No. 98-1059

In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH, PETITIONER

v.

ANIMAL LEGAL DEFENSE FUND, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an individual who observes primates in captivity at exhibition facilities, and who objects to what he believes to be inhumane treatment of such primates, has standing under Article III of the Constitution to challenge the legality of regulations promulgated by the Department of Agriculture governing the treatment of primates in such facilities.

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Constitution, statute and regulation:

U.S. Const. Art. III	3, 4
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OPINIONS BELOW

The opinion of the court of appeals sitting in banc (Pet. App. 1a-49a) is reported at 154 F.3d 426. The original panel opinion (Pet. App. 84a-103a) is reported at 130 F.3d 464. The opinion of the district court (Pet. App. 50a-83a) is reported at 943 F. Supp. 44.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1998. On November 24, 1998, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 30, 1998. The petition for a writ of certiorari was filed on

December 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Animal Legal Defense Fund, Inc. and several individuals (the private respondents) brought this action against the Department of Agriculture (USDA) and certain of its officials (the federal respondents). The private respondents challenged 9 C.F.R. 3.81, which regulates the treatment of primates by dealers, research facilities, and exhibitors. Among other things, the private respondents argued that Section 3.81 failed to fulfill the USDA's statutory obligation under the Animal Welfare Act (AWA), 7 U.S.C. 2131 *et seq.*, to "promulgate standards to govern the humane handling, care, [and] treatment * * * of animals, * * * includ[ing] minimum requirements * * * for a physical environment adequate to promote the psychological well-being of primates." 7 U.S.C. 2143(a)(1) and (a)(2)(B).

Respondent Marc Jurnove, the sole respondent presently at issue, alleged that he had standing because (1) he frequently visited a particular zoo and intended to continue doing so, (2) he observed the primates in the zoo in conditions that he believed were inhumane and inconsistent with the requirements of the Animal Welfare Act, and (3) he suffered personal distress and aesthetic and emotional injury when observing primates under those conditions. Pet. App. 3a-5a, 7a-8a.

2. The district court found that Jurnove and other individual respondents had standing, and ruled for the plaintiffs on the merits. Pet. App. 50a-83a. Petitioner, the National Association for Biomedical Research, intervened in the district court for purposes of noting an appeal. *Id.* at 93a. The United States also appealed. A

divided panel of the United States Court of Appeals for the District of Columbia Circuit held that plaintiffs lacked Article III standing. *Id.* at 84a-103a.

3. The court of appeals granted rehearing in banc, and held that Jurnove had established Article III standing. Pet. App. 105a, 1a-49a.

a. The in banc majority held that Jurnove had established injury in fact, because he had seen "with his own eyes the particular animals whose condition caused him aesthetic injury." Pet. App. 9a. The majority explained that both this Court and the courts of appeals have recognized that injury to aesthetic interests can support standing. *Id.* at 8a-17a. It rejected the argument that such injury supports standing only if the environmental feature in which the plaintiff asserts an aesthetic interest is threatened with destruction. *Id.* at 17a-18a.

The majority also held that Jurnove had established that his injury was "fairly traceable" to actions of the USDA, because Jurnove's claim was that the USDA's regulation unlawfully failed to prohibit some of the mistreatment Jurnove claimed to have observed. Pet. App. 19a-22a. The majority rejected the argument that actions of third parties are not fairly traceable to government regulation unless the government regulation specifically authorizes or compels the challenged actions. *Id.* at 24a-28a.

The majority further held that Jurnove's injury would likely be redressed by a favorable ruling, because stricter regulations would prevent the alleged mistreatment that caused Jurnove's injury and would permit Jurnove to visit the zoo in the future without suffering that injury. Pet. App. 28a. The majority also stated that if the zoo were to shut down rather than comply with stricter regulations, Jurnove might visit the

animals "he has come to know in their new homes within exhibitions that comply with the more exacting regulations."[1] *Ibid.*

Having determined that Jurnove had standing, the majority left "a determination of the merits of the plaintiffs' claim to a future panel." Pet. App. 32a.

b. Judge Sentelle dissented, joined by Judges Silberman, Ginsburg, and Henderson. Pet. App. 32a-49a. The dissent concluded that "Supreme Court cases addressing aesthetic injury resulting from the observation of animals are limited to cases in which governmental action threatened to reduce the number of animals available for observation and study." Pet. App. 35a. Extending standing to persons claiming that animals were being treated inhumanely, the dissent reasoned, would "open[] an expanse of standing bounded only by what a given plaintiff finds to be aesthetically pleasing." *Id.* at 37a.

The dissent also disagreed with the majority's conclusion that Jurnove's injury was "fairly traceable" to the USDA. Pet. App. 40a-46a. According to the dissent, the actions of a third party (here the zoo exhibitor) are fairly traceable to government regulation only if those actions are expressly authorized or compelled by the regulation in question. *Id.* at 45a-46a.

Finally, the dissent concluded that it was not likely that Jurnove's injury would be redressed by a favorable ruling. Pet. App. 46a-48a. The dissent viewed Jurnove's aesthetic injury as so indistinct that there was no way to tell whether more stringent regulations would ameliorate it. *Id.* at 47a. In addition, the dissent

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[1] In addition to finding that the requirements of Article III were met, the majority held that Jurnove fell within the zone of interests protected by the AWA. Pet. App. 29a-31a.

thought it quite speculative that Jurnove would be able to continue to observe the primates in question if the zoo were to shut down in response to more stringent regulations. *Id.* at 47a-48a.

ARGUMENT

Although we believe that the court of appeals erred in ruling that respondent Jurnove had standing, review by this Court is not warranted at this time. Because the court of appeals has not yet determined the merits of the private respondents' claims, this case is in an interlocutory posture. If the court of appeals were to rule in favor of the private respondents on the merits, either the United States or the petitioner would be free to seek review not only of that determination but also of the court of appeals' ruling that respondent Jurnove had standing. See, *e.g.*, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979); *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955). Except in extraordinary cases, this Court's practice in such circumstances is to decline to exercise certiorari jurisdiction. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ [of certiorari] is not issued until final decree. [The absence of a final judgment] of itself alone furnishe[s] sufficient ground for the denial of [an] application.") (citations omitted); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari).[2]

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[2] No adequate basis for departing from the Court's usual practice of avoiding premature review is presented by petitioner's claim (Pet. 12-13) that the ruling of the court of appeals conflicts

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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"at least in principle" with decisions from the Fourth, Fifth, and Ninth Circuits. See *Fund for Animals, Inc.* v. *Lujan*, 962 F.2d 1391, 1395-1397 (9th Cir. 1992) (finding standing because plaintiffs "suffered an injury arising from a direct sensory impact of a change in [their] physical environment" when they observed bison being shot) (internal quotation marks omitted); *International Primate Protection League* v. *Administrators of Tulane Educ. Fund*, 895 F.2d 1056, 1059 (5th Cir. 1990) (plaintiffs lacked standing to challenge treatment of laboratory animals because plaintiffs had no future access to animals), rev'd on other grounds, 500 U.S. 72 (1991); *International Primate Protection League* v. *Institute for Behavioral Research, Inc.*, 799 F.2d 934, 938 (4th Cir. 1986) (same), cert. denied, 481 U.S. 1004 (1987).