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,
Plaintiffs,

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

v.

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

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

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

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

REPLY BRIEF OF FEDERAL APPELLEES/CROSS-APPELLANTS

Counsel listed on inside cover

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

Of Counsel:

FRANK LUPO
Office of the Solicitor
U.S. Department of the Interior

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,
Plaintiffs,

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

v.

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

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

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

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

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

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

2. Counsel of record and other interested persons:

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

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

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

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

e. Amici curiae: Cato Institute, Southeastern Legal Foundation, and Mountain States Legal Foundation (Attorneys: Trevor C. Burrus, Ilya Shaprio); Goldwater Institute (Attorneys: Jonathan Riches, Roger B. Borgelt); State of Texas (Attorneys: Ken Paxton, Jeffrey C. Mateer, Kyle D. Hawkins, Natalie D. Thompson); Terry M. Wilson (Jason Boatright); The American Farm Bureau Federation, Chamber of Commerce of the United States of America, National Association of Home Builders of the United States, National Federation of Independent Business Small Business Legal Center, and Texas Farm Bureau (Paul J. Beard II); and Environmental Law Professors (Brian Wolfman, Hope M. Babcock, David Albert Schwartz).

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Regulations

Other Authorities

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 28.1(c), the Government herein replies in support of its cross-appeal. Even setting aside other jurisdictional defects, the appeal must be dismissed because the only appellants—John Yearwood and Williamson County—were erroneously permitted to intervene and are therefore not proper parties to this case. Government's Principal Brief at 29-34. Appellants' response glosses over the fundamental criteria for permissive intervention: there must be a common question of law or fact. This element was inexplicably absent here. The original Plaintiffs' claims hinged on the question whether, as a scientific matter, the Bone Cave Harvestman still needed protection; whereas Appellants' claims hinged on whether the federal government had the constitutional authority to regulate an intrastate species. Skirting the "common question" requirement, Appellants instead rely on irrelevant aspects of inapplicable joinder rules and ultimately fall back on the misplaced conclusion that even if they improperly became parties, there is now no remedy for that fundamental error. As detailed below, these contentions fail.

ARGUMENT

Yearwood and Williamson County were granted permissive intervention under Federal Rule of Civil Procedure 24(b). The plain text of that rule requires would-be intervenors to have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). This threshold determination "is not discretionary; it is a question of law." *Newby v. Enron Corp.*, 443 F.3d 416, 421 (5th

Cir. 2006); *see also United States v. Henderson*, 636 F.3d 713, 717 (5th Cir. 2011) ("A district court abuses its discretion if it bases its decision on an error of law."). Rather than identifying any common question of law or fact that their claims purportedly shared with Plaintiffs, Appellants advance two faulty arguments.

First, they contend that permissive intervention was "well within the court's discretion," because they and Plaintiffs "were challenging the same 'transaction or occurrence'—*i.e.*, the Service's continued failure to delist the species." Reply and Response Brief at 16. But the fact that both would-be intervenors and plaintiffs might raise claims challenging the same "transaction or occurrence" does not mean that those claims also share a "common question of law or fact." Indeed, the very text of the rule upon which Appellants mistakenly rely—Federal Rule of Civil Procedure 20—proves this point.[1]

Rule 20 provides that persons may be joined as plaintiffs if "(A) they assert any right to relief . . . with respect to or arising out of the same transaction [or] occurrence, . . . *and* (B) any question of law or fact common to all plaintiffs will arise in the action." Fed. R. Civ. P. 20(a)(1) (emphasis added). Thus, Rule 20—which is not even applicable here—only confirms that the Federal Rules treat the "common

[1] Rule 20 was not invoked below and is not relevant. Rule 20 provides a mechanism for existing parties to join additional plaintiffs or defendants. As third-parties who were not joined by an existing party, Yearwood and the County sought to intervene pursuant to Rule 24. *See Thompson v. Boggs*, 33 F.3d 847, 858 (7th Cir. 1994) (non-parties may seek to join a case on their own accord under Rule 24, not Rule 20).

question" requirement as separate and distinct from the "transaction or occurrence" requirement. *See also* 7 Charles Wright et al., *Federal Practice & Procedure* § 1653 (3d ed.).

This distinction is consistent with the plain text of Rule 24(b)(1)(B). The rule does not refer to "common claims" or "common subject matter," but to "common questions" that underpin a "claim or defense." *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (describing the "common question" requirement in the Rule 23 context and explaining that the claims "must depend upon" a specific shared question). As the Supreme Court explained in *Wal-Mart*, it is not enough that claims may, for example, commonly assert "an unlawful employment practice" or even that plaintiffs "have all suffered a violation of the same provision of law," because the law "can be violated in many ways." *Id.* Thus, the mere fact that two claims may challenge the same transaction or occurrence in unrelated ways is insufficient. Instead, the "claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor." *Id.* This ensures that multiple claims will "productively be litigated at once," because the factfinder's resolution of the common question will resolve an issue central to both claims "in one stroke." *Id.*

No such efficiencies were presented by the claims here—a fact that even the district court acknowledged. *See* ROA.274 ("Movants have not shown that they will contribute significantly to the development of factual issues in this cause."). Accordingly, the fact that both Appellants and Plaintiffs desired a delisting was not

itself a common question, as each party's claim rested on a concededly unique set of legal and factual contentions.[2]

Second, Appellants urge that even if intervention were improperly granted, the remedy would be severance rather than dismissal, and because there is no underlying case left to sever *from theirs*, severance is "beyond the power of this Court." Reply and Response Brief at 17. There is no support for this *non sequitur*, which assumes the conclusion that Appellants have their own case to which they can anchor their claims.

As an initial matter, Appellants incorrectly rely on Federal Rule of Civil Procedure 21 to argue that misjoinder of parties is not a ground for dismissal. *Id.* at 16. But Rule 21 applies to improper joinder, not improper intervention. And even if that rule were considered, it offers Appellants no support. Rule 21 provides that rather than dismissing an entire case outright, the district court should drop only the misjoined party or sever a party's misjoined claims. Either way, employing that remedy here would effectively conclude this appeal, because when "the claim to be severed happens to be the only claim asserted by one of multiple plaintiffs, then severing the claim will have the effect of severing that plaintiff from the action," and a nonparty may not pursue an appeal. *Henderson v. AT&T Corp.*, 918 F. Supp. 1059, 1062 (S.D. Tex. 1996); *see also Edwards v. City of Houston*, 78 F.3d 983, 993 (5th Cir.

[2] Indeed, it is not clear that Appellants were even challenging the same "transaction or occurrence" as Plaintiffs. Appellants have at times argued that they are challenging the original 1988 listing, whereas the Plaintiffs were challenging the Service's 2017 90-Day Finding.

1996) ("It is well-settled that one who is not a party to a lawsuit, or has not properly become a party, has no right to appeal a judgment entered in that suit.").[3]

To be sure, the full scope of the remedy for improper intervention would depend on the circumstances and stage of the litigation. For example, if the improper intervenor obtained a judgment, vacatur of that judgment might be appropriate; whereas, if the intervenor obtained no unique relief and his involvement did not materially alter the litigation, vacatur might be unnecessary. *See, e.g., Mothersill D.I.S.C. Corp. v. Petroleos Mexicanos, S.A.*, 831 F.2d 59, 61 (5th Cir. 1987) (vacating improper intervenor's post-trial judgment award); *Stockton v. United States*, 493 F.2d 1021, 1022 (9th Cir. 1974) (same); *Prete v. Bradbury*, 438 F.3d 949, 959–60 (9th Cir. 2006) (vacatur not required where intervenor obtained no unique relief and its participation did not impact the outcome). But regardless of what retroactive relief should be considered as to the judgment below, it should be clear that a person who had no business being a party to the case in the first place should not be permitted to pursue an appeal. This would only compound the error and prejudice the Government, who must continue

[3] Appellants also suggest that even if they did not properly intervene, they have the right to appeal because they established Article III standing below. Reply and Response Brief at 17. However, as Appellants sought to intervene in an existing action, the district court did *not* consider whether they independently had standing. ROA.272-74; *cf. Newby*, 443 F.3d at 422 ("[T]here is no Article III requirement that intervenors have standing in a *pending* case."). Moreover, even if they could have shown standing, there is no support for the notion that Article III standing is sufficient to confer party-rights, absent compliance with the relevant Federal Rules.

litigating whether a federal agency had the constitutional authority to issue a decision that has since been vacated and no longer has effect.

Finally, while Appellants contend that dismissal of their appeal would be wasteful and inefficient, Reply and Response Brief at 17, what may be expedient for Appellants is not the touchstone for permissive intervention. Appellants failed the only gatekeeping requirement for their mode of intervening—a requirement that promotes efficiencies in the judicial process by enabling jurists and factfinders to resolve issues underlying multiple claims. These principles would not be advanced by adopting Appellants' position. And the notion that the rules should be disregarded to achieve efficiencies for Appellants is doubly problematic here, where they are asking the Court to reach out to address a constitutional question that could well be obviated by the ongoing remand.[4]

Appellants' suggestion that this Court should just throw up its hands and allow their ill-conceived claims to take on new life in this forum also raises a serious question whether a party opposing improper intervention could truly obtain effective

[4] Appellants' reliance on *United States v. LULAC*, 793 F.2d 636 (5th Cir. 1986), is also misplaced. In *LULAC*, the Court declined to dismiss a claim that was raised both by parties that had already properly joined the case and by new intervenors. *Id.* at 643. Unlike here, however, no party on appeal challenged the intervention as procedurally improper under Rule 24(a) or (b), and the Court even noted that the requirements of permissive intervention could have been met. *Id.* at 644-45. The Court nevertheless cautioned that "[o]ur decision is not to be viewed as sanction for this type of intervention which, by resting on a slender legal reed, enables a litigant to select the cause in which, and the judge to whom, it will present its case." *Id.* at 645-46.

relief, given that the *grant* of intervention is not appealable until after entry of a final judgment. *See In re Estelle*, 516 F.2d 480, 484 (5th Cir. 1975). This is an issue of significant concern for the United States, which is frequently involved in multi-party litigation of widespread interest. While district courts enjoy great discretion over permissive intervention, such liberality "does not equate with rights of indiscriminate intervention and the rule continues to set bounds that must be observed." 7 *Federal Practice & Procedure*, *supra*, § 1904 (internal quotation marks omitted).

CONCLUSION

For the reasons discussed, the district court's grant of intervention must be reversed and the appeal dismissed.

Respectfully submitted,

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

Of Counsel:

FRANK LUPO
Office of the Solicitor
U.S. Department of the Interior

January 23, 2020
DJ 90-8-6-07841

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2020, 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

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 28.1(e)(2)(C) because, excluding the parts of the document exempted by Rule 32(f), it contains 1,807 words.

2. This document likewise complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Garamond font.

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