

# NOTE

## BULLHOOKS AND THE LAW: IS PAIN AND SUFFERING THE ELEPHANT IN THE ROOM?

By  
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*In the United States, violent use of “bullhooks”—sharpened, steel-tipped rods—on captive elephants at carnivals, circuses, and zoos is all too routine. Yet animal-welfare advocates struggle to protect elephants from the (mis)use of bullhooks under the current regulatory regime. At the federal level, advocates cannot consistently rely on either the Animal Welfare Act or the Endangered Species Act, due to these statutes’ narrow provisions, standing limitations, and inconsistent enforcement. State animal-protection laws are equally deficient, as only two states have defined suffering and abuse clearly enough in their statutes to enable effective prosecution of elephant mistreatment, and plaintiffs in even these states frequently fail for lack of standing. Ultimately, the most effective solution to the problem of bullhooks may lie with local lawmaking authorities. Many counties and municipalities have begun to protect captive elephants by enacting ordinances that expressly ban these devices within their jurisdictions. These local laws, which are growing increasingly popular, could offer the most effective protections against elephant abuse to date.*

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## I. INTRODUCTION

Over the past several decades, public awareness of the plight of captive elephants in the United States (U.S.) has grown tremendously. This is due in large part to a better understanding of these creatures’ remarkable intelligence, and to exposés of the training and handling methods used to control the elephants and induce them to perform unnatural postures. As the axiom holds, changes in culture fuel changes in law. Indeed, we are currently witnessing an unprecedented evolution in the law, reflective of a broader shift in cultural values toward favoring greater protections for captive elephants. At the center of this national discussion is the use (and misuse) of bullhooks—ubiquitous elephant-training tools resembling fireplace poker.

This Note takes a national survey of the intersection of bullhooks and the law at the federal, state, and municipal levels. Part II explores the charged debate surrounding the use of these training devices from the perspectives of both “bullhook” abolitionists and proponents of their use as “guides.” Parts III, IV, and V walk through the current treatment of bullhooks in federal, state, and local laws respectively, with particular focus on legislation and regulation that expressly or tacitly implicate the use of bullhooks. This Note also examines judicial interpretations of these laws, as well as each law’s relative effectiveness, in light of both the broad enforcement discretion the laws typically grant to law enforcement and the difficulties advocates face in establishing standing to sue.

## II. “GUIDE” OR “BULLHOOK”? THE DISPUTE OVER SEMANTICS AND PORTRAYAL

*This instrument, also known as a “guide,” is a standard, well-accepted tool in the elephant industry . . . that is indispensable for the safe and proper handling of elephants in a traveling circus.*<sup>1</sup>

*And the noises that you heard, that was not an elephant laughing at a joke; that was the noise of an elephant crying out in pain . . . Now, you can call it a guide, you can call it anything you want to call it, but it is a bull hook and it does, in fact, inflict pain.*<sup>2</sup>

The bullhook (also called a guide, ankus, or elephant hook) is a device routinely used by elephant trainers and handlers to control captive elephants.<sup>3</sup> Resembling a fireplace poker, it is a two-and-a-half to three-foot long rod made of wood, fiberglass, Lexan, or nylon, with a metal hook and a metal point (generally stainless steel) on the end.<sup>4</sup> While the shape and size of bullhooks are fairly uniform, depictions of its intended and actual use (and, indeed, even what it is called) vary considerably. The chasm in the national discourse about bullhooks pits dogged “bullhook” abolitionists on one side against staunch proponents of the “guide” on the other.

Reflecting their general support for the use of bullhooks, many facilities on the elephant-management continuum—including many circuses and zoos—stridently eschew the term “bullhook” as a misnomer, preferring instead the gentler term, “guide.”<sup>5</sup> According to the *Elephant Husbandry Resource Guide*, an instructive manual on captive elephant care and training to which circuses such as Ringling Brothers and Barnum & Bailey often cite,<sup>6</sup> “[i]t is not only necessary, but appropriate that the term “guide” be added to the elephant handler’s vocabu-

<sup>1</sup> Br. in Support of Pl.’s Mot. for T.R.O., Interlocutory Inj. & Perm. Inj. Relief, *Feld Ent., Inc. v. Fulton Co.*, 3 (No. 2012cv211353, Ga. Super. Fulton Co. (Feb. 13, 2012)) (on file with *Animal Law*).

<sup>2</sup> Fulton Co. Commn., *Minutes of Recess Meeting Transcript* at 100 (Oct. 20, 2012) (available at <http://mm1.co.fulton.ga.us/cache/00009/793/rc101020db.pdf> (accessed Apr. 13, 2013)) [hereinafter *Oct. 20, 2012 Minutes*] (Commissioner Robb Pitts’s statement regarding #10-1091, a resolution sponsored by Commissioner Pitts to amend Article VI of Chapter 34 of the Fulton County Code of Ordinances to prohibit the use of bullhooks and similar devices on elephants).

<sup>3</sup> Elephant Managers Assn., *Standard Guidelines for Elephant Management* 6 (available at [https://elephantmanagers.com/uploads/ema\\_standard\\_guidelines\\_for\\_elephant\\_management\\_-\\_updated.pdf](https://elephantmanagers.com/uploads/ema_standard_guidelines_for_elephant_management_-_updated.pdf) (updated Feb. 2010) (accessed Apr. 13, 2013)).

<sup>4</sup> *Elephant Husbandry Resource Guide* 66 (Deborah Olson ed., 2004); see also *Am. Socy. for the Prevention of Cruelty to Animals v. Feld Ent., Inc.*, 677 F. Supp. 2d 55, 59 n. 3 (D.D.C. 2009) [hereinafter *ASPCA I*] (court’s description of a bullhook); People for the Ethical Treatment of Animals, *Update: Atlanta Guts Bullhook Ban*, <http://www.peta.org/b/thepetafiles/archive/2012/06/19/will-the-atlanta-city-council-ban-bullhooks.aspx> (updated June 19, 2012) (accessed Apr. 13, 2013) [hereinafter *PETA Update*] (providing an image of a bullhook).

<sup>5</sup> *Elephant Husbandry Resource Guide*, *supra* n. 4.

<sup>6</sup> See e.g. Email from Thomas L. Albert, Vice Pres., Govt. Rel., Feld Ent., Inc., to Lt. Jeff Doyle, Animal Control Supervisor, Tallahassee Animal Serv., *Follow Up Re:*

lary in place of the outdated, misunderstood, and misnamed [bullhook].”<sup>7</sup> To this group, the “guide” is merely a “tool that is used to teach, guide, and direct the elephant into the proper position or to reinforce a command.”<sup>8</sup> The handler is instructed to “cue” the elephant to perform certain actions, like lifting its leg, by coupling a verbal command with the physical cue—that is, “catch[ing]” the animal’s skin with the “tapered” end of the guide and then, with “very little pressure,” using a “pushing or pulling motion.”<sup>9</sup>

Despite this relatively innocuous portrayal of the bullhook, however, the elephant-husbandry manual also cautions that “on a rare occasion, superficial skin marks may result,” and that the “shaft of the guide may be used as punishment after the elephant acts in an inappropriate or aggressive manner.”<sup>10</sup> To opponents of this practice, these supposedly “rare” occurrences of physical scarring and punishment are “business as usual” when it comes to the use of bullhooks, bolstering their message that a bullhook by any other name would be entirely “euphemistic.”<sup>11</sup> In the words of one anti-bullhook advocacy organization, Born Free USA, “[a] bullhook can easily inflict pain and injury [as] trainers often embed the hook in the soft tissue behind the ears, inside the ear or mouth, in and around the anus, and in tender spots under the chin and around the feet.”<sup>12</sup> Indeed, an elephant’s seemingly impenetrable hide is only deceptively tough. “The thickness of an elephant’s skin ranges from one inch across the back and hindquarters to paper-thin around the mouth and eyes, inside the ears, and at the anus,” and it is so delicate that an elephant can purportedly feel the pain of an insect bite.<sup>13</sup>

Moreover, Born Free USA contends that

“[t]he bullhook is used to establish human dominance over the elephant through negative reinforcement in the form of corporal punishment. Elephants are conditioned through violent training sessions<sup>[14]</sup> and know that

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*Ringling Bros.* (Jan. 20, 2012, 3:14 p.m. EST) (on file with *Animal Law*) (referencing the *Elephant Husbandry Resource Guide* for “proper use of the ‘guide’”).

<sup>7</sup> *Elephant Husbandry Resource Guide*, *supra* n. 4, at 65 (emphasis added).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 66.

<sup>10</sup> *Id.*

<sup>11</sup> Compare *id.* at 65–66 (referring to the terms “ankus” and “bullhook” as outdated, while claiming that the “guide” only pierces an elephant’s skin on rare occasions) with *Leider v. Lewis*, No. BC375234, slip op. at 36 (Cal. Super. L.A. July 23, 2012) (stating that the term “ankus” is perhaps a euphemistic alternative to the term “bullhook”). For one journalist’s account of a yearlong investigation of Ringling Bros. and Barnum & Bailey Circus that revealed rampant abusive use of bullhooks in the circus industry, see Deborah Nelson, *The Cruellest Show on Earth*, Mother Jones (Nov. 2011) (available at <http://www.motherjones.com/environment/2011/10/ringling-bros-elephant-abuse> (accessed Apr. 13, 2013)).

<sup>12</sup> Born Free USA, *The Bullhook*, [http://www.bornfreeusa.org/a1a6b1\\_bullhook.php](http://www.bornfreeusa.org/a1a6b1_bullhook.php) (accessed Apr. 13, 2013).

<sup>13</sup> *Id.*

<sup>14</sup> Captive elephants are often trained (or “broken”) using a combination of bullhooks and “block and tackle.” “A block and tackle is an arrangement of chains and pulleys that

refusal to obey a bullhook-wielding trainer's commands will result in severe punishment."<sup>15</sup>

Corroborating this portrayal of bullhooks as fear-inducing instruments, John Lewis, Director of the Los Angeles Zoo, confirmed that "if an elephant has been hurt by a [bullhook] in the past, the elephant will react negatively" and comply with the requests by the trainer or keeper if a keeper merely shows a bullhook.<sup>16</sup>

In this national debate over the use of bullhooks, the line in the sand is clearly drawn. On one side, proponents of bullhooks confidently aver that the "guide" is a long-standing industry practice that is not harmful to the elephants when used properly, and is "indispensable" for the safe handling of elephants.<sup>17</sup> On the other side, opponents stridently declare that the bullhook is "a weapon that is used to inflict pain [and] fear on the elephants. . . . That's it."<sup>18</sup> The sharp public divide over bullhooks is spurring courts, lawmakers, and law-enforcement officials to grapple with the issue. Quite predictably, they are reaching vastly disparate conclusions as to the painfulness, abusiveness, and ultimately, the lawfulness of using bullhooks on captive elephants.

### III. BULLHOOKS AND FEDERAL LAW

At the federal level, two principal statutory schemes—the Animal Welfare Act (AWA)<sup>19</sup> and the Endangered Species Act (ESA)<sup>20</sup>—and their accompanying bodies of administrative regulations ostensibly cover the use (and misuse) of bullhooks. The AWA purports to ensure the "humane care and treatment"<sup>21</sup> of animals exhibited in "carnivals, circuses, and zoos,"<sup>22</sup> and regulations promulgated under the AWA are supposed to safeguard exhibited animals from handling that causes "physical harm [or] unnecessary discomfort."<sup>23</sup> The ESA protects federally listed endangered species, including wild-born Asian ele-

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is usually used to lift heavy objects, like large pumps, steel poles, and machine frames. In this situation, the block and tackle is used to train elephants to do certain things, like lie down, by using chains to pull their legs apart." *Leider*, slip op. at 36 (citations omitted).

<sup>15</sup> Born Free USA, *supra* n. 12.

<sup>16</sup> *Leider*, slip op. at 37.

<sup>17</sup> Br. in Support of Pl.'s Mot. for T.R.O., Interlocutory Inj. & Perm. Inj. Relief, *Feld Ent. Inc.* at 3.

<sup>18</sup> Fulton Co. Commn., *Minutes of Regular Meeting Transcript* 68 (Nov. 3, 2010) (available at <http://mm1.co.fulton.ga.us/cache/00009/742/rm101103db.pdf> (accessed Apr. 13, 2013)) [hereinafter *Nov. 3, 2010 Minutes*] (Commissioner Pitts's statement regarding #10-1091, a resolution sponsored by Commissioner Pitts to amend Article VI of Chapter 34 of the Fulton County Code of Ordinances so as to prohibit the use of bullhooks and similar devices on elephants).

<sup>19</sup> 7 U.S.C. §§ 2131–2159 (2006).

<sup>20</sup> 16 U.S.C. §§ 1531–1544 (2006).

<sup>21</sup> 7 U.S.C. § 2131(1).

<sup>22</sup> *Id.* at § 2132(h).

<sup>23</sup> 9 C.F.R. § 2.131(b)(1) (2012).

phants,<sup>24</sup> by prohibiting the “taking” of any member of the species,<sup>25</sup> a term which includes actions that “harass,” “harm,” or “wound” the animal.<sup>26</sup> While these two statutory regimes could conceivably be construed to proscribe the use of bullhooks on elephants, no definitive legal declaration has been issued since their enactment—by Congress, the enforcement agencies, or the courts—resolving the degree to which the use (or misuse) of bullhooks violates these federal laws.

### A. *The Animal Welfare Act*

In 1970, Congress amended the Laboratory Animal Welfare Act of 1966, which had previously applied strictly to research animals, by renaming the statute the “Animal Welfare Act” and enlarging the class of protected animals to include animals used “for exhibition purposes.”<sup>27</sup> Among the list of defined “exhibitors” regulated by the amended statute are “carnivals, circuses, and zoos exhibiting such animals[,] whether operated for profit or not.”<sup>28</sup> Congress charged the U.S. Department of Agriculture (USDA)—or, more specifically, a division of the USDA called the Animal and Plant Health Inspection Service (APHIS)—with enforcing the AWA, and promulgating regulations governing the care and handling of animals covered by the statute.<sup>29</sup> While bullhooks are not specifically mentioned anywhere in the AWA or its associated USDA/APHIS regulations, two particular provisions in the regulations appear to implicate their use. The first stipulates that the “[h]andling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, . . . behavioral stress, physical harm, or unnecessary discomfort.”<sup>30</sup> The second forbids “[p]hysical abuse . . . to train, work, or otherwise handle animals.”<sup>31</sup>

#### 1. *Shortfalls of the Act*

Despite the stringent regulatory language designed to protect exhibited animals like captive elephants from “discomfort” and “abuse,”

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<sup>24</sup> 41 Fed. Reg. 24062, 24066 (June 14, 1976). The Asian elephant (*Elephas maximus*) was listed as an “endangered species” pursuant to Section 4 of the ESA by the U.S. Fish and Wildlife Service (FWS) in 1976. *Id.* Notably, ESA protections apply only to wild-born Asian elephants because, in 1979, FWS adopted the “captive-bred wildlife” (CBW) registration regulation, which exempted animals born in captivity and held pursuant to a valid CBW permit from the “take” prohibition of the ESA. *Am. Socy. for the Prevention of Cruelty to Animals v. Ringling Bros.*, 502 F. Supp. 2d 103, 110–11 (D.D.C. 2007) (citing 50 C.F.R. § 17.21(g)); 44 Fed. Reg. 54002, 54007 (Sept. 17, 1979)).

<sup>25</sup> 16 U.S.C. § 1538(a)(1)(B).

<sup>26</sup> *Id.* at § 1532(19).

<sup>27</sup> 7 U.S.C. § 2131.

<sup>28</sup> *Id.* at § 2132(h).

<sup>29</sup> *Id.* at § 2142; see generally U.S. Dept. of Agric., *APHIS’ Enhanced Animal Welfare Act Enforcement Plan* (available at [http://www.aphis.usda.gov/animal\\_welfare/downloads/awa/AWA\\_Enforcement.pdf](http://www.aphis.usda.gov/animal_welfare/downloads/awa/AWA_Enforcement.pdf) (accessed Apr. 13, 2013)).

<sup>30</sup> 9 C.F.R. § 2.131(b)(1).

<sup>31</sup> *Id.* at § 2.131(b)(2)(i).

the AWA has remained an impotent statute, failing to prevent cruelty to many species.<sup>32</sup> The USDA's sporadic and inconsistent enforcement of the Act's provisions<sup>33</sup> has done little to establish a bright-line rule determining the appropriate use of bullhooks under the AWA, much less whether their use is lawful under the Act in any regard. The noted reasons for the AWA's ineffectiveness are many,<sup>34</sup> but two primary pitfalls are most conspicuous: (1) the USDA's broad enforcement discretion and apparent reluctance to enforce the AWA; and (2) the AWA's lack of a private cause of action (i.e., a citizen-suit provision).<sup>35</sup>

First, the AWA grants broad enforcement discretion to the Secretary of Agriculture, which arguably "undermines the laudable mandates of [the] AWA."<sup>36</sup> The Act provides the Secretary of the USDA with unchecked authority to "make such investigations or inspections as the Secretary deems necessary" to determine whether a regulated exhibitor is violating the provisions of the statute or regulations.<sup>37</sup> The Secretary is granted the discretionary authority to suspend or revoke exhibition licenses,<sup>38</sup> assess civil penalties up to a \$10,000 fine for each violation,<sup>39</sup> issue cease-and-desist orders,<sup>40</sup> and initiate criminal prosecutions for knowing violations of the Act.<sup>41</sup>

Courts have upheld the USDA's broad enforcement discretion when the agency has been sued for failing to take corrective action under the AWA. For instance, in *Performing Animal Welfare Society v. USDA*, the court, in dismissing the case for plaintiff's lack of standing, concluded that in exercising its discretion not to take enforcement action against several elephant exhibitors' alleged animal abuse, "[t]he USDA ha[d] not completely failed to act . . . [I]t ha[d] investigated the allegations of abuse, but ha[d] chosen not to avail itself of its enforcement powers."<sup>42</sup> "The fact that violations [might] continue to occur," the court concluded, was "irrelevant."<sup>43</sup>

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<sup>32</sup> Joshua E. Gardner, Student Author, *At the Intersection of Constitutional Standing, Congressional Citizen-Suits, and the Humane Treatment of Animals: Proposals to Strengthen the Animal Welfare Act*, 68 Geo. Wash. L. Rev. 330, 331 (2000).

<sup>33</sup> *Id.* at 332.

<sup>34</sup> See *e.g. id.* at 331–32 (citing insufficient funding resulting in insufficient inspections).

<sup>35</sup> Emily A. Beverage, Student Author, *Abuse Under the Big Top: Seeking Legal Protection for Circus Elephants After ASPCA v. Ringling Bros.*, 13 Vand. J. Ent. & Tech. L. 155, 165 (2010); see generally Gardner, *supra* n. 32 (presenting proposals to resolve these pitfalls); see also Katharine M. Swanson, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. Mich. J.L. Reform 937 (2002) (addressing the lack of enforcement in research labs).

<sup>36</sup> Beverage, *supra* n. 35, at 158.

<sup>37</sup> 7 U.S.C. § 2146(a) (2006).

<sup>38</sup> *Id.* at § 2149(a).

<sup>39</sup> *Id.* at § 2149(b).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* § 2149(d).

<sup>42</sup> *Perf. Animal Welfare Socy. v. U.S. Dept. of Agric. Animal & Plant Health Inspection Serv.*, Civil Action No. 95–4719, 1996 WL 524333, at \*2 (E.D. Pa. Sept. 9, 1996).

<sup>43</sup> *Id.*

Second, the AWA lacks a citizen-suit provision, which would enable private parties to bring claims before the court for alleged violations of the Act.<sup>44</sup> Courts have refused to imply a private right of action in the AWA;<sup>45</sup> therefore, animal-protection advocates seeking to ensure that AWA-covered animals like elephants are treated humanely must employ the Administrative Procedure Act (APA), and surmount the Supreme Court's stringent constitutional and prudential standing limitations.<sup>46</sup> For example, in *International Primate Protection League v. Institute for Behavioral Research, Inc.*, the court ruled that the animal-welfare group lacked standing to sue under the AWA to be named guardian of research animals seized from a research facility.<sup>47</sup> The court dismissed the plaintiff's claim, stating that "[t]he commitment of an organization [to animal welfare] may enhance its legislative access; it does not, by itself, provide entry to a federal court."<sup>48</sup> In contrast, in *Animal Legal Defense Fund, Inc. v. Glickman*, by leveraging the APA—not the AWA—the plaintiffs established standing in a suit against the USDA for enabling the continued inhumane treatment of nonhuman primates at the Long Island Game Farm Park and Zoo.<sup>49</sup> Specifically, the plaintiffs alleged that the USDA violated the APA by failing to promulgate regulations specifying minimum standards for the humane treatment of nonhuman primates as required by the

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<sup>44</sup> See e.g. 33 U.S.C. § 1365(a) (2006) (Clean Water Act's citizen-suit provision); 16 U.S.C. § 1540(g) (2006) (Endangered Species Act's citizen-suit provision).

<sup>45</sup> See e.g. *Intl. Primate Protec. League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934, 939 (4th Cir. 1986) (finding that the statute does not provide a private right of action); *Perf. Animal Welfare Socy.*, 1996 WL 524333 at \*2 (same).

<sup>46</sup> See 5 U.S.C. §§ 701–704 (2006) (where there is no adequate remedy in court, a person suffering a legal wrong because of final agency action is entitled to judicial review). Pursuant to Article III, Section 2, of the U.S. Constitution, federal courts are courts of limited jurisdiction and may only hear “cases” and “controversies” for which a plaintiff has established standing to present questions to the court in an adversarial process. *Mass. v. Evtl. Protect. Agency*, 549 U.S. 497, 536 (2007). “The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.” *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citation and quotation marks omitted). As the Supreme Court articulated in *Lujan v. Defenders of Wildlife*, as a constitutional minimum, the plaintiff must establish three essential elements: (1) injury-in-fact; (2) causation; and (3) redressability. 504 U.S. 555, 560–61 (1992). First, a plaintiff must have suffered an “injury in fact” that is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. *Id.* at 560. Second, the injury has to be “fairly traceable” to the challenged action of the defendant and not the independent action of some third party not before the court. *Id.* at 560–61. Third, it must be “likely,” not “speculative,” that the injury will be “redressed by a favorable decision.” *Id.* at 561. In addition, the Supreme Court has recognized prudential requirements for standing, including “that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.” *Bennett*, 520 U.S. at 162.

<sup>47</sup> *Intl. Primate*, 799 F.2d at 935.

<sup>48</sup> *Id.* at 938.

<sup>49</sup> *Animal Leg. Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 428–29 (D.C. Cir. 1998) (en banc).



AWA.<sup>50</sup> In that case, the D.C. Circuit held that the lead plaintiff, Marc Jurnove, satisfied the constitutional and prudential standing requirements by sufficiently establishing via affidavit that he “suffered [a] direct, concrete, and particularized injury” to an “aesthetic interest in observing animals living under humane conditions.”<sup>51</sup>

By recognizing “aesthetic” injuries in the animal-welfare context, the *Glickman* decision seems to reflect a less-restrictive view of the injury-in-fact standing requirement that would afford animal-protection advocates greater access to the courts to challenge alleged animal abuse or flagrant agency inaction. However, unless a would-be plaintiff can point to a “discrete”<sup>52</sup> and “final”<sup>53</sup> agency action that violates the APA, in the absence of a citizen-suit provision, judicial review of the use (or misuse) of bullhooks under the AWA appears wholly unavailable. Indeed, Congress tried in 1986 and again in 1989 to add a citizen-suit provision to the AWA, realizing that “[t]here is little point in having a law on the books that is not enforced,” but the amendments received little support and died in committee.<sup>54</sup>

## 2. Documented Mistreatment: Sporadic, Yet Heavy-Handed, Enforcement

Because citizen plaintiffs are essentially barred access to the courts for review of alleged AWA violations, courts have not had the opportunity to emphatically “say what the law is,”<sup>55</sup> and clarify the stringency and reach of the Act’s protective provisions as they apply to the use of bullhooks. In the following USDA-documented cases of apparent misuse of bullhooks, it is unclear how a reviewing court, if given the opportunity via a citizen-suit, would have interpreted the AWA regulations proscribing “trauma,” “unnecessary discomfort,” and “physical abuse.” Would a court have construed the regulations as setting a hard line against “abusive” use of the bullhook or, going even

<sup>50</sup> 7 U.S.C. § 2143(a) requires the Secretary of the USDA “to ‘promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors.’ These standards require the inclusion of ‘minimum requirements’ necessary for ‘a physical environment adequate to promote the psychological well-being of primates.’” Gardner, *supra* n. 32, at 350.

<sup>51</sup> *Animal Leg. Def. Fund, Inc.*, 154 F.3d at 431.

<sup>52</sup> See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64–65 (2004) (stating that “a claim under § 706(1) can only proceed where the plaintiff asserts an agency failed to take a discrete agency action it is *required to take*” (emphasis in original)).

<sup>53</sup> *Bennett*, 520 U.S. at 175, 177–78 (noting that the APA provides judicial review of all “final agency action”); *Lujan*, 497 U.S. at 882 (clarifying that the “agency action” in question must be “final agency action”).

<sup>54</sup> Swanson, *supra* n. 35, at 964 (citing Rob Roy Smith, *Standing on Their Own Four Legs: The Future of Animal Welfare Litigation after Animal Legal Defense Fund v. Glickman*, 29 *Envtl. L.* 989, 1003 (1999) (quoting 132 *Cong. Rec.* 6834 (Jan. 21, 1986) (statement of Rep. Chandler))).

<sup>55</sup> See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

further, interpreted the law as establishing a categorical ban on the use of bullhooks altogether?

A 2003 report prepared by the American Society for the Prevention of Cruelty to Animals (ASPCA) analyzed USDA documents obtained pursuant to the Freedom of Information Act.<sup>56</sup> The documents revealed multiple examples of lax USDA enforcement in response to allegations of elephant abuse by whistleblowers formerly employed by Ringling Bros. Circus, a subsidiary of Feld Entertainment, Inc.<sup>57</sup> In one case dating back to 1999, USDA investigators made an announced visit to a Ringling facility in response to allegations of elephant abuse brought by former Ringling employees.<sup>58</sup> During that visit, the investigators observed a bloody hole, one-eighth inch in diameter, above one elephant's ear, consistent with a bullhook puncture wound.<sup>59</sup> According to the ASPCA report, the USDA also took affidavits of eight former Ringling employees who admitted that bullhooks are routinely used on elephants, but not surprisingly, the employees also denied that bullhooks were ever used in an "abusive manner."<sup>60</sup> One employee did admit, however, to routinely seeing "hook boils" (i.e., infectious sores resulting from abrasions and puncture wounds caused by bullhooks) on the elephants' trunks and inside of their legs.<sup>61</sup> Despite thoroughly documented testimony of employees describing elephant beatings, as well as the investigator's own acknowledgement that there was evidentiary "support for the inappropriate use of a bullhook," the USDA investigation closed with no action against Ringling, citing "insufficient evidence."<sup>62</sup>

Two months after that USDA investigation closed, Ringling was once again under USDA scrutiny following the untimely death of a four-year-old elephant named Benjamin.<sup>63</sup> This young elephant, who had been a subject in the prior Ringling investigation, drowned while swimming in a pond after suffering a purported "cardiac arrhythmia" (i.e., heart attack), even though he had no preexisting heart condition.<sup>64</sup> According to the ASPCA report, "[d]espite the USDA's own investigator's conclusion that '[t]he elephant seeing and/or being "touched" or "poked" by Mr. Harned (the trainer) with [a bullhook] created behavioral stress and trauma which precipitated in the physical harm and ultimate death of the animal,' the USDA General Counsel's

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<sup>56</sup> Am. Socy. for the Prevention of Cruelty to Animals, *Government Sanctioned Abuse: How the United States Department of Agriculture Allows Ringling Brothers Circus to Systematically Mistreat Elephants* (2003) (on file with *Animal Law*) [hereinafter *ASPCA Ringling Report*].

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at pt. III, 1–13.

<sup>59</sup> *Id.* at pt. III, 4.

<sup>60</sup> *Id.* at pt. III, 5.

<sup>61</sup> *Id.*

<sup>62</sup> *ASPCA Ringling Report*, *supra* n. 56, at pt. III, 10.

<sup>63</sup> *Id.* at pt. III, 10; *id.* at pt. V, 1–7.

<sup>64</sup> *Id.* at pt. V, 5.

office closed the investigation without taking any enforcement action against Ringling.”<sup>65</sup>

Ringling did not evade civil penalties much longer. In November 2011, the USDA and Ringling Bros. reached a settlement agreement in which the circus acquiesced to paying a civil penalty of \$270,000—the largest ever assessed against an exhibitor under the AWA—for alleged violations of the Act dating from June 2007 to August 2011.<sup>66</sup> Notably, despite a record number of violations, none of the inspection reports cited Ringling for abusive use of a bullhook.<sup>67</sup>

USDA inspection reports reveal that the numerous alleged violations included an incident in which circus handlers “required” an elephant named Banko to perform on a day when she was ill with “diarrhea” and “probable sand colic,” and needed medication for pain.<sup>68</sup> Arguably, given her apparent illness, Banko would not have performed the commanded maneuvers (e.g., standing on her head or balancing on her hind legs) of her own volition on that day, absent her handler’s consistent, if not forceful, use of a bullhook. Remarkably, however, the use of a bullhook was not expressly mentioned in the inspection report.<sup>69</sup> The USDA inspector only cited Ringling for exhibiting Banko “for a period of time and under conditions [in]consistent with [her] good health and well-being.”<sup>70</sup> The USDA notably did *not* cite Ringling Bros. for handling Banko in a manner that caused “physical harm or unnecessary discomfort”<sup>71</sup>—the USDA regulation that ostensibly forbids using a bullhook with such deliberate intensity to induce an ill or injured animal (i.e., an animal not in “good health”) to perform physically demanding (and debatably unnatural) postures.

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<sup>65</sup> *Id.* at pt. V, 6.

<sup>66</sup> Press Release, U.S. Dept. of Agric., *USDA and Feld Entertainment, Inc. Reach Settlement Agreement* (Nov. 28, 2011) (available at <http://www.usda.gov/wps/portal/usda/usdamediafb?contentid=2011/11/0494.xml> (accessed Apr. 13, 2013)). But, as Ringling’s press release clarifies, in refusing to dispute the fines, the company did not admit wrongdoing or any violation of USDA regulations. Press Release, Feld Entertainment, Inc., *Feld Entertainment, Inc. Resolves U.S. Department of Agriculture Regulatory Disputes* (Nov. 28, 2011) (available at <http://www.feldentertainment.com/press/PressRelease.aspx?id=56277> (accessed Apr. 13, 2013)).

<sup>67</sup> See U.S. Dept. of Agric., *Feld Entertainment Results: Inspection Information* (available at <http://acisearch.aphis.usda.gov/LPASearch/faces/CustomSearch.jspx;search=Feld+Entertainment;select=Inspection+Information>) (accessed Apr. 13, 2013) (showing eighteen inspections, none of which cited Ringling for abusive use of a bullhook).

<sup>68</sup> U.S. Dept. of Agric., *APHIS Inspection Report for Feld Entertainment, Inc.* (Aug. 25, 2011) (available at <http://acisearch.aphis.usda.gov/LPASearch/faces/CustomSearch.jspx;search=Feld+Entertainment;select=Inspection+Information;select=Details> for inspection date Aug. 25, 2011 (accessed Apr. 13, 2013)).

<sup>69</sup> See *id.* (containing no mention of a bullhook).

<sup>70</sup> *Id.* (citing 9 C.F.R. § 2.131(d)(1) (“Animals shall be exhibited only for periods of time and under conditions consistent with their good health and well-being.”)).

<sup>71</sup> See *id.* (citing 9 C.F.R. § 2.131(b)(1) for the treatment of Kimba, but not Banko (“Handling of all animals shall be done as expeditiously and carefully as possible in a matter that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.”)).

Although USDA citations relating to bullhooks are generally sparse, the agency has sporadically levied fines for “abusive” use of a bullhook. For example, in January 2000, the USDA assessed a \$10,000 civil penalty against Clyde Beatty-Cole Bros. Circus (Cole Bros.) for “abusive” use of a bullhook.<sup>72</sup> One month later, in February 2000, the USDA reportedly cited the circus again on similar grounds after an inspector found several bullhook scars on two of its elephants, Bessie and Helen.<sup>73</sup> Since those sanctions over a decade ago, Cole Bros. has been cited by the USDA only three times for failing to handle its elephants in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort, and none of the citations involved the use of a bullhook.<sup>74</sup> But this paucity of citations for the abusive use of bullhooks is not necessarily an indication that conditions for elephants in Cole Bros. have improved.<sup>75</sup> In June 2011, the USDA cited Carson & Barnes, performing as Cole Bros., for mishandling its elephant, Viola, after an employee was discovered “using excessive force while tugging at the elephant with the [bullhook], . . . demonstrating [a] lack of control of the elephant and lack of experience or proper training to handle elephants.”<sup>76</sup>

### 3. Recommendations for Greater Efficacy

In order to compensate for the USDA’s weak and sporadic enforcement of the AWA and lend more credence to the Act and its commendable mission to protect captive animals from abuse, the Act should be amended to enlarge the class of persons able to file suit under its regulatory regime. To accomplish this, Congress should amend the AWA to

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<sup>72</sup> People for the Ethical Treatment of Animals, *Cole Bros. Circus Factsheet 5* (2012) (available at [http://www.mediapeta.com/peta/PDF/Cole\\_Bros\\_Circus\\_Factsheet.pdf](http://www.mediapeta.com/peta/PDF/Cole_Bros_Circus_Factsheet.pdf) (accessed Apr. 13, 2013)).

<sup>73</sup> *Id.* at 4–5.

<sup>74</sup> *See id.* at 2–3 (June 23, 2004: “noncompliance of causing elephants trauma, physical harm, behavioral stress”; April 10, 2007: stressful transport of one elephant; May 15, 2007: stressful transport of two elephants).

<sup>75</sup> In 2003, the USDA assessed Cole Bros. a \$2,750 fine after a trainer was videotaped hitting an elephant with a broom. *Id.* at 4. Again, in 2004, the USDA cited the circus after inspectors, first alerted by an eyewitness, discovered injuries consistent with physical trauma on one of the performing elephants. *Id.* at 3. A handler later admitted to hitting the elephant, Jewel, with a plastic PVC pipe. *Id.* at 3. Moreover, since 2000, the USDA has also repeatedly cited Cole Bros. for failing to provide adequate veterinary care for its elephants. *Id.* at 1–4.

<sup>76</sup> U.S. Dept. of Agric., *APHIS Inspection Report for Carson & Barnes Circus* (June 29, 2011) (available at <http://acisearch.aphis.usda.gov/LPASearch/faces/CustomSearch.jspx>; search “Carson & Barnes Circus,” select Inspection Information, select Details for inspection date June 29, 2011 (accessed Apr. 13, 2013)) (This particular citation is for a violation of 9 C.F.R. § 2.131(d)(3) (“During public exhibition, dangerous animals such as . . . elephants must be under the direct control and supervision of a knowledgeable and experienced animal handler.”)); People for the Ethical Treatment of Animals, *supra* n. 72, at 1.

include a citizen-suit provision or a *qui tam* action.<sup>77</sup> Either of these proposed amendments would carve out a pathway for elephant advocates to place before the courts the issue of whether the use of bullhooks to train and handle elephants violates the Act or its accompanying regulations.<sup>78</sup>

Adding a citizen-suit or *qui tam* provision to the AWA would transfer much of the enforcement burden from the administrative arena to the judicial arena by effectively enlisting the public as private attorneys general and allowing citizens to don the mantle of the state to prosecute violations of the Act. A citizen-suit provision could parallel those already used in federal environmental statutes like the ESA,<sup>79</sup> while a *qui tam* action could be modeled after provisions in the False Claims Act.<sup>80</sup>

In order to stave off a flood of unintended or frivolous litigation, both of these provisions could narrowly limit the class of persons authorized to file suit. For instance, because the expanse of the AWA covers laboratory animals as well as animals used in exhibitions, the provisions could be restricted to apply only to exhibitors (i.e., circuses and zoos) to avoid the political unpopularity of subjecting research institutions to a host of litigation.<sup>81</sup> Congress could narrow the provisions even further by limiting the availability of the citizen-suit provision to nonprofit animal-protection organizations<sup>82</sup> and reserving the *qui tam* provision only for whistleblowers employed by USDA-licensed exhibitors. The clear challenge would be drafting the text of these provisions in such a way that does not “run afoul of Article III,” but simultaneously does not restrict prospective plaintiffs to only those people who have suffered an aesthetic injury as eyewitnesses to violations of the Act.<sup>83</sup>

Suing under a citizen-suit or *qui tam* provision would present its own particular challenges, especially in the context of alleged elephant abuse with bullhooks. First, a plaintiff bringing a suit pursuant to an AWA citizen-suit provision would invariably hit a formidable constitu-

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<sup>77</sup> A *qui tam* action is “a whistleblower claim brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the part of the penalty to go to any person who will bring such action and the remainder to go to the state or some other institution.” *Qui Tam Action in Words & Phrases* vol. 35B, 496–97 (2006) (citations omitted).

<sup>78</sup> Of particular concern for advocates are the USDA regulations forbidding handling that causes “behavioral stress, physical harm, or unnecessary discomfort” and forbidding the use of “[p]hysical abuse” to train and handle animals. 9 C.F.R. § 2.131(b)(1)–(2) (2012).

<sup>79</sup> 16 U.S.C. § 1540(g) (2006).

<sup>80</sup> 31 U.S.C. § 3730 (2006); Mariann Sullivan, *The Animal Welfare Act: What’s That?* 79 N.Y. St. B. Assn. J. 17, 23 (2007) (stating “Congress could create a *qui tam* action, similar to that found in the False Claims Act” (emphasis omitted)).

<sup>81</sup> Beverage, *supra* n. 35, at 180.

<sup>82</sup> *Id.* Indeed, many states already authorize humane associations to litigate on behalf of animals. *Id.*

<sup>83</sup> Sullivan, *supra* n. 80, at 23.

tional barrier, namely the Article III injury-in-fact standing requirement—"a very tough standard to meet when it is the animals that have been harmed, not the person bringing the suit."<sup>84</sup> Next, if Congress adopted a *qui tam* provision specifically available to whistleblowers working for animal exhibitors, then Congress would concurrently need to reinforce and expand the AWA's anti-retaliation clause,<sup>85</sup> which today only applies to personnel in research facilities.<sup>86</sup> Expanding the anti-retaliation clause would encourage those circus or zoo employees with inside knowledge of elephant mistreatment to come forward without fear of retribution, thus giving the AWA the potency it conspicuously lacks in its current form.

### B. *The Endangered Species Act*

Pursuant to Section 4 of the ESA, the U.S. Fish and Wildlife Service (FWS) listed the Asian elephant as an endangered species.<sup>87</sup> Once the Asian elephant was "listed," Section 9 of the ESA prohibited the "take" of any wild-born Asian elephant (whether that animal remained in the wild or was held in captivity),<sup>88</sup> Congress broadly defined the term "take" as "to harass, harm, . . . wound, . . . or attempt to engage in any such conduct."<sup>89</sup> FWS has further defined "harm" and "harass" to include any acts that actually kill or injure wildlife or "significantly disrupt normal behavioral patterns."<sup>89</sup> In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the U.S. Supreme Court indicated that the term "take" should be construed "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."<sup>90</sup>

Moreover, Section 11 of the ESA grants a private right of action enabling interested parties to sue regulated entities or the government for alleged violations of the take prohibition.<sup>91</sup> Specifically, the ESA's citizen-suit provision authorizes any "person" to "commence a civil suit" "to enjoin any person, including the [U.S.] . . . who is alleged to be in violation of any provision of [the ESA] or regulation issued under the [Act], or against the Secretary [of FWS] where there is alleged a failure . . . to perform [a nondiscretionary] act or duty."<sup>92</sup> As the Su-

<sup>84</sup> *Id.*

<sup>85</sup> 9 C.F.R. § 2.32(c)(4) (2012) ("No facility employee, Committee member, or laboratory personnel shall be discriminated against or be subject to any reprisal for reporting violations of any regulation or standards under the Act[.].").

<sup>86</sup> Deawn A. Hersini, *Can't Get There from Here . . . Without Substantive Revision: The Case for Amending the Animal Welfare Act*, 70 UMKC L. Rev. 145, 166 (2001).

<sup>87</sup> 41 Fed. Reg. 24062, 24066 (June 14, 1976).

<sup>88</sup> 16 U.S.C. §§ 1532(19), 1538(a)(1)(B) (2006).

<sup>89</sup> 50 C.F.R. § 17.3 (2011). The term "wound," however, is not defined in either the ESA or in FWS regulations. See *id.*; 16 U.S.C. § 1532(19) (neither containing a definition of "wound").

<sup>90</sup> *Babbitt v. Sweet Home Ch. of Communities for a Great Or.*, 515 U.S. 687, 704 (1995) (quoting Sen. Rpt. 93-307 at 7 (July 6, 1973)) (emphasis added).

<sup>91</sup> 16 U.S.C. § 1540(g)(1)(A)-(C) (2006).

<sup>92</sup> *Id.*

preme Court noted in *Bennett v. Spear*, the ESA's citizen-suit provision is "an authorization of remarkable breadth when compared with the language Congress ordinarily uses."<sup>93</sup>

1. *Bullhooks on Trial, Act I: ASPCA v. Feld Entertainment, Inc.*

In 2000, encouraged by the Supreme Court's expansive construction of the ESA's take and citizen-suit provisions, a coalition of animal-protection organizations, which included the ASPCA as the named plaintiff, filed a citizen suit in the D.C. District Court against Feld Entertainment, Inc. (owner of Ringling Bros. or Ringling).<sup>94</sup> Specifically, the plaintiffs alleged that Ringling's

use of the bullhook [to train, handle, "correct," and "discipline" the elephants] "wounds," "harms," and "harasses" the elephants in violation of the ESA's "take" prohibition because it causes physical, psychological, and behavioral injuries to the elephants, and also significantly impairs and disrupts the elephants' essential and normal behavioral patterns, including their ability to move freely without being hit, their ability to explore their surroundings, and their ability to socialize with other elephants.<sup>95</sup>

In their complaint, plaintiffs sought, inter alia, an order (1) declaring the use of bullhooks as violative of the ESA's take prohibition; and (2) enjoining Ringling Bros. from "beating, wounding and injuring endangered elephants, [and] forcibly separating baby elephants from their mothers . . . unless and until [Ringling] obtains a permit to do so from [FWS] pursuant to . . . Section 10 of the ESA."<sup>96</sup> Section 10(a)(1) requires that whenever a "person"—defined to include a corporation such as Ringling Bros.<sup>97</sup>—seeks to take an endangered species, that person must first obtain a permit from FWS authorizing the take.<sup>98</sup> Under Section 10(c), all of the permit-application materials would be available to the public.<sup>99</sup> Moreover, if FWS grants a take permit, the agency must then ensure that the animals are being "maintained under humane and healthful conditions,"<sup>100</sup> and agency documentation of the permit-verification process would also be available to the public.<sup>101</sup>

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<sup>93</sup> *Bennett*, 520 U.S. at 164–65.

<sup>94</sup> "The original complaint in this action was . . . filed on July 11, 2000 on behalf of, among others, the American Society for the Prevention of Cruelty to Animals ("ASPCA"), Animal Welfare Institute ("AWI"), and Fund for Animals ("FFA"), as well as certain plaintiffs who were later dismissed, namely the Performing Animal Welfare Society ("PAWS"), Pat Derby, Edward Stewart, and Glenn Ewell." *ASPCA I*, 677 F. Supp. at 59.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 61.

<sup>97</sup> 16 U.S.C. § 1532(13) (2006).

<sup>98</sup> *Id.* at § 1539(a)(1).

<sup>99</sup> *Id.* at § 1539(c).

<sup>100</sup> 50 C.F.R. § 13.41 (2011).

<sup>101</sup> 16 U.S.C. §§ 1539(a)(2), 1539(c).

The plaintiffs in *American Society for the Prevention of Cruelty to Animals v. Feld Entertainment, Inc. (ASPCA v. Feld)* proffered three standing theories to satisfy Article III's case-or-controversy requirement. First, Tom Rider, who worked as a "barn helper" and "barn man" with one of Ringling's traveling circuses during the late 1990s, asserted in his capacity as an individual plaintiff that he suffered an "aesthetic" and "emotional" injury at having witnessed elephants, with whom he averred to have developed a "strong, personal attachment," being mistreated with bullhooks.<sup>102</sup> In 2001, the district court initially dismissed Rider's aesthetic injury claim,<sup>103</sup> but in 2003, the Court of Appeals for the D.C. Circuit reversed the district court's ruling and upheld Rider's right to allege an aesthetic injury.<sup>104</sup> The D.C. Circuit stated that "an injury in fact can be found when a defendant adversely affects a plaintiff's enjoyment of flora and fauna, which the plaintiff wishes to enjoy again upon the cessation of the defendant's actions."<sup>105</sup> The D.C. Circuit also found that, considering "the lesser showing required at the pleading stage, . . . Rider's allegations of emotional attachment, coupled with his desire to visit the elephants and his ability to recognize the effects of mistreatment, were sufficient to establish injury in fact."<sup>106</sup> After the D.C. Circuit ruled that the case could proceed to trial, the district court then held a six-week bench trial to determine the veracity of Rider's alleged "aesthetic" and "emotional" injuries.<sup>107</sup>

Second, the organizational plaintiffs alleged "informational" standing, arguing that Ringling's refusal to seek a take permit to use bullhooks on endangered Asian elephants "deprived [them] of information to which [they] would be entitled in the course of a ["take"] permit proceeding."<sup>108</sup> The "informational" standing theory rested "on Section 10(c) [of the ESA], which requires public disclosure of information contained in ["take"] permit applications"<sup>109</sup>—in this instance, information from Ringling detailing the care and treatment of the elephants that would have to be included in a take permit application to FWS.<sup>110</sup>

Third, the organizational plaintiffs argued that they "suffered an injury in fact because they had to expend resources to combat"

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<sup>102</sup> *Am. Socy. for the Prevention of Cruelty to Animals v. Feld Ent., Inc.*, 659 F.3d 13, 17–18 (D.C. Cir. 2011) [hereinafter *ASPCA II*].

<sup>103</sup> *Perf. Animal Welfare Socy. v. Ringling Bros. and Barnum & Bailey Circus*, No. 00-cv-01641, 2001 U.S. Dist. LEXIS 12203 (D.D.C. June 29, 2001).

<sup>104</sup> *Am. Socy. for the Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus*, 317 F.3d 334, 336 (D.C. Cir. 2003).

<sup>105</sup> *Id.* (relying on *Animal Leg. Def. Fund*, 154 F.3d 426 (en banc)).

<sup>106</sup> *ASPCA II*, 659 F.3d at 18 (citing *Am. Socy. for the Prevention of Cruelty to Animals*, 317 F.3d at 336).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 19.

<sup>109</sup> *Id.* at 22.

<sup>110</sup> See 16 U.S.C. §§ 1536(g), 1536(o) (2006) (setting out the procedure for applying for an exception to the take prohibition); 50 C.F.R. § 13.41 (2012) (requiring permitted wildlife to be held in healthful conditions and maintained humanely).



Ringling's alleged mistreatment of its elephants with bullhooks.<sup>111</sup> "In *Havens Realty Corp. v. Coleman*, . . . the Supreme Court held that an organization may establish Article III standing if it can show that the defendant's actions cause a 'concrete and demonstrable injury to the organization's activities' that is 'more than simply a setback to the organization's abstract social interests.'"<sup>112</sup> Claiming *Havens* standing, the animal-protection organizations contended that Ringling's allegedly "unlawful conduct undermine[d] its advocacy and public education efforts—the entire point of which is to put an end to the injury [bullhooks] . . . inflict on the elephants"—by 'contributing to the public misimpression, particularly in young children, that bullhooks . . . are lawful and humane practices.'<sup>113</sup>

In 2009, after nearly a decade of litigation, the district court entered judgment in favor of Ringling (a ruling later affirmed by the circuit court in 2011) after determining that neither Tom Rider nor the organizational plaintiffs established constitutional standing under any of the three asserted standing theories.<sup>114</sup> With regard to Tom Rider, the district court ruled that Rider could not credibly prove his alleged "emotional" and "aesthetic" injuries, and that he was "essentially a paid plaintiff and fact witness."<sup>115</sup> The district court specifically noted that he "had referred to one of the elephants as a 'bitch' and 'killer elephant' who 'hated' him" and "that after leaving his employment with [Ringling], [he] had used a bullhook on elephants at a circus in Europe, casting doubt on his claim that he left [Ringling] because he was unable to witness further mistreatment of Asian elephants."<sup>116</sup>

Next, the district court rejected the organizational plaintiffs' "informational" standing theory because no provisions in the ESA gave them the right to any further information.<sup>117</sup> However, the D.C. Circuit did acknowledge that "[the plaintiffs] might have informational standing to bring suit for violations of [S]ection 10 [of the ESA]" if the use of bullhooks was judicially determined to be a take.<sup>118</sup> The potential for standing would be limited to a situation in which Ringling applied for a take permit but then refused to disclose information, or in which FWS refused to make public the information it received in Ringling's application.<sup>119</sup>

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<sup>111</sup> *ASPCA II*, 659 F.3d at 19.

<sup>112</sup> *Id.* at 25 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). To establish *Havens* standing, an organizational plaintiff must first show that the defendant's allegedly unlawful activities injured the organization's interest in promoting its substantive mission. If the organization successfully carries this burden, it must then demonstrate that it used its resources to counteract that injury. *Id.* at 25.

<sup>113</sup> *Id.* at 26.

<sup>114</sup> *Id.* at 18–19 (citing *ASPCA I*, 677 F. Supp. 2d at 93–94).

<sup>115</sup> *Id.* at 18 (citing *ASPCA I*, 677 F. Supp. 2d at 67).

<sup>116</sup> *Id.* at 20 (citing *ASPCA I*, 677 F. Supp. 2d at 87, 89).

<sup>117</sup> *ASPCA II*, 659 F.3d at 19 (citing *ASPCA I*, 677 F. Supp. 2d at 97–101).

<sup>118</sup> *Id.* at 23–24.

<sup>119</sup> *Id.*

Finally, the district court rejected the *Havens* standing theory because the plaintiffs had “failed to present any evidence that [they] would spend fewer resources on captive animal issues if the use of bullhooks . . . were declared to be a taking.”<sup>120</sup> Furthermore, as the D.C. Circuit noted in its affirmation of the district court’s ruling, the plaintiffs “failed to provide any expert testimony regarding the effect of [Ringling’s] use of bullhooks . . . upon the public’s impression of those practices.”<sup>121</sup>

## 2. *So, Do Bullhooks “Harm”? An Issue Still Unresolved*

Because *ASPCA v. Feld* was dismissed for lack of standing, the court never adjudicated the merits of whether the use of bullhooks “harms,” “harasses,” or “wounds” Asian elephants in violation of the ESA’s Section 9 take prohibition. The evidence from this protracted proceeding is preserved, however, so the issue is seemingly ripe for another challenge.<sup>122</sup> The mere possibility of a second case presupposes that an individual plaintiff steps forward who can “credibly” prove an aesthetic or emotional injury, and that the organizational plaintiffs remedy the faults of their first attempt at establishing *Havens* standing. The Court of Appeals for the D.C. Circuit seemed to enunciate the evidentiary threshold for establishing *Havens* standing in a possible follow-up case: that expert testimony could substantiate a clear correlation between Ringling’s continued use of bullhooks and a measurable increase in the public’s misimpression that the use of bullhooks is “harmless.”<sup>123</sup>

One important caveat to consider before any renewed attempt to leverage the ESA against the use of bullhooks—whether against Ringling or any other circus/facility that uses bullhooks on Asian elephants—is that the suit will be time-barred: not by a statute of limitations per se, but by the elephants’ life spans and their age of retirement. The ESA only applies to wild-born Asian elephants;<sup>124</sup> however, circuses like Ringling Bros. are more commonly using captive-bred elephants in their shows and exhibits.<sup>125</sup> Therefore, absent a revision to FWS regulations striking the captive-bred wildlife exemption for Asian elephants, the possibility of another ESA suit will be

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<sup>120</sup> *Id.* at 19 (citing *ASPCA I*, 677 F. Supp. 2d at 101).

<sup>121</sup> *Id.* at 28.

<sup>122</sup> Understandably, animal-protection groups may be disinclined to bring a similar case against Ringling Bros. because, at the conclusion of the underlying suit, Ringling countersued the animal-protection coalition for collusion and racketeering under both the federal Racketeer Influenced and Corrupt Organizations Act and the Virginia Conspiracy Act. *Feld Ent., Inc. v. ASPCA*, 873 F. Supp. 2d 288 (D.D.C. 2012).

<sup>123</sup> *ASPCA II*, 659 F.3d at 27–28.

<sup>124</sup> See *supra* n. 24 (discussing the captive-bred exemption to the ESA).

<sup>125</sup> See Ringling Bros. and Barnum & Bailey Center for Elephant Conservation, *Ringling Bros. Center for Elephant Conservation Facts & Figures*, [http://www.elephantcenter.com/Facts\\_and\\_Figures.aspx](http://www.elephantcenter.com/Facts_and_Figures.aspx) (accessed Apr. 13, 2013) (boasting twenty-two Asian elephant births to date at its Center for Elephant Conservation in central Florida).

come moot when the remaining wild-born Asian elephants die or are retired.

#### IV. BULLHOOKS AND STATE LAW

At the state level, the use of bullhooks is most generally covered by criminal anti-cruelty statutes, which are usually enforceable only by a district attorney or other public prosecutor.<sup>126</sup> Therefore, much like under the federal regulatory regimes, the effectiveness of these state anti-cruelty laws in protecting elephants from mistreatment is often stymied by lax enforcement and the inability of concerned citizens to seek redress in the courts. Despite these shortcomings, some states legislatures—Oregon and California in particular—have bolstered their animal-protection laws in direct response to widely publicized incidents of elephant abuse in their states.<sup>127</sup> Additionally, two recent California lawsuits serve as prime case studies of citizens crafting novel legal theories under non-animal-related state laws to get the bullhook issue into the courts.<sup>128</sup>

##### A. *State Anti-Cruelty Statutes: Elephant Beatings Spur Legislative Reform*

Generally, most states' catchall anti-cruelty statutes<sup>129</sup> criminalize acts that "torment" or inflict "unnecessary pain or suffering" on animals.<sup>130</sup> Facially, the language of these anti-cruelty statutes may seem to implicate at least the most flagrant misuse of bullhooks (if not their routine use as well). But much like the federal Animal Welfare Act, these broad statutes have proven rather inadequate at addressing mistreatment of captive elephants with bullhooks. The efficacy of these state-level anti-cruelty statutes seems to be hindered by two common pitfalls: (1) the terminology used in the statutes is "often devoid of useful definitions, rendering [the terms] vague and extremely subjective"; and (2) without sufficient standards and definitions in place, prosecu-

<sup>126</sup> William A. Reppy, Jr., *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 *Animal L.* 39, 40 (2005).

<sup>127</sup> See Bruce A. Wagman et al., *Animal Law Cases and Materials* 150–51 (4th ed., Carolina Academic Press 2010) (providing an overview of Oregon Revised Statutes Section 167.310 and California Penal Code Section 596.5).

<sup>128</sup> *Leider*, slip op. at 2 (illustrating that plaintiff filed a bullhook suit under the California Code of Civil Procedure, which authorizes taxpaying citizens to sue municipal government agents); *Profant v. Have Trunk Will Travel*, No. CV 11–05339–RGK (OPx), 2011 WL 6034370 at \*1 (C.D. Cal. Nov. 29, 2011) (showing that plaintiffs alleged two violations of the California Business & Professions Code based on defendant's mistreatment of elephants).

<sup>129</sup> For a comprehensive database of state anti-cruelty laws, see Mich. St. U. College of L., *Animal Legal and Historical Center*, <http://www.animallaw.info/articles/armp-statecruelty.htm> (accessed Apr. 13, 2013).

<sup>130</sup> See e.g. Fla. Stat. § 828.12(2) (2011) ("A person who intentionally commits an act to any animal which results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering, or causes the same to be done, is guilty of a felony of the third degree.").

tors must rely on experts to discern the intent and meaning of the law, which can lead to non-uniform judicial interpretations that may not be beneficial to the interests of animals or that may dissuade prosecutors from trying such cases at all.<sup>131</sup>

Two case studies involving incidents of zoo employees beating elephants, the first at the Oregon Zoo in Portland and the second at the San Diego Wild Animal Park, highlight how undefined statutory terms in state anti-cruelty statutes can severely hinder efforts to prosecute the alleged abusers.<sup>132</sup> Notably, when the gaps in the statutory definitions came to light during the course of the investigations and court proceedings, both the Oregon and California state legislatures swiftly responded by enacting more explicit and tailored animal-protection laws.<sup>133</sup>

In 2000, a zookeeper at the Oregon Zoo was charged with animal cruelty for using a sharpened bullhook to inflict 176 puncture wounds on Rose-Tu, an elephant at the zoo.<sup>134</sup> The assault left gashes all over her body, and it was discovered that the keeper had also sodomized her rectum with the bullhook.<sup>135</sup> Oregon's anti-cruelty law at the time required prosecutors to establish a minimum showing of "physical injury," which was defined in statute as "impairment of physical condition or *substantial pain*."<sup>136</sup> Because "substantial pain" was not further defined, the prosecution was required to call expert witnesses to testify as to whether Rose-Tu suffered pain and, more importantly, whether the pain was "substantial."<sup>137</sup> In the end, the keeper was convicted of animal cruelty,<sup>138</sup> and the case galvanized the Oregon Legislature to amend the definition of "physical injury" in the state anti-cruelty statute to include "physical trauma."<sup>139</sup> "Physical trauma" is now further defined in statute as "fractures, cuts, punctures, bruises, burns or other wounds,"<sup>140</sup> thus "obviate[ing] the need to present evidence of pain" in an elephant abuse case.<sup>141</sup>

As another case study, in 1988, investigations by the San Diego Humane Society revealed that zookeepers at the San Diego Wild Animal Park had "disciplined" an eighteen-year-old African elephant named Dunda by "chaining her four feet, hauling her down to her knees and repeatedly smacking her on top of the head . . . with ax

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<sup>131</sup> Stephan K. Otto, *State Animal Protection Laws—The Next Generation*, 11 *Animal L.* 131, 142 (2005).

<sup>132</sup> Wagman et al., *supra* n. 127, at 150–51.

<sup>133</sup> *Id.*

<sup>134</sup> Otto, *supra* n. 131, at 142.

<sup>135</sup> *Id.* at 142–43.

<sup>136</sup> Or. Rev. Stat. § 167.310(5) (1999) (current version at Or. Rev. Stat. § 167.310(8) (2011)) (emphasis added).

<sup>137</sup> Otto, *supra* n. 131, at 143.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Or. Rev. Stat. § 167.310(9) (2011).

<sup>141</sup> Otto, *supra* n. 131, at 143.

handles and the wooden end of [bullhooks].”<sup>142</sup> Additionally, “[o]ne of the keepers described the blows as ‘home-run swings.’”<sup>143</sup> At the conclusion of a six-week investigation into the incident by the San Diego Humane Society, the city attorney stated that the incident “arose from a legitimate *need* to discipline and train a dangerous, four-ton elephant.”<sup>144</sup> Because California’s anti-cruelty statute at the time only criminalized “*needless* suffering” and “*unnecessary* cruelty,”<sup>145</sup> no criminal charges were brought against the zookeepers because the “necessity” of the beatings was arguable, and according to the city attorney, a “criminal case . . . would [have been] riddled with reasonable doubt.”<sup>146</sup>

In response to the public outcry over the San Diego Wild Animal Park’s controversial “disciplinary” training and handling methods,<sup>147</sup> the California Legislature promptly enacted California Penal Code Section 596.5, specifically outlawing “abusive behavior towards [an] elephant.”<sup>148</sup> The new law makes it a misdemeanor crime “for any owner or manager of an elephant to engage in abusive behavior towards the elephant,” including the “discipline” of an elephant by any of the methods in this non-exclusive list:<sup>149</sup> (1) deprivation of food, water, or rest; (2) use of electricity; (3) physical punishment resulting in damage, scarring, or breakage of skin; (4) insertion of any instrument into any bodily orifice; (5) use of martingales;<sup>150</sup> or (6) use of block and tackle.<sup>151</sup>

Oregon and California’s robust animal-protection laws are quite anomalous, however, as the vast majority of states continue to rely on standard anti-cruelty statutes. As mentioned, these broad anti-cruelty laws are often rendered toothless because most are replete with vague

<sup>142</sup> Jane Fritsch, *Trainers Cleared in Elephant Beating*, L.A. Times (July 1, 1988) (available at [http://articles.latimes.com/1988-07-01/news/mn-6376\\_1\\_elephant-keeper](http://articles.latimes.com/1988-07-01/news/mn-6376_1_elephant-keeper) (accessed Apr. 13, 2013)).

<sup>143</sup> Jane Fritsch, *Aftermath of Dunda Beating: Elephant Care and Staff Has Changed at S.D. Park*, L.A. Times (July 17, 1989) (available at [http://articles.latimes.com/1989-07-17/news/mn-2776\\_1\\_african-elephant](http://articles.latimes.com/1989-07-17/news/mn-2776_1_african-elephant) (accessed Apr. 13, 2013)).

<sup>144</sup> Fritsch, *supra* n. 142 (emphasis added).

<sup>145</sup> Cal. Penal Code § 597(b) (2010) (emphasis added).

<sup>146</sup> Fritsch, *supra* n. 142.

<sup>147</sup> Ralph Frammolino, *Elephant-Abuse Bill Sparked by Dunda Incident, Advances*, L.A. Times (June 9, 1989) (available at [http://articles.latimes.com/print/1989-06-09/local/me-1539\\_1\\_dunda-incident-sen-dan-mccorquodale-elephant-abuse-bill](http://articles.latimes.com/print/1989-06-09/local/me-1539_1_dunda-incident-sen-dan-mccorquodale-elephant-abuse-bill) (accessed Apr. 13, 2013)).

<sup>148</sup> Cal. Penal Code § 596.5 (2010).

<sup>149</sup> See *Culp v. City of L.A.*, No. BC375234, slip op. at 6 (Cal. App. 2d Dist. Sept. 23, 2009) (available at <http://www.helpbilly.org/documents/utills.php?action=download&file name=B208520.pdf> (accessed Apr. 13, 2013)) (“[P]enal Code section 596.5 proscribes two types of actions—abusive behavior toward an elephant in general, and inappropriate discipline of the *nonexhaustive* types listed.” (emphasis added)).

<sup>150</sup> Martingales are heavy chains that bind an elephant’s tusks to its front feet. H.R. Jud. Comm., *Captive Elephant Accident Prevention Act of 1999: Hearings on H.R. 2929*, 106th Cong. 17 (June 13, 2000).

<sup>151</sup> Cal. Penal Code § 596.5.

and undefined terms, the effect of which is to cripple efforts to prosecute elephant mistreatment in their respective states.

*B. Bullhooks on Trial, Act II*

1. *Judge Declares Ban on Bullhooks: Leider v. Lewis*

When tested under exacting judicial scrutiny, even California's novel elephant-protection statute evinced some latent textual ambiguities that ultimately hindered one court's ability to apply the law to its outer limits to protect captive elephants. In the recent case of *Leider v. Lewis*, the plaintiff alleged, inter alia, that the Los Angeles Zoo engaged in "abusive behavior" toward its elephants in violation of California Penal Code Section 596.5 by (1) keeping the elephants in enclosures too small and on substrate too hard to meet their basic physiological and behavioral needs; and (2) using bullhooks "that can be and in the past have been used to abuse elephants."<sup>152</sup>

The plaintiff, therefore, sought an order to close the elephant exhibit at the Los Angeles Zoo.<sup>153</sup> Mr. Leider alleged that Billy, a male Asian elephant captured in Malaysia and brought to the zoo in 1989, "spends much of his time engaged in standing, rocking or swaying while bobbing his head up and down, a behavior known as 'stereotypic behavior,' that reflects emotional distress and causes physical injury to his joints, legs, feet, and nails."<sup>154</sup> Despite confirming the plaintiff's allegations that the Los Angeles Zoo is "not a happy place for elephants," and that "the elephants are neither thriving, happy, or content,"<sup>155</sup> the court ultimately held that "the lack of a definition of what is 'abusive' and therefore prohibited under [the statute] makes it difficult to determine what standard to use in deciding whether the Los Angeles Zoo's treatment of its elephants 'rises to the level of abusive behavior.'"<sup>156</sup> The court unquestionably sympathized with the plight of the elephants at the Los Angeles Zoo<sup>157</sup> but could not overcome the California Legislature's failure to define the key statutory term "abusive behavior."<sup>158</sup> The court sided with the defendants and ruled that

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<sup>152</sup> *Leider*, slip op. at 2–3.

<sup>153</sup> *Id.* at 3.

<sup>154</sup> *Id.*

<sup>155</sup> The court's full statement: "[T]he Elephants of Asia exhibit at the Los Angeles Zoo is not a happy place for elephants, nor is it for members of the public who go to the zoo and recognize that elephants are neither thriving, happy, nor content. Captivity is a terrible existence for any intelligent, self-aware species, which the undisputed evidence shows elephants are. To believe otherwise, as some high-ranking zoo employees appear to believe, is delusional." *Id.* at 30.

<sup>156</sup> *Id.* at 31.

<sup>157</sup> *See id.* at 9 ("All is not well at the Elephants of Asia exhibit at the Los Angeles Zoo. Contrary to what the zoo's representatives may have told the Los Angeles City Council in order to get construction of the \$42 million exhibit approved and funded, the elephants are not healthy, happy, and thriving.")

<sup>158</sup> *Leider*, slip op. at 36, 55 (finding no "abusive behavior," yet also ordering an injunction requiring the zoo to exercise the elephants at least two hours a day, and to regularly rototill the soil and substrate of the elephant exhibit).

the zoo was not engaging in “abusive behavior” toward the elephants by keeping them in their current captive environment.<sup>159</sup>

In striking contrast to the ruling that the exhibit itself is not “abusive,” the court emphatically concluded that “[n]o one seriously disputes that the use of bull hooks . . . to train or manage an elephant is abusive and inappropriate discipline under Penal Code [S]ection 596.5.”<sup>160</sup> The Los Angeles Zoo used bullhooks both in routine handling and to induce Billy to “lie down” and “stand up on his back two legs in front of spectators.”<sup>161</sup> The court soundly discredited the testimony of Victoria Guarnett, the Senior Elephant Keeper at the zoo, that these are “exercise” postures and not “tricks.”<sup>162</sup> The court also firmly rejected her “similarly remarkable testimony that the keepers never command Billy to stand on his back two legs or lie down, they merely ‘ask’ him to do so.”<sup>163</sup> Going further, the court admonished Ms. Gaurnett for claiming to be wholly unaware of the “kinds of things that elephant trainers had to do to Bil[l]y and other elephants to train them to lie down on command,” specifically, “poking the elephant’s admittedly sensitive skin with a [bullhook].”<sup>164</sup>

Ultimately, the court ruled that the use of bullhooks as training and handling tools categorically violates California’s law against elephant abuse, and subsequently issued an injunction prohibiting the Los Angeles Zoo from using bullhooks in the “management, care, and discipline of the elephants.”<sup>165</sup> In reaching this conclusion, the court rejected the defendants’ “voluntary cessation” argument.<sup>166</sup> Essentially, the defendants argued that the injunction “would be grossly inappropriate” because the zoo had stopped using bullhooks eighteen months prior, and since then “used only positive reinforcement under a protected contact management system that does not require discipline.”<sup>167</sup> Instead, the court was swayed by the plaintiff’s reasoning that without a definitive injunction banning bullhooks, keepers would have the discretion to use a bullhook whenever they subjectively “believe[d] that it would not be abusive or constitute negative reinforcement.”<sup>168</sup> In support of the injunction, the court noted that neither the 2011 edition of the zoo’s elephant-management manual nor the standards of the Association of Zoos and Aquariums (AZA), which the Los Angeles Zoo follows, prohibit or ban the use of bullhooks on ele-

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 37.

<sup>161</sup> *Id.* at 28.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Leider*, slip op. at 28

<sup>165</sup> *Id.* at 44, 55.

<sup>166</sup> *Id.* at 40.

<sup>167</sup> *Id.* at 38.

<sup>168</sup> *Id.* at 42–43.

phants.<sup>169</sup> Moreover, the court found it highly suspicious that the zoo did not stop using bullhooks until the lawsuit was initiated.<sup>170</sup>

The *Leider* case is noteworthy not only for prompting what is likely the first judicial decree in the U.S. banning the use of bullhooks for *any* purpose, but also because it underscores the difficulty animal-protection advocates face establishing standing to bring such cases before state courts. The elephant-protection statute at issue in *Leider* falls under California's Penal Code and provides no private right of action.<sup>171</sup> In order to obtain judicial review of the "abusive" use of bullhooks, Mr. Leider took a more novel approach and leveraged Section 526a of the California Code of Civil Procedure, which allows taxpaying citizens to sue any "agent" of the municipality in which they reside and pay taxes for any "illegal expenditure of, waste of, or injury to" municipal property.<sup>172</sup>

California courts have liberally construed Section 526a to give a large body of taxpaying citizens standing to challenge government action that would otherwise go unchallenged because of the standing requirement.<sup>173</sup> Because the *Leider* court concluded that the statutory term "illegal" modifies *expenditure*, but not *waste* or *injury*, Section 526a provides three independent bases for taxpayer standing.<sup>174</sup> For the "illegal expenditure" claim, any criminal statute in the California Penal Code provides a sufficient legal standard to bring a claim.<sup>175</sup> Thus, Mr. Leider's allegation of illegal elephant abuse at the zoo under Penal Code Section 596.5 sufficed for the court to entertain the case.<sup>176</sup> Note, however, that Section 526a of California's Civil Procedure Code only applies to *public* property; therefore, *Leider's* precedential value is strictly limited to elephants that are public/municipal property and does not extend to elephants that are owned by private circuses or zoos.

## 2. *Bullhook Case Summarily Dismissed: Profant v. Have Trunk Will Travel*

In contrast to the successful application of the taxpayer citizen-suit provision in *Leider*, anti-bullhook advocates in *Profant v. Have Trunk Will Travel* attempted to use the fraudulent advertising section

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<sup>169</sup> *Id.* at 41–43.

<sup>170</sup> *Leider*, slip op. at 40.

<sup>171</sup> Cal. Penal Code § 596.5 (2010).

<sup>172</sup> Cal. Code Civ. Proc. § 526a (West 2013) (emphasis added).

<sup>173</sup> *Leider*, slip op. at 4.

<sup>174</sup> *Id.* at 5.

<sup>175</sup> *Id.* at 6.

<sup>176</sup> *Id.* at 53. The court dismissed both the "waste" and "injury" prongs. *Id.* First, the court ruled that the zoo's treatment of its elephants was not on par with the test for "waste," that is, "whether the governmental action is 'a useless expenditure and waste of public funds,' or 'wasteful, improvident and completely unnecessary spending.'" *Id.* Second, the court held "there is no 'legal standard by which the alleged governmental conduct may be tested' for the injury provision of section 5[2]6a." *Leider*, slip op. at 53.



of the California Business & Professions Code; however, the court barred access to judicial review for lack of standing.<sup>177</sup> In *Profant*, the plaintiffs had paid to see the film *Water for Elephants*, which starred one of the defendant's elephants, Tai.<sup>178</sup> The plaintiffs alleged that they purchased tickets to the film in reliance on defendants' representations that they trained Tai using humane techniques and without the use of bullhooks.<sup>179</sup> Upon later watching an undercover video (publicly released by the animal-welfare group Animal Defenders International) of defendants "beating [their] elephants with [bullhooks]," the plaintiffs filed suit pursuant to two California Business & Professions Code statutes: the Unfair Competition Law (UCL) and the False Advertising Law (FAL).<sup>180</sup> The court concluded that the plaintiffs satisfied the injury and causation requirements for standing under the UCL and FAL by alleging that they had suffered a financial injury caused by their reliance on the defendants' misrepresentations.<sup>181</sup> Even so, the court determined that the plaintiffs were not entitled to their requested relief as a matter of law and, therefore, had failed to establish the redressability prong of standing.<sup>182</sup> Specifically, the court ruled that: (1) the plaintiffs' request for restitution of their ticket cost was insufficient because the complaint failed to allege that Have Trunk Will Travel acquired, either directly or indirectly, any portion of their ticket money; and (2) the plaintiffs' request for injunctive and declaratory relief failed because they did not allege in their complaint that they were realistically threatened by the defendants' future conduct (i.e., the defendants' future use of bullhooks on their elephants).<sup>183</sup>

## V. BULLHOOKS AND MUNICIPAL AND COUNTY LAW

Because most cities and counties across the country are not home to zoos or elephant-breeding facilities,<sup>184</sup> at the local level, bullhooks and the law typically only intersect when the circus comes to town. The spectrum of municipal and county laws that local prosecutors and law enforcement could conceivably apply to bullhooks ranges from general anti-cruelty ordinances to laws specifically addressing circuses and the mistreatment of performing animals. Some communities are taking an even more decisive approach by enacting outright bullhook bans and, in doing so, are refusing to allow the question of whether

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<sup>177</sup> *Profant*, 2011 WL 6034370 at \*\*1, 5.

<sup>178</sup> *Id.* at \*1.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at \*\*1–2; Cal. Bus. & Prof. Code Ann. § 17200 (West 2008); Cal. Bus. & Prof. Code Ann. § 17500 (West 2008).

<sup>181</sup> *Profant*, 2011 WL 6034370 at \*3.

<sup>182</sup> *Id.* at \*5.

<sup>183</sup> *Id.*

<sup>184</sup> See e.g. Ringling Bros. and Barnum & Bailey Center for Elephant Conservation, <http://www.elephantcenter.com> (accessed Apr. 13, 2013) (featuring a 200-acre breeding facility in Central Florida).

bullhooks cause pain and suffering to remain the “elephant in the room.”<sup>185</sup>

A. *Municipal & County Anti-Cruelty Laws*

At the local level, anti-cruelty ordinances, much like their state-level counterparts, have not been interpreted as de facto bullhook bans. For example, officials of Fulton County, Georgia testified that whether the use of a bullhook is considered “abuse” under the county anti-cruelty ordinance<sup>186</sup> depends wholly on the circumstances in which the bullhook is used and requires a judicial determination based on corroborating evidence.<sup>187</sup> A cruelty determination for the use of a bullhook essentially breaks down to a four-step process.<sup>188</sup> First, someone must file a claim alleging elephant abuse and then contact law enforcement or animal control.<sup>189</sup> Second, an animal control officer would then need to conduct an on-site quasi-investigation to determine if sufficient grounds exist to issue a citation for abusive use of a bullhook.<sup>190</sup> However, the abusive conduct would likely have abated by the time the animal control officer arrives. Therefore, in order to justify a citation, the officer would need to observe the condition of the animal, write a report that includes witness statements, and possibly take pictures and confer with a staff veterinarian.<sup>191</sup> Third, the officer at her discretion may issue a citation upon a finding of sufficient evidence of cruelty.<sup>192</sup> And fourth, if a citation is issued, the matter would go before the Magistrate Court, unless the animal’s injuries are so severe as to warrant felony charges, in which case the matter would be heard before a state-court judge.<sup>193</sup>

As this hypothetical scenario illustrates, anti-cruelty ordinances are often ineffective at protecting elephants from mistreatment because the reporting and investigation process is inherently reactive

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<sup>185</sup> *E.g.* Hallendale Beach Code Ordin. (Fla.) § 6-66 (2012) (available at <http://www.hallendalebeachfl.gov/files/2012-12-18/Agenda%20Outline%20for%202012-12-18%2017-30.htm> (accessed Apr. 13, 2013)); *scroll down to 12B, select Supporting Docs* (accessed Apr. 13, 2013) (prohibiting the use of bullhooks); Michelle Kretzer, *The PETA Files, More Cities Banning Bullhooks!*, <http://www.peta.org/b/thepetafiles/archive/2012/12/19/more-cities-banning-bullhooks.aspx> (accessed Apr. 13, 2013) (providing a list of cities in Florida that ban bullhooks).

<sup>186</sup> Fulton Co. Code (Ga.) § 34-204(a) (current through Jan. 24, 2013) (“It shall be unlawful for any person to overload, poison, cruelly treat, maim, tease, bruise, deprive of necessary sustenance or medical attention, improperly use, deprive of shade and shelter, or in any manner whatsoever, torture, kill, or abuse any animal.”).

<sup>187</sup> *Nov. 3, 2010 Minutes*, *supra* n. 18, at 70–71 (including testimony of Tony Phillips, head of Fulton County Code Enforcement, and David Ware, County Attorney, regarding the application of Fulton County’s anti-cruelty ordinance to a hypothetical elephant-abuse scenario).

<sup>188</sup> *Id.* at 70–73.

<sup>189</sup> *Id.* at 70–71.

<sup>190</sup> *Id.* at 71.

<sup>191</sup> *Id.* at 71–72.

<sup>192</sup> *Id.* at 72.

<sup>193</sup> *Nov. 3, 2010 Minutes*, *supra* n. 18, at 73.

(i.e., citations are issued only *after* the elephant has endured the physical abuse). Municipal or county officers may be deterred from pursuing alleged abuse cases because of the time and resources necessary to conduct a fact-finding mission thorough enough to surmount the evidentiary threshold to obtain a cruelty conviction. Moreover, harking back to *Leider*, most local anti-cruelty laws—Fulton County’s included—do not define the term “abuse,” leaving the courts little to no legal standard for determining if the allegedly cruel use of a bullhook actually rises to the level of “abusive” conduct. As the Rose-Tu abuse case at the Oregon Zoo illustrates, even if an animal control officer discovers upwards of hundreds of puncture wounds consistent with abusive use of a bullhook, without a statutory definition of a key term like “abuse,” a reviewing court will likely require expert testimony to divine the extent of the animal’s pain and suffering before a final cruelty determination can be made.<sup>194</sup>

*B. Ordinances Governing Performing-Animal Exhibitions:  
Implicit Bullhook Bans?*

In light of the shortcomings of these general anti-cruelty ordinances, many municipalities and counties have adopted laws specific to performing-animal exhibitions that seem to implicate the use of bullhooks. The most common performing-animal ordinances stipulate that “[n]o performing animal exhibition or circus” shall induce or encourage an animal “to perform through use of chemical, mechanical, electrical, or *manual devices* in a manner which will cause, or is likely to cause, *physical injury or suffering*.”<sup>195</sup> Similar ordinances add to, or replace, the terms “physical injury or suffering” with progressively more protective terms like “harm,”<sup>196</sup> “stress,”<sup>197</sup> or “discomfort.”<sup>198</sup> Still other local laws bar animal performances where the animal “engages in unnatural behavior or is . . . displayed in such a way that the animal is abused or stressed mentally or physically.”<sup>199</sup> Almost uniformly, though, these ordinances have not been applied to bullhooks,

<sup>194</sup> Wagman et al., *supra* n. 127, at 150.

<sup>195</sup> See e.g. San Ramon Mun. Code (Cal.) § B2-89 (1992); Alamosa Code Ordin. (Colo.) § 3-79(a) (1964); Parker Code Ordin. (Fla.) § 10-16(a) (2007); Shalimar Code Ordin. (Fla.) § 10-125(a) (2011); S. Daytona Code Ordin. (Fla.) § 4-19(a) (1977); Valparaiso Code Ordin. (Fla.) § 10-13(1993); Munster Code (Ind.) § 6-8(a) (1985); Gibraltar Code Ordin. (Mich.) § 4-11(a) (1992); Riverview Code Ordin. (Mich.) § 10-39(a) (1978); Jackson Code Ordin. (Miss.) § 18-20(a) (1971); Ridgeland Code (Miss.) § 14-12(a) (2009); Yukon Code Ordin. (Okla.) § 14-5(a) (1975); Beaufort Code (S.C.) § 6-4004(a) (1989); Port Royal Code Ordin. (S.C.) § 3-59(a) (1983); Germantown Code Ordin. (Tenn.) § 5-7(a) (1986); Aransas Pass Code Ordin. (Tex.) § 4-7(b)(1) (1996); Schertz Code Ordin. (Tex.) § 14-167 (2008) (emphasis added) (city ordinances all containing the quoted language).

<sup>196</sup> Newnan Code Ordin. (Ga.) § 4-27(a) (2010).

<sup>197</sup> Wichita Falls Code Ordin. (Tex.) § 14-387(a) (2009).

<sup>198</sup> Tallahassee Code Gen. Ordin. (Fla.) § 4-8 (2010).

<sup>199</sup> Kingsland Code Ordin. (Ga.) § 4-32(a) (1993); Granite City Mun. Code (Ill.) § 6.32.020 (1989); Branson Mun. Code (Mo.) § 46-380(a) (1990).

leaving one to question whether local law enforcement is reading into these ordinances a rebuttable presumption that bullhooks do not actually cause “injury,” “suffering,” or even “discomfort.”

As a case in point, Tallahassee, Florida’s performing-animal ordinance outlaws the use of devices that cause “discomfort,”<sup>200</sup> which could be read as a ban on bullhooks, since the very purpose of a bullhook is to produce (at least mild) discomfort, thereby “cueing” the elephant to obey the handler’s command.<sup>201</sup> Nevertheless, to date, Tallahassee law enforcement has not interpreted its performing-animal law to proscribe the use of bullhooks. For example, in January 2012, just prior to Ringling’s scheduled stop in Tallahassee, Deborah Fahrenbruck, Government Relations for Ringling Bros., specifically inquired with city officials about the applicability of the ordinance to Ringling’s use of bullhooks during their upcoming circus performances.<sup>202</sup> Tallahassee’s Animal Control Supervisor alerted the Ringling Bros. representative of the ordinance’s key language, and in response, Ringling presented the city with the standard industry manuals on elephant care and training, which depict the bullhook as a “guide.”<sup>203</sup> City officials acquiesced to Ringling’s portrayal and declined to enforce the ordinance.<sup>204</sup>

### C. Municipal & County Bullhook Bans

While these performing-animal ordinances may leave doubt as to whether they apply to the use of bullhooks, a few localities have tackled the issue head-on and recently passed absolute bullhook bans. In June 2011, Fulton County, Georgia became a vanguard in the anti-bullhook movement when the county commission passed the nation’s first outright ban on the use of bullhooks.<sup>205</sup> After two failed attempts at passing the ban at previous commission meetings in October<sup>206</sup> and November 2010,<sup>207</sup> the sponsor, Commissioner Robb Pitts, finally mustered enough votes to pass the “Cruelty to Elephants” ordinance, which reads:

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<sup>200</sup> Tallahassee Code Gen. Ordin. (Fla.) § 4-8(a) (2010) (“In any performing animal exhibition, it shall be unlawful to use any substance or device which induces an animal to perform by causing pain, suffering or *discomfort*.”) (emphasis added).

<sup>201</sup> See *Elephant Husbandry Resource Guide*, *supra* n. 4, at 65–66 (describing how handlers should guide elephants with bullhooks using either a pushing or pulling motion that “should catch but not tear or penetrate into the skin”).

<sup>202</sup> Email from Erika Leckington, Dir., Tallahassee Animal Serv. to Author, *Ringling Bros. and Barnum & Bailey Visit to Tallahassee* (Aug. 24, 2012, 4:58 p.m. EST) (on file with *Animal Law*).

<sup>203</sup> *Id.*; Email from Thomas L. Albert, *supra* n. 6.

<sup>204</sup> See Tallahassee Leon Co. Civic Ctr., *Past Events*, [http://tlccc.org/info\\_html/past.html](http://tlccc.org/info_html/past.html) (accessed Apr. 13, 2013) (listing “Ringling Bros. and Barnum & Bailey Presents Barnum Bash” among past events).

<sup>205</sup> Fulton Co. Code (Ga.) § 34-212 (2011).

<sup>206</sup> *Oct. 20, 2010 Minutes*, *supra* n. 2, at 103.

<sup>207</sup> *Nov. 3, 2010 Minutes*, *supra* n. 18, at 78.

(a) As used in this section, the term “bullhook” shall mean a device or instrument containing a spike, hook, or any combination thereof. . . .

(b) It shall be unlawful for any person to use a bullhook on an elephant within [the unincorporated area of Fulton County, or within any municipality in Fulton County, who has or may enter into an agreement with Fulton County for animal control services].

(c) It shall be unlawful for any person to use on an elephant any device or instrument that inflicts pain on, or causes or is likely to cause injury to, an elephant, except as necessary to administer legitimate medical treatment or in response to an immediate threat to public safety.<sup>208</sup>

A mere eight months after its passage, Fulton County’s bullhook ban came under fire when, in February 2012, county officials attempted to enforce the ban against Ringling Bros. during their circus tour stop in Atlanta.<sup>209</sup> Just one day before their scheduled arrival, Ringling filed suit in the Superior Court of Fulton County, seeking a temporary restraining order to prevent the County from enforcing the ban.<sup>210</sup> Specifically, Ringling Bros. argued that the bullhook ordinance as written does not apply within Atlanta city limits because, in contrast with the ordinance’s requirements, Atlanta is neither an “unincorporated area of Fulton County,” nor did Atlanta have a “validly executed intergovernmental agreement with Fulton County for animal control services.”<sup>211</sup> Moreover, Ringling alleged that if the bullhook ban was enforced against them, they would suffer “irreparable economic and reputational damage,”<sup>212</sup> because without the use of bullhooks, “[Ringling] cannot manage its elephants in a manner”<sup>213</sup> “that is consistent with federal and state law and that protects [Ringling’s] employees, the animals, and the general public.”<sup>214</sup> Ultimately, the court granted Ringling Bros. the restraining order and enjoined Fulton County from enforcing the bullhook ban in the City of Atlanta.<sup>215</sup>

In the wake of that decision, Atlanta City Councilwoman Felicia Moore introduced legislation to ban bullhooks within the City of Atlanta.<sup>216</sup> But in June 2012, the Atlanta City Council rejected

<sup>208</sup> Fulton Co. Code (Ga.) § 34-212 (2011).

<sup>209</sup> Ltr. from Tony M. Phillips, Dept. of Plan. & Community Serv., Animal Serv. Div., to Lisa Joiner, Feld Ent., Inc., *Fulton Co. Ordin. Sec. 34-212—Cruelty to Elephants* (Feb. 10, 2012) (on file with *Animal Law*); see also Pl.’s Compl. at ¶ 2, *Feld Ent., Inc. v. Fulton Co.* (Ga. Super. Fulton Co. Feb. 13, 2012) (No. 2012cv211353) (on file with *Animal Law*) (containing letter as Ex. A).

<sup>210</sup> Pl.’s Compl. at ¶ 1, *Feld Ent., Inc.*

<sup>211</sup> *Id.* at ¶ 2.

<sup>212</sup> Br. in Support of Pl.’s Mot. for T.R.O., Interlocutory Inj. & Permanent Injunctive Relief, *Feld Ent. Inc.* at 7 (on file with *Animal Law*).

<sup>213</sup> *Id.* at 9.

<sup>214</sup> *Id.* at 8.

<sup>215</sup> Or. Granting T.R.O., *Feld Ent., Inc. v. Fulton Co.* (Ga. Super. Fulton Co. Feb. 14, 2012) (No. 2012cv211353) (on file with *Animal Law*).

<sup>216</sup> Press Release, City of Atlanta, *City Councilmember Felicia Moore Introduces Legislation to Ban the Use of Bullhooks on Elephants* (June 19, 2012) (available at <http://citycouncil.atlantaga.gov/press/69b.htm> (accessed Apr. 13, 2013)).

Councilwoman Moore's proposed outright ban on bullhooks, adopting instead legislation sponsored by Councilwoman Yolanda Adrean that amended the city's anti-cruelty ordinance making it unlawful "to engage in abusive behavior towards an elephant."<sup>217</sup> The law prohibits using any instrument—including a bullhook—to "discipline" the elephant by, *inter alia*, "physical punishment resulting in damage, scarring, or breakage of the skin."<sup>218</sup> If the law sounds familiar, this is because Atlanta's new elephant-protection ordinance tracks nearly verbatim the text of California's elephant-protection statute.<sup>219</sup>

With fortuitous timing, just one month after Atlanta enacted its elephant-protection ordinance, the California court in *Leider* construed the language of its closely worded California elephant-protection law to impose an out-and-out ban on the use of bullhooks.<sup>220</sup> As previously mentioned, however, the *Leider* ruling has little to no precedential force in Georgia. Aside from *Leider* having only persuasive—not binding—influence on Georgia courts, Georgia law does not grant its citizens a private right of action analogous to California's taxpayer citizen-suit provision. Therefore, in the absence of a citizen-suit statute, Georgia citizens will likely be unable to establish standing to request a Georgia court to interpret whether, in line with the *Leider* court, Atlanta's elephant-protection ordinance similarly calls for an outright ban on bullhooks.

In light of this fact, Councilwoman Moore, joined by a chorus of anti-bullhook advocates, has expressed concern that under Atlanta's less stringent ordinance, "it will be difficult to prove before a judge that an elephant was [not] being 'humanely trained[,] [because] [t]he amendment is too vague and is unenforceable."<sup>221</sup> A press release from People for the Ethical Treatment of Animals (PETA) continues, "[t]his ordinance will not protect elephants because enforcing it would require that someone not only be there to witness the abuse, but be close enough to see the . . . [bullhook] break the skin, something a blunt object [that] causes pain does not always do."<sup>222</sup> Sharing in Councilwoman Moore and PETA's concerns that anything shy of a total ban will be wholly ineffective at protecting elephants from abusive use of bullhooks, in 2011, both Union City, Georgia<sup>223</sup> (incidentally, a city incorporated within Fulton County) and Margate, Florida<sup>224</sup> fol-

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<sup>217</sup> *Id.* (citing Atlanta Code Ordin. (Ga.) § 18-123(d) (2011)).

<sup>218</sup> Atlanta Code Ordin. at § 18-123(d).

<sup>219</sup> Compare *id.* with Cal. Penal Code Ann. § 595.5 (West 1989) (demonstrating that the Atlanta ordinance and the California statute are textually identical except that California further prohibits the use of martingales and "block & tackle").

<sup>220</sup> *Leider*, slip op. at 37.

<sup>221</sup> City of Atlanta, *supra* n. 216.

<sup>222</sup> PETA Update, *supra* n. 4.

<sup>223</sup> See Union City Code Ordin. (Ga.) § 4-21(b) (2011) ("It shall be unlawful for any person to use a bullhook on an elephant within the jurisdiction of the City of Union City.").

<sup>224</sup> See Margate Code Ordin. (Fla.) § 4-25(b) (2011) ("It shall be unlawful for any person to use painful techniques and devices, that may cause or are likely to cause physical

lowed Fulton County's lead and banned the use of bullhooks outright in their municipalities.

*D. Beyond Bullhooks: Bans on Circuses and Wild Animal Displays*

Some municipalities have endeavored to circumvent the bullhook debate by either foreclosing wild animal displays altogether or by placing strict regulations on live animal exhibitions, particularly those featuring elephants. For example, many ordinances prohibit the "display" of any "wild or exotic animals" for public entertainment or amusement, where "display" typically includes "any exhibition, act, circus, public show, . . . carnival, ride, [or] performance," and "wild or exotic animal"<sup>225</sup> includes elephants.<sup>226</sup>

Other municipalities like Dane County, Wisconsin and Rio Rancho, New Mexico have more tailored strictures. Dane County, for instance, recently passed an elephant-specific ban, prohibiting "the exhibition of elephants for performances or other acts where the elephant participates in performances for the amusement or entertainment of the audience . . ." <sup>227</sup> A bit less stringent than Dane County's law, the "live animal exhibitions" law in Rio Rancho requires any "traveling show that involves inherently dangerous wild

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injury, torment or pain and suffering to animals, including but not limited to: . . . bullhooks . . .").

<sup>225</sup> See e.g. Corona Mun. Code (Cal.) §§ 6.17.010–6.17.030 (1999); Hawthorne Mun. Code (Cal.) §§ 6.27.010–6.27.030 (2001); Pasadena Code Ordin. (Cal.) §§ 6.40.010–6.40.040; Port Townsend Mun. Code (Wash.) §§ 9.44.010–9.44.030 (2001); Redmond Mun. Code (Wash.) §§ 7.08.010–7.08.030 (1999) (ordinances containing the quoted language); see also Encinitas Mun. Code (Cal.) §§ 9.22.010–9.22.030 (2002); Rohnert Park Code Ordin. (Cal.) § 6.16.050 (2005); Revere Code Ordin. (Mass.) § 6.04.031 (1999); Somerville Code Ordin. (Mass.) § 3-39 (2010); Orange Co. Code Ordin. (N.C.) §§ 4-131 to 4-132 (2001); Burlington Code Ordin. (Vt.) §§ 5-5 to 5-6 (2004) (ordinances using less exhaustive language than the earlier quoted examples).

<sup>226</sup> A number of these ordinances contain exemptions for educational exhibitions put on by institutions accredited by the Association of Zoos and Aquariums (AZA, formerly the American Zoological Association). E.g. Rohnert Park Code Ordin. § 6.16.090(A) (exempting AZA-accredited institutions from the prohibition on display of wild or exotic animals). These educational exemptions are noteworthy because the AZA currently does not restrict its member institutions from using "free contact" management, whereby the handler shares an unrestricted space with the elephant and uses a bullhook to control the animal. However, the apparent gap in these municipal ordinances will soon close, as the AZA recently announced that as of September 2014, in order to maintain accreditation, AZA-accredited facilities must implement "protected contact" management, whereby the elephant keepers and the elephants are separated by a protective barrier. Assn. of Zoos & Aquariums, *Maximizing Occupational Safety of Elephant Care Professionals at AZA-accredited and AZA-certified Facilities* 1, <http://www.aza.org/uploadedFiles/Accreditation/Elephant%20Policy%20Board%20Approved%2012%20Aug%2011.pdf> (Aug. 12, 2011) (accessed Apr. 13, 2013); Assn. of Zoos & Aquariums, *AZA Standards for Elephant Management and Care* 26–27, [http://www.aza.org/uploadedFiles/Conservation/Commitments\\_and\\_Impacts/Elephant\\_Conservation/ElephantStandards.pdf](http://www.aza.org/uploadedFiles/Conservation/Commitments_and_Impacts/Elephant_Conservation/ElephantStandards.pdf) (Mar. 2011) (accessed Apr. 13, 2013). In plain terms, the AZA is effectively barring the use of bullhooks as a routine management practice at its accredited facilities. *Id.*

<sup>227</sup> Dane Co. Code Ordin. (Wis.) § 54.42 (2012).

animal(s),”<sup>228</sup> which includes elephants,<sup>229</sup> to first obtain a permit and meet certain requirements relating to compliance with the federal Animal Welfare Act (AWA).<sup>230</sup> Specifically, a permit applicant cannot have been cited by the U.S. Department of Agriculture within the past three years for violations of the AWA, including “inappropriate handling of animals causing stress or trauma,”<sup>231</sup> nor may the applicant “have any official notices of alleged violations[,] or any stipulations, consent decrees, or settlements entered into with the USDA within the last five years.”<sup>232</sup>

In marked contrast with—and quite likely in reaction to—these constraints on wild animal displays, some municipalities have enacted laws that provide an express right for circuses and wild animal shows to perform in their towns. For example, Kansas City, Missouri has a local law specifically sanctioning the “humane presentation of any circus, . . . trained animal act or other similar traveling or temporary animal display,” provided that the show first “procure[s] a permit from the supervisor of animal health and public safety.”<sup>233</sup> Unlike the Rio Rancho law, an applicant for an animal-show permit in Kansas City does not have to prove compliance with federal (or state) animal-welfare laws.<sup>234</sup> Instead, the supervisor of animal health and public safety is granted full discretionary authority to “make an objective judgment as to whether the applicant is qualified to operate the show in a safe and humane manner.”<sup>235</sup>

## VI. CONCLUSION

*Clown #1: Hey, be careful. You'll hurt the little guy.*

*Skinny: Aw, go on. Elephants ain't got no feelings.*

*Clown #2: No, they're made of rubber.*<sup>236</sup>

When it comes to bullhooks and the law, the following syllogism would seem to control: despite what the clowns in *Dumbo* believed, elephants feel pain and discomfort, and bullhooks cause elephants pain and discomfort; therefore, laws that forbid inflicting “discomfort” and “unnecessary pain and suffering” on animals effectively ban the use of bullhooks on elephants. However, as this Note explores, this logical progression has not held true with respect to general animal-welfare laws at the federal, state, and local levels. Instead, these laws are hamstrung from reaching the use of bullhooks by both the unbridled

<sup>228</sup> Rio Rancho Mun. Code (N.M.) § 90.30(A)(1) (2009).

<sup>229</sup> *Id.* at § 90.30(A)(2).

<sup>230</sup> *Id.* at § 90.30(C)(8)(a).

<sup>231</sup> *Id.* (referencing USDA regulations found in 9 C.F.R. §§ 2.131(b)(1), 2.40, 3.125).

<sup>232</sup> *Id.* at § 90.30(C)(9).

<sup>233</sup> Kansas City Code Ordin. (Mo.) § 14-46(a) (2006).

<sup>234</sup> *Id.* at § 14-46(b)(2).

<sup>235</sup> *Id.* at § 14-46(b)(2)(a).

<sup>236</sup> *Dumbo*, Motion Picture (Walt Disney Prod. 1941).



discretion of law enforcement and the fact that advocates are generally foreclosed from seeking judicial review of these laws (California notwithstanding).

In light of these setbacks, the most surefire way to resolve the discord in the law—between the widely accepted fact that bullhooks cause pain and discomfort and law enforcement’s apparent presumption otherwise—is for legislative bodies to enact laws that unambiguously ban bullhooks. Indeed, we are witnessing just that. Some of the most striking and unprecedented progress in the elephant-protection movement is currently taking place at the state and local levels, where legislative bodies (and in one unique California case, even a state court) are confronting the use of bullhooks head-on, no longer shying away from pointed discussions about their potential to inflict pain and suffering.