



Animal Law Podcast: Transcript for Episode 93, Interview with Margie Robinson

Mariann Sullivan: Welcome to the Animal Law Podcast, Margie.

Margie Robinson: Thanks, Mariann. I'm excited to be here.

Mariann: I am really excited to have you. I feel like you're going to get us up to date on a saga that's been going on for an unbelievable amount of time. I think we need to start by delving into some history as background for this current dispute, though, because this is such a long, tortured saga, we're gonna have to abbreviate some of that history, or we'll be here all day.

Can you just give us a little background, maybe starting with the history of research on chimpanzees prior to the CHIMP Act, which is the law that we're going to be talking about?

Margie: Absolutely. So the United States government and NIH, in particular, bred hundreds of chimpanzees to be used in biomedical experiments for research on things like HIV and Hepatitis and then realized that it had to do something with these animals when they were no longer needed for research because they live for a very long time. Well into their fifties, sometimes even longer than that.

Congress looked at what it was going to do with these animals when they were no longer needed for research and passed, in 2000, a law called the Chimpanzee Health Improvement Maintenance and Protection Act, the CHIMP Act, to deal with the issue of what's going to happen with these chimps when they're no longer needed for research.

And so, Congress recognized in passing the CHIMP Act that it had a moral obligation to these animals, that it had to provide for their lifetime care. And it determined that couldn't be done in the labs and that the best place for these animals to go was sanctuary. The CHIMP Act creates and funds a federal

sanctuary for the retirement of federal chimpanzees when they're no longer needed in research.

Mariann: It's just an extraordinary development, actually, even though they are chimpanzees, and now we have come to accept that chimpanzees are these extraordinary animals. I'm sure before the CHIMP Act was passed, there were many, many people doing research on chimpanzees who never blinked at the idea that, "Well, just like all other animals in research, we'll just kill them when we're done. We don't have to worry about supporting them."

So I think it's worth noting that the CHIMP Act was extraordinary, even though it's only chimpanzees, only this very, very special animal, and it didn't end the research, but we'll get to that story next. I guess we should probably mention the end of split-listing, which really had a lot to do with how things changed even more.

But when the CHIMP Act was passed, it didn't say chimps couldn't be used in research. It just said that once we're done with them, we have to take care of them. What was the end of split-listing, and how did it change things?

Margie: Yeah, so as you noted, Mariann, the CHIMP Act didn't end invasive research on chimps. It was still permissible and left it to NIH to decide whether or not a chimpanzee was needed for research, and whether or not the animal was "surplus" under the language of the act.

The way that invasive research could continue on chimps was because chimps were listed under the Endangered Species Act, for a number of years, as endangered in the wild, but listed as threatened when they were in captivity in the United States. And so, the Endangered Species Act prohibition that doesn't allow the taking of a listed animal, and that taking can include harming or harassing the animal, which invasive research would do. That taking prohibition under the Endangered Species Act didn't apply to animals who were kept in captivity, so research on these animals could continue, even though wild chimpanzees were listed as endangered and the take prohibition applied to them.

Humane Society of the United States, the organization that I work for, petitioned the US Fish and Wildlife Service to end that split-listing and list all chimpanzees, whether they were in captivity or the wild, as endangered under the Endangered Species Act. In doing so, the take prohibitions, the prohibition against harming and harassing the animals, would apply if they were listed in captivity, and so we were successful in that.

In 2015, the Fish and Wildlife Service ended the split-listing of chimpanzees, and as a result, chimpanzees couldn't be used in invasive research. They couldn't be harmed or harassed unless there was a permit issued under one of the narrow exceptions under the Endangered Species Act, and no permits have been issued, so it effectively ended invasive research on chimps. And I should also add that HSUS, Humane Society of the United States, and other animal protection groups were also pushing on NIH to end the practice of using chimps in research because the United States was the last holdout; every other country had stopped by 2009, and the US was continuing.

And so animal protection groups were pushing from both sides, pushing on the split-listing that effectively allowed this to occur, but also pushing NIH and noting that the chimpanzees were special, exceptional creatures that cannot be used in this type of research. Of course, we don't think animal research is appropriate in other circumstances, as well, but chimpanzees are a special case here, for sure.

Mariann: There are additional arguments that can be made for chimpanzees that can't be made for other animals, though we probably agree that plenty of good arguments can be made regarding other animals as well. But it was an extraordinary development, and I assume it meant that this idea that we're going to move them to sanctuary once they're no longer needed in research just became a much bigger thing after it was decided, or it was legally mandated that they can't be used, at least in invasive research, so there's going to be a whole lot more chimpanzees going to sanctuary. So how has the development of sanctuaries for these chimpanzees gone?

I assume from the time it was passed, we have needed more and more space. And aside from the chimpanzees who are the subject of this case, who we'll get to in a minute, are they all in sanctuary now, other than these? Or are there some who are still waiting for sanctuaries to be expanded?

Margie: So my understanding is at this point, NIH has moved all the chimps that it thinks are movable, that it thinks can be moved to sanctuary. There are chimps remaining in a few labs, including Alamogordo Primate Facility, which is the facility, and the chimpanzees, that are at issue in our lawsuit. But there are, I think, about a hundred federal chimps outside of sanctuary, at this point.

Mariann: Does NIH take the position that none of them can be moved to sanctuary or are they still just waiting for a space?

Margie: NIH takes the position that they can't be moved to sanctuary because of what the agency identifies as perceived risks in transfer, which, of course, we don't agree with.

Mariann: We'll be getting into all of that.

I didn't realize there were additional ones to the ones that we're talking about here. So just for a moment, just to paint the picture, can you tell us what life is like at the sanctuary that's at issue here, Chimp Haven?

Margie: Yeah, so Chimp Haven is the sole nonprofit that operates the federal sanctuary. It's a federal sanctuary in Keithville, Louisiana. It's home to, I think, about 300 chimpanzees, at this point. Many, but not all of them, are former federal research chimps, and it's a top-notch facility. It provides the highest standard of physical and psychological care for these animals who have been through so much.

Its mission is entirely focused on protecting these animals and doing what's best for these animals. And it provides complex social groups for them to live in and a natural and expansive environment for them to spend their days.

Mariann: How long do chimps live anyway? And how old are they? So how much time are we talking about for putting them in sanctuary for the rest of their lives?

Margie: It varies. Some of the chimps are in their mid-thirties, some of them are older than that, in their fifties. But certainly, many of these animals could live for another decade or more at sanctuary because chimps live well into their fifties and sometimes into their sixties.

Mariann: Let's get to the chimps at issue here and where they're living. And NIH, as you mentioned, decided they could not be moved to sanctuary even if it was available.

So tell us a little bit about their living conditions, and then we'll get into what they are stating as the reason for their ineligibility to move to sanctuary.

Margie: When Congress passed the CHIMP Act, Congress recognized that sanctuary was the best place to retire these animals, that they would receive the highest quality of care there, and that they would have the most appropriate social and living environments at sanctuary.

A laboratory cannot provide the same standard of care for these animals. And I think it's important to note that the facility the animals are at, the Alamogordo Primate Facility, is on a US Air Force base. The facility, and the care of the chimps, is maintained through a contract with a third party, Charles River Laboratories, that's business model is to breed animals for use in research.

And so that's a very different approach to thinking about how animals should be used than Chimp Haven, that's focused very much on providing the highest level of care possible for chimpanzees, and has a chimpanzee-centric mission.

Also, the social groupings at the facility, at APF, Alamogordo Primate Facility, are not as complex. The chimps are kept in single-sex groups. They're not as large. So (there are more) opportunities at Chimp Haven for more complex social groupings and more natural social groupings because chimpanzees in the wild live in multi-male, multi-female groups. It's just a better fit and allows them to engage in more natural species-specific behavior.

Mariann: One thing that struck me that was in your papers was that it's just going to keep getting worse and worse if they're in these small groups. They're going to start dying, and then the groups are going to get smaller and smaller until somebody's living alone. So it really does seem like a very unsatisfactory life.

I mean, they're not in individual cages the way they used to be. I've been doing this for so long that I remember when chimps were at the Coulson facility being used to test oven cleaner. The history is horrifying. So it's not as bad as that, but compared to the lifestyle they would have at the sanctuary, it certainly sounds very, very limited.

I don't think I noticed in your papers; it's run by Charles River? Like I said, I've been doing this for a long time; those are notorious words. They have been supplying animals for everybody for a very long time. I didn't know that.

Let me get back to thinking about this. They decided, NIH decided, that these chimps, in spite of the fact that the living conditions are obviously better at the sanctuary, cannot be moved. Even if the sanctuary had space, they kept building more space and getting more chimps. But even if there had been space, they said that they were ineligible.

What were their stated reasons for that ineligibility?

Margie: Yeah, that's right. So NIH determined it wouldn't move any of these animals regardless of whether or not there was space available at the sanctuary for them. And I should note that the planned order was to move the chimpanzees at this facility, Alamogordo Primate Facility, and then to move on to the other facilities.

So when the lawsuit was brought, there was space at Chimp Haven, and these animals would've been the next in line to go if the agency hadn't made its decision. But the agency maintains that it won't move these animals because they suffer from chronic health conditions like heart disease and diabetes and hypertension.

These conditions are common in former research chimps because they're former lab animals who are sedentary in many parts of their day and many, many times of the day. And so the agency just said it wasn't going to move these animals.

I think it's important to note the decision not to move the animals was spurred by the veterinarian at the facility (of) the third-party contractor that operates the facility. In our view, there's a conflict of interest there because the contractor has an interest in maintaining the government contract to keep the animals at the facility. And although the agency, NIH, did assemble a panel of veterinarians to review the lab vet's recommendation and make the final determination, they did that based on files provided by the lab.

The panel never visited the chimps in person or assessed them in person. It was just on the records provided by the lab. In our view, the agency overestimated the risks of transfer and didn't think about the concrete and very real benefits of moving these animals to sanctuary, which Congress recognized when it passed the CHIMP Act. That's why it created the sanctuary because it felt, or determined, that the best standard of care would be provided at a sanctuary and not in a laboratory environment.

Mariann: Yeah, you brought it up, so let's go into it a little bit more. You're not directly making this allegation, but it's certainly something that hangs over this whole decision, and that's the standard process of following the money. How much money does this facility make out of taking care of these chimpanzees?

And what is the difference between that and what it would cost the government if they were sent to sanctuary?

Margie: Yeah, so the cost of care is pretty significantly different to NIH between what it costs the agency to keep the chimps at the facility compared to what it would cost at the lab.

And part of that is the cost-sharing scheme that the CHIMP Act creates. The CHIMP Act, requires Chimp Haven, the nonprofit that's operating the sanctuary, to cover 10% of the costs of establishing the system, and then 25% of the costs of operating the system. And then there's also just an economy of scale when you have more chimpanzees living in an environment, a single sanctuary, rather than scattered (in) labs across the United States.

But in terms of the numbers there, under NIH's most recent accounting, it costs the agency about \$119 a day per chimp to maintain the chimps at the facility at APF compared to about \$49 per chimp per day at Chimp Haven. So about two and a half times more to keep them at the lab as compared to the sanctuary.

Mariann: There does seem to be something going on here. There's certainly a vested interest, even if there's no way of establishing that that's the only reason that they're being kept there.

Let's talk a little bit about the danger because NIH's decision had a lot to do with that it would be so dangerous to move them.

What is the transport like? I mean, it just seems like a lot of people have a lot of illnesses. It doesn't mean they can't get in a vehicle and go to another state.

Off the top of my head, it doesn't seem that dangerous. Can you talk a little bit about it? And they're currently in New Mexico, is that right?

Margie: Yeah. So the process... NIH has been doing this for years, working with Chimp Haven and the labs to get the animals to sanctuary. My understanding is that they're put on a truck, in cages, and that they're moved across the country. Also, Chimp Haven and NIH take steps to reduce the risk.

For example, they won't move animals during the summer because it's hotter then, so there's a greater risk of complications associated with transport and putting the animals under anesthesia to move them, though we think that there could be steps taken and that animals don't have to be anesthetized to be moved across the country. We told the agency that in comments we provided when it announced that it was contemplating keeping some chimps in labs.

But I think the important thing to keep in mind is that NIH has moved chimps to sanctuary, including six chimps who are sicker and older, without incident. It's our view that the risks of transfer shouldn't be a basis to foreclose the very concrete and real benefits of sanctuary. And again, we think the agency's overestimated the risks associated with transport.

I think it's also worth noting that the agency's not just looking at the risks associated with the transportation process, but the agency argues that there are risks beyond that process, as well, in integrating chimps into social groups and getting them settled at the sanctuary.

And again, we think Congress assessed those risks and determined that all these chimps should go to sanctuary because that's the best place for them.

Mariann: Well, does the sanctuary have the capacity to care for the medical issues? You said they were mostly fairly common. I would assume that some of the other chimps who are there also have diabetes and some heart issues.

Margie: That's right. The sanctuary, Chimp Haven, has the capacity to provide individualized and specialized care for chimpanzees with chronic health conditions and has been doing so for other chimpanzees who have similar health issues.

Mariann: Not to bend over backward for the sanctuary, but it's got to be a huge job. When I think of what it's like to integrate a new cat into the household, I can imagine integrating these very complex, who of a certain age with personalities is a big job, and they must have done a lot to make sure that they are in groups that are compatible. That seems to be what they do.

Margie: Yeah, when they know new chimps are coming to the sanctuary, they spend a lot of time planning and preparing, thinking about how to integrate chimps into new groups and which groups would be the best fit for the animals coming in. So absolutely that's something that Chimp Haven has done and certainly has the ability to do, and puts a lot of thought into.

Mariann: I'm kind of curious; obviously, you're here, so we're talking about a lawsuit, but was that a last resort? Was there a lot of back and forth about the wisdom of this decision before you decided to file suit?

Margie: There was. The agency announced in early 2018 that it was contemplating the possibility of keeping some chimps in labs rather than moving them to sanctuary. When the agency made that announcement, Humane

Society of the United States and other groups wrote to NIH and expressed their concern and expressed the view that the agency had a moral and legal obligation under the CHIMP Act to move these animals to sanctuary and that the supposed risks that the agency had identified shouldn't foreclose moving these animals to sanctuary.

There was also a public comment process later in the process, and many groups weighed in at that point as well. After we saw the first application of the protocol that the agency put in place to decide whether or not it was going to move chimps to labs, which is the chimpanzees at issue here, at the Alamogordo Primate Facility. When the agency issued that decision with respect to those chimps, again Humane Society of the United States and other groups pushed the agency to reevaluate that decision. There's been pushback from congressional offices as well, to the agency, in viewing the decision as a circumvention of its legal obligations under the CHIMP Act.

So there certainly have been multiple efforts before this litigation to try to get the agency to change course.

Mariann: But obviously, they were unsuccessful, so let's talk about the lawsuit. First of all, can you explain who the plaintiffs are? And we didn't really arrange to talk about the initial motion to dismiss, which had to do with standing, but it's an animal law case, so you always want to talk about standing a little bit. So you can tell us who the plaintiffs are and who has standing and why.

Margie: There are six plaintiffs in this lawsuit. Three organizational plaintiffs: Humane Society of the United States, Animal Protection of New Mexico, and Humane Society Legislative Fund. All three of those groups have worked for years to end invasive testing on chimps and get chimpanzees from labs to sanctuary once they're not being used in research.

And then, there are three individual plaintiffs. Each of those individual plaintiffs worked at a facility. Two of them worked at Alamogordo Primate Facility when it was called something else. One of them worked at a different lab but worked with chimpanzees who were later moved to APF. So all three of those individual plaintiffs worked in positions where they either cared for some of the chimpanzees at issue in this case or interacted with them on a regular basis. They're all committed chimp advocates. They've fought for these animals for years, since leaving those positions, and have very deep and personal connections to the animals, and I think are really troubled and haunted by knowing that some of these animals remain at a lab rather than being retired to sanctuary.

In terms of standing, the government did move to dismiss, arguing that we didn't have standing either for the organizational plaintiffs or the individual plaintiffs. There was a motion to dismiss briefing on that, and the court determined that both the organizational plaintiffs and the individual plaintiffs had standing. There wasn't a written order; the judge ruled from the bench at a hearing on that issue. But our arguments, with respect to the organization standing, were under what's called a *havens* theory for the case. That establishes this concept that an organization can have standing, in its own right, if the challenged action in the lawsuit frustrates the organization's mission and causes a diversion, or caused a diversion, of the organization's resources.

Here, in this case, we have three organizational plaintiffs that have advocated for chimpanzees for years, specifically federal chimpanzees, to end invasive research on chimps and to get them moved from labs to sanctuary. Both HSUS and Animal Protection New Mexico advocated for the CHIMP Act when it was originally passed. Humane Society Legislative Fund wasn't in existence then, but then subsequently advocated for amendments to the CHIMP Act. So these groups have been involved in these issues for a long time.

And so our point was this frustrates the organization's missions. They clearly have a demonstrated interest and goal of getting these chimps from labs to sanctuary. The decision circumvents that, and so these organizational plaintiffs were required to divert resources to try to counteract the agency's decision. They did things like hire experts to assess the soundness of the decision. They engaged in some of the activities that we talked about a few minutes ago in trying to get the agency to change course.

Humane Society of the United States and Humane Society Legislative Fund collected over 155,000 signatures asking NIH to reassess its decision to keep these chimps at the facility. So, that diversion of resources came at the expense of other mission-critical work because the organizations were engaging in these activities that, necessarily, came at the expense of other work.

There was a recent case in the Fourth Circuit, our case is in the District of Maryland, and there was a recent Fourth Circuit opinion, in 2021, from a case PETA brought against a roadside zoo challenging their treatment of animals, alleging that it violated the Endangered Species Act. The court found under similar allegations in that PETA case that PETA had standing, and so the judge looked at that precedent and found it relevant in establishing the organizational plaintiff standing here.

And with respect to the individual plaintiffs, the Fourth Circuit, again, we're in the District of Maryland, has made clear that an aesthetic interest in the

observation of animals is a legally protected interest for the purpose of standing. And NIH's decision to keep these chimps at the lab invades the individual plaintiffs' aesthetic interest in the observation of animals in a real, non-speculative, and personal manner.

And that's because the chimps, right now, are housed on a secure Air Force base where the public isn't able to access the animals and gets very limited information about the animals and the conditions they're being kept in. Whereas if the chimps were moved to sanctuary, the only sanctuary that they can be moved to under the act, Chimp Haven, provides opportunities for the public to visit, and they also provide videos and pictures, and other information about the chimps. And so our individual plaintiff's aesthetic interests in reconnecting and getting information about the chimpanzees at issue, in this case, is hindered by the decision, and the court determined, based on our arguments, that the individual plaintiffs have standing, as well.

Mariann: That was a great, great summary. And from somebody who's been involved in this for a long time, for those of you who haven't, the development of standing in this area really has changed so much. The fact that the court just decided this from the bench, that the law seemed very clear to the court, is just a really miraculous development. I can imagine, in the past, this case might have never gotten into court because the standing rules were so outlandish.

All right. The standing arguments were a little complex. On the other hand, there are only two causes of action, both under the Administrative Procedure Act, and actually, only one ended up being truly relevant. So can you just briefly describe what the Administrative Procedure Act does, and what these two causes of action allow you to do when you are aggrieved by the action of an administrative agency?

Margie: The CHIMP Act itself doesn't provide a cause of action for the plaintiffs to sue the government, even though we allege, and the court agreed with us, that what the agency did was in violation of the CHIMP Act, there's not a separate cause of action in the CHIMP Act.

The Administrative Procedure Act does provide a cause of action and waives the federal government's sovereign immunity, and allows plaintiffs to challenge agency actions in certain circumstances, including if they're arbitrary and capricious, or if the action being challenged is otherwise not in accordance with law.

And so, we brought two claims under the Administrative Procedure Act, the APA. The first was that the government is mandated by the CHIMP Act to transfer these chimpanzees, and NIH, in deciding not to move the animals to sanctuary, exercised discretion that it doesn't have under the CHIMP Act. And so, that decision was not in accordance with law and therefore violated the CHIMP Act and the Administrative Procedure Act.

The second claim was an arbitrary and capricious claim. That claim argues that NIH's decision to keep the chimps at the lab is arbitrary and capricious under the APA because NIH's decision-making was faulty. We alleged that NIH's assessment of individual chimpanzee's health status and transfer risk was erroneous and incomplete, that the agency ignored key considerations and evidence before it, and that the decision contradicted NIH's own policies and past precedence.

And so those were the two claims at issue. But as you noted, given the posture of the case after the motion to dismiss briefing where the government had also moved to dismiss for failure to state a claim under Federal Rules of Civil Procedure, 12, the government had started to argue that our interpretation of the CHIMP Act wasn't a permissible interpretation of the CHIMP Act. So the judge, at that hearing on the motion to dismiss, asked for more information about the CHIMP Act interpretation, and the parties proposed that we just move to summary judgment briefing on that question, rather than having to brief it twice, in a motion to dismiss and then again in summary judgment briefing.

Mariann: Oh, that makes sense. That's why it's on summary judgment.

But there was a cross-motion for summary judgment. There doesn't seem to be any question that there are no questions of fact at issue. So if I understand correctly, as we said, the court's decision was under the first cause of action. The ineligibility decision that these particular chimpanzees were not eligible for transfer was just not in accordance with law, and that's pretty unusual.

Usually, you do get into that the agency has some discretion, and then they use their discretion arbitrarily and capriciously. But the court is like, "No, the law says this, and they didn't do it."

What are the specific provisions of the CHIMP Act that are at issue here? That the court just said, "It's clear that they had to do it; they didn't do it."

Margie: So there are two provisions of the CHIMP Act that are at issue. The first provision, subsection A generally requires NIH to create and operate a

sanctuary system to provide for the lifetime care of federal chimpanzees who are no longer needed for research.

So again, “surplus chimpanzees” is what you might hear me refer to those animals as because that's what they're called under the CHIMP Act.

Mariann: That's a legal term; it's not our opinion. *both laugh*

Margie: Right. Surplus chimpanzee just means a federal chimpanzee who's been designated by NIH as no longer needed for research purposes.

And at this point, all federal chimpanzees are surplus chimpanzees because invasive research on chimps has ended. So subsection A creates the sanctuary system and directs NIH to operate that system in compliance with the other requirements of the CHIMP Act. And then subsection C of the CHIMP Act states that all surplus chimpanzees shall be accepted into the sanctuary system.

There were ellipses there. It's all surplus chimpanzees, ellipses, shall be accepted into the sanctuary system, and the court looked at that language and said, “All means all. Shall means shall. It’s a mandatory duty impervious to discretion.” And read that directive coupled with the directive to NIH to create and operate the sanctuary system in subsection A. Read those two subsections to mandate the transfer of surplus chimpanzees, including the chimpanzees at APF, at Alamogordo Primate Facility, to the sanctuary.

And the court's ruling was supported by the fact, we argued this in the briefing, and the court agreed with us, that the CHIMP Act gives NIH discretion to not accept non-surplus chimpanzees. So there's language in the CHIMP Act where the agency has clear discretion on the issue of whether or not to accept animals, but only those animals who are non-federal chimps, non-surplus chimpanzees. So if they're someone's former pet, or if they’re chimpanzees coming from a private, rather than a government, facility, then the agency can accept those animals, but it doesn't have to.

And the court looked at the contrast between the mandatory language with respect to surplus chimpanzees, federal chimpanzees, and the discretionary language and determine that provided further evidence.

And there was also evidence in the legislative history that we pointed to. And I think here it's important to sort of contextualize the CHIMP Act and where we were at the time that the law was passed. At that point, as we talked about earlier, invasive research on chimps was still legal, so Congress expected that

the chimps who would be going to sanctuary would be the animals who were no longer appropriate for use in research.

And there's language in the Senate report that accompanied the Senate version of the CHIMP Act where Congress says, "Chimps will only enter the sanctuary system if they're no longer appropriate for use in research, for example, due to advanced age or infections."

So, we argued, and the court agreed with us, that that signaled that Congress understood older and sicker animals would be the animals going to sanctuary because they would be the animals not appropriate for use in research. Chronic health conditions are not a basis to keep animals in labs.

Mariann: That makes total sense. These are the animals for whom the whole idea was originally developed. Those who are too old and sick to be used in research.

Honestly, it all seems pretty clear. This isn't a complex question of statutory interpretation; it's basically, "Is the language ambiguous?", which is the first question you ask in statutory interpretation. The court said, "No, it's not."

Tell us about what their arguments are and what their position is. And I can think of one that I think would pop into most people's heads, "Maybe these chimpanzees should be eligible, but it would be possible that if you have a really ill, dying chimpanzee, you would not want to take them to sanctuary."

You can imagine the exception. I think that was one of the government's arguments. Can you tell us if, if I'm right? And what other arguments they made that the statute didn't mean what the statute said?

Margie: You're right. They did argue that there could be circumstances where it wouldn't be appropriate to move a chimpanzee who was dying, moribund, and we agreed with that.

Our view is that if a chimp is truly moribund, such that they're at the end of life, moving them to sanctuary is going to be impossible, and so they don't have to be moved because you just can't affect the purpose of the act. You can't get these animals to sanctuary if they're going to die in transit or immediately thereafter.

But I think it's important to note that we're not conceding that any of these animals fall into that category, and our position is that it is very unlikely that

any chimpanzees would fall into that category because the facility, APF's policy is to euthanize animals before they become that sick.

And so we just think practically that situation is unlikely to arise. A rare outlier circumstance where it would be impossible to move a chimp shouldn't foreclose the agency's compliance with the law. This isn't the reason that the agency was withholding these chimps. The agency didn't say these chimps were at death's door. Rather, they said they couldn't be moved because of chronic conditions like heart disease and diabetes, which, again, are common in former research chimps.

Mariann: Yeah, and if I understand, their position was basically, "Since there might be a situation in which it will be impossible to comply, that means we have discretion, and the whole thing is just discretionary."

And when you first hear that, I was like, "Oh yeah, I can see that." But it doesn't actually make any sense. But the government also brought the Animal Welfare Act into it, I believe, and argued that there are provisions of the Animal Welfare Act that would prohibit the transfers. Can you talk about that?

Margie: Yeah, so NIH couldn't find any language in the CHIMP Act that gave it the discretion that it purported to exercise, and so it looked to external sources. It looked to regulations promulgated under the Animal Welfare Act to try to justify its conduct. And so, the agency pointed to two regulations that have been promulgated under that Act.

One regulation requires a licensed veterinarian to sign a health certificate before a non-human primate is transported from a research facility. And that certificate needs to state that the animal appeared to be free of any infectious disease or physical abnormality, which would endanger the animal or other animals, or endanger public health, and that's 9 CFR § 2.38(h).

The language in the regulation doesn't require the vet to speak with certainty regarding the risk to the animal or to forecast the risk caused by transit, let alone consider risks beyond the transport process, and as I mentioned earlier, NIH was looking far down the line as to what would happen, and the perceived risk once the animal was moved to sanctuary. So, well outside of the bounds of the language in that regulation.

We also argued that NIH's strict reading of that regulation would preclude the transfer of many surplus chimpanzees, again, because they often suffer from

health conditions, chronic health conditions, and even in cases where a chimp is totally healthy, there are risks associated with moving the animal.

And so taking such a strict view of the regulation, particularly when set against a congressional mandate to move these animals to sanctuary in a later enacted and more specific law, these regulations really just could be read in harmony to allow the transfer of the animals in this particular circumstance, where we're talking about moving a surplus chimpanzee from the lab to sanctuary.

The court held that there's no requirement in the regulation that a veterinarian assesses the chimpanzee's overall health prior to transport, and agreed with us that the regulation could be harmonized with the language of the CHIMP Act.

The other regulation that NIH pointed to, 9 CFR § 3.90(c), generally prohibits the transport of a primate if the animal is obviously ill, injured, or in physical distress, but a primate can be transported to receive veterinary care for the condition. And so our point was, again, you've got to read this regulation against the backdrop of the later enacted and more specific CHIMP Act, which reflects a congressional determination on what is in the best welfare interest of these animals.

The sanctuary was created to provide these animals with the highest standard of care, including the highest level of veterinary care, so they can be moved under that exception. And the court agreed with us there as well, noting that the exception in that regulation appeared to be implicated by transferring surplus chimpanzees to sanctuary.

And finally, NIH was just pointing to regulations under the CHIMP Act. So even if they couldn't be harmonized, and we argued, and the court agreed, that they could be harmonized with the CHIMP Act, but even if they couldn't be harmonized, an administrative regulation cannot trump a congressional mandate. And there was nothing in the CHIMP Act that suggested Congress anticipated these Animal Welfare Act regulations being a trump card that allowed the agency to maintain chimps in a lab.

Mariann: Even if they had been totally clear that that they applied, they still obviously wouldn't apply. *laughs*

Yeah, that's a weak argument.

Just to cover all bases, they also argue that their obligations under the CHIMP Act were modified in a subsequent report in Congress, I believe. Can you just discuss that argument as well?

Margie: Yeah, so there's language in the CHIMP Act...so the CHIMP Act requires NIH to promulgate regulations regarding the standard of care at Chimp Haven, at the federal sanctuary. And so the CHIMP Act directs NIH to consider this national research council's report, which I believe is from 1997, which was looking at the issue of, "Okay, we've got all these chimpanzees. What are we going to do with them? What are our options?" And so, the court directed the agency to consider that report in promulgating regulations regarding the standard of care at the sanctuary.

And so our argument was subsection C of the act, which is the language I read earlier about all surplus chimpanzees shall be accepted into the sanctuary system. That's a clear mandate under the act. Subsection D, which is the subsection of the act that gave the agency the authority to promulgate regulations regarding the standards of care under the CHIMP Act, that's a different thing. We're talking about acceptance into the sanctuary system, and then we're talking about standards of care once the animals get there. And the court agreed with us that those are two distinct parts of the CHIMP Act and address different issues. And there were some other factual and legal problems with the government's arguments there, which we argued in briefing, that the court didn't reach in the decision.

Mariann: Now, let's talk about that decision. What did the court decide? And there are aspects of the decision I don't fully understand regarding remedy. So, can you tell us what the court decided in your favor, and then what were the issues about remedy?

Margie: Yeah, so the court decided in our favor regarding the interpretation of the CHIMP Act. The judge agreed with us that the CHIMP Act mandates the transfer of surplus chimpanzees, including the chimpanzees at APF, to sanctuary, and she determined that NIH didn't have discretion with respect to the acceptance of surplus chimpanzees into the sanctuary system.

So she ruled for us on the legal arguments that we made, but she wanted further information from the parties regarding the appropriate remedy, so we provided another filing to the court on that and had a hearing, recently, on that issue.

Mariann: That was the joint status report? A joint status report is just, you getting together with the lawyers on the other side and informing the court of some background information.

Margie: That's right. So a joint status report is the parties presenting a status report together to the court about what's going on in the case. I've had other cases where I filed joint status reports with the opposing party of the government, and we've been able to jointly present where we think the case is to the judge. Here we had our position as to what the appropriate remedy was, and NIH had a different position, so we filed a joint status report, but each provided our own positions in that report.

Mariann: What were those positions, and how did the court respond to the joint status report?

Margie: Our position is that the proper course is to vacate the decision, the ineligibility decision, as we called it in the briefing, and the court called it in its ruling, and remand the matter back to the agency to take action consistent with the summary judgment ruling and a remedies order from the court.

We also asked that the court direct NIH to transfer the chimpanzees at APF to sanctuary as space becomes available there, either through expansion of the facility or through natural attrition as chimpanzees pass away at the sanctuary, and then asking the courts to maintain jurisdiction while that those transfers are occurring and to require regular reporting from the agency.

NIH took the view in that filing, as I understand it, that it was going to reassess the chimps and decide whether or not to move them again. So leaving it open for the agency to essentially have a redo of its decision and decide that these chimps aren't eligible to be transferred to sanctuary or otherwise evade its statutory duty to transfer these animals to sanctuary.

Mariann: So what happens if the court just vacated the ineligibility order and remands the matter to NIH? Like they would just get to do it over? You need an order telling the NIH what it has to do, right?

Margie: That was our concern, yeah. That the agency would effectively redo the same decision, evade its statutory duty, and not act, in what we view, as in compliance with the court's order regarding the summary judgment ruling.

So our position was, this is a point where the agency doesn't have discretion on remand. You know, there are some Administrative Procedure Act cases where an

agency could violate the law; the court could find the agency violated the law, it could send the matter back to the agency, and the agency could reach the same outcome lawfully the second time around.

So I'm thinking of cases where the agency's decision-making was faulty. Perhaps it didn't consider a factor that it should have considered or didn't explain itself well enough. The court could identify a legal error and send it back to the agency, and the agency could consider that factor, or it could better explain its decision, but still ultimately reach the same outcome.

Here though, the agency doesn't have the discretion to exercise on remand because the CHIMP Act mandates the transfer of these animals to sanctuary and doesn't afford NIH discretion with respect to the acceptance of these animals into the sanctuary system. We think it's totally proper and necessary for the court to provide direction to NIH regarding its legal obligations on remand here, and there's case law supporting our position.

Mariann: I can see the court, which has done a really good job in a lot of ways, really being worried like maybe one of these chimpanzees...the same thought that came to me...really might die, and I don't want to order them transferred. But I guess what you're saying is that if that's the case, NIH could come to the court and say, "Make a decision; it's up to the court whether this chimpanzee should be transferred. It's not within our discretion. We have made the decision that it shouldn't, and you would have to bring an action to change that."

It doesn't mean they have to do that, but it's just not within their discretion to make the decision, is that right? Did that make any sense?

Margie: Again, we don't think that situation is likely to occur...

Mariann: Right. It's just hard to believe it's not the worry at the back of somebody's mind.

Margie: The agency, if that was the case, could seek relief from the court's order to transfer that particular animal.

Mariann: Yeah. The court wants additional briefing, correct? And what is that about?

Margie: That's right. So, so we did get an order after the hearing, and the judge did vacate and remand the matter to NIH, but she also directed them to comply with the CHIMP Act requirement that all surplus chimpanzees shall be accepted to the sanctuary system in accordance with the summary judgment ruling.

And that summary judgment ruling, as we've talked about, determined that the CHIMP Act mandates transfer of these animals to sanctuary. So, our view is that the agency should start making plans to start transferring these animals as soon as practicable, under the court's order. But she did ask for additional briefing regarding whether or not it's permissible for the court to direct the agency to transfer the chimpanzees to Chimp Haven as space becomes available, whether that's permissible under the Administrative Procedure Act.

We certainly think it is, for the reasons that I just mentioned, that the agency lacks discretion here, and the concern is that if the court doesn't provide direction to the agency, it could end-run the requirements of the CHIMP Act and the court's summary judgment ruling, and so further explicit direction to the agency is appropriate here.

Mariann: It seems kind of obvious that if the court has decided that the agency must do this, the court has the power to tell the agency it must do this.

Margie: Yeah, and I think the court has, right? It's told the agency to comply with the CHIMP Act in its summary judgment ruling. But certainly, we think it would be appropriate for the court to also tell the agency to transfer these animals, as space becomes available.

Mariann: Okay. Once you do this additional briefing and the court makes its decision, is it going to be appealable? Is this going to go on and on and on? Is this the rest of your life, Margie?

Margie: It could be. I can't forecast what the agency will do. That's a decision for the agency to make regarding the court's ruling. Then if our requested relief is entered, that's the agency's decision as to whether or not to appeal. So, you know, it's certainly possible that there could be an appeal; I can't say how likely that is or not, because I work for plaintiffs and not defendants.

Mariann: Do you have a theory as to why the NIH is taking such a stand here? Or one that you can share?

Margie: You know, I think that the agency has looked at this and thinks that its vets have assessed this decision and stands by its assessment.

But again, the plaintiffs in this matter see a lot of flaws in the agency's decision-making here. As I said, this whole thing was spurred by the recommendation of the vet at the lab. NIH adopted that recommendation wholesale. It didn't determine that any of these chimps could be moved after the vet made that initial recommendation. Then it did so without going to the facility, it did so based on records that it received from the lab, and it did so without assessing the very real and concrete benefits identified by Congress in transferring these animals to sanctuary.

And again, we think that the agency overestimated the risks of transfer here.

Mariann: I find it a bit mystifying, but you know, I frequently do.

All right. I think that that covers where we are in the case unless I've left something out. Even so, I just want to clarify because this is something I tend to forget about, too. This isn't all the chimpanzees in the country. There are still chimpanzees who are privately owned.

Certainly, invasive research...that covers all the chimpanzees in the country, that decision, I believe. But there are still chimpanzees out there, right?

This doesn't send them all to sanctuary, right?

Margie: The CHIMP Act is specific to federal chimpanzees, chimpanzees who are owned by the government or were used in federally supported research. So the CHIMP Act applies to federal chimpanzees.

So there are other chimps. I don't know as many details about the number of chimpanzees in private labs as I do about federal chimps, but certainly, that's been another piece of this that the organization I work for, and other organizations, have been working on is getting chimpanzees out of private labs and into sanctuary after invasive research.

Mariann: Invasive research has been ended, but there are other kinds of research, behavioral research, and psychological research that still could be going on.

Margie: Yeah, it would have to be within the parameters of the Endangered Species Act. So would not be permitted to harm or harass the animals without an ASA permit.

And we're not aware of any of those permits being issued, so it would more limited on species, and my background is actually in primate behavior, so there's certainly plenty of forms of behavioral research that can be non-invasive and just sort of sitting in the background and watching animals.

There would be pretty significant limitations on what can be done.

Mariann: I just wanted to make sure that people kind of understood the parameters of what we're talking about.

I only know of one other effort to give research animals a life after research, and I might be wrong. Some states have laws requiring, or allowing, dogs to be adopted under certain circumstances.

Do you see this as an overall approach that could work for additional animals? Because, after all, chimpanzees, as we started out saying, are remarkable special animals, but all of these animals matter. And presumably, some of the research that was being done on chimpanzees is now being done on monkeys, and it hasn't put an end to research.

It seems like there's something appealing here. That other arguments haven't reached people or reached legislatures. Not just that it's chimpanzees, but that it isn't fair to kill them after we've harmed them. Do you see that as a way forward in other areas?

Margie: Yeah, I certainly think that this could be used as a potential model, and I think the circumstances would be different.

For example, a monkey can't be adopted out as a pet in a private home because monkeys are not suitable and appropriate pets, and they would not do well in that environment. And the humans would not do well in that environment because very smart animals with opposable thumbs do not make good pets.
laughs

Mariann: And it would be hard to develop that many sanctuaries for all those monkeys.

Margie: Sure.

Mariann: I mean, going the other direction...

Margie: Right. I think we are talking about a more limited number of animals here.

But I certainly think that just because it would be difficult, shouldn't foreclose the exploration and potential to provide retirement to animals, and there are certainly animals who would be appropriate for adoption, like cats and dogs, if they're used in research. Humane Society of the United States has helped place animals, for example, beagles, who are being used at a facility that was breeding them for research purposes.

HSUS has helped place those animals in homes. So I certainly think that there are opportunities that we should explore with respect to these other animals and that this could be a starting point to do so.

Mariann: I agree. The argument seems to reach people when other arguments don't necessarily. It was really my pleasure, and I'm sure it's the same for all the people who are listening.

Thanks so much, Margie.

Margie: Thank you.