No. 21-3057

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Animal Legal Defense Fund,
Plaintiff-Appellant,

v.

Special Memories Zoo, LLC,
Dona Wheeler, and Gretchen Crowe,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 1:20-cv-00216-WCG
The Honorable Judge William C. Griesbach

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Animal Legal Defense Fund (ALDF) brought this case to enjoin Special Memories Zoo, Dona Wheeler, and Gretchen Crowe (collectively, SMZ) from violating the Endangered Species Act (ESA) and Wisconsin's public nuisance statute. ALDF succeeded in full. The district court held that SMZ violated both statutes, and it entered a permanent injunction prohibiting SMZ from ever again possessing or exhibiting animals or participating in any business or entity that does. App. 8–11.

In its opening brief, ALDF explained that a successful ESA plaintiff is entitled to an award of attorneys' fees unless special circumstances would render such an award unjust and that the four factors on which the district court based its denial of a fee award are not special circumstances. In response, SMZ argues that ALDF is not eligible for a fee award under the catalyst theory because it claims that SMZ would have closed eventually even if ALDF had not brought this case. That argument is irrelevant because ALDF did not seek fees under the catalyst theory. Rather, ALDF obtained a final judgment and permanent injunction, rendering it the prevailing party and the issue of causation irrelevant.

SMZ also argues that a fee award to a prevailing ESA plaintiff is completely discretionary. In so arguing, SMZ ignores entirely the decisions of the Supreme Court and this Court holding that a prevailing plaintiff is entitled to a fee award in the absence of special circumstances that would render an award unjust. Instead, it argues that ALDF's victory was "pyrrhic," ignoring the fact that ALDF obtained a permanent injunction that abates the violations and prevents their recurrence. SMZ also argues that ALDF did not serve the purposes of the ESA because closing small zoos is not a specific goal of the statute. SMZ has confused a collateral effect of some ESA lawsuits with the Act's purpose of abating and preventing prohibited conduct, and it fails to address the decisions awarding fees to plaintiffs in ESA cases against zoos.

SMZ's amicus makes a different statutory-purpose argument, asserting that the ESA does not protect captive covered animals unless they are suitable for a breeding program designed to restock the wild population. That argument is unsupported by the record and is wrong as a matter of law.

Finally, SMZ and its amicus urge this Court to follow a decision of the Eighth Circuit that denied an award of attorneys' fees in an ESA case.

That case, however, denied fees based on two special circumstances that this Court has held are not relevant considerations in awarding attorneys' fees. SMZ and its amicus fail to address this Court's cases on those points.

Because ALDF prevailed and there are no special circumstances that would render an award unjust, this Court should reverse the district court's decision, hold that ALDF is entitled to an award of attorneys' fees and costs, and remand the case for a determination of the amount of attorneys' fees and costs that should be awarded.

ARGUMENT

I. A prevailing party that obtains a final judgment and a permanent injunction need not show causation to be eligible for an award of attorneys' fees.

SMZ argues that ALDF failed to establish a causal link between the lawsuit and SMZ's change in conduct, as would be necessary to award fees to plaintiffs who do not obtain court-ordered relief but whose suit has a catalytic effect. SMZ's argument is irrelevant. Below, after nearly a year of contentious litigation, the district court held that SMZ violated the ESA, and it entered judgment in favor of ALDF and permanently enjoined SMZ from ever again possessing or exhibiting animals or

participating in any business that does. App. 8–11. As ALDF explained in its opening brief, because it secured an enforceable judgment, it need not show causation to establish eligibility for a fee award. Appellant's Br. 20; *see Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609–10 (2001) (explaining that if a plaintiff prevails by obtaining judicially-sanctioned relief, a court need not analyze the cause of defendant's change in conduct).

SMZ asserts that *Buckhannon* is limited to cases under the Fair Housing Amendments Act (FHAA) and the Americans with Disabilities Act (ADA). Appellees' Br. 13. Although that assertion is not correct, *see, e.g.*, *Vaughn v. Principi*, 336 F.3d 1351, 1353 (Fed. Cir. 2003), it is true that *Buckhannon*'s rejection of the catalyst theory does not extend to "when appropriate" statutes like the ESA, *e.g.*, *Ass'n of California Water Agencies v. Evans*, 386 F.3d 879 (9th Cir. 2004); *Sierra Club v. EPA*, 322 F.3d 718, 719 (D.C. Cir. 2003); *Loggerhead Turtle v. Cty. Council of Volusia Cty., Fla.*, 307 F.3d 1318, 1319 (11th Cir. 2002). Nonetheless, the *Buckhannon* opinion reflects the self-evident fact that an inquiry into causation is not needed when the party has obtained an enforceable judgment. That point plainly applies here as well.

If SMZ wanted to try to avoid a fee award by arguing that "ALDF's lawsuit had nothing to do with the closure of SMZ," Appellees' Br. 13, it could have tried to avoid judgment by continuing to mount a defense. For example, SMZ could have renewed its motion to dismiss the case as moot following discovery on that issue, and then, if successful, it could have challenged ALDF's entitlement to fees under the catalyst theory by arguing that the lawsuit did not cause SMZ to change its conduct. Instead, after its various efforts to dismiss the lawsuit failed, SMZ gave up and acquiesced to entry of a final judgment and permanent injunction. ALDF is thus the prevailing party, and SMZ's causation argument is irrelevant.[1]

[1] In its opening brief, ALDF discussed the catalyst theory to illustrate that the standard for awarding fees under "when appropriate" statutes like the ESA is more generous than the standard used for "prevailing party" statutes. The former allows fee awards to catalyst parties, while the latter does not. *See Sierra Club*, 322 F.3d at 719; *Loggerhead Turtle*, 307 F.3d at 1327. ALDF did not, however, argue for application of the catalyst theory here. Rather, ALDF explained that it easily meets the "when appropriate" standard because, by obtaining a final judgment and a permanent injunction, ALDF would qualify for a fee award even under the stricter "prevailing party" standard. Appellant's Br. 11–14.

II. A successful ESA plaintiff is entitled to an award of attorneys' fees unless special circumstances would render an award unjust.

As ALDF explained in its opening brief, this Court has long embraced the standard, articulated in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), that a district court may deny attorneys' fees to a prevailing plaintiff in a fee-shifting case only where special circumstances would render an award unjust. Appellant's Br. 14–15 (citing *King v. Ill. State Bd. of Elections*, 410 F.3d 404, 424 (7th Cir. 2005); *Lenard v. Argento*, 699 F.2d 874, 899 (7th Cir. 1983); *Dawson v. Pastrick*, 600 F.2d 70, 79 (7th Cir. 1979); *Davis v. Murphy*, 587 F.2d 362, 364 (7th Cir. 1978)). ALDF further explained that, although this Court has not yet applied that standard to a "when appropriate" statute, the Supreme Court has used case law regarding "prevailing party" statutes to interpret "when appropriate" statutes. *Id.* at 15–16. For example, in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986), the Court interpreted the fee-shifting provision of the Clean Air Act, 42 U.S.C. § 7604(d)—a "when appropriate" statute—in the same manner as the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988—a "prevailing party" statute. And in *Ruckelshaus v. Sierra*

Club, 463 U.S. 680 (1983)—the decision holding that "when appropriate" statutes expand eligibility for fee awards beyond prevailing plaintiffs to reach plaintiffs achieving at least some success—the Court applied general fee-shifting principles with respect to issues that did not turn on specific statutory language regarding the degree of success necessary for an award of fees. *Id.* at 683–84. Thus, this Court should apply the "special circumstances" standard to "when appropriate" statutes as the Ninth Circuit did in *Saint John's Organic Farm v. Gem County Mosquito Abatement District*, 574 F.3d 1054, 1063 (9th Cir. 2009) ("We hold that the district court may deny attorney's fees to a prevailing plaintiff under [a 'when appropriate' statute] only where there are 'special circumstances.'").

Nonetheless, SMZ argues that this Court should not apply the Supreme Court's and this Court's long-standing and familiar "special circumstances" standard to "when appropriate" statutes. Appellees' Br. 20. It asks this Court instead to split with the Ninth Circuit by adopting the "substantial contribution" standard used to deny fees to a prevailing defendant in another Ninth Circuit case, *Carson-Truckee Water Conservation District v. Secretary of the Interior*, 748 F.2d 523 (9th Cir.

1984)—a decision abrogated by *Marbled Murrelet v. Babbitt*, 182 F.3d 1091 (9th Cir. 1999). In *Carson-Truckee*, a Tribe intervened as a defendant in a case brought against the Secretary of the Interior to force the sale of water from a reservoir for municipal and industrial use. 748 F.2d at 523–24. The defendants prevailed by arguing that the ESA required the government to prioritize the protection of endangered fish over other potential uses of the water. *Id.* at 524. Although the Tribe was on the winning side, the district court declined to award attorneys' fees because it found that the Tribe's participation in the case "did not substantially contribute to the goals of the [ESA]." *Id.* at 526. Although the resolution of the case served the ESA's goals, "the government had raised the issue before the Tribe intervened, and had energetically litigated the issue," and the Tribe had raised several defenses—rejected by the district court—that were inconsistent with the ESA. *Id.*

In *Marbled Murrelet*, the Ninth Circuit recognized that it had used two different standards in the past to determine eligibility for attorneys' fees under "when appropriate" statutes. 182 F.3d at 1092. It explained that the "substantial contribution" standard from *Carson-Truckee* "is no longer good law," *id.* at 1095, because intervening Supreme Court

authority had interpreted "when appropriate" statutes in the same way as "prevailing party" statutes based on their common purpose, *id.* (citing *Delaware Valley*, 478 U.S. at 559–60). The court held that, consistent with the Supreme Court's approach, the same standard should be used for both types of statutes. In the context of a prevailing defendant, a district court may award fees only if the plaintiff's action was frivolous. *Id.* at 1096 (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)). In the context of a prevailing plaintiff, a district court may deny fees only if special circumstances would render an award unjust. *Piggie Park*, 390 U.S. at 402. Such circumstances are "extremely rare." *Saint John's*, 574 F.3d at 1064 (citation omitted).

III. ALDF obtained significant relief that serves the purposes of the ESA.

SMZ contends that, although ALDF succeeded in obtaining a judgment and permanent injunction, special circumstances justify a denial of fees because ALDF's victory was "pyrrhic," Appellants' Br. 12 & 14, and did not further the purposes of the statute, *id.* at 21. SMZ is wrong on both counts.

A. SMZ argues that ALDF's victory was not meaningful because SMZ would have shut down the zoo even if it had not been sued. Even

assuming that self-serving assertion were true, the permanent injunction goes beyond closing the zoo or enjoining violations of the ESA at SMZ's facilities. It prohibits SMZ, including the individual defendants who were themselves involved in the mistreatment of endangered animals, from ever again participating in any business or entity that possesses or exhibits animals. Such relief is meaningful because SMZ argued unsuccessfully that the case was moot while seemingly preserving its ability to profit from the animals. After SMZ transferred its endangered and threatened species to other facilities, it moved to dismiss the case as moot based on carefully worded declarations that failed to reveal whether the transfers were irrevocable and whether SMZ, including the individual defendants, maintained title to the transferred animals. *See* Decl. of Dona Wheeler, R. 26 ¶ 5; Decl. of Gretchen Crowe, R. 27 ¶ 3; Transcript of Motion Hearing, R. 43 at 4:19–22. As a result, the district court denied the motion to dismiss and allowed discovery on the issue of "whether the animals were irrevocably transferred to third parties and [whether] all interests/rights of the defendants over the animals [have] now terminated." R. 41. SMZ did not respond to that discovery and the court entered judgment in favor of ALDF. Given that SMZ had

equivocated on whether it maintained any interest in the transferred animals, as well as because the injunction bars all of the defendants from participating in the zoo business in the future, SMZ's characterization of the relief provided by the permanent injunction as "pyrrhic" is wholly unsupported by the facts of and judgment in this case. *Cf. Mo. Primate Found. v. People for the Ethical Treatment of Animals, Inc.*, 2020 WL 1139026, at *3 (E.D. Mo. Mar. 9, 2020) (denying motion to dismiss as moot an ESA case against a defendant who gave up her ownership rights over the animals, because the defendant had not proved that she would not "repossess or regain ownership of endangered species in the future").

B. The relief obtained by ALDF—putting an end to SMZ's unlawful conduct and preventing its recurrence in the future—is directly in line with the statutory purposes. The ESA has three broad purposes, set forth in 16 U.S.C. § 1531(b):

> [1] to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [2] to provide a program for the conservation of such endangered species and threatened species, and [3] to take such steps as may be appropriate to achieve the purposes of [certain international] treaties and conventions.

To serve the conservation purpose, the ESA prohibits the "take" of any covered species, *id.* at § 1538(a)(1)(B), and it defines "take" to include

"harass" or "harm," *id.* at § 1532(19). When applied to captive animals, the definition of "harass" does not include "generally accepted" animal husbandry practices, breeding procedures, or certain aspects of veterinary care. 50 C.F.R. § 17.3.

SMZ does not dispute that protecting captive covered animals from mistreatment by prohibiting conditions of confinement that "harass" or "harm" the animals serves a purpose of the ESA. Rather, it argues that because "closing small zoos" is not a specific goal of the ESA, and some small zoos would rather cease covered activities than remedy the violations by improving conditions, ESA lawsuits that result in a zoo closure have not served the purposes of the Act. Appellees' Br. 15–16. SMZ has confused a collateral effect of some ESA lawsuits with the Act's purpose of abating and preventing prohibited conduct. Indeed, to the extent successful ESA lawsuits deter small zoos from possessing endangered and threatened species that they lack the resources to care for properly, the ESA's purpose of abating and preventing violations has been served. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (holding that, in enacting the ESA, Congress intended to protect endangered species "whatever the cost").

IV. The statutory-purpose argument raised by the amicus is unsupported by the record and is wrong as a matter of law.

The amicus contends that "ALDF's lawsuit did not further the purposes of the ESA," Amicus Br. 15, for a reason never raised by SMZ. Although the amicus concedes that "the ESA prohibits take of all endangered species, whether wild or captive," *id.* at 7, the amicus asserts that Congress did not intend for the ESA to prohibit the mistreatment of captive endangered and threatened species unless they are part of a carefully managed breeding program designed to restock the wild population, and it speculates that the covered animals possessed by the SMZ defendants were genetically inferior and "could not have a role in ensuring the survival of their species," *id.* at 8. The Court should reject the argument raised by the amicus for two reasons.

First, the amicus speculates that the endangered and threatened species possessed by SMZ were genetically inferior and "worthless" for conservation purposes. Amicus Br. 6–10. No evidence in the record supports that claim. Thus, the Court should disregard the amicus's assertion. *See, e.g.*, *Hirmiz v. New Harrison Hotel Corp.*, 865 F.3d 475, 476 (7th Cir. 2017) ("[N]ew evidence may not be presented on appeal."); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 978 n.3 (9th Cir. 2007) ("[A]n

amicus may not generally introduce new facts at the appellate stage."). "Like the district court, [this Court] can rule only on the basis of what is in the record before [it]—a record that was made by the parties in the district court." *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 447 (7th Cir. 1994).

Second, the amicus argues that, although "ALDF may have technically succeeded on its ESA claim, ALDF did not further the purpose of the ESA," Amicus Br. 14, because Congress intended—but somehow forgot—to limit the ESA's prohibition on the mistreatment of captive covered animals to those playing an active role in restocking the wild population.[2] The amicus is wrong.

To begin with, the amicus ignores the text of the statute, which prohibits the "take" of covered animals without regard to their participation in a breeding program. Such disregard for the text is telling, because a statute's purpose is best expressed by the ordinary meaning of

[2] The amicus also asserts that ALDF may not have prevailed at all despite having obtained a final judgment and permanent injunction. Amicus Br. 14 n.9. That argument was waived after the district court entered judgment based on a finding that SMZ "did violate the ESA," App. 8, and SMZ did not file a notice of appeal or a motion for relief from the judgment.

its text. "We do not speculate upon congressional motives when attempting to discern the meaning of a statutory text, because we assume that the ordinary meaning of the text accurately expresses the legislative purpose." *INTL FCStone Fin. Inc. v. Jacobson*, 950 F.3d 491, 499 (7th Cir. 2020) (cleaned up); *see Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (citation omitted)); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of [statutory] purpose is the statutory text adopted by both Houses of Congress and submitted to the President."). Thus, arguments about the ESA's purpose "cannot be used to contradict, supplement, or suppress its text." *INTL FCStone*, 950 F.3d at 499.

In addition, the amicus ignores the cases that have found ESA violations based on the mistreatment of captive animals without regard to whether they play a role in restocking the wild population. *See*, *e.g.*, *People for the Ethical Treatment of Animals, Inc. v. Lowe*, 2022 WL 576560, at *5–8 (W.D. Okla. Feb. 25, 2022) (holding that all lions, regardless of subspecies, hybrid status, or captive status, are fully

protected under the ESA, and entering judgment against defendant whose mistreatment of four captive lions harmed and harassed the lions in violation of the ESA); *People for the Ethical Treatment of Animals, Inc. v. Wildlife in Need & Wildlife in Deed, Inc.*, 476 F. Supp. 3d 765, 779, 784–85 (S.D. Ind. 2020) (holding that defendants' mistreatment of captive lions, tigers, and hybrids harmed and harassed the animals in violation of the ESA); *People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Md., Inc.*, 424 F. Supp. 3d 404, 408 (D. Md. 2019) (holding that defendants' mistreatment of captive lions, tigers, and lemurs harmed and harassed the animals in violation of the ESA); *see also Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1163 (D. Or. 2001) (holding that although the promotion of genetic diversity essential to recovery of the species is "one of many underlying goals of the ESA," it does not justify excluding from ESA protection populations less capable of serving that purpose).

Further, the amicus has not cited a single case holding that Congress intended to limit the ESA's prohibition on the mistreatment of captive covered animals to those being bred for restocking the wild population. And even if its theory is limited to the propriety of a fee award

rather than the propriety of a judgment, the amicus has ignored the decisions awarding fees to organizations that used the ESA to stop and prevent the recurrence of mistreatment of covered captive animals without regard to whether the animals were part of a restocking program. *See, e.g.*, *People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Md., Inc.*, 2022 WL 622312, at *6 (D. Md. Mar. 2, 2022) (awarding $1,284,049 in attorneys' fees and costs under the ESA); *People for the Ethical Treatment of Animals, Inc. v. Wildlife in Need & Wildlife in Deed, Inc.*, 2021 WL 7210702, at *2 (S.D. Ind. June 14, 2021) (awarding $696,091 in attorneys' fees and expenses and $37,907 in costs under the ESA).

Importantly, the amicus has also cherry-picked the legislative and regulatory history to support its claim that the *sole* purpose of the ESA's protection of captive covered animals is for use in breeding programs designed to restock wild populations. Although that is certainly *one* way that protecting captive animals serves the ESA's conservation purpose, it is hardly the only way. Indeed, the protection of captive covered animals promotes the survival of the wild population even if the captive animals will not reproduce.

For example, in *Safari Club International v. Jewell*, 960 F. Supp. 2d 17 (D.D.C. 2013), the court upheld two rules that provide ESA protection to U.S. captive-bred herds of three species of antelope native to North Africa. The court explained that the ESA's prohibition on the "take" (without a permit) of captive covered animals serves the conservation purposes of the ESA in several ways that do not depend on whether the animals will be used to restock the wild population. Regulating the captive-bred animals "avoids any confusion about the source of the three antelope species." *Id.* at 68. Avoiding source confusion protects the wild population by discouraging the illegal trade in animal trophies by making it possible to differentiate between captive animals killed pursuant to a permit and those that were illegally killed in the wild. *Id.* Further, requiring facilities holding captive members of the population to obtain permits to "take" endangered species "prevents or discourages captive-breeders from indiscriminately killing members of their herd, for example, if the price of trading the animals drops." *Id.*

The prohibition on "take" of captive covered animals further serves the conservation purposes of the ESA by reducing the incentive for poachers "to remove animals from the wild and smuggle them into

captive-holding facilities." Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Listing All Chimpanzees as Endangered Species, 80 Fed. Reg. 34500, 34503 (June 16, 2015). The amicus speculates that the covered animals possessed by SMZ were unworthy of protection because they "were of unknown, and likely unknowable, origin," Amicus Br. 8, rendering them unsuitable "to either provide genetics for endangered species recovery or serve as candidates for reintroduction," *id.* at 10. But the difficulty of tracing the origin of animals in captive facilities demonstrates why their protection serves the species-conservation purpose of the ESA: because wild animals are often smuggled into captive facilities, like SMZ, where they become "indistinguishable" from the other animals at the facility. 80 Fed. Reg. at 34503; *see id.* at 34524 ("Given the potential for increased take and trade in 'laundered' wild-caught specimens that would generally be indistinguishable from unprotected and unregulated captive specimens, we conclude[] that separate legal status under the Act for captive animals would be inconsistent with the [conservation purpose] of the Act."). The amicus itself admits as much, explaining that captive generic tigers, though unsuitable for restocking the wild population because of their

mixed or unknown genetic composition, are fully protected by the ESA because allowing captive tigers to enter the illicit wildlife trade would undermine conservation efforts for wild tigers. Amicus Br. 9; *see id.* at 16 (conceding that the ESA "applies to captive populations to reduce trafficking of wild species").

The protection of captive covered animals also serves the conservation purpose of the ESA by reducing the need to take stock from the wild for research on captive populations that can lead to improved management of wild populations. Such conservation outcomes depend, however, on the good health and wellbeing of captive wildlife. "Thus, safeguarding and maximizing the well-being of endangered animals who are held captive is fundamental to the mission of the ESA." *Endangered Species Act: Law, Policy, and Perspectives* 367 (Donald Baur & Ya-Wei Li eds., 3d ed., 2021).

Finally, the amicus argues that the ESA—despite its prohibition of conduct that harms or harasses covered animals—cannot be used to challenge mistreatment of zoo animals because the Animal Welfare Act (AWA), 7 U.S.C. § 2131, regulates the treatment of exhibited animals pursuant to a licensing scheme enforced by the USDA. Amicus Br. 15–

16. Again, the amicus ignores the myriad cases holding that claims under the ESA are not precluded by the AWA. "[C]ourts around the country have rejected [the] argument that AWA compliance precludes a private citizen's suit under the ESA." *People for the Ethical Treatment of Animals, Inc. v. Wildlife in Need & Wildlife in Deed, Inc.*, 2018 WL 8577966, at *4 (S.D. Ind. Feb. 8, 2018) (collecting cases).

V. This Court has rejected the two "special circumstances" cited in the Eighth Circuit's decision on which SMZ and its amicus rely.

While arguing that this Court should follow the Eighth Circuit's decision in *Kuehl v. Sellner*, 887 F.3d 845 (8th Cir. 2018), SMZ and its amicus fail to acknowledge that *Kuehl* conflicts in two important respects with decisions of this Court—decisions that neither SMZ nor the amicus acknowledge.

First, in affirming the district court's denial of attorneys' fees to successful ESA plaintiffs, the Eighth Circuit held that a defendant's ability to pay a fee award can be a special circumstance. *Kuehl*, 887 F.3d at 855–56. This Court has held just the opposite. *See Lenard*, 699 F.2d at 900 ("The ability to pay a fee award has been held not to be a special circumstance that would bar an award"); *Entertainment Concepts, Inc. v.*

Maciejewski, 631 F.2d 497, 507 (7th Cir. 1980) ("Ability to pay is not a 'special circumstance' that will bar an award of attorneys' fees to a successful plaintiff").

In any event, *Kuehl* relied on record evidence regarding the zoo's inability to withstand a fee award, finding that the ESA violations were themselves the result of the zoo's financial inability to provide proper care and conditions to the covered animals. 887 F.3d at 856. Here, there is no evidence in the record concerning SMZ's ability to pay.

Second, *Kuehl* held that an organizational plaintiff's funding is a special circumstance that can bar a fee award. Again, this Court has held just the opposite. *See Sierra Club v. Khanjee Holding, Inc.*, 655 F.3d 699, 708–09 (7th Cir. 2011). As this Court explained in *Sierra Club*, Congress included citizen-suit and fee-shifting provisions in statutes like the ESA because it wanted to encourage meritorious litigation to aid enforcement of the Act, and it recognized that public interest organizations would conduct a great deal of that litigation. *Id.* at 708 (citations omitted). Particularly where, as here, a prevailing plaintiff does not receive any direct financial benefit from the lawsuit, that the plaintiff is a well-

funded organization that may benefit from increased charitable donations "does not preclude an award of fees." *Id.* at 709.

VI. The reasonableness of ALDF's fees is not at issue in this appeal.

The amicus argues that, although ALDF is the prevailing party, the only reasonable fee would be no fee at all if ALDF obtained only *de minimus* relief. Amicus Br. 17–18 (citing *Farrar v. Hobby*, 506 U.S. 103, 115 (1992)). The district court did not consider the reasonableness of the fees sought by ALDF, and that issue is not before this Court. In any event, *Farrar* is easily distinguished because it involved a lawsuit seeking compensatory damages, but the plaintiff was awarded only nominal damages. Here, in contrast, ALDF obtained all the relief available under the citizen-suit provision of the ESA—a permanent injunction abating the violations and preventing their recurrence.

CONCLUSION

This Court should reverse the district court's order denying ALDF's motion for attorneys' fees and costs and remand the case for the district court to determine the amount of attorneys' fees and costs to award to ALDF, including those incurred on appeal.

April 4, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c). As calculated by my word processing software (Microsoft Word for Office 365), the brief contains 4,821 words.

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2022, I am electronically filing this brief through the ECF system, which will send a notice of electronic filing to counsel for all parties in this case.

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick