

# EXHIBIT M

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT  
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5 AMERICAN SOCIETY FOR THE  
6 PREVENTION OF CRUELTY TO  
7 ANIMALS, ET AL.,

8 Appellants,

No. 10-7007

9 v.

10 RINGLING BROS. AND BARNUM &  
11 BAILEY CIRCUS, ET AL.,

12 Appellees.  
-----

13 Monday, September 12, 2011

14 Washington, D.C.

15 The above-entitled matter came on for oral  
16 argument pursuant to notice.

17 BEFORE:

18 CIRCUIT JUDGES TATEL, GARLAND, AND BROWN

19 APPEARANCES:

20 ON BEHALF OF THE APPELLANTS:

21 CARTER G. PHILLIPS, ESQ.

22 ON BEHALF OF THE APPELLEES:

23 JOHN M. SIMPSON, ESQ.  
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C O N T E N T S

ORAL ARGUMENT OF:

PAGE

Carter G. Phillips, Esq.  
On Behalf of the Appellants

3; 38

John M. Simpson, Esq.  
On Behalf of the Appellees

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P R O C E E D I N G S

THE CLERK: Case number 10-7007, et al., American Society for the Prevention of Cruelty to Animals, et al., Appellants v. Ringling Bros. and Barnum & Bailey Circus, et al. Mr. Phillips for the Appellants; Mr. Simpson for Appellees.

ORAL ARGUMENT OF CARTER G. PHILLIPS, ESQ.

ON BEHALF OF THE APPELLANTS

MR. PHILLIPS: Good morning, Your Honors, and may it please the Court --

JUDGE TATEL: Good morning.

MR. PHILLIPS: -- Carter Phillips for the Plaintiff/Appellants in this case. I'd like to reserve three minutes for rebuttal.

The last time this appeal was before, this case was before this Court it sought out and followed what it described as the simplest path, which was to decide the issue on the narrowest basis available to it for reversing Judge Sullivan. I would urge the Court to follow the same course in this case at this time, however, I think the organizational standing argument is candidly the simpler basis on which to decide this case. And the Court I don't think need to go much further than to review Judge Sullivan's single finding with, or single conclusion of law with respect to resource allocation and standing as it applies to API and compare it to this Court's

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1 statement in Spann.

2 In his conclusion he says there was no -- this is at  
3 3317 of the Joint Appendix, there was no testimony that API  
4 would actually spend less resources on captive animal issues  
5 or even on elephants and circuses where FEI's practice is  
6 declared to be a taking. And so, he has imposed a very high  
7 burden on the Plaintiff in this particular case, which is that  
8 they have to demonstrate not only that there has been an  
9 allocation of resources, but that they have to actually  
10 testify that those resources would not be expended for the  
11 same basis purpose of the organization in the event they were  
12 to prevail in this case. That is not what this Court held in  
13 Spann.

14 In Spann this Court said specifically at page 27 of 899  
15 F.2d, "Havens makes clear, however, that an organization  
16 establishes Article 3 injury if it alleges that purportedly  
17 illegal action increases the resources the group must devote  
18 to programs independent of its suit challenging the action."  
19 And in this case Judge Sullivan specifically found that  
20 resources are in fact increased, have to be spent as a  
21 consequence of the Defendants' actions in this particular  
22 case. And all that's required under Havens is that the  
23 Plaintiff has to identify and counteract the illegal actions  
24 of the Defendant, and the Court in making that determination  
25 has to assume, candidly, that there has been a violation of

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1 the statute under these particular circumstances. And all of  
2 the Defendants' arguments, candidly, address the question on  
3 the assumption that there has not been a taking, indeed, most  
4 of the statement of the case from the Defendant is that there  
5 has been no taking, that what they do here is a perfectly  
6 permissible way to approach it. And of course, under those  
7 circumstances no Plaintiff would ever have standing because  
8 there's no violation, but that has it exactly wrong. What the  
9 Court needs to do is to assume standing. I'm sorry, Judge  
10 Tatel.

11 JUDGE TATEL: Go ahead and finish and then I'll ask  
12 you my question.

13 MR. PHILLIPS: No, no. It's just that the Court has  
14 to assume standing.

15 JUDGE TATEL: Well, let's assume you're right. I  
16 mean, you are right. We have to assume that they're violating  
17 the statute, and assume further that you're right about the  
18 District Court's finding here. What's troubling me, I'll just  
19 lay it out on the table for you, what's troubling me is that  
20 the Plaintiffs here still have to show that the Defendants'  
21 actions caused the increased costs of their activities, right?

22 MR. PHILLIPS: Right. Absolutely.

23 JUDGE TATEL: You still have to prove causation, and  
24 we're beyond the motion to dismiss stage, so there has to be  
25 evidence of a causation. And you say in your brief that the

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1 causation here is that the treatment of the elephants in the  
2 circuses, the use of bull hooks and chains, that that conveys  
3 to the public, particularly to young people, right, that this  
4 treatment is okay, right?

5 MR. PHILLIPS: Right. No question.

6 JUDGE TATEL: Yes. And -- well, right. There's no  
7 question that that's in the brief. But the question is  
8 where's the -- I know you didn't try the case, but it's not in  
9 the affidavits that I could find, and I don't know that  
10 there's any evidence on that point, and don't we need that?  
11 Or, I guess there's two questions. Question number one, am I  
12 asking for something that you think we don't need for you to  
13 prove standing --

14 MR. PHILLIPS: Yes, I think that's something you  
15 don't --

16 JUDGE TATEL: -- and number two --

17 MR. PHILLIPS: Right. And then is there evidence to  
18 that effect?

19 JUDGE TATEL: -- is there evidence? Yes.

20 MR. PHILLIPS: Yes. Judge Tatel, I think the answer  
21 to your question is that is not something we need to prove  
22 under these particular circumstances. It seems to me it's a  
23 logical inference to draw from it, but the question, I think  
24 the only legal issue that the Court has to decide --

25 JUDGE TATEL: But the --

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1 MR. PHILLIPS: -- is --

2 JUDGE TATEL: Go ahead.

3 MR. PHILLIPS: Do you want me to go forward, or --

4 JUDGE TATEL: No, you go ahead.

5 MR. PHILLIPS: The only question is, you know, is it  
6 a concrete and particularized injury in the sense that do we  
7 have to spend resources to identify and counteract, or combat,  
8 the illegality of the Defendants' actions. And Judge Sullivan  
9 specifically finds, because these are not just monies that are  
10 spent in general in advocating --

11 JUDGE TATEL: No, no. I'm with you --

12 MR. PHILLIPS: -- on behalf of elephants.

13 JUDGE TATEL: I'm with you on the expenditure. I'm  
14 willing to assume that the affidavits are sufficient on it.  
15 I'm asking you the next standing question. And Lujan says  
16 that at this stage, at least at post-summary judgment, and,  
17 you know, we're post-trial, it must set forth by affidavit or  
18 other evidence --

19 MR. PHILLIPS: Right.

20 JUDGE TATEL: -- specific facts to show causation.

21 MR. PHILLIPS: Right. And --

22 JUDGE TATEL: And, you know, I'm responding to your  
23 point well, it's just logical that the public treatment of the  
24 elephants will demonstrate to the public that this is safe and  
25 humane treatment which the Plaintiff here has to counter with



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1 the increased expenditures.

2 MR. PHILLIPS: Right. But I think all --

3 JUDGE TATEL: Yes.

4 MR. PHILLIPS: -- that's required for a concrete and  
5 particularized showing is that it's not simply advocacy in the  
6 abstract, that it is in fact advocacy aimed directly at the  
7 wrongdoing of the specific --

8 JUDGE TATEL: No, no, you're going --

9 MR. PHILLIPS: -- Defendant in this case.

10 JUDGE TATEL: -- that's a different point than I'm  
11 asking about. I agree with you about that, but I'm asking you  
12 the proof question.

13 MR. PHILLIPS: Right. But --

14 JUDGE TATEL: What level of proof -- and I'm really  
15 responding to your point it's just logical. At this stage,  
16 the question is at this stage of the litigation are we allowed  
17 to decide a standing question on the basis of, quote, it's  
18 logical to think that they would have, that the Defendants'  
19 behavior caused the injury? That's the question I have.

20 MR. PHILLIPS: Well, if the testimony of Ms.  
21 Paquette, which is what it was, is that FEI's specific  
22 practices --

23 JUDGE TATEL: Yes.

24 MR. PHILLIPS: -- are what caused them to take, to  
25 incur specific expenses. It's not mistreatment in general,

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1 it's FEI's specific mistreatment, both in terms of the conduct  
2 and in terms of their failure to provide critical information  
3 that they would have to through the permitting process  
4 otherwise. But those were two alternative arguments. But  
5 both of those are specific and particularized in their  
6 application to FEI, and that, I think, is precisely what the  
7 Supreme Court in Havens, and what this Court in Spann requires  
8 of the Plaintiff. And then it seems to me you can fairly  
9 infer the rest of what I argued and what's argued in the brief  
10 from the fact that we spend specifically to combat FEI's  
11 actions, and obviously, if FEI stops doing what we find to be  
12 a, what we believe is a violation of the statute, what the  
13 Court has to assume is a violation of the statute, then  
14 obviously that will redress our particular problem.

15 JUDGE BROWN: Wouldn't every advocacy organization  
16 have exactly that same argument?

17 JUDGE TATEL: Right.

18 JUDGE BROWN: I mean, if you're an advocate because  
19 you oppose something that the Defendant is doing, if the  
20 Defendant stops doing it you don't have to spend money  
21 opposing it anymore, so that would give standing to everybody  
22 who has --

23 JUDGE TATEL: Right.

24 JUDGE BROWN: -- a problem with anything.

25 MR. PHILLIPS: Well, I mean, I do think it is a

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1 broad standing doctrine that I'm urging for the Court, but  
2 it's not as --

3 JUDGE TATEL: Yes, that's true.

4 MR. PHILLIPS: -- everybody has that right, because  
5 Sierra Club says it's not enough simply that we would be  
6 offended by the idea of elephants being in a circus, and  
7 advocating for that. That, it seems to me that's not a  
8 resource allocation that is specific enough to this particular  
9 problem to justify standing under these circumstances. But if  
10 in fact we do as API does specifically allocate resources to  
11 combating, identifying and combating this precise Defendants'  
12 conduct, then it seems to me that that's a sufficiently  
13 concrete and particularized injury that is in fact  
14 redressable. The reason why this seems sweeping I think is  
15 largely because of the nature of the Endangered Species Act.  
16 Obviously, the endangered species cannot sue on their own  
17 behalf, so someone has to stand in their place, and Congress  
18 wrote what the Supreme Court recognized is an extraordinarily  
19 broad and very sweeping statute designed to deal precisely --

20 JUDGE TATEL: Right, but --

21 MR. PHILLIPS: -- with this kind of a situation  
22 where you have the minimal showing for standing, which is  
23 injury, resource reallocation, and information deprivation.

24 JUDGE BROWN: But it seems to me then you're  
25 defining actual injury as something that the Plaintiff can

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1 always create. The Defendant is doing X, I oppose X, I have  
2 spent money opposing X therefore I have standing.

3 MR. PHILLIPS: Well, to be sure there is something  
4 volitional in that, but this Court in the Equal Rights Center  
5 recognized that the fact that these were volitional and  
6 voluntary payments and decisions made by the Plaintiff that in  
7 terms of how they're going to allocate the resources is not  
8 the obstacle. This Court --

9 JUDGE TATEL: See, I --

10 MR. PHILLIPS: -- carved out in that case a  
11 specific -- I mean, it seems to me there are two limitations  
12 on the doctrine I've asked for, one is obviously it cannot be  
13 expenditures solely for preparation and actual litigation of  
14 the case. The Court specifically held to the contrary, and  
15 there's no doubt in this instance that API spent a lot of  
16 money prior to this litigation, not in anticipation of this  
17 litigation, and the District Court didn't find to the  
18 contrary.

19 And second, it is not sufficient that we simply have a  
20 strong preference for how animals ought to be treated. It's  
21 not -- or, you know, that's exactly what the Court said in  
22 Sierra Club is not adequate. What we have to do is in fact  
23 expend resources designed to halt a particular use --

24 JUDGE GARLAND: So, what -- given --

25 JUDGE TATEL: But it's not just --

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1 JUDGE GARLAND: Sorry.

2 JUDGE TATEL: Let me just pursue this, because as I  
3 understood it you're not saying -- you're agreeing that it  
4 isn't enough that you're seeking to halt the alleged  
5 mistreatment of the elephants --

6 MR. PHILLIPS: Of all elephants.

7 JUDGE TATEL: -- right? What you've spent the  
8 additional money on is to counter the public impression that  
9 the Defendants are given by their treatment, correct?

10 MR. PHILLIPS: Yes.

11 JUDGE TATEL: That's your argument? It's like --

12 MR. PHILLIPS: Right.

13 JUDGE TATEL: It's just like Spann, right?

14 MR. PHILLIPS: It is exactly like Spann --

15 JUDGE TATEL: Okay. But --

16 MR. PHILLIPS: -- Judge Tatal.

17 JUDGE TATEL: -- Spann was a motion to dismiss.

18 Now, we're beyond that, and the question is so -- and I  
19 understood you were, in your briefs you were saying look, this  
20 is pretty precise, and this is why you don't have to worry  
21 that we're creating standing for anybody. But you agree,  
22 don't you, that -- I'm understanding your case, your argument  
23 correctly, right? That critical to your argument about  
24 standing it's not just that you're seeking to counter, to end  
25 the alleged mistreatment of elephants, but that the additional

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1 money is spent to counter the public impression given by the  
2 Defendants' treatment of the elephants, right? That's your  
3 argument?

4 MR. PHILLIPS: Well, I mean, to be sure that is --

5 JUDGE TATEL: Yes.

6 MR. PHILLIPS: -- our argument.

7 JUDGE TATEL: Yes.

8 MR. PHILLIPS: I think, though, that you don't need  
9 to have specific testimony as to that. I think all you need  
10 to show is that it is the mistreatment --

11 JUDGE TATEL: But then you go back, then I go back  
12 to Judge Brown's question. See, if we don't have evidence on  
13 that link then basically any advocacy organization can claim  
14 it, certainly at the motion to dismiss stage that's enough,  
15 that's what Spann says. But we're beyond that now.

16 MR. PHILLIPS: Right. But if you take --

17 JUDGE TATEL: Yes.

18 MR. PHILLIPS: -- if you convert Spann -- let's go  
19 back to the language of it, okay --

20 JUDGE TATEL: Yes.

21 MR. PHILLIPS: -- because what it says is --

22 JUDGE TATEL: Sure.

23 MR. PHILLIPS: -- it makes clear that an  
24 organization establishes Article 3 injury if it alleges, it  
25 seems to me that you could substitute for that if it proves

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1 that the illegal action increases the resources the group must  
2 devote to programs independent of its suit.

3 JUDGE TATEL: Yes, where is that proof here? I'll  
4 ask one more time. That's the affidavit, you said? That's  
5 it, right?

6 MR. PHILLIPS: That's the testimony of Ms. Paquette.

7 JUDGE TATEL: And it's her testimony that if they  
8 stopped we won't have to spend the money.

9 MR. PHILLIPS: Correct. If they --

10 JUDGE TATEL: Okay. Good.

11 MR. PHILLIPS: -- stop we will, the bulk --

12 JUDGE TATEL: Okay.

13 MR. PHILLIPS: -- of this, of the money won't be  
14 spent in that --

15 JUDGE TATEL: Right.

16 MR. PHILLIPS: -- particular direction.

17 JUDGE TATEL: Okay. (Indiscernible.)

18 MR. PHILLIPS: And Judge Tatal, just one other --

19 JUDGE TATEL: Yes.

20 MR. PHILLIPS: -- point to make in regard to this,  
21 and that is that, of course, is the resource allocation  
22 specifically --

23 JUDGE TATEL: Yes.

24 MR. PHILLIPS: -- it doesn't go to the information  
25 deprivation argument, that's a separate argument, and it seems

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1 to me doesn't depend on that particular linkage at all. But  
2 unless there are questions I'll --

3 JUDGE GARLAND: There are, sorry.

4 MR. PHILLIPS: -- reserve my time. Good.

5 JUDGE GARLAND: So, I mean, in the opposing  
6 Counsel's reply brief they raise the issue of the Winn case,  
7 the Supreme Court's recent decision regarding taxpayer  
8 standing under the Establishment Clause.

9 MR. PHILLIPS: Right.

10 JUDGE GARLAND: So, how do you answer the argument  
11 assume there is an organization which as it devoted its life  
12 and lots and lots of money to trying to oppose legislation for  
13 tax credits going to parochial schools, and they lose, they're  
14 not litigating, they're only trying to get, to prevent the  
15 legislature from doing what they regard as unconstitutional.

16 MR. PHILLIPS: Right.

17 JUDGE GARLAND: They lose, they try again, they  
18 lose, they ask for an amendment, they lose, and then they  
19 bring suit, and they say: look, if we win this suit we will  
20 not have to continue to try to get the legislation changed,  
21 and this is the only thing we care about, and we're in  
22 Arizona, or whatever state, I can't remember what state it was  
23 in. Do they have standing?

24 MR. PHILLIPS: No, I don't think they have  
25 standing --



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1 JUDGE GARLAND: All right. So, explain to me why --

2 MR. PHILLIPS: -- under those circumstances.

3 JUDGE GARLAND: -- it's different than this case?

4 MR. PHILLIPS: Because --

5 JUDGE GARLAND: That would be --

6 MR. PHILLIPS: -- what we are doing, and it goes to  
7 Judge Tatel's point, I think, which is that this is not  
8 designed simply to get legislation, although that's part of  
9 the package, obviously, but what it's really designed to do is  
10 to rebut the clear inference that the public would draw from  
11 the very conduct that's ongoing.

12 JUDGE GARLAND: Right. But is it --

13 MR. PHILLIPS: That this is --

14 JUDGE GARLAND: So --

15 MR. PHILLIPS: -- a perfectly permissible way to  
16 behave.

17 JUDGE GARLAND: Fair enough. So, they say well,  
18 Arizona passes this statute, that certainly indicates to the  
19 public that it's okay to give tax credits for this purpose, we  
20 think it is not okay, we think it violates -- the Supreme  
21 Court never has decided the underlying question, they are only  
22 deciding lack of standing, so our position is this gives the  
23 public the wrong view about, you know, about what's  
24 constitutional under the Establishment Clause.

25 MR. PHILLIPS: Right.

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1 JUDGE GARLAND: So, isn't that the same as what  
2 you're saying?

3 MR. PHILLIPS: I don't think so, because again, all  
4 we're looking for is whether this is sufficiently concrete and  
5 particularized, and what you've described --

6 JUDGE GARLAND: But why isn't that? That's what --

7 MR. PHILLIPS: Because that impresses me as simply  
8 sort of a broad brush, we're seeking broad --

9 JUDGE GARLAND: It's not a broad brush, it's a we --

10 MR. PHILLIPS: -- advocacy.

11 JUDGE GARLAND: -- don't want our state to give  
12 money for tuition credits. That's a very narrow thing.

13 MR. PHILLIPS: Right.

14 JUDGE GARLAND: And we think that violates the  
15 Establishment Clause. It seems pretty narrow. I mean, I  
16 don't see --

17 MR. PHILLIPS: Well, I mean --

18 JUDGE GARLAND: -- why it's saying we must narrow  
19 than saying we don't want the circus to use bull hooks and --

20 MR. PHILLIPS: We don't want this particular  
21 circus --

22 JUDGE GARLAND: Well, we don't want this  
23 particular --

24 MR. PHILLIPS: -- to be engaged in this particular  
25 kind. It seems to me that that is the fundamental difference,

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1 Judge --

2 JUDGE GARLAND: Well, we don't want this --

3 MR. PHILLIPS: -- Garland.

4 JUDGE GARLAND: -- particular state to provide it.

5 They're not asking all states, they're asking their own state.

6 Why is that?

7 MR. PHILLIPS: Well, it --

8 JUDGE GARLAND: You think it's not --

9 MR. PHILLIPS: -- I mean, you know --

10 JUDGE GARLAND: -- that's the difference?

11 MR. PHILLIPS: -- at some point, obviously, there's

12 a line the Court has to draw with respect to sort of what's

13 permissible, and it seems to me the line is not at the stage

14 where you're saying public, I don't think it's a public

15 advocacy point. I think what the Supreme Court is trying to

16 get at is that at some point everybody has the same basic

17 claim, and saying that, you know, and limiting taxpayer

18 standing, and trying to limit the Article 3 in a particular

19 way, I don't think that argument applies when you're talking

20 about, first of all, a statute where Congress has conferred

21 the broadest possible standing, so we're looking at what are

22 the constitutional limitations, and at this point we're

23 talking about a very particularized and concrete dispute

24 between our organization, which spends money to identify and

25 combat specific practices undertaken by the Defendant, and if

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1 the Court were to conclude that this is a take within the  
2 meaning of that statute then we would not devote those  
3 particular resources. It seems to me that is a sufficiently  
4 particularized meaning within what this Court said in Spann,  
5 if you simply apply Spann to the next level, which is to say  
6 it goes beyond obviously allegations, you have to prove it, it  
7 seems to me we've proved it, and Judge Sullivan accepted our  
8 proof with respect to are those, you know, are those resources  
9 in fact being reallocated in a particular way. And the only  
10 inference is if they stop doing what they're doing then we  
11 will stop having to spend those monies in that particular way.

12 JUDGE GARLAND: Let me ask two more questions.

13 MR. PHILLIPS: Of course.

14 JUDGE GARLAND: On that issue, can you not read  
15 Spann and the other particular, particularly the other housing  
16 discrimination cases to say that they are not -- those were  
17 organizations that were not in really, advocacy was part of  
18 what they're doing, but it wasn't the main thing that they  
19 were doing, the main thing they were doing was persuading  
20 people, helping people move in to segregated neighborhoods,  
21 providing them with loans, providing them with counseling, et  
22 cetera, and that this was preventing, the illegal actions were  
23 preventing them from going about their other business. Which  
24 their argument, your opposing Counsel's argument is that the  
25 Plaintiffs here don't have another business, their only

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1 business is to prevent, as you define it is to prevent this  
2 tactic, this use of these two items.

3 MR. PHILLIPS: Well, I mean, our business generally  
4 is to protect animals, not just elephants. So, it's not, I  
5 mean, that's not our business. I mean, we are talking about a  
6 very specific and particularized, and I would argue  
7 sufficiently concrete dispute between ourselves with respect  
8 to this to satisfy the minimal standards of Article 3.

9 JUDGE GARLAND: And one last question. Does the  
10 circus use the chains and the --

11 MR. PHILLIPS: Bull hook.

12 JUDGE GARLAND: -- bull hook in front of the public?

13 MR. PHILLIPS: On occasion if need be. They try to  
14 conceal it as much as possible. But certainly in certain  
15 instances yes, they have to -- I mean, they, as I say, they  
16 try to avoid it, and certainly in the CEC they do it.

17 JUDGE GARLAND: So, if --

18 MR. PHILLIPS: But behind closed doors --

19 JUDGE GARLAND: -- your argument is that we're  
20 trying to counter the suggestion that these things are okay --

21 MR. PHILLIPS: Right.

22 JUDGE GARLAND: -- but if these things are all  
23 actually done concealed how does their using them give the  
24 public the notion that they're okay?

25 MR. PHILLIPS: Well, I --

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1 JUDGE GARLAND: It actually sounds like it gives the  
2 opposite, we're --

3 JUDGE TATEL: Right.

4 JUDGE GARLAND: -- hiding this, we don't, you  
5 know --

6 MR. PHILLIPS: Well, first of all, I don't think --

7 JUDGE GARLAND: -- we're ashamed, we hide it.

8 MR. PHILLIPS: -- they do in fact hide it. I mean,  
9 they make an effort to, but there's no question that on  
10 occasion they do that. But I think the more fundamental point  
11 here is that the message that they are conveying is that the  
12 elephants are being treated in a very healthy and humane way  
13 when in point of fact the animals are being treated, the  
14 elephants are being treated in a very unhealthy and very  
15 inhumane way if you accept our theory of Section 9 and 10 of  
16 the Endangered Species Act.

17 JUDGE GARLAND: Okay. Thanks.

18 JUDGE TATEL: Thank you.

19 MR. PHILLIPS: Thank you, Your Honor.

20 ORAL ARGUMENT OF JOHN M. SIMPSON, ESQ.

21 ON BEHALF OF THE APPELLEES

22 MR. SIMPSON: May it please the Court, John Simpson  
23 for Feld Entertainment.

24 I'd just like to follow up, Judge Tatel, on what you  
25 mentioned with respect to affidavits, and that is this is not

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1 based on affidavits. This case was tried in its entirety in a  
2 bench trial to the trial court, and it's the only case I'm  
3 aware of in my career in which the Article 3 issues of  
4 standing, and the facts related thereto went to trial with the  
5 entire lawsuit. Both parties rested, both parties submitted  
6 this case to the Court for a decision. So, this judge was in  
7 a particularly unique situation in that he had before him not  
8 only a full evidentiary record based on live testimony at  
9 trial with respect to the Article 3 issues, but also with  
10 respect to the merits itself.

11 JUDGE TATEL: So, is it your theory that no advocacy  
12 organization, and that is an organization whose entire  
13 function is public education and advocacy, as opposed to  
14 providing, you know, a specific service, like counseling, is  
15 it your position that an organization like that can never have  
16 Havens standing?

17 MR. SIMPSON: I think in this situation that's true.

18 JUDGE TATEL: No, no, no. I'm not asking you in  
19 this situation.

20 MR. SIMPSON: I'm thinking that, in the situation of  
21 your question I think that's true. I think unless the  
22 Plaintiff organization can demonstrate that the Defendants'  
23 conduct actually affects something they're doing --

24 JUDGE TATEL: Well, suppose they --

25 MR. SIMPSON: -- makes it harder to advocate --

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1 JUDGE TATEL: Well, but suppose -- that's my  
2 question. Right. It makes it harder to advocate.

3 MR. SIMPSON: It makes it --

4 JUDGE TATEL: Suppose they can actually show that.  
5 Suppose, for example, look, suppose for example you've got an  
6 organization that's devoted to opposing nuclear power, right,  
7 and they're interested in -- they're opposing nuclear power  
8 plants, they're opposing nuclear weapons, everything, okay?  
9 And a power plant builds, decides to build a new facility and  
10 to launch a \$50 million public education program to convince  
11 the public that it's safe, right? And they sue, and they say  
12 look, we've had to reallocate all of our money to countering  
13 that public education program. And not only that we have a  
14 witness who says that as a result of the Defendant's public  
15 education program the public now, the latest polls shows that  
16 the public now, 75 percent of the public now thinks they're  
17 safe, whereas before the Defendant's public education it was  
18 only 50 percent. So, they've actually shown that the  
19 Defendant has affected what the public thinks, made the public  
20 think that they're safer, and they're countering that with a  
21 much more extensive public education program. Now, would they  
22 have standing?

23 MR. SIMPSON: I don't think they would. And --

24 JUDGE TATEL: No?

25 MR. SIMPSON: -- let me explain why.



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1 JUDGE TATEL: Yes, why?

2 MR. SIMPSON: Because that's nothing more than pure  
3 issue advocacy.

4 JUDGE TATEL: Yes.

5 MR. SIMPSON: You have a point of view about a  
6 specific social issue, and you spend your resources making  
7 that point of view known.

8 JUDGE TATEL: No, but if they're trying to counter a  
9 direct impact created by the Defendant why doesn't that fall  
10 directly under our case law?

11 MR. SIMPSON: Because your case law --

12 JUDGE TATEL: I mean, why isn't that --

13 MR. SIMPSON: -- for example, in --

14 JUDGE TATEL: -- just like Spann? Spann says that,  
15 Spann says that you can engage in public education to counter  
16 the public impression given by the Defendant's housing act.

17 MR. SIMPSON: And I think that's the difference, is  
18 that's a case that's based on the dissemination of illegal  
19 information, i.e. the availability of housing. Section 804(d)  
20 under the Fair Housing Act case, which prohibits --

21 JUDGE TATEL: Yes, but we have to assume for  
22 purposes of standing that the Plaintiffs were right that the  
23 Defendants' treatment of elephants is in fact unlawful.

24 MR. SIMPSON: That's true. In the section of the  
25 statute that they've invoked, Section 9, says nothing about

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1 the dissemination of information about the elephants. And Ms.  
2 Paquette never testified, there's not one single word in her  
3 testimony that API spends a single nickel --

4 JUDGE TATEL: No, no, no. But, yes, I understand  
5 that. That's why I was asking you a hypothetical.

6 MR. SIMPSON: But your hypothetical includes --

7 JUDGE TATEL: Yes.

8 MR. SIMPSON: -- the concept of responding to what  
9 the nuclear industry is saying about the safety of its plants.

10 JUDGE TATEL: Yes.

11 MR. SIMPSON: There's no testimony in this case --

12 JUDGE TATEL: Yes, that's why I called it a  
13 hypothetical.

14 MR. SIMPSON: -- that API -- but there's not  
15 testimony --

16 JUDGE TATEL: Right? It's not this case, that's why  
17 I called it a hypothetical.

18 MR. SIMPSON: Right. But there's no --

19 JUDGE TATEL: My question, though, is,  
20 hypothetically, I mean, I realize you say in this case there  
21 isn't a public education campaign, and there's no evidence  
22 connecting their behavior to the public perception, but I'm  
23 trying to understand your basic position. Is it that even if  
24 there was such evidence there would be no standing?

25 MR. SIMPSON: That's correct. I don't think that's

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1 any different than Sierra Club, any different than this  
2 Court's decision in National Tax Payer Union, any different  
3 than this Court's decision in Center for Law and Education.  
4 All three of those cases, except for Sierra Club, but the two  
5 lower court cases involve --

6 JUDGE TATEL: So, Spann is wrong?

7 MR. SIMPSON: No, Spann is correct, because in Spann  
8 the organization ministered to a constituency of people who  
9 were affected by the housing discrimination. And Spann falls  
10 into the same fact pattern as Havens Realty, and Fair  
11 Employment Council, and Abigail Alliance, and Action for  
12 Senior Alliance, and the Court's recent decision in Equal  
13 Rights Center in that they had a program ongoing that was  
14 actively interfered with.

15 JUDGE TATEL: Yes, but so many of the things in  
16 those cases could also be called public education advocacy. I  
17 mean, it's a tough line to draw. I guess I'm trying to figure  
18 out why you would draw the line there. And again, it's just  
19 hypothetical. I don't see why you draw the line there,  
20 particular since it's so difficult to draw. I mean, in Spann  
21 many of their activities were very similar to what's going on  
22 here.

23 MR. SIMPSON: Except in --

24 JUDGE TATEL: At least what they claim they're  
25 trying to do.

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1 MR. SIMPSON: -- Spann there was an active program  
2 of counseling and referral --

3 JUDGE TATEL: Right.

4 MR. SIMPSON: -- that they allege was interfered  
5 with.

6 JUDGE TATEL: Yes.

7 MR. SIMPSON: And this, the Plaintiff in this case  
8 never testified to any such interference with its advocacy.

9 JUDGE TATEL: Yes.

10 MR. SIMPSON: In fact, Feld Entertainment gives it  
11 something to advocate about. If anything, there's no injury  
12 in fact because Feld Entertainment continues to do what they  
13 oppose. And the more important point, not only is there --

14 JUDGE TATEL: Yes.

15 MR. SIMPSON: -- no injury in fact, but the specific  
16 remedy that she testified, or they ultimately sought from  
17 Judge Sullivan, which was very narrow from what they pleaded,  
18 which is we want a declaratory judgment that use of the guide  
19 and use of tethers to present elephants in the circus is a  
20 take. There's no testimony whatsoever by Ms. Paquette that  
21 that remedy would have one, would cause them to spend one  
22 nickel less on their circus campaign. So, we think not only  
23 did they not prove it from an injury in fact standpoint, they  
24 didn't prove the redressability point. And at this point in  
25 the case, as Justice Scalia made clear in Lujan, the Plaintiff

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1 has an obligation to prove all elements of standing with the  
2 same proof that you have to prove your main case, and they  
3 didn't do that. It's that simple.

4           There are a lot of fine points here about  
5 organizational standing. We think these fair housing cases,  
6 every single one of them is distinguishable on the ground that  
7 there was an organization that had an ongoing program of  
8 referral and counseling, they may have also had an educational  
9 aspect to that, but not one of those cases is based solely on  
10 the concept that spending money to advocate your position  
11 gives you injury in fact to sue whoever you're advocating  
12 against. Because if that were the case all you'd have to do  
13 is spend 97 cents on a bumper sticker, put it on the back of  
14 your car and you could sue whoever your bumper sticker  
15 opposes. That's essentially where this would lead, and we  
16 think that stretches Article 3 beyond its limits, beyond the  
17 limit that any court has ever accepted.

18           JUDGE TATEL: You want to say something about  
19 informational standing? What's your best argument about why  
20 that (indiscernible)?

21           MR. SIMPSON: On informational injury, Your Honor,  
22 we don't think it even -- the statute they've invoked imposes  
23 no obligation on Feld Entertainment to provide any information  
24 of any kind, even if they win this case just from start to  
25 finish that everything we do is a take. There's nothing in

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1 Section 9 that obligates Feld Entertainment to provide them  
2 with any information.

3 JUDGE TATEL: You mean, is that because your client  
4 may decide not to file an application?

5 MR. SIMPSON: Whether we do or not it's not an  
6 obligation. Unlike Akins, unlike --

7 JUDGE TATEL: No, but if you do won't they be  
8 entitled to all the information in the application?

9 MR. SIMPSON: If the Fish and Wildlife Service  
10 decides to implement such a proceeding.

11 JUDGE TATEL: No. I thought their point was is that  
12 under the statute the application, all the information in the  
13 application is public.

14 MR. SIMPSON: It is public, but you still have to  
15 have such a proceeding. And the record in this case  
16 demonstrates --

17 JUDGE TATEL: No, you mean -- oh, you mean so it's  
18 not public unless the agency decides to have a proceeding  
19 about it?

20 MR. SIMPSON: That's correct, and that's illustrated  
21 by Judge Garland's opinion in Gerber v. Norton. What happens  
22 is if a private party submits a permit application the Fish  
23 and Wildlife Service has to decide to have a proceeding. And  
24 what happens is they publish a notice in the Federal  
25 Register --

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1 JUDGE TATEL: Yes.

2 MR. SIMPSON: -- they invite comments, and they  
3 state --

4 JUDGE TATEL: I see.

5 MR. SIMPSON: -- that the application is available  
6 from the Fish and Wildlife Service.

7 JUDGE TATEL: So, two things have to happen, one,  
8 the Defendant has to agree to file an application; and number  
9 two, the agency has to have a hearing?

10 MR. SIMPSON: That's correct.

11 JUDGE TATEL: Yes, I see.

12 MR. SIMPSON: And they don't have any proof --

13 JUDGE TATEL: Yes.

14 MR. SIMPSON: -- that the agency would actually  
15 conduct this proceeding. And we actually have evidence in  
16 this trial record, it was testified to by Mr. Zuwalski  
17 (phonetic sp.) that in 1975 the company applied for a permit  
18 and was told by the agency you don't need one.

19 JUDGE GARLAND: Maybe I'm not sufficiently familiar  
20 with Judge Garland's opinion in the Gerber case. I thought  
21 the idea is assume for the moment that you lose this case, and  
22 that if you want to continue using the elephants in the way  
23 you do you have to get a permit, okay? You have to have a  
24 permit, right? Because it's a take, correct?

25 MR. SIMPSON: I would not accept that, but I were

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1 only to assume that --

2 JUDGE GARLAND: Assuming you lose the case --

3 MR. SIMPSON: Yes.

4 JUDGE GARLAND: -- and I know you don't accept that  
5 you're --

6 MR. SIMPSON: Yes.

7 JUDGE GARLAND: -- going to lose the case, I got  
8 that point, but --

9 JUDGE TATEL: You don't like hypotheticals, do you?

10 JUDGE GARLAND: -- I think you're opposing counsel  
11 is correct that for purposes of standing we have to assume you  
12 lose the case on the merits. So, going forward from that  
13 point of view, if you do have to have a permit then doesn't  
14 the Secretary always have to publish a notice of the  
15 application for a permit?

16 MR. SIMPSON: If he decides to conduct a permit  
17 proceeding.

18 JUDGE GARLAND: As compared to what? Giving you a  
19 permit without a proceeding?

20 MR. SIMPSON: No, as opposed to telling the  
21 applicant you don't need to do this.

22 JUDGE GARLAND: If we say you do need to do this are  
23 you saying that the secretary can say I don't care what the  
24 circuit says, we don't have to?

25 MR. SIMPSON: No, I don't think so. I think,



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1 again --

2 JUDGE GARLAND: What are you saying?

3 MR. SIMPSON: -- you get back to the point that we  
4 tried this case, it's a factual part of their redressability,  
5 it was incumbent upon them to get that information out of some  
6 witness, either my clients, or --

7 JUDGE GARLAND: No, no.

8 JUDGE TATEL: What information?

9 MR. SIMPSON: -- out of the Fish and Wildlife  
10 Service.

11 JUDGE GARLAND: I'm trying to be hypothetical here,  
12 just like Judge Tatel. Let me be hypothetical just for the  
13 moment. Assume you lose the case on the merits and you have  
14 to have a permit in order to continue treating the elephants  
15 the way that you do, okay? You with me so far?

16 MR. SIMPSON: Yes.

17 JUDGE GARLAND: Okay. If you want to treat the  
18 elephants the way that you are then you have to apply for a  
19 permit, and when you do doesn't the agency have to publish  
20 notice?

21 MR. SIMPSON: If they decide to do that. They're  
22 not compelled to do that, and there's no evidence that they're  
23 compelled to do that.

24 JUDGE GARLAND: If they don't do that can they give  
25 you a permit?

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1 MR. SIMPSON: I think they could not give a permit  
2 without doing it.

3 JUDGE GARLAND: Right.

4 MR. SIMPSON: On the other hand they could do what  
5 they did in '75, which is to say you don't need one.

6 JUDGE GARLAND: Okay. Let me add an additional  
7 hypothetical. Let us hold on the merits that you do need one,  
8 okay? Now, we've just held on the merits you need a permit.  
9 Under those circumstances when you apply doesn't the  
10 information become public?

11 MR. SIMPSON: If you apply, and if they actually  
12 conduct a proceeding it would become public. Yes.

13 JUDGE GARLAND: If they don't conduct a proceeding  
14 you don't get the permit, correct?

15 MR. SIMPSON: It depends on how they interpret the  
16 Court's decision. That's one of the problems with --

17 JUDGE GARLAND: We'll be really clear in the  
18 opinion. We'll say you must grant a permit, you must have a  
19 permit to conduct this kind of activity, okay? Under those  
20 circumstances it's not up to them whether to have a proceeding  
21 or not, they have to have a proceeding if you're going to get  
22 a permit. The alternative is you get no permit, right?

23 MR. SIMPSON: The permit under Section 10 can only  
24 be issued pursuant to Section 10, which requires the notice  
25 and comment --

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1 JUDGE GARLAND: The proceeding, right.

2 MR. SIMPSON: -- if they decide to have it, they  
3 could dispense with it for good cause.

4 JUDGE GARLAND: What would be the good cause that --

5 MR. SIMPSON: I'm not saying that would applicable  
6 here.

7 JUDGE GARLAND: Yes.

8 MR. SIMPSON: But my basic point is this is a fact  
9 question. It doesn't follow as a matter of law from that  
10 statute that the Court's declaratory judgment will lead to a  
11 permit proceeding by the Fish and Wildlife Service --

12 JUDGE GARLAND: But there's only two choices, either  
13 you get a permit, or you don't continue the behavior.

14 MR. SIMPSON: Or you present the circus with the  
15 other elephants that already have a permit, which is what  
16 Judge Sullivan found.

17 JUDGE GARLAND: But it's at least those -- I see.  
18 So, but at least those elephants -- so those elephants you  
19 wouldn't be able to continue treating the way -- well --

20 MR. SIMPSON: Well, no, because --

21 JUDGE GARLAND: And I guess I've got to add to my  
22 hypothetical. Imagine on the merits the Court were also to  
23 hold that they're entitled to force the regulations  
24 requirement of humane treatment, and imagine on the merits the  
25 Court were also to hold that it's not humane to use these two

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1 devices. You couldn't do any of, none of the elephants you  
2 have with or without permits could then be used.

3 MR. SIMPSON: If that's what the ultimate ruling of  
4 the Court were that's --

5 JUDGE GARLAND: Right.

6 MR. SIMPSON: -- what we would be faced with.

7 But --

8 JUDGE GARLAND: Right.

9 MR. SIMPSON: -- my point here is you have a party  
10 who still has a decision to make who's not a party to the  
11 Court, and unless there's --

12 JUDGE TATEL: Who's that?

13 MR. SIMPSON: The Fish and Wildlife Service. And  
14 unless they decide to acquiesce in the decision then none of  
15 this stands up.

16 JUDGE GARLAND: You mean unless they decide to  
17 acquiesce in our decision.

18 MR. SIMPSON: In your decision. But that's the  
19 whole point.

20 JUDGE GARLAND: Do you know any case in which a  
21 court has held that there's no standing because United States  
22 government may refuse to follow the orders of the court?

23 MR. SIMPSON: I think that was implicitly the issue  
24 ultimately in Evans v. Utah, and Franklin v. Massachusetts,  
25 those two census cases. When they got to the Supreme Court

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1 standing was contested, but the redressability ultimately came  
2 through a concession from the Solicitor General that the  
3 federal government will abide by --

4 JUDGE GARLAND: That was the President, right? This  
5 is an issue about whether the President could be forced by the  
6 court.

7 MR. SIMPSON: No, it was the under-counting in the  
8 census, and the state lost a representative.

9 JUDGE GARLAND: Yes, but the question was the  
10 President had to in the end approve, and there was a serious  
11 issue about whether the court had authority over the  
12 President. We don't have that here.

13 MR. SIMPSON: No. It's --

14 JUDGE TATEL: So --

15 MR. SIMPSON: -- a different scenario, but you still  
16 have a factual component to the concept of redressability.

17 JUDGE TATEL: Let me add to --

18 MR. SIMPSON: And if the federal government doesn't  
19 acquiesce in that --

20 JUDGE TATEL: I'd like to add to Judge Garland's  
21 hypothetical. Suppose we don't agree with you that the agency  
22 lacks, that the agency has a discretion once we rule not to  
23 proceed, not to go ahead, what's the basis then for no  
24 informational standing?

25 MR. SIMPSON: The basis is that they never proved

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1 that they were deprived of information to begin with. The  
2 witness they put on the stand talked about what they hoped to  
3 get, how they would use it, but she never actually said at the  
4 time this lawsuit was filed we are deprived of information as  
5 a matter of fact. There's no a single piece of testimony on  
6 that. And not only did she fail to testify to it, on cross-  
7 examination it was brought out that every single piece of  
8 information that that permit proceeding would yield they  
9 already had, or got one way or the other through this case.  
10 So, despite all the legal back and forth about whether they  
11 have informational standing or not they failed to prove it as  
12 a matter of fact.

13 And I would point out that Ms. Paquette was not the last  
14 witness who testified at trial for the Plaintiff, she  
15 testified on February 19th, that same day Judge Sullivan  
16 ordered the parties to brief organizational standing because  
17 they evidently had a serious issue about it. We did so. They  
18 didn't rest for five more days. They could have come back and  
19 recalled this witness, they could have called other witnesses,  
20 they didn't shore up any of the facts that they needed to  
21 establish either the organizational or informational theories  
22 that they pursued. Thank you.

23 JUDGE TATEL: Thank you. Does Mr. Phillips have any  
24 time left?

25 THE CLERK: No, he's out.

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1 JUDGE TATEL: No. You can take two minutes if you'd  
2 like it.

3 MR. PHILLIPS: Thank you, Judge Tatel.

4 JUDGE TATEL: Yes. Sure.

5 ORAL ARGUMENT OF CARTER G. PHILLIPS, ESQ.

6 ON BEHALF OF THE APPELLANTS

7 MR. PHILLIPS: I want to focus on the informational  
8 standing point, which seemed to --

9 JUDGE TATEL: Yes. Good idea.

10 MR. PHILLIPS: -- interest the Court. I mean --

11 JUDGE TATEL: Right.

12 MR. PHILLIPS: -- I don't think there is any way  
13 candidly to read this statute, which is 9(c), which says the  
14 Secretary shall publish notice, notice of any such waiver  
15 shall be published by the Secretary, and information received  
16 by the Secretary as part of any application shall be available  
17 to the public, that's in the addendum to the blue brief at  
18 pages 13 and 14. So, there's no question about --

19 JUDGE TATEL: Yes.

20 MR. PHILLIPS: -- redressability here, if in fact  
21 this is a violation of Section 9, and they testified, and, I  
22 mean, their own testimony made this clear, the general counsel  
23 said we, one, when we have to get a permit we get a permit.  
24 And so, if this Court were to conclude that a permit is  
25 required under these circumstances there will be a filing,

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1 that filing will be available. And with respect to the proof  
2 here, again, Ms. Paquette specifically testified that they  
3 spend tens of thousands of dollars every year trying to get  
4 access to information about precisely the, about the conduct  
5 that FEI undertakes. And so, there's no question that we're  
6 not getting that information, otherwise why would we be  
7 spending money in order to obtain that from independent  
8 sources.

9 JUDGE TATEL: What about Mr. Simpson's last point,  
10 that the evidence shows that in fact you have all the  
11 information?

12 MR. PHILLIPS: Well, we have all the information in  
13 the past, but this is an ongoing responsibility and duty,  
14 and --

15 JUDGE TATEL: Yes.

16 MR. PHILLIPS: -- this is like FACA, this is not  
17 like FOIA where you say there's a specific document, give me  
18 that specific document, and if you have the document some  
19 other way it moves the case. This is like FACA where you have  
20 an ongoing obligation to provide this permitting information  
21 to tell us what takes you are engaged in, and seek, and  
22 seeking approval for or permission for, and under those  
23 circumstances you have to provide specific information.

24 One last point, Judge Tatel --

25 JUDGE TATEL: So, the thing that could also decide



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1 if they lose here or not to file an application, right?

2 MR. PHILLIPS: They can decide not to file an  
3 application, but then there has been a clear violation of the  
4 statute.

5 JUDGE TATEL: Well, no, they just couldn't use the  
6 elephants any more, right? I mean, they could decide they're  
7 just not going to contest this, and then stop --

8 MR. PHILLIPS: Right. Well, right, I mean --

9 JUDGE TATEL: -- switch to giraffes, or something.

10 MR. PHILLIPS: Well, they could do that, or just,  
11 yes, stop the take.

12 JUDGE TATEL: Right.

13 MR. PHILLIPS: But of course, under this Court's  
14 decision in Brock either way we win. Obviously, by  
15 eliminating the take, obviously, then we will have satisfied  
16 our need, our injury --

17 JUDGE TATEL: But you won't have gotten the  
18 information.

19 MR. PHILLIPS: -- based on the take.

20 JUDGE TATEL: But if your standing is based on the  
21 lack of information, if you're seeking information you  
22 wouldn't have gotten the information, right?

23 MR. PHILLIPS: Right. But our standing is also  
24 based on the resources that we have to allocate to obtain the  
25 information.

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1 JUDGE TATEL: No, no. Suppose you lose on that.

2 MR. PHILLIPS: No, no. But there are two sources of  
3 resource allocation here --

4 JUDGE TATEL: Yes.

5 MR. PHILLIPS: -- Judge Tadel. The one is --

6 JUDGE TATEL: I see, you mean the resources --

7 MR. PHILLIPS: -- in general, but the other one is  
8 for the specific information.

9 JUDGE TATEL: I see.

10 MR. PHILLIPS: And for that one it seems to me  
11 quite --

12 JUDGE TATEL: I see.

13 MR. PHILLIPS: -- clear that we've got an injury  
14 there, and --

15 JUDGE TATEL: I see.

16 MR. PHILLIPS: -- that's a factual injury that the  
17 District Court did not reject.

18 JUDGE TATEL: I see. Okay.

19 MR. PHILLIPS: One last point I want to make --

20 JUDGE TATEL: Sure.

21 MR. PHILLIPS: -- is that, you know, the Defendant  
22 specifically said that if we spent the money voluntarily to  
23 provide medical care for the elephants that that would provide  
24 us with standing. It seems to me all we're doing here is what  
25 we can't -- you know, is to accomplish exactly the same thing.

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1 The purpose of this is not to educate the public, the purpose  
2 of this is to protect the elephants, and the only way that an  
3 advocacy group can and satisfy the particularized requirements  
4 of Article 3 standing and that's by spending the resources to  
5 try to combat, to uncover and combat the illegal actions of  
6 the Defendant in this case.

7 JUDGE TATEL: Okay.

8 MR. PHILLIPS: Thank you, Your Honor.

9 JUDGE TATEL: Thank you. Gentlemen, thank you very  
10 much. The case is submitted.

11 (Recess.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



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Paula Underwood

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September 17, 2011

DEPOSITION SERVICES, INC.