Civ. App. No. 15-70117

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

APPELLANT'S BRIEF

Appeal from Order United States District Court for the Western District of California, Case No. 2:15-cv-3768-PMG(LUD)

Team Number: 1488

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ISSUES PRESENTED

1) **Whether an organization has direct standing to sue under the *Havens* analysis when the defendant's conduct did not perceptibly impair the organization's ability to function as an organization and any drain on the organization's resources was the result of a budgetary reallocation of funds**.

2) **The Endangered Species Act prohibits transfers of listed species "in the course of a commercial activity," defined as "all activities of industry and trade, including, but not limited to, the buying and selling of commodities and activities conducted for the purpose of facilitating such buying and selling . . . ." Is there ambiguity in the phrase "industry and trade" such that the court should defer to the Fish and Wildlife Service's reasonable interpretation under the *Chevron* doctrine?**

STATEMENT OF THE CASE

The Endangered Species Act (ESA) makes it illegal to "deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any [listed] species." 16 U.S.C. § 1538(a)(1)(E). The act further defines "commercial activity" as used within that section to mean "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." *Id.* § 1532(2). Since 1975, the Fish and Wildlife Service (Service) has interpreted "industry and trade" as used in that definition to mean "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.

Plaintiff, South Carolina Advocates for Captive Exotics (SCACE), brought this action in the United States District Court for the Western District of California against the Service (Service) for its denial of SCACE's petition to initiate rulemaking. SCACE had petitioned the Service to amend its regulatory definition of "industry and trade" as used in the statutory definition of "commercial activity" within § 3 of ESA. 50 C.F.R. § 17.3. The Service denied

SCACE's petition due to competing priorities and limited agency resources. SCACE then brought the present action claiming that the denial of its rulemaking petition was unlawful.

The Service filed a motion in the district court for judgment on the pleadings, on grounds that SCACE had failed to demonstrate standing and that the denial of its petition was lawful. The district court denied the Service's motion and it files this timely appeal.

STATEMENT OF THE FACTS

SCACE is an organization that advocates on behalf of captive exotic animals in South Carolina. Compl. ¶ 4. Mabel Moxie's Cantankerous Cats (MMCC) is an animal exhibition business located in South Carolina and owns a tiger named "Calixta." *Id.* ¶ 17. Some years ago, SCACE became concerned about Calixta's well-being and initiated a resource-intensive campaign to enhance Calixta's well-being out of concerns that she was being mistreated by MMCC. *Id.* ¶ 22.

Last year, MMCC entered a contract with the University of Agartha in California to allow the University to exhibit Calixta as a team mascot during home football games in exchange for a fee contingent on the sale of tickets to the games. *Id.* ¶ 25. Although Calixta is not located in South Carolina during the time she is exhibited at the University's football games, SCACE continues to spend substantial resources to continue monitoring her well-being in California. *Id.* ¶ 28–29. Because monitoring Calixta in California requires a substantial investment of resources, SCACE filed a complaint with the Service, arguing that it should hold MMCC accountable for violating § 9(a)(1)(E) of the ESA, which makes it unlawful to "deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity, any [listed] species" without a permit. 16 U.S.C. § 1538(a)(1)(E); Compl. ¶ 32–33. Because it has long interpreted § 9(a)(1)(E) to require the 'actual or intended transfer of wildlife or plants from one person to another in the pursuit of gain or profit" and Calixta had not changed ownership in the

course of MMCC's and University's transaction, the Service informed SCACE that MMCC had not violated the ESA. 50 C.F.R. § 17.3; Compl. ¶ 34.

In response to the Service's letter, SCACE filed a petition for rulemaking to expand the Service's regulatory definition of "industry and trade" to include other types of activities such as the arrangement involving Calixta. Compl. ¶ 36–37. Faced with competing priorities and limited resource, the Service denied SCACE's petition to amend the rule. *Id.* ¶ 38. SCACE brought this action challenging the denial in the United States District Court for the District of Western California. *See generally id.*

SUMMARY OF THE ARGUMENT

The district court erred in holding that SCACE satisfied the three constitutional requirements for standing: injury, causation, and redressability. Although during the pleading stage the facts are construed in light most favorable to the plaintiff, the court made unwarranted inferences to support standing.

First, injury cannot be established under *Havens* because the direct effect of FWS' denial of petition for rulemaking did not impair SCACE's ability to carry out its business as usual. The effect of that action was confined to Calixta alone, leaving SCACE unimpaired to advocate for the other exotic animals in South Carolina. Second, causation has not been established because Calixta's transportation to California is lawful regardless of whether the rule at issue prohibits such transportations. Calixta is exhibited in California at by a cultural organization and is therefore exempt from the transportation prohibitions of the Endangered Species Act (ESA). Finally, SCACE has not sufficiently alleged that the MMCC will not modify its behavior and Calixta's activities in order to qualify for another exception to the ESA. SCACE has failed to meet the elevated burden to show standing when a third-party is the subject of the government's action or inaction.

When an agency charged with administering a statute publishes an official interpretation of an ambiguity in that statute, the agency's interpretation is subject to substantial deference under the *Chevron* doctrine. The statutory definition of "commercial activity" at issue in this case is ambiguous enough that the court should defer to the agency's reasonable interpretation of the term "industry and trade." The text, context, and canons of construction all indicate that the term "industry and trade is ambiguous, while the legislative history supports the Service's interpretation. The sheer multitude of dictionary definitions of both "industry" and "trade" prevent the statute from being clear on its face. The surrounding "including but not limited to" language does help to inform the court's interpretation of "industry and trade," but because it does not eliminate the legislative ambiguity, it is better considered at *Chevron* step 2 in evaluating the reasonableness of the Service's interpretation. The legislative history strongly indicates Congressional approval of the Service's definition, based on amendments published the year following promulgation of the definition that left it in place.

Because the statutory language is ambiguous, the court should defer to the Service's longstanding reasonable interpretation. The Service's regulation defines "industry and trade," to include all "transfer of wildlife or plants from one person to another in the pursuit of gain or profit." This definition encapsulates all sale and trade and many other exchanges of listed species, far surpassing the low bar set by step 2 of *Chevron*. Additionally, the legislature has indicated its approval of the Service's interpretation, indicating further that it is at least reasonable.

STANDARD OF REVIEW

This court reviews district court decisions regarding standing de novo. *Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 820 (9th Cir. 2002). At the pleadings stage,

the court "accept[s] as true all the material allegations in [the] complaint and constru[es] the complaint in [the plaintiff's] favor." *Id.* However, "'conclusory allegations . . . and unwarranted inferences'" are not sufficient to overcome a challenge to standing even at this stage. *Id.* (quoting *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.1998)).

When reviewing a district court's denial of a motion for judgment on the pleadings, this court should accept all factual allegations in the complaint as true and review the lower court's decision de novo. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). Judgment on the pleadings is proper "when there is no issue of material fact in dispute and the moving party is entitled to judgment as a matter of law." *Id.* Because there is no genuine issue of material fact in this case, this court should reverse the district court's decision and grant the Fish and Wildlife Service judgment as a matter of law.

ARGUMENT

I. South Carolina Advocates for Captive Exotics Lacks Standing to Contest the Fish and Wildlife Service's Regulatory Definition of "Industry and Trade"

SCACE bears the burden of showing "the irreducible constitutional minimum of standing," which requires: (1) "injury in fact" that "is (a) concrete and particularized . . . and (b) actual or imminent," (2) a "causal connection between the injury and the [defendant's] conduct" that is "fairly traceable," and (3) that a favorable decision will "likely, as opposed to merely speculative[ly]" redress the alleged injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Organizations alleging direct standing are subject to these same requirements. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982). Because the agency action at issue in this case regulates a third party, MMCC, it is "substantially more difficult" to for SCACE to establish standing. *Defenders*, 504 U.S. at 562.

Direct organizational standing requires the plaintiff to show that the defendant's allegedly unlawful conduct has "perceptibly impaired" the plaintiff's ability to carry out its activities with a "consequent drain on the organization's resources." *Havens*, 455 U.S. at 379. From this standard, the Ninth Circuit adopted a two-prong test: an organization must show both "(1) frustration of its organizational mission; and (2) diversion of its resources to combat the particular [allegedly unlawful conduct] in question." *Smith v. Pac. Properties & Dev. Corp*., 358 F.3d 1097, 1105 (9th Cir. 2004). An organization "cannot manufacture [an] injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010).

In other words, "an organization may sue only if it was forced to choose between suffering an injury and diverting resources to counteract the injury." *Id.* at 1088 n.4 (citing *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1277 (D.C.Cir. 1994)). The independent "injury" to the organization's mission and the subsequent diversion of resources to counteract the injury together constitute an "injury in fact" for organizational standing. Because SCACE's mission was not frustrated as a direct effect of FWS' denial of petition, they lack standing in this case.

a. Calixta's Temporary Relocation to California Did Not Frustrate SCACE's Mission to End the Exploitation of Captive Exotic Animals

This court has equated Haven's requirement that the defendant's conduct "perceptibly impair the [plaintiff's] ability to provide [its services]" with a perceptible impairment of "their ability to carry out their mission." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013); see also *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1224-25 (9th Cir. 2012) (finding an impaired "ability to function as an organization" to be

a frustration of its mission). This makes sense because the only way to actually carry out their mission is to engage in activities that promote the mission. Therefore the organization's "ability to provide [services]" must be "perceptibly impaired" in order for their mission to be frustrated. *Havens*, 455 U.S. at 379. Otherwise, any frustration of purpose would be a "simply a setback to the organization's abstract social interests" and fail to be a concrete injury in fact. *Id.*

i. SCACE's Ability to Advocate for Exotic Animals Has Not Been Perceptibly Impaired

The impaired "ability to function as an organization" refers to the organization's general ability to carry out their activities and "function as an organization" rather than an impaired ability carry out an activity in an isolated instance or situation. *Roommate.com*, 666 F.3d at 1224-25; see also *Havens*, 455 U.S. at 377 ("[w]e have not suggested that discrimination within a single housing complex might give rise to [injury] throughout a metropolitan area").

A general disruption to the organization's functioning has always been required for organizational standing. *Havens* involved an organization, "HOME," with the mission to "to make equal opportunity in housing a reality in the Richmond Metropolitan Area." *Havens*, 455 U.S at 368. The defendant's racial "steering practices" included providing misinformation about the availability of housing, which thereby impaired HOME's ability to provide informed and truthful "counselling and referral services for low-and moderate-income homeseekers" in the area. *Id.* at 379. The Court found this to be sufficient for standing after HOME diverted resources to counteract these direct effects of the racial steering practices. *Id.*

The circuit courts have adopted the requirement that an organization's ability to carry out activities must be impaired generally, rather than merely in a specific instance. In *Smith*, the plaintiff's ability to "ensur[e] an adequate stock of accessible housing" was impaired by the defendant's discriminatory housing structures and facilities, thereby frustrating the plaintiff's

mission. *Smith*, 358 F.3d at 1105 (9th Cir. 2004). The court so held because the availability of accessible housing was reduced to all handicapped individuals in the area, thereby simultaneously frustrating the plaintiff's mission to "hel[p] to eliminate discrimination against individuals with disabilities" and impairing their ability to carry out their activities. *Id.*

This standard of an impaired general ability to operate predominates in other circuits as well. See e.g. *American Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 550 (6th Cir.2004) (Kennedy, J., concurring in part and dissenting in part) (distinguishing *Havens* because plaintiff did not "encounter[] significant difficulty helping individual plaintiffs counteract discrimination directed at them in a localized area"); *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (finding frustration of purpose where the USDA's failure to provide inspection reports for any and all avian-species impaired the plaintiff's ability to educate the public and "prevent cruelty . . . through its normal process").

The transportation of Calixta across state lines has not impaired SCACE's ability to advocate for animals in pursuit of its mission to "end the exploitation of captive exotic animals." Compl. ¶ 4. Although the denial of SCACE's petition for rulemaking may impair the ability to advocate for Calixta specifically, it has not impaired SCACE's ability to advocate for exotic animals in South Carolina, or in general. Indeed, SCACE has not alleged that the mere absence of Calixta's impairs its ability to advocate for any other animals.

Instead, Calixta's absence actually improves or at least maintains SCACE's ability to carry out its normal functions in pursuit of its mission. SCACE's normal functions are to

advocate for exotic animals, not just Calixta.[1] An organization's activities are impaired when it is unable to carry out "business as usual." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). None of SCACE's normal operations are dependent on Calixta. SCACE can carry out all of its normal operations for the other animals without Calixta being present in South Carolina and any money that is not spent on Calixta can be used to better advocate for current projects, or even allow SCACE to expand its reach to new exotic animals.

Moreover, SCACE's ability to carry out its functions is not limited by a shortage of animals[2], but by its "scarce resources." Compl. ¶ 42. *Havens* is distinguishable because, there, the racial steering practices impaired HOME's ability to provide services to every African-American homeseeker in the area. Likewise, in *Pacific*, the discriminatory housing structures reduced the ability to find accessible housing for all handicapped homeseekers in the area. Here, the denial of petition impairs only, if anything, the ability to advocate for Calixta *specifically*. SCACE has not established, nor alleged, that Calixta's absence impairs their ability to carry out their activities. Because the only direct effect of FWS' conduct is the transportation of Calixta[3], SCACE has failed to show that her absence alone frustrates their mission to "end the exploitation of captive exotic animals." Compl. ¶ 4.

[1] SCACE's normal advocacy activities are the same for each animal and include "monitoring and documenting the conditions in which they are kept, conferring with experts about these conditions, reporting apparent violations, . . . and engaging in public education and media campaigns." Compl. ¶ 5.
[2] Rather than alleging a shortage of animals that would make Calixta more essential to their mission, SCACE states that they "have monitored hundreds of captive exotic animals at dozens of substandard facilities across the state." Compl. ¶ 21.
[3] SCACE has not alleged that other animals they work with, or even have the potential to work with, have been or will be transported across state lines. To assume such speculative facts would be an "unwarranted inference" that cannot contribute to this injury. *Schmier* 279 F.3d 817, 820.

ii. Mere Diversion of Resources Cannot Cause the Frustration of an Organization's Mission Required for Standing

A diversion of resources absent an independent frustration of purpose cannot support standing. This "manufacturing of injury" fails to satisfy an independent frustration of purpose, the first prong of organizational standing. *Trabajadores*, 624 F.3d at 1088. Instead, an organization must divert resources to "counteract th[e] frustration of its mission." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013). It is wholly illogical to assert that a diversion of resources can both *cause* a frustration of purpose and be diverted to *counteract* that very same frustration.

The effects caused by the allegedly unlawful conduct do not extend to the diversion of resources when determining if there is frustration of purpose. *Havens* held the diversion of resources, to "counteract" the effects of the defendant's conduct, supported standing because it resulted in a "consequent drain on the organization's resources." *Havens*, 455 U.S. at 379. HOMES chose to spend resources that it would otherwise spend on counseling and referral services to identify the extent of the discrimination. *See id.* It was forced to *choose between* continuing its normal referral services, which were impaired by the racial steering, and diverting resources to reduce the racial steering practices. Thus, the court characterized the diversion as a choice made by HOMES, rather than an effect of the defendant's conduct that caused a frustration of purpose that needed to be counteracted.

SCACE's claim that its ability to advocate for exotic animals in South Carolina has been impaired only *after* diverting funds to California does not support standing. This is directly opposite *Havens*, in which the impaired ability to function occurred before the diversion of resources. Accordingly, even if SCACE diverted all of its funds to California in order to

advocate for Calixta, there would not be a sufficient injury for standing because there is no frustration of purpose independent of that diversion of resources.

b. The Fish and Wildlife Service has Not Caused SCACE Any Injury

i. SCACE Did Not Experience Any Frustration of Purpose Independent of Its Diversion of Resources

For the same reason that SCACE's diversion of resources alone failed to establish injury, their claim fails to establish causation. Havens required not just a specific two-part injury, but also required that those parts occur in a certain chain of causation. *Havens,* 455 at 379 (requiring a "*consequent* drain on organization resources") (emphasis added). As this court has stated, an organization "cannot manufacture the injury by . . . simply choosing to spend money fixing a problem that otherwise would not affect the organization at all. It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *Trabajadores*, 624 F.3d at 1088. As explained above, there was no "other injury" that the diversion of resource would counteract. *Id.* Therefore, any drain on resources resulting from that diversion was a self-inflicted budgetary decision that is not fairly traceable to FWS' conduct and SCACE fails to establish causation. *Defenders*, 504 U.S. at 560.

ii. The Rule at Issue is Not a But-For Cause of Calixta's Transportation Because the Transportation is Independently Lawful Under the Act's Museum and Cultural Organization Exception

The district court erred in finding that SCACE satisfied the causation requirement. Causation is satisfied when "the conduct that injures the plaintiff . . . would have been illegal without that [agency] action." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976). This principle, however, does not establish standing here because Calixta's transportation would have been *legal* even without FWS' denial of petition. The "exhibition of commodities by

museums or similar cultural or historical organizations" is lawful under the ESA's definition of "commercial activity." 16 U.S.C. § 1532 (2). Applying this rule, Calixta's transportation to a university for exhibition as the football team's mascot is lawful.[4]

The term "cultural or historical organization" is not defined within the statute, so the words in that phrase are to be given their "ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). To do so, we look to dictionaries. *See id.* Culture means "the body of customary beliefs, social forms, and material traits constituting a distinct complex of tradition of a racial, religious, or social group. Webster's New International Dictionary 552 (3d. 1971). Universities exhibit many of the attributes, particularly influencing the social forms of the student body. Each college campus has its own atmosphere that sculpts the culture of the local area and contributes to the culture of American society. Moreover, college football is universally regarded as a staple of American culture, especially within each respective university. The symbolic representation of the football team, and the culture that is associated with it, is embodied in their mascot. In this case, that mascot is Calixta.

Ironically, in its discussion of the merits, the lower court stated that this exception for cultural organizations "warrants attention," but then failed to even mention the exception in its standing analysis. The conduct that allegedly injures SCACE is the Calixta's transportation. The transportation is lawful under this cultural exception. Consequently, the conduct that injures the plaintiff would *not* be illegal without the denial of petition. Therefore, FWS' conduct is not

[4] If Calixta does not qualify as a "commodity" under this rule because commodities are only animals parts, rather than living animals, then FWS' definition of "industry and trade" necessarily encompasses more than just the "buying and selling of commodities." 16 U.S.C. § 1532(2); *See infra* Part II (a) (ii).

"fairly traceable" to the alleged injury and SCACE has failed to meet the causation requirement for constitutional standing.[5]

c. This Court is Incapable of Granting Relief that Would Redress SCACE's Alleged Injury

i. MMCC Would be Likely to Modify Its Behavior to Fit the Exception for Activities to Enhance the Propagation or Survival of the Species

If a prohibition of exempts a specific transport, then that transportation is lawful regardless of whether another rule prohibits it. Although Calixta's current activities in California do not qualify the transportation for the 50 C.F.R. § 17.21 (g)(6) exception, MMCC can, and likely will, modify those activities to meet the exemption so that Calixta can continue being transported to California. According to the regulation, "any person may . . . transport or ship in interstate [commerce] . . . in the course of a commercial activity . . . any endangered wildlife that is bred in captivity in the United States provided that the wildlife is of a taxon in paragraph (g)(6) of this section." 50 C.F.R. § 17.21 (g)(1). This transportation may be done without applying for or obtaining a permit and despite other prohibitions, including the one at issue in this case. 50 C.F.R. § 17.21 (g). As noted by the district court, such transportation is lawful when "the purpose of such activity is to enhance the propagation of the affected exempted species." Memorandum Opinion at 4 n.1; 50 C.F.R. § 17.21 (g)(6)(i).

From these regulations, three main elements can be derived as requirements for the exception: the animal must be (1) a member of a listed taxon that was (2) bred in captivity in the

[5] The cultural exception also applies to redressability. SCACE's alleged injury is caused by Calixta's transportation to California. Because the ESA's cultural exception permits this transportation independently of the rule at issue in this case, a favorable decision for SCACE would not redress the injury. 16 U.S.C. § 1532; *Defenders*, 504 U.S. at 560. Therefore SCACE has also failed to establish redressability. *Id.*

United States and (3) transported with the purpose of such activity is the propagation of the species.

The first two elements of this exception are satisfied for the purposes of SCACE's standing. First, the district court took "judicial notice that Calixta is most *likely* [a member of a taxon listed]." Memorandum Opinion at 4 n.1. Second, the complaint does not indicate where Calixta was born and SCACE has not even alleged that Calixta would fail to satisfy this element. Because SCACE bears the burden of proof in standing issues and it is completely speculative as to whether Calixta was born outside the US, this court should refrain from making such an "unwarranted inference." *Schmier*, 279 F.3d at 820.

Finally, MMCC will likely coordinate with a facility in California to undertake activities "for the purpose of enhanc[ing] the propagation of the species." 50 C.F.R. § 17.3 (g)(6)(i). Such activities:

> include[e] but are not limited to . . . (a) "normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible" [and] . . . (c) [e]xhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species." 50 C.F.R. § 17.3.

MMCC will likely arrange for activities with a California zoo or other facility that will meet at least one of those activities. The arrangement will likely include housing Calixta in a zoo that is "designed to educate the public about the ecological role and conservation needs of the affected species." *Id.*

Even if no zoo in California or the surrounding area has facilities capable of such education, Calixta will likely be used to improve the genetic vitality in the tiger species. This would be accomplished by arranging for housing and breeding with another zoo that is near the

university. Because Calixta will already be in California for one of these two purposes, she will be available for the University's football games.

SCACE must show that MMCC's choices "will be made in such manner as to produce causation and permit redressability of injury." *Defenders*, 504 U.S. at 562. In this case, that means SCACE must show that MMCC is unlikely to pursue the activities that would qualify for exemption under the regulations or that MMCC not likely to succeed in its efforts.

The probability that MMCC will undertake such efforts is at least more likely than being simply speculative. MMCC has a "long-term contract" with the University to use Calixta as their mascot. Compl. ¶ 25. This indicates that both parties have motivating interest in continuing Calixta's seasonal presence in California. In an effort to continue their professional relationship, both parties will likely to pursue activities for Calixta in accordance with 50 C.F.R. § 17.21 (g). Rather than simply indicating that MMCC might begin activities that would continue to allow Calixta's transportation to California, it is unlikely that they will not. Even looking at these facts in the light most favorable to SCACE, unwarranted inferences are required to show that it is *likely* that MMCC will fail to qualify for the exception. *Schmier*, 279 F.3d at 820. Therefore, it is not likely that a favorable decision for SCACE will redress their alleged injury by preventing Calixta from being transported to California. As a result, SCACE fails to establish redressability. *Defenders*, 504 U.S. at 555. SCACE has failed to demonstrate any standing requirement.

II. The Court Should Defer to the Service's Interpretation of the Ambiguous Phrase "Industry and Trade" Under *Chevron*

When interpreting statutes that Congress has entrusted to agency administration, it uses the test the Supreme Court crafted in *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837 (1984). That test requires the Court to first determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, the court "must give effect to the

unambiguously expressed intent of Congress"; however if the statute "is silent or ambiguous with respect to the specific issue," then the court merely determines "whether the agency's answer is based on a permissible construction of the statute." *Id.* The purpose of this doctrine has been described as to ensure that statutory ambiguities are resolved "not by the courts but by the administering agency," since "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013).

a. The Phrase "Industry and Trade" as used in the Endangered Species Act's Definition of "Commercial Activity" is Ambiguous

The Endangered Species Act forbids transport of any listed species in interstate commerce "in the course of a commercial activity." 16 U.S.C. § 1538(a)(1)(E). "Commercial Activity" is defined within the text of the Act itself 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." *Id.* § 1532(2).

SCACE claims that the meaning of "industry and trade" as used in this statutory definition indicates "the unambiguously expressed intent of Congress," such that the agency charged with administering the statute is due no deference. *Chevron*, 467 U.S. at 843. The Service has codified an official regulatory definition of "industry and trade," defining it to mean: "the actual or intended transfer of wildlife or plants from one person to another in the pursuit of gain or profit." 50 C.F.R. § 17.3.

The analysis into whether the statutory language is ambiguous requires the court to "employ[] traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. The

Supreme Court has described how to determine whether a statute is ambiguous at the first step of *Chevron*:

> the statute's text, its context, the structure of the statutory scheme, and canons of textual construction are relevant in determining whether the statutes is ambiguous and can be equally helpful in determining whether such ambiguity comes accompanied with agency authority to fill a gap with an interpretation that carries the force of law. *City of Arlington*, 133 S. Ct. at 1876

i. The Plain Meaning of "Industry and Trade" is Not Unambiguous

Traditionally, when trying to ascertain the meaning of statutory language, the courts "may look to sources such as dictionaries for a definition." *United States v. Mohrbacher*, 182 F.3d 1040, 1048 (9th Cir. 1999) (citing *Muscarello v. United States*, 524 U.S. 125 (1998)). The Ninth Circuit has found more specifically that "[d]ictionaries can aid in applying step one of the *Chevron* analysis." *Lagandaon v. Ashcroft*, 383 F.3d 983 (9th Cir. 2004). The dictionary offers many definitions of both "industry" and "trade." The sheer amount of potential meanings the legislature could have intended with those two words indicates the presence of some ambiguity in their use. Several potentially relevant definitions of "industry" include "habitual or constant work or effort," "a systematic labor esp. for the creation of value," or "manufacturing activity as a whole." Webster's Third New International Dictionary, 1155–56 (2002).

The dictionary offers at least as many potentially relevant definitions of "trade," offering such unhelpful examples as: "a path traversed or for traverse"; "a course of action or conduct"; "the business one practices or the work in which one engages regularly"; "the business of buying and selling or bartering commodities"; "exchange of merchandise between different places on a large scale"; "the group of firms or corporations engaged in a line of work." *Id.* at 2421. The potential meanings of "trade" are not only numerous, but contradictory. There is no good way

for the court to resolve which particular definition Congress had in mind without resorting to legislative history and the agency's reasonable interpretation under *Chevron*.

Black's Law Dictionary helps narrow down the potential definitions slightly, but still comes far shy of making either definition "unambiguous." It defines "industry" as "1. Diligence in the performance of a task. 2. Systematic labor for some useful purpose; esp. work in manufacturing or production. 3. A particular form or branch of productive labor; an aggregate of enterprises employing similar production and marketing facilities to produce items having markedly similar characteristics." Black's Law Dictionary, 845 (9th ed. 2009). It defines "trade" as "1. The business of buying and selling or bartering goods or services. 2. A transaction or swap. 3. A business or industry occupation; a craft or profession." *Id.* at 1629. If the statute is as unambiguous as SCACE claims and "all" activities that fall into either or both of the above definitions is included, a plethora of innocent activity, such as in-house transfers absent any economic activity that happen to cross state borders, would become criminal. If indeed "commercial activity" is interpreted to include every shred of every definition listed in the dictionary then it is no limitation at all and effectively becomes read out of the statute, as any and all activity of the listed kinds becomes criminal. *See United States v. Wenner,* 351 F.3d 969, 975 (9th Cir. 2003) ("[A] statute should not be construed so as to render any of its provision mere surplusage.").

The above examples illustrate only a fraction of the possible definitions of these two words the legislature used in its definition. The multitude of arguably applicable definitions of both the words in the statute indicates strongly that the intended meaning of Congress is too ambiguous to be understood by reference to the words' meaning alone.

ii. The Contextual Statutory Language Surrounding "Industry and Trade" Does Not Resolve the Ambiguity

1. "Including but Not Limited To"

In the district court's memorandum opinion, it placed great weight on the statutory context surrounding "industry and trade"—specifically the words: "including but not limited to" and "all." The Ninth Circuit has evaluated "including but not limited to" in a case that the district court found unduly influential in its opinion: *Turtle Island Restoration Network v. Nat'l Marine Fisheries Service*, 340 F.3d 969 (9th Cir. 2003). In that case, an environmental organization sought to compel the National Marine Fisheries Service to engage in Endangered Species Act consultation with regard to issuance of certain fishing permits pursuant to the High Seas Fishing Compliance Act, despite an agency interpretation of the act that left no room for discretion in issuance or denial of the permits. *Id.* at 971–72. Rather than deferring to the agency's interpretation of the statute, the court found that the agency's interpretation was "not entitled to *Chevron* deference because it [was] contrary to the unambiguous language of the statute." *Id.* at 975.

In *Turtle Island*, the court did go into a *Chevron* step 1 analysis of the phrase "including but not limited to," finding that the agency's interpretation of the statute was "not entitled to *Chevron* deference because it [was] contrary to the unambiguous language of the statute." 340 F.3d at 975. That case, however, was concerned with a completely different statute as well as a different sort of agency interpretation, both of which make the case inapposite to the situation in this case. The phrase at issue in *Turtle Island* came from the High Seas Fishing Compliance Act, which gave the Secretary of Commerce authority to "establish such conditions and restrictions" on fishing permits "including but not limited to" two specific types of conditions and restrictions. 16 U.S.C. § 5503(d). There was a very specific list of potential permitting conditions framed

with the phrase "including but not limited to" and the agency had interpreted the list so as to deny itself discretion to add conditions outside those on the short list.

In this case, however, the agency does not deny that it would have discretion to include other types of activities if it chose to do so—that is the effect of "including but not limited to." *Turtle Island* holds only that an agency has discretion to include more items than those expressly written into an "including but not limited to" list; not that it *must* include specific types of activity outside those Congress included. While "including but not limited to" unambiguously prohibits a finding that a statutory list is exhaustive, it surely does not mandate inclusion of specific items Congress left off of the list.

In addition, the Service's definition includes a broad category of activity that falls outside the "buying and selling of commodities and activities conducted for the purpose of facilitating such buying and selling." While "commodities" refers, as defined by Black's Law Dictionary, refers to "article[s] of trade or commerce" or "economic good[s]," the Service's definition explicitly includes transfer of "wildlife or plants," which are not "commodities." Black's Law Dictionary, at 331**.**

Even if the Service's interpretation of "industry and trade" were limited only to "the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling," the actual agency interpretation of the statute is not relevant for purposes of *Chevron* step 1. The first inquiry is whether the statutory text itself is ambiguous, which has nothing to do with what the Service's reading does or does not include. Analysis into the strengths and weaknesses of the Service's rule should be reserved for *Chevron* step 2 in the analysis of whether or not the interpretation is "a reasonable interpretation" of the statute. *Chevron*, 467 U.S. at 844.

Another major distinction between *Turtle Island* and the present case is that the agency interpretation in that case did not arise out of a codified regulation. The interpretation that the agency sought deference for came instead from a letter stating the agency's opinion that it lacked discretion concerning the fishing permits. *Id.* at 972. The court noted that the interpretation would be entitled no deference regardless of statutory ambiguity because "interpretations such as those in opinion letters . . . which lack the force of law—do not warrant *Chevron*-style deference." *Id.* at 975 n.10.

2. "All"

Another factor the district court discussed was the presence of the word "all" immediately preceding "activities of industry and trade" within the statutory definition of "commercial activity." Though the district court correctly pointed out that "all" is an inclusive word that does not mean "some," the Ninth Circuit cases it cited are inapposite and the current statute presents a completely different issue. In *Edwards v. McMahon*, this court addressed an agency interpretation of the Omnibus Budget Reconciliation Act, which requires state agencies to "promptly take all necessary steps to correct any overpayment or underpayment of aid." 834 F.2d 796 (9th Cir. 1987) (citing 42 U.S.C. § 602(a)(22)). Despite the agency's attempts to limit corrective payments and request for *Chevron* deference to its interpretation, the court found that Congressional intent was unambiguous because use of the word "all" indicated that clearly that all underpayments were to be corrected. *Id.* at 799.

The situation now before the court is wholly different from the scenario in *Edwards*. In that case, the agency was required to take "all necessary steps" yet attempted to avoid payment to certain groups. 42 U.S.C. § 602(a)(22). In the present case, the statute defines commercial activity as "all activities of industry and trade." 16 U.S.C. § 1532(2). Since the deference due

the definition of "industry and trade" is exactly what is at issue in this case, there can be no reasonable dispute whether "all" of it will be illegal. The Service defines "industry and trade" to include various activities and its interpretation thus indicates that "all" of those activities violate the ESA. SCACE's allegation that the word "all" implies inadequacy in the Service's definition presupposes that "industry and trade" includes activities outside the current regulatory definition—in effect that it has already won this case.

iii. The Legislative History of the Endangered Species Act Implies Congressional Approval of the Service's Definition

The legislative history of § 9 indicates that Congress has shown its support for the Service's interpretation. The Service originally adopted its regulatory definition of "industry and trade" in 1975, one year before Congress amended the act. 40 Fed. Reg. 44412, 44416 (1975). In the 1976 amendments, Congress amended the definition of "commercial activity," the basis for the "industry and trade" regulation, to add the "museum exception" in order to "allow the interstate exchange of displays between such organizations without violating the Act." H.R. Rep. No. 823, 94th Cong., 2d Sess. 7 (1976). The Supreme Court addressed Congressional silence in response to agency interpretations of statutory language in *Lorillard v. Pons,* 434 U.S. 575 (1978). It noted that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Id.* at 580. By revisiting the definition of "commercial activity" to add an express exception for "museums or similar cultural or historical organizations," without any express modification of the Service's definition of "industry and trade," Congress was thus effectively adopting it itself.

Indeed, a Representative considering the 1976 ESA amendments explicitly acknowledged and approved of the Service's definition in another piece of legislative history. Representative

Leggtt noted that one of the reasons for the amendment was that "the Department of Commerce had not adopted the same definitions as the Department of Interior," and noted specifically that the new museum exception was "not intended to limit the Department of the Interior's definition." 230 Cong. Rec. 3260 (1976) (Rep. Leggett). The legislative history indicates not only that the Service's interpretation of "industry and trade" is not only a permissible construction of the statute for *Chevron* purposes, but a construction that has express Congressional approval.

b. The Fish and Wildlife Service's Regulatory Definition of "Industry and Trade" is Reasonable and Entitled to *Chevron* Deference

Since the relevant text of the ESA is ambiguous, the Service does not need to demonstrate that its regulatory definition of "industry and trade" is the "best construction" of the statutory language or even that it is the same definition the court would come to independently. *Cervantes v. Holder*, 72 F.3d 583, 591 (9th Cir. 2014). It must only show that it's reading of the statutory text not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. The Service's interpretation of "industry and trade" includes all transfers of endangered species for profit, an assuredly reasonable interpretation of those words as they are used in the statutory definition. Where, as here, the administrative interpretation is longstanding and consistent, it is "entitled to considerable weight." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978).

i. The Service's Interpretation Includes More than Just Buying and Selling

While the "including but not limited to" language in § 3(2) does not prohibit the Service from interpreting the statute to prohibit only buying and selling of commodities, the Service's interpretation extends beyond only those activities. The current definition prohibits, in addition

to buying and selling, trading of endangered species for other species, and buying or selling of live species, as opposed to just commodities.

Additionally, one of the purposes of the Compliance Act in *Turtle Island* was to implement international conventions, including the Inter–American Convention for the Protection and Conservation of Sea Turtles. *Turtle Island*, 340 F.3d at 976. Effectively, the court found that the agency's position that it lacked discretion to include permit conditions protective of endangered turtles to be contradictory to the legislative intent of promoting international conventions. Here, where, as discussed above, the legislative intent is to maintain the Service's definition, the interpretation is significantly more reasonable than that in *Turtle Island*.

ii. The Service's Interpretation Does Not Turn §9(a)(1)(F) into Surplusage

Citing avoidance of surplusage as a statutory construction principle, the district court also noted that the Service's definition of "industry and trade" is inconsistent with the surrounding prohibitions of § 9. Though courts surely must avoid surplusage when interpreting statutory language, the Ninth Circuit has also found that "substantial overlap in definitions does not render terms superfluous." *ASARCO, L.L.C. v. Celanese Chemical Co.*, 792 F.3d 1203 (9th Cir. 2015) (citing *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001).

Section 9(a)(1)(F) of the ESA makes it illegal to "sell or offer for sale in interstate or foreign commerce" any listed species. 16 U.S.C. § 1538(a)(1)(F). The district court noted that this section turns the Service's interpretation of "industry and trade" into mere surplusage, finding that its prohibition on transfer for profit includes only activity that is already prohibited by subsection F, making the various terms of subsection E superfluous. This is not the case however. While subsection F prohibits the act of sale, subsection E goes further to prohibit other

actions that generally accompany a sale, including "deliver[y], recei[pt], carry[ing], transport[ation], or ship[ping]." *Id.* § 1538(a)(1)(E). Although some transfer of ownership for profit is necessary to meet the definition of "commercial activity," the different subsections prohibit different activities that both often arise from such transfers. Additionally, without subsection E, there would be no way to prosecute buyers of listed species, for subsection F prohibits only sale or offer for sale. *Id.* § 1538(a)(1)(F).

CONCLUSION

This court should overturn the district court's decision to deny the Service's motion for judgment on the pleadings and dismiss SCACE's complaint for lack of standing and failure to state a claim.