IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

USARK FLORIDA, INC., et al.,

Case No. 2021-CA-977

Plaintiffs,

v.

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION, et al.,

Defendants.
_____/

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND INCORPORATED MEMORANDUM OF LAW

In accordance with Florida Rule of Civil Procedure 1.510, Plaintiffs move for summary judgment on all claims in their Amended Complaint. Because the challenged rules exceed Defendants' constitutional authority, and Defendants violated Plaintiffs' procedural and substantive due process rights, Plaintiffs are entitled to summary judgment on Counts I through IV of the Amended Complaint.

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Summary of Argument

The Florida Fish and Wildlife Conservation Commission ("**FWC**") is constitutionally endowed with the regulatory and executive power of the state with respect to "***wild animal life***." Art. IV, § 9, Fla. Const. (emphasis added). With this provision as its exclusive authority, FWC amended chapter 68-5, Florida Administrative Code ("**Amended Rules**"), in February 2021 with the goal of prohibiting the commercial breeding of certain caged animals including Plaintiffs'.

FWC plays a critical role in protecting, preserving, and promoting Florida's wild animal life, but like every other executive agency, FWC must stay within its constitutional lane and observe due process when rulemaking. FWC has done neither in adopting the Amended Rules. This is a facial and as applied challenge to the Amended Rules asking this Court to declare whether they have the unconstitutional purpose and effect of prohibiting commercial breeding of caged animals that are not "wild animal life" and have no adverse impacts on wild animal life.

Plaintiffs also ask this Court to declare whether FWC has violated procedural due process under state law by virtue of: failing to notice the actual purpose of the Amended Rules to shutter the breeding industry; failing to consider statements of lower cost regulatory alternative ("**LCRAs**") proposed by Plaintiff USARK Florida on behalf of its members due to the unnoticed purpose; failing to prepare an adequate statement of estimated regulatory costs ("**SERC**"); failing to enact the Amended Rules on a credible biological basis; and biasing the final rule adoption hearing.

By rejecting the request for a draw-out hearing, FWC impliedly found that the rulemaking proceeding afforded an extra level of care and deliberation incorporating credible biological data that is factually accurate of the kind drawn out in an evidentiary hearing. Instead, FWC had no data for certain claims and speculated about risks of harm to wild animals hinged on never before confirmed escapes of the captive animals from commercial breeders to justify them.

In addition, Plaintiffs ask this Court to declare whether FWC violated substantive due process under state law unless the terms "wild animal life," "wildlife," and "domestic" are vested with the meaning discussed below consistent with statute, common law and common parlance. Otherwise, Plaintiffs ask this Court to determine that the rules discussed herein interpreting them are void-for-vagueness and the Amended Rules premised upon them are unconstitutional as applied to Plaintiffs' animals.

Statement of Undisputed Facts

1. Plaintiff USARK Florida is a non-profit trade organization which represents and promotes the reptile industry. [Affidavit of USARK President Elizabeth Wisneski ("Wisneski Aff.") ¶ 3].[1] USARK Florida's goals and objectives are to facilitate cooperation between government agencies, the scientific community, and the private sector in order to produce policy proposals that will effectively address important live animal husbandry and conservation issues. [*Id*.] Thus, the Amended Rules are within USARK Florida's general scope of interest and activity. [*Id.*]. Prior to the Amended Rules, a substantial number of USARK Florida's members kept, possessed, imported, exported, sold, and bred reptiles, including but not limited to Burmese pythons, reticulated pythons, green iguanas, and tegu lizards, and therefore are substantially affected by the challenged Amended Rules. [*Id.* ¶¶ 4-6, 9].

2. All Individual Plaintiffs are members of USARK Florida and own, are in possession of, or transact business with at least one reptile subject to the Amended Rules, and as such are businesses and individuals who are adversely affected by the Amended Rules. Before the Amended Rules became effective, the ownership, possession, and breeding of these reptiles and transaction of business involving these reptiles were lawful. [Affidavit of Mark Bell ("Bell Aff.")

[1] Affidavits in support of the motion for summary judgment are being filed separately under a Notice of Filing Affidavits in Support of Plaintiffs' Motion for Summary Judgment.

¶¶ 4, 8; Affidavit of Hector Berrios ("Berrios Aff.") ¶ 4; Affidavit of Jesse Hardin ("Hardin Aff.") ¶¶ 4-5; Affidavit of Laura Roberts ("Roberts Aff.") ¶¶ 4-5; Affidavit of John McHugh ("McHugh Aff.") ¶¶ 4-7].

3. USARK Florida members and the Individual Plaintiffs (together, "**Plaintiffs**") include small business owners and commercial breeders of nonnative species from "broodstock" or animals kept apart from other captive animals for breeding purposes, themselves the progeny of multiple generations of breeding to reveal desirable traits (e.g., color, size, disposition, eyesight, etc.). [Bell Aff. ¶¶ 4-7; Berrios Aff. ¶ 5; Hardin Aff. ¶¶ 6-8; Roberts Aff. ¶¶ 5-9; McHugh Aff. ¶¶ 8-10]. The broodstock are bred by animals raised in captivity from generations held in captivity for the purpose of birthing young that will be sold and traded as pets. [Bell Aff. ¶ 7; Berrios Aff. ¶ 7; Hardin Aff. ¶ 8; Roberts Aff. ¶¶ ; McHugh Aff. ¶ 8].

4. Plaintiffs do not remove animals from the wild or purchase animals from others who remove them from the wild to sell or trade as pets. Plaintiffs do not release any of their animals into the wild. Most of Plaintiffs' sales of animals are to buyers located out-of-state. Plaintiffs keep their animals in secure cages and facilities hardened against storms. [Bell Aff. ¶¶ 6-9; Berrios Aff. ¶¶ 8-9; Hardin Aff. ¶¶ 6-8; Roberts Aff. ¶¶ 6, 9; McHugh Aff. ¶¶ 6, 10, 12].

5. For decades, FWC represented in published professional articles and symposia that it would rather regulate nonnative species than prohibit them. [**Exhibit 1**, Agency Representative Deposition of Kristen Sommers, Tr. ("Ex. 1, Sommers Tr.") 62:4-65:20, 68:1-11; **Exhibit 2** at 43, 44]. FWC believed that a well-regulated pet industry is preferable to driving the traffic underground. [*See* Ex. 2 at 43, 44].

6. In accordance with this view, FWC created a Conditional Species List ("**Conditional List**") in 2008, which imposed various requirements on owners and breeders of the

listed conditional species such as caging, passive integrated transponder ("pit") tagging, inventory, and reporting obligations. R. 68-5.004, Fla. Admin. Code (2020).

7. In compliance with the Conditional List regulations, commercial breeders including USARK members and other Plaintiffs invested hundreds of thousands of dollars in real estate, cages, and other equipment and inventory based on FWC assurances. [Wisneski Aff. ¶ 7; McHugh Aff. ¶¶ 5-6].

8. Unbeknownst to Plaintiffs and the public, FWC underwent a philosophical shift, preferring prohibiting and preempting commercial breeding to regulating nonnative species. [Ex. 1, Sommers Tr. 89:16-24].

9. For example, at a public hearing held over February 20 and 21, 2019, when FWC voted to prohibit the commercial sale of another reptile, the yellow anaconda, FWC Commissioner Joshua Kellam asked for assurances that he would not be "setting a precedent for a faucet to be turned on to start throwing [species] on the prohibited list." [**Exhibit 3**, Deposition of Richard Frohlich, Tr. ("Ex. 3, Frohlich Tr.") 40:2-25]. FWC Commissioner Gary Nicklaus was also outspoken about this. [*Id.* 46:24-47:5].

10. FWC's then-Division of Habitat Species Conservation Director Richard "Kipp" Frohlich agreed with Commissioner Kellam that this could not be "furthest from the truth." [Ex. 3, Frohlich Tr. 41:4-42:9]. He distinguished the animals in front of them, including the yellow anaconda, from others "well-established in trade" such as the species at issue in this case (i.e., pythons, tegus, Nile monitors), which Frohlich represented FWC would not prohibit. [*Id.* 48:2-4, 48:25-49:3, 49:15-20, 50:19-25]. Plaintiffs reasonably relied on these assurances; however, FWC reversed itself a short year-and-a-half later. [*Id.* 73:3-13].

11. On July 7, 2020, FWC published a Notice of Development of Rulemaking signed by Mr. Frohlich in connection with FWC's plans to prohibit more species by modifying Chapter 68-5, Florida Administrative Code. The notice was premised on Article IV, Section 9 of the Florida Constitution for its rulemaking authority and section 379.372, Florida Statutes, for law implemented. FWC explained its purpose without explicitly stating its intent to prohibit commercial breeding as follows:

> PURPOSE AND EFFECT: The purpose and effect of this rule development effort is to align this chapter's rules with recent changes to Section 379.372, F.S., by adding new species to the Prohibited species list, creating new definitions, establishing permitting criteria, providing biosecurity and caging requirements, and clarifying the rules related to the Commission's Exotic Pet Amnesty Program. This effort will improve clarity and conciseness and aid in addressing emerging invasive species issues.

[**Exhibit 4**, Notice of Development of Rulemaking, at 1].

12. On September 14, 2020, FWC published a Notice of Proposed Rule identifying Article IV, Section 9 of the Florida Constitution as the exclusive rulemaking authority and law implemented and once again framed its purpose without mentioning prohibiting commercial breeding:

> PURPOSE AND EFFECT: The purpose and effect of these rule drafts is to add new species to the Prohibited species list, create new definitions, establish permitting criteria, provide biosecurity and caging requirements, and clarify the rules related to the Commission's Exotic Pet Amnesty Program. This effort will improve clarity and conciseness and aid in addressing emerging invasive species issues.

[**Exhibit 5**, Notice of Proposed Rule, at 1].

13. The Notice of Proposed Rule proposed to move various reptiles from the Conditional List to the Prohibited Non-native Species List in Rule 68-5.006 ("**Prohibited List**"), Florida Administrative Code, even though FWC recorded just two escapes of permitted animals that were recovered or euthanized. [Ex. 5, Notice of Proposed Rule, at 2-3; **Exhibit 6**, FWC's Resp. to First Set of Interrogatories, No. 2; **Exhibit 7**, Incident Bite Escape Records Summary, at FWC 2026-2027 (showing that of the 14 escapes claimed from 2010-2020, only 2 were of permitted animals, both which were recovered, and the third never escaped the owner found the animal in his attic)].

14. These reptiles moved from the Conditional to Prohibited List include the amethystine python, Burmese python, green anaconda, reticulated python, Southern African python, Northern African python, scrub python, and Nile monitor (the "**Conditional Species**"). [Ex. 5 at 2-3].

15. The Notice of Proposed Rule also proposed to move the green iguana and all species of tegus from their de minimus regulatory designation as a Class III Species to the Prohibited List. [*See* Ex. 5 at 3]. For ease of reference, we refer to the green iguana, tegus, and Conditional Species together as the **"Species**."

16. Some of the Species are already considered established in Florida (e.g., the Burmese python, Northern African python, Nile monitor, green iguana, and black and white Argentine tegus). [Ex. 6, FWC's Resp. to First Set of Interrogatories, No. 1]. FWC has no records of other Species in the wild in Florida, like the Amethystine python, scrub python, and Southern African python. [*See* **Exhibit 8,** Risk Summaries, at 1 (FWC 8358), 15 (FWC 8372)].

17. In September 2020, FWC published a "Statement of Estimated Regulatory Costs of Proposed Changes to Chapter 68-5, F.A.C." ("**September SERC**"). [**Exhibit 9**, September SERC]. It excluded the value of commercial breeding of green iguanas and tegus. [Ex. 1, Sommers Tr. 163:7-164:13, 212:2-213:4].

18. On October 5, 2020, Plaintiff USARK Florida proposed lower cost regulatory alternatives ("**LCRAs**") to the proposed changes to Chapter 68-5. [**Exhibit 10**, Oct. 5, 2020 Letter]. FWC concedes that these LCRAs would address threats that the Species posed to Florida's ecology, economy, or human health and safety. [*See* Ex. 1, Sommers Tr. 226:2-22]. FWC also admitted that the LCRAs would impose less of an economic impact on small business than the Amended Rules. [*Id.* 181:24-182:4, 226:18-22].

19. In December 2020, FWC published an amended "Statement of Estimated Regulatory Costs of Proposed Changes to Chapter 68-5, F.A.C." ("**December SERC**"), rejecting the LCRAs. [**Exhibit 11**, December SERC].

20. The December SERC rejected the LCRAs on the grounds that they failed to achieve "[t]he purpose of the proposed rules"; i.e., "to limit possession and prohibit commercial breeding of high-risk nonnative species in Florida." [Ex. 11, December SERC at 1, 15-16].

21. The December SERC did not consider, among other things, the Amended Rules' impacts to the economic "ecosystem" of small businesses that depend on the reptile industry [**Exhibit 12** at 3-4; **Exhibit 13** at 11-12; **Exhibit 14,** Deposition of Ariel Collis Tr. ("Ex. 14, Collis Tr.") 72:14-75:11; *see also* Ex. 1, Sommers Tr. 169:18-170:7], or whether the actual costs of the Amended Rules outweigh its benefits, particularly in light of the LCRAs offered by USARK Florida. [Ex. 12, Oct. 2, 2020 Comment at 20-21; Ex. 13, 2021 Comment at 3-7, 15-16; Ex. 14, Collis Tr. 71:25-72:11, 126:11-127:11].)

22. According to FWC, although the Notice of Proposed Rule did not expressly state it, "[t]he goal was always to eliminate commercial breeding." [Ex. 6, FWC's Resp. to First Set of Interrogatories, No. 24; *see also* **Exhibit 15,** FWC's Resp. to First Set of Requests for Admission, No. 5].

23. In addition, FWC considered the Amended Rules necessary to "fill a gap" left by the interpretation of the federal Lacey Act in *U.S. Ass'n of Reptile Keepers, Inc. v. Zinke*, 852 F.3d 1131, 1133 (D.C. Cir. 2017), but failed to reveal that: (a) the decision had no import whatsoever for roughly half the Species not covered by the Lacey Act; (b) the Lacey Act had only recently been applied to four of the Species; and (c) the decision restored the status quo ante. [**Exhibit 16,** Deposition of Kristen Sommers as Expert, Tr. ("Ex. 16, Sommers Exp. Tr.") 104:19-105:8, 140:5-141:20, 151:9-152:12, 154:17-21, 159:11-20, 160:15-161:18, 165:3-165:19, 168:11-24].

24. Preceding the final hearing before the Commission at which the Commission would vote on the Amended Rules, FWC took an unusual step: FWC launched a media campaign using iHeart radio and social media to target potential supporters (e.g., birders, protectors of native wildlife, and humane societies) to comment and join the hearing. [**Exhibit 17**, FWC's Responses to Sixth Set of Interrogatories, Nos. 58-59; **Exhibit 18**, PowerPoint Presentation Recap of IHeart Radio Campaign at 8-10].

25. FWC also published so-called "Risk Summaries" for each of the Species "to help staff portray to not just the commissioners, but members of the public what information we had that indicated potential risks of the species that were proposing for regulatory change." [Ex. 1, Sommers Tr. 112:7-15 (regarding Ex. 8, Risk Summaries)].

26. Next to a green line prominently marked "$," FWC states on most of the Risk Summaries that "[t]he FWC spends more than $3 million annually managing invasive fish and

wildlife." [Ex. 1, Sommers Tr. 279:4-13, 281:10-21; Ex. 8, Risk Summaries at 1(FWC 8358), 3 (FWC 8360), 5 (FWC 8362), 9 (FWC 8366), 11 (FWC 8368), 13 (FWC 8370), 15 (FWC 8372)]. But FWC actually spends nothing on half the Species and has no information on others. [Ex. 1, Sommers Tr. 159:10-160:2, 279:4-16, 280:22-281:24, 283:19-284:6, 286:24-287:15, 292:4-8].

27. The final hearing on the Amended Rules was held by videoconference on February 25, 2021. FWC arranged for and bumped its own partisans to the front of the queue and gave them more time, despite representing to the public that the hearing was first come, first served and each speaker would have three minutes each. [**Exhibit 19**, Agency Representative Shanna Chatraw Deposition Tr. ("Ex. 19, Chatraw Tr.") 29:16-17, 58:13-59:6; **Exhibit 20**, MeetingOne Representative Deposition Tr. ("Ex. 20, Soto Tr.") 36:6-37:10; **Exhibit 21**; Wisneski Aff. ¶¶ 18-21].

28. The vendor used to facilitate calls from the public experienced technical difficulties, causing an unknown of callers to be dropped. [Ex. 19, Chatraw Tr. 75:21-77:19, 78:21-79:10, 85:25-86:19]. When FWC ended public comment, many callers were still waiting to speak including one of Plaintiffs' experts who was on the line from the start. [*Id*. 87:4-8; Wisneski Aff. ¶ 24].

29. On March 15, 2021, FWC published a Notice of Change/Withdrawal (**"Notice of Change**"), making "extensive revisions" to the Amended Rules. [**Exhibit 22**, Notice of Change]. Among other things, this Notice withdrew commercial breeding liberties relied upon in the December SERC. FWC identified Article IV, Section 9 of the Florida Constitution as the exclusive rulemaking authority and law implemented. [*Id.*].

30. FWC did not prepare a SERC relating to the final Amended Rules as reflected in the Notice of Change. [Ex. 6, Resp. to First Set of Interrogatories, No. 8; Ex. 1, Sommers Tr.

222:18-223:9, 234:10-21]. FWC admitted the extensive changes contained in the Notice of Change could have economic effects with some increasing regulatory costs on small businesses including Plaintiffs. [*See* Ex. 1, Sommers Tr. 231:14-234:21].

31. Plaintiffs have drastically changed their businesses as a consequence of the Amended Rules. Some have been or will soon be forced to shutter their Florida businesses. [*See* Hardin Aff. ¶¶ 10-11; McHugh Aff. ¶¶ 3, 7; Berrios Aff. ¶ 11; Roberts Aff. ¶¶ 10-11; Bell Aff. ¶¶ 8-9].

32. To the extent some Plaintiffs have left the State because the Amended Rules ended or hindered their ability to continue their businesses in Florida, those Plaintiffs would return to the State if the rules were restored to what they were prior to the Amended Rules. [Hardin Aff. ¶ 11; McHugh Aff. ¶ 7].

Procedure and Standard of Review

This is a facial and as-applied challenge to the Amended Rules asking this Court to declare that the Amended Rules violate Article IV, Section 9 of the Florida Constitution (Count II), violate procedural and substantive due process (Counts I and II), and are arbitrary and capricious (Count II) and to find a violation of the Fourteenth Amendment due to procedural due process defects (Count III).[2] Plaintiffs seek declaratory and injunctive relief.

Plaintiffs aver each of the elements of declaratory relief set forth in Chapter 86, Florida Statutes. See *Syfrett v. Syfrett-Moore ex rel. Estate of Syfrett*, 115 So. 3d 1127 (Fla. 1st DCA 2013). Plaintiffs aver that (1) they have a "bona fide, actual present practical" need for a declaration because the Amended Rules are depriving them of personal property; (2) the pendency of this lawsuit reveals a present controversy due to FWC's adoption of the Amended Rules; (3)

[2] FWC's rules have the force of a legislative act. *Fla. Fish & Wildlife Conservation Comm'n v. Daws*, 256 So. 3d 907, 917 (Fla. 1st DCA 2018).

each Plaintiff's property interests and right to carry on a business involving breeding the Species is at stake; (4) Plaintiffs have "actual, present, adverse and antagonistic interests" in the Amended Rules; (5) all of the antagonistic and adverse interests are before the court by proper process; and (6) the relief sought inclusive of a request for declaratory and injunctive relief is not merely the giving of legal advice and will have actual practical impacts on Plaintiffs.

Plaintiffs seek summary judgment on each of their claims. Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a); *see also In re: Amends. to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 77 (Fla. 2021) (amending Rule 1.510 to align with the federal summary judgment standard and applying that standard to all summary-judgment motions filed beginning May 1, 2021). Under this standard, "[w]hen the moving party has carried its burden [to show there is no genuine issue of material fact,] its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (internal quotation marks omitted)).

A facial challenge requires the plaintiff to establish that no set of circumstances exists under which the act is valid. *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 2004) (statute). It considers only the text of the act, not its application to a particular set of circumstances, and the challenge must demonstrate that that its provisions pose a present total and fatal conflict with applicable constitutional standards. *Id*. In comparison, "[i]n considering an 'as applied' challenge, the court is to consider the facts of the case at hand to determine 'whether the statute can be fairly used to proscribe the defendant's . . . conduct, and the result is not binding on other parties.'" *Accelerated*

Benefits Corp. v. Dep't of Ins., 813 So. 2d 117, 120 (Fla. 1st DCA 2002) (citation omitted). There is no genuine dispute about the manner in which the Amended Rules apply to Plaintiffs.

Plaintiffs ask the Court to determine whether they are entitled to permanent injunctive relief because they have no adequate remedy at law, and have suffered and will continue to suffer irreparable harm without a permanent injunction barring enforcement of the unconstitutional rules. *Liberty Counsel v. Fla. Bar Bd. of Governors*, 12 So. 3d 183, 186 n.7 (Fla. 2009). "[A]n injury is irreparable where the damage is estimable only by conjecture, and not by any accurate standard." *See JonJuan Salon, Inc. v. Acosta*, 922 So. 2d 1081, 1084 (Fla. 4th DCA 2006) (internal quotation marks omitted); *see also, e.g.*, *Thompson v. Planning Comm'n*, 464 So. 2d 1231, 1237 (Fla. 1st DCA 1985) (where damages not ascertainable by any reasonable standard, as there were "simply too many uncertainties and variables involved," movant's "money damages would be speculative, thereby establishing the inadequacy of a legal remedy"). Plaintiffs cannot quantify the loss they have suffered and will continue to suffer under the Amended Rules, and consequently, they have established irreparable harm and the lack of an adequate remedy at law.

The Amended Rules have shuttered an entire industry, the full cost of which cannot be validly estimated. Plaintiffs do not sell widgets that can be easily and quickly reduced to a set dollar amount; in many cases, the Plaintiffs have bred and were breeding highly unique animals for which value is difficult to quantify. *See Zimmerman v. D.C.A. at Welleby, Inc.*, 505 So. 2d 1371, 1373 (Fla. 4th DCA 1987) (where lost sales and profit for each lost sale was difficult to determine, plaintiff illustrated harm was irreparable and remedy at law was inadequate); *see also U.S. 1 Office Corp. v. Falls Home Furnishings, Inc.*, 655 So. 2d 209, 210 (Fla. 3d DCA 1995) (where damages difficult to quantify, evidence of even the potential destruction of a business constitutes irreparable harm supporting issuance of a temporary injunction). Plaintiffs who must

leave the state to continue their businesses elsewhere have had to sell, transport, or euthanize their unique pets and uproot families besides buy and sell personal residences and businesses.

"Even if there were a remedy at law" such as money damages, "the law recognizes that a continuing constitutional violation, in and of itself, constitutes irreparable harm." *Fla. Dep't of Health v. Florigrown, LLC*, 320 So. 3d 195, 200 (Fla. 1st DCA 2019), *decision quashed on other grounds*, 317 So. 3d 1101 (Fla. 2021); *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1263-64 (Fla. 2017) ("In light of finding that the Mandatory Delay Law is likely unconstitutional, there is no adequate legal remedy at law for the improper enforcement of the Mandatory Delay Law. Thus, the Mandatory Delay Law's enactment would lead to irreparable harm . . . ."). Plaintiffs ask this Court to decide whether the Amended Rules are causing a continuing constitutional violation and, therefore, whether Plaintiffs are entitled to a permanent injunction enjoining them.

Argument

I. The Amended Rules Exceed FWC's Constitutional Authority.

The exclusive rulemaking authority and law implemented for the Amended Rules is Article IV, Section 9 of the Florida Constitution. [Ex. 5, Notice of Proposed Rule, at 1; Ex. 22, Notice of Change, at 1]. The Amended Rules do not rely upon statute or other rule, so this Court must set aside as impertinent Chapter 379, Florida Statutes, Rule 68A-1.002, Florida Administrative Code, and related authority.[3] To assess the meaning of Article IV, Section 9, "inquiry into the proper

[3] The Legislature has all the lawmaking power of the state that is not withheld by the Florida Constitution. *Whitaker v. Parsons*, 86 So. 247, 251 (Fla. 1920). As relates to "wild animal life," "[t]he legislature may enact laws in aid of the commission, not inconsistent with" Article IV, Section 9 of the Florida Constitution. The Legislature enacted Chapter 379, Florida Statutes. Consistent with *Barrow v. Holland*, 125 So. 2d 749, 751 (Fla. 1960), and its observations about the Legislature's police power, FWC's authority under Chapter 379 is the subject of *Foley v. Orange Cnty*., 2013 WL 4110414 at *8 (M.D. Fla. Aug. 13, 2013), *vacated and remanded by* 638 F. App'x 941 (11th Cir. 2016) (citing Op. Att'y Gen Fla. 2002-23 (2002)) and

interpretation of [the] constitutional provision must begin with an examination of that provision's explicit language." *Caribbean Conservation Corp., Inc. v. Fla. Fish & Wildlife Conservation Comm'n*, 838 So. 2d 492, 501 (Fla. 2003) (citation omitted). Article IV, Section 9 states:

> The Commission shall exercise the regulatory and executive powers of the state with respect to wild animal life . . . except that all license fees for taking ***wild animal life*** . . . and penalties for violating regulations of the commission shall be prescribed by general law.

Art. IV, § 9, Fla. Const. (emphasis added).

Put simply, the regulatory and executive powers that Article IV, Section 9 invests in FWC hinge on "wild animal life." FWC's application of the Amended Rules to Plaintiffs exceed this grant of constitutional authority for several reasons: (1) Plaintiffs' prohibited animals are not *ferae naturae*; (2) Plaintiffs' prohibited animals are domestic animals; and (3) Plaintiffs' prohibited animals do not adversely impact *ferae naturae*. Each of these reasons is an independent basis to invalidate the Amended Rules as applied to Plaintiffs and to grant summary judgment to Plaintiffs on Count II.

A. Plaintiffs' Prohibited Animals Are Not *Ferae Naturae*.

Neither Constitution nor statute defines the term "wild animal life," but the term is linked to the ancient common law doctrine *ferae naturae.* "'[T]he doctrine is . . . based upon a reality not appreciably altered by the passage of time; namely, the unpredictability and uncontrollability of wild animals." *Hanrahan v. Hometown Am., LLC*, 90 So. 2d 915, 917-18 (Fla. 4th DCA 2012). The key regulatory case applying it interprets the authority of FWC's predecessor, the Game and Fresh Water Fish Commission ("GFC"). *Barrow v. Holland*, 125 So. 2d 749 (Fla. 1960). The

Miramar v. Bain, 429 So. 2d 40 (Fla. 4th DCA 1983). None of this authority is pertinent because the Amended Rules rely for authority exclusively on the Florida Constitution.

Court ruled, "The justification for the establishment of [the GFC] stem[ed] from the State's interest in animals *ferae naturae*." *Barrow*, 125 So. 2d at 751.

In *Barrow v. Holland*, the plaintiff operated a wildlife exhibit as a tourist attraction. *Id*. at 750. "[A]ll of the animals [we]re owned by Barrow and [we]re confined on his land." *Id*. It was "also admitted that a large number of the animals are not native to Florida" and were "transported into Florida by appellant Barrow." *Id*. Barrow sued GFC when it notified him that he would have to close the business without a permit. *Id*. Barrow argued that the GFC had no power under the Florida Constitution "to regulate the control of animals which have been reduced to private possession and, particularly, those which are not native to Florida." *Id*. Although Barrow's animals had potential ecological impacts on *ferae naturae*, the Florida Supreme Court agreed with Barrow:

> The justification for the establishment of such a Commission stems from the State's interest in animals ferae naturae. It is a concept as old as the Common Law that such animals are owned by the State for the benefit of all of the people. This is not in the nature of a private proprietary ownership. It is in the nature of a title in trust with the public the beneficiary….
>
> Once such animals ferae naturae have been legitimately reduced to private control, confinement and possession, they become private property. When this occurs the owner thereof cannot be deprived of the use thereof, except in accord with all of the elements of due process which protect one's ownership of private property generally. ***In other words, once the animals are legitimately removed from their natural condition and are brought into confinement through private ownership, they cease to be a subject of regulation by appellee Commission***.
>
> ***This rule is even more clearly applicable to non-native wildlife acquired outside of Florida and brought into this State.*** We find nothing in the quoted constitutional provisions which endow the appellee Commission with the power to regulate the use of purely private property imported into this State even though such property be wildlife acquired in some other state.

Barrow, 125 So. 2d at 751 (internal citations omitted; emphasis added).

GFC "was a constitutional agency established by a 1942 constitutional amendment. *See* art. IV, § 30, Fla. Const. of 1885 (1942), *amended by* Art. IV, § 9, Fla. Const. (1968)." *Caribbean*

Conservation Corp., 838 So. 2d at 495. The amendment vested GFC with "'management, restoration, conservation and regulation' of the birds, game, fur bearing animals and fresh water fish of the State of Florida" including the "manner and method of taking, transporting, storing and using birds, game, fur bearing animals, fresh water fish, reptiles and amphibians." *Bell v. Vaughn*, 155 Fla. 551 (1945) (citing art. IV, § 30, Fla. Const. (1942)).

FWC inherited its constitutional authority from the GFC. The connection became all the more obvious when Article IV, Section 30 was amended by Article IV, Section 9 in the Florida Constitution of 1968. Exactly like current Article IV, Section 9, the 1968 provision authorized the GFC to "carry out 'the regulatory and executive powers of the state with respect to ***wild animal life*** and fresh water aquatic life.'" *Caribbean Conservation Corp*., 838 So. 2d at 495 (emphasis added). This jurisdictional language for the GFC and FWC is word-for-word the same.[4] *Barrow* remains controlling law.

The same authority anchors FWC's jurisdiction. Consequently, the validity of the Amended Rules turns on whether they concern *ferae naturae*. They do not. Plaintiffs are commercial breeders of nonnative species from "broodstock" or animals kept apart from other captive animals for breeding purposes, themselves the progeny of multiple generations of breeding to reveal desirable traits (e.g., color, size, disposition, eyesight, etc.). [Berrios Aff. ¶¶ 5, 8; Bell Aff. ¶¶ 5-7; Hardin Aff. ¶¶ 6-8; McHugh Aff. ¶ 10; Roberts Aff. ¶¶ 5-6, 8-9; *see also* Wisneski Aff. ¶ 4]. Many of these are referred to in the industry as "morphs." [Hardin Aff. ¶ 6; Roberts Aff. ¶ 8; *see also* Wisneski Aff. ¶ 4]. Due to their unusual traits, morphs ordinarily cannot survive

[4] The single change to Article IV, Section 9 associated with FWC's replacement of GFC is not relevant to this case. Article IV, Section 9 merged the GFC with the Marine Fisheries Commission to create the FWC, and thereby transferred saltwater fisheries to the new commission (adding a phrase to Article IV, Section 9), but it did not otherwise "contemplate a change in the nature of the new commission's power." Clay Henderson, *The Conservation Amendment*, 52 FLA. L. REV. 285, 296 (2000).

in the wild. [Berrios Aff. ¶ 5; Hardin Aff. ¶ 6]. The broodstock are bred by animals raised in captivity from generations held in captivity for the purpose of birthing young that will be sold and traded as pets. [Berrios Aff. ¶ 7; Bell Aff. ¶ 6; Hardin Aff. ¶¶ 6, 8; McHugh Aff. ¶¶ 8, 10; Roberts Aff. ¶ 9; *see also* Wisneski Aff. ¶ 4]. Plaintiffs do not remove animals from the wild or purchase animals from others who remove them from the wild to sell or trade as pets. [Berrios Aff. ¶ 7; Bell Aff. ¶¶ 6-7; Hardin Aff. ¶¶ 6, 8; McHugh Aff. ¶¶ 8, 10; Roberts Aff. ¶ 6].

Plaintiffs' prohibited animals are not *ferae naturae*. Rather, they are the same kind of animals that the Court in *Barrow* ruled were not within GFC's constitutional jurisdiction. FWC's constitutional jurisdiction is not broader. Whether FWC's jurisdiction is broader in a statutory sense is not here relevant because the Amended Rules do not rely upon statutory law. For this reason, Plaintiffs are entitled to summary judgment on Count II and a declaration that FWC has exceeded its constitutional authority by applying the Amended Rules to them.

B. Plaintiffs' Prohibited Animals Are Domestic Animals.

Another reason Plaintiffs are entitled to summary judgment on Count II is FWC's concession that it lacks jurisdiction over "***domesticated animals***." [Ex. 1, Sommers Tr. 30:25-31:7, 32:8-36:24, 288:18-289:11; **Exhibit 23**, Deposition of Andrea Sizemore Tr. ("Ex. 23, Sizemore Tr.") 17:19-22, 18:16-19; Ex. 3, Frohlich Tr. 90:5-12]. Tellingly, FWC mentions Article IV, Section 9 of the Florida Constitution as a key reason why it lacks jurisdiction over domestic animals. [**Exhibit 24**, FWC's Resp. to Fourth Set of Interrogatories, No. 50]. In fact, with Article IV, Section 9 of the Florida Constitution as the exclusive authority, FWC has indirectly defined "wild animal life" in a two-step formula to exclude domestic reptiles such as Plaintiffs' animals.

As the first step, FWC states: "***The following definitions*** are for the purpose of carrying out the provisions of the rules of the Fish and Wildlife Conservation Commission relating to ***wild animal life*** and freshwater aquatic life." R. 68A-1.004, Fla. Admin. Code (emphasis added). As

the second step, FWC lists this definition of "***wildlife***": "all wild or ***non-domestic*** birds, mammals, fur-bearing animals, ***reptiles*** and amphibians." R. 68A-1.004(91), Fla. Admin. Code; *accord State v. J.H.B.*, 415 So. 2d 814, 815 (Fla. 1st DCA 1982) ("'[W]ildlife' are 'living things that are neither human nor domesticated' such as 'mammals, birds, and fishes hunted by man.'"). The authority for Rule 68A-1.004 is exclusively Article IV, Section 9 of the Florida Constitution. Accordingly, FWC takes the position on the basis of Article IV, Section 9 that "wild animal life" includes non-domestic reptiles, but does not include domestic reptiles.[5]

FWC's own rule concedes that reptiles may be domestic, but which ones is less clear. Because FWC has not defined "domestic" or "domestication," this Court must either conclude that the Amended Rules as applied to Plaintiffs are unconstitutionally overbroad as the Court did in *Barrow* or look elsewhere to give the term meaning. There are three alternatives: statutory law, common law, or the term's usage in common parlance (i.e., the dictionary). Some of Plaintiffs' animals qualify under any of these definitions of domesticated animals. To this extent, the application of the Amended Rules to Plaintiffs is unlawful because they prohibit domestic or domesticated reptiles not subject to FWC's jurisdiction.

1. Plaintiffs' Animals Fit the Statutory Definition of Domesticated Animals.

FWC refers to statutory law as a reason it does not have jurisdiction over domestic animals. [Ex. 24, FWC's Resp. to Fourth Set of Interrogatories, No. 50]. The Legislature has several times defined the term "domestic animal" inclusively without requiring hundreds or thousands of years of domestication as the *sine qua non*. Based on these statutes, the Florida Department of

[5] FWC's rule contradicts the testimony of its agents that reptiles never can be domesticated because domestication takes "hundreds or thousands of years." [Ex. 1, Sommers Tr. 33:12-13; Ex. 23, Sizemore Tr. 18:8-15].

Agriculture and Consumers Services ("**DACS**") has adopted a rule defining a domestic animal to include reptiles maintained for private use or commercial purposes.

As background, the Legislature invested DACS with jurisdiction over "***domesticated animals***, including livestock, poultry, aquaculture products, and other wild or domesticated animals or animal products." § 570.65(1)(a), Fla. Stat. (emphasis added).[6] In furtherance of this grant of authority, the Legislature defined a "domestic animal" to "include any equine or bovine animal, goat, sheep, swine, domestic cat, dog, poultry, ostrich, emu, rhea, or ***other domesticated beast*** or bird." § 585.01(10), Fla. Stat. (emphasis added);[7] *accord* §§ 379.3761(5); 585.002(3), Fla. Stat. DACS then defined "animal or domestic animal" more specifically by rule as follows:

> ***Any animals that are maintained for private use or commercial purposes; including any*** equine such as horse, mule, ass, burro, zebra; any bovine such as bull, steer, ox, cow, heifer, calf, or bison; any other hoofed animal such as goat, sheep, swine, or cervids [i.e., deer]; any domestic cat, dog, ***reptile*** or amphibian; any avian such as ratites, poultry, or other domesticated bird or fowl; ***or any captive, exotic or non-native animals.***

R. 5C-30.001(1), Fla. Admin. Code (2022) (emphasis added); *see also* R. 5C-3.001(1), Fla. Admin. Code ("'Domestic Animal' shall include any equine or bovine animal, goat, sheep, swine, domestic cat, dog, poultry, ostrich, emu, rhea or other domesticated beast or bird."); *id.* R. 5C-04.0015(5) (same); 43 C.F.R. § 423.2 (defining "pet" as "a domesticated animal other than livestock….").

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[6] Officers appointed under this section "have the primary responsibility for enforcing laws relating to agriculture and consumer services, as outlined in this section, and have jurisdiction over violations of law which threaten the overall security and safety of this state's agriculture and consumer services." § 570.65(1), Fla. Stat. Consumer services include, for example, consumer protection, consumer information, and consumer grievances. § 570.544, Fla. Stat. For example, it is unlawful for a person to sell, transport or move or allow an animal to stray or drift within the state, knowing that the animal has a disease that is dangerous or transmissible to an agricultural interest in the state without written permission from DACS. § 585.17(1), Fla. Stat.

[7] In comparison, the Legislature said an "animal, as used in this chapter, shall include ***wild or game animals*** whenever necessary to effectively control or eradicate dangerous transmissible diseases or pests which threaten the agricultural interests of the state." § 585.01(10), Fla. Stat. (emphasis added). The Legislature's exercise of the police power to prevent the spread of infectious or contagious diseases among animals is liberally construed. *Compoamor v. State Live Stock Sanitary Bd.*, 182 So. 277 (Fla. 1938).

Plaintiffs' captive, exotic and non-native reptiles are maintained for private use or commercial purposes. [Berrios Aff. ¶¶ 7-8; Bell Aff. ¶¶ 4-7; Hardin Aff. ¶¶ 4, 6, 8; McHugh Aff. ¶¶ 8, 10; Roberts Aff. ¶¶ 4-6, 9; *see also* Wisneski Aff. ¶ 4]. Accordingly, they fit DACS's definition of "domestic animals," and are subject to DACS's consumer service and agricultural enforcement authority. This is not to say the Court must find they are subject to DACS's jurisdiction, only to confirm that Plaintiffs' prohibited animals are not within FWC's jurisdiction because they are "domesticated animals."

2. Plaintiffs' Animals Fit the Common Law Definition of Domesticated Animals.

Even before DACS defined a domestic animal, the common law adopted a usage that fits Plaintiffs' animals. Plaintiffs' reptiles prohibited by the Amended Rules are not removed from the wild, have been transported into Florida to be used for propagating purposes, and are confined. [Berrios Aff. ¶¶ 5, 7-9; Bell Aff. ¶¶ 6-9; Hardin Aff. ¶ 6; McHugh Aff. ¶¶ 6, 8, 10; Roberts Aff. ¶ 6; *see also* Wisneski Aff. ¶¶ 4, 7]. FWC has treated them as subject to being stolen and even tried to track down the criminals responsible. [Hardin Aff. ¶ 9]. To this same extent, Plaintiffs' animals fit the common law definition of domesticated animals and, thus, are not within the FWC's jurisdiction.

In *State v. Lee*, 41 So. 2d 662 (Fla. 1949), the state charged Lee with larceny of "***domesticated*** pet deer." *Id.* at 662-63 (emphasis added). The court had to decide whether stealing a penned deer was a crime. *Id.* at 662. To be sure, the court in *State v. Lee* allowed there could be times when *ferae naturae* are "transported from other States into Florida and the dominion and confinement thereof are incidental," *id*. at 664, but this was not so for the deer. GFC acquired the deer "for propagating purposes," the same as Plaintiffs' animals. The deer were "domesticated" by virtue of their removal from the wild, transport to Florida, and confinement. *Id*. at 664.

"[A]t common law there can be no larceny of animals wild, *ferae naturae*, and unreclaimed." *Id*. at 663. Animals *ferae naturae* ("of a wild nature") are owned by the state or the people generally. *Hanrahan v. Hometown Am., LLC*, 90 So. 2d 915, 917-18 (Fla. 4th DCA 2012)*; accord* Ex. 1, Sommers Tr. 30:1-16 (wildlife is property of the citizens of Florida, whereas captive animals are owned by the possessor). In contrast, the Florida Supreme Court determined that GFC's domesticated deer were subject to larceny:

> We have held that the ownership of animals *ferae naturae* or game is in the sovereign for the use and benefit of the people. The killing or taking and use of the game is subject to governmental regulation for the general good. *State ex rel. Spencer v. Bryan*, 87 Fla. 56, 99 So. 327. The wild animals at large within the border of a sovereign State are owned by the State as distinguished from its proprietary capacity. ***These wild animals are not subject to private ownership so long as they remain wild and unconfined, but such animals become property when removed from their natural liberty and made the subject of man's dominion***. It will be observed that animals *ferae naturae* become property, and entitled to protection as such, when the owner has them in his actual possession, custody or control and usually this is accomplished by ***taming, domesticating or confining them***. 3 C.J.S.; Animals, § 6, page 1088.

Id. at 663 (emphasis added).[8]

Likewise, FWC has indicated that Plaintiffs' animals are subject to larceny. FWC investigated when thieves broke into Plaintiff Jesse Hardin's facility, known as Jesse's Jungle, and stole 13 tegus. [Hardin Aff. ¶ 9]. Hardin valued the animals at about $35,000 at retail price. [*Id.*]. With Hardin's help FWC tracked down and Hardin recovered four of them. [*Id.*]. Had the tegus been wild animal life, Hardin could not have owned or recovered them and their taking would not have been something for FWC to help investigate.

[8] This accords with civil law. A person cannot be liable for the acts of *ferae naturae*, but can be for animals reduced to possession. *See, e.g., Hanrahan*, 90 So. 3d at 918. "The owner or keeper of a domestic animal is bound to take notice of the general propensities of the class to which it belongs, and also of any particular propensities peculiar to the animal itself . . . ." *Ferriera v. D'Asaro*, 152 So. 2d 736, 737 (Fla. 3d DCA 1963).

In short, Plaintiffs' animals are domesticated according to the common law usage of the term and FWC enforcement practice. Common law usage does not require domestication over hundreds or thousands of years. *See Hodges v. Marion Cnty*., 730 So. 2d 786, 787 (Fla. 5th DCA 1999 ("We are . . . certain that exotic birds can be sufficiently 'domesticated' to qualify as pets."). Because Plaintiffs' animals are domesticated in the statutory and common usage of the term, FWC is without jurisdiction to apply the Amended Rules to them.

3. Plaintiffs' Animals Fit the Dictionary Meaning of Domesticated.

It is well established that courts may interpret terms in rules according to their ordinary dictionary definition. *State v. Rosario*, 303 So. 3d 555, 560 (Fla. 5th DCA 2020). The term "wild" when used as an adjective commonly means "living in a state of nature and not ordinarily tame or domesticated" and "not subject to restraint or regulation." MERRIAM-WEBSTER DICTIONARY (2022). In contrast, "captive" animals are "kept within bounds" and "held under control of another." *Id*.[9] Captive animals may be domestic animals, but wild animals are not domestic.

"Domesticated" means "adapted over time (as by selective breeding) from a wild or natural state to life in close association with and to the benefit of humans." MERRIAM-WEBSTER DICTIONARY (2022). Plaintiffs' captive animals prohibited by the Amended Rules have been adapted over time by selective breeding of "broodstock" from a wild or natural state to life in close proximity and to the benefit of humans. [Berrios Aff. ¶¶ 7-8; Bell Aff. ¶¶ 6-7; Hardin Aff. ¶¶ 6-7; McHugh Aff. ¶ 10; Roberts Aff. ¶¶ 5-6, 9; *see also* Wisneski Aff. ¶ 4]. Therefore, Plaintiffs' animals fit the dictionary meaning of "domesticated," and thus are not subject to FWC jurisdiction.

[9] Viewed in this light, the term "captive wildlife" is oxymoronic. *Cf*. R. 68A-1.004(18), Fla. Admin. Code ("Captive wildlife" is "[a]ny wildlife, specifically birds, mammals, reptiles and amphibians ***maintained in captivity*** for exhibition, sale, personal use, propagation, preservation, rehabilitation, protection or hunting purposes." (emphasis added)).

The bottom line is that Plaintiffs' captive animals prohibited by the Amended Rules qualify as domesticated animals over which the FWC lacks jurisdiction. FWC has no basis to prohibit them under Article IV, Section 9 of the Florida Constitution; therefore, Plaintiffs are entitled to a declaration that FWC has exceeded its constitutional authority by applying the Amended Rules to them and to summary judgment on Count II.

C. Plaintiffs' Prohibited Animals Do Not Adversely Impact *Ferae Naturae*.

A final reason Plaintiffs are entitled to summary judgment on Count II is that their animals do not have any actual adverse impacts on *ferae naturae*. Article IV, Section 30 of the Florida Constitution (1942) vested in the GFC the "management restoration, conservation and regulation, of the birds, game, fur-bearing animals, and fresh-water fish, of the State of Florida." *Bell*, 155 Fla. at 552; *accord Barrow*, 125 So. 2d at 751 ("Article IV, Section 30 . . . was obviously intended to create a governmental agency clothed with power adequate to protect, preserve and promote the fresh water fish and game of the State.").

Modern Article IV, Section 9 requires the Legislature to appropriate revenue derived from the "taking of wild animal life and fresh water aquatic life" for the purposes of "management protection and conservation of wild animal life and fresh water aquatic life." Art. IV, § 9, Fla. Const. Accordingly, FWC believed until recently its regulation of nonnative species should be commensurate with actual adverse ecological impacts the animals pose. [Ex. 1, Sommers Tr. 73:11-23, 76:22-77:1, 77:20-78:1].

As long as Plaintiffs' animals continue to be caged, they do not and cannot have actual adverse impacts on *ferae naturae*. [*See* Berrios Aff. ¶ 9; Bell Aff. ¶¶ 10, 12; McHugh Aff. ¶¶ 6, 19; *see also* Wisneski Aff. ¶ 27]. For any harms or adverse impacts to occur Plaintiffs' prohibited animals would have to be intentionally released or escape into the wild and not be recaptured. [Ex. 23, Sizemore Tr. 32:5-8, 32:18-21, 35:22-25, 43:1-5]. Plaintiffs keep all of their animals in cages

behind walls in facilities. [*See, e.g.*, Berrios Aff. ¶ 9; Bell Aff. ¶ 9; McHugh Aff. ¶ 6; *see also* Wisneski Aff. ¶¶ 7, 27]. Plaintiffs have never released any Species into the wild. [*See* Berrios Aff. ¶ 8; Bell Aff. ¶ 7; Hardin Aff. ¶ 8; McHugh Aff. ¶ 10; Roberts Aff. ¶ 9]. None of Plaintiffs' Species have ever escaped Plaintiffs' facilities into the wild either. [*See* Berrios Aff. ¶ 9; Bell Aff. ¶ 7; Hardin Aff. ¶ 8; McHugh Aff. ¶ 10; Roberts Aff. ¶ 9].

FWC has not confirmed that any Species has escaped any licensed commercial breeder.[10] [Ex. 1, Sommers Tr. 50:10-51:11, 55:25-56:3]. FWC has no evidence any of the Species has escaped at all except for two, which escaped and were immediately recaptured or euthanized.[11] Species that are conditionally licensed must be pit-tagged. R. 68-5.004, Fla. Admin. Code (2020). No pit-tagged animal has ever been confirmed in the wild. [**Exhibit 25,** FWC's Resp. to Third Request for Admission, No. 10; Ex. 1, Sommers Tr. 50:10-51:11, 55:25-56:3]. Furthermore, FWC is not aware of research concerning the likelihood of any Species escaping in the future, much less

[10] FWC employees allege that a facility called Iguanaland was responsible for the establishment of a tegu population in Charlotte County. [*E.g.*, Ex. 23, Sizemore Tr. 159:11-24]. This matter was litigated and the Administrative Law Judge ("ALJ") ruled against FWC, concluding, "No escape from Iguanaland of any of the 176 non-native tegus were proven by any standard of review; non-native tegu existed in the landscape in Charlotte County prior to the establishment of Iguanaland . . . . Of the 9 non-tegu, non-native species in the report, 4 had never been owned or possessed by the Applicant [Iguanaland] . . . ." *Taesoon Park v. Fla. Fish & Wildlife Conservation Comm'n*, DOAH Case No. 20-4559, 2021 WL 559581, at *1 & ¶ 17 (Fla. Div. Admin. Hrgs. Jan. 15, 2021). FWC took exception to this finding, but the ALJ denied it and FWC in its final order accepted the ALJ's determination. *Taesoon Park v. Fla. Fish and Wildlife Conservation Comm'n*, DOAH Case No. 20-4559, 2021 WL 2407291, at *4 (FWC Apr. 30, 2021).

[11] FWC claimed 14 alleged escapes since 2010 of four of the Species (i.e., Burmese python, Green anaconda, Nile monitor and Reticulated python). [*See* Ex. 7, Incident Bite Escape Records Summary at FWC 2023, FWC 2026-27]. Six of the Species are not listed as escapees at all. In fact, FWC concedes it has no occurrence reports at all of scrub pythons or Southern African pythons in the State. [**Exhibit 26**, FWC's Resp. to Fifth Request for Admission, No. 6; **Exhibit 27**, Resp. to Fourth Request for Admission, No. 1]. Three alleged escapes of Species were from unlicensed owners. Unlicensed ownership may continue after adoption of the Amended Rules, so these escapes should also be set aside. A super-majority of alleged escapees (9 of 14) concern "unknown" owners whose licensure status is also "unknown." These escapes must also be set aside, first, because unlicensed ownership may continue after adoption of the Amended Rules and, second, because FWC cannot be sure the Species were ever captive. That leaves just three escapes of two Species since 2010 (i.e., reticulated python and Burmese python).

the likelihood they will cause ecological harm if they do escape. [*See* Ex. 24, Sizemore Tr. 33:5-10].

FWC's own leadership has called the potential for ecological harm into question as relates to escaped established Species. Put simply, one more fish in a sea full of them is unlikely to have adverse impact. FWC's former Division of Habitat Species Conservation Director Kipp Frohlich represented at a FWC public hearing, "[T]he juice wouldn't be worth the squeeze" to move the Species to the prohibited list because they "were already established in the environment" and "that is not the best time to prohibit an animal." [Ex. 15, FWC's Resp. to First Request for Admission, No. 3; Ex. 3, Frohlich Tr. 55:21-56:7].

In support, an article upon which FWC relies for determining which species are established states: "[I]n most instances, once introductions have been allowed to establish, no amount of money or effort can change the situation." [*See* Ex. 1, Sommers Tr. 95:4-98:7]. Even today, FWC concedes that, in many cases, meaningfully reducing or eradicating certain established Species is unlikely with FWC's present tools. [*Id.* 266:6-12, 300:12-15]. FWC's putative expert Sarah Funck allowed, "I believe that once a nonnative species becomes established in the environment, it's extremely difficult to eradicate that species." [**Exhibit 28**, Deposition of Sarah Funck Tr. ("Ex. 28, Funck Tr.") 99:14-24, 100:5-8, 100:18-22, 101:21-23].

Because Plaintiffs' prohibited Species are caged and have never been intentionally or unintentionally released, no Species has ever been recorded released from any breeder or found in the wild, and no statistical study has been introduced establishing any likelihood that the animals will be released in the future, this Court must grant summary judgment on Count II to Plaintiffs against application of the Amended Rules. Application of the Amended Rules to Plaintiffs does not preserve, protect, or promote *ferae naturae*.

II. FWC Violated Procedural Due Process.

FWC was constitutionally and statutorily required to adopt and implement due process procedures. Article IV, Section 9 of the Florida Constitution states:

> The commission shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions.

Art. IV, § 9, Fla. Const.

Section 20.331(9)(a), Florida Statutes, reiterates:

> The commission shall adopt a rule establishing due process procedures to be accorded to any party, as defined in s. 120.52, whose substantial interests are affected by any action of the commission in the performance of its constitutional duties or responsibilities, and the adequate due process procedures adopted by rule shall be published in the Florida Administrative Code.

§ 20.331(9)(a), Fla. Stat.

FWC reacted by adopting Rule 68-1.008, Florida Administrative Code, which states:

> The due process procedures adopted by the Fish and Wildlife Conservation Commission (FWC) are designed to satisfy Article IV, Section 9, Florida Constitution, and to address the recommendations in Section 20.31(9)(a)(b) and (c), F.S. (1999). The procedures adopted by the FWC are adequate within the meaning of the constitution because the procedures fully comply with the applicable procedural and substantive due process provisions of Chapter 120, F.S., and its companion provisions, the Uniform Rules of Procedure.

R. 68-1.008(1), Fla. Admin. Code (2008); *accord* R. 68-1.008(5)(b), Fla. Admin. Code (adopting R. 68-1.001, "the Uniform Rules of Procedure" contained in Chapter 28, F.A.C., as the rules of procedure for the FWC").

If FWC's due process procedures are adequate within the meaning of the constitution and statute because they comply with chapter 120, Florida Statutes, it should follow that the failure of FWC to comply with the rules alone evinces FWC's failure to comport with due process. *See Byle v. Pasco Cnty. ex rel. Bd. of Cnty. Comm'rs*, 970 So. 2d 366, 367–68 (Fla. 2d DCA 2007) (holding

that petitioner was not provided with procedural due process when trial court failed to follow its own rule requiring three-judge panels to decide certain cases).[12]

FWC defined "procedural due process" in two respects, both of which are critical to this case:

> Procedural due process, in a broad sense, encompasses the procedural requirements that must be observed in the course of a legal proceeding ***to ensure the protection of private rights and property***. Procedural due process, in an administrative setting, consists of ***requirements for notice, a meaningful opportunity to be heard and a fair, impartial decision-making authority***.

R. 68-1.008(5)(b), Fla. Admin. Code (2008) (emphasis added).

Specifically, FWC agreed to follow Chapter 120, F.S., the Administrative Procedures Act ("**APA**") "for all notices of FWC rule development and rulemaking," "in the use of rule development workshops," and preparation of SERCS and statements of LCRA "in accordance with the APA." R. 68-1.008(5)(b)3-4, Fla. Admin. Code.[13] FWC did not comply with these rules and, therefore, has offered constitutionally inadequate process as a result of: (1) failing to notice the actual purpose of the Amended Rules; (2) failing to consider Plaintiffs' LCRAs due to FWC's unnoticed purpose; (3) failing to prepare adequate SERCs; (4) failing to base the Amended Rules on credible biological data; and (5) biasing the final rule adoption proceeding.

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[12] *See also, e.g.*, *Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Regulation*, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999) ("An administrative agency is bound by its own rules."); *Soto v. Bd. of Cnty. Comm'rs*, 716 So. 2d 863, 864 (Fla. 5th DCA 1998) ("Where a governmental agency provides that employee disputes shall be resolved through a grievance process, the agency is bound to fully comply with its own rules and policies."); *Marrero v. Dep't of Prof'l Regulation*, 622 So. 2d 1109, 1112 (Fla. 1st DCA 1993) (observing that board was "bound to comply with its own rules until they have been repealed or otherwise invalidated").

[13] Under section 120.54(1)(i)1., Florida Statutes (2007), rules incorporating materials by reference—like the APA—incorporate only that material as it exists on the date the rule is adopted. Consequently, the 2007 APA applies with respect to the provisions of the APA incorporated by FWC in its due process rule adopted in January 2008, absent amendment of that rule.

A. FWC Failed to Notice the Actual Purpose of the Amended Rules.

Among the provisions of the APA that FWC adopted was Section 120.54(2)(a), Florida Statutes (2007). It states that a notice of rule development "shall . . . provide a short, plain explanation of the purpose and effect of the proposed rule." § 120.54(2)(a), Fla. Stat. (2007). The Notice of Development or Rulemaking and Notice of Proposed Rule (together, the "**Notices**"), prepared by FWC, are clear about the purpose of the Amended Rules, even capitalizing it to avoid misunderstanding as follows:

> PURPOSE AND EFFECT: The purpose and effect of this rule development effort is to align this chapter's rules with recent changes to Section 379.372, F.S., by adding new species to the Prohibited species list, creating new definitions, establishing permitting criteria, providing biosecurity and caging requirements, and clarifying the rules related to the Commission's Exotic Pet Amnesty Program. This effort will improve clarity and conciseness and aid in addressing emerging invasive species issues.

[Ex. 4, Notice of Development of Rulemaking, at 1].

Similarly, the Notice of Proposed Rule promulgated by FWC states:

> ***PURPOSE*** AND EFFECT: ***The purpose*** and effect of these rule drafts is to add new species to the Prohibited species list, create new definitions, establish permitting criteria, provide biosecurity and caging requirements, and clarify the rules related to the Commission's Exotic Pet Amnesty Program. This effort will improve clarity and conciseness and aid in addressing emerging invasive species issues.

[Ex. 5, Notice of Proposed Rule, at 1 (emphasis added)].

But FWC's actual purpose was different than as noticed. In the middle of the rule development process, FWC represented: "***The purpose of the proposed rules is to limit possession and prohibit commercial breeding of high-risk nonnative species in Florida***." [Ex. 1, Sommers Tr. 201:5-202:5 (regarding December SERC at 1) (emphasis added)]. According to FWC, "[W]e

clarified [w]hat we were trying to accomplish because that seemed to be confusing to people, what the purposes of the proposed rules were, so we clarified that." [Ex. 1, Sommers Tr. 200:2-5].[14]

The phrase "limit possession" or "prohibit commercial breeding" does not appear anywhere in the Notices, much less "to limit possession and prohibit commercial breeding of high-risk nonnative species in Florida." [Ex. 25, FWC's Resp. to Third Request for Admission, Nos. 7-8]. To the contrary, as initially proposed, the rules would have allowed Class III licensed breeders to retain, breed, and sell tegus and green iguanas. [Ex. 1, Sommers Tr. 210:19-211:8]. Plaintiffs had no reason to anticipate FWC's intention to eliminate commercial breeding for the additional reason that FWC publicly promised that it had no plan to do so.

For decades, FWC represented in published articles and symposia that it would rather regulate nonnative species than prohibit them. [*See, e.g.*, Ex. 2]. In 2012, Ms. Sommers' predecessor, Scott Hardin, was emphatic that "FWC strongly endorses responsible pet ownership and believes that a well regulated pet industry is preferable to driving the traffic underground." [Ex. 1, Sommers Tr. 70:18-72:24; Ex. 2]. As recently as February 2019, FWC's then-Division of Habitat Species Conservation Director Kipp Frohlich responded to the concerns of commissioners by stating that FWC was not "setting a precedent" and had no intention of shutting down commercial trade of the Species. [Ex. 3, Frohlich Tr. 39:24-40:25, 48:2-4, 48:25-49:24]. Frohlich even recognized a risk of black markets developing as a result of such prohibitions. [*Id.* 62:11-16].

[14] FWC's agency representative was confused about whether FWC's revised statement of purpose was really a "goal" or "objective," which she initially suggested is meaningfully different from a purpose [Ex. 1, Sommers Tr. 148:3-23, 201:23-202:22; *see also* Ex. 15, FWC's Resp. to First Request for Admission, No. 5; Ex. 6, FWC's Resp. to First Set of Interrogatories, No. 24 ("The goal was always to eliminate commercial breeding.")], then conceded "it's all just semantics." [Ex. 1, Sommers Tr. 202:16-17]. COLLINS ENGLISH DICTIONARY treats purpose, goal, and objective as synonyms.

Commercial breeders invested hundreds of thousands of dollars in real estate, equipment, and inventory based on these assurances. [*E.g.*, Hardin Aff. ¶ 5; McHugh Aff. ¶¶ 5-6; Wisneski Aff. ¶ 7]. FWC concedes that the breeders reasonably relied upon these representations at the time. [Ex. 1, Sommers Tr. 65:17-20]. But only one-and-a-half years after Mr. Frohlich assured Plaintiffs and others that FWC would not prohibit the Species, FWC filed the Notice of Development of Rulemaking with his name on it due to a "shift in FWC's approach to invasive species." [Ex. 3, Frohlich Tr. 37:1-4]. FWC decided it favored banning species regardless of the potential that such prohibition would foster black market trade. [*See* Ex. 1, Sommers Tr. 65:22-25, 82:7-83:16].

This fundamental shift of perspective was not accompanied by serious public exposure. Fifteen years later, FWC has not published a single paper on the subject in contrast to the agency's extensive professional engagement previously. [Ex. 1, Sommers Tr. 66:8-16 ("published literature, no" but distinguishing "information on our website")]. Plaintiffs are entitled to summary judgment on their request for declaratory relief that FWC violated their procedural due process rights due to FWC's failure to notice its real purpose for the Amended Rules in violation of Section 120.54(2), Florida Statutes (2007), as adopted by FWC in accordance with Article IV, Section 9 of the Florida Constitution.

B. FWC Failed to Consider Plaintiffs' LCRAs Due to FWC's Unnoticed Purpose.

As an additional protection against regulatory overreach, FWC must, consistent with procedural due process, consider proposals for LCRAs. § 120.54(3)(a)(1), Fla. Stat. (2007) ("The notice shall include . . . a statement that any person who wishes to provide . . . a proposal for a lower cost regulatory alternative as provided by s. 120.541(1), must do so in writing within 21 days after publication of the notice."); R. 68-1.008(5)(b)(4), Fla. Admin. Code ("The FWC shall follow the APA in the use of rule development workshops and shall prepare statements of

estimated regulatory cost and statements of lower cost regulatory alternative in accordance with the APA.").

Hence, underneath the "Purpose and Effect" statement, and obviously dependent upon it from an administrative procedure standpoint, the Notice of Proposed Rule stated:

> SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS AND LEGISLATIVE RATIFICATION . . . . Any person who wishes to provide information regarding the statement of estimated regulatory costs, or to provide a proposal for lower cost regulatory alternatives must do so in writing within 21 days of this notice.

[Ex. 5, Notice of Proposed Rule, at 1].

Plaintiff USARK Florida via counsel presented three LCRAs to FWC for its consideration, all of which would be an actual lower cost regulatory alternative. [Ex. 10 at 8-9]. FWC conceded that some of the offered LCRAs were a "step" in the right direction and would address threats that the Species posed to Florida's ecology, economy, or human health and safety (although not to the same extent as FWC's). [Ex. 1, Sommers Tr. 226:17-22]. FWC also admitted that the LCRAs would impose less of an economic impact on small business than the Amended Rules. [*Id.* 181:24-182:4, 226:19-22]. Yet FWC declined to adopt them.

The reason FWC gave for failing to adopt the LCRAs was unlawful; namely, that Plaintiffs did not propose to eliminate commercial breeding. [Ex. 11, December SERC, at 15]. The reason was unlawful both because FWC had not stated this as its purpose in the Notice of Proposed Rule (necessary so that a party knows what purpose or objective is sought through the rules such that it may offer an LCRA that "substantially accomplishes the objectives" being implemented, *see* § 120.541(1)(a), Fla. Stat. (2007)), and because the purpose itself was unconstitutional. Plaintiffs were without notice of this purpose in time to submit LCRAs addressing it in violation of Plaintiffs' procedural due process rights.

By failing seriously to consider Plaintiffs' proposed LCRAs, FWC did not comply with its own due process rules including section 120.54(2), (3)(a)(1), Florida Statutes (2007), as adopted by Rule 68-1.008(5)(b)(4), Florida Administrative Code (2007), in accordance with Article IV, Section 9 of the Florida Constitution.[15] Therefore, Plaintiffs are entitled to summary judgment on their request for a declaration that FWC violated their procedural due process rights.

C. FWC Failed to Prepare Adequate SERCs.

1. SERCS Relating to the Notice of Proposed Rule Were Flawed.

As part of its procedural due process responsibilities, FWC "shall prepare statements of estimated regulatory cost an statements of lower cost regulatory alternative in accordance with the APA." R. 68-1.008(5)(b)4, Fla. Admin. Code. The APA encourages agencies to prepare a SERC prior to the adoption, amendment or repeal of a rule and requires them to consider the impact of the rule on small business. §§ 120.54(3), 120.541(2)(d), Fla. Stat. (2007). The SERC must include "a good faith estimate" of the number of persons likely to be required to comply, the cost to the agency of implementing the rule, and the transactional costs likely to be incurred by persons required to comply with the rule. § 120.541(2)(a)-(c), Fla. Stat. (2007).

In contrast, the SERCs that FWC prepared concerning the Notice of Proposed Rules were fundamentally flawed. The most basic economic analysis is missing; i.e., analysis whether the overall cost of prohibiting trade in the animals exceeds the cost of regulating them or vice-versa.

[15] *See, e.g.*, *Fla. Waterworks Ass'n, v. Fla. Pub. Serv. Comm'n*, Case No. 96-3809RP, 1998 WL 866253, ¶¶ 77-78, 110 (DOAH March 2, 1998) (PSC's failure to conduct a "serious analysis" of the differences between adopting the proposed rule as opposed to the lower cost regulatory alternative was a violation of § 120.541, Fla. Stat. (1998), and constituted a material failure to follow the applicable rulemaking procedures); *see also, e.g.*, *Dania Entmt. Ctr., LLC v. Dep't of Bus. & Prof'l Reg.*, Case No. 15-7010RP, 2016 WL 4567194, ¶¶ 87-90 (DOAH Aug. 26, 2016) (observing that agency failed to employ statisticians or economists or anyone else to review LCRA and instead relied upon non-expert agency staff and vague assertions to reject LCRA), *aff'd in part & rev'd in part on other grounds*, 229 So. 3d 1259 (Fla. 1st DCA 2017).

[Ex. 14, Collis Tr. 126:16-127:11]. Indeed, as expert Ariel Collis found, FWC largely considered only the costs of managing the species in the wild versus the costs of managing species already subject to regulation, i.e., those species that are caged; in other words, the Amended Rules and the SERC nowhere account for the costs of actually managing the species affected by the Amended Rules. [*Id.* 99:11-102:2]. A good faith estimate of the transactional costs likely to be incurred under the Amended Rules should take into account the actual need for them. If existing regulations are working, there is no justification to impose the additional costs of the Amended Rules. [*Id.* 96:21-99:10]. The basic premise of a SERC is that it should consider and support a decision to change regulations in light of the economic costs imposed; here, it was irrational for FWC to go forward based on a SERC that never determined the right costs or benefits to balance in a SERC. [*See id.* 126:16-127:11].

Furthermore, although the SERC must contain a "good faith estimate of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenues," § 120.541(2)(b), Fla. Stat. (2007), the SERC failed to provide any estimate whatsoever of lost public revenue (i.e., sales taxes) from sales of the animals and their support accessories. [Ex. 1, Sommers Tr. 208:13-209:18]. Nor did the SERC ever estimate the true impact to all small businesses affected by the Amended Rules, which would necessarily include the "ecosystem" of not only direct sellers of reptiles, but also the food and caging suppliers, veterinarians, and others that depend on the reptile business. [Ex. 14, Collis Tr. 72:14-74:11].

The SERC's estimate of lost private revenue is badly understated because it excludes sales pursuant to private contract and lost multipliers from the breeders' purchases. FWC had the contact information for permittees to get real numbers but made no effort to contact them. [Ex. 1, Sommers Tr. 164:23-165:4, 214:22-215:7]. Furthermore, FWC did not estimate any economic

costs associated with transferring Species from the Conditional Species List to the Prohibited Species List.[16]

FWC valued the captive animal industry in Florida at $300 million in 2005-2006 and estimated 3,982 facilities permitted for captive animals. [Ex. 1, Sommers Tr. 177:6-23; Ex. 2 at 43]. Mr. Frohlich advised commissioners and the public that prohibiting the Species would have serious economic impacts on the industry. [Ex. 3, Frohlich Tr. 59:8-13, 72:18-21]. Nevertheless, in the initial September SERC concerning the economic impact of the proposed Amended Rules, FWC valued commercial breeding of the Species (except tegus and iguanas) in 2019 at between $106,185 and $583,600, then amended this to between $95,125 and $3,305,150 in the revised December SERC. [Ex. 9, September SERC, Table 3; Ex. 11, December SERC, Table 3].

The wild swing between SERCs in the estimate of the cost of the Amended Rules for commercial breeding of the Species and of the impact on the industry without any intervening change in the proposed rules underscores their unreliability and tends to show that if another SERC had been prepared pertaining to the Notice of Change, the cost would have materially changed again.[17]

[16] FWC believes that by prohibiting the Species, the number of people in possession of them will decrease. [Ex. 1, Sommers Tr. 228:15-229:2]. Certainly, the number of persons in lawful possession of them will decrease, but FWC has not studied whether the number of persons in unlawful possession would outstrip the reduction of those in lawful possession. [*See id.* 217:9-218:15].

[17] The September SERC (Ex. 9) was also flawed because it (1) misled about the management costs of the Species while excluding the costs to commercial breeders of regulating tegus and iguanas, (2) excluded an estimate of lost revenue from trade in the animals and support accessories for the Species, and (3) discarded actual species pricing FWC considered too extreme. FWC simply threw out the highs and lows. [Ex. 1, Sommers Tr. 170:25-171:25]. The December SERC (Ex. 11) relied on commercial breeding liberties withdrawn in the Notice of Change. For example, the December SERC assumed that Class III licensed breeders would continue indefinitely to be able to breed and sell tegus and green iguanas out-of-state, but the final rules limited their right to breed the animals to three years. [*See* Ex. 1, Sommers Tr. 233:2-12, 211:5-8, 211:23-212:9].

2. FWC Failed to Prepare a SERC for the Final Amended Rules.

FWC did not prepare any SERC at all after FWC filed its Notice of Change. [Ex. 6, Resp. to First Set of Interrogatories, No. 8; Ex. 1, Sommers Tr. 233:2-12]. The Notice of Change, in the words of FWC, "made extensive revisions to rule language." [**Exhibit 29**, Stakeholder Feedback Slide]. FWC's agency representative reiterated, "It was quite a substantial change . . . . There were a lot of changes all based on the feedback we received from stakeholders." [Ex. A, Sommers Tr. 232:6-10]. Changes included: (1) additional permit types; (2) additional exemptions; (3) change in plan possession; (4) banning outdoor breeding and imposing onerous additional caging requirements for any affected animals for which breeding was still authorized; and (5) prohibiting commercial breeding of iguanas and tegus after June 30, 2024.[18] [Ex. 1, Sommers Tr. 231:16-232:6; *see also* Ex. 22, Notice of Change]. FWC admitted the extensive changes contained in the Notice of Change could have economic effects with some increasing regulatory costs on small businesses such as Plaintiffs. [Ex. 1, Sommers Tr. 232:15-19].

Nevertheless, no SERC at all was prepared for the Amended Rules in their final form, contrary to Sections 120.54(3)(b)(1) and 120.541(1)(b), Florida Statutes (2007). Plaintiffs are entitled to summary judgment on Count I and a declaration that FWC violated their procedural due process rights because "[t]he failure of the agency to prepare or revise the statement of estimated regulatory costs as provided in this paragraph is a material failure to follow the applicable rulemaking procedures or requirements set forth in this chapter." § 120.541(1)(e), Fla. Stat. (2007).

[18] The last SERC prepared by FWC that supposedly outlined the economic effects of the Amended Rules expressly minimized the economic consequences for those persons breeding iguanas and tegus because the proposed Amended Rules at that point provided that they could continue doing so indefinitely. [Ex. 11, December SERC, at 5, 6, 8, 9, 11, 12, 19]

D. FWC Failed to Base the Amended Rules on Credible Biological Data.

FWC concedes only one restraint on its rulemaking authority: it cannot be contrary to science. [Ex. 23, Sizemore Tr. 20:10-12, 22:7-12]. In fact, it should be premised upon the "best available science" besides public input. [*Id.* 20:14-16]. In furtherance of this, Plaintiffs requested a draw-out hearing, which FWC has indicated it will provide in furtherance of procedural due process "upon request of a party if the agency determines that the rulemaking proceeding is inadequate to protect the person's substantial interests that the normal public hearing on a proposed rule does not provide." R. 68-1.008(5)(c)1.c, Fla. Admin. Code. The draw out proceeding is critical to determine whether a species warrants classification as of special concern or whether its classification should change. R. 68-1008(5)(d), Fla. Admin. Code.

Listing an animal as of special concern "affects a broad constituency . . . accordingly an extra level of care and deliberation is appropriate." *Id*. "[D]etermining whether a species warrants classification or whether its classification should change is a decision which must be based upon credible biological data and therefore, an evidentiary hearing, such as a draw-out may be useful." *Id*. "The decision should be factually correct and afforded special care and deliberation." *Id*.

FWC, however, denied Plaintiff USARK Florida's request for a draw-out hearing on the ground that the existing rulemaking proceeding was adequate to protect Plaintiffs' interests. [**Exhibit 30,** Nov. 30, 2020 Letter, at 2-3].[19] Hence, FWC impliedly found that it had met this standard of "an extra level of care and deliberation," and identified "credible biological data" of the kind ordinarily drawn out in an evidentiary hearing in support of the Amended Rules. This is far from the truth.

[19] Notably, FWC did not deny the request based on any claim that USARK Florida and its members were not entitled to a draw-out hearing under the language of the rule; instead, FWC contended that the rulemaking process afforded USARK Florida and its members sufficient due process.

1. FWC Evaluated Species Using Unattested and Discredited Tools.

FWC relied upon sheer speculation about the Species' potential harms as a predicate for the Amended Rules. [*See* Ex. 1, Sommers Tr. 59:1-8, 112:11-15]. FWC evaluated Species using unattested and discredited tools. To begin, FWC modified the so-called "Greater Everglades Ecosystem Response Screening Tool" (the "Everglades Tool") to develop a statewide "Rapid Response Screening Tool" (the "Adapted Everglades Tool") to evaluate ecological, economic, and health and human safety risks of the Species and others. FWC's tool was still "in development or was being tested" when deployed. [Ex. 3, Frohlich Tr. 99:9-10]. It was derived without peer review from the Everglades Tool, which also was not peer reviewed, but the Everglades Tool was "calibrated" to have reliability at the upper-70 percent level. [Ex. 23, Sizemore Tr. 131:4-132:17, 136:21-137:5; Ex. 28, Funck Tr. 57:15-20; **Exhibit 31,** Deposition of Christina Romagosa Tr. ("Ex. 31, Romagosa Tr.") 108:7-19]. The reliability of the Adapted Everglades Tool for use besides its stated purposes is entirely unknown. No one disputes the results lack any statistical certainty. [Ex. 23, Sizemore Tr. 61:25-64:4; Ex. 31, Romagosa Tr. 36:17-19].

The author of the Everglades Tool adds that it was "not meant to prohibit any animals, it's just meant for whether you go get it or not." [Ex. 31, Romagosa Tr. 92:16-20]. Both tools have as their sole purpose evaluating newly introduced species to determine what response is appropriate to prevent their establishment. [Ex. 28, Funck Tr. 81:18-24, 82:12-24]. The prohibited Species include established and never-introduced species. FWC evaluated both with a tool not suited for either. [Ex. 31, Romagosa 91:22-92:3, 95:1-4; Ex. 23, Sizemore Tr. 132:21-24; Ex. 6, Resp. to First Set of Interrogatories, No. 1 (listing which Species are established)]. First, no professional literature suggests the tool may be applied at all to already established animals. [Ex.

23, Sizemore Tr. 139:5-8].[20] Second, FWC conceded it has no "tool for species that are not yet here in the State of Florida." [Ex. 28, Funck 80:7-20].

FWC not only used the tools for unintended purposes, but also disregarded the policy response the tools recommended. In several cases, the outcome of the tool called for just "limited action" as a policy response. [Ex. 26, Resp. to Fifth Request for Admission, No. 21 (conceding for the Burmese python and implying for certain introduction scenarios for other species)]. Yet putative expert Sarah Funck rests her opinion that the Species should be prohibited on the results of FWC's Adapted Everglades Tool calling for much less. [Ex. 28, Funck 57:21-58:2, 60:13-15, 61:16-21, 62:25-63:10, 65:7-11, 69:20-70:1, 73:12-17].

2. The Risk Summaries Based on the Models Are Not Trustworthy.

Relying at least in part on the results generated using the Adapted Everglades Tool, FWC developed "Risk Summaries" [*see* Ex. 8] "to help staff portray to not just the commissioners, but members of the public, what information we had that indicated potential risks of the species that we were proposing for regulatory change." [Ex. 1, Sommers Tr. 112:7-15; Ex. 23, Sizemore Tr. 29:1-5; Ex. 28, Funck Tr. 157:25-158:6; *see also* **Exhibit 32**, FWC's Resp. to Second Set of Interrogatories, No. 27 ("The risk summaries for each species were a visual representation used to communicate the findings of risk screenings and habitat suitability models.")].

The Risk Summaries were not trustworthy or factually correct. For example, FWC highlights this statement at the bottom of most of the Risk Summaries: "The FWC spends more than $3 million annually managing invasive fish and wildlife." [Ex. 8, Risk Summaries at 1(FWC 8358), 3 (FWC 8360), 5 (FWC 8362), 9 (FWC 8366), 11 (FWC 8368), 13 (FWC 8370), 15 (FWC

[20] The Adapted Everglades Tool asks only about establishment of animals outside of Florida, not inside of Florida. [Ex. 23, Sizemore Tr. 138:22-139:4]. For species introduction, it asks about animals "seen out of captivity." [*Id.* 139:9-18].

8372)]. Although this suggests FWC spends this alone managing the Species, in reality, $3 million is the budget for the entire nonnative fish and wildlife program. [Ex. 28, Funck Tr. 219:8-13]. An unknown portion is spent on lionfish, a species unrelated to the Amended Rules. [Ex. 1, Sommers Tr. 161:15-160:2].

Turning to the "Habitat Suitability Model" featured on the Risk Summaries, FWC represented in sworn testimony that FWC's Fish and Wildlife Research Institute ("FWRI") "generate[d] habitat suitability models for species that did not already have published habitat suitability models available." [*See* Ex. 23, Sizemore Tr. 93:19-24]. Later, it came to light that FWRI prepared uniform models for all of the Species using more recent data, but FWC chose not to utilize them. [**Exhibit 33**, Deposition of Brittany Bankovich Tr. ("Ex. 33, Bankovich Tr.") 21:3-9, 69:18-70:8]. Despite the "Habitat Suitability Model" header, the models chosen were actually Climate Suitability Models (in the case models drawn from a 2009 article by R.N. Reed and G.H. Rodda ("Reed and Rodda")) and a Species Distribution Model for tegus. [Ex. 33, Bankovich Tr. 55:9-13, 84:19-85:18; Ex. 28, Funck Tr. 158:7-13].[21]

For most Species, the Habitat Suitability Model reprints maps from a highly flawed and discredited 2009 Reed and Rodda article. [Ex. 1, Sommers Tr. 206:13-21, 246:16-247:10, 248:11-17, 260:1-14, 269:23-270:5, 281:17-22, 283:9-15, 290:4-10; Ex. 8, Risk Summaries, at 3 (FWC 8360), 5 (FWC 8362), 11 (FWC 8368), 13 (FWC 8370), 15 (FWC 8372)]. The Reed and Rodda Habitat Suitability Model for Burmese pythons is grossly exaggerated because the authors treat

[21] FWC claimed that a climate suitability model is a type of habitat suitability model. [Ex. 26, Resp. to Fifth Request for Admission, No. 17]. But their employee Bankovich did not agree. The distribution model shows where species could migrate, whereas a habitat suitability model predicts where habitat is suitable for existence. [Ex. 33, Bankovich Tr. 85:12-86:8]. One model is binary—treating habitat as suitable or unsuitable based on a cut-off score—whereas the FWRI models are continuous showing gradients. [Ex. 33, Bankovich Tr. 88:16-21].

the Indian Python (*P. molurus*), which has a cold habitat, the same as the Burmese Python (*P. bivvittatus*), which does not, although the U.S. Fish & Wildlife Service treats them as different species. *See* 50 C.F.R. § 16.15. Further, FWC's internal staff called the study discredited and researchers whom FWC solicited comments about the Amended Rules observed that Reed and Rodda had walked back their analysis [*see* Ex. 1, Sommers Tr. 197:2-198:3; **Exhibit 34**]; even FWC's expert Kristen Sommers called the study "antiquated." [Ex. 1, Sommers Tr. 324:17-18]. Yet "[i]t was a choice by the staff" to feature the Reed and Rodda exaggerated and erroneous map in the Risk Summaries presented to the Commissioners and the public. [*Id.* 260:10-14]. FWC's putative expert Sarah Funck had no explanation for why FWC published the Reed and Rodda map rather than their critics' less expansive map, which she considered "relevant" and "worthy of consideration." [Ex. 28, Funck Tr. 113:4-20, 115:13-14].

The "Overall Risk to Florida" block on the Risk Summaries is another example of pseudo-science. First, the only foundation for the "High" or "Very High" scores is the outcomes of the flawed Adapted Everglades Tool, which addresses exclusively ecological risks, although the box also mentions economic and human health and safety risks. [Ex. 32, Resp. to Second Set of Interrogatories, No. 33; Ex. 23, Sizemore Tr. 47:8-12, 138:8-16]. Second, FWC chose a worse score than the tool indicated; i.e., "Very High" instead of "High." FWC declined to explain why. [Ex. 24, FWC's Resp. to Fourth Set of Interrogatories, No. 48].

The three horizontal bars below the "Overall Risk to Florida" header could be mistaken as the output of a computer program. [*See* Ex. 23, Sizemore Tr. 29:16-21, 30:1-4, 165:25-166:6]. FWC's own employee mistook them as such. [Ex. 33, Bankovich Tr. 120:17-21]. In reality, "[t]here was nothing specific . . . that said if this amount comes out of something, then the arrow has to go there." [Ex. 28, Funck Tr. 183:18-25]. FWC employees simply eyeballed where the

indicators should go. [Ex. 28, Funck Tr. 183:24-184:4; Ex. 23, Sizemore Tr. 70:25-71:4, 117:13-22 (citing Ex. 32, Resp. to Second Set of Interrogatories No. 33 ("The sliding green-yellow-bars were approximations to communicate risk screening results as a way of visually representing those findings.")), 163:8-164:23]. So nonscientific was the placement of the human health and safety indicator on the Risk Summaries that Ms. Funck, who lacks related credentials, ordered the indicator on the Risk Summary for the Northern African python shifted to the right simply to "look[] like the green anaconda version." [Ex. 16, Sommers Exp. Tr. 55:22-56:10; **Exhibit 35**, Nov. 2020 Emails, at 1 (FWC 28723)].

3. FWC Had No Data Supporting Several Claims.

FWC had no reason to prohibit certain tegu species and no data at all in support of its economic and human health and safety concerns pertaining to the Species. Beginning with tegus, the Amended Rules put all of tegu species on the Prohibited List, although FWC analyzed the risks associated with ***just*** the black and white tegu species (*S. marianae)* to wild animal life. [Ex. 26, FWC's Resp. to Fifth Request for Admission, Nos. 1-2; Ex. 28, Funck Tr. 179:19-23; Ex. 33, Bankovich Tr. 82:16-22]. Articles upon which FWC relies indicate that other tegu species are unlikely to establish in Florida. One example is *S. rufescens* or the "red tegu." [*See* Ex. 28, Funck Tr. 12:16-18]. Its highest habitat suitability is the arid southwest and northern Mexico. [*Id.* 108:18-24]. It is unlikely to establish in Florida. [Ex. 33, Bankovich Tr. 87:5-23, 90:11-17]. Nevertheless, FWC prohibited this animal too.

FWC also lacked data about economic costs and human health and safety risks. Article IV, Section 9 of the Florida Constitution confers no explicit authority on FWC even to take such risks into account, but FWC highlighted these issues anyway in the key documents that FWC published in support of the Amended Rules. [*See* Ex. 8, Risk Summaries; Ex. 1, Sommers Tr. 117:16-21]. As a result, commissioners who voted for Amended Rules were influenced by factors

FWC had no authority to consider and lacked the data to support. For example, FWC has no "data supporting the relative position of Species on the economic risk scale of the Overall Risk to Florida." [Ex. 23, Sizemore Tr. 66:3-13 (regarding FWC's response to Request for Production 20)]. FWC failed to show any bona fide estimate of any Species' economic costs. FWC initially claimed the tools discussed above measure both economic and human health and safety risks. [**Exhibit 36**, FWC's Resp. to Third Set of Interrogatories, Nos. 39-41; Ex. 23, Sizemore Tr. 71:20-72:10, 124:23-125:3, 125:8-10, 126:18-25, 127:20-25]. But neither tool has any related output. [Ex. 28, Funck Tr. 58:7-10; Ex. 31, Romagosa Tr. 36:3-16; Ex. 26, Resp. to Fifth Request for Admission Nos. 19-20].

FWC had no baseline at all against which to compare Species with high versus low economic risk. [Ex. 23, Sizemore Tr. 73:14-18].[22] Economic costs allegedly primarily included management costs, but there were no management costs at all for half of the Species (i.e., green anaconda, Southern African python, amethystine and scrub python, reticulated python), yet the risk indicator is in basically the same place for all of them. [Ex. 28, Funck Tr. 208:11-19, 212:9-14, 221:9-13; *see also* Ex. 1, Sommers Tr. 269:12-20, 273:13-19, 282:16-20, 287:23-288:3, 293:3-16]. FWC's putative expert had no explanation for this. [Ex. 28, Funck Tr. 212:22-213:4]. Moreover, FWC admitted that it "does not believe that further restricting [Plaintiffs'] high-risk species will measurably lower current management costs." [Ex. 1, Sommers Tr. 229:18-230:8].

The foundation for the human health and safety risks on the Risk Summaries is even weaker. As FWC employee Andrea Sizemore concedes, "[T]here is not a specific database that documents every human health and safety risk for these individual species." [Ex. 23, Sizemore

[22] FWC eventually conceded the Adapted Everglades Tool merely asks a couple questions about economic and human and animal health, but has no related output. [Ex. 26, Resp. to Fifth Request for Admission Nos. 19-20].

Tr. 126:3-7]. The risk indicator for Human Health and Safety is high for almost of the Species without material variation. [Ex. 8, Risk Summaries, at 1 (FWC 8358), 3 (FWC 8360), 5 (FWC 8362), 7 (FWC 8364), 9 (FWC 8366), 11 (FWC 0368), 13 (FWC 8370), 15 (FWC 8372)]. Yet one of the Species is a herbivore. [Ex. 1, Sommers Tr. 310:4-5, 332:7-25; Ex. 23, Sizemore Tr. 128:19-129:16]. The indicator is even mislabeled because FWC took into consideration health and safety risks not only to humans but also animals. [Ex. 28, Funck Tr. 185:13-186:4]. Summary judgment is required on Count I because FWC did not base the Amended Rules on credible biological data as required by FWC's own procedural due process rules.

The bottom line is that the key tools and Risk Summaries upon which FWC relied to enact the Amended Rules were not based upon credible biological data, were not factually correct, and certainly did not accord "an extra level of care and deliberation" that FWC suggested Plaintiffs would receive through the rulemaking process instead of a draw-out hearing.

E. FWC Biased the Final Rule Adoption Hearing.

Section 120.54(3)(c)(1), Florida Statutes (2007), requires scheduling a public hearing on proposed rules. The rules of the hearing "shall provide that all evidence, testimony and argument presented shall be afforded equal consideration, regardless of the method of communication." § 120.54(5)(b)(2), Fla. Stat. (2007). FWC's procedural due process rule requires "a meaningful opportunity to be heard and a fair, impartial decision-making activity" especially when the protection of private property rights and property is at issue. R. 68-1.008(5)(b), Fla. Admin. Code. But the decision-making process leading to the Amended Rules was anything but. To put it simply, FWC stacked the deck.

FWC took the unprecedented step of paying for an elaborate media campaign to reach "targeted populations" to generate support for the Amended Rules by entering into a contract with iHeart Media. [Ex. 28, Funck Tr. 187:13-19, 189:12-19, 190:1-192:17; *see also* Ex. 18,

PowerPoint Presentation Recap of IHeart Radio Campaign]. The targeted population included zip codes "with the greatest volume of incidents" associated with FWC's Wildlife Incident Management System database or, in other words, "the most calls about nonnative species interactions." [Ex. 28, Funck Tr. 190:17-191:14, 192:6-11]. A stated goal of the campaign was to also attract "wildlife and outdoor enthusiasts" including those representing the Audubon Society, Sierra Club, Defenders of Wildlife, and the Humane Society. [Ex. 18, PowerPoint Presentation Recap of IHeart Radio Campaign at 9.] The goal was to encourage "primarily those with environmental interests to make FWC's online survey and/or sign up and participate in our workshops." [Ex. 28, Funck Tr. 195:1-14].

The Notice of Proposed Rule was issued after the start of the pandemic; consequently, public hearings were online. [*See* Ex. 1, Sommers Tr. 142:24-143:16]. FWC's policy for public comment was first-come, first-served. [Ex. 3, Frohlich Tr. 94:22-95:1]. FWC claimed its public Zoom-like meetings adhered to this policy and that all callers had equal time: three minutes to start, then two minutes as the hearing wore on. [Ex. 19, Chatraw Tr. 29:16-17, 67:22-68:4, 85:11-19]. But the hearings were actually biased in favor of agency partisans. [*See* Ex. 19, Chatraw Tr. 29:21-24, 30:23-31:18, 43:5-15, 46:12-47:4, 67:22-68:7].

Everglades National Park Superintendent Pedro Ramos, South Florida Water Management District Executive Director Drew Bartlett, and their staffs worked with FWC on invasive species and many other issues. [Ex. 1, Sommers Tr. 104:13-105:22]. FWC directed its meeting vendor to let Ramos and Bartlett speak first and to give them more time to speak. [Ex. 26, Resp. to Fifth Request for Admission, Nos. 27-28; Ex. 19, Chatraw Tr. 30:12-14, 32:23-24, 46:12-47:4, 49:22-24; 68:23-69:8, 91:18-24; Ex. 21]. Ramos wound up receiving more than double time. [Wisneski Aff. ¶ 21]. FWC's agency representative concedes such a situation would not be "fair." [Ex. 1,

Sommers Tr. 110:6-111:6]. In fact, FWC's agency representative regarding the logistics of the Commission meeting agreed this would violate due process. [Ex. 19, Chatraw Tr. 20:15-21:3].

FWC publishes a meeting protocol on its website which states, "All persons who request an opportunity to speak at a commission workshop or meeting will be allowed to speak." [Ex. 19, Chatraw Tr. 24:22-25:10; **Exhibit 37**, Meeting Protocol]. Nevertheless, technical difficulties and/or the deadline imposed by FWC on public comment cut off an unknown number of speakers including at least one of Plaintiffs' experts, Richard Engeman. [Ex. 1, Sommers Tr. 144:2-9; Ex. 19, Chatraw Tr. 75:21-77:19, 78:21-79:10, 85:25-86:19; Wisneski Aff. ¶ 24]. When the hearing concluded, there were still persons waiting to speak. [Ex. 19, Chatraw Tr. 87:4-8]. Summary judgment is proper on Count I and Plaintiffs are entitled to a declaration that FWC biased the final rule adoption hearing in violation of Plaintiffs' procedural due process rights.

III. FWC Violated Substantive Due Process.

A. The Foundation for the Amended Rules Is Void for Vagueness.

If the term "domesticated animals" cannot be distinguished from "wild animal life" within the meaning of Article IV, Section 9 of the Florida Constitution, Rule 68A-1.004(91)—defining "wild animal life" by reference to "wildlife" exclusive of "domestic" animals—is void-for-vagueness as applied to Plaintiffs under these facts in violation of the due process clauses of the federal and state constitutions, or at least is too vague to be self-executing as applied. In short, FWC has failed to distinguish domesticated reptiles over which it does ***not*** have jurisdiction from non-domesticated reptiles over which it ***does*** have jurisdiction, leaving Plaintiffs without notice as to what conduct is properly illegal under FWC's jurisdiction. Furthermore, Article IV, Section 9

cannot be self-executing if it is too vague.[23] *Alsdorf v. Broward Cnty*., 333 So. 2d 457, 457 (Fla. 1976).

"The fundamental concern of the vagueness doctrine is that people be placed on notice of what conduct is illegal." *State v. Rawlins*, 623 So. 2d 598, 600 (Fla. 5th DCA 1993). The judicial test of vagueness is whether the language is specific enough to give persons of common intelligence and understanding adequate warning of the proscribed conduct. *State v. J.H.B*., 415 So. 2d 814, 815 (Fla. 1st DCA 1982). "[T]he test for vagueness of a constitutional provision is 'whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice.'" *State v. Kirvin*, 718 So. 2d 893, 896 (Fla. 1st DCA 1998). The doctrine applies as much to rules as any other laws. *Rawlins*, 623 So. 2d at 600; *State v. Reisner*, 584 So. 2d 141, 144 (Fla. 5th DCA 1991). FWC has failed adequately to distinguish domesticated reptiles over which it does not have jurisdiction from non-domestic reptiles and wild animal life over which it does have jurisdiction.

At a minimum, the rules violate the condition on valid rulemaking that the Florida Supreme Court articulated in *Barrow v. Holland*: GFC only had "the power to promulgate a regulation with reasonable standards requiring a permit to be obtained" where the standards are "clearly stated in the regulation itself" so as to avoid the exercise of "arbitrary power to determine private rights with an unbridled discretion." 125 So. 2d at 751-52. If after "read[ing] the rules of the Commission backwards and forwards" an individual still cannot "obtain[] any information whatsoever" as to what is wild animal life, wildlife, or domesticated animals, such that it leaves

[23] "The basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment." *NAACP, Inc. v. Fla. Bd. of Regents*, 876 So. 2d 636, 639 (Fla. 1st DCA 2004).

"absolute and unbridled power to decide who should be granted a permit and who should not," then the rules are unenforceable in violation of due process. Barrow prevailed in the final analysis on this basis. *Id*. at 753.

Article IV, Section 9 states that FWC has jurisdiction over wild animal life. The Amended Rules are based exclusively on this authority. FWC defines wild animal life by reference to wildlife and adds that wild animal life can be privately owned, but wildlife excludes domestic animals. Rule 68A-1.004, Fla. Admin. Code. If the term "domestic" cannot be defined in one of the fashions explored above, then the term "domestic" and, in turn, "wildlife" and "wild animal life" is too void for vagueness. The Amended Rules predicated upon Article IV, Section 9 violate due process. Plaintiffs are entitled to summary judgment on this claim.

B. The Amended Rules Are Arbitrary and Capricious.

Arbitrary and capricious rules violate the substantive due process clause of Article I, Section 9 of the Florida Constitution. Art. I, § 9, Fla. Const. ("No person shall be deprived of life, liberty or property without due process of law . . . ."); *cf. Wiggins v. City of Jacksonville*, 311 So. 2d 406, 408 (Fla. 1st DCA 1975) (an arbitrary and capricious classification violates "the equal protection clauses of the Constitution of the State of Florida and of the Constitution of the United States of America").

"In the Eleventh Circuit, an arbitrary or capricious legislative act may provide the basis for a substantive due process claim, which is called 'an arbitrary and capricious due process claim.'" *Support Working Animals, Inc. v. DeSantis*, 457 F. Supp. 3d 1193, 1223 (N.D. Fla. 2020). Such a claim "addresses government action that is invalid the moment it occurs despite any subsequent remedy or compensation." *Id*. (quotations and citations omitted). "Thus, where a person's state-created property rights are infringed by a legislative act, the substantive component of the Due Process Clause generally protects that person from arbitrary and irrational government action." *Id*.

(quotations and citations omitted). Federal and state substantive due process law are similar. See *State v. Robinson*, 873 So. 2d 1205, 1212 (Fla. 2004).

Substantive due process challenges are analyzed under the rational basis test; that is, a legislative act of the government will not be considered arbitrary and capricious if it has a rational relationship with a legitimate general welfare concern. *Martin Cnty. v. Section 28 P'ship, Ltd*., 772 So. 2d 616, 620 (Fla. 4th DCA 2000); *DeSantis*, 457 F. Supp. 3d at 1225. This standard is similar to the standard applicable to rule challenges. *Fla. League of Cities, Inc. v. Dep't of Envtl. Reg*., 603 So. 2d 1363, 1367 (Fla. 1st DCA 1992). Under this law, a rule is arbitrary when it is "not supported by fact or logic" and capricious if it is taken "without thought or reason." *Dravo Basic Materials Co., Inc. v. State, Dep't. of Transp*., 602 So. 2d 632, 634 (Fla. 2d DCA 1992) (citing *Agrico Chem. Co. v. State Dep't of Envtl. Reg*., 365 So. 2d 759 (Fla. 1st DCA 1978)). "Administrative discretion must be reasoned and based upon competent substantial evidence," which is "such evidence as a reasonable person would accept as adequate to support a conclusion." *Agrico*, 365 So. 2d at 763.

A rule is arbitrary and capricious when the claimed basis for the rule is repudiated with competent substantial evidence, *Ameraquatic, Inc. v. State, Dep't of Natural Res*., 651 So. 2d 114, 121 (Fla. 1st DCA 1995), or, relatedly, when there is "no reasonable relationship shown between the prohibition of the rule and the health, morals, safety or welfare of the public," *Dep't of Health & Rehab. Servs. v. Johnson & Johnson Home Health Care*, 447 So. 2d 361, 363 (Fla. 1st DCA 1984), or when a rule vests unbridled discretion in an agency. *Cortes v. State, Bd. of Regents*, 655 So. 2d 132, 138 (Fla. 1st DCA 1995).[24]

[24] In *Ameraquatic*, a proposed rule confirmed arbitrary and capricious was premised upon a claimed correlation between aquatic vegetation and fish population that expert evidence repudiated. 651 So. 2d at 121. In *Johnson*, the stated purpose of the rule deemed arbitrary and capricious was to halt the proliferation of home health agencies, but the record before the hearing officer showed that the rule "was designed to

The exclusive reasons FWC has given for the Amended Rules are repudiated by substantial competent evidence. The caged Species have not had any actual impacts on wildlife. FWC has overstated and misled regarding even their potential impacts on wildlife. In the absence of actual impacts on wild animal life, (1) there is no reasonable relationship between the prohibitions contained in the Amended Rules as outlined above and Article IV, Section 9 of the Florida Constitution and (2) FWC is invested with unbridled discretion to pick winners and losers in the commercial breeding industry. The stated purpose of the Notice of Proposed Rule was one thing: "aid[ing] in addressing emerging invasive species issues"; but the actual purpose was another: eliminating commercial breeding. [Ex. 5, Notice of Proposed Rule, at 1].

Despite classifying two of ten species as more or less equally dangerous in the Risk Summaries, FWC has exercised unbridled discretion to treat breeders of tegus and green iguanas less restrictively than the other eight Species listed in the Amended Rules by grandfathering them. FWC concedes there was not an environmental reason for this. [Ex. 1, Sommers Tr. 149:23-151:6]. In other words, FWC has acted as if it has the constitutional wherewithal to pick winners and losers in the commercial breeding industry based on caprice, rather than protecting, preserving, and promoting wildlife. Nothing in the Florida Constitution even hints at FWC's authority to infringe private property in this manner.

FWC lacks the authority simply to declare that Plaintiffs may no longer own or do business in the State of Florida as commercial breeders of animals that are not *ferae naturae* based on Amended Rules that do not have as their purpose regulating or controlling the taking of *ferae naturae*. According to *Barrow*, "[a]n agency of government having the power to regulate is not

protect the existing industry from competition." 447 So. 2d at 362. In *Cortes*, a rule conferred standardless discretion on university presidents. 655 So. 2d at 138.

permitted to arrogate to itself or to delegate to its employees the arbitrary power to determine private rights with an unbridled discretion." 125 So. 2d at 752.

Furthermore, to the extent FWC contends that the Amended Rules were needed to purportedly "fill a gap" left by a reinterpretation of the federal Lacey Act in 2017, that decision had no import whatsoever for roughly half the Species not covered by the Lacey Act, the Lacey Act had only recently been applied to four of the Species, and the 2017 interpretation simply restored the status quo ante. [*See* Ex. 16, Sommers Exp. Tr. 104:19-105:8, 140:5-141:20, 151:9-152:12, 154:17-21, 159:11-20, 160:15-161:18, 165:3-165:19, 168:11-24]. In other words, FWC's erroneous interpretation of the D.C. Court of Appeals' decision in *U.S. Ass'n of Reptile Keepers, Inc. v. Zinke*, 852 F.3d 1131, 1133 (D.C. Cir. 2017), cannot serve as a purported "rational basis" for the Amended Rules as that interpretation is itself irrational.

Consequently, this Court should declare that the Amended Rules are arbitrary and capricious in violation of substantive due process per Article I, Section 9 of the Florida Constitution and the Fourteenth Amendment of the United States Constitution.

IV. FWC Violated the Fourteenth Amendment.

Plaintiffs have sued FWC under the Fourteenth Amendment of the U.S. Constitution pursuant to 42 U.S.C. § 1983. U.S. Const. amend. XIV ("No state shall … deprive any person of life, liberty or property, without due process of law…."). Section 1983 is not a source of substantive rights, but a method for vindicating federal rights elsewhere conferred. *Chakra 5, Inc. v. City of Miami Beach*, 254 So. 3d 1056, 1065 (Fla. 3d DCA 2018). To state a claim for procedural due process under the Fourteenth Amendment, Plaintiffs must show besides constitutionally-inadequate process as discussed above, (1) a deprivation of a constitutionally-protected liberty or property interest, and (2) state action. *Id.* at 1070; *Bradsheer v. Fla. Dep't of Highway Safety & Motor Vehicles*, 20 So. 3d 915, 918 (Fla. 1st DCA 2009). State law defines the parameters of a

plaintiff's property interest for purposes of section 1983. *Bradsheer*, 20 So. 3d at 918. Violation of procedural due process under 42 U.S.C. § 1983 occurs as a corollary to violation of procedural due process. *Chakra 5*, 254 So. 3d at 1070.

Plaintiffs aver that the Amended Rules have deprived them of personal property (reptiles), investments, and their very livelihoods. [Bell Aff. ¶¶ 4-9; Berrios Aff. ¶¶ 4-11; Hardin Aff. ¶¶ 4-6, 10; Roberts Aff. ¶¶ 4-11; McHugh Aff. ¶¶ 3, 5-7, 11]. Each of these qualify as constitutionally-protected property interests. *See State v. Lindquist*, 698 So. 2d 299, 303 (Fla. 2d DCA 1997) (personal property constitutionally-protected property interest); *Bradsheer*, 20 So. 3d at 919 (where license revocation may affect drivers' livelihoods, such "licenses warrant due process protections"); *see also State ex rel. Hosack v. Yocum*, 186 So. 448, 451 (Fla. 1939) (acknowledging the "fundamental right to earn a livelihood in pursuing some lawful occupation is protected by the Constitution"). Under the Amended Rules, Plaintiffs and many other members of USARK Florida must cease or drastically change their businesses as the Amended Rules forbid commercial sale and breeding of the affected reptile species and many have been required to liquidate their existing inventories of reptiles.

The Amended Rules also constitute state action. Consequently, Plaintiffs are entitled to a declaration that FWC has deprived them of their procedural due process rights in violation of the Fourteenth Amendment of the United States Constitution.

V. FWC's Affirmative Defenses Are Legally Insufficient as a Matter of Law.

Plaintiffs are entitled to summary judgment on all their claims notwithstanding FWC's affirmative defenses. *See, e.g.*, *Thomas v. Ocwen Loan Servicing, LLC*, 84 So. 3d 1246, 1246 (Fla. 1st DCA 2012) (To be entitled to summary judgment, a plaintiff must refute the defendant's affirmative defenses or establish they are legally insufficient as a matter of law.). "Where there are no facts pled to support general allegations of affirmative defenses, the defenses are legally

insufficient." *S. Waste Sys., LLC v. J&A Transfer, Inc.*, 879 So. 2d 86, 87 (Fla. 4th DCA 2004); *Leal v. Deutsche Bank Nat'l Trust Co.*, 21 So. 3d 907, 909 (Fla. 3d DCA 2009) (noting that "some of the affirmative defenses . . . are conclusory" and citing *Southern Waste* for the quoted proposition). Where a defense is not a valid defense to the cause of action at issue, it is also legally insufficient. *See, e.g.*, *Howdeshell v. First Nat'l Bank of Clearwater*, 369 So. 2d 432, 433 (Fla. 2d DCA 1979) (holding that certain affirmative defenses were "improper defenses to foreclosure of a mortgage").

FWC's September 14, 2022 answer to the amended complaint asserts only two affirmative defenses: (1) "Plaintiffs fail to state a claim upon which relief can be granted"; and (2) "Plaintiffs have failed to mitigate damages" and "failed to take reasonable steps to avoid business losses and expenditures." (Answer ¶¶ 147-48.) Neither forecloses entry of summary judgment in Plaintiffs' favor.

FWC does not actually point to any element of any claim Plaintiffs have supposedly failed to allege; indeed, FWC never moved to dismiss the amended complaint on any basis. *Cf. Cady v. Chevy Chase Sav. & Loan*, 528 So. 2d 136, 137-38 (Fla. 4th DCA 1988) ("A careful analysis of each of the affirmative defenses reflects that they are, on the whole, conclusory in their content, and lacking in any real allegations of ultimate fact demonstrating a good defense to the complaint. . . . Certainty is required when pleading defenses, and pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient."). Further, the affirmative defense of failure to mitigate damages does not apply as ***Plaintiffs are not seeking damages***, only declaratory and injunctive relief. *See, e.g.*, *Agostinacchio v. Heidelberg Eng'g, Inc.*, No. 0:18-CV-60935-UU, 2019 WL 3243408, at *5 (S.D. Fla. Feb. 5, 2019) (striking affirmative defense of failure to mitigate damages as "Plaintiff is not seeking damages"); *see also, e.g.*, *Sys. Components Corp. v. Fla. Dep't*

of Transp., 14 So. 3d 967, 982 (Fla. 2009) ("The doctrine of avoidable consequences, which is also somewhat inaccurately identified as the 'duty to mitigate' damages, commonly applies in contract and tort actions. There is no actual 'duty to mitigate,' because the injured party is not compelled to undertake any ameliorative efforts. The doctrine simply 'prevents a party from recovering those damages inflicted by a wrongdoer that the injured party could have reasonably avoided.'" (internal citation omitted)); *Friedberg v. Fed. Home Loan Mortg. Corp.*, 624 So. 2d 811, 811 (Fla. 3d DCA 1993) ("As the defendant-appellant's affirmative defenses did not relate to liability, but only to damages, the trial court was not required to dispose of the affirmative defenses prior to entering partial summary judgment on liability.").

For all these reasons, the Court should grant Plaintiffs' motion for summary judgment, notwithstanding FWC's deficient affirmative defenses.

Conclusion

Plaintiffs ask this Court to declare that the Amended Rules have the unconstitutional purpose and effect of prohibiting commercial breeding of caged animals that are not "wild animal life" and have no adverse impacts on wild animal life, stretching beyond FWC's constitutional authority.

Plaintiffs also ask this Court to declare that adoption of the Amended Rules violated Plaintiffs' procedural due process rights under state and federal law. FWC published a different purpose in its Notice of Proposed Rulemaking and did not reveal its actual unconstitutional purpose until Plaintiffs' ability to offer a LCRA was exhausted. FWC never prepared a SERC concerning the Amended Rules in their final form despite extensive changes to them, and the SERCs that FWC did prepare were materially flawed. FWC's rulemaking was also not founded on credible biological data; instead, FWC failed to muster any data in support of its prohibition of tegus species other than the black and white tegu, relied upon flawed tools designed for different

purposes than as used, disregarded some of the results of those tools, and speculated about risks. FWC was required to provide Plaintiffs and members of the public with a meaningful opportunity to be heard and a fair, impartial rule-making process. But FWC instead biased the final adoption hearing by launching a media campaign and prioritizing partisans for testimony on the Amended Rules. For all the reasons that FWC has been shown to have violated due process, the Court should also find for Plaintiffs on their § 1983 claim.

Finally, FWC lacks the authority simply to declare that Plaintiffs may no longer own or do business in the State of Florida as commercial breeders of animals that are not *ferae naturae* based on Amended Rules that do not have as their purpose regulating or controlling the taking of *ferae naturae*. The Amended Rules are arbitrary and capricious in violation of substantive due process per Article I, Section 9 of the Florida Constitution and the Fourteenth Amendment of the United States Constitution.

Because there are no genuine issues of material fact and Plaintiffs are entitled to a judgment as a matter of law, Plaintiffs respectfully request an order granting them summary judgment on all counts, declaratory and injunctive relief, and such other relief as is just and proper.

Respectfully submitted on March 3, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on counsel for Defendants via email at rhonda.parnell@myfwc.com on March 3, 2023.

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