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

UNITED STATES ASSOCIATION OF REPTILE KEEPERS, FLORIDA CHAPTER, JOSH BARGER, AQUATIC N EXOTIC, INC., MARK & KIM BELL, REPTILE INDUSTRIES, INC., HECTOR BARRIOS, HECTOR'S HABITAT, LLC, PATRICK C. CANNAROZZI, MYSTIC REPTILES, LLC, ANTHONY & RENEE CAPORALE, JESSE HARDIN, JESSE'S JUNGLE, JASON HOOD, MICHELLE WATTS & JOHN MCHUGH, EGG TOOTH REPTILES, BRUCE & LAURA ROBERTS, ZOO MOM SCIENCE, LLC, MARTIN SPILKIN, and DIALUP LLC,

Plaintiffs,

v.

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION, RODNEY BARRETO, in his official capacity as the Chairman of the Florida Fish and Wildlife Conservation Commission, and ERIC SUTTON, in his official capacity as Executive Director of the Florida Fish and Wildlife Commission,

Defendants.
_____/

Case No. _____

PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION
AND SUPPORTING MEMORANDUM OF LAW

Pursuant to Florida Rule of Civil Procedure 1.610, Plaintiffs United States Association of Reptile Keepers, Florida Chapter ("USARK Florida"), and Josh Barger, Aquatic N Exotic, Inc., Mark and Kim Bell, Reptile Industries, Inc., Hector Berrios, Hector's Habitat, LLC, Patrick C. Cannarozzi, Mystic Reptiles, LLC, Anthony and Renee Caporale, Jesse Hardin, Jesse's Jungle, Jason Hood, Michelle Watts and John McHugh, Egg Tooth Reptiles, Bruce and Laura Roberts,

Zoo Mom Science, LLC, Martin Spilkin, and Dialup, LLC (collectively, the "Individual Plaintiffs," and together with USARK Florida, "Plaintiffs") move this Court for the entry of a temporary injunction against Defendants Florida Fish and Wildlife Conservation Commission ("the Commission"), Commission Chairman Rodney Barreto ("the Chairman"), and Commission Executive Director Eric Sutton ("the Executive Director"), enjoining them from implementing or enforcing amendments to Rules 68-5.004, 68-5.006, 68-5.007, and 68-5.008, Florida Administrative Code (the "Amended Rules"), pending resolution of the complaint on the merits. In support, Plaintiffs state as follows:

INTRODUCTION

Although the Commission is constitutionally authorized to regulate non-native reptile species, it must exercise that authority in accordance with the principles of due process. At a minimum, the Commission must follow its own due process procedures. The Commission did not do so in promulgating the Amended Rules. Consequently, the Individual Plaintiffs as well as a substantial number of other USARK Florida members face imminent injury if the Amended Rules are not enjoined, as the unconstitutional Amended Rules will require them to surrender or euthanize their animals and destroy their livelihoods. There is no adequate remedy at law.

Through this motion, its accompanying affidavits, and the complaint and its exhibits, Plaintiffs have satisfied the requirements of Florida Rule of Civil Procedure 1.610 and are entitled to a temporary injunction.

FACTUAL BACKGROUND

Not everybody has an affinity for reptiles. Some consider them menacing or even loathsome creatures. But to others, reptiles are as dear as dogs or cats. No amount of money could compensate the owners of these reptiles for having to surrender or euthanize their unique animals.

Each animal is exceptional in its own respect and far more so than real estate for which the law recognizes specific performance. Some of the reptiles that are the subject of this motion are rarer than any canine. They are exotic, fascinating creatures in their own right, worthy of respect and stewardship. To be sure, this requires regulation because nearly anything good can be turned to nefarious ends, but the Amended Rules engineer a complete ban on ownership of these species, without due process and without a rational scientific basis.

I. The Commission's Regulation of Non-Native Reptiles Before April 29, 2021

For more than a decade, the Commission has regulated certain non-native reptiles through what has become known as the "Conditional Species program," under which the Individual Plaintiffs and other USARK Florida members have possessed, sold, imported, exported, and bred certain reptile species, subject to permitting and stringent regulation by the Commission. (Affidavit of USARK Florida President Elizabeth Wisneski ("USARK Florida Aff.") ¶¶ 4-5.) As the Commission's architect of the regulations reasoned, a highly regulated reptile industry was preferable to underground traffic. Scott Hardin, Florida Fish & Wildlife Conservation Commission, *Managing Non-native Wildlife in Florida: State Perspective, Policy and Practice*, Managing Vertebrate Invasive Species, USDA National Wildlife Research Center Symposia at 43 (2007).

By rule, the Commission has designated certain Florida non-native wildlife as "Conditional Non-native Species" or "Conditional Species." Fla. Admin. Code R. 68-5.004.[1] The list of Conditional Species designated by the Commission includes the following snakes and lizards: Burmese pythons, reticulated pythons, Northern African pythons, Southern African pythons, amethystine pythons, scrub pythons, green anacondas, and Nile monitors. *See id.* 68-5.004(4).

[1] Unless stated otherwise, references to Chapter 68-5, Florida Administrative Code refer to those provisions in effect prior to April 29, 2021.

The Commission extensively regulates the possession, use, and sale of these Conditional Species in Florida. Specifically, per rule, "[n]o person shall import into the state, sell, possess, or transport any live specimens of [Conditional S]pecies, or hybrids or eggs thereof, . . . except by Conditional . . . species permit." Fla. Admin. Code R. 68-5.005. The Commission issues Conditional Species permits "only to individuals or institutions engaged in research, or to commercial import or export businesses, public aquaria, public zoological parks, or public educational exhibits." *Id.* 68-5.005(1). Conditional Species cannot be kept purely for private purposes. *See id.*

Conditional Species permittees are subject to a comprehensive set of regulations written by the Commission, concerning, among other things, inspections, escape-proof enclosures and facilities, structural facility minimums, and microchipping. Snakes and lizards that are designated as Conditional Species must be kept indoors or in outdoor enclosures with a fixed roof and must be permanently identified with an embedded chip, a passive integrated transponder ("PIT") tag. *Id.* 68-5.005(5). Permittees of snake and lizard Conditional Species must submit a Captive Wildlife Disaster and Critical Incident Plan to the Commission and maintain accurate records of inventory, noting every birth, death, acquisition, sale, and transfer. *Id.* 68-5.005(5). The Commission has also reserved for itself broad authority to inspect snake and lizard Conditional Species held in captivity. *Id.* 68-5.005(5). Snakes and lizards designated as Conditional Species may be transferred within Florida only to other persons authorized to possess Conditional Species, and accompanied by a prescribed form. *Id.* 68-5.005(5)(f)3. Given these extensive regulations, no Conditional Species held by permittees have gone missing, but if any did it would be obvious given these tags. Fla. Admin. Code R. 68-5.005(5); (*see also* Affidavit of Michael Cole ("Cole Aff.") ¶¶ 6-7).

The reptiles that many of the Plaintiffs have cared for the longest have enabled the Plaintiffs to build successful businesses to support their families by breeding and selling their animals' offspring, much like dog owners breed their animals for sale. Many of the females of the species at issue require three to four years or longer to get to the point of maturity to breed, and thus require an extraordinary amount of time, care, and resources. Importantly, as a consequence of the need to nurture these animals over the course of many years so that they will breed, Plaintiffs and other permittees have also come to regard many of their animals as part of their family. For example, for Plaintiffs Anthony and Renee Caporale, they will be forced to surrender or euthanize reticulated pythons that are several years and even more than a decade old that they have spent years nurturing to maturity, and that are effectively pets at this point with individual names and personalities. (Affidavit of Renee Caporale ("Caporale Aff.") ¶¶ 10-11; *see also* Affidavit of Jesse Hardin ("Hardin Aff.") ¶ 11.)

Tegu lizards and green iguanas are not part of the Commission's Conditional Species program. Until now, tegu lizards and green iguanas could be raised as pets without limitation, although a person intending to sell a tegu lizard or green iguana had to obtain a Class III wildlife license from the Commission. (USARK Florida Aff. ¶¶ 9-10.) In particular, tegus are partially warm-blooded, notable for their unusually high intelligence, can be housebroken like other pets, and live for 15 to 20 years. (Hardin Aff. ¶¶ 10-11.) Iguanas are also intelligent; they are able to recognize their owners and family and can be affectionate. (*Id.* ¶ 10.) Both have personalities and can be tamed and trained. (*Id.* ¶ 10-11; *see also* Affidavit of Hector Berrios ("Berrios Aff.") ¶ 7.) According to surveys conducted by the Commission in 2019, there were approximately 106 Class III licensees authorized to sell more than 1,245 tegu lizards, and approximately 382 licensees authorized to sell more than 5,307 green iguanas in inventory. *See* Fla. S. Comm. on Rules,

CS/CS/CS/SB 1414 (2020) Staff Analysis 6-7 (hereinafter "S. Rules Comm. Staff Analysis").[2]

II. The Amended Rules

In September 2020, the Commission published notice of its intent to amend Chapter 68-5, Florida Administrative Code. As proposed, the Amended Rules would move Burmese pythons, reticulated pythons, Northern African pythons, Southern African pythons, amethystine pythons, scrub pythons, green anacondas, and Nile monitors from the Conditional Species List to the Prohibited Species List. The Commission presented no evidence of any material escape problem nor injuries caused by these reptiles in support of their more restrictive treatment (i.e., a total ban), nor of any other material failure to adhere to the limitations associated with the Conditional Species List. (*See* USARK Florida Aff. ¶ 24; Cole Aff. ¶¶ 5-6.) The Commission may have been motivated to appear decisive in light of the invasive non-native species in the Everglades that moved in long before they were regulated or to respond to 2020 legislation that would have done much of what the Amended Rules seek to do, although that legislation was declared unconstitutional by a Florida court. Order Granting Plaintiffs' Amended Motion for Partial Summary Judgment, *U.S. Ass'n of Reptile Keepers v. Fla. Fish & Wildlife Conservation Comm'n*, No. 2020 CA 001277 (Fla. 2d Cir. Ct. Sept. 24, 2020). The Commission's conduct was also contrary to statements made by Commissioners and Commission staff a little more than a year earlier, in February 2019, assuring stakeholders that the Commission would not open the door to moving more species from the Conditional Species List to the Prohibited Species List because "the juice wouldn't be worth the squeeze, [as these animals such as the Burmese python] are already in the environment . . . , and it would really have economic impacts" on numerous individuals and families that depend on that industry. Feb. 21, 2019 Commission Meeting (46:30-48:05).[3]

[2] *Available at* https://flsenate.gov/Session/Bill/2020/1414/Analyses/2020s01414.rc.PDF.
[3] *Available at* https://thefloridachannel.org/videos/2-21-19-florida-fish-wildlife-conservation-commission-part-3/.

The Commission also caused green iguanas and tegu lizards to leap over the Conditional Species List to add them to the same Prohibited Species List without presenting any evidence that listing them on the Conditional Species List would be futile. The listing itself demonstrates otherwise. No other Prohibited Species may be kept as a pet; however, the Amended Rules permit certain owners of green iguanas and tegu lizards to do just this by obtaining a permit by a deadline set by the Commission. Moreover, certain Class III licensees with a documented inventory of green iguanas or tegus may continue to possess and use those animals commercially, subject to additional regulation and a defined sunset date: June 30, 2024. In effect, by adding green iguanas and tegu lizards to the Prohibited Species List, the Commission converted the Prohibited Species List to another kind of "Conditional Species List," but without some of the liberties available to other Conditional Species, such as outdoor breeding. As such, the Amended Rules arbitrarily treat owners of "Prohibited Species" differently, depending upon whether the "Prohibited Species" is a snake, green iguana, or tegu lizard.

The Amended Rules' ultimate effect is to require numerous individuals and businesses to surrender, relocate with, or potentially euthanize many of these animals, except for those permittees that may qualify for a Prohibited Species permit by taking steps that pose a significant if not impossible hurdle for Plaintiffs and certain temporarily exempted licensees and pet owners with respect to green iguanas and tegus.

III. The Commission's Rulemaking Process

The Florida Constitution accords broad authority to the Commission to exercise the regulatory and executive powers of the state with respect to wild animal life, but subject to other state and federal constitutional rights such as follows:

> The commission shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions. The legislature may enact laws in aid of the commission, not inconsistent with this section. . . .

Art. IV, § 9, Fla. Const.

In furtherance of article IV, section 9 of the Florida Constitution, the Legislature provided as follows:

> (a) 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.
>
> (b) The Legislature encourages the commission to incorporate into its process the provisions of s. 120.54(3)(c) when adopting rules in the performance of its constitutional duties or responsibilities.
>
> (c) The commission shall follow the provisions of chapter 120 when adopting rules in the performance of its statutory duties or responsibilities.

§ 20.331(9), Fla. Stat.

As required by the Florida Constitution and the Florida Legislature, the Commission has adopted due process procedures in Florida Administrative Code Rule 68-1.008 (the "Due Process Rule"). *See* art. IV, § 9, Fla. Const.; § 20.331, Fla. Stat. While the Commission is not subject to the Florida Administrative Procedure Act ("APA") when using constitutionally-derived authority, it has agreed to follow the 2007 APA in certain respects.[4] Of most relevance here, the Commission has agreed to abide by the 2007 APA with respect to (1) the preparation of statements of estimated regulatory cost ("SERCs"), (2) considering proposals for lower cost regulatory alternatives ("LCRAs"), and (3) offering draw-out hearings when a rulemaking proceeding would fail to adequately protect a person's substantial interests. Fla. Admin. Code R. 68-1.008(5)(b), (c), (d).

[4] Given when the Commission adopted the Due Process Rule, the Due Process Rule incorporates the relevant provisions of the 2007 APA. *See* § 120.541(1)(i)1., Fla. Stat. (2007).

The Commission has also agreed that its rules may be challenged by declaratory and/or injunctive relief actions in circuit court. *Id.* R. 68-1.008(5)(c)1.

The Commission has also adopted certain procedures to accord with Florida's Sunshine Law at public meetings. Pursuant to those policies, "[a]ll persons who request an opportunity to speak at a Commission workshop or meeting will be allowed to speak within the following Commission guidelines." Public Comment at Commission Workshops and Meetings, https://myfwc.com/about/commission/meeting-protocol/. Notably, "[w]hen a large number of people wish to speak, the [Commission] Chairman may limit the time for each speaker, or the time allotted to public comment on specific agenda items, ***in order to ensure that all speakers are heard within the time allotted for the meeting***." *Id.* (emphasis added).

A. The Commission's Original SERC

The Commission prepared a SERC in September 2020 because the Amended Rules would impact small businesses within the meaning of the APA. (Compl. Ex. B.) Under section 120.541(2), Florida Statutes (2007), a SERC must include: (1) a good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule; (2) a good faith estimate of the cost to the agency, and to other governmental entities, of implementing and enforcing the proposed rule; (3) a good faith estimate of the transactional costs likely to be incurred by individuals and entities required to comply with the rule; (4) an analysis of the impact on small businesses, if applicable; and (5) any additional information that the agency deems useful.

Per the SERC, the Commission said that "[e]nhanced regulations are necessary because of the threats that the Burmese pythons, reticulated pythons, amethystine pythons, scrub pythons, Northern African pythons, Southern African pythons, green anacondas, Nile monitor lizards, tegus

(all species) and green iguanas pose to Florida's ecology, economy or human health and safety"; and the then-proposed Amended Rules were designed "to reduce the risk that some species of invasive lizards and snakes pose to the state of Florida." (Compl. Ex. B at 4.)

Unfortunately, the Commission's analysis of each of the required elements for a SERC was poorly researched and/or flatly erroneous, particularly the purported assessment of impacts on small businesses, which significantly understated the Amended Rules' effects. As such, the SERC was without any rational basis. In addressing the impact on small businesses, the Commission stated summarily and without evidentiary predicate that while the Amended Rules "will have a negative impact on [small] businesses," the businesses could simply shift their business models to "species that are legally traded." (Compl. Ex. B at 8.) Instead of reaching out directly to the permittees and licensees the Commission regulates to understand the industry and threatened financial impact, the Commission's staff instead relied upon "an internet search conducted on August 4-6, 2020."

In addition to grossly understating the impact to the industry, the Commission's SERC overstated the regulatory costs imposed by the species on the Commission and other governmental entities by often citing more global invasive species management and control costs. For instance, the Commission claimed that it had spent more than $3 million annually on management efforts, including on "tegus, green iguanas, pythons, ***lionfish***, and Nile monitor lizards." (Compl. Ex. B at 2 (emphasis added).) But lionfish are not part of the Amended Rules. The Commission presented ***no evidence*** of the discrete management costs associated with any of the reptiles that are the subject of this motion besides Burmese pythons and tegu lizards, or whether or how these costs would be reduced by the adoption of the Amended Rules. (*Id*.) The species allowed into the

environment before regulation will presumably continue to need attention. In these respects and others, the SERC lacks any rational basis in fact.

B. USARK Florida's Proposed LCRAs and Request for a Draw-out Hearing

Under the 2007 APA, within 21 days of the publication of rule notice, a substantially affected person may submit to an agency a good faith written proposal for a LCRA to a proposed rule "which substantially accomplishes the objectives of the law being implemented." § 120.541(1)(a), Fla. Stat. (2007). USARK Florida complied with this directive, submitting a letter to the Commission within 21 days of the rule publication notice that: (1) offered comments on the Amended Rules; (2) offered comments and pointed out numerous deficiencies with the Commission's SERC, with support from an economist; (3) proposed three LCRAs that would substantially accomplish the Commission's stated goal of reducing impacts from the non-native species at issue; (4) suggested that the Commission engage in negotiated rulemaking or form a technical advisory group, the latter of which was used to initially craft the Conditional Species regulations; and (5) requested a draw-out hearing in accordance with the Commission's Due Process Rule. (*See* Compl. Ex. C.)

More specifically, in light of the claimed objective of the Amended Rules—to "reduce the risk that some species of invasive lizards and snakes pose to the state of Florida"—USARK Florida offered the following LCRAs that would substantially accomplish that objective without destroying an entire industry and dispossessing hundreds of their pets and animals:

(1) Make no change to Chapter 68-5, Florida Administrative Code, and maintain the existing regulations of reptiles designated as Conditional Species, green iguanas, and tegu lizards, which had proven successful and provide for careful control and monitoring of the species at issue;

(2) Alternatively, add tegu lizards to the Conditional Species List, which would ensure tegu lizards are no longer sold or maintained as pets in Florida and make commercial dealers of these species subject to the same stringent requirements applicable to other Conditional Species, including caging, biosecurity, and reporting requirements;

(3) Alternatively, add tegu lizards and green iguanas to the Conditional Species List, which would accomplish the same things as described in (2) above.

C. The Commission's Amended SERC and Rejection of the LCRAs

In late November 2020, the Commission sent USARK Florida a letter indicating that it would respond at a future date to the association's LCRAs and other comments. (Compl. Ex. E.) That response came in December 2020, when the Commission published an "updated" SERC ("Amended SERC") that rejected every single one of the proposed LCRAs in a manner underscoring that the Amended SERC lacks a rational basis.

The Amended SERC contained some small changes apparently aimed at address USARK Florida's concerns. The Commission this time agreed that the inventory value of tegus alone could be hundreds of thousands of dollars (thus, establishing that the original SERC had no rational basis), but waved away the financial impact by stating such licensees "will still be able to sell these out of state." (Compl. Ex. D at 11-12.) As explained later, this proved to be untrue. The Commission also attempted to update its financial analysis on the industry impacts to be caused by prohibiting the Conditional Species at issue, but again relied upon its own web searches of prices instead of reaching out to the permittees and licensees it regulates. (*Id.* at 13.) As a result, the Amended SERC also lacks any rational basis in fact.

With respect to USARK Florida's proposed LCRAs, the Commission rejected each but not for reasons related to the original objective of the Amended Rules. Rather, the Commission simply

changed the objective. Notwithstanding the Commission's original stated goal of "reduc[ing] the risk that some species of invasive lizards and snakes pose to the state of Florida" (Compl. Ex. B at 4), the Commission rejected each LCRA because none would "substantially accomplish ***the objectives of FWC's proposed rules, namely, to eliminate commercial breeding in order to reduce risks to Florida's native species***." (Compl. Ex. D at 15-16 (emphasis added).) In other words, the Commission moved the goal posts from reducing the risks posed by lizards and snakes to eliminating the commercial breeding industry rather than respond to the LCRAs, and, in so doing, violated due process. This sleight of hand had two consequences inconsistent with due process. First, the plaintiffs never had an adequate opportunity to testify about or address the revised objective. The Commission presented no grounds associated with the original objective of the Amended Rules to reject the LCRAs. Nor did it explain why or demonstrate that it was necessary "to eliminate commercial breeding" in order to "reduce risks to Florida's native species." Second, the changed objective underscores the inadequacy and irrationality of the Commission's Amended SERC which assumed continued commercial breeding of green iguanas and tegu lizards, rather than its elimination as explained later.

D. The Commission Refused a Draw-Out Hearing

As part of its effort to ensure its members were afforded due proces, USARK Florida requested a draw-out hearing on behalf of its members. As USARK Florida urged, "[t]his dispute involves complex technical and other factual issues that cannot be fairly resolved, and should not be resolved, by the Commission based on three-minute presentations by interested parties" at a final public hearing on the Amended Rules. (Compl. Ex. C at 10.) Such a decision should instead be premised "upon credible biological data, and therefore an evidentiary hearing, such as a draw-out hearing can be useful." Fla. Admin. Code R. 68-1.008(5)(d).

In late November 2020, the Commission's General Counsel denied the requested draw-out hearing in a letter. That letter did not state whether the Commission had denied the request, or whether the General Counsel had been delegated authority to deny the request. What the letter did claim was that USARK Florida had not "provide[d] adequate reason to believe that [USARK Florida's members'] due process rights are not protected in this rule development process." (Compl. Ex. E at 2.) Indeed, the General Counsel assured the association that "[a]ll members of the public, including USARK Florida, have had and will continue to have ample opportunity to present their case to the FWC, including Commissioners." (*Id.*) The General Counsel advised that "[i]ndividuals will also be provided an opportunity to speak during the public Commission meeting/hearing." (*Id.*) Unfortunately, that did not hold true.

Instead, on February 25, 2021, the Commission held a public meeting at which the Commissioners formally considered adoption of the Amended Rules. After a presentation by staff, two hours were allotted for public comment, with each commenter given three minutes to speak. Commenters were not permitted to appear by video or in person but were allowed only to call into a special conference line for purposes of offering public comment at the meeting. (USARK Florida Aff. ¶¶ 16-17.)

The public comment portion of the meeting proved chaotic, with numerous technical issues. It was not entirely clear the order in which the Commission took public comment; in some instances, the Commission may have selected the speakers from which it wanted to hear, including comments taken from multiple representatives of the same association supportive of the Amended Rules. Notably, notwithstanding the time limit, the first speaker—who was friendly to the Amended Rules—was given almost seven minutes to offer public comment. (*Id.* ¶ 19.) In fact, the first six speakers from whom the Commission took public comment all spoke in support of the

Amended Rules, even though the vast majority of speakers at the hearing were opposed to them. (*Id.* ¶¶ 19, 21.) As the end of the two hours approached, the Chairman extended the public comment period by one hour but, going forward, restricted comments to two minutes per speaker. (*Id.* ¶ 20.) Ultimately, after three hours had expired, numerous USARK Florida members, business owners, and representatives had not been granted the opportunity to speak, including but not limited to plaintiffs Jason Hood and Jesse Hardin, numerous USARK Florida board members including President Elizabeth Wisneski, and scientific expert Rick Engeman. (Affidavit of Jason Hood ("Hood Aff.") ¶ 9; Hardin Aff. ¶ 22; USARK Florida Aff. ¶ 22; Affidavit of Richard Engeman, Ph.D. ("Engeman Aff.) ¶ 18.)

E. The Commission's Significant Revisions of the Amended Rules through the March 15, 2021 Notice of Change

After the February 25, 2021 meeting at which the Commission voted to approve the Amended Rules, the Commission published a March 15, 2021 Notice of Change in the Florida Administrative Register which significantly revised what was already proposed to be changed in Rule 68-5.007. In relevant part, the Notice of Change contained: (1) a new prohibition on the outdoor breeding of Prohibited Species, including green iguanas and tegu lizards, with new strict requirements for indoor breeding (Comp. Ex. A at 13 (new Fla. Admin. Code R. 68-5.007(7)(c)3.a.)); and (2) a new sunsetting provision for those persons allowed to continue commercial use of green iguanas and tegu lizards under the Amended Rules until June 30, 2024 (Compl. Ex. A at 11 (new Fla. Admin. Code R. 68-5.007(4)(a)3.))

Neither the SERC nor the Amended SERC addressed these new provisions, yet these new provisions will have significant impacts on licensees and plainly contradict the SERC's numerous statements disregarding any impact to such licensees for the reason that they may continue some commercial use. (*E.g.*, Compl. Ex. D at 6, 8, 11, 19.) Indeed, the Amended SERC waved away

the financial impact by stating such "grandfathered" iguana and tegu licensees "will still be able to sell these out of state." (Compl. Ex. D at 11-12.)

To the contrary, compliance with the new prohibition on outdoor breeding will be practically impossible, as those affected Plaintiffs cannot build or retrofit indoor facilities within the apparent 180-day deadline arbitrarily imposed under the Amended Rules, and building new facilities would be entirely uneconomic for no more than three years of operations until the sunset provision kicks in. (*See, e.g.*, Affidavit of Martin Spilkin ("Spilkin Aff.") ¶ 9; Affidavit of Laura Roberts ("Roberts Aff.") ¶ 9; Berrios Aff. ¶ 10.)

III. Absent Entry of a Temporary Injunction, Plaintiffs Will Suffer Irreparable Harm

The Amended Rules went into effect on April 29, 2021. Under Rule 68-5.007(13) (effective April 29, 2021), "[p]ersons in possession of species listed as Prohibited after May 2, 2019"—which would include the reptile species at issue—"shall have ninety (90) days from the effective date of the species' listing as Prohibited to come into compliance with the provisions of this section." Consequently, the continued possession, sale, import, export, and breeding of Conditional Species will be unlawful under the Amended Rules beginning **July 28, 2021**. In other words, in less than two months, an entire industry has to dissolve itself completely or somehow pick up and move to another state while salvaging what it can of its assets at fire sale pricing. Some Plaintiffs will even have to forego remaining months on their existing valid licenses. (Spilkin Aff. ¶ 4; Berrios Aff. ¶ 4; *see also* Affidavit of Patrick C. Cannarozzi ("Cannarozzi Aff.") ¶ 5.) Because most of the businesses are closely-held, it means selling homes, replacing special use facilities with new ones in the few places where the animals can thrive, alienating children from schools and friends, moving animals while preserving their health or taking any offer to buy

them exclusively from out-of-state buyers, and potentially euthanizing the rest. Many licensees will not be willing or able to make such a radical change in so little time.

Given these practical realities, the change in law will require individuals to surrender or euthanize animals that have become pets, many of which are irreplaceable as far as these Plaintiffs are concerned. (*See* USARK Florida Aff. ¶¶ 25-26.) For Plaintiffs like Anthony and Renee Caporale, they will be required to move out-of-state or part with 11 reptiles—the oldest of which is 15 years old—all of which have unique personalities and even their own names, like Sonny, Flash, and Laverne. (Caporale Aff. ¶¶ 10-11.) The Caporales and their two children have worked with these animals since they were born. (*Id.*) For others, like Plaintiff Martin Spilkin, the animals in question are genetically unique and are the product of years of hard work. (Spilkin Aff. ¶¶ 5-7, 12.) Plaintiff Chris Cannarozzi has bred one particular reticulated python that was the first of its kind in the world and remains the only one of its kind today; he nurtured that snake since it was born. (Cannarozzi Aff. ¶ 7.) No amount of money could ever replace this animal. For the Individual Plaintiffs and many USARK Florida members, the Amended Rules will also eviscerate their businesses and future plans with respect to their property and provide no means for exemption, compensation, or other remedy. (*See, e.g.*, Caporale Aff. ¶¶ 8, 14; Spilkin Aff. ¶¶ 8-9, 13; Cannarozzi Aff. ¶ 7; Hood Aff. ¶¶ 5-6.)

Further, although individuals like Plaintiff Martin Spilkin are temporarily "exempted" and allowed to possess and continue selling green iguanas and tegu lizards in some capacity, such "exemption" lasts only until June 30, 2024. Even then, under the Amended Rules which ban outdoor breeding, the practical reality is that these "exempted" individuals will be required to retrofit or build facilities to comply with the new indoor breeding requirement and other caging

restrictions in less time than practical at, in many cases, too much cost to justify three more years of breeding. (Spilkin Aff. ¶¶ 8-11, 12; *see also, e.g.*, Hood Aff. ¶ 6; Roberts Aff. ¶ 9.)

There is no indication that discontinuing the Conditional Species program with respect to reptiles and limiting the sale of green iguanas and tegu lizards will provide any benefit to the state. Although the Commission's apparent goal was to limit the proliferation of non-native invasive species in Florida, those reptiles kept in accordance with the Commission's stringent regulatory programs pose no public threat or harm. (Engeman Aff. ¶¶ 10-11, 15; *see also, e.g.*, USARK Florida Aff. ¶ 27; Cole Aff. ¶¶ 3-7.) The Amended Rules lack any rational basis because they do not counteract the actual threat to wildlife posed by invasive species which arrived before any regulation began.

MEMORANDUM OF LAW

I. Legal Standard

"The purpose of a temporary injunction is to preserve the status quo until a final hearing may be held and the dispute resolved." *Bailey v. Christo*, 453 So. 2d 1134, 1136-37 (Fla. 1st DCA). The status quo refers to "the last peaceable noncontested condition that preceded the controversy." *Id.* A circuit court has broad discretion in granting a temporary injunction. *Alachua Cty. v. Lewis Oil Co.*, 516 So. 2d 1033, 1035 (Fla. 1st DCA 1987).

In order to be granted a temporary injunction, Plaintiffs must show: (1) a substantial likelihood of success on the merits; (2) the likelihood of irreparable harm; (3) the unavailability of an adequate remedy at law; and (4) a temporary injunction will serve the public interest. *DePuy Orthopaedics v. Waxman*, 95 So. 3d 928, 938 (Fla. 1st DCA 2012); *see also* Fla. R. Civ. P. 1.610. Plaintiffs satisfy each of these elements.

II. Plaintiffs Have a Substantial Likelihood of Success on the Merits

To demonstrate a substantial likelihood of success on the merits, Plaintiffs must show that there are "good reasons for anticipating [a successful] result" on their claims. *City of Jacksonville v. Naegele Outdoor Advert. Co.*, 634 So. 2d 750, 753 (Fla. 1st DCA 1994). Plaintiffs have made that showing.

A. Plaintiffs Are Likely to Succeed in Their Claims for Declaratory Relief and under 42 U.S.C. § 1983 Because the Commission's Conduct Violated Procedural Due Process

Although the Commission maintains exclusive authority with respect to the regulation of wild animal life in Florida, the Commission must afford due process in exercising that exclusive authority. Art. IV, § 9, Fla. Const. Plaintiffs are likely to succeed on the merits of their declaratory relief claim and substantive claim under 42 U.S.C. § 1983 that the Amended Rules were issued without affording procedural due process within the meaning of the Commission's own Due Process Rule.

1. The Commission's Due Process Rule

Both the Florida Constitution and the U.S. Constitution prohibit the deprivation of a person's property without due process of law. Art. I, § 9, Fla. Const.; U.S. Const. amend. XIV, § 1. To comport with those constitutional requirements, the Commission specifically enacted the Due Process Rule to "ensure adequate process in the exercise of [the Commission's] regulatory and executive functions." Fla. Admin. Code R. 68-1.008(2); *see also id.* 68-1.008(5)(a); § 20.331(9)(a), Fla. Stat. ("The commission shall adopt a rule establishing due process procedures to be accorded any party [within the meaning of the Administrative Procedure Act]."). The Commission recognizes through the Due Process Rule that "[p]rocedural due process, in an administrative setting, consists of requirements for notice, a meaningful opportunity to be heard

and a fair, impartial decision-making authority." Fla. Admin. Code R. 68-1.008(5)(b).

2. The Commission Failed to Provide Procedural Due Process

In the case of rulemaking, the Commission agreed that it would afford procedural due process by following "the A[dministrative Procedure Act, Chapter 120, Florida Statutes ('APA'),] for all notices of FWC rule development and rulemaking . . . [and] in the use of rule development workshops[,] and [the Commission] shall prepare statements of estimated regulatory cost and statements of lower cost regulatory alternative in accordance with the APA." Fla. Admin. Code R. 68-1.008(5)(b)3., 4. Moreover, the Commission has agreed to afford a draw-out hearing upon a party's request if the rulemaking proceeding is inadequate to protect the party's substantial interests, much less not followed, and the normal public hearing on the proposed rule does not provide that party with an adequate opportunity to protect their interests. *Id.* R. 68-1.008(5)(c)1.c.

To state a claim for procedural due process under 42 U.S.C. § 1983, and to be entitled to a declaration that Defendants' conduct violated procedural due process, Plaintiffs must show "(1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." *Chakra 5, Inc. v. City of Miami Beach*, 254 So. 3d 1056, 1070 (Fla. 3d DCA 2018) (internal quotation marks omitted); *Bradsheer v. Fla. Dep't of Highway Safety & Motor Vehicles*, 20 So. 3d 915, 918 (Fla. 1st DCA 2009).

First, the deprivation of constitutionally-protected interests are at stake under the Amended Rules: the personal property (reptiles), investments, and very livelihoods of the Individual Plaintiffs and many other members of USARK Florida. *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, the Plaintiffs must part with their personal property, their animals, and cease operating or dissolve their businesses. Plaintiffs cannot afford to make the changes required within 60more days to continue to do business in the State of Florida.

The Amended Rules also constitute state action.

Last, and as explained below, the Commission's numerous failures to comply with its own Due Process Rule and due process procedures establish that the Commission afforded constitutionally inadequate due process. *See Byle v. Pasco Cty. ex rel. Bd. of Cty. 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); *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 Cty. 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").

(1) Failure to Grant the Requested Draw-out Hearing. A draw-out hearing is a "special hearing which may be provided upon request of a party if the agency determines that the rulemaking proceeding is inadequate to protect the person's substantial interests and the normal public hearing on a proposed rule does not provide that person with an adequate opportunity to protect their interests." Fla. Admin. Code R. 68-1.008(5)(c)1.c.; *see also id.* R. 68-1.008(5)(d). A

draw-out proceeding consists of an evidentiary hearing before an administrative law judge, the preparation of a record, and the transmittal to and review of that record by the Commission. *Id.* The Due Process Rule states that the draw-out hearing process is particularly appropriate when deciding how a species should be classified because the determination whether a species warrants a certain classification "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.* (emphasis added).

There can be little question that USARK Florida timely requested a draw-out hearing on behalf of its members. (Compl. Ex. C at 10 (requesting draw-out hearing within 21 days of the Commission's publication of the notice of proposed Amended Rules)).

There also can be little question that USARK Florida satisfactorily showed that its members will be substantially affected by the Amended Rules and that the Commission's rulemaking proceeding failed to afford adequate due process. (Compl. Ex. C; Compl. Ex. F.) USARK Florida repeatedly emphasized that the organization and its members "will be substantially affected by the adoption of the Proposed Rules" and that the existing procedures were insufficient to protect them. (*E.g.*, Compl. Ex. C at 1.) "Without anything to refute these matters," the Commission's apparent conclusion that USARK Florida had failed to demonstrate that the Commission's rulemaking proceeding was "inadequate to protects its [members'] interests is not supported by the record and is thus arbitrary." *Bert Rogers Schs. of Real Estate v. Fla. Real Estate Comm'n*, 339 So. 2d 226, 228 (Fla. 4th DCA 1976); *accord Balino v. Dep't of Health & Rehab. Servs*., 362 So. 2d 21, 26 (Fla. 1st DCA 1978) ("The hearing officer failed to make inquiry, either

as to the nature of testimony sought to be elicited or the substantial interest of petitioners in the rule modification which might require a s. 120.57 draw-out.").[5]

Bert Rogers is particularly instructive. There, a petitioner requested an opportunity to be heard concerning certain rule amendments and asked for a draw-out hearing under section 120.57, Florida Statutes. *Bert Rogers Schs.*, 339 So. 2d at 227. The respondent agency instead held a hearing under section 120.54(2), Florida Statutes, and never permitted the petitioner to demonstrate that such a hearing was inadequate to protect the petitioner's interests. *Id.* at 227-28. On petition for review by the Fourth District Court of Appeal, the respondent agency said that the section 120.54(2) hearing "was to allow 'affected persons' to give 'input' to the commission relative to the proposed amendment to the rules." *Id.* While the respondent agency did not expressly determine that the section 120.54(2) hearing was or was not adequate to address the petitioner's substantial interests, the appellate court said that even if the agency had expressly denied the hearing for the reason that the section 120.54(2) hearing was adequate, such denial represented a "clear abuse of discretion":

> The only matters the respondent had before it upon which a denial could have been based . . . were letters petitioner had sent respondent. Those letters set forth the interests petitioner asserted were substantial. The letters also contained assertions that petitioner's "substantial interests" would not be adequately protected by a Section 120.54(2) hearing and specifically requested a Section 120.57 hearing, setting forth the issues petitioner wished to present at such a hearing. Without anything to refute these matters, a conclusion that petitioner had failed to demonstrate that the Section 120.54(2) proceedings of December 22nd were inadequate to protect its interests is not supported by the record and is thus arbitrary.

Id. at 228.

[5] Notably, the courts in *Bert Rogers* and *Balino* rejected an agency's use of a section 120.54(2) hearing in lieu of the draw-out hearing under section 120.57 even when it was up to the agency to "determine[] that the rulemaking proceeding is not adequate to protect the person's interests." § 120.54(3)(c)2, Fla. Stat.

The Commission's only stated reason for denying the request for a draw-out hearing, via its General Counsel, was the claim that the rulemaking process afforded Plaintiffs all the process that was required, including the opportunity to speak at the final public hearing on the Amended Rules. (*See* Compl. Ex. E.) At that time, the only information the Commission had before it were USARK Florida's contentions of the Amended Rules' substantial impacts imminent to its members and the inadequacy of the meetings held by the Commission concerning the Amended Rules, plus the Commission's likely plan to significantly limit public comment at the public hearing at which the Amended Rules would likely be approved. Yet the Commission denied the request anyway.

USARK Florida's worries proved to be correct; notwithstanding the Commission's General Counsel's assurances in November 2020, the Commission's rulemaking process did not afford an adequate opportunity to protect the substantial interests of those affected. In fact, Plaintiffs never saw the purported "credible biological data" supporting the Commission's decision to ban commercial use of each of the impacted species. *See* Fla. Admin. Code R. 68-1.008(5)(d); (USARK Florida Aff. ¶ 24.) And while the Commission's staff hosted numerous workshops and meetings with stakeholders, at no meeting did the Commission's staff or Commissioners engage with or challenge any of the evidence USARK Florida and its members presented illustrating that the current Conditional Species and other regulations are working. (USARK Florida Aff. ¶¶ 13-15; *see also, e.g.*, Spilkin Aff. ¶ 15.)

This all culminated with the February 25, 2021 meeting—the only meeting at which all of the Commissioners were actually present to hear public comment—where the Commission voted to approve the Amended Rules. Under the Due Process Rule, a draw-out hearing is particularly appropriate where "the normal public hearing on a proposed rule does not provide [a substantially-

impacted] person with an adequate opportunity to protect their interests." Fla. Admin. Code R. 68-1.008(5)(c)1.c. According to the Commission's own due process procedures, when a large number of speakers are expected on a topic, the Chairman must ensure "that all speakers are heard within the time allotted for the meeting." Commission Meeting Protocol, Public Comment at Commission Workshops and Meetings.[6] There can be no dispute, however, that the Commission and the Chairman failed to comply with this requirement; at the very least Plaintiffs Jason Hood and Jesse Hardin along with USARK Florida board members and expert Dr. Engeman were not permitted to speak, notwithstanding the fact that many had joined the appointed conference line at the very beginning of the meeting. (Hood Aff. ¶ 9; Hardin Aff. ¶ 22; USARK Florida Aff. ¶ 22; Engeman Aff. ¶ 18.) USARK Florida did all it could within its power to be able to speak at the meeting; for example, by contacting the Commission before the hearing to request reasonable time for at least its economic and scientific experts to be heard and joining the meeting before the start. This too underscores that the "hearings" offered by the Commission through the rulemaking proceeding were constitutionally inadequate and a draw-out hearing was appropriate.

In short, the Commission's failure to afford a draw-out hearing pursuant to USARK Florida's timely request is a clear violation of the Due Process Rule and thus a clear violation of procedural due process. *See, e.g.*, *Morfit v. Univ. of S. Fla.*, 794 So. 2d 655, 656 (Fla. 2d DCA 2001) (university violated student's due process rights by failing to abide by provision of code which stated that student may hear and question adverse witnesses); *see also, e.g.*, *Arnesto v. Weidner*, 615 So. 2d 707, 709 (Fla. 3d DCA 1993) ("An agency violates a person's due process rights if it ignores rules it promulgated which affect individual rights.").

(2) Failure to Seriously Consider USARK Florida's Proposed LCRAs. Under the 2007

[6] *Available at* https://myfwc.com/about/commission/meeting-protocol/.

APA, a substantially affected party may submit to an agency a LCRA "which substantially accomplishes the objectives of the law being implemented." § 120.541(1)(a), Fla. Stat. (2007). Upon receipt, the agency must prepare or revise a SERC and "either adopt the alternative or give a statement of the reasons for rejecting the alternative in favor of the proposed rule." *Id.* § 120.541(1)(b). "The failure of the agency to prepare or revise the [SERC] as provided in this paragraph is a material failure to follow the applicable rulemaking procedures or requirements set forth in this chapter." *Id.*

The Commission outright rejected each of USARK Florida's proposed LCRAs for the stated reason that none would accomplish the Commission's goal of ending commercial breeding. But that is not what the Commission's stated objectives were, at least in the original SERC. In fact, the Commission appears to have changed its objectives for the Amended Rules to avoid serious consideration of USARK Florida's LCRAs. But the failure seriously to consider USARK Florida's proposed LCRAs means that the Commission did not comply with its own Due Process Rule and the APA (as adopted by the Commission). *See, e.g.*, *Fla. Waterworks Ass'n v. Fla. Pub. Serv. Comm'n*, Case No. 96-3809RP, 1998 WL 866253, ¶¶ 77-78, 110 (DOAH Mar. 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).

(3) Failure to Adequately Prepare or Revise the SERC. The Commission agreed to abide by the 2007 APA in preparing SERCs. That means that the Commission was required to provide through a SERC: a good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule; a good faith estimate of the transactional costs likely to be incurred by individuals and entities required to comply with the requirements of the rule; and an analysis of the impact on small businesses. § 120.541(2), Fla. Stat. (2007). The failure to comply with this requirement is a material failure to follow rulemaking procedures. *Id.* § 120.541(1)(b).

The Commission's SERC and Amended SERC fail to meet the statutory requirements, thus constituting a material failure to follow rulemaking procedures. As the Commission acknowledged, a SERC was particularly warranted because the commercial reptile industry in Florida is largely one of small businesses—those with fewer than 200 employees or less than $5 million in sales. (Compl. Ex. B at 8.) But neither the SERC nor the Amended SERC actually captures the impact to small businesses. The Commission could have, but did not, reach out directly to those it regulates to investigate the financial impacts required to be described in the SERC. Instead, the Commission's staff simply performed internet searches of retail websites and came up with their own ideas of the market value of the affected animals and thus the size of the industry at issue. The Commission also summarily announced that, to the extent small businesses were impacted, they could simply shift to selling other reptiles. This is without any basis in fact. For many Plaintiffs, the affected reptiles are their true passion, and one cannot simply switch out what reptiles they grow and breed; each reptile represents years of work. (*See, e.g.*, Cannarozzi Aff. ¶ 11; Caporale Aff. ¶ 14; Spilkin Aff. ¶ 13.)

The Commission's SERC also utterly fails to account for the significant restrictions placed upon even "grandfathered" tegu and iguana permittees, who are required under the Amended Rules to drastically change their businesses by converting to indoor breeding and to ultimately end possession and commercial use by June 30, 2024. Indeed, the Commission's Amended SERC waves away impacts to tegu and iguanas permittees because they may still "sell these animals out of state." (Compl. Ex. D at 11; *see also id.* at 12 ("The proposed revisions to Chapter 68-5 F.A.C. may impact some businesses that sell or trade these species. For many of these entities the impact will be minimal. . . . [T]hose businesses that have verified commercial use in tegus or green iguanas ***have an opportunity to apply for limited exception permits that will allow some continued commercial use***." (emphasis added)). Many if not most of those temporarily exempted will be unable to comport with the Commission's new requirements to move all breeding indoors by the deadline set by the Amended Rules as it will be literally impossible to build or retrofit facilities for these purposes, besides uneconomic to do so for at most three years of sales. (*See, e.g.*, Spilkin Aff. ¶ 9; Roberts Aff. ¶ 9; Berrios Aff. ¶ 10.) The Commission prepared ***no*** SERC with respect to these significant changes.

(4) Failure to Follow Requirements in Modifying the Proposed Rules. Under the 2007 APA as adopted by the Commission, an agency may modify a rule after the final public hearing on the rule before it is formally adopted so long as that change is "supported by the record of public hearings held on the rule," is in "response to written material received on or before the date of the final public hearing," or is "in response to a proposed objection by the [Joint Administrative Procedures C]ommittee." § 120.541(3)(d), Fla. Stat. (2007).

The first time the Commission published the proposed ban on outdoor breeding and sunset for the continuation of limited commercial use of green iguanas and tegu lizards was March 15,

2021, in the Notice of Change, ***after*** the Commission had already approved the Amended Rules for adoption. Although the Commission's staff mentioned the proposed changes in passing at the February 25 meeting, there was no discussion of why the changes were being made or why they were being formally proposed so late in the process—particularly where those changes were directly contrary to statements made in the Commission's own Amended SERC, as noted above. Regardless, it does not appear that these changes are supported by the public record, made in response to written material received before the February 25, 2021 meeting, or made in response to objections by the Joint Administrative Procedures Committee, as required by section 120.541(3)(d)1. For this reason too, the Commission's rulemaking process fell short of the requirements of the 2007 APA incorporated into the Due Process Rule.

In short, the Commission's SERC failed to meet the requirements of section 120.541 and consequently materially failed to follow rulemaking procedures. § 120.541(1)(b), Fla. Stat. (2007).

As a consequence of these failures, Defendants failed to afford Plaintiffs procedural due process, and Plaintiffs are entitled to a declaration to that effect and a ruling in their favor under 42 U.S.C. § 1983.

B. Plaintiffs Are Likely to Succeed in Showing the Rules are Arbitrary and Capricious and Impair Vested Rights

In the Due Process Rule, the Commission has stated that, as part of affording those impacted with substantive due process, the Commission's rules derived from constitutional authority may be subject to challenge before circuit courts. Fla. Admin. Code R. 68-1.008(5)(c)1.

Before adoption of the Due Process Rule, the Commission's rules derived from constitutional authority were subject to the rational basis test. *See Wakulla Commercial Fishermen's Ass'n v. Fla Fish & Wildlife Conservation Comm'n*, 951 So. 2d 8, 9 (Fla. 1st DCA

2007). Notably, however, *Wakulla Commercial Fishermen's Association* was decided before the Commission formally adopted the Due Process Rule, including portions of the APA, in early 2008.

(1) *The Commission Has Not Shown the Amended Rules Are Necessary or Will Have Any Appreciable Impact and Ignored Scientific Evidence to the Contrary.* Under the APA, a rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational. § 120.52(8)(e), Fla. Stat. (2007).[7] In determining whether a rule is arbitrary or capricious, a court should determine whether an agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of those factors to its final decision. *Adam Smith Enters., Inc. v. Dep't of Envtl. Regulation*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The Amended Rules fail that test.

The Amended Rules are arbitrary and capricious and unsupported by logic because the Commission has not shown that the Amended Rules will reduce the impacts associated with non-native reptile species in Florida. The evidence before the Commission is that the Conditional Species program and the regulations applicable to green iguanas and tegu lizards are working. (*See* Cole Aff. ¶¶ 3-7.) No evidence tied the Commission's Amended Rules to an actual reduction in impacts associated with the non-native species at issue. In fact, several of the species at issue were introduced and established in Florida long before the Commission enacted the regulations for Conditional Species in 2007:[8]

[7] The Commission has taken the position that this definition applies to its rules in prior litigation. *See* Defendant's Response in Opposition to Plaintiff's Motion for Preliminary Injunction at 13, *Aldred v. Fla. Fish & Wildlife Conservation Comm'n*, No. 2019-CA-001537 (Fla. 2d Cir. Ct. Oct. 24, 2019).

[8] The information provided in this chart is sourced from Kenneth L. Krysko, et al., *New Verified Nonindigenous Amphibians and Reptiles in Florida through 2015, with a Summary of over 152 Years of Introductions*, IRCF Reptiles & Amphibians 23(2):110-143 (Aug. 2016).

Species Common Name	Year Introduced in Florida	Year Established in Florida
Burmese python	1979	1980s
Reticulated python	1989	not established
Northern African python	2002	2000s
Green anaconda	2004	not established
Nile monitor	1981	1990s
Green iguana	1964	1960s
Argentine black & white tegu	2002	2000s
Red tegu	2007	not established
Gold tegu	1990	2000s

As Kenneth Krysko and his co-authors acknowledge at the beginning of their study, "[i]n most instances, once introductions have been allowed to establish, ***no amount of money or effort can change the situation***."[9] The creation of the Conditional Species program in 2007 did not result in the establishment of any of the above-listed species in Florida. In fact, no species has become established in Florida after placement on the Conditional Species list. By the same token, the elimination of that program with respect to reptiles will not change the fact that some of the listed species are already established in Florida.[10]

For those species affected by the Amended Rules that are ***not*** established in Florida, the evidence before the Commission was that there were good reasons to doubt that they would or could become established. The reticulated python and green anaconda, for instance, even if previously found in the wild in Florida, are physiologically and geographically unable to reproduce and establish wild populations. (Engeman Aff. ¶ 9.) As the Commission's staff recognized in their July report to the Commission on the drafts of the Amended Rules, while reticulated pythons

[9] Krysko, et al., *supra*, at 111 (emphasis added) (quoting Fred Kraus).

[10] It is also questionable whether commercial dealers were ever the culprit. As Mr. Hardin recognized in his 2007 study, "[a]lthough anecdotal evidence suggests dealers have released inventories to establish source populations, ***the majority of introductions have resulted from release of pets by owners***." Hardin, *supra*, at 43 (emphasis added).

and green anacondas may have been observed in the wild in Florida, they are "not breeding."[11] Importantly, no not-yet-established reptile species designated as a Conditional Species has become established in Florida in the 14 years the program has been in effect. This shows that the existing Conditional Species program has worked.

Despite the Commission's commitment to follow the "best information available" in adopting rules derived from constitutional authority,[12] the Commission's rulemaking process reveals that the Commission ignored scientific evidence including from USARK Florida's expert that the Amended Rules will not accomplish the Commission's stated goal of addressing non-native species' impacts on Florida's ecology, economy, or human health and safety. Indeed, the Commission appears to have ignored the main thrust of the Krysko study it cites repeatedly in its SERC (*see* Compl. Ex. D at 1-3, 20): "once introductions have been allowed to establish, ***no amount of money or effort can change the situation***."

(2) The Amended Rules Arbitrarily Treat Iguanas and Tegus Differently from Other Non-Native Reptile Species. Furthermore, the fact that the Amended Rules authorize continued pet ownership as well as commercial use of tegus and green iguanas, even if on a shortened timeframe and subject to more stringent regulations, demonstrates the arbitrariness of the Amended Rules. If the Commission's goal was to reduce impacts associated with non-native species by ending commercial breeding, it makes no sense to authorize continued pet ownership and the continued commercial breeding of two of the species which appear to be the main culprit of the regulatory costs about which the Commission complains. (*See* Compl. Ex. B at 1-3, 12

[11] Florida Fish and Wildlife Conservation Commission, Presentation, Enhancing Regulations of Invasive Reptiles, Slide 11 (July 23, 2020), https://myfwc.com/media/24090/8a-presentation-reptileregulations.pdf; *see* Krysko, et al., *supra*, at 2 (equating establishment with reproduction).

[12] *See* James V. Antista, *FWC Met Due Process Standards in Shark Feeding Case*, The Florida Bar Administrative Law Section Newsletter, Vol. XXIX, No. 2, at 4 (Dec. 2007).

(citing various documented impacts specific to green iguanas and tegus); Compl. Ex. D at 1-3 (same)). As such, the Amended Rules arbitrarily treat owners of the designed Prohibited Species differently without any basis in logic or fact. In fact, the Amended Rules treat allegedly the most cost-inducing species the best without rational basis.

(3) The Amended Rules Impermissibly Retroactively Apply to Existing Licenses and Permits, Impairing Vested Rights. The Commission has made clear that the Amended Rules apply to all existing licensees and permittees, notwithstanding the expiration date of a particular license or permit. In effect, then, the Commission's position is that the Amended Rules retroactively apply. But like any law, the Commission's regulations cannot retroactively impair vested rights.

For at least three Plaintiffs, Martin Spilkin, Hector Berrios, and Chris Cannarozzi, their existing licenses and permits are not scheduled to expire until after the grace period ends. (Spilkin Aff. ¶ 4; Berrios Aff. ¶ 4; Cannarozzi Aff. ¶ 5.) Other USARK Florida members are in the same predicament. (USARK Florida Aff. ¶ 12.) Even when a governmental body expresses a clear intent to apply a new law retroactively, "the second inquiry is whether retroactive application is constitutionally permissible." *Coventry First, LLC v. State, Office of Ins. Regulation*, 30 So. 3d 552, 557 (Fla. 1st DCA 2010). Retroactive application is impermissible when the law "impairs vested rights, creates new obligations, or imposes new penalties." *Id.* (internal quotation marks omitted).

A vested right must be "more than mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand." *Div. of Workers' Compensation v. Brevda*, 420 So. 2d 887, 891 (Fla. 1st DCA 1982). Plaintiff Berrios and other USARK Florida members have a vested right in their existing, in-good-standing licenses and permits with the Commission, under which they

operate businesses. *See Presmy v. Smith*, 69 So. 3d 383, 387 (Fla. 1st DCA 2011) (educator had a vested property interest in his educational certification such that statute could not retroactively strip educator of that certification). Because the Amended Rules impair existing, vested rights to operate under the licenses and permits that are still in good standing, and create new obligations and impose new penalties not in existence when those permits and licenses were issued, Plaintiffs are likely to prevail on their claims that the Amended Rules unconstitutionally retroactively impair existing licensees and permittees.[13]

Accordingly, Plaintiffs have a substantial likelihood of success on the merits of their claims that the Commission failed to afford due process and adopted arbitrary and capricious rules in violation of the 2007 APA and the Commission's own Due Process Rule.

III. Plaintiffs Will Suffer Irreparable Harm and Have No Adequate Remedy at Law

Plaintiffs must also demonstrate that irreparable harm will result absent entry of a temporary injunction and they lack an adequate remedy at law. *See, e.g.*, *Fla. Dep't of Health v. Florigrown, LLC*, No. 1D18-4471, 2019 WL 2943329, at *3-4 (Fla. 1st DCA July 9, 2019), *rev'd on other grounds*, No. SC19-1464 (Fla. May 27, 2021). Plaintiffs have met that burden as the damages and loss they will suffer are difficult if not impossible to quantify.

"[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,

[13] Plaintiffs do not dispute that regulation changes occurring during the pendency of an application for a license or permit are operative as to that application, but it is concerning that the Commission has appeared in some cases to delay issuing applications or permits with the apparent aim of applying the new rules, which is impermissible. *See Lavernia v. Dep't of Prof'l Regulation, Bd. of Medicine*, 616 So. 2d 53, 53-54 (Fla. 1st DCA 1993) (agency's unreasonable delay in acting upon an application until after the effective date of a new law precluded agency from judging application based on new law).

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 will suffer if the Amended Rules are enforced, and consequently, they have established irreparable harm and the lack of an adequate remedy at law. *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).[14]

The Amended Rules will shutter an entire industry, the full cost of which cannot be validly estimated. Plaintiffs who attempt to move to another state will sell and buy single use real estate and equipment to include businesses and personal homes; sell, transport, or euthanize animals; and move families across state lines. The Amended Rules will also dispossess individuals like Plaintiffs Anthony and Renee Caporale, Martin Spilkin, and Chris Cannarozzi of their unique animals. No amount of money will be able to compensate Plaintiffs for having to surrender their reptiles and lose their companionship. (*See, e.g.*, Caporale Aff. ¶¶ 4-12; Spilkin Aff. ¶¶ 5, 11-12; Cannarozzi Aff. ¶¶ 6-7, 9-10; Berrios Aff. ¶ 7, 11, 15.)

[14] Importantly too, as a governmental entity, the Commission has sovereign immunity and its liability is correspondingly limited, even if Plaintiffs' harm could be reasonably reduced to monetary damages. *Fla. Dep't of Health*, 2019 WL 2943329, at *4 ("Moreover, because all of the defendants are either state governmental entities or state governmental actors, absent a waiver of sovereign immunity in the amendment, which is not present, no monetary damages could be recovered at law for the constitutional violations."), *rev'd on other grounds*, No. SC19-1464 (Fla. May 27, 2021); *see also, e.g.*, *Tucker v. Resha*, 634 So. 2d 756, 759 (Fla. 1st DCA 1994) (finding no legislative waiver of sovereign immunity as to the privacy provision of the Florida Constitution and therefore concluding that money damages are not available for violations of that right).

Notably, the Amended Rules require those impacted to come into compliance within 90 days of the effective date of the Amended Rules—in other words, by the end of July, Plaintiffs must sell, relocate with, or part ways with their animals. Fla. Admin. Code R. 68-5.0079(13) (effective Apr. 29, 2021). Ninety days is insufficient for many to find suitable homes for the reptiles at issue. The number of facilities authorized to take these species is small. There will be fire sales or donations. Plaintiffs may be forced to euthanize some of their reptiles, which is a tragic result. (*See, e.g.*, USARK Florida Aff. ¶ 26; Caporale Aff. ¶ 12.) Destruction and/or forced dispossession of these reptiles—many of which are incredibly unique due to their breeding and genetics and are, without exaggeration, priceless—plainly cannot be redressed by money damages. *See Schiller v. Miller*, 621 So. 2d 481, 482 (Fla. 4th DCA 1993) (injunction properly granted to prevent forced disposition of unique personal property). For someone like the Caporales, they will be potentially forced to euthanize a specific type of very rare dwarf reticulated python, of which theirs is one of only ***20*** found within the United States, even though the uncontested evidence is that reticulated pythons are not likely to become established in Florida. (Engeman Aff. ¶ 9); *see also* Florida Fish & Wildlife Conservation Commission, Presentation, Enhancing Regulations of Invasive Reptiles, Slide 11 (July 23, 2020).[15]

Furthermore, "[e]ven 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*, 2019 WL 2943329, at *4; *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1263-64 (Fla. 2017). Thus, the continuing due process violation alone constitutes irreparable harm. In light of the extensive power conferred on the Commission with respect to

[15] *Available at* https://myfwc.com/media/24090/8a-presentation-reptileregulations.pdf.

wildlife it should not be too much to require it at least to comply with its own due process procedures before depriving Plaintiffs of these unique and priceless animals.

For all these reasons, Plaintiffs have demonstrated that absent issuance of a temporary injunction, they will suffer irreparable harm for which there is no adequate remedy at law.

IV. A Temporary Injunction Serves the Public Interest

Finally, a temporary injunction would serve the public interest. The issuance of an injunction will prevent the Commission's ongoing due process violation and preserve the status quo pending the resolution of this lawsuit, thereby serving the public interest. *See Gainesville Woman Care*, 210 So. 3d at 1264 (finding that enjoining a law that would impose burdens in violation of the Florida Constitution would serve the public interest). The issuance of an injunction would stop the ongoing violation of Plaintiffs' procedural due process rights, maintain the status quo—under which Plaintiffs were authorized to possess the reptile species at issue—and provide time for the Commission to promulgate rules in compliance with its Due Process Rule.

A temporary injunction would also serve the important public interest in avoiding the destruction of unique animals worthy of respect in their own right, the loss of consortium of the Plaintiffs with their pets, and the dissolution of Plaintiffs' businesses and livelihoods pending a final determination regarding the Amended Rules' constitutionality.

Moreover, there is no countervailing public interest, such as in preventing the proliferation of invasive non-native species in Florida. As described above, those permittees and licensees operating pursuant to the Commission's comprehensive regulatory programs are subject to an extensive regulatory framework that works to limit the proliferation of non-native species in Florida. Those licensees and permittees operating under the Commission's pre-April 29, 2021 regulations are not the source of Florida's problems with non-native species, and consequently an

injunction maintaining the status quo as it existed pre-April 29, 2021, cannot have any negative or positive impact. If enforcement and implementation of the Rules are temporarily enjoined during the pendency of this action, it will not harm the public or Florida's environment. (USARK Florida Aff. ¶ 27; *see also* Engeman Aff. ¶¶ 11, 15.) An injunction in these circumstances would simply do what injunctions are precisely designed to do: preserve the status quo before an irreparable loss occurs—here, the loss of Plaintiffs' livelihoods and animals—before this Court may determine the merits of the claims.

V. Bond

Florida Rule of Civil Procedure 1.610(b) requires the movant to post a bond in an amount the Court deems proper. "The purpose of [an injunction] bond is to provide a sufficient fund to cover the adverse party's costs and damages if the injunction is wrongly issued." *Cushman & Wakefield, Inc. v. Cozart*, 561 So. 2d 368, 370 (Fla. 2d DCA 1990). The Court should determine the amount of the bond after both parties are provided the opportunity to present evidence on the appropriate amount. *See Longshore Lakes Jt. Venture v. Mundy*, 616 So. 2d 1047, 1047-48 (Fla. 2d DCA 1993).

Plaintiffs submit that any bond imposed should be minimal. The conduct Plaintiffs seek to enjoin is not the kind that can cause financial hardship to the Commission. The Commission will not suffer any monetary losses even if the injunction is wrongfully issued, and may actually save expenses in implementing the Amended Rules only to later face a court determination that the Amended Rules are unconstitutional. *See Southards v. Motel Mgmt. Co.*, 567 So. 2d 523, 524 (Fla. 3d DCA 1990). Further, the Commission's low chances of subsequently overturning any temporary injunction imposed by the Court weigh in favor of a nominal bond. *See Cushman*, 561 So. 2d at 371.

Nonetheless, Plaintiffs are willing to post a bond in whatever reasonable amount the Court deems appropriate, after hearing from both parties on the issue.

CONCLUSION

WHEREFORE, for the reasons stated above, Plaintiffs request that this Court enter a temporary injunction against the Commission, the Chairman, and the Executive Director, enjoining them and all persons acting under their direction or acting in concert with them from implementing or enforcing the Amended Rules pending resolution of this matter on the merits, as well as any other relief that this Court deems just and proper.

Respectfully submitted on May 28, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 28, 2021, a copy of this motion for temporary injunction has been provided via electronic service to:

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