

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PERFORMING ANIMAL WELFARE)
SOCIETY, et. al.,)
)
Plaintiffs,)
)
V.)
)
RINGLING BROTHERS AND BARNUM & BAILEY)
CIRCUS,)
)
Defendant.)

Case No. 1:00CV01641
(EGS)

FILED

JUN 29 2001

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION AND ORDER

I. Introduction

Plaintiffs, individuals and animal rights groups, seek review of the treatment of captive endangered Asian elephants by the Ringling Brothers and Barnum & Bailey Circus. Plaintiffs allege that defendant violated the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (1973) ("ESA"), by treating its animals in a manner that constitutes an illegal taking under the ESA and requests that the elephants be forfeited to the government.

Defendant's motion to dismiss is pending before this Court. Defendant's motion argues: 1) that plaintiffs lack standing, and 2) that plaintiffs failed to state a claim under the ESA. Since plaintiffs do not have standing based upon their aesthetic, emotional, or informational injuries, defendant's motion is **GRANTED** and this case is **DISMISSED WITHOUT PREJUDICE**.

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II. Jurisdiction

Standing questions involve constitutional limitations on federal court jurisdiction as well as prudential limitations on its exercise. See *Bennett v. Spear*, 520 U.S. 154, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997). Defendant challenges the constitutional standing of all plaintiffs, and the prudential standing of organizational plaintiffs Performing Animal Welfare Society, American Society for the Prevention of Cruelty to Animals, Animal Welfare Institute, and The Fund For Animals ("the organizational plaintiffs").

A. Article III Standing

Plaintiffs contend that their aesthetic and emotional injuries are a viable basis for standing. It is settled law that to satisfy Article III's standing requirements, a plaintiff must show that (1) he has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. See *Lujan v. Defender's of Wildlife*, 504 U.S. 555, 560-561, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). Defendant alleges that plaintiffs failed to

demonstrate an adequate injury in fact to support standing in this case.

1. Plaintiffs' Aesthetic Injuries

Plaintiffs allege that they have been aesthetically and emotionally injured due to the harm defendants have inflicted upon the elephants in question. Plaintiff Thomas Rider, a former employee and elephant handler at Ringling Brothers, contends his aesthetic and emotional injuries are sufficient for standing, and relying on *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996), contends that his standing supports standing for the other plaintiffs. In *Mountain States*, the D.C. Circuit held that if standing can be shown for at least one plaintiff, the court need not consider the standing of the other plaintiffs to raise the claim. *Id.* Plaintiff Rider alleges that he ceased working for defendant because he could no longer tolerate working in such an environment. He states that he wishes to visit and work with defendant's elephants again, but is precluded from doing so as long as the alleged maltreatment of the animals persists. The individual and organizational plaintiffs also collectively allege that they suffer present and continuing emotional injuries, as a result of their knowledge

that the elephants continue to be treated in this manner by defendant.¹

"Injury to an aesthetic interest in the observation of animals is sufficient to satisfy the demands of Article III standing." *Animal Legal Def. Fund, et. al. v. Glickman* ("ALDF I"), 154 F.3d 426, 432 (D.C. Cir. 1998) (en banc) (citing *Lujan*, 504 U.S. at 562-563); see also *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 92 L. Ed. 2d 166, 106 S. Ct. 2860 (1986); *Sierra Club v. Morton*, 405 U.S. 727, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972). However, past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing adverse effects. See *Lujan*, 504 U.S. at 564.

The courts have placed important limitations on the breadth of standing based on an aesthetic injury. This Circuit has held that a plaintiff's aesthetic injury must be either presently suffered or imminently threatened in order to support standing. See *Animal Legal Defense Fund v. Espy*, 23 F.3d 496, 500 (D.C.

¹ The organizational plaintiffs seek associational standing. An association has standing to bring suit on behalf of its members only when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. See *Friends Of The Earth, Inc, et. al. v. Laidlaw Env'tl., Inc.*, 528 U.S. 167, 181, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977)).

Cir. 1994) ("*ALDF II*") (citing *Lujan*, 504 U.S. at 560). See also *Whitmore v. Ark.*, 495 U.S. 149, 155, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990); *L.A. v. Lyons*, 461 U.S. 95, 102, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983). In *ALDF II*, the court held that because the plaintiff was no longer employed as a psychobiologist, the past aesthetic injury she allegedly suffered from her exposure to animals inhumanely treated by her employer was insufficient. See *ALDF II*, 23 F.3d at 500. The court noted that the imminence requirement "has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control." *Id.* (citing *Lujan*, 504 U.S. at 564). In its holding the court noted that the plaintiff's contention that she will be required to engage in additional research, and thereby be exposed to additional aesthetic injury in order to further her career, was inadequate. See *id.* at 500-501. The court noted that plaintiff had been outside of the research field for the past six years, during which time she had not suffered these injuries, and that the plaintiff would not be subjected to such injuries unless she were to make an affirmative decision to subject herself to those conditions again. See *id.* Thus, the court held that the plaintiff's injury failed to be of a

certainly impending nature, and was insufficient to support standing. See *id.* at 501.

The instant case is factually similar to *ALDF II*. Plaintiff Rider has not been employed by Ringling Brothers for the past two years. During this time he has not been exposed to the elephants' alleged mistreatment, and thus he has not alleged a presently suffered aesthetic injury. While he contends that he wishes to return to elephant training, this speculative and uncertain claim is not sufficient to support the requirement that the plaintiff's aesthetic injury, if not presently suffered, be imminently threatened. Plaintiff Rider admits that he has no intention of returning to the circus unless the elephants in question are transferred to an undetermined sanctuary or other setting. The claims of plaintiffs Stewart and Derby, neither of whom have worked with the elephants, but who generally join the allegations of Plaintiff Rider, are even further removed. Accordingly, none of the plaintiffs demonstrate a sufficient present or imminently threatened aesthetic injury.

Plaintiff Rider also alleges he suffers a continuing injury-in-fact, because defendant's actions forced him to choose between his career and continued exposure to the inhumane treatment of the elephants. In *Alternative Research & Dev. Found. v. Glickman* ("ARDF"), 101 F. Supp. 2d 7, 11 (D.D.C. 2000), the court held that a plaintiff's instant and continuing aesthetic injury

was sufficient to satisfy the injury-in-fact requirement for standing. The plaintiff in that case, a college student, alleged that her required participation in laboratory experiments involving inhumanely-treated animals inflicted a continuing aesthetic injury, forcing her to choose between her career aspirations and continued exposure. See *id.* The court held she suffered a sufficient concrete and particularized injury to her aesthetic interests to support Article III standing. See *id.* (citing *ALDF I*, 154 F.3d at 441-443). In *ALDF I* the plaintiff was a regular visitor to a public game park, where he repeatedly witnessed and documented the park's inhumane treatment of primates. See *ALDF I*, 154 F.3d at 429-430. The court held that the plaintiff's pattern of repeated visits, both past and future, were sufficient to satisfy the continuing and particularized injury required for standing. See *id.* at 438.

Plaintiff Rider claims that his exposure to the alleged aesthetic harm directly resulted in his departure from Ringling Brothers, and thus, alleges he suffers a continuing injury. However, plaintiff Rider's contention is distinguishable from both *ARDF* and *ALDF I*. In those cases the courts determined that a continuing harm existed because of the plaintiffs' continued exposure. See *ALDF II*, 154 F.3d at 430; *ARDF*, 101 F. Supp. 2d at 11. That a plaintiff who alleges to have left his or her employment in order to escape continued exposure to an aesthetic

harm has thereby alleged sufficient current injury to support standing, based on their having to choose between their career and such exposure, is a theory that has never been adopted by this or any other circuit. Such a finding would stretch the definition of a continuing injury beyond the breaking point.

2. Plaintiffs' Emotional Injuries

Plaintiffs further allege that they suffer a continuing emotional harm due to their belief that the elephants continue to be mistreated. This alleged injury is not sufficient to support standing. In *Humane Soc'y v. Babbitt*, 46 F.3d 93, 98 (D.C. Cir. 1998), the court held that "general emotional 'harm,' no matter how deeply felt cannot suffice for injury-in-fact for standing purposes." See also *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982) ("the psychological consequence presumably produced by observation of conduct with which one disagrees" nonetheless "is not an injury sufficient to confer standing under Art. III"); *Humane Soc'y of the United States v. Hodel*, 840 F.2d 45, 52 (D.C. Cir. 1988) (agreeing with the lower court that "what it terms the 'mere emotional injuries' in this case are noncognizable"). In *Humane Soc'y v. Babbitt*, 46 F.3d at 98, plaintiffs sought an injunction, claiming that the defendant's attempt to transfer Lota, an Asian elephant, from the

Milwaukee Zoo, to a private circus had caused them sleeplessness, depression, and anger. The D.C. Circuit rejected the plaintiffs' contention that emotional harm may be sufficient injury-in-fact to satisfy the Constitutional requirements of standing, and remanded the case with directions to dismiss the case for want of jurisdiction. See *id.* at 95.

In view of the foregoing, this Court finds that plaintiffs have failed to demonstrate sufficient injury-in-fact. Accordingly plaintiffs Rider, Stewart, and Derby do not have standing to sue and their claims are **DISMISSED WITHOUT PREJUDICE**.

C. Organizational Plaintiffs' Standing

Organizational plaintiffs allege an "informational" injury as a result of defendant's evasion of the notice and comment provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, *et seq.* (1970). In order to secure judicial review under APA, plaintiffs must satisfy the additional requirement of prudential standing. See *ARDF*, 101 F. Supp. 2d at 10 (citing *Bennett*, 520 U.S. at 154). In order to have prudential standing plaintiff must show that his interests "arguably fall within the zone of interests protected or regulated by the statutory provision ...invoked in the suit." *Bennett*, 520 U.S. at 162-163. The zone of interests test requires a court to discern the interests arguably to be protected by the statutory provision and

then to determine if a plaintiff's interests are among them. See *Nat. Cred. Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 492, 140 L. Ed. 2d 1, 118 S. Ct. 927 (1998). This test does not require a showing of Congressional intent to benefit plaintiff. See *id.* Plaintiff must show only that the interests affected by the agency action are arguably protected under the statute. See *id.* Prudential standing does not exist where a plaintiff's interests are so "marginally related to ...the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit" or if a plaintiff is only an incidental beneficiary of a statutory provision. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 389, 93 L. Ed. 2d 757, 107 S. Ct. 750 (1987).

Organizational plaintiffs claim that they have suffered an "informational" and economic injury due to defendant's failure to properly apply for a permit prior to each act that may be construed as a taking. Plaintiffs claim that defendant's conduct, particularly the separation of baby elephants from their mothers, as well as the routine chaining and beating of its elephants, represent extraordinary takings that are not permitted under the statute. Plaintiffs allege that defendant must therefore apply for, and acquire, additional permits prior to each such act. Plaintiffs allege that defendant's failure to do so has deprived them of information that they would otherwise

have received through the public notice and comment provisions of the statute. Plaintiffs claim that in the absence of this process, they have had to expend their own resources to gather this information, and thus, that this informational injury has led to an economic injury as well.

This Circuit has held that an informational injury, resultant from a procedural violation, may be sufficient to satisfy the elements of Article III standing. See *Animal Legal Def. Fund v. Espy* ("ALDF III"), 29 F.3d 720, 724 (D.C. Cir. 1994). In *ALDF III*, the plaintiffs were held to have standing based on their inability to monitor third-parties' compliance with the Animal Welfare Act, 7 U.S.C. §§ 2131, et. seq. (1970) ("AWA"), and their subsequent inability to disseminate such information to their members, due to the alleged failure of the United States Department of Agriculture ("USDA") to propound sufficiently detailed regulations. See *id.* at 723-724. The Circuit held that such a claim may be sufficient to support standing to a person adversely affected or aggrieved by an agency action (or inaction). See *id.* at 724.

Plaintiffs' alleged informational injury, however, is insufficient to provide a basis for standing in this case. Plaintiffs' alleged injury is in fact the result of the USDA's administration of the AWA and its permitting process. Thus, plaintiffs' alleged injury is the result of an act of the USDA, a

party not properly before this Court. This Court notes a continuous line of case law holding that standing based on an informational injury is only applicable in suits brought against that agency that failed to enforce the regulation in question. See *id.*; *Humane Soc'y v. Babbitt*, 46 F.3d at 101 (citing *Heckler v. Chaney*, 470 U.S. 821, 831, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985)); *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-665 (D.C. Cir. 1996). See also *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 141 L. Ed. 2d 10, 118 S. Ct. 1777 (1998); *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 105 L. Ed. 2d 377, 109 S. Ct. 2558 (1989). Thus, while plaintiffs in this case may have suffered a sufficient injury-in-fact as a result of their inability to obtain information that may otherwise have been publicly available, any such injury was not caused by defendant, but rather by a third party's interpretation of the applicable statute. Thus, the organizational plaintiffs' informational injury claim cannot provide standing in this case and they are dismissed from this suit.

D. Conclusion

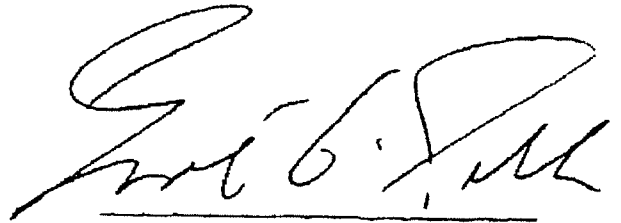
In view of the foregoing, plaintiffs, individual and organizational, lack standing to bring this case before the Court. Accordingly, defendant's motion to dismiss is **GRANTED**. This Court will not pass judgment on the subjective issues

addressed within plaintiffs' Complaint without the jurisdiction to do so. This case is **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

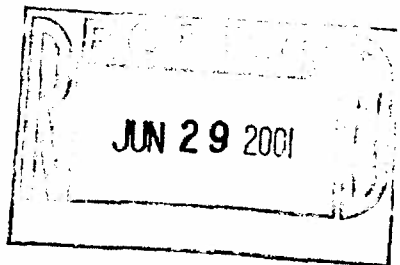
6/29/01

Date

A handwritten signature in black ink, appearing to read "Emmet G. Sullivan", written over a horizontal line.

Emmet G. Sullivan

U.S. District Court Judge



United States District Court

For the District of Columbia

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