No. 15-70117

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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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 FEDERAL DEFENDANT-APPELLANT

_____

TEAM NUMBER 1400
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ISSUES PRESENTED

1. An agency interpretation of an environmental statute permits interstate transportation of certain animals. Does a state-based advocacy organization have standing to challenge the agency's denial of a petition to amend this interpretation, where the organization alleges that the organization has incurred extra expenses in pursuing its advocacy across states?

2. The agency interpretation has stood for more than four decades, during which time Congress has repeatedly amended the statute without changing the agency interpretation. Is the agency entitled to judgment on the pleadings, in the organization's challenge to the agency's refusal to amend this longstanding interpretation?

STATEMENT OF THE CASE

South Carolina Advocates for Captive Exotics (SCACE) seeks declaratory and injunctive relief against the U.S. Fish and Wildlife Service (FWS) under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–06. Pl's Compl. ¶ 1. SCACE alleges that FWS's denial of a petition for rulemaking to revisit a statutory definition was unlawful. *Id*. ¶ 15. Defendant FWS filed a motion for judgment on the pleadings, which the District Court denied. *See South Carolina Advocates for Captive Exotics v. U.S. Fish and Wildlife Serv.,* No. 2:15-cv-3768-PMG(LUD) (W.D.CA). Defendant timely appeals the District Court's order.

STATEMENT OF THE FACTS

FWS has administered the Endangered Species Act (ESA) since the act's passage in 1973, working to conserve endangered and threatened plants and wildlife, and their habitat. *See* 16 U.S.C. § 1531 *et seq*.

The ESA contains several references to "commercial activity." 16 U.S.C. § 1538(a)(1)(e), (b)(1), (c)(2)(d); § 1539(b)(1), (f)(1)(a)(i–ii), (i)(5). The act defines "commercial activity," 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). The ESA lacks a definition, however, for "industry and trade," *See* 16 U.S.C. § 1532. To fill in this gap, FWS promulgated a definition for *industry* and *trade* shortly after the ESA's passage. *See* 40 Fed. Reg. 44,415, 44,416 (Sept. 26, 1975) (to be codified at 50 C.F.R. § 17.3). FWS defines *industry* and *trade* as, "the actual or intended transfer of wildlife or plants from one person to another person in the pursuit of gain or profit." 50 C.F.R. § 17.3.

SCACE, a South Carolina -based nonprofit animal protection organization, now challenges this FWS definition. SCACE alleges that the definition permits the private organization Mabel Moxie's Cantankerous Cats (MMCC) to transport a captive tiger named Calixta between South Carolina and California. Pl's Compl. ¶ 41.

SCACE fulfills its mission of advocacy on behalf of captive exotic animals by monitoring and documenting their living conditions, reporting violations of law to officials, and engaging in media and public education campaigns. *Id.* ¶ 4. SCACE's activities and contacts are primarily focused in South Carolina. *Id.* ¶ 4–5. However, SCACE is particularly interested in one tiger, Calixta, whom MMCC has arranged to rent to the University of Agartha in California, for activities including display at football games. *Id.* ¶ 17, 25–29. SCACE alleges deficiencies in the living conditions of Calixta in SC, in transit, and in CA. *Id.* ¶ 22, 27. SCACE alleges that it has incurred a resource burden in following and monitoring Calixta interstate. *Id.* ¶ 40-42.

SCACE alleges that MMCC's conduct violates the ESA's ban on moving an endangered species in "interstate . . . commerce . . . in the course of a commercial activity." *Id.* ¶ 7 (citing 16 U.S.C. § 1538(a)(1)(E)). SCACE alleges that FWS's definition of *industry* and *trade* leads to an

unlawful construction of the ESA term "commercial activity." *Id*. ¶ 14–15. SCACE further alleges that FWS's interpretation has permitted MMCC to contract with the University of Agartha, and that in the absence of FWS's interpretation, such activity would be unlawful. *Id.* ¶ 41. It thus assigns FWS to be a "but for" cause of its resource burden in monitoring Calixta. *Id*.

Unhappy with MMCC's interstate transport of Calixta, SCACE filed a complaint with the FWS alleging a violation of the ESA. *Id*. ¶ 33. The FWS dismissed this complaint, explaining that MMCC's activity was not proscribed under FWS's interpretation of the ESA. *Id.* ¶ 34. As a result, SCACE petitioned FWS for rulemaking to revisit FWS's regulatory definition of *industry* and *trade*. *Id.* ¶ 36. SCACE requested that FWS adopt SCACE's preferred broad definition. *Id.* ¶ 37. FWS denied this petition as well, citing its competing priorities and limited resources. SCACE then brought suit, petitioning the court to compel FWS to abide its requests.

SUMMARY OF ARGUMENT

The court should vacate the District Court opinion because SCACE does not have standing to bring this suit as a matter of law. Modern standing doctrine preserves the essential separation of power between the political branches and the democratically insulated judiciary. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). SCACE's complaint is precisely the type of political controversy appropriate for resolution by the executive or legislative branches, but not by the courts. SCACE lacks each of the three elements required for standing: an injury-in-fact that is particularized and not general, a direct causal relationship between the defendant and the injury, and redressability by the courts. *Id*. at 560–61. SCACE's injury is a political grievance generally available to animal rights activists in the public *writ large*, not the type of specific harm that constitutes a 'case' or 'controversy.' *See Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). Its alleged injury — resource expense and burden — is the

result of actions by MMCC, and it can only implicate FWS through a long chain of speculation and assumption. *See Allen v. Wright*, 468 U.S. 737, 757 (1984). Finally, a favorable ruling in this Court is highly unlikely to yield SCACE the resolution it seeks; MMCC can continue its interstate transport of Calixta under other exceptions to the ESA.

Even if this Court finds that SCACE has standing, this Court must find that FWS is entitled to judgment on the pleadings. FWS had good reason to deny SCACE's rulemaking petition, as that petition, and this litigation, erroneously attack FWS's reasonable ESA interpretation. Shortly after the ESA's passage, FWS promulgated, via notice-and-comment, an interpretation of the terms *industry* and *trade*, which ESA uses to define *commercial activity*. This regulation, as an agency interpretation of a statute it administers, deserves great deference. FWS's interpretation fits in line with dictionary definitions of *industry* and *trade*, with the legislative history of the ESA term *commercial activity*, and with the rule of lenity. FWS has adhered to its interpretation for decades, entitling the interpretation to additional deference. Congress has ratified FWS's interpretation by repeatedly amending the ESA without altering FWS's interpretation. In fact, Congress amended the ESA definition of *commercial activity* for the purpose of ensuring the Commerce Department would interpret the ESA in a manner similar to FWS's interpretation. For these reasons, this Court must uphold FWS's interpretation. Even if FWS could in theory come up with a better interpretation, FWS had discretion to deny SCACE's rulemaking petition based on FWS's balancing of its regulatory priorities in light of limited resources.

ARGUMENT

I. SCACE DOES NOT HAVE STANDING TO BRING THIS SUIT.

Standing doctrine is essential to ensure that the every aggrieved member of the political process does not descend upon the courts in an attempt to win, in this more insulated forum, the battles lost in the legislative and executive spheres. *See Lujan*, 504 U.S. at 560. Parties are limited to bringing only "cases" or "controversies," U.S. Const. Art. III, § 2, not mere political disappointment, to the judicial tribunal for resolution. *See also Allen*, 468 U.S. at 750 (standing doctrine provides "constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government"). The Court has defined standing eligibility by the presence of three factors. *Lujan*, 504 U.S. at 560–1**.** First, the party must demonstrate an "injury-in-fact" that is concrete and imminent. *Id.* at 560. Second, the conduct causing the injury must be caused by the defendant. *Id*. Finally, the injury must be redressable by the lawsuit. *Id*. at 561. These requirements are identical for individuals and for groups or special interest organizations. *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 378 (1982).

SCACE fails all three standing requirements. SCACE is a political group that dislikes certain actions taken by private firm MMCC; SCACE wants FWS to consider a rulemaking that would restrict MMCC's ability to conduct some, but not all, of these actions; when SCACE failed to get the outcome desired in the executive branch, it headed quickly to the judiciary for another try. Rather than appealing to the aesthetic injury of its members, *cf. Lujan*, *504 U.S. at 562*, SCACE asserts injury to its own interests as an organization. Pl's Compl. ¶¶ 28–31. SCACE alleges that FWS's declining to initiate rulemaking procedures is the cause of alleged animal maltreatment by MMCC. Pl's Compl. ¶ 41**.** SCACE must also argue that a favorable decision in

this Court would resolve its grievance — its difficulty monitoring MMCC's mistreatment of the tiger. *See id*. With each factor, SCACE's assertions become more speculative.

The District Court's order erroneously mistook the duty to defer to the nonmoving party's statements of fact as a duty to also to defer to its conclusory statements of law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Even taking all of SCACE's factual assertions as true, SCACE does not meet the legal requirements for standing. The District Court's standing decision will be reviewed *de novo*. *Fair Hous. of Marin v. Combs,* 285 F.3d 899, 902 (9th Cir. 2002).

A. SCACE does not have a particularized injury in fact.

SCACE has alleged a "mere interest," not a "direct stake," in FWS's policy. *Sierra Club* at 739–40 (internal citations omitted). While SCACE alleges financial and logistical harms as a result of MMCC's decision to transport the tiger out-of-state, these organizational responses to a disfavored federal policy do not rise to the level of concrete injury-in-fact, demanded by this Court and by the Constitution.

SCACE's injury is not particularized, but is rather the kind of general political grievance available to any similarly-minded member of the public. *See Sierra Club*, 405 U.S. at 738 ("an injury that is widely shared is ipso facto not an injury sufficient to provide the basis for judicial review"). As an animal protection charity, Pl's Compl. ¶ 4, SCACE certainly has a "special interest" in the way FWS regulations impact tigers like Calixta, but a group's "special interest" in a policy choice does not amount to an injury-in-fact. *Lujan*, 504 U.S. at 563. To do so would obliterate the careful boundaries on judicial jurisdiction erected by standing doctrine. *Sierra Club*, 405 U.S. at 739 ("if a 'special interest' in this subject were enough to entitle [groups] to

[litigate], there would appear to be no objective basis upon which to disallow a suit by any [group] however small or short-lived . . . [or] any individual citizen").

SCACE asserts that its interest is particularized because it suffers concrete and specific injuries in its efforts to monitor the tiger's welfare out-of-state. *See* Pl's Compl. ¶¶ 28–29, 40–43. In particular, SCACE alleges it will have to devote "a significant portion of its" resources to travel and forge relationships with out-of-state enforcement agencies. *Id*. ¶ 40–43. SCACE asserts that this fact is sufficient to meet the Ninth Circuit's definition of a "diversion of [a group's] resources and . . . frustration of its mission," *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (citation omitted), and the District Court agreed. This must fail for two reasons: misinterpretation of the doctrine, and insufficient support of the facts.

SCACE's interpretation of the "frustration of . . . mission" standard dramatically misreads the doctrine, twisting it into an empty tautology. The Ninth Circuit's doctrine derives from *Havens*, in which a nonprofit group that provided counseling and housing referral services was forced to devote significant resources to a separate mission, in response to racially discriminatory steering practices: it had to send undercover operatives to identify rental organizations that denied tenants based on race. 455 U.S. at 379. In *Havens*, the group's diversion of resources to do investigatory work took resources away from its core mission of "provid[ing] counseling and referral services for low-and moderate-income homeseekers." *Id*. Because this investigatory work was tangential to the group's core mission, its reallocation of funds was a "demonstrable injury to the organization's activities," *see id*., or as the Ninth Circuit has termed it, a "frustration of [the group's] mission," *La Asociacion*, 624 F.3d at 1088. This is consistent with the plain text of the standard, which demands a tension between the expenditure

and the core mission. After all, any time a group dislikes a policy because it "frustrates [their] mission," the group will inevitably "divert resources" to combating its effect (either by investigating or, at the very least, filing a lawsuit). If these groups could all, automatically, claim an injury-in-fact, the constitutional standard would be rendered meaningless. Nonetheless, this is exactly what the District Court has held. *South Carolina Advocates,* No. 2:15-cv-3768-PMG(LUD) at *8.

SCACE's mission has been "frustrat[ed]" only if the tautological standard, and not the actual Supreme Court standard, is applied. SCACE describes itself as an "advocate[ ] on behalf of captive exotic animals from South Carolina." Pl's Compl. ¶ 4. Its methods of achieving that mission include "monitoring and documenting the conditions in which they are kept," among other activities. *Id*. As an advocacy organization, it regularly spends resources on transportation to the homes of exotic animals, monitoring these animals, writing about their conditions, and advocating on their behalf through local agents and public campaigns. However, SCACE alleges that its expenditures outlaid to travel to Calixta constitute a diversion of resources, *Id.* ¶ 41, and consequently a frustration of its mission. This is incongruent: the expenditures to visit Calixta are *in direct furtherance* of its advocacy mission. Its methods, including travel to visit a tiger, are consistent those for other captive exotics on behalf of which it advocates; although they may be more expensive. (As noted below, SCACE has not provided facts to allege that the expense would deplete the organization of such funds that it could no longer operate.)

Finally, this "diversion of resources" must be genuine. The group may not "manufacture the injury" by spending money on issues outside of its normal area of concern, or incurring litigation costs to create a drain of resources. *La Asociacion*, 624 F.3d at 1088 (citing *Fair Employment Council v. BMC Mktg. Corp.,* 28 F.3d 1268, 1276–77 (D.C.Cir.1994)). As FWS

alleged in earlier briefing, SCACE's expenses should be considered "self-inflicted," and thus irrelevant. *See id.* As SCACE's name indicates, and as SCACE admits, Pl's Compl. ¶ 4, the group's primary focus is on captive exotic animals in South Carolina. It does not have a particular interest in the treatment of captives in California, any more than it does the treatment of captives in Texas or Maine — except, it asserts, for the treatment of this particular tiger. *Id.* ¶ 17, 25. Given that the group's primary relationships are with South Carolina enforcement officials, *id*. ¶ 20, and the South Carolina public, its expenditure of resources to assess the behavior of a California operator seems suspect; if this expenditure is a dramatically high proportion of the group's budget (the group never discloses the exact amount, or proportion of total expenses), its prioritization seems particularly suspect.

Moreover, SCACE has alleged no facts to support its claim that it has "divert[ed] a significant portion of its resources" to monitoring Calixta out-of-state, Pl's Compl. ¶ 40, or to allow the court to assess this claim. While the court is required to accept non-moving party's statements as true, *see Levine v. Vilsack*, 587 F.3d 986, 991 (9th Cir. 2009), it does not treat "legal conclusion[s] couched as a factual allegation[s]" the same way, *Iqbal*, 556 U.S. at 678 (internal citation omitted). Instead, where the plaintiff merely alleges "labels and conclusions" without any supporting facts, the court need not afford any deference. *Id*. It is hard to find a more conclusory accusation than SCACE's: the group repeatedly states that resources have been diverted, *see, e.g.*, Pl's Compl. ¶¶ 40–43, but does not say how it reaches that conclusion. For instance, SCACE never states how much manpower or financial resources have been spent on transit to monitor Calixta. SCACE never compares this expenditure to its overall operating budget and resource list, to support its conclusion that the resource expenditure was "significant," Pl's Compl. ¶ 40.

This lack of data is highly problematic. Surely, the court would not hold that any reallocation of a group's funds to accommodate an event or policy change constitutes a diversion of resources that may frustrate the group's purposes. Highway construction that lengthens commutes, new paperwork requirements or new FOIA procedures, all seem patently out of scope of this rule — yet they technically require such a "diversion." Instead, the question is one of *degree*: the extent of financial and resource burden the action in question poses, such that a group's resources may be considered "diverted," and its mission vulnerable to "frustration." The court cannot simply accept a group's conclusory allegation at face value. Indeed, the absence of data demonstrating the exact organizational costs, and proportional budgetary impact, was one of the several reasons that plaintiffs were found to lack standing in *La Asociacion*. 624 F.3d at 1088. The District Court erred in permitting this factually unsupported allegation.

B. SCACE cannot demonstrate that FWS is the cause of its injury, or that a favorable decision would redress its injury.

Most importantly, the injuries asserted by SCACE result from the actions of a third party not privy to this suit: MMCC. As a result, SCACE cannot demonstrate that FWS is the cause of its injury, or that resolution of this lawsuit would bring the redress sought.

The court will generally look at these two components of standing in conjunction, as they are interrelated. *See Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982). Plaintiff must assert that its injury is directly "traceable" to the defendant's action, and that resolution of its suit will address the injury complained of. *Lujan*, 504 U.S. at 561. While this is normally a straightforward inquiry, it becomes far more demanding where the plaintiff asserts that its injury arises from the government's regulation (or lack thereof) of someone else. *Id*. at 562 ("[in such circumstances,] much more is needed"). The challenge with bringing a suit against the government, to forestall the behavior of a third party, is that the line of causation is generally

"too attenuated," and the likelihood of redress "too speculative," to define a true case or controversy. *Allen*, 468 U.S. at 752. Here, the plaintiff must show that both the source of the injury and its potential for favorable resolution do not "hinge on the response of the . . . third party," whose "unfettered choices" the court cannot presume to predict. *Lujan*, 504 U.S. at 562 (internal citations omitted).

SCACE has failed to meet its heavy burden. SCACE asserts that its injury is an increased expense in monitoring tiger Calixta, which it must incur because MMCC has entered into an arrangement with a California university to loan this tiger out during the school year. Pl's Compl. ¶¶ 25–26, 28. Moreover, it undergoes these expenses not merely because SCACE has an interest in this particular tiger, but because SCACE has allegedly witnessed Calixta in physically damaging conditions both during interstate transit and during California captivity. Pl's Compl. ¶ 27. In order to support a suit against FWS, SCACE faults the FWS's interpretation of the ESA for permitting this transport. Pl's Compl. ¶¶ 39–40. Specifically, SCACE asserts that FWS's definition of "commercial activity," 50 C.F.R. § 17.3, and its refusal to engage in alternate rulemaking, allows this arrangement to escape the condemnation of the ESA, Pl's Compl. ¶ 41. However, it is clear that MMCC is the true source of SCACE's injury, not FWS; and, moreover, that even if FWS were to undertake the actions sought by SCACE, the likelihood that SCACE's injury would be resolved is "speculative," at best. *See Allen*, 468 U.S. at 758.

First, it must be stressed that SCACE's injury results directly from the actions of MMCC, and not FWS. FWS's challenged actions did not mandate that MMCC transport its animals interstate, to the detriment of SCACE. FWS has not required the allegedly abusive conditions under which Calixta is transported or lodged in California. MMCC chose to engage in these activities independently, and continues to engage in them — without legal challenge from

SCACE. MMCC then, and not FWS, is the direct culprit in SCACE's increased expenses. Still, SCACE asserts that FWS's policies created a legal environment that enabled these activities. *See* Pl's Compl. ¶ 41. However, the line of causation between FWS's ruling and MMCC's action is "highly indirect." *Allen*, 468 U.S. at 757. Under SCACE's theory, the agency's regulation defining a particular term in a broad and complex statute must have prompted MMCC to identify a new profit-making avenue, *and* to initiate the tiger's interstate transit, and to maintain its out-of-state captivity, *and* to have designed the transit and the captivity to take place in abusive and physically and emotionally damaging conditions.

Moreover, SCACE cannot establish redressability beyond mere speculation. SCACE needs to demonstrate that FWS's granting of a petition for rulemaking would necessarily render MMCC's activity illegal. *Cf. Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998). (Or, at the very least, would create "a significant increase in the likelihood" that the activities would stop. *Utah v. Evans*, 536 U.S. 452, 464 (2002).) This is simply not the case. First, even if FWS granted SCACE's request for rulemaking, there is no guarantee that FWS's adopted rule would yield the result SCACE seeks: a redefinition of "commercial activity" that encompasses MMCC's actions. So long as they follow APA requirements, agencies generally have significant discretion to issue regulations like the one at issue here. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Thus, even after an invitation of notice and comment, it is highly probable that the agency's new regulation would be similarly unsatisfactory to SCACE.

Second, even if FWS did amend this particular regulation as SCACE requests, MMCC could very well continue to engage in the same activities here complained of. SCACE alleges, without supporting, that this regulation provides MMCC's legal justification for interstate transport. *See* Pl's Compl. ¶ 41. However, MMCC may very well find refuge for its activities in

other areas of the ESA: for instance, in the Act's exception for "exhibitions . . . by museums or similar cultural or historical organizations." 16 U.S.C. § 1532(2). SCACE appears to acknowledge this risk, by delving tangentially into the legislative history surrounding this exception so as to deny its applicability. *See* Pl's Compl. ¶ 13. However, SCACE has not made a compelling legal argument for why a university would not qualify as a "similar cultural . . . organization," 16 U.S.C. § 1532(2), and thus why MMCC's relationship with the University of Agartha would fall outside of the exception. Instead, FWS considers it highly probable that MMCC's activities would be permitted under section 1532(2), and as a result, that a favorable outcome in this case would not yield a change in MMCC's activity, or any probability of amelioration of SCACE's injuries.

II. FWS IS ENTITLED TO A JUDGMENT ON THE PLEADINGS.

FWS's longstanding, nearly-contemporaneous definition of the ESA terms *industry* and *trade* offers a reasonable interpretation, squarely in line with Congressional intent. The District Court thus erred in failing to grant FWS judgment on the pleadings.

This Court reviews *de novo* a district court denial of judgment on the pleadings. *See Metrophones Telecomm., Inc. v. Glob. Crossing Telecomm., Inc.*, 423 F.3d 1056, 1063 (9th Cir. 2005) *aff'd*, 550 U.S. 45 (2007). This *de novo* review extends to the interpretation of a statute. *See Id*. at 1063. A court grants judgment on the pleadings for the defendant when, accepting as true all statements in the pleadings, the defendant is entitled to judgment as a matter of law. *See Deveraturda v. Globe Aviation Sec. Servs.*, 454 F.3d 1043, 1045 n.2 (9th Cir. 2006). A court upholds an agency's interpretation of an ambiguous statute that the agency administers if the agency has offered a permissible interpretation. *Chevron*, 467 U.S. 837.

A. FWS's longstanding interpretation carries considerable weight.

Under *Chevron*, a court grants, "considerable weight" "to an executive department's construction of a statutory scheme it is entrusted to administer." 467 U.S. at 844. In addition, the longstanding, nearly-contemporaneous nature of FWS's ESA interpretation requires extra deference beyond even this highly-deferential *Chevron* standard.

An agency's "longstanding interpretation [] should be accorded particular deference." *Barnhart v. Walton*, 535 U.S. 212 (2002). *Barnhart* deferred to an agency interpretation in part because the agency had held the interpretation for 45 years. *Id.* at 220. FWS has held its interpretation for roughly the same length of time — 41 years. *See* 40 Fed. Reg. at 44,416.

This Court has explained that both "the long history and stability of the interpretation in question" led to deference in *Barnhart*. *Fournier v. Sebelius*, 718 F.3d 1110, 1121 (9th Cir. 2013). This Court considers, "the weight of years of consistent administrative interpretation" in deciding whether to defer. *Id.*, at 1121 (deferring to agency). FWS's interpretation has remained stable since its adoption. *Compare* 40 Fed. Reg. at 44,416 *with* 50 C.F.R. § 17.3; *see also Humane Soc'y of the United States v. Lujan*, 1992 U.S. Dist. LEXIS 16140, *13 (D.D.C. Oct. 19, 1992) (finding that FWS's "consistent interpretation for over seventeen years lends further weight to the argument for deference"), *abrogated on other grounds by Humane Soc'y of the United States v. Babbitt*, 46 F.3d 93 (D.C. Cir. 1995).

According to this Court, "a nearly contemporaneous construction is entitled to significant deference." *Fournier*, 718 F.3d at 1121. Courts place "peculiar weight" on "a contemporaneous construction of a statute by the persons charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) (internal quotation marks and brackets omitted) (upholding agency interpretation). In *Fournier*, this Court referred to as

"nearly contemporaneous," and thus deferred to, a regulation adopted two years after the relevant statute's passage. *See* 718 F.3d at 1121 (referring to a statute passed in 1965 and a regulation promulgated in 1967). Similarly, FWS, tasked with setting the ESA's "machinery in motion," promulgated this regulation two years after the ESA passed.[1] This Court should thus grant special deference to FWS's nearly contemporaneous interpretation.

B. The ESA terms *industry* and *trade* contain *Chevron* Step One ambiguity.

In reviewing an agency interpretation, a court first asks the *Chevron* Step One question of "whether Congress has directly spoken to the precise question at issue." *Chevron*, U.S. 467 U.S. at 842. Congress has not spoken precisely to the meaning of the ESA terms *industry* and *trade*, so this Court should move on to *Chevron* Step Two.

The ESA lacks a definition for *industry* and *trade*. As a result, the chairman of the House subcommittee with jurisdiction over the ESA referred to the meaning of "commercial activity" as "not altogether precise." 122 Cong. Rec. 3260 (1976).[2] FWS has responded to this ambiguity by promulgating a definition of *industry* and *trade* as used in the ESA.

The terms *industry* and *trade* contain ambiguity because both terms have at least two meanings that could work within the ESA context — including one meaning that would suggest ESA *commercial activity* reaches only ownership transfer, and a second that would suggest the term reaches all business activities.

Trade can specifically mean the business of buying, selling, and bartering. *See Trade*, Black's Law Dictionary (10th ed. 2014) ("The business of buying and selling or bartering goods

[1] The ESA passed in 1973. Pub. L. No. 93–205 (1973). FWS promulgated the *industry* and *trade* rule in 1975. 40 Fed. Reg. at 44,416. As the District Court for the District of Columbia explained, "[t]he Department's regulation at 50 C.F.R. § 17.3 was part of its initial comprehensive rulemaking to implement the ESA. Thus, it was essentially a contemporaneous construction of the statute." *Humane Soc'y*, 1992 U.S. Dist. LEXIS at *13.

[2] *available at* https://ia600302.us.archive.org/15/items/congressionalrec122bunit/congressionalrec122bunit.pdf.

or services; commerce").[3] Buying, selling, and bartering all involve ownership transfer. Under this definition, therefore, ESA *trade* refers exclusively to endangered species ownership transfer. *Trade* can also mean business generally. *See id.* ("A business or industry occupation; a craft or profession"). Under this definition, ESA *trade* would reach further.

Similarly, *Industry* can specifically mean the business of manufacturing or production. *Industry*, Black's Law Dictionary (10th ed. 2014) ("Systematic labor for some useful purpose; esp., work in manufacturing or production . . . [A]n aggregate of enterprises employing similar production and marketing facilities to produce items having markedly similar characteristics"). Manufacturing based on endangered species would necessarily involve the transfer of ownership, as producers acquire endangered species out of which to manufacture products, and then distribute products containing these species to consumers. Under this definition, therefore, ESA *industry* always involves species ownership transfer. *Industry*, however, can also mean business generally. *See id.* ("Systematic labor for some useful purpose; . . . A particular form or branch of productive labor). Under this definition, ESA *industry* would reach further.

Because multiple meanings of *industry* and *trade* could work with the ESA's language, the ESA fails to speak precisely to the direct question of whether ESA *industry* and *trade* always involve ownership transfer.

C. FWS's regulation meets the *Chevron* Step Two Permissibility Standard.

Because the ESA is "ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Because the FWS regulation represents a reasonable interpretation of the ESA, this Court must uphold FWS's regulation. "[T]he Court may not substitute plaintiff's

[3] *Commerce* means, "The exchange of goods and services." *Commerce*, Black's Law Dictionary (10th ed. 2014).

interpretation of the statute, or any other interpretation which the Court may prefer, where the agency's construction is reasonable." *Id*. at 844.

Dictionary definitions show the reasonableness of a regulation that defines *industry* and *trade* of endangered species to require ownership transfer: *Trade* has as its primary meaning buying, selling, and bartering, all of which transfer ownership. *See Trade*, Black's Law Dictionary (10th ed. 2014). *Industry* has as one of its main definitions manufacturing, which, as discussed above, necessarily involves ownership transfer. *See Industry*, Black's Law Dictionary (10th ed. 2014).

Even a Supreme Court Justice appears to have interpreted the ESA reference to *commercial activity* as ownership transfer: Justice Stevens summarized the ESA clause that outlaws the movement of endangered species "in the course of a commercial activity" in interstate commerce. 16 U.S.C. § 1538(a)(1)(E). Justice Stevens wrote that the clause makes it unlawful to, "traffic in endangered species" in interstate commerce. *Lujan*, 504 U.S. at 588 (Stevens, J., concurring). To *traffic* means "[t]o trade or deal in (goods, esp . . . contraband)." *Traffic*, Black's Law Dictionary (10th ed. 2014).[4] Thus, to traffic in endangered species would mean to transfer ownership of those species.

Legislative history also shows the reasonableness of interpreting *commercial activity* to refer to transfer: The House Conference Report for the ESA explains the definition of *commercial activity* merely by stating that, the definition "includes trades and exchanges of animals or products from those animals." H.R. Rep. No. 93-740 (1973) (Conf. Rep.), *as reprinted in* 1973 U.S.C.C.A.N. 3001, 3002.

[4] To *deal in* means "[t]o distribute (something)," which implies ownership transfer. *See Deal*, Black's Law Dictionary (10th ed. 2014). To *deal with* can also refer more broadly to doing business. *See id.* ("To transact business with (a person or entity)"). This latter use of to *deal*, however, cannot work in the phrase "to deal in."

Further support for the reasonability of FWS's interpretation comes from Congressional ratification. According to the Supreme Court, the fact that, "Congress has frequently amended or reenacted the relevant provisions without change" to the agency's interpretation provides, "evidence . . . that Congress intended the Agency's interpretation, or at least understood the interpretation as statutorily permissible." *Barnhart*, 535 U.S. at 220 (upholding agency's interpretation in part because of Congressional ratification). In *Fournier*, this Court based its decision to defer to the agency in part on Congressional ratification. *See* 718 F.3d at 1122. In fact, when Congress knows about the agency's interpretation, Congressional ratification creates a presumption of validity: "Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (internal quotation marks omitted) (upholding agency interpretation). Here, Congress has demonstrated that Congress either intends FWS's definition, or at least finds FWS's definition permissible, by reauthorizing and amending the ESA eighteen times, without ever overriding FWS's transfer-only interpretation of *industry* and *trade*. *See* Pub. L. No. 94–325 (1976); Pub. L. No. 94-359 (1976); Pub. L. No. 95–212 (1977); Pub. L. No. 95-632 (1978); Pub. L. No. 96–159 (1979); Pub. L. No. 96–246 (1980); Pub. L. No. 97-304 (1982); Pub. L. No. 98-327 (1984); Pub. L. No. 99-659 (1986); Pub. L. No. 100-478 (1988); Pub. L. No. 100-653 (1988); Pub. L. No. 100-707 (1988); Pub. L. No. 106-201 (2000); Pub. L. No. 107-171 (2002); Pub. L. No. 108-136 (2003); Pub. L. No. 108-1236 (2003); Pub. L. No. 110-236 (2008); Pub. L. No. 113-287 (2014). Congress has declined to override FWS's interpretation despite Congressional awareness of the interpretation: Less than two weeks after FWS promulgated its *industry* and *trade* definitions, the

House of Representatives held oversight hearings on the ESA's progress. *See Endangered Species Oversight Hearings before the Subcomm. on Fisheries & Wildlife Conservation & the Environment of the Comm. on Merch. Marine and Fisheries,* 94th Cong. (1976).[5] In these hearings, the subcommittee chairman noted that, per FWS's new regulation, *commercial activity* in the ESA meant *transfer*. *Id* at 240. Also during the hearings, an FWS representative explained that, under the regulation, "the exhibition of animals, even though for profit [is] not a commercial activity." *Id*. at 241. A few months later, the subcommittee chairman read aloud FWS's transfer-only definition of *industry* and *trade* on the House floor. *See* 122 Cong. Rec. 3260 (1976). The subcommittee chairman then encouraged Congress to amend the definition of *commercial activity* to explicitly exclude certain exhibitions — an exclusion which might seem unnecessary given FWS's transfer-only definition. *Id*. The subcommittee chairman, however, called such an amendment, "necessary because the Department of Commerce has not adopted the same definitions as the Department of Interior." *Id.* Accordingly, Congress amended the *commercial activity* definition to explicitly exclude "exhibition of commodities by museums or similar cultural or historical organizations." Pub. L. 94–359 (1976). In doing so, Congress demonstrated that it in fact preferred to limit the extent to which ESA *commercial activity* could apply to exhibitions.

The statutory interpretation canon of lenity also contributes to the reasonability of FWS's regulation. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *E.g.*, *United States v. Santos*, 553 U.S. 507, 514 (2008). The rule of lenity applies to the ESA's *commercial activity* definition because the ESA imposes criminal penalties for transporting species in the course of commercial activity. *See* 16 U.S.C. §§ 1538(a)(1)(E); 1540(b)(1). Faced with multiple dictionary definitions for *industry* and *trade*,

[5] *available at* http://babel.hathitrust.org/cgi/pt?id=mdp.39015081117643;view=1up;seq=1.

including some definitions that would criminalize a broader range of behaviors and some that would criminalize a more narrow range, FWS reasonably adhered to the "venerable rule" of lenity and chose the narrower interpretation. *See Santos*, 553 U.S. at 514.

D. FWS had discretion to deny SCACE's rulemaking petition.

Even if FWS had adopted a less reasonable interpretation, FWS would still have discretion to deny SCACE's rulemaking petition due to FWS's competing priorities.

In holding an agency's denial of a rulemaking petition reasonable, the District of Columbia Circuit recently noted the "extremely limited and highly deferential standard that governs [court] review of an agency's denial of a rulemaking petition." *WildEarth Guardians v. Environmental Protection Agency*, 751 F.3d 649, 651 (D.C. Cir. 2014) (internal quotation marks omitted). The court held that the agency had "discretion to determine the timing and priorities of its regulatory agenda" as part of the agency's discretion over the use of the agency's own limited resources. *Id.* at 651. The District of Columbia Circuit has explained that, "[w]ith its broader perspective, and access to a broad range of undertakings, and not merely the program before the court, the agency has a better capacity than the court to make the comparative judgments involved in determining priorities and allocating resources." *Nat'l Cong. of Hispanic American Citizens (El Congreso) v. Marshall*, 626 F.2d 882, 889 (D.C. Cir. 1979). The agency in *WildEarth* had given as its reason for denying the petition that it "'must prioritize its actions in light of limited resources and ongoing budget uncertainties,'" and the court accepted this reason. 751 F.3d at 651. Similarly, FWS has expressed that "more important competing priorities and limited resources" prevented it from reconsidering the regulation, and this Court should accept FWS's reason. Compl. ¶ 28.

E. The District Court misapplied statutory interpretation principals.

The District Court refused to grant judgment on the pleadings in part because the court made a few statutory interpretation errors.

First, the District Court misinterpreted the significance of the "exhibition of commodities by museums or similar cultural or historical organizations" exception to the definition of *commercial activity*. 16 U.S.C. § 1532(2). The District Court failed to recognize that Congress passed this museum exception *after* FWS adopted, and Congress learned of, FWS's *industry* and *trade* interpretation. *See* Pub. L. 94–359 (1976). As a result, the District Court erroneously treated the museum exception as revealing Congressional expectations about how FWS would interpret *industry* and *trade*. *See South Carolina Advocates,* No. 2:15-cv-3768-PMG(LUD) at *19. To the contrary, a proper analysis would see the museum exception as an endorsement of FWS's transport-only interpretation, intended to ensure that the National Marine Fisheries Service treats *commercial activity* similarly to how FWS treats the term. *See* 122 Cong. Rec. 3260 (1976) (calling the museum exception, "necessary because the Department of Commerce has not adopted the same definitions as the Department of Interior.").

Second, the District Court worries unnecessarily about the term *all* in "all activities of industry and trade" losing its significance due to FWS's regulation. *See South Carolina Advocates,* No. 2:15-cv-3768-PMG(LUD) at *17. In reality, the word *all* will have a meaning regardless of how FWS defines *industry* and *trade*, because *all* refers to the activities associated with whatever definition FWS chooses. Using the definition of *industry* and *trade* as ownership transfer, the term *all* means that "all activities of industry and trade" includes every single activity associated with transferring species ownership — such as a seller bringing an animal to a shipper, a shipper transporting an animal for the purpose of a sale, a buyer bringing the animal

home after the purchase, breeding activities conducted for the purpose of selling offspring, and activities associated with non-sale ownership transfer.

Third, the District Court argues incorrectly that FWS has read "including, but not limited to" out of the statute; and that FWS has made the *commercial activity* prohibition redundant with the ESA's prohibition against selling or offering for sale. *South Carolina Advocates,* No. 2:15-cv-3768-PMG(LUD) at *15–16, *19. Both these findings stem from the misperception that FWS's regulation interprets *industry* and *trade* to solely include sale and purchase. In reality, the FWS regulation includes other activities as well. To start, the regulation explicitly mentions that it includes the *intended* transfer of a species. In addition, the regulation would include, among other activities, the bartering of a species for something else of economic value, the transfer of species ownership as part of a larger business transaction such as a merger, the free giveaway of a species as part of a business promotion intended to generate revenue, or even a the current owner of a dangerous animal paying a new owner to take the animal off her hands.

F. This Court should remand with directions to grant FWS judgment on the pleadings.

This Court must uphold FWS's reasonable, longstanding, nearly-contemporaneous interpretation of ambiguous ESA language, especially considering that Congress has ratified the ESA's interpretation.

The District Court for the District of Columbia has once had occasion to consider this same FWS interpretation, and upheld the interpretation. See *Humane Soc'y*, 1992 U.S. Dist. LEXIS at *13. "After determining that the statutory language is ambiguous, the [District Court for the District of Columbia] held that FWS' interpretation of 'commercial activity' is not unreasonable, accords with the legislative history of the ESA, and has been impliedly ratified by Congress through subsequent amendments to the statute which left the definition of 'commercial

activity' unchanged." *Humane Soc'y*, 46 F.3d at 96. Although without binding authority, the District of Columbia District Court ruling still may prove of interest to this Court.

CONCLUSION

For the foregoing reasons, this Court should vacate the decision below for lack of standing, or else grant a judgment on the pleadings in favor of FWS.

Dated this 15th day of January, 2016

Respectfully submitted,

TEAM NUMBER 1400
Attorneys, U.S. Department of Fish and Wildlife Services