[ORAL ARGUMENT NOT YET SCHEDULED]
No. 15-5199

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES ASSOCIATION OF REPTILE KEEPERS, INC., ET AL.,
Plaintiffs/Appellees

v.

SALLY JEWELL, THE HONORABLE, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE INTERIOR AND UNITED STATES FISH AND WILDLIFE SERVICE,
Defendants/Appellants,

and

THE HUMANE SOCIETY OF THE UNITED STATES AND
CENTER FOR BIOLOGICAL DIVERSITY,
Defendant-Intervenors/Appellees.

On Appeal from the United States District Court
for the District of Columbia

OPENING BRIEF OF DEFENDANT-INTERVENORS/APPELLEES THE HUMANE SOCIETY OF THE UNITED STATES AND CENTER FOR BIOLOGICAL DIVERSITY

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CERTIFICATE OF INTERESTED PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

Pursuant to Circuit Rule 28(a)(1)(A), the undersigned, on behalf of The Humane Society of the United States and the Center for Biological Diversity, hereby states that all parties, intervenors, and amici appearing before the district court and this Court are listed in the Opening Brief of the Federal Appellants.

Ruling Under Review

Pursuant to Circuit Rule 28(a)(1)(B), the undersigned further states that this case challenges the decision of the U.S. Fish and Wildlife Service ("Service") to limit the importation and interstate transportation of eight invasive giant constrictor snake species by listing them as "injurious" under the Lacey Act, 18 U.S.C. § 42(a)(1). *See* 77 Fed. Reg. 3330 (Jan. 23, 2012) (listing four species); 80 Fed. Reg. 12,702 (Mar. 10, 2015) (listing four more species); 50 C.F.R. § 16.15(a).

Plaintiffs/Appellees USARK has challenged these two listing decisions in the District Court for the District of Columbia. The ruling under review is the district court's decision to grant in part USARK's motion for a preliminary injunction on the 2015 Rule. *U.S. Ass'n of Reptile Keepers v. Jewell*, No. 13-2007, 2015 U.S. Dist. LEXIS 65351 (D.D.C. May 19, 2015) (Hon. Randolph D. Moss) (ECF No. 60) ("District Court Opinion Dated May 19, 2015"); *U.S. Ass'n of*

Reptile Keepers v. Jewell, No. 13-2007, 2015 U.S. Dist. LEXIS 61839 (D.D.C. May 12, 2015) (Hon. Randolph D. Moss) (ECF No. 52) ("District Court Opinion Dated May 12, 2015"). Specifically, the district court enjoined the Service from:

> [I]mplementing, enforcing, or otherwise giving effect to the [2015 Rule] (1) with respect to transportation by any Plaintiff or member of Plaintiff United States Association of Reptile Keepers ("USARK") of the reticulated python and/or green anaconda between any two States within the continental United States other than Texas and Florida, and (2) with respect to transportation by a Plaintiff or member of USARK of the reticulated python and/or green anaconda from either Texas or Florida to any State within the continental United States other than Texas and Florida.

District Court Order Dated May 19, 2015 at 1-2 (ECF No. 61). The injunction leaves in place the 2015 Rule's prohibition on transporting the listed snakes into Texas and Florida, as well as the prohibition on importing them into the United States. *Id*.

Related Cases

Pursuant to Circuit Rule 28(a)(1)(C), the undersigned further states that The Humane Society of the United States and the Center for Biological Diversity are not aware of any other cases challenging the Service's decision to limit the importation and interstate transportation of invasive giant constrictor snakes by listing them as "injurious" under the Lacey Act.

Respectfully submitted this 9th day of December 2015,

/s/ Collette L. Adkins

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Intervenors/Appellees certify as follows: The Humane Society of the United States is a non-profit corporation under the laws of the District of Columbia, registered with the Internal Revenue Service as a 501(c)(3) organization. The Center for Biological Diversity is a non-profit corporation under the laws of California, registered with the Internal Revenue Service as a 501(c)(3) organization. These organizations do not have stock, nor do they have parent companies, subsidiaries, or affiliates that have issued shares to the public.

Respectfully submitted this 9th day of December 2015,

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2015 Rule	80 Fed. Reg. 12,702 (Mar. 10, 2015)
AD	Addendum to Opening Brief of Defendant-Intervenors/Appellees The Humane Society of the United States and the Center for Biological Diversity
HSUS	Defendant-Intervenors/Appellees The Humane Society of the United States and the Center for Biological Diversity
Service	Defendant/Appellants Sally Jewell, The Honorable, in her official capacity as the Secretary of the Interior and United States Fish and Wildlife Service
USARK	United States Association of Reptile Keepers, Inc., Benjamin Renick, Matthew Edmonds, Raul Eduardo Diaz, Jr., and Caroline Seitz

STATEMENT OF JURISDICTION

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1291. USARK has alleged that the district court has subject matter jurisdiction over its Second Amended Complaint pursuant to the Administrative Procedure Act, 5 U.S.C. § 702; Small Business Regulatory Enforcement and Fairness Act, 5 U.S.C. § 611; and the Declaratory Judgment Act, 28 U.S.C. § 2201. The Humane Society of the United States and the Center for Biological Diversity (together, "HSUS") were granted intervention as of right by the district court, having also demonstrated Article III standing through the declarations of Christina Celano, Stuart Pimm, Nicole Paquette, and Noah Greenwald, set forth in the Addendum ("AD"). ECF No. 68 (granting intervention). The district court granted in part USARK's motion for a preliminary injunction on May 12, 2015, and clarified the scope of relief in an opinion and order dated May 19, 2015. ECF Nos. 52, 60-61. The U.S. Fish and Wildlife Service ("Service") filed a timely notice of appeal on July 17, 2015. ECF No. 71.

STATEMENT OF THE ISSUES

1. Given that the plain language and legislative history of the Lacey Act show that Congress intended the Act to prohibit transportation of injurious wildlife over state lines, does USARK have a likelihood of success on the merits on their statutory construction claim?

2. Do uncertain, recoverable, and minor economic losses to USARK constitute the irreparable harm necessary to justify preliminary injunctive relief?

3. Given the ecological damage and other harm to the public interest caused by invasive giant constrictor snakes, does the balance of the equities tip in favor of preserving USARK's interstate sales of these snakes during the litigation?

STATUTES AND REGULATIONS

The separately-bound Addendum presents any pertinent statutory and regulatory provisions or legislative history not already contained in the Addendum to the Opening Brief of the Federal Appellants, as well as the declarations of Christina Celano, Nicole Paquette, Noah Greenwald, and Stuart Pimm.

STATEMENT OF THE CASE

The Giant Constrictor Snake Trade

Constrictor snakes are among the largest snakes in the world, with some exceeding 20 feet in length, and they kill their prey – which can include humans – by powerfully squeezing them and obstructing blood flow. These snakes can survive in a wide-range of habitats and temperatures. Constrictor snakes are predators that eat a variety of small to large mammals, birds, and other reptiles and hunt both on the ground and in trees. They grow rapidly and can produce hundreds of offspring over their lifetime of a decade or more. For example, the reticulated python, one of the species at issue in the 2015 Rule, can produce 124 eggs in a

single clutch. Paquette Decl. ¶ 14 (AD24). The green anaconda, another species at issue in the 2015 Rule, gives birth to live young, and a single female is capable of producing multiple offspring without even mating with another snake.[1]

The importation and interstate trade of these non-native, giant constrictor snakes have well-established, major risks. Indeed, the district court acknowledged that the Service's "showing of potential environmental harm is serious and credible." *U.S. Ass'n of Reptile Keepers v. Jewell*, No. 13-2007, 2015 U.S. Dist. LEXIS 61839 (D.D.C. May 12, 2015) (District Court Opinion Dated May 12, 2015 at 45). Constrictor snakes kept as pets are often released into the wild when they grow to unmanageable lengths (as it is exceedingly difficult to humanely provide for their specialized needs in captivity). Paquette Decl. ¶¶ 11-12 (AD23). When these top predators are introduced into new ecosystems, they have the power to decimate native wildlife (from raccoons to bobcats), which have not evolved to evade these nonnative snakes. *See* 75 Fed. Reg. 11,808, 11,816 (Mar. 12, 2010); Paquette Decl. ¶ 13 (AD23); Greenwald Decl. ¶ 8, Ex. B (AD148, AD156-57).

[1] Robert N. Reed & Gordon H. Rodda, *Giant Constrictors: Biological and Management Profiles and an Establishment Risk Assessment for Nine Large Species of Pythons, Anacondas, and the Boa Constrictor* 226 (2009), http://pubs.usgs.gov/of/2009/1202/pdf/OF09-1202.pdf; Carly Sharec, *North Georgia Zoo Officials Believe Anaconda Had Baby Snake Without Mate*, Gainesville Times, Feb. 10, 2015, http://www.gainesvilletimes.com/archives/107791/.

For example, after a decade of colonization, pythons in the Everglades have caused as much as 99 percent population declines of the area's small and medium sized mammals. Greenwald Decl. ¶ 8, Ex. B (AD148, AD156-57). Once these invaders are established, "[e]radication will almost certainly be unachievable" and efforts to remove the snakes from local ecosystems are unduly burdensome on state and federal wildlife agency budgets. 80 Fed. Reg. 12,702, 12,715 (Mar. 10, 2015) ("2015 Rule") (noting that "USGS, in conjunction with the University of Florida, has spent over $1.5 million on research, radio telemetry, and the development, testing, and implementation of constrictor snake traps").

Not only do these snakes cause environmental harm, they impact humans too. Snakes can carry salmonella and other pathogens that cause zoonotic diseases and are unsafe to maintain in residential areas. Paquette Decl. ¶ 17 (AD25). Moreover, seventeen people have died from incidents involving large constrictor snakes in the United States since 1978. Paquette Decl. ¶ 17 (AD25). In addition, reticulated pythons carry ticks that can transmit diseases to livestock and wild hoofed animals. District Court Opinion Dated May 12, 2015 at 46.

Despite these clear risks, USARK expends substantial resources to promote the private ownership of snakes and to protect the profits of its members who breed and sell these dangerous snakes.

Legal Framework

The Lacey Act is the nation's oldest wildlife protection law, originally enacted in 1900. Lacey Act, ch. 553, 31 Stat. 187 (1900). The Lacey Act authorizes the Secretary of the Interior to prohibit the "importation into the United States . . . or any shipment between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States" of any wildlife that is "injurious to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States . . . ." 18 U.S.C. § 42(a)(1). In addition to providing such regulatory authority to the Service, Congress itself has statutorily designated several wildlife species as injurious, including mongoose, fruit bats, zebra mussels, and bighead carp. *Id*.

The Service has adopted regulations to implement this law, providing that importation or transportation of injurious wildlife is generally prohibited, subject to certain exceptions. 50 C.F.R. § 16.3. Permits to import and transport injurious wildlife can be issued for otherwise prohibited activities if they are for zoological, educational, medical, or scientific purposes. *Id*. § 16.22. Thus, a Lacey Act listing aims to eliminate the importation and interstate trade of injurious, invasive species for use as exotic pets or other commercial purposes, but it continues to allow justifiable uses of such species.

Pursuant to this authority, on March 12, 2010, the Service issued a Proposed Rule to add nine species of invasive giant constrictor snakes to the list of injurious wildlife under the Lacey Act. 75 Fed. Reg. 11,808. Finding that these species of snakes pose a significant risk of becoming established in the wild in the United States as invasive species, and potentially threatening native wildlife and costing the government millions of dollars to address, the rule proposed to prohibit the importation and interstate transportation of the Indian python (including Burmese python), reticulated python, Northern African python, Southern African python, boa constrictor, green anaconda, yellow anaconda, DeSchauensee's anaconda, and Beni anaconda.

On January 23, 2012, the Service took a first step and restricted trade in four of the nine species identified as injurious: Indian pythons (including Burmese pythons), Northern African pythons, Southern African pythons, and yellow anacondas. 77 Fed. Reg. 3330 (Jan. 23, 2012) (codified at 50 C.F.R. § 16.15) ("2012 Rule"). In June 2014, following the publication of additional scientific evidence of the risks giant constrictor snakes pose to native ecosystems, the Service reopened the comment period on the 2010 proposed rule and reviewed substantial input from experts and the public (including those, unlike USARK, who do not have a vested financial interest in unregulated trade). 79 Fed. Reg. 35,719 (June 24, 2014). Then on March 10, 2015, the Service issued a final rule listing

four more species of giant constrictor snakes as injurious – the reticulated python, DeSchauensee's anaconda, green anaconda, and Beni anaconda. 80 Fed. Reg. 12,702 (Mar. 10, 2015) ("2015 Rule"). However, the Service has not yet listed the boa constrictor as injurious.

The District Court Decision At Issue On Appeal

Through the present litigation, USARK has challenged both the 2012 and 2015 rules and sought preliminary injunctive relief to stall the implementation of the 2015 Rule (but not the 2012 Rule). The district court granted in part USARK's motion for a preliminary injunction and its decision on that motion is at issue in this appeal.

The district court held that there is a substantial likelihood that USARK will prevail on their statutory construction claim. District Court Opinion Dated May 12, 2015 at 6. The district court accepted USARK's argument that Congress intended to limit transportation of listed injurious species "only between all forty-nine continental states as a singular entity and the other listed jurisdictions (or between those jurisdictions), not within or between the continental states." *Id*. at 11. The district court rejected the Service's and HSUS's arguments that the plain language and legislative history of the Lacey Act show that Congress intended the Act to

prohibit interstate transportation of listed species.[2] *Id*. at 14-15. The district court also rejected arguments from the Service and HSUS that USARK failed to demonstrate irreparable harm and that the public interest would be furthered by keeping the 2015 Rule in place during the pendency of the litigation. *Id.* at 40-50.

The district court found that USARK's declarations "demonstrate that breeders who substantially rely on the listed species for their livelihoods are likely to suffer serious economic losses if the 2015 Rule takes effect." *Id*. at 43. The district court rejected arguments made by the Service and HSUS that the snake breeders' predictions about economic losses are too speculative or minor given that the 2015 Rule has no impacts on intrastate sales of listed species or sales of unlisted snakes. *Id*. at 43-44. Because any economic losses that the breeders might suffer could not be recovered from the Service due to sovereign immunity, the district court concluded those losses are "unrecoverable," but the district court did not consider whether the breeders could recoup those losses if they are ultimately successful in setting aside the 2015 Rule through this litigation. *Id*. at 43.

SUMMARY OF ARGUMENT

The Service listed eight species of giant, invasive constrictor snakes as injurious under the Lacey Act given the high risk of their release, likelihood of

[2] When USARK filed a Motion for a Temporary Restraining Order on April 1, 2015 (ECF No. 28), The Humane Society of the United States immediately moved for leave to file an amicus brief in opposition to the motion, which the district court granted (ECF No. 37).

establishing wild populations, and improbability of eradication. These snakes prey upon native wildlife – including endangered species – and compete with them for food and habitat, causing severe and permanent ecological damage. 80 Fed. Reg. at 12,715-19.

To protect the environment from these invasive snakes, the Service banned their importation into the United States, as well as their interstate transportation by commercial snake breeders. The district court preliminarily enjoined in part the Service's decision and that ruling is under review in this appeal.

Contrary to the district court's holding and the arguments made by USARK, the Service's decision is authorized by the Lacey Act. Analysis of the statutory language and legislative history of the Lacey Act, dating back to 1900, shows it has always prohibited interstate transportation of injurious species. Moreover, the current plain language of the Act shows that Congress intended to maintain the prohibition on interstate movement, as in previous versions of the Act. Therefore, the district court was wrong to hold that USARK had a likelihood of success on the merits of their statutory interpretation claim.

The district court also found that breeders of the listed snakes "are likely to suffer serious economic losses." District Court Opinion Dated May 12, 2015 at 43. But USARK did not prove – as the D.C. Circuit requires – that any such economic losses are certain, unrecoverable, and serious. The snake breeders also failed to

prove that their speculative private economic harm outweighs the devastating environmental threat posed by these dangerous invasive snakes.

For all these reasons and those explained below, the Court should reverse the district court's decision enjoining in part implementation of the 2015 Rule.

ARGUMENT

"A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014). The plaintiff must show "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id*. As explained below, the district court's decision to enjoin in part the Service's 2015 Rule must be reversed because USARK has not show that "all four factors, taken together, weigh in favor of the injunction." *Id*.

I. Because The Service's Reasonable Listing Decision Is Authorized By The Lacey Act, USARK Lacks A Likelihood Of Success On The Merits

In holding that USARK had a "likelihood of success on the merits," the district court misinterpreted the Lacey Act. The district court wrongly believed the Lacey Act did not address interstate transportation of injurious species prior to its 1960 amendments. But a careful analysis of the amendments shows the Lacey Act has prohibited interstate transportation of injurious species since its beginning,

when it was enacted more than a century ago. Moreover, the current plain language of the Act shows that Congress intended to maintain the prohibition on interstate movement, as in previous versions of the Act.[3]

A. Legislative History Shows That The Lacey Act Has Always Prohibited Interstate Transportation Of Injurious Wildlife

The district court rejected the Service's interpretation of the Lacey Act by finding that the prohibition on interstate movement did not exist prior to 1960, so if Congress intended such a prohibition, it would have had to originate with the 1960 amendments. And because the legislative history of the 1960 amendments made no mention of such a significant change in the Act, the district court concluded that Congress must not have intended to effect such a prohibition. Specifically, the district court stated that "[p]rior to the 1960 amendments, the Lacey Act . . . did not address [ ] domestic transportation" of listed species. District Court Opinion Dated May 12, 2015 at 15; *see also id*. at 16. And the district court's examination of the legislative history surrounding the 1960 amendments (correctly) revealed that Congress intended just minor changes through the 1960 amendments.[4] As

[3] To avoid repetition, the HSUS hereby endorses arguments made in the Opening Brief of Federal Appellants and incorporates them by reference under Federal Rules of Appellate Procedure 28(i). *See* Opening Br. of Federal Appellants at 14-45.

[4] *See* District Court Opinion Dated May 12, 2015 at 16 (explaining that "the prior version of the Lacey Act was broadened only 'a bit.'"); *id*. ("Other statements in the legislative history confirm that the language was not intended to dramatically expand the scope of conduct prohibited under the Lacey Act."); *id*. at 17 ("The

such, the district court concluded, "[i]t strains credulity to imagine that criminal legislation . . . would adopt a sweeping expansion of the conduct it prohibited through the (at best) obscure language at issue here . . . ." *Id*. at 18.

Yet "no sweeping expansion" occurred when Congress passed the 1960 amendments because the Lacey Act has always prohibited interstate transportation of injurious imported species. The language in the original 1900 enactment is clear:

> [I]t shall be unlawful for any person or persons to deliver to any common carrier, or for any common carrier to transport from one State or Territory to another State or Territory, or from the District of Columbia or Alaska to any State or Territory, or from any State or Territory to the District of Columbia to Alaska, any foreign animals or birds the importation of which is prohibited . . . .

§ 3, 31 Stat. 187, 188. In short, Section 3 the Lacey Act, as originally enacted, made it "unlawful for any person . . . to transport from one State or Territory to another State or Territory . . . any foreign animals or birds the importation of which is prohibited." *Id*.[5]

House Report described the legislation as 'clarifying certain provisions of the criminal code relating to the importation or shipment of injurious [animals],' and noted that the 'amendments [were] technical in nature . . . .'"); *id*. ("The purpose of the bill is to clarify and to make more inclusive . . . certain provisions of the Criminal Code.") (external citations omitted).

[5] Section 2 provided that the "importation of the mongoose . . . or such other birds or animals as the Secretary of Agriculture may from time to time declare injurious to the interest of agriculture or horticulture is hereby prohibited." § 2, 31 Stat. 187, 188 (1900). All subsequent versions of the Lacey Act, including the present-day version, also include a provision prohibiting the importation of injurious species. *See* Lacey Act, ch. 9, § 241, 35 Stat. 1134, 1137 (1909); Lacey Act, ch. 645, §

The first amendment, in 1909, preserved that key language with only minor, non-substantive changes. It provided as follows:

> It shall be unlawful for any person to deliver to any common carrier for transportation, or for any common carrier to transport from any State or Territory, or District of the United States, to any other State, Territory or District thereof, any foreign animals or birds, the importation of which is prohibited . . . .

Lacey Act, ch. 9, § 242, 35 Stat. 1134, 1137 (1909).

The next amendments occurred in 1935, and the Lacey Act continued to regulate the interstate movement of imported injurious species. In relevant part, the 1935 amendments provided:

> It shall be unlawful for any person . . . to ship, transport, or carry, by any means whatever, from any State, Territory, or the District of Columbia to, into, or through any other State, Territory, or the District of Columbia, or to a foreign country any wild animal or bird . . . imported from any foreign country contrary to the law of the United States . . . .

Lacey Act, ch. 261, § 242, 49 Stat. 378, 380 (1935) (AD1). The legislative history of the 1935 amendments provides no mention of an intent to alter the meaning of the statute. *See* H.R. Rep. No. 74-886, at 2 (1934) (ECF No. 31-1 at 5) (AD12) (explaining that the amendments serve to allow the Act to apply to present-day vehicles, provide for enforcement, and extend to foreign commerce).

42(a), 62 Stat. 683, 687 (1948); Lacey Act, Pub. L. No. 86-702, § 42, 74 Stat. 753 (1960); 18 U.S.C. § 42(a)(1).

This prohibition on interstate transportation of imported injurious species also remained substantively unaltered in the 1948 amendments, which provided criminal penalties to:

> Whoever delivers or knowingly receives for shipment, transportation, or carriage in *interstate* or foreign commerce, any wild animal or bird, or the dead body or part thereof, or the egg of any such bird imported from any foreign country, or captured, killed, taken, purchased, sold, or possessed contrary to any Act of Congress . . . .

Lacey Act, ch. 645, § 43, 62 Stat. 683, 687 (1948) (emphasis added). And again, the legislative history of the 1948 amendments provides no mention of an intent to alter the meaning of the statute. *See* H.R. Rep. No. 80-304, at A10 (1947) (Addendum to Federal Appellants' Opening Br., Vol. II at A90) (explaining that the "words 'interstate or foreign commerce' were substituted for the enumeration of geographical subdivisions of the United States" as well as "[o]ther changes [ ] in phraseology to effect the consolidation").

As such, the district court was wrong when it held that the Lacey Act did not address domestic transportation of injurious species prior to 1960. *See* District Court Opinion Dated May 12, 2015 at 15, 16. And the district court was therefore also wrong to conclude that the minor changes effected by the 1960 amendments meant that Congress did not intend to prohibit interstate transportation of injurious species. Indeed, the 1960 amendments merely continued the prohibition on domestic transportation of listed species found in previous versions of the Act.

Because the district court's myopic focus on the 1960 amendments led to a misinterpretation of the Lacey Act, the district court's decision must be reversed.

B. The Service's Interpretation Is Consistent With The Act's Plain Language

While the legislative history adds valuable information about Congressional intent, the most important consideration is what the Lacey Act says today. At issue is whether interstate movement is included in the prohibition on transportation of injurious species "between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States . . . ." 18 U.S.C. § 42(a)(1).

The best interpretation of that language is that Congress continued the prohibition on interstate movement, as in previous versions of the Act. That interpretation is supported by Congress's inclusion of the District of Columbia in that key language. If the "continental United States" is a "single, undifferentiated entity," as USARK argues and the district court held, the inclusion of the District of Columbia is odd because the District of Columbia is obviously within the continental United States. *See* District Court Opinion Dated May 12, 2015 at 14. Indeed, even the district court conceded that "the separate inclusion of the District of Columbia is baffling." *Id*.[6]

[6] Contrary to the district court's conclusion, the inclusion of Hawaii is not problematic under the Service's interpretation. By specifying the continental

Moreover, USARK's interpretation does not comport with Congress's placement of the disjunctive "or" at the end of the list. If Congress wanted to prohibit movement of injurious species between the continental United States (as one singular unit) *and* any of those other entities, it would have used "and" (instead of "or") and would have used that conjunction before its list of the other entities. Instead, Congress prohibited trade between the continental United States *or* those other entities, which is best read to include movement between any of the continental United States or those entities, as with previous versions of the Act.

For all these reasons, and those additional reasons stated in the Opening Brief of Federal Appellants, the Court should reverse the district court and hold that USARK is unlikely to succeed on the merits of its statutory interpretation claim.

II. Uncertain, Recoverable, And Minor Economic Losses To USARK Do Not Constitute Irreparable Harm; The Injunction Harms The Public Interest In Preventing Environmental Damage From The Invasive Snakes

As the party seeking to enjoin the 2015 Rule, USARK must prove that it would suffer irreparable harm from implementation of that rulemaking. USARK must also show that the public interest would be furthered by the injunction.

United States and Hawaii, rather than referring to the "States" more generally, Congress excludes Alaska, which makes sense given that Alaska's inhospitable climate reduces the threats posed by invasive species.

USARK has not met this burden and injunctive relief is therefore inappropriate here.

The D.C. Circuit "has set a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). "Such injury must be 'both certain and great,' 'actual and not theoretical,' 'beyond remediation,' and 'of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.'" *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (quoting *Chaplaincy of Full Gospel Churches*, 454 F.3d 290 at 297) (emphasis omitted).

"Where the injuries alleged are purely financial or economic, the barrier to proving irreparable injury is higher still, for it is 'well settled that economic loss does not, in and of itself, constitute irreparable harm.'" *Mexichem Specialty Resins, Inc.*, 787 F.3d at 555 (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Financial injury is only irreparable where no "adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation." *Mexichem Specialty Resins, Inc.*, 787 F.3d at 555. Injunctive relief may be appropriate when monetary loss threatens the very existence of the movant's business, *Wis. Gas Co.*, 758 F.2d at 674, or in some cases when the claimed economic loss is unrecoverable. *Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 53 (D.D.C. 2011). But "the mere fact that economic losses may be

unrecoverable does not, in and of itself, compel a finding of irreparable harm," *id*., for the harm must also be "more than simply irretrievable; it must also be *serious* in terms of its effect on the plaintiff." *Mylan Pharms. v. Shalala*, 81 F. Supp. 2d 30, 42 (D.D.C. 2000) (emphasis added).

Although the district court correctly dismissed the snake breeders' predictions that their monetary losses threaten the very existence of their businesses (District Court Opinion Dated May 12, 2015 at 44),[7] the district court departed from binding precedent when it enjoined the 2015 Rule after finding that the snake breeders' economic harm is "likely." District Court Opinion Dated May 12, 2015 at 43.

The district court did not find that USARK demonstrated "certain" harm, as the D.C. Circuit requires to justify injunctive relief. *See, e.g.*, *Mexichem Specialty Resins, Inc.*, 787 F.3d at 555; *Wis. Gas Co.*, 758 F.2d at 674. Claims about what plaintiffs "expect" to happen to their business, what customers are "likely" to do,

[7] USARK breeders are capable of adjusting their operations to account for the new regulatory landscape (as businesses routinely do), and the injurious listing would not prohibit breeders from continuing to sell the listed snakes internationally (for breeders with in-state ports) or intrastate or for scientific or educational purposes, or from continuing to sell other non-listed snakes (including boa constrictors, which are one of the most popular pet snakes). *See Nat'l Mining Ass'n*, 768 F. Supp. 2d at 50-52 (finding that the plaintiff failed to demonstrate irreparable harm where declarant mentioned his company's lost revenues and predicted that he "will be out of business within [eighteen] months" because the declaration failed to "offer a projection of anticipated future losses, tie that to an accounting of the company's current assets, or explain with any specificity how he arrived at the conclusion that he would be forced out of business in eighteen months").

or what "could" happen to the snake market, do not demonstrate certain or actual harm. *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 78-79 (D.D.C. 2013).

The record clearly shows that "some of the declarants who now allege significant risks to their businesses were able to survive implementation of the 2012 Rule, which, among other things, prohibited interstate transportation of the Burmese python." District Court Opinion Dated May 12, 2015 at 43-44. The fact that USARK breeders successfully dealt with the ban on popular and lucrative Burmese pythons (by shifting to unlisted species or to sales of the listed snakes that are unimpeded by the rule) highlights the uncertainty involved in predicting the economic impact of the 2015 Rule. *See Humane Soc'y of the United States v. Cavel Int'l, Inc.*, No. 07-5120, 2007 U.S. App. LEXIS 10785, at *7 (D.C. Cir. May 1, 2007) ("If Cavel's competitive edge and financial security were not irreparably harmed then, how can it be that the current temporary shutdown would bring about the certain, great, imminent, and irreparable harm that would justify issuing a stay?"). Such speculative economic losses are not irreparable and cannot justify injunctive relief.

Attempting to distinguish cases holding that speculative losses are insufficient to establish irreparable harm, the district court found that some of USARK's members had *already* experienced lost sales from the then-impending

effective date for the 2015 Rule. District Court Opinion Dated May 12, 2015 at 42. But again, the district court's analysis does not justify preliminary injunctive relief. The fact that some losses have already occurred is insufficient; USARK would need to show that any such economic losses *cannot be recovered*. *Mexichem Specialty Resins, Inc.*, 787 F.3d at 555 (holding that injunctive relief is unjustified if "adequate compensatory or other corrective relief will be available at a later date . . . ."). It is true that any lost profits experienced by breeders from the 2015 Rule could not be recovered against the Service because of sovereign immunity. Importantly, however, the district court failed to recognize that the breeders could likely recoup their losses by resuming sales if USARK succeeds on the merits and the 2015 Rule is set aside.

In this way, this case is similar to *National Mining Association v. Jackson,* where the court denied preliminary injunctive relief because "the plaintiff has not demonstrated how or why these losses cannot ultimately be recovered if and when the mining projects in question are permitted to proceed." 768 F. Supp. 2d at 53. Here too, USARK has offered *no* proof that any lost sales already experienced by breeders could not be recouped by later selling those snakes if they succeed on the merits and interstate commerce in all eight species becomes lawful. Because USARK has not proven that their economic losses are unrecoverable, they cannot

demonstrate that their economic harm is irreparable, and the district court's order granting the preliminary injunction must be reversed.

Even unrecoverable economic losses do not justify preliminary injunctive relief unless USARK can also prove that the breeders' losses – during the pendency of the litigation – would be "serious." *Mylan Pharms.*, 81 F. Supp. 2d at 42; *see also Gulf Oil Corp. v. Dept. of Energy*, 514 F. Supp. 1019, 1026 (D.D.C. 1981) ("The result of this balancing process appears to be that the injury must be more than simply irretrievable; it must also be serious in terms of its effect on the plaintiff."). In *Mylan Pharmaceuticals*, sellers of generic drugs brought a case alleging that some of its products were wrongly taken off the market and sought preliminary injunctive relief given the certainty of lost sales of those generic drugs during the pendency of the litigation. After analyzing the total annual sales and expected loss of revenue from the generic drugs at issue, the court denied preliminary injunctive relief, finding that the sellers could rely on other drug sales in the interim and that "[s]uch a minor loss" due to lost sales of the generic drugs at issue during the pendency of the litigation "does not constitute irreparable harm." *Mylan Pharms.*, 81 F. Supp. 2d at 43.

The present case is directly analogous to *Mylan Pharmaceuticals* because the breeders also rely upon lost sales in attempting to justify preliminary injunctive relief. And just like *Mylan Pharmaceuticals*, the breeders can continue with other

profitable sales unimpeded by the injurious listings. The district court provided *no* analysis of how predicted lost sales of listed snakes during the pendency of the litigation would compare to the breeders' total sales. Instead, the district court relies on two declarations stating that only small fractions of the breeders' sales of the listed species are intrastate. District Court Opinion Dated May 12, 2105 at 43 (citing McCurley Decl. ¶ 3 and Brown Decl. ¶ 11).[8] Yet both of these snake breeders also sell non-listed reptiles, which are unimpeded by the 2012 and 2015 rules. McCurley Decl. ¶¶ 2-3 (other reptiles); Brown Decl. ¶ 2 (Asian water monitors). The snake breeders can also continue to sell the listed snakes to scientific or educational purchasers. 50 C.F.R. § 16.22. And many breeders live in states with designated ports from which they can continue to legally export snakes for international sales. Brewer Decl. ¶ 3 (based in California); Parker Decl. ¶ 2 (based in Texas); Kelley Decl. ¶ 2 (based in California); Garibaldi Decl. ¶ 2 (based in California); Edmonds Decl. ¶¶ 2, 3 (based in Florida with intent to move to Washington).

The availability of all these alternatives shows that the breeders' economic losses can be relatively easily avoided even under their current business models and are therefore not irreparable. Courts have routinely found no irreparable harm when plaintiffs could have avoided the economic harm. *Pennsylvania v. New*

[8] All of USARK's declarations are found at ECF No. 28.

Jersey, 426 U.S. 660, 664 (1976) (per curiam) (holding that litigant cannot "be heard to complain about damage inflicted by its own hand"); *Safari Club Int'l v. Salazar*, 852 F. Supp. 2d 102, 124 (D.D.C. 2012) (holding no irreparable harm because the regulatory change "has been a topic of debate over a period of many years" and the plaintiffs had opportunities "to alleviate at least temporarily some of the forces of the market that were outside of their control"); *see also Safari Club Int'l v. Jewell*, 47 F. Supp. 3d 29, 35 (D.D.C. 2014) (holding that "self-inflicted" harm does not satisfy the irreparable harm criterion). Here, USARK and its members have been on notice of the regulatory change since at least 2010 when the Service proposed listing the snakes as injurious. Any economic harm the snake breeders may suffer now is the result of their own decisions to continue to breed and retain stock of these dangerous snakes, and therefore is indirect, self-inflicted, and not irreparable harm.

To the extent the breeders assume that all of the alternative markets will be insufficient to allow them to avoid serious economic harm, that assumption is pure speculation, which (as explained above) cannot support preliminary injunctive relief. Importantly, the breeders' predictions of long-term economic effects of the rules are absolutely irrelevant, as the Court's consideration is limited to harms of the 2015 Rule that would be suffered only *during the pendency of the lawsuit*. *Nat'l Treasury Emps. Union v. United States*, 927 F.2d 1253, 1255-56 (D.C. Cir.

1991) ("[F]oreseeable long-term effects do not entitle the [applicant] to preliminary, injunctive relief.").

In summary, any lost interstate sales during the pendency of the litigation cannot justify preliminary injunctive relief because USARK has not proven that these lost profits are "certain" to occur, cannot be recouped if the 2015 Rule is vacated through this litigation, and would cause "serious" economic harm to the breeders in the meantime. Because the burden for injunctive relief based on economic losses is so high, "Courts within the Circuit have generally been hesitant to award injunctive relief based on assertions about lost opportunities and market share." *Mylan Pharms.*, 81 F. Supp. 2d at 42 (summarizing cases). Thus, USARK has failed to demonstrate that implementation of the 2015 Rule would cause the breeders irreparable harm, and the district court's decision granting preliminary injunctive relief must be reversed.[9]

Further, an injunction cannot be justified after weighing any private economic losses experienced by the snake breeders against the significant public interest served by restricting interstate sales of these invasive giant snakes to protect local ecosystems, which the district court agreed is a "serious and credible"

[9] The district court's improper grant of the preliminary injunction is not saved by its narrow tailoring. *See* District Court Opinion Dated May 19, 2015 at 5 (explaining that the injunction leaves in place the current prohibition on transportation of listed species into Texas and Florida and does not apply to Beni or DeSchauensee's anacondas). Even the most narrow injunction cannot be justified without proof of certain, unrecoverable, and serious harm.

concern. District Court Opinion Dated May 12, 2015 at 45. Indeed, the district court acknowledged that "the potential for a new invasive constrictor species becoming established in any part of the United States is an extremely serious threat to the public interest -- much more serious than any of the private harms asserted by Plaintiffs." District Court Opinion Dated May 12, 2015 at 48.

The listed snakes, if introduced into the wild, would rank among the most powerful predators in North America with the potential of wiping out native wildlife, including endangered species. 80 Fed. Reg. 12702, 12713-17 (2015 Rule). In addition, the injurious snakes serve as disease vectors for livestock and native wildlife. District Court Opinion Dated May 12, 2015 at 47. The 2015 Rule aims to prevent further economic harm to wildlife agencies that attempt to control these giant, invasive constrictor snakes. The district court found that "federal, state and local governments spend an average of nearly $600,000 per year to prevent or reduce the spread of invasive constrictor species . . . ." *Id*. at 47. Preventing the spread of the injurious snakes is key because once established they are "extremely difficult, if not impossible, to eradicate" *Id*. at 46.

The importance of leaving the Rule in effect during the pendency of the litigation is illustrated by recent events showing that without the full implementation of the 2015 Rule, the exotic pet trade in reticulated pythons and green anacondas proliferates and poses an unreasonable risk to the environment,

animal welfare, and public safety. In August 2015 alone, local officials removed two reticulated pythons (including a 20-foot snake that weighed 225 pounds and was recently acquired across state lines) from unqualified owners in Vermont and Illinois to prevent potential escape and protect the public and the environment.[10]

Therefore, given the ecological damage and other harm to the public interest caused by these snakes, the district court's order enjoining the 2015 Rule should be reversed.

CONCLUSION STATING THE RELIEF SOUGHT

The Service's decision to list eight invasive constrictor snakes as injurious under the Lacey Act was authorized by the plain language and legislative history of the statute. It was a reasonable response to a clear environmental threat, and USARK has not proven that their members will experience irreparable harm from the Service's decision. As such, USARK has failed to meet the test for preliminary injunctive relief. The HSUS therefore respectfully asks the Court to set aside the preliminary injunction and reinstate the 2015 Rule in full.

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[10] *See* Jack Thurston, *2 giant pythons, illegal to own, removed from Vermont property*, WPTZ (Aug. 25, 2015), http://www.wptz.com/news/2-homeless-pythons-given-to-vermont-man-head-to-sanctuary/34905168; *Snakes, rabbits among 2 dozen animals rescued from vacant Gillespie home*, KMOV, Aug. 6, 2015, http://www.kmov.com/story/29728062/snakes-rabbits-among-2-dozen-animals-rescued-from-vacant-gillespie-home. And just last week a nine-foot long green anaconda was found on the loose in Florida next to a river where residents recreate. Nina Golgowski, *Monster 9-Foot Anaconda Found in Florida*, Huffington Post (Dec. 3, 2015), http://www.huffingtonpost.com/entry/anaconda-in-florida_5660a891e4b08e945feea030.

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1. This brief complies with the type-volume limitation of Circuit Rule 32(e)(2) because this brief contains 6,460 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

The undersigned certifies that the Opening Brief of Defendant-Intervenors/Appellees The Humane Society of the United States and Center for Biological Diversity was electronically filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit on December 9, 2015, by utilizing the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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