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 United States District Court for the Ninth District

Brief for Appellee South Carolina Advocates for Captive Exotics

Team number: 1787

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Statement of the Issues Presented for Review

1. Did the District Court err in holding that Appellee South Carolina Advocates for Captive Exotics (SCACE) has adequately alleged standing?

2. Did the District Court err in denying the FWS's motion for judgment on the pleadings as to the lawfulness of its denial of SCACE's petition for rulemaking?

Statement of the Case

South Carolina Advocates for Captive Exotics (SCACE), a non-profit organization, brought this suit against U.S. Fish and Wildlife Service (FWS) for their denial of SCACE's petition for rulemaking to amend 50 C.F.R. 17.3. To defend itself, FWS offered only that the regulatory meaning is solely derived from those things explicitly stated in the statutory definition, restricting all other possible interpretations. Memorandum Opinion at 15, S.C. Advocates for Captive Exotics v. U.S. Fish and Wildlife Service (2014) (No. 2:15-CV-3768-PMG-LUD). FWS sought a "judgment on the pleadings as to the lawfulness of its denial of SCACE's petition for rulemaking," which the lower court denied after finding the facts provided were enough to make a lawful argument for injury, causation and redressability, *Id*. at 7-13, from which FWS now appeals. In its defense, FWS has stated that SCACE's injuries were "self-inflicted," *Id.* at 9, or alternatively caused by someone other than FWS, *Id*. at 10, and that even if FWS had promulgated the rule, it would not have addressed the issue of SCACE's injuries without the actions of others. *Id*. at 11.

Statement of Facts

South Carolina Advocates for Captive Exotics (SCACE), is a "nonprofit organization and animal protection charity" based in South Carolina that monitors and advocates for captive exotic animals. Complaint at 4, S.C. Advocates for Captive Exotics v. U.S. Fish and Wildlife Service

(2013) (No. 2:15-CV-3768-PMG-LUD). Until about 2013, most of this work was done in South Carolina, comprising of "investigations into the treatment and conditions" of captured exotic animals, public education, and public outreach. *Id* at 2. For a number of years this work has included direct advocacy for Calixta, *Id*. at 5, a captive *Panthera tigris*, *Id*. at 3, owned by the for-profit organization Mabel Moxie's Cantankerous Cats (MMCC). *Id*. at 5. Calixta's welfare has improved as a result of SCACE's complaints with local law enforcement about violations of her care by MMCC, including reports of abuse and maltreatment. *Id*. SCACE has done this at its own cost "like any member of the public" and has developed a personal interest in Calixta's care through the relationships it has developed with local law enforcement and the enrichment of its public education and outreach campaigns using Calixta's care as an example. *Id*. Despite the tiger's months-long displacement to California, *Id*. at 6, SCACE has continued to monitor the tiger's well-being at the University of Agartha in California (UAC) and plans to do so in the future. *Id*. at 7.

In either late 2012 or early 2013, Calixta's well-being was diminished when South Carolina-based MMCC, *Id*. at 5, contracted with UAC, *Id*. at 6, to rent Calixta to serve as a mascot at their football games. In order to allow Calixta to serve as UAC's mascot at home games, the parties contracted for the tiger to be transported back and forth between South Carolina and California each year, indefinitely. In exchange, MMCC earns a handsome profit which includes a fee that "exceeds the cost of transporting and caring for Calixta" and "ten percent of the team's profits from home game ticket sales." *Id*. at 6. In order to prevent the observed harms inflicted upon Calixta from accruing, SCACE filed a complaint with Defendant U.S. Fish and Wildlife Service (FWS), asking for enforcement of the Endangered Species Act (ESA) against MMCC for transporting an endangered species interstate in the course of commercial activity, violative of 16

U.S.C. § 1538(a)(1)(E). *Id.* at 7. FWS dismissed SCACE's notice of violation stating there could be no commercial activity in Calixta's case without the "actual or intended transfer" of her "ownership" from MMCC to UAC, *Id*. at 8, pursuant to their definition of "industry and trade" at 50 C.F.R. § 17.3.

To address this perceived shortcoming, SCACE filed a formal petition of rulemaking with FWS urging the amendment of the definition to omit the "ownership" requirement, so as to be protective of endangered animals like Calixta, who are being harmed by interstate transport for the purposes of exhibition. *Id.* at 8. FWS then responded with a denial because the "definition was within the scope of its broad discretion[,]... and they had 'more important competing priorities, and limited resources.'" *Id*. at 9. SCACE believes that private sector pressure from transporters of endangered animals has forced the government agency to "refus[e] to adopt a regulatory definition...that is consistent with the ESA's statutory language" so that "exhibitors...and circuses" in particular, may be allowed to continue profiting from the harms to the endangered species. *Id*.

Without FWS's authorization of interstate transport of endangered animals like Calixta and refusal to amend its regulation, SCACE would not have been harmed. *Id*. at 10. As such, SCACE filed a complaint with the district court seeking declaratory relief that the "denial of [the] petition for rulemaking violated the [Administrative Procedures Act] APA," *Id*. at 10-11, and "that the … definition" as applied "is contrary to the ESA." *Id*. at 8,11. It is the contention of SCACE that its public education and outreach missions have been impaired, *Id*. at 9-10, because the organization does not feel able to advocate for the endangered animal without "diverting its scare resources to" California or other venues, as it has already done and continues to do, despite local officials being unresponsive "to the organization's complaints" which "describe clear violations of law" containing "compelling documentary evidence as well as expert statements." *Id*. at 10. As an

organization originally based in South Carolina, SCACE has had to invest in rebuilding a new network of legal counsel, "officials, press outlets, and citizens" in California. *Id*. Unlike the follow-up information SCACE received from local enforcement in South Carolina, used for its public education and outreach, *Id*. at 5,9, the organization has not been able to gain information regarding its complaints to the authorities in California. *Id*. at 10. In order to prevent future injuries to the organization, SCACE has additionally sought injunctive relief "to set aside … [FWS's] denial of the petition." *Id*. at 11. It is the belief of SCACE, that without "judicial intervention," the organization will continue to be injured as it attempts to advocate for Calixta and other endangered animals it monitors that could be harmed through unlawful transport in interstate commerce. *Id*. at 10-11.

Having been brought to court, FWS sought a "judgment on the pleadings as to the lawfulness of its denial of SCACE's petition for rulemaking," which the lower court denied and FWS now appeals. Briefing Order, S.C. Advocates for Captive Exotics v. U.S. Fish and Wildlife Service (2015) (No. 2:15-CV-3768-PMG-LUD). To defend itself, FWS offered only that the regulatory meaning is solely derived from those things explicitly stated in the statutory definition, restricting all other possible interpretations. Memorandum Opinion at 15, S.C. Advocates for Captive Exotics v. U.S. Fish and Wildlife Service (2014) (No. 2:15-CV-3768-PMG-LUD). The court found the facts provided were enough to make a lawful argument for injury, causation and redressability, *Id*. at 7-13, from which FWS now appeals. In its defense, FWS has stated that SCACE's injuries were "self-inflicted," *Id.* at 9, or alternatively caused by someone other than FWS, *Id*. at 10, and that even if FWS had promulgated the rule, it would not have addressed the issue of SCACE's injuries without the actions of others. *Id*. at 11.

Summary of the Argument

The District Court did not err in holding that SCACE had adequately alleged standing because SCACE alleged actual injury, caused by FWS, that could be redressed by the court ordering FWS to properly review SCACE's petition for rulemaking. The decision to deny SCACE's petition was arbitrary and capricious.

The District Court did not err in denying the FWS's motion for judgment on the pleadings as to the lawfulness of its denial of SCACE's petition for rulemaking because the court did not consider outside information and SCACE's adequately plead a sufficient claim for which relief could be granted.

Argument

This Court requested the parties to brief two issues before them: (1) whether the District Court erred in holding SCACE had standing to seek declaratory and injunctive relief; and (2) whether the District Court erred in denying the FWS's request for judgment on the pleadings on the lawfulness of its denial of SCACE's petition for rulemaking. In order to answer the question of standing, the lower court must first have decided whether there were enough facts pled in SCACE's complaint to survive a request for judgment on the pleadings in order to validate the necessary findings of injury, causation, and redressability. The court should find that the lower court did not err by allowing SCACE's complaint on whether FWS acted lawfully when it denied the petition for rulemaking and that the lower court properly found standing.

A judgment on the pleadings was sought by FWS asking the court to dismiss SCACE's complaint that FWS acted unlawfully when the agency denied SCACE's petition for rulemaking. There is no information leading to the conclusion that the motion should have been heard as a

summary judgment, so the court is restricted solely to the information in the pleadings. FWS does not deny any claims made by SCACE, except that it acted unlawfully, therefore all other facts present in the pleadings must be held as true. FWS incorrectly assumes it has the same broad discretion for denying rules as it does in promulgating them or in denying enforcement. The Secretary of Interior (Secretary) is charged with promulgating any regulations necessary for the protection of endangered species and FWS is charged with enforcing those provisions. FWS has broad discretion when choosing to enforce a regulation, but lacks the power to substantively change the rules without consultation with the Secretary, who must publish proposed rules in the Federal Register. While neither body must approve rules proposed by citizens, the arbitrary decision to not enforce the ESA, by reading restrictions into the law not consistent with the statute, is unlawful.

With a finding of an unlawful petition for rulemaking being properly alleged, SCACE has also met the requirements necessary to establish standing. First, SCACE has shown an injury personal to the organization that is concrete, particular, and actual because it has directly interfered with the organization's mission surrounding Calixta, resulting in undue burdens that have been and continue to be in place. Second, SCACE demonstrated that the injury was caused by FWS directly, traced to the denial of the petition for rulemaking, resulting in the tiger's continued transportation and therefore necessitating continued interstate involvement by SCACE. Finally, SCACE has presented a plausible argument that by setting aside FWS's decision to deny the petition for rulemaking and reconsideration of the rule, the court could force FWS to restrain MMCC from renting Calixta across state lines, and therefore lessen the burdens on SCACE in trying to fulfill its mission of protecting endangered animals within South Carolina.

With proper standing and sufficient pleading to make a plausible showing that FWS unlawfully denied SCACE's petition for rulemaking, the court must uphold the lower court's findings of sufficient standing and denial of FWS's judgment on the pleadings.

I. THE DISTRICT COURT DID NOT ERR WHEN IT HELD SCACE HAS ADEQUATELY ALLEGED STANDING BECAUSE SCACE WAS INJURED IN FACT BY FWS'S DENIAL OF THEIR RULEMAKING PETITION AND THE INJURY MAY BE REDRESSED BY THE COURT REQUIRING FWS TO REVIEW THEIR DEFINITION UNDER 50 C.F.R. 17.3.

A. Standing

Standing questions are reviewed de novo. Preminger v. Peake, 552 F.3d 757 (9th Cir. 2008). Standing may be conferred as "prudential and constitutional standing" when a statute "explicitly indicates" that the court may review the discretionary actions of an agency. Federal Election Commission v. Akins, 524 U.S. 11 at 26 (1998). "The parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court." Massachusetts v. E.P.A., 549 U.S. 497; 516 (2007). Standing is made up of three elements: an injury, a causal connection, and redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555; 560 (citations omitted). First, there must be an "injury in fact," this injury must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" Lujan v. Defenders of Wildlife, 504 U.S. 555; 560 (citations omitted). Second, the injury must be "'fairly traceable to the challenged action of the defendant." Lujan v. Defenders of Wildlife, 504 U.S. 555; 560 (citations omitted). Third, the injury must be 'likely' 'redressed by a favorable decision by the court.'" Lujan v. Defenders of Wildlife, 504 U.S. 555; 560 (citations omitted). Therefore, SCACE must show that it suffered an actual and particular injury, that can be traced to the dismissal of its petition by FWS, and that judicial relief will prompt FWS to review its regulation for amendment, which will likely result in a reduced risk of allowing harmful transportation of endangered animals

through interstate commerce for commercial activities, if FWS decides to bring their reading of the regulation in line with the ESA.

1. Authority of the Court to Review Agency Action.

The Court reviews agency action under 5 U.S.C. § 706(2) for arbitrariness and capriciousness "under [the ESA's] citizen suit provisions because ESA...contains no statutory mandated standard." Defenders of Wildlife v. Tuggle, 607 F.Supp.2d 1095 (9th Cir. 2009) at 1099. The refusal of an agency to initiate its rule making authority is better suited for a legal analysis as opposed to a factual one. Massachusetts v. EPA, 549 U.S. 497 at 526 (citations omitted). A suit may be brought by citizens "to enjoin any person, including…any…governmental instrumentality or agency…who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof provided the action has not been enacted within sixty days of a violator's receipt of the "written notice of violation" from the Secretary. 16 U.S.C. § 1540(g)(1) & (2)(A); Lujan v. Defenders of Wildlife, 504 U.S. 555; 571-572. The procedural rights must be provided to address the "concrete interests" of the persons harmed, not the rights of others, even if that discrete harm was "suffered by many persons." Lujan v. Defenders of Wildlife, 504 U.S. 555; 572. It cannot be a generalized harm based solely on the "proper application of the…laws." Lujan v. Defenders of Wildlife, 504 U.S. 555; 573. However, even though the denial of the petition was not true to the spirit of the ESA, it was likely in accordance because the Secretary is not required to promulgate rules proposed by citizens. *See* 5 U.S.C. § 503(e) *and* 16 USC 1531-1540 *generally*.

A court shall review "all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action…[t]o compel agency action...unreasonably delayed." 5 U.S.C. § 706(1). The court may hold the agency

finding or conclusion unlawful if the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a). If the court is reviewing the agency finding or conclusion under 5 U.S.C. § 706, it must consider those parts of the record cited by a party. 5 U.S.C. § 706. The court may not review the finding or conclusion if a statute precludes the court from doing so or the action taken by the agency is within its "discretion by law," 5 U.S.C. § 701(a), with its review being limited by any "appropriate legal or equitable ground," *compare* 5 U.S.C. § 702. Without an applicable statutory proceeding under the ESA title, the APA may be used as a remedy absent *res judicata* grounds, 5 U.S.C. § 703, and therefore judicially reviewed by a court, 5 U.S.C. § 704. Absent a decision by an administrative judge, the decision by FWS in taking and transportation matters is final and cannot be internally appealed.

Congress expressly provided that the APA applies to "any regulation promulgated to carry out the purposes" of the ESA. 16 U.S.C. § 1533(b)(4). All agencies must provide "an interested person the right to petition for the…amendment…of a rule." 5 U.S.C. § 553(e). The denial of a petition for rulemaking is a final agency action making the decision eligible for judicial review, Massachusetts v. E.P.A., 415 F.3d 50, (D.C. Cir. 2005) rev'd, 549 U.S. 497 (2007) (overruled on other grounds), and there is no "specific language...that is a reliable indicator of congressional intent" that rebuts the presumption favoring judicial review of administrative actions. Block v. Community Nutrition Inst., 467 U.S. 340, 349 (1984).. The purpose of the civil procedures under Title 50 of the C.F.R. § is to "provide uniform rules and procedures for the assessment of civil penalties in connection with violations of certain laws and regulations enforced by the service," 50 C.F.R. § 11.1, not to provide relief for denials of petitions for rulemaking. SCACE has already demonstrated in the pleadings that its petition for rulemaking was denied by FWS. Without a

tribunal review of the denial, review of this matter is proper before the court, and therefore, the lower court did not err in allowing SCACE to base its injury on the actions of the FWS.

2. Chevron Test

The Chevron test, used when reviewing an agency's statutory construction, consists of two parts. "First … is whether Congress has directly spoken to the precise question at issue [and i]f the intent of Congress is clear...the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 842-43 (1984). Second, "[i]f...the court determines Congress has not directly addressed the precise question at issue," because "the statute is silent or ambiguous with respect to the specific issue," "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation," but instead decides "whether the agency's answer is based on a permissible construction of the statute." *Id.*

The statute explicitly prohibits the transportation of an endangered animal in interstate commerce "by any means whatsoever [when] in the course of a commercial activity." 16 U.S.C. § 1538(a)(1)(E). As presented by SCACE and affirmed by FWS, commercial activity is statutorily defined as "all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purposes of facilitating such buying and selling." 16 U.S.C. § 1532(2). The statutory prohibition reads, "[I]t is unlawful...to...transport or ship in interstate...commerce...in the course of ['all activities of industry and trade, including, but not limited to, the buying or selling of commodities...'][1], any such species ['[*p*]*rovided, however*, [t]hat it does not include exhibition of commodities by museums or similar cultural or historical organizations.']"[2] 16 U.S.C. § 1538(a)(1)(E). Therefore, it would be illegal to transport Calixta

[1] 16 U.S.C. § 1532(2) has been inserted into the statutory quotation for ease of reading.
[2] 16 U.S.C. § 1532(2) has been inserted into the statutory quotation for ease of reading.

through interstate commerce, if shipping her from South Carolina to California was done as an activity of "industry and trade," for example, providing her for photography in exchange for valuable consideration that exceeded the costs of her transportation and care and ten percent of UAC's profits from home ticket sales, even if MMCC had shipped her to itself and kept her in its own care.

The regulations do not redefine commercial activity, but do define "industry and trade" to mean "the actual or intended transfer of wildlife...from one person to another in the pursuit of gain or profit." 50 C.F.R. § 17.3. This creates a regulatory definition of "[I]t is unlawful for any person...to...transport or ship in interstate...commerce...in the course of ['all activities of ['the actual or intended transfer of wildlife...from one person to another person in the pursuit of gain or profit'],[3] including, but not limited to, the buying or selling of commodities…']"[4], any such species ['[*p*]*rovided, however*, [t]hat it does not include exhibition of commodities by museums or similar cultural or historical organizations.']"[5] 16 U.S.C. § 1538(a)(1)(E). Therefore, it would be illegal for MMCC to transport Calixta through interstate commerce, if shipping her from South Carolina to California was to transfer her to the care of UAC in pursuit of a profit, such as the valuable consideration that exceeded the costs of her transportation and care and ten percent of UAC's home ticket sale profits.

a. **Congressional Intent**

[3] 50 C.F.R. § 17.3 has been inserted into the statutory quotation for ease of reading.
[4] 16 U.S.C. § 1532(2) has been inserted into the statutory quotation for ease of reading.
[5] 16 U.S.C. § 1532(2) has been inserted into the statutory quotation for ease of reading.

The first part of the Chevron test is to determine Congress's intent. The original bill from the House of Representatives for the ESA did not include a definition for "commercial activity." However, the term was used many times in the bill. The Senate proposed their own bill with the term commercial activity included under the definitions in Section 3. "Also added to the section was a new definition of 'commercial activity,' to delineate the types of activities which would qualify for special treatment under the Act. It includes trades and exchanges of animals or products from those animals wherever those trades or exchanges are undertaken in the pursuit of any gain or profit." H.R. CONF. REP. 93-740, H.R. Conf. Rep. No. 740, 93RD Cong., 1ST Sess. 1973, 1973 U.S.C.C.A.N. 3001, 1973 WL 12684 (Leg.Hist.).

The fact that the term commercial activity is only used in sections 9 and 10 of the ESA, pertaining to prohibited acts and the limited exceptions, is significant. An endangered species transported for non-commercial activities is not a violation of the act. Commercial activity is used to modify the application of the prohibition to species that were held in captivity prior to the approval of the act by Congress on December 28, 1973. If the endangered species were held in captivity before that date, prohibitions, such as the violation of a regulation promulgated by the Secretary, applied if the prior or subsequent holdings were "in the course of commercial activity." 16 U.S.C. § 1538(b)(1). Even if not listed as endangered, otherwise permissible taking and importation of species contrary to the protections outlined in Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) becomes prohibited when done "in the course of a commercial activity." 16 U.S.C. § 1538(c).

Additionally, permits for economic hardship to escape ESA requirements are unavailable if the use of the specimen includes "commercial activity," 16 U.S.C. § 1539(b)(1). Had either Congress or the Secretary intended for a change of ownership to be the exclusive meaning of transfer, they would have used explicit language. In construing the statutes and regulations together it would be hard to ignore the reality that a transfer of responsibility could suffice as a violation under the law. It is clear from a legal position that transfer need not be reduced to a change in ownership for the purposes of the ESA.

Furthermore, the definition of "commercial activity" includes an exemption for the "exhibition of commodities by museums or similar cultural or historical organizations." 16 U.S.C. § 1532(2). The exemption most likely only applies to "tangible goods" as opposed to the animal itself, thereby further bolstering the argument against any permit obtainable on those grounds by MMCC.[6] A slight argument could be made that using Calixta to promote the school's football team was within a context "similar [to a] cultural or historical organization," but it would be disingenuous to compare a college to, say, Alaska Natives. *See* 50 C.F.R. § 17.5 (The conversion of non-edible by-products of endangered...wildlife...sold in interstate commerce" is lawful "when made into authentic native articles of handicrafts and clothing.") This exemption shows that Congress recognized that a display of a piece of an endangered species as a commercial activity, without requiring a change in ownership, since many museums borrow and lend items between themselves and the private sector.[7] When this understanding is applied to the specific exemption

[6] *See* Black's Law Dictionary, 10th ed. 2014 ("commodity ...An article of trade or commerce… embrac[ing] only tangible goods...as distinguished from services.")
[7] *See* U.S. v. Pritchard, 346 F.3d 469, 474 (3d Cir. 2003) (citing American Association of Museums, *Guidelines on Exhibiting Borrowed Objects*) ("Since no single museum contains, or could contain, all objects of admiration and understanding, museums have traditionally exhibited not only objects from

by Congress of "exhibition of commodities by museums or similar cultural or historical organizations" in its definition of commercial activity, it reasonable to infer that Congress did not intend commercial activity to require change in ownership.

b. Permissibility of the Agency's Construction

The second step of the Chevron test is to determine whether the agency's construction of the statute is permissible. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 843-44 (1984). If the "delegation...is implicit," "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 843-44 (1984). Agencies are given great deference in their interpretation of statutes they are entrusted to administer. Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 844 (1984). The Secretary was expressly directed to promulgate regulations to implement the ESA. 16 U.S.C. § 1533. Congress's purpose in creating the ESA was to provide a means of protecting endangered species through conservation, and by honoring the protections outlined in treaties and conventions such as CITES. 16 U.S.C. §§ 1531(a)-(b); 16 U.S.C. § 1538(c) *supra*. Congress also explicitly declared its policy that "all Federal...agencies shall seek to conserve endangered species...and shall utilize their authorities in furtherance of the purposes of this

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their own collections but also objects borrowed from other museums and from private individuals and organizations. Borrowing objects allows museums to provide more comprehensive exhibits and to make objects more accessible that would otherwise be seen by only a few" *construing* 18 U.S.C. § 668(b)) *at* http://www.aam-us.org.

chapter." 16 U.S.C. § 1531(c)(1). Therefore, if the Secretary promulgates regulations under the ESA, they must be in furtherance of the purposes and policies of the ESA.

FWS substantively and impermissibly changed the meaning of transfer by reading "ownership" into the regulation. FWS's interpretation of section 9(a)(1)(e) by inclusion of its definition of "industry and trade," forbids the transportation of endangered species through interstate commerce "by any means" if the activity involves "the actual or intended transfer of wildlife" between two parties and at least one party profits or otherwise realizes a gain. FWS's interpretation limits its power to enforce the ESA by carving out only those animals whose ownership was "actually or intended to be" changed. Congress expressly rejected such an amendment, proposed by Ringling Brother's Circus, to allow the Secretary to issue permits for the activities of circuses and zoos, instead of the limited purpose of enhancing the propagation of endangered species. 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. Another regulation under the same Title regulations also expressly recognizes that a transfer may be a "loan" where endangered animals can be borrowed "for scientific, education, or public display purposes," and the costs paid include those relating to "care, storage, and transportation," 50 C.F.R. § 12.36(a)-(b), none of which are recognized to be commercial, 16 U.S.C. § 1532(2) *supra*; 50 C.F.R. § 23.5 *supra*.

The Department of Interior, when submitting draft legislation to amend the ESA, submitted Executive Communication No. 1815, identifying an interest in reducing commercial demand for endangered animals. H.R. REP. 94-823, 8-9, 1976 U.S.C.C.A.N. 1685, 1691. With the interpretation provided by FWS, as long as an endangered species is on loan, they may be

transported interstate indefinitely, no matter the profit realized by the owner, and not violate the ESA. This would make it more profitable to own endangered species and lease them out than to try to conserve them. If the renter pays for all care and shipping expenses, the owner incurs no expenses, and realizes only profit all without violating the ESA, because there is no change of ownership. How does permitting renting a tiger, leasing a leopard, hiring a hyena, or borrowing a baboon help conserve the species as Congress intended? Permitting the interstate transport of leased endangered animals only increases the commercial demand for endangered animals.

Any argument that prohibiting interstate transportation of all endangered species, instead of those transferring ownership, would reduce the conservation of the species by prohibiting the transportation of species for mating purposes is invalid as the Act provides the ability to obtain a permit for any act otherwise prohibited that would enhance the propagation of the affected species." 16 U.S.C. § 1539(a)(1)(A).

The U.S. Supreme Court has said, "that it will accord great weight to a departmental construction of its own enabling legislation, especially a contemporaneous construction []. Its impact carries most weight when the administrators participated in drafting and directly made known their views to Congress in Committee hearings. In such circumstances, absent any indication that Congress differed with the responsible department, a court should resolve any ambiguity in favor of the administrative construction, if such construction enhances the general purposes and policies underlying the legislation." Zuber v. Allen, 396 U.S. 168, 192-93 (1969). The Department of the Interior was involved in Congressional Committee hearings on the ESA, however, the issues they addressed were federal preemption of state protection laws and resolving any potential conflict between the ESA and the Marine Mammals Protection Act. They did not contemporaneously construct their regulations with the ESA. In fact, when Senator Stevens asked

Mr. Bohlen, the Deputy Assistant Secretary of the Interior for Fish and Wildlife and Parks, if they had, "draft of regulations that [they were] prepared to issue pursuant to law" if the ESA passed, Mr. Bohlen replied, "No, sir" and confessed that they were months away from promulgating regulations under the ESA. To Amend the Endangered Species Act of 1973: Hearings before the Subcomm. on Environment of the Senate Comm. on Commerce, 93rd Cong. 1st Session, at 69 (June 18, 1976 and June 21, 1976), available at http://congressional.proquest.com/congressional/docview/t29.d30.hrg-1973-com-0029?accountid=14613.

Furthermore, FWS did not make its views regarding the ownership requirement for commercial activity known to Congress in the Committee hearings. As stated above, the only issues FWS brought forth were questions about federal preemption, concerns about the interaction between the ESA and the Marine Mammals Protection Act, and encouragement to enact the legislation as soon as possible to conserve endangered species.

FWS's interpretation of the statute is arbitrary and capricious because it is opposition to the clear intent of Congress in enacting the ESA. Congress made it clear that its intent was to protect and conserve endangered species and specifically noted that its policy is that federal agencies use their authority to conserve endangered species, however, the interpretation by FWS limits their enforcement authority of the ESA. Finally, the regulations were not contemporaneously created with the Act and FWS did not make their views regarding the ownership requirement directly known to Congress during the Committee hearings. Therefore, FWS's interpretation of the statute, by enacting its regulation requiring transfer of ownership when prohibiting interstate

transportation of endangered species, is arbitrary and capricious. *But see* Humane Soc. of U.S. v. Babbitt, 46 F.3d 93, 96 (D.C. Cir. 1995).[8]

3. Personal Stake

"At bottom, "the gist of the question of standing" is whether petitioners have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." Massachusetts v. E.P.A., 549 U.S. 497; 517 (2007) (citations and internal quotations omitted). At first glance it would not appear that the public interest agency charged with the welfare of animals through its connection with the Secretary under the ESA would be adverse to a non-profit group protecting animals, especially when they are in apparent agreement that the transportation of the tiger in this case was harmful. Congress has found that endangered animals "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3).

However, where the two create their adversity is sharpened in whether the broad discretion for FWS to deny enforcement covers also its ability to deny petitions for rulemaking that would make the application of the regulation more clearly in line with the statute to avoid arbitrary and capricious decision-making in the future. Given the mislaid defenses provided by FWS, that the harm was either created by MMCC when it shipped Calixta, or that SCACE harmed itself by pursuing the matter, it remains a dividing issue between the parties of whether FWS has either

[8] The Court of Appeals for the District of Columbia noted that the District Court for the District of Columbia determined, "that the statutory language is ambiguous, the court held that FWS' interpretation of "commercial activity" is not unreasonable, accords with the legislative history of the ESA, and has been impliedly ratified by Congress through subsequent amendments to the statute which left the definition of "commercial activity" unchanged." Humane Soc. of U.S. v. Babbitt, 46 F.3d 93, 96 (D.C. Cir. 1995).

such authority or such discretion and the two therefore have sufficient adversity between that the court will require clarification upon.

The personal stake put forth by SCACE in their claim is that its actual advocacy for the tiger has been and will continue to be impaired without the promulgation of the new rule. As already discussed, the old rule has been seemingly deemed sufficient by FWS even though it was not enough to protect the endangered animal from harm in interstate commerce for commercial purposes that FWS agreed to have taken place. This court has no reason to disagree that the expense of valuable and limited resources on arbitrary and capricious dismissals of petitions that meet lawful requirements because the the agency is far too busy and strapped for cash to address their concerns certainly leaves the group in a position. The actual advocacy for, beyond mere monitoring of, this particular tiger has been a way of life for the Respondent for number of years and continued to be part of their mission even though responsibility for the tiger was temporarily transferred to another in California. *Compare* Lujan v. Defenders of Wildlife, 504 U.S. 555; 566. SCACE has taken a very personal and long-standing interest in the tiger that demonstrates its willingness to sharpen its knives for the welfare of this single tiger, though the implications are clearly broader. This is enough to defeat arguments this may be "the 'animal nexus' approach, whereby anyone who has an interest in" endangered species may attempt to gain standing. *Compare* Lujan v. Defenders of Wildlife, 504 U.S. 555; 566.

4. Injury

"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.'" Lujan v. Defenders of Wildlife, 504 U.S. 555; 560 (citations omitted). It must be greater than an "intent" to do something that may involve the endangered

animal in the future, *Id*. at 563 (citations omitted), and more than "conceivable," *Id*. at 560. To fulfill the injury requirements, there only needs to be an "injury in fact." Federal Election Commission v. Akins, 542 U.S. 11 at 21. The party must be harmed greater than being deprived of proper procedure, otherwise the harm is too general to be accorded the time of the courts. *Compare* Lujan v. Defenders of Wildlife, 504 U.S. 555; 576

As already discussed, the specific monitoring of the single tiger shows a personal stake, so therefore it is more likely that the movement of the tiger would have personal impact on SCACE. It is more than "conceivable" that a working definition in conflict with the statutory and regulatory provisions to allow specifically forbidden harms to arise due to the refusal of an agency to clarify the application of a law as demonstrated by this case can cause a group to be taken cross-country at its own expense in order to further its mission. Though SCACE requested a promulgation for a rule that would have wide-reaching implications to all endangered species, the heart of its complaint lies the reality of its personal connection to a specific tiger they have been made unable to help because of the wonton application of a regulation and an agency's unwillingness to admit its part in the wrongdoing. Between the actual, concrete reality that SCACE has been required to needlessly expend its resources to continue to monitor Calixta in California over the last two years as Calixta has been subsequently harmed in interstate commerce for commercial purposes creates the high probability that its public education and media outreach has been impaired. through sending staff to monitor her and retaining California Counsel to research the state and local laws applicable to animal protection. Without reconsideration from FWS, SCACE will continue to experience harm, as they have declared they will continue to monitor Calixta, further expending their limited resources. SCACE continues to face harms in the future.

There is an argument to be made that the harm to endangered species harms all citizens because of Congress' findings of their value outside of the commercial realm, thereby making it a general harm. There is an injury in fact to be argued, however, when SCACE must expend valuable time and resources to have FWS clarify the laws so there are no surprises in its application and then must take FWS to court in order to have it compelled to make up its mind about the meaning and application of the law beyond scarce resources and priorities. This is not a simple case of misapplication of the law that would reduce the population of tigers but, rather, a case where an agency is given the broad discretion to ignore the unambiguous law as it is written in order to avoid enforcement then to avoid explaining itself when it states the law as written is sufficient to address those very harms complained of simply because it neither has the time or resources to do so. SCACE is not complaining of a procedural deprivation, just the facially-valid basis that the conclusion of FWS was too ambiguous in light of its earlier denial. To say on the one hand that there is no violation because today there was no actual or intended transfer of ownership and therefore no violation of the law but then to allow an agency to tomorrow deny a petition for rulemaking that would state that the rule does not require a transfer of ownership because it already envelopes those ideas is the very basis of a factual and founded argument that the agency is acting impulsively or unexpectedly.

FWS incorrectly defended itself on the grounds that it was not responsible for the harms, either because it was not the correct party brought before the court or because SCACE did it to itself. SCACE's harm results from FWS arbitrarily applying the law by choosing not to address harms it agrees would not stand, save the ownership requirement, and then by refusing to take into consideration rules that would clarify the application of the law. SCACE has not alleged that the FWS failed to regulate MMCC or UAC, though it does contend that the clarification of would

force commercial transporters of endangered species to think again. *Compare* Lujan v. Defenders of Wildlife, 504 U.S. 555; 562. Nor does SCACE complain of any projects funded by FWS were creating harms that would endanger endangered species. *Id*. at 563. SCACE has only alleged that FWS's arbitrary denial of the petition for rulemaking has endangered its current and future ability to monitor the tiger with whom it has had an ongoing relationship and to provide public education and outreach. Even though this would reach all endangered animals being trafficked through interstate commerce for commercial purposes, and reach all groups suffering similar harms, SCACE is currently and actually expending resources from the fallout of the arbitrary decision-making of FWS.

5. Causation and Redressability

"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.'" Lujan v. Defenders of Wildlife, 504 U.S. 555; 560-561 (citations omitted). Even if an agency would have "reach[ed] the same result exercising its discretionary powers lawfully," redressability may come where the discretion is based "upon an improper legal ground." Federal Election Commission v. Akins, 524 U.S. 11 at 25. "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujan, *supra*, at 561 (citations omitted). The "favorable decision" need only create a "substantial likelihood that the judicial relief requested will prompt [the agency] to take steps to reduce [the] risk" of the harm alleged by the petitioned-for action. Massachusetts v. EPA, 549 U.S. 497 at 521 (2007) (internal citation and quotation omitted). Since the injury occurred due to the denial of the petition for rulemaking, the group must show that FWS did not have the legal authority to deny the petition within its discretionary powers

and that a judicial decision will fall in the favor of SCACE because it will cause FWS to rethink its position on the matter.

Agencies have broad discretionary powers on how to use their resources and personnel for their "delegated responsibilities," and that power is never greater than when it "decides not to bring an enforcement action." 50 C.F.R. § 10.1. "The use of the word 'judgment' is not a roving license to ignore the statutory text[; i]t is but a direction within defined statutory limits." Massachusetts v. EPA, 549 U.S. 497 at 531. A "sweeping definition" described using "any" should be read as "embraces all" and is therefore unambiguous, foreclosing the agency from narrowing the definition. *Id*. at 528. "[T]he fact that a statute can be applied in situations not expressly anticipated by congress does not demonstrate ambiguity[; i]t demonstrates breadth." *Id*. at 531.

There is undoubtedly a direct link between FWS's arbitrary application of the law and the injuries suffered by SCACE. To allow the agency on the one hand to support the propositions except for its impermissible rationale that denies relief to the endangered animal, then to allow the agency on the other hand deny a notice of violation that would make it clear the agency must apply the law as stated without any substantive additions to it only so that the agency could then blame third parties for the actions of the denied notice or the injured party for seeking redress makes no rational sense. Since the agency has denied the notice of violation by ignoring the statutory text, FWS has failed to stay within its limits and therefore the fallout of those actions rest with FWS including SCACE's expenses in order to pursue its mission and seek judicial recourse. Just as it may not have been in the mind of Congress, transfer of responsibility is still within the breadth of the regulation when it spoke because the statute unambiguously provides for all intercourse in the form of commercial activity which presumably would include temporary transfers of responsibility like renting out tigers across state lines. It is also very likely that a judicial opinion from a court

denying that there is no even facial validity to SCACE's claims will cause FWS to rethink its position either in how it applies the law or in potentially promulgating a new rule, both of which are likely to redress SCACE's concerns of Calixta and other endangered animals being harmed in interstate transport for commercial purposes. Therefore SCACE has at least facially made the necessary showings of causation and redressability necessary to move forward with its complaint as a matter of standing.

II. THE DISTRICT COURT DID NOT ERR WHEN IT DENIED FWS'S MOTION FOR JUDGMENT ON THE PLEADINGS AS TO THE LAWFULNESS OF ITS DENIAL OF SCACE'S PETITION FOR RULEMAKING BECAUSE SCACE ADEQUATELY PLEAD A SUFFICIENT CLAIM FOR WHICH RELIEF COULD BE GRANTED.

The Court reviews "de novo a district court's order granting a Rule 12(c) motion for judgment on the pleadings. A judgment on the pleadings is properly granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." Marshall Naify Revocable Trust v. U.S., 672 F.3d 620, 623 (9th Cir. 2012).

Once the pleading stage has closed, "a party may move for judgment on the pleadings" if it would not delay trial proceedings. Fed R. Civ. P. 12(c). If the court considers any information beyond what is in the pleadings, "the motion must be treated as one for summary judgment" with "reasonable opportunity to present all material that is pertinent to the motion." Fed R. Civ. P. 12(d). The court need only discount allegations from the pleadings that are contested. *Cf*. Lujan v. Defenders of Wildlife, 504 U.S. 555; 561 ("In response to a summary judgment motion...the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts...'"). If the proceedings are not transformed into those for summary judgment, the nonmovant only needs to have a facial showing of a sufficient claim upon which relief could be granted and the the court treats the motion as one for dismissal, Christy v. We The People Forms and Service Centers, USA, Inc., 213 F.R.D. 235 at 238 (2003) (citations omitted),

where the movant must show that the claim was stated inadequately or unsupported by a showing of any facts. *Cf.* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 at 562 ("once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint").

The court need only consider "whether the claimant is entitled to offer evidence to support [its] claims," not whether "a recovery is very remote and unlikely." Scheuer v. Rhodes, 416 U.S. 232 at 236 (1974) (*abrogated on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800 (1982)). The court may only look at the pleadings and no additional information. Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1550 (1989). "At the pleading stage, general factual allegations...may suffice [because] we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim," Lujan v. Defenders of Wildlife, 504 U.S. 555 at 561 (internal citation omitted), and those allegations are read "in the light most favorable to the nonmoving party." Micale v. Bank One N.A. (Chicago), 382 F. Supp.2d 1207 at 1215 (citations omitted). Therefore, if no outside information is considered, the lower court needs only to decide whether there was enough factual information provided in the pleadings for the claimant to proceed and not whether the claim was sufficient to survive a motion for summary judgment.

The court relied in part on the agreement of the parties that the exceptions relating to incidental taking permits do not apply and cites information not contained in the complaint. Memorandum Opinion at 4. As the issue relates to permits, SCACE incorporated into its complaint the underlying allegation that no permits could be acquired by MMCC for its actions, which was assented to by FWS's finding that no commercial activity was found despite the allegations of no permit being obtainable. The court could easily have come to its own conclusion that the parties appeared to be in agreement without the extraneous information that "the vast majority of tigers

in this country are" *Panthera tigris* according to the outside source or the parties' agreement. Therefore, the motion was properly considered as a motion to dismiss and not as a motion for summary judgment.

It was pled that FWS denied a petition for rulemaking due to "competing priorities" and "limited resources," and that FWS had stated it had the "broad discretion" to deny a motion for those reasons. It was further pled that a notice of violation was filed by SCACE, which was likewise denied by FWS, because it read the word "ownership" into the statute clarified by a regulation promulgated by the Secretary of the Interior. SCACE alleged when its petition for rulemaking was denied, FWS was "arbitrary, capricious, an abuse of discretion, or otherwise or not in accordance with law." 5 U.S.C. § 706(2). In the light of FWS having earlier rejected SCACE's notice of violation as sufficient under the requirements to notify FWS of the notice of violation, since the notice was dismissed on other grounds but insufficient because there was no showing of a change of ownership, it stands to reason that if ownership does not belong in the reading there can be no more "arbitrary" or "capricious" application of the regulation. Since SCACE needed only a facial showing, the lower court did not err in ruling that SCACE met the requirements to defeat a motion for dismissal.

The allegations made by SCACE were primarily based in documentary evidence included by reference into its complaint, demonstrating its ability to provide the information in discovery and at trial, except in three instances where the organization made assumptions "upon information and belief." If these three pieces of information were discounted from the pleadings, which they need not be, the court would only have excluded the possibility of the tiger suffering from "painful joint problems" exacerbated by the transport and subsequent confinement in less adequate housing, the possibility of inadequate ventilation in the trailer, and the potential private sector pressure

preventing FWS from doing its duty under the law. Read in the light most favorable to SCACE, the allegations of improper transport allowed to illegally take place by the FWS to be continued because of the denial of the petition for rulemaking--because FWS had better things to do and not enough resources to look into the matter--are not discounted. The boilerplate defenses provided by FWS that it was not responsible for the injuries or that the injuries were the fault of SCACE, because it chose to pursue the matter, do not diminish the pleadings as these are fact-based contestations which lend themselves to the ideas behind discovery and a trial. Therefore if the court had the authority to review FWS's denial of the petition, SCACE adequately alleged it was harmed by the denial.

Conclusion

SCACE pled sufficient facts and allegations within its complaint to survive a motion for dismissal. On its face, SCACE provides that an arbitrary application of the law amounted to unlawful action by FW,S by first denying a notice of violation based on the statutory and regulatory reading of the law, then by denying a later petition for rulemaking that essentially affirms the law is sufficient to address the group's concerns regarding the interstate transport of endangered animals for commercial purposes. As a result, SCACE was burdened in its attempt to fulfill its mission because it has had to expend money on travel, legal counsel, and related expenses in order to continue to monitor the tiger Calixta, with whom the group has furthered their mission through public education and outreach and for whom the group has been and continues to be an advocate. If not for the denial of the petition for rulemaking, SCACE would not have suffered these harms and has pled enough to make a facial showing that would entitle the organization to proceed past the pleading stage. Once past the pleading stage, FWS is likely to rethink its position on whether

ownership is properly applied in the statutory and regulatory scheme or to propose the petition in the Federal Register that would allow members of the public to comment on it before making a lawful decision on whether or not it is in the best interests of the species to read the rules more broadly.

Though FWS would seek to displace blame on others, the crux of the case relies primarily on the reality that FWS did not have the authority to deny the petition for better things to do and a lack of funding, as it found within its assumed discretion. The discretion FWS had, in fact, was to apply the law as written and not to constrain it so when it impermissibly refined "industry in trade" in the statute to mean only a transfer of ownership, it casually gave itself the power to deny notices of violations covered by the statutory and regulatory definitions, while also granting itself the authority to ignore any clarifications it could make to ensure the definitions were applied. By granting itself such broad discretion, FWS became free to capriciously make decisions and go against the tenets of the ESA, placing advocacy, like that done by SCACE, at risk and endangering wildlife covered under the statute and regulations at increased harm.

The ESA is primarily driven toward the conservation of endangered wildlife to the point that despite having signed onto a treaty recognizing the economic opportunities to be gained therefrom, our Congress took the protections a step further and recognized everything but. The statutory and regulatory framework is replete with examples where exemptions and permits cannot apply where "commercial activity" is involved. Congress could not have intended so large a hole as interstate transportation of endangered animals to only mean for the change of ownership in exchange for valuable consideration when it recognizes the multitude of harms that arise from other commercial transactions, such as loans.

SCACE made the necessary showings that, on their face, establish standing: personal stake, injury, causation, and redressability. These are in part established by those facets which FWS requested judgment on the pleadings for, which was whether the agency had acted lawfully when it denied SCACE's petition for rulemaking. SCACE pled and alleged enough information, steeped primarily in documentary evidence it is prepared to share with FWS and the court, that on its face would suggest that it has made a facial showing that a review of the agency action is valid and necessary on the matter, and that it may have been unlawful. Since it may have been unlawful, there may have been an injury caused by the agency and judicial intervention may be able to provide relief. Therefore the lower court did not err in denying the Appellant's motion for judgment on the pleadings and properly alleged that SCACE's standing was proper.

For the foregoing reasons, the Court should affirm the final judgment of the district court, finding SCACE had standing to bring its claim against FWS and denying FWS's motion for judgment on the pleadings as to the lawfulness of its denial of SCACE's petition for rulemaking.