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

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES FISH & WILDLIFE SERVICES,
Appellant,

v.

SOUTH CAROLINA ADVOCATES FOR CAPTIVE EXOTICS,
Appellee.

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

BRIEF OF THE APPELLEE

Team #1720

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STATEMENT OF THE CASE

The U.S. District Court for the Western District of California denied the United States Fish and Wildlife Services' motion for judgment on the pleadings. *S.C. Advocates for Captive Animals v. U. S. Fish & Wildlife Services*, No. 2:15-cv-3768-PMG(LUD) (W.D. Cal. May 22, 2015) ("Memo Opinion").

STATEMENT OF THE FACTS

The South Carolina Advocates for Captive Exotics ("SCACE") is a South Carolina-based animal rights organization that advocates for captive exotic animals. Compl. ¶ 4. SCACE's activities to protect these animals include "monitoring and documenting the conditions in which they are kept, conferring with experts about these conditions, reporting apparent violations related to these conditions to officials, and engaging in public education and media campaigns." *Id.* ¶ 4. SCACE extensively coordinates with local lawmaking and media agencies in South Carolina to obtain information necessary to complete its mission. *Id.* ¶ 5.

SCACE has been a long-time advocate for a tiger named Calixta, owned and exhibited by Mabel Moxie's Cantankerous Cats (MMCC), a for-profit corporation. *Id.* ¶ 16–18. The tiger is an endangered species protected under the Endangered Species Act ("ESA"). *Id.* ¶ 11; *see also* 50 C.F.R. § 17.11. Over the years, SCACE has established strong relationships with local officials who assist in various ways with the protection of Calixta. Compl. ¶ 20. SCACE has uncovered many concerning incidents of MMCC mistreating Calixta. *Id.* ¶ 21. For example, it

has documented MMCC staff "striking and jabbing Calixta with metal poles" and "shocking [her] with an electric prod." *Id.* ¶ 22. It has also gathered evidence of poor welfare such as footage of Calixta pacing back and forth in her unnaturally small enclosure, joint problems from the enclosure's concrete surface, and wounds on her face that likely result from rubbing her face on the chain link fence. *Id.* ¶ 22–24.

Last year, MMCC entered into a contract with the University of Agartha in California, in which it agrees to transport Calixta to the university each fall and hold her there for exhibition as the university's mascot for the duration of the football season. *Id.* ¶ 25. For the entirety of the over 2,500 mile trek to California, Calixta is held in a tiny, unventilated trailer with a concrete floor that can exacerbate foot and joint problems. *Id.* ¶ 27. While held at the university, she is constrained to an unnatural, approximately ten foot by ten-foot enclosure. *Id.* Further, although fall temperatures in Agartha can reach 90 degrees Fahrenheit, Calixta has no way to cool her body at the university nor during the cross-country transport. *Id.* ¶ 27.

MMCC receives a hefty profit from this arrangement, which is set to repeat every year for the foreseeable future. *Id.* ¶ 25–27. The fee that MMCC receives for transporting Calixta exceeds its actual transportation costs, especially considering that the accommodations provided for Calixta during travel are woefully inadequate. *Id.* ¶ 25. Additionally, "the contract guarantees MMCC ten percent of the team's profits from home game ticket sales." *Id.* ¶ 25.

MMCC's agreement to transport Calixta to California makes it exceedingly difficult for SCACE to oversee her wellbeing, but SCACE nonetheless continues to monitor and document her conditions. *Id.* ¶ 28–29. To avoid abandoning its mission of advocating for Calixta, SCACE has been forced to divert substantial resources. *Id.* ¶ 31. Additional costs stemming from the transport of Calixta to California include those related to researching California laws, networking

with California press outlets, and overcoming difficulties connecting with California officials needed for assistance with investigations. *Id.* ¶ 40–43.

Because MMCC's transportation of Calixta subjects her to additional mistreatment and strains SCACE's resources, SCACE filed a complaint against MMCC with the United States Fish and Wildlife Service (FWS). *Id.* ¶ 28–29, 32–33. SCACE called on FWS to hold MMCC in violation of the ESA, which prohibits "any person subject to the jurisdiction of the United States 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 [endangered] species." *Id.* ¶ 33; 16 U.S.C. § 1538(a)(1)(E). SCACE noted in its complaint that the FWS does not recognize the exhibition of an endangered animal as a mascot at a football game as within the ESA's exception to this rule for the transport that is "scientific" in nature or intended to "enhance the propagation or survival of the species." *Id.* at § 1539(a); *see* Compl. ¶ 10.

However, FWS dismissively responded to SCACE's complaint, finding that MMCC had committed no violation. Compl. ¶ 34. FWS stated:

> 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. ¶ 34.

The narrow definition of "industry and trade" proffered by FWS conflicts with the ESA's broad definition of "commercial activity." *Id.* ¶ 35. Thus, SCACE then filed a formal petition for rulemaking, requesting that FWS expand its definition of "industry and trade" to include not only transfers of ownership for profit, but "*all* activities of industry and trade," as a plain reading of the ESA requires. *Id.* ¶ 36–37; 16 U.S.C. § 1532(2) (emphasis added). FWS denied SCACE's petition, and in response, SCACE initiated this proceeding to challenge the denial.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's denial of FWS's motion for judgment on the pleadings because SCACE has standing to sue and FWS improperly denied SCACE's petition for rulemaking.

SCACE has sufficiently established legal standing to file suit as an aggrieved party. SCACE suffered an injury in fact when FWS refused to revise its arbitrarily narrow definition of "industry and trade" within the meaning of the ESA. This conduct injured SCACE by rendering it unable to challenge MMCC's unlawful transport of Calixta the tiger. Such travel has obstructed SCACE's ability to protect Calixta in furtherance of its mission of advocating for captive exotic animals. SCACE was forced to divert substantial resources to counteract this concrete, particular, and actual injury.

SCACE has sufficiently demonstrated that the aforementioned injury was caused by FWS's unlawful regulatory conduct, and will likely be redressed by a favorable decision from this Court. Specifically, the injury incurred by SCACE is traceable to FWS, which authorized third party conduct that the ESA would otherwise render illegal. It is substantially likely, rather than merely speculative, that MMCC would cease transporting Calixta to California if FWS revised its definition of "industry and trade" to prohibit such conduct. Thus, a decision from this

court requiring FWS to do so would redress SCACE's injury. Accordingly, SCACE has sufficiently asserted standing to sue FWS

FWS's motion for judgment on the pleadings as to SCACE's petition for rulemaking was properly denied by the district court. The definition of commercial activity in the ESA is unambiguous and therefore does not require FWS to insert its own interpretation. A court must always apply the straightforward, plain meaning of a statute. When a statute is clear and unambiguous, agency interpretation is not required. Here, the definition of commercial activity is unambiguous and does not require FWS to substitute its own definition for that of Congress. Commercial activity is defined as "all activities of industry and trade" which was intended by Congress to include all economic activity. The inquiry should end with this definition from the statute.

Alternatively, if this Court finds the definition of commercial activity is ambiguous and requires agency interpretation, FWS's is still not entitled to judgment on the pleading because its definition of phrase "industry and trade" fundamentally alters the meaning of the statute. FWS miss construes the term "including but not limited to" as phrase that allows subsequent examples to limit preceding language. However, this Court has consistently held that "including but not limited to" does not constrain otherwise broad language of a statute. Rather, this phrase is followed an illustrative, non-exhaustive list that are mere examples of the terms preceding the phrase. FWS argues buying and selling transactions are the only types illustrated in the definition of commercial activity and, therefore, Congress only intended these to be covered by the definition of commercial activity. This fundamentally misunderstands the term "including but not limited to" to be a restrictive phrase, rather than a broadening phrase. This Court should therefore affirm the district court's denial of FWS motion for judgment on the pleadings.

ARGUMENT

The district court properly denied FWS's Rule 12(c) motion for judgment on the pleadings. Fed. R. Civ. P. 12(c). As an injured party, SCACE has established constitutional standing to challenge FWS's refusal to change its arbitrary, narrow definition of "industry and trade" within the meaning of the ESA. SCACE's injury is the result of FWS's conduct, and would be redressed by a favorable decision from this Court.

FWS's denial of SCACE's petition for rulemaking was improper. The definition of commercial activity in the ESA is unambiguous. FWS's definition of "industry and trade" fundamentally alters the meaning of the ESA, contradicting the plain meaning of the statute.

When ruling on a motion for judgment on the pleadings, this Court must accept as true all facts and allegations asserted in the complaint and view the pleadings in the light most favorable to the plaintiff. *Levine v. Vilsack*, 587 F.3d 986, 991 (9th Cir. 2009). This Court reviews the district court's decision on a motion for judgment on the pleadings *de novo*. *Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989).

I. SCACE HAS SUFFICIENTLY ESTABLISHED STANDING BY DEMONSTRATING THAT FWS CAUSED SCACE TO SUFFER AN "INJURY IN FACT" BY ARBITRARILY LIMITING ITS DEFINITION OF "INDUSTRY AND TRADE," AND THAT EXPANDING THE DEFINITION WOULD REDRESS THAT INJURY.

Standing is a core jurisdictional requirement of the case-or-controversy clause in Article III of the U.S. Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The plaintiff bears the burden of establishing it has standing to sue by alleging sufficient stake in the outcome of the controversy. *See id.* at 561; *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977); *Sierra Club v. Morton*, 405 U.S. 727, 731–32 (1972). This requires a showing of three elements. First, the plaintiff must have incurred an "injury in

fact"; the injury must be "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560. Second, the conduct to which the plaintiff objects must have caused the injury. *Id.* Finally, it must be likely that a favorable decision from the court would redress the injury. *Id.* at 561. These three elements represent the test to establish standing both when the plaintiff is an individual and when the plaintiff is an organization. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982).

The district court properly held that SCACE successfully met all of these three elements sufficient to assert its standing.

A. SCACE has adequately alleged that it suffered a concrete, particular, and actual injury when FWS arbitrarily limited its definition of "industry and trade" to include only transfers of ownership of wildlife for profit.

For purposes of standing, the United States Supreme Court defines "injury in fact" as any "invasion of a legally-protected interest." *Lujan*, 504 U.S. at 560. The Court has construed this definition to include both economic interests and other interests, such as environmental and social interests. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72–74 (1978); *Arlington Heights*, 429 U.S. at 261–63. However, the injury must be "concrete and demonstrable." *Havens Realty Corp*, 455 U.S. at 379. A mere setback to an organization in achieving its "*abstract* social interests" does not constitute an injury for purposes of standing. *Id.* (emphasis added); *see also Sierra Club*, 405 U.S. at 739.

For example, in *Sierra Club*, the environmental protection organization Sierra Club sued to challenge plans to alter Mineral King, a valley in Sequoia National Park, including plans to construct a road and install power lines through the valley. *Sierra Club*, 405 U.S. at 727. The Court acknowledged the Sierra Club's unwavering commitment to "protecting our Nation's natural heritage from man's depredations," but held that this generalized interest was "not sufficient by itself to render the organization adversely affected or aggrieved" as needed to

establish standing. *Id.* at 739 (internal quotations marks omitted). As the Court noted, the Sierra Club failed to allege how the potential construction would actually affect the organization or its members, or even that they used Mineral King. *Id.* at 727.

In contrast, in *Havens Realty Corp.* the Court found a sufficient showing of "concrete and demonstrable injury" where an organization called Housing Opportunities Made Equal ("HOME") demonstrated particularly how it suffered social and economic harm as a result of an apartment company's discriminatory housing practices. 455 U.S. at 379. There, the property owner's "racial steering practices perceptively impaired the organization's . . . efforts to assist equal access to housing through counseling and other referral services." *Id.* In *Sierra Club* and *Havens Realty Corp.*, both organizations sued largely in furtherance of their respective missions, but only the organization in *Havens Realty Corp.* was found to have standing because the alleged injury was incurred by the organization itself, rather than merely to its abstract cause. *Id.*

In reaching its conclusion, the Court in *Havens Realty Corp.* also considered that the injury to HOME's activities created a "consequent drain on the organization's resources." *Id.* That is, to avoid experiencing increased difficulty in counseling people on where to live, HOME had no choice but to spend money fighting the defendant's discriminatory practices. *Id.* Citing to *Havens Realty Corp.*, this Court articulated this principle by stating that an organization can successfully demonstrate an injury sufficient to establish standing by asserting that it was forced to choose between the "frustration of its mission" and diverting resources as necessary to counteract this injury. *La Asociation de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1087–88 (9th Cir. 2010) (internal citation omitted). However, this Court noted in *Lake Forest* that a plaintiff may not "manufacture the injury by incurring litigation costs or

simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *Id.* at 1088.

The injury alleged here is not abstract or hypothetical, but tangible and real. Because "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," this Court must accept as true the specific, concrete allegations of harm that SCACE claims to have experienced. *See Cafusso, U.S. ex rel. v. Gen. Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011) (internal citations omitted). FWS's refusal to amend its arbitrarily narrow definition of "industry and trade" within the ESA has prevented SCACE from challenging MMCC's unlawful transportation of Calixta and, consequently, overseeing her treatment. This directly injures SCACE as an organization by hindering its ability to perform its primary function of protecting Calixta, which it has for many years. Moreover, the consequence of FWS's conduct is imminent. MMCC—which has been repeatedly reprimanded for treating Calixta inhumanely—has already begun transporting Calixta from South Carolina to California in a tiny, unventilated trailer to profit from her exhibition at football games. This travel creates an impediment to challenging existing and future mistreatment of Calixta, frustrating SCACE's mission in a way that is far more "concrete and demonstrable" than a mere speculative setback to animal rights generally.

Additionally, like the organization in *Havens Realty Corp.*, SCACE has had to divert its resources to counteract the injury caused by FWS's refusal to revise its arbitrarily narrow definition of "industry and trade" to reflect the common-sense meaning of the term. SCACE has been forced to expend substantial additional resources to travel, monitor Calixta, and document her conditions. It has also faced logistical challenges related to performing its work in California rather than its home state of South Carolina. For example, SCACE has needed to research

California laws, network with California press outlets, and overcome difficulties connecting with California officials needed for assistance with investigations. Forced to choose between abandoning its protection of Calixta and expending such substantially increased resources to continue advocating for her, SCACE "could not avoid suffering one injury or the other, and therefore ha[s] standing to sue." *See Lake Forest*, 624 F.3d at 1088.

Further, SCACE's injury was not "self-inflicted," as FWS argues. While true that an organization may not manufacture injury by incurring unnecessary costs or spending money to fix problems that would not otherwise affect the organization, choosing to continue the organization's ordinary work in furtherance of its mission—protecting Calixta—does not constitute inflicting self-harm.

Accordingly, the district court properly held that SCACE demonstrated it suffered an injury in fact sufficient to establish standing.

B. SCACE has adequately alleged that the injury incurred was a result of FWS refusing to revise its arbitrarily narrow definition of "industry and trade" and that the injury would likely be redressed by a favorable decision from this Court.

For purposes of determining standing, this Court examines together the elements of causation and redressability because of their close relationship. *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982). A causal connection requires that an injury be "fairly traceable to the defendant's acts or omissions" and not the result of an independent action of a third party. *Arlington Heights*, 429 U.S. at 261; *Lujan*, 504 U.S. at 560–61. Further, redressability "must be *likely*, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (internal quotations omitted; emphasis added). However, the plaintiff need not prove that a favorable decision would "certainly" redress the injury. *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013).

In cases involving allegations that a government agency has unlawfully regulated or failed to regulate a third party, "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction…." *Lujan*, 504 U.S. at 561–62. A plaintiff organization that has been adversely affected by the impact of an agency decision on third parties is generally found to have standing to challenge the legality of the agency decision. *Federal Election Commission v. Akins*, 524 U.S. 11, 25 (1998) (citations omitted). The plaintiff bears the burden of proving that a third party's choices stem from the regulation of the defendant government agency, such as to "produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 561–62.

To meet this burden, a plaintiff must show that the third party's actions are bound by the defendant's regulation. *See id.* at 568. For example, this Court in *Levine* held that a favorable ruling for the plaintiff would not create a substantial likelihood of redressing the plaintiff's alleged injury, because curing the injury would require too many attenuated steps of speculative regulatory action regarding a statute not even at issue in the case. 587 F.3d at 993. In contrast, where a favorable ruling would have a "determinative or coercive effect" on the third party, the elements of causation and redressability are met. *Id.* at 995 (citing *Bennett v. Spear*, 520 U.S. 154, 169 (1997)). A showing that the challenged regulatory conduct determines the lawfulness of third party activity is sufficient to establish this direct link between a favorable decision invalidating said regulation and third party conduct. *See Simon v. East Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976). In other words, an alleged injury is "directly traceable to the action of the defendant" when it complains of conduct "that would have been illegal without that action." *Id.*

Here, FWS argues that the injury incurred by SCACE is purely the result of the independent conduct of a third party, MMCC, and therefore cannot be redressed by this Court. However, it is not MMCC's alleged mistreatment of Calixta that SCACE seeks to redress through this action, but the regulatory conduct of FWS that allowed MMCC to unlawfully transport her, impeding SCACE's protective efforts. Unlike the plaintiff in *Levine*, SCACE has sufficiently alleged that FWS's regulation has a "determinative and coercive effect" on entities bound by the ESA, including MMCC. Indeed, MMCC's actions would be illegal if not for FWS's improper regulatory conduct. If as a result of these proceedings, FWS redefined "industry and trade" to effectively prohibit the transport of endangered species for *all* for-profit activity, this would be substantially likely to result in MMCC discontinuing such travel, thereby redressing the injury that SCACE alleges here.

Although it could never be proved beyond all doubt that MMCC would certainly abide by FWS's regulation, presuming that an entity will act within the bounds of the law does not require attenuated speculation. Moreover, even if MMCC did choose to violate the ESA as enforced by FWS, the change in FWS's regulatory conduct requested by SCACE would allow for direct legal recourse against MMCC for its unlawful practices.

Because SCACE has shown that it suffered an injury caused by the conduct of FWS and that a favorable decision would redress this injury, it has sufficiently asserted its standing.

II. FWS IS NOT ENTITLED TO JUDGMENT ON THE PLEADING AS TO SCACE'S PETITION FOR RULEMAKING BECAUSE CONGRESS DEFINED COMMERCIAL ACTIVITY AS ALL INDUSTRY AND TRADE AND FWS'S DEFINITION OF "INDUSTRY OR TRADE" IS NOT A PERMISSIBLE CONSTRUCTION OF THE STATUTE.

"A judgment on the pleadings is a decision on the merits" and on appeal should be reviewed *de novo*. *Gen. Conference*, 887 F.2d at 230 (citing *see McGlinchy v. Shell Chemical Co.,* 845 F.2d 802, 810 (9th Cir. 1988)). An agency's actions are reviewed under the

Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A); *see Gila River Indian Cmty. v. United States,* 729 F.3d 1139, 1144 (9th Cir. 2013), *as amended* (July 9, 2013) (quoting *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.,* 378 F.3d 1059, 1065 (9th Cir. 2004)). A court should reject an agency's definition

> if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Ecology Ctr. v. Castaneda, 574 F.3d 652, 656 (9th Cir. 2009) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)) (internal quotation marks omitted).

When reviewing an agency's interpretation of a statute, a court should "adhere to the familiar two-step test of *Chevron*." *Nw. Envtl. Advocates v. U.S. E.P.A.*, 537 F.3d 1006, 1014 (9th Cir. 2008) (quoting *Holland v. Nat'l Mining Ass'n,* 309 F.3d 808, 815 (D.C. Cir. 2002)).[1] Under *Chevron*, first the reviewing court must "question whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the intent of Congress is clear from the statute, the inquiry is over. *Id.* "If, however, the court determines Congress has not directly addressed the precise question at issue," the court must determine whether the "agency's answer is based on a permissible construction of the statute." *Id.*

Here, the definition of commercial activity is clear and unambiguous. "*All* activity of industry and trade" is broad language meant to encompass all different forms of commercial

[1] Recently, this Court referred to the test from *Chevron* as a three-part inquiry. *See Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1217 (9th Cir. 2015). The three-part inquiry in *Jewell* remains the same in substance as the two-part *Chevron* test applied by the Supreme Court and this Court previously, the difference being this Court in *Jewell* introduced an additional step to determine if Congress "intended 'the agency to be able to speak with the force of law when it addresses ambiguity in the statute.'" *Id.* (quoting *United States v. Mead Corp.,* 533 U.S. 218, 229 (2001)). Because this was not at issue at the district court level, for the purposes of this brief, SCACE will apply the two-part test from *Chevron*.

activity. However, even if this Court finds this definition in the ESA ambiguous and requires application of step two under *Chevron*, FWS's interpretation is clearly overly restrictive, ignoring key language in the provision, and FWS is therefore not entitled to judgment on the pleadings.

A. Congress clearly defined commercial activity in the ESA and an agency interpretation is not required.

SACES petition for rulemaking requests FWS to alter its interpretation of "industry and trade" to be in keeping with the plain language of commercial activity in the ESA. Because this language in the ESA is straightforward and unambiguous, FWS is not permitted to insert its own interpretation.

Under the first step of the two-part *Chevron* test, the reviewing court must decide if Congress has already spoken on the matter. *Chevron,* 467 U.S. at 842. In the definitions section of the ESA, the term "commercial activity" is defined as "all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling." 16 U.S.C. § 1532(2). On its face, this definition can be broken up into two parts—the first defines commercial activity as "all activities of industry and trade" and the second part gives a list of some such activity.

i. The phrase "all activities of industry and trade" in the definition of commercial activity is broad language intended by Congress to encompass all commercial activity.

"The preeminent canon of statutory interpretation requires" the reviewing court to presume that the "'legislature says in a statute what it means and means in a statute what it says there.'" *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004)). Thus, if "the statutory language is unambiguous and the statutory scheme is coherent and consistent, judicial inquiry must cease." *In re Ferrell*, 539

F.3d 1186, 1190 n.10 (9th Cir. 2008) (quoting *Robinson v. Shell Oil Co*., 519 U.S. 337, 340 (1997) (internal quotations marks omitted). Further, "a statute should not be construed so as to render any of its provisions mere surplusage." *United States v. Wenner*, 351 F.3d 969, 975 (9th Cir. 2003). A court should give preference to the reading of a statute that gives meaning to every word in the statute and yields the most harmonious reading. *See James v. City of Costa Mesa*, 700 F.3d 394, 402 (9th Cir. 2012); *In re Transcon Lines*, 58 F.3d 1432, 1440 (9th Cir. 1995). Thus, a reviewing court should look to the statutory text first for a common-sense interpretation that utilizes the entire text.

Here, the phrase "all activities of industry and trade" is clear and unambiguous. Congress chose broad, purposeful language when writing this definition as included many different types of economic activity. This is apparent from its use of "all" and both "industry *and* trade." Congress could have omitted the words "all" and "industry" if it intended for commercial activity in the ESA to be limited to simple buying and selling transactions. The definition could have then read "activities of trade including the buying and selling of commodities." Congress, however, included the words "*all* activates" of not only trade but also of industry. This is a broad definition of commercial activity intended to include much more than buying and selling. Commercial activity in the ESA means exactly what it says and says what it means—all economic activity.

ii. The "including, but not limited to" language in the definition commercial activity is an illustrative, non-exhaustive list of possible activities that qualify as commercial activities.

This Court has consistently held that "including but not limited to" language does not restrain a provision to the examples that follow. *See Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 975 (9th Cir. 2003). This language demonstrates that

Congress contemplated the principles of statutory construction and intended for the subsequent text not to restrain the prior provisions. *Id.* "Including but not limited to" is broad language that does not restrict a statute. *Id.* (citing *In re Forfeiture of $5,264,* 432 Mich. 242, 439 N.W.2d 246, 251–52 (1989)). Such language is often used by Congress to mitigate the rigid application of the general rules of statutory construction. *Ramirez, Leal & Co. v. City Demonstration Agency,* 549 F.2d 97, 104 (9th Cir. 1976). This language allows Congress to illustrate an example without limiting its prior broad language.

Here, Congress gives a list of activities after the phrase that are simply illustrative examples of some types of activities covered by its definition of commercial activity. These include buying, selling, and other activities that aid in such a process. If this was intended to be an exhaustive list, Congress could have the written the definition in such a way. Congress instead chose to use the language "not limited to," leaving its earlier phrase of "all activities" broad.

B. Even if this Court finds the definition of commercial activity in the ESA as ambiguous and requiring agency interpretation, FWS's interpretation of "commercial activity" is still contradictory to the language of the statute.

FWS's interpretation of the definition of commercial activity contradicts the plain meaning of the statute. FWS defines "industry and trade" too narrowly, contradicting the plain meaning of the statute and rendering the words "all" and "industry" mere surplusage. Furthermore, FWS misinterprets the phrase "including but not limited to" as a restrictive phrase.

i. FWS's current interpretation of "all activities of industry and trade" does not appropriately give meaning to every word in the statute.

The ESA states that commercial activity is defined as "*all* activities on industry *and* trade." 16 U.S.C. § 1532(2) (emphasis added). A central notion of statutory construction is that

"a statute should not be construed so as to render any of its provisions mere surplusage." *Wenner*, 351 F.3d at 975. Stated another way, a fundamental principle of statutory construction is that every word must have meaning. *Bowsher v. Merck & Co.,* 460 U.S. 824, 833 (1983). Thus, when multiple competing readings of a statute exist, a court must give preference to the interpretation that gives meaning to all words in the statute.

Here, FWS's interpretation of the definition of commercial activity renders the word "all" meaningless. FWS's interpretation narrows commercial activity by limiting "industry and trade" to 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. FWS states that only an actual or intended transfer of ownership qualifies under its interpretation of commercial activity. *See* Compl. ¶ 34.

This interpretation conflicts with two portions of the provision. First, FWS's definition renders the word "all" meaningless. By limiting the definition of commercial activity to just buying and sell of animals, a myriad of actions and activities covered by a common-sense definition of the provision would be excluded. For example, a long-term rental of a protected species would not fall under FWS's definition of commercial activity because there is no transfer of ownership.

Further, the definition of commercial activity in the ESA uses the terms *industry* and *trade*. FWS's interpretation renders the term "industry" in the definition either redundant and superfluous, or just meaningless, because it focuses on transfer of ownership, which is encompassed by the word "trade" in the definition. However, by using the "industry" in conjunction with trade, Congress must have intended to encompass a wider array of activities than simple sale and transfer, which would be captured in the word "trade" alone.

Industry encompasses a wide array of activities that are not simple trade of animals protected by the ESA, but still result in economic exploitation of animals that Congress likely intended to be included in economic activity. FWS's interpretation results in "industry" and "trade" having the same meaning or industry being mere surplusage.

ii. FWS mistakenly construes the "including but not limited to" language in the definition of commercial activity as restrictive language.

FWS argues that "only buying and selling and related facilitative activities are expressly referenced in the statutory definition" and therefore the agency may refrain from including additional activity. Memo Opinion at 15. FWS fundamentally misunderstands the term "including but not limited to" to be a restrictive phrase, rather than a broadening phrase. "Including but not limited to" phrasing allows the subsequent language to be illustrative, rather than exhaustive. *Harlick v. Blue Shield of California*, 686 F.3d 699, 712 (9th Cir. 2012) ("The words 'including, but not limited to' in the regulation suggest that the list . . . [is] illustrative rather than exhaustive.").

By using such a phrase, Congress obviously did not intend to limit the definition of commercial activity. If Congress had intended for that, it would have written, "limited to buy and selling" rather than "including but not limited to." This Court has consistently held that "including but not limited to" language is not restrictive language, but is merely illustrative of some situations that conform to the prior defined parameters. *See Turtle Island*, 340 F.3d at 975; *Harlick,* 686 F.3d at 712. FWS's interpretation again renders language in the definition as mere surplusage.

CONCLUSION

For the foregoing reasons, Appellee, the South Carolina Advocates for Captive Exotics (SCACE), respectfully requests that this Court affirm the district court's denial of the U.S. Fish and Wildlife Service's Fed. R. Civ. P. 12(c) motion for judgment on the pleadings.

Respectfully submitted,

Team #1720

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