No. 21-35121

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY,
Plaintiff-Appellant,
v.

DEB HAALAND, in her official capacity as Secretary of the Interior,
MARTHA WILLIAMS, in her official capacity as Principal Deputy Director of the U.S. Fish & Wildlife Service,
Defendants-Appellees,
and

STATE OF WYOMING, et al.,
Intervenor Defendants-Appellees.

On Appeal from the United States District Court
for the District of Montana
NO. 9:19-cv-00109-DLC
Hon. Judge Dana L. Christensen

BRIEF OF LAW PROFESSORS DANIEL ROHLF, PAT PARENTEAU, OLIVER HOUCK, AND ROBERT PERCIVAL, AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Federal Rule of Appellate Procedure 29(a)(4)(A), *amici curiae* certify that they have no parent corporations and that no publicly held company owns 10% or more of the *amici curiae*.

Respectfully submitted,

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STATEMENT OF INTERESTS[1]

Each of the *amici* have expertise in both administrative and environmental law. They wish to stress the importance of considering recovery plans issued under the Endangered Species Act ("ESA"), 16 U.S.C. § 1533(f), as "rules" under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551(4), 553(e).

- Professor Daniel Rohlf is a Professor of Law at Lewis and Clark Law School, where he has taught Wildlife Law for over 30 years, including a class on the ESA. He specializes in environmental, natural resources, and sustainability law. He also co-founded the Earthrise Law Center at Lewis and Clark, the law school's domestic environmental law clinic, through which he has litigated cases for 25 years under the ESA, including a case seeking to protect Grizzly Bears and their habitat. He has conducted ESA training for federal agency personnel for over 25 years; has participated in numerous professional conferences and meetings about the ESA; and has published extensively on the ESA and endangered species conservation, including on issues related to recovery plans.

- Professor Pat Parenteau is a Professor of Law, and Senior Counsel, at the University of Vermont Law School Environmental Advocacy Clinic. He has taught a class on the Endangered Species Act for 28 years, and has extensive expertise in environmental and natural resources law. He has worked in the field for decades, litigating major cases, testifying before Congress, drafting language that was incorporated into the ESA amendments, and publishing numerous articles on the ESA and the recovery process. He served as Special Counsel to the FWS in the Spotted Owl ESA Exemption Committee ("God Squad") proceedings in 1992, and participated in all other exemption committee proceedings.

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[1] Amici file this brief solely as individuals and not on behalf of the institutions with which they are affiliated. All parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned counsel certifies that counsel for amici authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity–other than amici and their counsel–contributed monetarily to this brief's preparation or submission.

- Professor Oliver Houck is the David Boies Chair in Public Interest Law at Tulane Law School, where he has taught classes on the ESA and natural resource law for 40 years. He has published several books and articles on environmental law and policy issues, including the ESA. Prior to teaching at Tulane Law School, he litigated ESA issues for seven years.

- Professor Robert Percival is the Robert F. Stanton Professor of Law and the Director of the Environmental Law Program at the University of Maryland School of Law. He has taught Environmental Law at Maryland since 1987, and is a visiting professor at Harvard Law School and the Georgetown University Law Center. He also taught Administrative Law at both Maryland and Georgetown. Professor Percival is the principal author of a leading casebook on environmental law, *Environmental Regulation: Law, Science & Policy,* first published in 1992 and now in press for its ninth edition.

BACKGROUND

I. Introduction

This case involves a challenge by the Center for Biological Diversity ("the Center") to the denial by the Fish and Wildlife Service ("FWS") of the Center's petition to amend the outdated 1993 Grizzly Bear Recovery Plan—a species listed as "threatened" under the ESA. The petition was submitted pursuant to Section 553(e) of the APA. However, the FWS refused to consider the petition on the ground that a recovery plan is not a "rule" within the meaning of the APA. Excerpts of Record ("ER") at 9, 33–34. The district court upheld that decision. ER at 18–27. As demonstrated below, that determination is wrong; hence, this Court should reverse the district court's decision.

II. The Role of the Recovery Plan

Congress enacted the ESA to "provide a program for the conservation of . . . endangered species and threatened species." 16 U.S.C. § 1531(b). "Conservation" means to use "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures [of the Act] are no longer needed," 16 U.S.C. § 1532(3)—i.e., to *recover* the species. This recovery objective permeates the statute, including Section 4(f)(1), which provides that the FWS "*shall develop and implement*" recovery plans "for the conservation and survival of endangered species and threatened species[,]" 16 U.S.C. § 1533(f)(1) (emphasis added), and Section 7, which requires all federal agencies to use their authorities "for the conservation" of listed species, and to ensure that their activities are "not likely to jeopardize the continued existence" of any such species or "result in the destruction or adverse modification" of any of the habitat deemed "critical" to the species' recovery. *Id.* § 1536(a)(1)–(2).

The statute further provides that, "in developing and implementing recovery plans," the FWS "shall, to the maximum extent practicable," incorporate in each such plan "such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species," and "objective, measurable criteria which, when met, would result in *a determination . . . that the species be removed from the list*." *Id.* (emphasis added); *see also Fund for Animals*

v. Babbitt, 903 F. Supp. 96, 104 (D.D.C. 1995) (observing that "a recovery plan 'delineates, justifies, and schedules the research and management actions necessary to support recovery of a species, including those that, if successfully undertaken, are likely to permit reclassification or delisting of the species.'") (internal citation omitted). The statute also provides that "prior to final approval of a new or revised recovery plan," the FWS "shall . . . provide public notice and an opportunity for public review and comment on such plan," and that the FWS "shall consider all information presented during the public comment period prior to approval of the plan." 16 U.S.C. § 1533(f)(4).

III. The Right to Petition Under the APA

The APA provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). This right is firmly grounded in the First Amendment to the Constitution, which affords "the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I; *see also* S. DOC. NO. 79-248, at 359 (1946) ("The right of petition is written into the Constitution itself.").

The APA defines the term "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4). As the Supreme Court has observed, this term "is *defined broadly*." *Perez v. Mortg.*

Bankers Ass'n, 575 U.S. 92, 95 (2015) (emphasis added). Indeed, as this Court has observed, "[t]he term 'rule' may embrace '*virtually every statement an agency may make*.'" *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 838 (9th Cir. 2006) (emphasis added), *vacated on other grounds*, 490 F.3d 725 (9th Cir. 2007). As explained below, recovery plans fall squarely within the APA's capacious definition of "rule."

ARGUMENT

I. A RECOVERY PLAN IS A "RULE" UNDER THE PLAIN LANGUAGE OF THE APA.

Again, the APA defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4). Recovery plans qualify as "rules" under this definition for several reasons.

A. A Recovery Plan Implements and Prescribes Law with Future Effect.

Recovery plans both implement and prescribe law with future effect, because the ESA mandates that the FWS "*shall* develop and *implement*" recovery plans for the conservation of listed species. 16 U.S.C. § 1533(f)(1) (emphasis added). Thus, the statute mandates that the FWS specifically determine what current and future measures must be taken to bring a species back to the point at which the statute's protections are no longer needed, and further mandates that the

agency "implement" those measures. *See also* S. REP. NO. 100-240, at 9 (1987) (explaining that the addition of the requirement for "objective, measurable criteria" was added to "ensure that plans are explicit as possible in describing *the steps to be taken in the recovery of a species*") (emphasis added); *see also Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 (D.C. Cir. 2012) (observing that the Secretary of the Interior has "statutory obligations to create and to *implement a recovery plan*") (emphasis added); U.S. FISH & WILDLIFE SERV., GRIZZLY BEAR RECOVERY PLAN (1993), https://www.fws.gov/mountain-prairie/es/species/mammals/grizzly/Grizzly_bear_recovery_plan.pdf ("1993 Recovery Plan") at 168; ER at 64 ("All participating federal and state agencies will sign the document and *agree to its provisions*.") (emphasis added).

The district court ruled that recovery plans do not implement law because they do not "bind an agency into any single course of action." ER at 25. Yet, this is not the correct analysis. The fact that the agency may change its mind as circumstances themselves change does not deprive these documents of their function as "rules." For example, as this Court has explained, the measures delineated in a recovery plan "are an important component of both the jeopardy and adverse modification determinations" that must be made pursuant to Section 7 of the statute. *Alaska v. Lubchenko*, 723 F.3d 1043, 1054 (9th Cir. 2013); *id.* (noting that the National Marine Fisheries Service was required "to consider

whether the proposed action, continued fishing, could prevent the species from achieving the Recovery Plan's goals for delisting"). Indeed, the FWS's own Section 7 Consultation Handbook explains that recovery plans can also designate "recovery units" that form the basis for jeopardy and adverse modification determinations under Section 7, rather than requiring such assessments to be based only on the species or critical habitat *as a whole*. *See* U.S. FISH & WILDLIFE SERV., CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING CONSULTATION AND CONFERENCE ACTIVITIES UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT (1998), https://www.fws.gov/endangered/esa-library/pdf/CH4.PDF.

Moreover, another statute, the Marine Mammal Protection Act, requires compliance with ESA recovery plans before certain other actions may be taken with respect to protected marine species. *See* 16 U.S.C. § 1371(a)(5)(E)(i)(II) (requiring preparation of a recovery plan before incidental taking may be permitted); 16 U.S.C. § 1374(c)(4)(A) (allowing permits for taking listed species only if the taking is consistent with any conservation or recovery plan, or if no such plan exists, an evaluation indicates that such takes would enhance the recovery of the species); 16 U.S.C. § 1387(f)(11) (requiring take reduction plans to be consistent with recovery plans promulgated under the ESA); *see also In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.,* 818 F. Supp. 2d 240, 257–60 (D.D.C. 2011), *aff'd* 516 F. App'x 5 (D.C. Cir. 2013) (ruling

that the FWS acted reasonably in denying an import permit for a polar bear trophy because the import was not "consistent" with "the factors that would be addressed in a . . . recovery plan" for the species). Accordingly, a recovery plan both "implements" and "prescribes" what is required by law.

B. A Recovery Plan Implements and Prescribes Policy with Future Effect.

For similar reasons, recovery plans also implement and prescribe *policy*. *See* 5 U.S.C. § 551(4). They constitute the expert agency's determination of the actions that are *necessary to recover the species*, as a matter of both law *and* policy. Indeed, there are many ways to recover a species, e.g., by preserving its habitat or acquiring new habitat, or by reintroducing or relocating individual members of the species—all of which are crucial *policy* determinations the agency must make in crafting the most effective recovery strategy for any particular species.

The district court wrongly reasoned that because the plan "does not, in and of itself, create change" it cannot "implement" policy. ER at 24. However, the mere fact that the plans are not self-effectuating does not remove them from the definition of "rule." *See, e.g.*, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 892 (1990) (land withdrawal program qualified as "rules of general applicability" under the APA even though it was not yet ripe for review); *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998) (noting that although a land use plan was not yet ripe for review, plaintiff "will have ample opportunity later to bring its

legal challenge" to the lawfulness of the plan when the agency takes concrete steps to implement it); *see also Norton v. S. Utah Wilderness All.,* 542 U.S. 55, 70 (2004) (observing that a land use plan constitutes the agency's "policy determination").

In fact, courts have held that matters are "rules" within the meaning of the APA regardless of whether they are self-effectuating. *See, e.g.*, *Batterton v. Marshall*, 648 F.2d 694, 705 (D.C. Cir. 1980) (finding Department of Labor statistical methodology a "rule" because it was used to determine who was considered "unemployed" for purposes of allocating emergency job monies); *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994) (stating that eviction procedures had "all the hallmarks of a rule" despite having "no immediate, concrete effect on anyone").

In concluding that recovery plans are not "rules," the district court seemed to believe that the unpublished opinion in *Friends of the Wild Swan, Inc. v. Dir. of United States Fish & Wildlife Serv.*, 745 F. App'x 718, 720 (9th Cir. 2018), which held that a recovery plan is not a final agency action for purposes of judicial review under the APA, necessarily controls this issue. Thus, the district court believed that requiring the FWS to respond to a petition for rulemaking to update the recovery plan was a "backdoor" attempt to circumvent this ruling. ER at 26–27.

However, not only is *Friends of the Wild Swan, Inc.* unpublished, and hence not controlling authority, *see* 9TH CIR. R. 36-3(a), but the present case does not concern the judicial reviewability of a recovery plan. Rather, the only issue presented in *this* case is whether a petition to *revise* a recovery plan is authorized by the APA. Because, as demonstrated above, a recovery plan is "an agency statement . . . designed to implement and prescribe law or policy," it falls squarely within the broad APA definition of "rule." Accordingly, any "interested person"—including the Center—may petition the agency to amend such plans. 5 U.S.C. §§ 551(4), 553(e).

C. A Recovery Plan Also Interprets Law and Policy.

At an absolute minimum, there can be no question that recovery plans "interpret" law and policy within the meaning of "rule"—a part of the APA definition that was not addressed by the district court.

The word "interpret" means "to explain." *Interpret*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/interpret (last visited March 22, 2021). The Grizzly Bear Recovery Plan certainly "explains" what is necessary to recover the species. It represents the agency's expert determination of the particular measures that will be most effective in "conserving" the species—i.e., bringing it back to the point where the statute's protective measures are no longer needed. Thus, recovery plans "interpret" both law and

policy. *See Perez*, 575 U.S. at 97 ("[T]he critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.") (internal quotation omitted); *See also Animal Legal Def. Fund*, 469 F.3d at 840 (explaining that an agency's "draft policy" would qualify as an interpretative rule because it "would have summarized 'what the [United States Department of Agriculture] believe[d] must be considered and included' in the environmental enrichment plan" required by the Animal Welfare Act); *Gunderson v. Hood*, 268 F.3d 1149, 1154 (9th Cir. 2001) ("[A]gencies issue interpretive rules to clarify or explain existing law or regulations so as to advise the public of the agency's construction of the rules it administers."); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1393–94 (9th Cir. 1995) (the preamble to the migratory bird rule was an "interpretive rule" because it explained the agency's "understanding of [a] statutory term"). For this additional reason, recovery plans constitute "rules" within the meaning of the APA.[2]

[2] Contrary to arguments made by Defendants below, the right to petition an agency applies to *any* APA rule, including interpretative rules. *See, e.g.,* MAEVE P. CAREY, CONG. RESEARCH SERV., R46190, PETITIONS FOR RULEMAKING: AN OVERVIEW 4–5 (2020); *see also Soundboard Ass'n v. U.S. Fed. Trade Comm'n*, 254 F. Supp. 3d 7, 14 n.3 (D.D.C. 2017) (noting that the plaintiffs could seek the desired outcome by petitioning the agency to amend its interpretive rule under 5 U.S.C. § 553(e)).

II. THE INCLUSION OF A RIGHT TO PETITION TO HAVE A SPECIES LISTED DOES NOT FORECLOSE RULEMAKING PETITIONS TO AMEND A RECOVERY PLAN.

In finding that a recovery plan is not a "rule," the district court observed that although Congress specifically included in Section 4 of the ESA a right to petition the FWS to *list* a species as either threatened or endangered, it did not provide a similar right to petition the agency to revise a recovery plan. ER at 26. However, the mere fact that the ESA specifically mentions "petitions" for listing, but not for recovery plans, does not mean that Congress meant to *prohibit* petitions to amend recovery plans. Rather, the APA requires agencies to follow all of its procedures *in addition* to any procedures specifically provided by a particular organic statute. As the Administrative Conference of the United States has succinctly explained, "[b]eyond the APA's *general right to petition*, Congress has occasionally granted more specific rights to petition under individual statutes." Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,114, 75,117 (Dec. 17, 2014).

Indeed, all of the APA's procedures apply unless they are expressly limited by statute—a limitation that was not included in the ESA. *See* 5 U.S.C. § 559 (stating that statutes enacted subsequent to the APA "may not be held to supersede or modify this chapter . . . except to the extent that it does so *expressly*") (emphasis

added); *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999) (absent an express exception, reviewing courts must apply APA standards to agency factual findings).

For example, no one would reasonably suggest that the public may not petition to amend some *other* "rule" that the FWS has promulgated under the ESA—e.g., the Section 7 or Section 10 regulations—even though those sections of the statute do not mention "petitions" either. Thus, this reasoning of the district court simply begs the question of whether a recovery plan is a "rule" in the first instance. If it is, then the APA clearly applies, as it does to all other "rules." *See also Bennett v. Spear*, 520 U.S. 154, 175 (1997) (explaining that "it would not be maintainable" to contend that "the causes of action against the Secretary set forth in the ESA's citizen-suit provision are exclusive, *supplanting those provided by the APA*") (emphasis added).

III. PETITIONS TO AMEND RECOVERY PLANS ARE CRUCIAL TO ENSURING THAT THEY REFLECT THE MOST RELEVANT SCIENTIFIC INFORMATION NECESSARY TO CONSERVE THE SPECIES.

The right to petition an agency to issue, amend, or rescind a rule is vital to ensure that agency "rules" reflect important, current scientific, and other relevant information. As the legislative history to the APA stresses, the right to petition "is of *the greatest importance*." S. DOC. NO. 79-248, at 359 (1946) (emphasis added). Indeed, scholars uniformly recognize the importance of rulemaking petitions. *See, e.g.*, Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts?*

Petitions and Public Production of Information in Environmental Law, 58 UCLA L. REV. 321, 325 (2010) (explaining that in formulating petitions, the public may gather diffuse information that an agency would struggle to gather independently); William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1, 25–26 (1988) (stressing that rulemaking petitions may contain "idea[s] altogether new to the agency," "present an eminently sensible solution to a problem facing the agency," or be "a welcome excuse to engage in regulatory change which, for political or other reasons, the agency was loath to institute on its own initiative."); Sean Croston, *The Petition Is Mightier Than the Sword: Rediscovering an Old Weapon in the Battles over "Regulation Through Guidance"*, 63 ADMIN. L. REV. 381, 389 (2011) ("[P]etitions would force agencies to simply but reasonably explain the substance of any controversial guidance document, rather than hiding behind procedural exemptions to standard notice-and-comment rulemaking").

In fact, Congress clearly recognized the importance of public input regarding the contents of recovery plans by specifically requiring that all such plans, and revisions thereto, be subject to public notice and comment. 16 U.S.C. §§ 1533(f)(4)–(5). Thus, obviously Congress believed it was crucial to the scientific integrity of these plans to allow for public input, because the public may have

important information bearing on the measures needed to recover a particular species.

Yet, under the FWS's formulation, such input is permitted only when the agency *itself* decides to revise a recovery plan. Not only does this ignore the universal right conferred by the APA to petition for revisions to *any* agency rule, 5 U.S.C. § 553(e), but it makes no practical sense. If, for whatever reason, the FWS chooses not to revise a certain plan, despite drastic changes in the circumstances that affect the ability to recover the species, there would be no process available to the public to inform the agency of the need for such changes. Moreover, unlike other provisions of the ESA (e.g., the listing provisions), the recovery plan requirements do not impose any deadline on the agency for the issuance of either initial or revised recovery plans—making it all the more important that interested persons be able to petition the agency to issue and revise such plans when, for whatever reason, the agency fails to do so.

Indeed, it is particularly ironic that one of the main reasons the district court rejected the Center's right to petition for an amendment to the Grizzly Bear Recovery Plan is the observation that "recovery plans are flexible documents that allow an agency to deviate from the plan *as circumstances change*." ER at 25 (emphasis added); *see also id.* (citing *Fund for Animals*, 903 F. Supp. at 107–08, *amended*, 967 F. Supp. 6 (D.D.C. 1997) (noting that "[b]y the time an exhaustively

detailed recovery plan is completed and ready for publication, *science or circumstances could have changed and the plan might no longer be suitable*") (emphasis added)). Rather than defeat the need to respond to a petition to revise a recovery plan, this observation cries out for application of the right to petition for revisions to such plans. It is vital that the recovery plan be as scientifically current as possible. Otherwise, the overarching statutory goal to "conserve" the species will be difficult, if not impossible, to achieve.

The 1993 Grizzly Bear Recovery Plan itself directs the FWS to "[r]eevaluate and refine population criteria *as new information becomes available*." 1993 Recovery Plan at 44; ER at 58 (emphasis added). Yet, absent the exercise of this vital petition right, such critical changes may *never* be made, to the detriment of listed species and the public that depends on such species for aesthetic, recreational, scientific, and myriad other important interests. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 177 (1978) (observing that in enacting the ESA, "Senators and Congressman uniformly deplored the *irreplaceable loss to aesthetics, science, ecology, and the national heritage should more species disappear* (internal citation omitted) (emphasis added); *id.* at 178 (noting that endangered species "are *keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask*") (citation omitted) (emphasis added).

For all of these reasons, and because the term "rule" in the APA is "defined broadly," *Perez*, 575 U.S. at 95, the FWS should be required to fully consider the Center's petition to amend the Grizzly Bear Recovery Plan.

CONCLUSION

For the foregoing reasons and for those set forth in the Center's opening brief, this Court should reverse the district court's decision in this case.

Respectfully submitted,

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[3]Amici wish to thank Harvard Law student Julia O'Neil and recent graduate Elizabeth MeLampy for their invaluable assistance in drafting this brief.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G), I hereby certify that the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 3975 words (excluding the exempted parts of the brief). I also certify that this amicus brief complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5).

DATED: August 25, 2021

_____/s/_____
Katherine Anne Meyer

CERTIFICATE OF SERVICE

I certify that on August 25, 2021, I electronically filed the foregoing Brief of Amici Curiae Law Professors in Support of Plaintiff-Appellant, and therefore, served counsel for the Defendants-Appellees, by using the appellate CM/ECF system.

DATED: August 25, 2021

____/s/_____
Katherine Anne Meyer