No. 19-50321

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

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

v.

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

FEDERAL APPELLEES' MOTION TO DISMISS APPEAL

JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
ANDREW C. MERGEN
VARU CHILAKAMARRI
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 353-3527
varudhini.chilakamarri@usdoj.gov

CERTIFICATE OF INTERESTED PERSONS

No. 19-50321

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

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

v.

DEPARTMENT OF INTERIOR; UNITED STATES FISH AND WILDLIFE SERVICE; DAVID BERNHARDT, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, in his official capacity; MARGARET E. EVERSON, in her official capacity as Director of the U.S. Fish and Wildlife Service; AMY LUEDERS, in her official capacity as the Southwest Regional Director of the U.S. Fish and Wildlife Service,
Defendants-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. Attorneys 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, Kevin Dow Collins, Theodore Hadzi-Antich, Chance Weldon, Chad Ennis (district court), David Barton Springer (district court).

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

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

s/ *Varu Chilakamarri*
VARU CHILAKAMARRI
Counsel for Federal Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

INTRODUCTION

In 2017, the U.S. Fish and Wildlife Service (FWS) denied a petition to remove a species called the "Bone Cave harvestman" from the endangered species list—i.e., the list of species determined to be "endangered" under the Endangered Species Act (ESA). Intervenors John Yearwood and Williamson County, Texas joined others in challenging FWS's decision. The district court determined that FWS had in fact erred, vacated the agency's decision, and remanded for further consideration. Dissatisfied with the *grounds* for the vacatur, Intervenors alone now seek to appeal. In so doing, they seek a premature resolution of a constitutional question that may be avoided altogether.

The Federal Appellees (the Government) respectfully move for dismissal of Intervenors' appeal under Federal Rule of Appellate Procedure 27(a)(1). As elaborated below, Intervenors' appeal is neither justiciable nor appropriate for adjudication because the agency action that was challenged in this case has been vacated. The challenge to the now-vacated agency action is moot, and any potential challenge to future agency actions is not ripe for review. The vacatur has accomplished all of the relief in favor of Intervenors that is appropriate at this juncture. Their appeal should therefore be dismissed.[1]

---

[1] The Government is not appealing the vacatur and remand order. *See* U.S. Notice Letter, Doc. 515025098. The Government noticed a cross-appeal to preserve its ability to challenge the grant of intervention to Yearwood and Williamson County. Notice of Appeal, Doc. 514978923. But if the instant motion to dismiss Intervenors' appeal is granted, the Government will dismiss its cross-appeal as moot. Thus, granting the instant motion would resolve this appeal in its entirety.

LEGAL AND FACTUAL BACKGROUND

A. The Endangered Species Act and 90-day findings

The ESA directs the Secretary of the Interior, through FWS, to determine whether a species should be listed as "endangered." *See generally* 16 U.S.C. § 1533. After a species is so listed, an interested person may petition FWS to "delist" the species. *Id.* § 1533(b)(3)(A). 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." *Id.* § 1533(b)(3)(A). If FWS concludes that the petition satisfies the substantial information threshold (a "positive" 90-day finding), FWS must begin a 12-month review, after which FWS may remove the species from the list of endangered species if delisting "is warranted." *Id.* § 1533(b)(3)(B).

B. The challenged agency action: FWS's 2017 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 was listed as endangered in 1988. *Id.*; 58 Fed. Reg. 43,818 (Aug. 18, 1993). In 2014, Plaintiff American Stewards of Liberty and others filed a petition with FWS to delist the harvestman, arguing that delisting may be warranted because the harvestman had allegedly recovered. ROA.1480-1544, 7198-99, 7210. On May 4, 2017, FWS issued a "Negative 90-Day Finding," denying the petition for failing to present substantial scientific information indicating that delisting may be warranted.

ROA.1561-1613. In particular, FWS cited the petition's failure to provide adequate data on the harvestman's population. ROA.1577.[2]

C. The proceedings below and the vacatur of the 90-day finding

American Stewards of Liberty and some of its members (Plaintiffs) filed suit challenging FWS's Negative 90-Day Finding. They argued that FWS applied an improperly heightened evidentiary standard by requiring their petition to provide certain population data. ROA.1348-76 (Plaintiffs' operative complaint).

John Yearwood (a property owner in Williamson County, Texas) and the County moved to intervene as plaintiffs, claiming injury from the listing of the harvestman. ROA.140-49, 1077-78.[3] They too sought to challenge FWS's 90-Day Finding—but on different grounds. Yearwood and the County urged that the 90-Day Finding was unlawful on *constitutional* grounds, claiming that FWS's "decision not to delist the [harvestman] violates the Administrative Procedure[ ] Act [ ], because the Service does not have the constitutional authority to list [the harvestman] or prohibit the take thereof." ROA.1081 (Intervenors' operative complaint); *see also* ROA.1084

---

[2] FWS initially issued a negative 90-day finding in 2015, but it reconsidered that decision upon discovering that it had inadvertently failed to examine certain reference materials submitted with the petition. ROA.7199. In 2017, FWS issued a new negative 90-day finding, which was the agency decision at issue below. *Id.*

[3] Yearwood had signed the Stewards' delisting petition but did not join other signatories in becoming a named party to Plaintiffs' complaint (although he is noted in Plaintiffs' complaint as a member of the Stewards). ROA.1482, 1350-53. Williamson County was not a signatory to the petition. ROA.1482.

(citing the Commerce Clause and Tenth Amendment). These constitutional issues were not raised in the delisting petition. *See* ROA.1480-1523, 1561-89. The district court granted Yearwood and Williamson County permission to intervene over the Government's objection. ROA.270-75. Thereafter, all parties filed cross-motions for summary judgment.

On March 28, 2019, the district court issued an opinion and a final judgment. ROA.7192-7228 (Exhibit 1). The court concluded that the "2017 finding is arbitrary, capricious, and not in accordance with law," because FWS had demanded "a higher quantum of evidence than is permissible" under the ESA by requiring Plaintiffs to present population information that was unavailable. ROA.7208, 7212, 7225. The court noted that Plaintiffs' petition presented substantial information indicating that delisting "may be warranted." ROA.7214. The court therefore held "unlawful and set aside" FWS's 90-Day Finding under the APA. ROA.7225. As a result, the court decided to "vacate the 2017 finding and remand" to FWS. *Id.*

As for Intervenors, the court held that because Williamson County was not a party to the delisting petition, its claims were time-barred under the APA, as any injuries stemming from the species' original listing would have accrued decades earlier. ROA.5251-53, 7217-19. The court concluded that Yearwood's challenge was not time-barred because he was a signatory to the delisting petition. ROA.7219. The court then rejected Yearwood's constitutional theories, following this Court's decision in *GDF Realty Investments v. Norton*, 326 F.3d 622 (5th Cir. 2003), which held that the

ESA's listing of the harvestman and consequent regulation of private activities vis-à-vis the species were valid exercises of authority under the Interstate Commerce Clause —notwithstanding the species' wholly intrastate presence. ROA.7219-25.

FWS accepted the vacatur and remand order, and has stipulated that it will complete a new 90-Day Finding by October 15, 2019. D.Ct. Doc. 187.

ARGUMENT

"Article III of the United States Constitution limits federal courts' jurisdiction to 'cases' and 'controversies.'" *Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005). The case-or-controversy limitation plays a vital role in ensuring that the "power and duty of the judiciary is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts" and not from "an unlimited power to survey the statute books and pass judgment on laws." *International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809, 817 (5th Cir. 1979) (internal quotation marks omitted). In other words, plaintiffs must not "enlist the aid of a federal court in a general effort to purge unconstitutional measures from the body of the law." *Id.*

"In order to give meaning to Article III's case-or-controversy requirement, the courts have developed justiciability doctrines," such as the standing, mootness, and ripeness doctrines. *Sample*, 406 F.3d at 312. A case or controversy "must be extant at all stages of review." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018). In the absence of a case or controversy, an appeal must be dismissed. *Id.*

Such a dismissal is compelled here. FWS's 90-Day Finding has been vacated, and the delisting petition is once again before the agency. Consequently, the case or controversy that started this suit has been extinguished, and further review by this Court at this time is improper. *First*, Intervenors no longer have a live claim: any injury stemming from the vacated decision is gone, and any injury that might stem from FWS's future decision on the remanded petition is not yet ripe. *Second*, the vacatur of the agency's decision represents a favorable judgment—from which a plaintiff is generally precluded from appealing, particularly where the appeal raises a constitutional question that may be avoided. *Finally*, unless and until the agency renders a new challengeable decision, no further remedy is available or appropriate given the scope of the action below.

I. The vacatur of the Negative 90-Day Finding rendered Intervenors' challenge non-justiciable.

Even if Intervenors once had a justiciable claim against FWS's 90-Day Finding, that claim was effectively rendered moot when the Finding was vacated by the district court, and any new challenge they may have to a future FWS finding is not yet ripe.

"[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986); *cf. Town of Chester v. Laroe Estates*, 137 S. Ct. 1645, 1651 (2017). Article III, in turn, requires a party to demonstrate that it has suffered an injury that is traceable to the

defendant's action and will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Intervenors' appeal falters on the causal element of standing. Intervenors cannot show that any current alleged injury "fairly can be *traced to the challenged action* of the defendant." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976) (emphasis added); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

To begin with, FWS's Negative 90-Day Finding issued in 2017 was the *only* agency "action" challenged by any party in this case.[4] 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 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); *see also* ROA.4389 (stating 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").

That Negative 90-Day Finding has been set aside and vacated, and that vacatur has been accepted by FWS, which is now reconsidering the delisting petition. Vacatur wipes the slate clean of that 2017 agency action. *See Camreta v. Green*, 563 U.S. 692,

---

[4] Plaintiffs' complaint challenged only the 2017 finding, and when Intervenors joined, they also targeted only that agency action, albeit for different reasons. *See* ROA.1349 (Plaintiffs' operative complaint ¶ 2); ROA.1081-84 (Intervenors' operative complaint ¶¶ 59, 80).

713 (2011) ("Vacatur then rightly strips the [court] decision below of its binding effect" (internal quotation marks omitted)); *Fort Knox Music Inc. v. Baptiste*, 257 F.3d 108, 110 (2d Cir. 2001) ("A vacated judgment has no effect"; the appealing party "is thus no longer subject to" that judgment; "he is no longer aggrieved by that judgment."); *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 151 (D.C. Cir. 1993) (recognizing similar principles regarding vacatur of agency decisions). The vacatur of FWS's Negative 90-Day Finding naturally took with it any illegal effects emanating from that finding. Any alleged ongoing injury thus cannot be fairly "traced" to "the challenged action" because the non-extant finding cannot cause any continuing injury. *Simon*, 426 U.S. at 41; *see also* Charles A. Wright et al., 13A *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."). Therefore, Intervenors lack standing to pursue their appeal, and their appeal is moot. *See Arizonans for Official English*, 520 U.S. 43, 68 n.22 (1997) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).").

Intervenors cannot circumvent the traceability requirement of standing by conflating the agency action that they did challenge in this lawsuit with some other agency action that they did not (and could not) challenge. *See, e.g., Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 407, 413 (2013) (holding that plaintiffs could not "satisfy the 'fairly traceable' requirement" of Article III standing because they could not show that their injuries stemmed from the challenged surveillance provision, as opposed to

preexisting government surveillance actions, "none of which [had been] challenged"). In the district court, Intervenors asserted that they were generally injured by the *listing* of the harvestman in 1988. But any ongoing injuries allegedly stemming from that particular agency action do not count for Article III standing purposes, because the 1988 listing was never before the district court. The court considered a distinctly different action: the Negative 90-Day Finding rejecting the Stewards' petition to *delist* the harvestman is not equivalent to the 1988 determination to *list* the species. The listing decision required FWS to conclude that the species was in fact endangered, *see* 16 U.S.C. § 1533(a)(1) (five criteria for listing), whereas the Negative 90-Day Finding centered on the Stewards' failure to present substantial information that delisting may be warranted, *see id.* § 1533(b)(3) (delisting procedures). That finding—and the district court's review thereof—turns on the adequacy of the information presented by petitioners, not on a fresh determination that the species is endangered.

In any event, if Intervenors' alleged injuries truly stemmed from the Negative 90-Day Finding, then the vacatur will prevent that Finding from causing further injury. Instead, Intervenors' continued pursuit of this litigation post-vacatur (and without the original Plaintiffs) confirms that they now solely seek to remedy injuries that existed in the status quo—well before the Negative 90-Day Finding ever issued. But as the Supreme Court has recognized, plaintiffs cannot satisfy the traceability prong of standing by treating preexisting agency actions as interchangeable with subsequent challenged actions. *See Clapper*, 568 U.S. at 407 ("[B]ecause the

Government was allegedly conducting surveillance of [plaintiff] before Congress enacted [the challenged provision] it is difficult to see how the safeguards that [plaintiff] now claims to have implemented can be traced to [the challenged provision].").

Causation is a foundational aspect of the standing requirement, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998), and excusing a causal break between the challenged action and a party's injury would permit plaintiffs to seek judicial review of free-floating claims of injury without an actual case or controversy. That danger is evident in a case like this, where Intervenors allege injuries stemming from the listing of a species that occurred more than 30 years ago but challenge no specific application of that listing to them.[5] No court has jurisdiction to review that generalized time-barred claim; however, by pursuing this appeal divorced from the Stewards' petition, that review is exactly what Intervenors circuitously seek to obtain.[6]

---

[5] Intervenors claim to have an interest in eliminating protective land-use restrictions, but they failed to challenge any specific application of these ESA restrictions to them. Unlike plaintiffs in prior cases, *see infra* p. 15 & n.8, Intervenors do not challenge a permit denial, nor have they claimed any imminent enforcement action against them. Instead, their claim relied solely on the "Negative 90-Day Finding denying Plaintiffs petition to delist the BCH," under the theory that this "denial constitutes final agency action whereby the Service has chosen to regulate the [harvestman]." ROA.1084, ¶ 80. But under this logic, now that the 90-Day Finding is vacated, there is no ripe action whereby the Service "has chosen to regulate the [species]."

[6] Intervenors agreed that a free-floating challenge to the 1988 listing would fall outside of the APA's 6-year statute of limitations. ROA.4387. This jurisdictional limitation is why the district court correctly dismissed Intervenors' claims insofar as they attacked the 1988 listing itself. ROA.7219-20; *see also Dunn-McCampbell Royalty Interest, Inc. v.*

Because Intervenors may no longer allege injuries stemming from the now-vacated Negative 90-Day Finding, their appeal is moot; any challenge they may wish to bring to a new agency action following remand has not yet ripened. The appeal should be dismissed on this ground alone.

II. Review is inappropriate given the posture of this appeal.

In addition to the Article III bar, the judgment below is not appealable by any plaintiff, and the fact that Intervenors may disagree with the nature of the remand or seek to challenge the agency's underlying authority to regulate the harvestman does not compel a contrary conclusion.

As a general rule, a party may not appeal from a favorable judgment simply to obtain review of a conclusion it deems erroneous. *See, e.g., Camreta*, 563 U.S. at 703-04; *Mathias v. Worldcom Technologies, Inc.*, 535 U.S. 682, 684 (2002); *Ward v. Santa Fe Independent School District*, 393 F.3d 599, 603 (5th Cir. 2004) ("It is a central tenet of appellate jurisdiction that a party who is not aggrieved by a judgment of the district court has no standing to appeal it."). The Supreme Court has explained the prudential aspect of this rule by noting that the judiciary's resources "are not well spent superintending each word a lower court utters en route to a final judgment in the petitioning party's favor." *Camreta*, 563 U.S. at 703-04. Consequently, courts have "adhered with some rigor" to the principle that a court "reviews judgments, not

---

NPS, 112 F.3d 1283, 1286-87 (5th Cir. 1997) (holding that the 6-year statute of limitations governing APA claims "operates to deprive federal courts of jurisdiction").

statements in opinions." *Id.* (internal quotation marks omitted). As this Court has put the point, it is "well-established that the Intervenors may not appeal for the sole purpose of seeking a more favorable opinion from the district court." *United States v. Fletcher ex rel. Fletcher*, 805 F.3d 596, 604 (5th Cir. 2015); *see also id.* at 602 (reiterating that a "party may not appeal a favorable ruling for the purpose of obtaining a review of findings he deems erroneous" (internal quotation marks omitted)).

This rule is especially applicable here, where Intervenors seek to litigate a constitutional issue that was appended to a challenge to an agency action that is now void. The district court's judgment vacating FWS's Negative 90-Day Finding is one that favored the Plaintiffs *and* Intervenors because it set aside the agency action that was challenged by both parties. Although the district court rejected Intervenors' legal theory for challenging the finding (and, on that basis, partially denied their summary judgment motion), Intervenors are not substantively aggrieved by the judgment in a manner that would render their appeal reviewable in this posture. In *California v. Rooney*, 483 U.S. 307, 311 (1987), for example, the State sought to appeal the lower court's adverse determination that the State's search of a communal trash bin was unconstitutional. But the Supreme Court held that review of that issue would be "most premature" because—notwithstanding the excluded trash bin evidence—the lower court had still upheld the State's search warrant, "which was the sole focus of the litigation." *Id.* at 311, 314. Thus, California effectively prevailed, even if it was for a reason different from the one it may have desired.

The same is true here. Intervenors may desire further adjudication of their constitutional arguments against the Negative 90-Day Finding, but that finding—which was "the sole focus of the litigation"— is no longer extant, and the delisting petition (which Intervenors presumably still wish to see granted) is back on the table. Just as in *Rooney*, where the Supreme Court refused review notwithstanding the State's claim that the constitutional ruling was "adverse to the State's long-term interests," here, Intervenors' interest in the constitutional ruling does not warrant review of an otherwise favorable judgment vacating the agency action at issue. *See also Fletcher*, 805 F.3d at 604 (dismissing the intervenors' "unusual" appeal, where they had effectively prevailed in preventing a school district from obtaining relief from a desegregation order, but nonetheless sought review of the district court's reasons for denying the school district's request); *Ward*, 393 F.3d at 603 ("[A] winning party cannot appeal merely because the court that gave him his victory did not say things that he would have liked to hear, such as that his opponent is a lawbreaker." (internal quotation marks omitted)). In short, although Intervenors may view the district court's decision as a loss, the judgment was not unfavorable in a way that renders the matter fit for appellate review. Although Intervenors may be unsatisfied with the judgment because the remand leaves FWS free to issue a new adverse determination, and because their broader constitutional challenge was not accepted, neither argument demonstrates that review is appropriate in the present posture.

A. The remand order is interlocutory and not appealable.

While Intervenors may object to the remand process insofar as it enables FWS to further consider the delisting petition—rather than categorically requiring delisting at this stage—Intervenors are not yet aggrieved by this remand in a manner that permits appellate review. Indeed, remands are typically considered to be interlocutory because they are inherently non-injurious. 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 is "interlocutory" rather than "final" and thus generally not immediately appealable except by the agency, which is the only party that would be uniquely and irrevocably injured by the remand process, which cannot be undone (*citing Cohen v. Perales*, 412 F.2d 44, 48 (5th Cir. 1969))); *cf.* 28 U.S.C. § 1291 (extending appellate jurisdiction only to "final decisions of the district courts").[7]

[7] Intervenors cannot claim injury from the mere fact that FWS will undertake an internal administrative process on remand to reconsider Plaintiffs' delisting petition. *See, e.g., Steel Co.,* 523 U.S. at 107 (explaining that the "psychic satisfaction" that the "Nation's laws are faithfully enforced" is not an acceptable Article III remedy); *Allen v. Wright*, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.").

Although there is an exception to this general rule that permits review of certain collateral orders, *see Exxon Chemicals America v. Chao*, 298 F.3d 464, 469 (5th Cir. 2002), that exception is not available here because the ruling on the constitutional claims is not effectively "unreviewable" on a subsequent appeal from a final judgment. If FWS issues a *new* negative 90-day determination, Intervenors will be in the same position as they were before to raise their challenges to that separate agency action. *See Fletcher*, 805 F.3d at 604 (declining the 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).[8]

But review of the remand order now makes little sense, where the remand itself could initiate steps toward a *delisting* decision, thereby rendering moot any claims relating to the listing of the harvestman. *ITT Rayonier Inc. v. United States*, 651 F.2d 343, 345 (5th Cir. 1981) (holding that action for declaratory and injunctive relief based on claim that EPA exceeded statutory authority in issuing a list of violating facilities was moot, where EPA had removed plaintiff from its list). This Court should

[8] Indeed, plaintiffs have been able to adjudicate similar constitutional arguments by raising them in a concrete dispute that was presented in an appropriate procedural posture. *See, e.g., GDF Realty*, 326 F.3d at 622 (challenging on constitutional grounds the decision by FWS to deny landowners a permit to develop lands occupied by the same protected harvestman); *People for the Ethical Treatment of Property Owners v. FWS*, 852 F.3d 990, 995 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 649 (2018) (raising similar constitutional arguments challenging an amendment to a rule regulating the take of a protected intrastate listed species).

therefore decline "Intervenors' invitation to jumpstart the appellate process." *Fletcher*, 805 F.3d at 607.

B. This Court should decline review under principles of constitutional avoidance.

Similarly, Intervenors may urge that the nature of their challenge—targeting FWS's underlying authority to regulate the harvestman—entitles them to immediate review. To the contrary, principles of constitutional avoidance compel incremental adjudication here.

It is "a well-established principle . . . that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Northwest Austin Municipal Utility District v. Holder*, 557 U.S. 193, 205 (2009) (internal quotation marks omitted). That "other ground" exists here, and it was the reason for the vacatur. Where an unlawful agency decision has been vacated, it is inappropriate to continue adjudicating other possible reasons that the agency decision could have been rejected—particularly where those other reasons are constitutional. Instead, the proper course is to hear such challenges only if, upon reconsideration, the agency's decision compels such a resolution. This principle was illustrated in *Northwest Austin*, where the Supreme Court concluded that it was unnecessary to review the district court's ruling that the preclearance requirement of the Voting Rights Act was constitutional, because the Court concluded that the plaintiff qualified for a statutory exception to that challenged requirement. *See* 557 U.S. at 197, 204 ("[T]he importance

of the question does not justify our rushing to decide it," because "judging the constitutionality of an Act of Congress is the gravest and most delicate duty that this Court is called on to perform.").

The Supreme Court also made plain in the *FCC v. Fox Television Stations, Inc.* litigation that incremental adjudication is no less appropriate where (as here) a litigant characterizes its claim as a broader challenge to the agency's underlying authority to act. *See* 556 U.S. 502 (2009); 567 U.S. 239 (2012). In that litigation, Fox Television first challenged an FCC indecency finding as arbitrary and capricious and also argued that the agency's underlying indecency regime was unconstitutionally vague. 556 U.S. at 511, 513. The Second Circuit reversed and remanded FCC's finding as inadequate under the APA and declined to reach the constitutional question. *Id.* Only after the agency appealed and successfully defended its reasoning under the APA did it become necessary for the courts to consider the constitutionality of the finding. 567 U.S. at 258-59. And even in this second round of litigation, the Supreme Court considered only one of the two constitutional issues presented. *Id.* Because the Court held that FCC had not provided fair notice—and reversed and remanded the FCC's finding on that basis—the Court declined to reach a broader argument that the First Amendment deprived the FCC of authority to regulate the programming at issue. *Id.* As a result, the Court's "opinion [left] the [FCC] free to modify its current indecency policy" on remand and to apply that policy until a new challenge was ripe for review. *Id.* at 259.

Intervenors' appeal is no different. They aim to present broader constitutional issues for the Court's consideration, but like the plaintiffs in *Northwest Austin* and the *Fox Television* litigation, Intervenors essentially gained success on a narrower ground and now must wait to see if a constitutional challenge ripens. *See Martin Tractor Co. v. FEC*, 627 F.2d 375 (D.C. Cir. 1980) (holding that the plaintiff's constitutional challenge to the Federal Election Campaign Act was not ripe where the plaintiff could potentially seek an administrative remedy), *cert. denied*, 449 U.S. 954 (1980).

III. No further relief is available within the scope of this action.

This appeal may also be dismissed for the related reason that no further relief is available to Intervenors under the limited scope of this action.

Intervenors joined a suit challenging a discrete agency action (the Negative 90-Day Finding) as unlawful under the APA, 5 U.S.C. § 706(2), which authorizes courts to "hold unlawful and set aside agency action, findings, or conclusions" if they are (among other things) arbitrary or capricious, unconstitutional, or otherwise unlawful. Intervenors likewise alleged that the Finding was unlawful under Section 706(2). ROA.1083. Under Section 706(2), the Negative 90-Day Finding has been declared unlawful and set aside. No further remedy is available under Section 706(2).

Although Intervenors challenged only the Negative 90-Day Finding and did not bring an action for mandamus relief or a suit to compel agency action under Section 706(1), they nonetheless demanded a slew of prospective injunctive remedies beyond vacatur. ROA.1085 (requesting a broad declaration that the 1988 listing is

unconstitutional, an order requiring FWS to rescind the 1988 listing, and a permanent injunction against ESA protections for the harvestman). But those remedies plainly exceed the scope of Section 706(2). *See, e.g., American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (explaining that notwithstanding that the plaintiff had "introduced a good deal of confusion by seeking an injunction," if a plaintiff "has standing . . . and prevails on its APA claim, it is entitled to relief under that statute, which normally will be a vacatur of the agency's order").

Now that the agency's Negative 90-Day Finding has been set aside, the case is over. That Intervenors did not succeed on their constitutional theory does not change this fundamental fact, nor does it enlarge the Court's authority to award relief that was never available under Intervenors' chosen cause of action. 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 taken a discrete action. Thus, the scope of judicial review is limited to the scope of the challenged agency action. *See John Doe #1 v. Veneman*, 380 F.3d 807, 815 (5th Cir. 2004) (concluding that an injunctive remedy "exceeded the legal basis for review under the APA," where the agency had agreed not to release information that the plaintiff sought to protect, and holding that the "plaintiff has no remedy until the agency determines it will release requested information"); *cf. Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 160 (2010) (holding that where the district court vacated

the challenged deregulation order under APA, it had no authority to enjoin future deregulation orders that would have been independently subject to review); *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").

The district court has provided all the relief that is available under Section 706(2), the vehicle by which the present lawsuit was filed. As in *John Doe*, 380 F.3d at 814, because the challenged action is no more, no further remedy is available under the APA unless and until the agency decides to issue a new and adverse decision.

CONCLUSION

For the foregoing reasons, Intervenors' appeal should be dismissed.

Respectfully submitted,

s/ *Varu Chilakamarri*
JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
ANDREW C. MERGEN
VARU CHILAKAMARRI
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice

July 9, 2019
DJ 90-8-6-07841

CERTIFICATE OF CONFERENCE

Pursuant to Circuit Rule 27.4, counsel for Federal Appellees notified counsel for Intervenor Appellants of the Federal Appellee's intent to file this motion. Counsel for Intervenor Appellants advised that they oppose the motion to dismiss and intend to file a response.

Counsel for Intervenor Defendants (Center for Biological Diversity, Travis Audubon, Defenders of Wildlife) advised that they do not oppose the motion to dismiss. Counsel for Plaintiffs-Cross Appellees (American Stewards of Liberty, et al.) advised that they take no position on this motion.

s/ *Varu Chilakamarri*
VARU CHILAKAMARRI
Counsel for Federal Appellees

Dated: July 9, 2019

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 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.

s/ *Varu Chilakamarri*
VARU CHILAKAMARRI
Counsel for Federal Appellees

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Fed. R. App. P. 27(d) and Fed. R. App. 32, because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d) because it contains 5,164 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word. I further certify that any required privacy redactions have been made, the electronic submission is an exact copy of the paper document, and the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/ *Varu Chilakamarri*
VARU CHILAKAMARRI
Counsel for Federal Appellees

Dated: July 9, 2019

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

AMERICAN STEWARDS OF LIBERTY, CHARLES SHELL, CHERYL SHELL, WALTER SIDNEY SHELL MANAGEMENT TRUST, KATHRYN HEIDEMANN, ROBERT V. HARRISON, SR., JOHN YEARWOOD, AND WILLIAMSON COUNTY, TEXAS, PLAINTIFFS,	§	
JOHN YEARWOOD AND WILLIAMSON COUNTY, TEXAS, PLAINTIFF-INTERVENORS,	§	
V.	§	CAUSE NO. 1:15-CV-1174-LY
DEPARTMENT OF THE INTERIOR, UNITED STATES FISH AND WILDLIFE SERVICE, SALLY JEWELL, DANIEL M. ASHE, BENJAMIN N. TUGGLE, CENTER FOR BIOLOGICAL DIVERSITY, TRAVIS AUDUBON, AND DEFENDERS OF WILDLIFE, DEFENDANTS,	§	
CENTER FOR BIOLOGICAL DIVERSITY, DEFENDERS OF WILDLIFE, AND TRAVIS AUDUBON, DEFENDANT-INTERVENORS.	§	

MEMORANDUM OPINION AND ORDER

Before the court in the above-styled and numbered cause are Plaintiffs' Motion for Summary Judgment filed October 5, 2017 (Dkt. No. 132), Plaintiff-Intervenors' Motion for Summary Judgment filed October 10, 2017 (Dkt. No. 133), Amicus-Curiae Brief of Mountain States Legal Foundation in Support of Plaintiff-Intervenors' Motion for Summary Judgment filed October 16, 2017 (Dkt. No. 136), Brief of Texas as Amicus Curiae in Support of Intervenor-Plaintiffs' Motion for Summary Judgment filed October 6, 2017 (Dkt. No. 137), Federal

Defendants' Cross Motion for Summary Judgment & Opposition to Plaintiffs' Motion for Summary Judgment filed December 15, 2017 (Dkt. Nos. 142 & 144), Federal Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiff-Intervenors' Motion for Summary Judgment filed December 15, 2017 (Dkt. Nos. 145 & 146), Defendant-Intervenors' Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment filed December 21, 2017 (Dkt. No. 147 & 148), Federal Defendants' Response to Amici Curiae Briefs of Mountain States Legal Foundation and Texas filed December 22, 2017 (Dkt. Nos. 149 & 150), Defendant-Intervenors' Cross-Motion for Summary Judgment and Opposition to Plaintiff-Intervenors' Motion for Summary Judgment filed December 22, 2017 (Dkt. Nos. 151 & 152), Plaintiff-Intervenors' Combined Reply in Support of Motion for Summary Judgment and Opposition to Federal Defendants and Defendant-Intervenors' Cross-Motions for Summary Judgment filed January 19, 2018 (Dkt. Nos. 154 & 155), Plaintiffs' Reply to Responses to Plaintiffs' Motion for Summary Judgment filed January 19, 2018 (Dkt. No. 156), Plaintiffs' Combined Response in Opposition to Defendants' Cross-Motion for Summary Judgment and Opposition to Defendant-Intervenors' Cross Motion for Summary Judgment filed January 19, 2018 (Dkt. No. 157), Federal Defendants' Reply in Support of Their Motion for Summary Judgment Against Plaintiff-Intervenors filed February 16, 2018 (Dkt. No. 158), Federal Defendants' Opposed Motion to Strike Four Exhibits Attached to Plaintiffs' Reply Brief filed February 16, 2018 (Dkt. No. 159), Federal Defendants' Reply In Support of Their Motion for Summary Judgment Against Plaintiffs filed February 2, 2018 (Dkt. No. 160), Defendant-Intervenors' Reply in Support of Their Cross-Motion for Summary Judgment and in Opposition to Plaintiff-Intervenors' Motion for Summary Judgment filed February 16, 2018 (Dkt. Nos. 161 & 162), Plaintiffs' Opposition to Federal Defendants' Motion to Strike filed February 23, 2018

(Dkt. No. 163), Federal Defendants' Reply in Support of Their Opposed Motion to Strike Four Exhibits Attached to Plaintiffs' Reply Brief filed February 27, 2018 (Dkt. No. 165), Plaintiff-Intervenors' Notice of Supplemental Authority filed December 3, 2018 (Dkt. No. 172), Response to Plaintiff-Intervenors' Notice of Supplemental Authority filed December 10, 2018 (Dkt. No. 173), and Defendant-Intervenors' Response to Plaintiff-Intervenors' Notice of Supplemental Authority filed December 10, 2018 (Dkt. No. 174). On March 2, 2018, the court conducted a hearing on the motions at which all parties were represented by counsel. Having reviewed and considered the motions, responsive and supplemental filings, arguments of counsel, and applicable law, the court renders the following order.

I. BACKGROUND

The bone cave harvestman ("harvestman") is a tiny, pale, orange, eyeless, almost invisible, spider-like species that spends its entire life underground. It derives its nutrition from bugs, moisture, and other nutrients that filter down from the surface. It is an elusive spider known to inhabit only Travis and Williamson Counties, Texas and does not often reveal itself to even the most skilled observer. Because of the harvestman's limited population and fragile nature, the United States Fish and Wildlife Service ("the Service") listed the species as endangered in 1993. This case arises out of Plaintiffs ("the Stewards")[1] and Plaintiff-Intervenors' ("Yearwood") request to remove the harvestman from the endangered-species list.

[1] When a case presents competing claims of varying parties, it is often hard to keep the claims of an individual party in focus. And using the legal designation of the parties is often hard for the reader to follow. Here, certain of the parties may be grouped with regard to issues where their interests do not diverge. For simplicity, the court will refer to the parties as follows, unless otherwise noted or needed for context: Plaintiffs American Stewards of Liberty, Charles Shell, Cheryl Shell, Walter Sidney Shell Management Trust, Kathryn Heidemann, Robert V. Harrison, Sr., John Yearwood, and Williamson County, Texas will be collectively referred to as "the Stewards." Plaintiff-Intervenors John Yearwood and Williamson County, Texas will be collectively referred to as "Yearwood." Defendant-Intervenors Center for Biological Diversity, Defenders of Wildlife, and Travis Audubon will be collectively referred to as "the Center."

A. THE ENDANGERED SPECIES ACT

Congress enacted the Endangered Species Act in 1973 (the "Act") to "provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and to "provide a program for the conservation of . . . endangered species." 16 U.S.C. § 1531(b). A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." *Id.* at § 1532(6). The Service is responsible for determining whether to list a species as endangered. *Id.* at § 1533(a)(1). It is also responsible for determining whether to delist a species. *Id.* at § 1533(a)(2)(B).

"[I]nterested person[s]" may petition the Service to change the status of a species, including petitioning the Service to remove a species from the endangered-species list. *Id.* at § 1533(b)(3)(A). Within 90 days of the filing of a petition, the Service must make a finding ("90-day finding") as to whether the petition "presents substantial scientific or commercial information indicating that the petitioned action may be warranted." *Id.* Though "substantial scientific and commercial information" may seem like a high bar, *id.*, the Service's regulations indicate otherwise, defining substantial information as only "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b)(1) (2014).

The Service must evaluate a petition for a "detailed narrative justification" for the requested delisting and a description of the "numbers and distribution of the species involved," "any threats faced by the species," and whether the petition "[p]rovides information regarding the status of the species over all or a significant portion of its range." *Id.* at § 424.14(b)(2)

As the interests of Plaintiffs, American Stewards of Liberty, Charles Shell, Cheryl Shell, Walter Sidney Shell Management Trust, Kathryn Heidemann, Robert V. Harrison, Sr., John Yearwood, and Williamson County, Texas, do not diverge, the court will refer to Plaintiffs collectively as "the Stewards," unless otherwise noted or as needed for context.

(2014). The petition need only be "based on available information." *Id.* The Service must publish its findings in a "listing determination" based on a consideration of five factors:

> (A) the present or threatened destruction, modification, or curtailment of [the species'] habitat or range;
> (B) overutilization for commercial, recreational, scientific, or educational purposes;
> (C) disease or predation;
> (D) the inadequacy of existing regulatory mechanisms; or
> (E) other natural or manmade factors affecting [the species'] continued existence.

16 U.S.C. § 1533(a)(1); *see also* 50 C.F.R. § 424.11(c), (d) (2014). Listing determinations must be made "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A).

If the Service determines that delisting *may* be warranted, it will undertake a second more searching 12-month review of the status of the species to determine whether delisting action "*is*" or "*is not* warranted." 16 U.S.C. § 1553(b)(3)(B) (emphases added). Under the implementing regulations, delisting is warranted where:

> the best scientific and commercial data available...substantiate that the species is neither endangered nor threatened for one or more of the following reasons:
> (1) Extinction . . .
> (2) Recovery . . . A species may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened.
> (3) Original data for classification in error. Subsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error.

50 C.F.R. § 424.11(d)(1)-(3) (2014). If the Service determines that a petition presents substantial scientific or commercial information indicating that listing or delisting may be warranted, the Service is required to make a finding within 12 months that (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted but precluded by other higher-priority actions. 16 U.S.C. § 1533(b)(3)(B).

B. THE HARVESTMAN'S EARLY LISTING HISTORY

In 1988, the Service determined that five species of karst invertebrate should be protected by the Act, including the bee creek cave harvestman. 53 Fed. Reg. 36,029-01 (Sept. 16, 1988). At that time, the bee creek cave harvestman was known to exist only in five or six caves in Travis and Williamson Counties. The Service found in its 1988 listing that the gravest threat to these karst invertebrates was habitat destruction and modification due to urbanization. The Service posited that residential, commercial, and industrial development affected the entire known range of the species. Potential threats to the species from development activities included cave collapse or filling; alteration of drainage patterns; alteration of surface plant and animal communities; contamination of the habitat, including groundwater, from nearby agricultural disturbance, pesticides, fertilizers, and other runoff; and increased human visitation and vandalism. The Service also found that the species was threatened because no laws protected the species or their habitats.

It was not until 1993 that the Service determined that bee creek cave harvestman is actually two species, the bee creek harvestman and the bone cave harvestman. The Service formally extended the 1988 listing to include the bone cave harvestman in 1993. 58 Fed. Reg. 43,818-01 (Aug. 18, 1993). At that time, the Service found that both species continued to face the same threats identified in the original 1988 listing determination, including imperiled habitats due to urbanization. 58 Fed. Reg. at 43,819. In 1993, the Service received and denied the first petition to delist the harvestman. So began a 25-year process to delist the harvestman as more locations of the spider were discovered.

In 1994, the Service completed a Karst Invertebrate Recovery Plan for Travis and Williamson Counties, which included recovery criteria for the harvestman. The Service

examined the threats facing the species, including threats posed by urbanization to the harvestman's habitat. At that time, the Service noted the harvestman's potential for complete recovery and delisting of the species was uncertain. The plan identifies steps and benchmarks that must be met before the harvestman can be reclassified from endangered to threatened.[2]

In 2009, the Service completed a five-year species-status review, as required by the Act. 16 U.S.C. § 1533(c)(2)(A). The purpose of such review is to determine whether a species' status has changed since it was last evaluated, including whether it should be delisted. *Id.*; 50 C.F.R. § 424.21 (2014). The Service determined that no change in listing status was warranted at that time.

C. 2014 Petition and 2017 Finding

A petition to delist a species must provide available information about past and present population figures and distribution of an endangered species, threats faced by the species, and information about the status of the species over a significant portion of its range. 50 C.F.R. § 424.14(b)(2) (2014). In 2014, the Stewards petitioned the Service to remove the harvestman from the endangered-species list. The petition presented evidence about the harvestman that corresponded to each of the statutory factors and contended that delisting was warranted for three primary reasons. First, the petition asserted that there were significant increases in the overall size of the harvestman's range and known of number of habitats. Second, new data indicates that

[2] The plan requires establishing "karst-fauna regions" and "karst-fauna-area preserves" with the following specifications: (1) distinct areas known to support one or more locations of a listed karst species; (2) that possess geologic and hydrologic features that create barriers to the movement of water, contaminants, and troglobitic fauna; and (3) that exist far enough apart from each other that, if a catastrophic event occurs in one area preserve, it would not destroy any other area preserve occupied by the species. Under the recovery plan, reclassification would be possible if three karst-fauna-area preserves within each karst fauna-region in a species' range are protected in perpetuity. If fewer than three karst-fauna-area preserves exist within a given karst-fauna region, then all karst-fauna-area preserves within that region should be protected. Before the Service will reclassify a species, the necessary protections must be in place for at least five consecutive years, with assurances that the area preserves will remain protected in perpetuity.

the existence and magnitude of threats identified in the 1988 listing do not support the conclusion that the species is at risk of extinction now or in the foreseeable future. Third, significant local and state conservation efforts and laws have helped to achieve recovery of the harvestman.

The Service issued a 90-day finding, concluding that delisting was not warranted. 80 Fed. Reg. 30,990 (June 1, 2015). On December 15, 2015, the Stewards filed this suit challenging the 2015 90-day finding. While the case was pending, the Service sought to voluntarily remand the case back to the Service to address an inadvertent clerical error in its decision, namely, in failing to examine certain reference materials in making its decision. This court granted the remand.

In 2017, the Service rendered a second 90-day finding, concluding that delisting was not warranted based on the evidence presented in the original 2014 petition. 82 Fed. Reg. 20,861-02 (May 4, 2017).[3] The 2017 finding supersedes the 2015 finding. 82 Fed. Reg. at 20,863. The parties now contest the 2017 finding. The evidence presented in the 2014 petition and the Service's response in the 2017 finding is summarized below

Factor 1: Present or threatened destruction, modification, or curtailment of the harvestman's habitat or range

The primary threat to the harvestman identified in 1988 was the potential loss of habitat because of threats posed by urbanization and development. Much of the evidence in the petition is intended to disprove this threat.

[3] The delisting determination consists of several parts: (1) the Service-published summary notice of its finding; (2) a more detailed, signed notice of the same finding; and (3) the Petition Review Form for Delisting a Listed Entity. For the purpose of this order, the court will refer to the summary notice, detailed signed notice, and petition review form collectively as the "2017 finding."

The Stewards presents evidence of an increase in known locations of the harvestman from five or six at the time of the 1988 listing to 172 in 2014. This amounts to an increase at a rate of 7.59 new sites discovered per year and a total population increase of 3,340 percent. The Stewards also presents evidence of five caves that currently support the harvestman despite being located near developing areas, humans, and tourist attractions, which were all identified as threats to the survival of the species in 1988.

- Inner Space Caverns: This cave is located under a highway and train track, receives about 100,000 visitors per year, and includes paved walkways and electrical lighting. Surveys done on the cave show a continued presence of the harvestman despite heavy human traffic.

- Sun City Caves: These caves are located near a residential subdivision and regularly monitored. One survey found an increase in fauna, and most surveys indicate that there has not been a substantial negative change in the population. Biologists continue to observe the harvestman during their surveys of the property.

- Weldon Cave: The Service identified this cave in the 1988 listing as a concern because of a nearby road extension and residential development. In 1988, this cave was the only example given by the Service of the potentially adverse effects of development on the harvestman. The cave has since been identified by the Service as a sustainable habitat for the species.

- Three-Mile and Four-Mile Caves: The petition lists these caves as places where the harvestman persists despite being located underneath a highway. The interior of the walls are covered in historic graffiti, which indicates a steady stream of vandalism and human traffic throughout the years.

The petition urges that, without affirmative evidence that development activities will lead to a significant reduction in the population size, the caves provide compelling evidence that the harvestman has continued to persist alongside development, contrary to the Service's conclusion at the time of listing.

The petition also presents some evidence documenting the use of "mesocaverns" by the harvestman—a phenomenon that was not considered in the 1988 listing—as a potential habitat for the species. A mesocavern is a humanly impassable void that may or may not be connected

to larger cave passages. The discovery of mesocaverns as a habitat location is significant, the petition explains, because mesocaverns are geologically protected from development and other activities occurring on the surface that threaten the harvestman's habitat. The petition states that it is likely that there are at least 125 square miles of habitable mesocaverns.

In sum, the petition argues that current available evidence demonstrates that the harvestman coexists with development and human traffic. The petition points out that no negative correlations have been found between development and a decline in the harvestman population. Since impacts of development are likely not as significant to the species as predicted by the Service in the 1988 listing, the petition argues that the harvestman should be delisted.

The Service begins its discussion of *Factor 1* by restating that the primary threat to the harvestman is still the potential loss of its habitat due to development activities. The Service recognizes the five caves discussed in the petition. Nonetheless, the Service states that the observation of the harvestman in these locations is not proof that they are thriving or can withstand the long-term impacts of development activities. The Service acknowledges that it lacks adequate data to conduct a species-trend analysis, given that it may take decades to detect the harvestman's population trend because of small sample sizes, difficulty surveying the species, and its long life span. Nonetheless, the finding states that the petition does not provide the Service with adequate information to detect population trends. After concluding that there is not enough data to do a trend analysis, the Service addresses each of the caves presented in the petition.

- Inner City Space Caverns: The Service states that although the harvestman may be present at the caverns, their presence is not proof that the harvestman's population is robust and secure. The Service points out that, despite the harvestman's presence, the population may still be declining and at risk from threats arising from development. The Service also observes that the cavern has an overgrowth of algae that may out-compete the harvestman for food. The

Service further states that the petition failed to provide enough data for the Service to assess trends in the harvestman in relation to the time that they have been exposed to artificial lighting in the cavern. The Service further observes that part of the cavern is located under a highway and train tracks, which both present a threat of contaminant spill that could impact the species in the future.

- Sun City Cave: The Service states that the petition failed to provide enough data for the Service to assess the cumulative effect of the development on the harvestman's population trend.

- Weldon, Three-Mile, and Four-Mile Caves: The Service points out that the Weldon cave is surrounded by undeveloped space, not developed space, as the petition asserts. The Service further states that detailed survey data was not provided by the petitioners for three or four-mile caves.

- Mesocaverns: The Service states that it is unclear why the Stewards believes that mesocaverns are geologically protected from surface activities. It points to a study that mesocaverns are subject to rapid permeation of surface water. As a result, the harvestman would be as susceptible to groundwater contamination because water penetrates rapidly through the rock in mesocaverns.

The finding additionally discusses a study conducted in 2007 that compares caves in urbanized areas with caves in natural areas to bolster the finding's conclusion about the effect of urbanization on the harvestman. The study found that, even though a small area within a largely urbanized ecosystem may support a cave community with karst invertebrates, karst populations are significantly lower than those found in caves in more natural, less-developed ecosystems. The study suggests that this is most likely a result of reduced nutrient input. The finding does not note whether the harvestman was specifically considered in the study. The finding also points to a study conducted at Lakeline Cave in Travis County, that documents a significant decline in another karst-invertebrate species over a 20-year time frame. During this same time frame, no more than three examples of the harvestman were observed in any one survey, and the harvestman was not seen at all over six years and 12 surveys. The finding concludes that urbanization and human population growth and development continue to represent a threat to the species, especially in light of the exploding population in the Austin area.

Factor 2: Disease or predation

In the 1988 finding, fire ants were identified by one study as being a potential competitor with the harvestman. The study predicted that threats posed by fire ants would be exacerbated as the human population increased. The petition presents evidence that fire ants have not been shown to have a lasting negative impact on the harvestman populations nor on the ability of the harvestman to persist in areas that contain fire ants. Specifically, the petition includes a discussion of studies conducted since the 1988 listing, which suggest that the impact to the harvestman by fire ants is greatest during and shortly after an initial fire-ant invasion, and long-term impacts are likely not as significant as once believed. The petition asserts this represents new scientific information that refutes previous conclusions drawn by the Service about the susceptibility of the harvestman to fire-ant infestations. The petition also presents evidence of specific locations in Texas where there was not a decline in the harvestman despite the presence of fire ants.

The Service recognizes the study, but notes that the study also states that red fire ants likely did contribute directly or indirectly to the disappearance or reduction in numbers of the harvestman and that the study should not be interpreted as an indication that detrimental effects of invasive ants will simply disappear with time. The Service states that fire ants have been observed within and near many caves in central Texas. The Service finally notes that it previously considered the study cited by the petition.

Factor 3: Inadequacy of existing regulatory mechanisms

In 1988, there were no laws in place to protect the harvestman or its habitats. The petition identifies 94 caves that are now protected from development by state and local regulations. The petition also details extensive state, county, and city regulations that represent

significant conservation efforts, including regulations by the City of Austin, City of Georgetown, and the Texas Commission on Environmental Quality.

The Service recognizes the new regulations but nonetheless concludes that there is not enough information in the petition to indicate whether or not the state and local regulations provide enough protection against all threats faced by the harvestman. For example, the Service states that the City of Austin ordinances do not meet karst-preserve design criteria[4], do not protect crickets (a food source for the harvestman), do not include surface and subsurface drainage basins, and do not protect the entire range of the harvestman's habitat. As for the City of Georgetown Water Quality Management Plan, the Service points out that, because the purpose of the plan is designed to protect salamanders, the plan offers only limited benefit to the harvestman. The Service also observes that participation in the Georgetown Plan is voluntary and that the petition does not provide enough detail to evaluate all the benefits the plan would provide to the harvestman. As for the Texas Commission on Environmental Quality rules, the Service explains that it previously concluded that the rules have limited benefit because they do not regulate all caves inhabited by the harvestman.

Factor 4: Other natural or manmade factors affecting continued existence

Though not originally identified in 1988, the Service has since identified climate change as a potential threat to the harvestman. The Service acknowledges a lack of evidence showing a direct correlation between climate change and impact on the harvestman. The petition argues that studies indicate that the harvestman habitats in smaller and deeper mesocaverns may mitigate the potential threat of climate change.

The Service addresses the likelihood that climate change will affect the harvestman, and specifically, the petition's contention that the use of mesocaverns may mitigate the threat of

[4] *See supra* note 2.

climate change. The Service acknowledges that mesocaverns may provide protection from climate change, but states that mesocaverns will likely not be enough to ameliorate the effect of climate change on the harvestman. The Service identifies specific dangers from climate change including increased storms, higher temperatures, and modifying habitat or nutrient availability.

II. STANDARD OF REVIEW

Summary judgment is appropriate if the record shows "that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In the context of a challenge to an agency action under the Administrative Procedure Act ("APA"), "[s]ummary judgment is the proper mechanism for deciding, as a matter of law, whether an agency's action is supported by the administrative record and consistent with the APA standard of review." *Blue Ocean Inst. v. Gutierrez*, 585 F. Supp. 2d 36, 41 (D.D.C. 2008). Thus, in evaluating a case on summary judgment, the court applies the standard of review from the APA. *See Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 627 (5th Cir. 2001); *see also Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933 (5th Cir. 1998).

Under the APA, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. A 90-day finding that delisting is not warranted is subject to judicial review under the Act. *See* 16 U.S.C. § 1533(b)(3)(C)(ii) ("Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review."). In a challenge to agency action brought pursuant to the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be," among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory

jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law." 5 U.S.C. § 706(2)(A)-(D).

When reviewing for arbitrariness and capriciousness, a court considers whether an agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Agency action is arbitrary and capricious when "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* The scope of review "is narrow and a court is not to substitute its judgment for that of the agency." *Id.* Nor should the court "reweigh the evidence." *Cook v. Heckler*, 750 F.2d 391, 392 (5th Cir. 1985). Instead, this court looks to "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Judulang v. Holder*, 565 U.S. 42, 53 (2011). Even though arbitrary-and-capricious review is narrow, "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Id.*

In addition to a prohibition on arbitrary or capricious action, the APA prohibits agency action that is "not in accordance with law," 5 U.S.C. § 706(2)(A), or is carried out without following procedures prescribed by statute. *See id.* at § 706(2)(D); *see also FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293, 300 (2003) ("The Administrative Procedure Act requires federal courts to set aside federal agency action that is "not in accordance with law," 5

U.S.C. § 706(2)(A)—which means, of course, any law, and not merely those laws that the agency itself is charged with administering."). The court recognizes that Section 706(2)(A) has four standards within it and considers in this opinion whether the Service's 90-day finding is "arbitrary, capricious, . . . or otherwise not in accordance with law." *Id.* at 706(2)(A).[5]

A. ARGUMENTS OF THE PARTIES

The Stewards moves for summary judgment on the basis that the Service's finding is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A). More specifically, the Stewards argues that: (1) the Service applied an unlawful and overly burdensome standard of review in making its finding; (2) the Service unlawfully judged the petition based on whether it proved that criteria from the 1994 Recovery Plan had been met; (3) the Service failed to consider claims in the petition that the harvestman was listed in error, as required by its own regulations; and (4) the Service misapplied its regulations in making its finding.

The Service separately moves for summary judgment, arguing that its finding is not arbitrary and capricious.[6] More specifically, the Service asserts that it applied the correct standard and considered all appropriate information when it reviewed the petition. It also contends that the Stewards has not met its burden in showing that the Service's denial of the petition is so implausible that it could not be ascribed to a difference in view or the product of

---

[5] The court's analysis would not change were it to analyze the 90-day finding under Section 706(2)(D).

[6] The Stewards, the Service, and the Center for Biological Diversity ("the Center") each move for summary judgment under the APA. The motions address whether the Service's finding is arbitrary, capricious, or otherwise not in accordance with law. The Service and the Center's motions for summary judgment will be considered together, as they make substantially the same argument. Yearwood, the Service, and the Center additionally move for summary judgment based on the constitutionality of the Act. *See infra* Section IV.

agency expertise. To that end, the Service argues it rationally determined that the petition failed to present substantial scientific or commercial information.

The Center also moves for summary judgment, arguing that the Stewards has not met its burden in presenting substantial scientific information to indicate that delisting of the species may be warranted. The Center additionally argues that any doubts regarding the threats facing the harvestman must be construed in its favor.

III. ANALYSIS

The Stewards presents several arguments as to why summary judgment should be granted in its favor, but its most persuasive argument is that the Service required a higher quantum of evidence than is permissible under the Act and implementing regulations governing a 90-day finding.

Upon review of the petition and the 2017 finding, and for the reasons that follow, the court concludes that the Service violated its regulations when it required the Stewards to essentially present conclusive evidence about the harvestman's population trends—more evidence than the Service admits is available or attainable. The Service's regulations require a petition to present only "available information," and the Service committed a clear error in judgment and acted arbitrarily, capriciously, and not in accordance with law when it called for more evidence than the law requires. The court will vacate the 2017 finding and remand the finding to the Service for further consideration of the Stewards' petition based on available population information, not population information that the Service admits is impossible to attain.

A. The Service violated its regulations governing the standard for reviewing a delisting petition by requiring an unlawfully high quantum of evidence.

In a challenge to agency action under the APA, part of the court's task involves "reviewing agency action to determine whether the agency conformed with controlling statutes." *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983). Agency action that disregards applicable law is arbitrary and capricious, and must be set aside. *See, e.g.*, *Caring Hearts Pers. Home Servs., Inc. v. Burwell*, 824 F.3d 968, 970–71 (10th Cir. 2016); *Friends of Richards-Gebaur Airport v. F.A.A.*, 251 F.3d 1178, 1195 (8th Cir. 2001) ("[A]n agency implementing a statute may not ignore . . . a standard articulated in the statute."). Agency regulations are an extension of the legislative process and bind the agency with the force and effect of law. As with statutes, an agency must comply with its own regulations, and the court must review an agency's actions to ensure conformity with relevant regulations. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–68 (1954) (standing for proposition that agencies must comply with their regulations); *see also Erie Boulevard Hydropower, LP v. Fed. Energy Regulatory Comm'n*, 878 F.3d 258, 269 (D.C. Cir. 2017) ("It is axiomatic . . . that an agency is bound by its own regulations."); *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 841, 852 (9th Cir. 2003) (upholding challenge under Section 706 of the APA and finding that "[h]aving chosen to promulgate the [] policy, the [Service] must follow that policy"); *Alamo Exp., Inc. v. United States*, 613 F.2d 96, 97–98 (5th Cir. 1980) (per curiam) (finding Interstate Commerce Commission violated APA because it failed to comply with internal procedures).

Under the Act, a petition must "present[] substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A). The Service's regulations in turn, define substantial information as "that amount of information that

would lead a reasonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b)(1) (2014). The regulations further provide that a petition must "[c]ontain detailed narrative justification for the recommended measure, describing, *based on available information*, past and present numbers and distribution of the species involved and any threats faced by the species." *Id.* at § 424.14(b)(2) (2014) (emphasis added). The Service must make each listing determination "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A).

The petition presents extensive evidence that the gravest threat to the harvestman identified in the 1988 listing—loss of habitat due to development—might not be as grave as was predicted in 1988, and that reconsideration of the listing determination may be warranted. To support this contention, the petition includes evidence that the population of the harvestman has steadily increased since the time of the listing—from five in 1988 to 172 as of 2014—despite an explosion in the human population. It also offers examples of five different caves in which the harvestman co-exist with human visitors, highway disruptions, tourist attractions, and industrial development, all of which the 1988 finding predicted would endanger or eradicate the species. It presents evidence that the fire ant, identified by some studies as a competitor with the harvestman, may not threaten the harvestman's food source to the extent believed by the Service in 1988. Finally, it presents evidence of overlapping regulatory regimes that now provide protection for the harvestman, as compared to no regulatory protections in 1988.

In considering the Stewards' petition, the Service correctly articulates the standard required by its regulations, "[w]e evaluated this petition under the 50 CFR 424.14 requirements that were in effect prior to October 27, 2016, as those requirements applied when the petition and supplemental information were received." The Service analyzed the five "listing factors," as the

Act requires. The Service determined that the evidence presented in the petition is not enough for the Service to conclude that delisting may be warranted. The Service came to this decision after conducting an overall assessment of the viability of the harvestman and threats to its continued existence. However, the finding recognizes that there is currently no available data on the overall population trend of the harvestman. The finding also recognizes that, although population-trend information is likely impossible to attain, it is nonetheless essential to proving that the harvestman's population is not declining or threatened because of urbanization. For example, the finding stated that "[i]t may be infeasible to assess karst invertebrate population trends in any statistically significant manner given their association with humanly inaccessible cave habitat such as mesocaverns." Indeed, the harvestman is so elusive that the Service requires 14 different surveys of a cave to determine to its satisfaction whether the harvestman is present. And yet, when presented with actually available evidence that the harvestman exists and continues to populate near developing areas, the Service discounts this evidence, stating at least four times that the petition "failed to provide data adequate to assess trends." The Service stated that the harvestman "may be declining or threatened even though they are observed at a . . . site. The petition did not provide adequate information to detect population trends . . . and it is not available from other sources . . . . [w]e indicated in the [1994 90-day [f]inding] that more time was needed to detect if the species is declining; however . . . we are still lacking adequate data to conduct a trend analysis." The Service also makes that "the petition failed to provide data adequate to assess trends in the karst invertebrate populations since the development occurred," and also that "the petition failed to provide any data adequate to assess trends in the karst invertebrate population in relation to the time (duration and frequency) that [the harvestman has] been exposed to the artificial lighting." As for climate change, the Service states that "the

petition provided no trend analysis to indicate that this species can withstand the threats associated with development or climate change over the long term." This lack of conclusive population data led the Service to conclude that the petition did not present enough information to demonstrate that delisting may be warranted.

By requiring evidence that the Service admits is either infeasible to collect or totally unavailable, the Service makes it all but impossible for the Stewards to disprove the essential assumption of the 1988 listing—that the harvestman would decline as the population increases because of dangers to its habitat—and thus, makes the case for delisting the harvestman impossible. Rather than considering whether the information presented in the petition may indicate that delisting is warranted, the Service requires conclusive evidence that the overall population of the harvestman did not decline as human population and development increased. The Service disputes this point and argues that the petition was not denied because of a lack of population-trend data, but that the Service denied the petition after the Service conducted an overall assessment of the viability of the harvestman and threats to the harvestman's continued existence. Nonetheless, after review of the finding, this court concludes that the bulk of the evidence presented in the petition was discounted because it was not accompanied by overall-population-trend data.

The court concludes that denying the petition because the petition lacks admittedly *unavailable* evidence, the Service did not make its decision based on the best *available* data, in violation of the Act and implementing regulations. *See* 16 U.S.C. § 1533(b)(1)(A) ("Listing determinations" must be made "solely on the basis of the best scientific and commercial data available"); 50 C.F.R. § 424.14(b)(2) (2014) (petition must describe "based on available information, past and present numbers and distribution of the species involved and any threats

faced by the species"). In reaching this conclusion, the court recognizes that the evidence presented in the petition is not conclusive proof that the species is actually increasing or that an increase in human population will not detrimentally affect the harvestman's habitat. The court concludes only that that the evidence presented in the petition meets the low evidentiary threshold set forth in the Act and implementing regulations for a 90-day finding—that delisting of the harvestman *may* be warranted. The Service may determine after a more searching inquiry whether the harvestman is, in fact, increasing, and whether delisting of the species definitively is or is not warranted. *See* 16 U.S.C. § 1533(b)(3)(B).

B. The Service's violation of the Act and implementing regulations is arbitrary, capricious, and not in accordance with law.

Under the APA, a court must set aside an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43. When reviewing for arbitrariness or capriciousness, this court looks to "whether [an agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Judulang*, 565 U.S. at 53. Even though arbitrary and capricious review is narrow, "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Id.* In determining whether the Service has engaged in "reasoned decisionmaking" this court considers what is required of the agency by the Act and implementing regulations, which provide the evidentiary lens through which the agency is to "examine relevant data." *State Farm*, 463 U.S. at 43.

Many courts have concluded that an agency's failure to comply with its own regulations is arbitrary and capricious. *See, e.g.*, *Erie Boulevard Hydropower*, 878 F.3d at 269 ("[I]f an

agency action fails to comply with its regulations, that action may be set aside as arbitrary and capricious."); *Nat'l Envtl. Dev. Assoc.'s Clean Air Project v. E.P.A.*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (holding that an "agency is not free to ignore or violate its regulations" and "an agency action may be set aside as arbitrary and capricious if the agency fails to 'comply with its own regulations'"). Other courts have concluded that an agency's failure to comply with its own regulations is "not in accordance with law." *See, e.g.*, *Calderon v. Sessions*, 330 F. Supp. 3d 944 (S.D.N.Y. Aug. 1, 2018) (citing 5 U.S.C. § 706(2)(A)); *Koshman v. Vilsack*, 865 F. Supp. 2d 1083, 1095 (E.D. Cal. 2012) (challenge that agency did not abide by its own regulations and governing statutes and concluding that agency's decision is "not in accordance with the law").

The court finds that the Service did not engage in "reasoned decisionmaking" when it did not follow the standard set by Congress and implementing regulations intended to guide the Service's decisionmaking. The court concludes that the petition presents available, substantial scientific and commercial information indicating that delisting of the harvestman may be warranted. As a result, the court concludes that the Service's conclusion to the contrary is arbitrary, capricious, "or otherwise not in accordance with [the Act and implementing regulations]," which require that a petition need only present available evidence. 5 U.S.C. § 706(2)(A).[7] The court will vacate the 2017 finding and remand the finding to the Service for further consideration of the Stewards' petition based on available population information, not population information that the Service admits is impossible to attain. *See Chamber of Commerce of United States of Am. v. United States Dep't of Labor*, 885 F.3d 360, 388 (5th Cir.

[7] The Stewards additionally contends that the 2017 finding is arbitrary and capricious because the Service unlawfully relies on the recovery plan and karst-preserve design recommendations as necessary evidence of whether the harvestman has recovered and necessitates delisting. Because the court concludes that the finding is arbitrary and capricious on other grounds, the court need not consider the argument that the use of the recovery plan as binding is unlawful.

2018), *judgment entered sub nom. Chamber of Commerce of Am. v. United States Dep't of Labor*, No. 17-10238, 2018 WL 3301737 (5th Cir. June 21, 2018) (vacating rule found to be arbitrary, capricious, and not in accordance with law); *see also N. Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 550 F.3d 16, 20 (D.C. Cir. 2008) ("[W]hen a court reviewing agency action determines that an agency made an error of law . . . the case must be remanded to the agency for further action consistent with the corrected legal standards.").

C. The Service considered whether the harvestman was listed in error.

Delisting is also appropriate under the Service's regulations if "[s]ubsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error." 50 C.F.R. § 424.11(d)(3) (2014).

The 1988 listing identifies the primary threat to the harvestman as potential loss of habitat because of ongoing development activities. The Stewards' petition states that the discovery of many previously unknown populations of the harvestman arguably demonstrates that the 1988 listing was in error because more species have been discovered as development increases. The Stewards argues that the record is devoid of any evidence that the Service evaluated whether the original listing was in error. This argument is not supported by the record.

The finding expressly considers whether the original listing was erroneous. The finding states that a review of the petition does not indicate that the original classification was made in error. The Service concludes "[b]ased on our review and evaluation . . . the petition does not present substantial scientific or commercial information indicating that the delisting of the harvestman may be warranted due to . . . error in the original scientific data at the time the species was classified or in our interpretation of that data." For example the Service indicates that "species may be delisted when subsequent investigations 'show that the best scientific and commercial data available when the species was listed, or the interpretation of such data, were in

error.'" The Service also considered the petition's assertion "that threats to the species are not as severe as originally thought . . . [w]e evaluate that information, below, with respect to the five listing factors." In light of the record, the court concludes that the Service did consider whether the original listing was in error.

The Stewards also disagrees with the substance of the Service's determination that the original listing was not in error. Very little was known about the harvestman at the time of the 1988 listing. The 1988 listing is based on a handful of studies on similar species, their food sources, and the potential effects of human development on the species. At the time of listing, neither the Service nor scientists were aware that the harvestman was a distinct species, and the listing is not specific to the harvestman. Nonetheless, the primary threat identified is the potential loss of habitat due to ongoing human development. The petition posits that the discovery of previously unknown populations of the harvestman arguably demonstrates that the 1988 listing was in error. The court is not persuaded. The regulations governing whether a listing was in error are backward looking, and the court looks to whether subsequent information reveals that "data available when the species was listed . . . were in error" at the time of listing. 50 C.F.R. § 424.11(d)(3) (2014). The discovery of previously unknown populations of the harvestman does not demonstrate that the data on which the original listing is based was erroneous at the time of the 1988 listing. Limited information available about the species at the time indicated that the habitats of the harvestman would be threatened by changes arising from human population increases and development. Information now available indicates that threat may not be as grave as initially predicted and that delisting may be warranted. The Service will consider this on remand. The court rejects the Stewards argument of error in the 1988 listing.

IV. PLAINTIFF-INTERVENORS' MOTION FOR SUMMARY JUDGMENT

Yearwood moves separately for summary judgment under the APA, arguing that Congress has exceeded its constitutional authority under the Commerce Clause, the Necessary and Proper Clause, and Tenth Amendment by regulating the "take" of the harvestman. *See* U.S. Const. art. I, § 8, cl. 3; U.S. Const. art. I, § 8, cl. 18; U.S. Const. Amend. X; *see also* 16 U.S.C. § 1538(a)(1)(B) (prohibiting the "take" of certain endangered species).[8] Yearwood is supported by the State of Texas and Mountain States Legal Foundation, both of whom submitted *amicus curiae* briefs in support of Yearwood's motion for summary judgment.

The Service and the Center cross-move for summary judgment, arguing that Yearwood's claims are barred by the applicable statute of limitations.[9] In the alternative, the Service argues that Yearwood's constitutional arguments is foreclosed in this circuit because regulating takes of the harvestman under the Act is a valid exercise of the Commerce Clause power. *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *reh'g denied*, 362 F.3d 286 (5th Cir. 2004). The Service also contends that the Congress's regulation of takes is consistent with the Necessary and Proper Clause and the Tenth Amendment. *See* U.S. Const. art. I, § 8, cl. 18; U.S. Const. Amend. X.

---

[8] A "take" is defined as harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, collecting, or attempting to engage in any such conduct. *Id.* at § 1532(19). Property owners and developers must seek permits from the Service for approval of any activities that might disturb an endangered species. *Id.* at § 1539(a). The consequences of an unauthorized take can be serious, including civil and criminal penalties, fines as great as $50,000, and imprisonment for up to one year. *Id.* at § 1540.

[9] The arguments of the Service and the Center are substantively similar, and the court will refer to the arguments made by both as the Service's arguments, unless otherwise noted or as needed for context.

A. Yearwood's claims are not barred by the statute of limitations, but Williamson County's claims are barred.

Under the APA, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law [or] contrary to a constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(A)-(B). Because the APA lacks a specific statutory limitations period, challenges brought under the APA are "governed by the general statute of limitations provision of 28 U.S.C. § 2401(a), which provides that every civil action against the United States is barred unless brought within six years of accrual." *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1286 (5th Cir. 1997); *see also* 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.").

In determining when a right of action accrues, the law distinguishes between a "facial challenge" to a regulation and a challenge to a regulation after an agency applies that regulation to a plaintiff. *See Dunn*, 112 F.3d at 1287. "On a facial challenge to a regulation, the limitations period begins to run when the agency publishes the regulation." *Id.* The *Dunn* court, declined to rule on the merits of a plaintiff's facial claim "that the regulations exceeded National Park Service authority under the Padre Island National Seashore Act" because the plaintiff "failed to mount a facial challenge to the regulations within six years of their publication." *Id.* Nonetheless, the court concluded that the regulation could be challenged "after the limitations period has expired, provided that the ground for the challenge is that the issuing agency exceeded its constitutional or statutory authority." *Id.* To sustain such a claim, an agency must apply the rule to the plaintiff such that the plaintiff can "show some direct, final agency action." *Id.* Final agency action includes a plaintiff petitioning an agency for relief from a regulation. *Id.* (citing

Wind River Mining Corp. v. United States, 946 F.2d 710, 715–16 (9th Cir. 1991); *Public Citizen v. Nuclear Regulatory Com'n*, 901 F.2d 147, 152–53 (D.C. Cir. 1990)). It also includes an agency issuing an order requiring a plaintiff to comply with a regulation. *Dunn*, 112 F.3d at 1287 (citing *Texas v. United States*, 730 F.2d 409, 411–12 (5th Cir. 1984)). Thus, "an agency's application of a rule to a party creates a new six-year cause of action to challenge to the agency's constitutional or statutory authority." *Dunn*, 112 F.3d at 1287.

In addition, "agency action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *U.S. Army Corps of Engineers v. Hawkes Co.*, —— U.S. ——, 136 S.Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Agency action marks the consummation of agency decisionmaking if it is not "advisory in nature" but is instead "definitive [in] nature." *Id.* at 1813–14. The action must also be one by which rights or obligations have been determined, or from which legal consequences will flow, and thus, must "give rise to 'direct and appreciable legal consequences.'" *Id.* at 1814 (quoting *Bennett*, 520 U.S. at 178).

The court concludes that Yearwood's challenge is not barred by the limitations because he is a party to the 2014 petition to delist the harvestman and is directly affected by the Service's decision not to delist the harvestman. Yearwood can demonstrate the requisite "direct, final agency action" affecting him personally and may challenge the Service's statutory and constitutional authority for applying the rule. *Dunn*, 112 F.3d at 1287. Accordingly, the court concludes that Yearwood's constitutional challenges are not barred by the statute of limitations.

As Yearwood concedes, however, Williamson County is not a party to the 2014 petition to delist the harvestman. The County nonetheless claims that it has suffered similar injuries to those suffered by Yearwood and other parties who filed the petition and should not be barred by

limitations. The County marshals to no legal support for this proposition. Because the County is not a party to the 2014 petition, it cannot show the requisite direct and final action that flows from the denial of Yearwood's petition. The County's claims are barred by limitations.

B. The Service's regulation of the harvestman takes does not violate the Commerce Clause.

Under the Commerce Clause, Congress may "regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, including regulating activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995); *United States v. Morrison*, 529 U.S. 598, 609–12 (2000). Additionally, an intrastate activity may be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 545 U.S. at 561; *Morrison*, 529 U.S. at 657.

In reviewing an act passed under Congress's Commerce Clause authority, the court applies a rational-basis analysis, under which courts "need not determine whether . . . activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (quoting *Lopez*, 514 U.S. at 557); *see also GDF Realty*, 326 F.3d at 627. Yearwood disputes that this court should review the Act under a rational-basis standard. Yearwood's primary argument is that Supreme Court and Fifth Circuit cases altered the landscape for evaluating regulations of non-commercial intrastate activity "from a traditional Commerce Clause analysis," which is scrutinized for a rational basis, to one that is analyzed under the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, with a higher level of scrutiny. *See Raich*, 545 U.S. at 34; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 562–74 (2012); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *United States v. Whaley*, 577 F.3d 254, 260–61 (5th Cir. 2009).

Yearwood asserts that the Necessary and Proper Clause requires that regulations be (1) "narrow in scope," (2) "incidental" to the regulation of commerce, and (3) cannot "work a substantial expansion of federal authority." *Sebelius*, 567 U.S. at 560–61.

a. *GDF Realty Investments, Ltd. v. Norton*

Regulation of a take of the harvestman is a valid exercise of the Commerce Clause power. *GDF Realty*, 326 F.3d at 622. In *GDF Realty*, a group of developers challenged the harvestman's listing determination, arguing that the Act's take provision as applied to the harvestman was unconstitutional. Like Yearwood, the developers argued that the take provision exceeded Congress's Commerce Clause authority because a take of the harvestman has no relationship to interstate commerce. *Id.* at 626. The court analyzed the Act and the listing provision under the *Lopez* and *Morrison* framework, and concluded that the Act is a general regulatory statute that is economic in nature and has a substantial relation to commerce. *Id.* at 640 (citing *Lopez*, 545 U.S. at 561; *Morrison*, 529 U.S. at 657). Though takes of the harvestman by themselves do not have an effect on interstate commerce, the court concluded that regulating intrastate takes is an essential part of the Act as a whole. *Id.* Thus, the application of the Act to the harvestman "is a constitutional exercise of the Commerce Clause power." *Id.* at 641.

Yearwood recognizes *GDF Realty* but argues that its mode of analysis has been overruled by subsequent cases. *See Raich*, 545 U.S. at 34; *Sebelius*, 567 U.S. at 562–74; *Castille*, 712 F.3d at 215; *Whaley*, 577 F.3d at 260–61. Yearwood contends that the *GDF Realty* court applied a "deferential" version of rational-basis scrutiny to claims under the Commerce Clause in *GDF Realty*. Yearwood asserts that *Raich*, *Sebelius*, and *Whaley* altered the applicable test for evaluating regulations of non-commercial intrastate activity "from a traditional Commerce Clause analysis," analyzed under rational-basis scrutiny, to one that more closely scrutinizes

regulations under the Necessary and Proper Clause. Thus, Yearwood asks this court ignore the holding of *GDF Realty* and look anew at the regulation of the harvestman takes in light of *Raich*, *Sebelius*, and *Whaley*.

b. *Gonzalez v. Raich* and *United States v. Whaley*

Yearwood argues that a concurring opinion *Raich* altered the analysis for intrastate activities that have a substantial effect on interstate commerce. *Raich*, 545 U.S. at 34 (Scalia, J., concurring) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce)" should "derive[] from the Necessary and Proper Clause."). *Id.* The *majority* in *Raich*, however analyzed the case under *Lopez* and *Morrison* and applied a rational-basis test in reviewing non-commercial intrastate activities that have a substantial effect on interstate commerce. *Id.* at 22. The majority did not separately analyze the case under the Necessary and Proper Clause.

Yearwood additionally contends that the circuit adopted *Raich's* concurring opinion in *United States v. Whaley*. 577 F.3d at 260. *Whaley* involved a challenge to the Sex Offender Registration and Notification Act that the court upheld as a valid regulation of activities under the Commerce Clause. *Id.* at 258. After upholding the statute under the Commerce Clause, the court stated "to the extent that [the statute] applies to sex offenders remaining intrastate, the Necessary and Proper Clause provides Congress with the necessary authority." *Id.* at 260–61 (citing *Raich*, 545 U.S. at 35–37 (Scalia, J., concurring)).

The Fifth Circuit "follows the rule that alternative holdings are binding precedent and not obiter dictum." *Texas v. United States*, 809 F.3d 134, 178 n.158 (5th Cir. 2015) (quoting *United States v. Potts*, 644 F.3d 233, 237 n.3 (5th Cir. 2011)), *aff'd by an equally divided Court*, —

U.S. —, 136 S.Ct. 2271 (2016); *see also United States v. Reyes-Contreras*, No. 16-41218, — F.3d —, — n.19, 2018 WL 6253909, at *7 n.19 (5th Cir. Nov. 30, 2018) (en banc). This court does not find that *Whaley's* brief, two-paragraph discussion of the Necessary and Proper Clause, is an "alternative holding" as opposed to additional reasoning. Assuming, *arguendo*, that *Whaley's* discussion is an alternate holding, the court nonetheless concludes that *Whaley's* alternative invocation of the Necessary and Proper Clause to analyze instrumentalities and channels of interstate commerce does not overrule *GDF Realty*. *Whaley* does not mention *GDF Realty*, and as such, does not unequivocally overrule the holding or analysis of *GDF Realty*. Moreover, the circuit did not reference *Whaley* nor apply a Necessary and Proper Clause analysis when it most recently upheld the constitutionality of the Act's critical-habitat-designation provision under the Commerce Clause. *See Markle Interests, L.L.C. v. United States Fish & Wildlife Serv.*, 827 F.3d 452, 459 (5th Cir. 2016), *vacated and remanded sub nom. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, — U.S. —, 139 S. Ct. 361 (2018), and *cert. granted, judgment vacated on other grounds sub nom. Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, No. 17-74, 139 S. Ct. 50 (Dec. 3, 2018). Instead, the circuit applied the majority's analysis in *Raich* and discussed the reasoning and holding of *GDF Realty*. *Id.* at 477–78.

This court recognizes that the Supreme Court vacated the judgment in *Markle* in light of *Weyerhaeuser*, but the Court did so on other grounds.[10] Though *Markle* no longer holds

[10] Two separate petitions for a writ of certiorari were filed in *Markle*. The Court granted the petition of Weyerhaeuser Company, which primarily raised an issue of statutory construction of the Act's critical-habitat-designation provision. *See Weyerhauser Co. v. U.S. Fish and Wildlife Serv.*, No. 17-71, — U.S. —, 138 S. Ct. 924 (Jan. 22, 2018). The petition of Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties LLC presented a question about whether Congress exceeded its authority under the Commerce Clause in regulating intrastate critical habitats. The Court held Markle's petition, granted it, and vacated the judgment, and remanded the case for further consideration in light of *Weyerhaeuser*. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, No. 17-74, 139 S. Ct. 50 (Dec. 3, 2018).

precedential value, this court finds persuasive its reasoning on the Commerce Clause, because *Markle* is the most recent and directly applicable articulation by the Fifth Circuit on how the court analyzes intrastate activities regulated by the Act under the Commerce Clause. The Court in *Weyerhaeuser* did not consider the constitutionality of the Act's critical-habitat-designation provision under the Commerce Clause, nor whether such a question should be analyzed under the Necessary and Proper Clause. Instead, *Weyerhaeuser* involved a question of statutory interpretation of the critical-habitat provision of the Act.[11]

Yearwood finally asserts that Supreme Court in *Sebelius* "found that the Affordable Care Act could not be justified by the Commerce Clause when viewed through the Necessary and Proper Clause." Yearwood repeatedly, but improperly, refers to a solo concurrence in *Sebelius* as the Court's holding. The majority decided the case based on Congress's taxing power, not on the Necessary and Proper Clause. 567 U.S. at 538-539, 564–74. Accordingly, the court does not find Yearwood's invocation of a concurring opinion in *Sebelius* to be persuasive authority.

In sum, this court recognizes that *Raich* and *Whaley* mention the Necessary and Proper Clause. However, these passing references are not enough to shift the well-established Commerce Clause analysis—one the Fifth Circuit has twice applied in considering the constitutionality of the Act—to one that has not been adopted by a majority of the Supreme Court nor by the Fifth Circuit in a factually analogous case.[12] Accordingly, the court will

---

[11] More specifically, the Court granted certiorari to consider whether a critical habitat need be currently habitable; the Fifth Circuit held it did not. *Weyerhaeuser*, 139 S. Ct. at 364. The Supreme Court also granted certiorari to consider whether the Service's decision to exclude an area as a critical habitat is subject to judicial review; Fifth Circuit held that it is not. *Id.*

[12] Yearwood also asserts that the rational-basis test applied in *GDF Realty* "is no longer sufficient in this circuit" because the "Fifth Circuit has since rejected this no-evidence approach to rational-basis scrutiny in other contexts." *See, e.g.*, *Castille*, 712 F.3d at 223 ("Our analysis does not proceed with abstraction for hypothesized ends and means do not include post hoc hypothesized facts."). *Castille* analyzes the constitutionality of a state casket regulation under

continue to follow *GDF Realty* and concludes that the Service's regulation of the harvestman does not violate the Commerce Clause.

C. TENTH AMENDMENT

Yearwood argues that Congress's regulation of the harvestman violates the Tenth Amendment, but devotes no briefing to the issue. U.S. Const. Amend. X. "Arguments that are insufficiently addressed in the body of the brief, however, are waived." *See Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 356 n.7 (5th Cir. 2003) (citing *Quick Techs., Inc. v. Sage Group PLC*, 313 F.3d 338, 343 n.3 (5th Cir. 2002)) ("Arguments raised in a perfunctory manner, such as in a footnote, are waived"). Accordingly, the court concludes that Yearwood waived this argument.

V. CONCLUSION

The court concludes the 2017 finding is arbitrary, capricious, and not in accordance with law. When a reviewing court concludes an agency action to have been carried out "without observance of procedure required by law," the court shall "hold unlawful and set aside" the action. 5 U.S.C. § 706. Accordingly,

IT IS ORDERED that Plaintiffs' Motion for Summary Judgment filed October 5, 2017 (Dkt. No. 132) is **GRANTED** with regard to the Stewards's claim that the Service acted arbitrarily and capriciously. The court will vacate the 2017 finding and remand the 2017 finding to the Service for further consideration consistent with this opinion. In all other respects, the motion is **DENIED**.

---

the Due Process and Equal Protection Clauses of the Fourteenth Amendment, to determine whether the regulation has a rational connection to the state's police powers. *Castille*, 712 F.3d at 221–22. In so doing, the Court states that "a hypothetical rationale, even post hoc, cannot be fantasy." *Id.* at 223. However, *Castille* does not involve a Commerce Clause challenge and cannot stand for a broad refashioning of the test used in Commerce Clause challenges, as Yearwood asserts.

IT IS FURTHER ORDERED that Federal Defendants' Cross Motion for Summary Judgment filed December 15, 2017 (Dkt. Nos. 142) is **GRANTED** as to its argument that the Service considered whether the harvestman was listed in error. In all other respects, the motion is **DENIED**.

IT IS FURTHER ORDERED that Defendant-Intervenors' Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment filed December 21, 2017 (Dkt. No. 147) is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff-Intervenors' Motion for Summary Judgment filed October 10, 2017 (Dkt. No. 133) is **GRANTED** to the following extent: Yearwood's arguments are not barred by the statute of limitations. In all other respects, the motion is **DENIED**.

IT IS FURTHER ORDERED that Federal Defendants' Cross-Motion for Summary Judgment filed December 15, 2017 (Dkt. Nos. 145) and Defendant-Intervenors' Cross-Motion for Summary Judgment filed December 22, 2017 (Dkt. Nos. 151) are **GRANTED** to the following extent: Congress's regulation of a "take" of the harvestman under the Act is a valid exercise of the Commerce Clause power. In all other respects, the motions are **DENIED**.

IT IS FINALLY ORDERED that Federal Defendants' Opposed Motion to Strike Four Exhibits Attached to Plaintiffs' Reply Brief [Dkt. Nos. 156-6, 156-7, 156-8, 156-9 & 157-6, 157-7, 157-8, 157-9] and Memorandum in Support filed February 16, 2018 (Dkt. No. 159) is **DISMISSED**, as the court did not consider these exhibits.

SIGNED this 28th of March, 2019.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

AMERICAN STEWARDS OF LIBERTY, CHARLES SHELL, CHERYL SHELL, WALTER SIDNEY SHELL MANAGEMENT TRUST, KATHRYN HEIDEMANN, ROBERT V. HARRISON, SR., JOHN YEARWOOD, AND WILLIAMSON COUNTY, TEXAS, PLAINTIFFS, JOHN YEARWOOD AND WILLIAMSON COUNTY, TEXAS, PLAINTIFF-INTERVENORS, V. DEPARTMENT OF THE INTERIOR, UNITED STATES FISH AND WILDLIFE SERVICE, SALLY JEWELL, DANIEL M. ASHE, BENJAMIN N. TUGGLE, CENTER FOR BIOLOGICAL DIVERSITY, TRAVIS AUDUBON, AND DEFENDERS OF WILDLIFE, DEFENDANTS, CENTER FOR BIOLOGICAL DIVERSITY, DEFENDERS OF WILDLIFE, AND TRAVIS AUDUBON, DEFENDANT-INTERVENORS.	§	CAUSE NO. 1:15-CV-1174-LY

FINAL JUDGMENT

Before the court is the above-styled and numbered cause. On this date, the court rendered an order granting Plaintiffs American Stewards of Liberty, Charles Shell, Cheryl Shell, Walter Sidney Shell Management Trust, Kathryn Heidemann, Robert V. Harrison, Sr., John Yearwood, and Williamson County, Texas's motion for summary judgment in part; granting the Defendants Department of the Interior, United States Fish and Wildlife Service, Sally Jewell, Daniel M. Ashe, Benjamin N. Tuggle, Center For Biological Diversity, Travis Audubon, and

Defenders of Wildlife's motion for summary judgment in part; denying Defendant-Intervenors Center for Biological Diversity, Defenders of Wildlife, and Travis Audubon's motion for summary judgment; and granting Plaintiff-Intervenors John Yearwood, and Williamson County, Texas's motion for summary judgment in part. As nothing further remains to resolve, the court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that the 2017 finding of the United States Fish and Wildlife Service, 82 Federal Register 20,861-02 (May 4, 2017) is vacated and remanded to the United States Fish and Wildlife Service for further consideration consistent with this judgment.

IT IS FURTHER ORDERED that Plaintiffs American Stewards of Liberty, Charles Shell, Cheryl Shell, Walter Sidney Shell Management Trust, Kathryn Heidemann, Robert V. Harrison, Sr., John Yearwood, and Williamson County, Texas, recover costs of court against Defendants Department of the Interior, United States Fish and Wildlife Service, Sally Jewell, Daniel M. Ashe, Benjamin N. Tuggle, Center For Biological Diversity, Travis Audubon, and Defenders of Wildlife and Defendant-Intervenors Center for Biological Diversity, Defenders of Wildlife, and Travis Audubon, jointly and severally.

IT IS FURTHER ORDERED that the case is hereby **CLOSED**.

SIGNED this 28th of March, 2019.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE