No. 20-1183

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 A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The district court found that Petitioners Tri-State Zoological Park of Western Maryland, Inc., Animal Park, Care & Rescue, Inc. and Robert Candy (collectively "Petitioners" or "Tri-State") harmed, harassed, and killed endangered and threatened animals protected by the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (the "ESA"), while masquerading as an animal sanctuary. The district court also found that the mission of Respondent People for the Ethical Treatment of Animals, Inc. ("PETA") "requires it to protect and rescue animals from conditions of abuse and neglect" (Pet. App. 75a) and that Tri-State's abuse and its false self-portrayal as a sanctuary caused PETA to expend resources (independent of the litigation) both to protect the animals from further harm, and to dispel the false impression Tri-State created about animal welfare standards and the conditions at its facility. (Pet. App. 75a–76a). Based on those findings, the district court held that PETA had standing to sue under the citizen suit provision of the Endangered Species Act. On appeal, Tri-State did not contest the district court's factual findings, or raise any defense to liability. The Fourth Circuit affirmed (Pet. App. 5a, 11a–12a). The question presented is:

Did PETA have Article III standing to sue Tri-State under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which Petitioner concedes was "correctly decided" (Pet. 16)?

CORPORATE DISCLOSURE

Respondent People for the Ethical Treatment of Animals, Inc. is a Virginia nonstock corporation with no parent corporation. No publicly held company owns 10% or more of its stock.

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The opinion of the Fourth Circuit (Pet. App. 1a) is not published in the Federal Reporter, but is available at 843 Fed. App'x 493. The opinion of the district court (Pet. App. 17a) is reported at 424 F. Supp. 3d 404.

JURISDICTION

The judgment of the Fourth Circuit was entered on January 29, 2021. The petition for writ of certiorari was filed on February 23, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Statutory and Regulatory Background

The ESA represents "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities." *Id*. at 194. To achieve these Congressional objectives, "[c]itizen involvement [is] encouraged by the [ESA], with provisions allowing interested persons to * * * bring civil suits * * * to force compliance with any provision of the Act." *Id*. at 180–81 (citation omitted). *See also* 16 U.S.C. § 1540(g)(1)(A) (authorizing private citizen actions "to

enjoin any person * * * who is alleged to be in violation of" the ESA); *Fox v. Vice*, 563 U.S. 826, 833 (2011) (noting that a private attorney general provision allows citizens to "vindicat[e] a policy that Congress considered of the highest priority").

One of the ESA's central provisions prohibits "takes" of endangered species, or any threatened species, unless the agencies tasked with administering the ESA, the U.S. Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS"), provides otherwise. 16 U.S.C. §§ 1532(15), 1533(d), 1538(a)(1)(B), (G); 50 C.F.R. §§ 17.21(c), 17.31. The ESA also prohibits possession of unlawfully "taken" animals, subject to similar exceptions. 16 U.S.C. §§ 1533(d), 1538(a)(1)(D), (G); 50 C.F.R. §§ 17.21(d), 17.31.

To "take" means to "harm" or "harass" a protected animal—both terms further defined by regulations of the FWS—or to "pursue, hunt, shoot, wound, kill, trap, capture, or collect [such an animal], or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). *See also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 (1995) ("'[T]ake'" should be defined "'in the broadest possible manner to include every conceivable way in which a person can "take" or attempt to "take" any fish or wildlife.'") (quoting S. Rep. No. 93-307, p. 7 (1973)).

The term "harm" means any act that "kills or injures" an endangered or threatened animal. 50 C.F.R. § 17.3.

"Harass" means any "intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3. When applied to captive wildlife, the regulations exclude from the definition of "harass" "[a]nimal husbandry practices" that (1) are "generally accepted," (2) "meet or exceed the minimum standards for facilities and care under the Animal Welfare Act," and (3) "are not likely to result in injury to the wildlife." *Id*. The FWS has made clear that, notwithstanding this narrow exemption, "maintaining animals in inadequate, unsafe or unsanitary conditions, feeding an improper or unhealthful diet, and physical mistreatment constitute harassment because such conditions might create the likelihood of injury or sickness of an animal." 58 Fed. Reg. 32632, 32637 (June 11, 1993).[1]

[1] *See also* 63 Fed. Reg. 48634, 48638 (Sept. 11, 1998) (explaining that, under this exemption, "[t]he Act continues to afford protection to listed species that are not being treated in a humane manner"); *id*. at 48636 ("The purpose of amending the [FWS]'s definition of 'harass' is to exclude proper animal husbandry practices that are not likely to result in injury from the prohibition against 'take.' ").

B. Tri-State's Pervasive Violations of the ESA, Resulting in the Deaths of Multiple ESA-Protected Animals Held at Tri-State's Decrepit Facility

For years, Tri-State has operated a roadside facility in Cumberland, Maryland, confining hundreds of animals, including, during the relevant time, nine animals protected under the ESA: five tigers, two lions, and two ring-tailed lemurs. Tri-State held these animals in "fetid and dystopic conditions," causing chronic suffering and causing five of them to die between when PETA first gave Tri-State notice of an intent to sue under the ESA and trial. Those five animals suffered "long and painful," "early and tragic" deaths. (Pet. App. 20a, 33a, 51a). Tri-State's chronic ESA violations were patent. As trial evidence "overwhelmingly demonstrate[d]," every protected animal had been unlawfully "taken" under the ESA—"harassed, harmed, or both in a most grievous fashion at Tri-State." (Pet. App. 74a).

"Tri-State's deplorable conditions" "harassed" the two lions at Tri-State—Mbube and Peka—who "lived in isolation" and were denied "social interactions [that] are integral to the well-being of lions." (Pet. App. 77a) (alteration in original). Mbube and Peka were confined to barren enclosures, "exposed to harsh temperatures with little reprieve," and were denied the opportunity "to engage in a wide range of normal social behaviors." (*Id*.). Tri-State further "harassed" Peka by failing to diagnose and treat her gait abnormality, a "longstanding condition [that] likely causes her chronic pain and

interferes with species-typical behaviors." (Pet. App. 78a).

Tri-State also "harmed Mbube, to the point of a painful death," allowing him to die slowly "without any real veterinary care." (Pet. App. 52a, 79a). Mbube was "in dire physical straits," yet Tri-State left him to suffer for months before "even notif[ying] a singular, patently unqualified veterinarian," by which point he was "starving" and "emaciated." (Pet. App. 79a).

Tri-State "harassed" the five tigers in its custody—Cayenne, Kumar, India, Mowgli and Cheyenne—by holding them in "squalid living conditions" that were "so far removed from * * * accepted husbandry practices that they significantly disrupt[ed] a multitude of typical tiger behaviors and put the tigers at a high likelihood of injury." (Pet. App. 80a–82a). Tri-State was located on the site of a long-abandoned recreational area, which included a swimming pool. Tri-State divided the old swimming pool into sections and confined the tigers to the concrete pit, which was "dirty" and "dilapidated." (Pet. App. 80a). The bottom of the pit held a reservoir of water, which Tri-State intended for swimming and was also a source of drinking water for the tigers, that was "filthy, static, and filled with feces." (*Id.*). The lack of sanitation created high risks for disease and infection, and indeed "at least two of the tigers * * * contracted diseases * * * consistent with unhygienic conditions." (Pet. App. 80a–81a). Their squalid enclosures lacked any meaningful enrichment or adequate shade, which further "deprive[d] the tigers

of their ability to 'engage in their natural behaviors.'" (Pet. App. 81a).

Tri-State "harmed" the tiger Cayenne, who "died due to the lack of basic veterinary care" (CA JA 1480[2]), after being anesthetized by Tri-State's veterinarian, who admitted "lack[ing] *any* specialized experience or training in medical care for tigers" (CA JA 1479–80), and who left Cayenne unattended during recovery despite initial complications and "the high risk of an adverse reaction during [anesthetic] recovery," during which she suffered a heart attack and died (CA JA 1480).

Tri-State "harmed" and "harassed" the tiger Kumar by failing to treat his "broken, pulp-exposed teeth, ulcerated gums, and * * * punctured lip," as well as his paws and hind legs, which were "pocked with ulcers," all "while leaving him to languish in filthy surroundings." (Pet. App. 82a). It further "harmed" and "harassed" Kumar by failing to provide him with adequate veterinary care during the days leading up to his death: Kumar was neither walking nor eating, yet "received *no* adequate evaluation, treatment, or pain management, which unnecessarily prolonged whatever illnesses he endured." (Pet. App. 82a–83a). Even when its own veterinarian "strongly recommended euthanasia," Tri-State "chose * * * to let Kumar suffer." (Pet. App. 60a). Kumar's necropsy revealed that he had

[2] Citations to "CA JA" refer to the Joint Appendix filed in the court of appeals below, *People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of Western Maryland, Inc.*, No. 20-1010 (4th Cir.), Docs. 17-1, 17-2, 17-3, 17-4 & 17-5.

been suffering from chronic and "consistently painful" oral ulcers; a "deep, penetrating [mouth] wound"; a distended colon; and "a two-centimeter long tear and hemorrhaging in the membrane of his abdominal cavity." (Pet. App. 61a–63a).

The tiger India was also "harassed and harmed directly by [Tri-State]." (Pet. App. 83a). While alive, India suffered from chronic (and preventable) flystrike; "[her] ears had been eaten [by flies] so badly and for so long that the veterinarian who performed her necropsy believed that her ears had been 'surgically truncated.'" (Pet. App. 65a–66a). India died prematurely of "sepsis, an infection of colossal proportions not seen in cats in captivity," that "[Tri-State] allowed * * * to ravage India" for "*more than a month*" while "expressly refus[ing] to secure medical treatment." (Pet. App. 63a, 83a). The sepsis also caused "myocarditis," an inflammation of the heart, which left India to suffer and die while experiencing "*daily* pain 'similar to a heart attack' * * * 'every time she took a breath.'" (Pet. App. 63a, 83a). Given Tri-State's failures, the district court found, that "[u]nquestionably [Tri-State is] directly responsible for India's death." (Pet. App. 84a).

Tri-State also "harassed" and "harmed" the tiger Mowgli, who was "obese" with "flaccid" muscles. (*Id*.). Mowgli was "in obvious discomfort" as evidenced by his constant rubbing "across deteriorating wood in his damp enclosure." (*Id*.). Tri-State left him to suffer "for years" with an easily diagnosable skin condition, and in the same environment as Kumar and India, "two victims of obvious painful infections." (*Id*.).

The lemurs—Bandit and Alfredo—also were "subjected * * * to an onslaught of environmental assaults that harassed and harmed them." (*Id.*). The two lemurs were housed in an "isolating, barren, freezing, dirty, stress-inducing enclosure," which deprived them "of almost all of their natural behaviors." (Pet. App. 85a). They were further harassed by being surrounded "with filth and a natural predator." (*Id.*). The chronically filthy conditions "disrupted their olfactory communication and their ability to scent-mark and put them at high risk of physical pain and permanent physical damage." (*Id.*).

Tri-State further "harmed" and "harassed" Bandit—who suffered from "untreated pain" stemming from a "protracted respiratory infection for nearly two years"—by "confin[ing him] to an environment that disrupted his normal behaviors leading to his self-mutilation, and * * * then fail[ing] to monitor, treat, and alleviate [his] life-threatening and ultimately fatal injuries." (Pet. App. 56a–57a, 86a). Indeed, before his death, Bandit "exhibited signs of significant distress," and did not receive "*any* [veterinary] examinations until the day of his death," when he was "bleeding from [the] genital area" and hypothermic. (Pet. App. 56a–58a).

Tri-State did not challenge any of these findings in its appeal below. Nor did it challenge the factual findings that PETA's mission required it to incur the resource expenditures at issue and that PETA in fact diverted the resources at issue because of Tri-State's misconduct. Tri-State's appeal, and its petition to this

Court, focused solely on whether those injuries were cognizable under Article III as set forth in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which Petitioner concedes was "correctly decided" (Pet. 16).

C. The District Court's Unchallenged Findings of Fact That PETA Was Injured by Tri-State's Conduct

PETA is a federally registered animal protection charity. It brought this suit, challenging Tri-State's unlawful "take" of endangered and threatened species, "on its own behalf to protect its programs, which ha[d] been perceptibly impaired by Tri-State['s] * * * actions." (CA JA 61 ¶ 111).

As the district court found and as was undisputed, PETA's mission is to advocate for all animals by "protecting animals from abuse, neglect, and cruelty" (Pet. App. 11a) and otherwise addressing the manner in which those animals are commonly and, in many instances, lawfully used. (CA JA 1893 at 6:5–19, 1927–28 at 40:16–41:1, 61 ¶ 110). To achieve its mission, PETA pursues several programs, including public education, cruelty investigations, research, animal rescue, special events, celebrity involvement, protest campaigns, and advocacy for animal-welfare legislation. (Pet. App. 11a; CA JA 1894 at 7:7–11, 1895 at 8:15–25, 61 ¶ 111).

As the district court found, based on "[t]he record evidence at trial," "PETA's mission has been frustrated through its protracted involvement in attempting to

prevent the abuse of protected species." (Pet. App. 75a). Specifically, the court found that Tri-State unlawfully harmed animals that PETA's mission "requires it to protect." (Pet. App. 75a; CA JA 1894 at 7:12–17, 1926 at 39:17–21, 1935 at 48:6–14, 61 ¶¶ 110, 112). The court of appeals further summarized those unchallenged findings, explaining that "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 [Tri-State] to government agencies, compile and publish information about Tri-State's treatment of its animals, and to investigate and monitor [Tri-State]." (Pet. App. 11a). It further agreed that "[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," and thereby " 'perceptibly impaired' PETA's ability to carry out its mission through frustration of that mission and a consequent drain on its resources." (Pet. App. 11a–12a (quoting *Havens Realty Corp.*, 455 U.S. at 379)). In addition, the district court found that Petitioners "deceptively hold themselves out to be a sanctuary, thereby creating the public misperception that their animal welfare standards are acceptable, if not laudable." (Pet. App. 76a). For example, based on Tri-State's repeated characterizations of its facility as a sanctuary and rescue for unwanted animals (CA JA 650, 1340–49), patrons are misled to believe that the facility "provides great homes for neglected and abandoned animals," and that the animals are "in great health and

very well taken care of." (CA JA 652, 655, 658). Indeed, at trial, Petitioner Candy acknowledged the public's impression that Tri-State is providing animals in its custody with good care. (CA JA 1940–41 at 170:21–171:25, 1944–45 at 186:5–187:14). The district court found that this too "frustrated" PETA's mission, even independent of PETA's efforts to stop Tri-State's violations of the ESA, because PETA's mission required it not only to combat Tri-State's misconduct itself, but also to "attempt[ ] * * * correct the misperception that Tri-State properly cares for [protected species]." (Pet. App. 75a).

Particularly given the gravity of Tri-State's uniquely egregious conduct, PETA's mission required the organization to divert its limited resources away from other programs in order to protect its own mission. (Pet. App. 11a–12a, 75a–76a; CA JA 1933–35 at 46:13–48:22). Indeed, PETA had to divert "significant resources" for over a *decade* to identify and counteract Tri-State's unlawful treatment of ESA-protected animals. (Pet. App. 76a; *see also* Pet. App. 11a–12a; CA JA 1926–28 at 39:22–41:23, 1933–34 at 46:13–47:9, 63–64 ¶¶ 115–18). PETA was also compelled to divert even more resources to counteract Tri-State's false and misleading public comments and acts holding itself out as an animal-protecting sanctuary, resulting in public misperceptions about the conditions at Tri-State and about what constitutes appropriate husbandry standards for captive tigers, lions and lemurs. (CA JA 1896 at 9:4–14, 1927–28 at 40:5–41:10, 63–64 ¶¶ 115–16).

PETA's efforts to address Tri-State's unlawful acts, and to counteract the false public impression that its practices are consistent with the ESA and animal welfare, included: submitting complaints about Tri-State to "the USDA and other regulatory agencies"; drafting and publishing public statements regarding the conditions at Tri-State and the ways in which Tri-State was violating and misrepresenting generally accepted animal husbandry standards; reviewing and responding to complaints from the public about Tri-State; compiling and publishing information on PETA's website about Tri-State's history of animal-welfare abuses; distributing press releases on Tri-State's Animal Welfare Act ("AWA") violations; filing and litigating a lawsuit over Tri-State's AWA license renewal; and sending an attorney to meet with Petitioner Candy to offer to place the animals at reputable sanctuaries. (Pet. App. 76a; CA JA 1900–01 at 13:21–14:12 (trial testimony regarding PETA's efforts and diversion of resources); CA JA 1901–03 at 14:14–16:15 (trial testimony explaining why and how PETA submits complaints and the consequent drain on PETA's resources); CA JA 1912–13 at 25:15–26:18 (trial testimony explaining why and how PETA creates blog posts and web features and the consequent resource drain); CA JA 1913–14 at 26:19–27:20 (explaining PETA's public complaint response process and consequent resource drain); CA JA 1911–12 at 24:10–25:14 (trial testimony explaining why and how PETA created and shared the information regarding Tri-State, and the consequent resource drain); CA JA 1903–04 at 16:16–17:9, 1907–08 at 20:6–21:8 (trial testimony explaining

why and how PETA sends press releases regarding Tri-State, and the consequent resource drain); CA JA 1901 at 14:5–12 (trial testimony regarding PETA's license renewal lawsuit and hiring of an attorney)).

In addition, to compile accurate information about Tri-State to share with the public and its members, as well as to counteract Tri-State's unlawful conduct and the false public impression that Tri-State's practices were consistent with the ESA and animal welfare, PETA expended considerable staff time tracking and gathering Tri-State's USDA inspection reports; arranging for staff and activists to visit Tri-State; monitoring Tri-State's social media pages and website; and submitting multiple public records requests related to the facility and reviewing and analyzing numerous responsive documents. (Pet. App. 76a; CA JA 1918–20 at 31:4–33:16 (trial testimony explaining how and why PETA monitors Tri-State's USDA record, the process involved in doing so, and the consequent drain on PETA's resources); CA JA 1926 at 39:4–16 (trial testimony regarding the activists and staff PETA has sent to Tri-State); CA JA 1914–16 at 27:23–29:9 (trial testimony regarding PETA's monitoring process and the consequent resource drain); CA JA 1916–17 at 29:10–30:22 (trial testimony regarding process for preparing and analyzing responses to public records requests, and the consequent resource drain)).

In addition to staff time, PETA incurred numerous costs related to these efforts, including attorneys' fees; research expenses; filing fees; phone charges; fees for shipping and printing services; and travel expenses.

(CA JA 1928 at 41:11–19). These significant monetary and staff time resources—all entirely separate from those incurred in pursuing this action (*Id*. at 41:20–23)—diverted resources away from the programs that form the core of PETA's mission and therefore frustrated its efforts to alleviate the suffering of other animals. (Pet. App. 11a (finding that PETA's "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"); CA JA 1927–28 at 40:5–41:10, 1934–35 at 47:19–48:22).

At the pleadings stage, at summary judgment, and again based on a full trial record, the district court determined that PETA "indisputably ha[d] standing." (Pet. App. 75a).

D. The Court of Appeals Affirmed the District Court's Findings and Conclusions Regarding PETA's Standing, and Tri-State's Liability on All Theories of Liability Presented at Trial

On appeal, Tri-State argued that PETA lacked Article III standing because it did not plead or prove a cognizable "injury in fact."[3] It did not, however,

[3] The district court and court of appeals denied Petitioners' motions for a stay, after which the surviving lion and two tigers in Petitioner's custody were transferred to The Wild Animal Sanctuary in Colorado in February 2020. (Pet. App. 87a–88a); *People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of Western Maryland, Inc.*, No. 20-1010 (4th Cir.), Doc. 14; *People for the Ethical Treatment of Animals, Inc. v. Tri-State*

challenge any of the district court's findings of fact, either as to Tri-State's ESA violations or PETA's standing to challenge those violations. Tri-State disputed only whether its ESA violations and PETA's resulting mission impairment, and expenditures and resource diversions, were cognizable within the meaning of *Havens*.[4]

In reviewing the district court's standing rulings *de novo*, the Fourth Circuit affirmed in an unpublished per curiam opinion. (Pet. App. 2a, 5a). The panel (Judges Wilkinson, Shedd, and King) held unanimously that PETA had organizational standing—i.e., "standing in its own right to seek judicial relief for injury to itself"—to challenge Tri-State's unlawful "take" of federally-protected animals under the ESA's citizen-suit provision. (Pet. App. 7a, 11a–13a). The court held that PETA had alleged and proven that Tri-State's "actions impaired its ability to carry out its mission combined with a consequent drain on its resources." (Pet. App. 13a).

Zoological Park of Western Maryland, Inc., No. 17-cv-02148 (D. Md.), Doc. 210.

[4] So too in this Court, as explained below. Although the Petition challenges PETA's standing arising from the resource diversion caused by Tri-State's ESA violations themselves, the Petition does not even mention the additional, independent, fact-intensive injury the district court and court of appeals held established PETA's standing, arising from Tri-State's public statements misleading the public both about the conditions at Tri-State and about generally accepted standards for captive big cats and lemurs.

Although Tri-State raised some arguments on appeal about redressability, due process, and one of PETA's experts, the court of appeals held those arguments had been abandoned and were not properly before it. (Pet. App. 13a–14a). Tri-State does not seek further review from this Court on those issues.

Tri-State did not seek *en banc* review. The Petition followed.

REASONS TO DENY THE PETITION

Petitioners do not assert that this case raises a legal question on which the circuit courts are in conflict. Nor does the Petition seek reconsideration of *Havens*, or claim that the decision below conflicts with a decision of this Court. Instead, they dispute the Fourth Circuit's application of this Court's longstanding precedent on organizational standing to the unique factual record of this case. The fact-bound application of a settled legal standard is not worthy of review, and was correct in any event.

I. There Is No Circuit Split Over How to Apply *Havens*.

Contrary to Petitioners' suggestion that there is a "divide among the various circuit courts" (Pet. 20), the courts of appeals agree that, under *Havens*, an organization has standing when the defendant's unlawful conduct causes injury to the organization by

frustrating its mission, requiring the organization to respond by diverting resources to address that harm. There is also no confusion about how to apply organizational standing to prevent abuse of endangered species and affirmative misrepresentations to the public about appropriate standards of care. Moreover, this case would be a poor vehicle to clarify the law of organizational standing, even if that were needed, because petitioners lose even under the standard they describe as the "correct understanding" of *Havens*. (Pet. 19).

1. The plaintiff in *Havens* was Housing Opportunities Made Equal ("HOME"), a nonprofit fair housing organization dedicated to "assist[ing] equal access to housing through counseling and other referral services." 455 U.S. at 379. The defendant's racial steering, in violation of the Fair Housing Act, frustrated HOME's ability to provide those services and forced it to "devote significant resources to identify and counteract" the defendant's illegal practices. *Id*. This Court held there was "no question" those injuries gave rise to Article III standing because they represented a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—[that was] far more than simply a setback to the organization's abstract social interests." *Id*. (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)).

2. Petitioners identify no circuit explicitly disagreeing with any other with respect to the standard articulated in *Havens*. And while Petitioners claim that the *Havens* standard has been "misunderstood"

(Pet. 16–20, 33–46), the Petition does not show that lower courts are reaching conflicting results in cases with similar facts.

Even the claim of an intra-Fourth Circuit conflict with *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012), rings hollow in light of petitioners' decision not to seek en banc review. The Fourth Circuit below distinguished *Lane* because the resources spent responding to "inquiries into the operation and consequences of interstate handgun transfer provisions" did not "result[] * * * from any actions taken by the defendant," while in this case defendants' unlawful conduct "impede[d] [PETA's] efforts to carry out its mission." (Pet. App. 8a–10a).

Moreover, the plaintiffs in *Lane* sought to remedy a mere "inconvenience[]"; they were, "[a]t worst * * * burdened by additional costs and logistic hurdles"—which were not even caused by the challenged legislation itself, but rather by "third parties" that were "not before th[e] court": firearm licensees that voluntarily charged fees for interstate gun transfers after passage of the legislation. *Lane*, 703 F.3d at 673–74. The record here established that PETA's mission to protect animals from neglect and abuse was directly and perceptibly impaired by Tri-State's years-long violations of federal law, an injury that was compounded by Tri-State having falsely held itself out as an animal sanctuary, resulting in public misperceptions that PETA's mission required it to counteract. (Pet. App. 11a–12a, 75a–76a).

Nor has the Fifth Circuit adopted any rule in conflict with the Fourth Circuit or its own decisions. The different results reached in *Association for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Center Board of Trustees*, 19 F.3d 241 (5th Cir. 1994) ("*Citizens of Dallas*"), and *Association of Community Organizations for Reform Now v. Fowler*, 178 F.3d 350 (5th Cir. 1999), flow from the different facts presented. In *Citizens of Dallas*, the only resources alleged to have been expended were "the legal costs of the particular advocacy lawsuit." *Citizens of Dallas*, 19 F.3d at 244. But merely redirecting some resources to the litigation itself does not constitute an injury-in-fact. *Id*.

The injury asserted by the organizational plaintiff in *Association of Community Organizations for Reform Now*, was distinct. 178 F.3d at 350 (5th Cir. 1999). There, the organizational plaintiff was found to have standing to challenge Louisiana's alleged failure to implement one aspect of the National Voter Registration Act ("NVRA") because (1) it had expended resources to counteract the effects of Louisiana's failure and (2) its purpose was "in direct conflict with Louisiana's alleged failure." *Id*. at 360–61. And consistent with its holding in *Citizens of Dallas*, the Fifth Circuit rejected ACORN's alternative allegation of injury in fact due to "resources it ha[d] expended bringing this and other NVRA-enforcement litigation." *Id*. at 358.

Petitioners also examine selected case law from the Eleventh Circuit, but again point to no case that conflicts with the decision below or *Havens*. Instead,

Petitioners point to a Southern District of Florida case that found that PETA had standing to challenge alleged violations of the ESA. *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1337–38 (S.D. Fla. 2016), *aff'd sub nom. People for Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142 (11th Cir. 2018). What Petitioners characterize as a "misplaced *Havens Realty* analysis" (Pet. 45), is actually a straightforward application of *Havens* and its progeny.

3. Rather than a real circuit split, the Petition gathers a few dissenting and *dubitante* opinions as evidence of "confusion" (Pet. 33) about how to apply *Havens*. But the claim of confusion is both overstated and irrelevant to the outcome of this case. Even Petitioners acknowledge (Pet. 32) differences between organizational suits against governmental parties like in *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (9th Cir. 2018), and *People for the Ethical Treatment of Animals v. U.S. Department of Agriculture*, 797 F.3d 1087 (D.C. Cir. 2015) ("*PETA v. DoA*"), and suits against private parties asserting substantive claims under federal law. Many suits against governmental parties raise procedural claims that only indirectly implicate organizational interests, or that implicate organizational interests that are hard to distinguish from issue advocacy. The facts that are determinative in those cases are very different from the kinds of facts about organizational injury the courts below relied on here. Yet the Petition primarily dwells on cases involving challenges to government agency action, not cases like

this one involving a citizen-suit against a private party.

Petitioners cite (Pet. 37) a dissenting opinion in *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 118 (2d Cir. 2017) (Jacobs, J., dissenting). But Judge Jacobs' principal concern in that dissent was that the lead plaintiff—unlike PETA—was "a special-purpose litigation vehicle, created to bring this lawsuit," and therefore could not have been injured by the ordinance it was challenging. *Id*. at 119–20. Petitioners do not argue, for example, that *Havens* does not justify standing based on unrebutted factual findings that the challenged limits on public assembly would make a second plaintiff organization's work more difficult to accomplish in specific and concrete ways, or that granting review in this case would have any bearing on that question. These things are plainly not at issue here. Judge Millett's opinion in *PETA v. DoA* arose not only in the context of a lawsuit against governmental parties, *see* p. 19, *supra*, but also implicating a specific standing doctrine about suits against the government to enforce the law against third parties, which has no application to this case. 797 F.3d at 1101 (Millett, J., *dubitante*).

4. One of PETA's injuries in this case was an "organizational interest in educating the public" about animal care practices that are consistent with the ESA and animal welfare, which the D.C. Circuit recognized was legally sufficient in *Friends of Animals v. Bernhardt*, 961 F.3d 1197, 1208 (D.C. Cir. 2020) (Silberman, J.). As the decision below found, Petitioners' "take

of animals at Tri-State protected by the ESA increased animals subject to abuse and *created the misimpression that the conditions in which the animals were kept were lawful and consistent with animal welfare.*" (Pet. App. 11a (emphasis added)). In contrast to the factual record deemed insufficient in *American Society for Prevention of Cruelty to Animals v. Feld Entertainment, Inc*., 659 F.3d 13 (D.C. Cir. 2011) where the organization offered no evidence that the circus's use of "bullhooks and chains" had any effect on "the public's impression of those practices," and the relevant witness "never mentioned" that *any* resources were diverted to combat that "public impression," in this case, *id*. at 27–28, PETA presented evidence at trial substantiating injury to its interest in educating the public about animal welfare standards (Pet. App. 76a (Trial Tr. vol. 4, 183–87 (trial testimony "citing examples of how [Petitioners] deceptively hold themselves out to be a sanctuary, thereby creating the public misperception that their animal welfare standards are acceptable, if not laudable"))). That distinct harm to PETA's interest in promoting animal welfare standards from Petitioners' deceptive claims to be an animal sanctuary make this case an unsuitable vehicle to address Judge Ikuta's criticism of organizational standing doctrine in *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1224–27 (9th Cir. 2012) (Ikuta, J., concurring and dissenting).

5. Petitioners argue (Pet. 27–29) that the law of organizational standing warrants review because, in view of the Fourth Circuit's decision, the law does not

protect individual interests to the same degree that *Havens* protects an organization's mission. But the robust body of standing law in the ESA context refutes that: individual interests, even when those interests are simply an aesthetic interest in the observation of animals, confer standing. For example, in *Hill v. Coggins*, the Fourth Circuit held that two individuals had standing to sue under the ESA after observing federally protected bears kept at a North Carolina zoo under inhumane conditions. 867 F.3d 499 (4th Cir. 2017). As the *Hill* court explained, "Courts frequently treat an aesthetic interest in the observation of animals as a legally protected interest." *Hill*, 867 F.3d at 505 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562–63 (1992) (explaining that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing")). "When that interest is invaded in a real, nonspeculative, and personal manner, the requirement of an actual or imminent, concrete, and particularized injury is satisfied." *Id*. at 505. Likewise, in *Kuehl v. Sellner*, 887 F.3d 845 (8th Cir. 2018), the Eighth Circuit held that individuals could sue an Iowa zoo, Cricket Hollow, for violating the ESA. The court rejected the zoo's argument "that [the plaintiffs] inflicted injury upon themselves by visiting Cricket Hollow" because defendants "mischaracterize[d] plaintiffs' injury, which * * * stem[med] from Cricket Hollow's inability to properly care for its animals." *Id*. at 851. Their injuries "were not self-inflicted, but instead resulted from the conditions at Cricket Hollow." *Id*. The injury to PETA's mission from Petitioners' conduct is no less significant

and no more self-inflicted than the injury to the individuals in these factually analogous cases.

6. In any event, even if there were confusion about organizational standing, this case would be a poor vehicle to resolve it, because Petitioners lose under their own approach. Petitioners say a "correct understanding" of *Havens* is found in *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, (Pet. 19), which holds that an organization, "must * * * show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." 624 F.3d 1083, 1088 (9th Cir. 2010). Had it not acted, PETA would have been injured by Petitioners' false portrayal of their facility as a sanctuary for endangered animals, thereby misleading the public about animal welfare standards contrary to PETA's mission. Absent PETA's resource diversion, its mission would also have been frustrated by Tri-State's maintenance of endangered animals in unlawful and uniquely egregious conditions.

Because Petitioners lose either way, there is no reason for the Court to consider changing the scope of organizational standing in the manner Petitioners propose in order to decide this case. PETA has standing regardless, and the Court "is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 180 (2016) (quoting *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308, 314 (1893)). *See also Preiser*

v. Newkirk, 422 U.S. 395, 401 (1975) (this Court "has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' ") (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

II. The Lower Court's Application of *Havens* to the Factual Record in this Case Does Not Warrant Review.

As noted, Petitioners do not challenge *Havens* itself, which they concede was "correctly decided" (Pet. 16). And there is no circuit split, as explained above. § I, *supra*. Moreover, Petitioners did not challenge any of the findings of fact below, including findings that Petitioners' unlawful conduct in fact frustrated PETA's mission and caused it to divert resources in response to that frustration of purpose, as the court of appeals summarized. (Pet. App. 11a–12a). In other words, at this point there is no dispute about the facts, and there is no dispute about the law. The Petition boils down to a plea that the Fourth Circuit misapplied *Havens* to the facts in this case. It did not; PETA's undisputed injury fell squarely within the rule in *Havens*.

Based on the robust and undisputed record evidence, the Court of Appeals held that PETA had established a cognizable injury in fact because Petitioners' unlawful "take" of ESA-protected animals "increased animals subject to abuse and created the misimpression that the conditions in which the animals were kept were lawful and consistent with animal welfare."

(Pet. App. 11a). In accordance with PETA's mission, which requires it "to protect and rescue animals from abuse and neglect," PETA "devoted its resources to submit complaints about [Petitioners] to government agencies, compile and publish information about Tri-State's treatment of its animals, and to investigate and monitor [Petitioners]." (*Id.*). "The allegations and evidence adduced showed that this diversion of resources impeded PETA's efforts to carry out its mission." (*Id.*). Thus, Tri-State's "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." (Pet. App. 11a–12a (quoting *Havens Realty*, 455 U.S. at 379)).

Petitioners attempt to distinguish this case from *Havens* by suggesting that their facility is further from PETA's various offices than *Havens Realty* was from HOME's office. (Pet. 18). But PETA is a national, not a local organization, and there are no geographic limits on its mission to protect animals from abuse, neglect, and cruelty. (CA JA 1357). Indeed, as long as an organization asserting standing in its own right demonstrates that it has suffered a "concrete and demonstrable injury to [it]s activities—with the consequent drain on [it]s resources," *Havens Realty Corp.*, 455 U.S. at 379—the geographic scope of an organization's mission is irrelevant. *See*, *e.g.*, *Ass'n of Cmty. Organizations for Reform Now*, 178 F.3d at 354, 360–61 (finding that national nonprofit membership corporation had standing to challenge Louisiana's alleged failure to implement one aspect of the NVRA); *Nat'l*

Council of La Raza v. Cegavske, 800 F.3d 1032, 1036, 1039–41 (9th Cir. 2015) (holding that national organization had *Havens* standing to challenge Nevada's alleged violations of the NVRA).

Petitioners' attempt to distinguish this case from *Havens* also distorts the nature of the injury suffered by HOME. (Pet. 17). Petitioners suggest that the injury-in-fact suffered by HOME prevented it from continuing to "function as a housing counselor" at all, and that *Havens* is limited to circumstances where an organization's very existence, its viability as a going concern, is under imminent threat. (Pet. 17–18). But *Havens* does not support Petitioners' existential-threat standard: this Court only required an organization to show that the challenged conduct has caused "perceptibl[e] impair[ment]" to its "activities" in furtherance of its mission. *Havens*, 455 U.S. at 379. Indeed, the "ability to function" standard articulated by Petitioners goes well beyond the "distinct and palpable injury" requirement of Article III. *Id*. at 372 (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

The evidence alleged and proved below established that PETA has suffered a classic organizational injury directly analogous to that suffered by HOME. PETA has suffered a further cognizable injury—which also squarely falls within the rule in *Havens*—from the public misimpressions related to Tri-State's ESA violations and Tri-State's false portrayals of itself as a sanctuary providing good care to unwanted animals. (Pet. App. 75a–76a). Indeed, just like Havens Realty's hidden and illegal discriminatory practices made it

harder for HOME to carry out its mission of making equal access to housing a reality, Tri-State's abuse and neglect of ESA-protected animals, and its concealment of its abuse as a sanctuary, made it harder for PETA to protect animals by creating a false impression of the standards for protecting captive endangered animals.

The district court and court of appeals' decisions below were correct, and there is no reason for this Court to review the court of appeals' application of an undisputedly correct precedent of this Court to an undisputed factual record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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