EXHIBIT 1

No. 19-50321

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

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

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

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
No. 1:15-CV-1174

APPELLANTS' SUR-REPLY IN OPPOSITION TO APPELLEES' MOTION TO DISMISS

CERTIFICATE OF INTERESTED PERSONS

No. 19-50321

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

v.

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

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

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:

   a. Attorney for Plaintiffs (not parties on appeal): Paul Stanley Weiland, Rebecca Barho, Brooke Marcus Wahlberg, Alan M. Glen (district court).

   b. Attorneys for Intervenors Plaintiffs-Appellants-Cross Appellees: Robert E. Henneke, Theodore Hadzi-Antich, Chance Weldon, Chad Ennis (district court), Kevin D. Collins (district court).

   c. Attorneys for Intervenor Defendants-Appellees-Cross Appellants: Jeffrey Bossert Clark, Eric Grant, Andrew M. Mergen, Varu Chilakamarri, Jeffrey H. Wood (district court), Seth Barsky (district court), Meredith Flax (district court), Lesley Karen Lawerence-Hammer (district court), Jeremy Hessler (district court), Frank Lupo and Joan Goldfarb.

   d. Attorneys for Intervenor Defendants-Appellees: Jason Craig Rylander, Charles W. Irvine (district court), Jared Michael Margolis (district court), John Jeffrey Mundy (district court), Ryan Adair Shannon (district court).

/s/Chance Weldon
CHANCE WELDON
Counsel for Appellants

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INTRODUCTION

Appellants-Intervenors John Yearwood and Williamson County, Texas (collectively the "Intervenors") file this Sur-Reply in Response to the Reply Brief of Appellee the United States Fish and Wildlife Service (the "Service") supporting its Motion to Dismiss. Intervenors file their Sur-Reply because the Service's Reply Brief misstates Intervenors' position, makes new arguments not specifically asserted in its opening brief or raised by Intervenors' Response, and raises for the first time Third Circuit Court of Appeals caselaw without noting contrary precedent from this Court. A brief Sur-Reply is therefore necessary to rebut the new and misleading arguments in the Service's Reply brief.

ARGUMENT

First, the Service claims that Intervenors "fail to address" the argument from *Clapper v. Amnesty International USA*, 568 U.S. 398, 407, 413 (2013) that "a plaintiff's alleged injuries must stem from the specific agency action challenged in the case, not from pre-existing events." Serv. Rep. Br., p. 2. This is demonstrably false. Intervenors do not mention Clapper by name because it is wholly inapposite to this case, but do devote two full pages to this argument.[1] *See* Int. Resp. Br. at 10-

[1] *Clapper* did not involve an appeal of a vacated agency action. The plaintiffs in *Clapper* challenged the constitutionality of Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §1881a ("Section 1881") which allows the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by jointly authorizing the surveillance of certain individuals. *Clapper*, 568 U.S. at 401. But the plaintiffs in *Clapper* could not establish that they were ever subject to surveillance under Section 1881 or were reasonably

11, *see also*, *Id*. at 10, n.2. As Intervenors explained, it is well settled in this circuit that Intervenors may challenge ongoing injuries caused by a pre-existing regulation by filing a petition to have that regulation rescinded and having the petition denied. *Dunn-McCampbell Royalty Interest v. Nat'l Park Serv.*, 112 F.3d 1283, 1287-88 (5th Cir. 1997). That is precisely what happened in this case and why the district court held that Intervenor John Yearwood has standing. ROA 19-50321.7218-19.

In its Reply, the Service now treats *Clapper* as if it says that a challenge to a vacated agency action is *per se* barred as a matter of Article III standing because there is no agency action left to trace one's injuries back to. Serv. Rep. Br. at p. 2. This bizarre argument is found nowhere in *Clapper* and is inconsistent with cases of this Court addressing appeals of vacated agency actions. *See, e.g.*, *Bordelon v. Barnhart*, 161 F.Appx. 348, 351 (5th Cir. 2005) (allowing appeal of vacated agency action). But even if *Clapper* did suggest such a thing, that argument was addressed in Intervenors' Response at p. 10, n. 2.

Second, the Service claims that the language Intervenors cite from *Forney v. Apfel*, 524 U.S. 266 (1998) only applies to appeals in Social Security cases. Serv. Rep. Br., p. 6-7. Tellingly, the Service cites a twenty-year old opinion from the

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likely to be surveilled under that provision in the future. *Id*. at 411. The Court held that such a hypothetical future injury based on an action that may never occur was not enough to establish standing. *Id*. at 416. Here, unlike the plaintiffs in *Clapper*, there is no question that Intervenors have already been affected by the government action at issue. The Service's refusal to delist the Harvestman prevents Intervenors from using their property and requires at least one Intervenor to spend significant amounts of money in mitigation every year. ROA 19-50321.1748-52.

Third Circuit Court of Appeals for this proposition. *See*, Serv. Rep. Br. at 6-7 (citing, *Kreider Dairy Farms v. Glickman*, 190 F.3d 113, 119-20 (3rd Cir. 1999). But the Service neglects to mention that this Court recently cited *Forney*, as relied upon by Intervenors, outside of the Social Security context. *See, e.g., United States v. Fletcher*, 805 F.3d 596, 602 (5th Cir. 2015) (quoting *Forney* in the context of a constitutional case for the proposition that "[t]his Court also has clearly stated that a party is 'aggrieved' and ordinarily can appeal a decision 'granting in part and denying in part the remedy requested.'"); *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 604 (5th Cir. 2004) (citing *Forney* in a First Amendment case, noting that the "general rule that prevailing party lacks standing to appeal is inapplicable where judgment grants only partial relief."). And, the Service is certainly aware of both *Fletcher* and *Ward* as it repeatedly cites both cases elsewhere in its briefing.

Finally, the Service flatly misstates the holding of *Northwest Austin Municipality Utility District No. One v. Holder*, 557 U.S. 193, 205 (2009) claiming that:

> the plaintiff received an unfavorable lower court decision on its *constitutional* challenge to the Voting Rights Act. The plaintiff was unable to obtain review of that ruling because the Supreme Court concluded that the utility district was eligible for a *statutory* exception to the Act.

(emphasis original). Serv. Rep. Br. at 6. But the plaintiff in *Northwest Austin* was not precluded from "review" of its constitutional claims. The Court granted

certiorari on the constitutional issue and entertained briefing and oral argument on the constitutional questions. *Id*. at 196-97 (noting extensive briefing of the constitutional issues), 197-206 (discussing the constitutional issues at length). After briefing and argument, the Court ultimately decided the case on statutory grounds because it could "afford [plaintiff] all the relief it seeks" without reaching the constitutional question. *Id*. at 206.[2] But the Court, nonetheless, held it had probable *jurisdiction* to hear the constitutional claim. *Id*. at 201. Indeed, Justice Thomas's concurring opinion in *Northwest Austin* resolved the case for the plaintiffs on the very constitutional issue that the Service claims the Court did not "review." *Id*. at 216 (Thomas, J., concurring in part, dissenting in part).

CONCLUSION

Accordingly, for the reasons stated here and in their Response Brief, Intervenors respectfully request this Court deny the Service's dismissal motion, and order new merits briefing deadlines to put this case back on track for timely review.

Respectfully submitted,

/s/ Chance Weldon

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[2] Indeed, the Court noted that Plaintiff's counsel had conceded at oral argument that the Court need not reach the constitutional issue to grant all of the relief requested. *Id*. at 206.

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2019, I electronically filed the foregoing response 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/Chance Weldon
CHANCE WELDON

CERTIFICATE OF COMPLIANCE

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 1,033 words, excluding the parts exempted by Rule 27(a)(2)(B); and (2) the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the same program used for the word count).

/s/Chance Weldon
CHANCE WELDON