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

GENERAL LAND OFFICE OF THE STATE OF TEXAS, *Plaintiff*, v. UNITED STATES DEPARTMENT OF THE INTERIOR et al., *Defendants*, and SAVE OUR SPRINGS ALLIANCE, *Defendant-Intervenor*.	)	No. 1:23-cv-169-DAE-ML **DEFENDANT-INTERVENOR'S CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The golden-cheeked warbler is Texan through and through. It is the only bird that breeds exclusively in Texas. To build its nests, it requires bark from the Ashe juniper tree—a species that itself is barely found outside of Texas. In large part because the golden-cheeked warbler has such specific and narrow habitat requirements, the U.S. Environmental Protection Agency classifies the warbler as "critically vulnerable" to climate change. The fact is, as human populations skyrocket in San Antonio and Austin, and warming temperatures constrict the warbler's range, this bird—ever loyal to its home state—has nowhere else to go. Though the warbler's circumstances remain precarious, its 1990 listing as "endangered" under the Endangered Species Act has yielded essential protections for the species, forestalling the threat of extinction.

Resolute in its optimism that the warbler is, nevertheless, doing fine, Plaintiff General Land Office of the State of Texas returns to this Court to plead the merits of a 2015 petition to delist the warbler. The Fifth Circuit held in 2020 that the U.S. Fish and Wildlife Service applied an inappropriately heightened standard of review to the delisting petition, and Plaintiff insists that the Service's post-remand denial of the delisting petition suffers from the same defect and must therefore be vacated.

There is no reasoned basis for this request. Even construing all evidence presented by delisting petitioners in their favor, the Service still articulated a multitude of rational reasons the warbler should remain listed, including such varied and severe threats as habitat loss, habitat fragmentation, predation, wildfire, climate change, and more. No "reasonable person" would view the body of evidence available to the Service—including the delisting petition and the

studies cited therein—and conclude that the warbler may no longer need the protections of the Endangered Species Act.

Accordingly, and for the reasons that follow, Plaintiff's motion for summary judgment should be denied, Defendant-Intervenor's cross motion for summary judgment should be granted, and the golden-cheeked warbler should retain its Endangered Species Act protections.

BACKGROUND

I. The Endangered Species Act

In 1973, recognizing that certain wildlife species "ha[d] been so depleted in numbers that they [we]re in danger of or threatened with extinction," Congress enacted the Endangered Species Act ("ESA" or the "Act"), "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(a)(2)–(b). Over fifty years since its passage, the ESA remains "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

To afford a terrestrial species the protections of the ESA, the Secretary of Interior, acting here through the U.S. Fish and Wildlife Service (the "Service," "FWS," or the "Agency"), must first list the species as either "endangered" or "threatened" pursuant to section 4 of the ESA. *See* 16 U.S.C. § 1533. A species is "endangered" when it "is in danger of extinction throughout all or a significant portion of its range," *id.* § 1532(6), while a species is "threatened" when it is "likely to become an endangered species within the foreseeable future," *id.* § 1532(20); *see also id.* § 1533(c). When determining whether a species should be listed as "endangered" or "threatened," the Service considers five statutory threat factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

Id. § 1533(a)(1). The Service must make these listing determinations "solely on the basis of the best scientific and commercial data available." *Id.* § 1533(b)(1)(A).

Once a species is listed, the Service must "develop and implement [a recovery plan] . . . for the conservation and survival" of that species. *Id.* § 1533(f)(1). Recovery plans must contain "objective, measurable criteria which, when met, would result in a determination . . . that the species be [delisted]." 16 U.S.C. § 1533(f)(1)(B)(ii). These objective, measurable criteria are based on the five statutory listing factors and measure whether threats to the species have been ameliorated. *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 111 (D.D.C. 1995), *amended,* 967 F. Supp. 6 (D.D.C. 1997). A recovery plan thus serves as a proverbial "road map" for species recovery—it lays out the end points for when a species may be considered recovered and delisted under the ESA and guides the Service in how to get there. Because of the central role of recovery plans in recovery efforts, the Service considers these documents to be "one of the most important tools to ensure sound scientific and logistical decision-making throughout the recovery process." *Save Bull Trout v. Williams*, 51 F.4th 1101, 1106 (9th Cir. 2022).

Any "interested person" may petition to add or remove a species from the ESA lists of endangered or threatened species, and the Service must make a finding, within 90 days of receipt of the petition, "as to whether the petition presents substantial scientific or commercial

information indicating that the petitioned action may be warranted." *Id.* § 1533(b)(3)(A). For purposes of evaluating such a petition, "'substantial information' is that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b)(1) (2014).[1] In evaluating these petitions, the Service is "expressly limit[ed]" to "reviewing the information presented in the [p]etition and the information contained in the Service's files." *W. Watersheds Project v. Norton*, No. CV 06-00127SEJL, 2007 WL 2827375, at *7 (D. Idaho Sept. 26, 2007). If the Service determines in response to a petition to delist a species that delisting "may be warranted," the Agency must commence a status review for the species that must culminate—within twelve months of the Service's receipt of the petition—in a decision to delist, "downlist" from endangered to threatened, or preserve the listing status quo for the species. 16 U.S.C. § 1533(b)(3)(B).

Independent of the Service's duty under these petitioning provisions to conduct a status review if it determines that a petitioned action may be warranted, the Service also has a duty under the ESA to conduct a status review for every listed species, "at least once every five years." *Id.* § 1533(c)(2). This status review similarly culminates in a decision to delist, downlist, or maintain the listing status for a given species. *Id.*

Any decision to delist a species, either in response to a delisting petition or at the culmination of a five-year status review, must be made in accordance with the same statutory and regulatory provisions that govern the Service's initial listing determinations. Thus, in delisting a species, the Service must consider whether the species is still threatened or endangered based on

[1] The Parties agree that the 2014 version of these regulations control as they were in effect at the time the delisting petition was filed in 2015. *See* Pl.'s Mot. Summ. J. ("GLO Br.") (ECF 55) at 3 n.1; Fed. Defs.' Combined Cross-Mot. Summ. J. & Opp'n to Pl.'s Mot. Summ. J. ("Fed. Defs.' Br.") (ECF 56) at 3 n.3.

the five statutory threat factors and must apply the best available scientific and commercial data in doing so. *Id.* § 1533(c)(2)(B). Furthermore, the Service may delist species only if one or more of the following situations apply: 1) the species is extinct; 2) the species has achieved "recovery"; and/or 3) the "original data for classification [of the species as threatened or endangered] [was] in error." 50 C.F.R. § 424.11(d) (2014).

II. The Golden-Cheeked Warbler

The golden-cheeked warbler (*Setophaga chrysoparia*; "warbler") is a small migratory songbird with bright yellow cheeks that nests exclusively in the mixed Ashe juniper/deciduous woodlands of central Texas Hill Country. Certified Administrative Record at AR006776. It is the only bird that is 100% Texan; every golden-cheeked warbler hatches in Texas, and it is the only bird whose breeding range is entirely contained within Texas. AR006962.

AR005856.

Following an emergency listing petition, the Service listed the golden-cheeked warbler as endangered in 1990. Endangered and Threatened Wildlife and Plants; Final Rule to List the

Golden-cheeked warbler as Endangered, 55 Fed. Reg. 53,153 (Dec. 27, 1990). The Service found that, due to dramatic human population increases within the warbler's Texas range, the warbler's habitat was rapidly being cleared and converted into urban sprawl. *Id.* at 53,157. Ashe juniper trees, which the warbler needs to build its nests, were also being cleared to improve grazing lands for game populations. *Id.*; *see also* AR007595.

The Service published a recovery plan for the warbler in 1992 (the "Recovery Plan"). AR007028. The Recovery Plan outlines five recovery criteria which, when met, will make the warbler eligible for delisting. AR007076. These criteria include:

(1) the protection of "sufficient breeding habitat . . . to ensure the continued existence of at least one viable, self-sustaining population in each of [the eight recovery regions]";

(2) measures to ensure "gene flow" and "genetic viability" between self-sustaining warbler populations;

(3) the protection of "sufficient and sustainable non-breeding habitat";

(4) the protection of "all existing [warbler] populations on public lands . . . to ensure their continued existence"; and

(5) the maintenance of all recovery criteria conditions "for at least 10 consecutive years." *Id.*

The Service has also published several five-year status reviews for the warbler, including most recently in 2014 (the "2014 Status Review"). AR006774. The 2014 Status Review concluded that the warbler should remain listed as endangered because the species "continues to be in danger of extinction throughout its range" due to the species' extremely limited breeding range and the "ongoing, wide-spread destruction of its habitat." AR006789.

III. Procedural History

A. The 2015 Delisting Petition and Challenge to the 2016 90-Day Finding

On June 29, 2015, several groups petitioned the Service to remove the golden-cheeked warbler from the ESA list of endangered species. AR000002–38. The petitioners did not claim that any of the recovery criteria had been met. Rather, they claimed that, based on then-new studies, "[t]here are roughly 19 times more warblers than [the Service] believed at the time of the [warbler's] listing," and that the species is therefore no longer endangered or threatened within the meaning of the ESA. AR000007.

The Service denied the petition on May 25, 2016. AR000440–55 (the "2016 90-Day Finding"). Among other things, the Service explained that, although some studies referenced by delisting petitioners estimated higher warbler population numbers than the Service had estimated in 1990, these higher numbers "do not imply recovery" because the "threats described in the original listing rule remain." AR000442. Plaintiff challenged the Service's petition denial, and this District upheld that denial. *Gen. Land Off. of Tex. v. U.S. Fish & Wildlife Serv.*, No. 17-cv-00538-SS, 2017 WL 10741921 (W.D. Tex. Nov. 30, 2017); *Gen. Land Off. of Tex. v. U.S. Fish & Wildlife Serv.*, No. 17-cv-00538-SS, 2019 WL 1010688 (W.D. Tex. Feb. 6, 2019).

On appeal, the Fifth Circuit reversed, holding that the Service "applied an inappropriately heightened [standard of review]" to the delisting petition by "requir[ing] the . . . petition to contain information that the Service had not considered in its five-year review that was sufficient to refute that review's conclusions." *Gen. Land Off. of Tex. v. U.S. Dep't of the Interior*, 947 F.3d 309, 321 (5th Cir. 2020). The court listed examples of the Service faulting the petition for failing to supply new information that the Service had not already considered in its five-year review. *Id.* In each example, the Service referenced its 2014 Status Review—and that

document's discussion of topics raised in the delisting petition—in lieu of evaluating the delisting petition on its own merits. *Id.* ("'Information provided in the petition is refuted by the 2014 5-year review . . . . 'This and other pertinent information was evaluated in the 2014 5-year review.'") (citing 2014 Status Review). Ultimately, the court vacated the 2016 90-Day Finding and remanded "for the Service to evaluate the delisting petition under the correct legal standard." *Id.* (emphasis omitted).

B. The 2021 90-Day Finding

Following its reconsideration of the delisting petition in accordance with the Fifth Circuit's order, the Service published a new determination on the petition on July 27, 2021 (the "2021 90-Day Finding" or the "90-Day Finding"). AR008085–88; AR008094–107. In its 90-Day Finding, in compliance with the Fifth Circuit's instructions, the Service did not require the petition to provide new information the Service had not considered in its 2014 Status Review. Instead, the Service evaluated whether "the sources cited in the petition provide substantial information to support [petitioners'] claim" that the warbler warrants delisting based on each of the five statutory factors. AR008095–106; 16 U.S.C. § 1533(a)(1). For each factor, the Service concluded that the petition had not provided substantial information to support delisting the warbler. AR008095–106.[2]

1. The Service concluded that the warbler continues to be threatened by destruction, modification, or curtailment of its range (factor A).

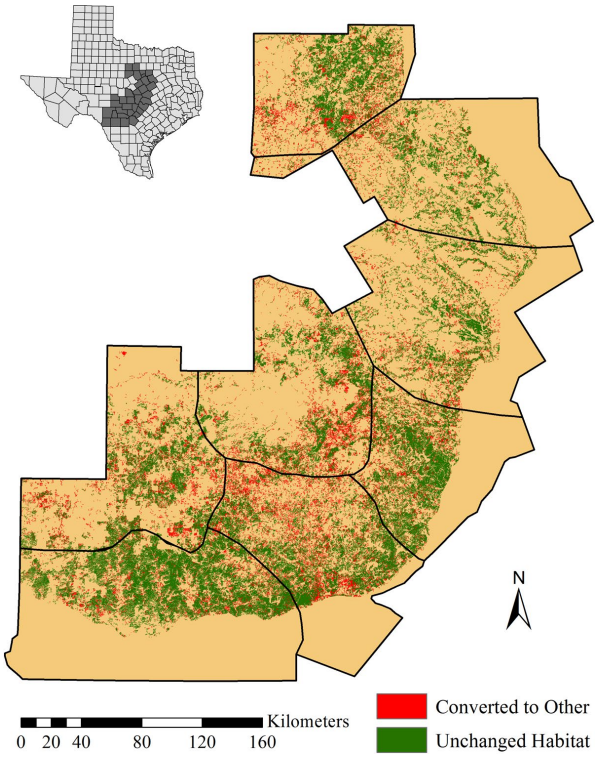
The Service concluded in its 90-Day Finding that "[h]abitat destruction, fragmentation, and degradation remain real and significant threats to the continued existence of the warbler."

[2] The Service stated in the 90-Day Finding that it "does not consider overutilization [factor B] to be a significant threat to the warbler at this time," and petitioners did not discuss this factor. AR008099–100. Therefore, this factor is not discussed here.

AR008098. In the Service's summation, the delisting petition "does not present substantial information" indicating that these trends "no longer threaten the species with extinction." *Id.*

As the Service explained, the threats of habitat loss, fragmentation, and degradation have only grown since the warbler was first listed as endangered in 1990. Between 1990 and 2010, the human population within the warbler's breeding range increased by nearly 50 percent. AR008099. The rate of growth was highest in Burnet, Hays, Travis, and Williamson counties, which grew by almost 90 percent during this period. AR002523. These counties happen to contain more contiguous warbler habitat than most of the other 31 counties that encompass the warbler's breeding range—indeed, Travis County alone is home to an estimated 40 percent more warblers than any other county in Texas. AR002507; AR002519. The Service expects these trends to continue: the human population within the warbler's breeding range is projected to increase by over 60 percent between 2010 and 2050. AR008099.

As the 90-Day Finding illustrated, land development driven by this population boom in central Texas has taken a serious toll on the abundance and quality of warbler habitat. Between 2001 and 2011, warbler breeding habitat declined by almost 30 percent. AR008098 (citing AR001921). Some of the most significant habitat losses were in the southern portion of the range, which has historically supported the highest abundance of warblers. AR002507; AR002518–20. These downward trends are evident in the following map showing range-wide breeding habitat losses between 2001 and 2011:



AR001921.

In that same 2001-2011 period, mean habitat "patch" size decreased, which indicates increasing habitat fragmentation. *Id.* This is significant for several reasons. First, warblers are more likely to be found in large patches of habitat than small patches. If a patch of habitat becomes sufficiently small, it is unlikely warblers will occupy it—thus functionally converting habitat to non-habitat. AR001916; AR002492. Second, the breaking up of formerly whole patches of habitat creates more "forest edge," which exposes warblers—including fledglings—to more predators. AR003903; AR004470. Finally, decreased habitat patch size often results in small, isolated warbler populations, which can increase inbreeding and the persistence of harmful genetic traits that reduce population viability. AR000904. These genetic trends have already been documented in the golden-cheeked warbler population. *See generally* AR000903–13.

The 90-Day Finding also noted that "warbler habitats are far more likely to be diminished than regenerated." AR008098. This is explained in part by the warbler's specific habitat

requirements: because warblers construct their nests from Ashe juniper bark and Ashe junipers do not begin shedding bark until at least 20 years of age, AR007044, attempts at new Ashe juniper "habitat regeneration" will not meet the warbler's present needs. Warblers further benefit from dense Ashe juniper canopy cover, and it can take decades for these trees to reach the requisite heights to form dense canopies. AR000332.

The Service summarized in the 90-Day Finding that the delisting petition does not present "any scientific data or analysis of existing data" that shows a decrease in the threats the warbler faces from habitat destruction and fragmentation. AR008099. Thus, the Service concluded, the petition "does not provide substantial information that delisting the warbler may be warranted" based on statutory factor A. AR008099.

2. The Service concluded that the warbler continues to be threatened by predation (factor C).

Regarding statutory factor C, the Service characterized predation and parasitism—particularly from the Texas rat snake and the brown-headed cowbird, respectively—as "moderate" threats to the warbler. AR008101; AR002463–64. The Service concluded the delisting petition "does not reference any scientific data or analysis of existing data that calls into question threats to the warbler associated with . . . predation" or parasitism. AR008101.

Texas rat snakes have been observed "preying on female warblers while on the nest," AR006785, which may be an "important source of [warbler] mortality." AR008101. And as previously discussed, an increase in habitat fragmentation in turn increases "forest edge," which leaves warbler nests exposed and in closer proximity to predators. *Id.* Texas rat snakes preferentially use forest edge because it allows them to thermoregulate by moving freely between habitats with different thermal properties. AR003903–04. "Opportunistic species" like fox squirrels, blue jays, grackles, and feral cats are also well adapted to fragmented and urban

habitats, and "have the potential to impact [warbler] populations by destroying eggs, young birds, and adults." AR006785. Thus, warbler nests near forest edges have a lower likelihood of survival. AR003927.

The threat of nest parasitism also persists, despite cowbird trapping efforts at Fort Hood Military Reservation. AR002463–64. Brown-headed cowbirds remove golden-cheeked warbler eggs and nestlings from warbler nests and replace them with their own eggs. AR002463. Cowbird nestlings have a competitive advantage over warbler nestlings because cowbird nestlings hatch earlier than warblers and grow at a faster rate. *Id.* This nest parasitism forces warbler nest failure and subsequent re-nesting. *Id.* Brown-headed cowbird nest parasitism rates as high as 57.6% of nests (in Kendall County) have been reported. *Id.* The Service therefore concluded that nest parasitism remains a "moderate" threat to the warbler under factor C. AR008101.

3. The Service concluded that the warbler should remain listed due to the inadequacy of existing regulatory mechanisms (factor D).

In addressing statutory factor F, the delisting petition contended that several regulatory mechanisms provide adequate protection for the warbler absent the Endangered Species Act: the Migratory Bird Treaty Act of 1918; the 1975 Texas Endangered Species law; and long-term land protections (the Balcones Canyonlands National Wildlife Refuge, the Balcones Canyonlands Preserve, and roughly 160 habitat conservation plans). The Service explained that none of these regulatory mechanisms provides sufficient protection for the warbler, and that the Endangered Species Act's protections are therefore essential for the long-term viability of the species. AR008102. The Service pointed out in the 90-Day Finding that the Migratory Bird Treaty Act of 1918 and the 1975 Texas Endangered Species law do not prohibit habitat destruction, "which is an immediate threat to the warbler." *Id.* Because warbler breeding habitat declined by almost 30

percent between 2001 and 2011, AR008098, and such habitat remains under threat from population growth in the Austin and San Antonio metropolitan areas that is expected to continue, AR008102, regulatory mechanisms beyond the Endangered Species Act are ill equipped to prevent warbler extinction. *Id.* The Service further noted that it does not consider long-term land protections to be "existing regulatory mechanisms" within the meaning of factor D, but even with these long-term land protections—considered instead under factor A—warbler breeding habitat still experienced this significant decline in recent years. *Id.* The Service thus concluded that the petition "does not provide substantial information" that delisting the warbler may be warranted based on statutory factor D. AR008103.

4. The Service concluded that other natural or manmade factors affect the warbler's continued existence (factor E).

As for the catch-all statutory listing factor E, the Service's 90-Day Finding explained that a number of other factors, including oak wilt and catastrophic wildfire, are also ongoing and even increasing threats to the warbler. AR008104–05. It concluded that the delisting petition does not present any information to suggest that these varied threats have abated. AR008105–06.

As the 90-Day Finding pointed out, oak wilt threatens—and will continue to threaten—the golden-cheeked warbler. AR008104. Oak wilt is a fungal infection that can kill some species, such as the Texas live oak, within one to six months of infection. AR005843. It occurs in 30 of the 35 counties occupied by the golden-cheeked warbler. AR005843–44. Warbler males whose forest territories were more than 10 percent affected by oak wilt experienced demonstrably lower success pairing with a mate than their less-oak-wilt-burdened counterparts. AR008104. Warblers also "avoid[] establishing territories" within forests affected by oak wilt. *Id.* This may be because oak wilt reduces total canopy cover and increases forest edge, and warblers are typically found in areas with high canopy cover and less forest edge. AR005844. Researchers have estimated that

almost seven percent of studied golden-cheeked warbler habitat was affected by oak wilt in 2008, and expected that number to nearly double within a decade. AR005843.

The Service also discussed catastrophic wildfire as an ongoing threat to the warbler. AR008105. Crown fires—fires which spread from treetop to treetop, often at high speeds—in particular can degrade warbler habitat for years, in part because Ashe junipers do not resprout after being "top killed" (killed due to crown fire). AR004436–37. Each of the five species of oak that occur in central Texas *does* resprout after being top killed, so competition from resprouting oak species can limit Ashe juniper seedling growth and thus shift forest composition from Ashe junipers to oaks following crown fires. AR004443. Researchers writing in 2008 predicted that, because Ashe junipers were so slow to recover following wildfire, burned areas would "likely not host large numbers of golden-cheeked warblers for several more decades." AR004443. Fire can also reduce the density of mature trees and otherwise negatively impact warbler habitat suitability. AR007503.

The Service also recognized that climate change poses an existential threat to the warbler. The 90-Day Finding stated that climate change will increase the risk of catastrophic wildfire in the warbler's range. AR008106. Climate change will also restrict the warbler's range as temperatures are projected to increase in the southern portion of warbler breeding habitat, but the warbler will not be able to shift its range further north because the Ashe junipers it needs for survival will not grow further north. AR006787; AR008106. For these and other reasons, the U.S. Environmental Protection Agency classifies the warbler as "critically vulnerable" to climate change. AR006787.

The Service acknowledged that the petition described research on warbler habitat quality "that has resulted in conflicting conclusions about the effects of oak wilt, fire, vegetation

management, . . . and [other factors] on warbler reproductive success." AR008104. But the Service clarified that, while the studies cited in the delisting petition report different conclusions regarding the severity of these adverse effects on the warbler, the studies all conclude that these adverse effects on the warbler persist. *Id.* Thus, the Service concluded that the warbler should remain listed due to threats from oak wilt and catastrophic wildfire, and the petition "does not provide substantial information that delisting the warbler may be warranted" based on statutory factor E. AR008105–06.

5. The Service concluded that estimates of warbler population size are not dispositive of the species' listing status under the ESA.

In its 90-Day Finding, the Service discussed the studies cited by petitioners which "show[ed] higher warbler population numbers than estimated at the time of listing," and stated that it "consider[s] [those studies] to be accurate for purposes of evaluating the information in the petition." AR008097. However, the Service also explained why those studies do not justify delisting.

The Service acknowledged that two recent studies cited by delisting petitioners, Mathewson et al. (2012) and Collier et al. (2012), as well as studies cited in a 2015 Texas A&M survey, predict higher warbler abundance and habitat than was estimated at the time of listing. AR008096–97. Mathewson et al. (2012) predicted a global population of 263,339 male warblers, AR003579, whereas the Service cited population estimates of 4,822–16,016 pairs in its 1992 Recovery Plan. AR007054. Collier et al. (2012) estimated 1.678 million hectares of warbler habitat (approximately 6,479 square miles), AR001595, whereas the Service's Recovery Plan estimated available breeding range habitat to be 329,503 hectares (approximately 1,272 square miles). AR007058. The 2015 Texas A&M survey did not include independent research into

warbler populations, but rather summarized existing research studies estimating warbler abundance, including the Mathewson and Collier studies. AR008097; AR000086.

Regardless of these new estimates of warbler population and range size, the 90-Day Finding stated, "the [Endangered Species Act] does not base listing determinations solely or predominantly on population or range size." AR008097. The Service must instead evaluate each of the five delisting factors in 16 U.S.C. § 1533(a)(1), and when it did so, it found that "[t]he most serious threats described in the original listing rule . . . remain." AR008097–98.

On January 12, 2022, Plaintiff again filed suit to challenge the Service's new 90-Day Finding.

STANDARD OF REVIEW

Summary judgment is the "appropriate procedure for resolving a challenge to a federal agency's administrative decision when review is based upon the administrative record," as it is here. *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 746 (W.D. Tex. 1997). Pursuant to the Administrative Procedure Act, agency action must be "set aside" if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Texas v. U.S. Env't Prot. Agency*, 91 F.4th 280, 290–91 (5th Cir. 2024) (quoting 5 U.S.C. § 706(2)). Under this standard, courts will not disturb agency decisions that are "based on a consideration of the relevant factors" and articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted). Courts are "not to substitute [their] judgment for that of the agency." *Id.* This is a "highly deferential" standard, *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379 (5th Cir. 2008), "particularly . . . where there are technical and scientific findings." *Healthy Gulf v. U.S. Army Corps of Eng'rs*, 81 F.4th 510, 520–21 (5th Cir. 2023). "Given the expertise of [the

Service] in the area of wildlife conservation and management and the deferential standard of review, [courts] begin[] with a strong presumption in favor of upholding decisions of the Service on . . . listing decisions." *Save Our Springs*, 27 F. Supp. 2d at 746–47.

In a 90-day finding, the Service determines whether a petition to list or delist an endangered or threatened species "presents substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A). For purposes of evaluating such a petition, "'substantial information' is that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b)(1) (2014). This "reasonable person" standard notwithstanding, the Service's 90-day findings are subject to the same APA "highly deferential" standard as other agency actions. *See Palouse Prairie Found. v. Salazar*, No. CV-08-032-FVS, 2009 WL 415596, at *1 (E.D. Wash. Feb. 12, 2009), *aff'd*, 383 F. App'x 669 (9th Cir. 2010); *Hayward*, 536 F.3d at 379. In reviewing the Service's denial of listing or delisting petitions, "the issue before the Court is not whether a reasonable person could accept their interpretation of the data, but whether the FWS had a rational basis for concluding that a reasonable person would not do so." *Palouse Prairie Found.*, 2009 WL 415596, at *2.

ARGUMENT

I. The Service properly denied the 2015 petition to delist the golden-cheeked warbler.

The Service's 2021 denial of the delisting petition was lawful. In its 90-Day Finding, the Service articulated a "rational connection" between the information presented by petitioners, the information already in the Service's files, and its conclusion that the delisting petition would not "lead a reasonable person to believe" that delisting the golden-cheeked warbler "may be warranted" on the basis of any of the delisting factors enumerated in the Endangered Species

Act. *See* 50 C.F.R. § 424.14(b)(1) (2014); *State Farm*, 463 U.S. at 43; 16 U.S.C. § 1533(a)(1). And in hewing to the statutory delisting factors in its 90-Day Finding, the Service based its denial of the petition "on a consideration of the relevant factors." *State Farm*, 463 U.S. at 43. Indeed, "[a]t each point along [its] analytical path . . . FWS had a rational basis for declining to draw the inferences sought by the plaintiff[]." *Palouse Prairie Found.*, 2009 WL 415596, at *6 (upholding Service denial of petition to list earthworm species as threatened or endangered, finding the Service "had a reasonable basis for its interpretation of the evidence"); *see also Wildearth Guardians v. U.S. Sec'y of the Interior*, No. 4:08-CV-00508-EJL-LM, 2011 WL 1225558, at *9 (D. Idaho Feb. 11, 2011), *report and recommendation adopted*, No. 4:08-CV-00508-EJL-LMB, 2011 WL 1225547 (D. Idaho Mar. 28, 2011) (similar).

The Service's conclusion that delisting is not warranted on the basis of "the present or threatened destruction, modification, or curtailment of [the warbler's] habitat or range" (factor A) is grounded in sources cited by petitioners themselves—and in the Agency's files—showing that the warbler's breeding range has continued to shrink and fragment since the time of listing. AR008095–99. As the 90-Day Finding detailed, human population booms on the southeastern portion of the warbler's range have eroded warbler habitat and will continue to do so. AR008099. The resulting habitat fragmentation is correlated with increased nest predation, which threatens warbler reproductive success. AR008101. Mature Ashe juniper trees, which warblers need for nesting and foraging, can take decades to recover following wildfires, which are expected to increase in frequency and intensity due to climate change. AR008106; AR006787. Climate change also threatens to severely restrict the warbler's range as temperatures will increase in the southern portion of the range, but the warbler will not be able to compensate by shifting its range further north because the Ashe junipers it needs for survival will not grow

further north. AR006787; AR008106. For these reasons, the U.S. Environmental Protection Agency classifies the warbler as "critically vulnerable" to climate change. AR006787.

The delisting petition did not address these facts. The petition instead leaned on several recent studies predicting that warbler habitat is more extensive than was estimated at the time of listing, AR008097, AR000091–92, one of which also predicted the warbler population size to be higher than was estimated at the time of listing (Mathewson et al. 2012). AR008097. In response, the Service "treat[ed these studies] as reliable for the purposes of evaluating whether the petition . . . presents substantial information that delisting may be warranted." AR008097; *see also Palouse Prairie Found. v. Salazar*, 383 F. App'x 669, 670 (9th Cir. 2010) (FWS must "accept [delisting petitioners'] sources and characterizations of the information, to the extent that they appear based on accepted scientific principles . . . unless [the Service has] specific information to the contrary") (internal citation omitted). But, as the Service pointed out, the Endangered Species Act "does not base listing determinations solely or predominantly on population and range size." AR008097. Delisting petitioners instead bore the burden of engaging with statutory delisting factor A—"the present or threatened destruction, modification, or curtailment of [the warbler's] habitat or range," 16 U.S.C. § 1533(a)(1)(A)—which they did not do. The delisting petition offered no studies or data to suggest that the existential threats of habitat loss and fragmentation have abated. AR008097–99.

The Service thus had a "rational basis for concluding that a reasonable person would not" deem the warbler no longer imperiled by habitat loss, fragmentation, and population size. *Palouse Prairie Found.*, 2009 WL 415596, at *2. In other words, the Service rightfully concluded that the delisting petition's showing on factor A—alongside the Service's available

information about this factor—would *not* "lead a reasonable person to believe" that delisting the warbler may be warranted. 50 C.F.R. § 424.14(b)(1) (2014).

The Service similarly articulated a "rational connection" between the information presented by the delisting petition, sources in its own files, and its conclusions that delisting was not warranted on the basis of each of the other statutory delisting factors. AR008099–106; 16 U.S.C. § 1533(a)(1)(B)–(E). The Service's conclusion that delisting is not warranted on the basis of "disease or predation" (factor C) was founded upon the numerous studies in its files—and those cited by the delisting petition—showing that warblers are preyed upon by, *inter alia*, "fire ants, snakes, mammals, and other birds." AR008101. Furthermore, habitat fragmentation increases forest edge, which, in turn, likely increases predation by species like rat snakes, which preferentially use forest edge to help with their own thermoregulation. AR003903–04. The Service's conclusion that delisting is not warranted on the basis of "the inadequacy of existing regulatory mechanisms" (factor D) flowed from the fact that the regulatory mechanisms petitioners cited—the Migratory Bird Treaty Act of 1918 and the 1975 Texas Endangered Species law—do not prohibit habitat destruction, "which is an immediate threat to the warbler." AR008102. The Service's conclusion that delisting is not warranted on the basis of "other natural or manmade factors affecting [the warbler's] continued existence" (factor E) rested upon many studies in the Agency's files—and cited by delisting petitioners—showing that oak wilt, fire, and other phenomena threaten and will continue to threaten the warbler. AR008104–05. The delisting petition did not reference any information to suggest that threats pertaining to factors C, D, or E have abated. AR008101, –103, –105–06.

In sum, the Service articulated a "rational basis" for its denial of the delisting petition and considered "all relevant factors" in that decision. *State Farm*, 463 U.S. at 43. The Service's

conclusion that the delisting petition would not "lead a reasonable person to believe" that delisting the golden-cheeked warbler "may be warranted" was lawful. 50 C.F.R. § 424.14(b)(1) (2014); *see also Palouse Prairie Found.*, 2009 WL 415596, at *6.

II. The Service has complied with the Fifth Circuit's remand instructions.

Contrary to Plaintiff's argument, the Service on remand dutifully followed the Fifth Circuit's order to "evaluate the delisting petition under the correct legal standard." *Gen. Land Off. of Tex.*, 947 F.3d at 321 (emphasis omitted). The Service considered whether a "reasonable person" would find, based on the information cited in the delisting petition and in the Service's files, that warbler delisting "may be warranted." 50 C.F.R. § 424.14(b)(1) (2014). The Service evaluated the merits of each topic raised in the delisting petition and did not fault the delisting petition for failing to refute information in the Agency's 2014 Status Review. AR008095–106. Plaintiff's arguments that the Service violated the Fifth Circuit's order do not hold water.

A. The Service did not require the delisting petition to contain "new information" the Agency had not already considered.

Plaintiff's sweeping argument that the Service required the delisting petition to "contain new information it had not previously considered"—in contravention of the Fifth Circuit's remand order, *Gen. Land Off. of Tex.*, 947 F.3d at 321—hinges precariously on a single observation made by the Service: that the 2015 Texas A&M survey "does not report any new data or study results regarding the warbler, but summarizes readily available information about the warbler and its habitat." Pl.'s Mot. Summ. J. ("GLO Br.") (ECF 55) at 17–18 (citing AR008097). However, the Service's observation was simply an acknowledgment that the 2015 Texas A&M survey, *see* AR000086, is not primary research, but rather a compilation of findings from primary research papers about the warbler. Because the 2015 Texas A&M survey is itself not a scientific article, the Service discussed the findings of the scientific articles compiled

within the 2015 Texas A&M survey, including Mathewson et al. (2012) and Collier et al. (2012). *See* AR008097. There is no evidence that the Service "disregard[ed]" the 2015 Texas A&M survey or "faulted" delisting petitioners for relying on it, as Plaintiff claims. GLO Br. at 17–18. To the contrary, the Service "treat[ed] Mathewson et al. [2012] and the other studies described in the [2015 Texas A&M survey] . . . as reliable" for purposes of evaluating the petition. AR008097. This shows that the Service did not require the delisting petition to contain "new" information, and thus complied with the Fifth Circuit's remand order. In sum, as in the *Palouse Prairie Foundation* case where a plaintiff similarly attempted to take a Service statement out of context to demonstrate that the Agency "employed a standard more demanding than that specified by the ESA," Plaintiff here treats the Service's cited statement "like the proverbial smoking gun" but ultimately "place[s] far too much weight" on it. *Palouse Prairie Found.*, 2009 WL 415596, at *5.

B. The Service did not require the delisting petition to show "proof" of recovery.

Plaintiff takes issue with the Service's observation that studies cited in the delisting petition "represent new estimates rather than indicators of positive trends in warbler habitat and population size, and thus do not imply recovery." GLO Br. at 19 (citing AR008097). Plaintiff claims that this shows the Service required "conclusive evidence" of warbler recovery in the delisting petition, thereby "appl[ying] an inappropriately heightened" standard of review. *Id.* Not so. The Service simply drew an important distinction between the research presented in the delisting petition—which reports new estimates of warbler population and range size without saying anything about population or range trends over time—and research showing the warbler population and range have actually *increased* since listing—which does not exist. At most, the delisting petition presented evidence that the warbler population and range size may have been

larger than was believed at the time of listing. It did not present evidence that the warbler population is growing and therefore recovering. The Service did not act irrationally in recognizing that distinction.

C. The Service's references to the warbler's Recovery Plan were proper.

Plaintiff's claim that the Service impermissibly treated its Recovery Plan for the warbler as a "determining factor" in denying the delisting petition, GLO Br. at 19–20, is also erroneous. At the outset, this claim is belied by the fact that the Service discussed each statutory delisting factor in detail and, for each factor, drew a "rational connection" between the information presented by the delisting petition, sources in its own files, and its conclusions that delisting was not warranted on the basis of that factor. *See generally* AR008095–106; 16 U.S.C. § 1533(a)(1)(B)–(E). The Service referenced the golden-cheeked warbler Recovery Plan in the 90-Day Finding only in passing within the discussion of delisting factor A, *see* AR008098 ("The most serious threats described in the original listing rule . . . remain, and recovery criteria have not been accomplished . . . ."), and referenced merely the *concept* of recovery in that same section, *see* AR008097 ("[The] [research] efforts [cited in the delisting petition] represent new estimates rather than indicators of positive trends in warbler habitat and population size, and thus do not imply recovery.").

Contrary to Plaintiff's argument, it was reasonable for the Service to reference the Recovery Plan in this manner. GLO Br. at 19-20 (citing *Friends of Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012)). Recovery plans must contain "objective, measurable criteria which, when met, would result in a determination . . . that the species be [delisted]." 16 U.S.C. § 1533(f)(1)(B)(ii). Such criteria, while technically not binding on the Agency, are nonetheless meant to be "predictive of the Service's delisting analysis," *Friends of Blackwater*, 691 F.3d at

433. The criteria "serve as proxies [for the delisting factors of 16 U.S.C. § 1533(a)(1)], tailored to what is known about the particular species" and "provide[] 'objective, measurable criteria' by which to evaluate the Service's progress toward its goal of conserving the species." *Id.* at 433–34. The Service therefore routinely relies on the delisting criteria in recovery plans when making delisting determinations. *See, e.g.*, *Alaska v. Lubchenco*, 723 F.3d 1043, 1049–50 (9th Cir. 2013) (noting that there was no dispute in the case that a subpopulation of endangered Steller sea lions was "not meeting the recovery criteria set forth in the [recovery plan] and therefore remains endangered"); *see also* Endangered and Threatened Wildlife and Plants; Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife,72 Fed. Reg. 37,346, 37,347 (July 9, 2007) (delisting the bald eagle when breeding pairs significantly exceeded the numeric goals set by recovery plans).

Plaintiff's point that recovery plans "do not have the force of law and are not binding on the Service," GLO Br. at 19, is of no moment. In evaluating delisting petitions, the Service must "review[] the information presented in the [p]etition" and may further review "information contained in the Service's files." *W. Watersheds Project v. Norton*, 2007 WL 2827375, at *7. The Recovery Plan is a relevant document in the Service's files. AR007028. There is no requirement in the Endangered Species Act that, in evaluating delisting petitions, the Service must limit its review to those readily available files that "have the force of law and are [] binding on the Service." GLO Br. at 19. Such a rule would be arbitrary—and, indeed, would exclude most of the materials the delisting petition cited to support its request for warbler delisting. *See, e.g.*, AR000013–22 (delisting petition citations to non-legal, non-binding materials including Mathewson et al. (2012), Collier et al. (2012), Duarte et al. (2013), and many others).

The Service therefore acted lawfully and rationally by referencing the recovery criteria in the Recovery Plan when evaluating the delisting petition. And, in any event, the Service did not treat the Recovery Plan as a "determining factor" in its denial of the petition, as evidenced by the Service's thorough explication of the delisting petition's failure to meet its burden for each of the statutory delisting factors. AR008095–106. Plaintiff's accusation that the Service "heightens the standard of review" in its references to the Recovery Plan, GLO Br. at 20, is spurious.

D. The Service reasonably rejected arguments that the original warbler listing decision was in error.

Plaintiff's assertion that the original warbler listing was in error fails because Plaintiff mischaracterizes the Service's original justification for listing. Specifically, citing new studies concerning warbler population and range size, Plaintiff attempts to argue that "the original Warbler listing was in error" because "the original data used to justify the Warbler's listing . . . were erroneous." GLO Br. at 20–21. The problem with this argument is that the Service did not "justify" the warbler's original listing on the basis of contemporaneous estimates of warbler population or range size. Rather, at the time of listing, the Service evaluated the status of the warbler through the lens of the five statutory factors—16 U.S.C. § 1533(a)(1)—and found the species vulnerable to significant threats, including widespread clearing of Ashe junipers, unabating population growth in central Texas, ongoing and planned construction of homes, highways, and water delivery systems, parasitism and predation by brown-headed cowbirds and rat snakes, and other factors. *See* Endangered and Threatened Wildlife and Plants; Final Rule to List the Golden-cheeked Warbler as Endangered, 55 Fed. Reg. 53,153, 53,157–58 (Dec. 27, 1990).

For Plaintiff to credibly argue that the original warbler listing "was in error," it would need to, at a minimum, engage with the scholarship documenting that some of the most

significant threats outlined in the original listing rule have not only persisted, but intensified. This Plaintiff does not do. Plaintiff claims that the delisting petition "presented and analyzed extensive scientific data showing the Warbler was never and is not now under threat due to habitat destruction, habitat fragmentation, disease, or predation." GLO Br. at 25. But the portions of the delisting petition Plaintiff cites in support of this proposition merely summarize the new studies on population and range size, which apply new methods that did not exist at the time of listing. AR00057–65. These new studies say nothing about warbler population and range size trends over time. Plaintiff cannot sidestep a real reckoning with the ongoing threats to the warbler by interpreting recent studies of population and range size as reflecting "increases"—which they do not—rather than the application of new methodologies to measure population and range size. *See* GLO Br. at 9, 21 (erroneously characterizing new studies as reflecting "increases" in warbler population and range size).[3]

Indeed, contrary to Plaintiff's argument, courts have endorsed agency determinations that an imperiled species' population size alone does not dictate its listing status under the Endangered Species Act. For example, plaintiffs in *Marincovich v. Lautenbacher*, 553 F. Supp. 2d 1237 (D. Or. 2008), challenged the National Marine Fisheries Service's listing of certain coho

[3] Plaintiff asserts that studies cited by the Service in its 2014 Status Review showed "an increasing trend in density of warblers . . . from 1991–2008." GLO Br. at 17. Plaintiff neglects to mention that this finding applied only to Camp Bullis, whose warbler habitat constitutes at most one percent of total habitat (depending on estimates used). *See* AR002445, –47 fig. 3.4; *compare* AR002560 (Camp Bullis warbler habitat acreage) *with* AR006781 (total breeding range habitat acreage). Furthermore, Camp Bullis is a U.S. Department of Defense military reservation that is actively managed for warbler monitoring and protection. AR002560 (outlining Endangered Species Management Plan and other restrictions on military training activities). Other warbler density studies cited in the 2014 Status Review were similarly limited to protected areas. AR002444–45. Thus, rather than evidencing range-wide recovery that may warrant warbler delisting, Plaintiff's cherry-picked statistic shows simply that site-specific warbler habitat protection plans can work.

salmon populations as threatened. *Marincovich* plaintiffs contended, *inter alia*, that the "current large number of hatchery coho" and the "sheer numbers of returning adult coho" rendered irrational any "threatened" finding for the species. 553 F. Supp. 2d at 1245. The court sided with the agency, which responded that "[t]he risk of extinction of [a population] depends not just on the abundance of fish, but also on the productivity, spatial distribution, and diversity of its component populations," all of which are important for the species "to survive environmental variation and natural and human catastrophes." *Id.* at 1245–46. "[S]heer abundance should [not] determine listing," the court held. *Id.* at 1245. The same conclusion applies here.

Similarly, Plaintiff's intimation that there may be "conflicting scientific information" that warrants a grant of the delisting petition, GLO Br. at 21, is groundless. Plaintiff cites no scientific information that conflicts with the Service's conclusions regarding the warbler's population and range. Indeed, in the 90-Day Finding, the Service "treats [new studies cited by Plaintiff concerning warbler population and range size] as reliable for the purposes of evaluating whether the petition . . . presents substantial information that delisting may be warranted." AR008097. In other words, the Service's denial of the delisting petition was not based on expert disagreement concerning the reliability of the new population and range predictions cited by Plaintiff because the Service assumed these studies *are* reliable for purposes of evaluating the delisting petition.

And Plaintiff's more specific suggestion that there is "conflicting scientific information" regarding *threats* to the warbler—GLO Br. at 21—is pure invention. Plaintiff has presented no evidence of expert rebuttals to scientific findings that the warbler lost roughly 30 percent of its habitat in a recent 10-year period, AR008098; that mean habitat "patch" size decreased in this same period, which indicates increasing habitat fragmentation and forest edge, rendering the

warbler more vulnerable to varied predators and nest parasites, AR001921, AR008101, AR002462–64; that the warbler population has experienced a "steep decline" in genetic diversity, meaning harmful genetic traits that can reduce population viability are more likely to persist, AR000903–04; that the warbler is "critically vulnerable" to climate change due to increased risk of wildfire and range restrictions, AR006787, AR008106; or research documenting any other threat to this species. In sum, there is no scientific disagreement as to whether the warbler faces continuing threats. The Service acted rationally in denying the delisting petition.

III. An order directing the Service to proceed directly to a 12-month review would not be appropriate here.

Finally, Plaintiff's remedial request is unjustified. In the event Plaintiff prevails on the merits—which it should not for the reasons stated—Plaintiff requests that this Court order the Service to skip another remand of the 90-Day Finding and "move ahead with the 12-month review." GLO Br. at 26. However, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Buffalo Field Campaign v. Williams*, 579 F. Supp. 3d 186, 206 (D.D.C. 2022) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)) (holding that, even though the Service had "twice failed to employ the correct evidentiary standard in reviewing the long-pending petitions," there was no reason "to believe that the agency is acting in bad faith or that it is unprepared to adhere to the Court's decision," and therefore declining to order the Service to proceed directly to 12-month review). Plaintiff has identified no "rare circumstances" that would justify an order from this Court directing the Service to initiate a 12-month review.[4]

[4] Plaintiff also argues in this section that the Service's failure to designate critical habitat for the warbler "undercuts its denial of the [delisting] [p]etition." GLO Br. at 27–28. The Fifth Circuit

Moreover, such an order would disturb the deference owed to the Service, particularly on technical and scientific matters within its realm of expertise in endangered and threatened species. *See Healthy Gulf*, 81 F.4th at 520; *Save Our Springs*, 27 F. Supp. 2d at 746–47. As one of the Nation's expert wildlife agencies, the Service is tasked with effectuating Congressional intent behind the passage of the Endangered Species Act to "halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth.*, 437 U.S. at 184. An order directing the Service to skip over a key step in the delisting process—without further scientific analysis of issues presented by the delisting petition—would not further the ESA's conservation objectives.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment should be denied, and Defendant-Intervenor's cross-motion for summary judgment should be granted.

Dated: February 26, 2024

Respectfully submitted,

/s/ Sharmeen Morrison

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has already held that Plaintiff's challenge to the Service's failure to designate critical habitat for the warbler at the time it was listed is time barred. *Gen. Land Off. of Tex.*, 947 F.3d at 318. Defendant-Intervenor incorporates by reference further responses to Plaintiff's critical habitat argument made by Federal Defendants. *See* Fed. Defs.' Br. at 28–29.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve a copy of the same on all counsel of record.

/s/ Sharmeen Morrison
Sharmeen Morrison