NO. 15-70117

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES FISH AND WILDLIFE SERVICE,
Appellant,

v.

SOUTH CAROLINA ADVOCATES FOR CAPTIVE EXOTICS,
Appellee.

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

BRIEF OF APPELLEE, SOUTH CAROLINA ADVOCATES FOR CAPTIVE EXOTICS

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16 U.S.C. § 1532(2) – Definition of Commercial Activity

> "*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 selling: *Provided, however,* that it does not include exhibitions of commodities by museums or similar cultural or historical organizations."

16 U.S.C. § 1538(a)(1)(E)

> "It is unlawful for 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" species the agency lists as endangered."

16 U.S.C. §1538(a)(1)(F)

> "It is unlawful for any person subject to the jurisdiction of the United States to . . . sell or offer for sale in interstate or foreign commerce any such species."

ISSUES PRESENTED

I. Whether the district court erred in determining SCACE properly alleged standing when SCACE suffered a distinct and imminent injury caused by the FWS's inaction that would likely be redressed by a favorable court decision?

II. Whether the district court erred in denying FWS's motion for summary judgment on the pleadings when FWS denied SCACE's rulemaking petition despite FWS's statutory interpretation of the ESA being contrary to Congressional intent?

STATEMENT OF THE CASE

This appeal challenges the United States District Court for the Western District Court of California's (the district court) order denying Appellant's, the United States Fish and Wildlife Service (the FWS), motion for judgment on the pleadings against the Appellee, South Carolina Advocates for Captive Exotics (SCACE). SCACE filed a complaint with the FWS requesting the agency hold Mabel Moxie's Cantankerous Cats (MMCC) in violation of 16 U.S.C. § 1538(a)(1)(E) of the Endangered Species Act (ESA) for the transportation of the tiger, Calixta, to California for exhibition as a mascot at college football games. Upon the FWS's decision that exhibition as a mascot does not constitute transport "in the course of commercial activity," SCACE filed a rulemaking petition with the FWS to expand the FWS's regulatory definition of "industry and trade" (defined within the ESA definition of commercial activity) in implementing the ESA because of the definitions impermissible limited protection. The FWS denied the petition and alleged its discretion allows the agency to disregard the broad statutory mandate to protect endangered species.

On December 20, 2013, SCACE filed its complaint with the district court and moved for declaratory and injunctive relief under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. The district court held SCACE adequately alleged standing and denied motion for judgment on the pleadings because, accepting all SCACE's material allegations as true, the FWS's regulatory definition is a plain error of law and the FWS is not entitled to judgment as a matter of law. The judgment of the district court was entered on May 22, 2014. The FWS now appeals to this Court. This Court entered a Briefing Order on October 27, 2015 and has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE FACTS

SCACE, a nonprofit organization and animal protection charity, seeks to end the exploitation of captive exotic animals. Compl. ¶ 4. Located in South Carolina, SCACE focuses on advocacy work for a tiger named Calixta, owned by MMCC, a for-profit corporation that exhibits animals. Id.; see also ¶ 16-17. As part of SCACE's campaign for Calixta, they have monitored and documented Calixta's conditions for several years and have shared this information with interested members of the public. Id. at ¶ 20. When MMCC's actions are illegal and inhumane, SCACE files complaints with local law enforcement officials. Id. For instance, SCACE gathered particularly disconcerting evidence regarding Calixta's treatment and living conditions. Id. at ¶ 21. SCACE has recorded evidence of MMCC staff "striking and jabbing Calixta with metal poles" and shocking her with electric prods. Id. at ¶ 22. Moreover, Calixta's enclosure at MMCC is miniscule in size and only a "tiny fraction" of the area wild tigers would normally use. Id. at ¶ 24.

Last year, MMCC entered into a contract, in which they obtain a handsome profit, with the University of Agartha in California (Agartha). Id. at ¶ 25. Every year for the foreseeable future, MMCC will send Calixta to Agartha to be displayed as the football team's mascot during the football season. Id. ¶ 25, 27. The contract is particularly concerning to SCACE because Calixta's enclosure at Agartha is even smaller than the one at MMCC, and Calixta is subjected to loud noises at the football games which scare her. Id. at ¶ 27. SCACE also has reason to believe the trailer in which MMCC transports Calixta lacks proper ventilation. Id. Because SCACE's main objective is to ensure MMCC treats Calixta humanely, SCACE intends to send staff and equipment to California to monitor and document Calixta's conditions. Id. at ¶ 29.

One of SCACE's complaints urged the FWS to enforce the ESA against MMCC. Id. at 32. MMCC's transportation of Calixta is a violation of the ESA's prohibition on "transport . . . in

interstate . . . commerce . . . in the course of a commercial activity," id. at ¶ 33 (quoting 16 U.S.C. § 1538(a)(1)(E)), and the FWS's regulatory definition of "industry and trade" is inherently inconsistent with the broad statutory definition of "commercial activity." Id. at ¶ 35; see also Mem. Op. at 18, ¶ 2. SCACE further alleged there was no possibility of MMCC obtaining a permit to engage in this unlawful activity through the exception set forth in 16 U.S.C. § 1539(a) because transporting Calixta for profit is not "scientific" and does not enhance propagation or survival, which the FWS recognizes. Compl. ¶ 33; see also Mem. Op. at 4. The exception for "museums or similar cultural or historical organizations" was added by amendment in 1976, at which time Congress rejected the animal exhibition industry's proposed amendment to exclude "ordinary activities of a zoo, circus, menagerie, or other similar exhibition, other than a sale or transfer of a threatened or endangered species for gain." Compl. ¶ 13.

The FWS rejected SCACE's claim, asserting no violation had occurred based on 16 U.S.C. §1532(2). Id. at ¶ 34. Accordingly, SCACE filed a petition for rulemaking with the FWS in hopes of encouraging the FWS to adopt a broader definition of "industry and trade" that would include more than the transfer of ownership for profit. Id. at ¶ 36-37. The FWS rejected SCACE's petition for rulemaking, Id. at ¶ 38, and SCACE filed this action.

SUMMARY OF THE ARGUMENT

SCACE has adequately alleged standing because they have satisfied the three prongs of standing set forth in Lujan v. Defenders of Wildlife. Since the FWS refused to grant SCACE's petition for rulemaking, SCACE is faced with two different courses of action, both of which constitute a direct and palpable injury. First, if SCACE sends staff to California they will incur excessive added expenses. Alternatively, if they choose not to send staff to California, they are unable to fulfill their mission of ensuring Calixta receives proper care and attention from MMCC staff. SCACE has further satisfied the causation and redressability prongs of the standing test. But for the FWS's inaction with regard to SCACE's petition for rulemaking, SCACE would not be forced to choose between two alternative injuries. Finally, a favorable decision by this Court would redress SCACE's injuries because MMCC would be forced to cease their transportation of Calixta.

Moreover, the FWS is not entitled to judgment on the pleadings because when accepting all allegations in the pleading as true, the FWS's denial of SCACE's rulemaking petition is a plain error of the law. Agency action is a plain error of the law when it violates Congressional intent. As the most comprehensive legislation enacted by a nation for the preservation of endangered species, Congress intended the ESA to have far reaching effects. As such, the FWS's narrow regulatory definition of "industry and trade," which only provides protection to endangered species bought and sold through commercial activity, is an impermissible statutory interpretation. Applying the *Chevron* test set forth in Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc., because Congress has directly spoken to the precise question at issue, the FWS must adhere to Congress's unambiguously expressed intent for broad protection. Additionally, FWS's statutory interpretation violates the permissible canons of statutory interpretation because the regulatory

definition does not align with the ESA's purpose, legislative history, or interpretation by the Supreme Court and renders part of the statute mere surplusage.

STANDARD OF REVIEW

This Court reviews the district court's decision regarding standing de novo. Fair Hous. Of Marin v. Combs, 285 F.3d 899, 902 (9th Cir. 2002). This Court also reviews the district court's ruling on summary judgment de novo. San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 601 (9th Cir. 2014). The ESA does not provide a separate standard of review and claims are reviewed under the APA standards. Id., see also Bennett v. Spear, 520 U.S. 154, 174 (1997). An agency's action violates 5 U.S.C. § 706(2)(A) of the APA when the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The ESA requires agencies to base actions on evidence supported by "the best scientific and commercial data available" and prohibits agencies from disregarding available scientific evidence that is in some way better. Jewell, 747 F.3d at 601-02. Thus, an agency decision is reversible when the agency entirely fails to consider an important aspect of the problem. McFarland v. Kempthorne, 545 F.3d 1106, 1110 (9th Cir. 2008). Furthermore, because this case is at the pleadings stage, it is important to note that the Court must take as true all of the allegations set forth in SCACE's Complaint. Levine v. Vilsack, 587 F.3d 986, 991 (9th Cir. 2009).

ARGUMENT

SCACE has adequately alleged standing because it has satisfied the three prongs of the standing test. First, SCACE has suffered a concrete and particularized injury. Second, SCACE's injury will imminently occur as a result of the FWS denying SCACE's petition for rulemaking. Third, SCACE's injury is redressable if this Court hands down a favorable decision. Moreover, the FWS is not entitled to judgment on the pleadings. Judgment on the pleadings is not proper because, when accepting all of SCACE's material allegations as true and interpreting them in the light most favorable to SCACE, there are material issues of fact to be resolved regarding the scope of the ESA and Congress's intent.

For these reasons, this Court should affirm the district court's holding that SCACE adequately alleged standing because SCACE suffered an injury at the hands of the FWS and a favorable court decision will likely redress the injury by ceasing MMCC's illegal transportation of Calixta. Because SCACE has standing, its Complaint for declaratory and injunctive relief is not foreclosed. Thus, this Court should also affirm the district court's denial of the FWS's motion for judgment on the pleadings because, as the agency entrusted with implementing Congress's noble desire to protect endangered species, the FWS's regulatory definition of "industry and trade" fails to uphold the ESA's broad scope and is not in accordance with the law.

I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S FINDING FOR STANDING BECAUSE SCACE DEMONSTRATED INJURY IN FACT AND THERE WAS A CAUSAL RELATIONSHIP BETWEEN THE FWS'S INACTION AND SCACE'S INJURY THAT WOULD LIKELY BE REDRESSED BY A FAVORABLE DECISION BY THIS COURT.

SCACE has demonstrated they have appropriately alleged standing under the three-prong test set forth in Lujan v. Defenders of Wildlife. 504 U.S. 555, 560 (1992). Because SCACE is the party invoking federal jurisdiction, they bear the burden of establishing the three standing elements. FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990). In order to assert standing, first, a plaintiff must have suffered an "injury in fact." Lujan, 504 U.S. at 560. Second, the plaintiff must demonstrate there is a causal connection between their injury and the defendant's action or inaction. Id. Third, the plaintiff's injury is likely to be "redressed by a favorable decision." Id. While these factors were originally for individual plaintiffs, the Supreme Court held an organization must also satisfy the same elements. Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982).

Because this litigation is occurring during the pleadings stage, it is critical to bear in mind the Court must accept as true all material allegations set forth in SCACE's Complaint. Lujan, 504 U.S. at 561. While this is a liberal standard, it is not without constraints. Ashcroft v. Iqbal, 555 U.S. 662, 678 (2009). Courts will not accept frivolous or conclusory allegations and unwarranted inferences to demonstrate standing. Id. Thus, this Court must determine whether SCACE had "such a personal stake in the outcome of the controversy as to" warrant deliberation before the court. Baker v. Carr, 369 U.S. 186, 204 (1962).

Accepting the allegations set forth in the Complaint as true, SCACE has satisfied the three prongs of the standing test. First, SCACE suffered a direct injury because they either spend money to send staff to California or they are unable to properly continue their advocacy work and update

the interested population. Second, the FWS directly caused SCACE's injury by denying their petition for rulemaking, which would have forced MMCC to cease transporting Calixta to California. Finally, a favorable decision by this Court would redress SCACE's injury because Calixta would remain in South Carolina where SCACE can continue to care for her and ensure her well-being.

A. SCACE suffered a distinct and palpable injury because the FWS's inaction forced SCACE to choose between incurring unplanned expenses or leaving Calixta without a staff to properly advocate for her well-being while she was in California.

SCACE suffered a concrete and particularized injury when the FWS denied its rulemaking petition, which allowed MMCC to continue transporting Calixta to California during a portion of the year. In order for a plaintiff to satisfy the first prong of the standing test, the plaintiff must allege an injury that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" Lujan, 504 U.S. at 560 (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Los Angeles v. Lyons, 461 U.S. 95, 102 (1983); O'Shea v. Littleton, 414 U.S. 488, 494 (1974)). In addition to these factors, when the plaintiff is an organization they must assert "both a diversion of its resources and a frustration of its mission" in order to satisfy the injury requirement. La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest, 624 F.3d 1083, 1088 (9th Cir. 2010).

An injury is concrete and particularized when it is a distinct and palpable injury directly to the complainant, rather than merely an abstract injury. Whitmore, 495 U.S. at 155 (citing O'Shea, 414 U.S. at 494. In Whitmore, the complainant was a third party and capital defendant who challenged the validity of a death sentence imposed on another capital defendant, Simmons. 495

U.S. at 151. The Supreme Court ultimately held the complainant did not adequately establish standing because his alleged injury was "too speculative." Id. at 151, 157. The complainant intervened in Simmons' proceeding in an effort to attack the State's "system of comparative review in death penalty cases," alleging that he had "a direct and substantial interest in having the data base against which his crime [was] compared to be complete and not be arbitrarily skewed by the omission of any other capital case." Id. Because the complainant had exhausted all possible appeals for his capital punishment case, his conviction and death sentence were final, which meant the allegations set forth in his complaint regarding the comparative review of death penalty cases were speculative and irrelevant. Id. at 157. Because the complainant's alleged injuries were not distinct and palpable, he lacked standing to bring his claim. Id. at 161.

Furthermore, an abstract injury is not enough. O'Shea, 414 U.S. at 494. The complainants in O'Shea brought a civil rights action against several state actors in Cairo, Illinois, alleging the state actors had engaged in various patterns and practices that deprived the complainants of their rights. Id. at 490. While none of the complainants personally suffered any injury in the manner specified, they generally alleging state officials had taken part in illegal conduct that deprived the individuals of their rights. Id. at 495. Considering the complainants alleged such an abstract injury and that none of the complainants had actually suffered any distinct or palpable injuries, the Supreme Court concluded they did not establish an "injury in fact." Id. at 499.

Moreover, an injury must be actual or imminent, rather than conjectural or hypothetical. Lyons, 461 U.S. at 102. The complainant in Lyons brought action pursuant to a Los Angeles police officer placing him in a chokehold despite the complainant offering no resistance or threat. Id. at 97. The complainant's ability to assert standing depended on "whether he was likely to suffer future injury from the use of chokeholds by police officers"—whether there was an actual or

imminent possibility that he would suffer the same injury again. Id. at 105. Prior to Lyons reaching the Supreme Court, the Chief of Police in Los Angeles changed the policy and prohibited the use of chokeholds in any circumstances due to an increased number of chokehold-related deaths. Id. at 100. The complainant in Lyons failed to demonstrate an actual or imminent injury for two reasons. First, because the police department had changed their policies it was unlikely the police officers would continue to place suspects in chokeholds. Id. at 105. Second, even if officers ignored the new policies and placed suspects in chokeholds, there was no evidence the complainant himself would be stopped for another traffic violation and placed in another chokehold. Id. Therefore, the complainant's injury was merely a hypothetical injury that did not satisfy the injury requirement of the standing test. Id.

In order to meet the injury requirements of the standing test, an organization must assert "both a diversion of its resources and a frustration of its mission." La Asociacion de Trabajadores, 624 F.3d at 1088. One of the complainants in La Asociacion de Trabajadores was a nonprofit union association seeking to enjoin the enforcement of a certain section of the city's municipal code so union workers could stand on the sidewalks to obtain work without sheriff deputies harassing them Id. at 1085-86. This particular organization was attempting to sue on its own behalf, claiming it was forced to divert resources to help other union coalitions involved in the suit. Id. at 1088. However, the nonprofit union's complaint lacked any allegations illustrating the alleged forced diversion of resources. Id. Furthermore, the complainant failed to demonstrate a frustration of its mission. Id. Accordingly, this Court determined the complainant did not meet the requirements for organizational standing. Id.

SCACE alleged a concrete and particularized injury resulting from the FWS's inaction in that SCACE had to choose between spending extra resources to send staff to California with

Calixta or staying in South Carolina where they are unable to properly advocate on Calixta's behalf. Unlike Whitmore, where the complainant's alleged injury was too speculative to warrant a court decision, here, SCACE's injury is distinct and palpable as recognizable on the face of the Complaint. Because one of SCACE's long-standing campaigns centers around the well-being of Calixta, it stands to reason they want to ensure her well-being wherever she goes—even when MMCC sends her across the country to California. SCACE planned to send staff and equipment to California while Calixta is there in order to continue monitoring her condition and informing the interested public. Not only will SCACE have to pay transportation costs for the staff and equipment, they will also be responsible for lodging expenses for the staff while in California. These expenses will quickly add up, considering MMCC is keeping Calixta in California for the entire football season.

Even if SCACE does not send staff with Calixta, SCACE would still suffer a distinct and palpable injury because they would not be able to keep the public informed on Calixta's condition - another one of SCACE's main objectives with regard to Calixta's campaign. Thus, unlike O'Shea, where the complainants alleged several abstract, generalized injuries, here, both of SCACE's possible injuries are distinct and particularized. None of the complainants in O'Shea were personally injured by the city officials' policies or procedures, but SCACE will suffer either unplanned monetary expenses or potential setbacks to their mission since they would not be able to properly continue their advocacy work if they stayed in South Carolina.

Moreover, SCACE's injuries are not hypothetical but imminent because MMCC is planning on sending Calixta to California every football season for the foreseeable future. Unlike Lyons, where the complainant could not demonstrate the likelihood that the LAPD would harm him in the imminent future, here, SCACE can easily demonstrate the FWS's inaction - that would

lead to MMCC's continued exhibition of Calixta in California - would harm them. MMCC has already sent Calixta to California during the previous football season and plan to send her every season for the foreseeable future because they are making a profit on her exhibition. Unlike the complainant in Lyons who could not allege an imminent injury, in part, because the Los Angeles Police Department had taken measures to remedy the actions that caused the complainant's injury in the first place, the FWS denying SCACE's petition for rulemaking allows MMCC to continue sending Calixta to California every year. Therefore, the FWS has taken actions that all but ensure SCACE's injury will continue.

SCACE's complaint also adequately alleges the additional requirements required to obtain organizational standing. Unlike La Asociacion de Trabajadores, where the organizational plaintiff did not adequately allege a diversion of its resources or a frustration of its mission, SCACE's complaint focused on these injuries. SCACE alleged two alternative injuries, both of which satisfy the organizational standing requirements. If SCACE sends staff and equipment to California, SCACE would be diverting their resources in a manner not originally intended. Alternatively, if they do not send staff with Calixta, SCACE would remain in South Carolina, unable to satisfy its mission of advocating on behalf of Calixta and keeping the public informed of her condition. SCACE is in the very position that is required of an organizational plaintiff to satisfy the additional standing requirements. Thus, because the FWS denied SCACE's petition for rulemaking, SCACE must choose between diverting its resources or frustrating its mission, both injuries of which are concrete, distinct, and imminent.

B. SCACE satisfied the causation and redressability prongs of the standing test because the FWS's inaction forced SCACE to choose between two alternative injuries, and a favorable decision by this Court would redress their injuries.

SCACE has adequately satisfied the causation and redressability prongs in their Complaint to allege standing to sue the FWS. In addition to alleging an "injury in fact," a complainant must demonstrate a causal connection between their injury and the defendant's action or inaction, and they must demonstrate that the injury is likely to be "redressed by a favorable decision" from the court. Lujan, 504 U.S. at 560. Because causation and redressability are so closely intertwined, courts often address the two prongs together. Gonzales v. Gorsuch, 668 F.2d 1263, 1267 (9th Cir. 1982).

The FWS contended SCACE's injuries arose from MMCC's actions - a third party to the suit - rather than their own. While SCACE's injuries do result, in part, from actions of a third party, this does not insulate the FWS from litigation because they are a government agency regulating the third party. When a complainant's injury arises from the government's regulation of a third party not involved in the current proceeding, "causation and redressability ordinarily hinge on the response of the regulated third party to the government action or inaction." Lujan, 504 U.S. at 561-62. Again, it is important to reiterate that because this case is at the pleadings stage, the court must "accept as true all material allegations of the complaint." Levine, 587 F.3d at 991.

A complainant must allege and prove the defendant caused the injury so that it is likely a favorable court decision would remedy the injury. Duke Power Co. v. Carolina Environmental Study Group, Inc. 438 U.S. 59, 72 (1978). In Duke Power Co., the complainants were forty individuals and two organizations that sued the power company in an effort to seek declaratory judgment on the constitutionality of a third party's actions - Congress's actions in passing the Price-Anderson Act. Id. at 67. The Act limited the liability of nuclear power companies in the

event of a nuclear reactor accident. Id. The defendant moved to dismiss, claiming the injury was merely speculative because there was no evidence a nuclear incident would occur. Id.at 78. The Supreme Court determined there were concrete and imminent injuries and further addressed the causation and redressability issues, ultimately concluding the complainants met the causation and redressability tests because but for the Price-Anderson Act the reactor would not have been built and the complainants would not have suffered these harms. Id. at 81.

In order for a complainant to demonstrate redressability, they must be able to show there is a "substantial likelihood that the requested relief will remedy the alleged injury in fact." Sprint Communs. Co., L.P. v. APCC Servs., 554 U.S. 296, 287 (2008) (citing Lujan, 504 U.S. at 561). In Sprint Communs. Co., the Supreme Court determined an assignee of a legal claim for money owed established an injury, causation, and redressability to satisfy the standing requirements. Id. at 271. The defendant asserted the complainants could not meet the redressability requirement because, if the litigation were successful, the assignee would remit the proceeds to a third party. Id. at 286. The Supreme Court did not agree with the defendant's claims and clarified the proper redressability requirement was whether a favorable decision would likely redress the *alleged injury*, not what the complainant intended to do with the proceeds of the favorable decision. Id. It is of no consequence that the plaintiff intended to remit the litigation proceeds; it is only necessary to determine whether a favorable decision would allow plaintiff to collect the money that he was owed. Id. at 287. Since a favorable decision would redress the alleged injury, the Supreme Court held the complainant had standing. Id. at 271.

SCACE's injury satisfied the causation and redressability prongs of the standing test because if not for the FWS's inaction with regard to SCACE's petition for rulemaking, SCACE would not have to choose between incurring added expenses or not properly advocating and caring

for Calixta. Similar to Duke Power Co., where the defendant's actions of building the nuclear power company in the specific location caused the complainants' injuries, here, the FWS's inaction caused SCACE's injuries. If the FWS had granted SCACE's petition for rulemaking, the agency would have redefined the parameters of the laws surrounding the transfer of endangered species, ultimately requiring MMCC cease its transportation of Calixta to California. Therefore, the FWS's denial of SCACE's rulemaking petition impaired SCACE's advocacy work in that SCACE must now choose between two distinct injuries as discussed above.

A favorable decision by this Court would redress SCACE's injuries because it would require MMCC cease its transportation of Calixta. Similar to Sprint Communs. Co., where a favorable decision would have allowed the complainant to collect the money he was owed, here, a favorable decision would allow SCACE to continue its advocacy work without being forced to incur added expenses. If this Court were to require the FWS grant SCACE's petition for rulemaking, MMCC would not be able to continue transporting Calixta to California, lest they violated endangered species trade laws. Therefore, it is likely that, ultimately, Calixta would remain in South Carolina where SCACE has all of its equipment and staff. SCACE would then be able to continue their advocacy work and continue documenting and informing the public of Calixta's current conditions.

In sum, SCACE has satisfied the three standing requirements because they alleged a concrete injury due to the FWS's inaction forcing them to choose between diverting resources or frustrating their mission. The FWS's inaction forced SCACE into their current position, and a favorable decision by this Court would require MMCC to keep Calixta in South Carolina, which would allow SCACE to continue their advocacy work with no additional expenses

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DENIAL OF JUDGMENT ON THE PLEADINGS FOR THE FWS BECAUSE THE FWS'S REGULATORY DEFINITION OF "INDUSTRY AND TRADE" IMPERMISSIBLY DIMINISHES THE SCOPE OF THE ESA AND VIOLATES APA 5 U.S.C. § 706(2).

The ESA is the most comprehensive legislation enacted by a nation for the preservation of endangered species. Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978). Congress sought to "halt and reverse the trend toward species extinction, whatever the cost" and decided the balance of hardships "always tips sharply in favor of the endangered or threatened species." Id. at 184; Washington Toxics Coalition v. Environmental Protection Agency, 413 F.3d 1024, 1035 (9th Cir. 2005). The Supreme Court describes the ESA as "institutionalized caution," meaning the balance is struck in favor of affording endangered species the highest of priorities. Id. at 194.

The FWS is entrusted with implementing the purpose of the ESA - protecting endangered species at whatever cost. 50 C.F.R. § 402.01(b). In maintaining a regulatory definition of "industry and trade" that protects only bought and sold animals, the FWS disregards the definition of "commercial activity" per the language of the ESA, 16 U.S.C. § 1538(a)(1)(E), and is not implementing Congress's intention of placing endangered species in highest priority. The FWS's decision to deny ESA protection to animals used in other interstate for-profit enterprises also disregards available scientific evidence of the harm these practices inflict on endangered species. Therefore, the FWS's denial of SCACE's petition for rulemaking to broaden the FWS's regulatory definition of "industry and trade" to adhere to the plain language of the ESA is "not in accordance with the law" and violates the APA. 5 U.S.C. § 706(2)(A). For these reasons, the district court correctly denied the FWS's motion for judgment on the pleadings regarding the lawfulness of its denial of SCACE's petition for rulemaking, and this Court should affirm the denial.

A. The FWS is not entitled to judgment as a matter of law because the FWS's regulatory definition of "industry and trade" limits the phrase in contrast to Congressional intent.

Courts review motions for summary judgment de novo, and "a judgment on the pleadings is proper when, taking all allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., 132 F.3d 526, 528 (9th Cir. 1997). Although Congress affords agencies broad discretion for non-enforcement decisions, when agencies deny rulemaking petitions they are not automatically entitled to judgment as a matter of law. Massachusetts v. E.P.A., 549 U.S. 497, 527 (2007). Judicial review is appropriate for denials of rulemaking petitions because these claims are less frequent and are more apt to involve legal analysis rather than factual analysis. Id.

While judicial review of refusals to promulgate rules are extremely limited and highly deferential, an agency's denial of a rulemaking petition will be overturned when there is a plain error of the law. Id. at 527-28; Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States, 883 F.2d 93, 97 (D.C. Cir. 1989). The APA provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." 5 U.S.C. §706(2)(A). As such, agency action is not in accordance with the law when it violates Congressional intent because the intent of Congress when writing statutes is law. City of Arlington, Tex. v. F.C.C., 133 S. Ct. 1863, 1868 (2013). Thus, the FWS's denial of SCACE's rulemaking petition should be set aside because the FWS's narrow definition of "industry and trade" violates Congress's intent for the ESA to have a broad scope.

1. **When applying the *Chevron* test to review the FWS's statutory interpretation of the ESA, the FWS's regulatory definition of "industry and trade" fails both step one and step two in violation of the law.**

When a reviewing agency's statutory interpretation is challenged under the APA's "not in accordance with the law" standard per 5 U.S.C. §706(2)(A), courts apply the *Chevron* test. Nw. Envtl. Advocates v. EPA, 537 F.3d 1006, 1014 (9th Cir. 2008). Under the *Chevron* test, courts adhere to a two-step analysis of the agency's statutory interpretation. Id. The Court must first determine "whether Congress has directly spoken to the precise question at issue." Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). If Congress's intent is clear, no further inquiry is required because the Court, as well as the agency, must adhere to Congress's unambiguously expressed intent. Id. If the Court determines Congress has not directly spoken to the precise question at issue, the Court must then determine if the agency based its statutory interpretation on a permissible canon of statutory interpretation. Id. at 843.

Applying this standard, the lower court held the FWS is not entitled to judgment as a matter of law. Because Congress's intent is clear, the FWS must adhere to Congress's unambiguously expressed intent for "commercial activity," and more specifically "industry and trade,", to afford ESA protection to endangered species beyond those bought and sold. Moreover, even if this Court does not find Congress's intent unambiguous based on the permissible canons of statutory interpretation, the terms "commercial activity" and "industry and trade" as written in the ESA include protection of endangered species even when there is no transfer of ownership. For these reasons, this Court should affirm the district court's denial of judgment as a matter of law.

i. Congressional intent for a broad definition of "industry and trade" is clear, and the FWS's narrow regulatory definition fails step one of the *Chevron* test.

Under step one of the *Chevron* test, when a court determines Congress expressed a particular intention on the precise question at issue while employing traditional tools of statutory construction, the intention is law and an agency must give effect to Congress's intention. Chevron, 467 U.S. at 843 n.9. In establishing Congress's intention, the Supreme Court held it is a "Court's duty" to give effect to the plain language of every word and clause of a statute when possible. Bennett, 520 U.S. at 173. Thus, a fundamental canon of statutory interpretation is that a statute should not be construed so as to render any provision superfluous, meaning every word and phrase of the statute must be given effect. United States v. Wenner, 351 F.3d 969, 975 (9th Cir. 2003).

When giving effect to every word and clause of a statute, the Supreme Court held courts may use dictionary definitions for the analysis of words. MCI Telecomms. Corp. v. AT & T Co., 512 U.S. 218, 225-28 (1994). As such, interpretation must give way to a statute's plain language. Lopez v. Espy, 83 F.3d 1095, 1100 (9th Cir. 1996). For example, when giving effect to the word "all" within statutes, the word means "every." Id. This Court reiterated the plain language meaning of the word "all" in Knott v. McDonald's Corp., stating "all means all." 147 F.3d 1065, 1067 (9th Cir. 1998).

Courts have also focused on the plain language meaning of the phrase "including, but not limited to" within statutes. See e.g. Cooper Distrib. Co. v. Amana Refrigeration, Inc., 63 F.3d 262, 280 (3d Cir. 1995); Hamilton v. Madigan, 961 F.2d 838, 841 n.4 (9th Cir. 1992). In FTC v. EDebitPay, LLC, this Court held the phrase is one of enlargement and indicates the enumerated examples following the phrase are not an exhaustive list because the use of "e.g." signifies subsequent examples are merely illustrative. 695 F.3d 938, 943-44 (9th Cir. 2012). Applying the

non-exhaustive nature of the "including, but not limited to" phrase and recognizing the phrase's inference of broad construction, in Turtle Island Restoration Network v. Nat'l Marine Fisheries Service this Court rejected the agency's interpretation that would have read the phrase out of a statute. 340 F.3d 969, 975 (9th Cir. 2003). This Court held when an agency's interpretation is contrary to the unambiguous language of a statute and effectively omits the phrase from the statute, the agency's interpretation is not entitled to *Chevron* deference. Id.

Applying *Chevron* step one here, traditional statutory interpretation finds Congress intended for "industry and trade" to encompass more than the FWS's regulatory definition limiting ESA protection to the transfer of ownership of endangered species. Mem. Op. at 18, ¶ 2. To establish Congress's intention of the phrase "industry and trade," every word and clause must be given effect when possible. Bennett, 520 U.S. at 173. Turning to the dictionary definition of the word "*all*" as directed to by the Supreme Court in MCI (512 U.S. at 225-28), all means "as much possible". See e.g., Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/all. Moreover, this Court held "all means all" and defined all as "every." Knotts, 147 F.3d at 1067; Lopez, 83 F.3d at 1100. Applying these definitions, Congress intended "all activities of industry and trade" to be a broad interpretation and include every activity of industry and trade. The FWS's regulatory definition of "industry or trade" does not include "*all*" activities but rather only one type of activity - "transfer . . . in the pursuit of gain or profit." 50 C.F.R. § 17.3. Because Congress intended to include as many activities as possible and the FWS's interpretation renders the term "*all*" void, the FWS's regulatory definition is precluded as a matter of law.

Next, this Court established the phrase "*including, but not limited to*" indicates enlargement and lists following the phrase are not exhaustive. FTC, 695 F.3d at 943-44. Thus, even though the

ESA definition provides "buying or selling of commodities" as an example of activities of industry and trade, it is not an exhaustive list and serves only to illustrate one of many activities prohibited by the ESA. Thus, the FWS's argument that it has the discretion to include in its regulatory definition only activities expressly referenced in the statutory definition fails because "*including, but not limited to*" indicates enlargement and an agency's interpretation cannot read the phrase out of a statute, see Turtle, 340 F.3d at 975, which by only including the enumerated activity the FWS's regulatory definition does. Furthermore, if the FWS's definition prevailed and only included the enumerated activity, the ESA's additional Section 9 provision making it "illegal to sell or offer for sale in interstate or foreign commerce any such species" is superfluous, which this Court held in Wenner violates statutory interpretation. See 351 F.3d at 975. Accordingly, the FWS's interpretation fails.

Furthermore, while Section 10 of the ESA allows the FWS to issue permits for exceptions to Section 9's prohibitions, the exception is not applicable here because exceptions are appropriate only in strictly limited circumstances "for scientific purposes or to enhance the propagation or survival of the affected species." 16 U.S.C. §1539(a)(1)(a). The FWS recognizes the exhibition of endangered species is neither scientific nor does it enhances the propagation or survival of the affected species. Mem. Op. at 4; see also Compl. ¶¶ 10, 33.

Even though the FWS has broad discretion on competing priorities and the use of its limited resources, as established in Chevron, Congress's intention is law and the agency must follow it accordingly. See 467 U.S. at 843 n.9. By categorically excluding all endangered species not sold from one person to another from the ESA's protections, the FWS's narrow regulatory definition of "industry or trade" is violating the clear statutory interpretation of Congress's intent as well as legislative history. When a court ascertains Congress's intention on the precise question at issue,

contrary agency interpretations must be rejected by the court. Id.; See e.g. FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981). As such, the FWS is not entitled to judgment as a matter of law.

ii. While Congressional intent is clear, the FWS's regulatory definition of "industry and trade" also fails step two of the *Chevron* test because the FWS's interpretation is not reasonable and renders part of the statute mere surplusage.

Under *Chevron* step two, when Congressional intent is unclear, the Court must determine if the agency based its statutory interpretation on a permissible canon of statutory interpretation. Chevron, 467 U.S. at 843. Congress speaks in plain terms when seeking to circumscribe statutes and speaks in capacious terms when seeking to enlarge agency discretion. City of Arlington, 133 S. Ct. at 1868. Thus, the presumption is when Congress leaves ambiguities within statutes the administering agency has the discretion to resolve the ambiguity. Id. However, the administering agency's discretion is still bound to reasonable interpretation. Id.

The Supreme Court held reasonable interpretation of the ESA requires a "broad sweep." See Hill, 437 U.S. at 188. In terms of the ESA Section 9, a broad interpretation is "in harmony with the ESA's purpose, legislative history, and interpretation of the Supreme Court." Aransas Project v. Shaw, 835 F. Supp. 2d 251, 270-71 (S.D. Tex. 2011). The purpose of the ESA is broad, as it is the most comprehensive legislation enacted by a nation for the preservation of endangered species and Congress sought to "halt and reverse the trend toward species extinction, whatever the cost." Hill, 437 U.S. at 184. Legislative history also supports a broad interpretation as evinced by Congress's intent for the ESA to have a "broad scope of prohibitions." See H.R. Rep. No. 94-823 (1976) at 7. Additionally, reasonable interpretation requires agencies to follow the statutory canon

of interpretation that when possible, no portion of a statute is construed as "mere surplusage." Wenner, 351 F.3d at 975.

In narrowly defining "industry or trade" as "the actual or intended transfer or wildlife or plans from one person to another in pursuit of gain or profit" (See 50 C.F.R. § 17.3), the FWS did not reasonably interpret the ESA because, as established in Hill, the Supreme Court has interpreted the statute as broad. As the most comprehensive piece of legislation for the preservation of endangered species, the FWS's limitation of protection to only endangered species bought and sold is contrary to the statute's purpose. By ignoring all other commercial activities, the FWS is not halting and reversing the trend toward species extinction at whatever the cost. The narrow regulatory definition also limits the scope of prohibitions rather than creating broad prohibitions, which is directly contrary to the legislative history. In 1976, Congress rejected the animal exhibition industry's proposed amendment to *exclude* "ordinary activities of a zoo, circus, menagerie, or other similar exhibition, *other than a sale or transfer of a threatened or endangered species for gain*." If Congress intended to regulate only the sale of endangered species as purported by the FWS, the animal exhibition industry would not have proposed the amendment and subsequently Congress would not have rejected it.

Moreover, the FWS's regulatory definition also violates the statutory interpretation canon referenced in Wenner because it impermissibly renders portions of the ESA as "mere surplusage." By interpreting 16 U.S.C. § 1538(a)(1)(E) as only prohibiting the sale of endangered species, the FWS renders id. §1538(a)(1)(F), which is the separate prohibition of "selling[ing] or offering[ing] for sale in interstate or foreign commerce any such species," null and void. The FWS's regulatory definition also renders exceptions set forth in the statutory definition of "commercial activity" mere surplusage. Had Congress intended for only the prohibition of sales, there would have been

no need to includes exceptions for the "exhibition of commodities by museums or similar cultural or historical organizations as it did in 16 U.S.C. § 1532(2). Thus, because the FWS's regulatory definition violates *Chevron* step two in addition to *Chevron* step one, the FWS is not entitled to judgment as a matter of law.

CONCLUSION

For the reasons stated above, the Appellee, South Carolina Advocates for Captive Exotics, respectfully requests this Court affirm the district court's affirmation of standing and denial of judgment on the pleadings.

Respectfully submitted.

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TEAM NO. 1873, ATTORNEY 1

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TEAM NO. 1873, ATTORNEY 2

JANUARY 15, 2016