UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

NEW ENGLAND ANTI-VIVISECTION SOCIETY, ET AL.,	)	
Plaintiffs,	)	
v.	)	Civ. No. 8:20-cv-02004 GJG
ELIZABETH GOLDENTYER, ET AL.,	)	
Defendants.	)	

OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs New England Anti-Vivisection Society ("NEAVS") and Animal Legal Defense challenge a decision by the United States Department of Agriculture ("USDA") to deny their Rulemaking Petition that urged the agency to amend the regulation intended to establish a standard "to promote the psychological well-being of primates" used in biomedical research. 7 U.S.C. § 2143(a)(2)(B). This regulation, issued almost thirty years ago in 1991, is now severely outdated and, as a result, fails to "insure" that these animals are treated "humane[ly]" as required by the Animal Welfare Act, 7 U.S.C. § 2131. In seeking to have this antiquated regulation substantially improved, Plaintiffs asked the USDA to adopt the approach taken over seven years ago by its sister agency, the National Institutes of Health ("NIH"), to improve the environments in which chimpanzees are kept by laboratories funded by NIH, and to apply similar standards to the *other* species of primates used in biomedical research throughout the country.[1]

Defendants have now moved to dismiss the case on the ground that Plaintiffs lack Article III standing to pursue this challenge. However, as demonstrated below, Plaintiffs amply meet the requirements for standing. Hence, the government's motion to dismiss should be denied and this case should proceed on the merits.

BACKGROUND

To demonstrate that Defendants' arguments have no merit, it is helpful to describe the relevant statutory provisions, the history of the current psychological well-being regulation, and the basis for Plaintiffs' Rulemaking Petition.

[1] Since this case was filed, NEAVS has changed its name to Rise for Animals. However, for the convenience of the parties and the Court, we refer to this Plaintiff as NEAVS throughout this brief, i.e., the name used in the Complaint.

A. The Relevant Statutory Requirements

In 1966, in response to "the shocking failure of self-policing by the medical community," 112 Cong. Rec. 13,893 (1966) (statement of Sen. Monroney), Congress enacted the Animal Welfare Act ("AWA"), 7 U.S.C. §§ 2131–2159, "to insure that animals intended for use in research facilities . . . are provided humane care and treatment." 7 U.S.C. § 2131. To accomplish this important objective, the statute further provided that the Secretary of the USDA "shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals" used by research facilities. 7 U.S.C. § 2143(a)(1).

In 1985, based on studies conducted by Dr. Jane Goodall and other renowned primatologists, Congress recognized that, like human primates, non-human primates have psychological needs that are critical to their well-being. Finding that the then "[c]urrent standards leave too much room for shoddy care and inhumane treatment," 131 Cong. Rec. 22,257 (1985) (statement of Sen. Chafee), Congress amended the AWA to provide that the standards required by the Act "shall include minimum requirements . . . for a physical environment adequate to promote the psychological well-being of primates." 7 U.S.C. § 2143(a)(2)(B). As explained by Senator John Melcher, the author of the amendment, this duty was intended to ensure that primates "not only have [] space[,] but . . . interesting things to do, so they are not bored to death just waiting to be part of man's quest through . . . research for better lives for us all." 131 Cong. Rec. S17881 (daily ed. Dec. 18, 1985) (statement of Sen. Melcher).

B. The Agency's Initial Regulation Proves Inadequate to Protect Primates.

In March 1989, in furtherance of this mandate, the Animal and Plant Health Inspection Service ("APHIS"), a division of the USDA, proposed detailed requirements addressing the "minimum space and physical environment requirements for primates." 54 Fed. Reg. 10,822,

10,945–48 (Mar. 15, 1989). Finding that, like human primates, nonhuman primates "require contact with other nonhuman primates for their psychological well-being," and that "[s]ocial deprivation is regarded by the scientific community as psychologically debilitating to social animals," 54 Fed. Reg. at 10,917, the proposed regulations provided that, subject to certain exceptions, "nonhuman primates must be housed in primary enclosures with compatible members of the same species." 54 Fed. Reg. at 10,944. However, in response to cost concerns of the regulated industries, the USDA issued a final regulation in 1991 that abandoned most of the specific requirements contained in the proposal. *See* 9 C.F.R. § 3.81. Under the final rule, that remains in effect today, the USDA allows each regulated entity to create its own environmental enhancement "plan" that promotes the psychological well-being of primates. *Id.* Instead of establishing the specific requirements for an adequate plan, the regulation simply provides that each plan "must be in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian." *Id.*

In addition, rather than requiring primates to be housed in social groups, the agency simply instructs regulated entities to "address" the social needs of primates in their individual enhancement plans. *Id.* Moreover, although the final plan must be available on site for USDA inspectors to review, the regulation does not require the facilities to obtain USDA approval of their plans to ensure that they are "adequate." *See id.* (plans need only be submitted to APHIS inspectors "upon request"). Therefore, because these plans are not submitted to the USDA, the public is not informed about their contents and hence what precisely the USDA believes is sufficient to "promote the psychological well-being of primates" as required by the AWA. *See*

id.; *see also Forsham v. Harris*, 445 U.S. 169, 171 (1980) (records must be in the possession of a federal agency to be subject to public disclosure under FOIA).

Within a few years after the regulation was promulgated, the USDA acknowledged that the extremely generic requirement that each facility develop its own "plan" for the environmental enrichment of primates was seriously deficient in meeting the agency's statutory obligation to ""ensure"" that primates are treated humanely. The agency explained that, "[i]n 1996, after 5 years of experience enforcing § 3.81," it "evaluated the effectiveness of the performance standards by surveying [its] inspectors about their experience" with the 1991 regulation. 64 Fed. Reg. 38,145, 38,146 (July 15, 1999) (cited in Complaint at ¶¶ 2, 32, 33, 35, 45, 48, 63) (attached as Plaintiffs' Exhibit ("Pl. Ex." A)); *see also Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016) (in deciding the motion to dismiss the Court may consider documents incorporated in the Complaint).

As the agency further explained, that evaluation indicated that "research facilities did not necessarily understand how to develop an environment enhancement plan that would adequately promote the psychological well-being of nonhuman primates." 64 Fed. Reg. at 38,146. The agency further stated that, in addition, "there has been considerable disagreement in various sectors of the public over the adequacy of the performance standards . . . as well as confusion among the regulated public concerning on what basis they will be judged by inspectors as meeting or not meeting the requirements." *Id.* Thus, the agency explained, its "inspectors requested information and clarification on how to judge whether someone was meeting the requirements in § 3.81." *Id.*

Accordingly, in 1999, the USDA informed the public that it had determined that "*additional information on how to meet the standards in § 3.81 is necessary*." *Id.*; Complaint ¶¶

33, 48 (emphasis added). It therefore published a "Draft Policy" intended "to be used by dealers, exhibitors, and research facilities as a basis in developing plans under § 3.81 for environment enhancement to promote the psychological well-being of nonhuman primates." *Id.* APHIS explained that the Policy "represents what [the agency] believe[s] are the currently accepted professional standards for promoting the psychological well-being of non-human primates through enhancement of the primates' environment." *Id.* Moreover, in contrast to Section 3.81, which does not specify the requirements of an adequate enhancement plan, the Draft Policy specified five "critical elements" that would have to be incorporated in each such plan, including that, as a general rule, primates should be housed in compatible social groups. 64 Fed. Reg. at 38,147; Complaint ¶ 32–33. The Draft Policy further provided that "for primates in persistent psychological distress, a primate behaviorist or veterinarian with formal training and experience in primate behavior will be consulted." 64 Fed. Reg. at 38,149. The Draft Policy also provided that any facility that wished to deviate from these requirements could seek USDA approval of an alternative plan. 64 Fed. Reg. at 38,146.

However, the Draft Policy was never finalized, and hence has never been implemented. As a result, the original 1991 regulation remains in place without modification.[2]

[2] Before the Draft Policy was issued, organizations challenged the 1991 regulation as violating the statutory command that the agency issue "minimum standards." By the time the D.C. Circuit ruled in that case, the agency had issued the Draft Policy, and relied on that fact to defend the regulation. In ruling for the government in 2000, the D.C. Circuit specifically observed that although Plaintiffs "may well be correct that some of the Secretary's regulations may prove difficult to enforce, or even difficult to augment through subsequent 'interpretation'. . . *the Secretary has begun to offer interpretations likely to assist both regulatees and enforcers*." *Animal Legal Def. Fund, Inc. v. Glickman*, 204 F.3d 229, 235 (D.C. Cir. 2000) (citing the pending 1999 Draft Policy) (emphasis added) (internal citation omitted).

C. The NIH Adopts Detailed Requirements to Ensure Ethologically Appropriate Environments for Chimpanzees Used in Research.

The USDA's AWA standards, including the one intended to promote the psychological well-being of primates, are binding on all research facilities, including those funded by NIH. Complaint ¶ 44. Nevertheless, in December 2010, NIH requested the Institute of Medicine to convene a committee to consider the necessity of using one species of primates, chimpanzees, in NIH-funded research, and to determine what standards should apply to the care of these primates. Complaint ¶ 41. In response, a Working Group spent several years analyzing the use of chimpanzees in research and exploring how to create environments that not only allowed, but affirmatively promoted, the natural behaviors and psychological well-being of chimpanzees maintained by labs. The subsequent report, completed in December 2011, defined the concept of "ethologically appropriate physical and social environments" as "captive environments that do not simply allow but also, importantly, promote a full range of behaviors that are natural for chimpanzees." 78 Fed. Reg. 39,741, 39,742–43 (July 2, 2013); Complaint ¶ 41.

On June 26, 2013, after considering public comments, NIH accepted nearly all of the Working Group's findings, including nine of ten recommendations regarding ethologically appropriate environments. Complaint ¶ 43; *see also* 78 Fed. Reg. at 39,743–47). In contrast to the USDA's 1991 primate regulation, these requirements include concrete minimum standards for environments in which chimpanzees are held, including standards to address specific physical and social needs. Complaint ¶ 43; *see also* 78 Fed. Reg. at 39,743–47. For example, they require that chimpanzees "have the opportunity to live in sufficiently large, complex, multi-male, multi-female social groupings, ideally consisting of at least 7 individuals," 78 Fed. Reg. at 39,743, and that they "have the opportunity to climb at least 20 ft. (6.1 m) vertically." 78 Fed. Reg. at 39,744. The NIH requirements also provide that chimpanzees have access to the outdoors and natural

substrates, such as grass and dirt, and that they have the opportunity to make choices about how to spend their time. *Id.* at 39,745. The requirements also provide that the management staff "must include experienced and trained behaviorists . . . and enrichment specialists" who understand the needs and behaviors of the primates. *Id.* at 39,746.

Many of the NIH recommendations correspond to the same elements identified by APHIS in its 1999 Draft Policy as "critical" to promoting the psychological well-being of all primates. 64 Fed. Reg. at 38,147. For example, both the NIH recommendations and the APHIS Draft Policy discuss the importance of social housing, physical space sufficient for species-appropriate behaviors, the availability of nesting materials, the ability for primates to exercise some control over their environments, and the need to ensure that the management staff is adequately trained in primate behaviors and enrichment needs. *Compare* 78 Fed. Reg. at 39,742–47 *with* 64 Fed. Reg. at 38,147–49.

D. Plaintiffs Petition the USDA to Adopt Similar Standards for All Primates Used in Research.

Building on NIH's actions with respect to chimpanzees in federally-funded research, on May 7, 2014, pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e), Plaintiffs NEAVS and ALDF submitted to the USDA a Petition for Rulemaking requesting that APHIS amend its antiquated 1991 regulation and promulgate specific, enforceable standards to promote the psychological well-being of *all* nonhuman primates used in research, including tens of thousands of baboons, macaques, and marmosets. Rulemaking Petition (Pl. Ex. B) Complaint ¶¶ 47–57. Plaintiffs urged the agency to adapt the NIH recommendations for chimpanzees to each of the other species of nonhuman primates used in research, and provided specific proposals for which recommendations should apply to all primates and which may need to be modified for particular species. Complaint ¶ 47. The Petition also requested that the USDA include in such

standards requirements for determining how and when primates exhibit psychological distress and how to address these issues to ameliorate such symptoms. Petition at 48.

The Petition explained that the current lack of clear and enforceable standards is extremely detrimental to the psychological well-being of primates used in research, and how the lack of such standards—and the fact that the facilities' "plans" are not even provided to the USDA—make it extremely difficult for Plaintiffs to know what, if any, measures are being implemented by the regulated industry, and how they are being construed and enforced by the USDA. Thus, for example, Plaintiffs explained that while the current regulation states that infants and juveniles require "special considerations," "[t]here is no additional information on what such 'special considerations' must be." Petition at 9. They further explained that:

> [i]n contrast to other USDA standards that mandate enforceable requirements —*see, e.g.,* 9 C.F.R. § 3.5(a) "The ambient temperature must not fall below 45° (7.2° C) for more than 4 consecutive hours when dogs or cats are present, and must not exceed 85° F (29.5°C) for more than 4 consecutive hours when dogs or cats are present"—*the only concrete requirement for the psychological well-being or primates is the existence of the requisite "plan."*

Petition at 9–10 (emphasis added).

Plaintiffs further complained that "[t]here are no specific minimum requirements defined, nor is there any requirement that the facility's plan even be reviewed and approved by the USDA, or, for that matter, that the plan even be submitted to the agency"—which they explained meant that the public was completely in the dark about what was actually contained in those plans. *Id.* at 10*; see also id.* at n. 3 (explaining that because the plans are not required to be submitted to the agency, they "are not generally available for public scrutiny under the Freedom of Information Act"); *id.* at 14 (complaining that "the enrichment plans are not publicly available"); *id.* at 10 (citing example of licensee telling an inspector that "there's nothing you can

do to me because there's nothing in those regulations that tell me what I have to do. So long as I have a plan, that's all that counts and you can't take any other action against me.").

Plaintiffs also cited the USDA's own 1996 survey of inspectors that showed that because of the lack of precise standards, "[o]ne-third of inspectors responded that they were *unable to distinguish compliance from violation*," and that "approximately 45% of inspectors expressed the opinion that it was *unclear what facilities needed to do in their enrichment plans to be in compliance with the regulations*, and nearly 50% of inspectors said that criteria were not adequate for enforcement purposes." *Id.* at 11 (emphasis added); *see also id.* at 12 (quoting USDA inspectors reporting that the regulations "*contain few solid criteria on which an inspector can judge the content of a plan as 'in compliance' or 'out of compliance*'" and that they "had concerns about Agency support for particular interpretations or judgment because of *the vague language,*" . . . and "that inspectors recommended clearer requirements for documentation of implementation.") (emphasis in original). Thus, Plaintiffs explained, "[s]etting concrete standards modeled on NIH's ethologically appropriate environment recommendations for chimpanzees, along with concrete criteria for signs of psychological well-being and distress, would go a long way to fulfilling the original intent of the 1985 Amendment and help enforce this important mandate for a 'physical environment adequate to promote the psychological well-being' of primates used in research." *Id.* at 18.

The USDA published Plaintiffs' Petition in the Federal Register for comment, and, by the close of the comment period, the agency received a total of 10,137 public comments—the overwhelming majority of which (99%) supported granting the Petition. Complaint ¶¶59-61. However, on October 10, 2019, APHIS denied Plaintiffs' Petition. *Id.* at ¶ 62.

E. Plaintiffs' Complaint

Believing that the agency's denial of their Rulemaking Petition is arbitrary and capricious and an abuse of discretion, Plaintiffs filed this case on July 9, 2020 under Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). To demonstrate that they had sufficient Article III standing to warrant this Court's consideration of the merits of their challenge, Plaintiffs explained that because the USDA had refused to amend the 1991 regulation, they lacked important information about what was actually *required* of the regulated community to comply with this important "standard," 7 U.S.C. § 2143(a)(2)(B), how the current requirement for an "adequate plan" to promote environmental enrichment was actually being implemented by the regulated industry, and how this requirement was being interpreted and enforced by the USDA.

Thus, Plaintiffs explained that the current regulations lack specific instructions as to "what is necessary to 'address'" the "social needs of nonhuman primates of species known to exist in social groups in nature;" nor do they clarify what is meant by the requirement that each plan "provide a 'physical environment' that is 'enriched by providing means of expressing non-injurious species-typical activities,'" "nor specify which activities must be accommodated." Complaint ¶ 29. Plaintiffs also complained that:

> although the regulations acknowledge that particular categories of primates, including: (a) infants and young juveniles; (b) animals that show signs of psychological distress; (c) those housed alone; and (d) great apes of a certain size "require special considerations," 9 C.F.R. § 3.81(c), *no guidance is given as to what these considerations are, nor actually mandate any particular enrichment requirements for these animals*.

Id. (emphasis added).

Plaintiff NEAVS further explained that "APHIS's denial of Plaintiffs' Rulemaking Petition requesting that the agency promulgate specific, enforceable regulations to promote the

psychological well-being of nonhuman primates used in research directly conflicts with, frustrates, and impairs NEAVS' mission to protect these animals from inhumane treatment and to educate the public and policymakers about these matters" and that "as a result of the agency's denial of its Rulemaking Petition, NEAVS will have to divert additional resources . . . *to obtain information about the ways [these primates] are treated and what is being done to minimize their suffering*." *Id.* at ¶ 7 (emphasis added).

NEAVS further explained that its "most significant campaign for nonhuman primates focuses on exposing, and educating the public about, the substantial inhumane treatment these animals endure in research laboratories," and that, "[t]oward that end, NEAVS regularly submits Freedom of Information Act ('FOIA') requests for APHIS inspection records, annual reports by research facilities, and reports by the facilities' Institutional Animal Care & Use Committees—the entities mandated by the AWA to oversee the treatment of animal used in research." *Id.* at ¶ 11. However, NEAVS explained, "because APHIS' current standards for primates are vague and unenforceable *the information NEAVS obtains is of little value.*" *Id.* (emphasis added). Thus, it further explained, "[i]f the agency had granted Plaintiffs' Rulemaking Petition, the information that would be required to be generated, collected, and reported by research facilities would have been far more useful toward this end, and *would allow NEAVS to effectively monitor how primates are treated in laboratories and whether APHIS is carrying out its statutory mandate to ensure their psychological well-being*." *Id.* (emphasis added).

Thus, NEAVS explained, "as a result of the agency's denial of its Rulemaking Petition, NEAVS will have to divert additional resources to alternative means of advocating for and protecting these animals, and *to obtain information about the ways they are treated and what is being done to minimize their suffering*." *Id.* at ¶ 7 (emphasis added); *see also id.* at ¶ 15 (Plaintiff

ALDF explains that it "relies on information generated from public records requests to investigate problematic facilities," and that "as a result of Defendants' denial of the Rulemaking Petition, in future advocacy for primates . . . ALDF will need to conduct rigorous investigations *to determine the inadequacy of primate enrichment at specific facilities*") (emphasis added). NEAVS further explained that if APHIS had granted the Rulemaking Petition, "and, at an absolute minimum, adopted standards akin to those now required by NIH for the treatment of chimpanzees in federally-funded laboratories, NEAVS would not have to undertake all of these . . . information-gathering efforts." *Id.* at ¶ 12; *see also id.* at ¶¶ 17–20 (explaining that because of the agency's denial of the Rulemaking Petition ALDF will have to submit additional FOIA requests or "forgo knowledge of [] important information entirely" and that it would not have to undertake these additional efforts and expend such resources "if Defendants had granted the Rulemaking Petition").

Plaintiffs also explained that because the current regulation has remained in effect since 1991, despite the vast array of scientific knowledge that has accrued since then concerning the critical psychological needs of *all* primates, "laboratory primates continue to be housed in conditions that are extremely detrimental to their psychological well-being." *Id.* at ¶¶ 36–40. Thus, as one observer lamented, "if you show a picture of a primate cage from 40 years ago and a primate cage now, it's basically the same: it's all metal with a perch added." *Id.* at ¶ 40.

ARGUMENT

Introduction

At the motion to dismiss stage, to demonstrate that the Court has jurisdiction under Article III of the Constitution, Plaintiffs must allege that they satisfy three requirements: 1) they suffer an injury-in-fact, 2) there is a causal connection between the asserted injury and the

challenged conduct, and 3) their injuries are likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Further, when evaluating a Fed. R. Civ. P. 12(b)(1) motion to dismiss for facial insufficiency, the Court must "draw all reasonable inferences in favor of the plaintiff," *Cooksey v. Futrell*, 721 F.3d 226, 234 (4th Cir. 2013) (internal citation omitted), in regard to both the facts and the merits. This means that the Court must accept the facts alleged in the Complaint as true, *see Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009), and that even "general factual allegations of injury . . . may suffice," for the Court must "presume that general allegations embrace those specific facts that are necessary to support the claim,'" *Lujan*, 504 U.S. at 561 (quoting *Lujan v. National Wildlife Federation*, 497 U.S., 871, 889 (1990)).

Moreover, in deciding standing ''the court must . . . assume that on the merits the plaintiffs would be successful in their claims.'' *Cooksey*, 721 F.3d at 239 (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)). As in all standing inquiries, only one plaintiff need allege "a personal stake in the outcome of the controversy . . . to warrant . . . invocation of federal-court jurisdiction." *Horne v. Flores*, 557 U.S. 433, 445 (2009) (quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 49194 (2009)).

Under all of these well-established tenets of standing jurisprudence, Plaintiffs easily satisfy the requirements for Article III standing.

A. PLAINTIFFS HAVE ALLEGED SUFFICIENT INJURIES-IN-FACT.

1. Plaintiffs' Organizational Injuries Fall Squarely Within Those Sanctioned by the Supreme Court.

It is axiomatic that "[a]n organizational plaintiff may establish standing to bring suit on its own behalf when it seeks redress for an injury suffered by the organization itself." *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 458 (4th Cir. 2005) (citing *Warth v. Seldin*, 422 U.S. 490,

511 (1975)). Thus, the Court must decide whether the plaintiff organization has "alleged such a personal stake in the outcome of the controversy as to warrant [the] invocation of federal-court jurisdiction." *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 378–79 (1982) (internal quotations and citations omitted). In *Havens,* the Supreme Court held that if the challenged action impairs an organization's activities, resulting in a diversion of the organization's resources, this is sufficient to establish the requisite injury-in-fact. *Id.* at 379. As recently articulated by this Court, the plaintiff organization must allege that the challenged unlawful conduct impairs "the ability of an organization to function" in some respect, thereby requiring an additional expenditure of resources to overcome that impairment. *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 240 (4th Cir. 2020) (petition for rehearing *en banc* pending).

Plaintiffs easily meet this test. Plaintiff NEAVS explains in great detail in the Complaint that its mission is to save animals from suffering, that it seeks "to reduce the suffering of laboratory animals by promoting their humane treatment," and that one of its "primary purposes is to end the suffering of nonhuman primates used in research—an issue it has been working on for many decades." Complaint ¶ 6. NEAVS further states that it "works to educate the public, lawmakers, and others about the needs of primates used in research, and the suffering they endure, as part of advocating that biomedical research transition from animal testing to non-animal alternatives." *Id.* NEAVS further explains that its "most significant campaign for nonhuman primates focuses on exposing, and educating the public about, the substantial inhumane treatment these animals endure in research laboratories," and that to further this objective it regularly submits FOIA requests to APHIS for "inspection records, annual reports," and other documents, but that "because APHIS' current standards for primates are vague and unenforceable, *the information NEAVS obtains is of little value*." *Id.* at ¶ 11 (emphasis added).

Indeed, NEAVS further explains that because the 1991 primate regulation still in existence is so vague and deferential—because it allows each regulated entity to devise its own "plan" for environmental enrichment, and because those "plans" are not made available to the public—NEAVS does not know (a) what measures are actually being implemented by the regulated facilities to comply with this regulation; (b) how APHIS inspectors are interpreting and implementing the regulation; and (c) how the USDA is ultimately enforcing this "standard" that was mandated by Congress *thirty-five years ago*. *See Id.* at ¶¶ 7, 10, 11, 29, 31. As NEAVS further explains, it was this lack of information and enforceable standards, coupled with NIH's move to provide more meaningful standards for the psychological well-being of chimpanzees used in federally funded research, that led NEAVS and Plaintiff ALDF to petition the USDA to promulgate more precise and enforceable standards for *all* primates used in research. *Id.* at ¶¶ 47-50.

Thus, as explained in the Complaint, NEAVS is harmed by the agency's denial of its Rulemaking Petition because this decision, which Plaintiffs intend to demonstrate to the Court was arbitrary and capricious and an abuse of discretion, "*deprives NEAVS of key information that it needs to educate the public about (a) the conditions under which primates are being maintained in laboratories; (b) whether they are suffering psychological distress; (c) if so, what measures are being taken to alleviate such suffering; and (d) whether APHIS is meeting its statutory obligation to "insure" the humane treatment of these animals*." *Id.* at ¶ 11 (citing 7 U.S.C. § 2131) (emphasis added).

Similarly, Plaintiff ALDF states in the Complaint that its mission is "to protect the lives and advance the interests of animals through the legal system," and that, in furtherance of this mission, it "engage[s] in communication campaigns to highlight the failure of laboratories to

provide proper care for primates." Complaint ¶ 15. ALDF further explains that to engage in these efforts, it "often relies on information generated from public records requests to investigate problematic facilities" including "AWA inspection reports and other regulatory records," that are "crucial sources of information." *Id.* Like NEAVS, ALDF also stresses that because the current psychological well-being regulation is so vague and unenforceable, ALDF has been unable to obtain the information it needs to carry out this work, and that this situation, along with NIH's chimpanzee initiative, prompted ALDF to submit the Rulemaking Petition at issue here. *Id.* at ¶¶ 15, 47–57. ALDF also asserts that the agency's "denial of Plaintiffs' Rulemaking Petition to promulgate specific, enforceable standards to promote the psychological well-being of all nonhuman primates used in research directly conflicts with, frustrates, and impairs ALDF's mission." *Id.* at ¶ 16.

Both NEAVS and ALDF further state that as a direct result of the agency's denial of their Petition, they have had to expend additional resources to continue their long-standing efforts to protect primates used in research. NEAVS explains that APHIS' refusal to upgrade the 1991 regulation has forced it to find alternative and costlier means of obtaining critical information about the primates at issue, such as by "engag[ing] in additional investigations and information gathering" to identify offending facilities. *Id.* at ¶10. Without these additional expenditures, NEAVS would be unable to continue "educat[ing] the public, policymakers, and others about the emotional and psychological suffering of nonhuman primates in laboratories." *Id.* NEAVS has also had to divert resources to fill the USDA's regulatory gap, namely by "developing modules of training for veterinary students . . . to educate future veterinarians who will be working with these primates in research labs or as employees of the USDA about how to identify common signs of psychological distress and suffering in nonhuman primates and how to ameliorate these

conditions." *Id.* at ¶ 9. Like NEAVS, ALDF explains that the agency's denial of the Rulemaking Petition "directly conflicts with, frustrates, and impairs [its] mission," and that, as a result, it will have "to spend additional time and resources investigating inadequate enrichment opportunities for nonhuman primates through other means . . . [and finding alternative ways to] ameliorat[e] [primates'] substandard welfare . . . through law enforcement requests, regulatory action, public communications, and other means." Complaint ¶ 16–17.

These organizational injuries are all perfectly cognizable under the test for organizational injury articulated in *Havens* and recently summarized by this Court in *CASA de Maryland, Inc. v. Trump*—i.e., APHIS's denial of Plaintiffs' Rulemaking Petition impairs the organizations' ability to carry out their longstanding animal protection missions, requiring these organizations to devote additional resources to obtain the information they need and to compensate for the agency's regulatory deficiencies.

Neither *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012), nor *CASA de Maryland*, upon which Defendants heavily rely, Defendants' Memorandum ("Def. Mem.") at 7–13, dictate otherwise. Both cases denied standing where the only alleged injury was the plaintiff organizations' assertions that they would have to spend more money informing the public about changes that had been made to laws affecting their organizational interests. *See Lane*, 703 F.3d at 670–71 (gun rights group asserted it had to spend resources answering questions about the impact of a new statute restricting the interstate transfer of guns); *CASA*, 971 F.3d at 234–40 (immigration group claimed injury because it had spent additional resources instructing its members on the meaning of the term "public charge" in a new regulation). In both cases, the Court of Appeals held that such "voluntary budgetary decision[s]" were not sufficient to demonstrate the necessary injury-in-fact for purposes of Article III standing. *CASA*, 971 F.3d at

239; *see also Lane*, 703 F.3d at 675 (characterizing the diversion of resources as a "budgetary choice").

Here, however, Plaintiffs' injuries stem from the fact that, as a direct result of APHIS' denial of their Rulemaking Petition, they cannot obtain important information they need to carry out core, pre-existing organizational functions—i.e., protecting primates used in research from inhumane treatment, and educating the public and policymakers about the ways in which primates are treated in an effort to improve such conditions. These injuries, far from being self-imposed, are precisely the kind of organizational injuries that *Havens* and its progeny, including this Court's recent *CASA* decision, have recognized as sufficient for Article III purposes. *See, e.g.*, *Havens*, 455 U.S. at 379 (challenged action that "perceptibly impair[s]" an organization's ability to fulfill its mission provides necessary injury-in-fact for standing); *CASA*, 971 F.3d at 240 (harm to an organization's operations satisfies the injury-in-fact test); *see also Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011) (organization that expends resources in response to, and to counteract, the effects of a defendant's alleged unlawful conduct rather than in anticipation of litigation has standing); *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (an organization demonstrates an injury-in-fact where it alleges that the challenged action frustrates its organizational mission, resulting in a diversion of resources to combat such action); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993) (organization had standing to challenge advertisements that featured only white models based on the time its staff had to spend "investigating and attempting to remedy" those advertisements).

Nor is the government's reliance on *Clapper v. Amnesty Int'l*, 568 U.S. 398 (2013) well placed. *See* Def. Mem. at 8. In that case, the Supreme Court held that the organization's assertion

of "*future* injury," based on its fear that it could one day be subjected to unlawful surveillance as a result of the challenged statute, was "too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" *Clapper*, 568 U.S. at 401 (emphasis in original). In response to the organization's alternative argument that it was suffering *present* injury because it was forced to spend resources protecting its international communications from unlawful surveillance, the Court held that this was also insufficient for standing because "respondents cannot manufacture standing by choosing to make expenditures *based on hypothetical future harm that is not certainly impending*." *Id.* at 402 (emphasis added).

Here, in sharp contrast, Plaintiffs must spend resources to counteract Defendants' unlawful conduct in denying their Rulemaking Petition—an injury that is based not on any "hypothetical future harm," but rather on an agency action that *has already occurred*. Thus, unlike the injuries asserted in *Clapper*, Plaintiffs' injuries are present and continuing.

2. The Informational Injury Cases Cited by Defendants Have No Relevance Here.

a) Plaintiffs are not asserting "informational injury" as that term is applied in those cases.

The government spends the bulk of its brief arguing that Plaintiffs cannot satisfy the test for "informational injury." Def. Mem. at 13–22. However, while Plaintiffs certainly rely on the lack of information that is vital to their missions as a basis for their organizational injuries under *Havens*, they are not asserting "informational injury" as that standing term has been construed by the Courts. Thus, such strict informational injury occurs when a plaintiff has a statutory right to certain information that has been denied and hence, as long as that plaintiff falls within the category of rightful recipients of such information, this is all that need be shown for purposes of establishing standing—i.e., the plaintiff need not show any *additional harm* to its organizational

interests. *See, e.g.*, *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989) (a challenge to the government's failure to provide requisite information under the Federal Advisory Committee Act or FOIA provides the requisite injury-in-fact for standing); *FEC v. Akins*, 524 U.S. 11, 12 (1998) (informational injury sufficient for standing where the plaintiff challenges the agency's failure to collect information that must be disclosed under the federal election laws); *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) (standing based on informational injury exists where the plaintiff alleges that it has been deprived of information required by statute and thereby suffers the type of harm Congress sought to prevent by requiring disclosure).

Indeed, Plaintiffs are not complaining that the USDA refuses to disclose information it has already generated. On the contrary, Plaintiffs complain that the agency's denial of their Rulemaking Petition constitutes an unlawful *failure* to generate information needed for Plaintiffs to carry out their missions to protect primates from inhumane treatment—specifically, actual standards that delineate necessary measures for "promot[ing] the psychological well-being of primates," 7 U.S.C. § 2143(a)(2)(B)—as well as inspection reports, annual reports, and other documents that would indicate whether such measures are actually being implemented and enforced. Accordingly, none of the informational injury cases relied on by Defendants are relevant to the standing inquiry presented here. *See* Def. Mem. at 13–21.

b) The government ignored other cases that demonstrate that Plaintiffs suffer sufficient injuries under Havens.

Further, although the government relies heavily on two informational injury cases decided by the D.C. Circuit, *Friends of Animals v. Jewell*, 828 F.3d 989 (D.C. Cir. 2016) and *American Soc'y for Prevention of Cruelty to Animals v. Feld Ent., Inc.*, 659 F.3d 13 (D.C. Cir. 2011), Def. Mem. at 14–18, it conspicuously failed to mention two other D.C. Circuit cases that

were decided on the basis of *Havens* organizational injury, the actual issue presented here, and that are directly on point. *See also Havens*, 455 U.S. at 379 (explaining that in addition to the informational injury suffered by the "tester" plaintiffs under the Fair Housing Act, the organization had standing because it had to devote resources "*to identify and counteract*" the defendant's unlawful discriminatory practices) (emphasis added).

The first case, *People for the Ethical Treatment of Animals v. U.S. Dep't of Agriculture,* 797 F.3d 1087 (D.C. Cir. 2015), involved a challenge to the USDA's alleged policy of non-enforcement of the Animal Welfare Act with respect to birds, despite the fact that Congress amended the statute in 2002 to make clear that its provisions applied to such animals. 797 F.3d at 1090–91. In that case, plaintiff People for the Ethical Treatment of Animals ("PETA") was asking the Court to compel agency action "unlawfully withheld" within the meaning of § 706(1) of the Administrative Procedure Act ("APA"). *Id.* at 1089.

To demonstrate standing, PETA explained that, as a result of the agency's failure to enforce the statute with respect to birds, the agency was depriving PETA of valuable information it needed to carry out its organizational mission to protect these animals from inhumane treatment. *Id.* at 1094–95. This deprivation of information—i.e., whether exhibitors were treating birds inhumanely—in turn impaired PETA's ability to educate the public about specific exhibitors that engage in such acts. *See id.* As PETA explained, such information is normally contained in agency inspection reports generated by USDA inspectors. *Id.* at 1095. However, because under the challenged policy of non-enforcement, inspectors were *not* evaluating the conditions of birds—and therefore *not* generating these crucial records—PETA was forced to expend resources to obtain this information in other ways, such as through private investigations or state and local public records. *See id.* at 1095–96. In addition, as a result of this "embargo on

information," *id.* at 1096, PETA was "perceptibly impaired" in its anti-cruelty activities because it did not have the investigatory information it needed to bring AWA violations to the attention of the agency, *id.* at 1095.

Finding that "PETA's alleged injuries—denial of access to bird-related AWA information including, in particular, investigatory information, and a means by which to seek redress for bird abuse—are 'concrete and specific to the work in which [it is] engaged,'" the D.C. Circuit held that PETA had alleged a cognizable injury sufficient to support Article III standing in accordance with *Havens*. *Id.* at 1095. Having found standing, the D.C. Circuit nevertheless ruled against PETA on the merits, finding that the Court could not compel the agency to carry out a discretionary enforcement decision under § 706(1) of the APA. *Id.* at 1098–99.[3]

A subsequent case was then brought against the USDA by two other bird protection groups under the prong of the APA that requires courts to compel agency action "unreasonably delayed," 5 U.S.C. § 706(1). *American Anti-Vivisection Soc'y v. U.S. Dep't of Agriculture*, 946 F.3d 615, 617 (D.C. Cir. 2020). In that case (issued several years after the two D.C. Circuit informational injury cases upon which Defendants rely here), the Avian Welfare Coalition similarly argued that the agency's failure to promulgate bird-specific regulations under the AWA deprived the organization of information it needed both to educate the public about the

[3] In a dubitante opinion, Judge Millett expressed the view that PETA should have been found to lack standing because the USDA had not taken any injurious actions *vis-à-vis PETA*, but rather had merely failed to enforce the statute against facilities that maintained birds. *See PETA v. USDA*, 797 F.3d at 1101 (Millett, J., dubitante). Here, by contrast, Plaintiffs challenge the USDA's denial of *their Rulemaking Petition*, which if granted, would have provided them the information needed to educate the public about the treatment of primates used in research and to monitor whether the agency is complying with its statutory duty to "insure" that these animals are humanely treated. 7 U.S.C. § 2131.

conditions of birds at regulated facilities and to ensure that these animals were treated humanely. *Id.* at 619. Finding that the Court's decision in *PETA v. USDA* controlled, the D.C. Circuit held that the organization had alleged sufficient standing because the standards it sought to have the agency promulgate "*would provide the substance from which the Coalition would 'educate' the 'public' and 'promote humane treatment of birds,' and would be used to gauge 'cruelty to birds*.'" *Id.* (emphasis added).

Therefore, because the USDA's alleged inaction had "perceptibly impaired" the Coalition's organizational interests "by depriving it of key information that it relies on to fulfill its mission," and because the Coalition had to spend resources "to fill the void" by developing its own "guidance on topics like handling and restraint, feeding, housing, and stress minimization," the Court held that the plaintiffs had alleged the necessary organizational injuries. *Id.* (internal citations omitted). Indeed, in language that is particularly pertinent to the instant case, the D.C. Circuit held that the Coalition's claim for standing was "even stronger than was PETA's" in the prior case because "the Coalition seeks standards that it alleges USDA is *legally required to promulgate*." *Id.* (emphasis added). Here, too, Plaintiffs allege that the standards they are requesting are legally required by the AWA because the existing regulation simply fails to "adequate[ly] promote the psychological well-being of primates" as required by the 1985 amendments to the AWA. 7 U.S.C. §2143(a)(2)(B).

Plaintiffs' injuries in this case are identical to those sanctioned in both *PETA v. USDA* and *American Anti-Vivisection Soc'y v. USDA*—which perhaps explains why Defendants failed to mention these two cases. Like the plaintiffs in those cases, Plaintiffs here have longstanding major campaigns focused on protecting primates from inhumane treatment, which they effectuate by informing the public about how these animals are treated and whether the agency is

adequately protecting them from inhumane treatment. Complaint ¶¶ 6, 11, 15. Furthermore, as with the plaintiffs in the two bird cases, Plaintiffs here are deprived of key information which, if their Rulemaking Petition had been granted, would have necessarily informed them of (a) what measures are specifically required of research labs to "promote the psychological well-being of primates," as required by the AWA, 7 U.S.C. § 2143(a)(2)(B); (b) how research labs are carrying out these requirements; and (c) how the USDA is implementing and enforcing this requirement. Complaint ¶ 11. Therefore, as in *American Anti-Vivisection Soc'y v. USDA,* the requested standards "*would provide the substance*" from which Plaintiff could "*educate the public and promote humane treatment*" of primates. *American Anti-Vivisection Soc'y v. USDA*, 946 F.3d at 619 (internal quotations omitted) (emphasis added).

In short, the agency's refusal to grant Plaintiffs' Petition means that Plaintiffs must spend additional resources to obtain information about the treatment of primates used in laboratory research. They will also have to "fill the void" left by the agency, *id.* at 619, by, for example, "divert[ing] resources to developing modules of training for veterinary students" to "educate future veterinarians who will be working with these primates in research labs or as employees of the USDA about how to identify common signs of psychological distress and suffering in nonhuman primates and how to ameliorate these conditions." Complaint ¶ 9. Accordingly, Plaintiffs have amply alleged sufficient injuries in fact.

B. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED CAUSATION.

Plaintiffs easily demonstrate that their injuries are "fairly traceable" to the challenged action of Defendants. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976). As NEAVS explains, "[h]ad APHIS granted [the] Rulemaking Petition, and, at an absolute minimum, adopted standards akin to those now required by NIH for the treatment of

chimpanzees in federally-funded laboratories, NEAVS would not have to undertake all of these additional advocacy, educational, and information-gathering efforts." Complaint ¶ 12; *see also* Complaint ¶¶ 18-20 (ALDF states that if Defendants had granted the Rulemaking Petition, ALDF would not have to "divert significant resources to seek other means of protecting the psychological welfare of nonhuman primates."); *Pye v. United States*, 269 F.3d 459, 471 (4th Cir. 2001) (finding causation where agency breached its duty by failing to consider options raised by plaintiffs) ((citing *Watt v. Energy Action Educ. Found*., 454 U.S. 151, 161–62 (1981)); *Nat'l Fed'n of the Blind v. U.S. Dep't of Educ.*, 407 F. Supp. 3d 524, 533 (D. Md. 2019) (plaintiff organization had successfully demonstrated an injury traceable to defendant agency because, "had [Defendant] not adopted the March 2018 Manual . . . Plaintiff would not have suffered this injury.").

C. PLAINTIFFS HAVE ALLEGED SUFFICIENT REDRESSABILITY.

Plaintiffs have also alleged sufficient redressability—i.e., that it is "'likely, as opposed to merely speculative, that [their injuries] will be redressed by a favorable decision.'" *Doe v. Virginia Dep't of State Police*, 713 F.3d 745, 755 (4th Cir. 2013) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Services,* 528 U.S. 167, 181 (2000). To meet this test, "no explicit guarantee . . . is required to demonstrate a plaintiff's standing," nor must the injury be redressable in its entirety. *Equity In Athletics, Inc. v. Dep't of Educ*., 639 F.3d 91, 100 (4th Cir. 2011); *see also Utah v. Evans*, 536 U.S. 452, 464 (2002) (holding that "a significant increase in the likelihood that the plaintiff would obtain relief" is sufficient to demonstrate redressability).

Here, both organizational Plaintiffs allege that their injuries would be redressed upon a favorable decision because APHIS would be required "to reconsider its denial of Plaintiffs' Rulemaking Petition," which in turn could lead to the promulgation of "heightened standards to

promote the psychological well-being of all primates used in research." Complaint ¶ 13 (NEAVS); *see also* Complaint ¶ 21 (ALDF).

Defendants argue that Plaintiffs cannot possibly demonstrate standing, as "it is not at all clear that a change in these standards would result in future agency records containing different information," because even if the Court grants summary judgment for Plaintiffs, "it is unknown at this time what [the] final rule would entail, or whether it would result in the generation of different information." Def. Mem. at 22. However, this formulation completely ignores a fundamental precept of standing jurisprudence, which requires this Court to accept Plaintiffs' theory of the case on the merits at this juncture. *Federal Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) (explaining that to decide standing the reviewing court must accept the plaintiff's "view of the law"); *accord, Cooksey v. Futrell*, 721 F.3d at 239.

Again, under Plaintiffs' theory of the case, the USDA is *required* to grant their Rulemaking Petition and promulgate new objective and enforceable standards for the psychological well-being of primates. That action will in turn provide new information to Plaintiffs concerning (a) the content of those standards; (b) the way they are being implemented by the regulated industry; and (c) the way the new standards are being interpreted and enforced by the agency. *See also Federal Election Comm'n v. Akins*, 524 U.S. at 25 (noting that causation and redressability are both satisfied even though on remand the agency "might reach the same result exercising its discretionary powers lawfully"); *Massachusetts v. EPA*, 549 U.S. 497, 534–35 (2007) (in ruling on the lawfulness of an agency's denial of a rulemaking petition the court need not find that on remand the agency will issue the regulation requested by the plaintiffs).[4]

[4] Defendants' reliance on *Clapper*, for this argument, Def. Mem. at 22, is also unavailing. In that case, the Court held that the organization's fear of *future* injury caused by unlawful surveillance that may occur under the challenged law was insufficient to establish any "impending" injury.

In fact, as Defendants themselves acknowledge, Congress has now mandated that the USDA affirmatively disclose to the public *all* USDA inspection reports, annual reports submitted to the agency by research labs, "reports or other materials documenting any non-compliances observed by USDA officials," and various other USDA records concerning how the agency is implementing and enforcing the AWA. Def. Mem. at 19–20 (citing 7 U.S.C. § 2146(a)). Therefore, if Plaintiffs prevail in this action and, as a result, the USDA issues the requested standard, a whole *slew* of new information about not only the *contents* of the new psychological well-being standard, but also how it is being implemented and enforced, will necessarily become available to the Plaintiffs as mandated by this new legislation. Accordingly, there can be no doubt that Plaintiffs have alleged sufficient redressability.

The agency also argues that Plaintiffs have no standing because "when the agency inspects a facility, the inspectors *already* 'examine and document all areas of care and treatment that are covered under the Animal Welfare Act.'" Def. Mem. at 22 (quoting the agency's denial of Plaintiffs' Petition) (emphasis in original). Thus, Defendants assert that "Plaintiffs' complaint does not explain what *new* information would be submitted in future reports" if their Rulemaking Petition were granted. *Id.* (emphasis in original). However, Defendants' assertion that Plaintiffs have failed to explain what "new information" would become available is demonstrably incorrect. As just one example—and there are many—Plaintiffs' Complaint states quite clearly that:

> If the agency had granted Plaintiffs' Rulemaking Petition, the information that would be required to be generated, collected, and reported by research facilities would have been far more useful [to their efforts to protect primates] and would allow NEAVS *to effectively monitor how primates are treated in*

Clapper, 568 U.S. at 410. However, as explained, Plaintiffs' organizational injuries are *already happening* as a direct result of the agency's denial of their Rulemaking Petition.

> *Laboratories and whether APHIS is carrying out its statutory Mandate to ensure their psychological well-being*.

Complaint ¶ 11 (emphasis added). The Complaint further states that:

> APHIS' denial of the Rulemaking Petition deprives NEAVS of key Information that it needs to educate the public about (a) the *conditions under which primates are being maintained in laboratories*; (b) *whether they are suffering psychological distress*; (c) if so, *what measures are being taken to alleviate such suffering*; and (d) *whether APHIS is meeting its statutory obligation to "insure" the humane treatment of these animals*.

Id (emphasis added). Thus, Plaintiffs could not be clearer about the information that would necessarily be generated by the agency and the regulated industry if their Rulemaking Petition were granted.

Furthermore, in light of all this new information that would be created and mandatorily disclosed to Plaintiffs, *see supra* at 15, 20, 23–24, Defendants' self-serving statement that its inspectors "already 'examine and document all areas of care and treatment that are covered by the [AWA,]'" Def. Mem. at 22, makes no sense. Plaintiffs seek to have the agency issue more *concrete, specific standards* to "promote the psychological well-being of primates," 7 U.S.C. §2143(a)(2)(B), akin to those now imposed by NIH for federally funded research involving chimpanzees. Therefore, if Plaintiffs' Petition is granted, there will inevitably be *new* "areas of care and treatment" that will have to be documented—precisely what prompted Plaintiffs to submit their Rulemaking Petition in the first place.

Finally, while not particularly relevant to the standing inquiry (or the merits, for that matter, because Plaintiffs are requesting *new* standards), the assertion that USDA inspectors "already examine and document all areas of care and treatment" required under the *existing* regulations, Def. Mem. at 22, is in dispute. As Plaintiffs allege in their Complaint, the agency "recently informed its inspectors of facilities accredited by the Association for Assessment and

Accreditation of Laboratory Animal Care . . . that they may *choose* which aspects of a particular facility they wish to inspect," meaning that "the inspectors are not even required to inspect *all* of the animals, *all* aspects of the facility, or even the environmental enrichment plans currently being used by such facilities when completing the annual inspections that are required by the AWA." Complaint ¶ 70 (citing 7 U.S.C. § 2143(a)(2)(B)) (emphasis in original).

Therefore, even with respect to the current sorely deficient primate regulation that has been in existence since 1991, the agency has apparently directed its inspectors that they need not conduct full inspections of labs conducting research on primates. Complaint ¶ 70. In fact, because the agency has failed to provide Plaintiffs with requested information about this particular directive, they have filed a FOIA case to obtain that information, which is currently pending before this Court as a related case. *Rise for Animals, et al. v. APHIS*, Civ. No. 8:20-cv-03013 (D. Md. filed October 16, 2020).

In any event, the government's assertion that Plaintiffs lack standing because the agency properly denied their Rulemaking Petition continues to ignore this Court's obligation to adopt Plaintiffs' view of this case when deciding standing. *See supra* at 13, 26. Under that view, the agency's denial of their Rulemaking Petition was arbitrary and capricious, an abuse of discretion, and not in accordance with the agency's obligation—included in the AWA since 1985—to issue a standard "for a physical environment adequate to promote the psychological well-being of primates," 7 U.S.C. § 2143(a)(2)(B), and thereby to "insure" that these animals "are provided humane care and treatment." 7 U.S.C. §2131.

CONCLUSION

For all of the foregoing reasons, Defendants' Motion to Dismiss should be denied.

Respectfully submitted,

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