the Supreme Court and this Court have held that a remand will not be considered a favorable outcome if other relief was denied. *See, e.g.*, *Forney*, 524

U.S. at 271; *Bordelon*, 161 F. Appx. at 351. Here, Appellants lost on every merits claim and did not receive any of their requested relief. Accordingly, the district court's decision cannot be reasonably construed as "favorable" to the Appellants.

3. The district court's judgment was not interlocutory.

The Service argued that the vacatur and remand of Plaintiff's separate claims makes this appeal interlocutory. The argument fails for at least two reasons. First, in multiparty litigation, a claim is considered "separate" and appealable if does not "turn on the same factual questions," or "involve common legal issues," with the other claims, and "separate recovery is possible." *Jordan v. Pugh*, 425 F.3d 820, 827 (10th Cir. 2005). As the district court noted, Plaintiffs' claims and Intervenors' claims "stand wholly separate," because they seek independent remedies and any decision on Intervenors' claims will not affect the legal or "factual development" of Plaintiffs arguments, or vice versa. ROA 19-50321.271. Intervenors' claims are therefore separate claims for the purpose of appellate review.

Second, even if the denial of Intervenors' claims could be construed as an interlocutory order, this Court should maintain jurisdiction because failure to hear this appeal would leave Intervenors "out of court." *See, Occidental Chem. Corp. v. La. PSC*, 810 F.3d 299, 306 (5th Cir. 2016) (holding that an order that otherwise may not be considered final for appellate purposes will nonetheless be appealable if it would put plaintiffs "effectively out of court.")

An order can place a party "out of court" in at least two ways. First, a plaintiff is out of court if not accepting the appeal would effectively deny plaintiffs a federal forum for their claims because of issues such as *res judicata*. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 (1983). Second, a plaintiff is out of court if the remand creates an undue delay in the party's ability to pursue its claims. For example, this Court has held that remanding a case to the EEOC was an appealable order because claims processing at the EEOC can take "at least eighteen months." *Hines*, 531 F.2d at 731. As this Court explained, a "practical construction [of finality] requires that when a plaintiff's action is effectively dead, the order which killed it must be viewed as final." *Id* at 730. "Effective death should be understood to comprehend any extended state of suspended animation." *Id.*

Both of these exceptions apply here. The remand for Plaintiffs claims within the trial court's final judgment has put Appellants out of court as a procedural matter. It would be fruitless to pursue their constitutional claims on remand because the Service, an administrative agency, lacks jurisdiction over such claims and even if it could hear them, the Service would be controlled by the district court decision on Intervenors' claims as the "law of the case." *Conway v. Chem. Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1062 (5th Cir. 1981) ("As a general rule, if the issues were decided, either expressly or by necessary implication, those determinations of law will be binding on remand.") And if Appellants try to raise their constitutional

claims in a new lawsuit after remand, those claims would potentially be barred by *res judicata*. *See Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 312-13 (5th Cir. 2004). Accordingly, Intervenors are effectively out of the case as a matter of law.

C. The Canon of Constitutional Avoidance Does Not Apply Here.

In its Motion to Dismiss, the Service asked this Court not to exercise jurisdiction because, "principles of constitutional avoidance compel incremental adjudication here." But constitutional avoidance is a tool that courts use to adjudicate cases after jurisdiction is established; it is not a way to avoid jurisdiction altogether. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (quoting The Federalist No. 78, p. 526 (J. Cooke ed. 1961) (A. Hamilton)) ("constitutional avoidance is not an excuse for a court to "shrink from [its] duty 'as the bulwar[k] of a limited constitution against legislative encroachments'".)

The jurisdiction of federal courts over constitutional claims is well established. *See* 28 U.S.C. § 1331. This Court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia,* 6 Wheat. 264, 404 (1821); *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 358–59 (1989) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.").

Moreover, constitutional avoidance simply does not apply here. Avoidance comes up in three circumstances on appeal:

1) When necessary to decide between two competing interpretations of an ambiguous text, *see, e.g., Clark v. Suarez Martinez*, 543 U.S. 371, 381, 125 S.Ct. 716, 724 (2005);
2) As a basis for remanding a case to the district court because a constitutional issue has arisen on appeal that the district court did not have the opportunity to address. *See, e.g., FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 529 (2009); or
3) When a party has pled statutory and constitutional claims and the statutory claims can resolve the case in its entirety. *See, e.g., Nw. Austin*, 557 U.S. at 206.

None of these circumstances are present here. First, no party has argued that there is any statutory ambiguity at issue in this case. Second, the district court has already ruled on the constitutional issues in this case and the record on that ruling is fully developed. Third, there is no statutory basis to resolve these constitutional claims. Accordingly, the application of the doctrine of constitutional avoidance is not appropriate in this case.

What the Service seeks is not constitutional avoidance, but for this Court to abdicate its jurisdiction based on the assertion that the agency *might* delist the species

in the indefinite future and thereby address Appellants' injuries. But our courts exist to ensure that litigants do not have to wait and hope that the government, in its benevolence, will redress their injuries. The Constitution does not leave Appellants' rights "at the mercy of [the Service's] *noblesse oblige*." *See United States v. Stevens*, 559 U.S. 460, 480 (2010).

II. THE DISTRICT COURT ERRED BY HOLDING THAT INTERVENOR WILLIAMSON COUNTY LACKED STANDING.

In the district court, the Service argued that Appellants' claims were barred by the APA's six-year statute of limitations because Appellants' injuries allegedly arise from the listing of the Harvestman, which first occurred in 1988. The district court rightly rejected this argument with regard to Appellant John Yearwood under this Court's holding in *Dunn-McCampbell Royalty Interest v. Nat'l Park Serv.*, 112 F.3d 1283 (5th Cir. 1997). *Dunn* held that an individual can challenge the constitutional authority of a regulation more than six years after its adoption "by filing a petition to rescind regulations and appealing the denial of the petition." *Dunn*, 112 F.3d at 1287–88. Here, John Yearwood was a party to the administrative petitions to delist the Harvestman that was denied. ROA 19-50321.61. Accordingly, the district court held that, under *Dunn*, John Yearwood's claims were not time-barred.

Having concluded that John Yearwood had standing, the district court had no reason to address the County's standing. Generally speaking, "Article III does not

require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so." *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998); *see also, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264, 97 S.Ct. 555, 562 (1977) (As long as there is "at least one individual plaintiff who has demonstrated standing to assert these rights as his own," a court "need not consider whether the other . . . plaintiffs have standing to maintain the suit."); *Legal Aid Soc'y v. Brennan*, 608 F.2d 1319, 1334 (9th Cir. 1979) ("it is unnecessary to examine the standing of all appellees so long as one had standing to secure the requested relief."). Here, John Yearwood had standing because, under *Dunn*, he was a party to the Delisting Petition. Accordingly, there was no reason to deny standing to his co-intervenor, Williamson County.

Nonetheless, the district court concluded that because the County was not a party to the delisting petition, its claims could not be saved by *Dunn* and were therefore time-barred. This holding should be overturned for at least two reasons. First, even without *Dunn*, the County's claims should not be barred by the statute of

limitations. And second, excluding the County from this case is contrary to the purpose behind Fed. R. Civ. P. 24.[2]

A. The County's Claims Should Not Be Time-Barred.

The Administrative Procedure Act (APA) is the primary vehicle to challenge the validity of federal agency regulations. On its face, the APA does not contain any statute of limitations. Nonetheless, this Court has held that the six-year statute of limitations from 28 U.S.C. § 2401(a) applies to certain challenges to final agency actions under the APA. *Dunn*, 112 F.3d at 1286.

Courts have never come to universal agreement however, on how this statute of limitations should be applied to claims challenging the constitutionality of regulations on their face. *See, id*. at 1289 (Jones, dissenting) (noting that other courts have not applied the six year limitation to challenges to agencies' constitutional or statutory authority); *Conner v. U.S. Dep't of the Interior*, 73 F.Supp.2d 1215, 1218 (D. Nev. 1999) ("If plaintiffs' challenge merely raises a procedural violation with regard to agency action, then the challenge must be brought within six years of the action. If, on the other hand, plaintiffs' challenge raises the question of whether the action exceeded the agency's constitutional or statutory authority, then the challenge may be brought more than six years after agency action.") As this Court has noted,

[2] These arguments are also true for John Yearwood, but not necessary to this case, because his claims clearly succeed under *Dunn*.

the six-year statute of limitations is designed primarily for challenges to agency adjudications. *See Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985). Regulations differ from adjudications in that "unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application." *Id*. Accordingly, if the six-year statute of limitations were strictly applied, it would "effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Id.* This is particularly problematic with regard to constitutional claims. As the Supreme Court has noted, unconstitutional restrictions "do not become less so through passage of time." *Palazzolo v. Rhode Island*, 533 U.S. 606, 626–27 (2001).

Thus far, this Court has chosen to address this tension by allowing individuals to circumvent the statute of limitations by filing a petition to rescind the regulation and then challenging the denial of that petition. *Dunn*, 112 F.3d at 1287–88. But that is not the only option available to this Court. And as this case shows, it is hardly adequate to protect constitutional rights. *See Dunn*, 112 F.3d at 1289-90 (Jones, dissenting).

B. Excluding the County from This Case is Contrary to Fed. R. Civ. P. 24.

Even if the APA's six-year statute of limitations were applicable in this case, its application to the County in these circumstances would run counter to the purpose

of Fed. R. Civ. P. 24. The County intervened in this case under Fed. R. Civ. P. 24. "Rule 24 is to be liberally construed." *Adam Joseph Res. (M) Sdn. Bhd. v. CNA Metals Ltd.*, 919 F.3d 856, 864 (5th Cir. 2019). One of the purposes of that rule is to allow individuals to intervene in suit where their property rights are affected. *See* Fed. R. Civ. P. 24.

In this case, a petition to delist the Harvestman was filed in 2015. As soon as the County was aware that a lawsuit had been filed regarding that petition, it intervened under Rule 24 to protect its sovereign interests. There is no dispute that the County's intervention was timely under Rule 24.

Nonetheless, the district court held that the County's claims were time-barred because it did not file the delisting petition itself. But the purpose of Rule 24 is to allow individuals to intervene in the lawsuits of others that have been, by necessity, initiated prior to the motion to intervene. Where, as here, constitutional issues are involved, the distinction between participating in the underlying administrative proceeding versus not participating should not affect the outcome.

III. THE FEDERAL GOVERNMENT DOES NOT HAVE AUTHORITY UNDER THE ENDANGERED SPECIES ACT TO REGULATE THE BONE CAVE HARVESTMAN, A PURELY INTRASTATE SPECIES.

A. This Court Should Clarify That the Panel Decision in *GDF Realty* is No Longer Good Law.

Sixteen years ago, the *GDF Realty* panel held that application of the ESA's take provision to the Harvestman is a constitutional exercise of the Commerce Clause power. *See GDF Realty*, 326 F.3d at 640–41. The *GDF Realty* panel reached its decision by applying a highly deferential form of rational basis scrutiny to uphold the ESA regulation of Harvestman takes, despite the fact that there is no evidence in the record that such takes affect interstate commerce. In the instant case, the district court felt bound by *GDF Realty*. But decisions of the Supreme Court and this Court show that the highly deferential form of rational basis scrutiny used by the *GDF Realty* panel to justify the federal regulation of the Harvestman under the ESA is impermissible under today's jurisprudence.

1. At the time *GDF Realty* was decided, the proper level of scrutiny for claims arising under the substantial effects test was unclear.

The Commerce Clause empowers Congress to regulate interstate and foreign commerce. *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J. concurring). "Commerce" includes "selling, buying, and bartering, as well as transporting for these purposes." *Id*. As the Supreme Court explained shortly after the Constitution was ratified, the Commerce Clause did not reach commerce "which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824). Nor did it

provide federal authority for local "[i]nspection laws, quarantine laws, health laws of every description, [or] laws for regulating the internal commerce of a State." *Id.* at 203. The Commerce Clause granted Congress precisely what the text would indicate—the authority to regulate interstate commerce. For 150 years, the Supreme Court strictly enforced that limitation.[3]

Over time, the Supreme Court expanded its interpretation of the term "commerce" to include intrastate economic activities that "substantially affect" interstate commerce. *See United States v. Morrison*, 529 U.S. 598, 607-08 (2000) (explaining the expansion). This line of cases reached its zenith in *Wickard v. Filburn*, 317 U.S. 111, 128 (1942), where the Court upheld the federal regulation of a farmer's private wheat crop because the "volume and variability [of] home-consumed wheat would have a substantial influence on price and market conditions."

After *Wickard*, the Court did not strike down another piece of legislation under the Commerce Clause for approximately fifty years. As long as the government could put forward a "rational basis" for believing that a regulated activity had a connection to interstate commerce, the regulation would be upheld. *See e.g., Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276

[3] *See, e.g. Carter v. Carter Coal Co.*, 298 U.S. 238, 308 (1936) (Congress may not regulate mine labor because "the relation of employer and employee is a local relation"); *United States v. Dewitt*, 76 U.S. 41, 44 (1869) (striking down a nationwide law prohibiting all sales of naphtha and illuminating oils, noting that the Commerce Clause "has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States.")

(1981) (the court must "defer to a congressional finding that a regulated activity affects interstate commerce, if there is *any* rational basis for such a finding.") (emphasis added).

But a pair of more recent cases called that deferential approach into doubt. In *United States v. Lopez*, 514 U.S. 549 (1995), the Court struck down a federal law banning the possession of firearms in a school zone as exceeding Congress' authority under the Commerce Clause. In explaining its decision, the Court canvassed its Commerce Clause jurisprudence over the past century and provided three categories of activities that fell within the Commerce Clause: (1) activities involving the "the channels of interstate commerce"; (2) activities involving "the instrumentalities of interstate commerce"; and (3) "those activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce." *Id.* at 558-59.

Within this third category—the "substantial effects test"—the Court recognized two potential sub categories: economic activities and non-economic activities. *Id.* at 561; *see also, Groome Res., Ltd. v. Par. of Jefferson*, 234 F.3d 192, 203-04 (5th Cir. 2000) (explaining the distinction between economic and non-economic activities in *Lopez*.). Economic activities could be aggregated in order to achieve the necessary substantial effect on interstate commerce to warrant federal

regulation. *Id*. Non-economic activities[4] could not be aggregated, but would nonetheless satisfy the substantial effects test if they were "part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id*. at 561. After carefully examining the *record*, the *Lopez* court concluded that the connection between interstate commerce and firearms possession at public schools was too tenuous to satisfy the substantial effects test. *Id*. at 563-64.

Five years later in *United States v. Morrison*, 529 U.S. 598 (2000), the Court relied on *Lopez* to strike down portions of the Violence Against Women Act, which prohibited purely intrastate acts of domestic violence. In its opinion, the Court pointed to four factors that it had considered when applying the substantial effects test: (1) the economic nature of the intrastate activity; (2) the presence of a jurisdictional element in the statute, which limits its application to matters affecting interstate commerce; (3) any congressional findings in the statute or its legislative history concerning the effect the regulated activity has on interstate commerce; and (4) the attenuation of the link between the intrastate activity and its effect on interstate commerce. *Id.* at 610-612. Applying those factors to the *record* in that case, the Court held that any connection between intrastate domestic violence and

[4] As the Supreme Court later explained in *Morrison*, the fact that non-economic activities should not be aggregated is implicit though not explicit in *Lopez*. *Morrison*, 529 U.S. 610-12.

an interstate market was too tenuous to be justified under the Commerce Clause. *Id*. at 617-18.

The majorities in *Lopez* and *Morrison* stated that they were applying the same deferential form of rational basis scrutiny that had been used in previous Commerce Clause cases. *See Lopez*, 514 U.S. at 557 (noting that the question was not whether the "regulated activity sufficiently affected interstate commerce," but, rather, whether Congress could have had "a rational basis" for so concluding); *Morrison*, 529 U.S. at 602 (citing *Lopez*). Yet, as the dissents in *Lopez* and *Morrison* pointed out, the Court in fact considered a host of factors that were outside of the Court's traditional deferential version of rational basis scrutiny. *See Lopez*, 514 U.S. at 609-10 (Souter dissenting); *United States v. Morrison*, 529 U.S. 598, 637 (2000) (Souter, Ginsburg, Stevens, Breyer dissenting).

Two of those considerations are particularly important. First, the Court in both cases had looked closely at the actual record evidence supporting a connection between the regulated activity and an interstate market. *Lopez*, 514 U.S. at 562-63 (noting the lack of congressional findings); *Morrison*, 529 U.S. at 614-15 ("Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."). Second, the Court in *Lopez* and *Morrison* placed particular emphasis on the impacts that accepting a broad

commerce power could have on federalism and the traditional powers of the states. *Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 613.

As the dissents in both cases also pointed out, neither of these considerations "square with rational basis scrutiny." *Lopez*, 514 U.S. at 609 (Souter, J. dissenting); *see also, e.g.*, *Morrison*, 529 U.S. at 644-45 (comparing the court's addition of federalism concerns to rational basis with the *Lochner* era's concerns over laissez-faire capitalism). The dissents therefore expressed concerns that the Court's opinions would create confusion in the lower courts by saying one thing (rational basis scrutiny) but doing another. *See, e.g., Morrison*, 529 U.S. at 654 (noting the confusion that would be created because "[c]ases standing for the sufficiency of substantial effects are not overruled; [yet] cases overruled since 1937 are not quite revived").

As predicted by the dissenting judges, lower courts applying the substantial effects test after *Lopez* and *Morrison* struggled with precisely that choice—apply the deferential rational basis scrutiny that the Supreme Court claimed it applied in *Lopez* and *Morrison*, or apply the more searching scrutiny it actually applied in those cases. *See* Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if The Supreme Court Held A Constitutional Revolution And Nobody Came?*, 2000 Wis. L. Rev. 369, 377 (2000). But because the standard of review for congressional conclusions technically remained the "rational basis" standard, most

"lower courts continued to apply an extremely deferential standard" under the substantial effects test. *Id.* This Court was among the courts to continue to apply the deferential rational basis standard. *See*, *Groome Res., Ltd. v. Par. of Jefferson*, 234 F.3d 192, 204 (5th Cir. 2000) ("the *Lopez* Court reaffirmed the rational basis test by which we are bound to evaluate the constitutionality of congressional actions."). It was during this time of legal uncertainty that *GDF Realty* was decided.

2. The *GDF Realty* panel applied an outdated version of rational basis review.

Many of the findings in *GDF Realty* were uncontroversial. For example, the panel rightly determined that Harvestman takes do not involve the channels or instrumentalities of interstate commerce and therefore may be regulated, if at all, only under the substantial effects test. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 628 (5th Cir. 2003). The panel also correctly found that Harvestman takes are non-economic activities that do not themselves substantially affect interstate commerce[5] and therefore may only be regulated under the substantial effects test if the regulation is "*an essential part of a larger regulation of economic activity*, in

[5] *See GDF Realty*, 326 F.3d at 638 ("Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture. If the speculative future medicinal benefits from the Cave Species makes their regulation commercial, then almost anything would be."); *id.* at 637-38 ("The *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster.").

which the regulatory scheme *could* be undercut unless the intrastate activity were regulated." *See id*. at 630.

But the *GDF Realty* panel applied an impermissible legal standard when it determined that federal regulation of the Harvestman was "essential" to a larger regulation of economic activity. Rather than using the heightened scrutiny standard applied by the Supreme Court in *Lopez* and *Morrison*, which involves a review of the record evidence to determine the extent to which there is a connection between the regulated activity and an interstate market, *see Lopez*, 514 U.S. at 562-63; *Morrison*, 529 U.S. at 614-15, the panel applied the older, highly deferential form of rational basis scrutiny, which defers to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding, regardless of whether the record supports the congressional finding. *GDF Realty*, 326 F.3d at 627. Applying that standard, the *GDF Realty* panel simply accepted the government's claim, unsupported by evidence in the record, that all species are somehow interdependent and that, therefore, regulation of the Harvestman was appropriate under the Commerce Clause because failure to regulate the Harvestman could in some undefined way affect other species, which could eventually affect interstate commerce. *GDF Realty* 326 F. 3d at 640. This takes *Wickard* beyond its outermost, and even absurd, limits. *See Rosenberger v. Rector & Visitors of the*

Univ. of Va., 515 U.S. 819, 862 (1995) (refusing to adopt constitutional interpretation that "would lead to absurd results").

As six judges of this Court (dissenting from the denial of rehearing *en banc*) noted at the time, the *GDF Realty* Panel's deferential approach ignored the *practical* guidance from *Lopez* and *Morrison*. *See GDF Realty Invs., Ltd. v. Norton*, 362 F.3d 286, 293 (5th Cir. 2004) (*GDF Realty II*). According to the *en banc* dissenters, the *GDF Realty* panel erred when it failed to look closely at the record to evaluate the alleged connection between the regulated activity and an interstate market. Instead, the Panel simply accepted the same kind of approach twice rejected by the Supreme Court in *Lopez* and *Morrison*. *Id.* at 292. As the dissenting judges noted:

> The panel holds that because "takes" of the Cave Species ultimately threaten the "interdependent web" of all species, their habitat is subject to federal regulation by the Endangered Species Act. Such unsubstantiated reasoning offers but a remote, speculative, attenuated, indeed more than improbable connection to interstate commerce…surely, though, there is more force to an "interdependence" analysis concerning humans, and thus a more obvious series of links to interstate commerce, than there is to "species." Yet the panel's "interdependent web" analysis of the Endangered Species Act gives these subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victim in *Morrison*.

GDF Realty II, 362 F.3d at 292.

Nor did the *GDF Realty* Panel meaningfully consider whether such a broad view of the commerce power would impact federalism by impinging on "the States'

traditional and primary power over land and water use." *Id.* at 292. Instead, the *GDF Realty* panel simply declared, *ipse dixit*, that the "interdependent web" approach "will not allow Congress to regulate land use or wildlife preservation." *Id*. (quoting *GDF Realty*, 326 F.3d at 640.) But as the six dissenting judges noted, "[o]nce the [Service] designates a species as endangered, the Government has functional control over the land designated as its habitat." *Id*. Tellingly, the dissenters observed that the panel's opinion is "confusing and self-contradictory" because it concedes that the Harvestman has "no link" to commerce while at the same time holding that the species could have a substantial effect on commerce. *GDF Realty II*, 362 at 291. Thus, according to a substantial minority of this Court sitting *en banc*, *GDF Realty* was improperly decided under standards applicable in 2003. Since then, the case law has evolved in a way that requires a rejection of *GDF Realty*.

3. In the sixteen years since *GDF Realty* was decided, courts have clarified that the substantial effects test is governed not only by the Commerce Clause but also by the Necessary and Proper Clause, and accordingly, the no-evidence rational basis test is impermissible.

Two years after *GDF Real*ty was decided, the Supreme Court held for the first time, in *Gonzales v. Raich*, 545 U.S. 1 (2005) that federal regulation of purely intrastate, non-economic activities should be analyzed under the Necessary and Proper Clause, not the Commerce Clause alone. *See Raich*, 545 U.S. at 5, 22. Justice

Scalia was concerned that the relationship between those two clauses did not receive the attention it deserved in the majority opinion so he wrote a concurring opinion focusing on that relationship. *Id*. at 34 (Scalia, J., concurring).

As Justice Scalia explained, the Court's prior description of the "substantial effects" test as arising under the Commerce Clause was "misleading" and led to confusion about how cases should be decided. *Id*. "[U]nlike the channels, instrumentalities, and agents of interstate commerce," Scalia noted, "activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone." *Raich*, 545 U.S. at 34. Rather, "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause." *Id*. (citations omitted). The distinction addressed by Justice Scalia explains why cases arising under the "substantial effects" test should be subject to different standards than traditional Commerce Clause cases. *Id*. at 34-37 (explaining the differences); *see id*. at 39 ("there are other restraints upon the Necessary and Proper Clause authority.").

According to Justice Scalia, these distinctions are fully consistent with the heightened scrutiny actually applied in *Lopez* and *Morrison*. First, unlike the Commerce Clause, which requires only that the regulated activity "affect" interstate

commerce, the Necessary and Proper Clause requires that the regulation of intrastate activities be incidental to the regulation of some interstate market. *Id.* at 38. As Justice Scalia noted, this is consistent with the holding in *Lopez* that "Congress may regulate noneconomic intrastate activities only where the failure to do so 'could . . . undercut' its regulation of interstate commerce." *Id.* (citing *Lopez*).

Furthermore, the Necessary and Proper clause requires that courts take a closer look at regulations to ensure that they are "plainly adapted" to the regulation of a commercial market. This is consistent, Scalia noted, with the holding of *Lopez* and *Morrison* that "Congress may not regulate certain 'purely local' activity within the States based solely on the attenuated effect that such activity may have in the interstate market." *Id*. at 38. Scalia would later refer to this as "careful scrutiny." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 653 (2012) (Scalia, J., dissenting) (the "Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants.").

Justice Scalia also observed that the Necessary and Proper Clause places additional restrictions on federal power by requiring that laws be proper—*i.e.*, "consistent with the letter and spirit of the constitution." *Raich*, 545 U.S. at 39. And a law is not "proper for carrying into Execution the Commerce Clause when it violates a constitutional principle of state sovereignty." *Id.* This too, can be found in *Lopez* and *Morrison*. *See Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 613.

While Justice Scalia's opinion in *Raich* was a concurrence, it has since been widely cited as controlling on these issues. For example, this Court has cited Justice Scalia's concurrence in *Raich* by name in explaining its current views on the interplay between the Necessary and Proper Clause and the Commerce Clause. *See, e.g.*, *United States v. Whaley*, 577 F.3d 254, 260 (5th Cir. 2009) ("As Justice Scalia has explained in the context of the third *Lopez* category, the Necessary and Proper Clause gives Congress the power to 'regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.'"). At least three other federal circuits have likewise adopted Scalia's concurring opinion in *Raich* as controlling. *See, e.g., United States v. Guzman*, 591 F.3d 83, 91 (2d Cir. 2010) (interpreting *Raich* as a Necessary and Proper Clause case.); *United States v. Sullivan*, 451 F.3d 884, 888-90 (D.C. Cir. 2006) (same); *United States v. Anderson*, 771 F.3d 1064, 1068-71 (8th Cir. 2014) (same).

Perhaps most telling, in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), all nine justices (despite their disagreements on its applications) either adopted Justice Scalia's concurrence in *Raich* by implication or cited it directly to explain the reach of the Necessary and Proper Clause with regard to the substantial effects test. *See Sebelius*, 567 U.S. at 561(Robert's C. J.) (referring to *Raich* as a Necessary and Proper Clause case); *id*. at 618 (Ginsburg, Sotomayor, Breyer and Kagan, concurring in part, concurring in the judgment in part, and dissenting in part)

(quoting from Justice Scalia's concurring opinion in *Raich* to explain the scope of the Necessary and Proper Clause); *id*. at 653 (Scalia, Kennedy, Thomas, and Alito, dissenting) (adopting Scalia's position that *Raich*, *Lopez*, and *Morrison* were Necessary and Proper Clause cases.).

Given this broad agreement on the relevance of the Necessary and Proper Clause to federal regulation of intrastate non-economic activities, a reevaluation of the panel decision in *GDF Realty* under the Necessary and Proper Clause is appropriate.

B. Applying the Necessary and Proper Clause Standard, Federal Regulation of Harvestman Takes Under the ESA is Unconstitutional.

The clearest and most recent articulation of the appropriate standard for Necessary and Proper Clause claims is found in Chief Justice Roberts' opinion in *Sebelius*. Drawing on a line of cases dating back to *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat.) (1819) the Chief Justice held that to survive review under the Necessary and Proper Clause a regulation must be "plainly adapted" to serve an enumerated power and "consistent with the letter and spirit of the Constitution." *Sebelius*, 132 S.Ct. at 2579. To meet that standard a regulation must be: (1) "incidental" to the regulation of interstate commerce, and (2) cannot "work a substantial expansion of federal authority." *Sebelius*, 132 S.Ct. at 2592. Applying

that standard here, the federal regulation of Harvestman takes is patently unconstitutional.

1. Federal regulation of Harvestman takes under the ESA is not incidental to the federal regulation of interstate commerce.

With regard to wholly intrastate, noneconomic activities, a regulation is only "incidental," if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Raich*, 545 U.S. at 36 (Scalia, J. concurring). This requirement is derived from the text of the Necessary and Proper Clause itself, which limits the exercise of that clause to laws "necessary and proper for *carrying into Execution* the [enumerated] Powers." U.S. Const., Art 1 Sec. 8. (emphasis added).

Importantly, it is not enough under the Necessary and Proper Clause that the regulated activity have some eventual "economic effect." As the Supreme Court has explained, "we have not yet said the commerce power may reach so far." *Morrison*, 529 U.S. at 611. Instead, the failure to regulate intrastate activity must have some real effect on the federal government's *ability* to regulate interstate economic activities. *Raich*, 545 U.S. at 38 (Scalia, J. concurring) (noting that the Necessary and Proper Clause only allows regulation of non-economic activities "where the failure to do so could undercut its regulation of interstate commerce.").

For example, in *Raich*, the Court held that federal regulation of intrastate possession of locally grown marijuana was justified under the Necessary and Proper Clause because failure to do so would impact the federal government's legitimate program to regulate interstate marijuana trafficking. 545 U.S. at 40. Importantly, the Court did not reach this holding on the basis of the fact that intrastate marijuana possession could have an economic impact. *Id*. Rather, the Court found that due to the difficulty in distinguishing between locally grown marijuana and marijuana grown in other states, enforcement of the federal ban on interstate marijuana would be severely undercut if it could not also ban possession of locally grown marijuana. *Id.*

The regulation of Harvestman takes fails this test. Unlike the regulation of marijuana trafficking in *Raich*, the regulation of Harvestman takes does not target commerce directly. The ESA's purpose is to protect biodiversity, not to regulate commerce in a commodity. *See* H.R. Rep. No. 93-412, at 4 (1973). Thus, unlike the regulation of possession of locally grown marijuana addressed in *Raich*, the regulation of Harvestman takes is incidental to the goal of encouraging biodiversity and not incidental to the goal of regulating interstate commerce.

The Service tried to circumvent this conclusion by arguing that regulation of Harvestman takes is essential to prevent piecemeal extinctions, which eventually may have some economic effect. In *GDF Realty*, that hypothetical scenario was

sufficient to carry the day. But mere economic effect is not sufficient. *Morrison*, 529 U.S. at 611. The test is whether the federal government's ability to regulate interstate *economic* activity would be adversely affected by a failure to regulate purely intrastate *noneconomic* activity. *Raich*, 545 U.S. at 38 (Scalia, J. concurring). The Service has never argued, and the lower court did not hold, that failure to regulate Harvestman takes would make it more difficult to regulate any interstate economic activity.

Unlike *GDF Realty's* version of rational basis scrutiny, a court applying the Necessary and Proper Clause is not required to accept the government's conclusions regarding necessity. *Lopez*, 514 U.S. at 557, n. 2 ("simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."). If the Court determines that the relationship to commerce is too tenuous, or that the invocation of the commerce authority is simply "pretext" to pass laws for other purposes, the court has the "painful duty" under the Necessary and Proper clause to find the law unconstitutional. *See McCulloch*, 17 U.S. (4 Wheat.) at 423.

There is nothing new in the record since *GDF Realty* to suggest that without federal regulation the Harvestman will become extinct. Or that if the Harvestman species did become extinct there would be any impact on other species, much less on interstate commerce. The lower court's adoption of the "all living things are

interconnected" principle to support its holding that regulation of the Harvestman species somehow protects interstate commerce goes far afield of recent case law, which requires a much tighter connection between the federal government's power under the Commerce Clause and its ability to regulate purely intrastate noneconomic activity. *See, e.g.*, *Lopez*, 514 U.S. at 567 ([T]he government may not "pile inference upon inference in a manner that would bid fair to convert congressional authority under the commerce clause to a general police power of the sort retained by the states.").

2. Federal regulation of Harvestman takes under the ESA requires a theory of the constitution that greatly expands federal authority in areas traditionally reserved to the states.

Assuming, *arguendo*, that the regulation of Harvestman takes were "necessary" to regulation of interstate commerce, it would still fail under the Necessary and Proper Clause, which adds an additional level of protection, by requiring that regulations must not only be necessary but also "proper"—i.e., within the "letter and spirit of the constitution" and in accord with the traditional balance of power between the federal government and the states. *Sebelius*, 567 U.S. at 537; *Raich*, 545 U.S. at 39 (Scalia, J. concurring).

When determining whether a regulation is "proper," courts must take a close look at whether the regulation would mark a substantial expansion of federal

authority into the traditional police powers of the states.[6] *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause."). "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." *Morrison*, 529 U.S. at 611.

For example, in *Morrison*, the court was particularly concerned with the fact that the law at issue involved the regulation of domestic violence, which is a traditional police power of the states. *Id.* As the Court explained, the "Constitution requires a distinction between what is truly national and what is truly local." *Id*. at 617-18. Accordingly, the Court rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id*. at 617.

[6] Even Alexander Hamilton, the Founding Father most amicable to an expansion of federal power, noted the importance of this distinction: "The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction." The Federalist No. 17, at 106. In the event that the Federal Government would attempt to exercise authority over such matters, its effort "would be as troublesome as it would be nugatory." *Id.*

The federal regulation of Harvestman takes fails for similar reasons. "Once the [Service] designates a species as endangered, the Government has functional control over the land designated as its habitat." *GDF Realty II*, 362 F.3d at 292 (dissent). If appellants wish to use or develop their properties they must, at a minimum, seek a permit from the Service. 16 U.S.C. § 1539(a). But land use and development permitting and control are traditional state functions. *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("Migratory Bird Rule would result in a significant impingement of the States' traditional and primary power over land and water use."); *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"). To allow the federal intrusion into this role would mark a significant expansion of federal authority into maters of traditional state concern.

Moreover, federal regulation of Harvestman takes is improper for an even greater reason. In *GDF Realty*, the Panel, in effect, accepted a theory of federal power that allows the federal government to regulate anything that, in the aggregate, affects the ecosystem. Under such a theory, it is difficult to imagine anything that would be beyond the scope of federal power. For example, all human activity in the aggregate affects the ecosystem, if for no other reason than humans are part of the ecosystem. Such "butterfly effect" legal reasoning could potentially turn every

enumerated power into a fount of unlimited federal authority. That type of broad expansion of federal authority cannot be categorized as "proper." *See Sebelius*, 567 U.S. at 655 (While "the precise scope of the Commerce Clause and the Necessary and Proper Clause is uncertain, the proposition that the Federal Government cannot do everything is a fundamental precept.").

C. This Court has Clarified that the "No-evidence" Approach to Rational Basis Scrutiny Applied by the *GDF Realty* Panel is No Longer Permissible.

Additionally, separate and apart from the Necessary and Proper Clause analysis, this Court no longer applies the hyper-deferential no-evidence approach to rational-basis scrutiny that was applied by the *GDF Realty* panel. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) ("Our analysis does not proceed with abstraction for hypothesized ends and means do not include post hoc hypothesized facts.").

In *St. Joseph Abbey*, this Court considered a regulation that required caskets to be sold by licensed funeral directors. The State argued that there was a rational basis for the regulation because it was designed to protect consumers from deceptive trade practices and to protect public health from defective caskets allowing human remains to seep out. The Court did not accept at face value these arguably rational, but hypothetical, justifications for the law. Instead, the Court examined the record and concluded that it contained no evidence that the regulations would protect

consumers or that "sellers of funeral goods are engaged in widespread unfair or deceptive acts or practices." *Id.* at 225. Likewise, there was no evidence that the regulations had any effect on public safety. The record showed that the regulations did not require any public safety expertise, and the state had elsewhere found that sealed caskets were not necessary for public safety. *Id.* at 226. Accordingly, the Court concluded that there was no rational basis for the casket regulation. *Id.*

In explaining its decision, the Court noted that it must look to the record to ensure government's "chosen means rationally relate the [government] interest it articulates." *St. Joseph Abbey*, 712 F.3d at 223. Even a "seemingly plausible" justification for a law can be rejected if it is not supported by facts in the record. *Id*.

In *GDF Realty*, the panel adopted the federal government's unsubstantiated assertion that, because of the interconnectedness of species, activities that affect the Harvestman necessarily have a substantial impact on interstate commerce. But, as in *St. Joseph Abbey*, this inferential, logic-jumping justification is not supported by the record. In fact, the record points in the other direction—Harvestman takes have no effect on interstate commerce. Accordingly, the regulation of Harvestman takes cannot survive under the current rational basis standard of this Court, regardless of whether the Court analyzes that question under the Necessary and Proper Clause or not.

The lower court refused to apply *St. Joseph Abbey* because that case involved the regulation of state powers under the Fourteenth Amendment. But neither this Court nor the Supreme Court have ever held that "rational basis" means something different depending on whether the federal or state government is involved. *See Adarand Constructors v. Pena*, 515 U.S. 200, 231 (1995) (rejecting the notion that congressional legislation should be reviewed under lesser scrutiny than state legislation). And even if there were some difference between rational basis applied against states under the 14th Amendment and rational basis as applied to the federal government, the application against the federal government would be less deferential, not more so. The federal government is a government of enumerated powers that lacks the latitude of the general police powers of the states. *United States v. Bredimus*, 352 F.3d 200, 204 (5th Cir. 2003) ("The Framers denied Congress a general police power reposing such power instead in the states.") To hold that federal actions should be held under less scrutiny than state actions turns federalism on its head.

CONCLUSION

For the foregoing reasons, this Court should (1) rule that this appeal is justiciable, (2) rule that Appellant Williamson County is a proper party to this lawsuit, (3) reverse the judgement of the district court on the merits by entering an order declaring that federal regulation of the Harvestman exceeds federal authority

under the Commerce Clause and the Necessary and Proper Clause, and (4) enter an injunction preventing the enforcement of such regulation against Appellants and their properties.

Dated: September 13, 2019

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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 September 13, 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.

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Dated: September 13, 2019

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