No. 19-50178

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GENERAL LAND OFFICE OF THE STATE OF TEXAS,
Plaintiff-Appellant,

v.

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

Appeal from the United States District Court for the Western District of Texas
No. 1:17-cv-00538 (Hon. Sam Sparks)

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CERTIFICATE OF INTERESTED PERSONS

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

1. Private parties

   a. Texans for Positive Economic Policy

b. Susan Combs

c. Texas Public Policy Foundation

d. Reason Foundation

2. Amici curiae

a. State of Texas

b. Texas State Senator Donna Campbell

c. American Stewards of Liberty

3. Counsel of record and other persons:

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d. Attorneys for amicus curiae Texas State Senator Donna Campbell: Adam Warren Aston and Sean Daniel Jordan

e. Attorneys for amicus curiae American Stewards of Liberty: Paul Stanley Weiland, Rebecca Barho, Alan M. Glen, and Sarah Wells Collins

f. Attorneys for movant-intervenor-defendants in the district court, Travis Audubon Society, Texas Ornithological Society, Center for Biological Diversity, and Defenders of Wildlife: David O. Frederick, Jason C. Rylander, and Ryan Adair Shannon

s/ *Amelia G. Yowell*
AMELIA G. YOWELL

Attorney of record for Federal Appellees

STATEMENT REGARDING ORAL ARGUMENT

This case challenges the U.S. Fish and Wildlife Service's 90-day finding denying a petition to delist the golden-cheeked warbler. The case has a complex administrative record and involves numerous scientific studies. Federal Defendants-Appellees believe that oral argument would be appropriate and helpful to the Court.

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INTRODUCTION

The golden-cheeked warbler, a small songbird that breeds only in central Texas, has been listed as "endangered" under the Endangered Species Act ("ESA") since 1990. Five years ago, the U.S. Fish and Wildlife Service (the "Service") surveyed the best scientific and commercial information regarding the warbler and concluded that it should remain listed as endangered in light of the ongoing, widespread threats to its habitat. Less than a year later, the Texas Public Policy Foundation and other entities petitioned the Service to "delist" the warbler. After evaluating the petition and considering information in its own files, including its recent review of the species, the Service issued what is generally referred to as a "negative 90-day finding" — a finding that the petition did not present substantial information indicating that delisting may be warranted.

In 2017, Plaintiff-Appellant Texas General Land Office (the "Land Office") sued the Service, challenging its negative 90-day finding, its 2014 review, and its 1990 listing of the warbler. The Land Office claimed that the listing was invalid because the Service has not yet designated "critical habitat" for the warbler. The Land Office also claimed that the Service's negative 90-day finding was arbitrary and capricious. Finally, the Land Office claimed that all three agency decisions violated the National Environmental Policy Act ("NEPA").

The district court correctly dismissed the Land Office's challenge to the 1990 listing as time-barred and correctly held that the Land Office had failed to state any claim under NEPA. The district court also properly granted summary judgment to the Service on the Land Office's claim challenging the negative 90-day finding. As the district court held, the Service's conclusions were rational, supported by the record, and adequately explained. The district court's judgment should be affirmed.

STATEMENT OF JURISDICTION

(A) The district court had jurisdiction under 28 U.S.C. § 1331 because the Land Office's claims arose under federal statutes, namely, the ESA, 16 U.S.C. §§ 1531 et seq.; NEPA, 42 U.S.C. §§ 4321 et seq.; and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq. ROA.844–48.[1]

(B) This Court has jurisdiction under 28 U.S.C. § 1291 because this is an appeal from a final judgment of the district court. ROA.1569–70.

(C) The district court entered judgment on February 6, 2019. *Id*. The Land Office filed its notice of appeal 23 days later on March 1, 2019. ROA.1571–72. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

[1] ROA refers to the record on appeal as paginated by the district court. This case also includes an administrative record filed with the district court but not included in the ROA. References to the administrative record use the original pagination of that record: ARxxxx.

(D) The district court's judgment was final because it resolved all claims against all defendants. ROA.1569–70.

STATEMENT OF THE ISSUES

1. Whether the Land Office's claims based on the Service's 1990 listing determination are barred by the six-year statute of limitations.

2. Whether the Service's 1990 listing determination, 2014 review, and negative 90-day finding resulted in no change to the physical environment and were therefore not subject to NEPA.

3. Whether the Service's negative 90-day finding reasonably concluded that the petition to delist did not present substantial scientific or commercial information indicating that delisting may be warranted.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. The Endangered Species Act

Congress enacted the ESA in 1973 to conserve endangered and threatened species and the ecosystems upon which such species depend. 16 U.S.C. § 1531(b). The Act directs the Secretary of the Interior to maintain a list of threatened and endangered species, *id.* § 1533(a)(1), and it defines "endangered species" to mean "any species which is in danger of extinction throughout all or a significant portion

of its range," *id.* § 1532(6). The ESA is a frequently litigated statute, with much of the litigation brought by groups seeking protections for various species.

The ESA enumerates five exclusive criteria by which the Service must determine whether any species is endangered or threatened: (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; and (E) other natural or manmade factors affecting the species' continued existence. *Id.* § 1533(a)(1). "[A]ny one or a combination" of these factors can support the listing of a species. 50 C.F.R. § 424.11(c). After taking into account the five statutory factors, the Service must base its determination "solely on the best scientific and commercial data available . . . after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State . . . to protect such species." 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b).

Once a species is listed, the ESA mandates specific protections. *See, e.g.*, 16 U.S.C. § 1536(a)(2) (directing federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence" of listed species); *id.* § 1533(f) (authorizing the Service to develop and implement recovery plans to promote conservation of the species); *id.*

§ 1538 (prohibiting unauthorized killing, harming, trading, or otherwise taking of an endangered species). The Service must also designate critical habitat for the species "concurrently" with the listing, but only "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A)(i); *see also id.* § 1532(5)(A) (defining "critical habitat"); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 139 S. Ct. 361, 368–69 (2018) (explicating that definition).

The ESA requires the Service to conduct a review of the status of all listed species at least once every five years. 16 U.S.C. § 1533(c)(2). A purpose of this review is to evaluate whether a change in the species' status is warranted.

A species may be removed from the list of endangered species — i.e., delisted — either on the initiative of the Service or on petition by an interested person. *Id.* § 1533(b)(3)(A); *see also* 5 U.S.C. § 553(e); 50 C.F.R. § 424.14(a). When a delisting petition is filed, the Service first determines "whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A). Under the regulation in effect at the time of the agency action here, "substantial information" is the "amount of information that would lead a reasonable person to believe that" delisting the species "may be warranted." 50 C.F.R. § 424.14(b)(1) (effective through Oct. 26, 2016). "To the maximum extent practicable," the Service must make this finding within 90 days of receiving the petition. 16 U.S.C.

§ 1533(b)(3)(A). If the Service finds that the petition does not present such substantial information, it issues a "negative 90-day finding" that is subject to judicial review. *Id.* § 1533(b)(3)(C)(ii).

If, however, the Service finds that the petition presents substantial information indicating that delisting may be warranted, the Service proceeds to the next step. *Id.* § 1533(b)(3)(A). The Service must "promptly commence a review of the status of the species concerned" and determine within 12 months after receiving the petition whether delisting the species is warranted, not warranted, or "warranted but precluded." *Id.* § 1533(b)(3)(A), (B).

In deciding whether a species should be delisted, the Service must consider the same five factors it considers for listing decisions. *Id.* § 1533(a)(1), (c)(2)(B); 50 C.F.R. § 424.11(c), (d); *see also Friends of Blackwater v. Salazar*, 691 F.3d 428, 432–34 (D.C. Cir. 2012). The Service is authorized to delist a species only if "the best scientific and commercial data available" show that the species is neither endangered nor threatened because (1) the species is extinct; (2) the species has recovered to a point at which protection under the Act is no longer necessary; or (3) the original listing determination was based on erroneous data or an erroneous interpretation of the data. 50 C.F.R. § 424.11(d).

2. The National Environmental Policy Act

NEPA serves the dual purpose of informing agency decision-makers of the significant environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). To meet these purposes, NEPA requires an agency to prepare a comprehensive environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

B. Factual background

The golden-cheeked warbler is a small songbird with distinctive yellow cheeks. Final Rule to List the Golden-cheeked Warbler as Endangered, 55 Fed. Reg. 53,153, 53,154 (Dec. 27, 1990). Although the warbler travels to other countries in the winter, it breeds only in Texas. *Id.*; *see also* AR6776; AR6780–81. Every spring, the warbler migrates to the same regions of central Texas to breed. 55 Fed. Reg. at 53,154; AR6780. The warbler's breeding range aligns closely with the range of Ashe juniper trees in Texas. *Id*. The "presence of mature Ashe junipers is a major requirement for habitat of golden-cheeked warblers." 55 Fed. Reg. at 53,154. The warbler uses Ashe juniper bark to construct its nest, eats insects living off the trees, and perches on its branches to sing. *Id.*; AR6776.

1. 1990 listing

The Service listed the golden-cheeked warbler as endangered in 1990. 55 Fed. Reg. at 53,153; *see also* Emergency Rule to List the Golden-cheeked Warbler as Endangered, 55 Fed. Reg. 18,844 (May 4, 1990). This listing decision was based on four of the statutory factors: the present and threatened destruction of habitat; nest predation; inadequacy of existing regulatory mechanisms; and other natural or manmade factors affecting its existence. 55 Fed. Reg. at 53,157–59; *see also* 16 U.S.C. § 1533(a)(1); 50 C.F.R. § 424.11(c).

At the time of the listing, roughly 50% of the juniper acreage in Texas had been cleared as a result of the state's juniper "eradication program." 55 Fed. Reg. at 53,157. Without junipers, warblers have fewer sources for nesting materials and they lose important canopy cover (the percentage of the ground area that is covered by tree crowns). *Id.* The Service was concerned that warblers would lose even more habitat in the future. It noted that juniper clearing remained a popular range management practice. *Id.* More pressing, population growth and increasing urbanization threatened warbler habitat. *Id.* The Service observed that approximately 67% of breeding warblers reside around rapidly growing cities, such as Austin and San Antonio. *Id.* Oak-juniper woodlands are frequently cleared in these areas to make way for homes, businesses, highways, reservoirs, and water delivery systems. *Id.* at 53,157–58.

The Service also determined that habitat fragmentation was "an immediate threat to the golden-cheeked warbler." *Id.* at 53,158. Habitat fragmentation breaks available habitat into smaller pieces and increases the space between patches of habitat. *Id.* In addition to decreasing the amount of suitable habitat for breeding, habitat fragmentation also increases the risk of predation because there are more "edges" for predators to enter. *Id.* at 53,158–59.

Given the present and threatened habitat destruction and fragmentation, combined with the increased risk of predation and the inadequacy of existing regulatory mechanisms, the Service listed the warbler as endangered based on its assessment of "the best scientific and commercial information available." *Id.* at 53,159. The Service did not designate critical habitat at the time of the listing, concluding critical habitat was "undeterminable." *Id.* at 53,156. The Service later stated that designating critical habitat was "neither necessary nor prudent." AR66 (citing 1994 letter from the Secretary of the Interior to the Governor of Texas); ROA.881. The Service has not yet designated critical habitat for the warbler.

In 1992, the Service issued a Recovery Plan that established five criteria to be met before the Service would consider the warbler sufficiently recovered to justify removal from the list of endangered species. AR7033. The Service also established a plan to achieve warbler recovery by encouraging research on the species, increasing protections for warblers on public lands, protecting the

warbler's migratory route, encouraging conservation by private landowners, and increasing public awareness. AR7080–92.

2. 2014 review

In 2014, the Service completed a status review of the warbler pursuant to 16 U.S.C. § 1533(c)(2). AR6774–98. In that review, the Service surveyed the best available scientific and commercial information concerning the warbler. The Service acknowledged that additional information had been collected about the warbler since the 1990 listing. AR6777–82. In particular, the Service recognized that "there have been increased efforts" to estimate the population of warblers, including studies estimating higher populations than those estimated at the time of the listing. AR6779. The Service also observed that warbler pairs had been found breeding in smaller habitat patches (less than 10 hectares), but that successful reproduction is more likely in larger patches (those exceeding 15 hectares). AR6778. (A hectare is equivalent to 2.471 acres.)

The Service nonetheless determined that the warbler should remain listed as endangered because it continued to be threatened by "(1) habitat destruction and fragmentation of breeding and wintering habitat; (2) a lack of reproduction of deciduous trees due to overbrowsing; (3) catastrophic wildfires; (4) nest predation and/or nest parasitism; and (5) potentially climate change and recreation." AR6789. The Service concluded that the "magnitude of impacts associated with

these combined threats is high, because (1) the breeding range of the species is limited to central Texas and (2) habitat within the breeding and wintering ranges of the [golden-cheeked warbler] continues to be lost." *Id.*

Although habitat loss was historically due to the widespread clearing of juniper, the 2014 review concluded that the recent destruction of warbler habitat was primarily due to "rapid suburban development" in three Texas counties. AR6782. Because the human population was projected to increase throughout the warbler's range, the Service determined that residential and commercial development would continue to reduce and fragment the warbler's habitat. AR6783. These threats also exacerbated other threats to the warbler's survival. For example, increased habitat fragmentation increases warbler nest predation to a "significant" degree. AR6785. The encroachment of urban development also "contributes to the risk of catastrophic wildfires." AR6787. Based on all of these facts, the Service concluded that the warbler was still "in danger of extinction throughout its range." AR6789.

3. Petition to delist and the Service's 90-day finding

Less than one year after the 2014 review, the Texas Public Policy Foundation and others submitted a petition to delist the warbler. AR44–84. The petition focused primarily on the updated population and habitat estimates that had been cited and discussed in the 2014 review. AR47–49. According to the petition,

these numbers "show that the warbler's continued listing is neither scientifically sound nor warranted by the listing criteria under the Endangered Species Act." *Id.* In support, the petition cited an unpublished survey of existing research that "summarize[d] information already known to the Service." AR442; *see also* AR57 (relying on a 2015 Texas A&M Institute of Renewable Natural Resources literature review). The petitioners submitted a supplement to their petition in December 2015. AR114–38.

The Service issued a negative 90-day finding that the petition failed to present substantial information indicating that delisting the warbler may be warranted. AR458; AR440–55. The Service again acknowledged that the warbler's population was potentially larger than estimated in 1990 and that "the known potential range is geographically more extensive than when the golden-cheeked warbler was originally listed." AR441–42; *see also* AR449. But the Service observed that "threats of habitat loss and habitat fragmentation are ongoing and expected to impact the continued existence of the warbler in the foreseeable future." AR449. It further observed that the petition only briefly mentioned those threats and cited no new information calling into question the Service's 2014 conclusions. AR443; AR449. Given the nature and severity of those threats, the Service determined that the information in the petition, including the updated

population and habitat estimates, would not lead a reasonable person to conclude that delisting may be warranted. AR449; *see also* AR440.

C. Proceedings below

In June 2017, the Land Office sued the Service in the Western District of Texas. ROA.15–35. The Land Office's three-count operative complaint first alleged that the Service impermissibly listed the warbler as endangered without concurrently designating critical habitat. ROA.844–45 (Count I). The Land Office also alleged that the Service acted arbitrarily or capriciously by failing to delist the warbler based on the scientific data in the petition. ROA.845–46 (Count II). Finally, it alleged that the Service's original listing, 2014 review, and negative 90-day finding violated NEPA because the Service did not prepare an EIS. ROA.846–47 (Count III).

1. Partial dismissal

The Service moved to partially dismiss the complaint. ROA.851–72. The Service argued that the Land Office's claims based on the 1990 listing were barred by the statute of limitations. ROA.858–64. It also argued that the Land Office failed to state a claim under NEPA because none of the agency actions identified in the complaint is subject to NEPA. ROA.864–70.

The district court agreed. ROA.951–66. First, the court dismissed the Land Office's challenges to the 1990 listing — the entirety of Count I and the portion of

Count III alleging that the 1990 listing failed to comply with NEPA — as time barred. ROA.961–62. The court ruled that the Land Office "cannot bring claims disputing the validity of classifying the Warbler as endangered over twenty-five years after [the] Service published its Final Rule." ROA.961. The court rejected the Land Office's "[a]ttempt[] to circumvent the statute of limitations" by asserting a continuing violation. *Id.*

Second, the court held that the Land Office failed to state a claim under NEPA and therefore dismissed the entirety of Count III. ROA.962–65. The court ruled that "NEPA only applies when there is a change affecting the environment," and that the Land Office provided "no indication the decision to list the Warbler as endangered and maintain that listing resulted in a change to the environment." ROA.964. Accordingly, the court ruled that none of the agency actions — the listing, the five-year review, or the 90-day finding — triggered NEPA. ROA.965.

2. Summary judgment

The parties filed cross-motions for summary judgment on the Land Office's remaining claim alleging that the 90-day finding was arbitrary and capricious. ROA.1277–1323, 1374–1414. The district court granted summary judgment to the Service on that claim. ROA.1546–68. The court held that the Service did not apply the wrong standard in evaluating the petition to delist. ROA.1562. Rather, the Service properly considered whether the petition presented substantial

information that would lead a reasonable person to believe delisting may be warranted. ROA.1562–65.

The court further held that the Service rationally determined that the petition did not contain such substantial information. In particular, the Land Office "overstate[d] the significance of the evidence presented in the Petition to Delist." ROA.1560. Although the petition included updated estimates of the warbler's known range and potential population, it did not "include any new information on a number of threats to the Warbler's survival." *Id.* Because scientific evidence demonstrated that these threats jeopardized the Warbler's continued survival, "a reasonable person could have concluded the Warbler remained endangered despite promising population predictions and a greater known potential range." *Id.*

The court also rejected the Land Office's argument that the warbler should be delisted because the Service failed to concurrently designate critical habitat. ROA.1565–67. The court explained that "nothing in the ESA compelled the Service to make a critical habitat designation concurrent with its 90-day finding that the Warbler remained endangered." ROA.1567. The listing determination and the critical habitat determination are two separate decisions that require the agency to consider separate factors. *Id.*

The court entered final judgment in the Service's favor. ROA.1569–70. The Land Office appeals. ROA.1571.

SUMMARY OF ARGUMENT

1. The district court correctly ruled that the Land Office's claims based on the 1990 listing decision are barred by the applicable six-year statute of limitations in 28 U.S.C. § 2401(a). The Land Office filed its claims more than twenty-six years after the Service's listing determination. The Land Office cannot evade the statute of limitations for the 1990 listing determination by arguing that the failure to designate critical habitat is a "continuing" violation. The Land Office does not challenge the failure to designate critical habitat, nor does it seek an order requiring such designation. All the Land Office seeks is the invalidation of the 1990 final rule listing the warbler as endangered. Because that listing determination was a discrete agency action that occurred long before the Land Office filed its complaint, its claims based on the 1990 listing are time-barred.

2. The district court correctly held that the Land Office failed to state a claim under NEPA. This Court and the Supreme Court have long recognized that NEPA's requirements do not apply when the proposed federal action will not change the status quo or alter the physical environment. None of the agency actions at issue would do either of those things. Courts have uniformly held that listing determinations are not subject to NEPA. Likewise, neither status reviews nor 90-day findings change the status quo or alter the physical environment.

3. The district court properly granted summary judgment to the Service on the Land Office's claim challenging the negative 90-day finding. That claim is governed by the APA's arbitrary and capricious standard of review. Under that standard, the issue before the Court is not whether a reasonable person could accept the petition's interpretation of the data, but whether the Service had a rational basis for concluding that a reasonable person would not do so. The Land Office has failed to show that the Service's conclusion was arbitrary or capricious.

a. The Land Office contends that the Service applied the incorrect standard of review when evaluating the 90-day finding. But the Service expressly applied the correct test — whether a reasonable person would believe that delisting may be warranted — on the face of the 90-day finding.

b. There is no merit to the Land Office's contention that the Service should have concluded that the information presented in the petition meets the reasonable person standard. Instead of attempting to show that the Service's conclusions were arbitrary and capricious, the Land Office simply reargues its interpretation of the data and asks this Court to independently conclude that the data is sufficient to lead a reasonable person to believe that delisting may be warranted. But that is not the correct standard. Moreover, there is no evidence in the record that the Service's conclusions regarding the evidence provided in the petition were arbitrary or capricious.

c. The Land Office's principal argument is that the failure to designate critical habitat has somehow infected the Service's negative 90-day finding, which concerns only whether the petition presented substantial information indicating that delisting the warbler may be warranted. That argument is a red herring: the Land Office cannot use an agency's alleged failure to fulfill one statutory duty as a means to attack the agency's discharge of another statutory duty. Moreover, the failure to designate critical habitat has no bearing on whether the 90-day finding was arbitrary or capricious. Critical habitat designation includes the consideration of national security and economic impacts, but these factors are not among the statutory criteria that the Service may consider when making listing decisions.

The judgment of the district court should be affirmed.

STANDARD OF REVIEW

A district court's dismissals for lack of subject matter jurisdiction and for failure to state a claim are reviewed de novo. *Center for Biological Diversity, Inc. v. BP America Production Co.*, 704 F.3d 413, 421 (5th Cir. 2013). Review of a district court's grant of summary judgment is also de novo. *Board of Mississippi Levee Commissioners v. EPA*, 674 F.3d 409, 417 (5th Cir. 2012).

ARGUMENT

I. The Land Office's claims based on the 1990 listing are barred by the statute of limitations.

The Land Office asserts two claims based on the Service's initial listing of the warbler as endangered. ROA.844–47. The Land Office alleges that the 1990 listing was impermissible because the Service did not designate critical habitat, ROA.844–45 (Count I); and did not prepare an EIS under NEPA, ROA.846–47 (Count III). The district court properly dismissed these claims under Federal Rule of Civil Procedure 12(b)(1). ROA.960–62; *cf. In re FEMA Trailer Formaldehyde Products Liability Litigation*, 668 F.3d 281, 286 (5th Cir. 2012) (a claim should be dismissed under Rule 12(b)(1) "when the court lacks the statutory or constitutional power to adjudicate the claim" (internal quotation marks omitted)). As the district court correctly held, the Land Office's "right of action to dispute the validity of the Warbler's listing accrued over twenty years ago." ROA.962.

The Land Office's claims are subject to the general six-year statute of limitations for suits against the United States. *See* 28 U.S.C. § 2401(a) (With exceptions not relevant here, "every 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."). A "plaintiff's failure to file his action within that period deprives the court of jurisdiction." *Gandy Nursery, Inc. v. United States*, 318 F.3d

631, 637 (5th Cir. 2003); *accord Ramming v. United States*, 281 F.3d 158, 165 (5th Cir. 2001).

The Land Office does not dispute that it filed its complaint more than twenty-six years after the Service issued its final rule listing the golden-cheeked warbler as endangered. Opening Brief 44–48. Nevertheless, the Land Office insists that its claims are timely based on the "continuing violation" doctrine. *Id.* at 45–48. This Court applies that doctrine sparingly. *See, e.g.*, *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 279–80 (5th Cir. 2004); *McGregor v. Louisiana State University Board of Supervisors*, 3 F.3d 850, 866 n.27 (5th Cir. 1993) (noting that "courts, including this one, are wary to use the continuing violation doctrine to save claims outside the area of Title VII discrimination cases"). It has further made clear that the doctrine does not apply to a "discrete action." *Doe v. United States*, 853 F.3d 792, 802 (5th Cir. 2017); *see also Smith v. Regional Transit Authority*, 827 F.3d 412, 422 (5th Cir. 2016) (continuing violation doctrine does not apply to "a single violation followed by continuing consequences" (internal quotation marks omitted)).

The Land Office argues that the Service's failure to designate critical habitat is a continuing violation. Opening Brief 45–46. But the Land Office does not challenge the failure to designate critical habitat, and it does not seek an order requiring the Service to make such a designation. ROA.844–48; *see also*

ROA.788, 1593:22–1594:1; Opening Brief 45. In fact, the State of Texas has repeatedly asked the Service *not* to designate critical habitat. ROA.874–75, 877–79. The Land Office's complaint mentions the failure to designate critical habitat only as a reason why it believes the Service's 1990 listing is invalid and should be struck down. ROA.844–45; *see also* ROA.788. That listing is a "discrete" action that is not subject to the continuing violation doctrine. *Doe*, 853 F.3d at 802; *see Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62–63 (2004) (agency final rule is a "discrete" action); *Davis Mountains Trans-Pecos Heritage Ass'n v. FAA*, 116 F. App'x 3, 17 (5th Cir. 2004) (NEPA violation is a "failure to act at a discrete point in time," not a "continuous delay"). The Land Office cannot now evade the statute of limitations by recasting its claims. *Cf. Texas v. United States*, 891 F.3d 553, 564 (5th Cir. 2018) (rejecting Texas's attempt to "short-circuit the Waste Act's timeliness requirement by framing claims in 'failure to act' terms").

The Land Office argues that this distinction is immaterial because the "listing requirement and the requirement to designate critical habitat are concurrent and inseparable statutory mandates constituting a unified duty." Opening Brief 46. Not so: the 1990 listing is a discrete agency action that is separate from the agency's obligation to designate critical habitat. In paragraph 4(a)(1) of the ESA, Congress directed the Service to determine whether any species is endangered or threatened based on five biological factors. 16 U.S.C. § 1533(a)(1); *see also id.*

§ 1533(b)(1)(A) (directing that listing determinations be made "solely on the basis of the best scientific and commercial data available"). In paragraph 4(a)(3), Congress separately directed the Service to "concurrently" designate critical habitat for that species based on economic impacts and other considerations, but only to the extent "prudent" and "determinable." *Id.* § 1533(a)(3)(A)(i), (b)(2). "Concurrently" simply means "at the same time," *Oxford English Dictionary* (2d ed. 1989) — not "in the same agency action" or "the same mandatory obligation," as the Land Office contends.

There is nothing in the text of the ESA suggesting that these two statutory obligations collectively comprise one "singular, inalienable duty," such that the failure to designate critical habitat invalidates the listing. Opening Brief 46. To the contrary, Congress directed the Service to consider different factors in making the two decisions. *Compare* 16 U.S.C. § 1533(a)(1) (identifying the five exclusive factors for determining whether a species is endangered or threatened under the ESA) *with id.* § 1533(b)(2) (instructing the Service to consider, among other things, the economic impact of any critical habitat designation). Congress also recognized that it may not be possible to designate critical habitat at the same time as the listing. *Id.* § 1533(a)(3)(A). Congress therefore allowed the Service to delay its designation when habitat is not determinable. *Id.* § 1533(b)(6)(C)(ii).

Nor is there anything in the history of the ESA suggesting that the duties are inseparable. In 1982, Congress amended the ESA to uncouple the Service's duty to list species from its duty to designate critical habitat because the "difficulties in designating critical habitat were slowing to a virtual standstill the listing process." *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1267 (11th Cir. 2007); *see also id.* at 1266 (Congress intended "to divorce from the listing decisions the economic analysis that comes with critical habitat designation"). Thus, Congress made clear that the listing obligation and the designation obligation were two different mandatory duties with their own separate statutory considerations and deadlines.

As a result, the Land Office may not use the failure to designate critical habitat to attack a listing decision. In addressing a similar challenge to an endangered species listing, the Eleventh Circuit held that the Service's failure to fulfill one statutory obligation (the designation of critical habitat) does not invalidate the Service's proper discharge of another statutory obligation (the listing of a species). *Alabama-Tombigbee Rivers*, 477 F.3d at 1269. The court explained that the "Endangered Species Act does not require that a species be destroyed in order to preserve a part of the process meant to save it." *Id.* Fundamentally, "[r]emoving one protection is not a fit remedy for the lack of another." *Id.* at 1271.

Far from supporting the Land Office's position, the cases cited by the Land Office merely confirm that its claims challenging the 1990 listing are time-barred. Opening Brief 45 (citing *Schoeffler v. Kempthorne*, 493 F. Supp. 2d 805 (W.D. La. 2007); *Southern Appalachian Biodiversity Project v. U.S. Fish & Wildlife Service*, 181 F. Supp. 2d 883 (E.D. Tenn. 2001)). Unlike here, the plaintiffs in those cases directly challenged the failure to designate critical habitat and sought orders requiring the Service to take action. *Schoeffler*, 493 F. Supp. 2d at 811, 822 (plaintiffs sought declaratory and injunctive relief for defendant's failure to designate the critical habitat of the Louisiana Black Bear); *Southern Appalachian Biodiversity Project*, 181 F. Supp. 2d at 884–85 (plaintiff moved to compel defendants to designate critical habitat for sixteen species of endangered or threatened plants and animals). Other cases involving agency inaction claims are likewise irrelevant because the Land Office did not bring a failure-to-act claim. Opening Brief 47; *see also* 5 U.S.C. § 706(1) (authorizing courts to "compel agency action unlawfully withheld or unreasonably delayed").

Even if the Land Office's complaint could be construed as asserting such a claim, other courts (including the Eleventh Circuit) have held that the continuing violation doctrine does not apply to a claim for failure to designate critical habitat. *See Center for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334–36 (11th

Cir. 2006); *Institute for Wildlife Protection v. U.S. Fish & Wildlife Service*, No. CV-07-358, 2007 WL 4118136, at *6–7 (D. Or. July 25, 2007).

Therefore, the Land Office's claims based on the 1990 listing of the golden-cheeked warbler are barred by the statute of limitations.

II. None of the challenged actions is subject to NEPA.

The district court properly dismissed the Land Office's NEPA claims under Federal Rule of Civil Procedure 12(b)(6). ROA.962–65. None of the Service's decisions at issue here — the 1990 listing, the 2014 review, or the negative 90-day finding — is subject to NEPA. ROA.964.

Courts have uniformly held that listing decisions are not subject to NEPA. *See, e.g.*, *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 835–41 (6th Cir. 1981) (EIS not required when a species is listed as endangered or threatened); *In re Polar Bear Endangered Species Act Listing*, 818 F. Supp. 2d 214, 236 (D.D.C. 2011) ("It is undisputed that an exemption from NEPA is necessary and appropriate for listing decisions under Section 4(a) of the ESA."); *Trout Unlimited v. Lohn*, No. CV05-1128, 2007 WL 1730090, at *13–17 (W.D. Wash. June 13, 2007) (determining that NEPA does not apply to agency policy providing guidance on certain listing determinations); *Safari Club International v. Babbitt*, No. MO-93-CA-001, 1993 WL 13932673, at *7 (W.D. Tex. Aug. 12, 1993) ("Plaintiffs['] claims pursuant to NEPA could not stand as the Secretary is legally

exempt from that act in making listing determinations pursuant to the ESA."). Consistent with these decisions, the Service has also concluded that NEPA does not apply to listing actions. *See* Endangered and Threatened Wildlife and Plants; Preparation of Environmental Assessments for Listing Actions Under the Endangered Species Act, 48 Fed. Reg. 49,244, 49,244 (Oct. 25, 1983).

NEPA likewise does not apply to the 2014 review or the 90-day finding. It is well-established that NEPA does not apply to actions that do not alter the physical environment. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773–75 (1983) (EIS not required for actions that are not "proximately related to a change in the physical environment"); *City of Dallas v. Hall*, 562 F.3d 712, 721–23 (5th Cir. 2009) (holding that setting an acquisition boundary for a wildlife refuge did not require the preparation of an EIS because it did "not effect a change in the use or character of land or in the physical environment"); *Sabine River Authority v. U.S. Dep't of Interior*, 951 F.2d 669, 679–80 (5th Cir. 1992) (The "acquisition of the easement by the Fish and Wildlife Service did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an EIS."). As this Court has recognized, an "EIS is not required . . . when the proposed federal action will effect no change in the status quo." *Sabine River Authority*, 951 F.2d at 679 (internal quotation marks omitted).

Neither of the challenged agency actions changed the status quo or altered the physical environment. ROA.964. Five-year status reviews are not final agency actions and have no legal consequences. *American Forest Resource Council v. Hall*, 533 F. Supp. 2d 84, 91–94 (D.D.C. 2008); *see also Coos County Board of County Commissioners v. Kempthorne*, 531 F.3d 792, 812–13 & n.12 (9th Cir. 2008) (rejecting contention that five-year status review was reviewable). Any recommendation presented in a status review must be implemented through a later formal rulemaking. 16 U.S.C. § 1533(b)(5); 50 C.F.R. § 424.16(a) (the Service "may propose revising the lists" based on the information received through a five-year status review).

Similarly, 90-day findings do not change the status quo. Negative 90-day findings simply conclude that petitions do not present substantial information indicating that a change in status may be warranted. 16 U.S.C. § 1533(b)(3)(C)(ii). Even when the Service issues a positive 90-day finding, it must move on to the 12-month review process. *Id.* § 1533(b)(3)(A). If the Service finds that delisting is warranted, it must promptly publish a proposed rule to delist the species. *Id.* § 1533(b)(3)(B)(ii). The Service must then issue a final rule either delisting the species or withdrawing the proposed rule. *Id.* § 1533(b)(6)(A)(i). Thus 90-day findings, which occur at the very beginning of this process, do not alter the status

quo or have any physical effect on the environment. *Sabine River Authority*, 951 F.2d at 679–80.

The Land Office suggests that the challenged decisions necessarily altered the physical environment because the ESA may prohibit it from taking certain actions on its property, such as real estate development or timber clearing for livestock grazing. Opening Brief 50 (arguing that the 2014 review and 90-day finding "exacerbated" the alleged NEPA error). But the Land Office misses the point. Status reviews and 90-day findings inherently *preserve* prohibitions already in place. Here, the Service's 2014 review and negative 90-day finding simply maintained the listing and the resulting protections afforded to the warbler under the ESA. In any event, the alleged restrictions on the use of the Land Office's property are not changes to the *physical* environment — the air, land, or water — and are therefore irrelevant for NEPA purposes. *See Metropolitan Edison Co.*, 460 U.S. at 773–74.

Catron County Board of Commissioners v. U.S. Fish & Wildlife Service, 75 F.3d 1429, 1437–38 (10th Cir. 1996), *cited in* Opening Brief 49–50, is also inapposite. Unlike *Catron County*, the present case involves only the Service's decisions to list the warbler and to maintain that listing — not any decisions concerning designation of critical habitat. In making and maintaining a listing decision, the Service is confined to the five biological factors set forth in the ESA.

16 U.S.C. § 1533(a)(1). As the Sixth Circuit has observed, this statutory mandate "prevents the [Service] from considering the environmental impact when listing a species as endangered or threatened." *Pacific Legal Foundation*, 657 F.2d at 836.

Catron is also distinguishable on its facts. The plaintiffs there alleged that the proposed agency action would cause immediate flooding on nearby farms and ranches, thus significantly affecting the physical environment. 75 F.3d at 1437–38; *id.* at 1436 ("The record in this case suggests that the impact will be immediate and the consequences could be disastrous."). By contrast, the Land Office's complaint alleges no such effects from the Service's decisions. ROA.828–49.

Accordingly, none of the Service's actions challenged by the Land Office is subject to NEPA, and so the district court was correct to dismiss the NEPA claim.

III. The Service's 90-day finding was rational and supported by the record.

The Service's 90-day finding may be set aside only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Bennett v. Spear*, 520 U.S. 154, 171–75 (1997). This is a "highly deferential" standard, *Medina County Environmental Action Ass'n v. STB*, 602 F.3d 687, 699 (5th Cir. 2010), and "a court is not to substitute its judgment for that of the agency," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (internal quotation marks omitted). The Court instead must apply "a presumption that the agency's decision is valid" and hold the plaintiff to its

burden to overcome that presumption. *Louisiana Public Service Commission v. FERC*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted).

In applying the arbitrary and capricious standard to a negative 90-day finding, "the issue before the Court is not whether a reasonable person could accept [the petitioner's] interpretation of the data" — as the Land Office suggests, Opening Brief 23 — "but whether the [agency] had a rational basis for concluding that a reasonable person would not do so." *Palouse Prairie Foundation v. Salazar*, No. CV-08-032, 2009 WL 415596, at *2 (E.D. Wash. Feb. 12, 2009); *see also Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 327 (5th Cir. 1988) (An "agency's decision need not be ideal, so long as it is not arbitrary or capricious, and so long as the agency gave at least minimal consideration to relevant facts contained in the record"). The Court's sole task is to determine whether the Service "has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983).

The Land Office has not met its burden to show that the Service's 90-day finding was arbitrary or capricious. As elaborated below, the Service had a rational basis for concluding that a reasonable person would not believe that the information in the petition may warrant delisting. In particular, the Service applied the correct legal standards and properly credited the data presented in the petition.

A. The Service applied the correct 90-day finding standard.

As recognized by the district court, it is clear from the text of the 90-day finding that the Service applied the proper standard. ROA.1562–63. The Service expressly acknowledged that it must "make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted." AR440. And the Service properly recognized that this standard required "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." *Id.* (quoting 50 C.F.R. § 424.14(b)(1)). Applying this standard, the Service concluded that the petition "does not offer any substantial information indicating that the petitioned action to delist the species may be warranted." AR449.

"Absent evidence to the contrary," this Court "presume[s] that an agency has acted in accordance with its regulations." *Medina County*, 602 F.3d at 699 (internal quotation marks omitted). The Land Office fails to acknowledge this presumption, much less rebut it. The Land Office instead selectively quotes from three sentences in the 90-day finding. Opening Brief 21, 24. But when considered in context, the Service's full analysis does not suggest that it applied a standard different from the stated one. *Cf. Palouse Prairie Foundation v. Salazar*, 383 F. App'x 669, 669–70 (9th Cir. 2010).

First, the Service did not disregard the petition's modeling studies of warbler habitat and population size, as the Land Office contends. Opening Brief 21. To the contrary, the Service recognized that "the modeling studies described in the 2015 Texas A&M Survey (Petition, Exhibit 1) do represent the most recent and comprehensive efforts to estimate range-wide warbler habitat and population size to date." AR442. The Service "acknowledge[d] that the known potential range is geographically more extensive than when the golden-cheeked warbler was originally listed." *Id.*; *see also* AR449. The Service then explained that these studies do not reasonably imply recovery, because they are "new estimates rather than indicators of positive trends in warbler habitat and population size." AR442. Even assuming the population and habitat range were larger than estimated at the time of the listing, the Service determined that serious habitat threats nonetheless placed the warbler in danger of extinction. AR442–43.

Second, the Service appropriately concluded that the petition did not "provide substantial information" showing that "delisting may be warranted" based on the lack of predation. AR444. In so concluding, the Service cited its 2014 determination that "multiple factors such as urbanization and fragmentation have likely resulted in increased rates of predation of warbler nests by a wide variety of animal predators," AR444–45, noting that the "petition d[id] not provide any new information indicating that predation is no longer a threat to the warbler," AR445.

The Land Office suggests that the Service may not reference its prior 2014 review analysis and must always accept a petition's conclusions, even if incomplete, at the 90-day finding stage. Opening Brief 24–26. But if that were the standard, every petition would clear the 90-day threshold and immediately move on to the 12-month review. The 90-day standard requires the petitioner to provide the Service with the necessary "substantial scientific or commercial information," 16 U.S.C. § 1533(b)(3)(A), including a "detailed narrative" analyzing the information and providing a justification for the recommended action, 50 C.F.R. § 424.14(b)(2)(ii). In evaluating the information presented in the petition, the Service is entitled to rely on its scientific expertise and any information within its files, including past five-year reviews on the species. *See Center for Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137, 1142 (D. Colo. 2004); *Colorado River Cutthroat Trout v. Kempthorne*, 448 F. Supp. 2d 170, 177 (D.D.C. 2006) (recognizing that the Service may consider its own records in combination with the petition at 90-day review stage); *see also Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998) (courts must be "extremely deferential" where "the agency's decision rests on an evaluation of complex scientific data within the agency's technical expertise"). Indeed, it would be arbitrary for the Service to ignore the information in its own files.

The notion that the Service is limited to merely the information presented on the face of a petition also would have considerable detrimental consequences for the petition process. Every year the Service receives an abundance of new listing petitions, with resulting statutory and court-ordered deadlines. *See generally Wildwest Institute v. Kurth*, 855 F.3d 995, 1008–12 (9th Cir. 2017) (discussing the Service's workload and pending listing actions). This Court should proceed mindful that a principle announced in the context of a petition to delist would apply equally to petitions to list additional species.

The Service need not "blindly accept statements in petitions that constitute unscientific data or conclusions, information [the Service] knows to be obsolete, or *unsupported conclusions of petitioners*." *Center for Biological Diversity*, 351 F. Supp. 2d at 1142 (emphasis added). Likewise, the Service may conclude that even though the information in the petition is valid, it is not substantial enough to indicate that the petitioned action may be warranted. *See, e.g.*, *Palouse Prairie Foundation*, 383 F. App'x at 670; *WildEarth Guardians v. Salazar*, No. 10-cv-00091, 2011 WL 4102283, at *6 (D. Colo. Sept. 14, 2011) (upholding Service's determination that "even though there were one or more potential threats cited in connection with the Beetle," there was no "substantial documentation to indicate that these threats were currently affecting the Beetle or reasonably likely to affect the Beetle in the future"). That is exactly what the Service did here. The

mere fact that the Land Office disagrees with the Service does not mean that the Service applied the wrong legal standard. *See* ROA.1564.

Third, the Service did not improperly require "conclusive evidence." Opening Brief 21. The Service actually agreed with the petitioners that there is "some uncertainty regarding the magnitude of threats" certain activities present to warbler habitat, but the Service nonetheless concluded that that uncertainty was not substantial enough to suggest that delisting may be warranted. AR447. That is precisely "the sort of judgment which the [Service] must make under the Act." *Palouse Prairie Foundation*, 2009 WL 415596, at *5.

Fourth and finally, the cases cited by the Land Office are inapposite. Opening Brief 25–26; *see also* ROA.1562–63. In contrast to those cases, the Service here did not conclude that there was "conflicting scientific evidence" that needed "more thorough analysis." *Cf. Humane Society of the United States v. Pritzker*, 75 F. Supp. 3d 1, 11 (D.D.C. 2014). Nor did the Service base its decision on any outside information selectively solicited from third parties. *Cf. Colorado River Cutthroat Trout*, 448 F. Supp. 2d at 176–77. The facts of this case are also unlike *Center for Biological Diversity v. Kempthorne*, No. CV 07-0038, 2008 WL 659822 (D. Ariz. Mar. 6, 2008). There, the court stated that the 90-day finding was based on a "policy call," and the record revealed there was reasonable disagreement among Service scientists regarding whether the petitioned action was

warranted. *Id.* at *11–12. Here, by contrast, there is no record evidence showing that any of the Service's scientists disagreed about the outcome of the 90-day finding.

On these facts, the district court was right to conclude that the Land Office "has failed to offer any evidence the Service applied the incorrect standard when it considered the Petition to Delist." ROA.1563.

B. The Service rationally concluded that the petition failed to present substantial information indicating that delisting may be warranted.

At the 90-day finding stage, the burden is on the petitioner to come forward with substantial information indicating that delisting the species may be warranted under the five factors in 16 U.S.C. § 1533(a)(1). *See id.* § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1), (2); *Western Watersheds Project v. Norton*, No. CV 06-00127, 2007 WL 2827375, at *2 (D. Idaho Sept. 26, 2007). The district court correctly held that the Service did not act arbitrarily or capriciously in determining that the petition failed to meet that burden.

As it did below, the Land Office ignores the arbitrary and capricious standard of review and asks this Court to independently evaluate the scientific evidence. Opening Brief 29–34; ROA.1563–64. But it is well-settled that courts are to be the most deferential when "an agency's particular technical expertise is

involved." *Medina County*, 602 F.3d at 699; *see also supra* pp. 29–30. This Court should reject the Land Office's invitation to second-guess the Service's analysis.

1. Present or threatened destruction, modification, or curtailment of the warbler's habitat

The petition relied primarily on a compilation of studies suggesting that "the warbler's habitat and population are greater than what [the Service] believed in 1990." AR47. The Service credited those studies and nonetheless explained that the updated estimates do not meet the "reasonable person" standard as the warbler continues to face serious habitat threats that place it in danger of extinction. AR442; *see also supra* p. 32. That conclusion was not irrational. ROA.1560–61.

Habitat. The petition recognized that the warbler has lost habitat. AR70 (citing Groce et al. (2010) for the proposition that there was a net loss of 116,549 hectares of woodland within the warbler's breeding range between 1992 and 2001); *see also* AR2520. The petition also acknowledged that the highest rates of habitat loss were "attributed to development and population growth" near urban areas, AR70, supporting the Service's 2014 determination that human population growth will result in further destruction and fragmentation of habitat, AR6783. Despite these well-documented threats to warbler habitat, the petition argued that the warbler should be delisted because warblers can breed on smaller patches of habitat. AR70–71. In support, the petition cited studies indicating that some warblers have established territories in small habitat patches (2.6 or 13.0 hectares)

and suggesting that warblers could successfully reproduce on a smaller minimum patch sizes. AR71; Opening Brief 29.

The Service reasonably concluded that these studies did not rise to the level of substantial information indicating that delisting may be warranted. AR441–43. While the Service agreed with the petition's conclusion that all patches — large and small — are important because they provide potential habitat, AR71, the Service noted that numerous studies (including those relied on by the petition) have concluded that larger, more connected habitat patches are especially important because they are more likely to support high warbler occupancy. AR443 (citing Collier et al. (2010); McFarland et al. (2012); Duarte et al. (2016)); AR448 (citing Collier et al. (2011); Peak (2007); Peak and Thompson (2014)). The Service also pointed out that one of the studies cited in the supplement to the petition, AR116, "found that significant losses of warbler breeding habitat have occurred over the past decade" and "concluded that the conservation of large blocks of habitat is especially important for ensuring the long-term viability of the species." AR443; *see* AR331–34 (Duarte et al. (2016)). That study further recognized that "large-scale habitat loss and fragmentation have continued to occur across the species' breeding range," AR327, and determined that "any change in the listing status of the species based on these projections is *not* warranted,"

AR334. In other words, the studies cited in the petition indicated that habitat fragmentation was a significant threat to the warbler.

Given that large patches of breeding habitat are "especially important for ensuring the long-term viability of the species" and that the threat of habitat fragmentation is ongoing, the Service reasonably concluded that the petition failed to present substantial information. AR443. Although the Land Office may disagree with the Service's interpretations and conclusions regarding these and other studies, it cannot show that the Service acted *irrationally* in concluding that the information in the petition was not "substantial" enough to lead a reasonable person to conclude that delisting may be warranted.

As it did in the district court, the Land Office's brief raises arguments and studies that were not cited in the petition for those arguments. *Compare* Opening Brief 30 (citing Reidy et al. (2009) and Coldren (1998)) *with* AR61–65 *and* AR70–72. Moreover, the Land Office's descriptions of those studies are incomplete and misleading. Reidy et al. (2009) did not show that "urbanization is not harming Warbler survival." Opening Brief 30. Rather, that study determined that some large, intact preserves in urban areas could support successful warbler populations, but that smaller, fragmented habitat patches harm the warbler. AR4466–72. Likewise, Coldren, a 1998 dissertation, found that larger habitat patches led to

better breeding success. AR1441; *see also* AR71. Neither study shows that the Service's conclusions were arbitrary and capricious.

Population. The Land Office likewise fails to show that the Service acted arbitrarily or capriciously in determining that new population estimates did not, on their own, constitute substantial information. Opening Brief 29–31. Population numbers alone do not determine whether a species is endangered under the ESA. *See* 16 U.S.C. §§ 1532(6), 1533(a)(1), 1533(b)(1)(A). Rather the ESA requires the Service to look at threats under the five statutory factors and determine whether one or all of those threats places the species in danger of extinction. *Id.* § 1533(a)(1). Although population numbers may play a role in determining whether a species faces threats that warrant listing or delisting, the ESA does not provide a mathematical formula with a certain threshold population size to determine whether a species should be listed. As the Service recognized, the fact that the warbler population may be larger than the agency estimated in the past does not mean that the warbler's population is growing. AR442. The Service also noted that even if the warbler population is greater than originally estimated, that population is still reliant on a particular habitat type found only in a portion of Texas that faces ongoing threats of "destruction, fragmentation and degradation." AR442; *see also* AR6782–84. Thus, the Service properly exercised its scientific

judgment in determining that these increased population estimates would not convince a reasonable person that delisting the warbler may be warranted. AR449.

The Beardmore Assessment does not show that the Service's conclusion was irrational. Opening Brief 30–31 (citing Beardmore, C., et al (1995)). That study sought to determine what would constitute a "[v]iable, self-sustaining population" in each of the eight recovery regions for the warbler. AR984. The Assessment recommended that a viable population contain 3,000 breeding pairs for warblers on roughly 32,500 acres of "good quality" and "sufficiently unfragmented" habitat. AR984. Significantly, a population of this size would be necessary in *each* of the eight recovery regions. *See id.* The petition provided no evidence that such a population exists in each of the eight recovery regions. To the contrary, another study cited by the petition determined that there were only two patches that met the Beardmore Assessment's recommendation. AR63 (citing Alldredge (2004)); AR535. This information does not demonstrate that the Service erred, much less that its conclusions were arbitrary or capricious.

2. Predation

The Service was well within its bounds to conclude that the petition did not present substantial information under this factor. AR444–45. At most, the information cited by the petition suggests that when considered in isolation, any particular predator's effects on the warbler could be viewed as minor. AR65. But

the petition did not present any information, let alone substantial information, suggesting that predation *as a whole* is not a threat to the warbler, either on its own or in combination with other threats. AR65; AR444–45. Nor did the petition address the increased risks caused by urbanization and habitat fragmentation, which were discussed exhaustively in the 2014 review. AR65; AR444; AR6785. Therefore, the Service rationally concluded that a reasonable person would not believe that delisting may be warranted. AR444–45.

The Land Office points to no evidence suggesting that this conclusion was arbitrary or capricious. To the contrary, the studies referenced in the petition support the Service's determination that predation is a serious risk. AR65; Opening Brief 32.[2] For example, one study concluded that "[p]redation of nesting females is potentially an important source of mortality for Golden-cheeked Warblers." AR4483 (Reidy et al. (2009)). Similarly, another study found that predators attacked 34 of 155 eggs monitored (22%) and 50 of 206 nestlings monitored (24%). AR5828 (Stake et al. (2004)); AR5830. Groce et al. (2010) noted that rates of cowbird parasitism — i.e., when a female cowbird steals

[2] The Land Office cites two studies not included in the petition's discussion of predation. *Compare* Opening Brief 32 (string citing Stake (2003), an unpublished master's thesis, and Butcher et al. (2010)) *with* AR65 (petition). Again, the Service had no obligation to evaluate these arguments.

warbler eggs and replaces them with her own — ranged from 8.3% to 57.6%, depending on the study site and year. AR2465.

The Service considered these studies in its 2014 review and again in its 90-day finding. AR6785 (citing Stake et al. (2004); Reidy et al. (2009); Groce et al. (2010)); AR444–45. Acknowledging that predation is a natural occurrence that "likely varies annually and regionally," the Service determined that predation threats "can be exacerbated by the loss and fragmentation of habitat." AR6785. Citing multiple scientific studies, the Service explained that habitat fragmentation leads to smaller patches of habitat, which in turn leads to more edges that allow predators easier access to warblers. *Id.*; *see also, e.g.*, AR4470 (Reidy at al. (2009), concluding that "higher abundance of predators in fragmented landscapes and higher predator activity near edges contributed to lower nest survival near edges"). Given these risks, the Service determined that a reasonable person would not believe that delisting may be warranted. AR444–45. The Land Office may disagree, but it is not enough for a plaintiff to show "a difference in view" from the agency. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (internal quotation marks omitted).

3. Existing regulatory mechanisms

The Service properly determined that a reasonable person would not believe that delisting may be warranted based on the existing regulatory mechanisms cited

in the petition. AR445–46; AR65–66. In particular, the Service observed that while the Migratory Bird Treaty Act of 1918 and the 1975 Texas Endangered Species law "provide some protections" for the warbler, neither "prohibits habitat destruction, which is an immediate threat to the warbler." AR445. The Service likewise observed that other land protection efforts, including voluntary habitat conservation plans, are inadequate given that "an estimated 29 percent of existing breeding season habitat was lost between 1999-2001 and 2010-2011," despite these efforts. AR446.

The Land Office asserts that these conclusions are irrational because the Service has not designated critical habitat and therefore may not take the position that habitat protections are important. Opening Brief 33–34. But listing the warbler as endangered provides significant protection to the warbler's habitat even without a critical habitat designation. For example, the ESA makes it illegal to "take" golden-cheeked warblers. 16 U.S.C. § 1538(a)(1)(B). An illegal "take" includes actions that harm the species by causing "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3; *see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 700–04 (1995) (habitat modification can be an unlawful taking under the ESA). Additionally, the ESA requires federal agencies to use

their authorities to conserve the warbler and to consider the effects of their actions and programs on the species. *See* 16 U.S.C. § 1536; 50 C.F.R. § 402.14; *see also Alabama-Tombigbee*, 477 F.3d at 1268 ("Most of the protections afforded endangered species attach as soon as the species is listed . . . .").

The Service reasonably considered the protections provided by the ESA listing and compared them to those provided by other regulatory mechanisms. AR445–46. In so doing, the Service concluded that these other protections were not "substantial" enough to indicate that delisting may be warranted. AR445. The Land Office has identified no evidence suggesting that this conclusion was arbitrary or capricious.

4. Other natural or manmade factors

Under the catchall factor, the petition referenced habitat fragmentation, oak wilt, wildfire, habitat management, and noise effects. AR70–72. The Service agreed that noise was not a significant threat to the warbler, AR448, but disagreed that the information regarding the other natural and manmade factors would lead a reasonable person to believe that delisting may be warranted. AR446–47. Again, the Land Office has not shown that this conclusion was arbitrary or capricious.

Oak wilt. The Service reasonably determined that oak wilt (a fungal infection that affects oak species) "has the potential to negatively affect warblers and their habitat." AR447. The studies cited by the Land Office do not suggest

otherwise. For instance, Stewart et al. (2014) found that "oak wilt frequently occurred in golden-cheeked warbler habitat" and predicted that it would affect almost twice as much habitat by 2018. AR5849. The study also found that males were less likely to successfully pair with female warblers in areas suffering from oak wilt. AR5843–51. Likewise, Appel et al. (2010) observed that the "effects of oak wilt on the landscape go beyond the destruction of trees." AR746. The infection creates gaps and edges in habitat patches and changes tree composition, which can negatively affect the warbler. *Id.*

Catastrophic fire. The Service acknowledged that "[w]ildfire is known to be an important process for maintaining oak-dominated ecosystems throughout eastern North America." AR447. But the Service also pointed out that the effects of "catastrophic wildfires" can "last for over a decade." AR447; *see also* AR4436 (Reemts & Hansen (2007), finding that "[d]ue to the slow recovery of Ashe juniper, it will likely be decades before the burned areas are again suitable as breeding habitat for golden-cheeked warblers"). In light of these effects, the Service rationally determined that a reasonable person would not conclude that delisting may be warranted based on the potential benefits of wildfires.

Recreation. Although the Land Office's brief cites studies that purportedly concern the effects of recreation on the warbler, Opening Brief 37, the petition did not make any arguments about threats posed by recreation. AR448.

In sum, the Service must consider all potential threats, even those that when viewed in isolation have a relatively minor or uncertain effect, in deciding whether to delist a species. At most, the petition presented some evidence indicating that the threats posed by various natural and manmade factors were potentially minor when viewed in isolation. But the petition failed to address the cumulative impacts of these threats to the warbler. The petition also provided no evidence regarding other potential threats, including recreation. AR448; AR6786–6788. Looking at this information as a whole, the Service exercised its scientific judgment and rationally determined that the petition did not present substantial information that would lead a reasonable person to believe that delisting may be warranted.

C. Designation of critical habitat is irrelevant.

The Land Office incorrectly asserts that the 90-day finding was arbitrary and capricious because the Service failed "to articulate a rational connection between its primary reason for listing and refusing to consider delisting the warbler, i.e. critical habitat destruction," and "its decision not to designate Warbler critical habitat." Opening Brief 39; *see also id.* at 8–11. That argument fundamentally misunderstands the Service's listing determination and overlooks that critical habitat is only a subset of habitat. *See Weyerhaeuser*, 139 S. Ct. at 368–69. In its 1990 listing and 2014 review, the Service concluded that the warbler was in danger of extinction due to the ongoing, widespread destruction of its habitat — not its

"critical habitat." AR6789. Critical habitat is a special designation awarded to a subset of habitat through formal rulemaking that affects only activities involving federal land or federal agency action. *Weyerhaeuser*, 139 S. Ct. at 365–66.

The Service had no obligation to address the designation of critical habitat in its 90-day finding. ROA.1565–67. The petition did not assert that the Service's failure to designate critical habitat rendered the listing invalid. Nor did it argue that the lack of critical habitat suggested that the warbler faced no threats to its habitat. The Land Office may not raise those arguments because they are outside the "four corners of the[] petition." *Wildearth Guardians v. U.S. Secretary of the Interior*, No. 4:08-CV-00508, 2011 WL 1225547, at *4 (D. Idaho Mar. 28, 2011).

In any event, the Service did not act arbitrarily or capriciously by not referencing critical habitat in the 90-day finding. For reasons discussed in Part I above (pp. 19–25), the text of the ESA makes clear that the Service's duty to list species is separate from its duty to designate critical habitat for those species. In considering whether a species should be listed or delisted, the Service may consider only the "best scientific and commercial data available" as to the five biological factors in 16 U.S.C. § 1533(a)(1). *See id.* § 1533(b)(1)(A); 50 C.F.R. § 424.11(b), (c). The Service may not add or remove a species from the list based on other information or for other reasons, including the existence of critical habitat.

Likewise, the designation of critical habitat is based on many factors that are not part of the listing analysis. For instance, the statute instructs the Service to designate critical habitat only to the extent "prudent and determinable," 16 U.S.C. § 1533(a)(3)(A), and it requires the Service to consider "the economic impact, the impact on national security, and any other relevant impact" in making a designation, *id.* § 1533(b)(2). The Service may not consider these types of impacts in making a listing determination. *See Alabama-Tombigbee Rivers*, 477 F.3d at 1266. The agency's regulations in effect at the time also prohibited the Service from using critical habitat as "a basis for the determination of the substantiality of a petition." 50 C.F.R. § 424.14(b)(2)(iv).

As a result, the Service's decision in 1990 that critical habitat was "undeterminable," 55 Fed. Reg. at 53,156, and its later observation that designation was "neither necessary nor prudent," AR25, does not contradict the Service's well-grounded and consistent scientific determinations that the warbler is endangered because it faces present and threatened destruction and fragmentation of its habitat, in addition to other threats. 55 Fed. Reg. at 53,156–59; AR441–43; AR449; AR6782–84; *see also* 16 U.S.C. § 1533(a)(1).

Indeed, Congress amended the ESA in 1982 specifically "to prevent [habitat] designation from influencing the decision on the listing of a species." *Alabama-Tombigbee Rivers*, 477 F.3d at 1266 (quoting H.R. Rep. No. 97-567, at

12 (1982)); *cf.* Opening Brief 43 (relying on prior version of the ESA that was modified by the 1982 amendments). In particular, "where the biology relating to the status of the species is clear, it should not be denied the protection of the Act because of the inability of the Secretary to complete the work necessary to designate critical habitat." *Alabama-Tombigbee Rivers*, 477 F.3d at 1270 (quoting H.R. Rep. No. 97-567, at 19). The Land Office's attempt to rewrite the ESA, Opening Brief 39–44, should be rejected.

Therefore, the Service's 90-day negative finding regarding the delisting petition was rational and supported by the record.

CONCLUSION

For these reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the Appellate Electronic Filing system on June 21, 2019. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 11,354 words according to the count of Microsoft Word and excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

I further certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, using Microsoft Office Word 2016.

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