Case No. 2:15-cv-3768-PMG(LUD)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES FISH AND WILDLIFE SERVICE,

Defendant-Appellant

v.

SOUTH CAROLINA ADVOCATES FOR CAPTIVE EXOTICS,

Plaintiff-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE PLAINTIFFS-APPELLEES

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STATEMENT OF THE ISSUES

Did the District Court err in holding that Appellee South Carolina Advocates for Captive Exotics has adequately alleged standing?

Did the District Court err in denying the United States Fish and Wildlife Service's motion for judgment on the pleadings as to the lawfulness of its denial of SCACE's petition for rulemaking?

STATEMENT OF THE CASE

This appeal arises from the District Court's denial of Appellant United State Fish and Wildlife Service's ("FWS") motion for judgment on the pleadings. Appellee South Carolina Advocates for Captive Exotics ("SCACE") brought this action for declaratory judgment indicating that FWS's denial of SCACE's petition for rulemaking violates the Administrative Procedures Act ("APA"); setting aside FWS denial of the petition as unlawful; and declaring that the "industry and trade" definition currently set forth in 50 C.F.R. Section 17.3 is contrary to the Endangered Species Act ("ESA") and does not control the meaning of "commercial activity" in 16 U.S.C. Section 1538(b)(1)(B).

The District Court denied FWS's motion for judgment on the pleadings, holding that SCACE had adequately pled standing; and that FWS's regulatory definition limited "industry and trade" in a manner contrary to congressional intent. Thus, FWS was not entitled to judgment as a matter of law.

STATEMENT OF FACTS

Appellee SCACE is a nonprofit organization and animal protection charity based in South Carolina. Appellant FWS is a federal agency within the Department of the Interior charged with implementing the ESA with respect to land animals.

SCACE advocates on behalf of captive exotic animals. This includes monitoring and documenting living conditions; conferring with experts on those conditions; reporting apparent violations related to those conditions to local officials; and engaging in public education and media campaigns. One of SCACE's projects includes monitoring the well-being of a tiger (*Panthera tigris*) named Calixta. The *Panthera tigris* is an endangered species.

Calixta is owned by Mabel Moxie's Cantankerous Cats ("MMCC"). MMCC is a South Carolina based for-profit corporation that exhibits animals. SCACE has documented MMCC staff striking and jabbing Calixta with metal poles; shocking her with an electrical prod; and keeping her in an unnaturally small enclosure. Calixta also has visible wounds on her face.

In 2014, MMCC entered into a contract with the University of Agartha in California so that Calixta can be exhibited at the Agartha home football games. MMCC receives a flat fee plus 10% of the university's football ticket sales as compensation. Calixta was transported last fall to California for this purpose. This contract indicates that Calixta will again be transported this fall to California from South Carolina.

SCACE has sent personnel and equipment to California to continue monitoring and advocating for Calixta. SCACE has continued to document Calixta's poor living conditions in California. These conditions include a lack of adequate ventilation in the transportation unit; an unnaturally small enclosure; and the loud noises of thousands football fans. These conditions have caused Calixta foot and joint problems. Further, Calixta has not had access to a pool at the University of Agartha, despite temperatures reaching over 90 degrees Fahrenheit. This is a necessary component of Calixta's habitat, as tigers use pools to cool themselves.

In order to continue its advocacy for Calixta, SCACE filed a petition for rulemaking with FWS. SCACE's petition requested that FWS expand its working definition of "industry and trade" to include transportation and exhibition of endangered animals, and not only buying and selling.

The ESA states, in part, "it is unlawful for any person… to deliver… carry, transport, or ship in interstate… commerce, by any means whatsoever and in the course of a commercial activity, any [endangered] species." 16 U.S.C. § 1538(a)(1)(E) (1988). Commercial activity is

defined as "all activities of industry and trade, including but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: Provided however, That it does not include exhibition of commodities by museums or similar cultural or historical organizations." 16 U.S.C. § 1532(2) (1988).

FWS declined to enforce the ESA against MMCC because it determined that "industry and trade," as used in the ESA definition of "commercial activity," means "the actual or intended transfer of wildlife or plants from one person to another person in the pursuit of gain or profit." 50 U.S.C. §17.3. Because Calixta is not bought and sold, and merely "rented," FWS concluded that the contract between MMCC and the University of Agartha is not subject to ESA regulation. Thus, FWS denied SCACE's petition for rulemaking. The denial of the petition for rulemaking has forced SCACE to divert scare resources to advocate on Calixta's behalf in California. This includes traveling from South Carolina to California to monitor Calixta; researching California laws in order to continue to advocate on Calixta's behalf; and building connections in California to further these purposes. Furthermore, SCACE has had difficulty obtaining the same information readily available in South Carolina from state officials in California, thereby impeding SCACE's ability to provide its informational objective to the community.

SUMMARY OF THE ARGUMENT

The Supreme Court held in *Lujan* that a Plaintiff must establish an injury in fact, causation, and redressability as a constitutional minimum to get into federal court. SCACE has established all three of these elements and thus possesses standing to litigate this issue. First, SCACE has established a specific injury in fact through several different modes of injury in fact analysis. The concrete injury SCACE has suffered, and will continue to suffer, is the diversion of

significant resources to travel from South Carolina to California to monitor Calixta, researching California laws in order to continue to advocate on Calixta's behalf, and the time it takes to build connections in California to further these purposes. Furthermore, SCACE provides a service to its community by providing information about Calixta's conditions. This has been hindered because of Calixta's relocation to California. Second, SCACE has shown that an injury to its organizational purpose has occurred because of the aforementioned difficulty in monitoring Calixta and providing the necessary information about her conditions to the community. Third, the APA provides standing because the denial of the petition for rulemaking is considered final agency action. Lastly, as a matter of public policy, courts have recognized that there is a trend in case law expanding the groups of people who have suffered an injury in fact through administrative action and thus the standing requirement should be considered lenient.

SCACE has also alleged facts sufficient to demonstrate both causation in redressability. Causation has been established because if it were not for FWS's denial of SCACE's petition for rulemaking, the increased burden of monitoring Calixta in California will not occur. Redressability flows naturally from causation as this element of standing only requires a favorable decision would likely redress the injury. An injunction preventing Calixta from being transported to California or a declaratory judgment indicating FWS interpretation of the ESA would remedy the injury to SCACE caused by FWS.

The denial of a petition for rulemaking must be accompanied by a detailed explanation of the reasoning for the denial. FWS failed to provide a detailed explanation as to why SCACE's petition for rulemaking was denied. Because FWS failed to demonstrate the reasoning behind the denial, FWS' decision was arbitrary and capricious. Furthermore, FWS' interpretation of 50 C.F.R. Section 17.3 and 16 U.S.C. Section 1532(2) is incorrect: Limiting the definition of "industry

and trade" to mean only the buying and selling of animals does not allow for a cohesive reading of 16 U.S.C. Section 1532. The canons of statutory interpretation mandate that statutes are to be interpreted in a manner that gives effect to all parts of the statute. Therefore, the appropriate interpretation is the one that includes all aspects of commercial activity in the definition of "industry and trade."

STANDARD OF REVIEW

A motion for judgment on the pleadings is found in F. R. Civ. P. 12(c). A judgment on the pleadings is properly granted when, after accepting all factual allegations in the complaint as true, there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law. *Chavez v. U.S.*, 683 F.3d 1102, 1108 (9th Cir. 2012). A motion for judgment on the pleadings is reviewed *de novo*. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir 2009).

The analysis between a Rule 12(c) motion and a Rule 12(b)(6) motion is considered "substantially identical." *Id*. "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Further, standing is a question of law that is reviewed *de novo*. *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1124 (9th Cir. 1996) (citing *Barrus v. Sylvania*, 55 F.3d 468, 469 (9th Cir. 1995)).

In regards to administrative agencies, the court affords FWS a high level of deference when it comes to rule making. *International Union v. Chao*, 361 F.3d 249, 255 (3rd Cir. 2004). However, when the court does review an agency's decision, it determines whether or not the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 USCA § 706(2).

ARGUMENT

STANDING

I. Injury in Fact

A. SCACE has demonstrated a concrete injury in fact because FWS denial of SCACE's petition for rulemaking has led to an increased economic and administrative cost in monitoring Calixta in California.

Appellant FWS argues that SCACE lacks standing. Standing is a jurisdictional requirement found in Article III of the United States Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574 (1992). A Plaintiff bears the burden of establishing the elements of standing. *Lujan*, 504 U.S. at 560. The elements of standing are (1) injury in fact; (2) causation; and (3) redressability. *Id*. These elements represent the constitutional minimum under Article III necessary to confer standing. *Id*. Injury in fact requires more than just an articulated "cognizable interest", it requires that the Plaintiff be directly injured. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). A threatened or actual "concrete injury" in fact must be at the core of any dispute that is capable of judicial resolution. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974). Injury to aesthetic surroundings has been recognized as sufficient to satisfy the injury in fact requirement. *See Animal Lovers Volunteer Ass'n Inc., (A.L.V.A.) v. Weinberger*, 765 F.2d 937, 938 (9th Cir. 1985).

SCACE's ability to advocate for the organization's intended purpose has been diminished, considerable resources must be diverted to continue this intended purpose, and SCACE has generally suffered economic harm, as a result of FWS's inaction. At this stage in the proceedings these allegations must be accepted as true. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in

favor of the complaining party."). Thus, the judgment of the District Court should be affirmed because SCACE has established a concrete injury in fact based off the pleadings.

The injury in fact requirement found in Article III of the United States Constitution is truly an elusive concept. Its complexity has led our United States Supreme Court to note that "generalizations about standing to sue are largely worthless as such." *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 151 (1970); *See also Am. Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 655 (7th Cir. 2011) (recognizing the constitutional standing doctrine as "tenuous"). Despite this difficulty in determining standing it is at least apparent that courts look for concrete facts indicating that a Plaintiff has truly been injured. *See Sierra Club*, 405 U.S. at 731. A court will look to the "specific circumstances of individual situations" to determine standing. *U.S. ex rel. Chapman v. Fed. Power Comm'n*, 345 U.S. 153, 156 (1953). Such concrete facts are apparent here as SCACE has been directly injured by FWS's inaction[1].

The failure of FWS to bring an endangered species such as Calixta under the protections of the Endangered Species Act ("ESA") is the catalyst that confers standing upon SCACE. Injury in fact is found where the relief sought by the Plaintiff will avert or mitigate the harm caused by the Defendant. *See Am. Bottom Conservancy*, 650 F.3d at 656. The harms to SCACE has already suffered are the cost of continuing to monitor Calixta from California and SCACE's inability to obtain the same information it provides to the community in South Carolina. These injuries are largely administrative and economic in nature. Because of FWS's inaction, SCACE must now divert significant resources to travel from South Carolina to California to monitor Calixta, research California laws in order to continue to advocate on Calixta's behalf, and to build connections in

[1] Courts have readily recognized that government inaction can cause an injury in fact. *E.g., Lujan,* 504 U.S. at 552.

California to further these purposes. Further, SCACE provides a service to its community by providing information about Calixta's conditions. This has been hindered because of Calixta's relocation to California.

The standard for demonstrating that an injury has or will occur is low. Courts have found injury in fact where the event that caused the harm has not occurred yet and required only that the alleged injury not be "so conjectural as to be more creative imagination than fact." *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 905-906 (Del. 1994). The facts present here rise to a level significantly higher than the *Oceanport* standard as SCACE has suffered a harm that has already occurred and will continue to occur absent judicial intervention. The harm suffered by SCACE is more in line with an actual or direct injury. Actual or direct harm has been held to confer standing and is analogous to establishing an injury in fact. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 114 (1979) (recognizing the need for actual injury to be felt by the Plaintiff); *See also Lujan*, 504 U.S. at 575 (discussing the need for a direct injury to the Plaintiff that is not a general interest common to all members of the public). SCACE's actual or direct injury solidifies the organization as having a personal stake in the outcome of this controversy. *See Baker v Carr*, 369 U.S. 186, 205 (1962) (recognizing the need of a personal stake in the outcome of a case to indicate constitutional standing under federal law).

These are not the conjectural or hypothetical injuries that courts fear when addressing issues of standing. *See Lujan*, 504 U.S. at 560 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). The reason for this goes to the need for the separation of the three branches of government as "[v]indicating the public interest…is the function of Congress and the Chief Executive." *Id.* at 576. The purpose of our courts is to "decide the rights of individuals…" *Marbury v. Madison*, 5 U.S. 137, 170 (1803). Courts have a distinct fear of adjudicating issues where only a generalized

interest felt by the public at large is at stake. Thus, the dispositive question in this circumstance is whether SCACE is seeking the court to address a private right as opposed to a public right. SCACE clearly seeks to vindicate the former.

The distinction between a public and private right was discussed in detail in *Sierra Club*. 405 U.S. 727. In *Sierra Club*, a developer bid for and received a right to conduct surveys and explorations in the Mineral King Valley in order to complete a master plan for a potential resort. *Id*. at 729. The United States Forest Service authorized this potential development and the Sierra Club, a nationwide conservationist group, sued to prevent the development from happening. *Id.* at 729-730. The Sierra Club did not plead an individualized harm, but rather indicated that development would negatively impact the scenery, wildlife, and recreational enjoyment of the park by future generations. *Id*. at 734. The court recognized that aesthetic and environmental well-being can be considered an injury in fact, but held that this concept did not negate the fact that the party bringing the lawsuit must "be himself among the injured." *Id.* at 734-735. The court concluded that the outcome would have likely been different had the Sierra Club plead that its individual members used the park for any purpose. *Id*. at 745. This was because the "impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King…and for whom the aesthetic and recreational values of the area will be lessened by the [proposed development]." *Id*.

SCACE has felt a direct harm because of the increased cost in monitoring Calixta that is not felt by the general public. The public at large has not suffered any such direct harm. This is a private right SCACE is seeking to have vindicated by our federal judicial court system. This is the private right Chief Justice Marshall referred to in *Marbury* and what Justice Scalia felt the Plaintiff lacked to indicate standing in *Lujan*.

SCACE does not merely have a "special interest" in monitoring Calixta, a similar issue discussed by the *Sierra Club* court. A mere "'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem..." does not immediately confer standing as an injury in fact. *Sierra Club*, 405 U.S. at 739 (discussing a similar doctrine of standing under the Administrative Procedures Act). This requirement reiterates the idea that a Plaintiff must feel a concrete injury that is not felt solely by the public at large. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 (1976) ("an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III."). Granted, both the Sierra Club and SCACE are similar organizations and share similar missions. The Sierra Club's principal reason for existence is to preserve the environment while SCACE seeks to protect exotic animals. In *Sierra Club*, the court felt that the Sierra Club's generalized interest in protecting the environment did not give it standing to litigate any issue related to the environment simply because it had a history of advocating for the environment. *Id*. at 739. Sierra Club did not specifically allege in its pleadings that its members suffered any type of individualized harm as a result of the proposed development. *Id*. This is distinct from the case at hand as the harm felt here is more particularized despite SCACE's long history of advocating on behalf of endangered animals. SCACE does not seek to vindicate a remote special interest in the preservation of all tigers, but rather an individualized interest in a single tiger: Calixta.

Additionally, courts have directly recognized that attachment to a particular animal or animals can lead to an injury in fact because of the similarities the preservation of animals has with the general environment. *Lujan* held that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purpose of standing." *Lujan*,

504 U.S. at 562-563. However, a more illustrative example can be found in *Am. Soc'y for Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus*. 317 F.3d 334 (D.C. Cir. 2003). In *Am. Soc'y for Prevention of Cruelty to Animals* the Court considered the implications of standing in regards to an individual Plaintiff ("Rider") who worked with Asian elephants at a circus. *Id*. at 335. Rider alleged that other employees "beat the elephants with sharp bull hooks, kept the elephants in chains for long periods of time, and forcibly removed baby elephants from their mothers at an earlier age than they could normally be weaned in the wild." *Id*. Rider left his job at the circus because of this mistreatment. *Id*. Rider further alleged that he became attached to the Asian elephants and, despite no longer working with the circus, would continue to visit them as a circus patron to continue his personal relationship with them. *Id*. The court held that this established a sufficient injury in fact to grant standing because it established Rider as having a concrete injury in fact that was distinct from the generalized interest of the public. *Id*. at 337. The court felt that Rider's desire to continue to see the Asian elephants made the injury "present or imminent." *Id.* The court further held that "[w]e can see no principled distinction between the injury that person suffers when discharges begin polluting the river and the injury Rider allegedly suffers from the mistreatment of the elephants to which he became emotionally attached during his tenure at Ringling Bros. – both are part of the aesthetic injury." *Id*.

Similar to the injury sustained by Rider in *Am. Soc'y For Prevent of Cruelty to Animals*, SCACE's injury is a personal one and should be considered part of aesthetic injury courts have historically protected in the realm of standing. The harm felt by the personal connection to a particular endangered animal, in this case the tiger Calixta, is similar to the harm felt when there is harm to the aesthetic surroundings of a park. SCACE is in the business of monitoring exotic species, but also has a lengthy history monitoring this specific tiger over a number of years.

Although SCACE has numerous other preservation campaigns with other exotic animals SCACE's members have developed a personal connection with Calixta, not just all tigers in general.

This connection is reinforced by the fact that SCACE is also not makeshift group of Plaintiffs taken from the public at large. It is an organization that specifically monitors Calixta so any action impeding this possibility is an injury in fact to the organization's purpose. This is particularly true considering Mabel Moxie's Cantankerous Cats' ("MMCC") history of mistreatment of Calixta in South Carolina and the continued mistreatment by the University of Agartha in California. Because of this mistreatment and the history of the organization's purpose SCACE and its members have developed a similar personal attachment that was felt by Rider in *Am. Soc'y for Prevention of Cruelty to Animals*[2]. Thus, SCACE has also suffered the injury in fact because it has demonstrated that it has an emotional or personal connection with Calixta. This is the same type of injury to the environment that courts have historically recognized as an injury sufficient to confer standing.

B. SCACE's specific organization purpose is to monitor Calixta and provide information to the community on her conditions. Thus, SCACE can also demonstrate injury to its organizational purpose.

This concept is particularly relevant because SCACE has also sustained harm to its organizational interest in which, as far as the inquiry into Article III standing is concerned, courts have used a two-part test to determine injury in fact. *See People for the Ethical Treatment of Animals v. U.S. Dept. of Agriculture*, 797 F.3d 1087, 1093 (D.C. Cir. 2015). This test requires that SCACE demonstrate that (1) its interest has been injured by agency action and (2) that it used

[2] SCACE, who is listed as the sole Plaintiff, has pleaded standing for its organization and not for any individual member. *Sierra Club* recognized that it "is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." 405 U.S. at 739; *See also Equal Rights Center v. Post Properties, Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). Thus, the injury in fact SCACE's members have endured confers standing on the organization.

resources to counteract this harm. *Id*. at 1094. A concrete injury is established when there is harm to an organizations activities and a drain on the organization's resources. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). This type of injury constitutes far more than a setback to an organization's abstract social interest. *Id*. However, courts have found a lack of standing when organizations have indicated that the harm felt was caused by the preparation for the ensuing litigation. *Equal Rights Center*, 633 F.3d at 1139 (recognizing that when an organization diverts resources in order to "test" a defendant through litigation that the harm is self-inflicted by the organization's own budgetary choices and thus standing is not conferred).

SCACE has demonstrated an injury in fact to its organization interest because of the increased burden of monitoring Calixta. One might argue that the increased cost was felt simply in preparation of litigating this case against FWS because SCACE still has the potential to monitor Calixta in South Carolina when the tiger returns from California. In this circumstance the injury would be considered self-inflicted if there was any injury at all.

SCACE is a "nonprofit organization and animal protection charity. SCACE's mission is to end the exploitation of captive exotic animals." Pl. Compl. for Declaratory and Injunctive Relief 2. To obtain this goal SCACE "advocates on behalf of captive exotic animals from South Carolina, including but not limited to a tiger named Calixta. SCACE's efforts on behalf of these animals include monitoring and documenting the conditions in which they are kept, conferring with experts about these conditions, reporting apparent violations related to these conditions to officials, and engaging in public education and media campaigns." *Id*.

The *Havens* court found that, at this stage in litigation, alleging increased difficulty in conducting a stated organization interest constitutes an injury in fact. *Havens Realty Corp.*, 455 U.S. at 379. *Havens* held that the drain on the organization's resources constituted an injury in fact

because it impaired their ability to provide housing counseling services. *Id*. Similarly, SCACE has suffered economic and administrative harm because of the added economic cost of monitoring Calixta in California. This is clear evidence of an increased difficulty in conducting SCACE's organizational purpose and an additional drain on resources has been documented. *See compl.* Further, SCACE's organization interest in ensuring the well-being of Calixta is not limited to South Carolina simply because that is where the organizational activity has occurred in the past. Given the documented abuse in South Carolina it naturally follows that SCACE would attempt to continue to monitor Calixta in California where signs of abuse have already occurred. *See Compl page x.*

C. The APA provides standing because the denial of the petition for rulemaking was final agency action.

SCACE is seeking to demonstrate it satisfies the requirements for standing under both Article III and under federal statute. A mechanism for bringing an administrative claim can also be found in the APA. The APA states that "final agency action for which there is no other adequate remedy in a court are subject to judicial review." Administrative Procedures Act, 5 U.S.C. § 704 (1966). An agency action is final when (1) the action marks the consummation of the agency's decision making process and (2) the action is one in which legal consequences will flow. *See Bennet v. Spear*, 520 U.S. 154, 177-178 (1997). There is little doubt that FWS' denial for SCACE's petition for rulemaking under the ESA is final agency action. The denial of the petition for rulemaking was appealable only to the District Court. Further, SCACE has suffered legal consequences, an economic and administrative harm, as a result of this denial. Thus, SCACE can also prove standing under the APA.

D. Public policy supports a minor inquiry into whether a Plaintiff has established an injury in fact.

The threshold for standing in this circumstance should be viewed as lenient. This is because where "statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action." *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970) ("[t]he whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend."). As a matter of public policy, the ESA states "[i]t is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." *See* 16 U.S.C. § 1531 (1988). FWS, the agency in charge of enforcing the ESA, has blatantly failed in its mission to protect endangered animals such as Calixta—where a clear history of abuse has been documented by SCACE. The policy of the ESA coupled with the trend in increasing access to federal courts in the context of administrative action indicates the analysis of injury in fact should not be substantial. Such a level of inquiry should be applied here because FWS is acting in violation of Congressional intent.

II. Causation and Redressability

A. Causation can be deduced from the fact that FWS denial for SCACE's petition for rulemaking has led to the concrete injury suffered by SCACE as a result of Calixta's transportation to California.

When an injury in fact is found, the analysis does not stop there. The injury must be "fairly traceable to agency action" and "redressable by a favorable ruling." *See Arizona State Legislature v. Arizona Indep. Redistricting Com'n*, 135 S. Ct. 2652, 2663 (2015) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)). These elements of standing are known as causation and redressability. *See generally Lujan*, 504 U.S. at 562. These elements are closely related because the similarity in the "power to redress a claimed injury and the requirement of a causal link between

the injury asserted and the relief claimed." *Gonzales v. Gorsuch*, 688 F.2d 163, 1267 (9th Cir. 1982). It is SCACE's burden to prove that the facts indicate choices "have been made or will be made in such a manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562. Further, Congress possesses the ability to define injuries and causation that will give rise to a case or controversy where none existed before. *Lujan*, 504 U.S. at 580.

Causation can be proven based off the facts SCACE has asserted under its claim for Article III constitutional standing. But for the fact that MMCC shipped Calixta to California then SCACE would not have suffered to increased cost in monitoring the tiger from another state nor would it have suffered the harm in providing accurate information to the community regarding Calixta's health. In the event that FWS included Calixta under the ESA's protections then this would surely not be the case. There is a direct correlation between FWS administrative failure and MMCC's contract. This is not a series of speculative steps, but rather the concrete outcome of FWS's actions or inability to act. *See Levine v. Vilsack*, 587 F.3d 986, 993-994 (9th Cir. 2009).

B. Redressability follows causation and is shown because it is within the courts power to fix the harm caused by FWS.

In regards to redressability, once injury in fact and causation is shown the standard is quite low as SCACE must only show that a favorable decision would likely redress the injury. *Lujan*, 504 U.S. at 590 (Plaintiff must allege a harm that is likely to be redressed by the requested relief in order to have a case or controversy under Article III). In addition, courts have readily admitted that these two elements of standing are quite similar. *See Gonzales*, 688 F.2d at 1267. Prohibiting MMCC from transporting Calixta would redress the harm in this circumstance. Again, in this case if Calixta were brought under the protections of the ESA or an injunction were granted preventing transportation to California then the injury SCACE has suffered would be remedied as SCACE is satisfied with its ability to monitor Calixta from South Carolina.

III. Prudential Standing

A. While the lower court should have additionally considered the issue of prudential standing this was not in error because SCACE has plead facts sufficient to pass the "zone of interest" test.

The inquiry into standing is a two part analysis. The court must consider (1) the injury in fact requirement under Article III and (2) the rule of self-restraint imposed by the federal courts themselves. *See Assn. of Data Processing Service Organizations, Inc.*, 397 U.S. at 153. This second prong is commonly referred to as the prudential principle or prudential standing. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-475 (1982) ("[b]eyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear the question of standing."). One such prudential principles is the zone of interest test which requires that the Plaintiff's grievance "fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennet*, 520 U.S. at 162. This prudential principle is founded on the concern for the role of the courts in a democratic society and takes into account the separation of the three branches of government. *Id*. at 162. Because of the basis of this concern, courts have recognized that Congress may abrogate this principle if it so chooses. *Id*. Further, this limitation on standing "is not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210, (2012) (quoting *Clark v. Securities Industry Assn. v.*, 479 U.S. 388, 399 (1987)).

The District Court made no mention of prudential considerations, but this does not defeat standing in this circumstances. Standing is a two prong analysis that considers the injury in fact requirement of Article III, but when that is satisfied, a court should then proceed to the

discretionary prudential considerations. SCACE has satisfied the both the constitutional requirements of standing as well as the prudential considerations aspect of the zone of interest test.

When considering suits under the ESA, the pivotal case on this issue is *Bennet v. Spear*. 520 U.S. 154. In *Bennet*, the dispositive issue was whether the Plaintiff had standing under the "citizen-suit" provision of the ESA. *Id*.; *See also* 16 U.S.C. § 1540(g) (2002). The court concluded, in a majority opinion by Justice Scalia, that the citizen-suit provision indicated Congress' intent that "everyman" may bring a lawsuit under the ESA. *Bennet*, 520 U.S. at 166. The *Bennet* court discussed at length the broad language used by Congress is this provision as opposed to similar provisions in other statutes. *Id*. at 164-165. Because of this broad interpretation of the ESA's citizen-suit provision it is clear that any lawsuit brought by a private citizen alleging violation of an ESA provisions will be within the zone of interest of that statute. Thus, Congress has abrogated any prudential considerations in this context because SCACE is alleging violations covered by specific provisions in the ESA.

It is still important to consider Article III in this context. Prudential considerations are a limiting factor in addition to the constitutional requirement because a court may choose to deny standing even if Article III standing is present. *See Bennet*, 520 U.S. at 162 (holding that in addition to the considerations of Article III and court must also consider a set of prudential principles that bear on the question of standing). As such it is clear that Article III standing is always a requirement to get into federal courts. "Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States." *Assn. of Data Processing Service Organizations, Inc.*, 397 U.S. at 153. Thus, even if prudential standing is obtained, a Plaintiff must also still demonstrate an injury in fact under Article III. SCACE has already established that it has sustained an injury in fact under Article III through numerous different interpretations of the standing

doctrine. The District Court was correct because it did not need to consider anything further than the Article III requirements for standing because the zone of interest test was explicitly negated based off the Court's interpretation of the citizen-suit provision in *Bennet*.

PETITION FOR RULEMAKING

IV. Denial of a petition for rulemaking

A. FWS' denial of SCACE's petition for rulemaking was inappropriate because it was based on a statutory misinterpretation. FWS' denial was arbitrary and capricious because it did not identify sufficient and explicit reason for the denial.

Interested parties may petition a government agency for the issuance or amendment of a rule. *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987). If the agency denies the petition, it must explain its reasoning for the denial. *Id*. This reasoning should be detailed, and identify the agency's scientific and economic reasons for the denial. *International Union v. Chao*, 361 F.3d 249, 255 (3d Cir. 2004). This reasoning should also identify the agency's projects that take priority over the subject matter of the rulemaking petition. *Id*. An agency action or conclusion is unlawful if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 USCA § 706(2). If an agency declines a petition for rulemaking, a court will consider it "arbitrary or capricious" when the decision was not "reasoned." *International Union*, 361 F.3d at 256 (Pollack, J., concurring) (citing *American Horse Protection Ass'n*, 812 F.2d at 5).

A court may review an agency's denial of a rulemaking petition in limited circumstances. The reviewing court "shall… interpret… statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 USCA § 706. An agency's denial of a rulemaking petition is afforded high deference. *International Union*, 361 F.3d at 255. A denial of a

rulemaking petition should be overturned when it involves "plain errors of law, suggesting that the agency has been blind to the source of its delegated power[.]" *American Horse*, 812 F.2d at 5 (internal citations omitted). "[W]hen the proposed rulemaking pertains to a matter of policy… the scope of review should… [ensure] that the [agency] has adequately explained the facts and policy concerns it relied on and… those facts should have some basis in the record." *Preminger v. Secretary of Veterans Affairs*, 632 F.3d 1345, 1353 (9th Cir. 2011), citing *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 817 (D.C. Cir. 1981).

American Horse addressed the statutory prohibitions on horse training practices. The statute at issue, 9 C.F.R. § 11.2 (1986), dealt with soring, the practice of injuring a horse's legs to induce a desired gait. Section A of the statute provided a broad prohibition on soring. Soring was defined as "no chain, boot, roller, collar, action device, *nor any other* device, method, practice, or substance shall be used with respect to any horse at any horse show, horse exhibition, or horse sale or auction *if such use causes or can reasonably be expected to cause such horse to be sore*". 9 C.F.R. § 11.2(a). Section B of the statute provided more specific prohibitions, including "no chains weighing more than eight ounces, rollers weighing more than fourteen ounces, and certain types of shoes." 9 C.F.R. § 11.2(b). The language of the general and specific prohibitions, when read together, left a loophole: "Under the general prohibition, however, there [was] no penalty unless the use of the device is shown to have caused soreness or the device can reasonably be expected to cause soreness." *American Horse*, 812 F.2d at 2.

Plaintiff petitioned for a rulemaking to make illegal *all* devices that could be used to sore horses, thus closing the loophole in the statutory language and effectively ending the practice. Defendant refused the rulemaking petition.

The *American Horse* court considered whether or not the Defendant's refusal was reasoned in order to determine whether the defendant's refusal was arbitrary or capricious. Because the court found "no articulation of the factual and policy bases for [the defendant's] decision," the refusal was inappropriate. *Id*. at 6. Furthermore, the court believed Defendant to be "blind to the source of its delegated power… when [defendant] appeared to resist the proposition that the act was intended to prohibit devices reasonably likely to cause soreness." *Id*. Resisting the explicit purposes of a statute is indicative of an arbitrary or capricious agency decision. The Court concluded that "[w]e see nothing ambiguous in the Act… the Act was clearly designed to end soring." *Id*. The court further explained, "under a reasonable interpretation of the present regulations no action device that caused soreness would be considered legal." *Id*. at 7. The Court held that because the purpose of the statute was unambiguous, defendant's interpretation of the statute, which would permit prohibited practice under certain conditions, was unreasoned and thus not subject to agency deference. *Id*.

International Union v. Chao addressed a denial of a petition for rulemaking. Plaintiffs petitioned the Occupational Safety and Health Administration ("OSHA") to create rules to protect workers from occupational exposure to metalworking fluids (MWF). OSHA denied the petition. In its denial, OSHA issued a letter to the Plaintiff explaining the reasons for the denial. Defendant explained that it had at least three other chemicals that required its attention because they were much more dangerous than MWF chemicals. Furthermore, defendant would have had to undertake extensive scientific studies to properly identify and assess these chemicals before any sort of regulation could be implemented. Because defendant had explicitly identified its priorities, economic limitations, and scientific reasons for the denial, the Court held that defendant had acted

reasonably. *International Union*, 361 F.3d at 255, 256. Thus, the denial was neither arbitrary nor capricious.

In *Preminger*, Plaintiff, a political party representative, sought to hold voting assistance events at a veterans' hospital in California. The hospital prohibited plaintiff from conducting such events because the hospital forbid politically partisan events on its campus. Plaintiff petitioned the Secretary of Veterans Affairs to rescind the clause prohibiting partisan events. The Secretary of Veteran Affairs denied Plaintiff's petition. Plaintiff sued, arguing that the denial was arbitrary and capricious. The court held that its review should consider whether "the [agency] has adequately explained the facts and policy concerns it relied on and to satisfy ourselves that those facts have some basis in the record… In other words, a court looks to see whether the agency employed reasoned decision making in rejecting the petition." *Preminger*, 632 F.3 at 1354. The Court held that the Secretary of Veteran Affairs' refusal was appropriate because they had provided ample evidence and statistics about its voter assistance services and educational opportunities already available for veterans. *Id*.

FWS' refusal of SCACE's petition for rulemaking was inappropriate because FWS failed to explicitly articulate its reasons for the refusal. Under *International Union* and *Preminger*, the court should defer to the agency when the agency has provided detailed economic, scientific and statistical reasons for its refusal. Unlike the *International Union* and *Preminger* defendants, FWS has failed to provide any semblance of such reasoning. FWS has vaguely stated that it does not have the resources to enforce the ESA against MMCC. However, FWS has not identified its financial limitations, more pressing obligations, or processes that are prohibitive of protecting Calixta from her subpar habitat in California. As discussed in *International Union* and *Preminger*, if an agency denies a petition for rulemaking, it must publically detail its reason for the denial.

FWS has failed to do this. *Preminger* states that a reasoned denial will generally be considered an appropriate denial; that is, if an agency can provide sufficient and detailed reasoning for a denial, then the denial will not be considered arbitrary or capricious. Because FWS has not detailed any such reasoning, its denial, under *Preminger*, is arbitrary and capricious. This alone is enough for the court to uphold the denial of judgment as a matter of law. However, under the *Chevron* analysis, it becomes increasingly clear that FWS is not entitled to summary judgment. *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

V. Statutory Construction

A. FWS' interpretation of the statute prevents the statute and all of its parts from existing cohesively, rendering the general prohibitions irrelevant.

When an "agency's refusal to initiate rulemaking implicates questions of statutory interpretation, [the court] use[s] the… *Chevron* test." *Maier v. U.S. E.P.A.*, 114 F.3d 1032, 1040 (10th Cir. 1997). This test has two parts: First, the court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843. However, if "the statute is silent or ambiguous with respect to the specific issue," then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

The rules of statutory construction dictate that a statute should not be construed so as to render any parts of the statute irrelevant. *United States v. Wenner*. 351 F.3d 969, 975 (9th Cir. 2003). Statutes should be read cohesively to give effect to all elements of the statute. *Bennet v. Spear*, 520 U.S. 154, 173 (1997).

The first step of the *Chevron* analysis requires the court to consider whether the statute in question is ambiguous. If the statute is not ambiguous, then the court shall uphold the unambiguous intent of the statute.

At the heart of this case is whether the phrase "industry and trade" means only "the actual or intended transfer of wildlife… from one person to another person in the pursuit of gain or profit"; or if it means "all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: Provided however, That it does not exclude exhibition of commodities by museums or similar cultural or historical organizations." 50 C.F.R. § 17.3; 16 U.S.C. § 1532(2).

The phrases "all" and "including but not limited to" demonstrate Congress' intent to regulate a wide variety of commercial endeavors involving endangered animals. The federal courts have dealt extensively with defining these two phrases.

1. All

Precedent directs us to begin the Chevron analysis at the dictionary. *Lagandaon v. Ashcroft*, 383 F.3d 983, 988 n.5 (9th Cir. 2004). Per Black's Law Dictionary, "all" means "every member or individual component of." *In re Nice Systems, Ltd. Securities Litigation*, 135 F. Supp. 2d 551, 569 (D.N.J. 2001), citing Black's Law Dictionary 74 (6th ed. 1990).

The Ninth Circuit further explicates the definition of "all" in the context of statutory interpretation: "All means every..." *Lopez v. Espy*, 83 F.3d 1095, 1100 (9th Cir. 1996). "All is an all-encompassing term… 'all' means all." *Knott v. McDonald's Corp.*, 147 F.3d 1065, 1067 (9th Cir. 1998).

FWS fails to honor this widely accepted understanding of the word "all." Rather, FWS' interpretation would regulate only *one* kind of commercial activity (transfer for gain or profit) instead of *all* of them. This is directly in contrast with Congress' intent, as this interpretation makes the phrase "all commercial activity" ineffective.

2. Including but not limited to

The phrase "including but not limited to" has been analyzed extensively by the federal court system. The results are consistent: When a list is prefaced by the phrase "including but not limited to," the list that follows is not exhaustive; rather, it serves as an example. Justice Alito further explained that when a list begins with "including but not limited to" the author "unambiguously stated that the list was not exhaustive." *Cooper Distrib. Co. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 280 (3rd Cir. 1995).

FWS' reading of the "including but not limited to" list is incorrect. As demonstrated above, this list is meant to give examples of commercial activity. The court has already rejected interpretations that would read the phrase out of the statute: The agency's interpretation "is not entitled to Chevron deference because it is contrary to the unambiguous language of the statute. If given credence, the agency's interpretation effectively omits the 'including but not limited to' language from the statute." *Turtle Island Restoration Network v. Nat'l Marine Fisheries Service*, 340 F.3d 969, 975 (9th Cir. 2003).

3. Cohesive reading of the ESA

Statutory construction requires that the statute be read cohesively, so that all elements of the statute are given effect; omitting elements of a cohesively clear statute cannot create ambiguity. FWS' reading of the statute renders the general prohibitions ineffective. By treating the phrase

"including but not limited to" as an exhaustive list of all of the activities prohibited by the statute, FWS' interpretation nullifies the phrase "all commercial activity" into extraneous fluff. If the statute only meant to control the specific activities listed in the "included but not limited to" schedule, then there is no need to further describe "all commercial activity." "All commercial activity" is unnecessary if it is true that the "including but not limited to" list is exhaustive. This interpretation, under the canons of statutory construction, is inappropriate. It renders the phrase "all commercial activity" as a redundant and unnecessary phrase. This would defy the canon of statutory construction that all elements of a statute be given effect. By claiming that only the "including but not limited to" activities are what constitute commercial activities, FWS makes the section regarding prohibited use meaningless. If only the uses on the "included but not limited to" list are prohibited, then there is no need for the ESA to further specify what activities are not prohibited. Under FWS' interpretation, only a small and specific number of activities are prohibited, and everything else is permitted. This reading makes the cultural use exception superfluous and, as discussed above, makes the "all commercial activity" phrase superfluous, too. FWS' interpretation of the statute impermissibly renders it ambiguous, because the ambiguity is created only after FWS omits the ESA's overarching control over "all commercial activity."

Reading these two phrases together, it makes much more sense for the list following "included but not limited to" to be read as a partial list of prohibited activities, and not an exhaustive list. This interpretation gives effect to all elements of the statute. The ESA regulates all commercial activity involving endangered animals, and the statute provides several examples of what constitutes commercial activity in order. Furthermore, these examples serve to emphasize what commercial activity is not: Use by museums or other cultural institutions. The statute, when interpreted per the canons of statutory construction, provides a holistic description of permissible

and impermissible activities, and then gives examples of what constitutes such activities. This interpretation allows all of these elements to work together effectively. More importantly, it allows all of these elements to coexist. Therefore, the statute should be interpreted to regulate all commercial endeavors involving endangered animals, and not only the activities explicitly listed as examples.

CONCLUSION

The District Court did not err in denying FWS's motion for judgment on the pleadings because SCACE has adequately pleaded standing and demonstrated FWS's denial of SCACE's petition for rulemaking was arbitrary and capricious.