

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NEW MEXICO CATTLE GROWERS'
ASSOCIATION,

Plaintiff,

v.

Civil Action No. 1:21-cv-3263-EGS

UNITED STATES FISH AND WILDLIFE
SERVICE; UNITED STATES DEPARTMENT
OF THE INTERIOR; DEBRA HAALAND, in
her official capacity as Secretary of the
Department of the Interior; and MARTHA
WILLIAMS, in her official capacity as Director
of the United States Fish and Wildlife Service,

Defendants,

CENTER FOR BIOLOGICAL DIVERSITY
378 N. Main Avenue, Tucson, AZ 85701, and

MARICOPA AUDUBON SOCIETY,
P.O. Box 65401, Phoenix, AZ 85082-5401,

Proposed Defendant-Intervenors.

MOTION TO INTERVENE

Pursuant to Federal Rule of Civil Procedure 24(a)(2), Proposed Defendant-Intervenors Center for Biological Diversity (“Center”) and Maricopa Audubon Society (“MAS”) respectfully move to intervene as defendants in the above-captioned action. In the alternative, the Center and MAS move for permissive intervention under Federal Rule Civil Procedure 24(b). In support of this motion, Proposed Defendant-Intervenors submit the accompanying (1) Memorandum in Support; (2) Declaration of Dr. Robin Silver; (3) Declaration of David Noah Greenwald; (4) Declaration of Taylor McKinnon; (5) Declaration of Charles J. Babbitt; (6) Proposed Answer to Plaintiff’s Complaint; (7) Proposed Order; and (8) Corporate Disclosure Statement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
FACTUAL BACKGROUND.....	2
I. The Endangered Southwestern Willow Flycatcher.....	2
II. The Service’s Denial of Plaintiff’s 2015 Petition to Delist the Flycatcher.....	4
III. Proposed Defendant-Intervenors and Their Interests in this Case.....	6
LEGAL BACKGROUND	8
I. Protection Under the Endangered Species Act	8
ARGUMENT	9
I. Proposed Defendant-Intervenors Have Article III Standing.....	9
A. Proposed Defendant-Intervenors’ Members Have Standing.	10
B. Proposed Defendant-Intervenors Have Standing on Behalf of Their Members.	12
II. Proposed Defendant-Intervenors Have a Right to Intervene.	13
A. Proposed Defendant-Intervenors’ Motion to Intervene is Timely.	14
B. Proposed Defendant-Intervenors Have Protectable Interests at Stake.....	15
C. An Adverse Judgment Would Harm Proposed Defendant-Intervenors’ Interests...	17
D. Federal Defendants May Not Adequately Represent Proposed Defendant-Intervenors’ Interests.	18
III. Proposed Defendant-Intervenors Alternatively Merit Permissive Intervention.	21
CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

<i>Am. Forest Res. Council v. Hall</i> , No. 07-0484, 2007 U.S. Dist. LEXIS 38433 (D.D.C. May 29, 2007).....	16, 18, 20
<i>Am. Horse Prot. Ass’n, Inc. v. Veneman</i> , 200 F.R.D. 153 (D.D.C. 2001).....	19, 21
<i>Am. Trucking Ass’ns v. Fed. Motor Carrier Safety Admin.</i> , 724 F.3d 243 (D.C. Cir. 2013).....	10, 12
<i>Associated Dog Clubs of N.Y. State v. Vilsack</i> , 44 F. Supp. 3d 1 (D.D.C. 2014).....	19
<i>Butte Cnty. v. Hogen</i> No. 08-519, 2008 U.S. Dist. LEXIS 46480 (D.D.C. June 16, 2008).....	21
<i>Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.</i> , 386 U.S. 129 (1967).....	17
<i>Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. U.S. Dep’t of Interior</i> , 100 F.3d 837 (10th Cir. 1996)	20
<i>Crossroads Grassroots Policy Strategies v. FEC</i> , 788 F.3d 312 (D.C. Cir. 2015).....	passim
<i>Ctr. for Biological Diversity v. EPA</i> , 861 F.3d 174 (D.C. Cir. 2017).....	10, 12, 13
<i>Defs. of Wildlife v. Perciasepe</i> , 714 F.3d 1317 (D.C. Cir. 2013).....	13
<i>EEOC v. Nat’l Children’s Ctr., Inc.</i> , 146 F.3d 1042 (D.C. Cir. 1998).....	21
<i>Env’t Integrity Project v. Pruitt</i> , No. 17-5010 (D.C. Cir. Nov. 28, 2017).....	9
<i>Foster v. Gueory</i> , 655 F.2d 1319 (D.C. Cir. 1981).....	17
<i>Friends of Animals v. Kempthorne</i> , 452 F. Supp. 2d 64 (D.D.C. 2006).....	20
<i>Fund for Animals, Inc. v. Norton</i> , 322 F.3d 728 (D.C. Cir. 2003).....	passim
<i>Harrington v. Sessions (In re Brewer)</i> , 863 F.3d 861 (D.C. Cir. 2017).....	13, 18
<i>Humane Soc’y of the U.S. v. Clark</i> , 109 F.R.D. 518 (D.D.C. 1985).....	22

<i>Idaho Farm Bureau Fed’n v. Babbitt</i> , 58 F.3d 1392 (9th Cir. 1995)	16, 17
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992).....	11, 16
<i>Mil. Toxics Project v. EPA</i> , 146 F.3d 948 (D.C. Cir. 1998).....	10, 12
<i>Moden v. U.S. Fish & Wildlife Serv.</i> , 281 F. Supp. 2d 1193 (D. Or. 2003)	5
<i>Mova Pharm. Corp. v. Shalala</i> , 140 F.3d 1060 (D.C. Cir. 1998).....	15
<i>Nat. Res. Def. Council v. Costle</i> , 561 F.2d 904 (D.C. Cir. 1977).....	17, 19
<i>Nat’l Ass’n of Home Builders v. EPA</i> , 667 F.3d 6 (D.C. Cir. 2011).....	9
<i>NB ex rel. Peacock v. District of Columbia</i> , 682 F.3d 77 (D.C. Cir. 2012).....	13
<i>Nuesse v. Camp</i> , 385 F.2d 694 (D.C. Cir. 1967).....	13, 17, 19
<i>Safari Club Int’l v. Salazar</i> , 281 F.R.D. 32 (D.D.C. 2012).....	14, 15, 17, 20
<i>Sagebrush Rebellion, Inc. v. Watt</i> , 713 F.2d 525 (9th Cir. 1983)	17
<i>SEC v. Dresser Indus., Inc.</i> , 628 F.2d 1368 (D.C. Cir. 1980).....	18
<i>Sierra Club v. Van Antwerp</i> , 523 F. Supp. 2d 5 (D.D.C. 2007).....	21
<i>Smoke v. Norton</i> , 252 F.3d 468s (D.C. Cir. 2001)	14
<i>Tenn. Valley Auth. v. Hill</i> , 437 U.S. 153 (1978).....	8
<i>Town of Chester v. Laroe Estates, Inc.</i> , 137 S. Ct. 1645 (2017).....	9
<i>Trbovich v. United Mine Workers</i> , 404 U.S. 528 (1972).....	18
<i>United States v. Am. Tel. & Tel. Co.</i> , 642 F.2d 1285 (D.C. Cir. 1980).....	18
<i>United States v. Philip Morris USA, Inc.</i> , 566 F.3d 1095 (D.C. Cir. 2009).....	10

<i>WildEarth Guardians v. Jewell</i> , 738 F.3d 298 (D.C. Cir. 2013).....	11, 12
<i>WildEarth Guardians v. Salazar</i> , 272 F.R.D. 4 (D.D.C. 2010).....	10, 14, 15
<i>Williams & Humbert, Ltd. v. W. & H. Trade Marks, Ltd.</i> , 840 F.2d 72 (D.C. Cir. 1988).....	13

Statutes

16 U.S.C. § 1531(b)	7
16 U.S.C. § 1532(19)	4, 8
16 U.S.C. § 1533(a)(1).....	8
16 U.S.C. § 1533(b)(1)(A).....	8
16 U.S.C. § 1536(a)(2).....	4, 8
16 U.S.C. § 1536(o)	4
16 U.S.C. § 1538(a)(1)(B)	8
16 U.S.C. § 1539(a)(1)(B)	4
16 U.S.C. § 1539(a)(2).....	4
28 U.S.C. § 1331	21

Regulations

50 C.F.R. § 17.3	4
50 C.F.R. § 17.21(c).....	4
50 C.F.R. § 17.31(a).....	4
50 C.F.R. § 222.102	8
50 C.F.R. § 402.01(b)	8

Federal Register

Final Rule Determining Endangered Status for the Southwestern Willow Flycatcher, 60 Fed. Reg. 10,694 (Feb. 27, 1995)	2, 3
Final Determination of Critical Habitat for the Southwestern Willow Flycatcher, 62 Fed. Reg. 39,129 (July 22, 1997).....	3
Designation of Critical Habitat for the Southwestern Willow Flycatcher (<i>Empidonax traillii</i> <i>extimus</i>), 70 Fed. Reg. 60,886 (Oct. 19, 2005)	3

90-Day Finding for a Petition to List the Kennebec River Population of Anadromous Atlantic Salmon as Part of the Endangered Gulf Of Maine Distinct Population Segment, 71 Fed. Reg. 66,298 (Nov. 14, 2006)	5
Designation of Critical Habitat for Southwestern Willow Flycatcher, 78 Fed. Reg. 344 (Jan. 3, 2013)	3
90-Day Findings on 29 Petitions, 81 Fed. Reg. 14,058 (Mar. 16, 2016).....	4, 5
12-Month Findings on Petitions To List a Species and Remove a Species From the Federal Lists of Endangered and Threatened Wildlife and Plants, 82 Fed. Reg. 61,727 (Dec. 29, 2017)	1, 2, 4, 5

Other Authorities

Center for Biological Diversity, Petition To List the Southwest Willow Flycatcher <i>Empidonax Traillii Extimus</i> As a Federally Endangered Species (Jan. 30, 1992).....	3
Fed. R. Civ. P. 24(b)(3).....	22

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

INTRODUCTION

Proposed Defendant-Intervenors Center for Biological Diversity (“Center”) and Maricopa Audubon Society (“MAS”) seek to intervene as defendants in this case to safeguard their interests in protecting and conserving the endangered Southwestern willow flycatcher (*Empidonax traillii extimus*) (“flycatcher”) and its habitat. The flycatcher is a small riparian songbird that depends on the rare and highly imperiled vegetated riparian habitats along rivers, streams, and other wetlands in the arid southwestern United States. The U.S. Fish and Wildlife Service (“Service”) first listed the flycatcher as “endangered” under the Endangered Species Act (“ESA”) in 1995 and has reaffirmed that listing on multiple occasions. Most recently, the Service denied a petition by Plaintiff and other groups asking the Service to remove the flycatcher from the list of species protected by the ESA. *See* 12-Month Findings on Petitions To List a Species and Remove a Species From the Federal Lists of Endangered and Threatened Wildlife and Plants, 82 Fed. Reg. 61,727 (Dec. 29, 2017) (“Delisting Denial”).

Plaintiff seeks an order setting aside the Delisting Denial. Such an order would harm Proposed Defendant-Intervenors and their members. Proposed Defendant-Intervenors have worked for over three decades to attain the existing protections for the flycatcher and its habitat. Proposed Defendant-Intervenors’ members’ recreational, aesthetic, scientific, and professional interests in the flycatcher and its habitat benefit from those protections. If Plaintiff succeeds here, those protections may disappear. Accordingly, the Court should grant Proposed Defendant-Intervenors’ motion to intervene so that they can defend their unique interests in this case.

Pursuant to LCvR 7(m), counsel for Proposed Defendant-Intervenors conferred with counsel for Plaintiff and Federal Defendants regarding the relief requested. Plaintiff does not oppose the Motion, provided that Proposed Defendant-Intervenors’ participation does not result

in duplicative briefing and provided that Plaintiff is afforded sufficient time and space to respond to any unique arguments raised by Proposed Defendant-Intervenors. Federal Defendants take no position on the Motion. The Parties agree that modifications to the schedule are warranted to accommodate Proposed Defendant-Intervenors' participation. The Parties intend to confer and propose any necessary modifications to the schedule.

FACTUAL BACKGROUND

I. The Endangered Southwestern Willow Flycatcher

The flycatcher is a small, neotropical migrant songbird, approximately six inches long, with grayish-green wings and back, whitish throat, light grey-olive breast, and pale yellowish belly. Final Rule Determining Endangered Status for the Southwestern Willow Flycatcher, 60 Fed. Reg. 10,694 (Feb. 27, 1995); 82 Fed. Reg. 61,727. It spends its breeding season in the Southwestern United States and migrates to Latin America in the winter.



Southwestern Willow Flycatcher © Jim Burns

During its breeding season, from about May to September, the flycatcher seeks suitable nesting habitat in parts of central and southern California, southern Nevada, southern Utah, southwestern Colorado, Arizona, New Mexico, and western Texas. 82 Fed. Reg. 61,727. The flycatcher breeds in areas near-sea level to over 8,500 feet in vegetation along rivers, streams, and other wetlands. *Id.* The flycatcher establishes nesting territories, builds nests, and forages in mosaics of relatively dense and expansive growths of trees and shrubs, near or adjacent to surface water or underlain by saturated soil. *Id.* The flycatcher eats a wide range of terrestrial and aquatic invertebrates including flying and ground- and vegetation-dwelling insects. *Id.*

The Center petitioned the Service to protect the flycatcher by listing it as endangered under the ESA on January 25, 1992. *See* Petition To List the Southwest Willow Flycatcher *Empidonax Traillii Extimus* As a Federally Endangered Species (Jan. 30, 1992). In its petition, the Center noted that the flycatcher warranted listing as an endangered species due to significant population declines and extensive habitat loss and fragmentation throughout its range. *Id.*

The Service listed the flycatcher as endangered in February 1995, citing “extensive loss of habitat, brood parasitism, and lack of adequate protective regulations.” 60 Fed. Reg. 10,694. More than 90 percent of the flycatcher’s habitat has been lost or modified, primarily due to the dewatering of rivers by dams and groundwater pumping, as well as the loss of young native trees to cattle grazing, urban sprawl, and many other human activities that threaten the flycatcher’s streamside forested habitat, all of which have contributed to its endangered status. *Id.* Throughout its range, the flycatcher’s remaining riparian habitats tend to be rare, small and linear locales, widely separated by vast expanses of arid lands. *Id.*

The Service designated 599 river miles of critical habitat for the flycatcher in July 1997, 62 Fed. Reg. 39,129 (July 22, 1997), and revised it in October 2005 to include a total of 737 river

miles, 70 Fed. Reg. 60,886 (Oct. 19, 2005). In response to a lawsuit initiated by Proposed Defendant-Intervenors challenging the revision—which failed to include 77 percent of the river miles identified in a science-based recovery plan developed by the Service, omitting, for example, the entire lower Colorado River, upper San Pedro River, Santa Clara River, and much of the Rio Grande—the Service agreed to reconsider the critical habitat designation. In 2013, the Service issued a final rule designating critical habitat for the flycatcher, which included a total of 1,227 river miles as protected critical habitat. 78 Fed. Reg. 344 (Jan. 3, 2013).

The flycatcher’s listing and critical habitat designation under the ESA provide significant protections for the songbird. Federal agencies are required to consult with the Service to ensure their actions do not jeopardize the flycatcher or destroy or adversely modify its critical habitat, *see* 16 U.S.C. § 1536(a)(2), and with limited exceptions, no individual, business, or government entity can “take”—that is, “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect,” *id.* § 1532(19)—a flycatcher without a permit. *See* 50 C.F.R. § 17.31(a) (incorporating take prohibition from 50 C.F.R. § 17.21(c)). This ban on “take” includes a ban on “significant habitat modification or degradation” that would kill or injure flycatchers “by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.* § 17.3. Activities likely to cause “incidental” take of the flycatcher—such as agricultural activities and development in flycatcher habitat—must follow either terms and conditions set forth through consultation under section 7 of the ESA, *see* 16 U.S.C. § 1536(o), or a habitat conservation plan approved under section 10 of the ESA, *see id.* § 1539(a)(1)(B), (a)(2)), to be free from liability.

II. The Service’s Denial of Plaintiff’s 2015 Petition to Delist the Flycatcher

In August 2015, on behalf of numerous groups including Plaintiff New Mexico Cattle Growers Association, Pacific Legal Foundation petitioned to request that the Service remove the

flycatcher from the Federal List of Endangered and Threatened Wildlife—*i.e.* “delisted.” 82 Fed. Reg. 61,727. This petition claimed that new studies showed the flycatcher was not a valid subspecies eligible for protection under the ESA. *Id.*

In March 2016, the Service concluded that the petition presented enough information to indicate that delisting the flycatcher “may be warranted” and initiated a review of the species’ status. 81 Fed. Reg. 14,058, 14,070 (Mar. 16, 2016). The standard for a “may be warranted” finding “is not overly-burdensome” and “does not require conclusive information.” *Moden v. U.S. Fish & Wildlife Serv.*, 281 F. Supp. 2d 1193, 1204 (D. Or. 2003). Indeed, at this stage, the Service “do[es] not conduct additional research” or “subject the petition to critical review.” 71 Fed. Reg. 66,298 (Nov. 14, 2006). The Service was clear that its “may be warranted” finding did not mean that, after a full status review of the species, the agency would conclude that delisting the flycatcher was warranted. 81 Fed. Reg. at 14,061.

On December 29, 2017, after taking public comment and conducting a status review of the flycatcher, the Service published its 12-month finding that the petition to delist the flycatcher was not warranted—*i.e.* the Delisting Denial. 82 Fed. Reg. 61,727. The Service determined that the best available science supported the agency’s longstanding conclusion that the flycatcher is a valid subspecies and that numerous threats are acting on the subspecies such that it continues to be an endangered species under the ESA. *Id.* Those threats include habitat loss and modification caused by dams and reservoirs, diversion and groundwater pumping, invasive plants and beetles, river management, urbanization, agricultural development, livestock grazing and management, fire and fire management, cowbird parasitism, recreation, drought and climate change, vulnerability of small or isolated populations, and genetic effects. *Id.* The Service also reiterated its finding that existing regulatory mechanisms were inadequate to ameliorate these threats. *Id.*

On December 13, 2021, Plaintiff filed this lawsuit challenging the Delisting Denial. *See* Compl., ECF No. 1. Plaintiff alleges that the Service violated the ESA and/or the Administrative Procedure Act because it did not “articulate a standard or definition for what constitutes an avian subspecies” when it denied the petition. *Id.* ¶¶ 88, 94. Plaintiff also alleges that the Service failed to “consider relevant and available scientific evidence” when it declined to consider one study cited in the petition because the agency found that it did not present new data. *Id.* ¶¶ 98-99. Plaintiff asks the Court to set aside the Delisting Denial, enjoin the Service from giving effect to that denial, and remand the Delisting Denial to the Service for reconsideration. *Id.* at 25.

III. Proposed Defendant-Intervenors and Their Interests in this Case

The Center for Biological Diversity is a national, nonprofit environmental organization that works through science, law, and media to protect imperiled species and their habitats. *See* Declaration of Dr. Robin Silver ¶¶ 4, 5 (“Dr. Silver Decl.”); Declaration of D. Noah Greenwald ¶ 4 (“Greenwald Decl.”). The Center is headquartered in Tucson, Arizona, with offices elsewhere in Arizona, as well as in California, Colorado, Hawaii, Florida, Mexico, Minnesota, Nevada, New Mexico, Oregon, Washington, and Washington, D.C. Dr. Silver Decl. ¶ 4. In addition to 1.7 million online supporters, the Center has more than 88,000 members dedicated to the protection of species hovering on the brink of extinction, including the flycatcher. Dr. Silver Decl. at ¶ 4. The Center has many members who live in flycatcher habitat and who regularly enjoy and will continue to enjoy educational, recreational, and scientific activities concerning the flycatcher and its habitat, whose interests in both the flycatcher and its habitat would be harmed if the Service’s Delisting Denial were invalidated. *See* Dr. Silver Decl. ¶¶ 6, 12, 15-18, 23; *see generally* Greenwald Decl.; Declaration of Taylor McKinnon (“McKinnon Decl.”).

The Center has a specific interest in protecting the flycatcher. Dr. Silver Decl. ¶¶ 5, 6. The Center first petitioned the Service to list the flycatcher as an endangered species in 1992. *See* Petition *supra* at 3. Since that time, the Center has challenged numerous projects that threaten the flycatcher and its habitat, including the release of tamarisk-defoliating leaf beetle; has advocated for strong regional conservation measures for the flycatcher; and has won a landmark settlement in 2010 that resulted in the protection of 1,227 river miles as flycatcher critical habitat in 2013. *See* McKinnon Decl. ¶ 5; Dr. Silver Decl. ¶¶ 6, 13.

MAS is a non-profit organization dedicated to the study and enjoyment of birds and other wildlife and is primarily focused on the protection and restoration of southwestern riparian habitats through fellowship, education, and community involvement. Declaration of Charles Babbitt ¶ 7 (“Babbitt Decl.”); Dr. Silver Decl. ¶ 8. MAS is a chapter of the National Audubon Society and has over 3,000 members, primarily in central Arizona. Dr. Silver Decl. ¶ 8. MAS has played a strong role in protecting endangered species in the Southwest through public education efforts, field surveys, position papers, and field trips with both MAS members and non-members of the public to the critical habitat areas of the flycatcher. Dr. Silver Decl. ¶ 9; Babbitt Decl. ¶¶ 13, 14. MAS has undertaken many past and ongoing actions to protect the flycatcher and its riparian habitat in the arid Southwest. Babbitt Decl. ¶ 23; Dr. Silver Decl. ¶¶ 9, 14. MAS intervenes on this action on behalf of itself and its adversely affected members who live in flycatcher habitat and who regularly enjoy and will continue to enjoy educational, recreational, and scientific activities concerning the flycatcher and its habitat. Dr. Silver Decl. ¶ 8; Babbitt Decl. ¶¶ 7, 9, 14, 23. If Plaintiff is successful in its attempt to delist the flycatcher, it will facilitate the decline of the flycatcher and its habitat. Babbitt Decl. ¶¶ 29, 30; Dr. Silver Decl. ¶¶ 22, 23; Greenwald Decl. ¶ 14. Accordingly, the educational, scientific, aesthetic, conservation,

and recreational interests of MAS and its members will be harmed unless the Court grants the motion to intervene. Babbitt Decl. ¶ 30; Dr. Silver Decl. ¶¶ 22, 23.

LEGAL BACKGROUND

I. Protection Under the Endangered Species Act

Congress enacted the ESA to protect species that are in danger of extinction, like the Southwestern willow flycatcher, and to “provide a means whereby the ecosystems upon which [such] species depend may be conserved.” 16 U.S.C. § 1531(b). The Supreme Court has stated that the “plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

In line with that intent, the ESA requires the Secretary of the Department of the Interior (“Secretary”) to determine whether any species is “endangered” or “threatened” based solely on the best available science. 16 U.S.C. § 1533(a)(1), (b)(1)(A). The Secretary has delegated the administration of the ESA to the Service. 50 C.F.R. § 402.01(b). To make this determination, the Service evaluates five factors: “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.” 16 U.S.C. § 1533(a)(1).

Once a species is protected by listing, a suite of substantive legal protections applies. For example, ESA section 9 makes it illegal to “take” any protected species, *id.* § 1538(a)(1)(B), which includes all manner of harm and harassment, including direct injury or mortality and any acts or omissions that disrupt or impair significant behavioral patterns, *id.* § 1532(19); 50 C.F.R. § 222.102. Additionally, ESA section 7(a)(2) requires all federal agencies to ensure that their

actions do not “jeopardize the continued existence” of any listed species or “result in the destruction or adverse modification” of designated critical habitat. 16 U.S.C. § 1536(a)(2).

ARGUMENT

Proposed Defendant-Intervenors have fought for decades to secure the existing endangered species protections for the flycatcher and its unique riparian forest habitat in the southwestern United States. Those protections are critical to the songbird’s survival. This lawsuit threatens those protections and, thus, threatens Proposed Defendant-Intervenors’ and their members’ interests in the flycatcher and its habitat. Because Federal Defendants are charged with representing the broader American public, they may not adequately represent Proposed Defendant-Intervenors’ interests and focused dedication to the flycatcher and the rare desert riparian areas where it may be found. Accordingly, this Court should grant Proposed Defendant-Intervenors’ motion so that Proposed Defendant-Intervenors can ensure that their interests and their members’ interests are fully represented in this case.

I. Proposed Defendant-Intervenors Have Article III Standing.

To the extent Article III standing is required to intervene in this case, Proposed Defendant-Intervenors have associational standing on behalf of their members.¹ “The irreducible

¹ The Supreme Court’s decision in *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017), calls into question the D.C. Circuit’s requirement that defendant intervenors must show standing, *see Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731–32 (D.C. Cir. 2003). In *Town of Chester*, the Supreme Court held that a potential intervenor must have standing “to pursue relief that is different from that which is sought by a party with standing.” 137 S. Ct. at 1651. The Court assumed that Laroe Estates (the would-be plaintiff-intervenor) did not have standing, *id.* at 1650 n.2, and remanded the case for the Second Circuit to determine whether Laroe sought different relief than the plaintiff, *id.* at 1652. If all intervenors—regardless of the relief sought—had to demonstrate standing, the question the Court presented for remand would be immaterial. Indeed, the Court recognized this by acknowledging that the “resolution” of Laroe’s standing might not “become[] necessary on remand.” *Id.* at 1650 n.2. The only way to square *Town of Chester*’s clear holding with its disposition is to recognize that intervenors do not need standing

constitutional minimum of standing contains three elements: (1) injury-in-fact, (2) causation, and (3) redressability.” *Nat’l Ass’n of Home Builders v. EPA*, 667 F.3d 6, 11 (D.C. Cir. 2011) (internal quotation marks omitted). An organization has associational standing “if (1) at least one of its members would have standing to sue in his own right; (2) the interest it seeks to protect is germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the member to participate in the lawsuit.” *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 182 (D.C. Cir. 2017) (quoting *Am. Trucking Ass’ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013)). Because Plaintiff seeks relief that would harm Proposed Defendant-Intervenors’ and their members’ interests, causation and redressability “rationally follow[.]”² *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015).

A. Proposed Defendant-Intervenors’ Members Have Standing.

Proposed Defendant-Intervenors’ members have standing to sue because they benefit from the Service’s Delisting Denial and would be harmed if the Court sets the Delisting Denial aside. *See Crossroads*, 788 F.3d at 317 (“Our cases have generally found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party’s benefit.”); *accord WildEarth Guardians v. Salazar*, 272 F.R.D. 4, 13 (D.D.C. 2010).

if they seek the same relief as a party with standing. Thus, if Federal Defendants defend this suit, the Center does not need standing to defend it as well. The D.C. Circuit has not yet addressed this issue in a binding opinion. *But see* Judgment, *Env’t Integrity Project v. Pruitt*, No. 17-5010 (D.C. Cir. Nov. 28, 2017).

² Although each Proposed Defendant-Intervenor has standing, this Court need only determine that one organization has standing to grant the motion to intervene. *See United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1146 (D.C. Cir. 2009); *Mil. Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998).

Proposed Defendant-Intervenors' members have concrete interests in protecting the flycatcher and its increasingly rare riparian forested habitat in the southwestern United States. Some of Proposed Defendant-Intervenors' members have recreational, aesthetic, scientific, and professional interests in observing the flycatcher in the wild. *See generally* Dr. Silver Decl.; Babbitt Decl.; McKinnon Decl. For instance, Dr. Robin Silver, one of the Center's founders and a longtime member and board member of MAS, co-authored the 1992 petition to list the flycatcher as an endangered species and, since that time, has devoted significant time to protecting the flycatcher and its habitat, and has repeatedly attempted to observe and photograph the flycatcher by visiting its critical habitat. Dr. Silver Decl. ¶¶ 10-23. Others have interests in utilizing or enjoying the unique desert riparian habitat areas (and associated flora and fauna) for recreational, aesthetic, scientific, and professional purposes. *See generally* Dr. Silver Decl.; Babbitt Decl.; Greenwald Decl.; McKinnon Decl. By way of example, Center member Taylor McKinnon has attempted to view and photograph the flycatcher in its native riparian habitat numerous times and in numerous places throughout the Southwest, traveling to flycatcher habitat as often as once a month and sometimes more frequently, but has yet to successfully photograph a Southwestern willow flycatcher. McKinnon Decl. ¶¶ 5, 6, 8, 10-11. Additionally, avid birdwatcher Charles Babbitt, both a Center member and past- and interim president of MAS, has often traveled to flycatcher habitat attempting to observe the rare songbird in the wild. Babbitt Decl. ¶¶ 11-17, 21-22. These members' interests are cognizable for purposes of standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562-63 (1992); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013).

Proposed Defendant-Intervenors' members benefit from the Service's Delisting Denial, and their interests in the flycatcher and its habitat are furthered by the existing protections under

the ESA. *See* Babbitt Decl. ¶ 29; Dr. Silver Decl. ¶¶ 6, 22; Greenwald Decl. ¶¶ 14-15; McKinnon Decl. ¶ 12. Had the Service granted Plaintiff’s petition to delist the flycatcher, the ESA’s protections for the bird and its habitat would have ended.³ By denying that petition, the Service ensured that the important federal protections for the flycatcher and its habitat—and the benefits to Proposed Defendant-Intervenors’ members from those protections—remain in place. Plaintiff requests that this Court set aside the Delisting Denial that benefits Proposed Defendant-Intervenors’ members. *See* Compl. 21–22. Accordingly, Proposed Defendant-Intervenors’ members would be harmed if Plaintiff succeeds in this case. *See* Babbitt Decl. ¶¶ 29-30. This is enough to establish a “sufficient injury in fact” for defensive intervention. *See Crossroads*, 788 F.3d at 317; *Fund for Animals*, 322 F.3d at 733; *Mil. Toxics Project*, 146 F.3d at 954.

Because Plaintiff seeks relief that would harm Proposed Defendant-Intervenors’ members, causation and redressability “rationally follow[.]” *Crossroads*, 788 F.3d at 316. The threatened harm to Proposed Defendant-Intervenors’ members is caused by Plaintiff’s requested relief, and the Court can redress this harm by upholding the Service’s Delisting Denial. *Id.* Accordingly, Proposed Defendant-Intervenors’ members have standing to defend the Service’s Delisting Denial to uphold necessary protections for the flycatcher.

B. Proposed Defendant-Intervenors Have Standing on Behalf of Their Members.

Proposed Defendant-Intervenors meet the three criteria for associational standing. *Ctr. for Biological Diversity*, 861 F.3d at 182. For the reasons described above, Proposed Defendant-

³ Indeed, Plaintiff wants the flycatcher delisted because that would undo the critical habitat designation, take prohibition, and related permit requirements and open those areas to development. *See* Compl. ¶ 8 (“The critical habitat designation hinders the ability of these property owners to use their property as well as decreases the value of their property.”); *id.* ¶ 10 (bemoaning alleged “improper and unreasonable habitat conservation and recovery plans”); *id.* ¶ 11 (“Regulatory restrictions related to the gnatcatcher, including large swaths of land marked as critical habitat, have long hampered the building industry.”).

Intervenors have members who have standing. The Court should have “no difficulty” concluding that Proposed Defendant-Intervenors satisfy the additional elements of associational standing. *See id.*; accord *WildEarth Guardians v. Jewell*, 738 F.3d at 305. As organizations dedicated to environmental protection, including the protection of the flycatcher and its habitat, *see* Dr. Silver Decl. ¶¶ 4-5, 8, Babbitt Decl. ¶ 7, Proposed Defendant-Intervenors have an “obvious interest” in defending the flycatcher’s listing under the ESA. *Ctr. for Biological Diversity*, 861 F.3d at 182 (quoting *Am. Trucking Ass’ns*, 724 F.3d at 247). Moreover, Proposed Defendant-Intervenors can litigate this case without their members’ participation as named intervenors. *See id.* Proposed Defendant-Intervenors thus have associational standing to intervene on behalf of their members.

II. Proposed Defendant-Intervenors Have a Right to Intervene.

Proposed Defendant-Intervenors easily satisfy all requirements to intervene as of right. Federal Rule of Civil Procedure 24(a) governs motions for intervention as of right. To intervene as of right under Rule 24(a)(2), a would-be intervenor must satisfy four requirements: “(1) the motion for intervention must be timely; (2) intervenors must have an interest in the subject of the action; (3) their interest must be impaired or impeded as a practical matter absent intervention; and (4) the would-be intervenor’s interest must not be adequately represented by any other party.” *Harrington v. Sessions (In re Brewer)*, 863 F.3d 861, 872 (D.C. Cir. 2017).

Rule 24(a)(2) is to be applied “liberal[ly] . . . in favor of permitting intervention.” *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967). A motion to intervene is judged “on the tendered pleadings.” *Williams & Humbert, Ltd. v. W. & H. Trade Marks, Ltd.*, 840 F.2d 72, 75 (D.C. Cir. 1988). Courts thus treat a would-be intervenor’s “factual allegations as true and must grant [the intervenor] the benefit of all inferences that can be derived from the facts alleged.” *Def. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013) (quoting *NB ex rel. Peacock v.*

District of Columbia, 682 F.3d 77, 82 (D.C. Cir. 2012)). Proposed Defendant-Intervenors satisfy these established standards for intervention as of right.

The instant motion is timely because this matter is still in its infancy. Proposed Defendant-Intervenors and their members also have a longstanding interest in protecting the flycatcher and its critical habitat, as demonstrated by the Proposed Defendant-Intervenors' history of advocacy on behalf of the flycatcher. These interests will be impaired if Plaintiff successfully challenges the Service's Delisting Denial because a ruling in Plaintiff's favor may eliminate critical protections for the flycatcher, impairing Proposed Defendant-Intervenors' ability to protect the flycatcher and its critical habitat. Finally, the Service may not adequately represent Proposed Defendant-Intervenors' interests because, as a federal government agency, the Service's interests are far broader than those of Proposed Defendant-Intervenors, which are narrowly focused on protecting the flycatcher and designated critical habitat.

A. Proposed Defendant-Intervenors' Motion to Intervene is Timely.

The timeliness of intervention is "judged in consideration of all of the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (cleaned up).

Proposed Defendant-Intervenors' motion to intervene is timely because this matter remains in the early stages of litigation, with no significant action having been taken by this Court and without the submission of the administrative record on which the case will be judged. *See WildEarth Guardians v. Salazar*, 272 F.R.D. at 15 (motion timely when filed before defendants filed administrative record). Proposed Defendant-Intervenors promptly moved to

intervene to defend their interests and their members' interests in the continued protection of the flycatcher and its habitat, filing this motion approximately four months after Plaintiff filed the Complaint and before any dispositive motions were filed. *See Safari Club Int'l v. Salazar*, 281 F.R.D. 32, 42 (D.D.C. 2012) (motion timely when filed three months after complaint and before any dispositive motions). Proposed Defendant-Intervenors have lodged their Proposed Answer as an exhibit to the Motion to Intervene and do not seek to expand the issues in this case beyond those raised in the Complaint. *See* ECF No. 11. In these circumstances, Proposed Defendant-Intervenors' participation will not prejudice any party or delay the proceedings. *See id.*; *WildEarth Guardians v. Salazar*, 272 F.R.D. at 14.

B. Proposed Defendant-Intervenors Have Protectable Interests at Stake.

Because Proposed Defendant-Intervenors have Article III standing, they “*a fortiori* ha[ve] ‘an interest relating to the property or transaction which is the subject of the action.’” *Crossroads*, 788 F.3d at 320 (quoting *Fund for Animals*, 322 F.3d at 735); *see also Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998). Regardless, Proposed Defendant-Intervenors have legally protectable interests in this case under Rule 24(a)(2). *See supra* 11–13.

Proposed Defendant-Intervenors have a “direct, substantial and legally protectable” interest in maintaining the robust protections for the flycatcher and its riparian forest habitat that Proposed Defendant-Intervenors have long advocated for—including the protections provided by its endangered species status and its critical habitat designation. *See Stewart v. Rubin*, 948 F. Supp. 1077, 1105 (1996) (“To establish an interest in the proceeding, the applicant for intervention must have an interest that is ‘direct, substantial, and legally protectable.’”). MAS has worked to protect the flycatcher and its habitat since the 1970s, including by fighting to protect the San Pedro River—now designated critical habitat—by stopping construction of the

proposed Charleston dam that would have inundated flycatcher habitat in the Upper San Pedro River. *See* Dr. Silver Decl. ¶ 9. The Center similarly has worked to protect the flycatcher and its critical habitat for more than thirty years, having first petitioned the Service to list the flycatcher on January 25, 1992. *See* Petition *supra* at 3; *see also* Dr. Silver Decl. ¶ 6. In 2016 the Center submitted comments about the status of the flycatcher and, in particular, why Plaintiff’s petition to delist the flycatcher—now at issue in this suit—was not warranted. *See* Greenwald Decl. ¶ 9. Proposed Defendant-Intervenors interests in defending the protections they have long advocated for and supported are legally protectable interests that will be impacted directly and significantly by the relief sought by Plaintiff. *See Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (holding that a public interest group had a legally protectable interest in “an action challenging the legality of a measure it has supported”).

Proposed Defendant-Intervenors’ members also have recreational, aesthetic, scientific, and professional interests in the protection and survival of the flycatcher and its habitat. *See generally* Dr. Silver Decl.; Greenwald Decl.; McKinnon Decl.; Babbitt Decl. The protections provided by the flycatcher’s endangered listing status and critical habitat designation are crucial to protecting Proposed Defendant-Intervenors’ members’ interests by ensuring that the flycatcher continues to persist in its native habitat. *See generally* Dr. Silver Decl.; Greenwald Decl.; McKinnon Decl.; Babbitt Decl.; *see also Lujan*, 504 U.S. at 562–63 (“[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.”). These interests are also sufficient for intervention as of right. *Am. Forest Res. Council v. Hall*, No. 07-0484, 2007 U.S. Dist. LEXIS 38433, at *2–4 (D.D.C. May 29, 2007) (granting motion to intervene based on finding that proposed defendant-intervenors’ interests would be impaired or impeded by an unfavorable ruling and were not adequately

represented by federal defendants). As such, Proposed Defendant-Intervenors' and their members have direct, substantial, and legally protected interests in the subject matter of this litigation that would be impaired by a ruling in Plaintiff's favor.

C. An Adverse Judgment Would Harm Proposed Defendant-Intervenors' Interests.

Proposed Defendant-Intervenors' showing of standing also satisfies Rule 24(a)(2)'s requirement that an intervenor be "so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." *See Safari Club Int'l*, 281 F.R.D. at 42 (impairment of interest requirement satisfied "for the same reasons" proposed intervenors had standing). As stated by the Supreme Court, under Rule 24(a)(2), if an applicant intervenor "would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 134 n.3 (1967).

Here, an adverse judgment would harm Proposed Defendant-Intervenors' interests and their members' interests in the protection of the flycatcher and its habitat. *See supra* 11–13; *see also Idaho Farm Bureau Fed'n*, 58 F.3d at 1398 (concluding that an action that "could . . . lead to a decision to remove" a species from the ESA list would impair intervenor's interests); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) ("An adverse decision in this suit would impair the [intervenors'] interest in the preservation of birds and their habitats."). For instance, among other requested relief, Plaintiff asks this Court to declare that Federal Defendants acted arbitrarily and capriciously when they denied Plaintiff's petition. Compl. at 24–25, ECF No. 1. Proposed Defendant-Intervenors' interests in the flycatcher and its habitat will be impaired if Plaintiff successfully challenges the Service's Delisting Denial because a ruling in

Plaintiff's favor may eliminate critical protections for the flycatcher, impairing Proposed Defendant-Intervenors' ability to protect the flycatcher and its critical habitat.

An adverse judgment could also impair Proposed Defendant-Intervenors' abilities to advocate for the flycatcher and its habitat in the future. Rule 24(a)(2) focuses on the "practical consequences' of denying intervention." *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977) (quoting *Nuesse*, 385 F.2d at 702). "[Q]uestions of 'convenience' are clearly relevant," *id.* at 910, and the "possibility" of impairment is sufficient, *Foster v. Gueory*, 655 F.2d 1319, 1325 (D.C. Cir. 1981). Here, the possible practical consequences of denying Proposed Defendant-Intervenors' intervention include the burden of relitigating the flycatcher's listing on remand. Regardless of whether Proposed Defendant-Intervenors could convince the Service to deny the petition again, or successfully challenge the Service's decision if it grants the petition, there is "no question" that doing so would be "burdensome." *Fund for Animals*, 322 F.3d at 735. These possible burdens satisfy Rule 24(a)(2)'s impairment requirement. *Id.*: *see also In re Brewer*, 863 F.3d at 873 ("[U]nnecessary litigation burdens have the 'practical consequence' of impairing third party interests in the efficient assertion of their rights."); *Am. Forest Res. Council*, 2007 U.S. Dist. LEXIS 38433, at *3 (concluding environmental groups' "interests would be impaired or impeded by an unfavorable ruling . . . directing defendants to propose rulemaking" to delist a bird under the ESA).

D. Federal Defendants May Not Adequately Represent Proposed Defendant-Intervenors' Interests.

Rule 24(a)(2) requires a party seeking to intervene as of right to make only a "minimal" showing that the representation of its interests "'may be' inadequate." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). This standard is "not onerous." *Crossroads*, 788 F.3d at 321 (quoting *Fund for Animals*, 322 F.3d at 735). Indeed, "a movant 'ordinarily should be

allowed to intervene unless it is *clear* that the party will provide adequate representation.” *Id.* (emphasis added) (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980)). “[T]he burden is on those opposing intervention to show that representation for the absentee will be adequate.” *Am. Tel. & Tel. Co.*, 642 F.2d at 1293.⁴

It is far from “clear” that Federal Defendants will adequately represent Proposed Defendant-Intervenors’ interests in this case.⁵ The D.C. Circuit has “often concluded that governmental entities do not adequately represent the interests of aspiring intervenors.” *Crossroads*, 788 F.3d at 314 (quoting *Fund for Animals*, 322 F.3d at 736). The fact that “parties share a *general interest* in the legality of a program or regulation does not mean their *particular interests* coincide so that representation by the agency alone is justified.” *Associated Dog Clubs of N.Y. State v. Vilsack*, 44 F. Supp. 3d 1, 6–7 (D.D.C. 2014) (emphases added) (quoting *Am. Horse Prot. Ass’n, Inc. v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001)); *see also Crossroads*, 788 F.3d at 321 (cautioning that a “general alignment” of purpose is not “dispositive”); *Costle*, 561 F.2d at 912 (“[A] shared general agreement . . . does not necessarily ensure agreement in all particular respects about what the law requires.”).

Separate representation is necessary here because Federal Defendants and Proposed Defendant-Intervenors have different *specific interests*. *See Costle*, 561 F.2d at 912 (concluding that where “[p]articular interests . . . ‘may not coincide,’” separate representation is justified

⁴ Although the D.C. Circuit has been “inconsistent as to who bears the burden with respect to this factor,” *Fund for Animals*, 322 F.3d at 736 n.7, it most recently indicated that the burden “rests on those resisting intervention.” *In re Brewer*, 863 F.3d at 872 (quoting *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1390 (D.C. Cir. 1980)). “In any event, *Trbovich* makes clear that the standard for measuring inadequacy of representation is low.” *Fund for Animals*, 322 F.3d at 736 n.7.

⁵ Plaintiff and Proposed Defendant-Intervenors have adverse interests. Plaintiff seeks to eliminate the flycatcher’s protections under the ESA, while Proposed Defendant-Intervenors seek to defend those protections.

(quoting *Nuesse*, 385 F.3d at 703)). Proposed Defendant-Intervenors are non-profit, public interest organizations with a narrow focus on protecting the environment, the flycatcher, and its habitat. *See supra* 6–8. In contrast, the ESA requires Federal Defendants “to represent the interests of the American people.” *Fund for Animals*, 322 F.3d at 736. Furthermore, the Service may be concerned with general agency policy, defending its process, and minimizing litigation costs. Given this broad mandate, Federal Defendants cannot—or at least *might not*—adequately represent the “more narrow” interests of Proposed Defendant-Intervenors. *See id.* at 737.

This is underscored by the fact that the Center has already had to intercede to spur the Service to both list the species and designate critical habitat, casting at least some doubt on the extent to which the Service may vigorously defend the flycatcher’s listing. *See Dr. Silver Decl.* ¶¶ 12, 14. Given this history, Proposed Defendant-Intervenors cannot—and should not have to—rely on Federal Defendants to adequately represent their interests in this case. *See Safari Club Int’l*, 281 F.R.D. at 42 (concluding the Service may not adequately represent hunting groups in light of “prior lengthy litigation by th[ose groups] against the FWS”); *Am. Forest Res. Council*, 2007 U.S. Dist. LEXIS 38433, at *3 (concluding the Service may not adequately represent environmental groups when, from the groups’ perspective, the Service had been “insufficiently protective of the [species] and its critical habitat in the course of past litigation and in its proposed rule changes”); *see also Coal. of Ariz./N.M. Cnty. for Stable Econ. Growth v. U.S. Dep’t of Interior*, 100 F.3d 837, 845 (10th Cir. 1996) (concluding the Service may not adequately represent a wildlife photographer’s interest in a bird when the photographer previously sued the Service over protections for that bird).

Given the disparate interests that Proposed Defendant-Intervenors and Federal Defendants will weigh when litigating this case, Proposed Defendant-Intervenors have made the

“minimal” showing that Federal Defendants’ representation of their interests “may be” inadequate, and this divergence of interests satisfies *Trbovich*’s “minimal” standard for inadequate representation. *Fund for Animals*, 322 F.3d at 737 (concluding the Service may not adequately represent interests of a would-be intervenor seeking to defend the agency’s listing of an animal as threatened, but not endangered); *Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64, 70 (D.D.C. 2006) (concluding the Service may not adequately represent interests of hunting groups seeking to defend the agency’s decision to exclude certain species, when bred in captivity, from the ESA’s take prohibition); *Am. Horse Prot. Ass’n*, 200 F.R.D. at 159 (concluding the Department of Agriculture may not adequately represent a non-profit organization when the agency was charged with balancing a “broad spectrum of interests”). Therefore, because Proposed Defendant-Intervenors have satisfied all requirements to intervene as of right, the Court should grant Proposed Defendant-Intervenors’ motion to intervene.

III. Proposed Defendant-Intervenors Alternatively Merit Permissive Intervention.

In the alternative to intervention as of right, Proposed Defendant-Intervenors request leave to intervene permissively under Federal Rule of Civil Procedure 24(b). Permissive intervention is appropriate when would-be intervenors present “(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action.” *EEOC v. Nat’l Children’s Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998).

Proposed Defendant-Intervenors meet these requirements. The Court has an independent ground for subject-matter jurisdiction because Proposed Defendant-Intervenors seek only to defend against claims brought by Plaintiff under federal statutes. *See Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 10 (D.D.C. 2007); *accord* 28 U.S.C. § 1331. Second, Proposed

Defendant-Intervenors' motion is timely. *See supra* 14–15. Finally, because Proposed Defendant-Intervenors seek only to defend against Plaintiff's claims, their defenses share “a question of law or fact in common with the main action.” *EEOC*, 146 F.3d at 1046; *see also Sierra Club*, 523 F. Supp. 2d at 10; *Butte Cnty. v. Hogen*, No. 08-519, 2008 U.S. Dist. LEXIS 46480, at *9 (D.D.C. June 16, 2008).

Having satisfied these prerequisites, the Court should allow Proposed Defendant-Intervenors to intervene permissively. Proposed Defendant-Intervenors have a significant interest in maintaining the flycatcher's endangered listing under the ESA. Having advocated for and helped design protections for the flycatcher and its habitat for decades, Proposed Defendant-Intervenors have a unique and valuable perspective that may aid this Court's review. *See Humane Soc'y of the U.S. v. Clark*, 109 F.R.D. 518, 521 (D.D.C. 1985) (granting permissive intervention to a group with “a perspective which may not otherwise be represented in this matter”). As discussed above in the context of intervention as of right, this motion is timely and will not cause undue delay or prejudice to existing parties because this matter is still in the very earliest stages of litigation. Proposed Defendant-Intervenors moved to intervene at an early stage in the case to ensure their participation will not “unduly delay or prejudice the adjudication of the original parties' rights.” Fed. R. Civ. P. 24(b)(3).

If their intervention is granted, Proposed Defendant-Intervenors will continue to support the efficient adjudication of the case. Given Proposed Defendant-Intervenors' stake in this case and the lack of prejudice that their participation will cause, the Court should at a minimum allow permissive intervention.

CONCLUSION

For the reasons set forth above, Proposed Defendant-Intervenors respectfully request that this Court grant the motion to intervene as of right or, in the alternative, permissive intervention.

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Respectfully submitted,

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