No. 19-50321

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

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

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

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

FEDERAL APPELLEES' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS APPEAL

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CERTIFICATE OF INTERESTED PERSONS

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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; 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.

Additional parties in district court: American Stewards of Liberty; Charles Shell; Cheryl Shell; Walter Sidney Shell Management Trust; Kathryn Heidemann; 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, Kevin Dow Collins, Theodore Hadzi-Antich, Chance Weldon, Chad Ennis (district court), David Barton Springer (district court).

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s/ *Varu Chilakamarri*
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INTRODUCTION

Intervenors disagree with the 30-year-old endangered species listing of the Harvestman, but they did not challenge any concrete application of that listing to them, let alone an application that remains live on appeal. Instead, Intervenors chose Plaintiffs' challenge to FWS's denial of a delisting petition as the vehicle for their constitutional arguments against listing. Now that FWS's denial of delisting has been set aside, all arguments against it are moot, and further review and relief cannot be had.

ARGUMENT

Although Intervenors concede that FWS's denial of delisting was the only vehicle for bringing their constitutional challenge, Response at 11, they contend they are nonetheless entitled to carry on their appeal, untethered to that denial—and despite the vacatur of that denial. This is so, they contend, because they are separate parties, raising separate arguments, and seeking separate relief from Plaintiffs. Intervenors' expansive theory of appellate jurisdiction is unsupported by the caselaw. An intervenor's "participatory rights remain subject to the intervenor's threshold dependency on the original parties' claims, for it is . . . well-settled that an existing suit within the court's jurisdiction is a prerequisite of an intervention." *Harris v. Amoco Production*, 768 F.2d 669, 676-77 (5th Cir. 1985) (internal quotation marks omitted). That rule precludes Intervenors from now attempting to create a new suit, particularly one that has long been jurisdictionally time-barred. Intervenors' appeal must be

dismissed because (1) their claims are moot; (2) the district court's remand order is not appealable; and (3) no further relief is available.

I. Intervenors' challenge to FWS's 90-Day Finding is moot.

As detailed in the motion, this Court lacks jurisdiction over Intervenors' appeal because the only agency action challenged in the case—FWS's Negative 90-Day Finding—has been set aside. Motion at 6-8. That challenged action has no remaining effect or any injurious repercussions, and Intervenors do not claim otherwise. To the contrary, the petition is now before FWS, which could issue a *positive* 90-Day Finding—the first step in any delisting process. *See* Motion at 5 (documenting that FWS "has stipulated that it will complete a new 90-Day Finding by October 15, 2019"). Intervenors therefore lack standing to appeal because they cannot show an alleged injury "traceable to the challenged action." *Clapper v. Amnesty International USA*, 568 U.S. 398, 407, 413 (2013). The challenge to FWS's 90-Day Finding is moot; any challenge to a future, yet-to-be-issued decision is unripe.

Intervenors do not dispute that their alleged injuries are not traceable to the now-vacated-90-Day Finding. Instead, they claim their injuries are traceable to the 1988 listing. Response at 9-10. But this basis for traceability contravenes the rule of *Clapper*—which Intervenors fail to address—that a plaintiff's alleged injuries must stem from the specific agency action challenged in the case, not from pre-existing events. Motion at 8-10 (citing *Clapper*, 568 U.S. at 407, 413).

Intervenors attempt to sidestep this problem by claiming the challenged action *was* the 1988 listing, and that they are permitted to challenge it—notwithstanding the jurisdictional time-bar—because the "statute of limitations clock *for the original listing* restarted on the date of the petition denial." Response at 11 (emphasis added) (citing *Dunn-McCampbell Royalty Interest v. NPS*, 112 F.3d 1283 (5th Cir. 1997)). Intervenors are wrong. As the district court recognized when it dismissed Williamson County, FWS's 90-Day Finding did not restart the six-year limitations period for facial challenges to the 30-year-old listing. ROA.7218-20. *Dunn-McCampbell* did "not create an exception from the general rule" that the limitations period for a "*facial* challenge to a regulation" runs from "the date of publication"; the case "merely stand[s] for the proposition that an agency's *application* of a rule to a party creates a new, six-year cause of action." 112 F.3d at 1287 (emphasis added). Thus, while plaintiffs may attack an agency's authority to apply an older regulation, they may do so only through a challenge to "some direct, final agency action involving [that] particular plaintiff" where the "impact on the plaintiff is direct and immediate." *Id.* at 1287-88.

Intervenors assert that FWS's 90-Day Finding is such an action. But now that the Finding has been overturned, there is no present application of the 1988 listing.[1]

[1] Intervenors are wrong in asserting that a 90-Day Finding "reaffirm[s]" a listing and is analogous to a denial of a petition to "rescind" a regulation. Response at 11; Motion at 9; *see also National Ass'n of Reversionary Property Owners v. STB*, 158 F.3d 135, 142 (D.C. Cir. 1998) (recognizing limits on reopening doctrine). But in any event, *Dunn* makes clear that the ability to attack a new application of an old regulation hinges on the

Consequently, Intervenors' appeal would transform this litigation into a forbidden facial challenge to the 1988 listing, causing the Court to review a different agency decision from what the district court considered.

Intervenors' attempt to continue their challenge without any live application of the 1988 listing underscores the importance of traceability as an element of Article III jurisdiction: Intervenors seek review of FWS's constitutional authority to issue a decision that it has not yet rendered and may not even be adverse to Intervenors. The lack of a present case or controversy compels dismissal.[2]

II. The district court's constitutional ruling and remand decision is not an appealable order.

Plaintiffs generally may not appeal favorable judgments or agency-remands. *See* Motion at 11-15. The district court's judgment was substantively favorable to the

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final and impending nature of that new action, which is absent here. 112 F.3d at 1288.

[2] Intervenors state that their lawsuit challenged "restrictions [FWS] placed on their property," Response at 1, but they did not challenge any specific agency decision enforcing or threatening to enforce the listing against them, unlike previous plaintiffs. Motion at 15 & n.8. For example, although they raise a specter of harm—including fees that must be paid "[i]f Intervenors wish to develop their properties near Harvestman habitat," and preserves that Williamson County must maintain under a voluntary Habitat Conservation Plan, *id.* at 9—Intervenors did not challenge the imposition of any fees; the Conservation Plan; any denial of a take permit; or any other particular agency action beyond the denial of delisting. ROA.1081-84, ¶¶ 59, 65, 80-81. If they had, their dispute would have taken on a factual dimension, instead of the "pure question of law" they claimed it to be. ROA.4376. Just as in *Dunn-McCampbell*, the mere fact that plaintiffs live under a regulatory regime that imposes obligations with which they disagree does not support an as-applied challenge. *See* 112 F.3d at 1288.

Plaintiffs and Intervenors because it set aside the unfavorable agency action that prompted this suit; it was also interlocutory because it remanded the matter for a new agency decision. Intervenors nonetheless contend that they may appeal because (1) their constitutional arguments were rejected, and so they did not obtain their requested relief; and (2) they would otherwise be "out of court" and thus qualify under the collateral order doctrine. Neither contention has merit.

First, while Intervenors did not convince the district court to adopt their legal theory as the basis for vacating the agency's decision, that is no reason for this Court to review an agency decision which has nevertheless been vacated. The fact that a party did not receive everything it sought is a *necessary* but *not sufficient* condition for appealing a decision. In addition, a party must suffer a cognizable "adverse effect" from the decision. *See Ward v. Santa Fe Independent School District*, 393 F.3d 599, 603 (5th Cir. 2004) (citing *California v. Rooney*, 483 U.S. 307 (1987)); *United States v. Fletcher*, 805 F.3d 596, 602 (5th Cir. 2015).

To illustrate: Intervenors are no more adversely effected by the rulings here than the City was in *Mall Properties v. Marsh*, 841 F.2d 440 (1st Cir.) (per curiam), *cert. denied*, 488 U.S. 848 (1988). There, the Army Corps of Engineers denied a shopping mall's permit-request, relying on socio-economic rather than environmental factors. *Id.* at 441. When the denial was challenged, the City intervened to defend the reliance on socio-economic factors, but the court rejected its arguments and remanded the case. *Id.* The City alone sought appeal, arguing—like Intervenors here—that the

decision was appealable because the court conclusively resolved the legal issue against it and did not retain jurisdiction. *Id.* at 443 & n.2. The court dismissed the appeal, explaining that the City could obtain review of its socio-economic arguments if and when the Corp issued a new decision *granting* the permit. *Id.* at 443 & n.3. Similarly, in *Northwest Austin Municipality Utility District No. One v. Holder*, 557 U.S. 193, 205 (2009), the plaintiff received an unfavorable lower court decision on its *constitutional* challenge to the Voting Rights Act. The plaintiff was unable to obtain review of that ruling because the Supreme Court concluded that the utility district was eligible for a *statutory* exception to the Act. *Id.* at 204. Thus, a plaintiff cannot appeal unless a ruling has an adverse effect on it—whether it be through the grant of the permit in *Marsh*, through the application of the Voting Rights Act requirements in *Northwest Austin*, or (as here) through a new Negative 90-Day Finding.

Relying on *Forney v. Apfel*, 524 U.S. 266 (1998), Intervenors respond that it "is well-established that a party may appeal a decision vacating and remanding a challenged agency action if the party had also requested relief in the district court in addition to vacatur and remand." Response at 7-8, 15. But *Forney* and its progeny (including *Bordelon v. Barnhart*, 161 Fed. Appx. 348, 351 (5th Cir. 2005)), do not stand for this broad proposition. Rather, as one court explained, the *Forney* line-of-cases

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

> to appellate jurisdiction under statutes containing language comparable to that found in the Social Security Act.

Kreider Dairy Farms v. Glickman, 190 F.3d 113, 119-20 (3d Cir. 1999); *see also* 33 Charles Wright et al., *Federal Practice and Procedure* § 8381 (2d ed.) (explaining that although "a district court order remanding to an agency has an obviously interlocutory character," an exception has been made for "remand orders issued under the judicial review provisions of the Social Security Act"). Here, unlike in *Forney* and the other Social Security Act cases cited by Intervenors, there is no special statute granting judicial review over remand-orders. Thus, this case is governed by the general rules of finality as described in our Motion at 14-16.

Second, Intervenors claim that the judgment would put them "out of court" due to res judicata and undue delay. Response at 15, 18-20. Neither contention has merit. Intervenors' res judicata argument incorrectly assumes that the district court's judgment would be treated as final, when it is well-established that remand orders are interlocutory. Indeed, this exact argument was rejected in *Mall Properties*, *see supra* pp. 5-6, where the court dismissed intervenor's appeal of a remand order. The court explained that a "prerequisite to the application of res judicata principles is a final judgment . . . [but] the district court judgment remanding to the agency is not a final judgment." 841 F.2d at 443 n.3 (noting that if the agency issues an adverse decision on remand, intervenor could re-raise its arguments, and even if the district court again rejected them under law-of-the-case-principles, the issue would be reviewable on

appeal); *see also Conwill v. Greenberg Traurig*, 448 Fed. Appx. 434, 437 (5th Cir. 2011) (interlocutory decisions have no preclusive effect). Nor would res judicata apply to review of a new agency decision. Collateral estoppel likewise would pose no bar because the district court's ruling on the constitutional issue was not necessary for the judgment. As in *Rooney*, 483 U.S. at 311, the district court "could as easily have held" that the constitutional claims were moot once it ruled on the validity of the agency action on the alternative grounds that Intervenor Yearwood himself advanced before the agency.

Contrary to Intervenors' assertion, moreover, mere delay in pursuing one's arguments does not render a decision reviewable under the collateral order doctrine. Response at 18-20. The touchstone of whether a party has been put "out of court" is not delay itself, but whether events during the delay would render the court "powerless to afford effective relief" from the challenged judgment. *Hines v. D'Artois*, 531 F.2d 726, 731 (5th Cir. 1976). Thus, in *Hines*—which discussed *stays*, not remands as Intervenors suggest—this Court reviewed a district court's order sua sponte staying plaintiffs' civil rights complaint until they initiated and completed EEOC proceedings that were not a prerequisite to filing suit. *Id.* at 728, 736. *Hines* concluded that if "plaintiffs were forced to await judicial review of the validity of the stay order until all EEOC proceedings . . . were completed, they effectively would be denied review on that point altogether." *Id.* at 731. Not so here: the district court did not stay the case

to require a parallel administrative proceeding; it remanded for the agency to reconsider the very decision from which Intervenors' suit arose.

That Intervenors must wait for a live case or controversy to raise their constitutional challenge does not render their claim reviewable under the collateral order doctrine or otherwise. As the Supreme Court has explained: "We will not shrink from our duty as the bulwark of a limited constitution against legislative encroachments . . . *but* 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*, 557 U.S. at 205 (internal quotation marks omitted; emphasis added). Intervenors focus solely on the former portion of this pronouncement, but it is the latter that controls here and that Intervenors entirely fail to address. Response at 20-21. Intervenors instead respond with the non sequitur that "there is no statutory basis to resolve the[ir] constitutional claims." *Id.* But the courts *avoid* constitutional claims when there is a statutory or other basis for resolving "the case." *Northwest Austin*, 557 U.S. 193, 205; Motion at 16-18. That constitutional arguments are left unresolved is the point of the constitutional avoidance doctrine, and it counsels dismissal here.

III. No further remedies are available.

The APA confines the legal basis for judicial review, and as a result, the remedy that can be granted. Motion at 19. Although it is undisputed that this suit was brought under 5 U.S.C. § 706(2), Intervenors seek more than the normal § 706(2)-

remedy of setting aside the agency action—wanting instead to enjoin a future Negative 90-Day Finding and to compel a delisting order. In this regard, Intervenors ignore the holding of *John Doe v. Veneman*, 380 F.3d 807, 815 (5th Cir. 2004)—that a court "exceed[s] its jurisdiction" by granting remedies that "exceed[] the legal basis for review under the APA."

Intervenors' response is to note that their complaint also references the Declaratory Judgment Act. Response at 12. But that Act creates no independent basis for federal jurisdiction; it authorizes declaratory relief only where jurisdiction already exists. *Skelly Oil v. Phillips Petroleum*, 339 U.S. 667, 671 (1950) ("The Declaratory Judgment Act is procedural only" and does not enlarge the "kinds of issues which give right to entrance to federal courts."). Because no APA jurisdiction exists for review beyond the 90-Day Finding, no additional remedies are available.

CONCLUSION

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

Respectfully submitted,

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July 26, 2019
DJ 90-8-6-07841

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 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*
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief 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 2,597 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.

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Dated: July 26, 2019