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,

v.

SAVE OUR SPRINGS ALLIANCE,
Intervenor-Defendants.

Civil Case No. 1:23-CV-00169-DAE

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' AND INTERVENOR-DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT AND REPLY TO THEIR OPPOSITIONS TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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ORAL HEARING REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: ***Page(s):***

Statutes:

Regulations:

INTRODUCTION AND SUMMARY OF ARGUMENT

While Federal Defendants United States Department of the Interior, *et al*. ("the Service") and Intervenor-Defendant Save Our Springs Alliance ("SOSA") continue to *recite* the correct legal standard of review applicable to the Petition to Delist (the "Petition"), they continue to *apply* the incorrect, heightened 12-month standard of review at the 90-day stage. In so doing, they fail to use the Endangered Species Act's ("ESA's") required test to determine whether "the [P]etition presents substantial scientific or commercial information indicating that the petitioned action *may* be warranted." 16 U.S.C. § 1533(b)(3)(A) (emphasis added). In its motion for summary judgment, Plaintiff General Land Office of the State of Texas ("TXGLO") shows that the Service, for the *second* time, failed to apply the proper legal standard during its review of the Petition—in contravention of the Fifth Circuit's instructions.

The Service unjustifiably refused to proceed to the 12-month review by denying the Petition at the 90-day stage despite recognizing in its Second 90-Day Finding that the Petition presented reliable and substantial information indicating the golden-cheeked warbler's ("Warbler's") population and range far exceeds prior estimates that led to the Warbler's original listing as an endangered species. Accordingly, this Court should order the Service to proceed to a 12-month review of the Petition. The Service has had two bites at this apple. In the interest of justice, the Court should not permit a third.

Before addressing the details, it is important to note that, in their motions for summary judgement and oppositions to TXGLO's motion for summary judgment, Federal Defendants and SOSA take a scattershot approach, using an indiscriminate, hit-or-miss methodology that serves primarily to obscure the straightforward issues in this case. Often, SOSA duplicates the exact same arguments made by the Federal Defendants, albeit sometimes tailoring them in superficially different clothing. In order to avoid any inference of waiver, TXGLO must respond to each of the arguments no matter how repetitive, convoluted, or irrelevant they may be to the central issue in this case—whether the Federal Defendants violated the instructions of the Fifth Circuit in issuing the Second 90-Day Finding.

ARGUMENT

I. STANDARD OF REVIEW

The Service misstates the standard of review this Court must apply to the Second 90-Day Finding. It argues that "the Court must defer to the agency's determination." Doc. No. 56 ("Service MSJ") at 16. That is incorrect, for at least four reasons. First, federal administrative agencies are bound by decisions of federal courts with regard to the scope of their authority to take action. *See Contender Farms, LLP. V. United States Dep't of Agric.*, 779 F. 3d 258, 272–73 (5th Cir. 2015).

Second, the Service is wrong that the Administrative Procedure Act ("APA") "only" allows this Court to declare the Second 90-Day Finding unlawful if the finding is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *Id*. at 15 (quoting 5 U.S.C. § 706(2)(A)). The APA also authorizes courts to "hold unlawful and set aside" the Service's Second 90-Day Finding if it was "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [and] without observance of procedure required by law. . . ." *See* Doc. No. 55 ("MSJ") at 18 (quoting 5 U.S.C. § 706(2)(C), (D)).

Third, "[t]he APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).

Fourth, on questions of law regarding agency action, courts "apply de novo review . . . ." *United States v. Texas*, 143 S. Ct. 1964, 1982 (2023) (quotation omitted). "[T]he courts are the final authorities on issues of statutory construction." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31–32 (1981). Where a court holds "that the governing statutory text is clear," an agency "interpretation is owed no . . . deference." *Forrest Gen. Hosp. v. Azar*, 926 F.3d 221, 228 (5th Cir. 2019). Furthermore, a court should not afford deference" to an agency interpretation of a regulation "if there is only one reasonable construction of a regulation[,]" but even if a court determines there is more than one, "the agency's reading must still be reasonable" and "come within the zone of ambiguity the court has identified after employing all its interpretive

tools." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415–16 (2019). Futhermore, a statute's "text, structure, [and] history . . . at least establish the outer bounds of permissible interpretation." *Id*. at 2416.

Cases cited by the Service and SOSA do not state otherwise.

II. THE SERVICE FAILED TO FOLLOW THE FIFTH CIRCUIT'S INSTRUCTIONS AND ONCE AGAIN APPLIED THE WRONG LEGAL STANDARD TO DENY THE PETITION

When examining the Service's First 90-Day Finding denying the Petition, the Fifth Circuit found that the Service impermissibly required 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 Office of Tex. v. USDOI*, 947 F.3d 309, 321 (5th Cir. 2020). Because the ESA only required the Petition to contain "substantial scientific or commercial information indicating that the petitioned action may be warranted[,]" 16 U.S.C. § 1533(b)(3)(A) (2014)[1], the Fifth Circuit vacated the First 90-Day Finding and remanded it to the Service for reconsideration. *Gen. Land Office of Tex.*, 947 F.3d at 321 (observing "[t]he Service *recited* this standard, but a careful examination of its analysis shows that the Service *applied* an inappropriately heightened one") (emphasis in original).

On remand, the Service again recited the proper statutory language in its Second 90-Day Finding, Appx. 00195, but then again impermissibly required the Petition to present new information and to show conclusive proof of the Warbler's recovery, contrary to the Fifth Circuit's instructions. This error alone warrants summary judgment in TXGLO's favor.

A. The Service Impermissibly Required The Petition To Show Conclusive Proof Of Recovery At The 90-Day Stage Of Review.

The Service does not provide a reasoned explanation for the Second 90-Day Finding in which it required conclusive proof of recovery. Instead, it seeks to evade the Fifth Circuit's holding by asserting falsely that the Petition fails to provide enough information.

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[1] The Service agrees that the ESA statutory language and attendant regulations in effect in 2014 should be applied to this case. *See* Doc. No. 56 at 10 n.3.

Many of the cases cited by the Service are out-of-circuit, distinguishable, or support TXGLO's position. For example, the court in the unreported case of *W. Watersheds Project v. Norton,* No. CV 06-00127-S-EJL, 2007 WL 2827375, 2007 U.S. Dist. LEXIS 71751 (D. Idaho Sept. 26, 2007) held that the Service may *not* require a petition to prove the best available science supports the petitioned action at the 90-day review stage. *Id.* at 15-16. In *Norton*, the Service argued, much as it does here, that it could deny a petition at the 90-day stage if it found the petition presented incomplete data. *Id*. at *11–12. The Court found this position inconsistent with the ESA and its regulations, ruling that a 90-day review requires only "a determination of whether [the petition] presents substantial information indicating to a reasonable person that the petitioned action may be warranted." *Id*. at *15. Because the Service "improperly imposed a higher standard when it reviewed the petition," the *Norton* court overturned the Service's determination even after "afford[ing] the Service its due discretion." *Id*. at *18.

The Service references two other unpublished cases in support of *Norton*'s quotation that "[i]t is the petitioner's burden to provide the Service with the necessary 'substantial scientific or commercial information'" at the 90-day stage. *Norton*, 2007 WL 2827375 at *2. The first, *W. Watersheds Project v. Kempthorne*, 2009 WL 10678130 at *3, 2009 U.S. Dist. LEXIS 138691 (D. Idaho Mar. 31, 2009) noted that this standard "does not require conclusive evidence[,]" *id*. at *8 (quotation omitted), and found that the Service impermissibly "convert[ed] the 90-day review and process to what is effectively a 12-month status review," thereby violating the ESA. *Id.* at *20 (quoting *Colo. River Cutthroat Trout v. Kempthorne*, 448 F. Supp. 2d 170, 176 (D.D.C. 2006)). The second case states that "[t]he petitioner does not have to present conclusive evidence; the petition need only present substantial scientific information that would lead a reasonable person to believe listing may be warranted." *Defs. of Wildlife v. Kempthorne*, No. CV 05-99-M-DWM, Doc. No. 52 at 13 (D. Mont. Sept. 29, 2006).[2]

[2] TXGLO uses the docket citation for this unpublished decision because the WL citation provided in the Service's brief is incorrect and could not be found through online commercial legal service providers available to TXGLO.

The Service cites *Morgenweck* for the obvious proposition that it "may consider information in its own files when evaluating a petition." Service MSJ at 17. But *Morgenweck* only establishes that the Service "can rely on what is within its own expertise and records to reject petitions *consistent with ESA standards*." *Ctr. for Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137, 1142 (D. Colo. 2004) (emphasis added). Here, TXGLO established that the Service did not follow the ESA's standard of review when evaluating the Petition at the 90-day stage, as articulated by the Fifth Circuit. MSJ at 14–26. Furthermore, the court in *Morgenweck* was skeptical of the "scope of review" the Service adopted when evaluating the petition at the 90-day stage and opined that the Service's "failure to consider all relevant information in the Petition was inappropriate." *Morgenweck*, 351 F. Supp. 2d at 1142. Accordingly, the *Morgenweck* court held that the Service's "failure . . . was arbitrary and capricious and its decision therefore must be set aside." *Id.* And as in *Norton*, the *Morgenweck* court ultimately found the Service's findings "flawed" because it required the petition to "contain conclusive evidence of a high probability" that the petitioned action may be warranted. *Id*. at 1141 (noting that 90-day review involves "a lesser standard").[3]

The Service conveniently ignores a published district court case that its preferred unpublished caselaw quotes repeatedly. In *Moden v. U.S. Fish and Wildlife Serv.*, 281 F. Supp. 2d 1193 (D. Or. 2003), the court found the Service applied an impermissibly strict standard when denying a petition at the 90-day stage. All the ESA requires at the 90-day stage, the *Moden* court found, is that a petition "present substantial scientific or commercial information indicating that a

[3] The Service cites another unpublished case for the uncontroversial proposition that it may consider information available in its own files when evaluating a petition. Service MSJ at 17 (citing *Wildearth Guardians v. U.S. Sec'y of the Interior*, No. 4:08-CV-00508-EJL-LMB, 2011 U.S. Dist. LEXIS 32470 at *13 (D. Idaho Mar. 28, 2011)). But *Wildearth Guardians* does not hold that the Service may require a Petition to show conclusive proof of recovery to receive a positive 90-day finding. The Service also cites *Wildearth Guardians* to argue that it may make a negative 90-day finding where it finds "there was not substantial documentation" to take the petitioned action. *See* 2011 U.S. Dist. LEXIS 103738 at *15. But TXGLO presented substantial documentation showing that delisting the Warbler may be warranted, based on rising Warbler populations and studies showing wider Warbler habitat range than originally suspected by the Service at the time of listing. *See, e.g.* MSJ at 33–34.

status review may be necessary." *Id*. at 1203. The ESA's "regulations define 'substantial' information in non-stringent terms" to require "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)). According to the *Moden* court, "the standard for evaluation whether substantial information has been presented . . . is not overly-burdensome, does not require conclusive information, and uses the 'reasonable person' to determine" whether a 12-month review is required. *Id*. at 1204.

The Service then oddly focuses on a term that is not used in the ESA or its implementing regulations in connection with 90-day findings. Service MSJ at 17–18. The Service argues that TXGLO must demonstrate "at least an implication" of recovery but does not explain why it focuses on a dictionary definition of the term "imply," which is a stranger to the 90-day review stage. Instead the Service asserts *ipse dixit* that it can require the Petition to "imply" Warbler recovery at the 90-day stage of review. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014) (finding "an agency may not rewrite [a statute] to suit its own sense of how the statute should operate"); *see also United States v. Calamaro*, 354 U.S. 351 (1957) (striking down regulation as "an attempted addition to the statute of something which is not there"). Accordingly, focusing on the term "imply" cannot provide a basis for satisfactorily explaining the Second 90-day Finding. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made" (cleaned up)). In fact, even using the Service's own mistaken "imply" terminology, the Service never explains why the Petition's extensive citations to multiple studies demonstrating increasing Warbler population and range do not "imply" delisting may be warranted. 16 U.S.C. § 1533(b)(3)(A) (2014); *see also Moden*, 281 F. Supp. 2d at 1204 (requirement of substantial information "not overly-burdensome" and "does not require conclusive information").

SOSA tries to bolster the Service's arguments by stating that the Service distinguishes between the Petition's cited studies "and research showing the [W]arbler population and range

have actually increased since listing—which does not exist." SOSA Br. at 27. In fact, the Petition lists a wide range of studies showing that Warbler population and range have increased substantially since the original listing. Appx. 00085, 107–112, 160. The Petition also includes information showing an increase in Warbler density across several monitoring sites from 1991–2008. Appx. 00082 (quoting Appx. 00158).[4]

SOSA then asserts that the Service may have differentiated between "evidence that the [W]arbler population and range size may have been larger than was believed at the time of listing" and "evidence that the [W]arbler population is growing and therefore recovering." Doc. No. 58 ("SOSA Br.") at 27–28. Either kind of evidence satisfies the 90-day standard of review because each constitutes substantial information suggesting Warbler delisting may be warranted. *See* 16 U.S.C. § 1533(b)(3)(A) (2014); *see also* 50 C.F.R. § 424.11(d) (2014).

In turn, the Service argues that it did not require conclusive proof of Warbler recovery. Service MSJ at 18. But the Second 90-Day Finding specifically disqualifies the Petition because "recovery criteria have not been accomplished." Appx. 00199; *see also* Appx. 00198. But conclusive proof that recovery criteria have been accomplished is *not* required at the 90-day stage. *See* 16 U.S.C. § 1533(b)(3)(A) (2014); *see also Moden*, 281 F. Supp. 2d at 1204.

The Service then asserts that it did not use the 1992 Recovery Plan for the Warbler as a determining factor when denying the Petition. Service MSJ at 33–34. But that assertion is belied by the Service's position that the Petition is disqualified because "recovery criteria have not been accomplished." Appx. 00199. The Service claims that its statement regarding the achievement of recovery refers to "eleven pages" in the Petition regarding the Recovery Plan. Service MSJ at 34; *see also* Appx. 00115 (referencing table); 119–129 (table). But those studies, which indicate completion of recovery benchmarks, are relevant information showing that delisting of the Warbler

[4] The Service states this data is "misleading" because it supposedly originates from a single monitoring site. Service MSJ at 25. So does SOSA. SOSA MSJ at 31 n.3. That is false. The data comes from three different sites across the Warbler's range. AR_2445–2447. The record page TXGLO cites makes this clear. The Service references only one of the data sources cited by TXGLO.

"may be warranted" at the 90-day stage. *See Friends of Blackwater v. Salazar*, 691 F.3d 428, 432–34 (D.C. Cir. 2012).

The Service cites *Morgenweck* again for the unsurprising proposition that it need not accept bad data or "obsolete or unsupported" statements in a petition. 351 F. Supp. 2d at 1142. However, the Service conveniently leaves out important context from that case. *Morgenweck*, which dealt with a *listing* petition and not a *delisting* petition, faulted the Service for failing to address "habitat fragmentation and degradation" when "the [p]etition presented substantial information" establishing its negative impact on the species the petition sought to list. *Id*. The Service needed to "directly consider" the petition's conclusions and data. *Id*. Just as in *Morgenweck,* here too, the Service failed to "directly consider" the data showing that the Warbler population is thriving and Warbler range is expanding but simply discounted that data without explaining why such data was discounted at the 90-day stage.

Next the Service argues that it "may determine, as an exercise of its scientific judgment, that certain inferences drawn by the petitioner are not warranted when considering the totality of the information before it." Service MSJ at 18. The case the Service cites for this proposition is inapposite. In *Palouse Prairie Found. v. Salazar*, No. CV-08-032-FVS, 2009 U.S. Dist. LEXIS 10492 (E.D. Wash. Feb. 12, 2009), the petition at issue contained "little direct scientific evidence" and "relied heavily upon circumstantial evidence." *Id*. at *4. The plaintiffs in *Palouse* argued the Service "was required to accept their interpretation unless no reasonable person would accept it." *Id*. at *5. TXGLO here has made no such argument and presents substantial scientific data demonstrating increases in Warbler population and greater Warbler habitat range than believed at the time of listing, which the Service admits is accurate. Appx. 00198. Additionally, the court in *Palouse* adopted a balancing test to determine whether the Service's finding was correct. Such a balancing test, however, is not found in the ESA, its regulations, or related case law. *See Palouse*, 2009 U.S. Dist. LEXIS 10492 at *6; *but see Gen. Land Office*, 947 F.3d at 321 (analyzing text of ESA to determine proper standard of review for 90-day finding). Furthermore, on appeal in *Palouse,* 383 F. Appx. 669, 670 (9th Cir. 2010), the appellate court found that "the petition . . .

failed to identify a single well-designed study determining the current or historical population and range" of the species at issue. *Id*. Not so here, for the reasons stated in this Section II.A and *infra* in Sections II.B and III. Additionally, in *Palouse* the Ninth Circuit found it important that the Service *applied* the same standard that "it stated" at the 90-day finding stage. *Id*. In the instant case, as indicated, the Service stated one standard in the Second 90-Day Finding and applied another—in contravention of the instructions of the Fifth Circuit.

It is also insufficient for the Service to continue insisting that its independent scientific analysis of the "totality of the information" disproves the Petition's data. Such an approach impermissibly applies the more stringent 12-month standard of review at the 90-day stage. And once again, the Service fails to reasonably explain *how* its analysis disqualifies the Petition at the 90-Day stage. *Prometheus Radio Project*, 141 S. Ct. at 1158 (rejecting agency action unless it is "reasonable and reasonably explained"); *see also Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (requiring agency to "articulate . . . a rational connection between the facts found and the choice made" (cleaned up)).

B. The Service Impermissibly Required The Petition To Present New Information At The 90-Day Stage Of Review.

As detailed *supra* in Section II.A, the Service "recited" the proper standard of review in the Second 90-Day Review, then "applied an inappropriately heightened one." *Gen. Land Office of Tex.*, 947 F.3d at 321. The Service asserts that it "credited . . . as accurate" the Petition's studies. Service MSJ at 19. But, without adequate explanation, the Service discounts those very same studies or resolves the dispute those studies raised about the Warbler's status against the Petition. This was impermissible. *See Buffalo Field Campaign v. Zinke*, 289 F. Supp. 3d 103, 110 (D.D.C. 2018) ("Unless the Service explains why the scientific studies that the petition cites are unreliable, irrelevant, or otherwise unreasonable to credit, the Service must credit the evidence presented.").

As TXGLO detailed in its motion for summary judgment, the Service tries to discredit the Texas A&M survey-of surveys, which is a major scientific review supporting the Petition, on the ground that it "*does not report any new data or study results regarding the [W]arbler*, but

summarizes readily available information about the [W]arbler and its habitat . . . ." Appx. 00198 (emphasis added). Accordingly, the Service is wrong when it asserts that its Second 90-Day Finding did not require the Petition to present "new" data. Service MSJ at 31. And then one sentence later, the Service describes this same source as containing "the most recent and comprehensive efforts to estimate range-wide [W]arbler habitat and population size to date . . . ." *Id*. Surely "the most recent and comprehensive effort," which included multiple studies establishing the Warbler's increasing population and range, constitutes substantial scientific information demonstrating that delisting may be warranted. 16 U.S.C. § 1533(b)(3)(A) (2014). But because the Service chose to discount the Texas A&M survey-of-surveys on the ground that the survey "does not report any new data," Appx. 00198, the Service used a standard the Fifth Circuit found "inappropriat[e]" and "incorrect." *Gen. Land Office of Tex.*, 947 F.3d at 321. Thus, the Service directly violated the Fifth Circuit's order "to evaluate the delisting petition under the correct legal standard." *Id*.

Because the Texas A&M survey-of-surveys contains comprehensive analysis of multiple Warbler population and habitat surveys, the Service's requirement that *this specific document* present new information is particularly inappropriate in light of the Fifth Circuit's instructions. And SOSA's insistence that "the Service's observation was simply an acknowledgement that [the source in question] is . . . a compilation of findings" is likewise not a justification for downplaying the significance of the Texas A&M survey-of-surveys. SOSA Br. at 26. The Service evaluated this source by a standard not contemplated under the ESA. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (stating it is arbitrary and capricious for agency to base its decision on "factors Congress did not wish it to consider"). Also, *contra* SOSA, there is abundant "evidence that the Service disregarded" or at least impermissibly downplayed the survey-of-surveys in question. *Id*. at 27. For example, the Second 90-Day Finding states—without explanation and relying on *ipse dixit*—that the modeling studies the survey-of-surveys summarizes "do not imply recovery" and may have overestimated Warbler habitat and population. Appx. 00198. But, as indicated, the fabricated standard of implying recovery is not the statutorily

mandated standard at the 90-day stage of review. And the Service acknowledges that it denied the Petition at the 90 day stage because "recovery criteria have not been accomplished." Appx. 00199. Yet accomplishing recovery criteria conclusively is irrelevant to the standard the Petition must meet at the 90-day stage. *See* 16 U.S.C. § 1533(b)(3)(A) (2014). In addition, the Service's suspicion that the Texas A&M survey-of-surveys may have overestimated Warbler population is insufficient grounds for denying the Petition. *See Moden*, 281 F. Supp. 2d at 1204.

Furthermore, the Service frivolously argues that it did not repeat the *exact* same error it made in the First 90-Day Finding, *i.e.*, requiring the Petition to present new information not found in its 2014 Five-Year Review. Service MSJ at 32–33. Incredibly, the Service wants this Court to believe that requiring the Texas A&M survey-of-surveys to provide new information not previously considered by the Service is permissible *because* the survey-of surveys is not the same document as the 2014 Five-Year Review. That reading would make a mockery of the Fifth Circuit's ruling by permitting the Service to adopt *any* heightened standard of review at the 90-day stage as long as it did not require new information not included in the 2014 Five-Year Review. Such a reading is antithetical not only to the Fifth Service's ruling but also to the litany of cases cited approvingly by the Fifth Circuit in its opinion. *Gen. Land. Office of Tex.*, 947 F.3d at 320–21.

Furthermore, the Service cannot evade its mistake by observing that a "holistic reading" of the Second 90-Day Finding "shows that the Service credited all studies presented in the Petition . . . ." Service MSJ at 33; *see also* SOSA Br. at 27 (raising same argument). As detailed *supra*, merely stating that the Service takes the Petition's studies as accurate but then downplaying them and rejecting their findings is not consistent with the 90-day review standard 16 U.S.C. § 1533(b)(3)(A) (2014).

SOSA again cites *Palouse Prairie Found.*, 2009 U.S. Dist. LEXIS 10492, which TXGLO has distinguished *supra*, to argue that TXGLO is taking the Service's attempt to require the Petition to present new information out of context. SOSA Br. at 27. But in *Palouse*, the plaintiffs argued the Service should take the petitioned action based on a statement a Service employee *made in an*

email. 2009 U.S. Dist. LEXIS 10492 at *16. TXGLO makes no such argument here but relies squarely on the strength of the studies set forth in the Petition and the instructions of the First Circuit.

Additionally, the Service stated that the Petition's studies showing several threats to the Warbler are no longer serious enough to warrant listing are "refuted by readily available information, in the Service's files" and required the Petition to "provide . . . scientific data or analysis of existing data showing that threats to the [W]arbler are minimal enough" that delisting the Warbler may be warranted. Appx. 00207. Relying on an undefined "minimal enough" standard to toss the multiple studies the Petition presents is not "crediting" those studies. *See Gen. Land Office*, 947 F.3d at 321 ("[t]he Service *recited*" the ESA's 90-day review standard "but a careful examination of its analysis shows that the Service *applied* an inappropriately heightened one") (emphasis in original). And once again, the Service failed to show its work when summarily relying on supposedly "readily available information" in its files.

III. THE SERVICE'S SECOND 90-DAY FINDING WAS UNREASONABLE, ARBITRARY, CAPRICIOUS, LACKING ADEQUATE EXPLANATION, AND OTHERWISE NOT IN COMPLIANCE WITH THE ESA AND IT'S IMPLEMENTING REGULATIONS.

The Second 90-Day Finding concluded that "habitat loss" is "the primary threat to the [W]arbler . . . ." Appx. 00200. Yet to this day the Service has not designated Warbler critical habitat. Without designating critical habitat, there is no way for the Service to determine the severity of any given habitat threat to the Warbler. Specifically, the Service's failure to designate the geographical area comprising critical habitat means that the Service—and regulated landowners such as TXGLO—are functionally blindfolded when trying to determine the impact of habitat on the Warbler's likelihood of survival. Accordingly, the Service is left to speculate how and why the Warbler's critical habitat—wherever it may be—is at risk. Nevertheless, the Petition's studies show that Warbler's *actual* "habitat is far more abundantly available than [the Service] erroneously concluded in 1990." Appx. 00084. The Petition presented studies showing

estimates of Warbler population far larger than originally thought "based on much more scientifically valid and robust data . . . ." Appx. 00086.

To reach its Second 90-Day Finding, the Service relied on studies from 1990 and earlier, along with its own flawed and outdated 2014 Five-Year Review, to discount the Petition's more recent studies. This duplicates its error in the First 90-Day Finding, where the Service found against the Petition based mostly on the same, older sources. In doing so, the Service continued to apply the wrong legal standard and improperly relied on incomplete and superseded data.

A. The Petition Provided Substantial Evidence That The Warbler May Not Be Endangered.

As set forth in TXGLO's motion for summary judgment, the Petition offered substantial scientific and commercial data demonstrating that the Warbler was likely listed in error and that, in any event, delisting may be warranted. MSJ at 27–32, 33–34. That is sufficient to meet the 90-day standard of review. *See* 16 U.S.C. § 1533(b)(3)(A) (2014); *see also Moden*, 281 F. Supp. 2d at 1204. The Service claims that "many of the studies cited in the Petition documented serious and ongoing threats to the Warbler, particularly from habitat loss and fragmentation." Service MSJ at 22–23. But the same studies show that Warbler habitat is likely far more extensive than believed, and that there are more Warblers within this habitat than previously estimated. Accordingly, the Petition presents data showing delisting "may" be warranted. *See*, e.g. Appx. 00107–112.

Furthermore, the Petition presents substantial evidence showing the original data supporting the Warbler's classification was erroneous, thereby warranting a 12-month review. *See* 16 U.S.C. § 1533(b)(3)(A) (2014); *see also* MSJ at 33–35. For example, the Texas A&M survey-of-surveys states "recent and comprehensive studies indicate that there is about 5 times more Warbler breeding habitat and that there are 19 times more Warblers than assumed at the time of the emergency listing decision" in 1990. Appx. 00113 (cleaned up); *see also* Appx. 00084–87.

The Service responds by arguing that the word "classification" in the ESA means "the assignment of animals into specific taxonomic categories[,]" rather than classification of a species

as endangered. Service MSJ at 20. But the Service uses the term "classification" to refer to whether a species is endangered in its own agency documents on the Warbler. Appx. at 00148 (First 90-Day Finding); 171, 184, 193 (2014 Five-Year Review). When it means taxonomic classification, the Service specifically denotes *that* particular meaning. Appx. at 00175 (2014 Five-Year Review).

Furthermore, in its 2014 Five-Year Review, the Service included a checkbox entitled "Original data for classification in error" as a reason for delisting under the section called "Recommended Classification." Appx. 00184. The term "classification" refers to 50 C.F.R. § 424.11(d)(3) (2014), which allows delisting when subsequent investigation shows "that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error." Appx. 00055. And 50 C.F.R. § 424.11(d)(3) (2014) is premised on the fact that the species in question has the correct taxonomic classification. *See* 50 C.F.R. § 424.11(a) (stating that "[a]ny species or taxonomic group of species . . . is eligible for listing"). Accordingly, contrary to the Service's assertion, an error in "classification" within the ESA and its regulations does not and cannot mean solely "a taxonomical error." Service MSJ at 20.

The best the Service can do to support its reinterpretation of "classification" is to string-cite instances when the Service delisted species that it found were the same taxonomic "classification" as other, non-endangered species. Service MSJ at 20–21. These were simply reevaluations of the endangered status of certain specific species and were undertaken by the Service because the ESA's definition of "endangered" refers to whether a particular species needs protection under the ESA. *Compare* 16 U.S.C. § 1532(16) (definition of "species") *with* 16 U.S.C. § 1532 (6) (definition of "endangered species"). Classification for ESA purposes therefore refers to whether a unique species is "in danger of extinction . . . " and not merely to taxonomical definitions. *Id*.

Courts do not allow agencies to "rewrite[e] regulations under the guise of interpreting them . . . ." *Fina Oil & Chem. Co. v. Norton*, 332 F.3d 672, 676 (D.C. Cir. 2003). Courts also reject agency interpretations of statutes that are "plainly erroneous . . . ." *Bowles v. Seminole Rock &*

Sand Co., 325 U.S. 410, 414 (1945); s*ee also Ala. Assn. of Realtors v. HHS*, 141 S. Ct. 2485, 2487 (2021) (*per curiam*) (finding reinterpretation of statutory language a "wafer-thin reed"). That is what the Service attempts to do here by distorting the term "classification" as utilized in the ESA and its implementing regulations.

To make its erroneous argument appear palatable, the Service resorts to mischaracterizing TXGLO's argument. TXGLO never argues that a species is listed in error "if any subsequent data improves upon the data known at the time of listing." Service MSJ at 21. Rather, TXGLO points out that the Petition's studies demonstrated that the scientific data used to list the Warbler "utilized now-primitive aerial imaging . . . that can lead to incorrect classification of landscape features that constitute Warbler habitat." MSJ at 29–30. This fact supports the argument that delisting "may be warranted." 16 U.S.C. § 1533(b)(3)(A) (2014); *see also* 50 C.F.R. § 424.11(d)(3) (2014).

The Service cites to a past case argued before this Court in an effort to bolster its position regarding classification. Service MSJ at 21 (referencing *Am. Stewards of Liberty v. DOI*, 370 F. Supp. 3d 711, 729–30 (W.D. Tex. 2019)).[5] In fact, both the court and plaintiffs' counsel in *Am. Stewards of Liberty* treat the term "classification" as referring to a species' status *as* endangered. *Id*. at 729–30 (discussing whether petition's reference to "previously unknown populations of the harvestman" demonstrates that the original listing was in error). Furthermore, the holding of *Am. Stewards of Liberty* supports TXGLO's argument in the instant case. *See id*. at 725 (stating 90-

[5] In so doing, the Service falsely claims that counsel for the plaintiff in *American Stewards of Liberty* is also counsel for Plaintiff TXGLO in the instant case. In fact, counsel for TXGLO in the instant case did not represent plaintiff American Stewards of Liberty in the prior case but represented only plaintiff-intervenors John Yearwood and Williamson County, Texas. The argument regarding "classification" falsely attributed by the Service to TXGLO's counsel was actually made by counsel for plaintiff American Stewards of Liberty. Furthermore, plaintiff-intervenors Yearwood and Williamson County did not make any argument regarding the term "classification." Their arguments were based solely on claims that Congress had exceeded its constitutional authority under the Commerce Clause, the Necessary and Proper Clause, and the Tenth Amendment by regulating the "take" of a species that existed only within the State of Texas. Finally, the Service's summary of the "classification" argument made by American Stewards of Liberty mischaracterizes that argument, as set forth in the text associated with this footnote.

day finding was arbitrary and capricious because the Service "required a higher quantum of evidence than is permissible under the [ESA] and implementing regulations").

In turn, SOSA argues that the Service did not use "contemporaneous estimates of [W]arbler population or range size" to justify its listing in 1990. SOSA MSJ at 30. That is not true. *See* 55 Fed. Reg. 53153, 53154 (Dec. 27, 1990) (referencing Wahl *et al*. 1990 study's estimates of Warbler population). SOSA states further that TXGLO needs to "engage with the scholarship documenting that some of the most significant threats outlined in the original listing rule have not only persisted, but intensified." SOSA MSJ at 30–31. But TXGLO offered substantial evidence that the threats the Service raises in the original listing are overstated. MSJ at 31–32. The Petition does the same, exhaustively. Appx. 00084–92.

SOSA then points out that the scientific studies demonstrating the original Warbler listing was erroneous "apply new methods that did not exist at the time of listing." SOSA MSJ at 31. Precisely. The applicable ESA regulation requires delisting where "the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error." Appx. 00055.

SOSA is incorrect that the Petition's studies "say nothing about [W]arbler population and range size trends over time." SOSA MSJ at 31. The Service's original listing estimated Warbler population according to studies available in 1990. 55 Fed. Reg. 53153, 53154 (Dec. 27, 1990). The Petition provides updated studies estimating the population in orders of magnitude greater than the Service found in 1990. One explanation for this data is that population and range size have increased over time. Another is that population and range size were greater than estimated in 1990. If either explanation "may" be correct, the Petition should receive a positive 90-day finding. 16 U.S.C. § 1533(b)(3)(A) (2014); *see also* 50 C.F.R. § 424.11(d)(3) (2014).

SOSA continues its signal error of using 12-month review criteria at the 90-day review stage by insisting that "an imperiled species' population size alone does not dictate its listing status under the [ESA]." SOSA MSJ at 31. That may be true at the 12-month stage of petition review. But TXGLO demonstrates that—at *this* 90-day stage—the Petition shows delisting may be

warranted and that, accordingly, the Service should proceed to the 12-month review into whether delisting the Warbler is in fact warranted. SOSA's nonprecedential case *Marincovich*, which does not involve a 90-day finding, is inapposite.

SOSA argues that "TXGLO cites no scientific information that conflicts with the Service's conclusions regarding the [W]arbler's population and range." SOSA MSJ at 32. But TXGLO did precisely that throughout its motion for summary judgment. *See, e.g.* MSJ at 27–32. Interestingly, the Service said it treated the Petition's studies as reliable in the Second 90-Day Finding in the same breath that it disparaged and denied their conclusions. *See* Service MSJ at 27; *see also* Appx. 00198 (Second 90-Day Finding). As detailed *supra*, the Service never provided *any* explanation—let alone a reasonable one—for its decision to prefer older studies that conflict with the more recent ones relied on by TXGLO.

TXGLO detailed how certain studies with updated modeling methods conflicted with previous estimates of Warbler population and habitat prevalence. MSJ at 28–30. Yet SOSA asserts TXGLO's position is "pure invention." SOSA MSJ at 32. In support of that assertion, SOSA presents examples of studies showing threats to the Warbler, immediately demonstrating that its own assertion is false, *id*. at 32–33, because increased habitat and population in the face of the threats SOSA lists implies that those threats may not have been serious enough to warrant listing originally and may not be serious enough to warrant continued listing now. That meets the standard for a positive 90-day finding. 16 U.S.C. § 1533(b)(3)(A) (2014) *see also* 50 C.F.R. § 424.11(d)(3) (2014).

B. The Second 90-Day Finding Was Unreasonable In Light Of The Relevant ESA Factors.

The Service impermissibly used a heightened standard at the 90-day stage of review when considering the ESA's statutory delisting factors. MSJ at 32. The Service does this again in its motion for summary judgment, Service MSJ at 22–31, thereby failing to adhere to the ESA and the Fifth Circuit's order. *Gen. Land Office*, 947 F.3d at 321. To receive a positive 90-day finding the Petition need only include information showing that the delisting criteria "may" be met. The

following sets forth each of the applicable statutory factors and analyzes them with regard to the requirements of the 90-day stage of review.

1. *Factor A: Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat*

As a threshold matter, it is beyond parody to argue that "critical habitat is irrelevant" to the Second 90-Day Finding, and that TXGLO's arguments on the subject are barred. Service MSJ at 35–36. TXGLO addresses the Service's continued failure to designate Warbler critical habitat to demonstrate that the Service's denial of the Petition due to "habitat loss" is irrational because its failure to designate critical habitat makes it virtually impossible to determine which Warbler habitat is actually *critical* for Warbler survival. Yet the Service bases almost its entire argument against the Petition on habitat loss, despite its ongoing failure to designate critical habitat. The Service's failure to specify the precise geographical location of Warbler critical habitat means that its position that "the Warbler's occupied habitat" is not "widespread," Service MSJ at 24, is suspect —especially given TXGLO's presented data. MSJ at 34.

In an effort to support its position that Warbler habitat is under sufficient threat such that there is no reasonable possibility that delisting may be warranted, the Service primarily cites the original Warbler listing decision, its 2014 Five-Year Review, and the Federal Register notice announcing the Petition's denial. Service MSJ at 23–24. Nothing the Service points to with regard to habitat threats demonstrates that the Petition did not present substantial evidence that Warbler delisting may be warranted.

The Service begins by admitting that "recent estimates suggest greater amounts of habitat exist than were known at the time of listing . . . ." Service MSJ at 23. This admission shows that there is information supporting TXGLO's position that a reasonable person could conclude that delisting may be warranted. Furthermore the Petition presents evidence from recent studies showing that habitat fragmentation is not a major concern. Appx. 00097–99; *see also* MSJ at 33–34 (gathering data).

The Service is relegated to speculating that the risks to Warbler habitat threaten the Warbler's continued survival. *See, e.g.* Service MSJ at 23 (stating "[c]limate change and the growing human population in Warbler habitat are *expected to* further contribute to habitat loss" and stating, "Warbler habitat is *unlikely to be* restored." (emphasis added)). The Service appears convinced, in the same tenor as its original listing decision in 1990, that increased development in the Warbler's as-yet-unspecified critical habitat warrants its continued listing. Service MSJ at 24. But urbanization does not unduly harm the Warbler.[6] Appx. 00097, 155, 162. Warbler population is far larger than estimated in 1990, meaning that it either increased despite development or was always large enough to withstand threats to habitat. The Warbler is "a widely distributed species that is preadapted to occur within a variety of environmental conditions." Appx. 00086. If the Service believes that its out-of-date information remains more reliable than updated scientific studies, then it should still return a positive 90-day finding. *Humane Soc. of the United States v. Pritzker*, 75 F. Supp. 3d 1, 11 (D.D.C. 2014) ("conflicting scientific evidence" suggests "a reasonable person might conclude that a [12-month status review] was warranted").

The Service takes issue with the conclusions the Petition draws from several studies—for instance, whether an "urban preserve" is "typical urban habitat" for the Warbler—requiring the Petition to "provide evidence genuinely disputing" the Service's conclusion that habitat loss and fragmentation threatens the Warbler sufficient to reject the Petition at the 90-day stage. Service MSJ at 25. The Petition made such a showing. MSJ at 33–34. Furthermore, the sole issue here is whether there is substantial evidence showing that delisting may be appropriate, not whether delisting is appropriate. *Compare* 16 U.S.C. § 1533(a) (2014) and 16 U.S.C. § 1533(b) (2014).

The Service suggests that TXGLO's argument boils down to the point that the Warbler must be delisted because of increased Warbler population estimates. Service MSJ at 25–26. Not so. The data the Petition presents shows that delisting may be warranted because Warbler

[6] Terming TXGLO's conclusions on urbanization "circular," Service MSJ at 25 n.11, after incorrectly paraphrasing them, is a bridge too far. TXGLO argues that that urbanization likely is not a serious threat to Warbler habitat even if it results in some fragmentation. MSJ at 34. *See, e.g., Moden*, 281 F. Supp. 2d at 1204.

populations either rose since 1990 *or* were always high enough to sustain the species. MSJ at 33–34. The Service argues that "the ESA listing criteria do not include a mathematical formula with a specific threshold population size" that determines listing status. Service MSJ at 26. But population figures are at least relevant to the issue of whether habitat threats pose substantial risks to Warblers. About 3,000 breeding pairs will sustain Warbler populations for 100 years. Appx. 00090–91. When the Petition was submitted, Warbler breeding populations numbered between 13,000–23,000. Appx. 00089–90.

The Service argues that some of the Petition's information from a study by Mathewson ("the Mathewson Study") showing higher Warbler populations "may be unreliable" based on different data the Service prefers. Service MSJ at 26. Again, the Service cannot manufacture doubt in its favor at the 90-day finding stage. It must not downplay the Petition's studies because other sources state those studies *may have* overstated habitat or population. Multiple studies show higher Warbler populations and greater habitat range than estimated in 1990. *See, e.g.* MSJ at 33–34; *see also* Appx. 00084–85, 88–90.

The Service attempts to avoid the consequences of its decision to disregard the Mathewson Study by stating it "assumed the Mathewson estimates were correct" when it made the Second 90-Day Finding. Service MSJ at 27. This assertion is belied by the finding itself. The Service does not explain how—if it accepted Mathewson's conclusion that Warbler populations and habitat were far higher than found in 1990—it could reasonably decide that moving on to the 12-month review is unwarranted.

Nevertheless, the Service argues without showing its work that the Petition's evidence was "not substantial enough to indicate that delisting may be warranted." The Service has turned a blind eye to the definition of the term "substantial," which its own regulations state means the information in question is "credible . . . such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted." 50 C.F.R. § 424.14(b)(1), (d)(1)-(5), (h)(i) (2014); *see also Am. Stewards of Liberty*, 370 F. Supp. 3d at 717. Courts have repeatedly recognized that "at the 90-day petition stage the Service is not

permitted to resolve substantial disagreements among 'reasonable scientists.'" *Campaign v. Williams*, 579 F. Supp. 3d 186, 196 (D.D.C. 2022) (quoting *Buffalo Field Campaign v. Zinke*, 289 F. Supp. 3d 103, 109 (D.D.C. 2018)); *see also Ctr. for Biological Diversity v. Kempthorne*, No. C 06-04186 WHA, 2007 U.S. Dist. LEXIS 4816 at *7 (N.D. Cal. Jan. 19, 2007) ("where there is disagreement among reasonable scientists, then the Service should make the 'may be warranted' finding").

The Service wants to conclusively litigate, right now, whether the Warbler should be delisted. *See* Service MSJ at 25 n.12. That is impermissible. *See Gen. Land Office*, 947 F.3d at 321. Simply stating a species may lose—or is losing—habitat is not sufficient to indicate that it should continue to be listed as endangered, especially where, as here, the Service has failed to designate critical habitat. Furthermore, habitat loss is only one of five factors for listing or delisting a species. And the Petition presents evidence showing that any evidence of habitat loss or fragmentation is at least potentially overcome by other factors, primarily high Warbler population and greater-than-originally-estimated habitat. The fact that there is "conflicting scientific evidence" over whether the Warbler should be listed on habitat-related grounds "suggests that a reasonable person might conclude that a review of the status of the species concerned was warranted." *See Pritzker*, 75 F. Supp. 3d at 11 (internal quotation marks excluded).

SOSA argues that the Service established a "rational connection" between the Petition's information, its own information, and its conclusion that the Petition would not lead a reasonable person to believe delisting the Warbler "may be warranted." SOSA MSJ at 22–23. On this factor, SOSA states that "the [W]arbler's breeding range has continued to shrink and fragment since the time of listing." *Id*. at 23. But the Petition presented studies published since 1990 showing "the range of [W]arbler habitat at two to six times the estimate" the Service relied on to list the Warbler. Appx. 00085. Accordingly, either the Warbler had more habitat than believed in 1990, or, its habitat has grown dramatically since then, and, in either event, delisting may be warranted.

SOSA attempts to discount these studies by arguing that "the existential threats of habitat loss and fragmentation" somehow outweigh studies showing rising Warbler population and

expanded range at the 90-day stage of review, quoting the Second 90-Day Finding's statement that listing determinations are not based "solely or predominantly on population and range size." SOSA MSJ at 24. At best, this is misleading. The ESA's implementing regulations applicable to the 12-month review stage state that "[a] species may be delisted only if" the data shows it is extinct, it has recovered, or the original data for classifying it as endangered were erroneous. 50 C.F.R. § 424.11(d) (2014). All of these factors involve a species' population. The same regulation states that a species' "habitat or range" is one of "[t]he factors considered in delisting a species . . ." *Id*. at (c)(1), (d). Population and range are therefore directly relevant to the question of whether a species should be delisted.

SOSA claims the Petition failed to engage with the delisting factor concerning habitat or range. SOSA MSJ at 24. But the Petition quoted multiple studies showing that Warbler habitat is estimated to be more extensive than found in 1990. *See, e.g.* MSJ at 33–34. Based on these estimates, a reasonable person could believe delisting the Warbler may be warranted.

2. *Factor B: Overutilization*

The Service correctly points out that neither the Petition nor TXGLO "specifically discussed" this factor as it relates to the Warbler. Service Br. at 22 n.8. That is because TXGLO agrees with the Service that overutilization is not a threat to the Warbler. *See* Appx. 00201 (Second 90-Day Finding).

3. *Factor C: Disease or Predation*

"The Service does not consider disease to be a significant threat to the [Warbler]." Service MSJ at 27 n.14. Neither does TXGLO or the Petition. Appx. 00092. Nevertheless, the Service asserts falsely that TXGLO's statement that the Petition presented substantial information showing the Warbler was never and is not currently threatened by predation is "conclusory." Service MSJ at 27. In fact, TXGLO provides substantial data showing that predation is not a major threat to the Warbler. *See* MSJ at 19, 31–32; *see also* Appx. 00084–92, 97–99. The Service decides to ignore this data and rely on the sources favored by its 2014 Five-Year Review to discount the Petition's

evidence. It neglects to place data about predation in its proper context: despite any threat, Warbler populations are high enough to sustain the species and have risen over the past several years. MSJ at 33–34. The Service likewise faults the Petition for not providing evidence "that predation does not have a significant negative effect" on the Warbler. Service MSJ at 28. The Petition did so by providing evidence of high Warbler populations. Appx. 00082–84.

The Service again cites the unpublished case *Palouse Prairie Found.*, 2009 U.S. Dist. LEXIS 10492, to justify its Second 90-Day Finding because it "had a rational basis for declining to draw the inferences sought" by the Petition. Service MSJ at 28. TXGLO distinguished this case thoroughly *supra* in Section II.A and Section II.B. Moreover, the standard of review of the Petition at the 90-day finding stage has been set by the Fifth Circuit. *See Gen. Land Office of Tex.*, 947 F.3d 321.

In an effort to contradict the Service's position on predation, SOSA points to evidence showing that Warbler predation occurs. SOSA MSJ at 25. But SOSA does not explain why a reasonable person would believe threats from predation mean that the evidence the Petition presents does not show Warbler delisting may be warranted, given rising Warbler populations and expanded Warbler habitat.

4. Factor D: Adequacy of Existing Regulatory Mechanisms

Contrary to the Service's assertion, the Warbler receives protections from other federal, state, and local statutes and regulations and TXGLO's argument is not "conclusory." Service MSJ at 29. The Service claims that potential risks from habitat fragmentation and predation *alone* somehow warrant ignoring the multiple state and federal programs and mechanisms protecting the Warbler. But the ESA requires the Service to take into account "those efforts, if any, being made by any State . . . to protect" the Warbler. 16 U.S.C. § 1533(b)(1)(A) (2014). The Petition detailed such efforts, and the Service discounts them because they do not "prohibit[] habitat destruction" and they "may discontinue if the species is no longer ESA-protected." Service MSJ at 29–30; *see also* SOSA MSJ at 25. But the Service ignores the fact that Warbler habitat is currently extensive

and the Warbler is well-adapted to function in variegated habitats. MSJ at 34. And the Warbler's listing should not be maintained based on speculation about whether other programs will continue. At the 90-day stage, making a decision about the Petition based on a guess is arbitrary and capricious. *See Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1227 (5th Cir. 1991) ("Musings and conjecture are not the stuff of which substantial evidence is made . . . ." (cleaned up)). Instead, the Service must decide whether the Petition presents "substantial . . . information" that delisting the Warbler may be warranted. 16 U.S.C. § 1533(b)(3)(A) (2014).

5. Factor E: Other Natural or Manmade Factors

The Petition detailed how other natural and manmade factors were not significant threats to the Warbler. Appx. 00097–99. The Service responds by downplaying this evidence and other substantial scientific and commercial information in the Petition—cited by TXGLO in its motion for summary judgment—showing a thriving and rising Warbler population. *See, e.g.* MSJ at 33–34 (gathering studies and Petition excerpts). Instead, the Service argues that oak wilt provides a reason for not proceeding to the 12-month stage of review. The fact that trees in Warbler habitat sometimes die cannot overshadow the multiple studies demonstrating high Warbler population and widespread Warbler habitat. *See id*. Neither do the issues of wildfire, prescribed fire, or habitat fragmentation. Service MSJ at 31. All of these threats have been present since 1990 yet the Warbler's population and habitat are at sustainable levels based on the scientific studies cited by the Petition. MSJ at 34 (citing Appx. 00089–91).

If the Service believes these factors need to be considered before delisting, the proper remedy is to make a positive 90-day finding on the Petition and conduct a 12-month review to determine whether the Warbler's current population and habitat are expansive enough to withstand them. The Service cannot resolve scientific doubt in its favor at this stage of review, *Campaign*, 579 F. Supp. 3d at 196, and conflicting evidence regarding whether and by how much the Warbler is threatened provides good reason to issue a positive 90-day finding. *Moden*, 281 F. Supp. 2d at 1204.

The Service's next attempt to demonstrate threats to the Warbler refers to its 2014 Five-Year Review—the first such review completed since the Warbler was listed. MSJ at 14–15. That document is flawed because it ignores relevant scientific evidence. MSJ at 24. The Service's attempt to essentially incorporate its 2014 Five-Year Review by reference repeats the mistake the Fifth Circuit warned against. *See Gen. Land Office of Tex.*, 947 F.3d at 321 (faulting Service for denying Petition based on 2014 Five-Year Review at 90-day stage of review).

The Service then states without reference that "[e]ven assuming that" the threats of climate change and recreation "have a relatively minor or uncertain effect when viewed in isolation," the Service still must consider them. Service MSJ at 31. There is no evidence to suggest that global effects of climate change affect the Warbler more acutely than any other species, whether endangered or not. The same applies to SOSA's argument that fires presumably caused by climate change make the Warbler vulnerable. SOSA MSJ at 33. And neither the Service nor SOSA explain how any threat from recreation is a serious obstacle to the Warbler, which is adaptable, has widely-distributed breeding habitat, and boasts a rising population. MSJ at 33–34.

After reciting threats the Warbler can encounter, SOSA attempts to establish that the Petition must "reference . . . information to suggest that threats . . . have abated" to receive a positive 90-day finding. SOSA MSJ at 25. This is not what the Petition must prove under the ESA and its implementing regulations to show delisting may be warranted. 50 C.F.R. § 424.11(d) (2014); *see also Moden*, 281 F. Supp. 2d at 1204. The Court should not hold the Petition to that heightened standard of review at the 90-day stage.

IV. TXGLO's REQUESTED REMEDY IS REASONABLE AND APPROPRIATE

As detailed *supra*, the Service defied the Fifth Circuit's order to apply the correct standard found in the ESA to the Petition at the 90-day stage of review, and instead employed an "impermissibly heightened" one for the second time. *Gen. Land Office of Tex.*, 947 F.3d at 321. "[O]ur constitutional system of separation of powers would be significantly altered if we were to allow . . . agencies to disregard federal law . . . ." *In re Aiken Cnty.*, 725 F.3d 255, 267 (D.C. Cir.

2013); *see also Univ. of Tex. M.D. Anderson Cancer Ctr. v. United States HHS*, 985 F.3d 472, 481 (5th Cir. 2021) (recognizing an agency lacks power "to disregard Congress's statutes). As such, due to the magnitude of the Service's second error and the high likelihood that it would be repeated a third time, this is one of the "rare circumstances" where remand would prove futile. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

Remand is futile if an agency will likely arrive at the same result it previously reached. *See NLRB v. WYMAN*, 394 U.S. 759, 766 n.6 (1969). The Service claims that *WYMAN* does not stand for this principle and that reversal of the Service's Second 90-Day Finding without remand would be unprecedented, arguing that the Supreme Court found in *WYMAN* that "remand is the proper solution where an agency 'applied the wrong standards to the adjudication of a complex factual situation.'" Service MSJ at 37 n.18 (quoting *WYMAN*). But the factual situation in the instant case is not complex. It requires the Service to apply a straightforward statutory standard to the Petition. Despite being instructed by the Fifth Circuit on how to do so, the Service has failed to fulfill its statutory duty. When an agency is required to apply a legal standard by existing caselaw, remand would "convert judicial review of agency action into a ping-pong game" and is not advisable. *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 544–45 (2008) (quoting *WYMAN*). Moreover, courts are cautioned only against "decid[ing] a question that has been delegated to an agency if that agency has not first had a chance to address the question . . . ." *Smith v. Berryhill*, 139 S. Ct. 1765, 1779 (2019). Here, the Service had two such chances and came out wrong, twice. In the interests of justice the Court should not permit a third try.

The Service quotes multiple cases stating that remand is "ordinarily the reviewing court's proper course" when the agency errs. *NLRB v. Food Store Emps. Union*, 417 U.S. 1, 10 (1974). Ordinarily, perhaps, but this is no ordinary case. Here, the Service disregarded the Fifth Circuit's

instructions, and shows no indication that it would not do so again on remand. In such situations, courts should reverse without remand. *Morgan Stanley*, 554 U.S. at 544–45. The Service's cited case of *Vt. Yankee Nuclear Power Corp*. is inapposite because TXGLO does not request "detailed injunctive relief," Service MSJ at 37, but only an order recognizing the Petition meets the ESA's 90-day review standard, which is "not overly-burdensome" and "does not require conclusive information." *Moden*, 281 F. Supp. 2d at 1204. And *Morgan Stanley* stands for the proposition that *SEC v. Chenery Corp*. does not apply when an agency flouts a court's decision specifying the criteria an agency must consider before taking action. *See* 554 U.S. at 544–45.

CONCLUSION

"[A]n agency implementing a statute may not ignore . . . a standard articulated in the statute." *Friends of Richards-Gebaur Airport v. FAA*, 251 F.3d 1178, 1195 (8th Cir. 2001). Agencies must also comply with their own regulations. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–68 (1954); *see also Am. Stewards*, 370 F. Supp. 3d at 726 (collecting cases). By failing to apply the correct standard of review to the Petition—after having received instructions from the Fifth Circuit as to how to apply the correct standard—the Service again did not do so. This Court therefore should enter summary judgment in TXGLO's favor.

Accordingly, TXGLO requests that this Court grant its motion for summary judgment by (1) vacating the Second 90-Day Finding, (2) declaring the correct standard of review for 90-day findings as found in the Fifth Circuit's decision in *Gen. Land Office of Tex*., 947 F.3d at 320–21 and ESA's applicable regulations at 50 C.F.R. § 424.14(b)(1) (2014), and (3) ordering the Service to immediately issue a positive 90-day finding and begin its 12-month review process.

Date: April 2, 2024,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2024, I electronically filed the foregoing with the Clerk of the Court for the U.S. District Court for the Western District of Texas by using the CM/ECF system, which will serve a copy of same on all counsel of record.

/s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing is in compliance with the Scheduling Order entered on October 16, 2023, because it is limited to 40 pages or less, exclusive of caption, signature block, any certificate, and any accompanying documents.

/s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH