No. 19-50321

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.

Appeal from the United States District Court for the Western District of Texas
No. 1:15-cv-1174 (Hon. Lee Yeakel)

COMBINED BRIEF OF FEDERAL APPELLEES/CROSS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

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Intervenor Defendants-Appellees-Cross Appellants,

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

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

1. Parties on appeal: John Yearwood; Williamson County, Texas; U.S. Department of the Interior; U.S. Fish and Wildlife Service; David Bernhardt, Secretary of the Interior; Margaret E. Everson, Director of the U.S. Fish and Wildlife Service; Amy Lueders, Southwest Regional Director of the U.S. Fish and Wildlife Service; Center for Biological Diversity; Travis Audubon; and Defenders of Wildlife.

Additional parties (Plaintiffs) in the district court: American Stewards of Liberty; Charles Shell; Cheryl Shell; Walter Sidney Shell Management Trust; Kathryn Heidemann; and Robert V. Harrison, Sr.

2. Counsel of record and other interested persons:

a. Attorneys for Plaintiffs (not parties on appeal): Paul Stanley Weiland, Rebecca Barho, Brooke Marcus Wahlberg, Alan M. Glen.

b. Attorneys for Intervenors Plaintiffs-Appellants-Cross Appellees: Robert E. Henneke, Theodore Hadzi-Antich, Chance Weldon, Chad Ennis (district court), David Barton Springer (district court), Kevin Dow Collins (district court).

c. Attorneys for Intervenor Defendants-Appellees-Cross Appellants: Jeffrey Bossert Clark, Eric Grant, Andrew C. Mergen, Anna T. Katselas, Varu Chilakamarri, Lesley Karen Lawrence-Hammer, Jeffrey H. Wood (district court), Seth Barsky (district court), Meredith Flax (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 Jeffery Mundy (district court), and Ryan Adair Shannon.

e. Amici curiae: Cato Institute, Southeastern Legal Foundation, and Mountain States Legal Foundation (Attorneys: Trevor C. Burrus, Ilya Shaprio); Goldwater Institute (Attorneys: Jonathan Riches, Roger B. Borgelt); State of Texas (Attorneys: Ken Paxton, Jeffrey C. Mateer, Kyle D. Hawkins, Natalie D. Thompson);

Terry M. Wilson (Jason Boatright); The American Farm Bureau Federation, Chamber of Commerce of the United States of America, National Association of Home Builders of the United States, National Federation of Independent Business Small Business Legal Center, and Texas Farm Bureau (Paul J. Beard II).

s/ *Varu Chilakamarri*
VARU CHILAKAMARRI
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STATEMENT REGARDING ORAL ARGUMENT

Given the nature of the threshold legal arguments and the fact that binding Circuit precedent controls on the merits, oral argument may not be necessary. But the Government stands ready to participate if the Court believes that argument would aid the decisional process.

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INTRODUCTION

More than thirty years ago, the U.S. Fish and Wildlife Service (FWS) listed an arachnid species called the "Bone Cave harvestman" as endangered under the Endangered Species Act (ESA). In 2014, a group of petitioners—including the original Plaintiffs in this action and Intervenor John Yearwood—invoked the ESA's petition process for "delisting" a species. They argued that the harvestman had recovered and no longer needed protection. They asked FWS to make a threshold determination that delisting "may be" warranted, which would trigger a more extensive review. In 2017, FWS denied the petition, prompting Plaintiffs to file this action under the Administrative Procedure Act (APA). Plaintiffs claimed that FWS's denial was arbitrary and capricious because it faulted petitioners' failure to present population data that was unattainable. Yearwood intervened (along with Williamson County, Texas), arguing that FWS's denial was also unlawful because FWS lacked constitutional authority to regulate this purely intrastate species.

The district court vacated and remanded FWS's decision on the ground that FWS had improperly required unattainable population data. Both FWS and Plaintiffs accepted the vacatur and remand. But Intervenors pursued this appeal, challenging the district court's rejection of their constitutional theory. Meanwhile, on remand, FWS concluded that delisting "may be" warranted and initiated the review sought by petitioners to further consider whether the harvestman should be delisted.

Intervenors' appeal should be dismissed because it suffers from several jurisdictional defects: the challenge to the now-vacated agency decision is moot; no further relief is available under the APA for this action or for an otherwise time-barred challenge; and the decision below was interlocutory. Moreover, even if this Court otherwise has jurisdiction, Intervenors were improperly permitted to intervene in the first place, and correction of that error alone—on which the Government cross-appeals—would obviate this appeal.

In the alternative, the district court's judgment should be affirmed on the merits because Intervenors' constitutional theory has been rejected by this Court.

STATEMENT OF JURISDICTION

Yearwood and Williamson County intervened in a challenge that other plaintiffs brought against FWS's 2017 petition denial—a challenge over which the district court had subject matter jurisdiction under 28 U.S.C. § 1331.

On April 26, 2016, the district court granted Intervenors permission to intervene as plaintiffs over the Government's objection. ROA.270-75. On March 28, 2019, the district issued an opinion and a final judgment, vacating and remanding the challenged agency decision. ROA.7192-7228. On April 11, 2019, Intervenors filed a timely notice of appeal. ROA.7249. On May 28, 2019, the Government filed a notice of cross-appeal that was timely under Federal Rule of Appellate Procedure 4(a)(1)(B). Doc. 514978923. Although Intervenors invoke 28 U.S.C. § 1291, this Court lacks jurisdiction over Intervenors' appeal for the reasons explained in Part I below.

STATEMENT OF THE ISSUES

1. Does this Court have jurisdiction over Intervenors' appeal?

a. Is the appeal moot, where the only agency action challenged below—FWS's 2017 Negative 90-Day-Finding—has been vacated and the agency has granted the specific relief requested by Yearwood and the other petitioners by issuing a Positive 90-Day-Finding, which has triggered a species status review?

b. Is there jurisdiction to grant further relief to Intervenors, where their chosen cause of action was confined to review of FWS's 2017 Finding, and that finding has now been set aside?

c. Is Intervenors' appeal interlocutory, where the district court remanded the proceedings to the agency for further consideration?

2. With respect to the Government's cross-appeal, did the district court properly grant permissive intervention to Yearwood and Williamson County where they failed to allege any question of law or fact in common with the main action below?

3. Did the district court err in concluding that Intervenors' constitutional challenge to FWS's regulation of the harvestman is foreclosed by this Court's binding precedent in *GDF Realty*, which held that FWS's listing of the harvestman under the Endangered Species Act is a constitutional exercise of the Commerce Clause power?

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. The Endangered Species Act and its protections for listed species

The ESA is "comprehensive legislation" that seeks "'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,' and 'to provide a program for the conservation of such . . . species.'" *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978) (quoting 16 U.S.C. § 1531(b)). Congress enacted the statute based on its findings that many animal and plant species had been driven to extinction by "economic growth and development untempered by adequate concern and conservation" and that species threatened with extinction have substantial "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(1) and (3). The ESA directs the Secretary of the Interior, through FWS, to determine whether a species should be placed on the list of "endangered" species. *See generally id.* § 1533; *see also id.* § 1532(6) (generally defining an "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range").

Listing a species as endangered triggers a variety of other ESA provisions. For example, under Section 4 of the ESA, FWS must develop plans to guide recovery of the listed species, 16 U.S.C. § 1536(f); and under Section 7, federal agencies must

ensure that their actions are not likely to jeopardize the continued existence of that listed species, *id.* § 1536(a)(2). Section 9 of the ESA regulates the conduct of private individuals and other persons, making it generally unlawful to "import" or "export" the listed species; to "sell or offer for sale" or "deliver, receive, carry, transport" the listed species in interstate or foreign commerce; or to "take" the listed species without authorization. *Id.* § 1538(a)(1).[1] Section 10 provides exceptions to certain of these prohibitions, and it provides a process by which any person can obtain a permit to "take" the listed species if such taking is incidental to an otherwise lawful activity. *Id.* § 1539. After a species is listed, FWS must affirmatively review the species' status every five years to determine whether it should be changed or whether the species should be removed from the list. *Id.* § 1533(c)(2).

2. Delisting petitions under the ESA

In Section 4 of the ESA, Congress established a formal administrative process through which any interested person may petition FWS to delist a species previously determined to be endangered. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. §§ 424.10, 424.14. Under this process, within 90 days of receiving a delisting petition, FWS must "make a finding as to whether the petition presents substantial scientific or commercial information" indicating that the delisting "may be warranted." 16 U.S.C.

[1] To "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Taking a listed species without a permit is subject to criminal penalty only if done "knowingly." *Id.* § 1540(a), (b).

§ 1533(b)(3)(A). If FWS finds that the petition fails to make this showing, this "negative" 90-day finding concludes the administrative process; that finding is subject to judicial review. *Id.* § 1533(b)(3)(C)(ii).

On the other hand, if FWS concludes that the petition satisfies the substantial information threshold, FWS makes a "positive" 90-day finding and thereby moves the petition to the next stage of the administrative process, wherein FWS must conduct a 12-month status review of the species. *Id.* § 1533(b)(3)(B), (C)(ii). After conducting the status review, FWS makes a final decision on the petition, determining whether delisting "is" or "is not warranted." *Id.* § 1533(b)(3)(B), (5). That decision concludes the petition process and is ultimately subject to judicial review. *Id.* § 1533(b)(3)(C)(ii) (providing review for a "not warranted" finding); *id.* 1533(b)(3)(B)(ii) (requiring an "is warranted" finding to be implemented through rulemaking, which is subject to judicial review); *see also In re Endangered Species Act Section 4 Deadline Litigation*, 704 F.3d 972, 977 (D.C. Cir. 2013).

B. Factual and procedural background

1. The delisting petition and the challenged 2017 Negative 90-Day Finding

The Bone Cave harvestman is a small orange arachnid known to live only in caves in central Texas. ROA.7194. 53 Fed. Reg. 36,029 (Sept. 16, 1988). The harvestman is predacious upon other small arthropods and also eats decomposing organic matter. ROA.1711. FWS listed the harvestman as endangered in 1988 due to

threats associated with development and urbanization. 53 Fed. Reg. 36,029; 58 Fed. Reg. 43,818 (Aug. 18, 1993). The listing was subjected to numerous unsuccessful attacks, including a delisting petition by representatives of Williamson County, 59 Fed. Reg. 11,755 (Mar. 14, 1994), and a suit by landowners who were denied a permit to develop a shopping center on harvestman habitat. *GDF Realty Investments v. Norton*, 326 F.3d 622 (5th Cir. 2003), *cert denied*, 545 U.S. 1114 (2005). In 2008, Williamson County obtained a county-wide take permit for the harvestman and other species; the County voluntarily proposed to administer that permit for its residents through a regional Habitat Conservation Plan, whereby the County and its developers undertake certain mitigation measures but are then relieved from potential take exposure. 74 Fed. Reg. 17,211 (Apr. 14, 2009).

In 2014, John Yearwood, the American Stewards of Liberty, and others invoked the ESA's administrative petition process by filing a "Petition to delist the Bone Cave harvestman . . . in accordance with Section 4." ROA.1480-1544. The Petition asserted that delisting was warranted because the harvestman had already recovered due to conservation efforts, and because new information indicated that the species was not at risk of extinction. ROA.1484-85. The Petition argued that "compelling support for delisting [was] not necessary" at this stage of the process, because FWS need only make a threshold 90-day finding that delisting "may be warranted," and then "USFWS must open a status review of the species . . . [under] the required process for making a 12-month finding under ESA." ROA.1522-23.

On May 4, 2017, FWS issued a Negative 90-Day Finding, denying the Petition. ROA.1561-1613. In particular, FWS cited the Petition's failure to present adequate data on the harvestman's population. ROA.1577.2

2. The proceedings below and vacatur of FWS's Negative 90-Day Finding

The American Stewards of Liberty and some of the other petitioners filed suit, challenging FWS's Negative 90-Day Finding. ROA.1348-76 (Plaintiffs' operative complaint). They argued that FWS applied an improperly heightened evidentiary standard by requiring their Petition to provide "unattainable" population data. *Id.*

Yearwood and the County moved to intervene as plaintiffs, and the Government opposed. ROA.140-49, 208-19. The district court denied intervention as of right, but it granted permissive intervention. ROA.270-75. Intervenors then filed their complaint, claiming that the Negative 90-Day Finding was unlawful on constitutional grounds, namely, that FWS's "decision not to delist the [harvestman] violates the [APA], because the Service does not have the constitutional authority to list [the harvestman] or prohibit the take thereof." ROA.1081, 1071-85 (Intervenors' operative complaint). These constitutional issues were not raised in the Petition. ROA.1480-1523, 1561-89. Intervenors' complaint also alleged that they had standing due to their interest in the Petition's success. ROA.1077-80. Yearwood, for example, asserted that there are three caves containing harvestman on his property, and that he wishes to allow more recreational activities near those caves but is concerned that

campfires, gunsports, and brush-clearing may cause take of harvestmen. ROA.1075-78. Williamson County asserted that under its voluntary Habitat Conservation Plan, it undertakes various efforts to preserve the harvestman.

Thereafter, all parties filed cross-motions for summary judgment. In March 2019, the district court issued an opinion and judgment. ROA.7192-7228. The court concluded that FWS's "2017 finding is arbitrary, capricious, and not in accordance with law," because FWS had demanded "a higher quantum of evidence than is permissible" by requiring petitioners to present unavailable population information. ROA.7208, 7225. The court opined that petitioners had presented substantial information indicating that delisting "may be warranted." ROA.7214. The court therefore held "unlawful and set aside" the 90-Day Finding. ROA.7225. As a result, the court decided to "vacate the 2017 finding and remand" to FWS. *Id.*

As for Intervenors' constitutional theory, the court concluded that because Williamson County was not a party to the Petition, its claims were time-barred under the APA: a facial challenge to the harvestman's 1988 listing would have accrued decades earlier. ROA.7217-19. The court concluded that Yearwood's challenge was not time-barred because he was a petitioner and could thus challenge FWS's denial. ROA.7219. But the court rejected Yearwood's constitutional theory on the basis of this Court's decision in *GDF Realty*, 326 F.3d 622, which held that the harvestman's listing and consequent take prohibition were valid exercises of authority under the Commerce Clause—despite the species' wholly intrastate presence. ROA.7219-25.

Plaintiffs and FWS accepted the district court's remand, and FWS stipulated that it would complete a new 90-day finding on the Petition by October 15, 2019. D.Ct. Doc. 187.

3. Proceedings on remand and Intervenors' appeal

On April 11, 2019, while the delisting Petition was on remand with FWS, Intervenors alone appealed the district court's summary judgment order. ROA.7249. The Government cross-appealed the district court's grant of permissive intervention. Doc. 514978923. On July 9, 2019, the Government filed a motion to dismiss in this Court, arguing that Intervenors' appeal was non-justiciable on mootness, finality, and other jurisdictional grounds. On August 12, 2019, after the motion was fully briefed, the Court ordered that the motion be "carried with the case," and that the parties' briefs should address the issue. Doc. 515073504.

4. FWS's 2019 Positive 90-Day Finding

On October 10, 2019, FWS issued a *Positive* 90-Day Finding, concluding—consistent with the district court's opinion—that the subject Petition "presents substantial scientific or commercial information indicating that delisting the Bone Cave harvestman may be warranted." 84 Fed. Reg. 54,542. Under the ESA's petition process, FWS announced the initiation of a status review "to determine whether delisting the species is warranted." *Id.* Accordingly, the Petition has now moved into the next stage of the administrative process.

SUMMARY OF ARGUMENT

This Court should dismiss Intervenors' appeal for lack of jurisdiction or for improper intervention. Alternatively, the Court should affirm the district court's dismissal of Intervenors' constitutional challenge on the merits.

1. Intervenors' appeal should be dismissed because it suffers from three independent jurisdictional defects.

First, the appeal is moot, because the sole agency action challenged below—FWS's Negative 90-Day Finding—has been vacated. The Court lacks jurisdiction over the appeal because Intervenors cannot demonstrate any injury traceable to the challenged agency action. Contrary to Intervenors' claims, the Negative 90-Day Finding did not open the door to otherwise time-barred facial challenges to the original 1988 listing of the harvestman.

Second, there is no jurisdictional basis to afford additional remedies. Remedies flow from the adjudication of a claim over which the court has jurisdiction. Plaintiffs and Intervenors brought this action under the APA to challenge FWS's Negative 90-Day Finding. Because the agency action was completely set aside, the court has no further basis to consider the additional, unrelated remedies Intervenors wish to pursue on appeal.

Third, because the district court's order remanding the matter to FWS was interlocutory, Intervenors' appeal runs afoul of the final judgment rule. The fact that Intervenors sought more than a remand order does not counsel an exception,

particularly where remand itself may obviate any need for adjudicating Intervenors' constitutional arguments. Nor does the collateral-order exception apply, because Intervenors would not be precluded from raising their arguments in the future.

2. The Government's cross-appeal provides an alternative basis for not reaching the merits of Intervenors' appeal. Because Intervenors are the only parties seeking to continue this litigation on appeal, they must establish that they were proper parties below. While the district court correctly denied them intervention as of right, it incorrectly granted permissive intervention. The court erred as a matter of law, because Intervenors shared no common question of law or fact with Plaintiffs, as required under Federal Rule of Civil Procedure 24(b).

3. On the merits, the district court correctly rejected Intervenors' argument that regulation of the harvestman is not authorized under the Commerce Clause. This Court squarely held in *GDF Realty* that regulation of the harvestman is valid under Congress's commerce power. Never having been overruled (silently or otherwise), that decision is binding and forecloses Intervenors' challenge.

STANDARD OF REVIEW

This Court is "obligated to determine de novo" whether it has jurisdiction. *In re Scruggs*, 392 F.3d 124, 128 (5th Cir. 2004). Contrary to Intervenors' incorrect statement of the law, Opening Brief at 9, the "burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction," and that party "constantly

bears the burden of proof that jurisdiction does in fact exist." *Raj v. Louisiana State University*, 714 F.3d 322, 327 (5th Cir. 2013).

A district court's denial of intervention as of right is reviewed de novo. *Ford v. Huntsville*, 242 F.3d 235, 239 (5th Cir. 2001). The grant of permissive intervention is reviewed for abuse of discretion, although subsidiary questions of law are reviewed de novo. *Newby v. Enron Corp.*, 443 F.3d 416, 421, 423 (5th Cir. 2006).

On the merits, the district court's decision on summary judgment is reviewed de novo. *Associated Builders v. NLRB*, 826 F.3d 215, 219 (5th Cir. 2016). FWS's decisions are reviewed under the APA, under which agency action may be set aside if it is "arbitrary, capricious, an abuse of discretion," or otherwise contrary to the law. 5 U.S.C. § 706(2).

ARGUMENT

I. This Court lacks jurisdiction over Intervenors' appeal.

Intervenors' ultimate goal is to obtain a constitutional ruling that requires delisting the harvestman, and they concede that the judicial vehicles for obtaining such a ruling are limited. Opening Brief at 18-19. For example, established principles of sovereign immunity prevent—as a jurisdictional matter—Intervenors from raising facial challenges that would have accrued over six years ago. *Dunn-McCampbell Royalty Interest v. NPS*, 112 F.3d 1283, 1287 (5th Cir. 1997) (citing 28 U.S.C. § 2401(a)). And although a plaintiff may challenge the application of a regulation after that limitations

period, it may do so only where there is a new "final agency action" directly involving that plaintiff. *Id.* at 1287-88.

Given these limitations, Intervenors chose to piggyback on Plaintiffs' challenge to FWS's 2017 Negative 90-Day Finding as the vehicle for raising their constitutional arguments. Indeed, it is undisputed that without that agency action in 2017, neither Plaintiffs nor Intervenors could have brought their suit. Now that the 2017 action has been vacated, any challenge to its legality is moot. But rather than accept the jurisdictional limitations of their chosen vehicle, Intervenors seek to change course and pursue free-floating constitutional arguments and remedies that are untethered to any final agency action that was—or could have properly been—challenged below. Accordingly, Intervenors' appeal must be dismissed, because (1) their claims are moot; (2) no further relief is available under the APA; and (3) the decision below is interlocutory and thus not an appealable final judgment.

A. The challenge to FWS's 2017 Negative 90-Day Finding is moot, and no other agency action is properly before this Court.

Mootness has been described as "the doctrine of standing in a time frame," flowing from the principle that the "requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)." *Environmental Conservation Organization v. Dallas*, 529 F.3d 519, 527 (5th Cir. 2008); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997). Where an intervenor seeks to appeal "in the absence of the party on whose side intervention

was permitted," the intervenor must show that he himself continues to fulfill Article III's requirements. *Diamond v. Charles*, 476 U.S. 54, 68 (1986); *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). As with other jurisdictional prerequisites, mootness (like standing) is analyzed claim-by-claim. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *see also Allen v. Wright*, 468 U.S. 737, 752 (1984) (explaining that "careful judicial examination of a complaint's allegations" is required "to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted"). Where, as here, no other statute provides the cause of action for plaintiff's claim, the APA authorizes challenges only to "final agency action." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 61–62 (2004).

The only final agency action that Intervenors challenged in their complaint was FWS's 2017 Negative 90-Day Finding. *See* ROA.1082, ¶ 65 (explaining in Count 1 that the Negative 90-Day Finding constitutes the challenged "final agency action" through which FWS has purportedly newly regulated the harvestman); ROA.1084, ¶ 80 (same in Count 2). Indeed, if there were any ambiguity about this, Intervenors made their position very clear below:

> Defendants attempt to conflate Plaintiff Intervenors' challenge to the recent negative 90-day finding with a challenge to the original [1988] listing, but the fact that *this lawsuit is based on the negative 90-day finding* is clear on the face of the pleadings.

ROA.4388 (emphasis added); *accord* ROA.4389 (Intervenors' statement that FWS's "denial of the petition" to delist was the "final agency action sufficient to create a new cause of action under the APA").

But that challenged Negative 90-Day Finding is no more. The challenged agency action has been vacated, and Yearwood's Petition is no longer "denied" but has instead moved to the next stage of the administrative process. This change has "eliminate[d] actual controversy after the commencement of a lawsuit," thereby "render[ing] that action moot." *Environmental Conservation Organization*, 529 F.3d at 527 (internal quotation marks omitted).

Mootness here has a constitutional dimension: Article III requires a party to demonstrate that it suffered an injury that is traceable to the challenged action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Intervenors' appeal falters on the causal element of standing, because Intervenors cannot show that any alleged injury to them "can be traced to the challenged action." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976). The "challenged action" that formed the basis of this lawsuit—the 2017 *Negative* 90-Day Finding—has been set aside and has no remaining effect or any injurious repercussions, and Intervenors do not seriously claim otherwise. Indeed, it would be puzzling if Intervenors claimed injury from what has now turned into a *Positive* 90-Day Finding, which is exactly what Yearwood sought as a petitioner before the agency. ROA.1522-23. Any injury that Intervenors allege therefore cannot be fairly "traced" to "the challenged action." *Simon*, 426 U.S. at 41;

see also 13A Charles A. Wright et al., *Federal Practice and Procedure* § 3531.5 (3d ed.) ("[W]hatever role injury plays in standing, it must be tied to the challenged acts if it is to be relevant."); *Clapper v. Amnesty International USA*, 568 U.S. 398, 407, 413 (2013) (plaintiffs' alleged injuries must stem from the specific agency action challenged in the complaint and not from other unchallenged government conduct); *Hollingsworth*, 570 U.S. at 705 (noting that after district court had enjoined the challenged action, parties were no longer injured and had no standing to appeal district court's order).

Intervenors contend that a vacatur order cannot negate standing, but the cases that they cite address the final judgment rule, not standing. Opening Brief at 19-20 (citing, as exemplary, *Forney v. Apfel*, 524 U.S. 266, 269 (1998), *discussed infra* p. 26-27). Moreover, standing is context-driven and depends on the nature of the challenged action. In the cases cited by Intervenors, plaintiffs challenged a binary decision point where they were denied disability benefits, and the statute permitted the court not only to remand but also to reverse and effectively award benefits. Here, by contrast, the threshold nature of a 90-day finding means that even the outright reversal of an erroneous finding would not effectively "delist" a species; instead, it would trigger the next stage of review by FWS. Now that this review is underway, a "full loaf"—in Intervenors' parlance—has been afforded at the 90-day stage.

In response to the Government's jurisdictional argument, Intervenors do not contend that their alleged injuries are actually traceable to the now-reversed 2017 finding. Instead, they claim to challenge the original 1988 listing of the harvestman,

arguing that they may do so—notwithstanding the APA's jurisdictional time-bar—because the "statute of limitations clock for the original listing restarted on the date of the [petition] denial." Opening Brief at 19 (citing *Dunn-McCampbell*, 112 F.3d at 1287). This claim fails for two reasons.

First, even under Intervenors' flawed understanding of the rules—under which the denial of a delisting petition somehow restarts the clock and opens the door to a facial challenge to the original listing—the fact that the delisting petition is now no longer "denied" means that there is no "'final agency action' sufficient to create a new cause of action under the APA." *Dunn-McCampbell*, 112 F.3d at 1287.

Second, and more fundamentally, Intervenors' restarting-the-clock theory misapprehends the teachings of *Dunn-McCampbell*, which recognized that new claims—even those raising old legal questions—must be directed at new agency action. *See* ROA.7218-20. *Dunn-McCampbell* did "not create an exception from the general rule" that the limitations period for a "*facial* challenge to a regulation" runs from "the date of publication"; the case "merely stand[s] for the proposition that an agency's *application* of a rule to a party creates a new, six-year cause of action" to challenge that application. 112 F.3d at 1287 (emphasis added). Thus, while plaintiffs may attack an agency's authority to *apply* an older regulation, they may do so only through a challenge to "some direct, final agency action involving [that] particular plaintiff" where the "impact on the plaintiff is direct and immediate." *Id.* at 1287-88. Here, the purported "application" of the 1988 listing to Yearwood was the Negative

90-Day Finding, and so any claims must be confined to that finding. Because that finding has been overturned and Yearwood has obtained his sought after positive finding, there is no present "application" of the 1988 listing to challenge. To hold otherwise would transform this litigation into a jurisdictionally forbidden challenge.

While Intervenors assert that they continue to be burdened by the harvestman's decades-old listing, Opening Brief at 10, 15-17, that assertion (even if true) does not resurrect their long-expired ability to attack the listing. An intervenor's "participatory rights remain subject to the intervenor's threshold dependency on the original parties' claims, for . . . an existing suit within the court's jurisdiction is a prerequisite of an intervention." *Harris v. Amoco Production*, 768 F.2d 669, 676-77 (5th Cir. 1985). That is certainly true here, where Intervenors did not in their complaint challenge any final agency action beyond the action challenged by Plaintiffs. The 1988 listing does not compel Intervenors to take any affirmative action, and FWS has "taken no action against [them] that demands immediate compliance." *Dunn-McCampbell*, 112 F.3d at 1288. Just as in *Dunn-McCampbell*, the mere fact that a plaintiff lives under a regulatory regime that imposes certain restrictions does not in and of itself support an as-applied challenge. *See* 112 F.3d at 1288.

Beyond raising a specter of harm—including permitting fees that must be paid if they "wish to develop their properties near Harvestman habitat"—Intervenors did not challenge any specific or even impending agency action against them: not the imposition of any fees, not the denial of any permit, not the adoption of the Habitat

Conservation Plan or the terms of the County's take permit, and not any particular enforcement action. ROA.1081-84, ¶¶ 59, 65, 80-81.[2] Even if Intervenors could make out such an as-applied challenge, they plainly did not bring that challenge here, nor did the district court consider such a challenge. *See Scherer v. U.S. Forest Service*, 653 F.3d 1241, 1245 (10th Cir. 2011) (Gorsuch, J.) (rejecting plaintiff's attempt to "expand the nature of his challenge" on appeal by suggesting his claim was a "site-specific" as-applied challenge rather than a facial challenge to a rule); *Gross v. GGNSC Southaven, LLC*, 817 F.3d 169, 183 (5th Cir. 2016) ("Absent special circumstances, a federal appellate court will not consider an issue passed over by a district court.").

If Intervenors had brought such a challenge, their dispute would have taken on a factual dimension, instead of being what Intervenors call a "pure question of law." ROA.4376. Moreover, any such as-applied challenge would run afoul of the jurisdictional time-bar, because—according to their own assertions—Yearwood and Williamson County have been purportedly burdened by the harvestman's listing for well over six years before they joined Plaintiffs' suit. ROA.1074-75.[3]

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[2] By contrast, other plaintiffs have been able to raise similar constitutional arguments in a concrete disputes arising from a new application of a rule or a new rule issued within the limitations period. *See, e.g., GDF Realty*, 326 F.3d at 626-27 (adjudicating constitutional challenge where FWS advised landowner that proposed development plan was likely to cause take of harvestman and where FWS denied landowner's take permit application); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1066 (D.C. Cir. 2003) (adjudicating FWS's application of the ESA to plaintiff's construction plans, which FWS had determined would cause illegal take).

[3] If Intervenors had brought an as-applied challenge concerning regulation of their properties, they would have needed to establish imminent injury by specifying the

B. There is no jurisdictional basis for granting further relief under the APA.

This appeal may also be dismissed for the independent (but related) reason that the court lacks jurisdiction under the APA to afford the relief that Intervenors now seek. Intervenors insist that they may pursue their appeal *because* they requested relief that they did not obtain below. Opening Brief at 14. But the mere fact that they requested something in their complaint does not make their request proper, nor does it entitle them to bootstrap the adjudication of any and all claims that could possibly result in their requested relief. Remedies flow from the adjudication of a claim that is properly before the court—not the other way around. *See, e.g., DaimlerChrysler Corp.*, 547 U.S. at 353 ("[T]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." (internal quotation marks omitted); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971) ("[T]he nature of the violation determines the scope of the remedy.").

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affirmative activities in which they planned to engage, exactly where those activities would occur in relation to the harvestman, and why those activities would likely trigger enforcement action. Whether a take permit would even be required for the various generic activities mentioned by Yearwood would be a factual question, necessarily contingent on how the activities were to be implemented. For this very reason, FWS offers technical and financial assistance to private property owners—including for activities like brush-clearing—to reduce conflicts between endangered species and private land management. *See* https://www.fws.gov/southwest/es/AustinTexas/Landowner_tools.html. Yearwood does not claim to have asked FWS about activities on his property or to have contacted the County to determine whether any activities would require a new permit or would be covered under the County's existing permit.

Here, Intervenors joined Plaintiffs' suit challenging a discrete agency action—the 2017 Negative 90-Day Finding—as unlawful under the APA, 5 U.S.C. § 706(2). Section 706(2) authorizes courts to "hold unlawful and set aside agency action" that is arbitrary, capricious, unconstitutional, or otherwise contrary to law. The 2017 agency action has now been held unlawful and set aside under the APA. That Intervenors did not succeed in their particular, constitutionally based approach in attacking that action does not change the fact that the action has nevertheless been set aside.

To be sure, Intervenors' complaint prayed for various kinds of relief beyond vacatur. ROA.1085 (seeking declaration that the 1988 listing is unconstitutional and injunction against its enforcement). But those remedies plainly exceed the scope of the federal judiciary's jurisdiction under Section 706(2). The APA does not authorize federal courts to entertain challenges to anything and everything that an agency may do, or fail to do, in the conduct of its business. Instead, Section 706(2) confines judicial intervention to those instances in which the agency has—within the applicable limitations period—taken a discrete final action, and the scope of judicial review is limited to the scope of that challenged agency action. "Where a plaintiff seeks review pursuant to the APA," a remedy that exceeds the scope of the violation "is overbroad because it exceeds the legal basis for the lawsuit," and the court would thus "exceed[] its jurisdiction" by granting such remedies. *John Doe #1 v. Veneman*, 380 F.3d 807, 815, 819 (5th Cir. 2004) (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), for the proposition that the "scope of injunctive relief is dictated by extent of the violation

established"); *accord, e.g., In re Pattullo*, 271 F.3d 898, 901-02 (9th Cir. 2001) ("To have jurisdiction, we must be able to grant effective relief within the boundaries of the present case.").

Now that the 2017 action has been completely "set aside," the case is over. No further relief is available under Section 706(2). *See American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (holding that although plaintiff had "introduced a good deal of confusion by seeking an injunction," if a plaintiff "prevails on its APA claim, it is entitled to relief under that statute, which normally will be a vacatur of the agency's order").

Any incongruity between the relief that Intervenors received below and the relief that they now seek is of their own making: Yearwood and the other plaintiffs chose to petition FWS on scientific grounds under the ESA's petition process, *see* 16 U.S.C. § 1533(b), and the resulting agency finding became the vehicle for this suit. They did not petition FWS to repeal the listing on constitutional grounds, 5 U.S.C. § 553(e), or attempt to bring a mandamus action. While Intervenors' complaint cites the Declaratory Judgment Act, *see* Opening Brief at 20-21, that statute furnishes no independent basis for jurisdiction; it authorizes declaratory relief only insofar as the court already possesses jurisdiction. *Skelly Oil v. Phillips Petroleum*, 339 U.S. 667, 671 (1950). At bottom, Intervenors' desire for other remedies cannot enlarge the court's authority to award relief that was never available under Intervenors' chosen cause of action in the first place.

C. The district court's decision is interlocutory and not therefore appealable.

Finally, Intervenors' appeal should be dismissed because the district court's decision is interlocutory and therefore not an appealable "final" judgment within the meaning of 28 U.S.C. § 1291. It is well settled in this Circuit that an "order of the district court that remands the proceedings to the administrative agency" is ordinarily not regarded as an appealable final judgment. *Memorial Hospital System v. Heckler*, 769 F.2d 1043, 1044 (5th Cir. 1985); *see also Occidental Petroleum Corp. v. S.E.C.*, 873 F.2d 325, 329-30 (D.C. Cir. 1989) (collecting cases and explaining that a remand to an agency is "interlocutory" rather than "final"). In adhering to the final judgment rule, "courts have generally pointed out that a party claiming to be aggrieved by final agency action can appeal, if still aggrieved, at the conclusion of the administrative proceedings on remand." *Id.* at 330; *see also* 33 Charles Wright et al., *Federal Practice and Procedure* § 8381 (2d ed.).

This reasoning makes abundant sense here, where the remand process has already resulted in a new Positive 90-Day-Finding on the Petition, and where the pending status review could result in a delisting decision, thereby rendering moot any claims relating back to the harvestman's listing. *See ITT Rayonier Inc. v. United States*, 651 F.2d 343, 345 (5th Cir. 1981). On the other hand, if after the status review, FWS determines that delisting is "not warranted," Intervenors will be in the same position as they were before to raise their challenges to that separate final agency action. *Cf.*

United States v. Fletcher, 805 F.3d 596, 604 (5th Cir. 2015) (declining intervenors' appeal and noting that they could re-raise their arguments against the school district the next time the district court considered lifting the school desegregation order).[4] Indeed, declining premature review is especially prudent here, given that Intervenors seek to adjudicate the constitutionality of an Act of Congress. Where the district court set aside the challenged agency action on another basis—i.e., that the action was arbitrary and capricious—it is inappropriate to adjudicate other (constitutional) grounds for setting aside the agency action. *See Northwest Austin Municipal Utility District v. Holder*, 557 U.S. 193, 205 (2009) (reiterating that courts must avoid resolving constitutional questions whenever there is a statutory or other basis for resolving the case).

Intervenors nonetheless contend that they may appeal now because (1) they raised a separate claim and sought separate remedies, and (2) they will otherwise be left "out of court." Opening Brief at 23. Neither contention has merit.

First, the mere fact that Intervenors raised separate arguments and did not obtain all they sought does not support an exception to the final judgment rule. What matters under the rule is that the disputed agency action has been remanded to the agency. *See, e.g., Mall Properties v. Marsh*, 841 F.2d 440 (1st Cir.) (per curiam) (dismissing interlocutory appeal where a permit denial was remanded to the agency,

[4] The Positive 90-Day Finding is not itself a final agency action subject to review. *See* 16 U.S.C. § 1533(b)(3)(C)(ii); *cf. In re Endangered Species Act Section 4 Deadline Litigation*, 704 F.3d at 977.

even though a separate party had intervened to defend the denial, and its separate arguments would have disposed of the case had they prevailed), *cert. denied*, 488 U.S. 848 (1988). Intervenors' reliance on *Jordan v. Pugh*, 425 F.3d 820 (10th Cir. 2005) is not relevant, as that case involved separate judgments under Rule 54(b), a rule not invoked below.

Contrary to Intervenors' claims, when a matter is remanded, that usually means that at least one party *has not* yet obtained all the relief it ultimately seeks—hence the need for the remand. Intervenors rely on *Forney v. Apfel*, 524 U.S. 266 (1998), to argue that "a party may appeal a decision vacating and remanding a challenged agency action" if that party had also requested additional relief below. Opening Brief at 14, 19, 22. But *Forney* and its progeny—including *Bordelon v. Barnhart*, 161 Fed. Appx. 348, 351 (5th Cir. 2005)—did not reject the general rule that remands are interlocutory. Rather, as one court succinctly explained:

> [*Forney*] created a separate exception to the finality rule based on the language of the Social Security Act. Accordingly, *Forney* cannot be read to extend appellate jurisdiction to all District Court orders remanding for further administrative proceedings as the parties contend, but rather speaks only to appellate jurisdiction under statutes containing language comparable to that found in the Social Security Act.

Kreider Dairy Farms v. Glickman, 190 F.3d 113, 119-20 (3d Cir. 1999); *see also* 33 *Federal Practice and Procedure*, *supra*, § 8381 (explaining that *Forney* created an exception for "remand orders issued under the judicial review provisions of the Social Security Act"). Here, unlike in *Forney* and the other SSA cases cited by Intervenors, there is

no special review provision granting courts authority to reverse and "modify" agency decisions "without remand." *See Forney*, 524 U.S. at 269. Rather, this case is governed by the APA and the general final judgment rule.[5]

Second, Intervenors urge review under the collateral order doctrine, arguing that they otherwise would be "out of court" due to res judicata and undue delay. Opening Brief at 23-25. Neither claim is persuasive. Intervenors' res judicata argument incorrectly assumes that the district court's judgment would be treated as final, when remand orders are interlocutory and for that reason lack preclusive effect. *See Mall Properties*, 841 F.2d at 443 n.3 (holding that a "prerequisite to the application of res judicata principles is a final judgment," but "the district court judgment remanding to the agency is not a final judgment," and that if the agency again issues an adverse decision on remand, intervenor can re-raise its arguments); *see also Conwill v. Greenberg Traurig*, 448 Fed. Appx. 434, 437 (5th Cir. 2011) (interlocutory decisions have no preclusive effect). Nor would res judicata apply to a new claim against a new agency decision. Collateral estoppel would likewise pose no bar because the district court's ruling on the constitutional issue was not "necessary" to its decision to remand. *See*

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[5] Intervenors note that this Court has cited *Forney* for the proposition that a party may be "aggrieved" and may appeal when it is only granted partial relief. *See Fletcher*, 805 F.3d at 602; *Ward v. Santa Fe Independent School District*, 393 F.3d 599, 604 (5th Cir. 2004). But those cases discussed the appeal of claims following final judgment where there was no remand to any agency. Moreover, Intervenors are not as a practical matter "aggrieved" by the district court's judgment; even though the court rejected their constitutional theory, it ultimately vacated the offending agency action.

California v. Rooney, 483 U.S. 307, 311 (1987) (refusing to review as "premature" a constitutional argument where the district court "could as easily have held" for the government without addressing the issue).

Contrary to Intervenors' assertion, moreover, mere "delay" in pursuing one's argument does not render a decision reviewable under the collateral order doctrine. Opening Brief at 24. The touchstone for determining whether a party has been put "out of court" is not delay itself, but whether events during the delay would render the court "powerless to afford effective relief" from the challenged judgment. *Hines v. D'Artois*, 531 F.2d 726, 731 (5th Cir. 1976). Thus, in *Hines*—which discussed *stays*, not remands—this Court reviewed a district court's order sua sponte staying the plaintiffs' civil rights complaint until they initiated and completed EEOC proceedings that were not a necessary prerequisite to filing suit. *Id.* at 728, 736. *Hines* concluded that if "plaintiffs were forced to await judicial review of the validity *of the stay order* until all EEOC proceedings . . . were completed, they effectively would be denied review on that point altogether." *Id.* at 731 (emphasis added). Not so here: the district court did not stay the case to require a parallel administrative proceeding; it remanded for the agency to reconsider the very decision from which Intervenors' suit arose.

Accordingly, this Court should dismiss Intervenors' appeal as interlocutory under the final judgment rule, and because the Court otherwise lacks jurisdiction.

II. The district court erroneously granted intervention to the Intervenors, who are now the sole appellants.

Yearwood and Williamson County moved to intervene in the district court as of right and permissively. ROA.140-49. The court correctly denied intervention as of right as not appropriate but incorrectly granted permissive intervention. ROA.272-74. The Government herein cross-appeals to seek a reversal of that improper grant of permissive intervention. If that ruling is reversed, Intervenors would have no right to pursue this appeal. Consequently, even if the Court determines that it otherwise has jurisdiction of Intervenor's appeal, it should nonetheless dismiss that appeal on the basis of improper intervention.

A. The district court erred in granting permissive intervention, where Yearwood and Williamson County shared no common question of law or fact with the main action.

Under Federal Rule of Civil Procedure 24(b), a court may grant a timely motion for permissive intervention where the applicant "has a claim or defense that shares with the main action a common question of law or fact," and intervention will not cause undue delay or prejudice. Although this Court reviews the grant of permissive intervention for abuse of discretion, the "threshold determination" of whether there is "a question of law or fact in common [with the main action] . . . is not discretionary; it is a *question of law*." *Newby*, 443 F.3d at 421, 423 (emphasis added). As explained below, the district court committed a *legal error* in concluding that the Intervenors satisfied the "common question" requirement.

In evaluating the motion to intervene, the district court found that Yearwood and Williamson County's complaint shared no common legal questions with Plaintiffs' complaint. *See* ROA.271, 274. That much is indisputably true: Plaintiffs challenged FWS's decision on the ground that the denial was *arbitrary and capricious* as a record-based matter, whereas Intervenors claimed that FWS *lacked constitutional authority* to regulate the species at all. Thus, they shared no underlying legal issues in common. As to the second prong of Rule 24(b)(1)(B)—whether there was a "question of fact" common to Intervenors' and Plaintiffs' claims—the district court summarily stated, without explanation, that Intervenors' "claims shares a common questions [sic] of fact with this action relating to the Bone Cave Harvestman." ROA.274. In so holding, the court failed to identify any *question* of fact was actually "common" to both Plaintiffs' and Intervenors' claims. Even Intervenors did not argue below that permissive intervention was warranted on the basis of a common issue of fact.[6] And it is clear from the record and proceedings below that there was no such question.

[6] Intervenors argued in summary fashion that "permissive intervention" was warranted under Rule 24(b) because Intervenors sought to "raise constitutional issues *not* raised by Plaintiffs." ROA.141, 149 (emphasis added). The government responded in kind by stating that Rule 24(b) requires an intervenor seeking permissive intervention to show that it presents a claim or defense that "'shares'" with the main case a "'common question of law or fact,'" and that intervenors "wrongly argue that they are entitled . . . to permissive intervention under . . . Rule 24(b)." ROA.211-12 (quoting Fed. R. Civ. P. 24(b)(1)(B)). The government added, in a footnote, that Intervenors "merely wish to present an alternative legal theory." ROA.218 n.5. Intervenors then focused in their reply exclusively on intervention as of right, without addressing permissive intervention. ROA.231-38. Thus, the district court's grant of

The common question of fact requirement under Rule 24(b) is similar to the commonality requirement found in Rule 20 (permissive joinder), Rule 23 (class actions), and Rule 42 (consolidation). 7C *Federal Practice and Procedure*, *supra*, § 1911 & n.14. At a minimum, the plain text of the rule calls for a shared "question" of fact that is salient to the underlying claims raised by both parties. *See id.* (collecting cases); *see also California v. Tahoe Regional Planning Agency*, 792 F.2d 779, 782 (9th Cir. 1986) (per curiam) (finding no common "question" of law or fact where the plaintiffs challenged an agency's environmental plan on its merits, while the intervenors attempted to argue that the agency was not legally constituted).[7]

Such a common question of fact is absent in this case, as evidenced by the respective complaints filed by Plaintiffs and by Intervenors. On the one hand, the factual questions underlying Plaintiffs' complaint concern whether the Petition had presented substantial scientific data indicating that delisting the harvestman may be warranted (1) because of the species' recovery or (2) because threats to the species

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permissive intervention relied on a common-question-of-fact theory that was never addressed by either party. ROA.274.

[7] In the Rule 23 context, the Supreme Court has explained that a common "question of fact" means that the parties' claims must both depend upon an underlying issue or contention to be resolved by a factfinder—the "truth or falsity" of which "will resolve an issue that is central to the validity . . . of the claims," such that all "their claims can productively be litigated at once." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *see also id.* at 369 (Ginsburg, J., concurring) (citing dictionary definitions for the point that a "'question' is ordinarily understood to be '[a] subject or point open to controversy'" and 'question of fact' as 'a disputed issue to be resolved . . . [at] trial'").

were not as harmful as previously considered. *See* ROA.1357-72. On the other hand, as Intervenors have conceded, their separate challenge raises no factual questions; instead, it raises "a pure question of law about the Federal Defendants' constitutional power to regulate a species that is found solely within one state and for which there is no commercial market." ROA.4376, *accord* ROA.1076-79.

There may indeed be factual premises underlying Intervenors' challenge, but those premises were not "questions" of fact below nor were they "common" to any questions of fact underlying Plaintiffs' claims. Plaintiffs' claims, for example, did not raise any question relating to the intrastate location of the species or whether it has a commercial market.[8] Indeed, Intervenors have confirmed on appeal that their claims shared no question of fact with Plaintiffs. Specifically, they have insisted that their appeal remains viable notwithstanding that the original case is moot, because—in Intervenor's own words—their claims do "not 'turn on the same factual questions,' or 'involve common legal issues,'" and because a decision on their claims would not have affected "the legal or 'factual development' of Plaintiffs arguments, or vice versa." Opening Brief at 23. Thus, by Intervenors' own admission, this is a situation where "the would-be intervenor's claim or defense contains no question of law or fact

[8] FWS's 2017 Negative 90-Day Finding states that the harvestman exists in two counties in Texas and refers to the original 1988 listing decision for more information about the species. ROA.7194. FWS's original listing decision acknowledged that the species is known only to exist in Texas, 53 Fed. Reg. 36,029, and no party disputed that fact below.

that [was] raised also by the main action," and so "intervention under [the permissive] branch of the rule must be denied." 7C *Federal Practice and Procedure*, *supra,* at § 1911.

Therefore, the district court erred as a matter of law in granting Yearwood and Williamson County permission to intervene. *See Newby*, 443 F.3d at 421. This legal error is prejudicial and consequential to the Government, as it has enabled Intervenors to hijack another litigants' civil action to pursue new challenges that Intervenors concede "stand wholly separate" from the original case. *See* Opening Brief at 23. As a practical matter, the Government has been dragooned into continuing to defend this litigation on appeal, notwithstanding that the underlying agency action at issue has been vacated and remanded to FWS, and the Petition is being further considered by the agency. Further, as federal agencies are frequently sued on any number of matters of widespread interest, the prejudicial effect would be felt more broadly if this sort of intervention is countenanced. If Intervenors had some basis for bringing their own suit, they could have done so. But they chose instead to move to insert themselves into Plaintiffs' separate action as their attempted vehicle, even arguing below that they did not need to establish independent jurisdiction for their claims because they were merely intervening. ROA.246-47.

Intervenors did not share a common question of law or fact with the main action below, and the district court erred in concluding otherwise. Accordingly, this Court should reverse the district court's grant of permissive intervention and dismiss Intervenors' appeal. *See Mothersill D.I.S.C. Corp. v. Petroleos Mexicanos, S.A.*, 831 F.2d

59, 63 (5th Cir. 1987) (concluding that if the district court had erroneously granted intervention, the intervenor was "not a proper party to the action," and the court lacked power to adjudicate its arguments).

B. The district court correctly denied intervention as of right.

In Part II of their brief, Intervenors erroneously state that the district court held that Williamson County lacked standing, and then they proceed to challenge that holding. Opening Brief at 27. But the court actually held that the County's facial attack on the original listing was jurisdictionally barred by the statute of limitations. ROA.7220. As discussed above (pp. 13, 17-19), that holding was correct.

Intervenors also summarily contend that the exclusion of Williamson County was contrary to Rule 24, because the County's motion to intervene was timely. Opening Brief at 30-31. But because the court did not deny intervention on grounds of "timeliness," and because the County was *granted* permissive intervention, it is not clear what ruling Intervenors are challenging here. To the extent that Intervenors are attempting to challenge the court's denial of intervention as of right to the County, their one-sentence observation that Rule 24 is meant to allow individuals to intervene when their property rights are affected, Opening Brief at 31, does not establish any legal error below. FWS's Negative 90-Day Finding and the challenge thereto did not relate to Intervenors' properties. Recognizing this, the district court properly denied intervention as of right (for both Intervenors), holding that Intervenors' property was not "the subject of the action" within the meaning of Rule 24(a)(2); that Intervenors'

ability to litigate claims relating to their properties would not be impeded by the outcome of Plaintiffs' litigation; and that a favorable ruling for FWS would simply maintain the status quo rather than impair Intervenors' property interests. ROA.271-72. Intervenors have offered in their opening brief no basis for reversal of that ruling. Thus, the error regarding permissive intervention is dispositive and requires dismissal.

III. The district court properly rejected Intervenors' constitutional challenge under this Court's binding precedent.

Intervenors and their amici contend that Congress lacks authority under the Commerce Clause and the Necessary and Proper Clause to regulate the harvestman, and therefore the district court erred in not ordering the immediate delisting of the harvestman and enjoining future enforcement of the listing—including ESA's resulting take prohibition. Opening Brief at 12-13; ROA.1085. If the Court reaches the issue, it should reject Intervenors' contention because (1) as expressed in this Court's binding *GDF Realty* decision, Congress has the constitutional authority to regulate the harvestman; and (2) *GDF Realty* remains good law.

A. *GDF Realty* held that Congress has authority under the Commerce Clause to list the harvestman as endangered and to regulate its take.

In *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), the Supreme Court held that under the Commerce Clause, Congress has authority to regulate (among other things) "those activities that substantially affect interstate commerce." In *GDF Realty*, 326 F.3d at 626-27, a landowner who had been denied a take permit by FWS argued

that Congress lacked authority under the Commerce Clause to regulate the take of noncommercial intrastate species including the harvestman. This Court rejected that argument, holding that "application of ESA's take provision to the [harvestman and other intrastate] Cave Species is a constitutional exercise of the Commerce Clause power" under the "substantial effects" category of *Lopez*. *Id.* at 640-41. In so ruling, *GDF Realty* self-consciously "appl[ied] the rational basis test as interpreted by the *Lopez* court," and reasoned that the ESA's regulation of the take of harvestman is valid because the "ESA is an economic regulatory scheme," and "the regulation of intrastate takes of the Cave Species is an essential part of" that scheme. *Id.* at 627, 640 (internal quotation marks omitted*); see also id.* at 640 ("ESA's take provision is economic in nature and supported by Congressional findings to that effect."); *accord, e.g., People for Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Service,* 852 F.3d 990, 1006-07 (10th Cir. 2017) (*PETPO*), *cert. denied*, 138 S. Ct. 649 (2018); *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1273-57 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008).

On this point, *GDF Realty* cited congressional findings supporting the conclusion that take of any endangered species threatens the "essential purpose" of the ESA, because the interdependent nature of animals and plants on one another means that allowing takes of all noncommercial intrastate species could lead to piece-meal extinctions of species of both unknown and known value. 326 F.3d at 640 ("Congress was concerned [not only] about the unknown uses that endangered

species might have [but also] about the unforeseeable place such creatures may have in the chain of life on this planet," and the "effect of a species' continued existence on the health of other species within the ecosystem seems to be generally recognized among scientists." (quoting *Hill*, 437 U.S. at 178-79, which cited H.R. Rep. No. 93-412 (1973))); *id.* at 641 (Dennis, J., concurring) ("The interrelationship of commercial and non-commercial species is so complicated, intertwined, and not yet fully understood that Congress acted rationally in seeking to protect all endangered or threatened species."); *see also supra* p. 4 (quoting Congress's statutory findings on the ESA). The Tenth Circuit similarly explained that roughly "sixty-eight percent of species that the ESA protects exist purely intrastate," and excising those species would "severely undercut" the ESA's purpose and "'leave a gaping hole'" in the statutory scheme. *PETPO*, 852 F.3d at 1007 (quoting *Raich*, 545 U.S. at 22); *see also Alabama-Tombigbee Rivers Coalition*, 477 F.3d at 1274-75 (holding that there are several rational bases for Congress's decision to include noncommercial interstate species, including the fragile and unknown relationship between species).

In holding as it did, this Court ruled consistently with the five other courts of appeals that have considered the issue—all of which have upheld Congress's rational inclusion of purely intrastate species-takes as an essential part of ESA's broader regulatory scheme, which substantially affects commerce. *See PETPO*, 852 F.3d at 990, 1007 (10th Cir.) (upholding regulation of intrastate noncommercial prairie dog); *San Luis & Delta-Mendota Water Authority v. Salazar*, 638 F.3d 1163, 1174-1177 (9th

Cir.) (same for intrastate fish with no present commercial value). *cert. denied*, 565 U.S. 1009 (2011); *Alabama-Tombigbee Rivers*, 477 F.3d at 1271-77 (11th Cir. 2007) (same); *Gibbs v. Babbitt*, 214 F.3d 483, 497-98 (4th Cir. 2000) (upholding regulation of take of intrastate red wolves with some present commercial value), *cert. denied*, 531 U.S. 1145 (2001); *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1046 (D.C. Cir. 1997) (upholding regulation of intrastate noncommercial fly), *cert. denied*, 524 U.S. 937 (1998); *cf. Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1066-80 (D.C. Cir. 2003) (upholding regulation of intrastate noncommercial toad as substantially effecting commercial development), *cert. denied*, 540 U.S. 1218 (2004).

GDF Realty squarely controls the claims here, and Intervenors do not contend otherwise. Indeed, Intervenors expressly concede that *GDF Realty* "held that . . . federal regulation of Harvestmen takes were a necessary part of the regulation of interstate commerce." Opening Brief at 12. This Circuit is "a strict *stare decisis* court," adhering without exception to the rule that "one panel of this court cannot disregard, much less overrule, the decision of a prior panel." *FDIC v. Abraham*, 137 F.3d 264, 268 (5th Cir. 1998). District courts and subsequent panels may only revisit another panel's decision if "directed" to do so by a controlling "intervening change in the law, such as by a statutory amendment, or the Supreme Court, or [the] *en banc* court." *Murphy v. Davis*, 901 F.3d 578, 597 n.11 (5th Cir. 2018). Here, in concluding that FWS's listing and regulation of the harvestman do not violate the Commerce Clause, the district court properly followed *GDF Realty*, as it was required to do.

B. *GDF Realty* remains good law.

In an effort to re-litigate this issue, Intervenors contend that *GDF Realty* is not good law because (1) it improperly applied an "outdated" "rational basis" standard rather than a "heightened scrutiny standard" in reviewing whether a law satisfies the "substantial effects" test, Opening Brief at 38-39, and (2) subsequent decisions have refashioned that test to now require heightened scrutiny under the Necessary and Proper Clause, *id.* at 41-54. Neither contention has merit.

1. *GDF Realty*'s "rational basis" review remains good law and has not been overruled.

Intervenors contend that *GDF Realty* was wrongly decided because this Court failed to use a more "searching" heightened-scrutiny standard that Intervenors assert the Supreme Court applied in reviewing congressional determinations in *Lopez* in 1995 and in *United States v. Morrison*, 529 U.S. 598 (2000). Opening Brief at 38-39. This contention is easily dispatched. *Lopez* and *Morrison* were decided literally years before *GDF Realty*, and thus cannot constitute an intervening change in law that would permit revisiting *GDF Realty*.

If anything else is necessary, one may look to the Supreme Court's subsequent decision in *Gonzales v. Raich*, 545 U.S. 1, 22 (2005), which *reaffirmed* that rational-basis review is the correct standard of scrutiny to be applied under the "substantial effects" test. In *Raich*, the Supreme Court upheld the application of the Controlled Substances Act to the intrastate cultivation and possession of home-grown medical marijuana,

and it had "no difficulty concluding that Congress had a *rational basis* for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA." *Id.* at 22 (emphasis added). Indeed, *Raich* expressly held that the Court "need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce *in fact*, but only whether a '*rational basis*' exists for so concluding." *Id.* (emphases added).

Moreover, *Raich* negates Intervenors' suggestion that a court must find "record evidence" establishing the connection between the specific intrastate activity that is regulated—here, harvestman take—and an interstate market. Opening Brief at 36, 39. To the contrary, *Raich* explained that when the challenged regulation is an application of a valid broader scheme, the "substantial effects" inquiry has a focus different from situations (as in *Lopez* and *Morrison*) in which a party asserts that "a particular statute or provision fell outside Congress' commerce power in its entirety." 545 U.S. at 23 ("This distinction is pivotal for we have often reiterated that where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances' of the class." (brackets and internal quotation marks omitted)).

Thus, *Raich* held that the individual instance of intrastate activity need not be proven to substantially affect interstate commerce where its regulation is rationally viewed as essential to a comprehensive scheme that bears a substantial relation to commerce. *See id.* at 21-22 n.32 (rejecting imposition of "a new and heightened

burden on Congress" to make "detailed findings proving that each activity regulated within a comprehensive statute is essential to the statutory scheme," and explaining that this "exacting requirement is not only unprecedented, it is also impractical"); *accord id.* at 37 (Scalia, J., concurring in the judgment) ("The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself 'substantially affect' interstate commerce."). Intervenors' contention that ESA-based regulation of the harvestman can survive only if there is record evidence establishing that individual takes of harvestman would affect interstate commerce, Opening Brief at 32, 48, 53, therefore starts from the wrong premise. The inquiry for a court is not whether takes of harvestmen substantially affect commerce in fact, but whether Congress had a rational basis for believing that regulating take of noncommercial intrastate species like the harvestman is essential to the broader regulatory scheme.

In a related vein, Intervenors argue that even if the Supreme Court has not imposed heightened, "record evidence" scrutiny under the Commerce Clause, this Court now has done so in *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013). *See* Opening Brief at 52. But that decision has no bearing on *GDF Realty* and, in any event, plainly does not support Intervenors' sweeping proposition.

In the first place, *St. Joseph Abbey* was not a Commerce Clause case, nor did it mention—much less purport to overrule—*GDF Realty*. Moreover, *St. Joseph Abbey* did not redefine rational-basis review to require Intervenors' desired heightened, record-

evidence standard. In that case, the Court reviewed whether a state regulation giving funeral homes the exclusive right to sell caskets was rationally related to consumer protection, health, and safety—as opposed to impermissible economic protectionism. 712 F.3d at 220. The Court concluded that the challenged regulation bore no rational relationship to the proffered purposes, because the state's chosen means (excluding certain casket-sellers) did nothing to change consumer protection, safety, and health standards, which had been the same for all sellers. *See id.* at 223-27. Thus, in noting that "a hypothetical rationale, even post hoc, cannot be fantasy," the Court merely applied the well-established rule that the state's "chosen means must rationally relate to the state interests it articulates." *Id.* at 223. Indeed, *St. Joseph Abbey* actually refutes Intervenors' theory of rational-basis review, explaining that such review "places no affirmative evidentiary burden on the government"; a court may "insist only that [the] regulation not be irrational." *Id.* at 223, 227 (explaining that it is the *plaintiff's* burden to "negate a seemingly plausible basis . . . by adducing evidence of irrationality").

In sum, *GDF Realty*'s version of "rational basis" review remains good law.

2. This Court's Commerce Clause test has not been supplanted with a heightened-scrutiny requirement under the Necessary and Proper Clause.

Seeking another path to heightened scrutiny, Intervenors argue that *Raich* and *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), now require all "substantial effects" cases to be analyzed under the Necessary and Proper Clause, which—Intervenors contend—requires more than the rational-basis review in *GDF*

Realty. Opening Brief at 41-45. This argument fails: no controlling authority suggests that a separate analysis—distinct from that already undertaken in accord with *Raich*—must be conducted under the Necessary and Proper Clause and, in any event, the regulation of the harvestman is necessary and proper.

As an initial matter, nothing in *Raich* or *Sebelius* requires revisiting *GDF Realty*. Some courts have read *Raich* as resting on the Commerce Clause alone, *see, e.g., PETPO*, 852 F.3d at 1005 & n.8, and others as resting on the Necessary and Proper Clause as well, *see, e.g., United States v. Whaley*, 577 F.3d 254, 260 (5th Cir. 2009). But Intervenors have identified no case in which that distinction made a difference. Indeed, the concurring opinion in *GDF Realty* aptly observed that the "comprehensive scheme principle" later applied in *Raich* already incorporates the "intersection of the Commerce Clause and the Necessary and Proper Clause." 326 F.3d at 642.[9]

Nor does *Sebelius* suggest that a re-evaluation of *GDF Realty* is warranted. *Sebelius* held that a part of the Affordable Care Act exceeded Congress's power under the Commerce Clause (but could be sustained under Congress's taxing power). 567 U.S. at 562-74. This Court explained why that holding is not license for lower courts to make wholesale departures from their Commerce Clause precedents when it

[9] Five other courts of appeals have upheld Congress's regulation of purely intrastate species takes as an essential part of the ESA's broader regulatory scheme, which substantially affects commerce. Three of those decisions came after *Raich* and one after *Sebelius*. *See supra* pp. 37-38.

rejected a criminal defendant's attempted reliance on *Sebelius* to relitigate a constitutional challenge to the prohibition against felons possessing firearms:

> Whatever the merits of [defendant's] argument on this point, we are not at liberty to overrule our settled precedent because the Supreme Court's decision in [*Sebelius*] did not overrule it. . . . [*Sebelius*] did not address the constitutionality of [18 U.S.C.] § 922(g)(1), and it did not express an intention to overrule the precedents upon which our cases . . . relied in finding statutes such as § 922(g)(1) constitutional.

United States v. Alcantar, 733 F.3d 143, 146 (5th Cir. 2013). The same is true here. The law of this Circuit—as articulated in *GDF Realty* before *Sebelius*—is that regulation of the harvestman is a valid exercise of Congress's constitutional power to regulate interstate commerce. That should end this matter.

In any event, regulation of the harvestman is valid as both a "necessary" and "proper" exercise of constitutional authority. Under the Necessary and Proper Clause, the Court examines "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 560 U.S. 126, 134 (2010); *see also Whaley*, 577 F.3d at 260. Contrary to Intervenors' contention that the Necessary and Proper Clause compels heightened scrutiny of the connection between the regulated intrastate activity and the enumerated power, Opening Brief 41-43, the Supreme Court (even after *Sebelius*) has continued to describe the level of scrutiny that would apply under a necessary and proper analysis as "rational basis" review—just as it was applied in *Raich*. *See United States v. Kebodeaux*, 570 U.S. 387, 399 (2013) (upholding sex-offender-registration

requirement because Congress could "reasonably have found" the requirement to be a "'necessary and proper' means for furthering its pre-existing registration ends," and citing, *inter alia, Raich*'s "rational basis" standard); *see also id.* at 401 (Roberts, C.J., concurring) ("What matters—all that matters—is that Congress *could have rationally determined* that [the requirement at issue] would give force to the [laws] adopted pursuant to Congress's power." (emphasis added)).

Intervenors nonetheless claim that the regulation of the harvestman cannot be deemed "necessary" for three reasons. None is supported by intervening precedent.

First, Intervenors argue that regulating intrastate species cannot be "necessary" for effectuating Congress's commerce power because such regulation "is incidental to the goal of encouraging biodiversity and not incidental to the goal of regulating interstate commerce." Opening Brief at 47. But the question is more appropriately framed as whether the regulation of noncommercial intrastate takes can rationally be viewed as "essential"—or necessary—to the ESA's regulatory scheme, which itself substantially affects commerce. *See Raich*, 545 U.S. at 22. This Court's answer is that protecting the last members of a species is essential to that very regulatory scheme. *See GDF Realty*, 326 F.3d at 640; *Babbitt*, 130 F.3d at 1053. Moreover, having non-economic motives does not undercut an otherwise valid exercise of constitutional authority. *See Raich*, 545 U.S. at 12-13 (noting that one of the main objectives of the statute was to "conquer drug abuse"); *see also Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964).

Second, citing *Raich*, Intervenors contend that intrastate activity can be deemed "essential" only if failing to regulate the local activity makes it "more difficult to regulate any interstate economic activity." Opening Brief at 46, 48. It is true that one permissible exercise of Congress's authority to regulate intrastate activities is where the failure to do so could functionally hinder the government's ability to regulate fungible commodities in commerce. *See Raich*, 545 U.S. at 18. But *Raich* itself made clear that the principle of regulating local activities has a long lineage that is not limited to regulating markets of fungible commodities. For example, *Raich* cited *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268-69 (1981), which upheld a statute requiring the protection and remediation of private lands used for coal mining. *Raich*, 545 U.S. at 22-23. *Hodel* held that Congress had a rational basis for concluding that the environmental harms of coal mining—taken in the aggregate—substantially affected interstate commerce because mining could reduce the affected land's future utility in a variety of ways, including destroying the land's wildlife resources. 452 U.S. at 276-80. In so holding, the Court rejected the argument (analogous to Intervenors' here) that the inquiry is whether the regulated "land can be regarded as 'in commerce.'" *Id.* at 275-26; *see also Raich*, 545 U.S. at 17 (citing *Perez v. United States*, 402 U.S. 146, 156 (1971)). Thus, Intervenors' narrow view of when a local activity may be deemed "necessary or "essential" to a broader scheme is wrong.

Third, Intervenors assert that regulation of intrastate species cannot be supported under the theory of species-interdependence. Opening Brief at 39, 48.

Their argument comes down to a policy disagreement with Congress's decision to apply the ESA to all species that meet the criteria for listing. But Congress's judgment is based on three related premises of the ESA: that individual species are part of an interdependent ecosystem; that the significance of a particular species (commercially and for other species) cannot reliably be determined in advance; and that extinction of a species permanently eliminates the possibility of future commercial uses. These premises are found in and supported by the ESA's history, and they form the basis for Congress's ultimate judgment that the stakes are too high to risk the irreversible loss of a resource of "incalculable" value. *See, e.g., Hill*, 437 U.S. at 174-79, 186-87 (recounting legislative history and findings). While Intervenors may have a different risk calculus, that mere difference is not a basis for a court to set aside Congress's contrary judgment (or to revisit *GDF Realty*).

Finally, Intervenors err in asserting that the regulation is not "proper" because *GDF Realty* upsets the "traditional balance of power between the federal government and the states." Opening Brief 49-52. On the contrary, *GDF Realty* maintains the balance that has been in place for the 45 years since the ESA was enacted, for the ESA protects only endangered and threatened wildlife, and "the conservation of scarce natural resources is an appropriate and well-recognized area of federal regulation." *Gibbs*, 214 F.3d at 500. The enactment of a comprehensive federal scheme protecting endangered and threatened species is not the equivalent of any assertion of a general, police-power responsibility for all wildlife within a state's

borders. The Supreme Court has observed, moreover, that establishing a federal floor of regulation can serve to prevent "destructive interstate competition," which in this context could causes extinctions of national significance. *Hodel*, 452 U.S. at 282; *see also Gibbs*, 214 F.3d at 501-03.

Whether the issue is considered under the rubric of the Commerce Clause alone or under the rubric of the Necessary and Proper Clause as well, this Court and several other courts of appeals have consistently concluded that Congress could have rationally determined that regulating the challenged subcategory of species—intrastate noncommercial species like the Bone Cave harvestman—is "essential" or "necessary" to effectuate the ESA's broader scheme. *See, e.g., GDF Realty*, 326 F.3d at 640; *id.* at 644 (Dennis, J., concurring) ("The ESA is a necessary and proper means not only to conserve the nation's valuable biological resources, but also to promote interstate commerce involving those resources."); *PETPO*, 852 F.3d at 1005 & n.8; *Alabama-Tombigbee Rivers Coalition*, 477 F.3d at 1276.[10]

[10] Even were the Court to conclude that some aspect of *GDF Realty* has been silently overruled, Intervenors would not be entitled to any remedies at this juncture. A remand to the district court would be required before any definitive conclusion could be reached as to the constitutionality of the ESA's regulating take of harvestman. The district court followed binding precedent and thus did not have occasion to consider, in the first instance, a number of issues that would require revisiting. For example, the court did not consider whether harvestman take is an activity that substantially affects commerce in and of itself, and information in the years since *GDF Realty* may bear on that analysis. *See, e.g.*, ROA.7082-88 (observing that the harvestman has been the subject of national research and tourism). Further, even if the regulation of such take were deemed invalid in certain circumstances, there is no basis for a "delisting" remedy or a general injunction against enforcement of the listing. As explained above

CONCLUSION

For the reasons discussed, Intervenors' appeal should be dismissed, and in the alternative, the district court's decision should be affirmed.

Respectfully submitted,

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(pp. 4-5), the listing triggers a host of other interconnected federal regulatory activities that are uncontested here, including federal recovery planning under Section 4 and consultation under Section 7 for activities under federal oversight.

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2019, I electronically filed the foregoing brief 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.

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CERTIFICATE OF COMPLIANCE

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