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' RESPONSE TO MOTION TO DISMISS APPEAL

CERTIFICATE OF INTERESTED PERSONS

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Intervenors Plaintiffs-Appellants-Cross Appellees,

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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; 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 Intervenors Plaintiffs-Appellants-Cross Appellees: Robert E. 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 Lawerence-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

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This motion involves complex issues involving the interplay between the Federal Rules of Appellate Procedure, the Administrative Procedures Act, and the Constitution. Accordingly, Appellants-Intervenors believe that oral argument will prove helpful to the Court in ensuring full deliberation.

INTRODUCTION

In 2015, the Appellants-Intervenors John Yearwood and Williamson County, Texas (collectively the "Intervenors") filed a lawsuit challenging the constitutionality of restrictions the United States Fish and Wildlife Service (the "Service") placed on their property under the Endangered Species Act ("ESA"). The court below rejected all of the Intervenors' constitutional challenges and denied all of Intervenors' requested relief, noting that "nothing further remains to resolve" and that the "case is hereby closed." The Intervenors timely appealed that adverse ruling.

In its dismissal motion, the Service argues that Intervenors' appeal is not justiciable, that the lower court's judgment is merely interlocutory, that no further relief is available to the Intervenors in this action, and that the court should decline review because of constitutional avoidance principles. The Service bases its arguments solely on the fact that the district court granted separate relief to a separate party in the case on a separate claim that Intervenors did not raise and that does not

address Intervenors' injuries. The Service's arguments are therefore without merit. The motion to dismiss should be denied.

FACTUAL AND LEGAL BACKGROUND

A. Factual Background

The Bone Cave Harvestman is a tiny arachnid that inhabits only two counties and does not affect interstate commerce. ROA 19-50321.7194, 7221. In 1988, the Harvestman was listed as endangered under the ESA. ROA 19-50321.7197.

Intervenors own property inhabited by the Harvestman. ROA 19-50321.1748-52. Accordingly, under the ESA, if Intervenors use their property in a way that disturbs the species, they can be subject to severe civil and criminal sanctions. ROA 19-50321.1723, 1748-52. Intervenor Williamson County (the County") must also take affirmative steps to preserve the species. Under the existing federal recovery plan, the County must maintain eleven separate Harvestman preserves on County property, totaling over 800 acres. ROA 19-50321.1748. These preserves require approximately $19,000 per year in fire-ant mitigation to prevent the ants from eating the Harvestman. *Id.* Additionally, the County must perpetually maintain a $20,000,000 mitigation fund to cover any incidental takes that may occur during development that it permits in the County. *Id.*

In 2014, several farmers, including Mr. 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 Delisting Petition argued that the original listing of the species was in error, and even if not, that the best science showed that the species had recovered and should no longer be listed as endangered. ROA 19-50321.101, 7198-99. The Service denied the petition. As a result, to this day the Intervenors' property remains subject to the restrictions of the ESA.

B. Legal Background: The Endangered Species Act and the Administrative Procedures Act

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 "90-day petition"). 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).

The Administrative Procedures Act provides several mechanisms to challenge the Service's decision on whether to grant or deny a delisting petition; two of which are relevant here. *See*, 5 U.S.C. § 706 (2) (A-F). If an affected individual believes that the Service's decision was not supported by the findings, or that the findings

were not supported by the evidence, then he may file a lawsuit under the APA challenging the Service's decision as "arbitrary and capricious." 5 U.S.C. § 706 (2) (A).

By contrast, if an aggrieved individual believes that the Service's decision exceeded its lawful authority—for example, because the Service lacked constitutional authority to regulate the species—then the individual may file a lawsuit under the APA challenging the Service's decision as being "contrary to law" or contrary to "constitutional right." 5 U.S.C. § 706 (2) (A), (B).

C. The Parties' Fundamentally Different Claims

In late 2015, American Stewards of Liberty (the "Plaintiffs" in the trial court), filed a lawsuit under the APA arguing that the Service's rejection of the Delisting Petition was not supported by the most recent evidence, and therefore was "arbitrary and capricious." ROA 19-50321.1372. Shortly thereafter, Intervenors intervened under Fed. R. Civ. P. 24.

Intervenors did not join Plaintiffs' science-based "arbitrary and capricious" challenge. ROA 19-50321.274, 1081. Instead, they argued that the Service's continued refusal to remove the Harvestman from the endangered species list was "contrary to constitutional right, power, privilege, or immunity" and "contrary to law" because the Service lacks constitutional authority to regulate purely intrastate, noncommercial species. ROA 19-50321.1081.

In granting the motion to intervene, the district court recognized the distinct nature of these claims:

> …although Plaintiffs and Movants both desire to see the Bone Cave Harvestman delisted, they present different claims. Plaintiffs claim only that the listing of the Bone Cave Harvestman under the Endangered Species Act is improper; Movants assert that the federal government lacks the constitutional power to regulate the Bone Cave Harvestman under the Endangered Species Act at all. The court concludes that Plaintiffs may not adequately represent Movants' interests.

ROA 19-50321.274.

The parties also sought different remedies. Plaintiffs argued that the district court should vacate and remand the Service's petition denial because the Service used improperly evaluated the scientific and technical evidence set forth in the petition. ROA 19-50321.1373. By contrast, Intervenors asked for a declaration that regulation of the Harvestman under the ESA was unconstitutional and for an order enjoining the Service from enforcing such regulation on their properties. ROA 19-50321.1085.

D. The Proceedings Below

After Intervenors moved for summary judgment, the Service requested a stay so that it could voluntarily remand its decision not to delist the Harvestman for further evaluation. ROA 19-50321.736. Intervenors opposed the stay because the delay was prejudicial and because the evidence that the Harvestman had recovered

was irrelevant to Intervenors' claims. ROA 19-50321.817. The stay was granted. ROA 19-50321.974.

After nearly six months, the Service issued a new finding in 2017, maintaining its previous position and refusing to delist the species. The parties amended their complaints to reflect the most recent decision and all sides filed new cross motions for summary judgment. ROA 19-50321.1071(Intervenors), 1088 (Plaintiffs').

E. The Final Judgment of the District Court

Nearly three years after Intervenors 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. That order ruled against Intervenors on all of their claims and granted the Service's motion for summary judgment against Intervenors on every issue except Mr. Yearwood's standing. ROA 19-50321.7226.

The order also granted Plaintiffs' motion for summary judgment on the grounds that, because the Service had failed to adequately consider evidence that the Harvestman had recovered, the negative 90-day finding was "arbitrary and capricious." *Id*. The court vacated and remanded to the Service for further consideration. *Id*.

The district court further entered its Final Judgment. ROA 19-50321.7227. The judgment noted that "nothing further remains to resolve" and that the "case is

hereby closed." ROA 19-50321.7228. The judgment granted an award of costs to Plaintiffs, but not to Intervenors. *Id.* Intervenors timely appealed.

The Service moved to dismiss Intervenors' appeal, alleging that the remand of Plaintiffs' separate claims has made this appeal non-justiciable and has otherwise mooted this case. The Service's arguments are without merit.

ARGUMENT

It is well-established that a party may appeal a decision vacating and remanding a challenged agency action if the party had also requested relief in the district court 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.*

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

Here, as in *Forney*, 524 U.S. at 271 and *Bordelon*, 161 F.Appx. at 351, Intervenors raised separate claims and requests for relief in the district court that were all denied. Because that relief was denied, Intervenors continue to suffer ongoing injuries. *See*, section I (A) *infra*. Accordingly, this Court has jurisdiction to hear Intervenors' claims.

The Service, nonetheless, argues that the vacatur and remand of the negative 90-day finding in in this case has rendered Intervenor's claims non-justiciable and that several prudential concerns justify denying jurisdiction in this case. As explained below, these arguments fail.

I. INTERVENORS' APPEAL IS JUSTICIABLE BECAUSE VACATUR AND REMAND DID NOT DEPRIVE INTERVENORS OF ARTICLE III STANDING ON THEIR CONSTITUTIONAL CLAIMS

"[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 allege: (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.

A. Intervenors Are Injured in Fact

Despite the vacatur and remand, the Harvestman is still listed. As a result, Intervenors continue to suffer injuries from the Service's challenged decision not to delist the species. Because of the continued listing, Intervenors 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 $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 19-50321.1748. 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 Co. v. United States Fish & Wildlife Service*, 139 S.Ct. 361, 368 (2018) (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.").

B. The Injuries to the Intervenors Are Fairly Traceable to the Service's Conduct

The Service argues that Intervenors 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. MTD 8-11.[2] But this claim was raised and rejected at the district court and should be rejected here. ROA 19-50321.7218-19.

Under the APA, regulations adopted by an administrative agency are "final agency action[s]" 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

[2] Passing comments in this section of the Service's motion could also be construed to argue that vacatur of an agency action, by definition, eliminates traceability for an appeal of that action, because there is no agency action left to challenge. *See*, MTD at 7-8 (vacatur "wipes the slate clean.") But that argument is foreclosed by precedent. *See, e.g.*, *Bordelon*, *supra*, 161 F.Appx. at 351. Tellingly, the cases cited by the Service in support of that proposition involved the precedential effect of court opinions, not the appealability of vacated agency actions. *See*, *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (explaining the need to vacate non-reviewable lower court decisions in order to avoid precedential effect); *Fort Knox Music, Inc. v. Baptiste*, 257 F.3d 108, 110 (2d Cir. 2001) (explaining the effect of a vacated district court judgment); *Allied-Signal v. United States Nuclear Regulatory Comm'n*, 300 U.S. App. D.C. 198, 988 F.2d 146, 151 (1993) (noting in passing that vacating a rule can be "disruptive" but not discussing at all the effect that vacatur has on standing or appeals).

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. Applying the principles of *Dunn*, Mr. Yearwood filed a petition to delist the species and that petition was denied in both 2015 and 2017. ROA 19-50321.61. According to *Dunn*, the denial of that petition to delist 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 petition denial, and the limitations period will not expire until 2023.[3]

The Service chides Intervenors for "circuitously seek[ing] to obtain" review of the constitutionality of the original listing by challenging the denial of the delisting petition. *See*, MTD at 9-10. No doubt the Service would prefer if its actions

[3] The Service takes a snippet out of context from the portion of Intervenors' district court briefing which noted that "the fact that this lawsuit is based on the negative 90-day finding is clear on the face of the pleadings." Read in context, however, it is clear that Intervenors were noting, as explained above, that the statute of limitations did not apply because the most recent agency action affirming the original listing—the negative 90 day finding—had occurred within six years. *See*, ROA 19-50321.4388-89.

were unchallengeable. But, as the district court in this case recognized, Intervenors chosen procedure for challenging the constitutional validity of older regulations is established by circuit precedent. ROA 19-50321.7218. If the Service wishes to overturn the holding of the district court on this issue and challenge this Court's precedent, then it should do so in its cross appeal on the merits, not in a motion to dismiss.

C. The Intervenors' Injuries Are Redressable by Granting the Requested Relief

The Service argues that Intervenors' injuries are not redressable because the only relief the Service claims[4] is available under the APA is vacatur of the challenged agency action—which has already happened. MTD at 18. But this ignores the claims plead in Intervenor's complaint. In addition to the APA, Intervenors brought this action under 28 U.S.C. § 2201 and § 2202. Once a case in 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

[4] This is an unduly cramped reading of the APA, which grants the court authority to "compel agency action," and "declare unlawful *and* set aside" agency actions. 5 U.S.C. 706 (emphasis added). This indicates authority to grant declaratory and injunctive relief.

relief "based on a declaratory judgment"). The Service's redressability argument therefore fails.

Accordingly, because the Intervenors meet all three prongs of the *Lujan* test for standing, the Service's challenge to their standing is without merit.

II. CONTRARY TO THE SERVICE'S ASSERTION, THE "POSTURE OF THIS APPEAL" DOES NOT MAKE APPELLATE REVIEW SOMEHOW INAPPROPRIATE

The Service next 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 and because the court should invoke the doctrine of constitutional avoidance. The arguments are without merit.

A. 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 Intervenors 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.

B. The District Court's Decision Was Not A "Favorable Outcome" For Intervenors

Even though Intervenors challenge a final decision from the district court, the Service argues that this Court should deny review under the prudential doctrine that appeals from "favorable outcomes" should not be heard. MTD at 11. But that doctrine does not apply in this case because Intervenors did not receive any of the relief that they requested.

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 denyi[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, Intervenors lost on every merits claim and did not receive any of their requested relief. Because the Service administers the ESA and does not prepare legal opinions on constitutional issues, Intervenors cannot properly pursue their constitutional claims on remand, and if they were to file suit in district court again after remand, their constitutional claims would likely be barred by *res judicata*.[5] That is not a "favorable outcome."

The Service's cited cases to the contrary are inapposite because they involved decisions where the judgment granted appellant all of the relief requested, but appellants still tried to appeal non-binding statements from the court's opinion. *See*, *e.g.*, *Mathias v. Worldcom Techs.*, 535 U.S. 682, 684 (2002) (per curiam opinion holding that party prevailing on all claims below could not appeal findings in the opinion that were "not essential to the judgment and not binding upon them in future

[5] The doctrine of res judicata, or claim preclusion, forecloses relitigation of claims that were or could have been raised in a prior action. *Allen v. McCurry*, 449 U.S. 90, 94, 66 L.Ed.2d 308, 101 S.Ct. 411 (1980). Four elements must be met for a claim to be barred by res judicata: (1) the parties in both the prior suit and current suit must be identical; (2) a court of competent jurisdiction must have rendered the prior judgment; (3) the prior judgment must have been final and on the merits; and (4) the plaintiff must raise the same cause of action in both suits. *Davis v. Dall. Area Rapid Transit*, 383 F.3d 309, 312-13 (5th Cir. 2004). All of these elements are present here. If Intervenors brought their constitutional claims again they would be against the same party, have already been decided on the merits by the same court, and present the same exact cause of action.

litigation."); *California v. Rooney*, 483 U.S. 307, 311 (1987) (government could not appeal favorable decision upholding the validity of its search warrant because it disagreed with dicta in the opinion); *Fletcher*, 805 F.3d at 603 (noting that had the court provided the "Intervenors with some, but not all, of the relief requested [it] might well be sufficient to allow the Intervenors to appeal…[but] [t]he Intervenors make no mention of the additional relief in their initial brief.").

The Service's heavy reliance on *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 601 (5th Cir. 2004) is instructive. In *Ward*, a high school student and her parents challenged a policy that prohibited the student from "including prayer or reference to a deity" in a speech she was scheduled to give at a high school football game. *Id*. The district court in that case granted a preliminary injunction in the plaintiffs' favor. *Id*. at 602. The school then permanently rescinded the challenged policy and the student was allowed to give her speech. *Id*. Shortly thereafter, the school entered a stipulation agreeing to pay nominal damages and attorneys' fees. *Id*. With the case effectively moot, the district court entered a summary order awarding nominal damages and attorneys' fees and dismissing the case. *Id*. Despite prevailing on every issue and receiving "all of the relief that they requested," plaintiffs appealed because "the district court did not render a [written] opinion on the issues they raised." *Id*. at 603. The sole injury that plaintiffs claimed was the

court's failure to articulate reasons for the dismissal. *Id.* Given this background, this Court held that the plaintiffs could not appeal.

That is not the case here. Unlike the plaintiffs in *Ward* and the other cases cited by the Service, Intervenors did not receive *all* of the relief requested—*they received none.* And unlike cases cited by the Service, Intervenors do not challenge "language" from the district court's opinion, or a lack thereof. They challenge the final judgment of the district court, which denied all their claims and failed to provide any of their requested relief. In short, Intervenors appeal precisely the sort of "final decision" over which this Court has jurisdiction.

C. Intervenors' Appeal Is Not Interlocutory

The Service also argues that the vacatur and remand of Plaintiff's separate claims makes Intervenors' separate appeal interlocutory. This 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 18 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 has put Intervenors out of court as a procedural matter. Intervenors cannot pursue their constitutional claims on remand because the 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 Intervenors try to raise their constitutional claims in a new lawsuit after remand, those claims would potentially be barred by *res judicata*. *See*, *Davis*, 383 F.3d at 312-13 (discussed more fully in n. 2, *supra*.). Accordingly, Intervenors are effectively out of the case as a matter of law.

And even if Intervenors future claims were not barred by *res judicata*, it could be months if not years before a new decision were available to challenge. The delisting process is notoriously slow. In the present case, it took the Service nearly six months just to reconsider its previous decision after litigation began. ROA 19-50321.974. While the Service currently has a status deadline[6] in October, if the Service finds that there is a reason to believe that delisting may be warranted, that triggers a mandatory twelve-month review process that could be extended further.

[6] The Service has entered an agreement with Plaintiffs to issue a new 90 day finding by October, but has not indicated what that finding will be, and that deadline can be extended.

At the end of that process, the Service may still elect not to delist the species. Such a delay is equivalent to the 18-month delay found sufficient for standing in *Hines*. This Court should therefore exercise jurisdiction over this appeal.

D. The Canon of Constitutional Avoidance Dos Not Apply Here

Finally, the Service asks this Court not to exercise jurisdiction in this case because, "principles of constitutional avoidance compel incremental adjudication here." MTD, at 16. But Constitutional avoidance is a tool that courts use to adjudicate cases after jurisdiction is established; 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. Code § 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 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.").

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 plead 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 half-hearted promise that the agency *might*

delist the species at some point in the indefinite future and therefore address Intervenors' injuries. But our judicial system exists 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 Intervenors' rights "at the mercy of [the Service's] *noblesse oblige*." *See United States v. Stevens*, 559 U.S. 460, 480 (2010).

CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied.

Respectfully submitted,

/s/ Chance Weldon
ROBERT HENNEKE
rhenneke@texaspolicy.com
THEODORE HADZI-ANTICH
tha@texaspolicy.com
CHANCE WELDON
cweldon@texaspolicy.com
TEXAS PUBLIC POLICY FOUNDATION
Center for the American Future
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728

Counsel for Appellants
John Yearwood and Williamson County, Texas

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2019, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/Chance Weldon
CHANCE WELDON

CERTIFICATE OF COMPLIANCE

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,135 words, excluding the parts exempted by Rule 27(a)(2)(B); and (2) the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the same program used for the word count).

/s/Chance Weldon
CHANCE WELDON