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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CENTER FOR BIOLOGICAL DIVERSITY *et al.*,	
and	CV 11-70-M-DWM CV 11-71-M-DWM
ALLIANCE FOR THE WILD ROCKIES *et al.*,	
Plaintiffs	SAFARI CLUB INTERNATIONAL AND NATIONAL RIFLE ASSOCIATION OF AMERICA'S [PROPOSED] BRIEF IN OPPOSITION TO THE SUMMARY JUDGMENT MOTIONS OF PLAINTIFFS
v.	
KEN SALAZAR, *et al.*, Defendants	
and	
SAFARI CLUB INTERNATIONAL and THE NATIONAL RIFLE ASSOCIATION OF AMERICA Defendant-Intervenor -Applicants	

Exhibit "A"

Safari Club International and the National Rifle Association of America ("Safari Club and NRA") respectfully submit this [Proposed] brief in opposition to the summary judgment motions and supporting memoranda filed in this litigation by Plaintiffs Center for Biological Diversity *et al.* and Alliance for the Wild Rockies *et al.* Safari Club and NRA seek to defend the constitutionality of Section 1713 of H.R. 1473, the Department of Defense and Full-Year Continuing Appropriations Act of 2011. P.L. 112-10 § 1713, 125 Stat. 38 (April 15, 2011) ("Section 1713"). In the interest of brevity and expediency, Safari Club and NRA do not repeat the factual and legal statements and arguments presented by Defendants Salazar *et al.* ("Federal Defendants") in Federal Defendants' Consolidated Response to Plaintiffs' Motion for Summary Judgment and Brief in Support of Cross Motion for Summary Judgment ("Federal Defendants' Brief") Doc 55. Safari Club and NRA file this brief to supply the Court with essential arguments that the Federal Defendants omitted or did not fully stress in their brief.

I. Background Facts

On May 5, 2011, two sets of Plaintiffs each filed a lawsuit to challenge the Constitutionality of Section 1713. That law, passed as a rider to appropriations legislation, directed the U.S. Fish and Wildlife Service ("Service") to reissue the April 2, 2009 federal regulation that delisted the wolves of Montana, Idaho and portions of Utah, Oregon and Washington State. Plaintiffs filed their lawsuit on

the very same date that the Secretary of the Interior, in accordance with Section 1713, reissued the text of the 2009 delisting rule in the form of a new Federal Register notice. 76 Fed. Reg. 25,590 (May 5, 2011). On May 31, 2011, in accordance with a briefing schedule established by this Court, the two sets of Plaintiffs each filed a motion for summary judgment. Federal Defendants submitted its brief on June 16, 2011. Missing from Federal Defendants Brief were four specific arguments that Safari Club and NRA deem essential to the constitutional defense of Section 1713: 1) given a choice between Constitutional and unconstitutional interpretations of a law, a Court cannot designate a law as unconstitutional; 2) a constitutional law remains constitutional even if allegedly drafted for unconstitutional purposes; 3) legislation is not unconstitutional simply because it moots a pending appeal; and 4) Plaintiffs lack prudential standing to assert harm from alleged interference with pending litigation.

II. Argument

A. Given the Choice Between Constitutional and Unconstitutional Interpretations of a Law, the Court Cannot Designate a Law as Unconstitutional

Both Plaintiffs and Defendants have offered the Court a great deal of discussion about opposing interpretations of Section 1713. Plaintiffs insist that the law is unconstitutional and Federal Defendants offer the court a contrary interpretation. The existence of opposing interpretations resolves the question. A

fundamental canon of statutory construction requires that, when given the choice between constitutional and unconstitutional interpretations of a law, a Court has no recourse other than to select the Constitutional interpretation. In such a case, the Court's "plain duty" is to "save the act." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

> When a statute is fairly subject to a variety of interpretations all but one of which would make it unconstitutional, then the courts must presume Congress intended the interpretation which is constitutionally permissible.

Apache Survival Coalition v. U.S., 21 F.3d 895, 904 (9th Cir. 1994) (Court rejected Constitutional challenge to Arizona-Idaho Conservation Act), quoting *United States v. Thompson*, 452 F.2d 1333, 1337 (D.C. Cir. 1971). The canon of statutory construction goes beyond the court's duty to interpret the law and relates to the judiciary's underlying duty to uphold the constitution as well as to respect the authority and integrity of its fellow branches of the government.

> This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

Edward J. De Bartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568, 575 (1988) (Court upheld the constitutionality of provisions of the National Labor Relations Act).

Because on its face, Section 1713 offers the Court a plausible and constitutional interpretation, this Court bears the obligation to select the interpretation that makes the law constitutional.

A. A Constitutional Law Remains Constitutional Even If Allegedly Drafted For Unconstitutional Purposes

Plaintiffs and Federal Defendants have each devoted much of their briefs to the question of whether the Court may or should review and/or consider the legislative history behind Section 1713, in addition to what properly constitutes the legislative history of the law. Whether or not it is appropriate for the Court to review whatever qualifies as legislative history, the motives of the legislators in drafting and adopting legislation revealed by the legislative history cannot be used to impugn the constitutionality of that legislation. The language of the statute dictates whether or not it is constitutional. If the legislation, on its face, is constitutional, the Court cannot use the potentially inappropriate motives of the legislators to declare the legislation unconstitutional. *Walker v. United States Department of Housing and Urban Development*, 912 F.2d 819, 830 (5th Cir. 1990) (Despite controversial statements by bill's sponsors, Court held that federal statute that eliminated funding for the demolition of public housing did not interfere with pending litigation) . Since nothing on the face of Section 1713 itself expresses Congress' intent to purposefully violate the separation of powers between the

legislative and judicial branches, this Court must declare Section 1713 constitutional.

B. Legislation Is Not Unconstitutional Simply Because It May Moot a Pending Appeal

The sole impact that Section 1713 might have on pending litigation is to potentially moot the appeals noticed by Federal Defendants and the rest of the appellants, including Safari Club and NRA, in *Defenders of Wildlife v. Salazar,* CV-09-77-M-DWM and *Greater Yellowstone Coalition, v. Salazar,* CV-09-82-M-DWM. The fact that a statute may moot the appeal of litigation does not make that statute an unconstitutional violation of the separation of powers between the judiciary and legislative branches of government. *Stop H-3 Association v. Dole,* 870 F.2d 1419, 1432 (9th Cir. 1989) (Court held constitutional a section of Federal-Aid Highway Act that exempted a Hawaiian highway construction project from NEPA requirements and mooted litigation challenging the project)

C. Plaintiffs Lack Prudential Standing to Assert Harm From Interference with "Pending" Litigation

Plaintiffs have based their challenges to Section 1713 on the premise that the law interferes with "pending" litigation, namely the two lawsuits, originally filed in this Court, challenging the April 2, 2009 regulation delisting the wolves of the Northern Rocky Mountains (Montana, Idaho, and parts of Utah, Oregon and Washington). *Defenders of Wildlife v. Salazar,* CV-09-77-M-DWM and *Greater*

Yellowstone Coalition, v. Salazar, CV-09-82-M-DWM. The only reason that any litigation concerning the listing status of the Northern Rocky Mountain wolf population remains "pending" is because the U.S. Fish and Wildlife Service, the states of Montana and Idaho, and non-governmental groups like Safari Club and the NRA filed appeals to the ruling that this Court issued in Plaintiffs' favor. But for those appeals, that litigation would not be pending and a separation of powers allegation would not be a viable option for any party. Plaintiffs (with the exception of WildEarth Guardians, which was not a party in either of the two cases) prevailed in the court below and received a final ruling when, on August 6, 2011, this Court determined that the April 2, 2009 rule to delist the Northern Rocky Mountain wolves was in violation of the Endangered Species Act ("ESA"). Section 1713 does nothing, in and of itself, to reverse that ruling or to reverse Plaintiffs' win. As victors, Plaintiffs neither desired to nor had the ability to appeal that ruling. One who prevails in court generally cannot appeal from a judgment that has succeeded in remedying his harms. *Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1059 (9th Cir. 2008) (Court prohibited litigant who prevailed on question of whether there was a fraudulent concealment claim to appeal the judgment), citing *Envtl. Prot. Info. Ctr., Inc v. Pac. Lumber Co.*, 257 F.3d 1071, 1075 (9th Cir. 2001). Just as they could not have appealed that ruling, Plaintiffs, as prevailing parties, should be prohibited from suing to avoid interference with an

appeal that they could not have taken and that would have been adverse to their interests.

The zone of interests for separation of powers claims should not include parties who were not responsible for the pending nature of the underlying litigation. Prudential standing should not extend to those who, but for the actions of their opponents, would have chosen to terminate the now pending litigation and walk away with their victory. Prudential standing encompasses only those with an "injury in fact" that is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Bennett v. Spear*, 520 U.S. 154, 163 (1997).

Technically, if any alleged interference with litigation did occur, the injured parties would be the appellants in the pending underlying challenge to the delisting rule.[1] The sole impact that Section 1713 could have on the pending litigation in *Defenders of Wildlife v. Salazar* and *Greater Yellowstone Coalition v. Salazar*, is to potentially moot the appeals taken by the U.S. Fish and Wildlife Service and other appellants such as Safari Club and NRA. Section 1713 potentially interferes with the ability of these appellants to seek a substantive reversal of that ruling.[2]

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[1] By making this argument, Safari Club and NRA do not admit that any unconstitutional interference with pending litigation has occurred.

[2] Even this is unsure, as the Ninth Circuit, not Congress, will decide if those appeals are moot and if they are, whether an exception to the mootness doctrine allows the appeals to continue.

Plaintiffs have no interest in this potential harm. The only ostensible reason that Plaintiffs would want the underlying litigation to continue is to give them the ability to pursue this constitutional challenge. The zone of interests related to the constitutional protections from interference with pending litigation should not extend to those whose only interest in prolonging the underlying litigation is to provide the basis for their constitutional challenge. Because Plaintiffs are not within the required zone of interests, their claims should be dismissed.

At most, the injuries allegedly sustained by Plaintiffs are derivative of the potential interference that Section 1713 causes to the appeals pursued by the appellants in the underlying delisting litigation. Plaintiffs are attempting to assert third party prudential standing to redress their injuries. "To demonstrate third party standing, a plaintiff must show his own injury, a close relationship between himself and the parties whose rights he asserts, ***and the inability of the parties to assert their own rights***." *McCollum v. California Dept. of Corrections and Rehabilitation*, --- F.3d ----, 2011 WL 2138221 at *6 (9th Cir. 2011) (emphasis added) (Court held that because prisoners could assert their own rights, volunteer prison chaplain lacked third party prudential standing to assert his loss of payment as derivative of prisoners' First Amendment right claims) quoting *Powers v. Ohio*, 499 U.S. 400, 409-10 (1991). In the instant matter, should they choose to do so, the U.S. Fish and Wildlife Service, Safari Club and NRA, and the other appellants

in the underlying litigation could assert their own rights against interference with their appeals. Consequently, Plaintiffs lack third party prudential standing to pursue their own claims and this Court should dismiss Plaintiffs' claims.

III. Conclusion

Given that it has been presented with both constitutional and unconstitutional interpretations of Section 1713 (and the constitutional interpretation is reasonable), this Court's only choice is to select a constitutional one. Whether or not the legislators' motives in drafting Section 1713 were appropriate, the language of Section 1713 lends itself to a constitutional interpretation, which this Court must select. The fact that Section 1713 potentially moots the appeals brought by Federal Defendants, and Safari Club and NRA, does not cause the law to be unconstitutional. Plaintiffs, who have no interest in preserving the pendency of the underlying litigation until it gave them a basis for their constitutional challenge, are not within the zone of interests to be protected by a separation of powers claim and lack third party prudential standing to pursue their claims. Consequently, this Court must enter summary judgment in favor of Safari Club and NRA and in favor of the Federal Defendants, must deny Plaintiffs' motions for summary judgment, and must dismiss these two lawsuits.

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DATED this 20th day of June 2011.

Respectfully Submitted,

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