ORAL ARGUMENT SCHEDULED ON APRIL 1, 2016
No. 15-5199

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

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

v.

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

and

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

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

[PROOF] REPLY BRIEF OF DEFENDANT-INTERVENORS/APPELLEES THE HUMANE SOCIETY OF THE UNITED STATES AND CENTER FOR BIOLOGICAL DIVERSITY

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GLOSSARY

2012 Rule	77 Fed. Reg. 3330 (Jan. 23, 2012)
2015 Rule	80 Fed. Reg. 12,702 (Mar. 10, 2015)
HSUS	Defendant-Intervenors/Appellees The Humane Society of the United States and the Center for Biological Diversity
Service	Defendant/Appellants Sally Jewell, The Honorable, in her official capacity as the Secretary of the Interior and United States Fish and Wildlife Service
USARK	United States Association of Reptile Keepers, Inc., Benjamin Renick, Matthew Edmonds, Raul Eduardo Diaz, Jr., and Caroline Seitz

SUMMARY OF ARGUMENT

It is black-letter law that a preliminary injunction is an extraordinary remedy and that such equitable relief cannot be issued for purely financial or economic harm. *See Abdullah v. Obama*, 753 F.3d 193, 197-98 (D.C. Cir. 2014); *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015). The district court abused its discretion by issuing an injunction based on USARK's assertions of lost profits from selling giant constrictor snakes in the exotic pet trade, a speculative injury for which there is an adequate remedy at law if USARK ultimately succeeds on the merits of its case.

USARK also failed to demonstrate that its statutory interpretation claim is likely to succeed on the merits, and the district court's conclusion to the contrary must be reviewed *de novo*. *See Abdullah v. Obama*, 753 F.3d at 197-98. The district court ignored 60 years of legislative history evidencing Congressional intent and instead adopted USARK's unnecessarily complicated reading of the Lacey Act's injurious species provision. For these reasons and those explained in the HSUS's Opening Brief, the Court should reverse the district court's decision and reinstate the 2015 Rule, 80 Fed. Reg. 12,702 (Mar. 10, 2015).

ARGUMENT

I. The District Court Abused Its Discretion By Granting Equitable Relief For Uncertain, Recoverable, And Minor Economic Losses To USARK

Although it remains an open question in this Circuit whether district courts can use a sliding-scale test – awarding a preliminary injunction based on a lower likelihood of harm when the likelihood of success is very high – there is no doubt that the moving party must make a "clear showing" that irreparable harm is likely. *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011), quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20, 22 (2008). Indeed, the *irreparable* nature of the harm is an irreducible minimum requirement for obtaining equitable relief, regardless of the likelihood of success on the merits. *See Winter*, 555 U.S. at 22. D.C. Circuit precedent is explicit that financial injury is insufficient – absent extraordinary circumstances – to demonstrate the irreparable harm necessary for injunctive relief. *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) ("injury must be beyond remediation").

The district court correctly found that the 2015 Rule would not threaten the very existence of plaintiffs' businesses. *U.S. Ass'n of Reptile Keepers v. Jewell*, 103 F. Supp. 3d 133, 163 (D.D.C. 2015) (hereinafter, "District Court Opinion Dated May 12, 2015"). The district court erred, however, by finding irreparable harm even though USARK did not clearly demonstrate a likelihood that its

members would suffer unrecoverable, serious, certain, and imminent economic injury if the 2015 Rule remains in effect during the litigation, as the D.C. Circuit requires. *Mexichem Specialty Resins, Inc*., 787 F.3d at 555; *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Mylan Pharms. v. Shalala*, 81 F. Supp. 2d 30, 42 (D.D.C. 2000).

The district court clearly erred in finding that USARK's harm is unrecoverable (District Court Opinion Dated May 12, 2015 at 43), and this Court can dispose of this appeal simply based on the fact that any harm suffered by USARK could be easily recovered by resuming sales of the restricted snakes if USARK ultimately succeeds on the merits of its case. *See Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 53-54 (D.D.C. 2011); Opening Br. of Defendant-Intervenors/Appellees The Humane Society of the United States and Center for Biological Diversity at 29, ECF No. 1587617 (hereinafter "HSUS Br.").

Further, the district court clearly erred in finding that the harm alleged by USARK is "serious." District Court Opinion Dated May 12, 2015 at 43. The district court did not analyze how the alleged losses compared to the overall sales of the declarants' businesses, and it completely failed to recognize that the only relevant lost sales are those that would occur *during the pendency of the litigation*.

See HSUS Br. 21-24. Such analysis is particularly important to determine the incremental impact of the 2015 Rule on an already heavily-regulated industry.[1]

Instead of conducting a rigorous analysis of the alleged lost profits to determine if such harm meets the demanding standard for injunctive relief, the district court simply offered the unsupported conclusion that USARK was "likely" to suffer serious harm. District Court Opinion Dated May 12, 2015 at 43. But the district court did not consider that snake breeders can continue to sell snakes not covered by the 2012 Rule or the 2015 Rule, including ball pythons, which are the "most popular" pet snakes selling for up to $10,000 per animal. David Fleshler, *What a Bunch of Snakes: The Reptile Lobby Uses the Tactics and Rhetoric of the Gun Lobby*, SLATE (Dec. 7, 2015), http://www.slate.com/articles/health_and_science/science/2015/12/the_snake_lobby_defends_dangerous_invasive_reptile_species.single.html. In short, the district court did not make the required findings that USARK demonstrated that its members would suffer unrecoverable, serious, certain, and imminent irreparable

[1] *See, e.g., Wilkins v. Daniels*, 913 F. Supp. 2d 517 (S.D. Ohio 2012), *aff'd* 744 F.3d 409 (6th Cir. 2014) (upholding Ohio's Dangerous Wild Animals and Restricted Snakes law, which regulates sales of reticulated pythons and green anacondas, against constitutional challenge by snake breeder); *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (upholding federal wildlife law that eliminated commercial trade in specimens, noting that "[p]rediction of profitability is essentially a matter of reasoned speculation").

harm in the absence of equitable relief. *See* HSUS Br. 17-19 (summarizing cases on the irreparable harm standard).

Notably, USARK has not disputed the arguments put forth by the HSUS in its Opening Brief regarding irreparable economic harm. *See* Br. of Appellees, ECF No. 1592898 (hereinafter "USARK Br."). USARK does argue, however, that the district court's order could be "affirmed" based on USARK's allegations of "irreparable loss of the companionship of beloved pets and the trauma of forced euthanization of broodstock due to the financial inability to maintain the animals without the subsidy of sales; loss of access to necessary specialized veterinary care; or because of planned moves to other states." USARK Br. 57-58. But the district court did not make a finding of irreparable harm for any of these alleged non-economic injuries, and so this Court cannot "affirm" on those grounds. *DeMarco v. United States*, 415 U.S. 449, 450 (1974) ("[F]actfinding is the basic responsibility of district courts, rather than appellate courts").

Additionally, while the HSUS is certainly sympathetic to the pain associated with losing the companionship of a pet, USARK's attempt to employ that concept here is dubious at best. To the extent that any USARK members value the companionship of individual green anacondas and reticulated pythons, nothing in the 2015 Rule would prevent continued possession of (as opposed to commercial activities involving) such animals. Further, the 2015 Rule would not require

"forced euthanization" of any snakes. If USARK members are not financially capable of caring for all of the animals they have produced, they should discontinue propagation and relocate surplus snakes to qualified facilities. Moreover, any such harm is self-inflicted and underscores the irresponsibility of these commercial snake breeders. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (holding that a litigant cannot "complain about damage inflicted by its own hand").

Similarly, the alleged loss of access to out-of-state veterinarians is insufficient for irreparable harm. Nothing in the 2015 Rule prohibits in-state practitioners from consulting with out-of-state veterinary specialists, a routine practice that is specifically endorsed by numerous states. *See, e.g.*, N.C.G.S. § 90-187.10(9); Ohio Rev. Code § 4741.14; AK Stat. § 08.98.125; Tenn. Code § 63-12-133(a)(2).

Finally, an assertion that a regulation would prohibit plaintiffs from executing "planned moves to other states" is again self-inflicted and insufficient for irreparable harm. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 67 (1979) (bearing the costs of regulations that bar interstate commerce of certain wildlife is "a burden borne to secure 'the advantage of living and doing business in a civilized community'") (internal citation omitted). As such, USARK did not make the

requisite showing of irreparable harm, and the district court's erroneous conclusion to the contrary constitutes an abuse of discretion.

Moreover, as discussed in the HSUS Opening Brief (HSUS Br. 24-26), the ecological damage these snakes cause – and the harm thereby caused to members of the public whose professional and aesthetic interests are deeply invested in preserving native ecosystems – are actually irreparable in nature and cannot be compensated at the end of the case. The harms that the 2015 Rule is meant to protect against and the great public interest in immediate implementation of the 2015 Rule outweigh USARK's less than sufficient showing of harm in support of their request for extraordinary relief in the form of a preliminary injunction.

Because USARK did not make the requisite showing of irreparable harm, and the district court's balancing of the equities was therefore an abuse of discretion, the district court's order must be reversed and the 2015 Rule reinstated.

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

In the Opening Brief, the HSUS provided an analysis of the statutory language and legislative history of the Lacey Act, dating back to 1900, showing that the Act has always prohibited interstate transportation of injurious species. *See* HSUS Br. 11-15. The HSUS also analyzed the current language of the Act and showed that Congress intended to maintain the prohibition on interstate transportation, as in previous versions of the Act. *See id.* at 15-16. For all those

reasons, and the additional reasons explained herein, USARK lacks a likelihood of success on the merits of their statutory interpretation claim.[2]

USARK's likelihood of success may turn on whether the Service has a reasonable interpretation of the Lacey Act's prohibition on "shipment between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States . . . ." 18 U.S.C. § 42(a)(1). Because the Service's interpretation is reasonable, and far better than USARK's unnecessarily complicated interpretation of the Lacey Act's phrasing, the district court's finding of law must be reversed.

Under the Service's interpretation, the Lacey Act's phrase "the continental United States" is a plural entity made up of the individual states found on the continent. And as such, the Lacey Act's prohibition on transportation "between the continental United States" includes interstate transportation.

The Service's interpretation does not make into "surplusage" the phrase "continental United," as USARK argues. USARK Br. 21. Under the Service's interpretation, the words "continental United" are given effect by treating "the continental United States" as including just those states within that geographic area. Because Hawaii is not included in the "continental United States," it makes

[2] To avoid repetition, the HSUS hereby endorses the plain language and ratification arguments made in the Reply Brief of Federal Appellants and incorporates them by reference under Federal Rules of Appellate Procedure 28(i). *See* Reply Br. of Fed. Appellants at 2-20.

sense that the Lacey Act also separately includes Hawaii in the list of places between which shipment is prohibited.

Under USARK's interpretation, which treats the "continental United States" as a "singular, undifferentiated entity," the Lacey Act's separate listing of the District of Columbia makes no sense. *See* District Court Opinion Dated May 12, 2015 at 14. If the "continental United States" is a singular entity that covers that entire geographic area, it must include the District of Columbia, which is obviously within that land mass. *See* HSUS Br. 15. Thus it is actually USARK's interpretation that creates surplusage in the Lacey Act by making the separate listing of "District of Columbia" unnecessary. *See* District Court Opinion Dated May 12, 2015 at 14 (finding the separate inclusion of the District of Columbia "baffling" under USARK's interpretation).

In contrast, under the Service's interpretation (which treats the "continental United States" as a plural entity comprising the individual states), the separate listing of the District of Columbia is not problematic. Indeed, it would have been reasonable for Congress to clarify that shipment involving the District of Columbia would also be prohibited because when the "continental United States" is a plural entity, it is not obvious what all is included.[3]

[3] As USARK points out, Congress went so far as to statutorily define the "continental United States" after Alaska was made a state. Pub. L. 86-70; § 48, 73 Stat. 141, 154 (June 25, 1959), *codified at* 1 U.S.C. § 1 note. Under that statutory

In fact, Congress in drafting the Lacey Act may have actually intended that "continental United States" mean the lower 48 contiguous United States and *not* Alaska, as Congress did in several other statutes.[4] Such an approach for the Lacey Act would have made sense because Alaska's harsh climate lessens the problem of invasive species. This could explain why the Lacey Act uses "continental United States" plus "Hawaii," instead of just "the States."

USARK's interpretation rewrites the Lacey Act by substituting "and" for "or" (so that the Act would prohibit shipment "between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, *and* any possession of the United States."). Relying on a dissenting opinion from 1986, USARK suggests that the Lacey Act's use of "or" can be read as "and." USARK Br. 31. But the case upon which USARK's relies makes clear that such a substitution can only stand if necessary to fulfill the "clear intent of the legislature." *Holyoke Water Power Co. v. FERC*, 799 F.2d 755, 761 (D.C. Cir. 1986). Here, it is more parsimonious to give effect to Congress's choice of the disjunctive "or" as under the Service's interpretation. USARK is right that "there

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definition, unless "otherwise expressly provided," Alaska – but not Hawaii – is within the "continental United States." *Id*.

[4] *See*, *e.g.*, Pub. L. 88-406, 78 Stat. 383 (Aug. 7, 1964), *codified at* 37 U.S.C. § 479(a)(1) (discussing transportation "between the continental United States and Alaska"); Pub. L. 89-554, 80 Stat. 378, 502 (Sept. 6, 1966), *codified at* 5 U.S.C. § 5724(b) (similar); 26 U.S.C. § 4262(c) ("The term 'continental United States' means the District of Columbia and the States other than Alaska and Hawaii.").

can be no shipment 'between' a single place, such as 'between Puerto Rico' or 'between Hawaii.'" USARK Br. 31. But the Service's interpretation does not compel such a nonsensical construction. The Lacey Act includes a list with one plural entity (under the Service's interpretation) and several singular entities joined by "or." There is nothing grammatically problematic about that approach.[5] The most reasonable interpretation is that the Lacey Act prohibits shipment between any of the continental United States, as well as between any paired combination of the several entities listed.

That courts sometimes use the phrase "continental United States" to mean a singular entity is unpersuasive. No one disputes that "continental United States" can often refer to the single, undifferentiated land mass. But that phrase also sometimes refers to the plural entity comprising all of the states within it. The only relevant question is what Congress meant in the Lacey Act, so USARK's citations to various cases using "continental United States" in the singular form is of no consequence. "In the Constitution, after all, 'the United States' is consistently a plural noun." U.*S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 n.1 (1995).[6]

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[5] It is easy to come up with similar lists that make perfect sense, such as, "The nurse told everyone in the classroom to wash their hands before lunch so that germs do not spread between the children, teacher, or teacher's aide."

[6] *See also Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 671 (1945) ("The term 'United States' may be used in any one of several senses."); *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202, 209 (2d Cir. N.Y. 2015) (citing *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282, 287 (S.D.N.Y. 2013) ("The district court gave

USARK argues that if Congress wanted to prohibit interstate shipment when it wrote "between the continental United States," it could have used a less ambiguous phrase, such as "to or from any State," which was used in a different section of a prior version of the Lacey Act. USARK Br. 26. Undoubtedly, this dispute could have been avoided if the current version of the Lacey Act used less ambiguous language. But as HSUS explained in its Opening Brief at 11-15, Congress in fact did use clear language in the early versions of the Lacey Act to prohibit interstate transportation of injurious wildlife. *See, e.g.*, Lacey Act, ch. 553, § 3, 31 Stat. 187, 188 (1900) (making it "unlawful for any person . . . to transport from one State or Territory to another State or Territory . . . any foreign animals or birds the importation of which is prohibited."). Because none of the legislative history indicates that Congress intended to *restrict* the scope of the Lacey Act through any of the numerous subsequent amendments, the best interpretation is that Congress intended to maintain the prohibition on interstate transportation of injurious species.

For all these reasons and the additional reasons stated in the Opening Briefs of the HSUS and Federal Appellants, the Court should reverse the district court

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as an example 'track[ing] the frequency of references to the United States as a single entity ("the United States is") versus references to the United States in the plural ("the United States are") and how that usage has changed over time.'").

and hold that USARK is unlikely to succeed on the merits of its statutory interpretation claim.

CONCLUSION STATING THE RELIEF SOUGHT

For all the reasons explained, the HSUS therefore respectfully asks the Court to set aside the preliminary injunction and reinstate the 2015 Rule in full.

Respectfully submitted on this 1st day of February, 2016,

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Circuit Rule 32(e)(2) because this brief contains 3,033 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2007 in 14-point Times New Roman font.

Respectfully submitted this 1st day of February 2016,

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CERTIFICATE OF SERVICE

The undersigned certifies that the Reply Brief of Defendant-Intervenors/Appellees The Humane Society of the United States and Center for Biological Diversity was electronically filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit on February 1, 2016, by utilizing the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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