THE ENDANGERED SPECIES ACT AS APPLIED TO CAPTIVE ANIMALS: SEA SHEPHERD LEGAL'S AMICUS BRIEF IN *PETA V. MIAMI SEAQUARIUM*

By
Sea Shepherd Legal*

This Article contains Sea Shepherd Legal's (SSL) amicus brief in the matter of People for the Ethical Treatment of Animals v. Miami Seaquarium*, an ongoing litigation concerning the captive orca known as "Lolita." SSL filed this brief for two reasons. First, the conditions under which Lolita is held are at once particularly illegal and immoral. Lolita's conditions of captivity violate both the Endangered Species Act (ESA) and the Animal Welfare Act (AWA), all while imposing continuous harm on a highly intelligent being in the name of entertainment. Second, the decision in this case frustrates the logic of the underlying laws. Captive members of an ESA-listed species occupy a unique position within the regulatory landscape. Unlike "regular" captive animals covered by the AWA alone, captive members of an ESA-listed species enjoy an extra set of protections courtesy of the ESA. So far, the Miami Seaquarium courts have failed to grasp this basic point.*

I. INTRODUCTION[1]

August 8, 1970. The sun breaks fresh and clear over the waters of Penn Cove, Washington, a small inlet tucked away in the northern reaches of the Puget Sound. Lured by the economic incentives of the burgeoning dolphinaria and marine theme park industry, a group of men in boats and diving gear descend upon the waters in an operation to capture orcas. The men round up over eighty specimens, encircling

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1 The facts regarding the initial capture operation are largely drawn from the Whale and Dolphin Conservation Society's writing on this saga. *See 40 Years in Captivity for Lolita*, WHALE & DOLPHIN CONSERVATION SOC'Y (Sept. 28, 2010, 11:00 PM), http://uk.whales.org/news/2010/09/40-years-in-captivity-for-lolita [https://perma.cc/CJ2Z-KW3U] (accessed Aug. 3, 2018) (describing the initial capture of Lolita from Puget Sound). Although we employ a touch of poetic license in crafting this narrative, the core facts are not in dispute. *See also The Penn Cove Orca Captures*, WHALE & DOLPHIN CONSERVATION SOC'Y, http://uk.whales.org/issues/penn-cove-orca-captures [https://perma.cc/T96Z-XWQS] (accessed Aug. 3, 2018) (containing footage of the capture operation, along with select interviews).

them in a large net. They target juveniles, using long poles fitted with ropes to ensnare the smaller orcas and haul them onto stretchers.

The men successfully capture at least seven orcas; at least four others drown and die in the process. In an apparent attempt to cover up these casualties, the men slice open the drowned animals, fill them with rocks, and tie anchors to their tails to sink the carcasses to the ocean floor.

One of the orcas that survived is now known to the world as "Lolita." Regrettably, she shares much more in common with Vladimir Nabokov's character than just her name.[2] Like Nabokov's creation, Lolita the orca is the object of a perverse attraction.

For nearly five decades, Lolita has been held captive in the Miami Seaquarium.[3] Indefensible in any circumstances, the conditions of Lolita's captivity are uniquely appalling. Despite her considerable size—Lolita is twenty feet long and weighs approximately 7,000 pounds—she lives in the smallest orca tank in North America.[4] The tank is just eighty feet across at its widest point and has a maximum depth of only twenty feet, entirely preventing Lolita from diving.[5] These dimensions are further compromised by a large concrete platform that cuts through the middle of the tank.[6] These confining circumstances are worsened by the fact that orcas normally swim up to 100 miles per day and dive hundreds of feet in an ocean environment.[7]

Compounding the problem, Lolita is forced to share her tank with two biologically incompatible Pacific white-sided dolphins.[8] These two dolphins attack Lolita on a regular basis, using their teeth to "rake" her skin.[9]

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[2] VLADIMIR NABOKOV, LOLITA (2d Vintage International ed. 1997) (1955).

[3] *See* Chabeli Herrera, *Miami Beach Commission Votes Unanimously to Free Lolita—But It's Not Happening Yet*, MIAMI HERALD (updated Oct. 24, 2017, 4:46 PM), http://www.miamiherald.com/news/business/article180639366.html [https://perma.cc/CS8G-JFUJ] (accessed Aug. 3, 2018) (observing that Lolita has been held in Miami since 1970).

[4] *Captured and Enslaved: The Story Behind Lolita,* SEA WORLD HURT, https://www.seaworldofhurt.com/features/lolita/ [https://perma.cc/5XJM-YPMS] (accessed Aug. 3, 2018); *12 Things Lolita Would Want Miami Visitors to Know,* PETA, https://www.peta.org/features/lolita-miami-seaquarium-know/ [https://perma.cc/L74E-9H7G] (accessed Aug. 3, 2018).

[5] Zachary Fagenson, *Activists Sue Miami Aquarium for Captive Orca Lolita's Release*, REUTERS (July 20, 2015, 11:40 AM), https://www.reuters.com/article/us-usa-whale-lolita/activists-sue-miami-aquarium-for-captive-orca-lolitas-release-idUSKCN0PU23C20150720 [https://perma.cc/Q7Z2-G4MZ] (accessed Aug. 3, 2018).

[6] Chabeli Herrera, *Lolita's Tank at the Seaquarium May Be Too Small After All, a New USDA Audit Finds*, MIAMI HERALD (updated June 8, 2017, 8:24 AM), http://www.miamiherald.com/news/business/article154928954.html [https://perma.cc/9K5V-9LZR] (accessed Aug. 3, 2018).

[7] PETA, *supra* note 4.

[8] *Id.*

[9] *Id.*

Even when not harassed by dolphins, Lolita is tortured by the sun.[10] The shallow depth of Lolita's tank conspires with the Miami sun to create solar conditions exponentially more intense than those she would encounter in her natural habitat.[11] Her tank also provides little to no shade during the hottest hours of the day.[12]

Living in these conditions, it is no wonder that Lolita is exhibiting classic signs of psychological anguish (in addition to physical deterioration).[13] Her psychological trauma manifests itself through stereotypic (i.e., repetitive and abnormal) behavior.[14] Such behavior "includes listless floating, lying motionless near an inflow valve, bobbing, pattern swimming, and rubbing her body against her tank."[15]

As a sister organization of Sea Shepherd Conservation Society, it should come as no surprise that Sea Shepherd Legal (SSL) has taken an interest in the fight against Lolita's captivity. Like all Sea Shepherd entities, SSL categorically opposes captivity on ethical grounds.[16] In the case of Lolita, however, there is another basis for opposition: federal law.

Captive animals used in exhibitions are afforded important, albeit inadequate, protections under the Animal Welfare Act (AWA).[17] Core among these are "*minimum requirements* . . . for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species."[18] These protections extend to all captive animals, regardless of the species' conservation status, providing a baseline floor of protections.[19]

When the National Marine Fisheries Service (NMFS) added captive members of the Southern Resident killer whale Distinct Popula-

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *See* People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 189 F. Supp. 3d 1327, 1343 (S.D. Fla. 2016) (discussing evidence of psychological injury).

[14] *Id.*; *see also* PETA, *supra* note 4 ("As is the case with many captive animals, Lolita shows signs of 'zoochosis' (obsessive, repetitive behavior.")); Victoria Blaine, *Lolita and Friends: An Ethical Examination of the Life Histories of Captive Orcas*, 3 AQUILA 21, 24–25 (2016), https://www2.fgcu.edu/Aquila/files/Blaine_Lolita_and_Friends.pdf [https://perma.cc/RL49-8LGJ] (accessed Aug. 3, 2018) (discussing evidence of listless floating and pacing).

[15] *PETA*, 189 F. Supp. 3d at 1343.

[16] *See Our Work*, SEA SHEPHERD LEGAL, https://seashepherdlegal.org/our-work [https://perma.cc/66J5-XBDT] (accessed Aug. 3, 2018) (discussing the focus of Sea Shepard Legal's (SSL) projects encompassing the greatest threats to marine animals and their environments).

[17] 7 U.S.C. § 2131 (2016). *See also* Carole Lynn Nowicki, *The Animal Welfare Act: All Bark and No Bite*, 23 SETON HALL LEGIS. J. 443 (1999) (explaining how the protections provided under the Animal Welfare Act are inadequate to address the full scope of needs for a living being).

[18] 7 U.S.C. § 2143(a)(2)(A) (2016) (emphasis added); *see also* 9 C.F.R. §§ 3.100–3.118 (2018) (setting forth the minimum standards applicable to marine mammals).

[19] *See id.* (providing that these protections extend to animals, and not just animals with a certain conservation status).

tion Segment (SRKW DPS) to the list of endangered species in 2015[20]—effectively expanding the scope of its 2005 decision to list the wild population of the SRKW DPS[21]—Lolita became entitled to another set of protections. Under the Endangered Species Act (ESA), it is illegal to "take" an endangered species.[22] As statutorily defined, "[t]he term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[23] Ever since the Supreme Court's landmark decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the legal community has understood that take is an exceedingly broad concept.[24]

The addition of ESA protections to the AWA baseline, in the case of Lolita or any other captive animal, should be just that: a regulatory adjustment that adds protections for the subject animal. Yet, when People for the Ethical Treatment of Animals, Inc. (PETA), Animal Legal Defense Fund (ALDF), and Orca Network sued on this theory, the district court rejected this logic.[25]

Although the district court cited *Sweet Home* at length, the court's muse was not the majority opinion but, bizarrely, Justice Antonin Scalia's dissent.[26] Harnessing Justice Scalia's minority interpretation, the district court held that an exhibitor of a captive animal only violates the take prohibition, via "harm" or "harassment," when the exhibitor engages in conduct that "*gravely* threatens or has the potential to *gravely* threaten the animal's survival."[27] Put differently, the district court held that the ESA's take standard is relaxed in the context of captive animals. Practically speaking, this approach renders ESA protections meaningless in the case of a captive animal. While the ESA-listed captive animal continues to 'enjoy' protections under the AWA, the ESA listing adds nothing to this suite of protections.

And so it played out in the district court's decision. Measuring Lolita's situation against the improvised "gravely threatens" standard—a standard that essentially requires life-threatening circum-

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[20] Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment, 80 Fed. Reg. 7380, 7380 (Feb. 10, 2015) (codified at 50 C.F.R. pt. 224).

[21] 50 C.F.R. § 224.101 (2018); 70 Fed. Reg. 69903 (Nov. 18, 2005).

[22] 16 U.S.C. § 1538(a)(1)(B) (2016). It is also illegal to "possess" an endangered species that was unlawfully captured. *Id.* § 1538(a)(1)(D). Unfortunately, this protection is not applicable in Lolita's case, as the capture operation was authorized.

[23] *Id.* § 1532(19) (1988).

[24] *See* Babbitt v. Sweet Home Chapter of Cmty.'s for a Great Or., 515 U.S. 687, 708 (1995) (holding that significant habitat modification, even in the absence of an intent to prejudice wildlife, can amount to take as a form of harm or harassment).

[25] *See PETA*, 189 F. Supp. 3d at 1354–55 (holding that the AWA, rather than the ESA, applied to the standards of conditions under which the Miami Seaquarium could hold Lolita).

[26] *See id.* at 1345 (citing *Sweet Home*, 515 U.S. at 721 (1995) (Scalia, J., dissenting)).

[27] *Id.* at 1355 (emphasis added).

stances—the district court granted summary judgment in favor of the Miami Seaquarium.[28]

Like many other groups within the conservation and animal-welfare communities, SSL read the district court's opinion with a combination of shock and indignation. While we have grown accustomed to decisions that marginalize non-human interests, the lower court's decision in this case was particularly disturbing. From even the most unsympathetic perspective, the court's decision flies in the face of controlling precedent and basic logic. As the United States District Court for the Western District of Texas recently explained in *Graham v. San Antonio Zoological Society*, "[t]here is no support for this [gravely threatens] standard in the ESA, the AWA, or the relevant regulations."[29]

When the plaintiffs filed an appeal and began to look for amicus support, SSL was honored to lend a hand. In addition to undermining ESA protections for captive animals, SSL was concerned that this holding, if allowed to stand, would represent a dangerous precedent, threatening ESA protections for *all* animals.

In light of the full record and controlling precedent, SSL was cautiously optimistic that the Eleventh Circuit would make the right decision on appeal. Unfortunately, the appellate court upheld the district court's decision in a per curium opinion[30] that sowed confusion through internal inconsistencies, all while dodging critical aspects of the litigation.

In the opinion's opening paragraphs, the Eleventh Circuit seems to acknowledge at least some degree of error by the lower court in its articulation of the improvised gravely threatens standard.[31] Commenting on this standard, the panel wrote: "[W]e do not agree that actionable 'harm' or 'harass[ment]' includes only deadly or potentially deadly harm."[32] This stands in considerable contrast to the district court's conclusion that an exhibitor can *only* commit take through harm or harassment if the conduct "*gravely* threatens or has the potential to *gravely* threaten the animal's *survival*."[33] However, in a classic (and normally legitimate) maneuver on appeal, the panel held that Miami Seaquarium was still entitled to summary judgment because the evidence, construed in the light most favorable to the plaintiffs, did not support the conclusion that the conditions of Lolita's captivity satisfied the legal standard of take.[34] How, then, did the appellate court

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[28] *Id.*

[29] Graham v. San Antonio Zoological Soc'y, 261 F. Supp. 3d 711, 743 (W.D. Tex. 2017).

[30] People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 879 F.3d 1142, 1150 (11th Cir. 2018).

[31] *Id.* at 1144.

[32] *Id.*

[33] *PETA*, 189 F. Supp. 3d at 1355 (emphasis added).

[34] *PETA*, 879 F.3d at 1144.

define that standard as applied to captive animals? Here, the Eleventh Circuit began its descent into confusion.

The panel held that, "[u]nder the ESA, 'harm' or 'harassment' is only actionable if it poses a threat of serious harm."[35] But what qualifies as "serious harm," and how is a threat of serious harm different than conduct that gravely threatens an animal's survival? More to the point, where is the legal authority for affixing any adjective ("serious," "grave," or otherwise) to the term harm? The court provided no indication whatsoever. Clearly, based on its disavowal of a test hinging on "deadly or potentially deadly harm,"[36] the panel understood serious harm to be slightly less onerous from the plaintiff's perspective. The degree of the difference, however, is entirely unclear.

If this were the extent of the Eleventh Circuit's opinion, one might be tempted to conclude that the court at least resurrected some portion of the ESA's independent force in the case of captive animals covered by the AWA. Perhaps, the thought runs, an exhibitor could satisfy the AWA's minimum requirements yet still take a listed species through harm or harassment amounting to a "threat of serious harm." Indeed, the Eleventh Circuit's opinion purports to accommodate precisely this scenario. According to the appellate court, its "conclusion that 'harm' or 'harassment' is actionable if it poses a threat of serious harm provides captive endangered animals with an additional layer of protection from harmful conditions of captivity without abrogating the complex regulatory scheme crafted and administered by APHIS [the Animal and Plant Health Inspection Service]" under the AWA.[37]

It is telling that the court felt compelled to acknowledge some independent force flowing from the ESA. If the ESA did not offer "an additional layer of protection,"[38] then citizen groups would have no reason to seek—and the government would have no reason to grant—ESA listing for captive animals.

Unfortunately, the remainder of the opinion provides ample fodder for defense counsel to argue that, practically speaking, AWA compliance renders an ESA suit untenable. In addressing the interaction between the AWA and the ESA, the Eleventh Circuit repeatedly cautioned that an expansive reading of take in the context of captive animals "could nullify the . . . regime of administrative enforcement" under the AWA.[39] "Even after APHIS had approved a particular aspect of an endangered animal's conditions of captivity," the court warned, "plaintiffs could expose the exhibitor to ESA liability by framing that condition as an impermissible 'take.'"[40]

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[35] *Id.* at 1150.

[36] *Id.* at 1144.

[37] *Id.* at 1150.

[38] *Id.*

[39] *Id.*

[40] *Id.* Here, we note that it is actually far from clear that the conditions of Lolita's captivity satisfy even the minimal requirements of the AWA.

Admittedly, this logic is seductive. If an expert federal agency has approved an entity's business practices (in this case, the conditions of captivity at a marine park), this approval would seem to doom a citizen suit alleging that such practices are nevertheless unlawful. Save for the case where the plaintiff also alleges error by the approving agency—an important exception—there would seem to be no room for litigation. Surely, a regulated entity is entitled to invoke the judgment of a federal agency as a shield to all complaints of unlawful conduct.

While this reasoning may offer a degree of temptation, it is at odds with longstanding law. Specifically, although the decision of an expert agency may preclude *some* complaints, this shielding power only goes so far—its outer limits are co-extensive with those of the statute that the agency in question administers. Put differently, an agency's judgment that an entity is in compliance with one law does *not* mean that the entity is in compliance with *all* laws.

The Supreme Court's recent decision in *POM Wonderful LLC v. Coca-Cola Co*. is a powerful example of this important limitation. In that case, a manufacturer of pomegranate-blueberry juice sued the Coca-Cola Company under the Lanham Act, a federal statute authorizing suits for unfair competition, on the grounds that Coca-Cola labeled and marked its own juice in a misleading fashion.[41] The plaintiff company alleged that, while Coca-Cola's product primarily consisted of apple and grape juice, Coca-Cola passed the product off as though it contained significant amounts of pomegranate and blueberry juice.[42]

Like Miami Seaquarium, Coca-Cola invoked its apparent compliance with another, arguably more specific statute—the Federal Food, Drug, and Cosmetic Act (FDCA)—to support its contention that it could not be sued for misleading labeling under the Lanham Act.[43] Coca-Cola's reasoning was virtually identical to that embraced by the Eleventh Circuit in the Lolita matter: If the agency charged with enforcing a statute (the FDCA) specifically dealing with "misbranded" food and drugs did not identify a problem, then the plaintiff had no grounds to assert a claim for mislabeling under another statute, particularly when that competing statute spoke in arguably more general terms.[44]

Significantly, the Supreme Court rejected this simplistic logic. The Court recognized that both statutes "touch on food and beverage label-

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[41] POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228, 2233 (2014).

[42] *Id.* at 2235.

[43] *See id.* at 2239 ("Coca-Cola argues the FDCA precludes POM's Lanham Act claim because Congress intended national uniformity in food and beverage labeling. Coca-Cola notes three aspects of the FDCA to support that position: delegation of enforcement authority to the Federal Government rather than private parties; express preemption with respect to state laws; and the specificity of the FDCA and its implementing regulations.").

[44] *See id.* (explaining Coca-Cola's argument in lower court); *see also id.* at 2235–36 (summarizing lower court decisions ruling in favor of Coca-Cola).

ing."[45] However, this overlap did *not* mean that compliance with the one rendered the other irrelevant. Instead, the Court observed that the statutes sought to vindicate different interests and supplied distinct remedies.[46] As the Court explained, "the Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety."[47]

The parallels to the Lolita case are compelling. In the context of captive endangered species, the AWA and the ESA both "touch on" the conditions of captivity. Yet, just as the Court rejected the notion that "the FDCA and its regulations are . . . a ceiling on the regulation of food and beverage labeling,"[48] so too is it equally flawed to deem the AWA the final word on conditions of captivity in the case of animals covered by the ESA. Rather, as in *POM Wonderful*, "[t]he two statutes impose 'different requirements and protections.'"[49] In this situation, the Court's instruction was emphatic: "When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other."[50]

Both the plaintiffs and SSL cited *POM Wonderful* at length in briefing before the Eleventh Circuit.[51] Nevertheless, the appellate court did not refer to this case at all. The panel's failure to engage with this decision is vexing. Combined with the court's confusing and narrow interpretation of the ESA, we are left with an opinion that is unfaithful to statutory law and Supreme Court precedent.

Despite the Eleventh Circuit's casual assurance that its approach provides "an additional layer of protection"[52] to the AWA baseline, this nebulous "protection" was of little aid to Lolita. In fact, it is hard to imagine a single case where this "additional layer of protection" will make any difference to a captive animal covered by both the ESA and AWA. As a formal matter, the Eleventh Circuit did not find that the AWA precludes an action for take under the ESA.[53] As a practical matter, the court came very close to doing just that. Reading the opinion as a whole, the court's acknowledgement of an independent role for the

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[45] *Id.* at 2238.

[46] *Id.*

[47] *Id.* at 2231.

[48] *Id.* at 2240.

[49] *Id.* at 2238 (quoting J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 144 (2001)).

[50] *Id.* at 2238.

[51] *See generally* Brief of Appellants, People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 2018 U.S. App. LEXIS 801 (No. 16-14814) (citing *POM Wonderful* at length throughout its briefing before the Eleventh Circuit); Brief of Amicus Curiae Sea Shepherd Legal in Support of Appellants and Reversal of the Order on Appeal, People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 2018 U.S. App. LEXIS 801 (No. 16-14814) (citing *POM Wonderful* at length throughout its briefing before the Eleventh Circuit).

[52] *PETA*, 879 F.3d at 1150 (11th Cir. 2018).

[53] *Id.* at 1150.

ESA sounds more like lip-service than a genuine endorsement of this statute's complementary role. The court's approach not only effectively renders NMFS' decision to add captive members of the SRKW DPS to the list of endangered species meaningless but also directly contravenes congressional intent by diluting the protections afforded to listed species.

II. SEA SHEPARD LEGAL'S AMICUS BRIEF[54]

STATEMENT OF THE ISSUES

(1) Did the district court err in concluding that an exhibitor of a captive animal only violates the take prohibition of the Endangered Species Act ("ESA") when the exhibitor engages in conduct that "gravely threatens or has the potential to gravely threaten the animal's survival"?[55]

(2) Even if the district court did not err in its construction of the ESA, did the district court err in granting summary judgment for defendants where the record shows that experts disagree about whether the conditions under which Lolita is held harm and/or harass her within the meaning of the ESA's take prohibition?[56]

BACKGROUND

The appellants in this case, People for the Ethical Treatment of Animals, Inc., Animal Legal Defense Fund, Howard Garrett, and Orca Network (hereinafter "Appellants" or "Plaintiffs"), commenced this action under Section 9(a)(1)(B) of the ESA. Plaintiffs accused Miami Seaquarium and Festival Fun Parks, LLC (hereinafter "Appellees" or "Defendants") of committing an unlawful "take" of an endangered Southern Resident Killer Whale ("SRKW") named Lolita. In particular, Plaintiffs alleged a "take" through "harm" and "harassment,' two of the terms that make up the statutory definition of "take."[57]

As the district court acknowledged in its opinion on summary judgment, Plaintiffs introduced evidence showing "harm" to, and "harassment" of, Lolita.[58] Plaintiffs' evidence fell within thirteen different categories (*e.g.*, an inability to engage in normal swimming patterns

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[54] For brevity's sake, we have deleted SSL's statement in compliance with Federal Rules of Appellate Procedure 26.1 and 29(c) and Eleventh Circuit Rule 29-2. Otherwise, *Animal Law* has made no textual corrections to the original brief as it was submitted to the Court.

[55] *PETA*, 189 F. Supp. 3d at 1355.

[56] Although this second issue becomes a key question on appeal should the court approve the district court's interpretation of the ESA, this *amicus* brief focuses primarily on the first issue.

[57] 16 U.S.C. § 1532(19) (2016).

[58] *PETA*, 189 F. Supp. 3d at 1342–43.

due to the size and configuration of her tank and forced companionship with socially incompatible Pacific white-sided dolphins).[59]

SUMMARY OF ARGUMENT

Despite acknowledging the above evidence, the district court granted summary judgment in favor of Defendants.[60] The court's decision turned not on an assessment of the facts but rather on a construction of the governing law. In particular, the outcome hinged on the court's novel interpretation of the terms "harm" and "harassment" as applied to captive animals protected under the ESA. In a holding that all but ignored governing Supreme Court precedent, the district court fashioned a new standard for "take" of a captive animal—holding that an exhibitor "takes" a captive animal "only when its conduct gravely threatens or has the potential to gravely threaten the animal's survival."[61] Although novel interpretations may not be invariably wrong, they always merit rigorous scrutiny on appeal.

By imposing a threshold requirement of life-threatening circumstances—and by erecting this barrier *only* for captive animals—the district court's approach would overturn settled law on "take." This interpretation of "take" clashes with decades of Supreme Court precedent, the plain language of the statute, agency administration, and basic science.

First, in construing the ESA's "take" prohibition, the district court ignored over twenty years of Supreme Court precedent. In *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, the Court held that "Congress intended 'take' to apply broadly[.]"[62] However, rather than relying on the analytical map provided by the majority in *Sweet Home*, the district court chose to follow the arguments made by the *dissent*.[63]

Second, the district court's flawed interpretation allows for significant "harm" and "harassment" of captive animals. The district court effectively held that the ESA blesses all manner of cruel, harassing, and harmful conduct, so long as the animal's life is not in immediate danger. This is not the law.

Third, the district court's approach would convert compliance with the Animal Welfare Act ("AWA")[64] into an impenetrable shield against otherwise valid ESA claims. Essentially, the district court held that the AWA provides the legal framework for "take" of a captive animal, even if listed under the ESA. The district court's interpretation notwithstanding, the AWA does *not* displace the ESA; it merely provides

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[59] *Id.*

[60] *Id.* at 1355.

[61] *Id.*

[62] *Sweet Home*, 515 U.S. at 704.

[63] *PETA*, 189 F. Supp. 3d at 1345.

[64] Here, we do not mean to suggest that Lolita's conditions actually satisfy the AWA. In fact, the evidence shows otherwise.

an additional layer of regulation, setting forth minimum standards that apply to *all* captive animals. The ESA, in turn, retains full, independent force in cases involving captive animals that are *also* listed as endangered.

Finally, in reaching its holding, the district court relies on the premise that captive animals are somehow categorically distinct from their wild counterparts.[65] To the extent that the court's decision rests in part on the notion that captive animals have different needs and vulnerabilities than wild animals, this finds no support in the scientific literature. Neither does this notion derive any support from the agencies' interpretations and positions under governing law.

In sum, the district court made a series of fundamental mistakes in its construction of the ESA as applied to captive animals like Lolita. This Court should reverse.

ARGUMENT

I. In Construing the ESA, the District Court Ignored 20 Years of Supreme Court Precedent

Under the ESA, it is unlawful to "take" endangered wildlife.[66] "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[67]

There is no dispute that Lolita is covered by the ESA.[68] Likewise, there is no dispute that captive animals, like Lolita, can be "taken" in violation of the ESA.[69] The only question is if, on the record before the district court, there was a genuine issue of material fact regarding whether the Defendants committed a "take" of Lolita.

In 1995, the Supreme Court famously stated that "Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions."[70] With this in mind, the Court upheld a regulation of the Fish and Wildlife Service ("FWS") interpreting the word "harm" to mean "an act which actually kills or injures wildlife."[71]

So understood, the Court agreed with the agency that the term "harm" could include significant habitat modification, even in the absence of an intent to prejudice wildlife.[72] In reaching this conclusion,

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[65] *PETA*, 189 F. Supp. 3d at 1350.

[66] 16 U.S.C. §§ 1538(a)(1)(B), (C) (2016).

[67] 16 U.S.C. § 1532(19) (2016).

[68] Listing Endangered or Threatened Species: Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment, 80 Fed. Reg. at 7380.

[69] *PETA*, 189 F. Supp. 3d at 1355.

[70] *Sweet Home*, 515 U.S. 687 at 704.

[71] *Id.* at 691 (quoting 50 C.F.R. § 17.3 (2018)). Save for the addition of the word "fish," the National Marine Fisheries Service uses the same language in its regulation defining "harm." 50 C.F.R. § 222.102 (2018).

[72] *Sweet Home*, 515 U.S. 687 at 708.

the Court rejected the lower court's reliance on the canon of *noscitur a sociis*—which holds that a word is known by the company it keeps—where the lower court employed this canon to find that "the word 'harm' should be read as applying only to 'the perpetrator's direct application of force against the animal taken[.]'"[73] The Court rejected the dissent's reliance on this canon as well.[74]

Thus, for over two decades, it has been settled law that "harm" amounts to "take" where such harm "actually kills *or* injures wildlife," even if the defendant did not intend such harm. Further, as the language plainly indicates, there is no question that *injury alone suffices*.[75] The lower courts, agencies, regulated entities, and third-party beneficiaries have long relied on this basic understanding.

Nevertheless, the district court all but ignored this precedent. In fact, were it not for the peculiar citations to *Sweet Home* (discussed below), one might conclude that the district court was unaware of this landmark decision. Seemingly out of thin air, the lower court held that that an exhibitor "takes" a captive animal "only when its conduct *gravely threatens or has the potential to gravely threaten the animal's survival*."[76] In other words, according to the district court, a "take" only occurs when the captive animal's life is in immediate jeopardy. Mere injury is not enough. This is in direct conflict with Sweet Home, National Marine Fisheries Service ("NMFS") and FWS regulations, and numerous court decisions over the past two decades.

In framing its discussion of the "take" prohibition, the district court began with *noscitur a sociis*. Where the district court should have noted the marginalization of this canon in *Sweet Home*, it went in the opposite direction. The court stated that *noscitur a sociis* "becomes even *more* pertinent when the proscribed conduct, like the term 'take' . . . is defined with a list of overlapping words."[77] Justice Scalia would agree. The majority in *Sweet Home* would not. In fact, this was the precise analysis that the Supreme Court overturned in 1995.[78]

With this canon inappropriately in mind, the district court stated that the terms "harm" and "harass" ought to be "interpreted with the same level of 'impact' to the listed species as the other eight terms [in the 'take' definition] denote."[79] The court reasoned that this "level of impact" can only be satisfied by (1) seizure, (2) life-threatening con-

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[73] *Id.* at 694 (quoting Sweet Home Chapter of Communities for a Great Or. v. Babbitt, 17 F.3d 1463, 1465 (D.C. Cir. 1994)).

[74] *See id.* at 720–21 (Scalia, J., dissenting).

[75] *See infra* Sea Shepard Legal's Amicus Brief Section II (supporting the argument that "long-standing authority reinforces the common-sense conclusion that the ESA prohibits conduct that is less than life-threatening.").

[76] *PETA*, 189 F. Supp. 3d at 1355 (emphasis added).

[77] *Id.* at 1345 (emphasis added).

[78] *Sweet Home*, 515 U.S. at 688, 694–95, 702.

[79] *PETA*, 189 F. Supp. 3d at 1346.

duct, or (3) conduct with the "potential to seize or gravely threaten the life of a member of a protected species."[80]

Accordingly, the district court took the very same tack the Supreme Court *rejected* in 1995.[81] In *Sweet Home*, the Supreme Court outlined the D.C. Circuit's approach as follows:

> Although acknowledging that "[t]he potential breadth of the word 'harm' is indisputable," the majority concluded that the immediate statutory context in which "harm" appeared counseled against a broad reading; like the other words in the definition of "take," the word "harm" should be read as applying only to "the perpetrator's direct application of force against the animal taken . . . . The forbidden acts fit, in ordinary language, the basic model 'A hit B.'" The majority based its reasoning on a canon of statutory construction called noscitur a sociis, which holds that a word is known by the company it keeps.[82]

Again, the Supreme Court did not uphold this reasoning—it *reversed* it.[83]

If we substitute the precise issue in *Sweet Home* (the scope of the term "harm" vis-à-vis indirect action) for the issue in this case (the degree of "harm" that suffices), the district court's opinion becomes a facsimile of the D.C. Circuit's opinion in *Sweet Home*.

How, then, did the district court reconcile its rationale with *Sweet Home*? Shockingly, it did not even try. Instead, the court cited Justice Scalia's *dissent*.[84] The district court then bolstered its conclusion with reference to a Ninth Circuit case, *United States v. Hayashi*,[85] that *Sweet Home* had explicitly marginalized.[86]

II. The District Court's Narrow Construction of "Take" Allows for Significant Harm and Harrassment of Captive Animals

In holding that an exhibitor takes a captive animal "only when its conduct gravely threatens or has the potential to gravely threaten the animal's survival,"[87] the district court effectively held that the ESA blesses all manner of cruel, harassing, and harmful conduct, so long as the animal's life is not "gravely threatened." However, long-standing authority reinforces the common-sense conclusion that the ESA prohibits conduct that is less than life-threatening.

In *ASPCA v. Ringling Bros. & Barnum & Bailey Circus*, for instance, the D.C. Circuit sanctioned a take suit against circus owners

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[80] *Id.* at 1347.

[81] *Sweet Home*, 515 U.S. at 688, 694–95, 702.

[82] *Id.* at 694.

[83] *Id.* at 688, 694–95, 702.

[84] *PETA*, 189 F.Supp.3d at 1345.

[85] *Id.* at 1346–47, 1355 (citing United States v. Hayashi, 22 F.3d 859, 864 (9th Cir. 1993)).

[86] *Sweet Home*, 515 U.S. at 702 n.16 ("Respondents' reliance on *United States v. Hayashi* . . . is also misplaced.").

[87] *PETA*, 189 F. Supp. 3d at 1355.

based on the employees' practice of striking endangered Asian elephants with bull hooks.[88] There was no question that this practice, while brutal, did not "gravely threaten the animals' survival." Under Judge Ungaro's articulation of the take standard, this claim would have failed—yet it did not meet such a fate.

Although technically limited to standing, *Ringling Bros.* shows what is obviously implied by the broad definition of "take": that a defendant may be liable for conduct that, however reprehensible, does not "gravely threaten[ ] or ha[ve] the potential to gravely threaten the animal's survival."[89] Indeed, this is precisely why the words "harm" and "harass" are included in the statutory definition of "take".[90]

The subsequent course of the *Ringling Bros.* litigation dispels any doubt as to the correctness of this conclusion. After the D.C. Circuit found standing, plaintiffs pursued their case through trial.[91] The "district court held a six-week bench trial, heard testimony from approximately thirty witnesses, [and] reviewed hundreds of documents entered into the evidentiary record[.]"[92] In the end, the court concluded that plaintiffs failed to establish standing, in large measure due to the lead witness's lack of credibility that he was "emotionally attached" to the elephants.[93] But the fact that plaintiffs succeeded in reaching the trial stage underscores the substantive viability of their underlying "take" claim as a matter of law.[94]

The idea that "harm" and "harassment" need not rise to the level of life-threatening conduct is further supported by numerous decisions

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[88] ASPCA v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334, 335, 338 (D.C. Cir. 2003) ("[Plaintiff] seeks . . . an injunction that would stop Ringling Bros. from continuing to mistreat the elephants in violation of the Endangered Species Act.").

[89] *PETA*, 189 F. Supp. 3d at 1355.

[90] The lower court's construction is also undermined by the word "wound" within the statutory definition of "take." Here, the district court ignored precedent illuminating the difference between "wound" and "harm." In discussing these terms, the court declared that "there is only a pedantic distinction between 'wound' and 'harm.'" *Id.* at 1345. This statement further betrays the court's bias in favor of an unjustifiably narrow construction of "take." In fact, the existence of a significant distinction between "wound" and "harm" was one of the few points of *agreement* between the majority and dissent in *Sweet Home*. *Compare Sweet Home*, 515 U.S. at 702 ("The statutory context of 'harm' suggests that Congress meant that term to serve a particular function in the ESA, consistent with, but distinct from, the functions of the other verbs used to define 'take.'"), *with Sweet Home*, 515 U.S. at 721 (Scalia, J., dissenting) (discussing how "harm" is distinct because it does not duplicate meanings of the other words listed under "take," including "wound").

[91] ASPCA v. Feld Entm't, Inc., 659 F.3d 13, 17–18 (D.C. Cir. 2011).

[92] *Id.* at 18.

[93] *Id.* at 20–21.

[94] Indeed, the extraordinary outcome of the *Ringling Bros.* litigation—dismissal of the case for want of standing following a six-week trial *and* an award of fees to the defendant—illustrates just how legitimate the underlying legal theory was. As the district court explained in its opinion on fees, the defendant "did not win this case based on any findings regarding its treatment of the elephants." Animal Welfare Inst. v. Feld Entm't, Inc., 944 F. Supp. 2d 1, 16 (D.D.C. 2013).

finding so-called "non-lethal takes,"[95] and agency decisions authorizing non-lethal takes in special circumstances.[96]

Indeed, one of the most powerful examples of non-lethal take comes from the Eleventh Circuit. In *Loggerhead Turtle v. Volusia County*, this court authorized a citizen suit based on "harm" and "harassment" of sea turtles from artificial lighting.[97] The plaintiffs alleged "harm" and "harassment" in the form of disorientation of turtle hatchlings (*i.e.*, baby sea turtles crawling toward city lights) and aborted nesting attempts by mothers.[98] While the case was contentious on several fronts, the existence of "take" was never in real dispute—even though many (perhaps most) of the turtles were not actually confronted with a life-threatening scenario.[99]

The agency's own practice in *Loggerhead Turtle* further undermines the notion that "take" may only occur when conduct "gravely threatens or has the potential to gravely threaten the animal's survival."[100] Significantly, the agency issued an incidental take permit (authorizing "takes" occurring from beachfront driving), recognizing that "take" need not be accompanied by a life-threatening scenario.[101] For instance, the permit authorized take in the form of "[h]arassment, injury, and/or death to hatchling sea turtles emerging from unmarked/unprotected nests" and by "[h]arassment, injury, and/or death to nesting female turtles . . . , resulting from physiological stress of potentially increasing the number of false crawls . . . ."[102]

In contrast, the district court failed to identify a single decision supporting its "gravely threatens" test. The court attempted to fill this void with a citation to NMFS' regulatory definition of the word "harm,"[103] which defines "harm" as "an act which actually kills or injures fish or wildlife."[104] The court referenced this language after expressing its agreement with the Defendants' position that "'harm' and

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[95] *See, e.g.*, Ctr. for Biological Diversity v. Salazar, 695 F.3d 893, 910 (9th Cir. 2012) (requiring FWS to issue an incidental take statement because "oil and gas exploration activities are reasonably certain to result in at least some nonlethal harassment").

[96] *See, e.g.*, Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. 15804, 15868 (Apr. 1, 2003) (codified at 50 C.F.R. pt. 17) (authorizing "the full spectrum of depredation control actions, from nonlethal opportunistic harassment to lethal control of depredating wolves."), *vacated*, Defenders of Wildlife v. Sec'y, U.S. DOI, 354 F. Supp. 2d 1156, 1174 (D. Or. 2005).

[97] Loggerhead Turtle v. Volusia Cty., 148 F.3d 1231, 1235–36 (11th Cir. 1998).

[98] *Id.* at 1235.

[99] *See* Loggerhead Turtle v. Volusia Cty., 896 F. Supp. 1170, 1180–81 (M.D. Fla. 1995) ("The evidence at this stage overwhelmingly supports the conclusion that artificial beachfront lighting harms and harasses the . . . turtles within the meaning of the [ESA].").

[100] *PETA*, 189 F. Supp. 3d at 1355.

[101] *Loggerhead Turtle*, 148 F.3d at 1239.

[102] *See id.* at 1240 (U.S. FISH & WILDLIFE SERVICE, DEP'T OF THE INTERIOR, TE811813-11, THREATENED AND ENDANGERED SPECIES–INCIDENTAL TAKE F.5, F.12 (Nov. 7, 2005)).

[103] *PETA*, 189 F. Supp. 3d at 1346.

[104] 50 C.F.R. § 222.102 (2018).

'harass' should be interpreted with the same level of 'impact' to the listed species as the other eight terms denote."[105] To bolster this conclusion—firmly rooted in the doctrine of *noscitur a sociis*—the court suggested that "by *replicating* the word "*kill*" in the definition of 'harm' the NMFS's interpretation emphasizes the degree of harm the Act requires: '[A]n act which *actually kills* or injures fish or wildlife.'"[106] These linguistic gymnastics ignore the fact that NMFS' definition of "harm" explicitly encompasses *injury*—and it does so without mention of "grave," "serious," or any other threshold. The court thus ascribed to NMFS an "interpretation" that has no actual basis in the language of the regulation and that, again, runs counter to a long line of authority broadly interpreting "take" under the ESA.

III. The District Court's Approach Would Convert AWA Compliance into an Impenetrable Shield Against ESA Claims

As the district court recognized, this case implicates two statutes, the ESA and the AWA.[107] While it was proper for the court to analyze the relationship between these two statutes, the analysis was flawed.

Defendants placed heavy emphasis on statements by the Animal and Plant Health Inspection Service ("APHIS"), the agency that administers the AWA, suggesting that Lolita's conditions satisfied the AWA.[108] The fundamental issue is, therefore, the implication of an APHIS finding of AWA compliance for animals also listed under the ESA.[109]

In attempting to resolve this issue, the district court held that the AWA provides the legal framework for claims sounding in "harm" or "harassment" of a captive animal, even if that animal is listed under the ESA.[110] If APHIS has determined that the animal's captivity complies with the AWA, then, according to the district court, there can be no claim for "harm" or "harassment" under the ESA unless the plaintiff clears the court-invented hurdle of a "grave[ ] threat[ ] [to] the

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105 *PETA*, 189 F. Supp. 3d at 1346.

106 *Id.* (emphasis added by district court).

107 *See id.* at 1351 (applying the ESA and AWA).

108 Defendant's Amended Answer and Affirmative Defenses to Complaint for Declaratory and Injunctive Relief by Festival Fun Parks LLC, Miami Seaquarium Exhibit C at 3, *PETA*, 189 F. Supp. 3d (No. 1:15CV22692); Defendant's Amended Answer and Affirmative Defenses to Complaint for Declaratory and Injunctive Relief by Festival Fun Parks LLC, Miami Seaquarium Exhibit D at 2, *PETA*, 189 F. Supp. 3d (No. 1:15CV22692).

109 *PETA*, 189 F. Supp. 3d at 1335. Here, we make two important qualifications. First, the statements upon which the district court relied are significantly dated. Second, to the extent that agency personnel at one point made a determination of compliance with the AWA, the record suggests that this determination was not supported by substantial evidence.

110 *See id.* at 1354 (stating that Plaintiff's interpretation of "harm" and "harass" in the ESA would conflict with the AWA and disrupt "long established regulatory framework").

animal's survival."[111] Put differently, APHIS' seal of approval under the AWA doubles as an impenetrable shield against otherwise valid ESA claims.

The district court's approach certainly provides a bright-line test. However, in apparently seeking analytical simplicity for the benefit of regulated entities, the court sacrificed fidelity to the statutory framework.

A. The ESA and the AWA Must Retain Independent Force To Serve Their Distinct but Complementary Functions

While observing that "statutes relating to the same subject matter should be construed harmoniously,"[112] the district court in fact *assumed* a conflict between the ESA and the AWA. This assumption was neither necessary nor proper. The two statutes relate to similar subject matter, but they operate in distinct ways.

To begin with, the scope of the statutes is different. The AWA governs *all* animals that are used as pets, for research, and in exhibition.[113] The ESA's "take" prohibition governs *only* animals that are *listed* as "endangered" (or, if extended by regulation, animals listed as "threatened").[114] Thus, it is hardly clear that the court was correct that the AWA is "the more specific statute," and should therefore prevail over the ESA in the event of conflict.[115] At the very most, the inquiry into specificity yields a toss-up: the AWA only applies in the case of certain "uses" of animals, and the ESA only applies to animals that are "endangered" or "threatened."

More to the point, when the two statutes both apply, there is *no conflict*. The statutes work together, regulating different aspects of a given scenario—or, when regulating the same aspect (*e.g.*, appropriate space), they do so to a different extent.

The AWA aims to ensure that covered animals "are provided humane care and treatment."[116] Accordingly, AWA standards governing marine mammals address facilities and operations, space requirements, health and husbandry, water quality, sanitation, and transportation.[117] In so doing, however, the AWA and its implementing regulations provide only the "*minimum* requirements."[118] In other words, the AWA sets a floor. If an exhibitor satisfies this floor, it will not be exposed to an enforcement action under the AWA. If the animal

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111 *Id.* at 1355.

112 *Id.* at 1351.

113 7 U.S.C. § 2131(1) (2016).

114 16 U.S.C. § 1538(a)(1)(B) (2016).

115 *PETA*, 189 F. Supp. 3d at 1351.

116 7 U.S.C. §§ 2131(1)–(2) (2016); Knapp v. USDA, 796 F.3d 445, 455–56 (5th Cir. 2015).

117 *See generally* 9 C.F.R. §§ 3.100–18 (2018) (containing standards governing marine mammal facilities and operations, space requirements, health and husbandry, water quality, sanitation, and transportation).

118 7 U.S.C. § 2143(a)(2) (2016) (emphasis added).

is not listed under the ESA, then the exhibitor has nothing more to worry about. If the animal *is* listed under the ESA, however, satisfying the AWA may not be enough.

The idea that the ESA retains independent force—building additional protections upon the AWA's floor—is reinforced by the fact that both NMFS and FWS have engaged in rulemaking to provide ESA protection to captive animals.[119] Why would the agencies take this step if they believed the AWA displaced the ESA in the context of captive animals? The answer, of course, is that they would not.

Indeed, when NMFS eliminated the exclusion of captive SRKWs from the species' endangered listing—thus extending ESA protections to Lolita—it explicitly recognized that "the ESA does not allow for captive held animals to be assigned separate legal status from their wild counterparts on the basis of their captive status" and that "captive members of a listed species are also subject to the relevant provisions of section 9 of the ESA as warranted."[120]

The *Ringling Bros.* saga once again illustrates the point.[121] As captive animals exhibited in a circus, the Asian elephants were subject to the AWA. As endangered species, however, they were also protected by the ESA. There was no question that plaintiffs could sue for "take" under the ESA notwithstanding the applicability of AWA regulations.[122] The courts also did not suggest that the "take" standard under the ESA was somehow modified—through the addition of a "gravely threatens" threshold or otherwise—because the elephants were captive animals regulated by the AWA.

To summarize, the AWA and the ESA complement each other in the context of captive listed animals—with each statute providing its own set of protections—and the agencies have recognized as much. This approach makes perfect sense, as it stands to reason that a captive animal that is also endangered or threatened would enjoy greater protection than a captive animal that is *not* listed as endangered or threatened.[123]

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[119] *See, e.g.*, Endangered and Threatened Wildlife and Plants; Removal of the Regulation That Excludes U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle from Certain Prohibitions, 77 Fed. Reg. 431, 439 (Jan. 5, 2012) (codified at 50 C.F.R. pt. 17) (eliminating the exclusion of captive-bred endangered antelopes); Listing Endangered or Threatened Species: Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment, 80 Fed. Reg. at 7380 (eliminating the exclusion of captive endangered SRKWs); Endangered and Threatened Wildlife and Plants; Listing All Chimpanzees as Endangered Species, 80 Fed. Reg. 34500 (June 16, 2015) (codified at 50 C.F.R. pt. 17) (eliminating the separate classification of captive chimpanzees).

[120] Listing Endangered or Threatened Species: Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment, 80 Fed. Reg. at 7385.

[121] *Ringling Bros.*, 317 F.3d at 334.

[122] *See id.* (holding that in a case regarding a violation of the Endangered Species Act, the court only had to determine if standing was proper).

[123] *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 185, (1978) (stating that Congress chose to "give endangered species priority").

B. The District Court's Analysis of the Relationship between the ESA and the AWA Disregards Supreme Court Precedent

The Supreme Court's recent decision in *POM Wonderful LLC v. Coca–Cola Co.*, underscores the importance of reconciling the AWA and ESA in a way that avoids displacement. Building on the long-standing rule that statutes relating to the same subject matter should be harmonized absent "positive repugnancy," the *POM Wonderful* Court unanimously held that a party may sue under the Lanham Act despite the challenged conduct's legitimacy under the Food, Drug, and Cosmetic Act ("FDCA").[124]

The parallels between *POM Wonderful* and this case are striking. In *POM Wonderful*, the plaintiff juice manufacturer sued Coca-Cola, claiming that Coca-Cola engaged in unfair competition by using misleading labels suggesting a higher content of pomegranate juice than actually existed.[125] Coca-Cola defended on the ground that the Food and Drug Administration ("FDA") had blessed its labels, finding them consistent with the strictures of the FDCA.[126] The lower courts agreed with Coca-Cola, holding that the FDCA barred the plaintiff's suit because the FDCA specifically deals with "misbranded" food and drugs, and the agency had "directly spoken on the issues that form the basis of [the] Lanham Act claim[.]"[127]

The Supreme Court reversed, holding that the statutes were complementary in scope and purpose.[128] Of great significance here, the district court's discussion of the relationship between the AWA and the ESA embraces every argument that *POM Wonderful* rejects.

First, neither statute in *POM Wonderful* expressly precluded or limited claims challenging labels regulated by the FDCA.[129] The Court found it significant that, as a matter of statutory language, "food and beverage labels regulated by the FDCA are not . . . off limits to Lanham Act claims."[130] The Court counseled against a finding of preclusion absent express statutory language to that effect.[131] By contrast, the district court drew the opposite inference from congressional silence.[132]

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124 *POM Wonderful*, 134 S. Ct. at 2233.

125 *Id.*

126 *Id.* at 2234.

127 *Id.* at 2236 (quoting POM Wonderful LLC v. Coca Cola Co., 727 F. Supp. 2d 849, 871–73 (C.D. Cal. 2010)).

128 *Id.* at 2233.

129 *Id.* at 2237.

130 *Id.*

131 *See id.* (finding Congress's silence to be "powerful evidence that Congress did not intend FDA oversight to be the exclusive means" of redress).

132 *See PETA*, 189 F. Supp. 3d at 1352–54 (discussing lengthy co-existence of the AWA and ESA as a reason to *limit* the force of the ESA).

Second, the Court found preclusion inappropriate in light of the complementary but distinct "scope and purpose" of the two acts.[133] Again, by contrast, the district court found the differing aims of the ESA and AWA as grounds for displacement.[134]

Third, the Supreme Court emphasized distinct enforcement mechanisms as a reason to *preserve* private causes of action under the Lanham Act.[135] Taking the opposite view, the district court cited distinct enforcement mechanisms as one more reason to *sideline* the ESA.[136]

Fourth, the Court was not persuaded by the argument that allowing Lanham Act claims in the face of FDA regulation would undermine "national uniformity in food and beverage labeling."[137] As the Court noted, the only "variability" that is produced is of the sort that Congress often sanctions when it authorizes a private cause of action in addition to administrative regulation and enforcement.[138] In distinct contrast, the district court embraced this uniformity argument without hesitation.[139]

Finally, the Supreme Court acknowledged that FDCA regulations addressed the subject at issue with more specificity but found this factor to be unimportant.[140] By comparison, the district court found this factor to be almost dispositive.[141]

In short, the district court commits the very sin that the Supreme Court condemns in *POM Wonderful*. "When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other."[142] By holding that the AWA precludes almost all ESA claims for "harm" and "harassment" of captive animals, the district court's opinion is the embodiment of such "disregard."

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133 *See POM Wonderful*, 134 S. Ct. at 2238 ("Although both statutes touch on food and beverage labeling, the Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety.").

134 *See, e.g.*, *PETA*, 189 F. Supp. 3d at 1352 (finding that, despite the two statutes' similar focus on "protection of animals from people," the AWA's focus on "'humane treatment' of captive animals used for exhibition" means that Lolita's case is largely the province of the AWA).

135 *See POM Wonderful*, 134 S. Ct. at 2238 (observing that while "[e]nforcement of the FDCA and the detailed prescriptions of its implementing regulations is largely committed to the FDA[,]" the Lanham Act is enforced by competitors).

136 *See PETA*, 189 F. Supp. 3d at 1351 ("However, in contrast to the ESA, the AWA's goals are not advanced through private causes of action.").

137 *POM Wonderful*, 134 S. Ct. at 2239.

138 *Id.* at 2240.

139 *PETA*, 189 F. Supp. 3d at 1354–55.

140 *POM Wonderful*, 134 S. Ct. at 2240.

141 *See PETA*, 189 F. Supp. 3d at 1354 ("Thus, it is clear that the AWA is intended for the specific purpose of protecting animals in captivity that are used by licensees for exhibition or research purposes.").

142 *POM Wonderful*, 134 S. Ct. at 2238.

IV. The District Court's Categorical Distinction Between Captive Animals and Wild Animals Finds Support Neither in Science nor in Agency Interpretations

In reaching its conclusion that an exhibitor "takes" a captive animal "only when its conduct gravely threatens or has the potential to gravely threaten the animal's survival[,]"[143] the district court relies on the premise that captive animals are somehow categorically distinct from their wild counterparts for purposes of the ESA.[144] To the extent that the court's decision rests in part on the notion that captive animals have different needs and vulnerabilities than wild animals, this finds absolutely no support in the scientific literature. Neither does this notion derive any support from the agencies' interpretations and positions under governing law.

A. Science Does Not Support a Distinction Between the Needs and Vulnurabilities of Captive Orcas and Wild Orcas

As alleged support for the conclusion that its novel "grave injury" standard is not implicated with respect to captive animals, the district court observes that "the types of harm . . . the ESA was designed to safeguard against are . . . distinct from concerns regarding the humane treatment and welfare of an animal in captivity."[145] Implicit in, and central to, this statement is the further (and supporting) conclusion that animals in captivity have different needs and vulnerabilities than animals in the wild. The district court offers no scientific support for this apparent conclusion, and there is none.

The weight of scientific research concerning the behavioral anomalies associated with captive animals (*e.g.* stereotypic behavior) overwhelmingly favors a contrary conclusion—one that does not draw an artificial distinction between the ways in which captive and wild animals experience stress. More particularly, in attempting to predict, and allegedly ameliorate, stress-related reactions of captive animals, scientists focus on the *species-specific* traits for the subject animals without distinguishing between wild or captive individuals.[146]

More to the point, animals—especially exotic animals like orcas—do not simply part ways with their physiological and psychological needs when brought into captivity. In fact, the continuance of these

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143 *PETA*, 189 F. Supp. 3d at 1355.

144 *Id.* at 1349–50.

145 *Id.* at 1351.

146 *See, e.g.,* Ross Club & Georgia Mason, *Animal Welfare: Captivity Effects on Wide-Ranging Carnivores*, NATURE 425, 473–74 (2003) ("[W]e investigate this previously unexplained variation in captive animals' welfare . . . and show that it stems from constraints imposed on the natural behaviour of susceptible animals, with wide-ranging lifestyles in the wild predicting stereotypy and the extent of infant mortality in captivity.").

needs is often the causal factor of stereotypic behavior.[147] This is especially true for species with a naturally wide range.[148] Despite the word "resident," Southern Resident Killer Whales, like Lolita, range far and wide in the wild.[149]

To group all captive animals of a given species (*e.g.*, orcas) into a single, monolithic category is to ignore the heterogeneous nature of these animals. "In the case of zoo animals, which have often come from very heterogeneous backgrounds, individuals may vary greatly in their previous life experiences, and this can influence their ability to cope with certain challenges[.]"[150] For this reason, animal-welfare scientists study animals at both the species and individual level.[151] Moreover, in assessing a captive animal's "coping" behavior, these scientists find it critical "to conduct studies that document behavioral changes in response to the changes in the captive environment and, where possible, *to document normal behavior patterns for individuals living in good conditions (wild and zoo), as a guide for comparison*."[152]

To a considerable degree, the lower court's reticence to apply the full and proper force of the ESA to captive orcas seems to be motivated by an unstated belief that these animals have somehow become "domesticated"—that they have comfortably adapted to their new life in a small concrete tank. If this were the case, why would captive orcas be suffering from significantly lower life expectancies (a phenomenon the district court acknowledged)?[153] While it may be true that *some* species adapt relatively well to captivity,[154] the great weight of scientific study suggests that orcas do *not* fare well in captivity and that they retain the same needs and vulnerabilities as their wild brethren.

In fact, even scientists sympathetic to the captive animal industry readily admit that many captive animals experience extreme suffering in captivity *regardless* of the objective "adequacy" of the conditions of confinement. For instance, Dr. Georgia Mason takes the position that

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147 *Id.* at 473.

148 *Id.*

149 *See* NOAA, *Killer Whale (Orcinus orca): Southern Resident Killer Whales*, NOAA FISHERIES, http://www.nmfs.noaa.gov/pr/species/mammals/whales/killer-whale.html [https://perma.cc/R7ZZ-3X8D] (accessed Aug. 3, 2018) ("[I]n recent years, [SKRWs] have been regularly spotted as far south as central California during the winter months and as far north as Southeast Alaska[.]").

150 Sonya P. Hill & Donald M. Broom, *Measuring Zoo Animal Welfare: Theory and Practice*, 28 ZOO BIOLOGY 531, 532 (2009).

151 *Id.*

152 *Id.* (emphasis added); *see also id.* at 536–37 ("It is likely that behavioral geography will apply across most species, in the wild and in captivity.").

153 *See PETA*, 189 F. Supp. 3d at 1333 n.3 (acknowledging a median life expectancy of thirty-eight to fifty years for wild SRKWs and a median life expectancy of only twelve years for captive orcas in U.S. facilities); *see also* Georgia J. Mason, *Species Differences in Response to Captivity: Stress, Welfare, and the Comparative Method*, 25 TRENDS IN ECOLOGY AND EVOLUTION 713, 715 (2010) (noting how orcas experience "annual mortality rates of 4–6% in captivity, compared with 2–3% in the wild, a significant difference resulting in an expected lifespan of half to two-thirds of that occurring naturally.").

154 *See id.* at 713.

"[c]aptive wild animals generally receive ample food and water, veterinary care, and protection from predation and conflict."[155] As a result, according to Dr. Mason, "they are often healthier, live longer and breed more successfully than conspecifics living free in their natural environments."[156] This opinion notwithstanding, Dr. Martin recognizes that "not all captive wild animals flourish in this way, with some surviving and breeding far less well than might be expected."[157] Further, "the evidence of compromised welfare often suggests that physiological or psychological needs are not being met."[158]

Overall, Dr. Mason concludes that, controlling for conditions, "it is evident that even close taxonomic relatives can differ enormously in captive wellbeing: some species have arguably acceptable or even good welfare, whereas their congeners display evidence of stress in similar conditions."[159] In other words, Dr. Mason, a respected scientist among her peers who sees captivity as a "haven" for some animals, would absolutely reject the idea that captivity, even under the "best" conditions, *categorically* implies an upgrade from the animal's perspective.[160] Rather, Dr. Mason would agree that the matter must be analyzed at the species, if not individual, level.

As an ethical matter, Sea Shepherd Legal disagrees with Dr. Mason's suggestion that captivity is a "haven" for some animals. Captivity is immoral in all circumstances. Nevertheless, Dr. Mason's analysis shows that one need not accept the moral argument against captivity to reject the idea that captive and wild animals are somehow categorically distinct for purposes of "harm" and "harassment." However, if a distinction were to be made, it should run in the opposite direction than that apparently chosen by the court. Specifically, scientific evidence strongly supports the proposition that captive animals—and especially those with wide ranges and strong social bonds like orcas—*are more susceptible to "take"* in captivity than in the wild.[161] The expected higher susceptibility of captive animals (and especially orcas given their particular traits) to "take" arises from their exposure to inescapable chronic stressors in their daily environment (*e.g.* social isolation, frequent human contact, abnormal social grouping, confinement, inability to exhibit natural behaviors, and artificial light)—stressors not found in the wild.[162]

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155 *Id.*

156 *Id.*

157 *Id.* at 713–14.

158 *Id.* at 714.

159 *Id.*

160 *Id.* at 713.

161 *See, e.g.,* Hill & Broom, *supra* note 150, at 14 ("Animals on farms, in laboratories or zoos and other captive settings often face environmental challenges that their species will not have encountered during most of their evolution, or only lately in domestication. Thus, captive animals may be poorly equipped to adapt to certain aspects of captivity that fail to meet their needs.") (citation omitted).

162 *See, e.g.*, Stephanie Hing et al., *A Review of Factors Influencing the Stress Response in Australian Marsupials*, 2 CONSERVATION PHYSIOLOGY 1, 5–6 (2014) ("The cap-

B. Agency Interpretations Neither Mandate nor Suggest the District Court's Conclusion

In justifying its novel "take" standard, the district court also claimed to rely upon NMFS' statements regarding "take" and FWS' interpretation of "harassment," both in the context of captivity.[163] However, the court misunderstood the upshot of these agency positions.

NMFS, not FWS, administers the ESA with respect to marine species like Lolita.[164] Although NMFS has not promulgated a definition of "harass," the agency made formal statements regarding the applicability of the "take" to captive animals. In fact, when it eliminated the exclusion of captive SRKWs from ESA protections, NMFS recognized that "captive members of a listed species are also subject to the relevant provisions of section 9 of the ESA as warranted."[165]

While acknowledging this fact, the district court found significance in NMFS' additional statement that, "depending on the circumstances, it would likely not find continued possession, care, and maintenance of a captive animal to be a violation of ESA section 9."[166] The court similarly emphasized the FWS regulation defining "harassment," which provides that "harassment," as "applied to captive wildlife, does not include generally accepted . . . [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the [AWA]."[167]

Under further scrutiny, it is evident that these agency pronouncements only *reinforce* the notion that the ESA retains its full force with respect to captive animals. NMFS simply stated that an agency finding of "take" would "depend[ ] on the circumstances"—a pronouncement entirely consistent with settled law that the "take" inquiry is conducted on a case-by-case basis.[168] NMFS' view that "continued possession, care, and maintenance of a captive animal" is not "likely" or "typically" a "take" only reflects the position that, in the absence of additional facts, mere possession and maintenance of an endangered species is not a "take."[169]

Turning next to FWS' definition of the term "harass," the regulation does *not* state that a licensed exhibitor is free from all "take"

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tive environment may entail a range of potential biotic and abiotic stressors that they would not otherwise face in their native habitat . . . ."); Kathleen N. Morgan and Chris T. Tromborg, *Sources of Stress in Captivity*, 102 APPLIED ANIMAL BEHAV. SCI. 252, 263–64 (2007) ("[R]elentless exposure to persistent stressors can have many deleterious consequences that are particularly undesirable for animals maintained in captivity.").

163 *See PETA*, 189 F. Supp. 3d at 1348–51.

164 *Id.* at 1334.

165 Listing Endangered or Threatened Species: Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment, 80 Fed. Reg. at 7385.

166 *Id.*

167 50 C.F.R. § 17.3 (2018).

168 *Sweet Home*, 515 U.S. at 708.

169 *See PETA*, 189 F. Supp. 3d at 1349.

claims simply because the exhibitor has a license to operate under the AWA. If this were the case, then FWS (or NMFS) would be unlawfully abdicating its responsibility to administer the ESA to APHIS.[170]

Thankfully, FWS clarifies the issue through further interpretative statements confirming the limited nature of this regulation:

> The purpose of amending the Service's definition of 'harass' is to exclude proper animal husbandry practices that are not likely to result in injury from the prohibition against 'take.' Since captive animals can be subjected to improper husbandry as well as to harm and other taking activities, the Service considers it prudent to maintain such protections, consistent with Congressional intent.[171]

In other words, contrary to the district court's understanding, this regulatory language *preserves* "take" claims based on "plain" (non-life-threatening) injury to captive animals. The regulation should *not* be interpreted to mean that anything that occurs during confinement—so long as the animal's "survival" is not "gravely threatened"—has a green light under the ESA.

According to the district court, satisfaction of the AWA precludes a finding of "take" while the animal is held captive *unless* the conduct at issue all but kills the animal.[172] Such a narrow interpretation of "take" is not the law, and neither FWS nor NMFS has ever suggested otherwise.

CONCLUSION

Most appeals present debatable questions of law and fact. This appeal is an exception. The district court's opinion reflects an interpretation of the ESA that the Supreme Court has rejected. Far from finding support in agency positions, the lower court's construction of the ESA is undermined by the very agency pronouncements upon which it relies. Additionally, the court's opinion clashes with peer-reviewed scientific literature involving the study of captive and wild animals. This Court should reverse.

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[170] *See* Ctr. for Biological Diversity v. U.S. BLM, 698 F.3d 1101, 1116 (9th Cir. 2012) (rejecting interpretation that would have left enforcement "to the discretion of FERC and the BLM, and not to the FWS, the expert agency entrusted with administering the ESA").

[171] Captive-Bred Wildlife Regulation, 63 Fed. Reg. 48634, 48636 (Sept. 11, 1998) (emphasis added).

[172] *PETA*, 189 F. Supp. 3d at 1355.