No. 20-

In The Supreme Court of the United States

JOHN YEARWOOD; WILLIAMSON COUNTY, TEXAS,

Petitioners,

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,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 26, 2020

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QUESTION PRESENTED

Whether the decision below denying the Petitioners' standing to appeal the district court's final judgment on their constitutional claims under the Administrative Procedure Act is in direct conflict with this Court's decision in *Forney v. Apfel*, 524 U.S. 266 (1998), as well as decisions of four other courts of appeals.

PARTIES TO THE PROCEEDINGS

The petitioners herein, which were the Intervenor-Plaintiffs-Appellant-Cross Appellees below, are John Yearwood (an individual) and Williamson County, Texas (a municipality of the State of Texas).

The respondents, which were defendants and appellees below, are United States Department of the Interior; United States Fish and Wildlife Service; David Bernhardt, Secretary, United States Department of the Interior, in his official capacity; Margaret E. Everson, in her official capacity as Director of the United States Fish and Wildlife Service; Amy Lueders, in her official capacity as the Southwest Regional Director of the United States Fish and Wildlife Service.

RULE 29.6 STATEMENT

Neither John Yearwood nor Williamson County, Texas, are corporations.

RELATED CASES

Am. Stewards of Liberty v. DOI, No. 1:15-cv-01174-LY, United States District Court for the Western District of Texas, Judgment entered March 28, 2019.

Am. Stewards of Liberty v. DOI, No. 19-50321, United States Court of Appeals for the Fifth Circuit, Judgment entered May 29, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioners John Yearwood and Williamson County, Texas (collectively, "Mr. Yearwood") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Am. Stewards of Liberty v. DOI*, 960 F.3d 223, 225 (5th Cir. 2020). The memorandum and order of the district court is published at *Am. Stewards of Liberty v. DOI*, 370 F. Supp. 3d 711 (W.D. Tex., Mar. 28, 2019). Copies are included in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2020. On July 28, 2020, the court of appeals denied petitioners' timely requests for panel rehearing and *en banc* review. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

5 U.S.C. § 702—A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 703—The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for

declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. § 704—Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 1291—The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United

States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

INTRODUCTION

In *Forney v. Apfel*, 524 U.S. 266, 271, 118 S. Ct. 1984, 1987-88 (1998), this Court unanimously held that a Social Security Act claimant had standing to appeal the District Court's remand of her benefit claims to the Social Security Administration because she had requested relief in addition to remand that was not granted. This Court held that when "the District Court's order gives petitioner some, but not all, of the relief she requested . . . she consequently can appeal the District Court's order insofar as it denies her the relief she has sought." *Id*. at 1988.

The question presented by this case is whether that holding established a general principle of appellate standing, as held by four circuit courts of appeals, or is limited to Social Security Act cases, as held by the Fifth Circuit in this case and by the Third Circuit previously.

A straightforward application of *Forney* in this case would have provided Mr. Yearwood with standing.

Mr. Yearwood filed constitutional claims under 5 U.S.C. § 706(2)(B) challenging the inclusion of the Bone Cave Harvestman ("Harvestman") on the federal Endangered Species List under the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* ("ESA"). Based on these claims, Mr. Yearwood sought declaratory and injunctive relief preventing the further regulation of Harvestman on his property. Mr. Yearwood lost on all of his claims in district court, receiving none of the relief he requested. Instead, based solely on the non-constitutional, statutory claims of another party in the case, the district court remanded the listing to the United States Fish and Wildlife Service (the "Service") to conduct a third-round of lengthy administrative review that would not, and cannot, provide the full relief Mr. Yearwood requested. Mr. Yearwood is not part of that administrative proceeding and, because the district court entered a final judgment on all issues, it did not retain jurisdiction on remand. Thus, under current case law, Mr. Yearwood is barred by *res judicata* from raising his constitutional claims in the future. In the interim, Mr. Yearwood's property remains regulated under the ESA. Under *Forney*, Mr. Yearwood should be able to appeal the district court's order, "insofar as it denies h[im] the relief [he] has sought." *Forney*, 524 U.S. at 271.

On appeal, however, the Fifth Circuit explicitly refused to apply *Forney* and held that Mr. Yearwood lacked standing simply *because* the matter was remanded to the Service. In holding that *Forney* is limited to Social Security Act cases, the Fifth Circuit

inexplicably abandoned its prior precedents. Such an exception finds no support in this Court's jurisprudence, conflicts with holdings of four other circuits that apply *Forney* beyond the Social Security Act, and impermissibly leaves Mr. Yearwood and those similarly situated bound by final district court judgments that are wholly unreviewable. Guidance from this Court is therefore necessary to maintain conformity with its binding precedent and to resolve a circuit split on a question of national importance.

STATEMENT OF THE CASE

Factual Background and Proceedings in the District Court

For more than a century, John Yearwood's family has owned a ranch in Williamson County, Texas. In addition to making productive use of the ranch, the Yearwoods have historically made the property available free-of-charge to local church groups and the 4H club for shooting sports, horseback riding, and camping.

Mr. Yearwood's ranch is also home to the Bone Cave Harvestman—a tiny arachnid that exists in cracks in the limestone in only two counties in Texas. The Harvestman is listed under the ESA as an endangered species by the United States Fish and Wildlife Service (the "Service"). 53 Fed. Reg. 36,029 (Sept. 16, 1988). As a result, the Yearwoods can no longer develop the property, use it for recreation, or even

maintain it by clearing brush without risking significant civil and criminal ESA penalties.

In 2015, Mr. Yearwood intervened in an Administrative Procedure Act lawsuit filed by the American Stewards of Liberty ("ASL") challenging the validity of the Service's denial of a petition seeking to have the Harvestman removed from the Endangered Species List. Mr. Yearwood's lawsuit sought a declaration that the Service's continued regulation of a purely intrastate species exceeded the federal government's powers under the Commerce and Necessary and Proper clauses, and sought an injunction preventing the further regulation of his property.

ASL's lawsuit, by contrast, argued that the Service had failed to adequately consider evidence that the Harvestman was no longer endangered, and sought to have the listing of the Harvestman remanded to the Service to reconsider the scientific evidence. Mr. Yearwood actively opposed any remand.

The district court entered a final judgment on both ASL's and Mr. Yearwood's claims. The court entered a final judgment rejecting Mr. Yearwood's constitutional claims, thereby denying all of the relief he requested. ROA 19-50321.7226. At the same time, the court ruled in favor of ASL's scientific evidentiary claims and remanded those claims to the Service, whereupon the district court closed the case. That remand triggered a lengthy administrative process that is still ongoing and may or may not ultimately result in the de-listing of the Harvestman. Meanwhile, the Harvestman

remains listed, thereby continuing to burden Mr. Yearwood's property with ESA restrictions.

Proceedings in the Court of Appeals

The Service argued that the district court's remand left Mr. Yearwood with no final agency action to challenge, thereby making the final judgment on the constitutional claims unappealable. Doc. No. 00515027761. Mr. Yearwood countered that the District Court's final judgment on his constitutional claims was appealable because he remained subject to the regulation he challenged. Moreover, he argued that the district court's final judgment against him was *res judicata* on his constitutional claims, and that, under *Forney*, he is entitled to appeal because the remand granted him none of the relief that he had requested. Doc. No. 005150401856.

The Panel dismissed Mr. Yearwood's appeal in a brief conclusory opinion. Without citation to authority, the Panel held that *Forney* was limited to claims arising under the Social Security Act and therefore could not provide a basis for standing. *Am. Stewards of Liberty v. DOI*, 960 F.3d 223, 231 (5th Cir. 2020). The Panel did not address conflicting opinions raised in the briefing that had applied *Forney* outside of the Social Security context or the ongoing *res judicata* effects of the district court's opinion. Yearwood's petition for *en banc* review was denied. The Harvestman remains listed.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S ARTIFICIAL LIMITATION OF *FORNEY* DIRECTLY CONFLICTS WITH *FORNEY* AND OTHER BINDING PRECEDENTS OF THIS COURT

Long before *Forney* was decided, this Court had repeatedly held that a party who receives some but not all of the relief requested has standing to appeal. *See*, *e.g.*, *United States v. Jose*, 519 U.S. 54, 56 (1996) (standing to appeal judgment granting in part and denying in part the relief requested in a dispute with the IRS); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 335, (1980) (standing to challenge denial of class certification even though plaintiff prevailed on the merits). In *Forney*, this Court extended this general rule of appellate standing to litigation involving a remand to an administrative agency. 524 U.S. at 271 (citing *Deposit Guar. Nat'l Bank*, 445 U.S. at 333; *Jose*, 519 U.S. at 56).

The plaintiff in *Forney* challenged the Social Security Administration's denial of her request for Social Security benefits. Ms. Forney sought reversal of the agency's benefits determination, or, in the alternative, that the case be remanded to the agency for further review under the proper evidentiary standard. The district court denied Ms. Forney's claim for reversal but granted the remand to the agency for further hearings.

Ms. Forney sought to appeal the denial of her request for reversal, but the Ninth Circuit held that she lacked standing because the challenged agency action

had been remanded. *Forney*, 524 U.S. at 271. This Court disagreed. A unanimous court held Ms. Forney had standing to appeal the denial of her request for reversal because, despite the remand, she had not received "all that she had requested" in the district court. *Forney*, 524 U.S. at 271-72. This Court noted that a reversal and a remand are significantly different remedies. *Id*. at 271. A remand is only "half a loaf." *Id*. It involves "further delay and risk" that the plaintiff will receive nothing at all. *Id*. Accordingly, Ms. Forney could appeal "insofar as [the remand] denies her the relief she has sought." *Id*.

The Fifth Circuit panel in this case held (without citation to authority) that *Forney* was limited to claims arising under the Social Security Act. *Am. Stewards of Liberty*, 960 F.3d at 231. But this Court gave no indication in *Forney* that it was crafting a narrow remedy limited to Social Security cases. Rather, citing *Deposit Guar.* and *Jose*, this Court explicitly applied well-established principles of appellate standing:

> We concede that this Court has held that a "party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 333, 63 L. Ed. 2d 427, 100 S. Ct. 1166 (1980). But this 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.' *United States v. Jose*, 519 U.S. 54, 56, 136 L. Ed. 2d 364, 117 S. Ct. 463 (1996). ***And this latter***

statement determines the outcome of this case.

Forney, 524 U.S. at 271 (emphasis added). In support of this conclusion, this Court cited six lower court opinions which it considered "roughly comparable" to requesting review after remand where the lower courts had found standing. *Id*. at 272. Not one of those opinions involved the Social Security Act.[1] The primary Social Security Act case discussed in *Forney* was *Sullivan v. Finkelstein*, 496 U.S. 617, 110 L. Ed. 2d 563, 110 S. Ct. 2658 (1990) (hereafter, "*Finkelstein*."). But while the Court noted that *Finkelstein* "reasoned, primarily from the language of § 405(g) [of the Social Security Act]," the Court concluded that "*Finkelstein's* logic, however, makes these features of [*Finkelstein*] irrelevant. . . ." Accordingly, there is no support—and the Fifth Circuit provided none—for limiting *Forney* to Social Security Act claims. Certiorari is appropriate to

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[1] *Id*. (citing *Gargoyles, Inc. v. United States*, 113 F.3d 1572 (Fed. Cir. 1997) (permitting appeal where prevailing party recovered reasonable royalty but was denied lost profits); *Castle v. Rubin*, 316 U.S. App. D.C. 293, 78 F.3d 654 (D.C. Cir. 1996) *(per curiam)* (permitting appeal where prevailing party awarded partial back pay but denied reinstatement and front pay); *La Plante v. American Honda Motor Co.*, 27 F.3d 731 (1st Cir. 1994) (permitting appeal where prevailing party awarded compensatory but not punitive damages); *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991) (permitting appeal where prevailing party awarded damages but denied attorney's fees); *Ragen Corp. v. Kearney & Trecker Corp*., 912 F.2d 619 (3d Cir. 1990) (permitting appeal where prevailing party denied consequential damages); *Carrigan v. Exxon Co., U.S.A.*, 877 F.2d 1237 (5th Cir. 1989) (permitting appeal where prevailing party awarded damages but not injunctive relief)).

correct this clear departure from this Court's established precedents.

II. THE FIFTH CIRCUIT'S ARTIFICIAL LIMITATION OF *FORNEY* EXPANDS AND EXACERBATES AN EXISTING SPLIT OF AUTHORITY AMONG CIRCUIT COURTS

The Fifth Circuit Panel's opinion exacerbates a split among the circuits on how *Forney* should be applied. In the two decades since *Forney* was decided, most circuit courts (the First, Seventh, Tenth, and Eleventh) have applied *Forney* as a general rule of appellate standing that is applicable outside of the Social Security context.[2] In fact, until it reversed course in this case, the Fifth Circuit had also taken that approach. *See*, *e.g.*, *United States v. Fletcher*, 805 F.3d 596, 602 (5th Cir. 2015) (applying *Forney* as an "ordinary case" in an equal protection challenge); *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 604 (5th Cir. 2004) (applying *Forney* as a "general rule" in a First Amendment challenge).

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[2] *See*, *e.g.*, *Corley v. Long-Lewis, Inc.*, 965 F.3d 1222, 1234 (11th Cir. 2020) (applying *Forney* in a multi-claim maritime law case); *Watchtower Bible v. Municipality of San Juan*, 773 F.3d 1, 7-8 (1st Cir. 2014) (applying *Forney* in a constitutional challenge to municipal regulations); *Horn Farms, Inc. v. Johanns*, 397 F.3d 472, 475 (7th Cir. 2005) (specifically rejecting the argument that *Forney's* reasoning is limited to Social Security Act claims); *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1275-76 (10th Cir. 2001) (applying *Forney* as a general rule to establish standing in a non-Social Security Act case).

By contrast, only the Third Circuit has clearly held that *Forney* is limited to claims arising under the Social Security Act. *Kreider Dairy Farms, Inc. v. Glickman*, 190 F.3d 113, 115 (3d Cir. 1999). And even that court has recently shown a lack of commitment to such a limitation on *Forney*. *See*, *e.g.*, *Aruanno v. Caldwell*, 637 F. App'x 675, 677 n.1 (3d Cir. 2016) (unpublished opinion applying *Forney* as a general rule of appellate standing in a non-Social Security case without mentioning *Kreider*).

While the Fifth Circuit provided no citation or explanation in support for its limitation of *Forney* in this case, the Third Circuit's prior explanation of its *Kreider* holding provides some insight into the Fifth Circuit's error. Eight years before *Forney*, this Court addressed in *Finkelstein* whether a "sentence four remand" under the Social Security Act was a "final judgment." *See Finkelstein*, 496 U.S. at 617. Based largely on the specific text of the Social Security Act at issue in that case, the *Finkelstein* Court concluded that such remands were final judgments and therefore were appealable. Because *Forney* also arose under the Social Security Act, this Court cited *Finkelstein* but ultimately decided *Forney* on other grounds not specifically addressed in *Finkelstein*. *See Forney*, 524 U.S. at 271 (citing *Jose*, 519 U.S. 54). In *Kreider*, the Third Circuit mistakenly concluded that *Forney's* holding relied wholly on *Finkelstein* and therefore stood for the proposition that *Forney* was limited to "statutes containing language comparable to that found in the Social Security Act." *Id*. at 119.

As set forth in Section I above, that position is contradicted by the text of *Forney*. *See Forney*, 524 U.S. at 271 (noting that *Jose*, not *Finkelstein*, "determines the outcome of this case."); *id*. at 272 (citing six lower court opinions which it considered "roughly comparable" to requesting review after remand where the lower courts had found standing—not one of which involved the Social Security Act or statutes with similar language). However, before the Panel's decision in the instant case, the errors of *Kreider* were largely isolated to the Third Circuit. But given the Fifth Circuit's newly-independent adoption of the same approach in this case, it is clear that guidance from this Court is necessary to resolve the expanding conflict over the scope of *Forney*.

III. THE FIFTH CIRCUIT'S ARTIFICIAL LIMITATION OF *FORNEY* RAISES ISSUES OF NATIONAL IMPORTANCE BY RENDERING NUMEROUS CONSTITUTIONAL CHALLENGES TO AGENCY ACTIONS UNAPPEALABLE

If left untouched, the Fifth Circuit's decision would leave numerous APA claimants effectively out of court, a result that was studiously avoided by this Court's decision in *Forney.* In *Forney*, this Court explained that if the mere remand of Forney's case meant that she lacked standing to appeal the denial of her claim for reversal, it would also necessarily mean that Forney would have also lacked standing to raise her claim for reversal on cross-appeal had the government

chosen to appeal the remand—which it had a right to do. *Forney*, 524 U.S. at 271-72. The result was a "heads I win, tails you lose" scenario where a government-respondent could have the benefit of appealing if it lost on either claim, while a petitioner could only appeal if she lost on both. *See id*. This Court rightly viewed such a situation as an unacceptable outcome and, accordingly, held that Ms. Forney had standing to independently appeal the lower court's refusal to reverse, even though she had prevailed on her request for remand.

The same catch-22 is created by the Fifth Circuit's refusal to apply *Forney* in this case. There is no dispute that the Service had standing to appeal the remand order. By holding that the remand itself deprived Mr. Yearwood of standing to appeal the final judgment on his constitutional claims, the Fifth Circuit's holding would have effectively barred Mr. Yearwood from raising those claims on cross-appeal had the Service elected to pursue its own appeal of the remand—an outcome specifically rejected by this Court. *See Forney*, 524 U.S. at 271-72 (stating that claimant should not be denied "the right to seek reversal (instead of remand) through a cross-appeal in cases where the Government itself appeals a remand order."). Indeed, if *Forney* does not apply here, Mr. Yearwood could never raise his constitutional claims again, regardless what the Service did or didn't do. As explained above, he could not have raised his constitutional claims on cross-appeal had the Service maintained its appeal. *See Forney*, 524 U.S. at 271-72. Furthermore, he could not raise them

on appeal directly, as illustrated by the instant case. *Am. Stewards of Liberty v. DOI*, 960 F.3d 223, 231. Moreover, he could not raise them administratively before the Service during the administrative remand because those claims were not remanded, and even if they were the Service would be bound by the district court judgment under the "law of the case." *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16, 108 S. Ct. 2166, 2177 (1988) (explaining the "law of the case" doctrine); *Conway v. Chem. Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1062 (5th Cir. 1981) ("As a general rule if the issues were decided, either expressly or by necessary implication, those determinations of law will be binding on remand."). Finally, if Mr. Yearwood tried to file a new lawsuit raising his constitutional claims after the remand is over, his claims would be barred by collateral estoppel. *See San Remo Hotel, L.P. v. City & Cty. of S.F.*, 545 U.S. 323, 336 n.16 (2005).

The lower court's decision thus forecloses Mr. Yearwood and others similarly situated from appealing their constitutional claims where the relief actually requested was wholly denied—a result contrary to both the holding and reasoning of *Forney.* Accordingly, this case raises issues of national significance under the Constitution of the United States that should be addressed by this Court.

IV. IF *FORNEY* DOES NOT APPLY TO ADMINISTRATIVE PROCEDURE ACT CLAIMS, THEN THIS COURT SHOULD CRAFT A REMEDY TO PREVENT *RES JUDICATA* ON CONSTITUTIONAL CLAIMS THAT ARE OTHERWISE UNAPPEALABLE

Even if this Court were to conclude that *Forney* does not apply to constitutional claims raised under the APA, the Court should clarify what the remedy should be in cases where property owners are left with unappealable final judgments on their constitutional claims. In *United States v. Munsingwear, Inc*., 340 U.S. 36, 40-41 (1950), this Court held that when a claim is rendered unreviewable on appeal, the proper remedy is for the appellate court to vacate those portions of the district court judgment that are unreviewable. This remedy is based on the salutary premise that an individual "ought not in fairness be forced to acquiesce in" a ruling that he was unable to appeal. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'shp.*, 513 U.S. 18, 25 (1994); *Munsingwear*, 340 U.S. at 39 ("those who have been prevented from obtaining the review to which they are entitled should not be treated as if there had been a review."). Vacatur resolves the issues created by the lack of review by " 'stripp[ing] the decision below of its binding effect, and clear[ing] the path for future relitigation.' " *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (citations omitted); *see also Munsingwear*, 340 U.S. at 40-41 (the point of vacatur is to prevent an unreviewable decision "from spawning any legal consequences.").

If *Forney* does not apply to APA claims, not only will the district court's final judgment on the constitutional claims in this case and others be unreviewable on appeal, but, just as importantly, despite being unreviewable, these final judgments will be entitled to *res judicata*. *See San Remo Hotel, L.P. v. City & Cty. of S.F.*, 545 U.S. 323, 336, n.16 (2005). As this Court has made clear, collateral estoppel applies to any future litigation involving a party who had an opportunity to litigate the issue to a final judgment. *See Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008). Here, Mr. Yearwood has litigated the constitutionality of the listing of the Harvestman to a final judgment. The judgment of the district court, on its face, states unequivocally that "Congress's regulation of a 'take' of the harvestman under the Act is a valid exercise of the Commerce Clause power." ROA 19-50321.7226. This statement on the face of the order is not merely dicta in the opinion. *Id*. Accordingly, it is entitled to *res judicata* effect.

The problem is clear. Mr. Yearwood continues to own property containing the Harvestman and therefore remains subject to ESA-mandated review of any federal permitting applications he may seek and to the risk of prosecution for species takes if Mr. Yearwood accidentally harms a Harvestman. Yet, if the Fifth Circuit's judgment stands, Mr. Yearwood will be barred from bringing his constitutional claims again if he seeks to contest a permit denial or is prosecuted for a species take. *San Remo*, 545 U.S. at 336, n.16.

As noted above, the appropriate response would be to allow Mr. Yearwood and others like him to appeal

these types of adverse judgments on the merits. However, to the extent that this Court is willing to let stand an APA exception to appellate standing as established by the Fifth Circuit in this case, then it should grant certiorari for the limited purpose of instructing the Fifth Circuit and other courts that the unappealable portions of district court judgments on constitutional claims created by misapplying *Forney* must be vacated. *See Camreta v. Greene*, 563 U.S. 692, 715 (2011) (Breyer and Sotomayor, concurring) ("we should simply vacate the portion of the Ninth Circuit's opinion Camreta sought to challenge and remand with instructions to dismiss"); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 335 (1980) (noting past practice of finding jurisdiction for the limited purpose of vacating prejudicial portions of a lower court judgment that were otherwise unappealable); *Electrical Fittings Corp. v. Thomas & Betts Co*., 307 U.S. 241, 242 (1939) (same).

CONCLUSION

"There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property." *Jones v. Barnes*, 463 U.S. 745, 756 n.1 (1983) (Brennan and Marshall, dissenting). Two decades ago, this Court made clear in *Forney* that remand orders to an administrative agency were not an exception to this general rule. Most lower courts got the message. But two circuits have held otherwise. Under the Panel's opinion in this case, not only is the Fifth Circuit's

judgment directly in conflict with this Court's decision in *Forney*, but it also allows the opinion of a single district court judge on Mr. Yearwood's constitutional claims to be considered final and unreviewable, both now and forever. Certiorari is appropriate to resolve the conflict with *Forney* and the split among the circuits on an issue of national importance.

DATED this 26th day of October, 2020.

Respectfully submitted,

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