UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	)	
Plaintiffs,	)	**Case No.: 03-2006 (EGS/JMF)**
v.	)	
FELD ENTERTAINMENT, INC.,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR ENTITLEMENT TO ATTORNEYS' FEES

EXHIBIT 8

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 10-7007, 10-7021

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN SOCIETY FOR THE PREVENTION
OF CRUELTY TO ANIMALS, ET AL.,

Plaintiffs-Appellants/Cross-Appellees,

v.

FELD ENTERTAINMENT, INC.,

Defendant-Appellee/Cross-Appellant.

On Appeal from the United States District Court
for the District of Columbia (Sullivan, J.)

BRIEF OF APPELLANTS

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PARTIES, RULINGS, AND RELATED CASES

Parties. The Plaintiffs are the American Society for the Prevention of Cruelty to Animals, the Animal Welfare Institute, The Fund for Animals, Born Free USA United with Animal Protection Institute, and Tom Rider. The Defendant is Feld Entertainment, Inc.

Rulings. The rulings under review are: (i) the decision granting judgment for Defendant issued by the district court (Sullivan, J.) on December 30, 2009 (Docket Entry 559); and (ii) the decision granting partial summary judgment to Defendant, issued on August 23, 2007 (Docket Entries 172 and 173).

Related Cases. Plaintiffs' claims were originally included in a complaint that was filed in the district court in 2000 and assigned Civil Number 00-1641. In 2001 that case was dismissed on standing grounds, and in February 2003, that decision was reversed by this Court in *ASPCA v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003). On September 26, 2003, the present case (Civ. No. 03-2006) was filed, and on November 25, 2003, the district court dismissed Civ. No. 00-1641 without prejudice. On February 4, 2010, Defendant filed a cross-appeal in this case. In addition, Defendant has filed a case under the Racketeer Influenced and Corrupt Organizations statute and several state causes of action against each Plaintiff, as well as their lawyers and other parties. *Feld Entertainment, Inc. v. ASPCA et al.*, Civ. No. 07-0152.

CORPORATE DISCLOSURE STATEMENT

Plaintiffs American Society for the Prevention of Cruelty to Animals, Animal Welfare Institute, The Fund for Animals, and Born Free USA United with Animal Protection Institute are nonprofit animal-protection organizations that have been involved in efforts to protect captive wildlife, including elephants in circuses. None of these organizations has any parent corporation or issues stock or shares.

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GLOSSARY

API	Animal Protection Institute
CEC	Center for Elephant Conservation
ESA	Endangered Species Act
FEI	Feld Entertainment, Inc.
FWS	Fish and Wildlife Service

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331, because this case arises under the Endangered Species Act ("ESA"). More than 60 days before filing suit, Plaintiffs sent notice of violations of the ESA and its regulations to Defendant Feld Entertainment, Inc. ("FEI"), the Secretary of Interior, and the Director of the Fish and Wildlife Service ("FWS"). The district court entered final judgment on December 30, 2009. Plaintiffs filed a timely notice of appeal on January 25, 2010. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether Plaintiff Animal Protection Institute—which expends significant resources advocating against and seeking information about the mistreatment of Asian elephants in circuses—has Article III standing to challenge Defendant's mistreatment of Asian elephants.

2. Whether Plaintiff Tom Rider—who, while employed by Defendant for more than two years, cared for and complained about the mistreatment of Defendant's Asian elephants—has Article III standing to challenge Defendant's mistreatment of Asian elephants.

3. Whether Section 11(g) of the ESA, 16 U.S.C. § 1540(g)—which authorizes any person to sue to enjoin a violation of "any" regulation issued under the ESA—allows Plaintiffs to challenge Defendant's violation of an ESA

regulation requiring that Defendant maintain the Asian elephants it possesses pursuant to captive-bred wildlife permits in "humane and healthful conditions."

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum to this brief.

STATEMENT OF THE CASE

At issue in this appeal is whether Plaintiffs Animal Protection Institute and Tom Rider have constitutional standing and statutory authority to bring suit under Section 11 of the ESA and its implementing regulations to redress the injuries they suffer as a result of Defendant's mistreatment of endangered Asian elephants.

At trial, Plaintiffs showed that they suffer concrete and personal injuries because Defendant's employees harm, wound, and harass Asian elephants by striking them with bullhooks and chaining them in place for extended periods of time. Plaintiffs showed that their injuries are caused by Defendant's violation of both the ESA's prohibition of "taking" an endangered species and an ESA regulation requiring that elephants held pursuant to a permit be kept under "humane and healthful conditions."

The district court did not address the merits of these claims, but instead concluded that Plaintiffs lacked standing to challenge Defendant's mistreatment of the elephants. That decision should be reversed. Plaintiffs have standing under Article III because Defendant's mistreatment of Asian elephants in violation of the

ESA causes them personal injuries, which would be redressed if the court enjoined Defendant from violating the ESA. Likewise, the ESA provides express statutory authority for Plaintiffs to challenge Defendant's violation of a regulation requiring that the Asian elephants Defendant holds pursuant to captive-bred wildlife permits be maintained under "humane and healthful conditions."

STATEMENT OF FACTS

A. Statutory and Regulatory Background.

1. The Endangered Species Act is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *TVA v. Hill*, 437 U.S. 153, 180 (1978). Section 9 of the ESA makes it unlawful, except as provided in Section 10, to "take any species within the United States" that is listed as "endangered," 16 U.S.C. § 1538(a)(1)(B), or to "violate any regulation pertaining to such species . . . promulgated by the Secretary pursuant to authority provided by this chapter," *id.* § 1538(a)(1)(G).

The ESA defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). Congress defined "take" "'in the broadest possible manner to include every conceivable way in which a person can "take" or attempt to "take" any fish or wildlife.'" *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687, 704 (1995). The Fish and Wildlife Service, which administers the ESA,

has defined (i) "harm" to include any act that "injures wildlife" and (ii) "harass" to encompass "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." 50 C.F.R. § 17.3. The "take" prohibition applies to endangered species in the wild and those held in captivity. *See* 16 U.S.C. § 1538(a)(1) (prohibiting the "take" of "any" endangered species).

2. Section 10 of the ESA authorizes FWS to "permit" certain conduct that would otherwise violate Section 9, including the prohibition on "taking" an endangered species. *Id.* § 1539(a)(1). The grant of a permit, however, does not insulate the treatment of an animal from challenge under the ESA. Section 10(g) provides that "[i]n connection with any action alleging a violation of [Section 9], any person claiming the benefit of any exemption or permit under this chapter shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation." *Id.* § 1539(g).

Under Section 10(c), the Secretary must "publish notice in the Federal Register of each application for an exemption or permit." *Id.* § 1539(c). Each such "notice shall invite the submission from interested parties . . . of written data, views or arguments with respect to the application." *Id.* "Information received by

the Secretary as a part of the application shall be available to the public as a matter of public record at every stage of the proceeding." *Id.*

Pursuant to FWS regulations implementing the ESA, persons seeking a permit for enhancement of propagation or survival of a species must submit to FWS an application providing information that includes, among other things, a "complete description of the facilities" where the animals will be maintained and "the details of the activities sought to be authorized by the permit." 50 C.F.R. § 17.22(a)(1). FWS has also issued "captive-bred wildlife" regulations that permit certain activities otherwise prohibited under the ESA with respect to non-native animals that were bred in captivity. *Id.* § 17.21(g). FWS regulations adopted under the ESA require that "[a]ny live wildlife possessed under a permit must be maintained under humane and healthful conditions." *Id.* § 13.41.

3. Section 11(g) of the ESA provides for citizen enforcement of the ESA and its regulations, authorizing "any person" to "commence a civil suit . . . to enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." 16 U.S.C. § 1540(g)(1). The "obvious purpose" of this provision "is to encourage enforcement [of the ESA] by so-called 'private attorneys general,'" and Congress's broad grant of authority for citizen-suits reflects its "intent to permit enforcement by everyman." *Bennett v. Spear*, 520 U.S. 154, 165-66 (1997).

B. Factual Background.

1. The Asian Elephant. Since June 14, 1976, the Asian elephant (*Elephas maximus*) has been designated as an endangered species. 50 C.F.R. § 17.11. Asian elephants are social animals that, in the wild, live in matriarchal societies where females stay together their whole lives and males stay with them until they become sexually active. JA530, 549 [Tr. 2/4 (pm) 15, 34]. They communicate with one another and seek social interaction. JA692 [Tr. 2/10 (pm) 43]. They sleep only four to five hours each night, JA1877, 2167 [Tr. 2/23 (am) 35; Tr. 3/5 (pm) 60], and have adapted to travel long distances (between 8 and 15 kilometers each day) to find food and water, JA532 [Tr. 2/4 (pm) 17].

As explained by Plaintiffs' expert, Dr. Benjamin L. Hart, an elephant's brain, like any animal's brain, "reflects" its "ecological niche." JA690 [Tr. 2/10 (pm) 41]. An "elephant's brain is hard-wired to be moving around, to go to water holes, to be foraging all day." JA689 [*Id.* at 40]. Thus, "memory is important for an elephant" so that it can recall "where water holes are or where forage is going to occur this time of year a hundred miles away." JA690 [*Id.* at 41].

To detect mistreatment, animal-behavior experts look for "markers" that reflect signs of adversity. A "good marker" for Asian elephants is the exhibition of "stereotypic behavior," which is "abnormal" behavior that the animal repeats "over and over again." JA689-90 [*Id.* at 40-41]. In Asian elephants, this can take the

form of repeated "weaving" or "head tossing or trunk waving." JA692 [*Id.* at 43]. Elephants exhibiting stereotypic behavior also "sway back and forth, . . . swing their trunks back and forth, and . . . head bob." JA695 [*Id.* at 46]. Scientific studies of elephants confined in railroad cars show that elephants exhibit these abnormal behaviors after "a relatively short period of time" of confinement in the cars, and "the longer they are there, the more adverse [the behavior] becomes." JA692 [*Id.* at 43].

Although the term "pachyderm" means "thick skin," an elephant's skin is in fact very sensitive; elephants can feel flies on their skin and use branches to swat them away. JA701, 802 [Tr. 2/10 (pm) 69; PWC 153]. Around and behind their ears, on their legs, and in and around their mouths, elephants' skin is both sensitive and thin. JA530-31, 1535 [Tr. 2/4 (pm) 15-16; Tr. 2/18 (pm) 35].

2. <u>Defendant's Mistreatment of the Elephants</u>. Defendant possesses 54 Asian elephants. JA2039 [Tr. 3/3 (pm) 8]. Eighteen of the elephants were born in captivity, and the remaining 36 were born in the wild. JA588-89, 1894-96 [PWC 151, 169]. Defendant has never sought a permit for the elephants that were born in the wild before Asian elephants were designated an endangered species. The remaining elephants that were born in captivity are held subject to captive-bred wildlife permits. *See ASPCA v. Ringling Bros. & Barnam & Bailey Circus*, 502 F. Supp. 2d 103, 114 (D.D.C. 2007).

Nineteen of the 54 elephants are used in Defendant's traveling circus; five other elephants are housed in Defendant's facility in Williston, Florida; and the remaining 30 are maintained at Defendant's Center for Elephant Conservation ("CEC") in Polk City, Florida. JA588-89, 1894-96 [PWC 151, 169]. Plaintiff Tom Rider worked directly with seven of Defendant's elephants that were born in the wild. JA846-54, 1667-69 [Tr. 2/12 (am) 21-29; PWC 36, at PL16418-20]. Two of those elephants—Karen and Nicole—remain part of Defendant's traveling circus, while the other five are currently housed at the CEC. JA2161-62, 1894-96 [Tr. 3/5 (pm) 35-36; PWC 169].

Plaintiffs presented evidence that Defendant's mistreatment of Asian elephants violates the ESA and its implementing regulations. *First*, Plaintiffs showed that Defendant's practice of confining and chaining the elephants for long periods of time on concrete and other hard surfaces harms, wounds, harasses, and injures the elephants. JA552-53, 559, 562 [Tr. 2/4 (pm) 46-47, 53, 61]. As Defendant's own witness Gary Jacobson confirmed, these elephants—whose brains are hard-wired to travel long distances—regularly are chained in place for over 12 hours at a time. JA2189-91 [Tr. 3/9 (am) 7-9]. The chaining requires two chains, one wrapped around a front foot and a second wrapped tightly around the opposite back ankle. JA687 [Tr. 2/10 (pm) 38]. Once chained, the elephant can take only one or two steps forward or backward. *Id.*

The conditions of confinement are even worse when the elephants are transported by train from city to city. Defendant is the only circus in the world to transport its elephants by train. JA1880 [Tr. 2/23 (am) 47]. Defendant's travel records reflect that the elephants spend, on average, more than 25 consecutive hours chained on the train as the circus travels from one city to the next. JA662-76,714-16 [Tr. 2/10 (am) 31-45; PWC 50]. Defendant's elephants often are chained in train cars for as long as 60 to 70 consecutive hours, and sometimes as long as 90 to 100 consecutive hours. JA714-16 [PWC 50]. At the end of a trip, the train cars are littered with excrement and urine that can fill two dump trucks. JA615 [PWC 114A]. The elephants in the trains cannot avoid stepping or lying in their excrement, JA658 [Tr. 2/9 (am) 12], and the smell of the train cars is "unbelievable," JA600 [Tr. 2/5 (am) 75].

The 30 elephants at Defendant's CEC facility fare no better. They are chained for a minimum of 16 hours a day in a barn with a concrete floor. JA2210, 1915-16 [Tr. 3/9 (pm) 7; PWC 175, at 154-55]. The CEC elephants have spent so much time chained in the same place that they have worn grooves into the concrete floor. JA1883 [Tr. 2/23 (am) 76]. A number of individual CEC elephants—Emma and Shirley—are chained for more than 22 hours each day. JA2191 [Tr. 3/9 (am) 9]. Likewise, the five Asian elephants housed at the Williston facility are kept in a barn with a concrete floor 15 hours each day. JA1965-66 [PWC 178, at 99-100].

Defendant's confinement of the elephants causes them mental and physical harm. As noted, prolonged chaining and confinement on railroad cars results in abnormal stereotypic behaviors: the elephants nod, weave, and sway various body parts aimlessly for hours on end. *See, e.g.*, JA1888, 83 [Tr. 2/23 (am) 101; PWC 128A (video); PWC 142E (video); PWC 143G (video)]. The confinement of elephants in chains and tightly enclosed pens causes them "misery." JA689 [Tr. 2/10 (pm) 40]. The incidence of stereotypic behavior drops substantially if the elephants are confined in more spacious pens that allow them greater freedom of movement. JA698, 826-27, 837 [Tr. 2/10 (pm) 49; PWC 158, at 213-14, 224]. Defendant's medical records reflect a litany of injuries to the elephants' feet, nails, and legs, as well as painful bedsores. JA1892 [Tr. 2/24 (am) 35].

Second, Plaintiffs presented evidence of Defendant's use of the "ankus" or "bullhook," which is a two to three foot rod, shaped like a fireplace poker, with a sharp metal hook and point on its end. JA1537-38 [Tr. 2/18 (pm) 37-38]. The "point" or "heel" of the bullhook is used to move the elephant away from the handler. *Id.* The "hook" is designed to pull the elephant toward the handler and is used on sensitive parts of the elephant's body, including the trunk, mouth, ears, and the backs of the legs. *See, e.g.*, JA1884-85 [Tr. 2/23 (am) 77-78].

The bullhook is effective because it inflicts pain, which, repeated over time, instills fear that induces the elephant to follow commands, perform tricks, and

obey the trainers and handlers. JA1538 [Tr. 2/18 (pm) 38] ("[O]ften times it's applied with such force that it causes puncture wounds or tears in the skin, and so, it hurts. So they learn that in order to avoid that pain, they need to move in the direction that is opposite of how the hook is being applied."). As the court stated at trial: "I've been looking at film footage of elephants . . . being arguably hit upwards with the bull hook, and I pull back because I sense the pain." JA704 [Tr. 2/10 (pm) 101]; *see also* JA705 [*id.* at 102] ("I've seen lot of film footage and I have—there have been a couple of times I closed my eyes, put my hands over and maybe I'm overreacting to what I see.").

There is no dispute that Defendant's employees regularly and repeatedly strike Defendant's elephants with the bullhook. JA2697 [Tr. 3/18 (pm) 8]. Defendant's CEO admitted that "all" of the handlers "strike" elephants with bullhooks. JA2056 [Tr. 3/3 (pm) 43]. Defendant admitted this during closing argument:

> [S]o if we're left with the ordinary definition of 'wound,' then any penetration of the skin is a wound, and therefore I might as well sit down. I mean, if that's all it is, I might as well sit down because there's not going to be any dispute, there's never been a dispute that this instrument, the guide, the bullhook, whatever you want to call it, penetrates the skin, so if that's what a wound is, then the case is over.

JA2695 [Tr. 3/18 (pm) 6].

The evidence showed that the bullhook is used on sensitive parts of the elephant's bodies and causes mental anguish and bloody wounds. *E.g.*, JA876-77,

878, 1985-86 [Tr. 2/12 (am) 51-52, 53; PWC 180, at 55-56]. The metal hook and "heel" of the ankus is pointed so that the handler can "get the elephant's attention." JA2110 [Tr. 3/4 (pm) 53]. Defendant uses a gray powder called "Wonder Dust," which is a coagulant that stops the bleeding and masks the wound caused by the bullhook. JA876-77 [Tr. 2/12 (am) 51-52].

According to Defendant's own internal memorandum, a bullhook resulted in the elephant Lutzi "dripping blood all over the arena floor." JA1551 [PWC 9]. Two other former employees of Defendant testified that an elephant was beaten by a bullhook that the handler wielded like a baseball bat, then put in the elephant's ear canal and pulled down with all his weight. JA596 [Tr. 2/5 (am) 71]. The employee struck the elephant with two bullhooks, one in each hand, for half an hour until it finally submitted. JA595-96 [*Id.* at 70-71]; *see also* JA604-06 [Tr. 2/5 (pm) 86-88].

One of Defendant's witnesses said that he would apply the bullhook to an elephant, and if it did not respond, then he would repeat the verbal command and "pull a little harder." JA2337 [Tr. 3/12 (am) 91]. Asked what he would do if the elephant still did not respond, the witness stated: "I've never been in a position where the elephant hasn't responded to me at that point." *Id.*

Defendant's witness Gary Jacobson, who had trained or "broken" more than 20 baby elephants, admitted that Defendant does not videotape "any of [the] training sessions when [Jacobson] [is] actually teaching the elephants how to do

their commands for the first time." JA2198 [Tr. 3/9 (am) 45]. Jacobson testified that training (or "breaking") an elephant "normally" requires that it be separated from its mother when it is still nursing. JA2194 [*Id.* at 41]. The elephant is put on chains "every day for four months with the exception of about forty minutes a day." JA2196 [*Id.* at 43]. During the training, the elephant is "hit with bullhooks" and put "in chains" to comply with the trainer's wishes. JA2196-97 [*Id.* at 43-44]. Although no videotapes are made of these training sessions, the elephants, cursed with extraordinary memories, cannot forget them. *See* JA684 [2/10 (pm) 8].

Jacobson testified that he would not allow "the public relations department or any other department of Feld Entertainment to come down there and videotape one of those training sessions." JA2198 [Tr. 3/9 (am) 45]. The court interrupted:

> THE COURT: Why not?
>
> THE WITNESS: I don't think they would understand, you know.
>
> THE COURT: The public or the public relations department?
>
> THE WITNESS: Public relations department.
>
> THE COURT: Why don't you think—what is it about the training that they wouldn't understand?
>
> THE WITNESS: Just tying them up. I'm sitting here defending that now, so, you know, it's a difficultness.
>
> THE COURT: It's difficult to defend that?

> THE WITNESS: It is in this modern world, yeah.
>
> THE COURT: Why is that difficult?
>
> THE WITNESS: Because everything is kind of born-free based. Everything has to be free and warm and fuzzy and, you know, we handle elephants and then, you know, they handle thousands of them in Asia and they tie them up and they have bullhooks, you know, but in the modern world it's just more difficult to explain, your Honor. It is.

JA2199 [*Id.* at 46].

3. Impact of Defendant's Conduct On Plaintiffs.

a. Animal Protection Institute. Nicole Paquette testified on behalf of Plaintiff Animal Protection Institute ("API"), which was formed in 1968, and has since joined with Born Free U.S.A. to form a single animal-protection group. JA1682-83 [Tr. 2/19 (pm) 3-4]. API has more than 40,000 members and supporters nationwide. JA1684 [*Id.* at 5]. One of API's principal goals is to advocate against cruelty and exploitation of captive animals, including the mistreatment of elephants in circuses and zoos. JA1683 [*Id.* at 4]. API spends significant sums each year advocating on behalf of Asian elephants that are mistreated in circuses, including the Asian elephants mistreated by Defendant. JA1683-84 [*Id.* at 4-5]. The purpose of API's education and advocacy program "is to educate the general public as well as [its] members about what goes on within animal circuses," including the "abuse that goes on with the use of the bull hooks and the chains" on Asian elephants. *Id.*

Defendant's mistreatment of Asian elephants in violation of federal law undermines API's advocacy efforts. Kenneth Feld, Defendant's CEO, testified that Defendant spends "millions of dollars" each year advocating on behalf of the circus and telling the public that animal-protection groups are "lying" and that Defendant's elephants are content and well cared for. JA2059, 2063, 2069 [Tr. 3/3 (pm) 90, 94, 100]. Expenditure of resources by API and other animal-protection groups is "vital" to counter Defendant's unlawful conduct and advertising campaign. JA2258-59 [Tr. 3/11 (am) 30-31].

API also spends significant resources each year attempting to determine the precise practices Defendant uses on its elephants. JA1709-10 [Tr. 2/19 (pm) 30-31]. Ms. Paquette testified that API would not be required to spend most of that money if Defendant (i) stopped mistreating the elephants or (ii) were required to seek a permit that required disclosure of information about Defendant's treatment of the elephants. JA1710-13 [*Id.* at 31-34].

b. Tom Rider. Tom Rider worked with Defendant's Blue Unit elephants from June 1997 to November 1999. JA842 [Tr. 2/12 (am) 17]. Mr. Rider cared for the elephants, cleaned after them, provided them water and food, and watched them constantly each day while he was working. JA843 [*Id.* at 18]. Seven of the Blue Unit elephants with whom Mr. Rider worked—Karen, Nicole, Lutzi, Zina, Mysore, Susan, and Jewell—are still in Defendant's possession. JA2161-62

[Tr. 3/5 (pm) 35-36]. Two of those elephants—Karen and Nicole—remain on tour with the Blue Unit; the remaining five are housed at the CEC. *Id.*

Mr. Rider saw "excessive" use of the bullhook by Defendant's elephant handlers, who hit the elephants on the tops of their heads, on the ears, and on the backs of their legs. JA875-76 [Tr. 2/12 (am) 50-51]. Mr. Rider also witnessed the elephants chained when they traveled in trains and when they were not performing in the shows. JA858-59 [*Id.* at 33-34]. He saw wounds inflicted by the bullhooks and the stereotypic behavior exhibited by the elephants when chained for long periods of time. *See, e.g.,* JA860, 875 [*Id.* at 35, 50]. The trial court specifically found that Mr. Rider "complained to the elephant handlers and his direct supervisor" about the mistreatment he witnessed, and that he also "complained to the union" about the mistreatment. JA3280-81 [Order 20-21].

Mr. Rider quit Defendant's circus to go to Europe with three "Chipperfield elephants" with which he had also developed a personal relationship. JA893-94 [Tr. 2/12 (am) 68-69]. Mr. Rider testified that his employer in Europe, Mr. Raffo, required Mr. Rider to handle a bullhook, JA896 [*id.* at 71], a fact corroborated by Mr. Raffo, JA2091-92 [Tr. 3/4 (am) 32-33]. After three months, Mr. Rider quit that job. JA896, 900 [Tr. 2/12 (am) 71, 75]. Subsequently, Mr. Rider visited the Asian elephants in Defendant's circus about 10 to 15 times a year. JA1384-86, 3297 [Tr. 2/17 (pm) 20-22; Order 37].

Mr. Rider also engages in advocacy work publicizing the plight of Defendant's Asian elephants. He has received funding from animal-protection groups to make this advocacy work possible. JA915-16 [Tr. 2/12 (am) 90-91]. In 2000, Diane Ward, the USDA employee who investigated Mr. Rider's complaint under the Animal Welfare Act, reported: "I have worked with Tom for the last week . . . . Tom worked with these elephants, as their keeper (Barn man) for 2 ½ years. There is no question that he loves the elephants that he worked with (in the blue unit) and wants to help them find a better life than what is provided by the circus." JA1519 [PWC 93, at 1].

C. Procedural History.

More than ten years ago, Plaintiffs filed the original complaint in this case, alleging that Defendant's use of the bullhook on its Asian elephants and its confinement and chaining of the elephants violated the "take" provision of the ESA and FWS's regulations implementing the ESA. *See ASPCA v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 335 (D.C. Cir. 2003). Plaintiffs sought a declaration that Defendant's conduct violates the ESA and implementing regulations, and an injunction against future violations. *Id.* at 335-36. The district court dismissed the case for lack of Article III standing. *Id.* at 336. This Court reversed, holding that Mr. Rider had sufficiently alleged standing. *Id.* at 336-38.

Because Mr. Rider's allegations were sufficient, the Court did not address the standing of the organizational Plaintiffs. *Id.* at 338.

On remand, the district court granted, in part, Defendant's motion for summary judgment. *ASPCA*, 502 F. Supp. 2d at 114. As relevant here, the court held that it lacked statutory authority to consider Plaintiffs' claim that Defendant's mistreatment of the Asian elephants it holds pursuant to captive-bred wildlife permits violates an ESA regulation applicable to these elephants. *Id.* at 111-12. The court later ruled that Plaintiffs' claims would be limited to the elephants with which Mr. Rider had worked and for which Defendant lacked a captive-bred wildlife permit. JA488-89 [Docket No. 213 at 6-7].

After conducting a non-jury trial from February 4 to March 18, 2009, the court invited the parties to submit proposed findings of fact and conclusions of law. The district court adopted large portions of Defendant's submissions and ruled that API and Mr. Rider lacked standing under Article III of the Constitution. JA3262 [Order 2].

SUMMARY OF ARGUMENT

Plaintiffs have standing under Article III and Section 11(g) of the ESA to bring suit against Defendant for its mistreatment of Asian elephants in violation of the ESA's "take" provision and regulations.

I. API has standing to challenge Defendant's mistreatment of its Asian elephants. API has for years expended significant resources advocating against the unlawful mistreatment of circus animals, including the excessive use of bullhooks and chains on the Asian elephants in Defendant's circus. API spends substantial sums combating that unlawful conduct each year. Defendant's mistreatment of its Asian elephants in violation of the ESA impairs API's advocacy work and impels API to devote additional resources to identify and counteract Defendant's unlawful conduct. These injuries would be redressed by a favorable ruling in this case.

Likewise, Defendant's refusal to seek a permit with regard to 36 of its Asian elephants denies API information to which it is statutorily entitled under Section 10 of the ESA. As a result, API expends significant resources each year on alternative efforts to obtain information regarding Defendant's mistreatment of the elephants. A favorable ruling would redress API's injury by requiring Defendant to make such information available through the permit process or to cease the unlawful conduct about which API collects information.

II. Mr. Rider also has standing to challenge the mistreatment of Defendant's Asian elephants. He worked for over two years taking care of the elephants. He complained to his supervisor, the elephant handlers, and the union about the mistreatment of the elephants. After leaving the circus, Mr. Rider visited Defendant's elephants 10 to 15 times a year, and he has publicly advocated against

their mistreatment. Evidence that Mr. Rider has received financial support from animal-protection groups that support his public advocacy does not negate the injury he suffers from the mistreatment of these elephants or otherwise strip him of standing under Article III.

III. Finally, the ESA authorizes any person to challenge a violation by any person of "any" ESA regulation. 16 U.S.C. § 1540(g)(1)(A). The ESA grants Plaintiffs statutory authority to challenge Defendant's violation of an ESA regulation requiring that the Asian elephants Defendant holds under a permit be maintained under "humane and healthful conditions." 50 C.F.R. § 13.41. Plaintiffs do not seek revocation of Defendant's permit, but instead to enjoin the violation of a regulation. That this regulation imposes a substantive obligation on permit holders does not insulate Defendant's violation of the regulation from challenge under Section 11(g).

STANDARDS OF REVIEW

Whether Plaintiffs have standing is a question of law reviewed *de novo*. *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 937 (D.C. Cir. 2004). Underlying findings of fact are reviewed for clear error. Fed. R. Civ. P. 52(a)(6). Whether the ESA authorizes Plaintiffs to challenge Defendant's violation of an ESA regulation is a question of statutory interpretation reviewed *de novo*. *Wyeth Holdings Corp. v. Sebelius*, 603 F.3d 1291, 1296 (D.C. Cir. 2010).

ARGUMENT

I. API HAS STANDING TO CHALLENGE DEFENDANT'S "TAKING" OF ASIAN ELEPHANTS IN VIOLATION OF THE ENDANGERED SPECIES ACT AND ITS REGULATIONS.

API has standing based on injuries it has suffered to its interests as an organization. "An organization has standing in its own behalf if it meets the same standing test that applies to individuals." *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990). "The organization must show actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *Id.* In an action under the ESA, these elements of Article III standing are the sole requirement because Congress, in providing a cause of action to "any person," eliminated any prudential limitations on the courts' authority and extended standing to the full scope of Article III. *See Bennett*, 520 U.S. at 166.

API has suffered an "injury in fact" in two respects: (i) Defendant's violation of the ESA impairs API's efforts to advocate against unlawful mistreatment of endangered Asian elephants and increases the resources API must devote to those efforts; and (ii) Defendant's refusal to apply for a permit deprives API of information to which it is statutorily entitled and which it would use in its advocacy efforts. These injuries are directly traceable to Defendant's unlawful

"taking" and inhumane treatment of its Asian elephants and would be redressed by a favorable decision. API thus has standing to maintain this suit.

A. Defendant's Violation Of The ESA Causes Concrete And Demonstrable Injuries To API's Efforts To Stop The Unlawful Mistreatment Of Asian Elephants In Circuses.

1. Organizations have standing to challenge unlawful conduct that impedes their activities or increases the resources they must devote to their programs. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), a nonprofit organization that advocated for equal housing opportunity alleged that the defendants' unlawful "racial steering" practices frustrated its counseling and referral services and forced it to devote significant resources to identify and counteract the defendants' illegal practices. *Id.* at 379. The Supreme Court held that there was "no question" that these allegations were sufficient to support the organization's standing: "Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Id.*

This Court "has applied *Havens Realty* to justify organizational standing in a wide range of circumstances." *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006). The Court has held, for example, that a group that advocated for better access to developmental

drugs had standing to challenge an administrative policy barring the sale of such drugs, *id.* at 132-33; that a group that advocated for equal employment opportunity had standing to challenge an employment agency's alleged pattern and practice of racial discrimination, *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994); and that groups that advocated for equal housing opportunity had standing to challenge racially discriminatory housing advertisements, *Spann*, 899 F.2d at 27-31. These cases establish the following:

First, an organization can establish standing by showing that the defendant's conduct causes a "concrete and demonstrable injury" to the organization's activities without regard to the organization's motivation for undertaking those activities. *See Havens Realty*, 455 U.S. at 379 & n.20 ("That the alleged injury results from the organization's noneconomic interest in encouraging open housing does not affect the nature of the injury suffered, and accordingly does not deprive the organization of standing.") (citation omitted). Such an injury sets the organization apart from those who allege only a setback to their abstract social interests. *See Spann*, 899 F.2d at 27.

Second, an organization cannot "manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit." *Id.* Because any litigant could otherwise create injury in fact simply by bringing a lawsuit,

courts "do not recognize such self-inflicted harm." *Abigail Alliance*, 469 F.3d at 133. "*Havens* makes clear, however, that an organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action." *Spann*, 899 F.2d at 27.

Third, the concrete injury to the organization's activities may take at least two forms. The defendant's unlawful conduct may impair the organization's existing activities by making them less effective.[1] Or, the organization may be "impelled" by the defendant's unlawful conduct to expend additional resources identifying and counteracting the defendant's illegal practices.[2] Consistent with these decisions, when an "organization has devoted specific effort and expense to combat the challenged activity," the resulting drain on its resources provides a "secure foundation for standing." 13A Charles Alan Wright et al., *Federal Practice & Procedure* § 3531.9.5, at 858-59 (3d ed. 2008).

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[1] *See Abigail Alliance*, 469 F.3d at 132 (defendant's conduct " 'frustrated' " group's efforts to assist its members and the public in accessing developmental drugs); *Fair Emp't Council*, 28 F.3d at 1276 (defendant's discrimination made the group's "overall task more difficult" by "reduc[ing] the effectiveness" of its activities); *Spann*, 899 F.2d at 28 (defendant's discriminatory ads " 'interfered with [the groups'] efforts and programs' ").

[2] *See Abigail Alliance*, 469 F.3d at 132-33 (defendant's conduct "caused a drain on [the group's] resources and time" because the group "had to divert significant time and resources" to counteracting the unlawful action); *Spann*, 899 F.2d at 27 (discriminatory ads "impelled the organizations to devote resources to checking or neutralizing the ads' adverse impact").

2. Under these principles, API has standing to challenge Defendant's mistreatment of Asian elephants in violation of the ESA and its regulations. As set forth in the testimony of Nicole Paquette, which the trial court credited, JA3310 [Order 50], API "advocates against cruelty and exploitation of animals" and has funded an entire "campaign" dedicated to opposing the mistreatment of animals in entertainment, including Asian elephants in circuses, JA1683 [Tr. 2/19 (pm) 4]. Each year, API expends significant resources independent of this litigation advocating against the use of bullhooks and chains on Asian elephants in circuses. JA3311 [Order 51].

For example, API:

- Publishes and distributes fliers, posters, and other materials to its members and the general public to educate them about mistreatment of animals in circuses, including the use of bullhooks and chains on Asian elephants. JA 1687, 1810-25 [Tr. 2/19 (pm) 8; PWC 92, at API 5550-65].
- Sends quarterly letters to its members describing the plight of circus animals, including Asian elephants. JA1689, 1826-34 [Tr. 2/19 (pm) 10; PWC 92, at API 5566-74].
- Broadcasts public-service announcements on the radio in cities where the circus performs discussing the dangers of animal circuses and the

mistreatment of Asian elephants. JA1690, 1835-37 [Tr. 2/19 (pm) 11; PWC 92, at API 5575-77].

- Posts billboards highlighting the abuse of circus animals, including Asian elephants, in cities where the circus performs. JA1690 [Tr. 2/19 (pm) 11].
- Sends "action alerts" to its members notifying them when the circus is coming and advising them how to get involved in the issue of mistreatment of animals, including Asian elephants. JA1691, 1839-40 [Tr. 2/19 (pm) 12; PWC 92, at API 5594-95].
- Publishes articles in its magazine about the mistreatment of Asian elephants and other animals in circuses. JA1691-92, 1846-49, 1850-53 [Tr. 2/19 (pm) 12-13; PWC 92, at API 5670-73, 5679-82].
- Drafts legislation and lobbies national, state, and local governments to enact measures prohibiting mistreatment of circus animals, including bans on the use of bullhooks and chains on Asian elephants. JA1697-702, 1859-74 [Tr. 2/19 (pm) 18-23; PWC 95].
- Monitors federal and state regulatory processes for information and opportunities to comment on issues relating to circus animals, including applications for permits. JA1703-09 [Tr. 2/19 (pm) 24-30].

These advocacy efforts consume significant resources. JA3310 [Order 50]. In 2007 and 2008, API spent approximately $97,000 per year advocating for animals

in captivity, most of which was spent on advocacy relating to Defendant's Asian elephants. JA1710, 1715-17, 3311 [Tr. 2/19 (pm) 31, 36-38; Order 51]. In addition, API spends approximately $40,000 per year seeking information about Defendant's treatment of its Asian elephants. JA1718, 3311 [Tr. 2/19 (pm) 39; Order 51].

Defendant's conduct causes concrete injuries to API's advocacy efforts. Defendant's "taking" and inhumane treatment of its Asian elephants—*i.e.*, its striking them with bullhooks and keeping them chained for most of their lives—undermines API's advocacy efforts, the entire point of which is to put an end to the injury these practices inflict on the elephants. The principal tool API has to accomplish that objective is to educate its members, the public, and government officials about the harm that bullhooks and chains inflict on the elephants. JA3310-11 [Order 50-51].

In *Spann*, this Court held that an organization had alleged a sufficient injury because the defendant's unlawful conduct impeded the organization's educational activities by creating a "public impression . . . that racial discrimination in housing is permissible." 899 F.2d at 29. The same principle applies here. Defendant's mistreatment of the Asian elephants in its popular circus impedes API's advocacy and educational activities by contributing to the public misimpression, particularly in young children, that bullhooks and chains are lawful and humane practices that do not harm, wound, harass, or injure the elephants.

Indeed, Defendant spends millions of dollars each year on a public-relations campaign designed to convince the public that its elephants are healthy and content and that the animal-protection organizations who say otherwise are "extremists" who should not be trusted. *See, e.g.*, JA2059-63 [Tr. 3/3 (pm) 90-94] (testimony of Defendant's CEO Kenneth Feld admitting that Defendant spends "well into the millions" on advertising and more than $100,000 per year for outside companies to do public relations for Defendant); JA2065-68 [*id.* at 96-99] (Defendant paid "over a hundred thousand" dollars for a full-page ad in the New York Times representing that the Ringling Brothers' animals "are healthy, well cared for and content"); JA2063, 2069 [*id.* at 94, 100] (Defendant spends money telling the public that animal-protection groups who say that Ringling Brothers mistreats animals are not telling the truth). Expenditure of resources on public education by API and other groups is necessary to counter the misimpression resulting from Defendant's mistreatment of the elephants. *See* JA2258-59 [Tr. 3/11 (am) 30-31].

Defendant's "taking" and inhumane treatment of Asian elephants also increases the resources API must devote to its advocacy efforts. The vast majority of the resources API expends gathering and disseminating information about Defendant's mistreatment of the elephants would not have to be spent, or could be diverted to other productive uses, if Defendant ceased "taking" the elephants in violation of the ESA. *See* JA1717 [Tr. 2/19 (pm) 38] ("the bulk of it we would no

longer have to spend" because "most of our work right now is . . . focused on the Ringling Brothers"); JA1718 [*id.* at 39] (API "wouldn't have to spend as much time and money" if Defendant complied with the ESA). These are precisely the kinds of concrete expenditures "'to identify and counteract the defendant's [unlawful] practices'" that the Supreme Court and this Court have held sufficient to establish organizational standing. *Havens Realty*, 455 U.S. at 379; *Abigail Alliance*, 469 F.3d at 134; *Spann*, 899 F.2d at 28.

3. The district court nonetheless concluded that API lacked standing because there was "no testimony that API would actually spend less resources on captive animal issues or even on elephants in circuses were FEI's practices declared to be a 'taking.'" JA3317 [Order 57]. This conclusion is based upon an erroneous legal standard. API does not have to show that it would spend fewer resources on captive animal issues or elephants in circuses to establish the requisite drain on its resources. What matters is that if API obtained the relief it seeks in this case, it would not have to spend as many resources advocating against the specific practices it has challenged—Defendant's excessive use of the bullhook and chains on Asian elephants.

To the extent that the district court was concerned about redressability, that concern was baseless. If the practices API challenges were declared to be a "take," Defendant would have two options—cease using the bullhook and chains or seek a

permit authorizing their use. Either way, API's injury would be redressed. If Defendant ceased using the bullhook and chains, then API would no longer need to expend resources opposing these practices and its injury would be wholly redressed. Alternatively, if Defendant sought a permit, API's injury would be at least partially redressed because such a permit would necessarily be conditioned upon the "humane and healthful" treatment of the elephants, 50 C.F.R. § 13.41, and therefore API would not have to expend as many resources advocating against these practices. *See Meese v. Keene*, 481 U.S. 465, 476-77 (1987) (partial redressability sufficient); *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 925 (D.C. Cir. 2008) (same). In addition, API would obtain the information that must be disclosed in the permit application, *see infra*, Part I.B, and therefore would not have to expend as many resources seeking to obtain this information from alternative sources, *see* JA1718-19 [Tr. 2/19 (pm) 39-40].

API has thus suffered concrete and demonstrable injuries to its activities that are at least as "palpable" and "specific" as other organizational injuries that have supported standing under Article III. *Spann*, 899 F.2d at 28. The injuries to API are directly traceable to Defendant's unlawful conduct and would be redressed by a favorable decision. API therefore has standing under *Havens Realty*.

B. API Has Standing Because Defendant's Refusal To Apply For A Permit Denies API Information To Which It Is Statutorily Entitled And Which It Would Use In Its Advocacy Efforts.

1. Independently, API has informational standing to challenge Defendant's "taking" of Asian elephants without a permit. A "plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998); *see also Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 448-51 (1989); *Havens Realty*, 455 U.S. at 373-74; *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 583 F.3d 871, 873-74 (D.C. Cir. 2009); *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008); *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1147-48 (D.C. Cir. 2002); *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986); *Int'l Union, United Auto. Workers of Am. v. Brock*, 783 F.2d 237, 246-47 (D.C. Cir. 1986). API has standing because Defendant's "taking" of Asian elephants for which it has not applied for and received a permit deprives API of information to which it is statutorily entitled and which it would use in its advocacy efforts.

Defendant may not lawfully "take" Asian elephants unless it applies for and obtains a permit authorizing it do so. *See* 16 U.S.C. § 1538(a)(1); 50 C.F.R. § 13.1 ("A person must obtain a valid permit before commencing an activity for which a permit is required . . . ."). Under Section 10 of the ESA and its implementing regulations, a party who applies for a permit must provide specified information to

FWS, and that information must be made available to the public. 16 U.S.C. § 1539(c) (FWS "shall publish notice in the Federal Register of each application for an exemption or permit," and "[i]nformation received by the Secretary as part of any application shall be available to the public as a matter of public record at every stage of the proceeding"). That information "must" include, among other things, a "full statement" of "the details of the activities sought to be authorized by the permit." 50 C.F.R. § 17.22(a)(1)(vii). These public-disclosure requirements are mandatory; FWS has no discretion to withhold information submitted in a permit application from the public. *See Gerber v. Norton*, 294 F.3d 173, 179-82 (D.C. Cir. 2002).

2. Defendant's "taking" of Asian elephants without a permit denies API the information to which it is entitled under Section 10. API spends significant resources seeking information about Defendant's treatment of Asian elephants. JA1709-10, 1717-18 [Tr. 2/19 (pm) 30-31, 38-39]. API reviews and comments on information in the Federal Register provided by entities seeking permits to "take" endangered wildlife. JA1707-09 [*Id.* at 28-30]. If Defendant applied for a permit, API would use the information that must be disclosed under Section 10 in its advocacy efforts. JA1712-13 [*Id.* at 33-34] (API would use information about the "details" of Defendant's activities in "a wide variety of ways," including in its educational and legislative efforts). Further, because

Defendant has failed to apply for a permit, API must spend resources pursuing alternative sources of information about Defendant's practices. JA3311 [Order 51]. API has therefore suffered an injury in fact. *See Akins*, 524 U.S. at 21 (finding informational injury where "there [was] no reason to doubt" plaintiffs' claim "that the information would help them"); *Ethyl Corp.*, 306 F.3d at 1148 (same).

API's injury is directly traceable to Defendant's violation of the ESA and redressable by a favorable decision. API's injury—deprivation of information that must be publicly disclosed before a party may lawfully "take" an endangered species—is caused by Defendant's "taking" of Asian elephants without having made the disclosures required to obtain a permit. That injury would be redressed by a holding that Defendant must either obtain a permit or cease "taking" the elephants. In the former event, API's injury would be redressed because API would receive the information to which it is entitled under the statute and regulations. In the latter event, API's injury would be redressed because the activity that generates API's need for and right to the information would cease. *See Brock*, 783 F.2d at 247 (informational injury redressed when the party "considering the practices at issue will be put to the choice of either reporting them or refraining from engaging in them in the first place").

3. The district court's conclusion that API lacked standing does not withstand scrutiny. *First,* the district court asserted that the "gravamen of

API's 'informational injury' claim is that FWS *should be* requiring FEI to apply for a Section 10 permit," and that this "is a matter that API must seek to redress with FWS." JA3313-14 [Order 53-54]. API's claims have nothing to do with any inaction by FWS. The gravamen of API's claim is that the *Endangered Species Act* and its implementing regulations require Defendant to obtain a permit if it wishes to continue "taking" Asian elephants with bullhooks and chains. That is a matter *the court* can redress under Section 11 of the ESA without involving FWS, by enjoining Defendant from "taking" the elephants unless it seeks and obtains a permit.[3]

Second, the district court ruled that a favorable decision would not "guarantee" that API would receive the information it seeks because Defendant might not seek a permit, and even if it did seek a permit, "the information flowing from that proceeding would be in the control of FWS, not FEI." JA3314 [*Id.* at 54]. That ruling is contrary to settled law. A plaintiff does not have to show that a favorable decision would "guarantee" it the redress it seeks, but only that "a favorable decision would create 'a significant increase in the likelihood that the

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[3] The district court stated that there was "no evidence of any obligation that FEI currently has to seek a permit under Section 10 of the ESA." JA3312 [Order 52]. If Plaintiffs are correct that Defendant's use of the bullhook and chains constitutes a "take"—as the court must assume for standing purposes, *see Defenders of Wildlife*, 532 F.3d at 924—then Defendant has a legal obligation under the ESA to obtain a permit if it wishes to continue engaging in these practices. *See* 16 U.S.C. § 1538(a); 50 C.F.R. § 13.1.

plaintiff would obtain relief that directly redresses the injury suffered.'" *Klamath Water Users Ass'n v. FERC*, 534 F.3d 735, 739 (D.C. Cir. 2008).

That requirement is readily met here. If Defendant decided not to seek a permit, it would have to cease "taking" the elephants, in which case API's informational injury would be redressed for the reasons explained above. Likewise, if Defendant applied for a permit, API's injury would be redressed because FWS would be required by law to make the information submitted with the permit application publicly available. *See* 16 U.S.C. § 1539(c); 50 C.F.R. § 17.22(a)(1). FWS has no discretion in the matter and "is therefore not the sort of truly independent actor who could destroy the causation required for standing." *Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 6 (D.C. Cir. 2005).

Third, the district court asserted that the ESA does not impose a duty on Defendant to disclose information "for the benefit of API." JA3314 [Order 54]. This "zone-of-interest" analysis has no place under the ESA because Congress eliminated any such prudential-standing requirement. *Bennett*, 520 U.S. at 164-66. In any event, the district court's premise is mistaken: Section 10's public-disclosure requirements exist precisely for the benefit of interested members of the public, like API, who have a right to comment on the proposed permit and to use the information to advocate for the animals. *See* 16 U.S.C. § 1539(c); *Gerber*, 294 F.3d at 179-82. "Published notice and public availability of information generated

in connection with § 10 permit applications make meaningful the participation of interested parties in the process of determining whether to allow an otherwise prohibited activity with respect to an endangered species." *Cary v. Hall*, No. 05-4363, 2006 WL 6198320, at *11 (N.D. Cal. Sept. 30, 2006).

Fourth, the district court concluded that "'standing based on an informational injury is only applicable in suits'" against the government. JA3314 [Order 54]. That is wrong. None of the cases the district court cited holds that informational standing is limited to cases involving the government. Indeed, the Supreme Court has found informational standing in a suit involving only private parties. *See Havens Realty*, 455 U.S. at 373-74. Further, nothing in the theory of informational standing limits its application to suits against the government. Where, as here, the deprivation of information is fairly traceable to the defendant's unlawful conduct and redresssable by the court, there is no reason that informational standing should be denied in a suit against a private party.

Finally, the district court asserted that as a result of discovery in this case, "API already has or has ready access to" the information Defendant would be required to disclose in a permit application. JA3316 [Order 56]. This is legally irrelevant: "The Supreme Court has expressly ruled that persons seeking to vindicate a statutory right to information have standing . . . even if the information is available to them through other channels." *Zivotofsky ex rel. Ari Z. v. Sec'y of*

State, 444 F.3d 614, 618 (D.C. Cir. 2006) (internal quotation marks and citations omitted). It is also factually incorrect. The information Defendant would be required to disclose if it sought a permit is different from that disclosed during discovery. *See Judicial Watch*, 583 F.3d at 874. For example, the information disclosed during discovery pertained only to Defendant's *past* activities and was subject to Defendant's objections as to relevance and privilege, whereas the information that would be disclosed in the permit process would concern Defendant's *future* activities and would not be subject to withholding based on evidentiary rules.

II. TOM RIDER HAS STANDING TO CHALLENGE DEFENDANT'S MISTREATMENT OF ASIAN ELEPHANTS.

Because API has standing in this case, the Court need not assess whether Mr. Rider also has standing. *See Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 429 (D.C. Cir. 1998) (en banc). In any event, Mr. Rider satisfies the requirements of Article III. Defendant cannot deny that Mr. Rider (i) worked with Defendant's Asian elephants for almost two and one-half years; (ii) complained to his supervisor, the elephant handlers, and the union about the elephants' mistreatment while employed by Defendant; (iii) visited the elephants 10 to 15 times a year thereafter; (iv) complained to the government about their mistreatment; and (v) engaged in a multi-year advocacy campaign to stop the mistreatment. These facts—which are indisputable—establish that Mr. Rider has a

sufficient "personal relationship" with Defendant's elephants; that he suffers injury as a result of their mistreatment; and that his injury would be redressed if the mistreatment ceased. The district court's contrary conclusion should be rejected.

A. Mr. Rider Has Standing To Bring This Lawsuit.

Mr. Rider has standing to challenge Defendant's mistreatment of Asian elephants because "he has suffered an [1] injury in fact, [2] fairly traceable to the defendant's action, and [3] capable of judicial redress." *ASPCA*, 317 F.3d at 336; *see Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 566 (1992) (a person who "works with a particular animal" has standing to challenge conduct that subjects the animal to "perceptible harm").

1. In *ASPCA*, this Court explained that, under the ESA, "an injury in fact can be found when a defendant adversely affects a plaintiff's enjoyment of flora or fauna, which the plaintiff wishes to enjoy again upon the cessation of the defendant's actions." 317 F.3d at 337. Such an individual has a "cognizable interest in viewing animals free from inhumane treatment." *Glickman*, 154 F.3d at 433 (alterations, omission, and internal quotation marks omitted).

In *Glickman*, this Court held that the plaintiff, Marc Jurnove, who worked for a variety of animal-relief organizations, had Article III standing to challenge the inhumane conditions at a Long Island "Game Farm" because he allegedly had visited the animals "nine times" over the course of a year and was injured by

seeing them kept under inhumane conditions. *Id.* at 429. Jurnove was required to show only that he "suffered his injury in a personal and individual way . . . by seeing with his own eyes the particular animals whose condition caused him aesthetic injury." *Id.* at 433 ("'[I]t is clear that the person who *observes* or works with a *particular* animal threatened by a federal decision is facing perceptible harm.'").

Here, as in *Glickman*, Mr. Rider suffers injury as a result of Defendant's mistreatment of the elephants. *First*, for over two years, Mr. Rider took care of Defendant's elephants. JA3279 [Order 19]. He gave them food when they were hungry, gave them water when they were thirsty, kept them company during their confinement in chains and in cramped train cars, washed them, attended to their injuries, and cleaned up after them. *E.g.*, JA843, 865-67 [Tr. 2/12 (am) 18, 40-42].[4] He traveled with them from city to city and observed the effects that chaining and use of the bullhook had on them. *See* JA855-57, 875-79 [*Id.* at 30-32, 50-54]. This evidence is undisputed.

Second, as the trial court found, Mr. Rider complained to his supervisor, to the elephant handlers, and to his union steward about the mistreatment of the

[4] Mr. Rider described each of the elephants with which he worked. JA846-51 [Tr. 2/12 (am) 21-26]. The district court nonetheless concluded that Rider failed to "supply information that would be known only to those with intimate personal knowledge of or familiarity with these animals." JA3298 [Order 38]. Evidence of "intimate personal knowledge or familiarity" is not required to support standing under this Court's precedent. *See Glickman*, 154 F.3d at 432-33.

elephants. JA883-85 [Tr. 2/12 (am) 58-60]; *see also* JA1449, 1452 [Tr. 2/17 (pm cont.) 8, 11]; JA884 [Tr. 2/12 (am) 59] ("I went to my supervisor, and that's about as far as I could go."). But the mistreatment did not stop. *See, e.g.*, JA885 [*Id.* at 60] (Jeff Steele, the Blue Unit manager, was aware of bullhook beatings and told employees, "don't get caught on camera"). Defendant acknowledged that Mr. Rider complained about the mistreatment of the elephants. JA953-56 [Tr. 2/12 (pm) 26-29]. The district court agreed, finding that "Mr. Rider complained to the elephant handlers and his direct supervisor about the alleged elephant mistreatment." JA3280 [Order 20].

Mr. Rider had no financial incentive to complain about the mistreatment of the elephants while working for Defendant. Indeed, *Defendant* elicited testimony that Rider's supervisor Randy Peterson "threatened [Rider's] job because [Rider] was complaining about him and the other handlers hitting the elephants." JA1052-53 [Tr. 2/12 (pm) 125-26]. Mr. Rider would not have complained unless the mistreatment of the elephants bothered him and caused him harm; he wanted the mistreatment to stop. This evidence alone demonstrates Mr. Rider's "personal attachment" to the elephants, shows that he suffers injury when the elephants are mistreated, and puts Mr. Rider's injury outside "the category of a generalized interest in ensuring the enforcement of the law." *ASPCA*, 317 F.3d at 337.

Third, after he stopped working for Defendant, Mr. Rider visited the elephants between "10 or 15 times per year." JA1385 [Tr. 2/17 (pm) 21]. That too is undisputed. JA3297 [Order 37]. Mr. Rider has traveled across the country, year after year, following Defendant's Asian elephants. JA1385-87 [Tr. 2/17 (pm) 21-23]. During these visits, he has viewed the elephants chained in place, JA922-23 [Tr. 2/12 (am) 97-98], and videotaped Defendant's elephants being harmed by the bullhook, JA1933-34, 83 [Tr. 2/12 (pm) 6-7; PWC 132P (video)].

Fourth, after he left his job for Defendant, Mr. Rider complained about the elephants' mistreatment to the USDA. JA2022-28 [PWC 20]. The USDA employee who took his complaint observed the bond that Mr. Rider has with these elephants. JA1519 [PWC 93, at 1] ("I have worked with Tom for the last week, and have taken a lengthy statement from him .... There is no question that he loves the elephants that he worked with (in the blue unit) and wants to help them find a better life than what is provided by the circus.").

Finally, Mr. Rider has continued to complain publicly about the mistreatment of Defendant's Asian elephants to the media and interested members of the public. JA3293 [Order 33]. He has attended the circus scores of times to see Defendant's Asian elephants, has spoken out on their behalf, and has testified that that he will continue doing so. JA3297, 1492 [*Id.* at 37; Tr. 2/17 (pm cont.) 51]. Mr. Rider's actions confirm his "personal relationship" with Defendant's elephants,

and attest to the injury he suffers as a result of their mistreatment by Defendant. *See ASPCA*, 317 F.3d at 338.

2. The evidence, as set forth above, is likewise overwhelming that Defendant's mistreatment of the elephants is the cause of the injury suffered by Mr. Rider. The trial court did not dispute that any injury Mr. Rider suffers from Defendant's mistreatment of the elephants necessarily is caused by Defendant.

3. Finally, Mr. Rider's injury would be redressed by a favorable decision. Mr. Rider seeks an injunction preventing mistreatment of the elephants by Defendant and a declaration that Defendant's mistreatment of the elephants violates the ESA and its implementing regulations. JA209 [Compl. 21]. Those remedies would redress the aesthetic injury Mr. Rider suffers when he views Defendant's elephants in the circus, as would requiring Defendant to apply for a permit that would ensure the elephants are treated humanely. *See ASPCA*, 317 F.3d at 338; *Glickman*, 154 F.3d at 432-33; 50 C.F.R. § 13.41.

For example, two of the elephants with which Mr. Rider worked continue to travel with the circus and can be observed by Mr. Rider. JA3302 [Order 42] ("Karen and Nicole are still performing with the Blue Unit"). As noted, Mr. Rider has seen the marks caused by excessive use of the bullhook and observed the elephants engaged in stereotypic swaying as a result of being chained for long periods of time. *E.g.*, JA875-77 [Tr. 2/12 (am) 50-52].

With regard to the chaining of the elephants, the evidence shows—and Defendant's own expert conducted studies demonstrating—that when elephants are released from chains, they no longer exhibit (or exhibit to a lesser extent) the stereotypic behavior that reflects the "misery" chaining and close confinement cause them. JA689, 698, 2221, 813, 826-27, 837 [Tr. 2/10 (pm) 40, 49; Tr. 3/9 (pm) 81; PWC 157; PWC 158, at 213-14, 224]. With regard to Defendant's excessive use of the bullhook, Mr. Rider's injury again will be redressed because he will not suffer the injury associated with seeing the elephants being abused or the marks and abnormal behavior that result from that abuse. That is all that Article III and this Court's precedents require. *See ASPCA*, 317 F.3d at 338 (redressability established if "likely" that "elephants will no longer exhibit the physical effects of mistreatment"); *Glickman*, 154 F.3d at 443 (redressability established where court ruling would "alleviate" aesthetic injury).

B. The District Court's Contrary Ruling Should Be Rejected.

The district court's contrary ruling is based on an unduly restrictive theory of standing and factual findings that are irrelevant, clearly erroneous, or both.

1. In *ASPCA*, this Court concluded that Mr. Rider's allegations, if proven at trial, would show that Mr. Rider "became attached to the elephants when he worked with them and would like to 'visit' them again 'so that he can continue his personal relationship with them, and enjoy observing them.'" 317 F.3d at 337.

Likewise, under *Glickman*, evidence of such a personal relationship establishes standing because mistreatment of the animals with which Mr. Rider worked causes him to suffer "injury in a personal and individual way." 154 F.3d at 433. The district court ignored these principles and embraced standards, advocated by Defendant, that render standing under the ESA well-nigh impossible to satisfy.

First, the district court acknowledged that Mr. Rider worked daily with Defendant's Asian elephants for almost two and one-half years. JA3279 [Order 19]. But the district court concluded that this evidence of close contact with the Blue Unit elephants *undermined* Mr. Rider's claim because, if he cared enough about the elephants, then he would not have "continued to work for FEI for two and one-half years." JA3280 [*Id.* at 20]. Under that analysis, an employee could *never* satisfy standing: An employee who cared sufficiently about the animals would quit because of the mistreatment before any "personal relationship" developed; conversely, an employee who remained employed long enough, despite the mistreatment, could not really care about the animals.

The district court's analysis is at odds with the en banc decision in *Glickman*, where this Court concluded that the plaintiff's repeated visits to view animals maintained under inhumane conditions, if true, *established* the personal injury necessary to support Article III standing. 154 F.3d at 432-33. Mr. Rider's

relationship with Defendant's elephants was much longer, stronger, and closer than the one held sufficient in *Glickman*.

In truth, there is no contradiction between Mr. Rider's personal attachment to the elephants and his continued employment in a job that allowed him to alleviate, to a small degree, some of the mistreatment he saw while working with the elephants. Mr. Rider could do so even though he was required to put chains on the Blue Unit elephants. JA858 [Tr. 2/12 (am) 33]. For this reason, the district court's focus on photographs in which Mr. Rider is holding a bullhook while working for another circus in Europe does not undermine Mr. Rider's concern for Defendant's Asian elephants. JA847-48 [*Id.* at 22-23].[5]

Second, although the court acknowledged that Mr. Rider complained about the mistreatment of the elephants while employed by Defendant, JA3280 [Order 20], it nevertheless concluded that he lacked standing because he (i) did not *also* "complain to anyone in management about the mistreatment," JA3280 [*id.*], and (ii) "did not complain about any mistreatment of the elephants even after he quit his job," JA3281-82 [*id.* at 21-22]. The first conclusion is irrelevant and the second is clearly wrong.

The trial court found that Mr. Rider complained to his direct supervisor and the elephant handlers about the mistreatment, and that he also complained to the

[5] Mr. Rider quit his job with that circus in Europe after only three months.

union that his job was being threatened because he was complaining so much. JA3280-81, 1052-53 [Order 20-21; Tr. 2/12 (pm) 125-26]. Contrary to the district court's ruling, nothing required Mr. Rider also to complain to Defendant's management or CEO. JA3280 [Order 20]. Likewise, the record is replete with documentary evidence chronicling that Mr. Rider has for years complained to all who would listen about Defendant's mistreatment of the elephants "after [Rider] quit his job." JA3282, 1065, 83 [*Id.* at 22; PWC 94A, 94B (video)].

Third, the district court found that Mr. Rider continued his relationship with the elephants by visiting them "approximately ten (10) or fifteen (15) times per year." JA3297 [Order 37]. That evidence too is more than sufficient to establish a personal relationship. *See Glickman*, 154 F.3d at 429, 432-33 (nine visits over the course of a year sufficient to support standing). Nevertheless, the district court again required more. It concluded that Mr. Rider failed to establish the necessary "personal attachment" because he had several "opportunities to visit his 'girls' outside of the circus, but he has not taken advantage of those opportunities." JA3298 [Order 38]. This Court's precedent requires only evidence of a "personal attachment," *ASPCA*, 317 F.3d at 337, or an "injury" suffered in a "personal and individual way," *Glickman*, 154 F.3d at 433, not a single-minded, all-consuming obsession.

Fourth, the district court concluded that Mr. Rider lacked standing because, "[a]fter Mr. Rider left his employment with FEI in November 1999, he did not complain to USDA or to any other animal control authority about the treatment of FEI's elephants." JA3282 [Order 22]. That finding is clearly erroneous. The documentary evidence confirms that Mr. Rider complained to both the USDA and Congress about Defendant's mistreatment of Asian elephants soon after he left the circus community. JA1519, 904 [PWC 93, at 1; Tr. 2/12 (am) 79].

Finally, the district court acknowledged Mr. Rider's "media and educational outreach activity regarding FEI's Asian elephants, including speaking out about what he allegedly witnessed regarding elephant mistreatment." JA3293 [Order 33]. The bulk of the district court's factual findings are directed at these advocacy efforts and the funding by other Plaintiffs and animal-protection groups that made them possible. JA3285-97 [*Id.* at 25-37]; *see, e.g.*, JA3293 [*id.* at 33] (noting that "Mr. Rider has been paid at least $190,000.00" by animal-protection groups from March 20, 2000, to December 31, 2008).

The district court admitted that these "payments to Mr. Rider may support his media and outreach efforts," JA3294 [*Id.* at 34], but relied on them to dismiss Mr. Rider as a mercenary who cared nothing about the elephants. According to the district court, "there is no evidence to indicate that Mr. Rider would have undertaken these efforts on his own accord, absent the payments, based on his

alleged personal and emotional attachment to the FEI elephants." JA3294 [*Id.*]. Here too, the district court imposed a burden that the law does not require Mr. Rider to bear.[6]

Mr. Rider—an individual of limited means—received monetary support from animal-protection groups that allowed him to advocate on behalf of Defendant's elephants about which both he and the groups care deeply. No one disputes that, without that funding, it would not have been possible for Mr. Rider to advocate for years on behalf of Defendant's Asian elephants. That Mr. Rider received funding from animal-protection groups is consistent with the other evidence showing that he suffers injury as a result of Defendant's mistreatment of the elephants.

Indeed, before *any* funding was provided by these groups, Mr. Rider made clear his concern for the elephants by "complain[ing] to the elephant handlers and his direct supervisor about the alleged elephant mistreatment." JA3280 [Order 20]. That funding by animal-protection groups has allowed him to *continue* advocating on behalf of Defendant's Asian elephants *bolsters* the conclusion that he has a

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[6] For example, the district court concluded that Mr. Rider lacked the necessary personal attachment because he did not take a job at PAWS that would "permit him to work with Rebecca again." JA3299 [Order 39]. The record was undisputed that Mr. Rider quit his job at PAWS because, pursuant to a settlement agreement PAWS reached with Defendant, Mr. Rider would have been precluded from criticizing Defendant's treatment of the elephants. JA906, 2079-80 [Tr. 2/12 (am) 81; Tr. 3/3 (pm) 110-11].

"personal relationship" with these elephants, that he is injured when these animals are mistreated, and that he wants that mistreatment to stop. Mr. Rider also has testified before governmental bodies on behalf of Asian elephants, and devoted the better part of a decade of his life to improve their treatment by Defendant. The receipt of money from animal-protection groups does not negate Mr. Rider's preexisting attachment to Defendant's elephants and does not strip him of standing to challenge Defendant's mistreatment of them.

2. The district court also erred when it adopted Defendant's arguments regarding redressability. JA3301-02 [Order 41-42].

At the outset, the district court stated that "[t]here is no evidence that Mr. Rider has the ability . . . to determine whether [an] elephant has been mistreated by the use of a bullhook or chains." JA3302 [*Id.* at 42]. That is clearly wrong. Mr. Rider stated that, during the course of his employment, he was required to cover up the wounds caused by bullhooks with "wonder dust," and that he could see hook marks and boils on the elephants with which he worked. JA876-77 [Tr. 2/12 (am) 51-53]. Likewise, he testified that he saw the elephants engage in stereotypic swaying when they were chained at the venues where the circus performed. JA860 [*Id.* at 35] ("Q. Did you have an opportunity to observe the way the elephants

behaved when they were on chains. A. Yes, I saw them. They would always sway back and forth").[7]

The court also should have rejected Defendant's argument that, even if the court ruled that Defendant's conduct was a "take," Mr. Rider could not show that his injuries would be redressed. JA3302 [Order 42]. Mr. Rider attended the circus and visited Defendant's elephants between 10 to 15 times a year after leaving his job with Defendant. JA3297 [*Id.* at 37]. That evidence, coupled with Mr. Rider's experience working with Defendant's elephants for over two years, is more than adequate to establish standing as to *all* of the elephants that currently are on tour in Defendant's circus. *See Glickman*, 154 F.3d at 429, 432-33 (finding standing based on plaintiff's ability to perceive mistreatment coupled with aesthetic interest in viewing animals nine times over the course of a year).

Even if standing were limited to the elephants with which Mr. Rider worked from 1997 to 1999, a favorable ruling would likely redress Mr. Rider's injuries. Five of the elephants with which Mr. Rider has worked are housed at the CEC under conditions that Plaintiffs have shown constitute a "take" under the ESA. *See*

[7] Mr. Rider is aware that Defendant's employees use the bullhook during circus performances and try to hide that use from the public, JA871-72 [Tr. 2/12 (am) 46-47], and he has treated the effects of bullhook use on the elephants, JA1382 [Tr. 2/17 (am) 18] (explaining that without Wonder Dust, marks from bullhooks were "clearly visible"); JA876 [Tr. 2/12 (am) 51] ("I had to go get the Wonder Dust and literally cover up the cuts on her"). Likewise, Mr. Rider observed stereotypic behaviors when he worked with Defendant's elephants. *E.g.*, JA1418 [Tr. 2/17 (am) 54] (Nicole "sways" when she is chained and not eating).

JA2161-62 [Tr. 3/5 (pm) 35-36]. Because excessive use of the bullhook and prolonged chaining are endemic at the CEC, a favorable ruling would mean that these elephants could no longer be housed at that facility, creating a likelihood that Mr. Rider could again visit them. *See Glickman*, 154 F.3d at 443 (Mr. Jurnove had shown redressability because "tougher regulations" would allow him to "possibly visit the animals he had come to know in their new homes within exhibitions that comply with the new exacting regulations").

With regard to two other elephants—Nicole and Karen—a favorable ruling would redress Mr. Rider's injury because they "are still performing with the Blue Unit." JA3302 [Order 42]. As a result, Mr. Rider could view these elephants free of mistreatment by Defendant. The district court rejected that conclusion because it accepted Defendant's testimony that "if the use of the bullhook and chains were prohibited," then Defendant would take Karen and Nicole from the circus and have them "removed to the CEC." *Id.*

That conclusion is wrong. If the district court ruled in favor of Plaintiffs, then Defendant could not send Karen and Nicole to the CEC because the evidence showed that the elephants at the CEC are being "taken" in violation of the ESA. Defendant cannot defeat standing by removing its elephants from public view and sending them to a private location where their confinement would violate the court's injunction against the "taking" of this endangered species. An injunction

could also curtail, rather than completely prohibit, uses of the bullhook and chains, in which case Karen and Nicole would likely stay on the road where Mr. Rider could visit them. *See* JA793-95 [PWC 152A, at 228-30] (testimony of Gary Jacobson stating that Karen and Nicole will stay on the road "as long as there's a blue unit," because "we need more, not less elephants on the blue show").

Consequently, an injunction prohibiting Defendant from mistreating Asian elephants through prolonged chaining and excessive use of the bullhook would redress Mr. Rider's injury. Mr. Rider therefore has standing.

III. THE ESA AUTHORIZES PLAINTIFFS TO CHALLENGE DEFENDANT'S VIOLATION OF A REGULATION REQUIRING THAT IT MAINTAIN ITS ELEPHANTS UNDER "HUMANE AND HEALTHFUL CONDITIONS."

The ESA authorizes "any person" to bring suit against any person alleged to have violated "any . . . regulation" promulgated under the ESA. 16 U.S.C. § 1540(g)(1)(A). Plaintiffs should have been permitted to challenge Defendant's violation of a regulation that governs the treatment of the elephants Defendant possesses under captive-bred wildlife permits.

A. The ESA Expressly Authorizes Plaintiffs To Challenge Defendant's Violation Of The ESA's Regulations.

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *accord Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1309

(D.C. Cir. 2004) (per curiam). Accordingly, "[t]he task of resolving [a] dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

The ESA expressly authorizes plaintiffs to challenge the violation of "*any* provision of [the ESA] *or regulation issued under the authority [of the ESA]*." 16 U.S.C. § 1540(g)(1)(A) (emphasis added). The Supreme Court has held that the ESA's citizen-suit provision is an "authorization of remarkable breadth," with the "obvious purpose . . . to encourage enforcement by so-called 'private attorneys general'" as a means "to ensure compliance with the Act." *Bennett*, 520 U.S. at 164, 165-66.

FWS has issued a regulation requiring that "[a]ny live wildlife possessed under a permit *must be maintained under humane and healthful conditions*." 50 C.F.R. § 13.41 (emphasis added). Plaintiffs challenged Defendant's violation of "the ESA and that statute's implementing regulations," including Defendant's violation of the regulation requiring that the Asian elephants Defendant possesses subject to a captive-bred wildlife permit be "maintained under 'humane and healthful conditions.'" JA201, 209 [Compl. 13, 21].[8] Plaintiffs asserted that Defendant's

[8] Section 13.41 appears in Subchapter B of Title 50 of the CFR, and FWS has confirmed that its regulations in "Subchapter B are promulgated to implement," *inter alia*, "the Endangered Species Act of 1973." 50 C.F.R. § 10.1.

"treatment of its elephants is inhumane and unhealthful for the animals, and violates . . . the FWS's regulations implementing the ESA." *Id.*

The language, structure, and purpose of the ESA confirm that Plaintiffs are authorized to challenge Defendant's violation of the regulation requiring "humane and healthful" treatment of captive-bred Asian elephants. 50 C.F.R. § 13.41. The text of the ESA authorizes plaintiffs to bring suit for the violation of "*any* . . . regulation issued under the authority [of the ESA]." 16 U.S.C. § 1540(g)(1)(A) (emphasis added). The word "any" reflects Congress's intent to authorize a broad array of actions for violations of regulations. *E.g.*, *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006) ("the word 'any' has an expansive meaning").

Likewise, the structure of Section 11(g), which reflects the "purpose" of encouraging "enforcement by so-called 'private attorneys general,'" supports statutory authorization to challenge Defendant's violation of a regulation adopted under the ESA. *Bennett*, 520 U.S. at 165. As explained in *Bennett*, Section 11(g) "encourage[s]" private lawsuits through its "elimination of the usual amount-in-controversy and diversity-of-citizenship requirements," and "its provision for recovery of the costs of litigation." *Id.* Section 11(g) authorizes private suits even when the government may have concurrent jurisdiction, and addresses potential conflicts by reserving to the "Government . . . a right of first refusal to pursue the action initially and a right to intervene later." *Id.*; *see* 16 U.S.C. § 1540(g)(2)(A).

Further, the structure of the ESA confirms that issuance of a permit does not necessarily insulate a party from a challenge brought by a private individual claiming a violation of the ESA's regulations. Section 9 states that, except as provided under Section 10, a party may not violate "any regulation . . . promulgated by the Secretary pursuant to authority provided by [the ESA]." 16 U.S.C. § 1538(a)(1)(G). Section 10 provides that the Secretary may permit conduct that would otherwise violate Section 9, *id.* § 1539(a), but makes clear that in "any action alleging a violation of section [9], any person claiming the benefit of any . . . permit . . . shall have the burden of proving that the . . . *permit is applicable*, has been granted, and was valid and in force at the time of the alleged violation," *id.* § 1539(g) (emphasis added). In addition, permits are "strictly interpreted" and "will not be interpreted to permit similar or related matters outside the scope of strict construction." 50 C.F.R. § 13.42.

B. The District Court Improperly Concluded That The Grant Of A Permit Insulates Defendant's Violation Of An ESA Regulation From Challenge Under The Citizen-Suit Provision.

The district court held that that Plaintiffs' claim was not authorized because "only the government, through the Secretary of the Interior, could bring actions for violations of a permit issued by FWS." *ASPCA*, 502 F. Supp. 2d at 111-12. The Court reasoned that "[b]y specifically referencing permits in subsections (a), (b), and (e) of Section 11 (governing civil enforcement, criminal sanctions,

administrative or judicial seizure and forfeiture), but not referencing permits in subsection (g) (pertaining to citizen suits), Congress evidenced its intent to preclude private parties from permit enforcement." *Id.* at 112. That ruling is wrong and should be rejected.

The court's analysis misconstrues both the nature of Plaintiffs' claim and the scope of the ESA's citizen-suit provision. Plaintiffs do not seek invalidation or revocation of Defendant's permits; rather, they challenge Defendant's refusal to comply with a "regulation" promulgated by FWS under the ESA that applies to Defendant's treatment of captive-bred elephants. Plaintiffs seek to enjoin Defendant's violation of its obligation to maintain its captive-bred Asian elephants under "humane and healthful conditions." 50 C.F.R. § 13.41; *see* JA209 [Compl. 21]. That claim is authorized by Section 11(g) of the ESA.

That FWS also has concurrent authority to challenge a violation of this regulation does not render the citizen-suit provision inapplicable. *Compare* 16 U.S.C. § 1540(e)(1) ("[t]he provisions of this chapter and any regulations . . . shall be enforced by the Secretary"), *with id.* § 1540(g)(1)(A) ("any person may commence a civil suit" to enjoin "violation of any provisions of this chapter or regulation issued under the authority thereof"). As noted, the language of the ESA's citizen-suit provision was drafted broadly "to encourage enforcement by so-called 'private attorneys general,'" while affording FWS a right of first refusal and

a right to intervene in the lawsuit. *Bennett*, 520 U.S. at 165. Section 11(g) thus provides the Secretary with the tools necessary to protect his interests when a private citizen sues to enforce the ESA's regulations over which the Secretary has concurrent jurisdiction. *See* 16 U.S.C. § 1540(g)(2)(A); *Bennett*, 520 U.S. at 166.

That statutory structure is inconsistent with the district court's decision to limit the express authority granted to private litigants to prevent an "end run" that might undermine FWS's interest in enforcing its permits. *ASPCA*, 502 F. Supp. 2d at 113. Such implicit repeals of express legal authority are disfavored. *See J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 138 (2001) ("negative inference simply does not support carving out subject matter that otherwise fits comfortably within the expansive language" of a statute.); *cf. FTC v. Ken Roberts Co.*, 276 F.3d 583, 592 (D.C. Cir. 2001).

Finally, the unpublished decision in *Atlantic Green Sea Turtle v. County Council*, No. 6:04-cv-1576, 2005 U.S. Dist. LEXIS 38841 (M.D. Fla. May 3, 2005), *vacated*, No. 05-13683-HH (11th Cir. Jan. 18, 2006), does not warrant a different result. There, plaintiffs filed suit against a private party and the Secretary under the ESA, NEPA, and the APA, challenging the timeliness of a permit application and seeking, as relevant here, that the Secretary "revoke the 1996 Permit." *Id.* at *12. Plaintiffs here do not seek revocation of the permit, but instead seek to challenge Defendant's failure to abide by a regulation that obligates

Defendant to maintain the elephants it possesses under captive-bred wildlife permits in "humane and healthful conditions." 50 C.F.R. § 13.41. The ESA expressly authorizes Plaintiffs to bring such a claim.

CONCLUSION

For these reasons, the judgment should be reversed and the case remanded to the district court for a ruling on the merits of Plaintiffs' claims under the ESA.

Respectfully submitted,

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