No. 19-50321

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMERICAN STEWARDS OF LIBERTY; CHARLES SHELL; CHERYL SHELL; WALTER SIDNEY SHELL MANAGEMENT TRUST; KATHRYN HEIDEMANN; ROBERT V. HARRISON
Plaintiffs,

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,
Defendants,

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-CROSS APPELLEES' COMBINED REPLY AND RESPONSE BRIEF

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CERTIFICATE OF INTERESTED PERSONS

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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).

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INTRODUCTION

The Fish and Wildlife Service (the "Service") is wrong on three overarching issues, which, considered together, are dispositive. First, the vacatur and remand on purely statutory grounds does not remove the causation/traceability element of Appellants' Article III standing. Appellants are property owners injured on two separate occasions by the Service's application of the ESA to the Harvestman. The first injury occurred in 1993, when the Service separately listed the Harvestman as an endangered species under the Act. The second injury occurred in 2017, when, after a prolonged administrative process occasioned by litigation, the Service finally denied the 90-day Petition to delist (the "Petition").

Under this Court's binding precedent, the second injury in 2017 provides more than enough support for the Appellants' standing to challenge the constitutionality of the Service's efforts to regulate the Harvestman under the ESA, regardless of the district court's vacatur and remand on unrelated statutory grounds. The Service argues that, although the traceability/causation prong of standing may have at first been satisfied by the Appellants in 2017, it was no longer satisfied upon vacatur and remand. The Service then goes on to argue that, because traceability/causation was lost in connection with the 2017 injury, the statute of limitations must be applied solely to the 1993 injury based on the original listing and that, consequently, the Appellants' constitutional claims are beyond the limitations

period and cannot be adjudicated. This "now you see it – now you don't" approach posits an appearance and then magical disappearance of Article III standing. As explained in detail in Section I.A., *infra,* such a smoke-and-mirrors effort to keep the Appellants "out of court" on their constitutional claims not only falls of its own weight but is flat-out inconsistent with the binding precedent of this Court that has been relied upon by litigants and honored by judges for over 20 years. Accordingly, the Service's convoluted, overly-clever argument should be rejected.

Second, contrary to the Service's assertions, Appellants substantive constitutional arguments have not been mooted due to the vacatur and remand. Appellants continue to suffer injuries from the unconstitutional regulation of Harvestman "takes," and Appellees continue to defend the constitutional validity of such regulation in this Court.

Third, with regard to the Appellants' substantive claims, neither the Harvestman nor the listing nor the denial of the Petition have a nexus with interstate commerce. Nor does the record suggest that failure to regulate the Harvestman would have any effect on the government's ability to regulate other species, much less interstate commerce. Accordingly, the Service's tendentious argument that a reasonable basis "may" exist for regulating takes of the commercially valueless, purely intrastate Harvestman should be rejected. A decision by this Court that the Service cannot assert federal power to regulate interstate commerce beyond the

limits imposed by the Commerce Clause would not create a "gaping hole" in the ESA, as suggested by the Service and their Amici. It would merely enforce the Constitution.

Moreover, recent opinions of this Court and the Supreme Court with regard to the nature and scope of the "rational basis" test, as well as the function of the Necessary and Proper Clause, belie the Service's argument that, because the Harvestman is somehow mysteriously interconnected to all living things in ways that defy rationality, the Service may interpret the ESA in a way that extends Congress's powers to regulate interstate commerce to the breaking point of the Commerce Clause. To the extent that such an argument may have had any merit in the past, it is now clearly inconsistent with recent case law binding on this Court, as set forth in Sections III-IV, *infra*.

Other arguments made by the Service and their Amici, which are both meritless and non-dispositive, are addressed as appropriate, *infra*.

ARGUMENT

I. THE SERVICE'S JURISDICTIONAL ARGUMENTS FAIL

The Service has spent more than three-dozen pages in this Court, including their motion to dismiss and the majority of their merits brief, arguing that the district court's opinion in favor of a different party in this case on an unrelated claim

somehow precludes the Court from reviewing the district court's final judgment against Appellants. Those arguments are meritless.

A. The Service falsely conflates the "action" necessary to satisfy the statute of limitations in the district court with the "injury" necessary to maintain Article III standing on appeal

Ignoring binding precedent of this Court, the Service impermissibly blurs the line between jurisprudential principles governing statutes of limitations and standing. *See Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770-71 (9th Cir. 1997) (distinguishing between standing and statute of limitations.) The Harvestman was listed in 1988 as part of a larger category of species and then separately as its own distinct species in 1993. To comply with the APA's six-year statute of limitations, Mr. Yearwood was required by this Court's decision in *Dunn-McCampbell Royalty Interest v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) to file a petition to have the species delisted and challenge the Service' denial of that petition—which he did.[1] ROA 19-50321.1372. The Service uses Mr. Yearwood's compliance with the procedural instructions of *Dunn* to argue that the

[1] The Service notes in passing that Mr. Yearwood did not raise his constitutional claims in the administrative Petition. DOJ Resp. Br. at 8. To the extent the Service implies that this raises issues of administrative exhaustion or affects Appellants' claims under *Dunn*, it is wrong. The only means to delist a species is a petition under 16 U.S.C. § 1533. That statute lays out five grounds the Service may consider in a petition to delist a species. 16 U.S.C § 1533(a)(1). That list does not include constitutional claims. Mr. Yearwood is not required to bring forward claims that the agency has no authority to consider. No doubt, this is why the Service does not raise exhaustion directly, but merely hints at it. In any event, such an argument would be waived at this late stage.

vacatur and remand on statutory grounds leaves Mr. Yearwood without a constitutional remedy because he allegedly is no longer injured by any action within the statute of limitations and therefore lacks standing. DOJ Resp. Br. 15-16. If accepted by this Court, the Service's convoluted argument would have the perverse effect of punishing Mr. Yearwood for following *Dunn's* instructions.

Dunn held that an individual injured by an existing regulation had two options to challenge the regulation's constitutional validity outside of the APA's six-year statute of limitations: 1) he could trigger some sort of enforcement action and bring an as applied challenge to the enforcement of the regulation against him; or 2) he could "file[] a petition with the agency to rescind regulations, then challenge[] the agency's denial of the petition in federal court." *Dunn*, 112 F.3d at 1287.

The second option allows individuals aggrieved by a regulation to challenge its validity without having to "bet the farm" in a potential enforcement action. *See, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010). The Supreme Court has repeatedly rejected interpretations of the APA that require a property owner to spend thousands of dollars seeking permits or risk an enforcement action before challenging an assertion of federal jurisdiction over their property. *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.")[2]

Here, Mr. Yearwood availed himself of the second option set forth in *Dunn*, namely, he filed the Petition. Like any plaintiff utilizing the second option in *Dunn*, his injuries arise *both* from the pre-existing listing (which is the cause of the regulation of his property) and from the denial of his Petition (which, to this day, has re-affirmed and extended that regulation).[3] Under *Dunn*, the denial of the Petition serves as the procedural mechanism by which *both* injuries can be adjudicated and one of the only procedural mechanisms by which the constitutionality of the underlying regulation can be challenged. That mechanism was not somehow magically negated by the remand of ASL's unrelated statutory claims. The injuries which provided standing for a *Dunn* claim still exist—the challenged regulation is still in place and the Service's denial of the petition, though eventually remanded,

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[2] The Service makes the same argument rejected in *Hawkes—i.e.*, that Appellants should have applied for a take permit or triggered some other enforcement action. DOJ Resp. Br. at 19-20. But, the Supreme Court has stiffly rejected these sorts of cavalier arguments from the government with regard to property rights. *See, Hawkes*, *supra*, 136 S.Ct. at 1815. Moreover, this argument is foreclosed by *Dunn*, which explicitly provides that property owners may challenge the enforcement of the regulation against them *or* petition to have the regulation rescinded and then challenge the denial of the petition. *Dunn*, 112 F.3d at 1287. This Court would not create an option for review that is merely a mirage.

[3] Because Mr. Yearwood has standing, the court need not address Williamson County's independent standing. *See 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.").

has still reaffirmed that regulation and delayed any possibility that the restrictions on Appellants' properties will be removed.

The Service argues that using the denial of a petition to resurrect a challenge to injuries arising from the Harvestman's original listing creates a bizarre "free-floating" constitutional challenge. DOJ Resp. Br. at 14. That may or may not be true. As Judge Jones noted in *Dunn*, it may make more sense for property owners to be able to challenge the constitutionality of regulations outside of the six-year statute of limitations directly, without the burden of resorting to what may be described as a legal fiction by filing a petition to rescind the regulation. *Dunn*, 112 F.3d at 1289-90 (Jones, dissenting). Indeed, other circuits have taken that approach. *See, Id.* But that is a critique of *Dunn* itself, which the Service does not challenge. Until this Court reconsiders *Dunn*, it should not punish property owners for complying with its instructions. *See Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("It is hard to imagine a more violent breach [of reasoned decisionmaking] than applying a rule of primary conduct . . . which is in fact different from the rule . . . formally announced.").

B. The district court's decision in this case did not moot Appellants' claims because it did not resolve any of Appellants' injuries

Establishing mootness is a heavy burden. A case becomes moot only if the issues presented are no longer in dispute,[4] the parties lack any "concrete interest" in the outcome[5], or "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox* v. *SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (internal quotation marks omitted).

The Service has not met that heavy burden here. The parties continue to have a live dispute regarding the constitutionality of federal action regarding the Harvestman. Indeed, the Service continues to vigorously defend the constitutionality of the listing of the Harvestman and the regulation of Harvestman takes on Appellants' properties. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (whether the government "vigorously defends the constitutionality of its . . . program" is important to the mootness inquiry.) Appellants have a significant "concrete interest" in that dispute because they still cannot use their property and still must take affirmative steps to preserve the species, costing them thousands of dollars each year. *See, Contender Farms, L.L.P. v. United States Dep't of Agric.*, 779 F.3d 258, 264 (5th Cir. 2015) (being subject to regulation is sufficient for standing). And, this Court could resolve Appellants' injuries by

4 *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000).
5 *Chafin v. Chafin*, 568 U.S. 165, 172 (2013).

issuing the very same declaratory judgment requested in the district court—namely, a declaration that the continued regulation of Harvestman takes on Appellants' properties is unconstitutional. This meets the minimal requirements of a "live controversy" sufficient to avoid mootness. *See*, *Knox*, 567 U.S. at 307.

C. Appellate courts routinely hear appeals after vacatur

Both this Court and the Supreme Court have repeatedly heard appeals from vacated agency actions. *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). Similarly, appellate courts often allow challenges to repealed statutes and ordinances, even though repealed legislative acts have no more "existence" than vacated agency actions. *See, e.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 661-62 (1993) (repeal of ordinance not sufficient to moot constitutional challenge); *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 288-89 (1982) (same).

Appeals of vacated actions are allowed because courts recognize that a vacatur and remand does not provide the same relief as an injunction. *Forney*, 524 U.S. at 271. A declaration that an agency action is unconstitutional, paired with an injunction, provides immediate and permanent protection from unlawful enforcement. By contrast, a remand to the agency is really only "half-a-loaf." *Id*.

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*.

This case is a prime example of how vacatur and remand is not the same as granting declaratory and injunctive relief. Had the district court ruled in Appellants' favor, Appellants would currently be able to use their properties and their injuries would be resolved. Instead, because the issue was sent back to the agency, the absolute earliest that the species *could* be de-listed and Appellants *might* be able to legally use their properties is years from now. In the meantime, Appellants remain deprived of their property rights, and Appellant Williamson County is required to continue spending thousands of dollars every month in species mitigation, none of which will ever be recoverable.[6] *See, SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 330-31 (5th Cir. 2001) (review was appropriate when appellant would incur financial losses that were "likely unrecoverable."). Moreover, should the Service elect to keep the species listed at the end of that two-year period, Appellants would be barred by *res judicata* and collateral estoppel from raising a similar constitutional challenge in

[6] Even if the Harvestman is eventually delisted two years from now, that still would not be the same as the declaratory and injunctive relief Appellants requested. Absent declaratory and injunctive relief, the Service could always re-list the Harvestman and could still prosecute Appellants for any species takes that may have occurred while the Harvestman was previously listed.

the future. Accordingly, Appellants have the right to appeal. *Forney*, 524 U.S. at 266.

D. The Service's novel redressability theory contradicts the text of the APA and ignores the equitable authority of federal courts

The Service argues that even if Appellants were injured, the only relief that was available to them under the APA was vacatur and remand to the agency, and therefore, there is nothing left for this Court to do. DOJ Resp. at 21-23. But this argument is contrary to the plain text of the APA and ignores the equitable authority of federal courts.

The plain text of the APA provides the district court with authority to "*hold unlawful* and set aside agency action…found to be…contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2) (emphasis added). Thus, the APA itself grants the district court authority to provide relief in the form of a declaration that agency action is unconstitutional. This authority is in addition to the court's power to "set aside" (*i.e.*, vacate) agency action.

The Service's argument also ignores the other equitable powers of Federal Courts. In addition to the APA, the Intervenors brought this action under 28 U.S.C. § 2201 and § 2202. Once a case in controversy exists, those statutes provide authority for any federal 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"). Since there is no dispute that the district court had jurisdiction to hear Appellants' claims, it therefore had the power under those statutes to grant declaratory and injunctive relief. 28 U.S.C. § 1291 grants this Court mandatory jurisdiction of "appeals from all final decisions of the district courts." This Court therefore has authority to grant relief in this case.

E. The district court's "Final Judgment" in this case cannot be construed as interlocutory

The Service also argues that this Court should withhold jurisdiction because the district court's decision is "interlocutory and therefore not an appealable 'final' judgment within the meaning of 28 U.S.C. § 1291." DOJ Resp. Br. at 24. This argument fails because the district court's decision was a final judgment.

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). The district court's final judgment in this case meets these standards. First, the judgment was a universal order on cross motions for summary judgment involving all of the issues in the case. An order resolving universal cross motions for summary judgment on the merits of all issues usually qualifies as a final decision. *See, e.g., Cohen v. Perales*, 412 F.2d 44, 48 (5th Cir. 1969).

Second, the district court's judgment meets the requirements of finality as a matter of form and function. As to form, the district court itself labeled its judgment a "Final Judgment" and noted that "nothing further remains to resolve" and that the "case is hereby closed." ROA 19-50321.7228. That should be the end of this discussion. *See, Willhauck v. Halpin*, 919 F.2d 788, 793 (1st Cir. 1990) (*citing,* 9 Moore's Federal Practice para. 110.08, pp. 43-44 (1990)) ("The words 'final decisions' in [28 U.S.C. § 1291] incorporate the terms 'final judgments' and 'final decrees.'"); *Sierra Club*, 115 F.3d at 313 (an order is final and appealable "if it ends the litigation on the merits and leaves nothing for the court to do.")

The district court's order is also final as a practical matter. When interpreting 28 U.S.C. § 1291, 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). "When 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).

By any reasonable definition, the district court's "Final Judgment" declaring the Harvestman's listing constitutional, dismissing Appellants' claims, and closing the case has effectively terminated Appellants' constitutional lawsuit. The district court no longer has jurisdiction over the case. It did not remand the constitutional issues to the Service for further review—it decided them as a matter of law. Even if the Service could hear constitutional challenges on remand, it would now be barred

by the "law of the case" doctrine from deciding those issues in Appellants' favor. *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."). If Appellants tried to bring their claims in a new lawsuit, those claims would likewise be barred by *res judicata*, or at a minimum, be decided in a summary fashion. If that does not make Appellants' claims "effectively dead," it is difficult to imagine what would.

The Service notes that trial court co-plaintiff American Stewards of Liberty's (ASL) case and claims were remanded to the service and that this Court generally does not hear appeals from remands of agency actions. DOJ Resp. Br. at 24. But this prudential rule does not apply here for at least three reasons. First, as noted above, Appellants' constitutional claims were not remanded and cannot be considered on remand. *See*, *Conway*, *Inc.*, 644 F.2d at 1062.

Second, this is no ordinary remand. By statute, the earliest that a new decision on remand could be reached is potentially years from now. 16 U.S.C. § 1533 (b)(3)(B) (establishing a twelve month review period); 16 U.S.C. § 1533(b)(6)(A) (establishing an additional notice and comment period after the 12-month review). In the past, this Court has held that a district court order granting a stay for eighteen-months so that an agency could re-evaluate a claim was as a final order because it left the appellants "out of court." *Hines*, 531 F.2d at 731. In doing so, this Court

held that "[e]ffective death should be understood to comprehend any extended state of suspended animation." *Id.* at 730. A delay of two-years is on par with the 18-months held to be an effective death in *Hines*.

Finally, as discussed *supra*, the agency remand rule does not apply when, as here, the party requested declaratory and injunctive relief and received a remand instead. *See, e.g.*, *Forney*, 524 U.S. at 271; *Bordelon*, 161 F. App'x at 351. The Service argues that *Forney* and its progeny are limited to the Social Security statute at issue in that case. But this Court recently cited *Forney*, as relied upon by Appellants, outside of the Social Security context. *See, e.g., United States v. Fletcher*, 805 F.3d 596, 602 (5th Cir. 2015) (quoting *Forney* in the context of a constitutional case for the proposition that "[t]his Court also has clearly stated that a party is 'aggrieved' and ordinarily can appeal a decision 'granting in part and denying in part the remedy requested.'"); *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 604 (5th Cir. 2004) (citing *Forney* in a First Amendment case, noting that the "general rule that prevailing party lacks standing to appeal is inapplicable where judgment grants only partial relief."). The Service's attempt to distinguish *Forney* therefore fails.

II. THE SERVICE'S CHALLENGE TO APPELLEES' INITIAL INTERVENTION IN THIS CASE IS FRIVOLOUS

In addition to their jurisdictional arguments, The Service argues that Appellants' claims should be dismissed because intervention was allegedly improperly granted by the district court. The argument is without merit.

Appellants' intervention at the trial court was within the court's discretion. A court should not overturn an order regarding permissive intervention unless it is clear that the trial court abused its discretion. *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 471 (5th Cir. 1984). This Court has noted that standard may be met only under "extraordinary circumstances" and that "such a decision by any federal appellate court is so unusual as to be almost unique." *Id*.

That standard is not met here. Under Federal Rule of Civil Procedure 24(b)(2), a third party may intervene in an action when its "claim or defense and the main action have a question of law or fact in common." The existence of a "common question" is liberally construed. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977). Here, Appellants and the parties below were challenging the same "transaction or occurrence"—*i.e.*, the Service's continued failure to delist the species. Fed. R. Civ. Pro. 20. Permissive intervention was therefore well within the court's discretion.

But even if intervention were improperly granted, the proper remedy would be severance, not dismissal. *See*, Fed. R. Civ. Pro. 21 ("Misjoinder of parties is not

a ground for dismissing an action."); *United States v. LULAC,* 793 F.2d 636, 644 (5th Cir. 1986) (dismissing claim on appeal due to improper intervention "would be wasteful and inefficient…"). This is because in order to be joined under Rule 24 an intervenor must establish independent Article III standing. Once Article III has been met, intervenors become full parties to the case with the right to appeal. *Stringfellow v. Concerned Neighbors in Action,* 480 U.S. 370, 375 (1987). While a court could sever a case that may prejudice the parties, a court cannot dismiss a case that independently meets Article III standing requirements. *Cohens v. Virginia,* 6 Wheat. 264, 404 (1821) (this Court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."); *New Orleans Pub. Serv., Inc. v. Council of City 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."). Here, Appellants meet the requirements of Article III standing, and there is no underlying case left to sever—ASL prevailed in its case. The Service therefore seeks a remedy that is beyond the power of this Court.

III. THE RULE OF ORDERLINESS DOES NOT PREVENT THIS COURT FROM CONSIDERING THE ISSUES IN THIS CASE.

The Service's primary merits argument is that this Court is bound by the panel decision in *GDF Realty* to uphold the constitutionality of the Harvestman's listing. Appellees contend that this is a "strict stare decisis court" and therefore, under the "rule of orderliness," this panel may not consider, much less depart from a prior

panel decision unless it has been explicitly overturned by a subsequent *en banc* panel of this Court or an opinion of the Supreme Court. CBD Resp. Br. at 36; DOJ Resp. Br. at 38. This is in accord with the district court's opinion, which did not independently evaluate the merits of Appellants' claims, because it held that it was bound by precedent.

But this Court's prudential "rule of orderliness" is not so absolute. Where the reasoning or conclusions of a prior panel decision were contrary to Supreme Court precedent at the time the decision was issued, or have since been implicitly called into question by opinions of the Supreme Court or this Court, the rule of orderliness will not bind a subsequent panel to the prior panel's decision. *Thompson v. Dall. City Attorney's Office*, 913 F.3d 464, 467-68 (5th Cir. 2019). Moreover, the rule of orderliness is at its weakest when this Court has consistently failed to rely on the prior opinion in subsequent cases. *Id.* at 468.

These criteria are present here. *GDF Realty* was contrary to Supreme Court precedent when it was decided. Furthermore, decisions of the Supreme Court and this Court have since made clear that the *GDF Realty* panel applied the wrong constitutional provision as well as the wrong level of scrutiny to analyze the claims in that case. Moreover, in the sixteen years since *GDF Realty* was decided, this Court has only relied on the *GDF Realty* panel's reasoning one time, in a case where the reasoning of *GDF Realty* was not challenged. That lone case was subsequently

vacated by the Supreme Court. The "rule of orderliness" therefore does not prevent this Court from addressing the merits in this case.

A. *GDF Realty* was contrary to precedent when it was decided

In most cases, the rule of orderliness requires a subsequent Supreme Court or *en banc* decision in order to overturn a prior panel opinion of this Court. *Thompson v. Dall. City Attorney's Office*, 913 F.3d 464, 467 (5th Cir. 2019). But this Court will not follow an opinion that was contrary to Supreme Court precedent when decided. *Id*. at 68. As this Court recently explained, "[o]rderliness, rightly understood, compels deference, not defiance. And disregarding on-point precedent in favor of an aberrational decision flouting that precedent is the antithesis of orderliness." *Id*., at 470.

The *GDF Realty* panel opinion is just such an anomaly because it departed from existing precedent in two ways. First, it aggregated non-economic activities in order to arrive at its conclusion that Harvestman takes have a substantial impact on interstate commerce. Second, it applied a highly deferential form of rational basis scrutiny that had already been called into question, if not abandoned, by the Supreme Court.

1. The *GDF Realty* panel broke from precedent by aggregating non-economic activities under the substantial effects test

In *United States v. Lopez*, 514 U.S. 549 (1995), the Court 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 the 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[7] 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.

Five years later in *Morrison* the Court reiterated this distinction noting that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *United States* v. *Morrison*, 529 U.S. 598, 613 (2000). As observed during en banc review, the

[7] 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.

GDF Realty panel explicitly departed from these cases by holding "for the first time in U.S. history, [that Congress] is authorized to aggregate purely intrastate, non-economic activity." *GDF Realty Invs., Ltd. v. Norton*, 362 F.3d 286, 290-91 (5th Cir. 2004) (*GDF Realty* II) (Jones, dissenting joined by five judges). This alone is sufficient to warrant reconsideration of *GDF Realty*.

2. The *GDF Realty* panel's use of no-evidence rational basis scrutiny was already highly questionable after the Supreme Court's opinion in *Morrison*

The panel opinion in *GDF Realty* also contradicted existing precedent at the time by applying the already largely discredited no-evidence rational basis approach to Commerce Clause claims. When *GDF Realty* was decided, the no-evidence rational basis model for Commerce Clause claims was already on its last legs. In *Lopez*, 514 U.S. at 557, the Court had parroted the language of no-evidence rational basis scrutiny when stating the standard of scrutiny it would apply, but had in fact applied a much more robust record-based and federalism-sensitive scrutiny to decide the case—a fact the dissents in that case pointed out. *See Lopez*, 514 U.S. at 609-10 (Souter dissenting).

Five years later in *Morrison*, 529 U.S. at 610-612, 614-15, the Court once again applied a record-based, federalism-sensitive test to the Commerce Clause, rather than no-evidence rational basis. While the Court in *Morrison* did not explicitly reject the no-evidence rational basis language of its prior cases, it did not

recite that boiler-plate rational basis language either. The only place no-evidence rational basis is mentioned in *Morrison* is by the dissent. *Id.* at 637. And the dissent rightly noted that by overruling prior rational basis cases *sub silentio*, the majority opinion in *Morrison* would cause confusion in the lower Courts about the proper standard. *Id*. at 654. It did.

Based on this confusion, the panel in *GDF Realty* applied the no-evidence form of rational basis scrutiny articulated (but not applied) in *Lopez*, and never even mentioned in *Morrison*. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 627 (5th Cir. 2003). 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 guidance from *Lopez* and *Morrison*. *See GDF Realty Invs., Ltd. v. Norton*, 362 F.3d 286, 293 (5th Cir. 2004) (*GDF Realty II*). Subsequent cases have shown that reading to be correct.

B. Subsequent cases have established that the *GDF Realty* panel applied the wrong constitutional provision and the wrong level of scrutiny to decide the case

To overturn a prior panel opinion, a subsequent *en banc* court or Supreme Court opinion does not have to call out the old opinion by name. It can overturn the prior case "implicitly." *Cent. Pines Land Co. v. United States*, 274 F.3d 881, 893 (5th Cir. 2001). "Fifth Circuit precedent is implicitly overruled if a subsequent Supreme Court opinion 'establishes a rule of law inconsistent with' that precedent."

Gahagan v. United States Citizenship & Immigration Servs., 911 F.3d 298, 302 (5th Cir. 2018). That burden is met when the Supreme Court "disavows the mode of analysis on which our precedent relied" or an intervening Supreme Court case "shifted the focus of the applicable test." *Stokes v. Sw. Airlines*, 887 F.3d 199, 204 (5th Cir. 2018). That burden is met here, because subsequent cases have established that the *GDF Panel* applied the wrong constitutional provision and the wrong level of scrutiny to assess the claims in that case.

1. It is no longer reasonably in dispute that the substantial effects test is governed by the Necessary and Proper Clause, not the Commerce Clause alone

There is no dispute that the *GDF Realty* panel relied on the Commerce Clause alone to decide the case. The Necessary and Proper Clause is not mentioned in the majority opinion. That approach has been undermined by more recent cases.

Two years after *GDF Realty* was decided, the Supreme Court for the first time explicitly relied on the Necessary and Proper Clause, instead of the Commerce Clause, to uphold a regulation under the "substantial effects" test. *Gonzales v. Raich*, 545 U.S. 1, 5, 22 (2005). As Justice Scalia explained in his concurrence in that case, the shift to the Necessary and Proper Clause was mandated by the text and history of the Constitution. "[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 (Scalia concurring).

The Service does not seriously attempt to rebut the fact that *Raich* clarified this aspect of the "substantial effects test." *See*, DOJ Resp. Br. at 43. Nor could they. As the Service concedes, this Court adopted Scalia's approach in *Raich* in *United States v. Whaley*, 577 F.3d 254, 260 (5th Cir. 2009). *Id.* Moreover, at least three other federal circuits have adopted Scalia's Necessary and Proper Clause approach as controlling,[8] and in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), all nine Supreme Court 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.[9] Put simply, the fact that the Necessary and Proper Clause should control here is beyond reasonable dispute.

Intervenor Appellees nonetheless argue that this Court need not address the Necessary and Proper Clause, because Harvestman takes may be justified under the

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[8] *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).

[9] *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.).

older "substantial effects" test of the Commerce Clause. CBD Resp. at 27. According to Intervenor Appellees, this Court should only reach the Necessary and Proper clause if the regulation cannot be justified under the old substantial effects test of the Commerce Clause. *Id*.

But the Necessary and Proper Clause does not supplement the substantial effects test with an additional bite at the apple for government to justify regulations that fail under the old standard. The Necessary and Proper Clause is what makes the substantial effects test itself legally permissible in the first place. As Justice 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 (Scalia concurring) (emphasis added). Under *Raich*, if Congress seeks to regulate purely intrastate non-economic activities that have a "substantial effect" on interstate commerce, it must do so under the Necessary and Proper Clause. *Id*. This Court is in accord. *See*, *United States v. Whaley*, 577 F.3d 254, 260 (5th Cir. 2009).

Appellees note that in *People for the Ethical Treatment of Prop. Owners v. United States Fish & Wildlife Serv.*, 852 F.3d 990, 996 (10th Cir. 2017) (*PETPO*) the Tenth Circuit held that it was unnecessary to evaluate the ESA regulation of the Utah Prairie dog under the Necessary and Proper Clause, because it could be justified under the substantial effects test of the Commerce Clause. CBD Resp. at 27-28. But

the Tenth Circuit is one of the few circuits that (contrary to this Court) have rejected Justice Scalia's opinion in *Raich*. *PETPO*, 852 F.3d at 1005 n.8. Indeed, the court in *PETPO* expressly reiterated that it did not follow Justice Scalia's opinion. *Id*. Moreover, because the plaintiffs in *PETPO* did not argue that the Necessary and Proper Clause imposed a higher standard of scrutiny, the court concluded that the distinction between the Commerce Clause and Necessary and Proper Clause was irrelevant. *Id. See Waters v, Churchill*, 511 U.S. 661, 678 (1994) ("Cases cannot be read as foreclosing an argument that they never dealt with.").

By contrast, this Court has adopted Justice Scalia's approach from *Raich*. *See, e.g.*, *Whaley*, 577 F.3d 254, 260. *PETPO* is therefore not persuasive.

2. The Necessary and Proper Clause requires more than the no-evidence rational basis scrutiny applied in *GDF Realty*

The rule of orderliness also does not apply here because subsequent cases have "shifted the focus of the applicable test." *Stokes*, 887 F.3d at 204. *In GDF Realty*, this Court applied a highly deferential, no-evidence form of rational basis scrutiny to determine whether the federal regulation of Harvestman takes was constitutional under the Commerce Clause. Because the evaluation of the "substantial effects" test now must take place under the Necessary and Proper Clause, that deferential form of scrutiny is not appropriate.

Since the first case to ever explore its contours, the Necessary and Proper Clause has required more than no-evidence rational basis scrutiny. *See*, *McCulloch*

v. Maryland, 17 U.S. 316, 423 (4 Wheat.) (1819). As the Court noted in *McCulloch*, to satisfy the Necessary and Proper Clause the connection to an enumerated power must be real. *Id*. 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. *Id.* Moreover, even if the record shows the regulation to be "necessary," the regulation must also be "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 (quoting *McCulloch*); *Raich*, 545 U.S. at 39 (Scalia, J. concurring). This has a distinct federalism aspect. *See*, *Printz v. United States*, 521 U.S. 898, 923-24 (1997).

While courts have differed over the years about the precise wording of the Necessary and Proper Clause test[10], this basic structure has remained consistent. *See*, *Sebelius*, 567 U.S. at 537 (quoting *McCulloch*); *Raich*, 545 U.S. at 39 (Scalia, J. concurring).[11]

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[10] *See, e.g.*, *United States v. Comstock*, 560 U.S. 126, 152 (2010) (Kennedy, concurring) (criticizing the majority opinion's use of the term "rationally related" in a Necessary and Proper Clause case, because it could easily be confused with the deferential "rational basis" test, which the court did not apply.); *Sabri v. United States*, 541 U.S. 600, 612 (2004) (Thomas, concurring)(raising the same critique of the careless use of the word "rational," noting that "'appropriate' and 'plainly adapted' are hardly synonymous with 'means-end rationality.'")

[11] Indeed, even the most controversial explanations of the Necessary and Proper Clause have required more than no-evidence rational basis alone. *See, United States v. Comstock*, 560 U.S.

This more "careful scrutiny" makes sense. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 653 (2012) (Scalia, J., dissenting) (using the term "careful scrutiny" to describe the test under the Necessary and Proper Clause). Unlike regulations passed under the Commerce Clause directly, when Congress regulates under the Necessary and Proper Clause, it is relying on "implied powers." *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 617-18 (1870). And Courts must be watchful in reading implied powers into the Constitution, lest the Necessary and Proper Clause "convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers." *Id.*; *see also*, *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 573-74 (1870) ("implied powers are not to be rashly or lightly assumed, and that they are not to be exercised at all, unless, in the words of Judge Story, they are "bona fide appropriate to the end.'")

Moreover, as Justice Scalia noted, the shift to the more careful scrutiny of the Necessary and Proper Clause also makes the decisions in *Lopez* and *Morrison* make sense. *Raich*, 545 U.S. at 38-39 (Scalia, J. concurring). As the dissents in those cases pointed out, *Lopez* and *Morrison* simply cannot be justified under the no-evidence rational basis scrutiny applied in prior cases. *See Lopez*, 514 U.S. at 609-10 (Souter dissenting); *Morrison*, 529 U.S. at 637 (Souter, Ginsburg, Stevens,

126, 165-66 (2010) (Scalia and Thomas, dissenting) (critiquing the majority opinion's apparent use of "a novel five-factor test supporting its conclusion that § 4248 is a 'necessary and proper' adjunct to a jumble of unenumerated 'authorities.'").

Breyer dissenting). Appellees raise three arguments in response. Each of these arguments fails.

a. Contrary to Appellees' assertions, the Necessary and Proper Clause does not expand the "substantial effects" test

Appellees argue that even if the Necessary and Proper Clause controls, it cannot require more scrutiny than the Commerce Clause because the Necessary and Proper Clause "expands, rather than contracts, federal authority…" CBD Resp. at 28. But this misunderstands Necessary and Proper Clause and the effect of *Raich*. It is true that the Necessary and Proper Clause allows the government to exercise powers incidental to (and therefore not clearly articulated by) an enumerated power, but that "expansion" is already accounted for by the "substantial effects" test itself, which cannot be justified under the text Commerce Clause alone. *Raich*, 545 U.S. at 34 (Scalia concurring). The question, therefore, is not whether the Necessary and Proper Clause allows the exercise of incidental powers, but how must courts evaluate claims arising under those incidental power?

Both precedent and common sense indicate that courts should apply closer scrutiny to a government claim of authority under the incidental powers of the Necessary and Proper Clause than they would to claims invoking an enumerated power directly. As St. George Tucker explained in one of the first treatises on the Constitution in 1803, the Necessary and Proper Clause "is calculated to operate as a

powerful and immediate check upon the proceedings of the federal legislature."[12] It provides authority for the court to act as a "bulwark provided against undue extension of the legislative power" by ensuring "necessity or propriety of the means adopted by congress to carry any specified power into complete effect." *Id*. Without this oversight, the enumeration of powers would be "a mere nullity." *Id*.

Justices Kennedy made a similar observation in *Comstock*, noting that the "rational basis" referred to in *Lopez* under the Commerce Clause was already more rigorous than no-evidence rational basis, because it required "a demonstrated link [to commerce] in fact, based on empirical demonstration." *Comstock*, 560 U.S. at 152. Justice Kennedy concluded, therefore, that under "the Necessary and Proper Clause, application of a 'rational basis' test should be at least as exacting as it has been in the Commerce Clause cases, if not more so." *Id.* at 151-52. Appellees' unsupported argument that claims under the Necessary and Proper Clause should require less scrutiny than those arising under the Commerce Clause fails.

The Service and their Amici argue that the Necessary and Proper Clause has been used to justify the expansion of Commerce Clause power when noneconomic activities are aggregated with economic activities to reach a conclusion that those

[12] Tucker, St. George. *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*. 5 vols. Philadelphia, 1803. Reprint. South Hackensack, N.J.: Rothman Reprints, 1969. Available at: http://press-pubs.uchicago.edu/founders/documents/a1_8_18s12.html

combined activities have a substantial effect on interstate commerce. Again, this misses the point. The question is not whether the Necessary and Proper Clause can ever allow such expansions—it is what level of scrutiny should apply when the government claims that it does. As Justice Scalia explained, at that "outer edge of the commerce power, this Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 653 (2012) (Scalia, J. dissenting, explaining his application of the Necessary and Proper Clause in *Raich*). Accordingly, contrary to the Service's position and that of its Amici, the Necessary and Proper Clause requires careful scrutiny of the Service's application of the ESA to a purely intrastate species with no discernable commercial value like the Harvestman.

b. *Alabama-Tombigbee Rivers*, *San Luis*, and *PETPO* are inapposite, because they were not Necessary and Proper Clause cases

Appellees next argue that decisions of three other circuits post-*Raich* have upheld the federal regulation of intrastate species under the ESA, and the shift to the Necessary and Proper Clause did not affect those courts' analysis. But the issue simply was not raised in those cases. Of the three cases cited, only *PETPO* discussed the Necessary and Proper Clause at all. *See, San Luis & Delta-Mendota Water Authority v. Salazar*, 638 F.3d 1163 (9th Cir. 2011) (never mentioning the Necessary and Proper clause or Scalia's opinion from *Raich*); *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1271-77 (11th Cir. 2007) (same). And, as

discussed *supra*, the court in *PETPO* only discussed the Necessary and Proper Clause to note that the Tenth Circuit had not adopted Justice Scalia's concurrence in *Raich*. *PETPO*, 852 F.3d at 1005 n.8. Moreover, none of the cases cited by Appellees involved a challenge to the application of no-evidence rational basis scrutiny. "Cases cannot be read as foreclosing an argument that they never dealt with." *Waters*, 511 U.S. at 678; *See De La Paz v. Coy*, 786 F.3d 367, 373 (5th Cir. 2015) ("[A]ccording to black letter law, 'a question not raised by counsel or discussed in the opinion of the court' has not 'been decided merely because it existed in the record and might have been raised and considered.'")

By contrast, this Court held after *Raich* that the substantial effects test is now governed by the Necessary and Proper Clause. *See, e.g.*, *Whaley*, 577 F.3d at 260. The effect of that transition on the constitutionality of ESA regulation of intrastate non-commercial species is an issue of first impression.

c. The boiler-plate invocation of rational basis scrutiny in *Raich* is not controlling

Next, Appellees argue that *Raich* could not have supplanted no-evidence rational basis scrutiny, because the majority opinion in *Raich* quotes rational basis language from *Lopez*. *See*, DOJ. Resp. at 40. But the mere use of the term "rational basis" in that case cannot mean a return to the very no-evidence standard *Lopez* and *Morrison* rejected. Indeed, it was the majority's unnecessary invocation of this old Commerce Clause language that justice Scalia believed was "misleading" and

caused him to write separately. *Raich*, 545 U.S. at 34 (Scalia, concurring). If applied literally, the majority's invocation of this old Commerce Clause boiler-plate rational basis standard would overturn both *Lopez* and *Morrison*—which the majority in *Raich* insisted it did not do. Indeed, the careless use of the word "rational" in Necessary and Proper Clause cases has repeatedly been criticized precisely because it could be confused with "rational basis" scrutiny. *See, e.g.*, *United States v. Comstock*, 560 U.S. 126, 152 (2010) (Kennedy, concurring) (criticizing the majority opinion's use of the term "rationally related" in a Necessary and Proper Clause case, because it could easily be confused with the deferential "rational basis" test, which the court did not apply.); *Sabri v. United States*, 541 U.S. 600, 612 (2004) (Thomas, concurring) (raising the same critique of the careless use of the word "rational," noting that "'appropriate' and 'plainly adapted' are hardly synonymous with 'means-end rationality.'") That one line of dicta therefore cannot bear the weight Appellees place on it.

Moreover, it is Justice Scalia's concurrence in *Raich*, not the majority opinion, that has influenced the common understanding of *Raich* in this circuit and various other courts around the country. Indeed, as noted *supra*, all nine justices of the

Supreme Court recently pointed to Scalia's concurrence in *Raich* either explicitly or by implication to explain the Necessary and Proper Clause in *Sebelius.*[13]

Finally, despite a brief mention of rational basis scrutiny, the majority in *Raich* conceded that it was applying the Necessary and Proper Clause, not the Commerce Clause alone. *Raich*, 545 U.S. 1, 5, 22. And the Court upheld the regulation because the connection to interstate commerce was "not only rational, but 'visible to the naked eye.'" *Id*. at 28-29. As noted *supra*, from 1819 to 2013 courts applying the Necessary and Proper Clause have applied more than no-evidence rational basis scrutiny. If the Court intended to change the standard for Necessary and Proper Clause cases, it would have said so more clearly.

3. This Court has moved away from no-evidence rational basis scrutiny, even in cases where the Necessary and Proper Clause is not implicated

Even if rational basis scrutiny still controlled, it would not be the deferential no-evidence version applied in *GDF Realty* and advocated by Appellees here. As noted *supra*, that approach to rational basis was already suspect at the time *GDF Realty* was decided. This Court has since rejected the no-evidence approach outright.

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13 *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.).

In *St. Joseph Abbey v. Castille*, 700 F.3d 154 (5th Cir. 2012), this Court evaluated a challenge to a Louisiana regulation of casket sellers. The government argued that the regulation was rationally related to the protection of the public from deceptive trade practices and to protect public health from defective caskets allowing human remains to seep out. Because this claimed connection to a legitimate government interest was facially plausible, the government argued that no further analysis was necessary. This Court disagreed, noting that the Court noted that it must look to the record to ensure government's "chosen means must rationally relate to the [government] interests it articulates." *St. Joseph Abbey*, 700 F.3d at 162. Even a "seemingly plausible" justification for a law can be rejected if it is not supported by facts in the record. *Id*. Looking at the record, the Court noted 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 162. Accordingly, the Court concluded that there was no rational basis for the casket regulation. *Id*. The regulation was therefore unconstitutional.

Appellees try to distinguish *St. Joseph* on two grounds, both of which fail. First, Appellees argue that *St. Joseph* does not require the evidence-based scrutiny that Appellants seek, because the Court noted in that case that rational basis "places no affirmative evidentiary burden on the government" and that plaintiffs bear the

burden of showing irrationality. DOJ Resp. Br. at 42. But this critique misunderstands Appellants' argument. Appellants do not contest that constitutional plaintiffs bear the burden of showing irrationality under rational basis scrutiny. Like the Appellants in *St. Joseph*, Appellants merely ask that the Court not close its eyes when the record contradicts or fails to support the governments' claimed connection to a legitimate end. *See*, *Id*. at 165 ("The great deference due state economic regulation does not demand judicial blindness…"). Even a cursory review of the record shows that the government's claim that regulating Harvestman takes is "an essential part of a larger regulation of economic activity" is a farce. As Appellants have pointed out, the record shows that the Harvestman are an isolated species with no connection to any species, much less interstate commerce. App. Op. Br., 4, 38 n. 5, 47-49. That the government claims, *ipse dixit*, that the regulation is essential to a broader scheme, is not enough. Just like it was insufficient for the government in *St. Joseph* to claim that the regulation was based on public safety when there was scant evidence in the record that supported that claim. It bears repeating, the Appellants challenge the application of the ESA by the Service to the Harvestman and, accordingly, it is the Harvestman species itself that must be the focus of the constitutional analysis.

Second, Appellees argue that *St. Joseph* is distinguishable because the alleged government interest in that case were merely pretext for an improper purpose—*i.e.*,

protectionism. DOJ Resp. Br. at 42. But that was not the holding in *St. Joseph*. This court made clear that even if protectionism had been a motivation, that alone would not have been sufficient to declare the law unconstitutional, if the law also served a "legitimate government purpose under the rational basis test." *Id*. at 162. The problem was that the government could not produce a rational basis that was not refuted by the "record compiled by the district court at trial." *Id*.

Similarly here, the issue is not whether the ESA's program of species protection is rational as a whole. The issue is whether the record shows that there is a rational basis to support regulation of Harvestman takes pursuant to the federal government's power to regulate interstate commerce. The record shows that there is no such rational basis here.

C. *GDF Realty* has not served as precedent in this Court

Finally, the rule of orderliness does not preclude review because *GDF Realty* has not served as precedent in this Court. In the sixteen years since it was decided, the Commerce Clause reasoning of *GDF Realty* has been relied on only once, in *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Service*, 827 F.3d 452 (5th Cir. 2016). But *Markle* was vacated by the Supreme Court and did not involve the question at issue in this case. It is therefore neither binding nor persuasive here.

This Court "has consistently held that vacated opinions are not precedent." *Asgeirsson v. Abbott*, 696 F.3d 454, 459 (5th Cir. 2012). The Supreme Court has

likewise held that a "decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case." *O'Connor v. Donaldson*, 422 U.S. 563, 577, n. 12 (1975).

Appellees try to circumvent this bright-line rule by arguing that *Markle* was vacated on the basis of the plaintiffs' statutory claims, not the constitutional issues. But in doing so, Appellees confuse a decision that has been vacated with a decision that has been reversed on other grounds. A decision reversed on other grounds may still have precedential value, "but a decision that has been vacated has no precedential authority whatsoever." *Cent. Pines Land Co. v. U.S.*, 274 F.3d 881, 894 n.57 (5th Cir. 2001) (citing *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n. 2 (9th Cir. 1991) ("This case illustrates the important difference between our treatment of a panel opinion after vacatur by the Supreme Court and our treatment when a judgment is reversed on other grounds.") *Markle* is therefore void.

But Even if *Markle* were not void, it has no application here because it did not discuss the issues raised in this case. The plaintiff in *Markle* did not ask the Court to overturn *GDF Realty*. It assumed that *GDF Realty* was valid, but questioned whether it was appropriate to extend that holding to critical habitat determinations. That argument failed. *See, Markle*, 827 F.3d 452, 477-78 ("we see no basis to

distinguish the ESA's prohibition on "takes" from the ESA's mandate to designate critical habitat.")

The key issues in this case—*i.e.*, the effect of the Necessary and Proper Clause on the substantial effects test, and the proper level of scrutiny for such claims—were not raised by the parties or addressed by the Court. Court opinions are not precedent for issues not raised or discussed. *Brecht v. Abrahamson*, 507 U.S. 619, 631, (1993) (explaining an opinion is not binding precedent on an issue "never squarely addressed" even if the opinion "assumed" one resolution of the issue.)

This Court's recent opinion in *Gahagan v. United States Citizenship & Immigration Servs.*, 911 F.3d 298, 302 (5th Cir. 2018) is instructive. In that case, this Court considered whether a prior panel opinion in a case called *Cazalas* had been overturned by a subsequent opinion in *Kay* that appeared to undermine its reasoning. *Id*. The appellant argued that *Kay* could not have undermined *Cazalas*, because this Court had cited *Cazalas* in another case, *ICC*, even after *Kay* had been decided. This Court rejected this approach because neither party in *ICC* had argued *Kay* had overruled *Cazalas*, and the court in *ICC* had therefore not analyzed that question. *Id*. This Court concluded that an opinion merely "restating a prior panel's ruling does not *sub silentio* hold that the prior ruling survived an uncited Supreme Court decision." *Id*.

Similarly here, *Markle* does not *sub silentio* hold that *GDF Realty* has not been overturned by *Raich* or *St Joseph*, when the parties did not argue and the court did not consider that question.

IV. UNDER THE PROPER LEVEL OF MEANINGFUL SCRUTINY, FEDERAL REGULATION OF HARVESTMAN TAKES IS UNCONSTITUTIONAL

A. Federal regulation of Harvestman takes is not an essential part of a larger regulation of economic activity.

The parties generally agree that the federal regulation of Harvestman takes is permissible only 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.

As explained in Appellants' opening brief, the regulation of Harvestman takes fails this test because the ESA is not a "larger regulation of economic activity," and neither the government's ability to administer the ESA to other species, or the government's ability to regulate interstate commerce would be "undercut" if it could not regulate the take of a tiny cave bug in Texas. App. Op. Br., 4, 38 n. 5, 47-49.

Appellees raise three arguments in response. First, Appellees argue that the ESA need not be a regulation of commerce itself, it only has to be "comprehensive"

and affect commerce. Second, Appellees argue that the record in fact shows that Harvestman regulation is necessary to regulate commerce. Third, Appellees argue that even if individual Harvestman takes do not affect interstate commerce, this Court cannot excise those non-commercial acts from a valid regulatory scheme. These arguments fail.

1. The ESA is not a regulation of interstate commerce

Appellees' basic claim is that the ESA is a regulation of commerce because it is a comprehensive regulation that has economic effects. But the relevant question is not whether the regulation could have an economic effect. Rather, the relevant question is whether it is a regulation *of interstate commerce*. *Morrison*, 529 U.S. at 611. At some level, every regulation has an economic effect. *Id*. The larger, more comprehensive and invasive the regulation, the more likely it will impact commerce. *Id*. But the Supreme Court has "not yet said the commerce power may reach so far." *Id*.

Indeed, if that were all that was needed to establish Commerce Clause authority, then the Constitution would create the perverse incentive for Congress to be as sweeping and invasive as possible in its regulations. Such an interpretation of congressional authority would have been anathema to those who ratified the Constitution.

An example illustrates the point. Imagine that Congress passed a law requiring that all American citizens sleep at least nine-hours a night as part of a comprehensive health care statute. Such a law would certainly be comprehensive. And forcing Americans to get more sleep would have certainly have "economic impacts." Better still, it is widely accepted that regulating sleep is actually necessary to producing positive health outcomes, no doubt intended by the statute. And one reason American's neglect sleep is economic activity. But is there any question at all that such a regulation of purely private, non-economic activities falls outside of the Congress's power to do that which is necessary and proper to regulate interstate commerce? Whatever the Commerce Clause means, it cannot mean that.

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."). As explained in Appellants opening brief and below, there is no reason to believe Harvestman regulation fits that description.

2. The record shows that regulation of Harvestman takes is not essential to the regulation of any other species, much less the regulation of an interstate market

As explained in Appellants' opening brief, the record shows that Harvestman takes have no impact on other species, much less interstate commerce. App. Op. Br., 4, 38 n. 5, 47-49. Appellees disagree, but in total, Appellees point to one piece of "evidence" in the record to support their claims. CBD Resp. Br. at 35. That "evidence" shows how tenuous any claimed connection to interstate commerce actually is.

After Appellants filed their motion for summary judgment, the district court remanded to the Service to supplement the record. After several months, the only piece of "evidence" the Service produced was a letter from a biologist who conceded that he is not "an economist and is not qualified to quantify the commercial economic value of the listed karst invertebrates" including the Harvestman. ROA 19-50321.4248.

The lack of evidence in that letter is telling. The letter claims that Harvestman provide economic benefits through "Research, Conferences and publications, Environmental/water supply protection, [and] Public education/tourism." ROA 19-50321.4244-45. But these claims are either wholly unsupported or actually contradicted by other statements in the letter itself.

First, the letter does not address the potential economic impacts of the Harvestman, but of "all of the listed karst invertebrates in Texas" in the aggregate. ROA 19-50321.4244. The letter concedes that Harvestman "are tiny, relatively few in observable number, [and] produce no known vital ecological services to humanity." ROA 19-50321.4244.

Second, while the letter lists over a dozen studies of Karst Invertebrates (of which the Harvestman are but one species), it concedes that these studies are "pure research of no apparent commercial value." ROA 19-50321.4246. It merely posits, *ipse dixit*, that such studies may turn out to one day produce something of value. *Id*. Such hypothetical speculation has already been rejected by this Court as a basis of Commerce authority. *See, GDF Realty*, 326 F.3d at 638 ("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.")

Third, the letter claims that regulation of Harvestman takes is necessary to protect water quality, but that claim is buttressed by "evidence" that has nothing to do with Harvestman takes or ESA regulation. The letter notes that the City of San Antonio (which is not in the Harvestman's habitat range) purchased a large quantity of land to act as a water quality preserve, and that such preserves have positive impacts by ensuring clean drinking water. ROA 19-50321.4246-47. It is difficult

to fathom how this shows that federal Harvestman regulation is necessary. These water quality preserves were purchased completely independently of any concerns about the Harvestman, and failure of the federal government to regulate Harvestman takes will not prevent cities like San Antonio from taking similar actions to protect their water supply in the future.

Fourth, the letter claims that conferences to study the Harvestman could have an economic impact, but concedes that he is "not aware of any conferences dedicated to the listed karst invertebrates." ROA 19-50321.4246. Moreover, this Court has already rejected this approach. *GDF Realty*, 326 F.3d at 637 ("any connection between takes and impact on the scientific travel or publication industries… is far too attenuated to pass muster.")

Fifth the letter claims, without evidence, that the Harvestman could increase tourism or encourage people to move to karst regions, but concedes that "karst invertebrates are not generally observable by the public" and one of the few caves where the Harvestman "might be seen" does not advertise that they can be seen there. ROA 19-50321.4248. The letter further concedes that it is "not aware of any studies that have quantified how many people moved to those cities or into adjacent neighborhoods to enjoy those benefits." ROA 19-50321.4247. Indeed, the letter provides no evidence that a *single person* ever has or ever will move to a region to see the Harvestman. This is far too thin a reed to hang such an intrusive federal

program on. And the fact that this letter is the sole basis of the Service's evidentiary claims, even after remand, shows that there is no meaningful evidence to support their claims. *See, St. Joseph Abbey*, 700 F.3d 154, 165 (noting that the government pointing to things that clearly were not supported by evidence as a basis for the regulation made the court "doubt that a rational relationship exists.")

3. Appellees misunderstand Appellants' challenge

Appellees also argue that the government need not produce "record evidence establishing that *individual takes* of harvestman would affect interstate commerce." (emphasis added). DOJ Resp. Br. at 40, 41. But this misinterprets Appellants' claims. It is true that courts will not "excise, as trivial, individual instances falling within a rationally defined class of activities" the regulation of which is essential to an economic scheme, merely because that individual instance does not affect commerce. *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968). For example, the government need not show that a plaintiff arrested for cultivating local marijuana has affected interstate commerce by growing his plants, if growing local marijuana is a class of activity the regulation of which is required to regulate an interstate market in marijuana sales. *See*, *Raich*, 545 U.S. at 40 (Scalia, concurring).

But the record shows that the Service's application of the ESA to Harvestman takes does not affect interstate commerce in any way, and completely excluding the Harvestman from ESA regulation would have zero impact on Congress' ability to

regulate any interstate market. In other words, Appellants are not trying to excise one intrastate instance out of an otherwise legitimately regulated class of activities. Appellants challenge the legitimacy of regulating the entire class—*i.e.*, Harvestman takes. Appellees' objection therefore misses the mark.

B. Interpreting the Commerce Clause or the Necessary and Proper Clause to allow for the Federal regulation of Harvestman takes would greatly expand federal power into areas traditionally reserved to the states

The Necessary and Proper Clause also requires that the regulation not mark a substantial expansion of federal power into areas traditionally reserved to the states. As explained more fully in Appellants' opening brief, there can be little dispute that *GDF Realty's* ecosystem-equals-commerce approach to the Commerce Clause does just that. According to *GDF Realty*, the interdependence of species requires that anything that affects any species affects all species, and therefore affects interstate commerce. *GDF Realty*, 326 F.3d at 640. This grants the Service functional land use authority throughout the country. *See, GDF Realty II*, 362 F.3d 286, 292 (dissenting opinion). But as the Supreme Court has noted, land use and wildlife protection have historically been matters of state concern. *Solid Waste Agency v. United States Army Corps of Eng'rs*, 121 S.Ct. 675, 684 (2001).

Appellees raise two arguments in response. First, Intervenor Appellees argue that this approach is not a substantial expansion of federal authority because the Federal government has long exercised authority in the name of wildlife protection.

Second, the Service argues that the prohibition on Harvestman takes cannot be an expansion of federal authority because the ESA has been on the books since the 1970's. Both of these arguments are meritless.

1. The Federal government does not possess a standalone power to regulate bio-diversity for its own sake

Intervenor Appellees argue that there is no federal expansion of power here because Congress has taken action to protect the environment numerous times in the twentieth century. But this misses the point. The federal regulation of Harvestman takes is not an expansion of federal authority because it involves environmental protection—it is an expansion of federal authority because it pursues environmental protection without any meaningful connection to an enumerated power. As the cases Intervenor Appellees cite make clear, the federal government has shared authority over environmental protection only "when the Federal Government exercises one of its enumerated constitutional powers"—*e.g.*, the power to regulate interstate commerce. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999)).

In our Federalist system of divided power, the authority to regulate land use and wildlife protection have historically been matters of state concern. *Solid Waste Agency*, 121 S.Ct. at 684; *see also* The Federalist No. 17, at 106 ("the supervision of agriculture and of other concerns of a similar nature…are proper to be provided for by local legislation, [and] can never be desirable cares of a general jurisdiction.")

The federal government has never had a general police power, or the ability to regulate things simply because they are important, or serve the "national interest." *Carter v. Carter Coal Co.*, 298 U.S. 238, 291-92 (1936). The standalone power to regulate for bio-diversity, regardless of its impact on commerce, as Intervenor Appellants have suggested, is anathema to the Constitution.

2. The fact that the regulation of Harvestman has been on the books for a long time does not make it constitutional

The Service's argument is equally meritless. The Service argues that federal regulation of Harvestman takes is not an expansion of federal authority because the ESA has been on the books since the 1970's. But whether an act expands federal power into an area of state concern is a question of constitutional structure, not a question of how long the violation has existed. Unconstitutional assertions of federal power "do not become less so through passage of time." *See*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 626–27 (2001). Indeed, in 2015 the Supreme Court struck down a New Deal era agricultural program that had been on the books for almost eighty years. *Horne v. Dep't of Agric*., 135 S.Ct. 2419, 2424 (2015). In comparison, the federal regulation of purely intrastate species is a relatively recent development. The government action at issue in this case is not shielded from constitutional scrutiny just because it has been around a few decades.

CONCLUSION

For the foregoing reasons, the Appellants respectfully request this Court to reverse the judgment of the district court and declare that (1) the Appellants have standing to bring their constitutional claims, (2) the statute of limitations does not bar the adjudication of those claims, (3) the claims are not moot and are otherwise ripe for review, and (4) the Service unconstitutionally applied the ESA to the Harvestman. Accordingly, the Appellants respectfully request this Court to enjoin the Service from enforcing the ESA against the Appellants in connection with any Harvestman located on their properties.

Dated: December 19, 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 December 19, 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/Chance Weldon
CHANCE WELDON

CERTIFICATE OF COMPLIANCE

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Dated: December 19, 2019

/s/Chance Weldon
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