No. 20-

IN THE SUPREME COURT
OF THE UNITED STATES

Tri-State Zoological Park of Western Maryland, Inc., Animal Park, Care & Rescue, Inc., and Robert L. Candy

Petitioners,

v.

People for the Ethical Treatment of Animals, Inc.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a civil action arising under a Federal question, can an organization that does not claim membership or representational standing, attain first party standing sufficient to satisfy the concrete and discernible injury requirements of Article III of the United States Constitution, by showing only that 1) the relief sought, if granted, would advance the organization's voluntarily chosen mission statement, and 2) that the organization has expended resources toward the same end?

CORPORATE DISCLOSURE STATEMENT

Neither of the two corporate petitioners in this case have parent corporations. Neither of the two corporate petitioners are publicly traded companies, and no publicly traded company owns more than 10% of the stock in either corporate petitioner.

PROCEEDINGS BELOW

People for the Ethical Treatment of Animals, Inc., v. Tri-State Zoological Park of Western Maryland, Inc., Animal Park, Care and Rescue, Inc., and Robert L. Candy, United States District Court for the District of Maryland, Case No. 17-2148, Final Judgment entered December 26, 2019, reported at 424 F. Supp. 3d 404.

People for the Ethical Treatment of Animals, Inc., v. Tri-State Zoological Park of Western Maryland, Inc., Animal Park, Care and Rescue, Inc., and Robert L. Candy, United States Court of Appeals for the Fourth Circuit, Case No. 20-1010, Opinion issued January 29, 2021, unreported.

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People for the Ethical Treatment of Animals, Inc., v. Tri-State Zoological Park of Western Maryland, Inc., Animal Park, Care and Rescue, Inc., and Robert L. Candy, United States Court of Appeals for the Fourth Circuit, Case No. 20-1010, Opinion issued January 29, 2021, unreported.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its Opinion on January 29, 2021, less than 90 days before the filing of this Petition. There were no requests for rehearing filed. There were no requests for extensions of time filed. This Court has statutory jurisdiction pursuant to 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution,
Article III, Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

ENDANGERED SPECIES ACT,
16 U.S.C § 1540(g)

(g)Citizen suits

(1)Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A)to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this

chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court

finds that the allegation that an emergency exists is supported by substantial evidence.

STATEMENT OF THE CASE

The Petitioners (hereinafter "the Zoo") jointly own and operate a small zoological park in Cumberland, Maryland. The Zoo kept tigers, lions, and lemurs, which are defined as threatened or endangered under the Endangered Species Act, as well as many other animals not covered by the Act.

Respondent People for the Ethical Treatment of Animals, Inc. (hereinafter, "PETA), a nationally known animal rights organization headquartered in Norfolk, Virginia, sued the Zoo under the citizen suit provision of the Endangered Species Act, 16 U.S.C § 1540(g). (p. 3 herein). The lawsuit alleged harmful conditions such as to constitute a "take" of the endangered or threatened animals at the Zoo in violation of the Endangered Species Act, and sought the seizure and removal of the animals listed as endangered species, and an injunction preventing the Zoo from keeping endangered or threatened species. (Opinion of Fourth Circuit, App. 1, pp 3a-4a).

Rather than making any claim to represent its members in the lawsuit, PETA alleged that the Zoo's actions were contrary to PETA's mission

statement, and that PETA had expended significant resources in opposing and challenging the manner in which the Zoo kept the animals that were the subject of the suit. (Opinion of Fourth Circuit, App. 1, pp. 7a-13a). From the very beginning, the Zoo has always conceded this, in that it is well known that PETA is opposed to zoos in general due to its mission statement, and it is also not disputed that PETA has expended a great deal of effort in opposition to the activities of the Zoo, both before and after filing suit, including sending mailers, making blog and internet posts, and sending complaint letters to various government agencies.

Relying largely upon this Court's prior holdings in *Sierra Club v. Morton*, 405 U.S. 727 (1972), *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and cases following, the Zoo challenged PETA's standing to sue in a motion for judgment on the pleadings, arguing that PETA's expenditure of resources and advancement of its voluntarily chosen mission statement could not be used to "manufacture" standing, as both the declared mission and expenditure of resources were voluntary. That motion was denied by the District Court. The Zoo later challenged PETA's standing to sue in a motion for summary judgment, which was also denied by the District Court.

At the trial of the matter on the merits, PETA called only one witness to testify on the subject of standing, its corporate designee Brittany Peet. In summary, Ms. Peet described in detail the various expenditures that PETA had made in its efforts to counteract what it perceived as wrongdoings by the Zoo, and stated that PETA was forced by its voluntarily chosen mission statement to take action against the Zoo, that it had expended substantial resources in its campaign against the Zoo, and that but for the use of resources against the Zoo, it could have applied those resources to actions against other zoos. See *PETA v. Tri-State Zoological Park, Inc.,* 424 F. Supp. 3d 404 at 429, 430 (D. Md. 2019), and also App. 3, 71a-73a. There was no suggestion that any member of PETA had sustained a concrete and discernible injury by observing the conditions at the Zoo or had any aesthetic enjoyment of the animals, or a particularized connection to any animal at the Zoo. There was no suggestion that any member of PETA had any injury that would be redressed by injunctive relief. There was also no suggestion that PETA as an organization had any particular interest in the specific animals at the Zoo that was greater than or in some way distinguishable from PETA's interest in the conditions under which all captive endangered species are kept within the United States.

The District Court denied the Zoo's renewed challenges to standing at trial, ordered the endangered species at the Zoo relocated, and enjoined the Zoo from owning endangered species in the future. District Court Order, App. 4, pp. 90a-91a.

Following upon a misunderstanding of *Havens Realty*, *id.*, that has become all too frequent in the past two decades, and citing to decisions by other courts that also failed to understand that case, the Memorandum Opinion of the District Court contained the following statement, in relevant part, on the question of PETA's standing to sue, at *PETA v. Tri-State Zoological Park, Inc.*, F. Supp. 3d 404, at 429-430 (2019), App. 3 at pp. 75a-76a:

> PETA as an organization may establish what is known as organizational standing on its own behalf. Equal Rights Ctr. v. Equity Residential, 798 F. Supp. 2d 707, 719 (D. Md. 2011). Organizational standing is conferred where the defendants' misconduct causes injury to the organization by frustrating the organizational mission, thus requiring the organization to divert resources in response. Id. at 720; Havens

Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982). The record evidence at trial demonstrates that PETA's mission has been frustrated through its protracted involvement in attempting to prevent the abuse of protected species and correct the misperception that Tri-State properly cares for the same. Compare Trial Tr. vol. 4, 181–82 (Brittany Peet, Director of the Captive Animal Law Enforcement Division of PETA, noting that PETA's mission requires it to protect and rescue animals from conditions of abuse and neglect) and id. at 183 (noting that Defendants' actions have impaired this mission) with People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 189 F. Supp. 3d 1327, 1338 (S.D. Fla. 2016), aff'd, 879 F.3d 1142, 1146 n.5 (11th Cir. 2018), adhered to on denial of reh'g, No. 16-14814-BB, 2018 WL 4903081 (11th Cir. Oct. 9,

> 2018)(finding that the alleged "take" of an animal is in "direct conflict with PETA's mission of protecting animals" and therefore evidence in favor of satisfying the "injury in fact" element of the standing analysis); *Compare* Trial Tr. vol. 4, 183–87 (Peet citing examples of how Defendants deceptively hold themselves out to be a sanctuary, thereby creating the public misperception that their animal welfare standards are acceptable, if not laudable) *with Organic Consumers Assoc. v. Sanderson Farms, Inc.*, 284 F. Supp. 3d 1005, 1011 (N.D. Cal. 2018) (finding standing for organizations that promote organic consumption in suit against company that deceptively labeled products as "natural").

The District Court went on to discuss the various expenditures that PETA had made in pursuit of its campaign against the Zoo. *Id.* at 429-

439, App. 3, p. 76a. The Zoo has never contested that these expenditures were made, but only the legal sufficiency of the combination of these voluntary expenditures with voluntary "mission advancement" to satisfy the injury requirements for standing to sue under Article III of the United States Constitution.

The Zoo appealed from the District Court's judgment to the United States Court of Appeals for the Fourth Circuit, which affirmed the decision of the District Court, using similar language and reasoning, set forth further *infra*. (App. 1, pp. 7a-13a).

The Zoo contends herein that not only did the Fourth Circuit in this case wrongly interpret *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), but that a frequent and haphazard misreading of that case by many lower courts has resulted in the gradual erosion of this Court's holdings in *Sierra Club v. Morton*, 405 U.S. 727 (1972), *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and cases following. This growing body of incorrect law, crafted entirely by the lower courts, has never been endorsed or reviewed by this Court, and has made this Court's prior holdings as to first party organizational standing nearly meaningless.

REASONS THE PETITION SHOULD BE GRANTED

I. Introduction

Although this case involves claims of direct organizational standing in a civil action filed under a citizen suit provision of the Endangered Species Act, the principles involved are much more broad, and the question presented is also presented in some of the arguments raised by the United States in its Application for Stay filed in this Court as *Barr v. East Bay Sanctuary Covenant*, Docket No. 19A230, which successfully sought an injunction of an order entered in *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026 (9th Cir. 2019).

It is well established that an organization may pursue litigation by two possible paths: as a representative of one or more of its members if a member would have standing individually (third party, representational, or associational standing), or by suing on its own behalf (first party or direct standing). This is a case where the only claim to standing was a first party claim by PETA as an organization. In order to demonstrate standing to sue, there must be a showing that there is a concrete and discernible injury. *Sierra Club v. Morton*, 405 U.S. 727 (1972), *Havens Realty v.*

Coleman, 455 U.S. 363 (1982), *Lujan v. Defenders of Wildlife*, 504 U.S. 455 (1992).

Following upon these earlier cases, this Court has repeatedly made plain that to seek injunctive relief under any theory of standing:

> [a] plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury. *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), citing to *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, at 180-181, (2000). See also *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).

This Court has also stated that "no matter how longstanding the interest and no matter how qualified the organization is in evaluating the

problem," ideological interests will not be sufficient to demonstrate standing to sue. *Sierra Club v. Morton*, 405 U.S. 727, at 739 (1972). Only when an organization's function has been "perceptibly impaired," is there a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—[to] constitute far more than simply a setback to the organization's abstract social interests." *Havens Realty, supra,* at 379 (1982).

This Court's decisions limiting standing were controversial when announced and unpopular among many prospective litigants, and presumably remain so. It is not surprising that oftentimes, through creative lawyering and a frequent abuse of the holding in *Havens Realty*, *supra*, "organizations get standing on terms that [the D.C. Circuit] has said individuals cannot." *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, at 1099 (D.C. Circuit, 2015, Millett, J., dubitante).

At no time in this case did PETA make any claim to stand in the shoes of its members, or that any of its members had visited the Zoo, were upset by the Zoo, had any aesthetic interest in or personal attachment to the animals at the Zoo, or that any of its members would benefit from injunctive relief. Neither was there any contention that the Zoo had taken any actions against PETA, other than carrying on its usual business, to which

PETA takes exception. The sole basis for PETA's complaint and the only evidence of standing that PETA forwarded at trial, was that PETA's mission statement would be advanced by injunctive relief obtained against the Zoo, and that PETA had devoted significant resources to its activities against the Zoo.

Narrowly construed, this is a matter that affects not only cases brought under the Endangered Species Act, but all manner of citizen suits, including those brought under the Fair Housing Act, Clean Water Act, Clean Air Act, Safe Drinking Water Act, CERCLA, and a number of other Federal citizen suit provisions. Taken more broadly, the question of direct organizational standing is not limited to citizen suits, but extends to nearly all organizational plaintiffs seeking to prove an injury-in-fact to itself rather than to its members.

The Zoo begins by explaining the decision in *Havens Realty, supra,* and demonstrating that under the facts of that case, the decision was correct but of limited applicability. The Zoo then explains *Havens Realty*, *supra*, as it was applied to the case at bar by the Fourth Circuit, in contrast with the prior decisions of the Fourth Circuit. The Zoo then explains that this incorrect interpretation of *Havens Realty* has been followed by many of the lower courts. This widespread misapplication of

Havens Realty has resulted in a new body of independent and contradictory case law in the lower courts, wherein organizations advancing their voluntarily chosen mission statements and expending resources to do so, successfully claim standing in contravention of the clear doctrine of this Court.

II. *Havens Realty* was correctly decided but has been widely misunderstood[1]

In *Havens Realty,* the plaintiff organization HOME (Housing Opportunities Made Equal), an organization located in Richmond, Virginia, filed suit against Havens Realty, a local real estate company, for housing discrimination. The case arose after HOME's presumptive counselee Paul Coles was told that there were no apartments available, and subsequent visits by both white and black testers, sent by HOME, showed that Havens Realty was likely discriminating based upon race. *Id*. at 367. This Court ultimately found that HOME had standing as an organization because "Havens

[1] A very comprehensive treatment of *Havens Realty, supra,* and the misapplication of that case in the lower courts is found in Ryan Baasch, *Reorganizing Organizational Standing*, 103 Va. L. Review Online 18 (2017).

had frustrated the organization's counseling and referral services, with a consequent drain on resources." *Id.* at 369, and stated that if Havens "steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact." *Id*. at 379, and went on to state "with the consequent drain on the organization's resources" this "constitute[d] far more than simply a setback to [HOME's] abstract social interests." *Id*.

The lower courts have frequently presumed that these statements indicate that HOME was injured as an organization when it expended resources on testers to investigate and begin to counter-act the illegal actions of Havens Realty. The Zoo contends that this was not this Court's intention, and the language supports a much more obvious and more meaningful reading: that HOME was injured because the work that it was doing in housing counseling was undone by the racial discrimination of Havens Realty. HOME expended resources to send counselees to Havens Realty with an expectation that those counselees would be treated lawfully, only to have that work undone by unlawful discrimination. For this reason, this Court appears to have used the phrase "consequent drain on resources." HOME had expended resources, and

Havens Realty had essentially pulled the plug on that expenditure. Obviously, the existence of racial discrimination among local housing sources accessed by HOME's counselees would be a drain on HOME's resources, and while later expenditures on testing were justifiable, those later, voluntarily expended resources, were not expended to further any inchoate ideological interest of HOME, but instead, because allowing discrimination in the local community to go unchecked would continue to impair HOME's ability to function as a housing counselor.

However, there is a substantial difference between a defendant's unlawful actions impairing an organization's function by draining its resources, and an organization voluntarily taking action against a defendant located hundreds of miles away due to actions that the organization believes to be unlawful. The decision in *Havens Realty* would have been different, if instead of a local housing counseling agency seeing its counselees unlawfully denied housing despite its efforts, HOME had been a national organization with no local ties to Richmond, Virginia, and instead had decided to sue a realty company hundreds of miles away, with no contact with HOME's counselees.[2]

[2] Another distinguishing factor in Fair Housing Act cases is that the receipt of false information is prohibited by the Fair

A correct understanding of *Havens Realty, supra,* was stated in *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest* 624 F.3d 1083 (9th Cir. 2010):[3]:

> [An organizational plaintiff] cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all. See, e.g., Fair Employment Council v. BMC Mktg. Corp., 28 F.3d 1268, 1276-77 (D.C. Cir. 1994). It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem. In Havens, for example,housing discrimination threatened to make it more difficult for HOME to counsel people on where they might live if the organization

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Housing Act, and is recognized by the statute as an injury. There is no such allegation in the case at bar.

[3] However, see also the seemingly contradictory line of reasoning in *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026 (9th Cir. 2019), and related cases.

> didn't spend money fighting it. 455 U.S. at 379, 102 S.Ct. 1114. The organization could not avoid suffering one injury or the other, and therefore had standing to sue. Cf. Smith v. Pacific Props. Dev. Corp., 358 F.3d 1097, 1105 (9th Cir. 2004).

The Zoo does not challenge the correctness of the decision in *Havens Realty, supra,* when properly understood. The plaintiff organization in *Havens Realty* showed that its function as an organization had been impaired, and that it had suffered an injury-in-fact that was not of its own volition. But "mission impairment" and "mission advancement" are not the same, as will be shown *infra*, first by explaining how the Fourth Circuit misunderstood *Havens Realty* in the case at bar, and how it has correctly understood *Havens Realty* in the past, and then by showing that other circuit courts of appeal have also frequently misapplied that case. This has engendered a divide among the various circuit courts as to when an organization can claim first party standing to sue, and has resulted in confusing and unpredictable decisions within some circuit courts. In many circuits, a new doctrine has evolved that recognizes injuries-in-fact never contemplated by this Court, and specifically

prohibited by *Sierra Club*, *supra*, and cases following.

III. The Fourth Circuit's decision was wrong in this case

A. The Fourth Circuit's decision was in error under that court's precedent in *Lane v. Holder*

In *Lane v. Holder*, 703 F.3d. 668 (4th Cir. 2012), *cert. denied* 571 U.S. 1195 (2014), the Fourth Circuit correctly rejected a claim of organizational standing based upon voluntary mission advancement and resource expenditure. The Fourth Circuit held, *id*. at 674-675:

> The plaintiffs analogize [Second Amendment Foundation']s position to that of the organization in *Havens*. Part of the harm to the organization in *Havens* took the form of a drain on its resources, and here the plaintiffs likewise assert that SAF has been injured because its "resources are taxed by inquiries into the operation and consequences of interstate

handgun transfer provisions." Appellants' Br. at 33.

This "mere expense" to SAF does not constitute an injury in fact, however. Although a diversion of resources might harm the organization by reducing the funds available for other purposes, "it results not from any actions taken by [the defendant], but rather from the [organization's] own budgetary choices." Fair Emp't Council of Greater Washington, Inc. v. BMC Mktg. Corp., 28 F.3d 1268, 1276 (D.C.Cir.1994). To determine that an organization that decides to spend its money on educating members, responding to member inquiries, or undertaking litigation in response to legislation suffers a cognizable injury would be to imply standing for organizations with merely "abstract concern[s] with a subject that could be affected by an adjudication." Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); see BMC Mktg., 28 F.3d at

> 1277; Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees, 19 F.3d 241, 244 (5th Cir.1994) (noting that finding standing for an organization that redirects some of its resources to litigation and legal counseling in response to actions of another party would "impl[y] that any sincere plaintiff could bootstrap standing by expending its resources in response to actions of another"). Such a rule would not comport with the case or controversy requirement of Article III of the Constitution.

Lane, supra, is exactly how cases claiming organizational standing by dint of mission advancement and resource expenditure should be decided. The plaintiff Second Amendment Foundation in that case doubtless had a mission statement that gave it a strong ideological interest in the subject matter addressed (i.e., new and more restrictive firearms regulations), and where that subject was no doubt also important to its membership, and it chose to expend its funds as a

result of the actions of the defendant to address what it perceived as a problem.

PETA's case against the Zoo did not even approach the harm alleged in *Lane*, *supra*. In *Lane*, the plaintiff Second Amendment Foundation was at least able to claim that it had not chosen the imposition placed upon it by the challenged action, and that but for the defendants' conduct, it would not be incurring expenses to counter-act that harm. In contrast, PETA had a genuine desire to further its mission statement, and alleged that it was injured by its spending in pursuit of that mission statement. Despite its prior holding in *Lane*, *supra*, the Fourth Circuit found that such factors sufficed to give rise to standing for PETA. In so doing, the Fourth Circuit demonstrated the misunderstanding of *Havens Realty, supra,* that is widespread throughout many lower courts. *PETA v. Tri-State Zoological Park*, Case No. 20-1010 (4th Cir. 2021), App. 1 at pp. 11-12:

> PETA is required by its mission to protect and rescue animals from abuse and neglect, and, in accordance with this mission-based requirement, devoted its resources to submit complaints about Defendants to government agencies, compile

> and publish information about Tri-State's treatment of its animals, and to investigate and monitor Defendants. The allegations and evidence adduced showed that this diversion of resources impeded PETA's efforts to carry out its mission by reducing its ability to engage in mission-related campaigns against other zoos. On the record here, Defendants' ESA-violative conduct "perceptibly impaired" PETA's ability to carry out its mission through frustration of that mission and a consequent drain on its resources. Havens Realty, 455 U.S. at 379. "Such concrete and demonstrable injury to the organization's activities . . . constitutes far more than a simple setback to the organization's abstract social interests." *Id.*; see also *S. Walk*, 713 F.3d at 183.

Yet this Court also stated in *Havens Realty*, *supra*, if an organization is to sue on its own behalf,

the court "conduct[s] the same inquiry as in the case of an individual"). *Id.* at 455 U.S. 363, 378 (1982). This Court also stated in *Lujan*, *supra*, at 566-567:

> It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible-though it goes to the outermost limit of plausibility-to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist, see Japan Whaling Assn. v. American Cetacean Society, 478 U. S. 221, 231, n. 4 (1986). It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or

> works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.

B. The frequent misunderstanding of *Havens Realty* has created unfair distinctions between individuals and organizations

Given the present state of the law, one might hypothetically inquire as to whether a private citizen of adequate financial means, upon viewing the controversial Netflix series *Tiger King*, might have been able to begin a spending campaign against the activities of "Joe Exotic" and then file suit against him for an injunction under the Endangered Species Act?

Of course not. Even if that private citizen were a zoologist of long experience, with a specialization in tigers and a deep passion focused upon their protection, without more of a particularized injury, i.e., some factual nexus between that individual and the tigers in question, they would be unable to demonstrate standing under this Court's clear precedents. Yet the decision of the Fourth Circuit

in the instant case would seem to indicate, if that individual were to form an organization with a mission statement,[4] and then undertake the same activities, the organization would then have standing under *Havens Realty*, *supra*, because the activities were undertaken to advance the organization's mission and resources were expended to that end.

In this case, PETA may have been able to show that as an organization, it had a "genuine interest" in the animals due to its mission statement, but did not show any more. This Court has specifically rejected "genuine interest" as a basis for standing, in addressing the dissent of Justice Stevens in *Lujan*, *supra*, fn. 3:

> JUSTICE STEVENS, by contrast, would allow standing on an apparent "animal nexus" theory to all plaintiffs whose interest in the animals is "genuine." Such plaintiffs, we

[4] If the prospective plaintiff were concerned about the particularity of that mission statement, of course it could be drafted to no other end than to require the organization to shut down "Joe Exotic" by any lawful means. But just as standing is more than a pleading game, it is also more than an exercise in cleverly drafting or amending a voluntarily adopted mission statement.

> are told, do not have to visit the animals because the animals are analogous to family members. Post, at 583-584, and n. 2. We decline to join JUSTICE STEVENS in this Linnaean leap. It is unclear to us what constitutes a "genuine" interest; how it differs from a "nongenuine" interest (which nonetheless prompted a plaintiff to file suit); and why such an interest in animals should be different from such an interest in anything else that is the subject of a lawsuit.

The Fourth Circuit's decision in this case amounts to no more than a peripheral embrace of "animal nexus" standing that privileges an organization over and above what could be achieved by an individual.

C. The misunderstanding of "resource diversion" as used in *Havens Realty*

The Fourth Circuit's Opinion stated "[t]he allegations and evidence adduced showed that this

diversion of resources impeded PETA's efforts to carry out its mission by reducing its ability to engage in mission-related campaigns against other zoos." App. 1, p. 11a. This is a misunderstanding of the "diversion of resources" giving rise to injury in *Havens Realty*, *supra*. In that case, resources were diverted from HOME's organizational purpose of finding housing for its counselees, in order to prevent injury to HOME's actual functioning as an organization. See also *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083 (9th Cir. 2010).

Seizing upon "resource diversion" as a buzzword, creative plaintiffs have claimed that the inability to allocate resources as desired gives rise to injury. At essence, they are complaining that they do not have enough money to pursue every goal they would like to pursue, so they have been injured by those they have chosen to pursue to the exclusion of others. Yet this is a case where if PETA had made a discretionary choice to sue some other zoo, it would be arguing that its resources were diverted from opposing Petitioner's Zoo to opposing some other zoo, also claiming standing in that other case. The fact that organizations make choices as to how to allocate their resources toward their regular activities, does not constitute injury as contemplated by *Havens Realty, supra*. This was correctly recognized by the Fourth Circuit in *Lane*,

supra, citing to *Fair Emp't Council of Greater Washington, Inc. v. BMC Mktg. Corp*., 28 F.3d 1268, 1276 (D.C.Cir.1994), stating that this sort of resource diversion "results not from any actions taken by [the defendant], but rather from the [organization's] own budgetary choices." This inconsistency within the Fourth Circuit is what makes the decision in this case confoundingly wrong.

Ultimately, whatever the nature of the resources expended, the expenditure of resources to oppose or counter-act a non-cognizable injury would still result in an absence of standing for the plaintiff organization. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2017). Self-inflicted harm is not cognizable harm under the law, and to take action based upon a voluntarily adopted mission statement, with no particularized factual nexus to the target of the action, and not to prevent any actual injury to the organization, is the very definition of self-inflicted harm, no matter how genuine the organization's interest in the subject matter may be.

D. The difference between government and private party defendants in evaluating organizational standing

Many of the cases claiming direct organizational standing are brought against government. The Zoo submits that while there are some distinctions between government and private parties as defendants, those differences are not of the essence in this case.

The government often has a privilege to cause injuries that are not cognizable because of its special prerogatives, but the fundamental question of whether a plaintiff has suffered an injury-in-fact should generally remain unaffected by whether the harm is caused by government or a private party. This Court has often stated the importance of preventing judicial interference with the executive or legislative prerogative, but has also stated that "in limiting the judicial power to 'Cases' and 'Controversies', Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by *private or official* violation of law." *Summers. v. Earth Island Institute*, 555 U.S. 488, at 490 (2009). (Emphasis added). This Court has also applied the same standard in evaluating injury-in-fact claimed

to have been caused by a private party as it has in cases against the government, in *Friends of The Earth, Inc. v. Laidlaw Environmental Services, (TOC) Inc.*, 528 U.S. 167 (2000). If there is a clear distinction in evaluating injury-in-fact alleged to have been caused by a private party versus that alleged to have been caused by the government, such a principle does not appear to have ever been defined in terms of a general rule.

IV. Substantial confusion exists within the circuit courts of appeal as to when an organization has standing, and many of them have expanded standing beyond its Article III limitations

A. The D.C. Circuit

Even in the court where many regulatory cases are brought by organizational plaintiffs, and where one might presume the issue is more familiar than in other courts, organizational standing remains vexing.

In *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087 (D.C. Cir., 2015) (dismissal affirmed on other grounds), a case wherein PETA's demanded that the USDA change its position as to the regulatory treatment of birds, Judge Millett wrote in *dubitante*: "[i]f the slate were clean, I

would feel obligated to dissent from the majority's standing decision. But I am afraid that the slate has been written upon, and this court's 'organizational standing' precedent will not let me extricate this case from its grasp." *Id*. at 1099. Judge Millett went on to explain precisely why the case in *Havens Realty*, *supra*, is not applicable to inquiries into standing in many cases, and observed that such a policy would never allow an individual to approach the courts on the same terms that are now achievable by an organization: "The same principles that prevent any individual caped crusader from using the courts to vindicate his or her views as to the proper enforcement of the laws should preclude the same gambit by a group of likeminded individuals. As for Batman or Wonder Woman, so too for the Justice League." *Id*. at 1106.

Subsequently, in *Am. Anti-Vivisection Society v. USDA*, 946 F.3d. 615 (D.C. Cir. 2019), a case seeking essentially the same relief sought by PETA in the earlier case, the court followed the same rule of law as to standing set forth in the earlier case against the USDA.

In these USDA cases, the D.C. Circuit relied upon its precedent in *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc*., 659 F.3d 13 (D.C. Cir. 2011), by looking to "whether the defendant's allegedly unlawful activities injured the plaintiff's interest in promoting its mission." *Id*.

at 25. This statement illustrates the fundamental problem with the present application of *Havens Realty*, *supra*. At some point in time, the legitimate injury in fact caused by a defendant acting to impair an organization's ability to function, transmogrified to become an injury to the plaintiff's interest in promoting its mission.

In *Ctr. for Resp. Science v. Gottlieb (II)*, 346 F.Supp.3d 29 (D.C. Dist. Ct. 2018), Judge Boasberg wrote for the District Court: "[a]s this Court noted on the last go round, organizational-standing doctrine in the D.C. Circuit is 'not a model of clarity.' *Gottlieb I*, 311 F.Supp.3d at 9. That said, the Court will do its best to extract from the Circuit's caselaw a cohesive framework to guide its inquiry." *Id.* at 36. The District Court went on, explaining that "[i]n this vein, the Court's task is to differentiate between 'organizations that allege that their activities have been impeded' — for whom the doors to the federal courts are open — 'from those that merely allege that their mission has been compromised' — against whom the doors swing shut. *Id*. at 37, citing to *Abigail Alliance For Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d. 129 (2006).

One might only wish that these two phrases, "activities impeded" and "mission compromised," would make things instantly clear. The difference may become clear after long study, but given that

the facts of *Gottlieb*, *supra*, and *Abigail Alliance*, *supra*, were quite similar, and yet the courts reached different conclusions as to standing, elucidation remains evasive in the D.C. Circuit. Judge Millett was correct in her *dubitante*. The D.C. Circuit has created new and erroneous case law, and that new case law has now achieved *stare decisis* despite being contrary to this Court's holdings.

In the two USDA cases described above, the plaintiffs did at least state, in circuitous fashion, that the USDA's inaction denied them anticipated information that their organizations needed in order to pursue their mission statements. However tenuous such a claim may be, it is better than what PETA was able to claim in this case against the Zoo. The Zoo did not in any way impair PETA's ability to function. Instead, the Zoo was a deliberately chosen target or focus of those functions, and nothing more. By analogy, there is a difference between merely being someone's opponent in a footrace, and having tied that person's shoelaces together.

B. The Second Circuit

The tension over the misuse of *Havens Realty*, *supra*, is brought into sharp relief by the divided decision in *Centro de la Comunidad Hispana de*

Locust Valley v. Town of Oyster Bay, 868 F.3d. 104 (2nd Cir. 2017). In that case, the Second Circuit panel found that an organization that challenged a town ordinance forbidding solicitation by day laborers on the town's sidewalks had standing to sue on its own behalf, despite the extremely attenuated injury that the organization claimed—that forcing the workers to cease soliciting in certain locations would make it more difficult for the organization to contact and communicate with those it wishes to serve.

It is undisputed that in such a circumstance, the day laborers themselves would have standing to challenge the ordinance. But as a scathing dissent by Judge Jacobs pointed out, the organizations themselves had an extremely attenuated and conjectural injury insufficient to support Article III standing, with one of the organizations seeming to have been formed for no purpose but to pursue the litigation. *Oyster Bay, id.* at 118. Nevertheless, the organizations were found to have first party standing through yet another misapplication of *Havens Realty*, *supra.*

C. The Fifth Circuit

In *Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241 (5th

Cir.1994), the plaintiff organizations Association for Retarded Citizens of Dallas, and Advocacy, Inc., citing their mission to advocate on behalf of persons with special needs, had sued the defendants when a project that would have served one of their clients, Matt W., was abandoned, and Matt W. had to move to temporary housing elsewhere, which was alleged to be to his detriment. The District Court dismissed for lack of standing and the Fifth Circuit affirmed. On appeal, Advocacy, Inc. cited its mission statement and the fact that it had been required to spend its funds challenging the action. The Fifth Circuit rejected this claim, *id*. at 244:

> The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization. Advocacy, Inc.'s argument implies that any sincere plaintiff could bootstrap standing by expending its resources in response to actions of another. Furthermore, that Advocacy, Inc. is a federally funded program established in

> part to provide disabled individuals with legal representation does not enhance its assertion of organizational standing. If this were not so, then, for example, indigent defender organizations established pursuant to the Criminal Justice Act or any other self-styled advocacy group could assert standing to sue whenever it believed the rights of its targeted beneficiaries had been violated. This result is at odds with Lujan's definition of injury in fact as the invasion of a legally-protected interest.[5]

Yet in the subsequent case of *Association of Community Organizations for Reform Now v. Fowler*, 178 F.3d 350 (5th Cir. 1999), the advocacy group ACORN filed suit below alleging that it as an organization was affected by the alleged failure of the State of Louisiana to comply with Federal voter registration laws. ACORN's argument, in a

[5] The Fifth Circuit introduced this analogy as a *reductio ad absurdum*, but apparently did not foresee that this would soon become exactly the law in many circuits, including its own.

nutshell, was that due to the State's failure to comply, ACORN would have to expend more resources on advocacy in terms of attempting to register low-income people to vote, in order to "counteract" the State's failure to act.

The Fifth Circuit relied upon *Havens Realty*, *supra*, at 357, in analyzing ACORN's claims. While the Fifth Circuit affirmed summary judgment on most counts of the complaint due to ACORN's failure to adequately support certain claims by affidavit, it found standing on one count, based upon ACORN's claim that the State had failed to make certain voter registration materials available at certain locations, and that ACORN would then incur additional expenses in reaching out to those voters.

At this point, one would expect the plaintiffs in *Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees, supra,* to ask "why standing for thee and not for me?" Certainly, those plaintiff organizations had stated an even more direct connection to their subject of concern than ACORN, and a more discernible injury than ACORN, even if still deficient under Article III.

D. The Ninth Circuit

Challenges to justiciability were raised by the United States in *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026 (9th Cir. 2019), which was the subject of an application for stay before this Court in *Barr. V. East Bay Sanctuary Covenant*, Docket No. 19A230 (2019).

In the related case of *East Bay Sanctuary Covenant v. Trump*, 932 F.3d. 742 (2018) the Ninth Circuit stated:

> To be sure, as the district court noted, several of our colleagues have criticized certain applications of the Havens Realty organizational standing test as impermissibly diluting Article III's standing requirement. See Fair Hous. Council, 666 F.3d at 1225-26 (Ikuta, J., dissenting); People for the Ethical Treatment of Animals v. U.S. Dep't of Agric. ("PETA"), 797 F.3d 1087, 1100-01 (D.C. Cir. 2015) (Millett, J., dubitante). Whatever the force of these criticisms, they are not directly applicable here,

> because they involve efforts by advocacy groups to show standing by pointing to the expenses of advocacy—the very mission of the group itself, see Fair Hous. Council, 666 F.3d at 1226 (Ikuta, J., dissenting); or by identifying a defendant's failure to take action against a third party, see PETA, 797 F.3d at 1101 (Millett, J., dubitante). And in any event, we are not free to ignore "the holdings of our prior cases" or "their explications of the governing rules of law." Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (citation omitted).

The factual distinction drawn in this case by the Ninth Circuit may have some validity, although the injuries claimed are still highly tenuous, as the United States government correctly pointed out. But the Ninth Circuit nevertheless maintains a very expansive definition of organizational standing that quite likely exceeds the bounds permitted by Article III of the Constitution, as noted by Judge Ikuta in her incisive partial dissent

in *Fair Housing Council v. Roommate.com, LLC*, 666 F.3d. 1216, at 1226 (9th Cir. 2012):

> [W]e have held that an organization with a social interest in advancing enforcement of a law was injured when the organization spent money enforcing that law. This looks suspiciously like a harm that is simply "a setback to the organization's abstract social interests," the very thing Havens indicated was not a "concrete and demonstrable injury to the organization's activities." Havens, 455 U.S. at 379; see also Sierra Club v. Morton, 405 U.S. 727, 738-39 (1972) (holding that an organization's abstract interest in a problem, without direct harm, is insufficient to establish standing). After all, an organization created to advance enforcement of a law is not hampered in its mission because the law is violated: absent violations, the

> organization would have to find a new mission. Furthermore, the organization has no legally protected interest in keeping its budget allocation constant, especially in the face of new opportunities to advance its mission. New organizational undertakings by definition divert resources but, as shown below, nothing about such diversion is per se harmful. [The ruling in *Smith v. Pac. Prop. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004)] to the contrary is in tension with the Supreme Court's requirement that an organization actually suffer a "concrete and particularized injury." Lujan, 504 U.S. at 560.
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> B
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> This case brings the strain between our case law and Supreme Court precedent close to a rupture.

There has perhaps been no more succinct statement than that of Judge Ikuta as to the

fundamental problem facing the circuit courts in the understanding and application of *Havens Realty*, *supra*, but nevertheless, the problem not only continues but expands. As applied to Zoo's case, it is clear that PETA, in choosing to pursue its mission against the Zoo, did not have its mission or its functions impaired by its efforts to remove the endangered species from the Zoo. Instead, removal of the endangered species from the Zoo *was* PETA's mission. PETA's voluntary choice of its mission, cannot give rise to a cognizable injury, and even if it could, PETA's inability to advocate against or sue other facilities it found objectionable rather than pursuing the Zoo, was also not a cognizable injury because it was merely a budgetary allocation. See *Fair Housing Council*, *supra* at 1226, *BMC Mktg. Corp.*, *supra* at 1276.

E. The Eleventh Circuit

In another case brought by *PETA, People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 189 F. Supp. 3d 1327 (S.D. Fla. 2016), aff'd, 879 F.3d 1142 (11th Cir. 2018), rehearing denied, No. 16-14814-BB, 2018 WL 4903081 (11th Cir. Oct. 9, 2018), the same misplaced *Havens Realty* analysis allowed PETA to gain standing due to that Circuit's prior decision in *Arcia v. Florida Secretary of State*, 772 F.3d 1335 (11th Cir. 2014).

The facts of *Arcia*, *id*., however, were very different from the facts in *Miami Seaquarium*, *supra*.

In *Miami Seaquarium*, *supra*, the Eleventh Circuit did not explain its reasoning in affirming the District Court's finding that PETA had standing. However, PETA in that case was a co-plaintiff with an individual, Howard Garrett, who claimed a direct aesthetic interest in the orca in question. Given that this Court has held that if one party in a suit has standing, Article III is satisfied as to all plaintiffs, perhaps the Eleventh Circuit found it unnecessary to further examine the question. See, e.g., *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006), at fn. 2.

IV. This case is an ideal vehicle for resolving the question presented

The Zoo presents here a single question without any related disputes of fact. The question is resolvable by looking only to short excerpts from the opinions of the Fourth Circuit and the District Court, and the relevant cases cited. The Zoo has never challenged the allegation that PETA's mission is in opposition to the Zoo, or that PETA has expended resources in opposing the Zoo's activities, but has only challenged the legal sufficiency of such claims to give rise to first party

organizational standing. Even if one accepts PETA's characterization of being somehow "forced" by its mission statement to pursue its actions against the Zoo, PETA cannot dispute that the mission statement was voluntarily adopted, which amounts to the same thing.

V. Conclusion

PETA's argument as to standing below was pure sophistry, but unfortunately, such sophistry often prevails where *Havens Realty*, *supra*, is involved, as has been repeatedly noted by judges of the lower courts.

Havens Realty, *supra*, was correctly decided upon a narrow set of facts. However, since that decision, it has been subjected to various linguistic twists and turns, and has been expanded by several lower circuits to justify the nearly complete nullification of this Court's holdings in *Sierra Club*, *supra*, and the entire line of cases following. The original logic of *Havens Realty* has been lost within a myriad of new cases setting forth independent precedent for standing based upon "mission advancement."

The Zoo submits that when Congress made a citizen suit provision part of the Endangered Species Act, it did so to enable citizens who were actually injured, but who could not convince the

government to intervene, to sue for relief on their own behalf. It did not envision well-funded organizations roaming the land in search of a potential target for its activities, pursing the target, and then claiming injury for having done so. And yet that is exactly what PETA did in this case.

Litigants deserve certainty in evaluating whether an organization has first party standing from the outset. An organization should be presumed to know before it approaches the courthouse doors what its injuries are. For defendants of limited means, being forced to defend such cases through trial despite a lack of standing brings ruinous legal fees, and even a successful defense on the merits may be a Pyrrhic victory.

Many judges of the lower courts openly admit their hesitance or state their complete disagreement with what has been made of *Havens Realty*, *supra*. The new doctrine of injury-in-fact based upon mission advancement and voluntary expenditure was created entirely by the lower courts, has taken on a life of its own, and has far departed from this Court's clear holdings limiting standing to actual cases and controversies.

A claim of injury must be more than a talismanic invocation of an organization's mission statement. This Court should intervene to clarify when an organization can claim an injury-in-fact, and to declare that voluntary mission advancement

and voluntary expenditures do not constitute injury-in-fact. If left undisturbed, this case and others like it will doubtless serve as a guidepost, and will embolden those who wish to sue simply to advance their abstract social interests, and the overly expansive body of contrary case law created by the circuit courts will continue unabated, and will undoubtedly become more firmly entrenched over time.

For the reasons stated above, the Petition should be granted.

Respectfully Submitted,

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