No. 19-50321

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMERICAN STEWARDS OF LIBERTY; CHARLES SHELL; CHERYL SHELL; WALTER SIDNEY SHELL MANAGEMENT TRUST; KATHRYN HEIDEMANN; ROBERT V. HARRISON, SR.,
Plaintiffs-Cross Appellees,

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

v.

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

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

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

FEDERAL APPELLEES' MOTION TO DISMISS APPEAL

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CERTIFICATE OF INTERESTED PERSONS

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

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

1. Parties: American Stewards of Liberty; Charles Shell; Cheryl Shell; Walter Sidney Shell Management Trust; Kathryn Heidemann; Robert V. Harrison, Sr. John Yearwood; Williamson County, Texas; Department of the Interior; U.S. Fish and Wildlife Service; David Bernhardt; Margaret E. Everson; Amy

Lueders; Center for Biological Diversity; Travis Audubon; Defenders of Wildlife.

2. Counsel of record and other interested persons:

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INTRODUCTION

In 2017, the U.S. Fish and Wildlife Service (FWS) denied a petition to remove a species called the "Bone Cave harvestman" from the endangered species list—i.e., the list of species determined to be "endangered" under the Endangered Species Act (ESA). Intervenors John Yearwood and Williamson County, Texas joined others in challenging FWS's decision. The district court determined that FWS had in fact erred, vacated the agency's decision, and remanded for further consideration. Dissatisfied with the *grounds* for the vacatur, Intervenors alone now seek to appeal. In so doing, they seek a premature resolution of a constitutional question that may be avoided altogether.

The Federal Appellees (the Government) respectfully move for dismissal of Intervenors' appeal under Federal Rule of Appellate Procedure 27(a)(1). As elaborated below, Intervenors' appeal is neither justiciable nor appropriate for adjudication because the agency action that was challenged in this case has been vacated. The challenge to the now-vacated agency action is moot, and any potential challenge to future agency actions is not ripe for review. The vacatur has accomplished all of the relief in favor of Intervenors that is appropriate at this juncture. Their appeal should therefore be dismissed.[1]

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[1] The Government is not appealing the vacatur and remand order. *See* U.S. Notice Letter, Doc. 515025098. The Government noticed a cross-appeal to preserve its ability to challenge the grant of intervention to Yearwood and Williamson County. Notice of Appeal, Doc. 514978923. But if the instant motion to dismiss Intervenors' appeal is granted, the Government will dismiss its cross-appeal as moot. Thus, granting the instant motion would resolve this appeal in its entirety.

LEGAL AND FACTUAL BACKGROUND

A. The Endangered Species Act and 90-day findings

The ESA directs the Secretary of the Interior, through FWS, to determine whether a species should be listed as "endangered." *See generally* 16 U.S.C. § 1533. After a species is so listed, an interested person may petition FWS to "delist" the species. *Id.* § 1533(b)(3)(A). Within 90 days of receiving a delisting petition, FWS must "make a finding as to whether the petition presents substantial scientific or commercial information" indicating that the delisting "may be warranted." *Id.* § 1533(b)(3)(A). If FWS concludes that the petition satisfies the substantial information threshold (a "positive" 90-day finding), FWS must begin a 12-month review, after which FWS may remove the species from the list of endangered species if delisting "is warranted." *Id.* § 1533(b)(3)(B).

B. The challenged agency action: FWS's 2017 90-day finding

The Bone Cave harvestman is a small orange arachnid known to live only in caves in central Texas. ROA.7194; 53 Fed. Reg. 36,029 (Sept. 16, 1988). The harvestman was listed as endangered in 1988. *Id.*; 58 Fed. Reg. 43,818 (Aug. 18, 1993). In 2014, Plaintiff American Stewards of Liberty and others filed a petition with FWS to delist the harvestman, arguing that delisting may be warranted because the harvestman had allegedly recovered. ROA.1480-1544, 7198-99, 7210. On May 4, 2017, FWS issued a "Negative 90-Day Finding," denying the petition for failing to present substantial scientific information indicating that delisting may be warranted.

ROA.1561-1613. In particular, FWS cited the petition's failure to provide adequate data on the harvestman's population. ROA.1577.[2]

C. The proceedings below and the vacatur of the 90-day finding

American Stewards of Liberty and some of its members (Plaintiffs) filed suit challenging FWS's Negative 90-Day Finding. They argued that FWS applied an improperly heightened evidentiary standard by requiring their petition to provide certain population data. ROA.1348-76 (Plaintiffs' operative complaint).

John Yearwood (a property owner in Williamson County, Texas) and the County moved to intervene as plaintiffs, claiming injury from the listing of the harvestman. ROA.140-49, 1077-78.[3] They too sought to challenge FWS's 90-Day Finding—but on different grounds. Yearwood and the County urged that the 90-Day Finding was unlawful on *constitutional* grounds, claiming that FWS's "decision not to delist the [harvestman] violates the Administrative Procedure[ ] Act [ ], because the Service does not have the constitutional authority to list [the harvestman] or prohibit the take thereof." ROA.1081 (Intervenors' operative complaint); *see also* ROA.1084

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[2] FWS initially issued a negative 90-day finding in 2015, but it reconsidered that decision upon discovering that it had inadvertently failed to examine certain reference materials submitted with the petition. ROA.7199. In 2017, FWS issued a new negative 90-day finding, which was the agency decision at issue below. *Id.*

[3] Yearwood had signed the Stewards' delisting petition but did not join other signatories in becoming a named party to Plaintiffs' complaint (although he is noted in Plaintiffs' complaint as a member of the Stewards). ROA.1482, 1350-53. Williamson County was not a signatory to the petition. ROA.1482.

(citing the Commerce Clause and Tenth Amendment). These constitutional issues were not raised in the delisting petition. *See* ROA.1480-1523, 1561-89. The district court granted Yearwood and Williamson County permission to intervene over the Government's objection. ROA.270-75. Thereafter, all parties filed cross-motions for summary judgment.

On March 28, 2019, the district court issued an opinion and a final judgment. ROA.7192-7228 (Exhibit 1). The court concluded that the "2017 finding is arbitrary, capricious, and not in accordance with law," because FWS had demanded "a higher quantum of evidence than is permissible" under the ESA by requiring Plaintiffs to present population information that was unavailable. ROA.7208, 7212, 7225. The court noted that Plaintiffs' petition presented substantial information indicating that delisting "may be warranted." ROA.7214. The court therefore held "unlawful and set aside" FWS's 90-Day Finding under the APA. ROA.7225. As a result, the court decided to "vacate the 2017 finding and remand" to FWS. *Id.*

As for Intervenors, the court held that because Williamson County was not a party to the delisting petition, its claims were time-barred under the APA, as any injuries stemming from the species' original listing would have accrued decades earlier. ROA.5251-53, 7217-19. The court concluded that Yearwood's challenge was not time-barred because he was a signatory to the delisting petition. ROA.7219. The court then rejected Yearwood's constitutional theories, following this Court's decision in *GDF Realty Investments v. Norton*, 326 F.3d 622 (5th Cir. 2003), which held that the

ESA's listing of the harvestman and consequent regulation of private activities vis-à-vis the species were valid exercises of authority under the Interstate Commerce Clause—notwithstanding the species' wholly intrastate presence. ROA.7219-25.

FWS accepted the vacatur and remand order, and has stipulated that it will complete a new 90-Day Finding by October 15, 2019. D.Ct. Doc. 187.

ARGUMENT

"Article III of the United States Constitution limits federal courts' jurisdiction to 'cases' and 'controversies.'" *Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005). The case-or-controversy limitation plays a vital role in ensuring that the "power and duty of the judiciary is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts" and not from "an unlimited power to survey the statute books and pass judgment on laws." *International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809, 817 (5th Cir. 1979) (internal quotation marks omitted). In other words, plaintiffs must not "enlist the aid of a federal court in a general effort to purge unconstitutional measures from the body of the law." *Id.*

"In order to give meaning to Article III's case-or-controversy requirement, the courts have developed justiciability doctrines," such as the standing, mootness, and ripeness doctrines. *Sample*, 406 F.3d at 312. A case or controversy "must be extant at all stages of review." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018). In the absence of a case or controversy, an appeal must be dismissed. *Id.*

Such a dismissal is compelled here. FWS's 90-Day Finding has been vacated, and the delisting petition is once again before the agency. Consequently, the case or controversy that started this suit has been extinguished, and further review by this Court at this time is improper. *First*, Intervenors no longer have a live claim: any injury stemming from the vacated decision is gone, and any injury that might stem from FWS's future decision on the remanded petition is not yet ripe. *Second*, the vacatur of the agency's decision represents a favorable judgment—from which a plaintiff is generally precluded from appealing, particularly where the appeal raises a constitutional question that may be avoided. *Finally*, unless and until the agency renders a new challengeable decision, no further remedy is available or appropriate given the scope of the action below.

I. The vacatur of the Negative 90-Day Finding rendered Intervenors' challenge non-justiciable.

Even if Intervenors once had a justiciable claim against FWS's 90-Day Finding, that claim was effectively rendered moot when the Finding was vacated by the district court, and any new challenge they may have to a future FWS finding is not yet ripe.

"[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986); *cf. Town of Chester v. Laroe Estates*, 137 S. Ct. 1645, 1651 (2017). Article III, in turn, requires a party to demonstrate that it has suffered an injury that is traceable to the

defendant's action and will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Intervenors' appeal falters on the causal element of standing. Intervenors cannot show that any current alleged injury "fairly can be *traced to the challenged action* of the defendant." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976) (emphasis added); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

To begin with, FWS's Negative 90-Day Finding issued in 2017 was the *only* agency "action" challenged by any party in this case.[4] Indeed, if there were any ambiguity about this, Intervenors made their position very clear below:

> Defendants attempt to conflate Plaintiff Intervenors' challenge to the recent negative 90-day finding with a challenge to the original listing, but the fact that *this lawsuit is based on the negative 90-day finding* is clear on the face of the pleadings.

ROA.4388 (emphasis added); *see also* ROA.4389 (stating that FWS's "denial of the petition" to delist was the "final agency action sufficient to create a new cause of action under the APA").

That Negative 90-Day Finding has been set aside and vacated, and that vacatur has been accepted by FWS, which is now reconsidering the delisting petition. Vacatur wipes the slate clean of that 2017 agency action. *See Camreta v. Green*, 563 U.S. 692,

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[4] Plaintiffs' complaint challenged only the 2017 finding, and when Intervenors joined, they also targeted only that agency action, albeit for different reasons. *See* ROA.1349 (Plaintiffs' operative complaint ¶ 2); ROA.1081-84 (Intervenors' operative complaint ¶¶ 59, 80).

713 (2011) ("Vacatur then rightly strips the [court] decision below of its binding effect" (internal quotation marks omitted)); *Fort Knox Music Inc. v. Baptiste*, 257 F.3d 108, 110 (2d Cir. 2001) ("A vacated judgment has no effect"; the appealing party "is thus no longer subject to" that judgment; "he is no longer aggrieved by that judgment."); *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 151 (D.C. Cir. 1993) (recognizing similar principles regarding vacatur of agency decisions). The vacatur of FWS's Negative 90-Day Finding naturally took with it any illegal effects emanating from that finding. Any alleged ongoing injury thus cannot be fairly "traced" to "the challenged action" because the non-extant finding cannot cause any continuing injury. *Simon*, 426 U.S. at 41; *see also* Charles A. Wright et al., 13A *Federal Practice and Procedure* § 3531.5 (3d ed.) ("[W]hatever role injury plays in standing, it must be tied to the challenged acts if it is to be relevant."). Therefore, Intervenors lack standing to pursue their appeal, and their appeal is moot. *See Arizonans for Official English*, 520 U.S. 43, 68 n.22 (1997) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).").

Intervenors cannot circumvent the traceability requirement of standing by conflating the agency action that they did challenge in this lawsuit with some other agency action that they did not (and could not) challenge. *See, e.g., Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 407, 413 (2013) (holding that plaintiffs could not "satisfy the 'fairly traceable' requirement" of Article III standing because they could not show that their injuries stemmed from the challenged surveillance provision, as opposed to

preexisting government surveillance actions, "none of which [had been] challenged"). In the district court, Intervenors asserted that they were generally injured by the *listing* of the harvestman in 1988. But any ongoing injuries allegedly stemming from that particular agency action do not count for Article III standing purposes, because the 1988 listing was never before the district court. The court considered a distinctly different action: the Negative 90-Day Finding rejecting the Stewards' petition to *delist* the harvestman is not equivalent to the 1988 determination to *list* the species. The listing decision required FWS to conclude that the species was in fact endangered, *see* 16 U.S.C. § 1533(a)(1) (five criteria for listing), whereas the Negative 90-Day Finding centered on the Stewards' failure to present substantial information that delisting may be warranted, *see id.* § 1533(b)(3) (delisting procedures). That finding—and the district court's review thereof—turns on the adequacy of the information presented by petitioners, not on a fresh determination that the species is endangered.

In any event, if Intervenors' alleged injuries truly stemmed from the Negative 90-Day Finding, then the vacatur will prevent that Finding from causing further injury. Instead, Intervenors' continued pursuit of this litigation post-vacatur (and without the original Plaintiffs) confirms that they now solely seek to remedy injuries that existed in the status quo—well before the Negative 90-Day Finding ever issued. But as the Supreme Court has recognized, plaintiffs cannot satisfy the traceability prong of standing by treating preexisting agency actions as interchangeable with subsequent challenged actions. *See Clapper*, 568 U.S. at 407 ("[B]ecause the

Government was allegedly conducting surveillance of [plaintiff] before Congress enacted [the challenged provision] it is difficult to see how the safeguards that [plaintiff] now claims to have implemented can be traced to [the challenged provision].").

Causation is a foundational aspect of the standing requirement, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998), and excusing a causal break between the challenged action and a party's injury would permit plaintiffs to seek judicial review of free-floating claims of injury without an actual case or controversy. That danger is evident in a case like this, where Intervenors allege injuries stemming from the listing of a species that occurred more than 30 years ago but challenge no specific application of that listing to them.[5] No court has jurisdiction to review that generalized time-barred claim; however, by pursuing this appeal divorced from the Stewards' petition, that review is exactly what Intervenors circuitously seek to obtain.[6]

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[5] Intervenors claim to have an interest in eliminating protective land-use restrictions, but they failed to challenge any specific application of these ESA restrictions to them. Unlike plaintiffs in prior cases, *see infra* p. 15 & n.8, Intervenors do not challenge a permit denial, nor have they claimed any imminent enforcement action against them. Instead, their claim relied solely on the "Negative 90-Day Finding denying Plaintiffs petition to delist the BCH," under the theory that this "denial constitutes final agency action whereby the Service has chosen to regulate the [harvestman]." ROA.1084, ¶ 80. But under this logic, now that the 90-Day Finding is vacated, there is no ripe action whereby the Service "has chosen to regulate the [species]."

[6] Intervenors agreed that a free-floating challenge to the 1988 listing would fall outside of the APA's 6-year statute of limitations. ROA.4387. This jurisdictional limitation is why the district court correctly dismissed Intervenors' claims insofar as they attacked the 1988 listing itself. ROA.7219-20; *see also Dunn-McCampbell Royalty Interest, Inc. v.*

Because Intervenors may no longer allege injuries stemming from the now-vacated Negative 90-Day Finding, their appeal is moot; any challenge they may wish to bring to a new agency action following remand has not yet ripened. The appeal should be dismissed on this ground alone.

II. Review is inappropriate given the posture of this appeal.

In addition to the Article III bar, the judgment below is not appealable by any plaintiff, and the fact that Intervenors may disagree with the nature of the remand or seek to challenge the agency's underlying authority to regulate the harvestman does not compel a contrary conclusion.

As a general rule, a party may not appeal from a favorable judgment simply to obtain review of a conclusion it deems erroneous. *See, e.g., Camreta*, 563 U.S. at 703-04; *Mathias v. Worldcom Technologies, Inc.*, 535 U.S. 682, 684 (2002); *Ward v. Santa Fe Independent School District*, 393 F.3d 599, 603 (5th Cir. 2004) ("It is a central tenet of appellate jurisdiction that a party who is not aggrieved by a judgment of the district court has no standing to appeal it."). The Supreme Court has explained the prudential aspect of this rule by noting that the judiciary's resources "are not well spent superintending each word a lower court utters en route to a final judgment in the petitioning party's favor." *Camreta*, 563 U.S. at 703-04. Consequently, courts have "adhered with some rigor" to the principle that a court "reviews judgments, not

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NPS, 112 F.3d 1283, 1286-87 (5th Cir. 1997) (holding that the 6-year statute of limitations governing APA claims "operates to deprive federal courts of jurisdiction").

statements in opinions." *Id.* (internal quotation marks omitted). As this Court has put the point, it is "well-established that the Intervenors may not appeal for the sole purpose of seeking a more favorable opinion from the district court." *United States v. Fletcher ex rel. Fletcher*, 805 F.3d 596, 604 (5th Cir. 2015); *see also id.* at 602 (reiterating that a "party may not appeal a favorable ruling for the purpose of obtaining a review of findings he deems erroneous" (internal quotation marks omitted)).

This rule is especially applicable here, where Intervenors seek to litigate a constitutional issue that was appended to a challenge to an agency action that is now void. The district court's judgment vacating FWS's Negative 90-Day Finding is one that favored the Plaintiffs *and* Intervenors because it set aside the agency action that was challenged by both parties. Although the district court rejected Intervenors' legal theory for challenging the finding (and, on that basis, partially denied their summary judgment motion), Intervenors are not substantively aggrieved by the judgment in a manner that would render their appeal reviewable in this posture. In *California v. Rooney*, 483 U.S. 307, 311 (1987), for example, the State sought to appeal the lower court's adverse determination that the State's search of a communal trash bin was unconstitutional. But the Supreme Court held that review of that issue would be "most premature" because—notwithstanding the excluded trash bin evidence—the lower court had still upheld the State's search warrant, "which was the sole focus of the litigation." *Id.* at 311, 314. Thus, California effectively prevailed, even if it was for a reason different from the one it may have desired.

The same is true here. Intervenors may desire further adjudication of their constitutional arguments against the Negative 90-Day Finding, but that finding— which was "the sole focus of the litigation"— is no longer extant, and the delisting petition (which Intervenors presumably still wish to see granted) is back on the table. Just as in *Rooney*, where the Supreme Court refused review notwithstanding the State's claim that the constitutional ruling was "adverse to the State's long-term interests," here, Intervenors' interest in the constitutional ruling does not warrant review of an otherwise favorable judgment vacating the agency action at issue. *See also Fletcher*, 805 F.3d at 604 (dismissing the intervenors' "unusual" appeal, where they had effectively prevailed in preventing a school district from obtaining relief from a desegregation order, but nonetheless sought review of the district court's reasons for denying the school district's request); *Ward*, 393 F.3d at 603 ("[A] winning party cannot appeal merely because the court that gave him his victory did not say things that he would have liked to hear, such as that his opponent is a lawbreaker." (internal quotation marks omitted)). In short, although Intervenors may view the district court's decision as a loss, the judgment was not unfavorable in a way that renders the matter fit for appellate review. Although Intervenors may be unsatisfied with the judgment because the remand leaves FWS free to issue a new adverse determination, and because their broader constitutional challenge was not accepted, neither argument demonstrates that review is appropriate in the present posture.

A. The remand order is interlocutory and not appealable.

While Intervenors may object to the remand process insofar as it enables FWS to further consider the delisting petition—rather than categorically requiring delisting at this stage—Intervenors are not yet aggrieved by this remand in a manner that permits appellate review. Indeed, remands are typically considered to be interlocutory because they are inherently non-injurious. It is well settled in this Circuit that an "order of the district court that remands the proceedings to the administrative agency" is ordinarily not regarded as an appealable final judgment. *Memorial Hospital System v. Heckler*, 769 F.2d 1043, 1044 (5th Cir. 1985); *see also Occidental Petroleum Corp. v. S.E.C.*, 873 F.2d 325, 329-30 (D.C. Cir. 1989) (collecting cases and explaining that a remand is "interlocutory" rather than "final" and thus generally not immediately appealable except by the agency, which is the only party that would be uniquely and irrevocably injured by the remand process, which cannot be undone (*citing Cohen v. Perales*, 412 F.2d 44, 48 (5th Cir. 1969))); *cf.* 28 U.S.C. § 1291 (extending appellate jurisdiction only to "final decisions of the district courts").[7]

[7] Intervenors cannot claim injury from the mere fact that FWS will undertake an internal administrative process on remand to reconsider Plaintiffs' delisting petition. *See, e.g., Steel Co.,* 523 U.S. at 107 (explaining that the "psychic satisfaction" that the "Nation's laws are faithfully enforced" is not an acceptable Article III remedy); *Allen v. Wright*, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.").

Although there is an exception to this general rule that permits review of certain collateral orders, *see Exxon Chemicals America v. Chao*, 298 F.3d 464, 469 (5th Cir. 2002), that exception is not available here because the ruling on the constitutional claims is not effectively "unreviewable" on a subsequent appeal from a final judgment. If FWS issues a *new* negative 90-day determination, Intervenors will be in the same position as they were before to raise their challenges to that separate agency action. *See Fletcher*, 805 F.3d at 604 (declining the intervenors' appeal and noting that they could re-raise their arguments against the school district the next time the district court considered lifting the school desegregation order).[8]

But review of the remand order now makes little sense, where the remand itself could initiate steps toward a *delisting* decision, thereby rendering moot any claims relating to the listing of the harvestman. *ITT Rayonier Inc. v. United States*, 651 F.2d 343, 345 (5th Cir. 1981) (holding that action for declaratory and injunctive relief based on claim that EPA exceeded statutory authority in issuing a list of violating facilities was moot, where EPA had removed plaintiff from its list). This Court should

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[8] Indeed, plaintiffs have been able to adjudicate similar constitutional arguments by raising them in a concrete dispute that was presented in an appropriate procedural posture. *See, e.g., GDF Realty*, 326 F.3d at 622 (challenging on constitutional grounds the decision by FWS to deny landowners a permit to develop lands occupied by the same protected harvestman); *People for the Ethical Treatment of Property Owners v. FWS*, 852 F.3d 990, 995 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 649 (2018) (raising similar constitutional arguments challenging an amendment to a rule regulating the take of a protected intrastate listed species).

therefore decline "Intervenors' invitation to jumpstart the appellate process." *Fletcher*, 805 F.3d at 607.

B. This Court should decline review under principles of constitutional avoidance.

Similarly, Intervenors may urge that the nature of their challenge—targeting FWS's underlying authority to regulate the harvestman—entitles them to immediate review. To the contrary, principles of constitutional avoidance compel incremental adjudication here.

It is "a well-established principle . . . that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Northwest Austin Municipal Utility District v. Holder*, 557 U.S. 193, 205 (2009) (internal quotation marks omitted). That "other ground" exists here, and it was the reason for the vacatur. Where an unlawful agency decision has been vacated, it is inappropriate to continue adjudicating other possible reasons that the agency decision could have been rejected—particularly where those other reasons are constitutional. Instead, the proper course is to hear such challenges only if, upon reconsideration, the agency's decision compels such a resolution. This principle was illustrated in *Northwest Austin*, where the Supreme Court concluded that it was unnecessary to review the district court's ruling that the preclearance requirement of the Voting Rights Act was constitutional, because the Court concluded that the plaintiff qualified for a statutory exception to that challenged requirement. *See* 557 U.S. at 197, 204 ("[T]he importance

of the question does not justify our rushing to decide it," because "judging the constitutionality of an Act of Congress is the gravest and most delicate duty that this Court is called on to perform.").

The Supreme Court also made plain in the *FCC v. Fox Television Stations, Inc.* litigation that incremental adjudication is no less appropriate where (as here) a litigant characterizes its claim as a broader challenge to the agency's underlying authority to act. *See* 556 U.S. 502 (2009); 567 U.S. 239 (2012). In that litigation, Fox Television first challenged an FCC indecency finding as arbitrary and capricious and also argued that the agency's underlying indecency regime was unconstitutionally vague. 556 U.S. at 511, 513. The Second Circuit reversed and remanded FCC's finding as inadequate under the APA and declined to reach the constitutional question. *Id.* Only after the agency appealed and successfully defended its reasoning under the APA did it become necessary for the courts to consider the constitutionality of the finding. 567 U.S. at 258-59. And even in this second round of litigation, the Supreme Court considered only one of the two constitutional issues presented. *Id.* Because the Court held that FCC had not provided fair notice—and reversed and remanded the FCC's finding on that basis—the Court declined to reach a broader argument that the First Amendment deprived the FCC of authority to regulate the programming at issue. *Id.* As a result, the Court's "opinion [left] the [FCC] free to modify its current indecency policy" on remand and to apply that policy until a new challenge was ripe for review. *Id.* at 259.

Intervenors' appeal is no different. They aim to present broader constitutional issues for the Court's consideration, but like the plaintiffs in *Northwest Austin* and the *Fox Television* litigation, Intervenors essentially gained success on a narrower ground and now must wait to see if a constitutional challenge ripens. *See Martin Tractor Co. v. FEC*, 627 F.2d 375 (D.C. Cir. 1980) (holding that the plaintiff's constitutional challenge to the Federal Election Campaign Act was not ripe where the plaintiff could potentially seek an administrative remedy), *cert. denied*, 449 U.S. 954 (1980).

III. No further relief is available within the scope of this action.

This appeal may also be dismissed for the related reason that no further relief is available to Intervenors under the limited scope of this action.

Intervenors joined a suit challenging a discrete agency action (the Negative 90-Day Finding) as unlawful under the APA, 5 U.S.C. § 706(2), which authorizes courts to "hold unlawful and set aside agency action, findings, or conclusions" if they are (among other things) arbitrary or capricious, unconstitutional, or otherwise unlawful. Intervenors likewise alleged that the Finding was unlawful under Section 706(2). ROA.1083. Under Section 706(2), the Negative 90-Day Finding has been declared unlawful and set aside. No further remedy is available under Section 706(2).

Although Intervenors challenged only the Negative 90-Day Finding and did not bring an action for mandamus relief or a suit to compel agency action under Section 706(1), they nonetheless demanded a slew of prospective injunctive remedies beyond vacatur. ROA.1085 (requesting a broad declaration that the 1988 listing is

unconstitutional, an order requiring FWS to rescind the 1988 listing, and a permanent injunction against ESA protections for the harvestman). But those remedies plainly exceed the scope of Section 706(2). *See, e.g., American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (explaining that notwithstanding that the plaintiff had "introduced a good deal of confusion by seeking an injunction," if a plaintiff "has standing . . . and prevails on its APA claim, it is entitled to relief under that statute, which normally will be a vacatur of the agency's order").

Now that the agency's Negative 90-Day Finding has been set aside, the case is over. That Intervenors did not succeed on their constitutional theory does not change this fundamental fact, nor does it enlarge the Court's authority to award relief that was never available under Intervenors' chosen cause of action. The APA does not authorize federal courts to entertain challenges to anything and everything that an agency may do, or fail to do, in the conduct of its business. Instead, Section 706(2) confines judicial intervention to those instances in which the agency has taken a discrete action. Thus, the scope of judicial review is limited to the scope of the challenged agency action. *See John Doe #1 v. Veneman*, 380 F.3d 807, 815 (5th Cir. 2004) (concluding that an injunctive remedy "exceeded the legal basis for review under the APA," where the agency had agreed not to release information that the plaintiff sought to protect, and holding that the "plaintiff has no remedy until the agency determines it will release requested information"); *cf. Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 160 (2010) (holding that where the district court vacated

the challenged deregulation order under APA, it had no authority to enjoin future deregulation orders that would have been independently subject to review); *In re Pattullo*, 271 F.3d 898, 901-02 (9th Cir. 2001) ("To have jurisdiction, we must be able to grant effective relief within the boundaries of the present case").

The district court has provided all the relief that is available under Section 706(2), the vehicle by which the present lawsuit was filed. As in *John Doe*, 380 F.3d at 814, because the challenged action is no more, no further remedy is available under the APA unless and until the agency decides to issue a new and adverse decision.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Pursuant to Circuit Rule 27.4, counsel for Federal Appellees notified counsel for Intervenor Appellants of the Federal Appellee's intent to file this motion. Counsel for Intervenor Appellants advised that they oppose the motion to dismiss and intend to file a response.

Counsel for Intervenor Defendants (Center for Biological Diversity, Travis Audubon, Defenders of Wildlife) advised that they do not oppose the motion to dismiss. Counsel for Plaintiffs-Cross Appellees (American Stewards of Liberty, et al.) advised that they take no position on this motion.

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

Dated: July 9, 2019

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ *Varu Chilakamarri*
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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Fed. R. App. P. 27(d) and Fed. R. App. 32, because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d) because it contains 5,164 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word. I further certify that any required privacy redactions have been made, the electronic submission is an exact copy of the paper document, and the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/ *Varu Chilakamarri*
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Dated: July 9, 2019