IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES ASSOCIATION OF REPTILE KEEPERS, INC., et al. Plaintiffs, v. THE HONORABLE SALLY JEWELL, et al. Defendants.	Case No. 1:13-cv-02007-RDM

MOTION BY THE HUMANE SOCIETY OF THE UNITED STATES FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

The Humane Society of the United States ("HSUS") respectfully requests leave to file the accompanying *amicus curiae* brief in support of Defendants' opposition to Plaintiffs' motion for temporary restraining order.

Pursuant to its statutory duty under the Lacey Act to regulate species that are harmful to humans or native wildlife (18 U.S.C. § 42), the U.S. Fish and Wildlife Service adopted reasonable regulations to limit the import of and interstate commerce in eight species of large constrictor snakes, such as anacondas and pythons. Plaintiffs are individuals who possess large constrictor snakes and who want to continue to profit from breeding and selling animals in the exotic pet trade regardless of the animal suffering and environmental damages such activities cause. Plaintiffs, by and through their corporate trade association, now seek extraordinary injunctive relief to protect their purely commercial interests.

HSUS and its millions of members and supporters have has a significant interest in the outcome of this case, as detailed below and in the attached Declaration of Nicole Paquette, HSUS Vice President, Wildlife Protection ("Paquette Decl."") and this timely brief would contribute to the Court's understanding and resolution of the matter. HSUS' proposed *amicus* brief is succinct and focused, and does not expand upon the issues raised in the motion for emergency injunctive relief now before the Court. Consistent with its specific interests and expertise, HSUS has limited the scope of the merits section of its proposed *amicus* brief to the issue of Plaintiffs' failure to demonstrate likelihood of success on their Lacey Act claims. Thus, the Court should exercise its discretion to grant this motion and accept HSUS' proposed *amicus* submission.

Federal Defendants take no position on this motion. Plaintiffs oppose this motion.

II. THE COURT HAS INHERENT AUTHORITY TO ALLOW *AMICUS* PARTICIPATION

District courts have wide discretion in deciding whether to grant leave to file an *amicus curiae* brief. *See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 519 F. Supp. 2d 89, 93 (D.D.C. 2007). This Court has often permitted third parties to file *amicus* briefs in cases where the outcome of the case would have an impact on those *amici curiae* and their members. *See, e.g.*, *Humane Soc'y of the U.S. v. Jewell*, Civ. No. 13-00185, --- F. Supp. 3d ----, 2014 WL 7237702 (D.D.C., Dec. 19, 2014) (considering *amicus* brief by Association of Fish and Wildlife Agencies); *Ctr. for Public Integrity v. F.C.C.*, 505 F. Supp. 2d 106 (D.D.C. 2007) (considering *amicus* briefs by communications trade associations); *Beverly Health & Rehab. Services, Inc. v. Thompson*, 223 F. Supp. 2d 73 (D.D.C. 2002) (considering *amicus* brief by long-term care trade association).

Although no defined tests bind a district court's discretion in granting *amicus* status, this Court has permitted the filing of *amicus* briefs in cases where a third party has a unique perspective or information that can contribute to the Court's understanding of the matter in question and can assist the Court in resolution of legal or factual questions. *See Jin v. Ministry of State Sec'y*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (quoting *Ryan v. Commodity Futures Trading Comm'n,* 125 F.3d 1062, 1064 (7th Cir. 1997)). *Amicus* status may be granted at any stage of the proceedings—this Court has permitted *amicus* participation in support of opponents to a preliminary injunction. *See Teva Pharmaceuticals USA, Inc. v. Sebelius*, 638 F. Supp. 2d 42, 59 (D.D.C. 2009) (citing *Firestone Tire & Rubber Co. v. PBGC,* 695 F. Supp. 43, 44 (D.D.C. 1988)), *rev'd on unrelated grounds*, 595 F.3d 1303 (D.C. Cir. 2010).

III. HSUS HAS SIGNIFICANT AND SPECIALIZED INTERESTS AND EXPERTISE RELATED TO THE TRADE IN EXOTIC SPECIES AND THE EFFECTIVE IMPLEMENTATION OF THE LACEY ACT

HSUS is a non-profit organization headquartered in Washington, D.C. and is the nation's largest animal protection organization. HSUS is committed to the goals of protecting, conserving, and enhancing wildlife and fostering the humane treatment of all animals. As part of its mission, HSUS has successfully advocated for common-sense legislation and regulations that limit the possession and use of dangerous exotic animals like tigers, chimpanzees, crocodiles, anacondas, and pythons, to qualified facilities. HSUS also routinely advocates for state and federal agencies to adopt humane methods of managing wild populations of animals, including invasive species. *See* Paquette Decl. ¶¶ 3, 17-18.

HSUS and its staff have more than sixty years of combined experience working on humane wildlife management and captive exotic animal issues, and unique knowledge of the animal welfare, conservation, public health, and public safety concerns raised by the exotic pet trade in

snakes. *Id.* ¶4. Dangerous snakes like anacondas and pythons are bred by large commercial enterprises and hobbyists who prioritize profit over conservation; these snakes are sold to ill-informed owners across the country who cannot provide for their specialized needs; and these snakes frequently are intentionally released or escape, posing threats to human safety and destroying native ecosystems that have not adapted to these formidable predators. *Id.* ¶¶8-16. HSUS members and supporters devote substantial recreational time viewing, enjoying, studying, and photographing native wildlife in parts of the United States that have been impacted by exotic large constrictor snakes that have escaped or been released from substandard facilities and unprepared owners. *Id.* ¶15.

HSUS has long advocated at the state and federal level for strict regulation of large constrictor snakes to ensure that only qualified facilities possess, breed, and transport these animals. For example, HSUS has helped introduce legislation on the private possession and trade of dangerous wild animals in over twenty states as well as in the U.S. Congress. Further, HSUS successfully intervened to defend Ohio's Dangerous Wild Animal and Restricted Snakes Act. *Wilkins v. Daniels*, 913 F. Supp. 2d 517, 542, *aff'd* 744 F.3d 409 (6th Cir. 2014). HSUS has also routinely advocated for legislation to prohibit the introduction of non-native species into native ecosystems, such as prohibiting the introduction of certain reptiles in Florida and the release of deer on unpopulated Hawaiian Islands. Paquette Decl ¶17.

HSUS has a long history of advocating for strict implementation of the Lacey Act. For example, HSUS was instrumental in the passage of the 2003 Lacey Act amendments that created the Captive Wildlife Safety Act to prohibit the exotic pet trade in big cats and HSUS has helped introduce federal legislation in recent years to expand the scope of the Lacey Act to prohibit interstate trade in captive primates. *Id.* ¶18. Further, HSUS has assisted the U.S. Fish and

Wildlife Service with enforcement of the Lacey Act, participating in Operation Cyberwild and Operation Wild Web to identify instances of individuals illegally selling endangered species parts online in violation of the Lacey Act. *Id.*

HSUS has expended substantial organizational time and financial resources participating in the promulgation of the U.S. Fish and Wildlife Service rule at issue in this case, submitting comments and meeting with agency officials on numerous occasions to discuss the animal welfare, conservation, and public safety concerns associated with snakes in the exotic pet trade. *Id.* ¶19.

HSUS' interests are threatened by the instant lawsuit – if one or both of the injurious listings for eight large constrictor snakes is overturned, HSUS will have to redouble its limited organizational resources to strengthen regulation of large constrictor snakes at both the federal and state levels. *Id.* ¶ 20. Moreover, a ruling from this Court that the Fish and Wildlife Service cannot lawfully regulate interstate transport under the Lacey Act injurious species provisions could have cascading negative impacts on HSUS' efforts to promote strict enforcement of other Lacey Act provisions and similar provisions in other federal wildlife laws. *Id.* HSUS supporters and staff who spend time and other resources researching and advocating for regulation of captive wildlife would be adversely affected if the law is overturned. *Id.*

IV. HSUS' BRIEF WILL ASSIST THE COURT AND IS RELEVANT TO THE DISPOSITION OF THE CASE

As an initial matter, HSUS respectfully submits that this motion and proposed brief are timely filed. Plaintiffs filed a motion for temporary restraining order on April 1, 2015 and a status conference was held on April 2nd to establish an expedited briefing schedule on that motion. This concise amicus brief in support of Defendants' opposition is submitted on the same

day as such opposition and granting this motion will neither expand the issues involved in, nor otherwise delay, the proceedings in any way.

As evidenced in the attached Declaration and through HSUS' long history of contributing *amicus* briefs to and intervening in animal litigation, HSUS is particularly well-suited to assist the Court with the quick resolution of Plaintiffs' motion for injunctive relief.[1] The proposed brief contains argument as to the scope of the Lacey Act and the Fish and Wildlife Service's lawful interpretation and application of the law, demonstrating that Plaintiffs have failed to establish a likelihood of success on the merits of their claims. The proposed brief also provides the Court with information as to the nature of the exotics pet trade and how listing anacondas and pythons as "injurious species" under the Lacey Act promotes conservation, animal welfare, and public safety, undermining Plaintiffs' claims of irreparable harm and showing that the public interest is overwhelmingly in favor of denying Plaintiffs' motion.

IV. CONCLUSION

Based on the foregoing, HSUS seeks permission from this Court to file the brief that accompanies this motion and requests that this motion be granted.

Dated: April 6, 2015 Respectfully submitted,

[1] For example, HSUS has been granted intervention or *amicus* status in a number of recent animal protection cases —in cooperation with, and without duplicating, the defendant's efforts. *See, e.g., See Wilkins v. Daniels*, 913 F. Supp. 2d 517, 542 (S.D. Ohio, 2012), *aff'd* 744 F.3d 409 (6th Cir. 2014); *U.S. v. Stevens*, 559 U.S. 460 (2010); *U.S. v. Lawson*, 677 F.3d 629 (4th Cir. 2012); *Am. Meat Inst. v. U.S. Dept. of Agric*., 760 F.3d 18 (D.C. Cir. 2014); *Associated Dog Clubs of New York State, v. Vilsack*, 2014 WL 5795207 (D.D.C. Nov. 7, 2014); *In re Aurora Dairy Corp. Organic Milk Marketing and Sales Practices Litigation*, 621 F.3d 781 (8th Cir. 2010); *WildEarth Guardians v. National Park Service*, 804 F.Supp.2d 1150 (D. Colo. 2011); *Chinatown Neighborhood Association v. Brown, et al.*, No. 13-15188 (9th Cir., filed 2013); *Nat'l Audubon Soc'y, et al. v. Gray Davis, et al.*, Nos. 01-15159, 01-15216, 01-15321 (9th Cir. 2002).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Motion for Leave to File *Amicus Curiae* Brief of The Humane Society of the United States In Support of Defendants' Opposition to Plaintiffs' Motion for Temporary Restraining Order with the Clerk of the U.S. District Court for the District of Columbia by using the appellate CM/ECF system on April 6, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 6, 2015

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Dated: April 6, 2015

Respectfully submitted,

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I. INTRODUCTION

This litigation concerns the U.S. Fish and Wildlife Service's ("the Service's") decision to limit the import of and interstate commerce in eight species of large constrictor snakes, including anacondas and pythons that grow to over 20 feet in length. Plaintiffs challenge this regulation in order to maximize their profits through continued unfettered breeding and sale of these dangerous exotic pets. But the exotic pet trade has severe negative impacts on snake welfare and conservation, and federal law clearly authorizes restrictions on such trade in order to protect human health and safety, agricultural interests, and native ecosystems that can be destroyed by the escape or release of these non-native predators.

This case has critical implications for the future of the nation's oldest wildlife law, the Lacey Act, as a tool to promote the conservation of native wildlife. While *amicus curiae* The Humane Society of the United States (HSUS) advocated for an even more restrictive regulation, the agency's rulemaking balanced all of the interests and resulted in reasonable regulations. Overturning the government's well-reasoned decision to limit imports of and interstate commerce in these large constrictor snakes to qualified facilities would result in unnecessary animal suffering, threaten public safety, and undermine conservation efforts. And granting Plaintiffs' extraordinary request for emergency injunctive relief would very likely exacerbate the problems addressed by this policy, as any delay in enforcement could result in a flood of imports, breeding, and sale of these snakes.

Because the Lacey Act clearly gives the Service the authority to regulate the interstate transport of large constrictor snakes, and because Plaintiffs' financial harms are not irreparable and do not outweigh the animal welfare and environmental harms caused by the lack of regulation, HSUS respectfully requests that this Court deny Plaintiffs' motion for a temporary restraining order or preliminary injunction.

II. INTERESTS OF *AMICUS CURIAE*

As explained in its motion for leave to participate as *amicus curiae* and supporting Declaration, HSUS is a non-profit organization that works to promote the conservation and welfare of animals. HSUS has significant interest in ensuring that the Service appropriately interprets and applies the statutory and regulatory provisions of the Lacey Act to effectuate congressional intent to conserve native ecosystems, prevent the introduction of invasive species, and protect human health and safety from species deemed injurious. HSUS also would be adversely affected by a delay in the effective date of the regulation, as the organization would have to divert resources to try to combat the inundation of imports of and interstate commerce in the four species of large constrictor snakes at issue in the injurious listing rule ("Rule"). *See* Declaration of Nicole Paquette ("Paquette Decl.").

III. BACKGROUND

The Large Constrictor Snake Trade

Snakes that kill their prey through constriction – including some of the largest snake species in the world that reach lengths exceeding 20 feet – are referred to as constrictor snakes. These snakes can live in a variety of habitats and can survive a wide range of temperatures. Constrictor snakes are predators that eat a variety of mammals, birds, and other reptiles and hunt both on the ground and in trees. These snakes grow rapidly and can produce hundreds of offspring over a lifetime of a decade or more. The reticulated python alone, one of the species at issue in the Rule, can produce 124 eggs in a single clutch. Paquette Decl. ¶ 14.

The risks associated with the import of and interstate commerce in species of constrictor snakes that are not native to the U.S. – including the Indian or Burmese python, reticulated python, Northern African python, Southern African python, boa constrictor, green anaconda,

yellow anaconda, DeSchauense's anaconda, and the Beni anaconda – are well-established. When these top predators are introduced into new ecosystems, they have the power to decimate native wildlife (from raccoons to bobcats), which has not evolved to evade giant snakes. *See* 75 Fed. Reg. 11808 (March 12, 2010); Paquette Decl. ¶ 13.

The U.S. is currently facing an epidemic of unqualified individuals and facilities possessing, breeding, buying, selling, transporting, and exploiting dangerous exotic animals, including many threatened and endangered species. Paquette Decl., ¶7. Large constrictor snakes in the exotic pet trade suffer from inadequate care and are often abandoned when they grow to unmanageable lengths (as their specialized needs are exceedingly difficult to meet in captivity). Paquette Decl. ¶¶ 11-12. Snakes can carry Salmonella and other pathogens that cause zoonotic diseases and are unsafe to maintain in residential areas (indeed, 17 people have died from incidents involving large constrictor snakes since 1978). *Id.* ¶ 17. Further, commercial trade of captive-bred wildlife often negatively impacts efforts to conserve wild populations by decreasing public awareness about the plight of the species and potentially contributing to illegal wildlife trade. *See* Paquette Decl. ¶ 10. Despite these risks, Plaintiff the United States Association of Reptile Keepers (USARK) expends substantial resources to promote the private ownership of snakes like anacondas and pythons and to protect the profits of its members who breed and sell snakes.

Legal Framework

The Lacey Act is the nation's oldest wildlife protection law, originally enacted in 1900 (31 Stat. 187 (1900)). The Lacey Act has been amended several times in the past century, and since 1960 has authorized 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, Congress itself has statutorily identified several wildlife species as injurious, including mongoose, fruit bats, zebra mussels, and bighead carp. *Id*. Congress' most recent additions to this list (zebra mussels and bighead carp) demonstrate that Congress intends the Lacey Act to regulate the shipment of injurious species over state lines ***within the continental U.S.*** (as well as importation into the U.S. and trade to non-contiguous U.S. states and territories). *See, e.g.,* 136 Cong. Rec. H8492-02, 1990 WL 142212 (Oct. 1, 1990) (recording debate in the House of Representatives on P.L. No. 101-646 and demonstrating that Congress listed zebra mussels as injurious in order to prevent their spread from the Great Lakes to the Mississippi River); Senate Report 111-181, May 5, 2010 (describing the objective of P.L. No. 111-307 as protecting the Great Lakes from the introduction of bighead carp from the Mississippi watershed by including the species on "the list of injurious species that are prohibited from being ***traded in interstate commerce*** or imported into the United States." (emphasis added)).

The Fish and Wildlife Service has adopted regulations to implement this law (50 C.F.R. §§ 16.1 *et seq.*), providing that importation or transportation of injurious wildlife is generally prohibited, subject to certain exceptions. *Id.* § 16.3. Injurious wildlife permits authorize otherwise prohibited activities for zoological, educational, medical, or scientific purposes. *Id.* § 16.22. Thus, an injurious listing aims to eliminate trade in invasive species for use as exotic pets or other commercial purposes, while continuing to allow justifiable use of such species (e.g., for conservation measures or scientific research).

Pursuant to this authority, on March 12, 2010, the Service issued a Proposed Rule to add nine species of large constrictor snakes to the list of injurious wildlife under the Lacey Act. 75 Fed. Reg. 11,808 (March 12, 2010). Finding that these nine 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 import 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 agency 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). In June 2014, following the publication of additional scientific evidence of the risks large constrictor snakes pose to native ecosystems, the agency reopened the comment period on the 2010 proposed rule and reviewed substantial input from experts and the public (including those, unlike Plaintiffs, 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 large constrictor snakes as injurious – the reticulated python, DeSchauensee's anaconda, green anaconda, and Beni anaconda. 80 Fed. Reg. 12702 (March 10, 2015).

Plaintiffs challenge both the 2012 and 2015 snake listings, and are seeking emergency injunctive relief to stall the implementation of the 2015 listing (though they have been on notice of such potential regulation since 2010).

IV. ARGUMENT

Plaintiffs have failed to meet their demanding burden to prove all of the elements required for the issuance of a temporary restraining order or preliminary injunction. Injunctive relief pending judicial review is an extraordinary remedy, and should only be granted when the moving party, "by a clear showing, carries the burden of persuasion" on ***all*** elements. *Sibley v. Obama*, 810 F. Supp. 2d 309, 310 (D.D.C. 2011) (*quoting Mazurek v. Armstrong*, 520 U.S. 968 (1997)). In order for the Court to issue a temporary restraining order (or preliminary injunction), Plaintiffs must show that: (1) they have a substantial likelihood of success on the merits, (2) they would suffer irreparable injury if the injunction were not granted, (3) an injunction would not substantially injure other interested parties, and (4) the public interest would be furthered by the injunction. *Id. See also Smith v. Henderson*, 944 F. Supp. 2d 89, 96 (D.D.C. 2013); *Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (Plaintiffs must show that the "injury complained of is of such imminence that there is a 'clear and present' need for equitable relief").

But Plaintiffs are unlikely to succeed on the merits of their claims. The implementation of the large constrictor snake rule as scheduled will not cause irreparable harm to Plaintiffs, a delay in enforcement would cause harm to Defendants and interested parties like HSUS, and the public interest is clearly in favor of denying this motion for preliminary relief. Thus, Plaintiffs' motion should be denied. The fact that Plaintiffs disagree with the policy at issue here (as they desire to continue to engage in the inhumane and risky interstate trade of large constrictor snakes, which can be sold for thousands of dollars each) is not a legitimate reason for stalling or overturning this reasonable regulation.

A. Plaintiffs Are Unlikely to Succeed on the Merits of Their Claims

Plaintiffs argue that they are likely to succeed on the merits of Counts One, Two, and Six of their Second Amended Complaint (pertaining to the scope of the Lacey Act and the Regulatory Flexibility Act), asserting that Counts Three, Four, and Five (pertaining to the National Environmental Policy Act and the Administrative Procedure Act) cannot be decided before the administrative record is produced. This section will focus on Plaintiffs' argument that the Service's regulations exceed the authority granted by the Lacey Act (Counts One and Two).

i. Congressional Intent Is Clear that the Lacey Act Prohibits Transport of Injurious Wildlife Over State Lines Within the Continental U.S.

Plaintiffs' brief largely ignores the plain language of the act, and instead takes the Court down a rabbit hole of legislative history going back over 100 years to try in support their strained argument. But the Supreme Court has made clear that in matters of statutory construction, courts must ask first "whether Congress has directly spoken to the precise question at issue." *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). If Congressional intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842–43. In the instant matter, this Court can simply look to the current version of the law and recent Congressional action to be confident that the agency has not exceeded its statutory authority in listing eight species of large constrictor snakes as injurious.

The Lacey Act prohibits

> the ***importation into*** the United States, any territory of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of 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 the mongoose of the species Herpestes auropunctatus; of the

> species of so-called "flying foxes" or fruit bats of the genus Pteropus; of the zebra mussel of the species Dreissena polymorpha; of the bighead carp of the species Hypophthalmichthys nobilis; ***and such other species*** of wild mammals, wild birds, fish (including mollusks and crustacea), amphibians, reptiles, brown tree snakes, or the offspring or eggs of any of the foregoing ***which the Secretary of the Interior may prescribe by regulation to be 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) (emphasis added).

In 2010, Congress amended this provision to add "big head carp of the species Hypophthalmichthys nobilis" to the statutory injurious species list, specifically to prohibit the movement of that invasive species from one part of the continental United States (the Mississippi River) to another part of the continental United States (the Great Lakes). *See* Senate Report 111-181 (May 5, 2010) (describing the objective of P.L. No. 111-307 as protecting the Great Lakes from the introduction of bighead carp from the Mississippi watershed by including the species on "the list of injurious species that are prohibited from being ***traded in interstate commerce*** or imported into the United States.") (emphasis added).[1] This legislative history (disingenuously omitted by Plaintiffs) makes absolutely certain that Congress intends this provision of the Lacey Act to regulate the transport of injurious wildlife across state lines within the continental United States, in addition to prohibiting import into the continental United States. *See Pharm. Research & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 224 (D.C.Cir.2001) (courts may use all "traditional tools of statutory interpretation," including "text, structure, purpose, and legislative history," to ascertain Congress's intent at *Chevron* step one); *Kornman v. S.E.C.*, (592 F.3d 173, 183-84

[1] Further, and also ignored by Plaintiffs, Congress itself considered legislation to add these large constrictor snakes to the statutory list of injurious species in order to prohibit movement of the species within the continental U.S. *See* H.R. Rep. 112-691, at 3 ("Section 42 currently prohibits the importation or ***interstate shipment*** of certain injurious animals" and "the U.S. Fish and Wildlife Service [] finalized a rule that bans the importation ***and interstate transport*** of four nonnative constrictor snakes…H.R. 511 includes these four species and five additional threatening species.") (emphasis added).

(D.C. Cir 2010) (noting that legislative history of congressional amendments to a statute may be used to make clear Congress' original and current intent as to how the statute should be interpreted).

Thus, Congress has explicitly approved of the Fish and Wildlife Service's use of the Lacey Act to regulate the movement of large constrictor snakes within the continental United States and Plaintiffs' claim that the Service's regulations are *ultra vires* is without merit.

ii. Plaintiffs Constitutional Arguments Are Groundless.

Plaintiffs' claim that the Service's reasonable limitation of trade in large constrictor snakes violates Plaintiffs' right to travel and the Equal Protection Clause is meritless. Animal ownership and use is not a fundamental constitutional right. Indeed, the strict regulation of large constrictor snakes has withstood direct constitutional challenge at the state level. *See Wilkins v. Daniels*, 913 F. Supp. 2d 517, 542 (S.D. Ohio, 2012), *aff'd* 744 F.3d 409 (6th Cir. 2014) (upholding Ohio's Dangerous Wild Animal and Restricted Snakes Act, finding that "exotic animals owned as personal property . . . are living creatures that pose unique threats to people, and thereby reasonably may be subject to onerous government regulation").[2]

The right to interstate travel is also not absolute. *See U.S. v. Brockdorff*, 992 F.Supp. 22 (D.D.C., 1997). "If the right to travel is implicated, it can only be because 'impeding travel is

[2] *See also Andrus v. Allard*, 444 U.S. 51, 65-68 (1979) (upholding federal prohibition on the sale of eagle feathers, and noting that "government regulation – by definition – involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. . . . It is true that appellees must bear the costs of these regulations. But, within limits, that is a burden borne to secure 'the advantage of living and doing business in a civilized community.'") (internal citations omitted); *Nicchia v. People of State of New York*, 254 U.S. 228, 230 (1920) ("Property in dogs is of an imperfect or qualified nature and they may be subjected to peculiar and drastic police regulations by the state without depriving their owners of any federal right."); *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698 (1897) (animals are "subject to the police power of the state, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens.").

[the law's] primary objective' or 'it actually deters . . . travel.'" *State of Kan. v. U.S.*, 16 F.3d 436 (D.C. Cir. 1994) (*quoting Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986)). Fish and Wildlife Service's regulation of large constrictor snakes is obviously not designed to impede interstate travel by citizens – the whole purpose of the regulation is to limit the movement of snakes, not people. Further, the regulation does not actually deter interstate travel by citizens, as citizens remain free to travel among the states (although they may have to find qualified facilities to care for their snakes during the duration of their travel).

For this Court to hold otherwise would call into question the constitutionality of all of the Lacey Act statutes and regulations that restrict interstate commerce in certain animals, as well as similar provisions in the Endangered Species Act. *See* 50 C.F.R. §§16.11 *et seq*. (prohibiting interstate transport in certain mammals, birds, fish, mollusks, crustaceans, and amphibians); 16 U.S.C. § 3372(a)(2)(C) (prohibiting interstate transport of big cats); 16 U.S.C. § 1538(a)(1)(E) (prohibiting interstate transport of endangered species without a permit). As the Supreme Court has acknowledged, "something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied." *Soto-Lopez*, 476 U.S. at 921. Plaintiffs have failed to show that the regulation on trade of dangerous exotic animals has more than a negligible impact on Plaintiffs' right to interstate travel and the agency regulation challenged here is rationally related to a legitimate government interest in promoting wildlife conservation.

Plaintiffs further claim, erroneously, that the large constrictor snake regulation implicates Equal Protection concerns. The Supreme Court has repeatedly held that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge

if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

Snake breeders and owners are not a protected class, and disparate treatment of such individuals is constitutional where, as here, there is a rational basis for the government's differential treatment (i.e., preventing the invasion of exotic snakes into native ecosystems). *See City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *State v. Schuler*, 1997 WL 76337, at *2 (Minn. App. Feb. 25, 1997) (upholding municipal ordinance requiring citizens to only have three dogs per household as rationally related to controlling dog noise and odor); *State v. Peters*, 534 So.2d 760, 763 (Fla. 3d DCA 1988) (finding that Equal Protection does "not guarantee that all dog owners will be treated alike").

Accordingly, the Court's duty to avoid constitutional conflicts has no application here. The canon of constitutional avoidance directs courts to interpret a statute in a manner that preserves its validity; thus, courts do not give deference to agency interpretations that present *serious* constitutional difficulties. *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008). But there are no serious constitutional concerns raised by the injurious listings here, nor are we dealing with an agency interpretation, but rather the plain language of the statute. *See also U.S. v. Castleman,* 134 S.Ct. 1405 (2014) (holding that Plaintiff "has not challenged the constitutionality [of the law] . . . either on its face or as applied to him, and the meaning of the statute is sufficiently clear that we need not indulge [Plaintiff's] cursory nod to constitutional avoidance concerns"); *Clark v. Martinez*, 542 U.S. 371 (2005) (the canon of constitutional avoidance "is not a method of adjudicating constitutional questions by other means").

Therefore, Plaintiffs are unlikely to succeed on the merits of Count One and Two from their second amended complaint. As addressed by federal Defendants, Plaintiffs are also unlikely to

succeed on the merits of Count Six (regarding Regulatory Flexibility Act procedures).[3] Thus, Plaintiffs' motion for emergency injunctive relief should be denied.

B. Plaintiffs Cannot Demonstrate Irreparable Harm

As Plaintiffs acknowledge, their burden is to prove that they would suffer certain and significant harm, not theoretical or negligible harm, from the scheduled implementation of the law. *See* Pls.' Br. at 36; *Monument Realty LLC v. Wash. Metro Area Transit Authority*, 540 F. Supp. 2d 66, 74 (D.D.C. 2008). Plaintiffs have clearly failed to meet that burden. Indeed, Plaintiffs' own brief reveals that the primary impact of this regulation on Plaintiffs would be financial, and thus, is not appropriately remedied by emergency injunctive relief. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290 (D.C. Cir. 2006) ("injuries, however, substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough").

Plaintiffs have also incorrectly identified the impacts the law will have. The injurious listing would not "impair vital bio-medical research" (Pls.' Br. at 42), as the regulations would specifically allow continued trade in snakes for bona fide medical and scientific purposes. 50 C.F.R. § 16.22. The Service may also issue permits for interstate transport of injurious species to seek necessary medical treatment for such animals. *Id.* Similarly, the injurious listing would not "hamper environmental education programs" (Pls.' Br. at 43), as the regulations allow for permits for educational purposes. 50 C.F.R. § 16.22. Nor would the injurious listing "deter necessary conservation efforts" (Pls.' Br. at 43), as permits are issued for scientific and

[3] Additionally, although Plaintiffs have not even argued that they are likely to succeed on the merits of Counts Three, Four, and Five, the Service's decision to list eight large constrictor snakes as injurious is not arbitrary or capricious and is in accordance with the Lacey Act and the Administrative Procedure Act, and that the Service's decision to protect native ecosystems from exotic snakes was appropriately analyzed under the National Environmental Policy Act (which is designed in part to protect native ecosystems from invasive species).

zoological purposes (50 C.F.R. § 16.22), and since the Lacey Act does not supplant the Endangered Species Act (which allows for conservation measures to protect endangered species like Indian Pythons). 16 U.S.C. §§ 1531 *et seq.*; 50 C.F.R. § 17.11.

Plaintiffs are clearly challenging this regulation in an attempt to continue to make profits from the business of selling dangerous snakes into the exotic pet trade. While *amicus* HSUS and many other animal welfare and conservation organizations oppose such activity, the injurious listing would not prohibit Plaintiffs from continuing to breed large constrictor snakes for personal use or for intrastate sale (or from breeding other snake species for interstate sale). Thus, Plaintiffs' claim that the rule would threaten the existence of their businesses is patently false, as there is nothing that prohibits Plaintiffs from adjusting their operations to account for the new regulatory landscape (as businesses routinely do). That the injurious listing might make Plaintiffs' business less profitable is not grounds for overturning a lawfully promulgated rule or for stalling its effective date.

Plaintiffs attempt to disguise the purely economic nature of their injury by arguing that the rule would sever the emotional attachment Plaintiffs' allegedly have to captive snakes. But the rule would not prohibit continued possession of pet snakes or breeding stock, and if Plaintiffs voluntarily euthanize snakes they can no longer sell for a profit that would be self-inflicted injury.

Thus, Plaintiffs have failed to demonstrate that the scheduled implementation of the injurious listing would cause them irreparable harm, and their motion for injunctive relief must be denied.

C. Enjoining Implementation of the Large Constrictor Snake Rule Would Cause Harm to Defendants and the Public

Plaintiffs claim that the length of time it took the Service to develop the injurious snake listings is evidence that further delay would not cause harm to Defendants. Pls.' Br. at 4, 33. However, the opposite is true. The fact that multiple years have passed since the federal government formally recognized the threats posed by these invasive species counsels in favor of immediate action to remedy this problem. Wildlife regulations routinely take multiple years for the Service to enact, but that does not minimize their importance. Under Plaintiffs' theory, for example, the Service's ongoing delay in regulating the domestic trade in elephant ivory could be stayed indefinitely by ivory dealers (given the longstanding status quo of deregulation) despite the ongoing poaching crisis in Africa. Similarly, here it is critically important that the rule go into effect immediately to stop the import and interstate transport of large constrictor snakes to protect native wildlife, animal welfare, and human safety and aesthetic interests.

Further, granting Plaintiffs' motion would result in harm to interested parties like HSUS, and a multitude of other animal welfare and conservation organizations and advocates.[4] If the Court enjoined the rule from taking effect, it would likely prompt a flood of imports and interstate transport of large constrictor snakes, exacerbating the problem addressed by the rule and requiring law enforcement entities and animal rescue entities to divert resources to deal with the ramifications of such. Paquette Decl. ¶ 20.

D. The Public Interest Is Served By Timely Implementation of the Rule

Issuing a temporary restraining order delaying the implementation of the injurious snake rule is clearly contrary to the public interest, as it would continue to allow unfettered breeding and sale of dangerous snakes as exotic pets.

[4] Including Natural Resources Defense Council, Center for Biological Diversity, The Nature Conservancy, National Parks Conservation Association, American Society for the Prevention of Cruelty to Animals, International Fund for Animal Welfare, The Wildlife Society, Ecological Society of America, and National Environmental Coalition on Invasive Species.

The snake industry (and its corporate lobbying arm, the United States Association of Reptile Keepers), has severe negative impacts on animal welfare, conservation, and public safety. Paquette Decl. ¶ 7. While many pet reptiles are bred in captivity, many are still taken from the wild, leaving behind depleted populations and damaged habitats. *Id.* ¶ 8. Harsh capture techniques, compounded by poor shipping practices, kill many reptiles before they reach the pet store or dealer. *See id.* ¶¶ 8.

Reptile breeding operations commonly warehouse snakes in stacked plastic containers no larger than a shoe box. *Id.* ¶ 9. These cheap, barren environments fail to mimic natural environments and prevent normal behaviors and movements, including the fundamental need to stretch out to full body length. *Id.* Currently, no federal agency regulates these snake breeding operations, as reptiles are exempt from the Animal Welfare Act. 7 U.S.C. ¶ 2132(g); Paquette Decl. ¶ 9.

Snake breeders, including those associated with USARK, selectively breed snakes to produce different colors and patterns, as these so-called "morphs" can be sold for higher prices. Paquette Decl. ¶ 10. Such breeding is inconsistent with sound conservation science principles – indeed, conservation professionals have found that breeding rare color morphs is linked to abnormal and debilitating conditions that compromise animal welfare and would likely fail to persist in the wild. *Id.*

Snakes are often taken home by families lured by the excitement of an allegedly "low maintenance" exotic pet, but who become overwhelmed by the level of care required, especially for snakes that grow over 8 feet in length (such as those species at issue in this case). Paquette Decl., at ¶11. Many snakes suffer as a result of ill-informed owners who lack knowledge of the

complex needs of these animals (including proper humidity, temperature, substrate, ultraviolet light exposure, and live prey). *Id.*

Because of the difficulty and expense of providing for a large constrictor snake, many snakes are abandoned in urban areas, forests, and wetlands, where they either die from starvation, exposure, or predation or survive and compete with native wildlife for food and habitat, damaging the balance of the ecosystem. *Id.* ¶12. The enormously high reproductive capability of large constrictor snakes increases the likelihood of colonization and the escape of just one pregnant snake in a hospitable environment could be enough to establish a significant population. *Id.* ¶14.

Those who devote substantial recreational time viewing, enjoying, studying, and photographing native wildlife in parts of the United States that have been impacted by (or are at high risk of being impacted by) the invasion of exotic large constrictor snakes (such as Florida, Puerto Rico, and Hawaii), including HSUS members, are adversely affected by the lack of regulation of the import and interstate transport of large constrictor snakes. *Id.* ¶15.

Not only do escaped and released snakes invade native ecosystems, but they also pose a direct threat to human health and safety. *Id.* ¶16. HSUS has tracked nearly 550 incidents in 46 states involving large constrictor snakes causing death or serious injury. *Id.* Seventeen people have died from large constrictor snake related incidents in the United States since 1978—12 just since 1990—including four babies squeezed to death while sleeping in their cribs. *Id.* Further, it is well established that snakes carry zoonotic diseases like Salmonella. *Id.*

Thus, the public interest is served by immediately implementing restrictions on the import and interstate transport of large constrictor snakes, and issuing a temporary restraining order or

preliminary injunction delaying the enforcement of the injurious species listing would undermine the public's interest in animal welfare, wildlife conservation, enjoyment of native ecosystems, and human health and safety.

V. CONCLUSION

As discussed herein, Plaintiffs' claims are meritless and this Court should deny this motion for emergency injunctive relief.

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Respectfully submitted,

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