UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

30 BARN OWLS *et al.*, Plaintiffs, v. TOM VILSACK, Secretary U.S. DEPARTMENT OF AGRICULTURE, *et al.*, Defendants.	Civil Action No. 1:21-cv-00968-TSC

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS BY AND THROUGH NEXT FRIENDS

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August 12, 2021

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PRELIMINARY STATEMENT

A bill of attainder lawsuit in the name of 30 barn owls confined in a Johns Hopkins University ("JHU") laboratory presents a novel case. The question presented, however, is well suited for traditional Supreme Court and D.C. Circuit doctrine applying Article I, § 9 (the "Bill of Attainder Clause").

At issue is an amendment to the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* ("AWA"), slipped into the 2002 Farm Bill by a retiring Senator Jesse Helms. This measure, now codified at 7 U.S.C. § 2132(g) (the "Helms Amendment"), excludes from the protections of the AWA all birds, mice, and rats born in laboratories.

This exclusion operates as a bill of attainder by depriving these groups of protection from painful confinement, painful and unlimited surgeries by unqualified students, and inhumane death. It also eliminates a requirement that facilities weigh alternatives to painful experiments. Plaintiff barn owls suffer from all of these deprivations. They lack species-appropriate housing. They are subject to repeated skull surgeries performed without appropriate pain medication by amateurs as part of a "learning process." After these surgeries—performed to implant damaging electrodes—the barn owls will be restrained for up to 12 hours at a time and bombarded with harmful stimuli while held in a head-fixation device and stuffed in tubes and jackets with their eyelids clamped open. Experimenters will kill all of these barn owls once they are damaged beyond use, or else when the experiments end.

By inflicting horrors that impose death sentences, imprisonment, and torture on targeted groups whose status is easily ascertainable and irreversible, the Helms Amendment is a bill of attainder. Per the Supreme Court, the presence of these types of deprivations evoking "the infamous history of bills of attainder" is the starting and potentially dispositive point of inquiry.

This is also the rare case that, to paraphrase the D.C. Circuit, evinces Congressional vindictiveness with a "smoking gun." Only one speech, by Sen. Helms himself, made up the entirety of the Congressional record on the Helms Amendment, which became law unchanged. In that speech, Sen. Helms asked his colleagues if they had "ever seen a hungry python eat a mouse," because why care about what happens to these non-human animals in a laboratory when they might otherwise be "food for reptiles" or "end up as a tiny bulge being digested inside an enormous snake?" He then explained that "Mrs. Helms would have a word or two for me if I forgot to phone the exterminator" if they were found in his basement. He closed with a call for his colleagues to "deliver a richly deserved rebuke" to those he termed "the so-called 'animal rights' crowd." Finally, as reinforced by D.C. Circuit precedent, that the Helms Amendment functions as a bill of attainder is further evidenced by its lack of safeguards. Although these barn owls are subject to experiments of negligible benefit to humans, JHU did not even have to weigh alternatives—as it would absent the Helms Amendment.

In their motion to dismiss, Defendants largely ignore this analysis. Instead, they argue that the Helms Amendment cannot act with specificity because it creates classes that fall outside the protection of another law. This structure, however, is similar to other laws analyzed by the Supreme Court, including in precedent finding bills of attainder.

Defendants also dwell, in their standing and Bill of Attainder Clause analysis, on the fact these barn owls are not human—despite the factors discussed above, as well as that the Bill of Attainder Clause already protects non-human corporations, that courts historically use the Bill of Attainder Clause to protect the peculiarly vulnerable, and that even precedent dismissing lawsuits brought for non-human animals have acknowledged that that there is no inherent Constitutional barrier to claims on behalf of such plaintiffs if the source of positive law—here,

the Bill of Attainder Clause—confers rights on them. Courts, including those cited by the government, increasingly acknowledge that the interpretation of generally-applicable law should reflect that parties like these barn owls are autonomous individuals who think, feel, and merit respect for their rights. Because this lawsuit presents a valid claim on Plaintiffs' behalf, capable of being redressed via abolition of the Helms Amendment, by and through next friends with a record of unique dedication to their best interests and as direct a connection to these laboratory-confined barn owls as possible, this Court should deny Defendants' motion to dismiss.

BACKGROUND

I. The Animal Welfare Act

In 1966, Congress passed the AWA to accord some legal protections for non-human animals used in laboratories. As amended in 1970, the AWA was intended "to insure that certain animals intended for use in research facilities . . . are provided humane care and treatment . . . by persons or organizations engaged in using them for research or experimental purposes." Compl., at ¶ 53, citing PL 91-579, 84 Stat. 1560 (Dec. 24, 1970). The statute applied to any "warm-blooded animal" used, or intended for use, in experimentation. *Id.* As Defendants recognize, "[i]t is the only federal law in the United States that regulates the treatment of animals" used in laboratories. Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss ("MTD"), at 2.

Defendant Tom Vilsack, as Secretary of the United States Department of Agriculture ("USDA"), is required by the AWA to promulgate standards to govern the minimization of pain, humane handling, care, treatment, and transportation of non-human animals by laboratories. Compl., at ¶ 24. *See also* 7 U.S.C. § 2143(a)(1).

These standards include:

- Taxonomic unit-specific rules governing the treatment of groups of non-human animals, including "warm-blooded animals other than dogs, cats, rabbits, hamsters, guinea pigs, non-human primates, and marine mammals." Compl., at ¶ 61, citing 9 C.F.R. §§ 3.125-3.142. For example, the latter rules make it illegal to confine such animals in enclosures that do not provide sufficient space for normal social and postural adjustments with adequate freedom of movement. *Id*. at ¶ 62. *See also* 9 C.F.R. § 3.128.
- Uniform rules governing Institutional Animal Care and Use Committees ("IACUCs") requiring facilities to consider and carefully document alternatives to experimentation on non-human animals that may cause discomfort, distress, or pain, or more than momentary or slight pain and distress. Compl., at ¶ 60, citing 9 C.F.R. §§ 2.31(d)(1)(i), (ii).
- Uniform rules governing IACUCs limiting the number of surgical procedures non-human animals can undergo, mandating that any surgical procedures be performed by appropriately qualified and trained personnel, and mandating that such experiments be conducted with appropriate sedatives and pain medication. *Id*. at ¶ 63, citing 9 C.F.R. §§ 2.31(d)(1)(iv)-(x).
- A uniform rule governing IACUCs mandating that the deaths of non-human animals be "humane." *Id*. at ¶ 63, citing 9 C.F.R. § 2.31(d)(1)(xi).

With regulations come an enforcement mechanism. Under the AWA, the Secretary of Agriculture is required to inspect regulated facilities and review the premises, records, husbandry practices, veterinary care, and animal handling procedures to ensure these facilities have not violated and are not violating the AWA or its implementing regulations, including those cited

above. *Id*. at ¶¶ 24-25, 60-63. *See also* 7 U.S.C. § 2146(a). This responsibility is delegated to Defendant Kevin Shea, the Administrator of the Animal and Plant Health Inspection Service ("APHIS"). Compl., at ¶ 25. *See also* 7 C.F.R. § 2.80(a)(6).

II. The Helms Amendment

Absent later Congressional intervention, barn owls—as well as other birds, mice, and rats—born in laboratories would benefit from those standards codified at 9 C.F.R. § 2.31 governing IACUCs, as well as either those standards codified at 9 C.F.R. §§ 3.125-3.142 or new taxonomic unit-specific rules. Compl., at ¶ 62. *See also id*. at ¶ 54 (quoting former Sen. Bob Dole's statement that "[w]hen Congress stated that the AWA applied to 'all warm-blooded animals,' we certainly did not intend to exclude 95 percent of the animals used."), citing 147 Cong. Rec. H3744-04 (June 28, 2001), at H3768. To remove any ambiguity, in 2000 the USDA committed to initiating and completing a new rulemaking for the benefit of birds, mice, and rats. *Id*. at ¶ 54.

In 2002, Sen. Jesse Helms introduced an amendment in the United States Senate to strip birds, mice, and rats born in laboratories of protection under the AWA. *Id*. at ¶¶ 55-56. Declaring his "outrage" at these animals' advocates, to whom he implored his colleagues to "deliver a richly deserved rebuke," *id*. at ¶ 55, citing 148 Cong. Rec. S612-01 (Feb. 12, 2002), at S617, Sen Helms explained his view that inhumane death was an appropriate outcome for these non-human animals. Sen. Helms asked his colleagues if they had "ever seen a hungry python eat a mouse," because there was little reason to care about what happens in a laboratory when these non-human animals might otherwise be "food for reptiles" or "end up as a tiny bulge being digested inside an enormous snake[.]" *Id.* After all, if they showed up in his home, Sen. Helms would subject these non-human animals to "extermination," elaborating: "I suspect Mrs. Helms would have a

word or two for me if I forgot to phone the exterminator upon finding evidence that a mouse has taken up residence in our basement." *Id.*

The Congressional Record evinces no other floor debate or discussion. *Id.* Sen. Helms' amendment was codified, unchanged. Compl., at ¶¶ 56-57, citing 7 U.S.C. § 2132(g).

The Helms Amendment stripped birds born in laboratories of precisely those protections identified above, *id*. at ¶¶ 59-63, including the requirement that facilities weigh alternatives to painful experimentation, and protections from excessively tight confinement, repeated surgeries lacking appropriate sedatives or pain medication performed by unqualified students, and inhumane death. *Id.*

III. Plaintiffs' Deprivations

Plaintiffs are 30 barn owls born in laboratories at JHU, the University of Maryland, and Stanford, Compl., at ¶¶ 13, 32, who suffer deprivations practically designed around the Helms Amendment. Confined to a JHU laboratory alleged to lack species-appropriate housing as defined by the AWA's implementing regulations, *id*. at ¶ 34, Plaintiffs, as described in experimenters' own grant application, are or will be subjected to many surgical procedures without provision of appropriate pain medication, performed by students as part of a "learning process." *Id*. at ¶¶ 36-38. The purpose of these surgeries is to implant and place recording equipment and electrodes in Plaintiffs' brains, a process that inevitably ruptures, severs, and pulls blood vessels, leading to bleeding, serum protein leakage, infiltration of blood cells, tearing and rupturing of cell bodies and processes, and tissue mutilation. *Id*. at ¶ 37.

Plaintiffs will then be restrained for up to 12 hours at a time—bombarded with harmful visual and auditory stimuli while being held in a head-fixation device and stuffed in plastic tubes and jackets, with bolts attached to their skulls, their eyelids clamped open, and earphones inserted within five millimeters of their eardrums. *Id*. at ¶¶ 35, 39-44.

Ultimately, the Helms Amendment serves as Plaintiffs' death sentence. Experimenters, not bound by 9 C.F.R. § 2.31(d)(1)(xi), will kill Plaintiffs in an inhumane manner—either when Plaintiffs become too physically or psychologically injured to be of further use to experimenters, or else when the experiments end, as if they are cheap, disposable instruments. Compl., at ¶ 45.

IV. Next Friends' Efforts to Save Plaintiffs

These horrifying deprivations have inspired unique backlash. People for the Ethical Treatment of Animals, Inc. ("PETA"), which has won many victories for non-human animals suffering in laboratories, has labored relentlessly on Plaintiffs' behalf during the course of many years, working with a broad coalition to advance Plaintiffs' best interests and save them from their fate under the Helms Amendment. Compl., at ¶¶ 14-15. These efforts include public records requests, letter writing campaigns not only to JHU but also to public officials and members of the public in positions where they may realistically be of assistance to Plaintiffs, media campaigns, public petitioning, in-person lobbying of public officials, and public protests and other campaigning at or directed to the JHU campus. *Id.* at ¶ 15.

A crucial component of the campaign is leveraging physical proximity and direct relationships to JHU and, by extension, Plaintiffs. Lana Weidgenant, a recent JHU student and public health major at JHU, provided—and plans to continue providing—on-the-ground assistance to Plaintiffs. *Id.* at ¶ 20. In the past, she has introduced resolutions to aid Plaintiffs within JHU student government, hosted a symposium at JHU highlighting Plaintiffs' circumstances, and advocated for Plaintiffs with members of the JHU student body and with the JHU student newspaper. *Id.* at ¶¶ 19-20. Dr. Martin Wasserman, the former Secretary of Health and Mental Hygiene for the State of Maryland, has leveraged his position as both a prominent alumnus of the JHU School of Medicine and a Director at the JHU School of Public Health to help lobby Maryland State Senator Benjamin F. Kramer on behalf of Plaintiffs. *Id.* at ¶¶ 17-18.

Another crucial campaign goal is raising public awareness of Plaintiffs' circumstances and directing that awareness toward methods that stand a realistic chance to help Plaintiffs. To this end, Evanna Lynch, an award-winning animal welfare activist and actor, has called on JHU's president, in a personalized letter, to end the "grotesque cruelty," tight confinement, and death sentence inflicted on Plaintiffs. *Id.* at ¶¶ 21-22. Ms. Lynch has also spread this message to her millions of social media followers and fans. *Id.* at ¶ 22.

V. The Instant Lawsuit

PETA, Lana Weidgenant, Dr. Martin Wasserman, and Evanna Lynch (together, "Next Friends") filed the instant lawsuit on April 8, 2021 on behalf of Plaintiffs, who are otherwise unable to vindicate their Constitutional right to be free from laws like the Helms Amendment that single them out for punishment. Compl., at ¶ 23. Because Plaintiffs are confined in a JHU laboratory, Next Friends believe the appearance of an alternative next friend with a more direct relationship to Plaintiffs is entirely precluded. *Id.* This lawsuit seeks redress of—by ending—Plaintiffs' unconstitutional deprivations via declaratory relief declaring the Helms Amendment to be in violation of Article I, § 9 of the U.S. Constitution and permanent injunctions restraining Defendants Vilsack and Shea, as well as their officers, employees, or agents, from ceasing to enforce existing AWA regulations and requirements that would otherwise benefit Plaintiffs and others similarly-situated, and requiring Defendants Vilsack and Shea to promulgate and enforce any other such standards. *Id.* at ¶ 9.

On July 15, 2021, the United States moved to dismiss the instant lawsuit under Rules 12(b)(1) and 12(b)(6). Plaintiffs, by and through their Next Friends, respond in opposition.

STANDARD OF REVIEW

To survive a motion to dismiss, a complaint need only "contain sufficient factual matter, [if] accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "In evaluating a Rule 12(b)(6) motion, the Court must construe the complaint in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged." *Bowser v. Smith*, 314 F. Supp. 3d 30, 33 (D.D.C. 2018) (quoting *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012)). The same is true for a motion under Rule 12(b)(1). *Jerome Stevens Pharms., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). In deciding a motion to dismiss for lack or jurisdiction, "courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987) (quoting *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975)). Plaintiffs are similarly entitled to "the benefit of all inferences that can be derived from the facts alleged." *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005) (quoting *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004)).

ARGUMENT

The Helms Amendment singles out Plaintiffs—as birds born in laboratories—and subjects them all to death, harsh confinement, and torture by excluding them from the safeguards of the AWA. In so doing, it recalls, both in structure and effect, the infamous history of bills of attainder as well as subsequent laws held unconstitutional under Article I, § 9. Removing all doubt as to the Helms Amendment's function and purpose, the only support offered in Congress is a speech by its sponsor justifying the exclusion of certain taxonomic units of non-human

animals from legal protections because, in his view, these groups would otherwise be "food for reptiles" who merit "extermination."

Plaintiffs—as barn owls confined in a laboratory—cannot avoid their unconstitutional attainder except by and through Next Friends. Because Next Friends represent all facets of an extensive campaign to rescue Plaintiffs, reaching not only public officials and regulators but also the close physical proximity of the JHU campus, Next Friends have standing to bring this case on behalf of these thinking and feeling individuals.

There is no Constitutional barrier to Plaintiffs' own standing. Though Plaintiffs are barn owls, precedent from across the country clarifies that non-human animals enjoy standing to the extent positive law—here, Article I, § 9—confers rights on them. Because the Helms Amendment inflicts a cognizable constitutional injury on Plaintiffs, and because its abolition—and enforcement of existing AWA provisions, including those that would protect all animals—would redress their injuries, Plaintiffs present a valid case or controversy.

I. Plaintiffs, Having Been Singled Out For a Death Sentence, Have a Valid Cause of Action Under the Bill of Attainder Clause

The Bill of Attainder Clause is a blanket prohibition on Congress, stating: "No Bill of Attainder ... shall be passed." U.S. Const., Art. I, § 9, cl. 3. The particular history of the Bill of Attainder Clause, and its application by courts including the Supreme Court and D.C. Circuit, makes it a uniquely appropriate vehicle for redressing Plaintiffs' injuries under the Helms Amendment.

A. The Helms Amendment Functions as a Bill of Attainder by Singling Out Plaintiffs as Birds Born in Laboratories

By its text, the Helms Amendment applies to all "birds, rats of the genus Rattus, and mice of the genus Mus, bred for use in research." Compl., at ¶ 57, citing 7 U.S.C. § 2132(g). This language satisfies the first test of whether a law functions as a bill of attainder, which is whether

it applies with sufficient specificity "either to named individuals or to easily ascertainable members of a group." *United States v. Lovett*, 328 U.S. 303, 315 (1946).

Key criteria are whether the singled-out class is obvious and irreversible. A 1959 law banning past and present Communist Party members from holding union office offers an exemplary case—being held to act with specificity because, rather than setting a "generally applicable rule decreeing that any person who commits certain acts or possesses . . . characteristics which, in Congress' view, make them likely to initiate political strikes . . . shall not hold union office," the law designated an "easily ascertainable" group who possessed the feared characteristics. *United States v. Brown*, 381 U.S. 437, 449-450 (1965). Similarly, a clause in the Reconstruction-era Missouri constitution that imposed civil and professional penalties for failure to swear an oath that one had never been in service to the Confederate States of America was deemed to act with specificity because, to the "whole classes of individuals [wh]o would be unable to take the oath[,] . . . there is no escape provided." *Cummings v. Missouri*, 71 U.S. 277, 327 (1866). *See also SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 671 (9th Cir. 2002) (holding that the Oil Pollution Act of 1990 "displays the first hallmark of a bill of attainder" for defining an easily-ascertained class "by the irreversible act of having spilled a specified quantity of oil").

Supreme Court precedent not finding specificity tends to focus on the lack of easy ascertainability and reversibility. An amendment to the Taft-Hartley Act requiring labor leaders to file an affidavit affirming they were not Communists was permitted because they were "free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past." *Am. Commc'ns Ass'n, C.I.O., v. Douds*, 339 U.S. 382, 413-414 (1950). A law requiring "Communist-action" organizations to register with a review board was

not a bill of attainder because the law applied to "designated activities" and not "the [Communist] Party by name." *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 84 (1961). A law conditioning student financial aid on selective service registration was non-specific because the law provided a prospective opportunity for compliance. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Grp.*, 468 U.S. 841, 857 (1984).[1]

These features make Plaintiffs a paradigmatic class for bill of attainder purposes. Plaintiffs are 30 barn owls born in laboratories. Compl, at ¶¶ 13, 32. Their status as "birds . . . bred for use in research" is "easily ascertainable." *Lovett*, 328 U.S. at 315-16. No choice of conduct will change that—their status is "irreversible." *Selective Serv. Sys.*, 468 U.S. at 848.

Defendants protest too much in arguing that "courts in this Circuit have made no findings as to the Clause's applicability to animals" and that Plaintiffs' complaint "fail[s] to cite even a single case, in which any court in the country has held that the Constitution's bill of attainder clause specifically pertains to non-human animals." MTD, at 16. While Plaintiffs' complaint concedes that their status as non-human animals presents a "novel issue," Compl., at ¶ 1, this is common to bill of attainder challenges, which the Supreme Court has recognized as a vehicle to protect "individual persons and private groups . . . who are peculiarly vulnerable." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (rejecting challenge to Voting Rights Act of 1965). What matters is that Plaintiffs, like other vulnerable groups, are uniquely at risk of nonjudicial determinations of guilt via laws singling them out for punishment. *See In re Adoption*

[1] *Elgin v. Dep't of Treasury*, cited by Defendants, MTD, at 15, also concerned a challenge to the Military Selective Service Act. 641 F.3d 6, 7 (1st Cir. 2011). The majority opinion in that case did not reach any bill of attainder questions, but instead held that the Civil Service Reform Act provided the exclusive remedy for federal employees to challenge the constitutionality of their removal. The concurring opinion cited by Defendants, which did discuss the Bill of Attainder Clause, would have found specificity lacking for the same reason as *Selective Serv. Sys.*— because the law penalized only prospective conduct. *Id.* at 21 (Stahl, J., concurring).

of Doe, 2008 WL 5070056, at *23 n.19 (Fla. Cir. Ct. Aug. 29, 2008) (citing *Katzenbach* in striking down gay adoption ban).

Defendants' argument that the Helms Amendment cannot act with specificity because it singles out "categories of animals [that] in fact fall outside the requirements of the AWA and therefore cannot be said to be a target of the statute," MTD, at 24, has no basis. The Supreme Court has recognized that "legislative acts, no matter what their form," can run afoul of Article I, § 9. *Lovett*, 328 U.S. at 315 (citing *Cummings*, 71 U.S. at 323 and *Ex parte Garland*, 71 U.S. 333 (1866)). The Helms Amendment is functionally the same as the law at issue in *Selective Serv. Sys.*, which made non-registrants ineligible for any assistance or benefit provided under Title IV of the Higher Education Act of 1965. 468 U.S. at 843. Although a "grace period" negated specificity, no Justice identified that law's structure as a barrier to specificity. *See id.* at 850 ("Because it allows late registration, § 12(f) is clearly distinguishable from the provisions struck down in *Cummings* and *Garland*."). Creation of classes who fall outside the protection of other laws is a recurring feature of bills of attainder. *See, e.g.*, *Garland*, 71 U.S. at 379-380 (nullifying bill of attainder that superseded the Judiciary Act of 1789 by making lawyers who had failed to swear a loyalty oath prescribed in 1862 ineligible for admission to federal courts, explaining that "[t]he question, in the case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution."). Defendants' view that "the language of the [Helms Amendment] imposes no burden whatsoever," MTD, at 27, would, if accepted, negate this precedent.

Defendants also are off-base to suggest that targeted groups must typically be those seeking "to overthrow the government." MTD, at 15. Although Defendants twice observe that

the Supreme Court has overturned only five legislative acts under Article I, §§ 9-10, *id.* at 15, 27, this ignores that lower courts have found a diverse array of legislative acts to be bills of attainder. *See, e.g.*, *Foretich v. United States*, 351 F.3d 1198, 1225 (D.C. Cir. 2003) (law preventing parent from having contact or visitation with daughter); *Consol. Edison Co. of New York v. Pataki*, 292 F.3d 338, 345 (2d Cir. 2002) (state regulation of nuclear facilities); *In re Adoption of Doe*, 2008 WL 5070056, at *27 (Florida ban on gay adoption).

Defendants similarly overreach in suggesting that Plaintiffs "have no legally cognizable injury-in-fact . . . because the constitutional protections against bills of attainder historically were intended only for specific persons." MTD, at 16. Article I, §§ 9-10 always have encompassed laws "directed against a whole class" consisting of "thousands," *Cummings*, 71 U.S. at 310, 323, including "large groups" identified "by description rather than name." *Brown*, 381 U.S. at 461. *See id.* at 444 (quoting Alexander Hamilton writing in support of the Bill of Attainder Clause, recognizing the risk that a legislature would act against "any number . . . by general descriptions."). *See also* Matthew Steilen, *Bills of Attainder*, 53 Hous. L. Rev. 767, 804, 818, 826, 836, 849-850, 852-853, 882, 885 (2016) (recounting examples from Tudor and Stuart England as well as colonial, Revolutionary, and post-Revolutionary New York and Pennsylvania in which bills of attainder were wielded against large groups identified by description). This remains true. *See In re Adoption of Doe*, 2008 WL 5070056. In addition, and as Defendants concede, Article I, §§ 9-10 already protects non-human corporations. MTD, at 16. *See Consol. Edison Co. of New York*, 292 F.3d at 346-47 (affirming decision in favor of utility company). *See also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995) (assuming the Bill of Attainder Clause applies to firms); *Kaspersky Lab, Inc. v. U.S. Dep't of Homeland Sec.*, 909 F.3d 446, 453 (D.C. Cir. 2018) (same); *SeaRiver Mar. Fin. Holdings*, 309 F.3d at 668 n.3 (same);

Club Misty, Inc. v. Laski, 208 F.3d 615, 617 (7th Cir. 2000) (same); *BellSouth Corp. v. FCC*, 144 F.3d 58, 63 (D.C. Cir. 1998) (same); *SBC Commc 'ns., Inc. v. FCC*, 154 F.3d 226, 234 n.ll (5th Cir. 1998) (same).

Finally, Defendants are mistaken that the Bill of Attainder Clause cannot apply to Plaintiffs because this would be inconsistent "with the pattern already established by the judiciary with respect to the Thirteenth Amendment and the writ of habeas corpus[.]" MTD, at 16. The Southern District of California stated in *Tilikum ex rel. PETA v. Sea World Parks & Entertainment, Inc.* that its holding was contingent on its view that historical sources and the *Slaughter-House Cases* compelled the conclusion that the concepts of "slavery" and "involuntary servitude" in the Thirteenth Amendment refer only to humans. 842 F. Supp. 2d 1259, 1262-64 (S.D. Cal. 2012). That court rejected the idea its holding should be part of a pattern, explicitly leaving open the question of whether other amendments or "fundamental constitutional concepts" may extend to non-human animals. *Id.* at 1264.

State courts considering habeas corpus have also been clear that their holdings denying relief to non-human animals are contingent and subject to change. *See, e.g.*, *Nonhuman Rts. Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1056-59 (2018) ("I write to underscore that denial of leave to appeal is not a decision on the merits of petitioner's claims. The question will have to be addressed eventually. . . . Although I concur in the Court's decision to deny leave to appeal now, I continue to question whether the Court was right to deny leave in the first instance. The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it." (Fahey, J., concurring)); *The NonHuman Rights Project v. Breheny*, No. 260441/19, 2020 WL 1670735, at *10 (N.Y. Sup.

Ct. Feb. 18, 2020) (recognizing, despite constraints imposed by state court precedent, that an elephant "is more than just a legal thing, or property," but "is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty."). Moreover, in a habeas case cited by Defendants, *People ex rel. Nonhuman Rts. Project, Inc. v. Lavery*, the Third Department of the New York Appellate Division acknowledged that "[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not, however, end the inquiry, as the writ has over time gained increasing use given its 'great flexibility and vague scope.'" 124 A.D.3d 148, 150-51 (N.Y. 2014) (internal citation omitted)).[2] The holding in that case is currently up for reconsideration before the New York Court of Appeals. *Matter of Nonhuman Rts. Project, Inc. v. Breheny*, 36 N.Y.3d 912 (2021).

B. The Helms Amendment Punishes Plaintiffs by Inflicting Exactly Those Deprivations Recalling the Infamous History of Bills of Attainder

Defendants are correct that paradigmatic bills of attainder from history "referred to acts of the English parliament that subjected a specific individual or members of a particular group to death." MTD, at 25. As recognized by the D.C. Circuit, "[t]he historical experience with bills of attainder in England and the United States 'offers a ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of Art. I, § 9.' . . . This checklist includes sentences of death, bills of pains and penalties, and legislative bars to participation in specified employments or professions." *Foretich*, 351 F.3d at 1218 (internal citations omitted).

[2] The Appellate Division concluded that the liberty interests at stake depended on the "societal obligations and duties" of the purported rights-holder. *Lavery*, 124 A.D.3d at 151. This was premised on a misapprehension of historical evidence—the Appellate Division cited a misquotation found in the 7th edition of Black's Law Dictionary. *Id.* at 151-152. The correct version of this quotation, included in the 11th edition, is cited below. *Infra, at* 32.

Although the Supreme Court has devised additional tests for evaluating modern challenges to laws or regulatory action as bills of attainder—looking to legislative function and intent—the presence of "forbidden deprivations" evoking "the infamous history of bills of attainder," rather than "new burdens and deprivations," is both the "starting point" and potentially dispositive point of inquiry. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 473 (1977) (rejecting challenge to law assigning custody of President Nixon's papers and recordings). Defendants err in largely skipping this inquiry and resting instead on their mistaken view that a law that singles out groups for exclusion from the protection of other laws cannot be a bill of attainder. *See* supra, at 13, citing *Selective Serv. Sys.*, 468 U.S. at 843, 850; *Lovett*, 328 U.S. at 315; *Ex parte Garland*, 71 U.S. at 379-380.

In this case, Plaintiffs are seeking protection from the "very particular thing" a bill of attainder meant "[t]o subjects of the British crown." *Kaspersky Lab, Inc.*, 909 F.3d at 454-61. That modern bill of attainder jurisprudence has expanded to include penalties short of death and imprisonment, *see* MTD, at 15, 23, is no reason to discount the most relevant historical antecedents. Death sentences are the archetypal bills of attainder. *See Nixon*, 433 U.S. at 473-474 (recognizing this history and citing 1685 bill of attainder sentencing James Scott, 1st Duke of Monmouth, to death). The one attainder mentioned during the Constitutional Convention—that of Thomas Wentworth, 1st Earl of Strafford—was a death sentence. *See* The Records of the Federal Convention of 1787 Vol. 2, ed. Max Farrand (New Haven: Yale University Press, 1911), *available at* https://oll.libertyfund.org/title/farrand-the-records-of-the-federal-convention-of-1787-vol-2#Farrand_0544-02_4341. Historical bills of attainders from their Tudor "heyday" included death sentences targeting large groups by description. *See, e.g.,* Steilen, *supra*, at 804,

citing 26 Hen. 8 c. 25 (attainting followers of the 9th Earl of Kildare); 28 Hen 8 c. 18 (attainting followers of the 10th Earl of Kildare).

Nonetheless, Defendants contend the Bill of Attainder Clause is not implicated because "the Owls ha[ve] not suffered anything resembling the sorts of legislative punishments historically deemed to be bills of attainder." MTD, at 25. In making this argument, Defendants barely acknowledge that Plaintiffs will all be killed. Compl., at ¶ 45.[3] They ignore that Plaintiffs are subject to confinement in inadequate enclosures. *Id.* at ¶ 34. They ignore that Plaintiffs are subject to repeated surgeries by amateurs, without appropriate pain medication. *Id.* at ¶¶ 35-38. They ignore that Plaintiffs are subject to mutilation from electrodes, head-fixation devices, plastic tubes and jackets, and harmful visual and auditory stimuli. *Id.* at ¶¶ 39-44. And they ignore that this is the result of the Helms Amendment and its exclusion of Plaintiffs from the protections of the AWA and its implementing regulations, including 9 C.F.R. §§ 1.1, 2.31(d)(1) and 3.125-3.142. *Id.* at ¶¶ 53-63. Because the Supreme Court has held that a "statutory enactment that imposes any of those sanctions . . . would be *immediately* constitutionally suspect," *Nixon*, 433 U.S. at 473 (emphasis added), these facts should be dispositive.

C. In Stating Those Like Plaintiffs Merit 'Extermination,' Sen. Jesse Helms Evinced Punitive Intent

While consideration of legislative function and intent may be required only during analysis of "new burdens and deprivations," *Nixon*, 433 U.S. at 475, these alternative tests also compel a decision in Plaintiffs' favor. Here, evaluating legislative intent is aberrantly straightforward—this is the rare case with "'smoking gun' evidence of congressional

[3] This fact alone underscores the inappropriateness of the tone of Defendants' motion to dismiss—which, if successful, will eliminate the only foreseeable barrier to Plaintiffs' deaths at the hands of experimenters. *See, e.g.*, MTD, at 1 ("Courts give a hoot about standing . . . this Complaint should be dismissed in one fell swoop"), 30 ("This Court should decline to allow Representatives' novel theory to grant constitutional rights to barn owls to soar.").

vindictiveness." *BellSouth*, 144 F.3d at 67 (finding that "a few scattered remarks referring to anticompetitive abuses allegedly committed . . . in the past" did not qualify). Only one speech, by Sen. Helms, comprised the entire Congressional record supporting or opposing the Helms Amendment. Compl., at ¶ 55. The Helms Amendment was codified into law unchanged. *Id.* at ¶¶ 56-57.

Defendants appear to agree that Sen. Helms's speech is the starting and ending point of this analysis. Per Defendants, "[t]he non-punitive legislative intent behind the Helms Amendment could not be clearer[a]s evidenced by the floor speech delivered by Senator Helms in support[.]" MTD, at 28. This is the correct inquiry. *See Nixon*, 433 U.S. at 478-480 (reviewing floor debates to evaluate legislative intent, and relying on the words of a "key sponsor"). *See also Leake v. Long Island Jewish Med. Ctr.*, 695 F. Supp. 1414, 1417 (E.D.N.Y. 1988), *aff'd and remanded*, 869 F.2d 130 (2d Cir. 1989) ("Congressional intent may be inferred from the statement of a sponsor on the floor."), citing *Regents of the University of California v. Public Employment Relations Board*, 485 U.S. 589 (1988). But Defendants are wrong that the speech is evidence of the "opposite" of non-punitive intent and "wholly devoid" of animus. MTD, at 28-29.

Defendants neglect Sen. Helms' own words in arguing that Sen. Helms was dispassionately focused on avoiding "the added burden of costly paperwork and bureaucratic processes," *id*. at 28, and that it is "baseless and conclusory" to characterize Sen. Helms' floor speech "as 'cruel' and 'sarcastic.'" *Id.* at 30. Nothing, save animus, required Sen. Helms to ask his colleagues if they had "ever seen a hungry python eat a mouse," because there was little reason to care about what happens in a laboratory when these non-human animals might otherwise be "food for reptiles" or "end up as a tiny bulge being digested inside an enormous

snake[.]" Compl., at ¶ 55. A fear of "duplicative regulatory processes" and "unnecessary costs," MTD, at 28, hardly would seem to motivate Sen. Helms's announcement that, if members of the targeted groups showed up in his home, he would subject them to "extermination," because "I suspect Mrs. Helms would have a word or two for me if I forgot to phone the exterminator upon finding evidence that a mouse has taken up residence in our basement." Compl., at ¶ 55. It is revealing that, although Defendants deny that Sen. Helms's speech can be read as "serving as a rebuke on the 'animal rights crowd,'" MTD, at 30, this was literally part of his closing remarks: "So, Mr. President, I hope the Senate will resist the extremism of activists and deliver a richly deserved rebuke to the methods of these people who are protesting so mightily." 148 Cong Rec. S612-01 (Feb. 12, 2002), at S617.

A court does not need to ask whether Congress—or Sen. Helms—intended to inflict literal retribution. *Brown*, 381 U.S., at 458-59. ("It would be archaic to limit the definition of 'punishment' to 'retribution.'"). Nor does a court need to conclude, as Defendants ask with their repeated invocations of paperwork, MTD, at 28, "that Congress's purposes were entirely benign on the basis of statements in the legislative record" that "appear conveniently self-serving." *Foretich*, 351 F.3d at 1226. It is enough where, as here, there is "a congressional determination of blameworthiness and infliction of punishment" etching "expressed contempt" into the Congressional record. *Id*. at 1225.

No aspect of Sen. Helms' speech is as "self-serving" as his invocation of National Institutes of Health ("NIH") animal welfare policies. As a defense to the charge the Helms Amendment is a bill of attainder, MTD, at 29, NIH policies are non sequiturs. Defendants do not claim—nor could they—that NIH policies remedy loss of those AWA protections that would otherwise prevent infliction of death, harsh confinement, and torture on Plaintiffs, as well as

APHIS enforcement of the same. As Defendants implicitly concede, *id*. at 4 n.1, NIH grant approvals—and applicable NIH policies—allow Plaintiffs to suffer from inadequate enclosures, repeated surgery by amateurs without appropriate pain relief, torture by electrodes, restraining devices, harmful stimuli, and summary death, all without serious and sufficient consideration of alternatives. Compl., at ¶¶ 13, 34-45, 60.

Defendants also err in suggesting that the Helms Amendment lacked punitive intent because it somehow codified the original intent of Congress. MTD, at 28. This Court previously held that Defendants' interpretation of the pre-Helms Amendment AWA is not only wrong, but antithetical to "the plain language of the statute." *Alternatives Rsch. & Dev. Found. v. Glickman*, 101 F. Supp. 2d 7, 15 (D.D.C. 2000) (Huvelle, J.) (holding that the USDA lacks "unreviewable discretion to exclude birds, mice, and rats from the AWA's protection"). Sen. Bob Dole correctly explained the relevant history in 2001, stating that "[w]hen Congress stated [in 1970] that the AWA applied to 'all warm-blooded animals,' we certainly did not intend to exclude 95 percent of the animals used. . . . I am aware of efforts by opponents of animal welfare to prevent coverage of birds, mice, and rats as detrimental to research. This notion is preposterous." Compl., at ¶ 54.

D. The Helms Amendment Lacks Necessary Safeguards While Imposing Deprivations Serving No Nonpunitive Purpose

The "functional test"—considering "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"—is subordinate when a law imposes "forbidden deprivations." *Nixon*, 433 U.S. at 475-476. Although some D.C. Circuit precedent has found that in some cases the functional test may be the "most important," none of these cases considered presumptively "forbidden" deprivations. *See BellSouth*, 144 F.3d at 62-67 (Telecommunications Act of 1996

limiting ability of operating companies to provide electronic publishing and Federal Communications Commission order implementing law were not bills of attainder); *Siegel v. Lyng*, 851 F.2d 412, 416-18 (D.C. Cir. 1988) (penalties imposed via administrative enforcement action for violations of Perishable Agricultural Commodities Act not a bill of attainder). The D.C. Circuit recognizes that functional analysis is subsequent to consideration of whether a law "falls outside the historical definition of punishment," *BellSouth*, 144 F.3d at 65, because history offers a "ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of Art. I, § 9." *Foretich*, 351 F.3d at 1218 (quoting *Nixon*, 433 U.S. at 473).

Nevertheless, the functional test also reveals the Helms Amendment as a bill of attainder. This test asks courts to "assess the balance" between the "purpose" and "burden" of a law. *Kaspersky Lab*, 909 F.3d at 455. This is a "stringent" test, often requiring more than a "rational basis" to "'ensure that 'the nonpunitive aims of an apparently prophylactic measure [are] sufficiently clear and convincing.'" *Id.* at 456 (original language from *BellSouth*, 144 F.3d at 65). It is not enough that the Helms Amendment might be "a means to serve the medical research community." MTD, at 27. As described in *Foretich*, "where there exists a significant imbalance between the magnitude of the burden imposed and a purported nonpunitive purpose, the statute cannot reasonably be said to further nonpunitive purposes." 351 F.3d at 1221. In that decision, the D.C. Circuit reversed the district court and held that a federal law preventing a noncustodial parent from obtaining visitation with his daughter was a bill of attainder. *Id.* at 1226. This law failed the functional test because the "means employed"—legislation allowing a teenager to withhold consent to visitation with an allegedly-abusive parent —was "merely incidental" to

promoting a child's best interests given the "severe burden" placed on the plaintiff. *Id.* at 1223-24.

Defendants ignore in their entirety allegations explaining that Plaintiffs' deprivations serve no nonpunitive end. MTD, at 26-27.[4] But these allegations, taken as true, establish that these deprivations yield nothing that justifies killing, confining, and torturing Plaintiffs. The experimenters' own grant application concedes that they use owls because they consider them easy and convenient to study. Compl., at ¶ 47. As alleged, there are no direct inferences that can be drawn between owls and the ostensible beneficiaries, humans with attention deficit disorders. Owl vision is adapted to low-light conditions, their ears are asymmetrical and work in tandem with sound-reflective feathers (lacking in humans), and they rely on different forms of brain function for auditory and visual attention control. *Id.* at ¶¶ 48, 51. In addition, because of acute and chronic stress from captivity and laboratory and experimental conditions, experiments on Plaintiffs cannot capture species-typical auditory and visual processes. *Id.* at ¶ 49. The lead JHU experimenter effectively concedes the latter point, explaining at a medical school event in 2020 that experiments on head-fixed animals like Plaintiffs could cause experimenters to "misinterpret" or "misunderstand" their data. *Id.* at ¶ 50.

The Helms Amendment makes no accommodation for Plaintiffs or any similarly situated birds, mice, or rats born in laboratories subject to experiments of negligible benefit to humans.

[4] Instead, Defendants again argue that Plaintiffs "fail to identify any burden that the Helms Amendment imposes." MTD, at 27. Aside from ignoring the many allegations describing the deprivations inflicted on them, Compl., at ¶¶ 33-45, and describing with precision the provisions of the AWA and its implementing regulations that would protect them were they to be defined as "animals" under 7 U.S.C. § 2132(g), *see id.* at ¶¶ 53-63, this appears to be another reference to Defendants' mistaken view that a law that excludes singled-out groups from the protection of other laws cannot be a bill of attainder. *See* supra, at 13, citing *Selective Serv. Sys.*, 468 U.S. at 843, 850; *Lovett*, 328 U.S. at 315; *Ex parte Garland*, 71 U.S. at 379-380.

But protective safeguards are not hard to imagine. It is ironic that Defendants cite the Congressional Policy Statement to the AWA, codified at 7 U.S.C. § 2131, as evidence that the *Helms Amendment* lacks punitive function. MTD, at 26-27. The AWA is the source of safeguards that the Helms Amendment eliminated for targeted groups. An example: Under an AWA regulation that applies to all covered animals, facilities like JHU must consider, and carefully document, alternatives to all procedures that may cause discomfort, distress, pain, or more than momentary or slight pain and distress. *Id.* at ¶ 60, citing 9 C.F.R. §§ 2.31(d)(i), (ii). As elaborated in Plaintiffs' complaint, but for the Helms Amendment this regulation should have protected Plaintiffs, since there is no shortage of viable and humane alternatives for studying attentional deficits in humans, including advanced neuroimaging techniques and computational and mathematical models. *Id.* at ¶ 60. This lack of "protective measures designed to safeguard the rights of burdened individuals or class," *Foretich*, 351 F.3d at 1222, is yet another reason the Helms Amendment is a bill of attainder.

II. Plaintiffs Have Standing Through Their Dedicated Next Friends

Next Friends have standing to seek the relief requested because Plaintiffs are inaccessible and have no other means of vindicating their legal interest in freeing themselves from a death sentence. That Plaintiffs are barn owls need pose no barrier under applicable precedent.

A. Next Friends Allege a Sufficient Connection to Plaintiff Barn Owls Under Supreme Court and D.C. Circuit Precedent

In arguing that Next Friends lack a "special relationship with [Plaintiff] barn owls" beyond "concerns regarding their well-being," MTD, at 13, Defendants both mischaracterize the allegations of Plaintiffs' complaint and neglect carefully-reasoned precedent.

Next Friends meet the standard established by the Supreme Court in *Whitmore v. Arkansas*, 495 U.S. 149 (1990), and developed by courts in this Circuit. In *Whitmore*, the

Supreme Court reiterated two "firmly rooted prerequisites" for next friend standing: that a next friend "provide an adequate explanation—including inaccessibility, mental incompetence, or other disability" as to "why the party in interest cannot appear on their own behalf" and be "truly dedicated to the best interests of the person on whose behalf [they] seek to litigate." 495 U.S. at 163 (internal citations omitted). To this end, Next Friends allege that "Plaintiffs' circumstances—confinement in a laboratory—entirely preclude the appearance of anyone with a more direct relationship to Plaintiffs or of the practical representation of Plaintiffs' interests by others similarly situated." Compl., at ¶ 23. *See also id.* at ¶¶ 33-45 (describing conditions of Plaintiffs' confinement).

Plaintiffs' complaint and relevant precedent illustrate why this case presents unusual circumstances in which requiring a special relationship would be impractical and perverse. Despite Defendants' suggestion to the contrary, courts in the D.C. Circuit do not impose a rigid "significant relationship" test. MTD, at 12, citing *Naruto v. Slater*, 888 F.3d 418 (9th. Cir. 2018). For good reason. This was not a requirement of *Whitmore*, which recognized only that a significant relationship was "suggested" by lower courts. 495 U.S. at 163-64, citing *Davis v. Austin*, 492 F.Supp. 273, 275–276 (N.D. Ga.1980). *See also Whitmore*, 495 U.S. at 177 (Stevens, J., dissenting, recognizing that the "significant relationship" test was not part of holding). Rather, as this Court recognized in a 2017 decision, *American Civil Liberties Union Found. on behalf of Unnamed U.S. Citizen* ("ACLUF") *v. Mattis*, "[e]ven where no relationship—significant or otherwise—exists, next friend standing may be warranted in extreme circumstances." 286 F. Supp. 3d 53, 57-59 (D.D.C. 2017) (Chutkan, J.) (recognizing statements in *Whitmore* regarding significant relationship test are "dicta" the Supreme Court "did not opine on"). *See also Does v. Bush*, No. CIV.A.05 313 (CKK), 2006 WL 3096685, at *6 (D.D.C. Oct.

31, 2006) (Kollar-Kotelly, J.) (recognizing that the D.C. Circuit has not held "there must be 'some significant relationship' between a 'next friend' and the individual on whose behalf the 'next friend' seeks to act").

ACLUF is instructive. In that case, the non-profit ACLUF filed a habeas petition on behalf of an unidentified citizen detained by the United States overseas. *ACLUF*, 286 F. Supp. 3d 53. While ACLUF never met with the detainee, this Court held that next friend standing could be established in the absence of a relationship if "the petitioner makes 'an affirmative and convincing demonstration' of its dedication to the detainee's best interests, 'including a showing that [it has] made a reasonable effort to establish a relationship if none exists;' and (2) the petitioner can also show 'that the circumstances entirely preclude both the appearance as next friend of anyone with a relationship to the detainee[ ] as well as the practical representation of the detainee[ ]'s interests in court by others similarly situated.'" *Id.* at 59 (internal citation omitted). Under this test, this Court found that the detainee was in fact "inaccessible," that ACLUF established their dedication to his best interests by writing letters to the Department of Defense on detainee's behalf that were "met with silence," and that "absent the ACLUF's appearance as next friend, the detainee will have no other avenue" for relief "to which he is constitutionally entitled." *Id.* at 58-60.

Next Friends' efforts mirror ACLUF's. Plaintiffs' complaint catalogs years of vigorous effort by Next Friends to rescue Plaintiffs—including, but far from limited to, letters to JHU administrators from PETA and Ms. Lynch and to government officials from PETA that included requests that PETA be allowed to assist in re-homing Plaintiffs to a reputable sanctuary, efforts by Ms. Weidgenant to save Plaintiffs through JHU student government and campus organizing, and letters to and lobbying of federal and state regulators by PETA and Dr. Wasserman to have

the experiments on Plaintiffs halted. Compl., at ¶¶ 15-22.[5] Likewise, Plaintiffs' circumstances evoke those of a detainee. Plaintiffs, in their natural environments, would be free to form social bonds, mate for life, and enjoy home ranges spanning miles. *Id*. at ¶ 27. Instead, they are confined in a JHU laboratory where they lack the opportunity to engage in natural social and physical behavior while undergoing deprivations they experience as torture. *Id*. at ¶¶ 33-44. Unless the Helms Amendment is abolished, they will all die in that same laboratory. *Id*. at ¶ 45. Defendants' unsupported suggestion that, because Next Friends are (undisputedly) not related to Plaintiffs, they could only serve as next friends if they were "charged with the Owls[']s care" or had "an ownership interest in the Owls" is akin to a standard that would limit a detainee's potential next friends to their jailers. *Cf. ACLUF*, 286 F.Supp. 3d at 58 ("The court finds the Defense Department's position to be disingenuous at best, given that the Department is the sole impediment to the ACLUF's ability to meet and confer with the detainee.").

Defendants' assertions that "the relationship PETA enjoys with the barn owls here is no more unique than what it enjoys with any other animals on whose behalf it advocates" and that "these efforts are no more significant or unique than efforts expended on behalf of other animals as part of PETA's overall advocacy mission," MTD, at 12-13, while not supported by Plaintiffs' complaint, are irrelevant. PETA's standing to proceed as a next friend to Plaintiffs would not depend on it lacking similar standing in any other context, just as ACLUF's "experience in representing other U.S. citizens detained under similar circumstances" did not undermine its next friend standing. *ACLUF*, 286 F. Supp.3d at 57. Isolated news releases cited by Defendants about various efforts by PETA to combat cruelty to non-human animals provide no grounds for this

[5] The most recent such request by PETA was based on revelations that JHU experimenters violated state law by neglecting to obtain necessary permits from the Maryland Department of Natural Resources. Compl., at ¶ 15.

Court to conclude PETA's efforts with respect to Plaintiffs are only manifestations of its "overall advocacy mission." MTD, at 13. What matters is that the volume of effort cataloged in Plaintiffs' complaint, Compl., at ¶ 15, shows that PETA has done as much as is reasonably possible given Plaintiffs' inaccessibility, *see id*. at ¶¶ 23, 33-45, to demonstrate its dedication to Plaintiffs' best interests. *See ACLUF*, 286 F. Supp. 3d at 58-60. Even though a "district court may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction. . . . the court must still 'accept all of the factual allegations in [the] complaint as true[.]'" *Jerome*, 402 F.3d at 1253 (citation omitted). Such acceptance would include allegations regarding the resources PETA has devoted "to Plaintiffs' best interests, including efforts to save Plaintiffs from their fate under the Helms Amendment." Compl., at ¶ 15.

Defendants are similarly tendentious in dismissing the efforts of Next Friends Weidgenant, Wasserman, and Lynch as merely "writing a letter," "attending that institution as a student," "making requests to that institution," or "advocating generally for the rights of owls and other non-human animals." MTD, at 11. Rather, as Plaintiffs' complaint explains, Ms. Weidgenant has provided years of on-the-ground assistance to the campaign to save Plaintiffs—in more or less as close physical proximity as reasonably possible for anyone who is not actively furthering Plaintiffs' deprivations—by introducing resolutions to aid Plaintiffs within JHU student government, hosting a symposium at JHU highlighting Plaintiffs' circumstances, and advocating for Plaintiffs with members of the JHU student body and with the JHU student newspaper. Compl., at ¶¶ 19-20. Defendants' view that this is not a sufficiently "extensive relationship with the Owls" that can rise above generalized concern, MTD, at 13, fails to make any accommodation for Plaintiffs' genuine inaccessibility within a JHU laboratory. *See* Compl., at ¶¶ 23, 33-45. *See also ACLUF*, 286 F. Supp. 3d at 58-60.

Dr. Wasserman enjoys similarly deep relationships with JHU as both a prominent alumnus of the JHU School of Medicine and a former Director at the JHU School of Public Health, and has leveraged his position to help end the grant that funds Plaintiffs' deprivations. Compl., at ¶¶ 17-18. To demean Ms. Lynch's contributions as limited to "writing a letter" is to ignore the very next sentence in the complaint, which explains that Ms. Lynch's efforts reached millions. Compl., at ¶ 22. Together, Next Friends represent all facets of a campaign to rescue Plaintiffs, the span of which includes the close physical proximity of the JHU campus, relevant seats of government, and mass media. *Id.* at ¶¶ 15-22.

Defendants' reliance on *Naruto*, 888 F.3d at 421, only highlights the strength of Plaintiffs' allegations supporting Next Friends' standing. PETA did not claim any unique interest in the individual macaque at issue in that case, but instead alleged sufficient resources, expertise, and ideological interest. *Id*. at 420. By the time that case reached the Ninth Circuit, an individual co-Next Friend—who had known, monitored, and studied Naruto since his birth—had withdrawn from the litigation. *Id.* at 421. Moreover, the Ninth Circuit treated the presence of a "significant relationship" as a "requirement," *id.*, which is not mandatory here. *See, e.g.*, *ACLUF*, 286 F. Supp. 3d at 59. Because of the absence of any next friend with more than a generalized interest in Naruto—as is present here in spades, *see* Compl., at ¶¶ 14-23—and the doctrinal differences between the Ninth and D.C. Circuits on next friend standing, Defendants' comparison fails.

Another case cited by Defendants for the proposition that this Court should impose a special relationship test, *Muthana v. Pompeo*, 985 F.3d 893 (D.C. Cir. 2021), does not require this result. In *Muthana*, the D.C. Circuit recognized, citing Seventh Circuit precedent, what has been acknowledged above—that some jurisdictions do ordinarily require a significant

relationship. *Id.*, 985 F.3d at 901-902. *Muthana* then cites a First Circuit decision in observing that this "may not rigidly apply when a minor has no significant relationships." *Id.* at 902, citing *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 91 (1st Cir. 2010). This entire discussion, however, is dicta—because Muthana could proceed as next friend to his grandson, the court did not issue any holding on this ground. *Id.* at 901.

B. That Plaintiffs Are Barn Owls Should Pose No Barrier to Their Standing By and Through Next Friends

Defendants misread precedent and Plaintiffs' complaint in arguing that there is no basis for Plaintiffs to pursue litigation through Next Friends because their complaint "is silent as to how the . . . barn owls are either minors or incompetent persons." MTD, at 9.

This Court has previously recognized that next friend standing is not strictly limited to writs of habeas corpus and incompetent or minor humans. *Ali Jaber v. United States*, 155 F. Supp. 3d 70, 76 (D.D.C. 2016) (Huvelle, J.), *aff'd sub nom., Jaber v. United States*, 861 F.3d 241 (D.C. Cir. 2017) (recognizing "*Whitmore* itself was not a habeas case, but instead, it involved a prisoner's attempt to appeal his fellow inmate's state-court conviction and death sentence. . . . After pointing out that Congress had not authorized next friend standing in that context, the Court expressly declined to hold that such statutory authorization is necessary, instead finding that Whitmore failed to meet his burden on the merits. . . As such, the most natural reading of *Whitmore* is that next friend standing is not limited to habeas cases, but instead may be invoked if plaintiffs can sufficiently demonstrate its necessity." (internal citations omitted)). *See also Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 16-20 (D.D.C. 2010) (Bates, J.) (entertaining claim filed by next friend to vindicate purported Constitutional rights of a competent adult plaintiff, and otherwise rejecting next friend standing based in part on finding that nothing prevented plaintiff from appearing via a U.S. embassy overseas or videoconference).

As discussed above, the language cited by Defendants in *Muthana* musing about the limits of next friend standing is non-binding dicta. *Muthana*, 985 F.3d at 901. That the D.C. Circuit affirmed *Ali Jaber*'s holding under the political question doctrine, without calling into question its holding regarding next friend standing, should carry similar if not greater weight. *Jaber*, 861 F.3d at 245 (recounting the district court's holding on next friend standing).

To the extent statutory authorization is relevant, Defendants also ignore the allegations of Plaintiffs' complaint in arguing that Next Friends "do not argue that Owls are 'persons.'" MTD, at 10. While there is no dispute that Plaintiffs are non-human animals, *id.*, Plaintiffs' complaint explains that barn owls "are highly sensitive and intelligent creatures, with complex communication systems and cooperative social structures." Compl., at ¶ 26. The complaint goes on to show the extent to which altruism and cooperation "shape owl social relationships," *id.* at ¶ 28, and how "[o]wls, like humans, can be more or less fearful, shy, or outgoing." *Id.* at ¶ 29. Turning to Plaintiffs, the complaint explains that "[b]arn owls bred and reared in laboratories have individual worth and needs just like other barn owls," *id.* at ¶ 31, and that Plaintiffs "are each individuals with distinct personalities." *Id.* at ¶ 32. Although Plaintiffs' status as barn owls means they are incompetent to "vindicate their rights effectively except through appropriate representatives," *id.* at ¶ 23, they are otherwise "thinking and feeling individuals." *Id.* at ¶ 65.

This should be sufficient, without requiring this Court to go to any extreme lengths to "conjure" or "divine" standing. MTD, at 9-11. Use of the term "person" in statutes or precedent does not foreclose application to non-humans. For example, the Supreme Court has found that the Fifth Amendment's guarantee that "[n]o person shall … be subject for the same offence to be twice put in jeopardy of life or limb" protects the interest of non-human corporations to be similarly free from being made subject "to embarrassment, expense and ordeal" and having "to

live in a continuing state of anxiety and insecurity[.]" *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). *See also Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886) (corporations are persons under the Fourteenth Amendment). Courts have previously recognized that non-human animals can be "intelligent, autonomous being[s] . . . who may be entitled to liberty." *Breheny*, 2020 WL 1670735, at *10. *See also Lavery*, 31 N.Y.3d at 1056-59 (recognizing the injustice of not applying the rights of persons to chimpanzees, and observing that chimpanzees should have a "right to liberty" based on evidence of chimpanzees' "advanced cognitive abilities," including the ability—like Plaintiffs here, *see* Compl., at ¶ 30—to "make tools to catch insects" (Fahey, J., concurring)).[6] The allegations of Plaintiffs' complaint are consistent with the definition of "person" found in Black's Law Dictionary stating that, "[s]o far as legal theory is concerned, a person is any being whom the law regards as capable of rights *or* duties. Any being that is so capable is a person, whether a human being or not[.]" PERSON, Black's Law Dictionary (11th ed. 2019) (quoting John Salmond, *Jurisprudence* 318 (Glanville L. Williams ed., 10th ed. 1947) (emphasis added)). Defendants' reliance on an unduly constricted understanding of personhood is particularly ironic here, in litigation attempting to vindicate Constitutional rights that are already enjoyed by non-humans. *Supra*, at 14.

[6] While not binding on this Court, the many international courts recognizing the personhood of non-human animals is further evidence that Plaintiffs' standing allegations are not the "divine" leap portrayed by Defendants. *See, e.g.*, *Singh v. State of Haryana*, CRR-533-2013, para. 95(29) (High Court of Punjab and Haryana at Chandigarh, India May 31, 2019) (finding non-human animals to be "legal entities with distinct persona with corresponding rights . . . of a living person"), *available at* https://www.animallaw.info/case/karnail-singh-and-others-v-state-haryana.pdf; *In re Cecilia*, File No. P-72.254/15 at 32 (Third Court of Guarantees, Mendoza, Argentina, Nov. 3, 2016) (finding a chimpanzee to be a "legal person"), *available at* https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia translation-FINAL-for-website.pdf.

Defendants' citation of *Tilikum* to support their argument that non-human animals must lack standing is similarly misplaced. MTD, at 11, 14. The only Rule 17 analysis undertaken in *Tilikum* was an observation that "whether Next Friends may bring this action on behalf of Plaintiffs turns on whether Next Friends are 'entitled under the substantive law to enforce the right sued upon.' . . . The Rule 17 inquiry, like the standing inquiry, requires the court to determine whether the substantive law, the Thirteenth Amendment, affords Plaintiff any relief." 842 F. Supp. 2d at 1262 n.2. Likewise, the Southern District of California's Article III standing analysis was entirely premised on whether the Thirteenth Amendment afforded "redress for Plaintiffs' grievances." *Id.* at 1262-64. That court answered in the negative, based on its view of the singular historical question at issue, while specifically leaving as an open question whether other "fundamental constitutional concepts" protect non-human animals. *Id*. at 1264-65.[7]

Neither does *Cetacean Community v. Bush*, 386 F.3d 1169 (9th Cir. 2004), support Defendants' position on standing. Defendants are correct that *Cetacean Community* declined to find standing for non-human animals to sue under the Administrative Procedures Act, the Endangered Species Act, the Marine Mammal Protection Act, and the National Environmental Protection Act. 386 F.3d at 1171. But *Cetacean Community* also recognized that "Article III does

[7] Nevertheless, the context of slavery does hold potential relevance to this Court's analysis of the limits of next friend standing. To the extent that *Whitmore* should be read "in keeping with the ancient tradition of the [next friend standing] doctrine," 495 U.S. at 164, it is relevant that "[i]n an era in which slaves were not considered persons or citizens, it was entirely acceptable to allow actions to be brought by slaves . . . often through a white guardian or 'next friend,' to challenge unjust servitude." Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. Rev. 1333, 1361 (2000). *Cf. Whitmore*, 495 U.S. at 177 (Stevens, J., dissenting, recognizing that "[t]he requirements for next friend standing are creations of common law"). Prof. Sunstein cites this historical antecedent as support for the view that litigation on behalf of non-human animals is "perfectly acceptable as an understanding of the Constitution. . . . So long as the named plaintiff would suffer injury in fact, the action should be constitutionally acceptable." Sunstein, *supra*, at 1361.

not compel the conclusion that a statutorily authorized suit in the name of an animal is not a 'case or controversy.' . . . [N]othing in the text of Article III explicitly limits the ability to bring a claim in federal court to humans." *Id.* at 1175 (internal citations omitted). As Article III is no barrier to standing, the question becomes whether the source of law confers rights on the non-human animals in question. *Id.* at 1176. As explained above, *supra, at* 10-24, Article I, § 9 does so.

The same applies to *Lewis v. Burger King*, 344 F. App'x 470 (10th Cir. 2009), another case cited by Defendants. In that case, a pro se plaintiff proceeding in forma pauperis filed claims on behalf of a dog, Lady Brown Dog, who was asked to leave a Burger King in New Mexico. *Lewis*, 344 F. App'x at 471. The plaintiff claimed this violated Lady Brown Dog's rights under the Americans with Disabilities Act of 1990 ("ADA"). *Id.* As explained by the Tenth Circuit, Lady Brown Dog lacked standing under the ADA because "[t]he question of whether animals have standing depends on the content of positive law." *Id.* at 472, citing Sunstein, *supra,* at 1359. Meanwhile, in *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, concerning the alleged transfer of a dolphin from Sea World to the United States Navy absent the permit process required by the Marine Mammal Protection Act ("MMPA"), the District of Massachusetts's denial of standing depended on its finding that the MMPA did not authorize suits brought by animals. 836 F. Supp. 45, 49-50 (D. Mass. 1993).

Lavery is similarly unavailing, given that court's recognition that "[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not, however, end the inquiry, as the writ has over time gained increasing use given its 'great flexibility and vague scope,'" 124 A.D.3d at 150-151 (internal citation omitted), and the fact this holding is currently on appeal. *Breheny*, 36 N.Y.3d 912.

Defendants are, then, flatly wrong that *Cetacean Community* is an "exception" to a clear "line of precedent." MTD, at 14. Rather, all of the cases cited by Defendants concerning the standing of non-human animals support the view that such individuals can have Constitutional standing provided a cause of action exists, whether under Article I, § 9 or any other Constitutional provision. *Tilikum*, 842 F. Supp. 2d at 1262-264; *Cetacean Community*, 386 F.3d at 1175; *Lewis*, 344 F. App'x at 472; *Citizens to End Animal Suffering & Exploitation,* 836 F. Supp. at 49-50; *Lavery*, 124 A.D.3d at 150-151.[8]

C. Plaintiffs' Injuries Stemming From Defendants' Enforcement of the Helms Amendment Can Be Redressed

Defendants misread Plaintiffs' complaint in suggesting that the injuries alleged "lack redressability because the relief they seek, for the Department to implement avian-specific regulations, is not guaranteed to address . . . concerns regarding the Owls' alleged 'inhumane

[8] Defendants devote several pages to an argument that Next Friends cannot demonstrate their own Article III standing, either via organizational or personal injury. MTD, at 17-23. Although this digression is a non sequitur because Plaintiffs' complaint alleges no injury-in-fact on the part of Next Friends, this Court should note that Defendants misstate the test for organizational standing. PETA would not need to allege "that the Department has prevented PETA from educating the public on its avian-specific advocacy," *id*. at 18-19, that Defendants have prevented PETA from "engag[ing] in extensive and aggressive public advocacy as it relates to the treatment of barn owls," *id*. at 19, or that Defendants have "taken any action impeding PETA from pursuing any activity." *Id.* at 20. Rather, the test—if PETA were a plaintiff rather than a Next Friend—would be whether PETA was "perceptibly impaired" by diversion of operational resources that would have been used for other mission-advancing programs to efforts "to identify and counteract" injuries inflicted by Defendants' unconstitutional acts. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-379 (1982). *See also Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011) (organizational standing exists if the organization "undertook the expenditures in response to, and to counteract, the effects of" defendant's conduct).

Regardless, Defendants' digression is of no moment. While the complaint catalogs the "significant resources" PETA has dedicated "to Plaintiffs' best interests, including efforts to save Plaintiffs from their fate under the Helms Amendment," Compl., at ¶ 15, there is no allegation that PETA diverted any resources that would have gone to other mission-advancing programs in order to counteract the injuries inflicted by Defendants' enforcement of the Helms Amendment, either with respect to Plaintiffs or otherwise. *Id.* at ¶¶ 14-16, 23. None of the individual next friends allege personal or aesthetic injury. *Id.* at ¶¶ 17-23.

treatment' and 'torture.'" MTD, at 22. The same is true of Defendants' suggestion that, "even if the Department implemented standards for birds used in research, there is no guarantee that these standards will likely address" Plaintiffs' alleged injuries, *id.*, and their arguments that, "[a]side from a vague request for standards generally," Plaintiffs' complaint "provides no further explanation as to the nature of any hypothetical standards" and that "the relief sought . . . is of an entirely speculative nature." *Id.*

Rather, Plaintiffs' complaint shows exactly how abolition of the Helms Amendment would redress their injuries. Plaintiffs' complaint seeks enforcement of "existing AWA regulations and requirements governing the minimization of pain and distress, humane handling, care, treatment, and transportation of non-human animals by research facilities for the benefit of groups specified by the Helms Amendment." Compl., at ¶ 9. Defendants ignore that, absent the Helms Amendment, the USDA has already implemented and is currently enforcing regulations that, by their plain meaning, would apply to Plaintiffs.

These existing regulations should redress Plaintiffs' constitutional injuries. If the Helms Amendment is abolished but Defendants implement no new regulations, Plaintiffs still would benefit from the standards codified at 9 C.F.R. §§ 3.125-3.142 that apply to all warm-blooded animals as defined under the AWA other than dogs, cats, rabbits, hamsters, guinea pigs, non-human primates, and marine mammals. The latter standards would, for example, prohibit confinement of Plaintiffs in enclosures that do not provide sufficient space. Compl., at ¶ 62, citing 9 C.F.R. §§ 3.125-3.142.

In addition, regardless of the latter standards' sufficiency as applied to birds under the AWA, *see* MTD, at 22, other standards cited in Plaintiffs' complaint, codified at 9 C.F.R. § 2.31, are blanket rules benefiting *all* animals protected by the AWA that would place immediate

prohibitions on JHU. These regulations would limit the number of surgeries that can be inflicted on Plaintiffs, require that surgeries no longer be performed by inexperienced students as a "learning process," and require that these procedures include appropriate pain medication. Compl., at ¶ 63, citing 9 C.F.R. §§ 2.31(d)(1)(iv)-(x). Plaintiffs' complaint also describes how application of these regulations should redress the death sentence placed on Plaintiffs by the Helms Amendment. Absent the Helms Amendment, Plaintiffs' deaths would have to be "humane." *Id*. at ¶ 63, citing 9 C.F.R. § 2.31(d)(1)(xi). These regulations would also require JHU to consider and carefully document alternatives to experimentation on non-human animals that may cause discomfort, distress, or pain, or more than momentary or slight pain and distress—which, as alleged, should be sufficient to save Plaintiffs given the viable and humane alternatives for achieving the stated goals of the experiments at issue. *Id*. at ¶ 60, citing 9 C.F.R. §§ 2.31(d)(1)(i), (ii).

Defendants' citation of *PETA v. Dep't of Agric.*, 7 F. Supp. 3d 1 (D.D.C. 2013) ("*PETA I*"), *aff'd*, 797 F.3d 1087 (D.C. Cir. 2015) ("*PETA II*") is of no relevance to redressability. That litigation concerned the lawfulness of the USDA's inaction as to birds not born in laboratories, and whether the USDA had discretion to decide "whether specific standards are appropriate . . . or if the general standards will suffice[.]" *PETA I*, 7 F. Supp. 3d at 14. The instant lawsuit concerns the constitutionality of the Helms Amendment—which, by depriving Plaintiffs of the protection of even those general standards that protect all "animals" under the AWA, effectively sentences them to death, harsh confinement, and torture. Compl., at ¶¶ 57-58. This Court need not determine standards necessary under the AWA. Plaintiffs' complaint asks this Court to act within its competency to redress violations of Article I, § 9, *see* Compl., Prayer for Relief, at ¶¶ 1-5—while providing a roadmap for how this can be accomplished, including by merely

negating the Helms Amendment's exclusion of targeted groups from the definition of "animal" found in 7 U.S.C. § 2132(g). *See* Compl., at ¶¶ 58-63.[9]

CONCLUSION

For the foregoing reasons, Plaintiffs, by and through their Next Friends, respectfully request this Court deny Defendants' Motion to Dismiss.

Respectfully submitted,

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[9] Defendants' assertions concerning the "entirely speculative nature" of redressability, MTD, at 22, are all the more inapt given that the USDA is currently engaged in rulemaking to ensure the humane care and treatment of birds—albeit, because of the Helms Amendment, only those not born in laboratories. Meeting Notice, 85 Fed. Reg. 51368 (Aug. 20, 2020). Moreover, should the USDA, in a post-Helms Amendment world, make a concrete statement announcing a general non-enforcement policy as to birds born in laboratories, that action would be a violation of the AWA. *See* 7 U.S.C. § 2146 (requiring annual inspections of "each research facility at least once each year" for deficiencies or deviations from AWA standards). Finally, to the extent this Court deems any of Defendants' statements regarding *PETA I* and *PETA II* relevant, they should be read in conjunction with the recent decision of the D.C. Circuit holding that the USDA had, in fact, failed to take "discrete action" the AWA "require[d] it to take" in not issuing standards regarding the humane treatment of birds. *Am. Anti-Vivisection Soc'y v. United States Dep't of Agric.*, 946 F.3d 615, 620-621 (D.C. Cir. 2020) (internal citations omitted).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

30 BARN OWLS *et al*., Plaintiffs, v. TOM VILSACK, Secretary, U.S. DEPARTMENT OF AGRICULTURE, *et al.,* Defendants.	)	Civil Action No. 1:21-cv-0968 (TSC)

[PROPOSED] ORDER

Upon consideration of Defendants' Motion to Dismiss, Plaintiffs' opposition and any replies thereto, it is hereby ORDERED that Defendants' motion is DENIED.

It is FURTHER ORDERED that the Defendants must serve their answer upon Plaintiffs within 14 days of the date of this Order. SO ORDERED.

Dated

TANYA S. CHUTKAN
United States District Judge