IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND MOTION FOR RELIEF PENDING REVIEW

Shaun M. Gehan
D.C. Bar No. 483720
THE LAW OFFICE OF SHAUN M. GEHAN
3050 K Street, N.W. – Suite 400
Washington, D.C. 20007
Telephone: (202) 342-8400
Facsimile: (202) 342-8451

David E. Frulla
D.C. Bar No. 414170

Paul C. Rosenthal
D.C. Bar No. 235242
KELLEY DRYE & WARREN LLP
3050 K Street, N.W. – Suite 400
Washington, D.C. 20007
Telephone: (202) 342-8400
Facsimile: (202) 342-8451

Attorneys for Plaintiffs

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Plaintiffs United States Association of Reptile Keepers, Inc. ("USARK"), Caroline Seitz, Dr. Raul Diaz, Benjamin Renick, and Matthew Edmonds (collectively, "Plaintiffs"), by and through their attorneys, submit this Memorandum of Points and Authorities in Support of their Application for Temporary Restraining Order and Motion for Relief Pending Review pursuant to Section 705 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 705, Rule 65(a), (c) of the Federal Rules of Civil Procedure, and 65.1(a), (c) of the Local Civil Rules.

Plaintiffs respectfully seek extraordinary injunctive relief to enjoin the Secretary of the Interior, the Honorable Sally Jewell, and the U.S. Fish and Wildlife Service (collectively "Defendants" or "FWS") from implementing on April 9, 2015, their final rule of March 10, 2015, which adds the reticulated python and the green, Beni, and DeSchuaensee's anacondas to the list of injurious species. The exigent circumstances supporting this application for extraordinary relief are described in this Memorandum and the attached declarations.

For reasons explained below, Plaintiffs' application should be granted.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to the Lacey Act, 18 U.S.C. § 42, Defendants announced a final rule on March 10, 2015, adding the reticulated python and the green, Beni, and DeSchuaensee's anacondas to the list of injurious species. *Injurious Wildlife Species; Listing Three Anaconda Species and One Python Species as Injurious Reptiles*, 80 Fed. Reg. 12702, 12702 (Mar. 15, 2015). As explained in Plaintiffs' Second Amended Complaint, the final rule (hereafter "March 2015 rule"), appears to represent the culmination of the listing process FWS initiated on March 12, 2010.[1] The March 2015 rule has an effective date of April 9, 2015, only thirty (30) days after the four species were listed as injurious. 80 Fed. Reg. at 12702. By adding these four species of to the list of reptiles designated injurious, Defendants purport to prohibit their not only their importation, but also their transportation and movement in interstate commerce between and among the continental United States. *See* 80 Fed. Reg. at 12702.

Plaintiff USARK is an organization which represents all segments of the reptile industry, including breeders, hobbyists, conservationists, and those working in affiliated industries who rely on and gain enjoyment from the breeding and maintenance of large, non-native constricting snakes; other Plaintiffs are individuals, including a licensed wildlife rehabilitator and environmental educator; an assistant professor of biology whose bio-medical research focuses on reptiles, including the listed Burmese and reticulated pythons and the green anaconda; a breeder and seller of reticulated pythons and green anacondas; and a hobbyist with a collection of

[1] (See Pl. Second Am. Compl. ¶ 2 (Dkt. No. 27-1) (March 23, 2015).) More specifically, FWS proposed listing nine species of non-native constricting snakes as injurious under the Lacey Act in March 2010. *See* 75 Fed. Reg. 11808 (March 12, 2010). On January 23, 2012, Defendants partially finalized the proposed rule when they added four of the nine species to the list of injurious reptiles. *See* 77 Fed. Reg. 3330 (Jan. 23, 2012) ("January 2012 rule"). With this action, Defendants have now listed all but one (the boa constrictor) of the nine snakes species included in the March 2010 proposed rule.

reticulated pythons who has concrete plans to move from Florida to Washington State to take a new job in the next six months. Plaintiffs are adversely affected by the March 2015 rule at issue, as it will considerably hamper their commercial, educational, environmental, research, and academic interests. Further, scores of USARK's members and Plaintiffs Renick and Edmonds will suffer irreparable harm if Defendants' unlawful rule is not enjoined during the pendency of this action.

Entry of the requested preliminary relief is justified. First, Plaintiffs are likely to prevail on the merits because, among other reasons, Defendants' interpretation of the law as prohibiting interstate commerce and movement of the listed snakes among the continental states is contrary to the Lacey Act's plain language, its legislative history, and even FWS' own prior interpretation of the law. Moreover, Defendants' interpretation runs afoul of the canon of constitutional avoidance as it burdens Plaintiffs' fundamental rights to travel and equal protection granted by the United States Constitution. Defendants also failed to engage in reasoned decisionmaking or fulfill their duties under the Regulatory Flexibility Act, 5 U.S.C. Chapt. 6.

Second, Plaintiffs and the community of constricting snake owners face imminent irreparable injury if the March 2015 rule is not preliminary enjoined, as requested. Among other reasons and as explained in depth below, imposition of this rule on April 9, 2015 will (1) cause small business entities, including several declarants, to cease business operations; (2) result in loss of exceedingly rare and even unique genotypic and phenotypic variations and localities; and (3) cause the imminent deaths of hundreds, if not thousands, of reticulated pythons and green anacondas owned for personal and business reasons due both to a lack of access to life saving care and because of the crushing expense of maintaining large numbers of these snakes that can no longer be sold. It goes without saying, being forced to euthanize these unique and very

valuable animals represents irreversible action. Whether owned for economic or personal reasons, all declarants in this case have strong emotional attachments to the animals they have spent decades raising and caring for. Their losses will cause Declarants severe emotional harm.

Third, and by comparison, Defendants will suffer no harm if the requested preliminary injunctive relief is granted. Five years have passed since FWS originally proposed listing these species. If these newly-listed species posed an imminent threat, surely FWS would have listed these species in 2012 rather than waiting more than three years. This delay of over three years clearly demonstrates that the Defendants will suffer no harm if injunctive relief is granted. Further, even according to Defendants' own analysis, only very small portions of two continental states constitute even potentially suitable habitat for reticulated python and green anaconda. These states, Florida and Texas, already have regulations regarding these species, so a delay of the effective date will have no impact upon them. These animals have been in trade and private ownership for decades and can be found in every state where ownership is permitted, but have not become, nor are likely to become, established in the wild. The two other species at issue, the Beni and DeSchuaensee's anaconda, are not even found in the United States, in trade or otherwise. Plaintiffs are merely seeking to maintain the status quo while this Court addresses the merits of their legal challenge. FWS cannot demonstrate any pressing need for allowing the March 2015 rule to become effective in such a short amount of time.

Fourth, the public interest supports enjoining implementation of the March 2015 rule until the matter is resolved on the merits, as important research and long-standing conservation efforts would be impaired if the March 2015 rule becomes effective on April 9th. A significant portion of the broodstock used in research is likely to be euthanized. There is a real threat of the loss of localities—generally smaller subspecies found only on islands or other isolated habitats

whose wild native populations are often threatened or even extinct[2]—and unique genotypic and phenotypic types. The public interest does not, moreover, require the decimation of a small, but vibrant sector of the reptile industry.

These reasons, and others, supporting Plaintiffs' application and requested injunctive relief are explained in more detail below.

II. STANDARD OF REVIEW

The APA authorizes courts to issue preliminary relief to "postpone the effective date of an agency action" or to "preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. "Motions to stay agency action pursuant to these provisions are reviewed under the same standards used to evaluate requests for interim injunctive relief." *Affinity Healthcare Servs., Inc. v. Sebelius,* 720 F. Supp. 2d 12, 15 n.4 (D.D.C. 2010) (citing *Cuomo v. U.S. Nuclear Regulatory Comm'n,* 772 F.2d 972, 974 (D.C. Cir. 1985).

In deciding whether to grant Plaintiffs' motion for a preliminary injunction, the Court must consider: (1) the likelihood Plaintiffs will succeed on the merits; (2) whether Plaintiffs will be irreparably injured if a preliminary injunction is not granted; (3) whether granting a preliminary injunction would substantially injure the other party (balance of harms); and (4) if an injunction would further the public interest or at least not be adverse to the public interest. *See Davis v. Pension Benefit Guar. Corp*., 571 F.3d 1288, 1291 (D.C. Cir. 2009); *World Duty Free Americas, Inc. v. Summers,* 94 F. Supp. 2d 61, 64 (D.D.C. 2000); *Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 361 (D.C. Cir. 1999).

Plaintiffs are not, however, required to demonstrate each of these four factors on an equally conclusive basis. Rather, the factors should be viewed "as a continuum, with more of

[2] (Declaration of Phil Goss ("Goss Decl."), ¶¶ 9-10, appended hereto as Exhibit P.)

one factor compensating for less of another." *See Northern Mariana Islands v. United States*, 686 F. Supp. 2d 7, 13 (D.D.C. 2009) (citing *Davis*, 571 F.3d at 1291-92). *See also Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1157 (D.C. Cir. 2007) ("[I]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak."). In other words, the four factors "interrelate on a sliding scale and must be balanced against each other."[3] *Davenport*, 166 F.3d at 361. In sum, a court may issue an injunction "with either a high probability of success and some injury, or vice versa." *Northern Marina Islands*, 686 F. Supp. 2d at 14 (citing *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985)). Nevertheless, the D.C. Circuit has advised that a moving party must demonstrate "at least some injury" for a preliminary injunction to issue because "the basis of injunctive relief in federal courts has always been irreparable harm . . . ." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

III. ARGUMENT

A. The Four Preliminary Injunction Factors Relied Upon By This Circuit All Favor Entering the Injunction Requested

1. <u>There Is a Substantial Likelihood Plaintiffs Will Prevail on the Merits of Their Complaint</u>

Under the first factor, Plaintiffs must demonstrate a "substantial indication" of likely success. *See American Fed'n of Gov't Employees v. United States*, 104 F. Supp. 2d 58, 64

[3] The Court of Appeals for the D.C. Circuit has traditionally applied this sliding scale approach in assessing the four preliminary injunction factors. In the interests of candor, Plaintiffs note that, following the Supreme Court's decision in *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008), the D.C. Circuit "has suggested, without deciding, that *Winter* should be read to abandon the sliding-scale analysis in favor of a 'more demanding burden' requiring Plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm." *Smith v. Henderson*, 944 F. Supp. 2d 89, 95 (D.D.C. May 15, 2013) (citing *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011)). Regardless of whether assessment of the four factors is done on a sliding-scale or whether likelihood of success on the merits and irreparable harm assessed independently, all four factors weigh in favor of granting Plaintiffs' requested relief.

(D.D.C. 2000) (citing *Davenport*, 166 F.3d at 361). This Court need not "find that ultimate success by the movant is a mathematical probability, and indeed, [the court] may grant [an injunction] even though its own approach may be contrary to [the movants'] view of the merits." *Id.* (quoting *New Mexico v. Richardson*, 39 F. Supp. 2d 48, 50 (D.D.C. 1999) (internal quotations omitted, alternations in original). In the instant case, Plaintiffs believe they are likely to succeed on the merits of all six counts brought in their Second Amended Complaint. In this Memorandum, however, Plaintiffs focus solely on Counts One, Two, and Six as these each raise issues that can be decided by this Court in the absence of an administrative record. Counts Three and Four arise under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370e, and Count Five under the Lacey Act and the APA. Those three Counts are not addressed herein as each relies on a detailed review of a record which heretofore has not been produced.

(a) Plaintiffs Are Likely to Prevail on Their Statutory Construction Claims, Counts One and Two

In Plaintiffs' Second Amended Complaint, Count One alleges that the March 2015 rule's blanket interstate transportation and commerce ban, insofar as Defendants purport to apply it to interstate movements within the continental states, is *ultra vires*. (Second Am. Compl. ¶¶ 103-108.) Count Two seeks a declaratory judgment that Plaintiffs cannot be subjected to criminal and civil penalties for engaging in activities the law permits. (*Id.* ¶¶ 109-117.) These Counts present a straightforward issue of statutory construction of the Lacey Act's express terms.

The Lacey Act, 18 U.S.C. § 42(a)(1), reads as follows:

> *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 [specific animals and certain enumerated classes of wildlife] 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, is hereby prohibited.*

Id. (emphasis added). As the first italicized phrase indicates, the Lacey Act bars "importation" of the listed species into "the United States," as well as D.C. and United States possessions and territories. Secondly, the law prohibits the "shipment" of these species, such as the constricting snakes at issue here, expressly as "between the continental United States," on one hand, and "the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States," on the other.[4]

As explained herein, in the March 2015 rule (as in the January 2012 rule also at issue), Defendants purport to prohibit movement of these snakes between the forty-nine continental states, as well. This interpretation is contrary to the statute's plain language, reading the words "continental" and "United" out of the statute. Defendants' interpretation is not only at odds with the Lacey Act's plain terms, but also its development by Congress over time, and FWS' own prior interpretations of Section 42.

(i) <u>Historical Evolution of the Lacey Act</u>

Over the years and many different iterations of the Lacey Act, Congress has been very deliberate in language it has used to define the geographic scope of the different prohibitions contained within the various sections of the law. When Congress first enacted this law in 1900, the predecessors to current Section 42's importation and domestic conveyance provisions were each contained in separate sections of Title 18, United States Code. Among other things, Section 2 of the 1900 Act prohibited the "[t]he importation into the United States, or any Territory or District thereof," of certain enumerated species "and such other birds and animals as the

[4] Nor, of course, could a specimen of a listed injurious species be shipped from Puerto Rico to Hawaii. The salient entity at issue here is the "continental United States," and whether the law refers to these forty-nine states as a single geographic unit or separately as several states.

Secretary of Agriculture may from time to time declare to be injurious to the interests of agriculture or horticulture."[5] Section 3 of the 1900 Act made it unlawful for "any person or persons to deliver to any common carrier, or for any common carrier to transport from *one State or Territory to another State or Territory*, or from the District of Columbia or Alaska" (1) "any foreign animals or birds *the importation of which is prohibited*"; and (2) any wildlife "killed in violation of the laws of the State, Territory, or District in which the same were killed."[6] (Section 3 of the 1900 act was thus a prototype of laws such as the Hobbs Act, 18 U.S.C. § 1951, in that it created a catch-all federal offense for violation of state wildlife laws, as well as providing enhanced penalties for violating a federal predicate law (*e.g.*, unlawfully importing wildlife), when there was further movement in interstate commerce.)

As observed above, Congress amended the law several times over the next hundred-plus years. Of the several iterations of the original law's injurious wildlife importation and conveyance provisions, the most relevant amendment for present purposes occurred in 1960. That year, Congress consolidated all of the 1900 Act's Section 2 and 3 provisions relating to movements of injurious species into 18 U.S.C. § 42, giving Section 42 the form that essentially exists today. *See* Pub. L. 86-702, 74 Stat. 753 (Sept. 2, 1960). Regarding Section 3 of the original Act, in addition to excising the provision dealing explicitly with injurious species

[5] C. 553, sec. 2, 31 Stat. 188 (May 25, 1900). This provision also made it unlawful to import "any foreign wild animal or bird" without a "special permit." *Id.* Note 5, *infra*, discusses the subsequent history of this section's codification.

[6] C. 553, sec. 3, 31 Stat. 188 (May 25, 1900) (emphasis added). In 1948, when Congress revised, codified, and enacted Title 18 into positive law, section 2 of the 1900 act was codified at 18 U.S.C. § 42, where it remains today, and Section 3 was codified at 18 U.S.C. § 43. Ch. 645, 62 Stat. 687 (June 25, 1948). In 1981, Congress repealed 18 U.S.C. § 43. *See* Lacey Act Amendments of 1981, § 9, Pub. L. 97-79, 95 Stat. 1073, 1079 (Nov. 16, 1981). In that same bill, Congress re-enacted and expanded the scope of the transportation-related crimes enacted under section 3 of the 1900 act, codifying them in Title 16, United States Code. *See id.*, § 3, 95 Stat. 1074, *codified at* 16 U.S.C. § 3372.

transport (quoted above), Congress in the 1960 Act also significantly modified other language therein (which in 1960 was codified at 18 U.S.C. § 43, *see* n.6 *supra*). In relevant part, Congress amended then 18 U.S.C. § 43 to read as follows:

> Whoever delivers, carries, transports, ships, by any means whatever, or knowingly receives for shipment, *to or from any State, territory, the District of Columbia, the Commonwealth of Puerto Rico, any possession of the United States, or any foreign country*, any wild mammal or bird of any kind . . . which was captured, killed, taken, purchased, sold, or otherwise possessed or transported *in any manner contrary to any Act of Congress or regulation issued pursuant thereto or contrary to the laws or regulations of any State, territory, the District of Columbia, the Commonwealth of Puerto Rico, possession of the United States, or foreign country* [may be civilly or criminally punished].

74 Stat. 754, *codified at* 18 U.S.C. § 43 (1965) (emphasis added). As a result of the 1960 Lacey Act amendments, each of the two Section 42 offenses – importation of wildlife deemed injurious "into United States" and shipment of injurious wildlife "between the continental United States" and other U.S. jurisdictions – can thus also serve as a predicate for a violation of the current catch-all liability provision that was codified as 18 U.S.C. § 43 in 1960, and is now found in similar form at 16 U.S.C. § 3732(a)(1). For example, today, if an animal listed as injurious was illegally imported into the United States, a violation under Section 3732 would occur if it was then moved to another state.

The table below shows how Congress deliberately defined and repeatedly refined the geographical scope to which the Lacey's Act's prohibitions apply. Specifically, the table shows the changing scope of the Act's (1) injurious species importation prohibition; (2) provision relating to domestic conveyance of injurious wildlife; and (3) catch-all liability provision covering sales, movements, and acquisition of wildlife that has been moved, taken, or otherwise obtained in violation of federal, state, tribal, or foreign now found in Section 3732 of Title 16 (and formerly codified at 18 U.S.C. § 43), at certain key junctures.

	1900 Act	1960 Act	Current Law
Injurious Wildlife Importation	"into the United States"* * C. 553, sec. 2, 31 Stat. 188	"**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"* * 18 U.S.C. § 42	Same
Injurious Wildlife Conveyance	"**from one State** or Territory **to another State** or Territory, or from the District of Columbia or Alaska to any State or Territory, or **from any State** or Territory **to the District of Columbia** or Alaska"* * C. 553, sec. 2, 31 Stat. 188	"**between the continental United States**, the District of Columbia, **Hawaii**, the Commonwealth of Puerto Rico, or any possession of the United States"* * 18 U.S.C. § 42	Same
Section 3732 (Section 43) Transportation of Wildlife Taken/Moved in Violation of Law	Same as immediately above	"**to or from any State**, territory, the District of Columbia, the Commonwealth of Puerto Rico, any possession of the United States, or any foreign country"* * 18 U.S.C. § 43 (1965)	**Subsection (a)(1)**: any sale, acquisition, movement without geographic limitation* **Subsection (a)(2)**: "interstate or foreign commerce"* * 16 U.S.C. § 3732

Accordingly, as the law now stands, 18 U.S.C. § 42 prohibits importation to the "United States" writ large of wildlife deemed injurious, while "shipment" is barred only between the "continental United States" and, for example, Hawaii or Puerto Rico. Designation of a species as injurious does not act to bar injurious species' conveyance among the forty-nine continental states.

(ii) ***The Lacey Act Has Long Been Construed By Defendants and Others As Allowing Domestic Conveyance of Injurious Species Within the Continental United States***

FWS and others have long construed the Lacey Act as permitting domestic movement and commerce in listed wildlife with the continental United States; which is to say, in line with congressional intent. For example, in a 1977 proposed rule, FWS stated: "Pursuant to the

statute, the proposed regulations would also prohibit the shipment of injurious wildlife between any two of the following geographic areas: the continental United States, the State of Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States." 42 Fed. Reg. 12972, 12974 (March 7, 1977); *see also* 40 Fed. Reg. 7935, 7936 (Feb. 24, 1975) ("Interstate shipments are not affected, except shipments between noncontinental parts of the United States (island ecosystems such as Hawaii and Puerto Rico) and the continental United States.").

These excerpts were from a series of rules proposed by FWS, beginning in December 20, 1973, 38 Fed. Reg. 34970, which would have deemed all non-native wildlife as injurious, save for specifically exempt animals. These proposals elicited significant concern from the pet industry, pet owners, zoos, and others as they would have resulted in significant numbers of animals already in domestic trade and ownership being listed as "injurious." *See, e.g.,* 40 Fed. Reg. 7936 (discussing comments). In 1974, during congressional hearings on the initial proposal, FWS special agent-in-charge Richard Parsons explained that, "there is no restriction that we find in section 42 of the Lacey Act to interstate shipments, with the possible exception of restrictions from areas off the continental United States, such as Puerto Rico, the Virgin Islands, and Hawaii." Report on Hearings on Proposed Injurious Regulations, Serial No. 93-46, at 151 (Dec. 12, 1974) (attached in relevant part hereto as Exhibit A).

FWS' understanding that the Lacey Act does not bar interstate conveyance of injurious wildlife between each of the continental states has been repeatedly noted over the years. For instance, in a 1993 report, the U.S. Office of Technical Assessment ("OTA") stated: "Interstate transport of injurious fish and wildlife listed under the Lacey Act, such as the zebra mussel (*Dreissena polymorpha*), is not prohibited by Federal law." OTA, *Harmful Non-Indigenous Species in the United States*, OTA-F-565, 165 (1993), *available at* http://www.anstaskforce.gov/

Documents/OTA_Report_1993.pdf (last visited April 1, 2015). OTA and others have seen this alleged gap as a "weakness" in the law. *See, e.g.*, Eric Biber, *Exploring Regulatory Options for Controlling the Introduction of Non-Indigenous Species to the United States*, 18 Va Envtl LJ 375, 401 (1999) (opining the "between the continental United States" language "might provide authority to regulate commerce of [non-indigenous species] between the mainland U.S. and the insular possessions, but not the spread of NIS within the United States.").

FWS has never issued a general regulation interpreting the Lacey Act in the manner it has employed in the non-native constricting snake rules. In fact when, in 1965, Defendants promulgated regulations governing its Lacey Act authority, they defined the prohibition with respect to conveyance of injurious species in the exact same geographic terms as the statute; *i.e.*, "between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any territory or possession of the United States." *See* 30 Fed. Reg. 9640 (Aug. 3, 1965); *see also* 50 C.F.R. § 16.3. As the language of the statute, its development over time, legislative history, and FWS' previous interpretation of the law discussed above all show, Congress expressly intended to limit such movements only between all forty-nine continental states as a singular entity and the other listed jurisdictions (or between those jurisdictions), not within or between the continental states.

(iii) *FWS Has Adopted a New, Unlawful Construction of the Lacey Act's Scope in the Rules at Issue*

Notwithstanding its prior interpretation of Section 43, in the March 2015 rule, FWS purports to bar "interstate transportation [of these snakes] between States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States," dropping the modifiers "continental" and "United" from the rule's preamble. 80 Fed. Reg. at 12708; *see also id.* at 12732 (FWS claiming "the authority to restrict transportation

between any of the States, territories, and other jurisdictions"); 77 Fed. Reg. at 3333 (same). According to Defendants, anyone transporting or shipping any of the listed snakes across a state line within the continental United States is subject to civil fines, up to six months in prison, or both under subsection (b) of Section 42. 18 U.S.C. § 42(b). FWS does not claim that the statute's language is ambiguous or that its interpretation is compelled by the Lacey Act's terms. Rather, Defendants' position is based on the new-found belief "that this interpretation is consistent with the language and intent of the statute."[7]

"As in all statutory construction cases, we begin with the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002). "*Chevron* analysis begins with asking whether Congress has delegated authority to an agency by leaving a statutory gap for the agency to fill." *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 707 (D.C. Cir 2008) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984)). Under the *Chevron* framework, a court must "first determine whether the statutory text is plain and unambiguous" and, if so, the court "must apply the statute according to its terms." *Carcieri v. Salazar,* 555 U.S. 379, 384 (2009) (citing *United States v. Gonzales*, 520 U.S. 1, 4 (1997)). "No deference is required when the statute's plain language resolves the dispute." *Lubow v. U.S. Dept. of State*, 923 F. Supp. 2d 28, 35-36 (D.D.C. 2013) (citing *Carcieri*, 555 U.S. at 379). There is nothing ambiguous about the phrase "the continental

[7] *Compare with In re: Polar Bear Endangered Species Act Listing*, 794 F. Supp. 2d 65, 82-85, 89-90 (D.D.C. 2011) (finding that FWS properly interpreted the Endangered Species Act ("ESA") phrase "in danger of extinction" in the definition of endangered species when it based that interpretation on: (1) this Court's finding that the phrase was ambiguous; (2) a delegation of authority to "fill the gap" in the law; and (3) a detailed eighteen page analysis of its past administration of the ESA, legal precedent, practical and biological considerations, and the law's text, structure, and legislative history). None of these factors exist in the case at bar.

United States" or in Congress' proscription on shipments "between" those states as a unit and other places, such as Hawaii.

Well-established canons of statutory construction require that agencies and courts "give effect to the meaning of each word of the statute." *Int'l Swaps and Derivatives Ass'n v. U.S. Commodity Futures Trading Com'n*, 887 F. Supp. 2d 259, 271 (D.D.C. 2012). FWS' interpretation of the law in the March 2015 rule (as in the January 2012 rule) – specifically, as applying to movements between "any state" – violates this canon by reading the modifier "continental United" out of the statute (and its regulations).

As shown above, *supra* at 11, other Lacey Act provisions in current law use broader formulations, such as 16 U.S.C. § 3732(a)(2) ("interstate or foreign commerce") and Section 42's importation restriction ("into the United States"). 18 U.S.C. § 42(a)(1). Indeed, Defendants treat the language used in Section 42's shipment provision as if it were identical to that Congress used to in Section 3732's predecessor following the 1960 amendments; that is, "any state." *See supra* at 9-10. "[W]here Congress includes particular language in one section of a statute [*i.e.*, "continental United States" in Section 42] but omits it in another section of the same Act [*e.g.*, "any State" in former Section 43], it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)) (alteration in original, internal quotations omitted); *see also American Petroleum Institute v. SEC*, 953 F. Supp. 2d 5, 14 (D.C. Cir. 2013) (same). FWS lacks the discretion to ignore the distinctions Congress created.

When Congress wants to refer to the several states, it knows how to do so. *See, e.g., Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 616 (1944) (Congress "uses broad language" when it wants to grant discretion). Congress, in fact, explicitly did so when amending

the Lacey Act in 1960. *See* Sec. 2, Public Law 86-702, 74 Stat. 753 (Sept. 2, 1960) (referring to "any state"). The use of different language to describe the geographic application of Section 42's importation limitation ("the United States") compared to that in its shipment provision ("the continental United States"), not to mention the distinct variations Congress has used in Section 3732 and its predecessors over the years, *see supra* at 11, is purposeful and must be given effect. *Rodriguez,* 480 U.S. at 525. Indeed, 18 U.S.C. § 5 defines "United States" as used throughout Title 18 to mean "all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone." *Id.* This provision of law adds another layer of context to Congress' deliberate use of the word "continental" in 18 U.S.C. § 42. Noetheless, in the rules at issue, FWS purports to apply the geographic scope of Section 42's importation and conveyance provisions as if they were conterminous.

No language in Section 42's domestic conveyance provision grants Defendants the authority to expand the scope of the law's geographic application in the manner done here. The use of the modifier "continental United" forecloses any interpretation that applies the prohibition between any states other than Hawaii. This case is thus akin to *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140 (D.C. Cir. 2006). In *Friends of the Earth,* the court found Congress' use of the word "daily" as a modifier for the phrase "total maximum loads" removed any ambiguity as to scope. 446 F.3d at 144. "[B]y providing for the establishment of 'total maximum loads,' Congress could have left a gap for EPA to fill," but did not. *Id.* Accordingly, the court vacated EPA's regulation providing for seasonal or annual loads for some pollutants. *Id.* at 148.

As in *Friends of the Earth*, so too in this case. In Section 42, Congress' use of the word "continental United" to modify "States," coupled with the specific reference to Hawaii, show clear intent to treat the forty-nine continental states as a single entity, distinct from the other

jurisdictions "between" which shipments are prohibited. These words remove ambiguity and, accordingly, this "'is the end of the matter.'" *Id.* at 144 (quoting *Chevron*, 467 U.S. at 843-43).

Agencies, moreover, "may not 'avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.'" *Friends of the Earth*, 446 F.3d at 145 (quoting *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)). FWS takes this impermissible step by "find[ing] that prohibiting interstate trade in these species . . . will reduce the risk of these species becoming more widespread to new areas of the United States, including the territories and insular possessions." 80 Fed. Reg. at 12724. Nor may FWS rest its "belief" that its reading of "continental United" out of the statute is justified on the grounds that it may further the Lacey Act's objectives. *See Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) (agencies cannot rely on "broader congressional intent" as justification). "The most reliable guide to congressional intent is the legislation the Congress enacted," *id.*, and, as Plaintiffs have demonstrated, Congress carefully crafted the 1960 amendments to apply different geographical limitations on the activities the law regulates.

(iv) *FWS' Construction of Section 42 is in Conflict of the Canon of Constitutional Avoidance*

Defendants' interpretation of the Lacey Act expressed in the two rules at issue also runs afoul of the "canon of constitutional avoidance." "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008). In *National Mining Association*, the D.C. Circuit explained that agency interpretations that unnecessarily raise constitutional concerns are not entitled to deference. As the court stated:

> This canon of constitutional avoidance trumps *Chevron* deference, *see DeBartolo*, 485 U.S. at 574-77, 108 S.Ct. 1392, and we will not submit to an agency's interpretation of a statute if it "presents serious constitutional difficulties," *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995). But we do not abandon *Chevron* deference at the mere mention of a possible constitutional problem; the argument must be serious.
> *See Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 409 (D.C. Cir. 1996).

Nat'l Mining Ass'n, 512 F.3d at 711 (D.C. Cir 2008). The burdens imposed on Plaintiffs' constitutional rights caused by Defendants' (mis)interpretation of Section 42 are "serious" and cannot be justified as serving any substantial state interest.[8]

As an initial matter, FWS' interpretation is not compelled by the language of the statute; indeed, as shown above, the two are irreconcilable. Even if FWS' construction of Section 42 were plausible, however, the limitation on movement of the listed snakes across continental state lines imposes a significant burden on Plaintiffs' fundamental right to travel and raises equal protection concerns under the Fifth Amendment.

"[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Attorney General of New York v. Soto-Lopez*, 415 U.S. 250, 254-262 (1974) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (alteration in original, quotations omitted). The right to travel "is virtually unqualified." *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (citing *United States v. Guest*, 383 U.S. 745, 757-758 (1966)). The regulations at issue significantly burden this right by limiting Plaintiffs' choices in domicile, as well as their ability to pursue career advancement and even to seek emergency medical care for one's pet.

For example, Dr. Diaz owns both a personal collection and research collection of Burmese pythons, reticulated pythons, and yellow anacondas. (Second Am. Compl. ¶ 14.)

[8] *See Oregon v. Mitchell*, 400 U.S. 112, 238 (1970) (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.)) ("governmental action that has the incidental effect of burdening the exercise of a constitutional right" may only be predicated "upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest").

Under Defendants' two rules, his ability to accept a position at an academic or research institution outside of California means sacrificing these animals. Plaintiff Edmonds is faced with the imminent decision whether to accept a better job in a state he and his family prefer (which would require him to abandon his reticulated python collection under FWS' interpretation of Section 42), or to remain in Florida. (Declaration of Matthew Edmonds ("Edmonds Decl."), ¶ 3, appended hereto as Exhibit B.) Declarant David Riston could face criminal charges if he takes his green anacondas or reticulated python to Northern Virginia for necessary medical attention not available in his home state of Maryland. (Declaration of David Riston ("Riston Decl.") ¶¶ 3, 5-8, appended hereto as Exhibit C.) No compelling reason justifies these restrictions on any of these people's guaranteed right to travel.

"A statute [or regulation] implicates the constitutional right to travel when it actually deters such travel, or when impedance of travel is its primary objective . . . ." *Soto-Lopez v. New York City Civil Serv. Comm'n*, 755 F.2d 266, 278 (2d Cir. 1985) (internal citations, quotations, and emphasis omitted). FWS recognized its prohibition on interstate movements of listed snakes deters travel,[9] and the evidence presented above confirms it. Defendants' policy of "if you like your python, you can keep your python (so long as you maintain your current domicile or forgo its necessary medical care)" clearly "implicates" an important constitutional right. While Congress generally is free to make a determination that such encumbrances are necessary to serve compelling public interests, it did not do so in this instance.

Likewise, Defendants' unwarranted extension of the Lacey Act's scope and putative ban on interstate transportation (save for Hawaii) of the listed snakes also implicates equal protection concerns. "Equal protection applies equally to the federal government through the Fifth

[9] *See* 80 Fed. Reg. at 12723 ("We emphasize that it will be lawful for pet owners to keep their pets (if allowed by State law)" unless "a pet owner . . . move[s] to another State").

Amendment Due Process Clause." *Holmes v. Fed. Election Comm'n*, No. CV 14-1243 (RMC), 2014 WL 5316216, at *5 (D.D.C. Oct. 20, 2014) (citing U.S. CONST. AMEND. 5) (case citations omitted). A violation of the equal protection clause can arise when a "plaintiff [is] 'arbitrarily and intentionally treated differently from others who are similarly situated – and the government has no rational basis for the disparity.'" *Kingman Park Civic Ass'n v. Gray*, 956 F. Supp. 2d 230, 247 (D.D.C. 2013) (quoting *Kelley v. District of Columbia,* 893 F. Supp. 2d 115, 122 (D.D.C. 2012)).

According to FWS,

> those breeders who live in the States with designated ports[10] (Alaska, California, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, New Jersey, New York, Oregon, Tennessee, Texas, and Washington) may continue to export from the United States through the designated port in their State (if allowed under State law), although they may not continue to ship to other States.

80 Fed. Reg. 12733. This means that Declarants Jay Brewer and Navarone Garibaldi may receive permits from FWS allowing them lawfully export reticulated pythons and green anaconda because they live in a state (California) with a "designated port."[11] By contrast, FWS would not grant such permits to Plaintiff Renick and Declarants Kevin McCurley and Kristopher Brown[12] because they do not live in such a state. As to this latter group, any attempt to export

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[10] *See* 50 C.F.R. § 14.12 (listing the "ports of entry are designated for the importation and exportation of wildlife and wildlife products").

[11] (*See* Declaration of Jay Brewer ("Brewer Decl.") ¶¶ 3.13, appended hereto as Exhibit D; *see also* Declaration of Navarone Garibaldi ("Garibaldi Decl.") ¶¶ 2, 4, appended hereto as Exhibit E. *See* Second Am. Compl. ¶ 74 and for discussion of the relevance of "designated ports.")

[12] (*See* Second Am. Compl. ¶ 16; *see also* Declaration of Lynlee Renick ("Renick Decl.") ¶ 7, appended hereto as Exhibit F; Declaration of Kevin McCurley ("McCurley Decl.") ¶¶ 10-13, appended hereto as Exhibit G; Declaration of Kristopher Brown ("Brown Decl."), ¶ 11, 21-22, appended hereto as Exhibit H.)

the listed snakes would make them felons.[13] There is no compelling reason for the distinction. For example, Mr. McCurley, who is located in Plaistow, New Hampshire, (McCurley Decl. ¶ 2), is located only fifty minutes by car from the designated port at Boston Logan International Airport. A similarly situated breeder located in, for example, Pittsfield, Massachusetts may engage in such exports, even though she is a two-and-a-half hour's drive from Logan Airport.

The irrationality this example highlights is likely one of many reasons Congress did not create such an unjust disparity in 5 U.S.C. § 42. The decision to burden fundamental rights in these ways was not made by Congress, but solely by FWS when it reversed course and decided to make all interstate transportation unlawful through the listings at issue.

The natural, intended, and, indeed, only understanding of the Lacey Act's "between the continental United States" and other jurisdictions is that it does not limit injurious species transportation and movement in commerce among continental states. The canon of constitutional avoidance thus deprives Defendants of any deference to which their tortured interpretation might otherwise be entitled. Defendants cannot bend over backwards to read the law in a manner that tramples fundamental rights when its language neither compels such a reading nor evinces any congressional intent to do so. This Court should avoid the constitutional questions by construing the Lacey Act to avoid them.

[13] (*See* Goss Decl. ¶ 16.) Felony penalties can be levied under 16 U.S.C. § 3733 because the interstate "transportation" of a listed snake violates the March 2015 rule and the export would violate Section 3372, which makes it unlawful to "transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States." *Id.* § 3372(a)(1).

(v) ***Conclusion***

For all of the reasons explained above, Defendants' construction of 5 U.S.C. § 42(a)(1), as reflected in the rules at bar, is inconsistent with the Lacey Act's plain terms and unsupportable by any canon of statutory construction. Thus, Plaintiffs have shown that Defendants have assumed a power – specifically, to prohibit movement of, and commerce in, wildlife designated as injurious within the continental United States – that 5 U.S.C. § 42(a)(1) does not grant. The March 2015 rule is, therefore, *ultra vires* to that extent, as Plaintiffs allege in Count One.

As to Count Two, brought pursuant to the Declaratory Judgment Act, Plaintiffs have an actual dispute with Defendants that arises under the laws of the United States, within the meaning of 28 U.S.C. § 1331, that involves the extent of FWS' coercive powers under the Lacey Act. Therefore, this Court has jurisdiction to declare, and should exercise its discretion to declare, that FWS cannot civilly or criminally prosecute Plaintiffs for transporting or shipping any of the constricting snakes subject to the rules at issue between the continental states. *See Cobell v. Babbitt*, 91 F. Supp. 2d 1, 24 (D.D.C. 1999) (federal question jurisdiction); *see also id.* at 38-39 (power to declare rights under a federal statute). Plaintiffs are thus likely to succeed on the merits of Counts One and Two.

(b) ***Plaintiffs Are Likely to Prevail on Their Regulatory Flexibility Act Claims, Count Six***

Count Six of Plaintiffs' Second Amended Complaint alleges that FWS failed to meet its duties under the RFA. The RFA requires any agency developing a rule for which the APA or any other law requires a "general notice of proposed rulemaking" to publish an "initial regulatory flexibility analysis" ("IRFA") in conjunction with such proposed rule. 5 U.S.C. § 603(a). An IRFA "shall describe the impact of the proposed rule on small entities" and provide "a description of any significant alternatives to the proposed rule which accomplish the stated

objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." *Id.* § (a), (c).

In conjunction with a final rule, the agency must publish a "final regulatory flexibility analysis" ("FRFA") which, in relevant part, must include:

> (2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; . . .
>
> (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

Id. § 604(a)(2), (5). The RFA provides for judicial review of an agency's compliance with the requirements of section 604, and authorizes injunctive relief. *Id.* § 611(a)(1), (4)(B). Judicial review is governed by the standards of chapter 7 of the APA. *Id.* § 611(a)(1), (2). An agency's analysis may be remanded if deemed to be "arbitrary and capricious." *Lake Carriers Ass'n v. EPA*, 652 F.3d 1, 5 (D.C. Cir. 2011) (quoting 5 U.S.C. § 706(2)(A)); *see also Nat'l Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009). While the RFA is "'[p]urely procedural' . . . and of itself imposes no substantive constraint on agency decisionmaking," *Nat'l Tel. Co-Op Ass'n*, 563 F.3d at 540 (quoting *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001)), an agency must still make a reasonable attempt to meet these procedural requirements.

FWS completed an IRFA in 2010 and took comment on it in conjunction with the March 2010 proposed rule. *See* 75 Fed. Reg. at 11811. In terms of "significant alternatives" required by RFA section 603(c), the IRFA's complete analysis was as follows: "The environmental assessment analyzes three alternatives to the proposed rule: (1) no action, (2) the listing of seven

species as injurious wildlife, and (3) the listing of five species as injurious wildlife. None of these alternatives would be significant."[14] Defendants issued a FRFA in conjunction with the January 2012 rule listing the Burmese python and three other non-native constricting snakes. *See* 77 Fed. Reg. at 3364.

Since 2012, FWS has completed another round of rulemaking and prepared a new FRFA in conjunction with March 2015 rule. 80 Fed. Reg. 12743. However, while Defendants reopened comment on the March 2010 proposed rule in June 2014, they did not then prepare a new IFRA. *See* 79 Fed. Reg. 35719 (June 24, 2014). Instead, FWS directed the public to refer to the 2010 IRFA. *Id.* This does not satisfy the RFA's minimum procedural requirements. Such an IRFA is an essential predicate for a valid FRFA. *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1436 (M.D. Fla. 1998).

As courts have recognized, times change, and analyses that may have been suitable for one rule may not be sufficient to support even a substantially similar rule adopted later. *See, e.g.*, *North Carolina Fisheries Ass'n v. Daley* ("*NCFA*"), 16 F. Supp. 2d 647, 652 (E.D. Va. 1997) (maintaining summer flounder quota from one year to the next requires new consideration of impacts). In the present case, even at the time of publication, the 2010 IFRA itself was deemed inadequate by the Small Business Administration's ("SBA") Office of Advocacy to support even the January 2012 final rule, much less the March 2015 rule. *See* Letter of Winslow Sargeant, Ph.D. to Daniel Ashe, at 2 (July 10, 2014), attached hereto as Exhibit N.[15] In that letter, SBA

[14] FWS, *Initial Regulatory Flexibility Analysis For Listing Nine Constrictor Snake Species As Injurious Under The Lacey Act*, at 5 (Feb. 1, 2010), *available in* Docket No. FWS–R9–FHC–2008–0015 at www.regulations.gov.

[15] SBA's Office of Advocacy has been described as the expert "RFA watch-dog." *Southern Offshore Fishing*, 995 F. Supp. at 1435.

reiterated its position that the 2010 IRFA lacked "discussion of all the significant alternatives to the proposed rule," and called on FWS to produce a supplemental IRFA. *Id.*

Defendants' March 2015 FRFA cannot, under 5 U.S.C. § 604(a)(2), reasonably be predicated upon the insufficient and outdated 2010 IFRA. As the court in *Southern Offshore Fishing* explained in terms relevant to this case:

> Pursuant to § 603, an IRFA would have required [the agency] to engage in a careful and meaningful study of the problem from the beginning. With notice of [the agency's] position, the public could have engaged the agency in the sort of informed and detailed discussion that has characterized this litigation. . . .
>
> [The agency] prepared an FRFA lacking procedural or rational compliance with the requirements of the RFA [including 5 U.S.C. § 604(a)(2), quoted above]. [The agency] could not possibly have complied with § 604 by summarizing and considering comments on an IRFA that NMFS never prepared.

995 F. Supp. at 1436. Nor could FWS have rationally considered alternatives under 5 U.S.C. § 604(a)(5) without taking the necessary steps to understand "the unraveling economic effect of its regulations on small businesses." *Id.* at 1436-37.

As the Second Amended Complaint and declarations show, the two injurious species listings at suit have had, and will continue to have, devastating economic consequences for small business owners. *NCFA* explained very well how a series of regulations can have compounding consequences. 16 F. Supp. 2d at 652.

Plaintiffs have sought extraordinary preliminary injunctive relief here because they learned from the January 2012 rule just how dislocating an injurious species determination covering animals in active trade, coupled with an arbitrary and capricious thirty-day effective date, can be. (Goss Decl. ¶ 6.) Had FWS provided the kind of warning – and opportunity for reasoned dialogue –the RFA requires, these issues could have been explored and addressed in the

agency record, rather than in an emergency injunction proceeding. Simply re-opening a comment period, as Defendants did before issuing the March 2015 rule, does not meet RFA requirements.

More specifically, the 2012 listing of the Burmese python and other species itself had changed the baseline conditions for small business entities of the reptile industry so substantially that by the June 2014 reopening of the comment period, there was no information in the 2010 IFRA relevant for the public to discuss. In fact, FWS expressly abandoned its 2010 IFRA and developed a new set of "straw man" alternatives *sub silento* for analysis in the 2015 FRFA, explaining, "[f]or the final economic analysis for this final rule (2015), our alternatives changed because we had already listed four species as injurious." 80 Fed. Reg. at 12742 (citing 77 Fed. Reg. 3330). Thus, just as in *Southern Offshore Fishing*, Defendants jumped straight to FRFA, analyzing alternatives to which the public had not been privy.

The 2012 listings altered the economic impacts of listing the remaining snakes in 2015 in a way that simply was not foreseeable, and thus not discussed, in the 2010 IFRA. For instance, breeders of large constricting snakes like McCurley, whose businesses had depended heavily on the Burmese python, were able to survive because the option to focus on reticulated python existed. (McCurley Decl. ¶ 6; *see also* McCurley comments of July 25, 2014, *available in* Docket No. FWS–R9–FHC–2008–0015 at www.regulations.gov.) FWS was also made aware of the difficulties attending disposal of large numbers of animals by breeders all at the same time. *See*, *e.g.*, comments of Kristopher Brown of July 25, 2014, *available in* Docket No. FWS–R9–FHC–2008–0015 at www.regulations.gov; (*see also* Goss Decl. ¶ 6).

While FWS did, in fact, consider additional alternatives ostensibly to minimize small business impacts in conjunction with the March 2015 rule, the agency never presented or

analyzed them in an IRFA, allowed for meaningful public comment, and interpreted the resulting information and insights into a lawful FRFA. Beyond those mentioned above, in the March 2015 rule, Defendants did decide to implement a truly "significant alternative," specifically, to rely on state/federal cooperation, state regulation, and private initiatives as an alternative to listing the boa constrictor, 80 Fed. Reg. at 12704, which Plaintiffs do appreciate. Plaintiffs and others, however, were denied the opportunity guaranteed by the RFA to comment on this approach as an alternative to listing the other four species covered by the March 2015 rule. In fact, the FRFA that accompanied the January 2012 rule led the public to believe FWS would *not* consider this approach. *See* FWS, *Final Regulatory Flexibility Analysis For Listing Constrictor Snake Species As Injurious Under The Lacey Act*, at 5 (claiming "this alternative [of co-management] is not practical or feasible from a technical standpoint"), *available in* Docket No. FWS–R9–FHC–2008–0015 at www.regulations.gov).

As a final point, Defendants never considered extending the effective date beyond the minimum thirty-day period specified in the APA. 5 U.S.C. § 553(d). On March 16, 2015, Plaintiffs, through their attorneys, sent a letter to FWS Director Daniel Ashe requesting that he use his discretion under the APA to extend the effective date. A copy of this letter is appended hereto as Exhibit I. Yesterday, Director Ashe denied this request. That letter is appended hereto as Exhibit O.

In denying this request, Director Ashe focused on only one of the many points raised, stating that Plaintiffs "are requesting an extension of the effective date for all four species not because the additional time is necessary to bring their actions into compliance with new legal restrictions but rather to minimize or avoid economic impacts to breeders and sellers by selling 'as much inventory as possible.'" Ashe Letter at 1. The response's clear import is that FWS

recognizes no obligation to minimize economic impacts of its regulatory actions, repeating a pattern established throughout this rulemaking process.

Thirty days is an inadequate amount of time to adjust to the unlawful restrictions FWS has placed on small entities. By way of example of the types of actions small entities might have taken with a longer phase-in, the March 2015 rule itself asserts at several junctures that its adverse economic impacts will be mitigated to some degree by breeders' ability to continue exporting these snakes *if* they happen to be located in a state with designated port. *See, e.g.,* 80 Fed. Reg. at 12733. Few green anaconda and reticulated python breeders, and only one major breeder, are located in a state with designated port. (Second Am. Compl. ¶ 74). Entities in that situation and who rely on exports for a significant portion of revenues could have, with a longer "cooling off" period, sought to relocate to a state with a designated port. (McCurley Decl. ¶ 14.)

The March 2015 rule's preamble also discusses myriad alternatives to euthanasia that, among others, breeders with large, expensive-to-maintain inventories of reticulated pythons and green anacondas now worth less than the cost of upkeep, might have pursued. These include donations to zoos, giving the animals away, and seeking persons to adopt the animals. *Id.* at 12733. These actions cannot happen overnight, especially if options are limited to intrastate after thirty days. (Goss Decl. ¶ 8; McCurley Decl. ¶¶ 11, 16-17.) Further, many breeders have outstanding orders that cannot be filled by the April 9, 2015, effective date because, for example, eggs are currently incubating and females are currently gravid, (*see, e.g.*, Miller Decl. ¶ 7; Brown Decl. ¶¶ 18-20), and improper shipping weather. (McCurley Decl. ¶ 13.) However, with more time, these breeders may have been able to recoup some of their investment through fulfillment of pre-orders, reduced price sales or exports. (Second Am. Compl. ¶ 72; *see also* Renick Decl. ¶ 9; Brown Decl. ¶ 20.) The thirty-day clock diminishes Plaintiffs' opportunities to do exactly

what the March 2015 rule recommended to mitigate financial losses and/or find responsible and caring homes for these animals, Director Ashe's glib response notwithstanding. (*See* Ex. N.) For reasons described above, Plaintiffs are likely to succeed on the merits of Count Six.

2. Plaintiffs Will Suffer Irreparable Harm If the Court Does Not Issue the Requested Preliminary Injunction

In considering whether to issue a preliminary injunction, some courts have held that "the most important inquiry is that concerning irreparable injury." *Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. App. 1976). In weighing whether a party has demonstrated that it will suffer irreparable harm, the court must consider two primary factors. First, the harm must be "certain and great, actual and not theoretical." *Monument Realty LLC v. Wash. Metro. Area Transit Auth.*, 540 F. Supp. 2d 66, 74 (D.D.C. 2008). Under this standard, the moving party must establish that the harm is imminent and provide a "clear and present" need for equitable relief to prevent such an injury. Second, to establish that the harm is irreparable, the moving party must demonstrate that no other adequate legal remedies are available. *Id.* When assessing both of these factors, the court must consider whether the moving party has shown that such irreparable harm is "likely" to occur. *Id*. at 74-75.

When the March 2015 rule becomes effective on April 9, 2015, Plaintiffs will suffer a series of immediate and irreparable injuries. These injuries are not speculative. Plaintiffs have submitted declarations from several constricting snake owners averring that, among other things: (1) concrete plans to accept a new job in a different state within the next six months may have to be abandoned (Edmonds Decl. ¶ 3); (2) a pet owner will lose access to life-saving care for his reticulated pythons and green anacondas (Riston Decl. ¶¶ 4-9); (3) the reticulated python breeding business of an Iraq war veteran suffering from post-traumatic stress disorder ("PTSD") is at imminent risk (Declaration of Ryan Parker ("Parker Decl.") ¶¶ 6-7, 12-14, appended here as

Exhibit J); and (4) several Declarants face the loss of businesses in which they have invested life-savings, coupled with the certainty of having to kill animals they have had and loved for decades due to the enormous financial burden their maintenance, no longer offset by sales, will entail.[16]

Economic harm may qualify as an irreparable injury where the harm, as it is here, "is so severe as to cause extreme hardship to the business or threaten its very existence." *Coalition for Common Sense in Gov't Procurement v. United States*, 576 F. Supp. 2d 162, 168 (D.D.C. 2008) (internal quotations omitted); *see also Toxco Inc. v. Chu*, 724 F. Supp. 2d 16, 31 (D.D.C. 2010). Courts also have reasoned that economic harm may qualify as irreparable "where a plaintiff's alleged damages are unrecoverable." *Clarke v. Office of Fed. Hous. Enter.*, 355 F. Supp. 2d 56, 65 (D.D.C. 2004*); see Bracco Diagnostics Inc. v. Shalala*, 963 F. Supp. 20, 29 (D.D.C. 1997) ("While the injury to plaintiffs is admittedly economic, there is no adequate compensatory or other corrective relief that can be provided at a later date, tipping the balance in favor of injunctive relief.").

The declarations submitted by constricting snake owners emphasize that the March 2015 rule classifying the four species of constricting snakes as "injurious" will have a certain, great, and actual effect on them and their businesses. There is little doubt that this rule will lead to "unrecoverable" economic damages for constricting snake owners and the industry at large. In declarations submitted along with this motion, several business owners demonstrate that the March 2015 Rule "threatens" the very existence of their businesses. *Supra* n.13. The implementation of the March 2015 rule is an existential matter for small business entities like that of Plaintiff Benjamin Renick and his wife, Lynlee Renick, which rely on interstate and

[16] (*See, e.g.,* Declaration of Jeff Kelley ("Kelley Decl."), 5-6, 11, appended hereto as Exhibit Q; McCurley Decl. ¶¶ 3, 18-19; Brown Decl. ¶¶ 3-4, 28; Garibaldi Decl. ¶¶ 6-9; Renick Decl. ¶ 6-10.)

foreign sales of reticulated pythons and green anacondas for the overwhelming majority of their revenues.[17] With only a thirty day pre-effectiveness window, the Renicks and others who are not located in a state with a designated port for exporting wildlife will be left with large inventories of unmarketable snakes whose care and feeding are prohibitively expensive. (Second Am. Compl. ¶ 16.) Declarant Parker, a former army medic suffering from PTSD from his service in Iraq, is likely to lose the reticulated python breeding business into which he invested his life savings. (Parker Decl. ¶¶ 8-12.) Furthermore, the March 2015 rule will result in a significant loss of foreign and domestic sales opportunities resulting from the limited number of "designated ports"[18] and FWS' disallowance of transport by air on flights that cross state lines. (*See, e.g.*, Brewer Decl. ¶¶ 25-26.)

The listing will have equally fatal impacts on industries that depend on the large constricting snake industry. For example, Declarant Bob Ashley runs the five largest national reptile breeder trade shows in the U.S., known as the North American Reptile Breeders Conferences ("NARBC"). (Declaration of Bob Ashley ("Ashley Decl."), ¶ 3, appended hereto as Exhibit K.) The listing of reticulated pythons and green anaconda, coupled with the prior listing of the Burmese python, may very well reduce revenues from vendors and ticket sales to the point it could cause NARBC to cease operations. (*Id.* ¶ 6.) The loss of large breeders of the listed snakes also puts Declarant Mark Daniel Krull, Jr.'s business at risk. (Declaration of Mark D. Krull, Jr. ("Krull Decl."), ¶¶ 7-8, appended hereto as Exhibit L.) Krull is a partner in Eden Bio-Creations, which produces textiles from the shed skins of large constrictors, providing a humane alternative to the killing of wild snakes. (*Id.* ¶¶ 3-4.) The sad irony is that FWS' rule will likely

[17] (*See* Second Am. Compl. ¶ 16; *see also* McCurley Decl. ¶¶ 13-14; Brewer Decl. ¶¶ 27-29.

[18] (*See, e.g.*, Second Am. Compl. ¶ 16; *see also* McCurley Decl. ¶ 10.)

have the cruel effect of hastening the demise of these large constricting snakes, many of which are threatened with extinction, in the wild. (*Id.* ¶ 9; *see also* Goss Decl. ¶¶ 8-10.) There is a substantial likelihood that rare genetic types will be lost and even complete loss of localities that only exist in private collections. (Brown Decl. ¶ 26; McCurley Decl. ¶ 16; Goss Decl. ¶ 9.) No amount of money can compensate for these losses.

Finally, and most fundamentally, adversely affected breeders will be faced with a choice of euthanizing or otherwise divesting themselves of snakes they have spent decades selectively breeding and to which they are emotionally attached. (*See, e.g.,* Renick Decl. ¶¶ 10-11; McCurley Decl. ¶¶ 4-5; Brewer Decl. ¶¶ 15-16, 42; Kelley Decl. ¶¶ 9-10.) More specifically, constricting snake breeders, such as Renick, McCurley, Kelley, and Brewer, are now faced with the likelihood of needing to euthanize their animals because of the cost of upkeep.[19] Once dead, nothing can bring these snakes, their unique genetics, or their emotional significance back. Breeders develop a strong emotional attachment with their animals, and decisions relating to euthanizing the snakes may have far-reaching and long-lasting emotional implications. (*See, e.g.,* Parker Decl. ¶¶ 12-14.) Mr. Edmonds faces the same dilemma with respect to his personal collection if he chooses to advance his career by moving to Washington, where he and his family would prefer to live. (Edmonds Decl. ¶ 3.)

The ban on transporting the listed snakes between states where ownership is lawful means that Declarant David Riston will not be able to seek specialized veterinary care for his reticulated pythons and green anacondas. (Riston Decl. ¶¶ 5-8.) He lives in Maryland, a state that has no herpetological specialists. (*Id.* ¶ 8.) The only life-saving care available for Mr. Riston's snakes is in northern Virginia, (*id.* ¶¶ 5, 7), but Defendants' unlawful actions have now

[19] (*See* Second Amended Compl. ¶ 16; Renick Decl. ¶¶ 6-10; Kelley Decl. ¶¶ 9-10; McCurley Decl. ¶¶ 14-16.)

made it impossible for Mr. Riston to access the only herpetological veterinarian available. Mr. Riston's snakes average four routine visits a year to this facility, not counting emergency visits due to these snakes' extreme sensitivity to temperature, humidity, and barometric pressure making the susceptible to life-threatening respiratory infections. (*Id.* ¶ 6.) Declarant Kyle Miller, a Nebraska native currently living in Colorado, will have to either give up plans to attend law school in his home state, and thus incur $50,000 to $100,000 more in tuition fees, or forgo his small collection of reticulated pythons and the rare genetic lineage they possess. (Declaration of Kyle Miller ("Miller Decl."), ¶¶ 2-5, 8-9, appended hereto as Exhibit M.)

Plaintiffs have submitted sufficient evidence to demonstrate that irreparable harm will result when the challenged rule is enforced and that the April 9, 2015 effective date fails to provide Plaintiffs and other constricting snake owners with enough time to take the necessary steps to protect their business and personal interests.

3. Defendants Will Not Be Harmed If Relief Pending Review is Granted and the Preliminary Injunction Issues

The third prong in the preliminary injunction analysis is whether a defendant would suffer a substantial injury if the request for an injunction is granted. Here, the FWS cannot credibly assert that it would be prejudiced by the implementation of a preliminary injunction.

Plaintiffs are seeking merely a continuation of the status quo while the Court addresses the merits of their legal challenge. In these circumstances, where FWS itself spent five years developing the rule at issue, Defendants cannot legitimately claim that they would suffer harm as a result of a delay in implementing its March 2015 rule while the case is litigated. *See AFL-CIO v. Chao*, 297 F. Supp. 2d 155, 165 (D.D.C. 2003) (entering preliminary injunction in challenge to rule imposing new reporting requirements on labor unions and finding that the status quo had been acceptable for 40 years and should therefore be preserved until the challenge is resolved);

see also Building and Construction Trades Dep't v. Donovan, 543 F. Supp. 1282, 1291 (D.D.C. 1982) (noting that two and one-half years had passed since the effort to change the regulations had started and this timetable showed that the government would not be harmed by maintaining the status quo pending the court's determination of the validity of the new regulations); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 15 (D.D.C. 2009) (finding the National Rifle Association operated under firearm restrictions in previous regulations for the past 25 years and would not be substantially harmed by an the enactment of an injunction that stayed implementation of a new March 2015 rule pending resolution of Plaintiffs' claims on the merits).

While FWS may claim that it maintains concerns about the risk of invasiveness of these four species of snakes, its own data show that this is not a reasonable concern. The risk assessment conducted by the United States Geological Survey ("USGS")[20] upon which FWS based its injurious determinations show that the reticulated python and green anaconda may find suitable climate in, at most, small areas of two states, Florida and Texas' southern Gulf Coast.[21] Additionally, Florida and Texas already have laws regulating these two species. *See id.* at 12705, 12726 (discussing these' states regulations). There is no suitable climate at all for the Beni or De Schuaensee's anacondas in the continental United States; nor are these two species in trade. *Id.* at 12712; *see also* USGS Risk Assessment, *supra* n.20, at 237, 209.

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[20] Reed, R.N. and Rodda, G.H., *Giant Constrictors: Biological and Management Profiles and an Establishment Risk Assessment for Nine Large Species of Pythons, Anacondas, and the Boa Constrictor*, United States Geological Service Open-File Report 2009–1202, Chapt. Seven (2009) ("USGS Risk Assessment"), *available in* Docket No. FWS–R9–FHC–2008–0015 at www.regulations.gov.

[21] *See* 80 Fed. Reg. at 12713 ("[T]he area of the mainland United States showing a climate match [for reticulated python] is exclusively subtropical, and limited to southern Florida and extreme southern Texas."); *id.* at 12716 ("Florida (roughly south of Gainesville) and extreme south Texas exhibit climatic conditions similar to those experienced by green anacondas in their large South American native range, but the rest of the continent appears to be too cool or arid.").

Reticulated pythons have been imported into the United States for over forty years and they, along with green anaconda, have not become established anywhere. (McCurley Decl. ¶ 25 (reticulated python)); *see also* 80 Fed. Reg. at 12712 (neither species breeding in the U.S.). Both species are tropical and highly sensitive to temperature. (*See* McCurley Decl. ¶ 13 (reticulated python cannot be shipped in cold weather); Edmonds Decl. ¶ 7 (temperatures of West Palm Beach, Florida too cold to allow python embryos to develop); Garibaldi Decl. ¶ 14 (reticulated python died indoors when external temperature was 50^{o} and power went out).) "Anacondas can be difficult to maintain, because not only are they sensitive to temperature, but they are also sensitive to humidity and barometric pressure." (Riston Decl. ¶ 6.) Even FWS considers the four species listed in the March 2015 rule to be only a "medium risk," while the boa constrictor, which Defendants chose not list, is considered to be a "high risk." 80 Fed. Reg. at 12708.

In short, there is no urgency in implementing this regulation now – as opposed to waiting until the legal questions surrounding this rule are resolved. The FWS cannot demonstrate any critical need for allowing the March 2015 rule to become effective immediately. When the lack of harm to FWS is compared to the substantial economic, professional, and personal harm that the new rule will wreak on Plaintiffs and other small business owners in this industry, this factor weighs heavily in favor of granting Plaintiffs' motion.

4. <u>The Requested Preliminary Injunction Will Further The Public Interest</u>

The final factor also weighs in favor of granting Plaintiffs' request for a preliminary injunction, as the public interest supports enjoining the implementation of the March 2015 rule until the matter is resolved on the merits. Plaintiffs have demonstrated that if the rule at issue is implemented within the immediate 30-day timetable, it will impair vital bio-medical research,[22]

[22] (*See, e.g.*, Second Am. Compl. ¶¶ 14, 65)

hamper environmental education programs,[23] and deter necessary conservation efforts relating to certain species of constricting snakes. (*See* Second Am. Comp. ¶ 95; Goss Decl. ¶¶ 8-10.) In the same vein, the public also has a legitimate interest in ensuring that the March 2015 rule promulgated by the FWS does not result in retarding biomedical advances, (Second Am. Compl. ¶¶ 14, 65; Goss Decl. ¶ 7), or environmental research. (Second Am. Compl. ¶ 64.) A preliminary injunction may also benefit FWS as it will ensure that the agency's goals of preventing "the accidental or intentional introduction and subsequent establishment of populations of these snakes in the wild," *see* 80 Fed. Reg. at 12704, are not undermined by other environmental impacts that have not yet been properly considered. *See Brady Campaign to End Gun Violence*, 612 F. Supp. at 26-27. For instance, it would avoid the potential for intentional release by loving, but reckless owners who cannot keep, find a suitable home in reasonable time-frame, or bear to kill their snake, as many declarants and public commenters predicted. *See, e.g,* 80 Fed. Reg. at 12723; (*see also* McCurley Decl. ¶ 28).

Further, the important public interest in promoting the economic viability of small businesses would be served by maintaining the status quo until there is a final determination regarding the legality of the March 2015 rule. If FWS lists these four species of constricting snakes as injurious, and if the March 2015 rule is subsequently held to be unlawful, such a result would be tremendously burdensome and disruptive to all parties. Reticulated python and green anaconda breeders are experiencing lost sales and many will have to close their businesses. Instead of forcing small business owners to grapple with difficult and life-defining economic decisions at this juncture, it serves the public interest to wait to implement the regulations until they have been determined with finality.

[23] (*See id.* ¶¶ 13; *see also* Brewer Decl. ¶¶ 8-12, 39-40.)

B. Courts In This Circuit Have Granted Preliminary Injunctions In Analogous Cases Against Federal Agencies.

This Court has previously granted preliminary injunctions in analogous cases where federal agencies were preliminarily enjoined from implementing or enforcing a final rule until the matter was finally adjudicated, when plaintiffs established the likelihood of success on the merits and the likelihood of irreparable harm in the absence of such an injunction. *See, e.g., Brady Campaign to Prevent Gun Violence*, 612 F. Supp. 2d at 15 (D.D.C. 2009) (preliminary injunction granted enjoining the Department of Interior from enforcing a rule permitting possession of concealed and loaded firearms in national parks); *Northern Mariana Islands*, 686 F. Supp. 2d at 7 (D.D.C. 2009) (preliminary injunction granted blocking an interim rule promulgated by the Department of Homeland Security to change immigration laws); *Building and Construction Trades Dep't, AFL-CIO*, 543 F. Supp. at 1291 (D.D.C. 1982) (preliminary injunction granted preventing the implementation of new regulations under the Davis-Bacon Act that would lead to a substantial increase in wages for semi-skilled "helpers" at the expense of laborers and mechanics).

Similarly, here, Plaintiffs will suffer irreparable harm if this Court does not enjoin the implementation of the March 2015 rule until this matter is finally adjudicated, or, in the alternative, stay the 30-day effective date of the March 2015 rule in order to give Plaintiffs and business owners more time to comport with the regulations. Plaintiffs, as stated herein, will face an immediate decrease in sales from the ban on interstate shipments, the loss of specific sales due to an inability to move across state lines with constricting snakes, the loss of export opportunities, and even the loss of their snakes themselves.

The FWS, on the other hand, will suffer no prejudice if an injunction is issued because Plaintiffs merely seek a continuation of the status quo while the Court addresses the merits of

their legal challenge. Under these circumstances, and based on the fact that FWS first published the proposed rule listing the specific species of constricting snakes as injurious on March 12, 2010 – exactly *five years* before finalizing the rule – it cannot credibly be said that the Government will be injured by maintaining the status quo pending a determination of the validity of the new regulations.

IV. CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this Court grant Plaintiffs' application for a temporary restraining order and motion for relief pending review, and preliminarily enjoin the enforcement of the March 2015 rule until this matter is finally resolved on the merits, or, in the alternative, stay the enforcement of the March 2015 rule.

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Respectfully submitted,

/s/ *Shaun M. Gehan*
Shaun M. Gehan
D.C. Bar No. 483720
THE LAW OFFICE OF SHAUN M. GEHAN
3050 K Street, N.W. – Suite 400
Washington, D.C. 20007
Telephone: (202) 342-8400
Facsimile: (202) 342-8451

David E. Frulla
D.C. Bar No. 414170
Paul C. Rosenthal
D.C. Bar No. 235242
KELLEY DRYE & WARREN LLP
3050 K Street, N.W. – Suite 400
Washington, D.C. 20007
Telephone: (202) 342-8400
Facsimile: (202) 342-8451

Attorneys for Plaintiffs