No. 15-3768

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES FISH AND
WILDLIFE SERVICE,
Appellant,

v.

SOUTH CAROLINA ADVOCATES FOR
CAPTIVE EXOTICS
Appellee.

Appeal from the United States District Court
for the Western District of California

BRIEF OF THE APPELLEE

Team # 1268

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STATEMENT OF THE ISSUES

I. Whether South Carolina Advocates for Captive Exotics (SCACE) has sufficiently plead standing.

II. Whether the FWS's denial of SCACE's rulemaking petition is unlawful under the Administrative Procedure Act (APA) when the FWS's interpretation of "commercial activity" contravenes the plain language, legislative intent, and policies of the Endangered Species Act (ESA).

STATEMENT OF THE CASE

The U.S. District Court for the Western District of California held that SCACE adequately alleged standing and denied the government's motion for judgment on the pleadings as to the lawfulness of its denial of SCACE's rulemaking petition. *South Carolina Advocates for Captive Exotics v. U.S. Fish and Wildlife Service*, No. 2:15-cv-3768-PMG (LUD) (W.D. Cal. 2015).

STATEMENT OF THE FACTS

This case centers on an advocacy organization's longstanding commitment to the protection of captive exotic animals through the enforcement of a key statutory prohibition under the Endangered Species Act. The relevant facts are set forth below.

SCACE advocates on behalf of captive exotic animals, including tigers, in South Carolina. For years SCACE has concentrated on monitoring and documenting the conditions of Calixta, a tiger owned by Mabel Moxie's Cantankerous Cats (MMCC), a South-Carolina for-profit corporation that exhibits animals to the public. SCACE has observed numerous instances of MMCC staff striking, jabbing, and even shocking Calixta with an electric prod, in turn filing

complaints with state and local law enforcement. Other signs of poor treatment include Calixta's facial wounds and tendencies to pace back and forth in its small enclosure.

Last year, Calixta became subject to harsher treatment when MMCC arranged a long-term contract with the University of Agartha in California. The parties agreed to transport Calixta, for a fee, each football season to be exhibited as a mascot at Agartha's football games. The contract provides that Calixta will spend each football season for the foreseeable future in Agaratha—where it is confined to an inadequate enclosure and deprived of a water source for cooling. The conditions Calixta endures while in transport are also meager. Calixta faces an even smaller enclosure, poor ventilation, and hard substrate that contributes to foot and joint injuries. SCACE is firmly committed to sending staff and resources to California—and to any other states Calixta is transported to for exhibition—to stay abreast of Calixta's wellbeing for each year in the future.

In order to combat this mistreatment of Calixta, a tiger listed as endangered under the ESA, SCACE filed a complaint with the FWS to hold MMCC in violation of the Act's prohibitions against interstate transport in the course of a commercial activity. Yet the FWS denied the complaint on the grounds of the agency's interpretation of "industry and trade" within the statutory definition of "commercial activity"—limited to the transfer of ownership or control of an endangered species. SCACE then petitioned the FWS to amend its regulatory definition, but the agency denied the petition based on its broad discretion, limited administrative resources, and competing priorities.

SCACE then filed this action challenging the denial, in hopes of finally bringing relief to captive exotic species like Calixta.

STANDARD OF REVIEW

This Court reviews its own jurisdiction de novo. *Hunt v. Imperial Merchant Services, Inc.,* 560 F.3d 1137, 1140 (9th Cir. 2009). Jurisdiction is a threshold matter and without it, a court may not proceed on any cause. *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). Likewise, this Court reviews judgment on the pleadings de novo. *Stanley v. Trustees of California State University*, 433 F.3d 1129, 1133 (9th Cir. 2006) (citing *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). "Judgment on the pleadings is proper when, taking all allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." *Id.*

SUMMARY OF THE ARGUMENT

SCACE has sufficiently plead facts in order to establish standing under Article III of the Constitution. As an organization dedicated to the monitoring and protecting of animals like Calixta, SCACE is injured when those goals are interfered with, forcing the organization to spend additional resources to mitigate the interference. MMCC's transportation of Calixta makes SCACE's operations considerably more difficult and expensive, causing the organization injury-in-fact.

The FWS is liable for SCACE's injuries as their decision to allow transportation like Calixta's directly lead to the injuries. As the regulating agency with in immediate duty to prohibit such actions, the FWS is liable under current Ninth Circuit and Supreme Court case law. When the FWS's misinterpretation of the ESA is corrected, MMCC's transportation of Calixta in commerce will be prohibited, remedying SCACE's injuries.

The FWS's denial of SCACE's petition for rulemaking is unlawful under the APA when based on an interpretation of "commercial activity" at odds with the ESA's language, legislative intent, and overarching policy of conservation. Because Congress' intent was clear, the agency is not entitled to receive *Chevron* deference.

First, the Act's text and context unambiguously show that Congress did not intend to confine "commercial activity" to transfers of ownership or control—a mere subset of commercial transactions. Rather, Congress defined this term expansively through: (1) a general class of activities, (2) "*including but not limited to"* the example of sales, (3) and a single, specific exception. The context of the ESA confirms that Congress employed "commercial activity" to delineate a violation of the Act, not an exception to its prohibitions. Moreover, related wildlife protection statutes and regulations demonstrate the broad scope that "commercial activity" embodies in similar contexts. Textual canons of construction, such as not treating statutory language as surplusage, further indicate that "commercial activity" must extend beyond the FWS's interpretation so as to not duplicate surrounding statutory language.

Second, the legislative history from the ESA's enactment in 1973 and its amendment in 1976 illustrates Congress' commitment to conservation and broadly construing the Act's general prohibitions against taking, importation, exploitation, and transportation of endangered species. By contrast, there is little to show Congress was fully apprised of the FWS's interpretation and impliedly ratified it. The U.S. Supreme Court has also substantially limited the doctrine of congressional acquiescence.

Third, even if the term "commercial activity" were ambiguous the FWS's interpretation would not be permissible because it undercuts the ESA's comprehensive program for endangered and threatened species protection—as stated by Congress and understood by the Supreme Court.

As a matter of policy, the FWS's interpretation unreasonably limits the scope of "commercial activity"—excluding entertainment exhibitions, research studies, leases, and long term contracts—at the expense of the welfare of endangered species, such as Calixta.

For the foregoing reasons, this Court should affirm the District Court's decision upholding SCACE's standing and denying the FWS's motion for judgment on the pleadings.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN HOLDING SCACE HAS ADEQUATELY ALLEGED STANDING

SCACE's pleadings sufficiently establish standing under the "case or controversy" requirement of Article III of the Constitution. U.S. Const. Art. III, § 2. In order for plaintiffs to have standing they must establish injury, causation, and redressability. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 590 (1992). SCACE, as an organization dedicated to protecting captive exotic animals and educating the public with information about those animals, monitors and reports the well-being of Calixta the tiger owned by Mabel Moxie's Cantankerous Cats. By transporting Calixta across the U.S. to the University of Agartha, MMCC interferes with SCACE's operations. This forces the SCACE to expend additional resources in order to ensure Calixta's wellbeing, or otherwise abandon SCACE's pursuit of its goals and services, establishing injury. The Fish and Wildlife Service's failure to regulate this activity, which would otherwise be illegal, causes this injury. By ordering the FWS to regulate MMCC's operations in accordance with the ESA, this Court can remedy SCACE's injuries. Thus, the district court did not err in holding SCACE adequately alleged standing.

A. The interstate transport of Calixta injures SCACE by forcing the organization to expend additional resources in order to fulfill its organizational purpose.

At its base, the case or controversy requirement demands that plaintiffs demonstrate "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues which the court so largely depends on for illumination." *Massachusetts v. E.P.A.,* 549 U.S. 497, 517 (2007). As an organization dedicated to monitoring and protecting Calixta, SCACE has both a deep personal stake and a unique ability to illuminate the issue before the Court.

The Supreme Court has set out a special path to establishing injury for service-providing organizations like SCACE. In *Havens,* the Supreme Court held an organization, which provided counseling and referral services for low income home-seekers, had standing when the practices of a landlord interfered with the organizations ability to provide those services. *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379 (1982). The Ninth Circuit has further developed this type of injury in several cases. In *El Rescate Legal Services,* this Court restated the *Havens* opinion as finding injury when "practices have perceptibly impaired [the organizational plaintiff's] ability to provide [the services it was formed to provide]." *El Rescate Legal Services, Inc. v. Executive Office of Immigration Review,* 969 F.2d 742, 748 (9th Cir. 1991)(brackets in original). Later, the Ninth Circuit reiterated this language as a two part test requiring 1) interference with organizational mission and 2) diversion of resources to mitigate the interference. *Fair Housing Council of San Fernando Valley v. Roomate.com,* 666 F.3d 1216, 1225 (9th Cir. 2012). Put more plainly, an organization is injured when it must choose between spending more money and giving up on its operations. *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest,* 624 F.3d 1083, 1088 (9th Cir. 2010). A simple setback to the abstract interests of the

organization is not sufficient to establish injury. *Havens,* 455 U.S. at 379. *See also Sierra Club v. Morton,* 405 U.S. 727, 740 (1972).

As SCACE's plight fits squarely within this framework, the organization has suffered an injury-in-fact. As part of its operations, SCACE monitors Calixta's situation, reporting abuses to authorities and publishing educational media on Calixta. However, when MMCC ships Calixta to California in fulfillment of their paid contract with Agartha, SCACE's operations become considerably more difficult and costly. Not only must SCACE transport its own people across the country to monitor Calixta, but it must also expend time and resources adapting its practices to Californian laws, government, press, and citizens in order to accomplish its normal goals. If SCACE does not expend these extra resources, then it must abandon its services of protecting Calixta and keeping the public informed of her condition. This is the same rock and hard place described in *La Asociacion* and perfectly fits the test described in *Fair Housing Council.* Calixta's transportation interferes with SCACE's mission and forces the organization to divert resources in order to mitigate that interference. By forcing this expenditure or surrender, this injury goes far beyond a mere setback of social interests, and establishes a concrete injury-in-fact.

SCACE's injury mirrors that of the plaintiffs in *People for the Ethical Treatment of Animals v. U.S. Dept. of Agriculture* (*PETA*), where the D.C. Circuit found standing. 797 F.3d 1087, 1097 (D.C.C. 2015). There, PETA sued the USDA for failing to protect birds under the Animal Welfare Act. *Id* at 1091. For other animals, PETA would submit complaints to the USDA when it discovered illegal mistreatment. *Id* at 1095. When the USDA investigated the complaints, it would issue a report and PETA would use those reports in educational materials for the public. *Id* at 1096. However, because the USDA interpreted the Animal Welfare Act to

not include birds, PETA's mission became more difficult and the organization had to expend additional resources doing its own investigations of bird abuses. *Id.* By making PETA choose between expending the other resources or not protecting birds, the USDA injured PETA, giving them standing.

By failing to regulate Calixta much in the same way the USDA failed to regulate birds in *PETA*, the FWS has injured SCACE. Just as PETA reported abuses and used the government as a source of information, SCACE reports abuses of Calixta and depends upon government information to inform the public. By failing to regulate endangered species as they should under the ESA, SCACE's mission becomes more difficult and additional resources must be spent to accomplish that mission.

B. By failing to regulate endangered species in interstate commerce as required by the ESA, the Fish and Wildlife Service has caused SCACE's injuries.

Under Supreme Court precedent, SCACE's injuries satisfy the causation requirement for standing. A plaintiffs injuries must be "fairly traceable" to the defendant in order to establish standing. *Steel Company v. Citizens for a Better Environment,* 523 U.S. 83, 103 (1998). Though the FWS is not the entity moving Calixta in interstate commerce, the Supreme Court has held government agencies liable for similar injuries initially caused by government action. The first notable example of this type of causation occurred in *Association of Data Processing Service Organizations* where the plaintiffs sued the Comptroller of Currency for allowing banks to compete in their data processing business. *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 152 (1970). The injuries caused by the increased competition obviously came from the banks now competing in the market but their actions were made legal by the Comptroller. *Id.* The injurious action was only made possible by the action of the Comptroller

and would have been illegal without that action. *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 45 n. 25 (1976) *citing* 397 U.S. 150 at 152 and *Barlow v. Collins,* 397 U.S. 159, 162-163 (1970). Given that kind of causal relationship between the decision and the injuries, the Court found the plaintiffs had standing. *Data Processing,* 397 U.S. at 152.

The Supreme Court expanded upon this idea of agency decisions causing injury via third parties in *Bennett v. Spear* where plaintiff ranchers sued the FWS for errors in a biological opinion. 520 U.S. 154, 160 (1997). The biological opinion did not in itself harm the ranchers but it was used by the Bureau of Reclamation in its decision to interfere with water reservoirs around the ranchers. *Id.* The Court found the ranchers had standing to sue the FWS because the biological opinion had a "determinative or coercive effect" upon the actions of the Bureau of Reclamation. *Id* at 169. Even though the FWS service did not directly injure the ranchers, their biological opinion had so much influence over the entity that did directly cause the injury the Supreme Court held the FWS liable as the real cause.

Some courts describe this kind of third party causation as "substantially more difficult" to establish, but in cases like the one before the court, causation is clear and no different than in a multitude of other cases. *Lujan,* 504 U.S. at 562. This increase in difficulty must be viewed in the context of normal regulatory causation. Normally, when a regulated party sues the agency regulating them, causation is clear is day and can be assumed from the fact that the agency's regulations directly control and affect the regulated party. Essentially, there is no burden of proof in these scenarios. When third parties become involved, a burden of proof does arise but it is by no means severe. Any burden of proof, no matter how insignificant is by definition "substantially more difficult" than no burden at all.

In reality, causation of a third party injury is no different than normal "fairly traceable" causation. This causal chain linking the conduct of the defendant to the plaintiff's injuries "does not fail simply because it has several links, provided those links are not hypothetical or tenuous and remain plausible." *Northwest Requirements Utilities v. F.E.R.C.,* 798 F.3d 796, 806 (9th Cir. 2015) (quoting *Washington Environmental Council v. Bellon,* 732 F.3d 1131, 1141 (9th Cir. 2013)). So long as the plaintiff's injuries do not depend on the "unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict" then causation exists. *Lujan,* 504 U.S. at 562 *citing ASARCO v. Kadish,* 490 U.S. 605, 615 (1989)(opinion of Kennedy J.)

In the present case, the decision of MMCC are by no means "unfettered" or without the "coercive effect" of the FWS's decisions. Paralleling the *Data Processing* case, MMCC's actions are only legal and able to harm SCACE because the FWS decided not to regulate them. As MMCC works with a species listed under the ESA, their actions are completely subject to the will of the FWS. Were the FWS to regulate MMCC's transport of Calixta in commerce, as they should, then MMCC would most certainly be subject to the determinative and coercive nature of FWS regulations. If SCACE prevails in the current proceedings and commercial activity, like Calixta's, will be prohibited and MMCC will no longer have any sort of "legitimate discretion" in whether they move Calixta and make SCACE's operations more difficult and expensive.

This direct coercion and control over MMCC's activities distinguishes the present case from precedent where the plaintiffs lacked standing. In *Levine v. Vilsack,* the Ninth Circuit rejected a plaintiffs standing arguments, in their attempt to compel the USDA to regulate poultry under the Humane Methods of Slaughter Act (HMSA). 587 F.3d 986, 994 (9th Cir. 2009). There, the USDA's challenged interpretation of the terms "livestock" was only one of severable links in

the causation chain leading to the alleged mistreatment of poultry. *Id.* Even if the USDA had interpreted the term "livestock" to include poultry, the agency would also have needed to include poultry under the blanket classification of "amenable species" regulated under the act and from there. Even with those definitional changes, the USDA would still need to promulgate regulations for poultry under the HMSA which would not necessarily change the actions of the slaughterhouses injuring the plaintiffs. With all these steps each with an element of discretion, the causal chain was broken and the plaintiffs lacked standing.

Unlike *Levine,* there is a direct determinative causal effect in the present case. Once the exception for MMCC's activities are removed, they are immediately subject to the outright ban of moving endangered species in interstate commerce. There are no new regulations or secondary definitions that need changing and would give the FWS any discretion and break the link of causation. If the statutory scheme in *Levine* instead merely required that poultry come under the definition of "livestock" to be subject to an already existing set of regulations, meaning there was only one determinative link in the causation chain, then the plaintiffs in that case likely would have had standing as SCACE does in the present case.

Instead, SCACE's standing parallels more with the plaintiffs in the *PETA* case and *Animal Legal Defense Fund v. Veneman.* In *PETA,* challenging the USDA's lack of regulation of birds under the Animal Welfare Act, the plaintiffs established standing by showing their increased costs and difficulty in completing their mission were a response to the lack of regulation. *PETA,* 797 F.3d at 1097. The defendant agency argued those costs were self-inflicted as part of PETA's own budgetary choices. The court held the costs were "in response to, and to counteract, the effects of the defendants' alleged unlawful acts" and thus were not self-inflicted. *Id.* By not regulating birds, the USDA did not engage in inspections and information gathering.

If the USDA included birds under the Animal Welfare Act, these inspections would be required and PETA would not have to redirect resources. Thus causation was direct and the plaintiffs had standing. *Id.*

This Court found causation in a very similar case in *Animal Legal Defense Fund v. Veneman.* 469 F.3d 826, 836 (9th Cir. 2006)(vacated for en banc rehearing which never occurred but still valuable as informational and persuasive value. *See U.S. v. Joelson,* 7 F. 3d 174, 178 n. 1 (9th Cir. 1993)). There, individuals and organizations challenged the USDA's lack of regulation of primates under the Animal Welfare Act. *Id* at 832. Though the Court never came to a decision on whether the plaintiff organizations had standing, it did find the individual plaintiff, Buchanan, had standing following the same lines of causation as the organizations. *Id.* at 836. The plaintiffs sought the adoption of a draft policy which would subject primates keepers to additional regulations, preventing the abuses the individual plaintiff witnessed and was aesthetically harmed by. *Id.* The abuses were only possible because the USDA unlawfully refused to adopt the draft policy, and thus the USDA caused the plaintiffs injuries. *Id* at 834.

These single step, failure to regulate cases, like *PETA* and *Veneman* mirror the exact same kind of causation SCACE alleges in the present case. Once Calixta's movement is included under the prohibitions of the ESA, the injuries caused by the movement will stop, just as the inspections in *PETA* and regulations in *Veneman* would immediately begin. Just as in those cases, plaintiff SCACE here also has shown causation and standing.

C. Plaintiff's injuries, as caused by the defendants, will be remedied by a favorable decision by this Court.

In order for plaintiffs to establish redressability, they must demonstrate that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth v. Laidlaw Environmental Services,* 528 U.S. 167, 181 (2000). A favorable

decision in the present case will force the FWS to include transportation of endangered species like what MMCC does with Calixta, under the prohibitions of the ESA. Once the transportation is prohibited, Calixta will no longer be transported to California and SCACE will no longer have to expend the additional resources monitoring and reporting on her condition, alleviating the injury. Previous cases allow for redressability to rely on the assumption that MMCC will not violate the prohibitions of the ESA after this case. *Artichoke Joe's v. Norton,* 216 F. Supp. 2d 1084, 1108 (E.D. CA 2002).

After a favorable decision, the only way to legally avoid the prohibitions against transporting Calixta in commercial activity will be to get a permit from the FWS. However, in order to obtain such a permit, MMCC must demonstrate that Calixta's transportation enhances her species under section 10 of the ESA. 16 U.S.C. § 1539. Renting a tiger as a mascot for a college does little to benefit the species as a whole, making any possibility of MMCC obtaining a permit speculative at best. Though this does leave a hypothetical situation where Calixta would still be transported, SCACE does not need to disprove every speculative hypothetical possibility in order to demonstrate redressability. *Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59, 78 (1978). If plaintiffs had to negate every possible outcome, "they would rarely ever be able to establish standing." *Artichoke Joe's,* 216 F. Supp. 2d at 1108 *citing Duke Power,* 438 U.S. at 73.

Under current Ninth Circuit and Supreme Court case law, SCACE clearly has standing to bring the present case. The frustration of SCACE's mission and additional cost of resources injure the organization and that injury directly stems from the decision of the FWS not to include Calixta's transport in their definition of commercial activity. As such, correcting the FWS's actions will remedy SCACE's injuries. Thus, SCACE has established standing.

II. THE DISTRICT COURT CORRECTLY DENIED THE FWS's MOTION FOR JUDGMENT ON THE PLEADINGS BECAUSE THE FWS's INTERPRETATION OF "COMMERCIAL ACTIVITY" CONTRADICTS THE PLAIN LANGUAGE OF THE ESA

The crux of the issue before the Court is whether the FWS's denial of SCACE's rulemaking petition is unlawful when based on an interpretation that contravenes the plain language, legislative intent, and policies of the ESA. 5 U.S.C. § 706(2)(A). As the Supreme Court has recognized, the ESA "is the most comprehensive legislation for the preservation of endangered species enacted by any nation" and it is "beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *TVA v. Hill*, 437 U.S. 153, 174 (1978). Yet the FWS's interpretation of "commercial activity" severely undermines those goals by only protecting endangered species from a mere subset of commercial transactions. Although courts may defer to administrative interpretations of ambiguous statutes, "[n]o deference is due to an agency interpretation at odds with the plain language of the statute itself." *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1984); *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–43 (1984) ("the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Thus, the Court should enforce the plain language of the statute and refrain from deferring to the FWS's restrictive interpretation of "commercial activity" which contradicts the breadth with which Congress defined it.[1]

[1] The District Court properly rejected the FWS's argument that its definition of "commercial activity" has already been upheld. The U.S. Court of Appeals for the District of Columbia vacated the district court opinion's deferring to the agency's interpretation. *Humane Soc'y of the United States v. Lujan*, No. 92-0952, 1992 U.S. Dist. LEXIS 16140, at *9 (D.D.C. Oct. 19, 1992) *vacated, sub nom. Humane Soc'y of the United States v. Babbitt*, 46 F.3d 93, 100 (D.C. Cir. 1995). This Court has held that "a decision that

A. The FWS's Interpretation of "Commercial Activity" Contradicts the Term's Statutory Definition and is Inconsistent with the Act's Context and Structure

Section 9 of the ESA sets forth various prohibitions, including the one at issue which makes it unlawful to "deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever in the course of a *commercial activity*," any endangered species. 16 U.S.C. § 1538(a)(1)(E) (emphasis added). Congress defined "commercial activity" in Section 3(2) broadly 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 exhibitions of commodities by museums or similar cultural or historical organizations." *Id.* § 1532(3) (emphasis added). Thus, Congress structured the statutory definition into three parts: (1) the general class of activities regulated, (2) an illustrative example, and (3) a single, specific exception. The FWS's regulation—defining "industry and trade" as the "actual or intended transfer of wildlife or plants from one person to another in pursuit of gain or profit"—narrows "commercial activity" in a manner not contemplated by ESA's the text, context, or structure. 50 CFR § 17.3. By limiting "commercial activity" to a transfer in ownership or control, this excludes entertainment exhibitions, pharmaceutical research studies, and leases—other types of commercial transactions that impact the wellbeing of endangered species like Calixta.

1. Section 3(2)'s Breadth Confirms that "Commercial Activity" is Not Limited to Transfers of Ownership or Control

In order to determine whether Congress' intent is clear at *Chevron* Step 1, the Court is to "employ[] traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. These tools include text, context, structure, and legislative history. *Citizens Coal Council v. Norton*, 330 F.3d 478, 481 (D.C. Cir. 2003). Although Congress broadly defined "commercial activity," clearly

delineating the general class of activities as *"all* activities of industry and trade, *including but not limited to*, the buying or selling of commodities and activities" the FWS contends that this term is confined to the enumerated actions. 16 U.S.C. § 1532(3). The Court must give effect to Congress' intention expressed plainly in the text as "[a] contrary agency interpretation is entitled to no deference." *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994).

First, Congress' definition of "commercial activity" is instructive. *U.S. v. Migi*, 329 F.3d 1085, 1087 (9th Cir. 2003) ("When we interpret a word in a statute, we use the statute's definition of that word."). From the outset, Congress constructed the term broadly as *"all* activities of industry and trade." As this Court explained, " '[A]ll' is an all-encompassing term . . . . In short, "all" means all." *Knott v. McDonald's Corp.*, 147 F.3d 1065, 1067 (9th Cir. 1998). Similarly, in *Massachusetts v. EPA*, the Supreme Court assessed whether the Clean Air Act's definition of "air pollutant" supported the Environmental Protection Agency's (EPA) interpretation that carbon dioxide was not an air pollutant. 549 U.S. at 527 (2007). The Court held that the Act's "sweeping definition" of "air pollutant"—"*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted or otherwise enters the ambient air"—precluded EPA's interpretation because of the use of the term "any." *Id.* The Court observed that Congress would not "define "air pollutant" so carefully and broadly, yet confer on EPA the authority to narrow that definition whenever expedient." *Id.* at 527 n.26. Likewise, the FWS's narrow construction of "commercial activity" violates the expansive meaning that Congress proscribed.

Furthermore, after delineating the general class of activities covered by "commercial activities," Congress explicitly used the language "*including, but not limited to*" before providing an example. As the Supreme Court has explained, "the term 'including' is not one of all-

embracing definition, but connotes simply an illustrative application of the general principle." *Federal Land Bank of St. Paul v. Bismarck Lumber Co.,* 314 U.S. 95, 100 (1941). Most Circuits,[2] including the Ninth Circuit, have also interpreted "*including, but not limited* to" to be unambiguous and not exhaustive. In *Turtle Island Restoration Network v. National Marine Fisheries Service*, the Fisheries Service interpreted the High Seas Fishing Compliance Act as limiting its discretion to the permitting obligations enumerated though the Act stated that the Secretary shall establish permit conditions "*including but not limited to* the markings of the boat and reporting requirements." 340 F.3d 969, 975–76 (9th Cir. 2003). The Court disagreed, holding instead that the statute provided the Service with discretion to protect listed species through the permit conditions on the grounds that otherwise "the agency's interpretation effectively omits the "including but not limited to" language from the statute." *Id.* Therefore, the Court held that the Fisheries Service's interpretation contradicting an unambiguous statute was not entitled to *Chevron* deference. *Id.* These precedents further confirm that Congress unambiguously defined "commercial activity" through the phrase "including but not limited to." Thus, Congress did not limit the term's scope to transfers of ownership.

However, even if the FWS contends that Congress left "industry and trade" within the definition of "commercial activity" undefined, the ordinary meaning of these terms indicates that they are not restricted to transfers of ownerships or control. In this case, it is appropriate to look to the dictionary definition of these terms as "[d]ictionaries can aid in applying step one of the *Chevron* analysis." *Lagandaon v. Ashcroft*, 383 F.3d 938, 988 n.5 (9th Cir. 2004) (citing *MCI Telecomms. Corp. v. AT & T Co.*, 512 U.S. 218, 225–28 (1994)). "Industry" is defined as "[a]ny

[2] *Cooper Distrib. Co. v. Amana Refrigeration, Inc.,* 63 F.3d 262, 280 (3rd Cir. 1995); *U.S. v. Phillips*, 588 F. 3d 218, 224–26 (4th Cir. 2009); *U.S. v. Novelli*, 544 F.2d 800, 803 (5th Cir. 1977); *Dan's Super Market, Inc.v. Wal Mart Stores, Inc.*, 38 F.3d 1003, 1006 n.2 (8th Cir. 1994); *McKissick v. Yuen*, 618 F.3d 1177, 1185 (10th Cir. 2010); *U.S. v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1200 (D.C. Cir. 2008).

department of branch of art, occupation, or business conducted as a means of livelihood or for profit." Black's Law Dictionary 776 (6th ed. 1990); *see also* Webster's Third New International Dictionary 1155 (1971) ("industry" means "systematic labor esp. for the creation of value.").

"Trade" is defined as the "[p]urchase and sale of goods and services between businesses, states, or nations." Black's Law Dictionary at 1492; *see also* Webster's Third New International Dictionary at 2421–22 ("trade" means "the business one practices or the work in which one engages regularly."). Collectively, these definitions indicate that "all activities of industry and trade" are not confined to transfer of ownership or control. Rather, the ordinary meaning of these terms encompasses the activity directly at issue here—the business of transporting endangered species as mascots for profit.

2. The Context of the ESA and Analogous Statutes and Regulations Demonstrate the Broad Scope of "Commercial Activity"

Although Section 3(2)'s text remains the best evidence of legislative intent, the context and structure of the ESA are also illuminating. *Turtle Island Restoration Network*, 340 F.3d at 975 ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). Here, the employment of the term "commercial activity" and specific exceptions throughout its provisions demonstrate Congress' intent to broadly construct "commercial activity." Other statutes and regulations defining "commercial activity" within the context of wildlife transport further indicate that this term ordinarily extends beyond transfers of ownership.

First, throughout the ESA Congress consistently employed "commercial activity" to denote a violation of the Act. Yet the FWS's regulation effectively transforms "commercial activity" into an exception to the Act's prohibitions. For example, in Section 9(b), Congress established an exception for species held in captivity or controlled environments at the time of

the ESA's enactment or at the time of the species' listing. 16 U.S.C. § 1538(b). However, Congress conditioned this exception upon "such holding and any subsequent or use of the fish or wildlife was *not* in the course of a commercial activity." *Id.* (emphasis added). Similarly, Sections 9(c)(2)(D) and 10(i) set forth exceptions to the ESA's prohibition on importation of endangered species as long as such importation are not made "in the course of a commercial activity." 16 U.S.C. § 1538(c)(2)(D); § 1539(i). Therefore, not only did Congress define "commercial activity" broadly, but it also reaffirmed that it was not intended to serve as an exception to the ESA's prohibitions.

Moreover, Congress provided for a clear means of carving out additional exceptions to the Act's general prohibitions. Section 10(a)(1)(A) provides that permits may be issued for actions otherwise prohibited by Section 9 that are only for "scientific purposes or enhance the propagation or survival of the affected species." § 1539(a)(1)(A). Likewise, in the definition of "commercial activity," which is directly applicable to Section 9, Congress amended it only once in 1976 to add an exception for "exhibitions of commodities by museums or similar cultural or historical organizations." § 1538(a)(1)(E).

In *TVA v. Hill*, the Supreme Court recognized that "[i]n passing the Endangered Species Act of 1973, Congress was also aware of certain instances in which exceptions to the statute's broad sweep would be necessary." 437 U.S. at 189. However, the Court reasoned that because Congress established a "number of limited 'hardship exemptions'" in Section 10 that "under the maxim *expresio unius est exclusio alterius*, we must presume that these were the only "hardship cases" Congress intended to exempt." *Defenders of Wildlife Center for Biological Diversity v. US EPA*, 450 F.3d 394, 404 n.2 (9th Cir. 2006) (citing *TVA v. Hill*, 437 U.S. 153, 188 (1978)). Likewise, applying the maxim *expresio unius* to the definition of "commercial activity" indicates

that Congress only intended to exempt a specific group of organizations that provide history, art, culture, and educational value—not other commercial arrangements, such as exhibitions of endangered species at sporting events. Furthermore, as the district court correctly noted if Congress intended for "commercial activity" to be limited to sales then it would have been unnecessary to exempt exhibitions by museums and similar organizations. Transfers to such organizations may not constitute sales but rather temporary or limited forms of ownership, such as rentals or leases.

In addition to the ESA's immediate context, other statutes and regulations provide context for how "commercial activity" or terms of similar import are defined under like circumstances. *Andrus v. Allard*, 444 U.S. 51, 62 (1979) (interpreting the Migratory Bird Treaty Act based on other conservation statutes including the ESA and Marine Mammal Protection Act because "related statutes may sometimes shed light upon a previous enactment."); *Hawkins v. Franchise Tax Bd. of California*, 769 F.3d 662, 669 (9th Cir. 2014) (interpreting term in Bankruptcy Code based on Internal Revenue Code's construction of same term). In enacting the ESA, Congress also implemented an international agreement regulating the international trade of wildlife and plants. Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249 (CITES). CITES prohibits the issuance of import permits for certain species when the import is "used for primarily commercial purposes." *See* CITES art. III, 27 U.S.T. 1087. The Convention has since adopted a definition of "commercial purposes" that is much broader than the Service's interpretation: "An activity can generally be described as 'commercial' if its purpose is to obtain economic benefit (whether in cash or otherwise), and is directed toward resale, exchange, provision of a service or any other form of economic use or benefit." CITES Resolution Conference 5.10. Definition of "Primarily

Commercial Purposes," Buenos Aires, Argentina (1985) General Principle 2. The Resolution even noted that "[t]he term 'commercial purpose' should be defined by the country of import as broadly as possible so that any transaction which is not wholly 'non-commercial' will be regarded as 'commercial'." *Id.*

Yet it is unclear why "commercial activity" would encompass a narrower scope in the ESA, especially when certain species may be subject to both the ESA's and CITES' provisions. Furthermore, CITES established *minimum* standards of wildlife protection. *Man Hing Ivory and Imports, Inc. v. Deuk Mejian*, 702 F.2d 760, 762 (9th Cir. 1983) ("the Convention shall in no way affect the right of parties to adopt stricter domestic measures regulating or even prohibiting the trade or transport of any part or derivative of certain species."). However, the FWS's interpretation of "commercial activity" falls well below this threshold. By contrast, the European Union, a party to CITES, broadly delineates "commercial activities" in its wildlife trade regulations as precluding the following activities for certain species: "purchase, offer to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain, [and] sale." Council Regulation (EC) 338/97, 1996 O.J. (L 061).

Furthermore, the U.S. Sentencing Guidelines for "Offenses Involving Fish, Wildlife, and Plants" heightens the offense if "committed for pecuniary gain or otherwise involved a commercial purpose." U.S.S.G. § 2Q2.1(b)(1) The commentary to the Guidelines define "commercial purpose" as "[t]he acquisition of fish, wildlife, or plants for *display to the public*, whether for a fee or donation and whether by an individual or an organization." As the commentary further indicates, "[t]his section applies to violations of the Endangered Species Act," among other wildlife protection statutes. This serves as an example of a policy—one that is

directly applicable to the ESA—that defines "commercial" to extend beyond sales and transfers of ownership.

It is also notable that the National Marine Fisheries Service (NMFS), whose jurisdiction under the ESA extends to marine species, defines "commercial activity" in the same manner as the statutory definition. 50 CFR § 222.102. Given that this definition is broader than the FWS' interpretation, marine species could receive a higher level of protection under the Act than freshwater fish and other species. However, there is no indication that Section 9's prohibitions on transactions in the course of "commercial activity" should apply differently based on species type. Therefore, the FWS' restrictive interpretation, which contravenes the statutory purpose of conservation, should fall.

3. Textual Canons Do Not Support a Narrow Construction of "Commercial Activity"

Textual canons of construction also serve as an important aid to understanding Congress' intent by "help[ing] give meaning to a statute's words." *The Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d 1051, 1060 (9th Cir. 2003). One of the most fundamental canons of statutory construction, to refrain from treating statutory language as surplusage, is applicable. *Bennet v. Spear*, 520 U.S. at 173 (1992) ("it is a cardinal principal of statutory construction . . . that it is our duty to give effect, if possible, to every clause and word of a statute."). The FWS's interpretation nullifies Congress's expansive language by limiting "commercial activity" to the single example provided of buying and selling species and their parts. As the district court correctly noted, the definition also fails to give credence to the provision directly following Section 9(a)(1)(E), which prohibits "sell[ing] or offer[ing] for sale in interstate or foreign commerce any such species." § 1538(a)(1)(F). The Court should give effect to the statutory

definition of "commercial activity" so as to not render its very terms or other provisions in the Act surplusage.

By contrast, *ejusdem generis* is inapplicable to Congress' construction of "commercial activity". Although this Court has noted "when general and specific words are associated . . . the general words are construed to embrace things similar to those enumerated by the specific words," it has also placed limitations on this principle. *Hamilton v. Madigan*, 961 F.2d 838, 840 (9th Cir. 1992). The Ninth Circuit explained that "the phrase "including but not limited to" . . . is often used to mitigate the sometimes unfortunate results of rigid application of the *ejusdem generis* rule."). *Ramirez, Leal & Co. v. City Demonstration Agency*, 549 F.2d 97, 104 (9th Cir. 1976); *see also Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969, 975 (9th Cir. 2003). Both the Third and Sixth Circuits agreed, citing to *Ramirez, Leal & Co.* for this proposition. *Cooper Distributing Co., Inc. v. Amana Refrigeration, Inc.*, 63 F.3d 262 (3rd Cir. 1995) ("the rule of *ejusdem generis* applies only if the provision in question does express a contrary intent . . . since the phrase "including, but not limited to" plainly expresses a contrary intent, the doctrine of *ejusdem generis* is inapplicable."); *Cintech Indus. Coatings, Inc. v. Bennett Industries, Inc.*, 85 F.3d 1198 (6th Cir. 1996).

Thus, the general class of activities within the definition of "commercial activity"—"all activities of industry and trade"—should not be cabined by the specific example of buying and selling that follows. Moreover, the Ninth Circuit has observed that "[t]he tool of *ejusdem generis* has never been deemed dispositive . . . [w]hen a statute's plain meaning is apparent, there is no need to resort to the rule of *ejusdem generis*, particularly when its application leads to a result undermining the statutory purpose." *U.S. v. Tobeler*, 311 F.3d 1201, 1206 (9th Cir. 2002). Here, because the FWS' interpretation undercuts both the ESA's text and goal of conservation by

substantially limiting the transactions to which Section 9(a)(1)(E)'s prohibition applies, the canon of *ejusdem generis* is inapplicable.

B. Congress' Enactment of the ESA in 1973 and its Subsequent Amendments in 1976 Does Not Support the FWS' Interpretation of "Commercial Activity"

Legislative history is also relevant to determining Congress' intent in defining "commercial activity". *United States v. American Trucking Assns*., 310 U.S. 534, 542 (1940) ("there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"). Yet, the ESA's legislative history regarding the definition of "commercial activity" is sparse. Neither the House nor Senate bills defined this term. H.R. 37, 93d Cong. (1973); S. 1983, 93d Cong. (1973). The Conference Committee briefly mentioned the addition of this definition: "[a]lso added to the section was a new definition of "commercial activity," to delineate the types of activities which would qualify for special treatment under the Act. It includes trades and exchanges of animals or products from those animals whenever those trades or exchanges are undertaken in the pursuit of any gain or profit." H.R. Conf. Rep. No. 93-740, at 3001 (1973). Although this statement does little to clarify intent, other parts of the legislative history confirm that Congress sought to broadly construe the ESA in order to foster conservation. Thus, even though Congress did not specifically address "commercial activity," collectively, Congress' sentiments indicate it would not intend for this term to be construed in a manner that would limit protections for species under the Act. *TVA v. Hill*, 437 U.S. at 184 ("While there is no discussion in the legislative history of precisely this problem, the totality of congressional action makes it abundantly clear that the result reached today is wholly in accord with both the words of the statute and the intent of Congress.").

The House Committee on Merchant Marine and Fisheries, to whom the House ESA bill was referred in 1973, spoke specifically to Section 9's prohibitions, which the term "commercial

activity" is directly applicable to: "[i]t includes, in the *broadest possible terms*, restrictions on the taking, importation and exploitation, and *transportation* of such species." H.R. Rep. No. 93-412, at 154 (1973) (emphasis added). Thus, because Congress clearly intended to expand rather than contract the prohibitions against such transactions, the FWS' narrow interpretation undercuts this intention. Moreover, the House Committee indicated why Congress insisted on broad protections: "[m]an can threaten the existence of species of plants and animals in any of a number of ways, by excessive use, by unrestricted trade, by pollution or by other destruction of their habitat or range." H.R. Rep. No. 93-412, at 144 (1973). Notably, these sources of endangerment are not limited to transfers of ownership.

Although Congress amended the definition of "commercial activity" in 1976 to include the exception for museums and similar organizations, it again did little to clarify its intent. Yet the House Committee on Merchant Marine and Fisheries, which proposed the amendment, noted that "commercial activity" would exclude the "exhibition of commodities by museums or *smaller* cultural or historical organizations." H.R. Rep. No. 94-823, at 542 (1976) (emphasis added). Thus, while Congress exempted certain institutions from Section 9's prohibitions, it intended for this to be of limited scope. This is consistent with another House Report reaffirming the seriousness of the Act's prohibitions on taking, importing, exporting, and transporting of endangered species because "[t]hese protections against commercial exploitation have been instrumental in insuring the continued survival of dozens of endangered and threatened fauna." H.R. Rep. No. 94-887, at 497 (1976).

Moreover, Congress' 1976 amendments to the Animal Welfare Act (AWA) demonstrate that Congress was specifically concerned about the transportation of animals in commerce at this time. The AWA regulates "the transportation, purchase, sale, housing, care, handling, and

treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use." 7 U.S.C. § 2131. The 1976 amendments were specifically aimed at expanding protections for the transport of animals for commercial purposes. H.R. Rep. No. 94-801, at 132 (1975). The Senate Report from the Committee on Commerce—the same committee to which the 1973 ESA bill and 1976 ESA amendments were referred to— discussed the purpose of the 1976 Amendments to the AWA: "In recent years, as the number of animals shipped has increased, the number of deaths and injuries to such animals has increased as well. It was in response to this situation that a number of congressional committees have studied the issue in hearings over the past four years." S. Rep. No. 94-580, at 214 (1975). This indicates that this committee, among others in Congress, was well aware of the threats that the transport of animals posed to their survival. Given Congress' concern over animal transport in the 1970s, it seems unlikely that Congress would have intended to substantially limit the scope of prohibitions on species transport under the ESA.

Nonetheless, Appellants may argue that because Congress was aware of its interpretation of "commercial activity" at the time of the 1976 amendments and subsequent amendments, but did not amend the statutory definition to preclude this interpretation, that Congress implicitly ratified it. However, congressional acquiescence is an untenable ground to rest on. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers,* 531 U.S. 159, 169–70 (2001) ("Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care."). On one hand, the Supreme Court has invoked this doctrine when Congress was clearly aware of an agency's interpretation because it specifically held hearings on it and 13 bills were proposed to overturn the agency's

interpretation. *Id.* (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983)). On the other hand, the Court has refrained from it even when an agency had engaged in the same practice for 34 years and the Committee with jurisdiction over the agency approved its practice. *TVA v. Hill*, 437 U.S. at 192 (citing *SEC v. Sloon*, 436 U.S. 103 (1978)).

Here, it is not abundantly clear that Congress was fully aware of the Service's interpretation at the time of the 1976 amendments. The FWS may point to a statement from Representative Leggett, the Chairman of the House subcommittee that proposed the amendment to "commercial activity," indicating that FWS's definition "narrows the scope of those activities which are prohibited by the act." H.R. Rep. No. 94-823, at 557 (1976). Yet the Supreme Court has cautioned that it is "extremely hesitant to presume general Congressional awareness . . . based only upon a few isolated statements in the thousands of pages of legislative documents." *SEC v. Sloon*, 436 U.S. 103 (1978). Therefore, it is inappropriate to presume congressional acquiescence to the FWS's interpretation based upon a single statement and mere inaction, particularly when Congress expressed its intention to broadly construe Section 9's prohibitions.

Overall, the text, context, and legislative history is unambiguous/unambiguously shows that Congress did not intend to substantially narrow the scope of "commercial activity" and Section 9's prohibition on the transport of species. Thus, there is no need to go beyond *Chevron* Step 1. *Chevron*, 467 U.S. at 842–43 ([i]f 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.").

C. The FWS' Construction of "Commercial Activity" Contravenes the Goals and Policies of the Act

Even if the Court concludes that the definition of "commercial activity" is ambiguous, the FWS's interpretation does not merit deference because it is not "based on a permissible

construction of the statute." *Chevron*, 467 U.S. at 843. The FWS' definition of "industry and trade" undermines the ESA's fundamental goal of conservation and thus is an unreasonable interpretation of the Act. *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 699 (1995) ("Congress' intent to provide comprehensive protection for endangered and threatened species supports the permissibility of the Secretary's "harm" regulation."). Not only did Congress set forth a goal of species conservation, but it also defined "conserve" broadly as "all methods and procedures which are necessary" so that any endangered or threatened species will no longer need the Act's protection. 16 U.S.C § 1531(c), § 1532(3). However, the FWS's regulation would permit unrestricted use of endangered species by the wildlife entertainment industry so long as there is no transfer of ownership. This interpretation wholly disregards the detrimental impact that short-term transfers still have on endangered species. For example, both during transport and at the university Calixta is confined to conditions substantially affecting its wellbeing. While full transfer of ownership to the university may prolong Calixta's suffering, this does not detract from the harm that Calixta has already incurred as a result of the long-term contract.

Likewise, the FWS's regulation undermines the weight that Congress placed on maintaining Section 9's prohibitions except for a few narrow exceptions. H.R. Rep. No. 93-412, at 154 (1973) (describing Section 9 as "includ[ing], in the broadest possible terms, restrictions on the taking, importation and exploitation, and transportation of such species"). Not only did Congress recognize the significance of Section 9, but so did the Supreme Court. In *TVA v. Hill*, the Court noted "the seriousness with which Congress viewed the issue [of conservation]: virtually all dealings with endangered species, including taking, possession, transportation, and sale were prohibited, 16 U.S.C. § 1538 (1976 ed.), except in *extremely narrow* circumstances,

see 1539(b).” 437 U.S. at 180. Therefore, because the FWS’s definition effectively exempts a number of transactions from Section 9(a)(1)(E)—ranging from transport for entertainment, exhibition, and pharmaceutical research purposes—this goes well beyond Congress’ intent and the Supreme Court’s understanding of it.

Thus, the Court should affirm the district court’s denial of the FWS’s motion for judgment on the pleadings. The unlawful denial of SCACE’s petition for rulemaking—based on a narrow construction of “commercial activity”—frustrates the ESA’s text and context, legislative history, and overriding goal of conservation.

III. CONCLUSION

For the foregoing reasons, the appellee, SCACE, respectfully requests that this Court affirm the district court’s decision upholding SCACE’s standing and denying the FWS’s motion for judgment on the pleadings.

Respectfully submitted,

Team # 1268