

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

UNITED STATES ASSOCIATION)	
OF REPTILE KEEPERS, INC., <i>et al.</i>)	
)	
Plaintiffs-Appellees,)	
)	No. 15-5199
v.)	
)	
S.M.R JEWELL, <i>et al.</i>)	
Defendants-Appellants,)	
)	
and)	
)	
THE HUMANE SOCIETY OF THE)	
UNITED STATES, <i>et al.</i>)	
Intervenor-Defendants-Appellees.)	
_____)	

MOTION BY THE CENTER FOR INVASIVE SPECIES PREVENTION, NATURAL AREAS ASSOCIATION AND THE WILDLIFE SOCIETY FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APELLANTS JEWELL AND FISH AND WILDLIFE SERVICE SEEKING REVERSAL OF THE DISTRICT COURT

I. INTRODUCTION

This is a Motion for Leave to file an *Amicus Curiae* brief in support of the Defendants-Appellants, The Honorable Sally Jewell, Secretary of the Interior, and the U.S. Fish and Wildlife Service. The Plaintiffs-Appellees, the United States Association of Reptile Keepers, Benjamin Renick, Matthew Edmonds, Raul Eduardo Diaz, Jr., and Caroline Seitz (collectively “USARK”) invoked the district court’s jurisdiction under the Administrative Procedure Act (“APA”), 5 U.S.C. § 702; the Small Business Regulatory Enforcement and Fairness Act, 5 U.S.C. § 611; and

the Declaratory Judgment Act, 28 U.S.C. § 2201. ECF No. 27-1. The district court issued a preliminary injunction in favor of USARK on May 19, 2015. Federal Defendants filed a timely notice of appeal on July 17, 2015. [Dkt. 71]

The Center for Invasive Species Prevention, Natural Areas Association and The Wildlife Society (“*Amici*”) respectfully request leave to file the proposed *Amicus Curiae* brief, attached herewith, in support of the Government’s position seeking reversal of the District Court. The detailed missions and interests of *Amici* are described in the proposed brief.

The Center for Invasive Species Prevention is a Maryland non-profit corporation, managed by science and policy professionals, that strives to advance policy and non-governmental approaches to prevent the introduction and spread of invasive species in the United States. The Natural Areas Association is an international non-profit organization dedicated to serving natural area professionals and to advancing the preservation of natural diversity. The Wildlife Society is a non-profit scientific and educational association of more than 9,000 professional wildlife biologists and managers in every State dedicated to excellence in wildlife stewardship through science and education. All *Amici* belong to the National Environmental Coalition on Invasive Species, a coalition with the Mission Statement of (in pertinent part): *promot[ing] sound state, federal, and international policy that prevents harmful non-native, or invasive, species from being introduced, becoming established, and spreading in the United States.*

Amici submit the proposed brief to: 1) further that prevention goal for large, invasive and dangerous, constrictor snakes, and 2) conserve the integrity of the Lacey Act “injurious species” regulation provision, 18 U.S.C. §42(a)(1), from the unprecedented legal challenge that USARK has mounted against it, which would eliminate much of its effectiveness.

II. LEGAL BASIS FOR MOTION

Under D.C. Circuit Rule 29(a), an *amicus curiae* brief “must avoid repetition of facts or legal arguments made in the principal . . . brief and focus on points not made or adequately elaborated upon in the principal brief.” (See also Fed. R. App. P. 29, Notes of Advisory Committee on 1998 Amendments, Note to Subdivision (b), in pertinent part: “An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. . . .). The proposed brief respects that guidance

Amici’s Counsel has contacted Plaintiffs-Appellees’, Defendants-Appellants’ and Intervenor-Defendants-Appellees’ Counsel to determine whether they would consent to the filing of *Amici’s* brief. Plaintiffs-Appellees’ Counsel did not respond to the query. Defendants-Appellees’ and Intervenor-Defendants-Appellees’ Counsel stated no objection.

III. INTERESTS AND PERSPECTIVES OF PROPOSED *AMICI*

Proposed *Amici* here have important interests unrepresented now by any Party. As organizations comprised of scientific, land management and conservation professionals concerned especially about environmental protection and wildlife, *Amici* will provide new, expert perspectives.

Amici’s Brief discusses in detail how the District Court’s decision, if upheld, would affect *Amici*. The District Court’s ruling in support of Counts One and Two of USARK’s Complaint by which USARK seeks an unprecedented declaration that the Secretary of the Interior’s regulatory power under 18 U.S.C. §42(a)(1) does not include authority to regulate interstate commerce in

the continental States. Second Amended Complaint, ECF No. 27-1, ¶¶ 103 through 117. If the District Court is upheld it would directly harm *Amici*'s and the public's interests in regulating the interstate spread of harmful invasive species.

As their Brief explains, *Amici* also will be affected due to the pendency of other injurious species listing Petitions under 18 U.S.C. §42(a)(1) and proposals which *Amici* organizations support. The scope of any new regulations would be directly diminished if USARK were to prevail on its Counts One or Two. *Amici* also would be affected by the frustration of their long years of advocating for more comprehensive implementation of 18 U.S.C. §42(a)(1), which would be drastically undercut if the District Court ruling is upheld. In short, there is no doubt *Amici*'s interests could be directly affected by the outcome of this case.

In addition, *Amici*, consisting to a large extent of conservation professionals and land area managers have a strong stake, as does the American public at large, in avoiding any additional large constrictor snake invasions in the nation's public and private natural areas. As discussed in the Brief, at least two new invasions of breeding populations of these snakes occurred during the nine year period that the listing regulations took to be developed, adopted and implemented. *Amici* provide science-based arguments about why a preliminary injunction against the maintenance of the current Federal listings of the eight constrictor snake species would be strongly contrary to the public interest and a serious risk to the environment and America's native wildlife heritage.

IV. CONCLUSION

The attached Proposed Brief is an appropriate *Amicus Curiae* filing that will provide the Court useful and relevant information. The Court is requested to grant permission to the Center

for Invasive Species Prevention, Natural Areas Association and The Wildlife Society to file their *Amicus* Brief.

Dated: Dec. 9, 2015

Respectfully submitted,

/s/ George Kimbrell

PETER T. JENKINS
Of Counsel
4507 Maple Avenue
Bethesda, MD 20814

GEORGE KIMBRELL, Sr. Attorney
Center for Food Safety
660 Pennsylvania Ave. SE, No. 302
Washington, DC 20003
(202) 547-9359
gkimbrell@centerforfoodsafety.org

Dated: December 9, 2015

No. 15-5199

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

UNITED STATES ASSOCIATION OF REPTILE KEEPERS, INC.;
BENJAMIN RENICK; MATTHEW EDMONDS; RAUL EDUARDO
DIAZ, JR.; and CAROLINE SEITZ,

Plaintiffs-Appellees,

v.

S.M.R JEWELL, in her official capacity as Secretary of the Interior; and UNITED
STATES FISH AND WILDLIFE SERVICE,

Defendants-Appellants

and

THE HUMANE SOCIETY OF THE UNITED STATES, and CENTER
FOR BIOLOGICAL DIVERSITY,

Intervenor-Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**PROPOSED - AMICUS CURIAE BRIEF OF THE CENTER FOR
INVASIVE SPECIES PREVENTION, NATURAL AREAS ASSOCIATION
AND THE WILDLIFE SOCIETY IN SUPPORT OF DEFENDANTS-
APPELLANTS JEWELL AND FISH AND WILDLIFE SERVICE
SEEKING REVERSAL OF THE DISTRICT COURT**

PETER T. JENKINS

Of Counsel

4507 Maple Avenue

Bethesda, MD 20814

Dated: December 9, 2015

GEORGE KIMBRELL, Sr. Attorney

Center for Food Safety

660 Pennsylvania Ave. SE, No. 302

Washington, DC 20003

(202) 547-9359

gkimbrell@centerforfoodsafety.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

CORPORATE DISCLOSURE STATEMENT..... vi

INTERESTS OF THE *AMICI CURIAE*..... 1

SUMMARY OF ARGUMENT..... 4

ARGUMENT..... 5

 I. Background..... 5

 II. *Amici* Have Strong Interests in the Application of
 18 U.S.C. §42(a)(1) to Interstate Commerce, as Congress Intended..... 6

 III. *Amici* Have Interests in Pending Regulatory Proposals
 that Will Be Potentially Injured by the Outcome of this Case..... 10

 IV. A Strong Public Interest is Associated with Continued Implementation
 of the Full Final Rules for the Eight Listed Snakes..... 12

CONCLUSION..... 16

CERTIFICATE OF COMPLIANCE WITH RULES 29(c)(5), 29(d), 32(a).. 19

CERTIFICATE OF SERVICE..... 20

TABLE OF AUTHORITIES

	PAGE(S)
FEDERAL CASES	
<i>Sibley v. Obama</i> , 810 F. Supp. 2d 309, 310 (D.D.C. 2011).....	12, 16
 STATUTES	
18 U.S.C. §42(a)(1).....	3, 4, 5, 6, 7, 12, 13
 REGULATIONS	
50 C.F.R. §16.13(a)(3).....	9
73 Fed. Reg. 5,784 (Jan. 31, 2008).....	6
75 Fed. Reg. 56,975 (Sept. 17, 2010).....	11
80 Fed. Reg. 67,026 (Oct. 30, 2015).....	11
 OTHER AUTHORITIES	
Asian Carp Regional Coordinating Committee, <i>Asian Carp Control Strategy Framework</i> (2013), available at http://www.asiancarp.us/documents/2013Framework.pdf (last visited Apr. 11, 2015).....	7
Comments of NECIS organizations to USFWS on large constrictor snakes, Docket No. FWS-R9-FHC-2008-0015; of Apr. 30, 2008 available at http://www.regulations.gov/#!documentDetail;D=FWS-R9-FHC-2008-0015-1292 ; of May 10, 2010, available at http://www.regulations.gov/#!documentDetail;D=FWS-R9-FHC-2008-0015-2890 ; of July 24, 2014, available at http://www.regulations.gov/#!documentDetail;D=FWS-R9-FHC-2008-0015-8244 (all last visited Apr. 21, 2015).....	4
Lynn Corn and Renée Johnson, Cong. Res. Serv., R43258, <i>Invasive Species: Major Laws and the Role of Selected Federal Agencies</i> (Oct. 24, 2013) available at http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R43258.pdf	

PAGE(S)

OTHER AUTHORITIES, CONT'D

(last visited Apr. 21, 2015).....	8
Defenders of Wildlife, <i>Broken Screens - The Regulation of Live Animal Imports in the United States</i> (2007), available at www.defenders.org/publications/broken_screens_report.pdf (last visited Apr. 11, 2015).....	15
Michael E. Dorcas et al., <i>Severe mammal declines coincide with proliferation of invasive Burmese pythons in Everglades National Park</i> . 109 Proc. Nat'l Acad. Sci. 2418-2422 (2012), available at http://www.pnas.org/content/109/7/2418.full.pdf , (last visited Apr. 11, 2015).....	14
Rodrigo B. Ferreira et al., <i>Global assessment of establishment success for amphibian and reptile invaders</i> . 39 Wildlife Research 637-640 (2012), available at http://www.academia.edu/4230511/Ferreira_et_al._2012-Global_assessment_of_establishment_success_for_amphibian_and_reptile_invaders (last visited Apr. 11, 2015).....	13
Clyde Haberman, <i>The snake that's eating Florida</i> . New York Times. Retro Report. Article and online video, (Apr. 6, 2015), available at www.nytimes.com/2015/04/06/us/the-burmese-python-snake-thats-eating-florida.html (last visited Apr. 11, 2015).....	15
Peter T. Jenkins, <i>Invasive animals and wildlife pathogens in the United States: the economic case for more risk assessments and regulation</i> . 15 Biological Invasions 243-248 (2013), available at http://link.springer.com/article/10.1007/s10530-012-0296-8 (last visited Dec. 6, 2015).....	3
Jim Malewitz, <i>States seek federal crackdown on mussel invaders</i> . USA Today (Aug. 5, 2013), available at www.usatoday.com/story/news/nation/2013/08/05/mussel-invaders-cost-billions/2618669/ (last visited Apr. 11, 2015).....	8

PAGE(S)

OTHER AUTHORITIES, CONT'D

USGS, Snakeheads FAQs. "How did snakeheads get into the United States?" (undated), available at <http://www.usgs.gov/faq/categories/9787/3000%20> (last visited Apr. 11, 2015)..... 8

U.S. Nat'l Park Serv., Fact Sheet - Burmese Pythons (undated), available at <http://www.nps.gov/ever/learn/nature/burmesepythonsintro.htm> (last visited Apr. 11, 2015)..... 6

White House Office of Management and Budget, Injurious Wildlife Species; Listing Salamanders Due to Risk of Salamander Chytrid Fungus, RIN: 1018-BA77, Unified Agenda of Regulatory and Deregulatory Actions (Fall 2015), available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=1018-BA77> (last visited Dec. 6, 2015)..... 11

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, *Amici* Center for Invasive Species Prevention, Natural Areas Association and The Wildlife Society are all nonprofit corporations, have no parent corporations and do not issue stock.

Dated: December 9, 2015.

Respectfully submitted,

/s/ George Kimbrell

GEORGE KIMBRELL

INTERESTS OF THE *AMICI CURIAE*

***Amicus Curiae* Center for Invasive Species Prevention (CISP)**, is a small Maryland non-profit corporation, managed by science and policy professionals, that strives to advance policy and non-governmental approaches to prevent the introduction and spread of invasive species in the United States. CISP works through engaging stakeholders, educating the public and decision-makers and advocating for effective measures to government officials. Its prevention work is focused in the following areas: forest pests and tree pathogens, and invasive animals and wildlife pathogens.

***Amicus Curiae* Natural Areas Association (NAA)** is an international non-profit organization dedicated to serving natural area professionals. Based in Bend, Oregon, its mission is to advance the preservation of natural diversity. NAA's broad and diverse membership includes government and non-governmental land and resource managers, conservationists, biologists, ecologists, researchers, land trusts, educators, students and others who care about conservation and management of natural areas.

***Amicus Curiae* The Wildlife Society**, founded in 1937, is a non-profit scientific and educational association of more than 9,000 professional wildlife biologists and managers in every State dedicated to excellence in stewardship through science and education. Headquartered in Bethesda, Maryland, The Wildlife Society's

mission is to inspire, empower and enable wildlife professionals to sustain wildlife populations and habitats through science-based management and conservation.

All *Amici* are conservation or scientific organizations that belong to the National Environmental Coalition on Invasive Species (NECIS). This is an unincorporated coalition founded in 2002 with the Mission Statement of (in pertinent part): *promot[ing] sound state, federal, and international policy that prevents harmful non-native, or invasive, species from being introduced, becoming established, and spreading in the United States...*

Amici have advocated for strong prevention policies in view of the tremendous harm invasive species of plants and animals have done – and still do – to America’s environments, its economic interests and in some case to public health and safety. Much of the attention of *Amici* centers on the protection of our native species from harms resulting from new non-native species invasions. This harm can take the form of direct predation, habitat degradation, competition, genetic swamping, disease transmission and other harms. Almost 25% of all listings of native species as threatened or endangered under the Endangered Species Act (ESA) identify harm from invasive species as a contributing factor.¹

With respect to the economic damage that also drives *Amici*’s involvement in this arena, it is estimated that the United States suffers over \$100 billion annually in

¹ United States Fish and Wildlife Service (USFWS), *Fact Sheet – The Cost of Invasive Species* (undated), available at <http://www.fws.gov/home/feature/2012/pdfs/CostofInvasivesFactSheet.pdf> (last visited Apr. 11, 2015)

cumulative economic losses and expenditures attributable to all varieties of invasive pests, weeds, and plant and animal pathogens. A major portion of that - tens of billions of dollars annually - is attributable to the full historical suite of invasive animals and associated animal pathogens now in the country.² For example, in 2011 alone, the Department of the Interior spent approximately \$100 million on invasive species prevention, early detection and rapid response, control and management, research, outreach, international cooperation and habitat restoration.³ Close to \$80 million of that was spent on preventing further spread of just one set of injurious animals listed under the Lacey Act, the Asian carps. *Amici* are very concerned with avoiding these types of massive losses and expenditures that would have been unnecessary had proactive prevention policies been applied in the first instance. Strong preventative approaches save the nation from tremendous avoidable costs – inversely, weak prevention mean greater economic damages.⁴

Amici organizations strongly support the listings of the eight large constrictor snake species at issue. They joined on various detailed public comments that the

² David Pimentel et al., *Update on the environmental and economic costs associated with alien invasive species in the United States*. 52 *Ecol. Econ.* 273-288 (2005), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1037&context=nwrcinvasive> (last visited Apr. 11, 2015)

³ USFWS, *Fact Sheet – The Cost of Invasive Species*, *supra* note 1.

⁴ Peter T. Jenkins, *Invasive animals and wildlife pathogens in the United States: the economic case for more risk assessments and regulation*. 15 *Biological Invasions* 243-248 (2013), available at <http://link.springer.com/article/10.1007/s10530-012-0296-8> (last visited Dec. 6).

NECIS Coalition filed in 2008, 2010 and 2014, urging prompt regulatory action by the U.S. Fish and Wildlife Service (USFWS).⁵

SUMMARY OF ARGUMENT

The authority of the USFWS to regulate interstate commerce, in addition to international imports, under 18 U.S.C. §42(a)(1) has been essential to its implementation. The ruling in this case by the District Court declaring that authority to be *ultra vires*, if upheld, would be devastating to implementation of 27 current regulatory listings amounting to at least 243 injurious species, and also devastating to several pending Petitions and proposals for new listings. This would expose *Amici* and the American public to more environmentally and economically harmful invasions mediated by interstate transport of captive-bred or resident wild populations of listed injurious animals. 18 U.S.C. §42(a) (1) should not be interpreted in a manner that renders it so ineffective – that is not what Congress intended. Further, absent the fully-effective listings for the eight constrictor snakes species involved here, risks of more constrictor snake invasions and environmental and economic harm will

⁵ Comments of NECIS organizations to the USFWS on large constrictor snakes, Docket No. FWS-R9-FHC-2008-0015; of Apr. 30, 2008 *available at* <http://www.regulations.gov/#!/documentDetail;D=FWS-R9-FHC-2008-0015-1292>; of May 10, 2010, *available at* <http://www.regulations.gov/#!/documentDetail;D=FWS-R9-FHC-2008-0015-2890>; of July 24, 2014, *available at* <http://www.regulations.gov/#!/documentDetail;D=FWS-R9-FHC-2008-0015-8244> (all last visited Apr. 21, 2015)

continue, as well as serious public safety concerns stemming from these potentially deadly animals.

Amici concur entirely with the arguments made in the Opening Brief of the Department of Justice on behalf of the Defendants-Appellants. The arguments of *Amici* here focus on the harm that an adverse ruling to the Government would inflict on the very purpose of the law at issue. That harm would reverberate through the environment by undercutting the scope of both past and future Lacey Act listings, with resulting harm to the public interest as well.

ARGUMENT

I. Background

This case is about the long efforts by the USFWS to list nine large constrictor snakes as “injurious species” under the Lacey Act, 18 U.S.C. §42(a)(1), specifically: Indian python (*Python molurus*, including Burmese python *P. molurus bivittatus*), reticulated python (*Broghammerus reticulatus* or *P. reticulatus*), Northern African python (*P. sebae*), Southern African python (*P. natalensis*), boa constrictor (*Boa constrictor*), yellow anaconda (*Eunectes notaeus*), DeSchauensee's anaconda (*E. deschauenseei*), green anaconda (*E. murinus*) and Beni anaconda (*E. beniensis*). The regulatory process began in 2006 with a Petition filed by the South Florida Water Management District

(SFWMD).⁶ This was in response to environmental degradation and the extensive SFWMD costs associated with the Burmese python invasion in the Everglades and surrounding lands in south Florida, where it was first documented as an established breeding population in 2000.⁷

In 2009, Federal reptile experts with the U.S. Geological Survey (USGS), after study and analysis, concluded that all nine species presented a high or medium risk of becoming invasive within the United States.⁸ They noted that several species already were in the United States and being moved via interstate commerce.

II. *Amici* Have Strong Interests in the Application of 18 U.S.C. §42(a)(1) to Interstate Commerce, as Congress Intended

The District Court's ruling essentially agreed with two of USARK's Complaint Prayers for Relief, *COUNT ONE (Ultra Vires, Lacey Act, 18 U.S.C. § 42, via the APA)* and *COUNT TWO (Declaratory Judgment Act, APA, Lacey Act, United States Const.)*, which are extremely far-reaching and would largely sweep away many decades of Lacey Act regulation of injurious, invasive, non-native animals. Second Amended Complaint, ¶¶ 103 through 117. USARK prayed for a Judgment, *inter alia*:

⁶ USFWS Notice of Inquiry, 73 Fed. Reg. 5784 (Jan. 31, 2008)

⁷ U.S. Nat'l Park Serv., *Fact Sheet - Burmese Pythons* (undated), available at <http://www.nps.gov/ever/learn/nature/burmesepythonsintro.htm> (last visited Apr. 11, 2015)

⁸ Robert Reed and Gordon Rodda. *Giant constrictors: biological and management profiles and an establishment risk assessment for nine large species of pythons, anacondas, and the boa constrictor*: U.S. Geological Survey Open-File Report 2009–1202. (“USGS Report”) available at <http://pubs.usgs.gov/of/2009/1202/pdf/OF09-1202.pdf> (last visited Apr. 21, 2015)

(b) Declaring, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, that Defendants lack legal authority to ban on interstate transportation or commerce in the listed species within the continental United States;

(c) Declaring, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, Defendants' purported ban on interstate transportation and commerce in the listed species to be ultra vires and contrary to law;

If the District Court's enabling of those two USARK Counts is upheld, then all of the other interstate commerce restrictions in the 27 injurious species listings under 18 U.S.C. §42(a)(1), comprising more than 243 species in total, would all also be *ultra vires* and, in effect, would be vacated.⁹ This would clearly contravene the very purpose of many listings under that statute. Many well-known examples exist of highly invasive, species for which the restrictions against interstate commerce are vital to prevent their further spread throughout the nation: Asian carp that threaten to enter and devastate the Great Lakes (bighead carp was listed by Congress directly)¹⁰; zebra mussels that have caused nationwide damage to aquatic systems and continue to

⁹ USFWS, *Fact Sheet - Species Listed as Injurious Wildlife under the Lacey Act (50 CFR 16)* (undated), available at http://www.fws.gov/injuriouswildlife/pdf_files/Current_Listed_IW.pdf. (last visited Apr. 11, 2015). That Fact Sheet is not current with the four additional large constrictor snake listings in the present case, thus they are added. The resulting 243 species total listing is approximate, as several listings were done at higher taxonomic levels. Further, the total excludes the disease-free certification listing for all salmonid fish, which is unique among the other listings for its broad scope.

¹⁰ Asian Carp Regional Coordinating Committee, *Asian Carp Control Strategy Framework* (2013), p. 49 (recounting interstate commerce restrictions and enforcement efforts), available at <http://www.asiancarp.us/documents/2013Framework.pdf> (last visited Apr. 11, 2015)

spread to more States (listed by Congress directly)¹¹; the Northern snakehead fish, which also continues to spread¹²; and others. Those species listed already were scattered within the nation at the time of their listing – their danger lay not primarily from further imports from overseas, but from interstate movement within the 49 continental States. The bighead carp and zebra mussel listings that Congress enacted directly were clearly for the purpose of restricting their further dissemination around the country; they made no sense otherwise.¹³

If the law were not applied so as to regulate commerce the continental States, then existing stocks of harmful injurious species would be able to be captive bred here, such as is true for the large constrictor snakes, or specimens can be taken directly from resident wild populations, such as the Asian carps, and then be freely transported around the nation. That would render any future regulations on international imports of many injurious species largely superfluous and pointless.

¹¹ Jim Malewitz, *States seek federal crackdown on mussel invaders*. USA Today (Aug. 5, 2013), available at

<http://www.usatoday.com/story/news/nation/2013/08/05/mussel-invaders-cost-billions/2618669/> (last visited Apr. 11, 2015)

¹² USGS, *Snakeheads FAQs*. “How did snakeheads get into the United States?” (undated), available at <http://www.usgs.gov/faq/categories/9787/3000%20> (last visited Apr. 11, 2015)

¹³ See, Lynn Corn and Renée Johnson, Cong. Res. Serv., R43258, *Invasive Species: Major Laws and the Role of Selected Federal Agencies* (Oct. 24, 2013), p. 8 (18 U.S.C. § 42(a)(1) regulates interstate shipments in addition to imports) available at <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R43258.pdf> (last visited Apr. 21, 2015)

It appears that only one of the 27 injurious species listings is by its terms limited to international imports, with all the others regulating both imports and interstate commerce. (It should be noted that 18 USC §42(a)(1) gives the Secretary of the Interior authority to regulate at the import stage “or” the interstate commerce stage; regulating at both stages is not mandatory.) That unique one is the disease prevention listing for “all salmonids” at 50 C.F.R. §16.13(a)(3), which involves certifying that salmon and trout imported from other countries are free of listed fish pathogens. It is the only listing that the District Court’s ruling does not severely undermine.

For the last twelve years *Amici* organizations and personnel working through the NECIS Coalition have called for more comprehensive protection from injurious foreign animal species. *Amici* have advocated for listings of many other injurious species beyond the constrictor snakes involved in this case. However, the direct effect of the District Court ruling, *supra* would be to, instead, dramatically diminish the scope and effect of injurious species listings and thereby expose *Amici*’s members, and the U.S. public as a whole, to more harmful invasions.

It also should be observed that the 49 individual continental States lack the capacity to inspect and regulate international or interstate imports and have no authority to limit interstate commerce as the Federal government has. Thus, as a practical matter, the States are largely powerless to prevent constrictor snakes or other

injurious species from being moved interstate, so long as they can be legally imported into and sold in other States. In short, State laws could provide no adequate “backstop” if the District Court ruling were to stand and the Federal power to regulate interstate commerce is stripped away.

Finally, this Court should note the absurdity of the interpretation 18 USC §42(a)(1) of applied to the District of Columbia in Judge Moss’s ruling. Under his interpretation, the District is treated as equivalent to Hawaii or one of the distant insular territories, such that commerce among the District and the 49 continental States can be regulated by the Defendants, but commerce among, for example, already heavily-infested Florida and other States cannot be regulated. From an invasive animal perspective, Washington, DC, presents close to zero risk. It is absurd to conclude that Congress, situated in the District, intended to treat it as a higher risk source of potentially injurious animals than Florida. Judge Moss did not tackle that logical hiatus at all in his opinion. The Court of Appeals should not similarly interpret the statute to lead to this absurd result.

III. *Amici* Have Interests in Pending Regulatory Proposals that Will Be Potentially Injured by the Outcome of this Case

Amici’s concerns are not academic; they are grounded in real interests. A NECIS Coalition Member, Defenders of Wildlife, filed a still-pending formal legal Petition for Rulemaking with the Service, endorsed by *Amici* and NECIS, seeking injurious species listing for traded amphibians that have not been certified as free of

the deadly chytrid fungus, *Batrachochytrium dendrobatidis*.¹⁴ If the District Court is upheld that result would cut the potential scope of that Petition effectively in half, rendering it impotent to regulate interstate commerce in infected amphibians. That could drastically weaken the protection that the *Amici*-supported Petition for Rulemaking could provide from this deadly pathogen threatening America's amphibians, including threatened and endangered amphibians under the ESA.

In addition *Amici* have supported at least two other proposed injurious species listings. One includes ten invasive freshwater fish species and one invasive crayfish that the Service has announced its intent to regulate in one listing package.¹⁵ Some of those species already are in commerce within the United States. If USARK prevails, the listing of these eleven species will become ineffective as far stopping their spread via ongoing commerce within the nation.

The other proposed listing is to regulate a deadly new Asian-origin fungal pathogen, *Batrachochytrium salamandrivorans* (Bsal), which, if introduced and transported among the continental States, would likely decimate North America's salamander

¹⁴ USFWS Notice of Inquiry, 75 Fed. Reg. 56975-56976 (Sept. 17, 2010) re Defenders of Wildlife, Petition to the Secretary of the Interior: To List All Live Amphibians in Trade as Injurious Unless Free of *Batrachochytrium dendrobatidis*, available at http://www.fws.gov/injuriouswildlife/pdf_files/Petition_Salazar_Bd_amphibian.pdf (last visited Apr. 11, 2015)

¹⁵ USFWS, *Injurious Wildlife Species; Listing 10 Freshwater Fish and 1 Crayfish, Proposed Rule*, 80 Fed. Reg. 67,026 (Oct. 17, 2015)

populations.¹⁶ This is a very high profile risk.¹⁷ The eastern United States are the global center of salamander diversity. Plainly, as with the other examples above, the scope and the very purpose of such a listing by the USFWS – will be seriously undermined if the District Court is upheld. If Bsal incursions then occur within the continental United States, the USFWS could do nothing to block interstate trade or transport of diseased salamanders. That would be a recipe for ecological disaster that this Court should not enable.

IV. A Strong Public Interest is Associated with Continued Implementation of the Full Final Rules for the Eight Listed Snakes

It is well-recognized that injunctive relief is not available when the moving party is unable to show that the public interest would be served thereby. *Sibley v. Obama*, 810 F. Supp. 2d 309, 310 (D.D.C. 2011). Rather than being served, the public interest will be harmed by upholding the injunctive relief blocking the continued implementation of the full final rules for the eight listed snakes.

Amici note for the Court that during the pendency of the nine-year listing process (2006-2015) it appears that two others among the nine proposed species have

¹⁶ White House Office of Management and Budget, *Injurious Wildlife Species; Listing Salamanders Due to Risk of Salamander Chytrid Fungus*, RIN: 1018-BA77, Unified Agenda of Regulatory and Deregulatory Actions (Fall 2015), available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=1018-BA77> (last visited Dec. 6, 2015)

¹⁷ Andrew Revkin, *Riled herpetologists press Obama Administration to protect America's salamanders from a fungal threat*. New York Times, DotEarth (Mar. 21, 2015), available at http://dotearth.blogs.nytimes.com/?_r=0 (last visited Apr. 11, 2015)

invaded elsewhere: the Northern African python (*P. sebae*),¹⁸ northwest of Miami, and *B. constrictor* in western Puerto Rico.¹⁹ There is a strong public interest in seeing no injunction imposed against fully implementing the Service's already excessively delayed regulations, as more delay could result in more new invasions. This would foreseeably harm especially *Amici* NAA and The Wildlife Society, whose members include many natural area managers seeking to protect our native wildlife heritage. Some developments connected to this particular harm:

- a) A 2012 published study revealed that rates of establishment for escaped or released reptiles are significantly higher than was previously generally understood.²⁰ In the past it was commonly assumed that only approximately 10% of introduced species establish wild populations successfully; this study showed that the danger of successful establishment and breeding for introduced reptiles is actually above 40%. In short, there is a very high risk of

¹⁸ NBC6 (Miami, FL) News, *Invasive Rock Pythons South Florida's Newest Threat*, Television news and article (Dec. 20, 2013), available at <http://www.nbcmiami.com/news/Invasive-Rock-Pythons-South-Floridas-Newest-Threat-236697881.html> (last visited Apr. 11, 2015)

¹⁹ R. Graham Reynolds et al., *Genetic analysis of a novel invasion of Puerto Rico by an exotic constricting snake*. 15 *Biological Invasions* 953-959 (2013), available at <http://pubs.er.usgs.gov/publication/70039860> (last visited Apr. 11, 2015)

²⁰ Rodrigo B. Ferreira et al., *Global assessment of establishment success for amphibian and reptile invaders*. 39 *Wildlife Research* 637-640 (2012), available at http://www.academia.edu/4230511/Ferreira_et_al._2012-Global_assessment_of_establishment_success_for_amphibian_and_reptile_invaders (last visited Apr. 11, 2015)

new invasions from constrictor snake escapes and releases, which will be enabled if the District Court is upheld.

- b) Large constrictor snakes are top predators that consume America's wildlife, as well as pets and domestic species, including, but not limited to, bobcats, deer, alligators, raccoons, rabbits, muskrats, possum, woodrats, mice, ducks, egrets, herons and songbirds. The Burmese python invasion is directly undermining the multi-billion dollar, nationally-supported, Everglades restoration project because the monitoring and success of that project are tied to measures of native wildlife "indicator" populations, which are now being consumed *en masse* by these pythons. One study indicated that after a decade of colonization, pythons in the Everglades have caused significant declines, eliminating as much as 99% of populations of the area's once-common small and medium sized mammals.²¹ Other States' native fauna are at risk if the Federal restrictions are struck down as far as interstate commerce in these snakes.

²¹ Michael E. Dorcas et al., *Severe mammal declines coincide with proliferation of invasive Burmese pythons in Everglades National Park*, 109 Proc. Nat'l Acad. Sci. 2418-2422 (2012), available at <http://www.pnas.org/content/109/7/2418.full.pdf> (last visited Apr. 11, 2015)

c) One set of the 2009 USGS Report findings stand out. Those are the clear threats each of these snakes pose to native species protected under the ESA.

The USGS Report states:

*...the greatest environmental impact of invasion by giant constrictors would be predation on endangered species, either via further endangerment or outright extinction.*²²

Amici, who are intent upon saving America's native species from further endangerment or extinction, have a strong interests in preventing further such invasions and in seeking to halt the ongoing decimation of ESA-protected species and other native wildlife associated with the snake invasions. There is high public awareness of this issue as well, as reflected in extensive media coverage.²³

USARK et al. have alleged some private interests, yet have made no showing of a strong public interest in reversing the Service's listing rules. This is not surprising because only a tiny fraction of the public's potential interest in owning a reptile is affected by the snake listing rules. At least 700 different reptile species are in the import trade.²⁴ The listings in 2012 and 2015 have restricted five, or at most six,

²² USGS Report, *supra*, note 8, at 255-57.

²³ For a retrospective review of press and public interest, see: Clyde Haberman, *The snake that's eating Florida*. New York Times. Retro Report. Article and online video, (Apr. 6, 2015), available at <http://www.nytimes.com/2015/04/06/us/the-burmese-python-snake-thats-eating-florida.html> (last visited Apr. 11, 2015)

²⁴ Defenders of Wildlife, *Broken Screens - The Regulation of Live Animal Imports in the United States* (2007) pp. 45-46 (table on Non-native Reptiles), available at

previously-imported reptiles of those 700 from future importation – or less than 1%.²⁵

There are numerous safer, non-invasive, reptiles that pet purchasers can readily substitute.

In short, there was no public interest associated with Plaintiffs' arguments. This undercut their attempt to satisfy that required element in order to obtain a preliminary injunction. *Sibley v. Obama*, 810 F. Supp. 2d 309, 310 (D.D.C. 2011). On the other hand, there is a very strong public interest in maintaining the Federal power to regulate interstate commerce when it presents serious environmental risks, as here.

CONCLUSION

In closing, *Amici* Center for Invasive Species Prevention, Natural Areas Association and The Wildlife Society reiterate:

- the authority of the USFWS to regulate interstate commerce under 18 U.S.C. §42(a)(1) has been essential to its implementation for many decades;
- a ruling declaring that authority to be *ultra vires* would render 18 U.S.C. §42(a)(1) largely ineffective and be devastating to implementation of 27 total

www.defenders.org/publications/broken_screens_report.pdf (last visited Apr. 11, 2015)

²⁵ There has been no known commercial importation of three of the eight listed species, i.e., Southern African python (*P. natalensis*), DeSchauensee's anaconda (*E. deschauenseei*) and Beni anaconda (*E. beniensis*).

current regulatory listings amounting to at least 243 invasive species, and also would be devastating to several pending Petitions and proposals for new listings;

- this would expose *Amici* and the American public to more environmentally and economically harmful invasions mediated by interstate transport of captive-bred or resident wild populations of listed injurious animals;
- absent the fully-effective listings for the eight constrictor snakes species, risks of more invasions and environmental and economic harm, as well as serious public safety concerns from these potentially deadly snakes will persist, contrary to the public interest; and
- the interests of *Amici* and the public would suffer from an injunction; this especially will be so in the biodiversity-rich southern tier States where the constrictor snakes are most suited to establishing breeding populations in the future.

The Court is requested to take the arguments above into account in this case. Then the Court should reverse the District Court's decision, as the Government has urged.

Respectfully submitted,

PETER T. JENKINS

Of Counsel

4507 Maple Avenue

Bethesda, MD 20814

GEORGE KIMBRELL

Senior Attorney

Center for Food Safety

660 Pennsylvania Ave. SE, No. 302

Washington, DC 20003

(202) 547-9359

Dated: December 8, 2015

gkimbrell@centerforfoodsafety.org

CERTIFICATE OF COMPLIANCE WITH RULES 29(C)(5), 29(D), 32(A)

1. Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amici* state that (a) no party's counsel authored the brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (c) no person—other than *Amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

2. With respect to the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B), this brief contains 3, 898 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/ George Kimbrell
GEORGE KIMBRELL

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ George Kimbrell
GEORGE KIMBRELL