

Civ. No. 05-2334

In The
United States Court of Appeals
For the Twelfth Circuit

ELEPHANT ADVOCATES,

and

THE GANESH PROJECT,

Appellants,

v.

UNITED STATES FISH & WILDLIFE SERVICE

Respondent.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE STATE OF BLISS

BRIEF FOR RESPONDENT UNITED STATES
FISH & WILDLIFE SERVICE

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STATEMENT OF JURISDICTION

1. The district court had jurisdiction of the case below pursuant to 28 U.S.C. § 1331 (2000).
2. This Court has appellate jurisdiction under 28 U.S.C. § 1291 (2000). This appeal is based on the District Court for the State of Bliss' final order granting summary judgment to Elephant Advocates and The Ganesh Project as to standing and to the United States Fish and Wildlife Service on the merits.

STATEMENT OF THE ISSUES

- I. Whether two members of environmental organizations have satisfied the requirements for Article III standing, when the members claim a imminent aesthetic injury if the United States Fish and Wildlife Service grants a permit to allow a theme park company to import seven Asian elephants from their native environment, yet neither member has visited the elephants in more than a year and neither has provided evidence of specific plans to visit them in the immediate future.
- II. Whether the United States Fish and Wildlife Service's decision to grant an import permit meets "minimal standards of rationality," when the controlling law allows issuance of an import permit that will "enhance the propagation or survival" of the species and is not primarily commercial, and the permit applicant plans to loan the endangered animals to a successful breeding program and educate the public about conservation needs without charging any additional fees for entry into its exhibit.

STATEMENT OF THE CASE

Appellants Elephants Advocates ("Advocates") and The Ganesh Project ("Ganesh") appealed Judge Hyde's Order granting summary judgment to the United States Fish and Wildlife

Service (“FWS”) on the merits. Respondent FWS also appealed Judge Hyde’s Order granting summary judgment to Advocates and Ganesh as to standing.

Advocates and Ganesh originally filed a motion seeking a preliminary injunction in the District Court for the State of Bliss, challenging a FWS decision to issue Wumba Amusement Park (“Wumba”) an import permit under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), 27 U.S.T. 1087 (March 3, 1973), pursuant to the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 et seq. (2000), and FWS permitting regulations, 50 C.F.R. §§ 17.22, 23.11, et seq. (2005). (R. 3-4.) Advocates and Ganesh moved for summary judgment on their claim that FWS’ import permit decision was arbitrary and capricious before the district court ruled on the pending request for preliminary injunction. (R. 3-4.) FWS moved for summary judgment that the plaintiffs did not have standing to bring their claim. (R. 3-4.) The FWS agreed to hold the permit in abeyance until the district court judge ruled on the cross-motions for summary judgment. (R. 3.)

As to standing, the district court held that both Advocates and Ganesh could have organizational standing if one of each organization’s members met the Article III standing requirements under the Constitution. (R. 6, 8.) The district court found that the Advocates member, Ms. Bark, suffered an aesthetic injury because of her personal familiarity with and research interests in the seven elephants. (R. 6-7.) The district court also found that Ganesh’s tour operator, Ms. Gambet, and other members would be injured if the number of elephants at Corbett National Park (“Corbett”) was greatly reduced. (R. 7-8.) As to causation and redressability, the district court found that issuance of the import permit would cause both of the group members’ injuries and their injuries would likely not occur if the court denied the permit.

(R. 6-8.) Thus, the district court held that both Advocates and Ganesh had standing to bring their claims. (R. 6, 8.)

As to the legal challenge of the permit, the district court granted summary judgment in favor of FWS' decision to issue an import permit under the ESA and CITES. In so doing, the district court ruled that no reasonable jury would find that FWS' permit issuance was arbitrary and capricious. The district court focused on Wumba's plans to engage in breeding efforts and elephant conservation public education. (R. 9-10, 12.) The district court held that FWS' permit issuance satisfied the ESA because the import would contribute to the enhancement of the survival of Asian elephants as a species. (R.12.) The district court further held that FWS' permit issuance was appropriate under CITES because the purpose of the import was not primarily commercial. (R. 10.) Therefore, the district court upheld the FWS' issuance of an import permit as consistent with the APA's requirement that FWS not make decisions in an arbitrary and capricious manner. (R. 3-4.) Judge Hyde then issued the order both that parties now challenge.

STATEMENT OF FACTS

The Parties

Advocates is a non-profit organization that advocates for the protection and conservation of captive and wild elephants. (R. 1.) One of Advocates' members is Ms. Bark, who researches wild Asian elephants. For six years, Ms. Bark conducted research at Corbett and studied the seven elephants at issue here. (R. 6.) Ms. Bark currently resides in the United States and has neither visited nor conducted research at Corbett for more than two years. (R. 6.) Ms. Bark has indicated that she may return to Corbett next spring for follow-up research, but has not made any definite plans to do so. (R. 6.)

Ganesh is a non-profit organization that conducts public tours of elephant habitats in southern India and works to preserve elephant habitats. (R. 1.) Ganesh's head tour operator and member, Ms. Gambet, has also visited Corbett. (R. 7.) According to Ms. Gambet, she leads an elephant observation tour to Corbett once a year or every other year. Ms. Gambet has not provided any information about when or if she will lead her next tour at Corbett. (R. 7.)

FWS is a government agency with the authority to issue CITES import permits under the ESA. (R. 1.) In order to issue such a permit, FWS must determine that import would enhance the propagation or survival of the imported species and that the import is not for a primarily commercial purpose. (R. 2.)

The Elephants

This appeal focuses on the import of Asian elephants. The elephants at issue here are seven female elephants nearing breeding age and currently living in their native habitat at Corbett. (R. 5.) Groups working with captive elephants in the United States have attempted to breed elephants, imported from abroad, in order to increase the North American captive elephant population. (R. 4.) The industry claims that this population is in crisis because there are few successful domestic breeding operations. One entity, the Bonanza Circus, has been able to produce Asian elephants in captivity regularly through artificial insemination. (R. 4.)

The Import Permit

Wumba is a theme park in Bliss. (R. 5.) In 2002, Wumba began implementing a new business plan. Part of this plan involved developing the "Asia Exhibit." (R. 5.) The Asia Exhibit is a 2.5 acre elephant habitat designed to look like a Southeast Asian jungle. (R. 5.) In addition to the jungle features, the exhibit would include a water ride and various food booths. (R. 5.) The exhibit would feature educational information about conservation through signage

around the exhibit and a recitation of a description of the elephants' endangered status to exhibit visitors. (R. 9.) The elephants would stay in heated concrete floored enclosures to help offset cold temperatures when they were not in the jungle portion of the exhibit. (R. 5.)

To implement their plan, Wumba applied for a CITES permit to import the seven elephants from Corbett. Wumba plans to use the elephants not only for their Asia Exhibit but also for breeding purposes by loaning them to Bonanza Circus' breeding program. (R. 9.) Wumba also indicates that its educational materials will inform the public about elephant conservation needs while giving each visitor a glimpse at Asian elephants in a replica of their natural habitat. (R. 11.) After submitting their request and supporting information, FWS granted Wumba's request for an import permit for the seven elephants. (R. 1.)

STANDARD OF REVIEW

Appeals of a district court's decision on Article III standing will be reviewed *de novo*. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, 528 U.S. 167 (2000); Bernhardt v. County of Los Angeles, 279 F.3d 862, 867 (9th Cir. 2002). Advocates and Ganesh, as the plaintiffs invoking federal jurisdiction, have the burden of establishing standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). At the summary judgment stage, the plaintiffs must "set forth by affidavit or other evidence specific facts, which for the purposes of standing will be taken to be true." Nat'l Wildlife Fed'n v. FEMA, 345 F. Supp. 2d 1151, 1160 (W.D. Wash. 2004) (citing Lujan, 504 U.S. at 561).

When a court of appeals reviews agency issuance of an import permit, the court applies the same "arbitrary and capricious" standard of review as the court below and must rule independent of the lower court's determination. Gerber v. Norton, 294 F.3d 173, 178 (D.C. Cir. 2002) ("we review the issues . . . as if the agency's decision 'had been appealed to this court

directly' ") (quoting Dr. Pepper/Seven-Up Cos. v. FTC, 991 F.2d 859, 862 (D.C. Cir. 1993)); Brown v. U.S. Dep't of Interior, 679 F.2d 747, 748-49 (8th Cir. 1982) (citing First Nat'l Bank of Fayetteville v. Smith, 508 F.2d 1371, 1374 (8th Cir.1974), cert. denied, 421 U.S. 930 (1975)). Under the Administrative Procedure Act, a court must affirm FWS action concerning the ESA unless that decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A) (2000); Friends of Endangered Species v. Jantzen, 760 F.2d 976, 981-82 (9th Cir. 1985). Under this most restrictive and narrow standard of review, a court may not substitute its own conclusions regarding whether issuance of an import permit was appropriate. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989); World Wildlife Fund v. Hodel, No. 88-1276, 1988 U.S. Dist. LEXIS 19409, at *8-9 (D.D.C. June 17, 1988) (hereinafter "WWF"). Further, a court must limit its review of an import permit issuance to the administrative record upon which the agency based its decision; a court may not engage in fact-finding outside of the record. Or. Natural Res. Council v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997); WWE, 1988 U.S. Dist. LEXIS 19409, at *8-9. However, the reviewing court may "obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." Camp v. Pitts, 411 U.S. 138, 143 (1973). Ultimately, the arbitrary and capricious standard charges this Court with determining whether FWS' import permit issuance was a rational choice within the zone of permissible decisions. Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 105-06 (1983); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 521 (D.C. Cir. 1983) (agency decision must be upheld when it "conform[s] to 'certain minimal standards of rationality' ") (citation omitted).

SUMMARY OF ARGUMENT

The District Court for the State of Bliss erroneously granted Advocates and Ganesh summary judgment on the issue of their standing to challenge a FWS-issued import permit. However, the district court appropriately granted FWS summary judgment on the merits, finding that FWS had not issued Wumba's import permit in an arbitrary or capricious manner.

To have Article III standing, at least one of an organization's members must have suffered an injury-in-fact, which is concrete and particularized and actual or imminent rather than conjectural or hypothetical. **(Part I.)** Neither Ms. Bark nor Ms. Gambet has suffered or will suffer such an injury if Wumba imports the seven elephants. **(Part I.A.)** Ms. Bark's alleged aesthetic injury results from an emotional attachment to the seven elephants and that she will no longer be able to enjoy seeing them in their natural environment with their families. However, this alleged injury is merely an emotional injury which is not concrete and particularized under the law. **(Part I.A.1.)** Ms. Gambet claims she will suffer an aesthetic injury because the import will result in fewer elephants for her and her tour groups to see. This alleged injury is a "loss of wildlife" injury that is insufficient to confer Article III standing. **(Part I.A.2.)**

Next, neither Ms. Bark nor Ms. Gambet can show their alleged injury is imminent. Ms. Bark has only provided the Court with a general plan to visit Corbett at some point in the future. Such an indefinite plan falls short of the imminence required under the law. Ms. Gambet also has not provided specific evidence of her intent to return to Corbett to view these seven elephants. Ms. Gambet has shown that she visited Corbett on a regular basis in the past but has not provided specific evidence indicating a return visit. **(Part I.B.)** Further, the district court supported its holding with cases that are factually inapposite to the case at hand. Because neither Ms. Bark nor Ms. Gambet has suffered an injury-in-fact, neither satisfies Article III standing.

(Part I.C.) Finally, the district court erred in granting organizational standing because FWS' import permit grant is not fairly traceable to the alleged injuries. Wumba, not FWS, will import the elephants. Therefore, Ms. Bark and Ms. Gambet's injuries could be fairly traced to Wumba's actions but not FWS' actions. Thus, because neither member has standing, organizational standing cannot lie. **(Part I.D.)**

Federal law protecting endangered species grants FWS the authority to issue permits for the import of any species listed as endangered when the permit applicant satisfies requirements under the ESA and CITES. This court should affirm the district court's decision granting FWS summary judgment on the merits of Advocates' and Ganesh's import permit challenge because FWS' permit issuance satisfied ESA and CITES requirements and therefore was not an arbitrary or capricious decision. **(Part II.)**

First, FWS' decision to issue Wumba an import permit satisfied the ESA requirement that a permit enhance the propagation or survival of the species. Agency rules promulgated to aid FWS in its enforcement of the ESA expressly define "enhance the propagation or survival of the species" to include breeding programs and conservation education such as those plans Wumba proposed. This Court should grant deference to the agency's interpretation of the ESA and affirm the district court's finding that FWS' application of its definition of "enhance the propagation or survival" in Wumba's case was not arbitrary or capricious. **(Part II.A.)**

Second, FWS' decision to issue Wumba an import permit also satisfied the CITES requirement that the purposes of the permit are not primarily commercial. Wumba's application displayed plans to loan the seven imported elephants to a highly successful breeding program and to educate exhibit visitors about Asian elephants' conservation needs. FWS was well within its discretion when it held that Wumba's goals were not primarily commercial. **(Part II.B.)**

ARGUMENT

I. ADVOCATES AND GANESH LACK ARTICLE III STANDING BECAUSE NEITHER ORGANIZATION’S MEMBERS HAVE SHOWN THAT THEY WILL SUFFER AN INJURY-IN-FACT THAT WILL BE CAUSED BY FWS’ IMPORT PERMIT GRANT TO WUMBA.

The district court below erred in holding that both Advocates and Ganesh have standing to challenge the grant of the import permit. In order to challenge a government action a plaintiff must meet the requirements under Article III of the Constitution. Laidlaw, 528 U.S. at 180-181. Article III “defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded” and the proper role the courts play in a democratic society. Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). Article III of the Constitution limits the jurisdiction of the federal courts to “cases” and “controversies.” U.S. Const. art. III, § 2. And, the issue of standing is one of the principles embodied in Article III, which provides a litmus test for those seeking to satisfy the cases and controversies threshold.

Under the doctrine of Article III standing, plaintiffs must first establish that they have suffered an injury-in-fact. Lujan, 504 U.S. at 561. This injury must be an invasion of a legally protected interest which is “concrete and particularized” rather than hypothetical, abstract, or conjectural. O’Shea v. Littleton, 414 U.S. 488, 494 (1974). If the injury has yet to take place, plaintiffs must show that the injury is imminent. Humane Soc’y of the U.S. v. Babbitt, 46 F.3d 93, 98 (D.C. Cir. 2003) (hereinafter “HSUS”) (citing Lujan, 504 U.S. at 2138). Furthermore, if the plaintiffs only seek declaratory or injunctive relief, they must show a “very significant possibility of future harm.” Nat’l Audubon Soc’y v. Davis, 144 F. Supp. 2d 1160, 1169 (N.D. Cal. 2000) (citing San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996)).

In addition to suffering an injury-in-fact, plaintiffs must establish causation in that this injury is fairly traceable to the challenged action, and redressability in that a favorable decision would redress the injury. Laidlaw, 528 U.S. at 180-181. At the summary judgment stage, plaintiffs must make these showings by averring specific facts supporting their positions rather than conclusory allegations. Lujan, 497 U.S. at 888-89. An organization can have “organizational standing” to challenge a government action only if one or more of its members satisfy the elements for Article III standing. Hunt v. Wash. State Apple Adver. Comm’n, 432 U.S. 333, 343 (1977).

A. Neither Advocates’ Member Ms. Bark Nor Ganesh’s Member Ms. Gambet Satisfy Article III Standing Because They Cannot Show A Concrete And Particularized Injury-In-Fact.

This issue of standing for both Advocates and Ganesh turns on whether their respective members, Ms. Bark and Ms. Gambet, will suffer a concrete and particularized injury-in-fact if this Court upholds the permit grant. Because Advocates and Ganesh seek declaratory relief, Ms. Bark and Ms. Gambet must show a “very significant probability of future harm.” National Audubon Society v. Davis, 144 F. Supp. 2d 1160, 1169 (N.D. Cal. 2000). For the following reasons, neither Ms. Bark nor Ms. Gambet can make such a showing.

1. Ms. Bark’s alleged aesthetic injury is merely a generalized emotional harm which falls short of the concrete and particularized requirements under Article III.

The district court erred in finding that Ms. Bark will suffer an injury-in-fact because her alleged injury is merely an emotional harm rather than a cognizable aesthetic injury. A plaintiff may satisfy the injury-in-fact element of Article III standing by alleging an aesthetic injury but not merely an emotional harm. Animal Legal Def. Fund v. Glickman, 154 F.3d 426, 431-32 (D.C. Cir. 1998) (en banc) (hereinafter “ALDF I”); Valley Forge Christian College v. Ams.

United for Separation of Church and State, Inc., 454 U.S. 464, 485 (1982) (hereinafter “Valley Forge”). Concrete and particularized aesthetic injuries such as these include a regular zoo visitor’s diminished ability to see animals living in humane conditions as a result of personally observing mistreatment of these animals. Id.; Friends of the Earth v. Consol. Rail Corp., 768 F.2d 57 (2d Cir. 1985) (hereinafter “FOW”) (holding that swimmers and fishers of a river suffer an aesthetic injury as a result of pollution of a river). Moreover, in order to be a concrete and particularized injury, plaintiffs must provide specific facts rather than mere allegations to establish an aesthetic injury. Lujan, 497 U.S. at 888-89; HSUS, 46 F.3d at 98 (denying standing to researcher who only showed that she had, at some point in the past, studied some of the elephants at issue). Mere emotional injuries, no matter how deeply felt, cannot suffice for an injury-in-fact. Valley Forge, 454 U.S. at 485 (holding that the psychological effects produced by observation of disagreeable conduct cannot suffice for an injury-in-fact); Animal Lovers Volunteer Ass’n v. Weinberger, 765 F.2d 937, 938-39 (9th Cir. 1985) (holding that members’ distress over the fact that goats will be shot does not constitute an injury-in-fact).

To begin, it is necessary to examine the specific, or lack of specific, allegations Ms. Bark has made regarding her alleged injury. She claims that she has developed an emotional attachment to the seven elephants and that this attachment will suffer if they are moved from Corbett. (R. 6.) These allegations of emotional harm are the extent of her evidence. Unlike the plaintiff in ALDF I who pointed to specific mistreatment of the animals in question, Ms. Bark has not shown how the removal from Corbett will diminish her emotional attachment. After all, the elephants will be located in Bliss, and as a United States resident she will be closer to the seven elephants.

In FOW, the plaintiffs provided specific evidence of how the defendant's pollution was affecting their ability to fish and swim in the river. FOW, 768 F.2d at 61. Ms. Bark has not provided such information about how her research efforts in Corbett will be diminished. For instance, she has only indicated that the seven elephants were among those that she studied. (R. 6.) Her situation is analogous to the plaintiff in HSUS. She has not claimed the seven elephants are the only elephants at Corbett or that they were the focal point of her research. Rather, the strongest argument she has posed is an emotional attachment, which as shown in Valley Forge and Weinberger is insufficient to result in a concrete and particularized injury-in-fact. Therefore, Ms. Bark cannot satisfy the injury-in-fact requirement for Article III standing.

2. Ms. Gambet's alleged aesthetic injury is merely a loss of wildlife injury which falls short of the concrete and particularized requirements under Article III.

The district court erred in finding that Ms. Bark will suffer an injury-in-fact because her alleged injury involves a "loss of wildlife" that cannot be considered a concrete and particularized aesthetic injury. When plaintiffs attempt to show an injury-in-fact based on the reduction of a species they must raise a substantial possibility that the removal of those animals will "irretrievably damage the species." Fund for Animals v. Frizzell, 530 F.2d 982, 987 (D.C. Cir. 1975). A lesser showing results in a non-specific loss of wildlife injury that cannot meet the concrete and particularized requirements for Article III standing. Id.

In Frizzell, plaintiffs appealed the denial of a preliminary injunction to prevent FWS from allowing certain states to hunt the greater snow goose during a limited season. Id. at 983. The court affirmed the lower court's denial of the preliminary injunction in part because the plaintiffs could not show the effects that this limited hunt would have on the species and in part on the fact

that such limited hunts would not result in a long-term decrease in the snow goose population. Id. at 986-97.

In the case before this Court, Ms. Gambet alleges an injury based on the reduction of the number of elephants at Corbett. Like in Frizzell, the government action here may result in a temporary reduction in the number of elephants at Corbett. But, like the plaintiffs in Frizzell, Ms. Gambet has not provided this Court with evidence indicating how the import will affect the elephant population at Corbett. She has not indicated how many elephants currently roam at Corbett nor the number she normally expects to see during a tour. Thus, she has not shown that FWS' permit grant will "irretrievably damage the species" of elephants at Corbett. Furthermore, without specific evidence of how the import will hurt her and her tour operation, Ms. Gambet's injury falls into the non-specific injury in Frizzell. Thus, Ms. Gambet cannot show a concrete and particularized injury to satisfy the injury-in-fact requirement for Article III standing.

B. Neither Advocates' Member Ms. Bark Nor Ganesh's Member Ms. Gambet Satisfy Article III Standing Because They Cannot Show An Imminent Injury-In-Fact.

Advocates and Ganesh must, through their respective members, show an injury-in-fact as a result of FWS granting Wumba the import permit. Laidlaw, 528 U.S. at 180-181. Because the elephants have not yet left Corbett, the members must show an imminent future injury to satisfy Article III standing. Animal Legal Def. Fund v. Espy, 23 F.3d 496, 500 (D.C. Cir. 1994) (hereinafter "ALDF II").

The district court erred in finding that Ms. Bark and Ms. Gambet will suffer an injury-in-fact because neither of their alleged injuries are imminent. In addition to offering specific evidence of a concrete and particularized injury, plaintiffs must also show that the injury has occurred or is imminent. ALDF II, 23 F.3d at 500. A plaintiff cannot meet the imminence

requirement by alleging an injury at some indefinite future time, especially when the acts necessary to bring about the injury are partly under the plaintiff's control. Id. A plaintiff who has researched elephants in the past but has not done so in more than two years and has only expressed a wish to see the elephants again in the future will not suffer an imminent injury.

Performing Animal Welfare Soc'y v. Ringling Bros. & Barnum & Bailey Circus, No.

1:00CV01641, 2001 U.S. Dist. LEXIS 12203, at *6 (D.D.C. June 29, 2001) (hereinafter "Ringling Bros. I"); HSUS, 46 F.3d at 97 (holding that lack of concrete plans to visit the elephant in question was insufficient to show an imminent injury).

The plaintiff in ALDF II expressed his wish to return to research the elephants in question but provided the court no specific evidence of an intent to do so. ALDF II, 23 F.3d at 501. The plaintiff in Ringling Bros. I indicated that he would not attempt to view the elephants again unless they were removed from the defendant's circus. Ringling Bros. I, 2001 U.S. Dist. LEXIS 12203, at *6. The plaintiff in HSUS presented no evidence of a desire to return to see the elephant in question. HSUS, 46 F.3d at 97.

The facts here are similar to those in ALDF II, Ringling Bros. I, and HSUS. Similar to the plaintiffs in ALDF II and Ringling Bros. I, Ms. Bark indicates that she researched the seven elephants for six years at Corbett. However, like the plaintiff in HSUS, she has not conducted research or visited Corbett in more than two years. (R. 6.) Furthermore, Ms. Bark's evidence, or lack thereof, of her intent to see the seven elephants is analogous to these cases. All Ms. Bark has alleged is plans to visit them next spring. (R. 6.) She has not provided this Court any documentation supporting these plans. She has not researched the elephants in more than two years and her sudden plans to do so seem curiously coincidental in light of this lawsuit. Allowing a former researcher, like Ms. Bark, to satisfy the imminence requirement by merely

alleging plans to return at some future date would encourage a system of organizing research trips just to get into court. Such a system is not in the spirit of the “cases and controversies” requirement under Article III.

Ms. Gambet’s lack of evidence of intent is similarly analogous to the cases this section discusses. Ms. Gambet claims that she leads a tour to Corbett once a year or every other year but has not provided specific information about her next tour. (R. 7.) Like the plaintiff in HSUS, Ms. Gambet has indicated past visits to Corbett to see, among other animals, the seven elephants. Yet also like the HSUS plaintiff, Ms. Gambet has provided this Court absolutely no indication of when she will lead her next tour. Although regular business in the past is certainly more indicative of future visits than the plaintiff’s mere wishes in ALDF II, it is not evidence of specific plans to return. Furthermore, one might expect a tour operator like Ms. Gambet to keep records of her past tours to Corbett and the likelihood and approximate dates of the next Corbett tour. The lack of such evidence in this case points away from an intent to return.

Because both Ms. Bark and Ms. Gambet have failed to provide this Court with specific evidence of their intent to research or visit the seven elephants at Corbett again in the immediate future, they cannot show that they will suffer an imminent injury. Therefore, they cannot satisfy the injury-in-fact element of Article III standing, and the district court erred in granting organizational standing to Advocates and Ganesh.

C. The Authority On Which The District Court Based Its Holding Regarding Injury-In-Fact Is Factually Dissimilar To The Case At Hand And Thus Does Not Support That Holding.

The district court relied on Am. Soc’y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334 (D.C. Cir. 2003) (hereinafter “Ringling Bros. II”), in holding that Ms. Bark’s familiarity with, and aesthetic and research interests in, the

seven elephants constituted an injury-in-fact. The district court also relied on Fund for Animals v. Clark, 27 F. Supp. 2d 8 (D.D.C. 1998) (hereinafter “Fund for Animals I”) and Fund for Animals v. Norton, 281 F. Supp. 2d 209 (D.D.C. 2003) (hereinafter “Fund for Animals II”) in holding that the removal of the seven elephants from Corbett will result in fewer elephants for Ms. Gambet to see and therefore constituting an injury-in-fact. However, due to the significant factual differences between these cases and the case at hand, the district court’s reliance on these cases is misplaced.

In Ringling Bros II., the court overturned a lower court’s ruling and held that the plaintiff had standing. Ringling Bros. II., 317 F.3d at 334. Plaintiff alleged that he used to work with elephants at defendant’s circus but quit because of the inhumane treatment they received. Id. at 335. The court accepted the inhumane treatment as an aesthetic injury because if the plaintiff patronized the circus he might actually see “direct physical manifestations of the alleged mistreatment of the elephants, such as lesions, or detect negative effects on the animals’ behavior.” Id. at 337. Because the plaintiff also presented evidence of a specific intent to return to the circus as a patron, the court found that his injury was imminent. Id. at 338.

Unlike in Ringling Bros II., Ms. Bark has provided no allegations of mistreatment, abuse, or inhumane conditions regarding the seven elephants. The only evidence remotely close is a simple allegation, without any supporting proof, that Wumba will beat the seven elephants into submission to adjust to life in captivity. (R. 3.) If proven, such an allegation may only confer standing on those wishing to sue to remove the elephants from Wumba’s custody. Such a situation is precisely why the courts have recognized an aesthetic interest in observing animals living in humane conditions. But, the issue presented here is different. The issue before this Court is the grant of an import permit and not whether the elephants are or will live in inhumane

conditions. Without more evidence of such claims, the analogy to Ringling Bros. II drops out of the equation. What is left is mere emotional injury, insufficient to establish Article III standing.

In Fund for Animals I and Fund for Animals II the district court granted plaintiff's motions for preliminary injunctions to stop the hunting of swan and bison respectively. Fund for Animals I, 27 F. Supp. 2d at 15; Fund for Animals II, 281 F. Supp. 2d at 237. The court in both cases stressed that the plaintiffs would suffer irreparable harm because of the aesthetic injuries they would suffer by either seeing or contemplating the animals being killed. Fund for Animals I, 27 F. Supp. 2d at 14; Fund for Animals II, 281 F. Supp. 2d at 220-21. In other words, the court in both cases focused on the fact that the animals would be hunted and killed.

Again, the case at hand is not about the hunting or killing of any animals at Corbett, including the seven elephants. Neither Ms. Bark nor Ms. Gambet presented evidence to indicate that the seven elephants will be harmed in any way. Certainly, Ms. Bark and Ms. Gambet would suffer an aesthetic injury if the FWS granted a permit to cull systematically some of the elephants from Corbett.¹ But this case is about importing elephants for the purposes of education and repopulation. As a result the analogies to Fund for Animals I and Fund for Animals II begin to break down. Thus, the district court lacked judicial authority to support its holding regarding standing without a strong factual analogy to these cases.

D. Advocates And Ganesh Do Not Meet The Requirements For Organizational Standing Because FWS' Issuance Of An Import Permit Will Not Cause The Members' Alleged Injuries.

The district court erred in granting standing to Advocates and Ganesh because their members' injuries cannot be fairly traced to FWS' permit grant. To satisfy Article III standing, in addition to establishing an injury-in-fact, plaintiffs must establish a chain of causation between

¹ This assumes only for the sake of argument that Ms. Bark and Ms. Gambet presented sufficient evidence of their intention to return to Corbett to view the elephants.

the injury and the government's conduct in that the injury must be "fairly traceable" to the conduct complained of rather than the result of action by some third party not before the court.² Lujan, 504 U.S. at 560-561; Leeke v. Timmerman, 454 U.S. 83, 86-87 (1981) (no causal connection because the injury turned on the action of a prosecutor, a party not before the Court).

First, as in Leeke, the injuries alleged by Ms. Bark and Ms. Gambet will not be directly caused by FWS' permit grant. Like the prosecutor in Leeke, Wumba will decide whether to import the seven elephants not FWS. Wumba is the third party not before the court who breaks the chain of causation. Thus, like in Leeke, Ms. Bark's and Ms. Gambet's injuries cannot be fairly traced to FWS' decision to grant the import permit.

Second, causation cannot lie in this case because the actual import of the elephants will not result in the injuries alleged. According to FWS, the Asian elephant's natural habitat has been extensively destroyed and poachers kill many elephants. Draft Policy for Enhancement-of-Survival Permits for Foreign Species Listed Under the ESA, 68 Fed. Reg. 49512 (July 25, 2003). Ms. Bark claims an injury from not being able to see the seven elephants in their native environment. (R. 6.) Ms. Gambet claims that import will result in fewer elephants to see. (R. 7.) While technically true, poachers and habitat loss are the real reasons for any reduction in viewable wild elephants. Import of these elephants will help relieve overcrowding in an already dwindling natural habitat. Furthermore, by donating the elephants to Bonanza's breeding program, Wumba will help increase the population of this endangered species.

² Redressability is final element of Article III standing and requires plaintiffs to show a "substantial likelihood" that the requested relief will remedy the alleged injury-in-fact. Lujan, 504 U.S. at 562. Because Wumba would not be able to import the seven elephants without the import permit, Advocates and Ganesh have likely satisfied the redressability element and as such it will not be addressed in this brief.

Therefore, because Wumba, not FWS will ultimately decide whether to import the seven elephants and because the import will benefit the species as a whole, neither Ms. Bark nor Ms. Gambet can establish that their alleged injuries will be caused by FWS' permit grant.

II. FWS' DECISION TO GRANT WUMBA A PERMIT TO IMPORT SEVEN ASIAN ELEPHANTS WAS REASONABLE BECAUSE IT MET THE REQUIREMENTS OF THE ESA AND CITES.

This Court should affirm the district court's finding that FWS' decision to grant Wumba a permit to import the seven elephants was not arbitrary and capricious. First, FWS was well within the bounds of its discretion when it found that Wumba's plans to loan the elephants to a highly successful captive breeding program and to educate the public about elephant conservation needs satisfied the ESA requirement that the permit applicant "enhance the propagation or survival" of the species. Second, FWS also made an appropriate finding that Wumba's breeding and education plans coupled with Wumba's plan not to charge an extra viewing fee satisfied the CITES requirement that the permit applicant's purposes not be primarily commercial. The Record does not support a finding that FWS failed to meet "minimal standard of rationality." Therefore, this Court must uphold the district court's grant of summary judgment to FWS on the merits of the agency's decision to issue the import permit.

A. FWS' Determination That Wumba's Elephant Breeding And Public Education Efforts Met The ESA Criteria Of Enhancing The Propagation Or Survival Of The Species Was Reasonable Because The Agency Definition Of "Enhance The Propagation Or Survival" Expressly Includes Breeding Programs And Public Education Efforts.

Under the ESA and the Department of Interior's implementing regulations, FWS may issue a permit to import an endangered species whenever the agency is satisfied that the import will "enhance the propagation or survival" of the species that is the subject of the permit application. 16 U.S.C. § 1539(a)(1)(A) (2000); 50 C.F.R. § 17.22(a)(1)(A) (2005). ESA

regulations specifically define activities which “[e]nhance the propagation or survival” of captive wildlife as including breeding and public education efforts. 50 C.F.R. § 17.3 (2005).

Chevron requires considerable judicial deference to the Interior Department’s interpretation that breeding programs and public education efforts enhance species propagation or survival. In Chevron v. NRDC, the Supreme Court ruled that when Congress delegates interpretive authority to an agency for a specific statutory provision, expressly or through its silence, federal courts are required to apply the agency’s construction of the provision unless that agency interpretation is impermissibly unreasonable. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). The Supreme Court noted that in a circumstance where Congress expressly delegated interpretive discretion and Congress has subsequently left the agency’s interpretation unchallenged and unamended for many years, the Court would defer to the agency’s interpretation. Utah v. Evans, 536 U.S. 452, 471-72 (2002) (approving Census Bureau’s use of imputation methodology for Census).

In the instant case, Congress expressly delegated to the Secretary of Interior the discretion to determine the conditions for granting import permits. Endangered Species Act of 1973, Pub. L. No. 93-205, § 10(A), 87 Stat. 884, 896 (codified as amended at 16 U.S.C. § 1539 (2000)) (“The Secretary may permit, under such terms and conditions as he may prescribe, any act otherwise prohibited by Section 9 of this Act for scientific purposes or to enhance the propagation or survival of the affected species.”). Acting under this express delegation of discretion, the Secretary promulgated rules interpreting the ESA which reasonably defined “enhance the propagation or survival” to include breeding programs and public education efforts. 50 C.F.R. § 17.3. Public education addressing the causes of endangerment and threats to species is widely accepted as an integral part of protecting endangered species. Shennie Patel,

Comment, The Convention on International Trade in Endangered Species: Enforcement and the Last Unicorn, 18 Hous. J. Int'l L. 157, 207-08 (1995). Breeding programs are the most likely activity to enhance propagation, which the dictionary defines as “[m]ultiplication or increase, as by natural reproduction.” The American Heritage Dictionary of the English Language (4th ed. 2000). Therefore, governed by a clear definition embracing the exact type of plans Wumba presented to FWS, the agency reasonably determined that Wumba’s breeding and public education plans would enhance the propagation or survival of the elephants.

ESA regulations define breeding efforts that will enhance the propagation or survival of a species as those which engage in “normal practices of animal husbandry needed to maintain captive populations.” 50 C.F.R. § 17.3. The Record in the instant case reflects that FWS based its decision to grant Wumba an ESA import permit exemption, in part, on Wumba’s plans to loan their elephants to a highly successful captive breeding program. (R. 4-5, 9.) Advocates and Ganesh argued below that the Wumba elephants would not qualify for the FWS “Captive-Bred Wildlife Program.” (R. 11.) However, FWS has never ruled that a species must qualify for the agency’s own breeding program to qualify for a permit under the “enhance the propagation or survival” standard. FWS has, however, stated in its Asian Elephant Conservation Fund fact sheet that Asian elephant populations are severely unbalanced, with nearly fifty female elephants to every one tusked male elephant. FWS International Affairs, Asian Elephant Conservation Fund Fact Sheet, <http://www.fws.gov/international/pdf/AsiaElephantfctsht0440.pdf>. Further, FWS has noted that the captive Asian elephant breeding stock in the United States is diminishing due to aging. Draft Policy for Enhancement-of-Survival Permits for Foreign Species Listed Under the ESA, 68 Fed. Reg. 49512 (July 25, 2003). FWS appropriately applied an express definition in reaching the reasonable conclusion that an import permit was appropriate.

Further, ESA regulations define public education efforts as enhancing species propagation or survival, specifically, “[e]xhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species.” 50 C.F.R. § 17.3. The Record reflects that Wumba proposed a state-of-the-art conservation education exhibit for the elephants, complete with signage and announcements explaining the Asian elephants’ endangered status. (R. 5, 10.) Again, ESA regulations are clear and express in their inclusion of public education efforts as an activity that will enhance the propagation or survival of an endangered species. FWS therefore acted reasonably when it concluded that Wumba’s planned public education efforts supported issuance of an import permit.

Advocates and Ganesh may claim that the foot problems experienced by some elephants housed on concrete floors is contrary to enhancing survival. However, it is within FWS’ discretion to weigh the varying benefits and challenges that any given import permit may cause. Further, many zoos throughout the country use concrete floors in their elephant exhibits. If this Court held, as a matter of law, that concrete floors are contrary to enhancing the survival of endangered elephants, it would rule by extension that zoos may no longer provide elephant exhibits unless those non-profit zoos undertake potentially cost-prohibitive renovations.

FWS need only find one reason that a permit applicant’s proposal will enhance the propagation or survival of the species to grant an import permit, but Wumba’s case presented two planned activities, breeding and public education, which clearly meet the agency’s express criteria for an ESA import permit. This permit does not grant Wumba unlimited discretion in its use and treatment of the elephants. The FWS may revoke a permit any time it finds that the permit-holder is not continuing to enhance the species’ survival. 16 U.S.C. § 1539(a)(2)(c) (2000); Nat’l Ass’n of Homebuilders v. Norton, 298 F. Supp. 2d 68, 72 (D.D.C. 2003).

Therefore, FWS acted within its discretion in granting Wumba an Asian elephant import permit and this Court should affirm the district court's grant of summary judgment for FWS on the merits of Advocates' and Ganesh's challenge to the import permit.

B. FWS' Determination That Wumba's Primary Purpose In Importing Elephants Was Non-Commercial Was Reasonable Because Wumba Plans To Lend The Elephants To A Successful Breeding Program, To Expend Resources To Educate The Public About Elephant Conservation, And To Not Charge Visitors Extra To See The Elephant Exhibit.

Under the ESA's incorporation of CITES, the FWS may issue an import permit when an applicant's purposes for import are not "primarily commercial." 16 U.S.C. § 1538(c)(1) (2000); 27 U.S.T. 1087, Art. III (March 3, 1973). A CITES permit applicant's purposes are not primarily commercial when the applicant's non-commercial purposes, such as breeding and education programs, predominate the application and there is no evidence of commercially exploitative behavior tied to the applicants proposal. See WWF, 1988 U.S. Dist. LEXIS 19409, at *10-13; see also Born Free U.S.A. v. Norton, 278 F. Supp. 2d 5, 17 (D.D.C. 2003); CITES, Definition of 'Primarily Commercial Purposes', Conf. Res. 5.10 (May 3, 1985), <http://www.cites.org/eng/res/all/05/E05-10.pdf>. The exporting country's profit in transferring possession of the permit-imported animal has no bearing on whether the permit applicant's intended use is primarily commercial. Born Free, 278 F. Supp. 2d at 14-15. FWS' interpretation of the language of CITES is subject to Chevron deference. Chevron, 467 U.S. at 842-43; Born Free, 278 F. Supp. 2d at 17.

In Born Free, the court denied an advocacy group's request for a preliminary injunction against a FWS-issued elephant import permit because the group did not show substantial likelihood of success on the merits. Id. at 8. The advocacy group claimed FWS should not have found that the permit application was for primarily commercial purposes because the permit

applicant might experience increased admission revenue as a result of its elephant exhibit. Id. at 14. The court dismissed Born Free's argument regarding additional admissions revenue. Id. at 16. The court found that FWS had a reasonable basis to determine the applicant's purpose was not primarily commercial because the applicant was a non-profit and planned to provide elephant conservation public education and to place the elephants into a captive breeding program. Id. The court focused on the applicant's breeding and education plans to support its finding that FWS did not act in an arbitrary and capricious manner when it determined that the applicant's purpose was not primarily commercial and issued a CITES import permit. Id.

In WWF, the court enjoined a CITES permit-holder from charging additional entry fees for a panda exhibit because it found some merit in an advocacy group's argument that the practice of charging this fee to see an endangered animal, discovered after FWS' permit issuance, might violate the CITES provision requiring a permit-holder's purpose for import to be not primarily commercial. WWF, 1988 U.S. Dist. LEXIS 19409, at *12. When FWS issued the permit, the agency failed to make a clear finding on the question of whether the application was primarily commercial, and the agency further admitted at trial that it believed the applicant would not charge an extra viewing fee. WWF, 1988 U.S. Dist. LEXIS 19409, at *11. However, the court's preliminary injunction did not invalidate the import permit and did not rule on the merits of whether charging the extra fee violated the prohibition against primarily commercial applications. WWF, 1988 U.S. Dist. LEXIS 19409, at *17. When FWS grants a CITES import permit, it must express its finding that the application is not for primarily commercial purposes and an applicant that does not charge an extra viewing fee to see the imported species is less likely to be focused on commercial gain. WWF, 1988 U.S. Dist. LEXIS 19409, at *11-13.

In Wumba's case, FWS ruled within its discretion that Wumba's purposes were primarily non-commercial when it granted the elephant import permit. (R. 9-10.) Wumba's plans to educate the public and breed the elephants are nearly identical to the applicant's plans in Born Free and similarly support the FWS' finding that a CITES permit was appropriate. While Wumba is taking on a considerable expense in importing these elephants and building an educational state of the art exhibit, the organization has committed to *loaning* its imported elephants to a highly successful captive breeding program. (R. 9.) Further, while Wumba may not be a non-profit enterprise like the applicant in Born Free, the Record reflects no plans on Wumba's part to charge an extra viewing fee for the exhibit like the WWF applicant. Based on relevant case law and FWS' interpretive authority under Chevron, the agency exceeded the required "minimal standards of rationality" in finding that Wumba's plans to breed the elephants, educate the public, and not charge extra for the exhibit supported a CITES import permit because Wumba's purpose for importing the elephants was not primarily commercial.

CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment of the district court granting Elephant Advocates and The Ganesh Project summary judgment as to standing. Furthermore, this Court should affirm the judgment of the district court granting the United States Fish and Wildlife Service summary judgment on the merits.

Respectfully submitted,

Counsel for Respondent

Dated: January 25, 2006