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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES FISH AND
WILDLIFE SERVICE,

Appellant,

v.

SOUTH CAROLINA ADVOCATES
FOR CAPTIVE EXOTICS,

Appellee.

On Appeal from the District Court for the Western District of California

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BRIEF OF APPELLEE

January 15, 2016

Team #1616
Attorneys for Appellee

Oral Argument Requested

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ISSUES PRESENTED

1. Under the judicial doctrine of standing, did the district court correctly rule that the appellee adequately alleged standing at the pleadings stage, when, after the appellant's denial of the appellee's petition for rulemaking, the appellee provided evidence of an organizational injury (in the form of diversion of resources and mission frustration), causation, and redressability?

2. Under *Chevron*, does the appellant's decision to deny a petition for rulemaking fail the two-step test when Congress unambiguously spoke to the direct issue at bar when analyzing the statute's legislative history, the plain meaning of the statute, and the canon to avoid surplasage, and where the appellant's interpretation of the statute runs contrary to the mission of the statute?

STATEMENT OF THE CASE

This case concerns the rights of an organization to be able to hold government accountable through a petition for rulemaking to a federal agency. After receiving South Carolina Advocates for Captive Exotics's ("SCACE") petition for rulemaking, the United States Fish and Wildlife Service ("FWS") immediately denied it, asserting that the FWS had discretion to use such a narrow definition of "industry and trade." Compl. ¶ 38. Upon receiving the denial, SCACE commenced this lawsuit on December 20, 2013, arguing that the denial of SCACE's petition for rulemaking violated the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2) (1966). The FWS motioned for judgment on the pleadings, which was subsequently denied by the United States District Court for the Western District of California. *South Carolina Advocates for Captive Exotics v. United States Fish and Wildlife Serv.*, No. 2:15-cv-3768-PMG(LUD) at 1 (W.D. Cal. 2014).

STATEMENT OF THE FACTS

SCACE is a nonprofit organization with a mission of ending the exploitation of captive animals. Compl. ¶ 4. To accomplish its mission, SCACE advocates for tigers (who are listed as an endangered species under the Endangered Species Act ("ESA"), 50 C.F.R. § 17.11(h) (2016)), and other exotic animals from South Carolina. *Id.* SCACE conducts the majority of its work, which includes monitoring animals and documenting the conditions in which the animals are kept, reporting violations when the animals are kept in inhumane conditions, and conducting media campaigns, in South Carolina. *Id.* SCACE also participates in administrative and legislative lobbying and engages in educating the public (through outreach, demonstrations, and information distribution) about captive exotic animals. *Id.* ¶ 5. To inform its lobbying, education, and media efforts, SCACE obtains information about South Carolina-based captive exotic

animals from local and state authorities in South Carolina. *Id.* When SCACE is unable to gather this information from South Carolina officials, it cannot conduct its lobbying, education, and media outreach work. *Id.*

In addition to advocating within South Carolina, for several years, SCACE has been monitoring Calixta, a tiger who is owned by Mabel Moxie's Cantankerous Cats ("MMCC"), and documenting the conditions under which Calixta is kept. *Id.* ¶¶ 17-20. MMCC is open to the public, and SCACE staff members are able to monitor Calixta by paying a fee to tour MMCC's facilities. *Id.* ¶ 19. When SCACE documents that Calixta is being kept in inhumane conditions or having cruelty inflicted upon her at the hands of MMCC workers (specifically, SCACE has videotaped MMCC staff members hitting Calixta and using an electric prod on her, causing her great pain and suffering), SCACE files complaints with local officials, which often result in citations from local law enforcement. *Id.* ¶¶ 20, 22. Over the years, SCACE has developed a relationship with local law enforcement, who are now aware of Calixta's living conditions, follow up on how Calixta is treated by MMCC, and provide frequent reports to SCACE about Calixta's well-being. *Id.*

In 2012, MMCC entered into a contract with the University of Agartha in California. *Id.* ¶ 25. The terms of the contract provide that, for a fee, MMCC will transport Calixta to California every September so she can be exhibited at the university's home football games. *Id.* While she is serving as the university's mascot, Calixta is held in California for the entire football season and then returned to South Carolina when the season ends. *Id.* During transportation, Calixta is kept in a trailer with inadequate ventilation and hard floors, which are known to cause foot and joint problems in tigers. *Id.* ¶ 27. Once Calixta is under the university's care, she is subjected to

cruel living conditions, specifically she is confined to a ten foot by ten foot enclosure, and she is subjected to loud noises from the university's cheering fans. *Id.*

To carry-out its mission of advocating for South Carolina-based captive exotic animals and documenting Calixta's conditions to inform the public, SCACE had to send staff and equipment to California to document Calixta at the university. *Id.* ¶ 28. Not only did SCACE have to spend money to send its staff to California, but since SCACE does not have contacts within the California legal system or in Agartha law enforcement, SCACE also had to use its resources to hire an attorney in California, who advised SCACE of whether the university was violating any California or Agartha animal cruelty regulations while caring for Calixta. *Id.* ¶ 31. SCACE also spent its valuable resources on trying to build relationships with Agartha and California officials, so the officials can both assist SCACE in monitoring Calixta and investigate acts of animal cruelty inflicted upon her. *Id.* ¶ 43. As a result of sending Calixta to California and having to expend financial resources there, SCACE's other programs have lost money and staff, and suffered in their effectiveness. *Id.*

Due to the appellant's unlawful actions, SCACE has to utilize its limited money and staff resources in California, which takes away SCACE's time and resources on other projects. *Id.* SCACE filed a complaint with the appellant, alleging that MMCC violated the ESA's prohibition on "transport . . . in interstate . . . commerce . . . in the course of a commercial activity," 16 U.S.C. § 1538(a)(1)(E) (1988), when MMCC transported Calixta, an endangered species, to California. *Id.* ¶ 33. SCACE also alleged that MMCC did not have a permit to transport Calixta because permits allowing transport are only issued "for scientific purposes or to enhance the propagation or survival of the affected species." 16 U.S.C. § 1539(a)(1)(A) (1988). Rather than

taking action against MMCC's transporting of Calixta, the appellant ignored SCACE's complaint. Compl. ¶ 34. In its response, the appellant outlined that:

> The ESA defines the term "commercial activity" 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." 16 U.S.C. § 1532(2). To inform this definition, FWS promulgated a regulation that provides: "Industry or trade in the definition of 'commercial activity' in the Act means 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. Because MMCA never transferred, or intended to transfer, ownership of Calixta, it was not engaged in an "activit[y] of industry and trade" and, thus, the transport of Calixta was not "in the course of a commercial activity" within the meaning of the ESA.

Id.

To ensure that the appellant's definition of "industry and trade" aligns with the ESA, SCACE filed a petition for rulemaking, arguing that the appellant should use a regulatory definition of "industry and trade" that complies with the ESA's broad scope. *Id.* ¶¶ 36-37. Noting that the drafters of the ESA aimed to protect endangered species, SCACE's petition asked that the appellant apply a broad definition of "industry and trade" so more endangered animals, like Calixta, would be protected from the cruelties of interstate transport (as noted above) when the transport is simply for profit, and not scientific purposes or other exceptions. *Id.* ¶ 38.

SUMMARY OF THE ARGUMENTS

First, SCACE adequately alleged standing to proceed with its request for a declaration that FWS violated the APA in denying SCACE's petition for rulemaking, and that FWS's definition of "industry and trade" does not control the meaning of "commercial activity" in the ESA. An organization has standing to pursue its claim in court, provided it properly alleges: 1. injury in fact, 2. causation, and 3. redressability. Court precedent provides that this Court is to view the evidence in a light most favorable to the non-moving party. In doing so, this Court

should rule that FWS caused SCACE an injury when FWS denied SCACE's petition for rulemaking and used a definition of "industry and trade" that allowed for a tiger, who SCACE monitored, to be transported and kept in California, and forced SCACE to divert valuable resources to monitor the tiger in California in frustration of SCACE's mission. SCACE has also adequately alleged redressability because if a court were to grant SCACE's request that the FWS's denial of SCACE's petition for rulemaking violated the APA and that FWS must use a definition of "industry and trade" that is broad and in line with the mission of the ESA, SCACE's injuries would be remedied.

Second, when deciding whether an agency's decision violates the APA's provision barring decisions that are not in accordance with law, a court will utilize the two-step test set forth by the Supreme Court in *Chevron*. Step one of the test states that if Congress has spoken directly to the issue at bar, the unambiguous intent will be followed and will end the court's examination with no deference to the agency. However if the court finds Congress was silent or ambiguous in its intent towards the present issue, with deference to the agency, the court will determine if the agency's decision was based on a permissible construction of the statute. By analyzing the legislative history, the plain meaning of the text, and the canon where the court will avoid an interpretation that would render any portion of the statute as meaningless, this court should find that Congress did unambiguously speak to the issue at bar, and follow that intent to uphold the lower court's denial of FWS's motion for judgment on the pleadings. If, however, the inquiry manages to move to the second step of Chevron, this court will still uphold the district court because the agency's decision was based on an impermissible construction of the ESA because it runs contrary to the mission of the ESA.

ARGUMENTS

I. THIS COURT SHOULD UPHOLD THE DISTRICT COURT'S DENIAL OF FWS'S MOTION FOR JUDGMENT ON THE PLEADINGS BECAUSE SCACE HAS ADEQUATELY ALLEGED STANDING BY SUCCESSFULLY PROVING INJURY, CAUSATION, AND REDRESSABILITY.

Standard of Review

Standing is a jurisdictional issue, and "[t]he party seeking to establish jurisdiction . . . bears the burden of demonstrating" it. *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 970 (9th Cir. 2013) (internal citations omitted).

Since motions for judgment on the pleadings and motions to dismiss are "functionally identical," this Court has determined that the "same standard of review applies" to both types of motions. *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). Thus, when ruling on a judgment on the pleadings for lack of standing, "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (*see also Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008), which indicates that when deciding motions to dismiss this Court must "construe the pleadings in the light most favorable to the nonmoving party"). Further, this Court has specifically noted that when evaluating a dismissal on the pleadings, allegations of fact asserted by "the opposing party are accepted as true." *Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984) (quoting *Austad v. United States*, 386 F.2d 147, 149 (9th Cir. 1967)).

This Court examines standing as "a question of law" which the Court "review[s] de novo." *Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002) (quoting *S.D. Myers, Inc. v. City & Cty. of San Francisco*, 253 F.3d 461, 474 (9th Cir. 2001)).

A. SCACE HAS MET ITS EVIDENTIARY BURDEN TO PROVE STANDING AT THE PLEADINGS STAGE.

SCACE lawfully claims standing as an organization, and as the Supreme Court has long recognized, an organization "may have standing in its own right to seek judicial relief from injury to itself." *Warth*, 422 U.S. at 511. As the district court articulated in its opinion, like individual plaintiffs, organizations must prove three elements to establish standing:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

South Carolina Advocates for Captive Exotics v. United States Fish and Wildlife Serv., No. 2:15-cv-3768-PMG(LUD) at 6 (W.D. Cal. 2014) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Regarding the level of evidence the plaintiff must provide in order to establish standing, the Supreme Court has made clear that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan*, 504 U.S. at 561.

1. <u>SCACE suffered an injury in fact when the appellant denied SCACE's petition for rulemaking.</u>

The Supreme Court has recognized that when a defendant impairs an organization's abilities, "there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). To demonstrate this injury, an organization can show "a drain on its resources from both a diversion

of its resources and frustration of its mission." *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (*see also La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010)).

a. FWS's definition of "industry and trade" and denial of SCACE's petition for rulemaking forced SCACE to divert resources from SCACE's usual programs, proving an injury in fact.

This Court in particular has taken a generous and broad view of injury to an organization at the pleadings stage, and has found a diversion of resources when an organization has to change how it monitors violations of law. *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105-06 (9th Cir. 2004). In *Smith*, the plaintiff, an organization "with the principal purpose of helping to eliminate discrimination against individuals with disabilities," sued the defendant, a housing developer, claiming that the defendant violated the Fair Housing Amendments Act by having construction and design defects in the defendant's four properties. *Id.* at 1099. This Court found evidence of an organizational injury because the plaintiff had to "divert its scarce resources from [its] other efforts to promote awareness of – and compliance with – federal and state accessibility laws and to benefit the disabled community in other ways," and instead use its resources to "monitor the violations" of the Fair Housing Amendments Act. *Id.* at 1105.

Similarly, as recognized by the Supreme Court, countering a defendant's unlawful practices represents a diversion of resources. *Havens Realty*, 455 U.S. at 379. In *Havens Realty*, the plaintiff, a fair housing organization, sued the defendant, the owner of an apartment complex, for allegedly violating the Fair Housing Act by participating in racial steering. *Id.* at 366-67. The Court determined that the plaintiff had standing because it was injured by having to divert resources from the plaintiff's counseling and referral services to instead "counteract the defendant's racially discriminatory steering practices." *Id.* at 379.

Further, when an organization loses the ability to undertake its usual efforts, this Court has found a diversion of resources, and thus, injury in fact. *Combs*, 285 F.3d at 905. In *Combs*, the plaintiff, a non-profit organization with the mission of "promoting equal housing opportunities," sued the defendant, an owner of an apartment complex, alleging that the defendant violated the Fair Housing Act by discriminating based on race. *Id.* at 902. Finding that the plaintiff could no longer provide "outreach and education to the community regarding fair housing" (part of the plaintiff's mission) because the plaintiff had to "investigat[e] and . . . counteract," the defendant's "discrimination above and beyond litigation" this Court found that the plaintiff had been injured enough to constitute standing. *Id.* at 905.

Just as the court in *Smith* found evidence of an organizational injury because the plaintiff had to divert resources to monitor potential violations of the law; here, SCACE has suffered an organizational injury because the appellant's conduct has forced SCACE to divert its scarce resources from advocating on behalf of exotic animals in South Carolina, and instead use the resources to monitor potential violations of animal cruelty laws inflicted upon Calixta in California. *Smith*, 358 F.3d at 1105. The adoption of a definition of "industry and trade" that is consistent with the ESA would have made MMCC's transport of Calixta unlawful, and thus prohibited. However, since Calixta can now be transported to California as a result of FWS adopting a definition that is contrary to the ESA and FWS denying SCACE's petition for rulemaking, SCACE is forced to invest money in monitoring Calixta to make sure that she is not a victim of illegal animal cruelty.

SCACE's case is also similar to *Havens Realty* and *Combs*, where the courts found a diversion of resources (and thus, an injury in fact) when the plaintiff had to counteract the defendant's illegal conduct and when the plaintiff lost the ability to perform its usual tasks.

Havens Realty, 455 U.S. at 379; *Combs*, 285 F.3d at 905. Similar to the defendant's unlawful conduct in *Havens Realty*, FWS unlawfully violated the APA when it denied SCACE's petition for rulemaking. This illegal conduct, which permits the transport of Calixta to California, forced SCACE to divert scarce resources from SCACE's work (ending exploitation of captive exotic animals by engaging in public education and media campaigns), and instead, spend money to send staff to California to monitor Calixta and investigate her living conditions. Moreover, since the heart of SCACE's mission is to advocate on behalf of captive animals in South Carolina, FWS's conduct has taken monetary resources from animals in South Carolina (since Calixta spends the football season in California), and virtually ensured that SCACE's money must be spent in another state.

b. SCACE's mission was frustrated by FWS's definition of "industry and trade" and denial of SCACE's petition for rulemaking, causing injury to SCACE.

Circuit courts have ruled that animal advocacy organizations can suffer injury by mission impairment when federal agency action precludes the organization "from preventing cruelty to and inhumane treatment of" animals and deprives the organization of "key information that it relies on to educate the public." *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1094 (D.C. Cir. 2015). In *PETA*, the plaintiff, an organization dedicated to promoting animal rights, sued the defendant, a federal agency, when the defendant refused to apply the Animal Welfare Act to birds. *Id.* at 1089-90. The court found that the plaintiff was injured in two ways: first, because the plaintiff could not fulfill part of its mission of advocating for birds and "redress[ing] bird mistreatment" (because the defendant declared the Animal Welfare Act does not apply to birds) and second, because the defendant "was not creating bird-related inspection reports that [the plaintiff] could use to raise public awareness." *Id.* at 1091-92.

Also, this Court has found that an organization has suffered a frustration of its mission when a government regulation prohibits the organization from carrying out its goals. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011). In *Redondo Beach*, the plaintiff, a day laborer networking organization, sued the defendant, a city, for passing an ordinance that prohibited "stand[ing] on a street or highway and solicit[ing], or attempt[ing] to solicit, employment, business, or contributions from an occupant of any motor vehicle." *Id.* at 940. This Court ruled that the plaintiff had adequately alleged injury since the ordinance had frustrated the plaintiff's "mission to strengthen and expand the work of local day laborer organizing groups because it . . . prevented day laborers from making their availability to work known in the City." *Id.* at 943 (internal quotations omitted).

SCACE's case is analogous to *PETA* because SCACE cannot properly fulfill its mission when FWS prevents SCACE from fully redressing captive exotic animal cruelty, and when FWS prohibits SCACE from obtaining vital information that SCACE needs for its education campaigns. To fulfill its mission, SCACE obtains information from state and local South Carolina authorities about captive exotic animals in South Carolina, and when it cannot obtain this information, SCACE's mission to educate the public is hindered. The defendant's allowance of Calixta to be transported to California has frustrated SCACE's public education efforts because SCACE can no longer obtain information about one particular, South Carolina animal, Calixta, from South Carolina authorities when Calixta is not in South Carolina and local authorities do not have access to her. Moreover, the same way that the defendant in *PETA* made it so the plaintiff could not fulfill its mission of redressing bird mistreatment, FWS has caused a frustration of SCACE's mission of ending the exploitation of captive exotic animals because it

has allowed for tigers (and other exotic animals) to be transported on long journeys, which exploits them by subjecting them to cruel conditions in other states. *PETA*, 797 F.3d at 1091-92.

Similarly, like in *Redondo Beach*, where the court acknowledged a frustration of mission when the defendant's conduct made it so the plaintiff could not carry out its goals, FWS's refusal to define "industry and trade" in a manner consistent with the ESA has made SCACE suffer a frustration of its mission because SCACE cannot fulfill its organizational goals of participating in administrative and legislative lobbying on behalf of captive exotic animals since its staff members are working in California, and thus cannot lobby in South Carolina. *Redondo Beach*, 657 F.3d at 943. SCACE is injured by FWS's conduct because SCACE's mission of helping captive exotic animals is compromised.

In conclusion, there is nothing hypothetical about SCACE's injuries. Viewing the facts in a light most favorable to SCACE, as the Supreme Court instructs, easily demonstrates that SCACE's injuries are concrete, actual, and imminent. *Warth*, 422 U.S. at 501*; Lujan*, 504 U.S. at 560-61.

c. SCACE's injuries were not self-inflicted; they were a direct result of FWS's conduct.

While circuit courts do not recognize self-inflicted harm as an injury, *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006), the appellant's arguments about SCACE inflicting its own harm are misguided. As the D.C. Circuit Court recently recognized, just because an organization "voluntarily, or willfully . . . diverts its resources . . . does not automatically mean that it cannot suffer an injury sufficient to confer standing." *PETA*, 797 F.3d at 1096-97 (quoting *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1139-40 (D.C. Cir. 2011) (internal quotations omitted)). Further, when an organization incurs costs, which are unrelated to a legal challenge, those costs "do qualify as an

injury, whether they are voluntarily incurred or not." *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008).

Rather, to determine if injuries are self-inflicted, courts must examine whether "the organization 'undertook the expenditures in response to, and to counteract, the effects of the defendants' alleged' unlawful acts 'rather than in anticipation of litigation.'" *PETA*, 797 F.3d at 1097. The court in *PETA* explained that the plaintiff "redirected its resources in response to [the defendant's] allegedly unlawful failure to provide the means by which [the plaintiff] would otherwise advance its mission—filing complaints with the [the defendant] and using the [the defendant's] information for its advocacy purposes." *Id.* Since the plaintiff redirected resources because of the defendant's unlawful conduct, the court ruled that the plaintiff had been injured and thus had organizational standing. *Id.*

Further, this Court should follow the guidance of other circuits, which have drawn a bright line as to when an injury is self-inflicted. *Cent. Alabama Fair Hous. Ctr., Inc. v. Lowder Realty Co.*, 236 F.3d 629, 642 (11th Cir. 2000). As the 11th Circuit observed:

> There is an obvious difference between the situation . . . where an organization manufacturers the injury necessary to maintain a suit by expending resources on that very suit—and the situation where an organization incurs diversion of resources and frustration of purpose damages as a result of specific documented incidents of unlawful [conduct by the defendants]. In the latter situation, the organization is clearly not seeking or inflicting its own injury; the injury is inflicted by the defendants.

Id.

SCACE's injury is not self-inflicted as its deprivation of resources and frustration of mission come not from this lawsuit, but from the defendant's unlawful denial of SCACE's petition for rulemaking and adoption of a definition of "industry and trade" that is contrary to the ESA. Even though SCACE may have elected to send staff to California to monitor Calixta, as the *Browning* court guides, this action was not self-inflicted because FWS's refusal to adopt a

definition of "industry and trade" (which would have required Calixta to remain in South Carolina) and subsequent denial of SCACE's petition for rulemaking virtually ensured that SCACE would have to monitor her in California in order to fulfill SCACE's mission of protecting captive exotic animals. *Browning*, 522 F.3d at 1166. Moreover, in its complaint, SCACE did not claim economic injuries based on this lawsuit or in anticipation of it. The only attorney who SCACE hired was retained not because of this lawsuit, but to advise SCACE on whether the university was violating any Agartha or California animal cruelty ordinances while caring for Calixta.

SCACE is in compliance with the definition of injury that the court in *Cent. Alabama* applies because SCACE has limited its injuries to the ramifications of FWS's violation of the APA, independent of this lawsuit. *Cent. Alabama*, 236 F.3d at 642. Specifically, FWS put SCACE in a no-win situation where SCACE either has to divert resources to California (and thus, get injured because resources are drained from SCACE's other education, lobbying, and advocacy campaigns) or not monitor Calixta, which injures SCACE because it frustrates SCACE's mission of monitoring and advocating for captive exotic animals. In either case, SCACE suffered an injury, not caused by itself, but caused by FWS's denial of SCACE's petition for rulemaking.

2. SCACE's injuries were caused by the FWS's unlawful denial of SCACE's petition for rulemaking.

As the district court highlighted, "[t]here is a close relation between the requirement of power to redress a claimed injury and the requirement of a causal link between the injury asserted and the relief claimed," and this Court evaluates these two issues in tandem. *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (citing *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 74 (1978)). Indeed, "[t]he Supreme Court has clarified that the 'fairly

traceable' and 'redressability' components for standing overlap and are 'two facets of a single causation requirement.'" *Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013) (quoting *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984)). The Supreme Court has ruled that:

> When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else* . . . the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict" [and] . . . it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.

Lujan, 504 U.S. at 561-62 (internal citations omitted).

Although the burden may be higher in cases such as this, SCACE has met its burden to prove causation because to establish standing, plaintiffs only need to "show that the injury is causally linked or 'fairly traceable' to the Agencies' alleged misconduct." *Washington Envtl. Council*, 732 F.3d at 1141. Indeed, the Supreme Court has found causation when a federal agency defendant acts, and the "alleged injury that was . . . traceable to the action of the defendant . . . would have been illegal without that action." *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 46 (1976).

Specifically, the "Supreme Court . . . [has] repeatedly found causation where a challenged government action *permitted* the third party conduct that allegedly caused a plaintiff injury, when that conduct would have otherwise been illegal." *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 442 (D.C. Cir. 1998) (emphasis in original). The D.C. Circuit supported this notion in *ALDF*, where the plaintiff, an individual, witnessed primates being treated poorly by a third party zoo and sued the defendant, the USDA, a federal agency, for failure to "adopt explicit minimum standards to govern the humane treatment of primates, and that the agency did

not do so." *Id.* at 438. The court found that the causation prong of the standing test was satisfied because the plaintiff's aesthetic injury of having to witness animals suffer in cruel conditions at the hands of a third party was caused by "current USDA regulations, but that lawful regulations would have prohibited those conditions and protected [the plaintiff] from . . . injuries." *Id.*

The Supreme Court has also recognized that the government's failure to adequately regulate a third party can give rise to causation. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986). In *Japan Whaling*, the plaintiff, a wildlife conservation organization, alleged that a United States government agent, the Secretary of Commerce, failed to regulate a third party, the Japanese whaling industry. *Id.* The Court agreed and found causation, indicating that the government had caused the plaintiff's aesthetic injury (of not being able to observe whales) since the plaintiff was unable to participate in whale-watching because the Secretary did not "certify Japan for harvesting whales in excess of . . . quotas." *Id.*

Like in *ALDF* and *Japan Whaling*, FWS is not only permitting MMCC's conduct, which should be illegal under the ESA, but FWS failed to regulate the transport of endangered species like Calixta, causing SCACE's injury. *ALDF*, 154 F.3d at 442; *Japan Whaling*, 478 U.S. at 230. Because FWS's definition of "industry and trade" is inconsistent with the ESA and because the FWS unlawfully violated the APA by denying SCACE's petition for rulemaking, Calixta was permitted to be taken to California by MMCC. This transport then caused SCACE to have its mission frustrated and forced SCACE to divert its valuable resources, causing injury in fact.

Importantly, this Court has ruled that a "causal chain does not fail simply because it has several links, provided those links are not hypothetical or tenuous and remain plausible." *Washington Envtl. Council*, 732 F.3d at 1141 (internal quotations omitted). This Court has also found that a defendant's conduct does not have to be the "sole source" of a plaintiff's injuries in

order to find causation. *Barnum Timber Co. v. U.S. E.P.A.*, 633 F.3d 894, 901 (9th Cir. 2011). Further, "[t]he Supreme Court's decisions . . . show that mere indirectness of causation is no barrier to standing." *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 705 (D.C. Cir. 1988) (internal citations omitted). Hence, even if there were several steps between FWS refusing to adopt a consistent regulatory definition of "industry and trade," and SCACE being injured by a third party, the above case law instructs that this Court should find that causation has been satisfied.

3. SCACE has satisfied redressability because, by affirming the district court, issuing an order setting aside the appellant's denial of SCACE's petition for rulemaking, and declaring that the appellant's definition of "industry and trade" does not control the meaning of "commercial activity," the court could redress SCACE's injuries

Redressability "examines the causal connection between the alleged injury and the judicial relief requested."*Am. Postal Workers Union v. Frank*, 968 F.2d 1373, 1375 (1st Cir. 1992) (internal quotations omitted). The Supreme Court has construed redressability liberally in favor of plaintiffs who have been adversely affected by a government agency decision, noting that "those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground. If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) (internal citations omitted).

This Court has ruled that "[r]edressability requires an analysis of whether the court has the power to right or to prevent the claimed injury." *Gonzales*, 688 F.2d at 1267. This Court has found that if a district court has power under the APA to "grant declaratory judgment and injunctive relief" that the plaintiff requests, the redressability requirement element of standing can be satisfied. *Barnum Timber*, 633 F.3d at 899.

When evaluating redressability, the Supreme Court instructs that courts should examine whether the plaintiff's "injury will likely be redressed by a favorable decision" even in cases

involving third parties. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Indeed, the Supreme Court has explained that if the court's decision has a "determinative or coercive effect upon the action" of the third party, then the plaintiff's claim is redressable. *Id.* at 169. Moreover, "a federal court may find that a party has standing to challenge government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government's action." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004).

To illustrate this point, courts have found that redressability was satisfied when "the relief sought . . . would make the injurious conduct of third parties complained of . . . illegal." *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 811 (D.C. Cir. 1983). In *Ladies' Garment Workers' Union*, the appellants argued that the government allowing "unfair competition (i.e., payment of subminimum wages)," by the Secretary of Labor lifting employment restrictions on homeworkers, would injure employers because they could not compete with other employers paying lower wages and injure homeworkers because employers that could not afford to keep homeworkers employed would have to lay them off. *Id.* at 810. The court noted that the appellants had satisfactorily argued redressability because the "alleged injuries can be redressed by controlling the source of the unfair competition." *Id.*

Similarly, this Court had found that redressability is satisfied when a law that prohibits an organization from fulfilling its mission is changed by judicial intervention. *Redondo Beach*, 657 F.3d at 943-44. As noted above, in *Redondo Beach*, a day laborer networking organization sued the city because the city's ordinance that prohibited day laborers from standing on the street interfered with the organization's mission to help day laborers obtain work and organize. *Id.* at 940. This Court found that redressability had been satisfied because by the Court striking the

ordinance, the plaintiff would no longer suffer injury since the day laborers could once again gather on the streets. *Id.* at 943.

A court ruling in SCACE's favor would have a determinative and coercive effect on third party behavior. *Bennett*, 520 U.S. at 162. Specifically, as the district court correctly ruled, the appellant injured SCACE because the appellant hindered SCACE's advocacy work by frustrating SCACE's mission and also made it so SCACE cannot provide information to its members. Thus, the court granting SCACE's prayer for relief, specifically by declaring that the "industry and trade" definition laid out in 50 C.F.R. § 17.3 does not control the meaning of "commercial activity" in 16 U.S.C. § 1538(b)(1)(B), would make it illegal, under the ESA, for the third party MMCC to transport Calixta to California. If Calixta can no longer be transported to California, SCACE would no longer need to divert staff and funding resources to monitoring Calixta in California, and SCACE could thus have its staff and funding remain in South Carolina to fulfill its mission of advocating for captive exotic animals there. So, as the Supreme Court provides in *Akins*, courts can set aside an agency's actions when the court finds an agency has misinterpreted the law, thus, the court in this case should set aside the appellant's action, which would ensure relief to SCACE, and thus satisfy redressability. *Akins*, 524 U.S. at 25.

Just as the court found redressability in *Ladies' Garment Workers' Union*, when the court said the plaintiff's injuries could be addressed by the government prohibiting unfair competition, the court in this case could address SCACE's injuries by ruling that FWS needs to adopt a definition of "industry and trade" that is consistent with the ESA, which, in effect would prohibit the transport of Calixta and the diversion of SCACE's resources. *Ladies' Garment Worker's Union*, 722 F.2d at 811. Moreover, like the court in *Redondo Beach* ruled that striking an ordinance that prevented the plaintiff organization from fulfilling its mission would satisfy

redressability, striking the FWS's current definition of "industry of trade" and adopting one that is broader and in line with the ESA, would allow SCACE to fulfill its mission since SCACE would no longer have to divert staff and money resources to California. *Redondo Beach*, 657 F.3d at 943-44.

The appellant relies on only one case, *Levine v. Vilsack*, 587 F.3d 986 (9th Cir. 2009), to argue that SCACE cannot satisfy causation and redressability since this Court noted that several "speculative steps" would have to occur for the third party to take action. *Levine*, 587 F.3d at 993. However, the present case is distinguishable since no speculation is necessary because MMCC has already entered into a contract to take Calixta to California. It is not necessary to hypothesize about whether a third party is taking action which hurts not only Calixta, but also SCACE's mission. This Court setting aside FWS's denial of SCACE's petition for rulemaking and ordering that FWS's definition of "industry and trade" does not control the meaning of "commercial activity" would prohibit MMCC from taking Calixta to California and prevent injuries to SCACE. Therefore, because a court injunction against FWS would make it so Calixta could not be transported to California, SCACE has successfully proven redressability.

In conclusion, as set forth in the standards above, this Court is to accept the facts in the complaint in a light most favorable to the appellee. In doing so, this Court should easily conclude that SCACE has adequately shown that it has been injured, its injuries were caused by FWS, and that the court can grant injunctive relief to the appellee, thereby demonstrating redressability.

II. THIS COURT SHOULD UPHOLD THE DISTRICT COURT'S DENIAL OF THE FWS'S MOTION FOR SUMMARY JUDGMENT BECAUSE UNDER *CHEVRON*, THE DENIAL OF SCACE'S PETITION FOR RULEMAKING VIOLATES THE ADMINISTRATIVE PROCECEDURE ACT

Standard of Review

Being that this case concerns FWS's motion for judgment on the pleadings, all factual elements of the case will be taken "as true and [construed in] the light most favorable to SCACE;" and as such, the only determinations made by this Court are to be "whether . . . the FWS is entitled to judgment as a matter of law." *South Carolina Advocates for Captive Exotics v. United States Fish and Wildlife Serv.*, No. 2:15-cv-3768-PMG(LUD) at 13 (W.D. Cal. 2014).

In terms of the standard of review for FWS's denial of the petition for rulemaking, the APA asks the court to decide whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir. 1999) (quoting 5 U.S.C. § 706(2)(A) (1966)).

It is well-recognized that judicial review of an agency's decision based on statutory construction will illicit the two-step approach found in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The first step presented in the United States Supreme Court decision guides a court reviewing the case to analyze "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If that court determines that there is an unambiguously expressed intent, the inquiry ends and that expressed intent will be utilized. *Id.* at 842-43. If, however, the court does not discover an unambiguous congressional intent, a court may not "impose its own construction on the statute." *Id.* at 843. On the contrary, "if the statute is silent or ambiguous with respect to the specific issue, the question" becomes "whether the agency's answer [was] based on a permissible construction of the statute." *Id.*

In the present case, this Court should uphold the district court's finding that the ESA produces a clear Congressional intent in terms of the issue at bar and must be followed. *South Carolina Advocates for Captive Exotics*, No. 2:15-cv-3768-PMG(LUD) at 18 (referencing

Chevron, 467 U.S. at 842). Therefore, this Court could end its inquiry at step one of *Chevron* and determine that based on the legislative history of the ESA and other tools of statutory interpretation, Congress clearly did not intend for the phrase "industry and trade" to be defined in the inexplicably narrow manner in which the FWS has promulgated. However, even if this Court should somehow decide the statute is silent or ambiguous on the present issue, and move to step two, the FWS offered definition runs starkly contrary to the mission of the ESA and cannot be considered "a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

A. UNDER THE FIRST STEP IN *CHEVRON*, THE UNAMBIGUOUS INTENT OF CONGRESS POSSESSED IN DRAFTING THE ENDANGERED SPECIES ACT TO PRODUCE FAR-REACHING PROTECTIONS THROUGH EXPANSIVE LANGUAGE MUST BE UTILIZED BY THIS COURT.

In an effort to determine whether an agency's denial of a petition for rulemaking violates the APA, this Court will apply the uncontested facts of this case to the test set forth in *Chevron*. Under the first step in *Chevron*, the "unambiguously expressed intent of Congress" will be used if such intent is found to speak directly to the present issue. *Chevron*, 467 U.S. at 842-43. The court will utilize "traditional tools of statutory construction" in determining whether "Congress had an intention on the precise question at issue." *Id.* at 843 n.9. These tools include legislative history, plain meaning of the text, and the canon aimed at avoiding interpretations that would render portions of the text "mere surplusage." *United States v. Wenner*, 351 F.3d 969, 975 (9th Cir. 2003).

In *Chevron*, the United States Supreme Court analyzed "whether [the] EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' [was] based on a reasonable construction of the statutory term 'stationary source.'" *Chevron*, 467 U.S. at 840. The case centered on the EPA's intentions to implement a permit system which "allow[ed] a State to adopt a plantwide

definition of the term 'stationary source.'" *Id.* In discussing the standard with which courts must "revie[w] an agency's construction of the statute which it administers," the Court set forth a two-step test. *Id.* at 842-43. Step one states that if "Congress has directly spoken to the precise question at issue[,] . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Id.* If the court finds this "unambiguously expressed intent," the inquiry ends and the intent will be utilized. *Id.* However, if the court determines that Congress was silent on the issue or the intent is ambiguous, under step two, "the question [then becomes] whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. In finding that "Congress did not have specific intention on the applicability of the bubble concept in these cases," the Court analyzed the legislative history of the Clean Air Act Amendments of 1977 and did not find a "specific comment on the 'bubble concept' or the question whether a plantwide definition of a stationary source is permissible." *Id.* at 845, 851. Therefore, as discussed below, the Court moved the discussion of the agency's decision to step two because with regards to the specific issue of the "bubble concept," there was not an "unambiguously expressed intent of Congress." *Id.* at 842-43.

This Court has dealt with statutory interpretation and its impact on agency decisions many times. One such case concerned plaintiffs bringing suit against the EPA in regards to the agency's "decision to issue National Pollution Discharge Elimination System (NPDES) permits to five municipalities, for their separate storm sewers, without requiring numeric limitations to ensure compliance with state water-quality standards." *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1161 (9th Cir. 1999). The EPA contended "that the Water Quality Act is ambiguous regarding whether Congress intended for municipalities to comply strictly with state water-quality standards, under 33 U.S.C. § 1311(b)(1)(C)." *Id.* at 1164. However, reviewing the facts

of the case under step one of *Chevron*, this Court found that Congress unambiguously intended to "not require municipal storm-sewer discharges to comply strictly with 33 U.S.C § 1311(b)(1)(C)." *Id.* at 1165. This Court stated "that Congress' choice . . . must be given effect." *Id.*

Likewise, in *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969 (9th Cir. 2003), this Court analyzed the National Marine Fisheries Service's ("NMFS") issuance of a biological opinion, pursuant to the ESA, concerning the Hawaii Fishery Management Plan. *Turtle Island*, 340 F.3d at 971. The plaintiffs in the matter argued that the NMFS violated the ESA by not conducting complete consultations. *Id.* In deciding whether the agency would enjoy *Chevron* deference, this Court stated that "[i]t is our duty to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section." *Id.* at 975 (quoting *Bennett v. Spear*, 520 U.S. 154, 173 (1997)). This Court went onto say that "Congress used the phrase 'including but not limited to' and in doing so, contemplated that the list of potential obligations that the United States had under the Agreement was not exhausted by those listed in the subsection." *Turtle Island*, 340 F.3d at 975 (referring to the language now contained in 16 U.S.C.A. § 5503(d) (2015). In finding that the agency would not be given *Chevron* deference, this Court reasoned that "[i]f given credence, the agency's interpretation effectively omits the 'including but not limited to' language from the statute[.]" *Id.* at 975.

Additionally, this Court analyzed the impact that the inclusion of the term "all" can have in a statute in determining congressional intent. *Edwards v. McMahon*, 834 F.2d 796 (9th Cir. 1987). In that case, the issue concerned "whether the Secretary of Health and Human Services must make corrective payments to former recipients of benefits under" a federal program. *Id.* at 797-98. The relevant statutory provision stated that the "State agencies must 'promptly take *all*

necessary steps [in order] to correct'" mistakes in payments. *Id.* at 798 (citing 42 U.S.C. § 602(a)(22) (2012) (emphasis in opinion). This Court "conclude[d] that the intent of Congress is clear . . . [that] '[a]ll' means every." *Id.* at 799. Furthermore, this Court stated that "[t]he plain meaning of the statute could not be broader." *Id.*

Comparing the facts of the present case to those present in *Chevron*, this Court must be persuaded to find an unambiguous intent of Congress on the issue of defining "commercial activity" and "industry and trade." Much like the Supreme Court's analysis of the legislative history, this Court must be guided by Congress's decision "to amen[d] the definition of commercial activity in 1976." Compl. ¶ 13 (citing 16 U.S.C. § 1532(2) (1988)). When Congress declared an exemption for "museums or similar cultural or historical organizations," but did not allow for a proposed exemption for "ordinary activities of a zoo, circus, menagerie or other similar exhibition, other than a sale or transfer of a threatened or endangered species," Congress demonstrated that there are several layers inside the definition of "industry and trade." Compl. ¶ 13 (citing To Amend the Endangered Species Act of 1973: Hearings before the Subcomm. on Environment of the Senate Comm. on Commerce, 94th Cong. 2d Session, at 87 (May 6, 1976), available at http://catalog.hathitrust.org/Record/003221851). And by the latter provision being rejected as an exception, it remains a violation of the statute yet is not enumerated as such. Therefore, there is an unambiguous intent by Congress to have more activities full under the terms "commercial activity" and "industry and trade" than enumerated, and certainly more than what would fall under the FWS's current definition of "industry or trade." 50 C.F.R. § 17.3 (2006).

Likewise, comparing the present case with *Browner*, this Court must give effect to which provisions/language Congress chose to include in the definition of "commercial activity," and

those which it chose not to include. Much like this Court's analysis of the provisions in *Browner* "regarding whether Congress intended for municipalities to comply strictly with state water-quality standards," the fact that Congress explicitly incorporated the phrase, "including but not limited to," in the definition "unambiguously" demonstrated Congress's intention for the definition to be used in determining which activities would fall under the power of the act. *Browner*, 191 F.3d at 1164; 16 U.S.C. § 1532(2) (1988); *Chevron*, 467 U.S. at 842-43. The choice by Congress to include "including but not limited to" in the ESA "must be given effect," and as such demonstrates Congress' unambiguous intent for the definition of "commercial activity" to include more than the enumerated examples. 16 U.S.C. § 1532(2) (1988); *Browner*, 191 F.3d at 1164.

Analyzing the present case in the same manner this Court utilized in *Turtle Island*, this Court should be guided by the traditional statutory tool of ensuring that all provisions within a statute are given effect and not rendered as surplus. In *Turtle Island*, this Court stated that "Congress used the phrase 'including but not limited to' and in doing so, contemplated that the list of potential obligations that the United States had under the Agreement was not exhausted by those listed in the subsection." *Turtle Island*, 340 F.3d at 975 (referring to the language now contained in 16 U.S.C.A. § 5503(d) (2015). In the present case, Congress purposefully and unambiguously included the phrase "including but not limited to" in an effort to ensure that the mission behind the ESA would be fulfilled. 16 U.S.C. § 1532(2) (1988). As such, it would violate the traditional statutory tool of giving force to all provisions in a statute if the phrase were take to mean anything other than that Congress' intention was for the definition to not be cut-off to only encapsulate the enumerated examples.

Lastly, the current case must be viewed through the lens with which this Court analyzed *Edwards*. In that case, this Court dealt with "whether the Secretary of Health and Human Services *must* make corrective payments to former recipients of benefits" as part of a federal program. *Edwards*, 834 F.2d at 797-98 (emphasis added). This Court reasoned that the relevant statute's inclusion of the word "all" meant that "every" necessary step must be made. *Id.* at 799. Likewise, the present case concerns a definition found in the ESA which states that "all activities of industry and trade" are under the overarching term "commercial activity." 16 U.S.C. § 1532(2) (1988). This Court must consistently apply its definition of the term "all" to mean "every," and as such must find that Congress unambiguously intended for the definition of "industry and trade" to encapsulate "every" activity of "industry and trade" which is not otherwise exempted. *Id.* at 799; 16 U.S.C. § 1532(2).

Per the discussion above regarding this Court's analysis of the present case under step one of *Chevron*, this Court must find that Congress unambiguously spoke to the present issue and that intent must be followed in upholding the district court's refusal of FWS's motion.

B. EVEN IF THIS COURT FAILS TO CORRECTLY DECIDE THIS CASE UNDER STEP ONE OF *CHEVRON*, NO AMOUNT OF DEFERENCE THE COURT COULD LEGALLY SHOW TOWARDS THE FWS'S INTERPRETATION CAN PERMIT THE FWS'S INTERPRETATION TO BE CONSIDERED "PERMISSIBLE," AND AS SUCH, THIS COURT SHOULD UPHOLD THE DISTRICT COURT AND DENY THE FWS'S MOTION FOR SUMMARY ON THE PLEADINGS.

If a court determines Congress was silent to the specific issue of concern in a suit or the intent of Congress was ambiguous, the court will proceed to step two of *Chevron*. *Chevron*, 467 U.S. at 842-43. It is in this step that the agency will be the beneficiary of deference. *Id.* at 865. However, the agency's action must have been "based on a permissible construction of the statute." *Id.* at 843.

As discussed previously, *Chevron* concerned the "bubble concept," and "whether [the] EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' [was] based on a reasonable construction of the statutory term 'stationary source.'" *Chevron*, 467 U.S. at 840. The Supreme Court did not find that Congress spoke directly in regards to the bubble concept, therefore, the discussion shifted to whether the agency's decision was based on a "permissible constructions of the statute. *Id.* at 845. In its discussion, the Court stated that it appeared that Congress intended (as much as could be discerned), "to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act." *Id.* at 862. The Court made note that one of the policy concerns was the "allowance of reasonable economic growth." *Id.* at 863. With that in mind, the Court "[held] that the EPA's definition of the term 'source' is a permissible construction of that the statute which seeks to accommodate progress in reducing air pollution with economic growth." *Id.* at 866.

Turning toward the Supreme Court case of *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), the Court dealt with an issue regarding the ESA and the Tellico Dam's impact on snail darters. *Tenn. Valley Auth.*, 437 U.S. at 171. In the Court's discussion of the case, it explicitly decreed, "[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, *whatever the cost*." *Id.* at 184 (emphasis added). This statement by the Court demonstrates the importance the act would have, and its mission must be realized and unhindered by external constraints.

Comparing the current case to *Chevron* and *Tennessee Valley Authority* brings forth a vital argument to be made to reason that the FWS's definition is an impermissible construction of the ESA. In *Chevron*, the Supreme Court stated that one of the policy concerns was "the

allowance of reasonable economic growth," and accepted the agency's interpretation as "permissible" because "the plantwide definition [was] fully consistent with . . . the allowance of reasonable economic growth." *Chevron*, 467 U.S. at 863, 866. Additionally, *Tennessee Valley Authority* discussed that the ESA's mission was to "halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth.*, 437 U.S. at 184.

A synthesis of these Supreme Court decisions must guide this Court to find FWS's interpretation to be "permissible" only if it furthers or, at the very least, maintains the "halt[ing] and revers[al] [of] the trend toward species extinction." *Id.* The FWS's interpretation cannot be considered such a construction. It not only does not "halt and reverse the trend toward species extinction," it runs contrary to the mission of the ESA. *Id.* By defining "industry and trade" narrowly as "the actual or intended transfer of wildlife or plants from one person to another in pursuit of gain or profit," the FWS is essentially restricting the impact of the ESA and as such cannot be construed as a permissible construction of the ESA. 50 C.F.R. § 17.3 (2006).

Therefore, whether this Court finds that the unambiguous Congressional intent must move the court to uphold the district court under step one of *Chevron*, or moves onto step two and determine that the agency's decision was not based on a permissible construction of the statute, this Court must uphold the district court's finding of denying FWS's motion for judgment on the pleadings.

CONCLUSION

For the above reasons, SCACE respectfully requests this Court uphold the district court's dismissal of FWS's motion for judgment on the pleadings.