PAID IN FULL: INTERPRETING AND DEFINING "MARKET VALUE" UNDER THE LACEY ACT

By
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There is a circuit split on the definition of "market value" under the Lacey Act. Courts disagree whether the price of hunting guide services should be factored into calculating the market value of the wildlife hunted. But the purpose of the Lacey Act suggests a broad interpretation of market value which includes guide services. This Article proposes amending the Lacey Act to make clear the definition of market value in keeping with its original purpose.

I. INTRODUCTION

There is a split amongst the Federal Circuits as to the definition of "market value" under the Lacey Act.[1] The Lacey Act states that it is

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[1] *See generally* United States v. Hughes, 795 F.3d 800 (8th Cir. 2015); United States v. Todd, 735 F.2d 146 (5th Cir. 1984); United States v. Stenberg, 803 F.2d 422

illegal to engage in conduct that involves the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants with a *market value* of $350 or more.[2]

In the case law, we see that the price of guide services plays a prominent role in defining market value.[3] The crux of the disagreement is whether guide services costing $350 or more definitively establishes a violation of the Lacey Act. Some courts have held that the price of guide services may be used conclusively to determine a felony violation under the Lacey Act,[4] while other courts have held that the price of guide services is relevant to market value, but it does not always equate to 'market value.'[5]

When courts do not equate the price of guide services to market value, there is a substantial amount of subjectivity involved which leads to loopholes that can be exploited, effectively rendering this provision of the Lacey Act toothless. This Article calls for and proposes amending the Lacey Act, defining *market value* to resolve the ambiguity surrounding the term, and defining several other relevant terms.

This argument proceeds as follows. Part I provides an introduction. Part II examines the purpose of the Lacey Act, which identifies why market value should be interpreted in a broad manner. Part III analyzes case law and how the Federal Circuits have interpreted market value under the Lacey Act, and whether the interpretation has or has not been consistent with the legislative intent. Part IV analogizes

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(9th Cir. 1986); United States v. Atkinson*,* 966 F.2d 1270 (9th Cir. 1992); United States v. Butler*,* 694 F.3d 1177 (10th Cir. 2012) (defining "market value" in different ways).

[2] Lacey Act of 1900, 16 U.S.C. § 3373(d)(1)(B) (2018).

[3] *Hughes*, 795 F.3d at 805 ("By virtue of § 3372(c), then, the offer or provision of guide services satisfies the "sale" element of offenses punishable (as either misdemeanors or felonies) under the Lacey Act. In other words, someone who sells the services of a guide to hunt wildlife is deemed to be selling the wildlife itself. This is logical; it is reasonable to consider a portion of the sale price for guide services to be allocated to the wildlife that is the ultimate object of the hunt."); *Todd,* 735 F.2d at 152 ("The best indication of the value of the game 'sold' in this manner is the price of the hunt. The evidence thus establishes that the appellants conspired to take game with a market value exceeding $350."); *Stenberg*, 803 F.2d at 436 ("We recognize that the Fifth Circuit has stated . . . that the provision of professional guiding services constitutes an offer to sell wildlife under the Lacey Act. *Id.* at 152. However, the court made its statement without any analysis whatsoever.") (citation omitted); *Atkinson,* 966 F.2d at 1273 ("*Todd* was decided before the Lacey Act was amended to include section 3372(c). Consistent with section 3372(c), we conclude that *Todd* sets forth the proper method for valuing game taken on a guided hunt. A violation of section 3372(c) does not involve a 'sale' of game in the traditional sense; rather, under section 3372(c) the commodity being 'sold' is the opportunity to illegally hunt game with the assistance of a guide."); *Butler,* 694 F.3d at 1179 ("We conclude that because the value assigned to loss of wildlife must reflect the actual value of the animals involved, the district court erred in conflating the value of the deer with the full price of a guided hunt.").

[4] *Hughes*, 795 F.3d at 805 (discussing *Atkinson* and *Todd*: "To the extent that these cases hold that a price of guide services in excess of $350 conclusively establishes a felony violation, we respectfully disagree.").

[5] *Id.* at 806 ("While these latter amounts may be *relevant* to determining market value, they are not *themselves* market value.").

interpretations of other animal protection statutes with how the Lacey Act should be interpreted. Part V identifies how a narrow interpretation of market value under the Lacey Act would lead to *reductio ad absurdum*. Part VI advocates for a dictionary definition of market value and several other related terms. Part VII proposes a legislative amendment to the Lacey Act to remedy the unfavorable interpretations that courts have made based on its current state. Part VIII concludes.

II. UNDERLYING PURPOSE OF THE LACEY ACT

A. History of the Lacey Act

Iowa Congressman John Lacey introduced the Lacey Act with the intent to expand laws to protect birds and expand the Department of Agriculture's powers.[6] Congressman Lacey noted that the decline of the bird population was correlated with harm inflicted upon agriculture.[7] As such, the Lacey Act empowered the Department of Agriculture to prohibit importing animals that it deemed "injurious," as well as requiring permits for other imports.[8] The Lacey Act also targeted game poachers, who Congressman Lacey explained were circumventing state laws at the time.[9] The Congressman illustrated this point with two recurring occurrences: First, poachers would purposely mismark taken game, then ship it out of state. Once the game was out of state, said state lacked jurisdiction to take action against the poacher due to the federal government holding power to regulate interstate commerce.[10] Second, poachers were displaying imported Scottish grouse in their store windows as a "fence" while actually selling the undifferentiable and illegally taken, local grouse.[11]

B. Legislative History

In 1969, Congress amended the Lacey Act to include amphibians, reptiles, mollusks, and crustaceans,[12] while removing birds covered under the Migratory Bird Treaty Act (MBTA).[13] The amendment also raised the *mens rea* for criminal violations to "knowingly and willfully" and expanded the *mens rea* for civil violations to "negligence."[14]

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[6] Lacey Act, ch. 553, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. §§ 3371–3378 (1988 & Supp. V 1993)).

[7] 33 CONG. REC. 4871 (1900) (statement of Rep. John Lacey).

[8] H.R. REP. NO. 56-474 (1900).

[9] 33 CONG. REC. 4871–74.

[10] 33 CONG. REC. 4872; U.S. CONST. art. I, § 8, cl. 3.

[11] 33 CONG. REC. 4873.

[12] S. REP. NO. 91-526, at 15 (1969), *as reprinted in* 1969 U.S.C.C.A.N. 1413, 1426.

[13] S. REP. NO. 91-526, at 21.

[14] *Id.* at 12–14.

As the business of illegally taking wildlife grew exponentially, the Lacey Act started to be exploited.[15] In 1981, Congress subtly acknowledged the faux pas it made in revising the amendments it made in 1969. First, it reinstated coverage of migratory birds after finding that there were issues concerning interstate commerce that were unclear.[16] Second, the addition of the term "willful" led to confusion, as the statute was being interpreted to have a "double intent" where the defendant had to know that he was engaging in illegal activity and that he was also violating the Lacey Act.[17] The 1981 amendment eliminated the "double intent" standard when it clarified that a defendant only had to know that he was engaged in illegal activity, or with due care should have known that he was engaged in illegal activity, to be held in violation of the Lacey Act.[18]

Courts that have held the price of guide services may not be included in the calculation of market value under the Lacey Act are violating the clear statement rule.[19] After the decision in *United States v. Stenberg*, Congress amended the statute to overturn the decision[20] by adding section 3372(c) to state that the definition of "sale" would include that of guide services for illegal takings.[21] Further, Congress also changed the language of § 3372(a)(1) to be identical to that of subsections (a)(2) and (a)(3); the change in § 3372(a)(1) grew from "taken or possessed" to "taken, possessed, transported, or sold."[22] Courts that have held that guide services are merely to be considered in calculating market value have completely ignored the costs of transportation of the illegal takings when calculating market value.[23]

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[15] *H.R. 1638 – Lacey Act Amendments of 1981*, CONGRESS.GOV, www.congress.gov/bill/7th-congress/house-bill/1638 (accessed Oct. 29, 2018) (site no longer available).

[16] S. REP. NO. 97-123, at 2 (1981), *as reprinted in* 1981 U.S.C.C.A.N. 1748, 1750–51.

[17] *Id.* at 7.

[18] 16 U.S.C. § 3373(a)(1).

[19] The clear statement rule is a canon of construction that "insist[s] that a particular result can be achieved only if the text (and not legislative history) says so in no uncertain terms." WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 201 (1999); *see also* William N. Eskridge, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) ("[C]onstitutional concerns . . . can be rebutted by . . . 'clear statement rules' that can only be rebutted by clear statutory text."). In this instance, both the statute and the legislative history clearly indicate that the price of guide services is to be included as a "sale" of wildlife under the Lacey Act.

[20] S. REP. NO. 100-563, at 9–10 (1988) ("This amendment would overturn the decision in *United States v. Stenberg* . . . which held that . . . the term 'sale of wildlife' does not include the provision of guiding services.") (internal citation omitted).

[21] Lacey Act, Pub. L. No. 100-653, §102, Stat. 3825, 3825–26 (1988).

[22] 16 U.S.C. § 3372(a).

[23] *See Hughes*, 795 F.3d at 802 ("The hunting packages cost between $1,600 and $2,600 per person and included accommodations, meals, hunting stands, field dressing, and carcass-cleaning facilities . . . . [t]he bucks were later *transported* out of state.") (emphasis added); *Todd,* 735 F.2d at 148 ("The *package included* a guaranteed, trophy-size animal, *transportation* by helicopter, a guide (Short), use of guns provided by Todd, and services of a taxidermist. The cost of a hunt ranged from $1,000 to $5,000 . . . .") (emphasis added); *Stenberg,* 803 F.2d at 425, 427 ("As a result of several more ex-

III. CURRENT STATE OF THE LAW

The courts that interpret market value narrowly[24] focus solely on the price of the wildlife involved, yet have failed to include, let alone acknowledge, the price of transportation.[25] This has been done despite

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changes, Ellison and two of his associates guided FWS Agent Adam O'Hara on an *illegal elk hunt* in January 1983. *During the hunt*, O'Hara *killed a bull elk*, and Ellison *shipped* the cape to Gavitt in Colorado [from Montana] . . . . Ellison contacted Gavitt by phone on November 28, 1983 and offered to sell him two elk capes. Gavitt wired Ellison $180, and Ellison *shipped* the capes to Gavitt in Colorado [from Montana] where they arrived on December 12, 1983 . . . . O'Hara *paid $600 for the hunt, plus $50 to cover the cost of shipping* the cape and horns to Gavitt [Colorado, from Montana].") (emphasis added); *Butler,* 694 F.3d at 1179 ("Clients were provided with lodging, food, *transportation*, and other accommodations. Depending on the type of weapon used by the client, the Butlers charged approximately $3,500 to $5,000 for a guided hunt. Following an extensive investigation into these illegal activities by federal agents, both brothers were charged with numerous *violations of the Lacey Act*, *which prohibits the transportation* and sale of unlawfully killed wildlife in interstate commerce.") (emphasis added) (citing 16 U.S.C. § 3372(a)(2)(A)).

[24] *See Hughes*, 795 F.3d at 807–08 (Bye, J., dissenting) ("By defining a 'sale of fish or wildlife' in this *broad manner*, Congress necessarily intended the price of the guiding or outfitting services to be considered when determining whether the sale of the fish or wildlife had a market value in excess of $350. Consequently, I do not believe there is a distinction between the so-called 'market value' and 'sale' elements of the statute.") (emphasis added); *Todd*, 735 F.2d at 152 ("The government argues that this proof [price quote of $1,200 and paid amount of $250] is adequate to support the conviction inasmuch as one hunter paid $600 for the hunt, even though he did not kill wildlife; and the hunt was part of a commercial operation, the target of the felony provision of the Act."); *Stenberg,* 803 F.2d at 436 ("It did not discuss either the language of the Act or the established rule that criminal provisions are to be *construed narrowly*; it merely cited the Senate Report quoted *supra*.") (emphasis added); *Butler,* 694 F.3d at 1180 ("Significantly, the 1988 amendments added subsection 3372(c), which *expands the definition* of selling and purchasing wildlife to include guiding, outfitting, and providing a license or permit for the illegal taking of wildlife.") (emphasis added) (citing 16 U.S.C. § 3372(c)).

[25] *See Hughes*, 795 F.3d at 802 ("The hunting packages cost between $1,600 and $2,600 per person and included accommodations, meals, hunting stands, field dressing, and carcass-cleaning facilities . . . . [t]he bucks were later *transported* out of state.") (emphasis added); *Todd,* 735 F.2d at 148 ("The *package included* a guaranteed, trophy-size animal, *transportation* by helicopter, a guide (Short), use of guns provided by Todd, and services of a taxidermist. The cost of a hunt ranged from $1,000 to $5,000 . . . .") (emphasis added); *Stenberg,* 803 F.2d at 425, 427 ("As a result of several more exchanges, Ellison and two of his associates guided FWS Agent Adam O'Hara on an *illegal elk hunt* in January 1983. *During the hunt*, O'Hara *killed a bull elk*, and Ellison *shipped* the cape to Gavitt in Colorado [from Montana] . . . . Ellison contacted Gavitt by phone on November 28, 1983 and offered to sell him two elk capes. Gavitt wired Ellison $180, and Ellison *shipped* the capes to Gavitt in Colorado [from Montana] where they arrived on December 12, 1983 . . . . O'Hara *paid $600 for the hunt, plus $50 to cover the cost of shipping* the cape and horns to Gavitt [Colorado, from Montana].") (emphasis added); *Butler,* 694 F.3d at 1179 ("Clients were provided with lodging, food, *transportation*, and other accommodations. Depending on the type of weapon used by the client, the Butlers charged approximately $3,500 to $5,000 for a guided hunt. . . . Following an extensive investigation into these illegal activities by federal agents, both brothers were charged with numerous *violations of the Lacey Act*, *which prohibits the transportation* and sale of unlawfully killed wildlife in interstate commerce.") (emphasis added) (citing 16 U.S.C. § 3372(a)(2)(A)).

the plain language of the Lacey Act—stating that transportation of wildlife is illegal in both the sale and purchase of guide services:

> (c) SALE AND PURCHASE OF GUIDING AND OUTFITTING SERVICES AND INVALID LICENSES AND PERMITS
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> (1) SALE It is deemed to be a sale of fish or wildlife in violation of this chapter for a person for money or other consideration to offer or provide—
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> (A) guiding, outfitting, or other services; or
>
> (B) a hunting or fishing license or permit;
>
> for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife.[26]
>
> (2) PURCHASE It is deemed to be a purchase of fish or wildlife in violation of this chapter for a person to obtain for money or other consideration—
>
> (A) guiding, outfitting, or other services; or
>
> (B) a hunting or fishing license or permit;
>
> for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife.[27]

Nevertheless, it is even more bewildering when the aforementioned courts have held that the price of guide services—while acknowledging that Congress amended the statute to fix this issue—are merely pertinent to market value but need not be included in its calculation.[28] While courts have offered this reasoning, none have pointed to a canon of construction to justify their reliance on this interpretation.[29]

A. Broad Interpretation

In *United States v. Atkinson*, the Ninth Circuit confesses that its previous ruling on the issue of what constitutes market value under the Lacey Act led Congress to change the statute in order to incorporate the sale of guide services in the calculation of market value.[30] In *Atkinson*, defendants led illegal hunts in which they charged $1,500 to

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[26] 16 U.S.C. § 3372(c)(1) (emphasis added).

[27] *Id.* § 3372(c)(2) (emphasis added).

[28] *See, e.g., Hughes,* 795 F.2d at 805–06 ("Our disagreement with these cases [*Todd* and *Atkinson*] may be more apparent than real, however. As discussed below, we believe that, in determining the market value of wildlife, the jury may consider evidence of the price of guide services. We agree with the Fifth and Ninth Circuits that evidence of the price of guide services is *relevant* to the market value of the wildlife; we simply do not agree that it is always the *same* as the market value of the wildlife (or, for that matter, that it is always the "*best* indication of the value of the game).") (citing *Todd,* 735 F.2d at 152).

[29] *Id.*

[30] United States v. Atkinson*,* 966 F.2d 1270, 1273–74 (9th Cir. 1992) ("A violation of section 3372(c) does not involve a 'sale' of game in the traditional sense; rather, under section 3372(c) the commodity being 'sold' is the opportunity to illegally hunt game with the assistance of a guide . . . [w]e never resolved the valuation issue, because we concluded that an offer to provide guide services was not a 'sale' under the Act.").

$3,000 per hunter.[31] Additionally, the defendants assisted in transporting the game animal to the homes of the hunters who resided outside of the state.[32]

The court came to the correct conclusion, but errantly cited a section of the opinion in *United States v. Todd* when it held that market value may include the price of a guide service.[33] In *Todd* (discussed *infra*), the Fifth Circuit held that the price of a guide service may be included in a conviction for conspiracy under the Lacy Act, but not for a substantive violation of the Lacey Act.[34] When calculating market value under the Lacey Act, courts should include the price of guide services for both conspiracy and substantive violations.

B. Inconsistent Interpretation

1. Fifth Circuit

In *Todd*,[35] the Fifth Circuit issued a contradictory opinion of market value under the Lacey Act where it held that the price of guide services should be included in the calculation for market value for conspiracy charges but not substantive charges. The court states, "[t]he best indication of the value of the game 'sold' in this manner is the price of the hunt. The evidence thus establishes that the appellants conspired to take game with a market value exceeding $350."[36] Regarding the substantive violation of the Lacey Act, the court came to a much different conclusion regarding the definition of market value:

> The only evidence the government offered as to the actual value of the game taken was the price of $1,200 quoted in the offer by one of the defendants and the $250 amount actually paid for the hunt by the hunter who killed the wildlife. The government argues that this proof is adequate to support the conviction inasmuch as one hunter paid $600 for the hunt, even though he did not kill wildlife; and the hunt was part of a commercial operation, the target of the felony provision of the Act. . . . We cannot agree. It is true that, had one of the animals been large enough to mount as a trophy, the proof would have supported a value of $1,200. Nonetheless, the statute requires proof of the value of the wildlife actually taken.[37]

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[31] *Id.* at 1272 ("Despite his knowledge that the hunters were violating Montana law by hunting without licenses . . . he proceeded to guide them on a series of *illegal hunts*.") (emphasis added) (internal citations omitted).

[32] *Id.* at 1275.

[33] *Id.* at 1273 ("As a result, the value of an animal taken in a guided hunt bears little relation to the market price of its parts. Instead, as the Fifth Circuit recognized in *Todd,* its market value is best represented by the amount a hunter is willing to pay for the opportunity to participate in the hunt.") (citing *Todd,* 735 F.2d at 152).

[34] *Todd*, 735 F.2d at 152.

[35] *Id.*

[36] *Id.*

[37] *Id.*

The *Todd* court is so narrowly focused on the 'take' element of the Lacey Act[38] that it completely overlooks the sale element.[39] In *Todd*, the defendant provided guide services for hunts with prices ranging from $1,000 to $5,000, which included transportation by helicopter for the hunt, taxidermist services, and a guarantee of taking a trophy-sized animal.[40] The court proclaimed that "[t]he best indication of the value of the game 'sold' in this manner is the price of the hunt. The evidence thus establishes that the appellants conspired to take game with a market value exceeding $350."[41] However, the court then erroneously held that to prove a substantive violation of the Lacey Act, the government must prove that the market value of the animals 'taken' is greater than $350 by defining take solely as the killing of an animal. *Take* is a term of art. Black's Law Dictionary defines *take* as "to obtain possession or control, whether legally or illegally; (2) to seize with authority; to confiscate or apprehend."[42] It is evident that *take* may mean kill,[43] and, under the Eleventh Circuit's definition, may also mean risk exposure or threat of serious harm[44] which is contrary to how the Fifth Circuit defined the term. The Fifth Circuit has acknowledged that the defendants engaged in conspiracy to illegally hunt wildlife and affirmed this conviction.[45] The Fifth Circuit has held that the optimum barometer of market value is the price of the hunt.[46] The court held that a defendant quoted a price of $1,200 for a tour,[47] and was aware of the illegal nature of the tour.[48] Engaging in an illegal hunt is sufficient to meet the definition of take under the threat of serious harm.

The *Todd* court also misinterpreted the plain meaning of the Lacey Act by misdefining the term "wildlife." The court states that a Barbados sheep does not qualify as wildlife under Texas law because it

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[38] 16 U.S.C. § 3373(a).

[39] *Id.* § 3373(d).

[40] *Todd*, 735 F.2d at 148.

[41] *Id.* at 152.

[42] *Take*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[43] *See* Max Birmingham, *Strictly for the Birds: The Scope of Strict Liability Under the Migratory Bird Treaty Act,* 13 J. ANIMAL & NAT. RESOURCE L. 1, 4 (discussing the broad (strict liability) and narrow (*mens rea*) interpretations of "take" under the Migratory Bird Treaty Act (MBTA)).

[44] *See* People for Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 879 F.3d 1142, 1144–50 (11th Cir. 2018) (showing how the Circuit Court lowered the District Court's standard of death to the standard of posing a threat of serious harm to the animal).

[45] *See Todd*, 735 F.2d at 151–52 ("We have no difficulty with the convictions for conspiracy to violate the Lacey Act. . . . A commercial arrangement whereby a professional guide offers his services to obtain wildlife illegally is an offer to sell wildlife. . . . The best indication of the value of the game "sold" in this manner is the price of the hunt. The evidence thus establishes that the appellants conspired to take game with a market value exceeding $350.").

[46] *Id*. at 152.

[47] *Id.*

[48] *See id.* at 151 ("Todd testified that he knew that hunting from a helicopter was a violation of federal law.").

is not enumerated.[49] First, the court should have looked to the statutory definition rather than state law,[50] as the Lacey Act defines the term "fish or wildlife" as "any wild animal, whether alive or dead, including without limitation any wild mammal, bird, reptile, amphibian, fish, mollusk, crustacean, arthropod, coelenterate, or other invertebrate, whether or not bred, hatched, or born in captivity, and includes any part, product, egg, or offspring thereof."[51] The plain language of the Lacey Act's definition is far broader than that of the Texas law cited, and would thus include Barbados sheep. The court relied on the Texas law definition of "game animal" rather than "wildlife."[52] Texas law holds that "'[f]ish or wildlife' means any wild mammal, aquatic animal, wild bird, amphibian, reptile, mollusk, or crustacean, or any part, product, egg, or offspring, of any of these, dead or alive."[53] This definition, similar to the Lacey Act's definition, is sufficiently broad enough to include Barbados sheep.

C. Narrow Interpretation

1. Eighth Circuit ("Fair Market Value")

In *United States v. Hughes*, the Eighth Circuit engages in judicial activism[54] by violating the canon of construction *a verbis legis non est*

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[49] *See id.* ("The appellants also contend that the government failed to establish that the game taken had a market value in excess of $350. On the January 1982 hunt one hunter paid a fee of $600 and killed a barbado sheep, which does not qualify as wildlife under Texas law, *see* Tex. Parks & Wild. Code § 63.001 (Vernon 1976), and therefore does not constitute a violation of the Lacey Act."); TEX. PARKS & WILD. CODE ANN. § 63.001(a) (West 1975) ("The following animals are game animals: mule deer, white tailed deer, pronghorn antelope, desert bighorn sheep, gray or cat squirrels, fox squirrels or red squirrels, and collared peccary or javelina.").

[50] TEX. PARKS & WILD. CODE ANN. § 63.001(a).

[51] 16 U.S.C. § 3371(a).

[52] *See Todd*, 735 F.2d at 151 ("The appellants also contend that the government failed to establish that the game taken had a market value in excess of $350. On the January 1982 hunt one hunter paid a fee of $600 and killed a barbado sheep, which does not qualify as wildlife under Texas law, *see* Tex. Parks & Wild. Code § 63.001 (Vernon 1976), and therefore does not constitute a violation of the Lacey Act.").

[53] TEX. PARKS & WILD. CODE § 68.001.

[54] *Judicial activism* is an abstract term that has come to take on different meanings. *See* David Boies, *Reflections on* Bush v. Gore*: The Role of the United States Supreme Court*, 1 FLA. AGRIC. & MECHANICAL U. L. REV. 105, 108 (2006) (asserting that jurists can be classified in a "conservative-liberal" category or a "judicial activism-judicial restraint" category and that "[a] liberal judge can be an advocate of judicial activism, such as Earl Warren, or judicial restraint, such as Felix Frankfurter. The same is true for a conservative judge."); Sudha Setty, *Preferential Judicial Activism*, 17 BERKELEY J. AFR.-AM. L. & POL'Y 151 (2015) (asserting that *judicial activism* is a term that conservatives use to describe judges who incorporate policy preferences in their opinions); Max Birmingham, *Whistle While You Work: Interpreting Retaliation Remedies Available to Whistleblowers in the Dodd-Frank Act,* 1 FLA. A&M U. L. REV. (forthcoming 2018) (asserting that interpreting a statute without citing a canon of construction is judicial activism). This Article argues that *judicial activism* in this context is when a court does not interpret a law according to its plain meaning, or cite another canon of construction, because of its personal preference in interpreting the statute.

recedendum ("from the words of the law there must be no departure")[55] when it admits that the plain language of the Lacey Act states that the sale of guide services is to be included in calculating market value,[56] but holds a contradictory view: "the price of guide services is *relevant* to the market value of the wildlife; we simply do not agree that it is always the *same* as the market value of the wildlife."[57] In *Hughes*, the defendant owned and operated a business that provided hunting guides and services that cost between $1,600 to $2,600 per person.[58] On separate occasions, hunters hired the defendant's services to hunt and kill bucks on illegal hunts, which were transported out of state.[59] The court notes that the term *market value* is not defined in the Lacey Act, so its ordinary meaning should be used.[60]

Through this interpretation of the statute the Eight Circuit conflates the definition of fair market value with the definition of market value.[61] Fair market value is a subset of market value. An ordinary meaning of market value is the most probable buy-sell price under normal and typical conditions.[62] Part of 'normal and typical conditions' in the transaction include parties being "*unaffected by special or creative financing or sales* concessions granted by anyone associated with the

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[55] *Cf.* DIG. 32.69pr. (Marcellus) ("The meaning of the words ought not to be departed from unless it is manifest that the testator intended otherwise."); *Cf. also* UNIF. STAT. AND RULE CONSTRUCTION ACT § 19 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1995) ("The text of a statute or rule is the primary, essential source of its meaning.").

[56] *See Hughes*, 795 F.3d at 804–05 ("Congress enacted § 3372(c) in response to *United States v. Stenberg,* 803 F.2d 422 (9th Cir.1986), in which the Ninth Circuit held that the furnishing of guide services does not constitute the sale of wildlife within the meaning of the Lacey Act.); *See also Atkinson,* 966 F.2d at 1273 n. 4 ("The express purpose of this amendment was to overturn our holding in *Stenberg.*"); Indeed, the Fifth Circuit interpreted the Lacey Act in this manner even before Congress amended it. *See Todd,* 735 F.2d at 152 ("A commercial arrangement whereby a professional guide offers his services to obtain wildlife illegally is an offer to sell wildlife.").

[57] *Hughes,* 795 F.3d at 806.

[58] *Id.* at 802.

[59] *Id.*

[60] *Id.* at 804.

[61] *See id.* ("The ordinary meaning of 'market value' is the value set by the market — that is, '[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction . . . .'").

[62] 12 C.F.R. § 722.2(f) (2018). ("The most probable price (in terms of money) which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby: (1) Buyer and seller are typically motivated; (2) Both parties are well informed or well advised, and acting in what they consider their best interests; (3) A reasonable time is allowed for exposure in the open market; (4) Payment is made in terms of cash in United States dollars or in terms of financial arrangements comparable thereto; and (5) The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.").

sale."[63] Furthermore, the definition indicates that the transaction has actually occurred ("*payment is made* in terms of cash in United States dollars or in terms of financial arrangements comparable thereto . . ."). [64] In the context of *Hughes*, creative financing is separating the price of the guide services and the price of the wildlife. Hunters would most likely not have paid solely for a guide service, or any of the other services without the opportunity to hunt wildlife. Notwithstanding, the defendants' packages also included "accommodations, meals, hunting stands, field dressing, and carcass-cleaning facilities."[65] As we can see, there is no separation of the pricing of any of the aforementioned activities as prospective hunters were cited one total cost.

The terms *market value* and *fair market value* are distinguished as a tenet of statutory construction called *verba cum effectu sunt accipienda* ("the words have effect"), colloquially known as the Rule Against Surplusage.[66] Merriam-Webster's Dictionary defines market value as the price at which something can be sold.[67] Merriam-Webster's defines fair market value as the price at which a willing seller sells a good or service to a willing buyer.[68] From these definitions, we may infer that fair market value is applicable to hypothetical transactions based upon the qualifying term "willing." The Supreme Court of the United States (SCOTUS) has confirmed that the term "willing" may mean that the transaction did not occur, but that the transaction may occur.[69]

The *Hughes* court relies on a SCOTUS opinion to define market value, then ignores the definition.[70] In *Olson v. United States*, the Court held that market value is the sum which probably would be arrived at as result of fair negotiations by owner willing to sell and purchaser willing to buy after due consideration of all elements

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[63] *Id.* (emphasis added).

[64] *Id.* (emphasis added).

[65] *Hughes*, 795 F.3d at 802.

[66] Kungys v. United States, 485 U.S. 759, 778 (1988) (plurality opinion); *see also* Fortec Constructors v. United States, 760 F.2d 1288, 1292 (2d Cir. 1985) (describing the canon as a "well accepted and basic principle").

[67] *Market Value*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/-market%20value [https://perma.cc/3RYR-H845] (accessed Dec. 26, 2018).

[68] *Fair Market Value*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/-fair%20market%20value [https://perma.cc/4Y55-3GQN] (accessed Dec. 26, 2018).

[69] United States v. Cartwright, 411 U.S. 546, 551 (1973) ("The fair market value is the price at which the property *would* change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." (quoting Treas.Reg. §20.2031–1(b)) (emphasis added).

[70] *Hughes*, 795 F.3d at 804. (citing Olson v. United States, 292 U.S. 246, 257 (1934) ("Defining market value to be 'the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy,' taking into account 'all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining'").

reasonably affecting value."[71] The *Olson* court details that *market value* is a term that is open to various factors, but it does note that "[c]onsiderations that may not reasonably be held to affect market value are excluded."[72] The inverse of this is that considerations that may reasonably be held to affect value are not excluded (i.e., included).

In the case of *Hughes*, the Eighth Circuit gainsays the district courts' factors of market value, specifically the second factor: "(1) the market value of the wildlife; (2) *the price that a hunter would pay for the opportunity to participate in a hunt for the wildlife*; and (3) Iowa's valuation of the wildlife under Iowa Code § 481A.130."[73] The Eighth Circuit further provides perplexing syllogism by stating that the aforementioned factors should have been considered, but that they are merely pertinent but not the equivalent of market value, which thus renders them nonfactors as they are not included in the calculation of market value.

2. Tenth Circuit ("Fair-Market Retail Price") ("Fair Market Value")

In *United States v. Butler*, the court also effectuates judicial activism[74] by admitting that Congress expressly amended the statute to incorporate the sale element and yet completely disregarded it.[75] In *Butler*, the defendants ran guided services which charged clients $3,500 to $5,000 each to lead illegal hunts.[76] The defendants also admit to conspiring to transport the poached animal for which they were charged with violating the Lacey Act.[77] The *Butler* court acknowledges that the plain meaning of the statute holds that there is no separation of the market value element and sale element.[78] The court does so because it reasons that the United States Sentencing Guideline (USSG) states otherwise, based upon the appearance of another term (fair-

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[71] *Olson*, 292 U.S. at 257.

[72] *Id.* at 256.

[73] *Hughes*, 795 F.3d at 806 (emphasis added).

[74] *See supra* note 54.

[75] *Butler,* 694 F.3d at 1181–82.

[76] *See id.* at 1178 ("On several occasions, they encouraged their clients to violate state hunting laws.").

[77] *Id.*

[78] *Id.* at 1182 ("The government urges us to follow *Atkinson* and conclude that the total price paid for a guided hunt constitutes the 'fair-market retail price' as that phrase is used in the Guidelines commentary. But *Atkinson*'s line of reasoning with respect to the statutory issue—that the Lacey Act deems a guided hunt to be a 'sale'—does not apply to the Guidelines provision we must interpret. Section 2Q2.1 does not use the term 'sale.' Instead, it instructs courts to determine the market value of flora and fauna when sentencing defendants convicted of 'offenses involving fish, wildlife, and plants.' *The fact that the Lacey Act defines a guided hunt as a 'sale' has no relevance to the Guidelines provision before us*, which governs several statutes other than the Lacey Act. *See* U.S.S.G. Appendix A. Thus, to the extent that *Atkinson* holds that the entire cost of a hunt constitutes the 'fair-market retail price' of a targeted animal for purposes of § 2Q2.1 application note 4, we respectfully disagree with its conclusion. *We hold that the 'fair-market retail price' must be the price of the animal itself, not the price of an expedition to hunt the animal.*") (citation omitted) (emphasis added).

market retail price) instead of market value. This is used despite the fact that SCOTUS has held that the USSG is advisory, not mandatory.[79] Thus, the Tenth Circuit could have found that the term *market value* may be substituted for fair-market retail price for the purposes of sentencing under the Lacey Act since the Lacey Act does not contain the term "fair-market retail price."[80] Notwithstanding, the court dictates that the fair-market retail price of killing wildlife does not include incidental costs associated with the transaction and "conclude[d] that because the *value assigned to loss of wildlife* must reflect the actual value of the animals involved, the district court erred in conflating the value of the deer with the full price of a guided hunt."[81]

The court makes a logical leap by trying to define market value according to the USSG instead of through the statute, starting with plain meaning by using a dictionary and/or case law.[82] The Tenth Circuit acknowledges the USSG does not define the term *market value* but does define the term fair-market retail price.[83] Black's Law Dictionary does not define *fair-market retail price* but it does define the following terms. For example, market price is "the prevailing price at which something is sold in a specific market."[84] And arm's-length price is "the price at which two unrelated, unaffiliated, and non-desperate parties would freely agree to do business."[85] Further, at-the-market price is "the price at which a good or service is offered, or will fetch, within a specified area; esp., the retail price that store owners in the same vicinity generally charge for a particular thing or its equivalent."[86]

The *Butler* court then furtively moves on from fair-market retail price to 'fair market value.'[87] These are two different terms, and again

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79 United States v. Booker, 543 U.S. 220, 245 (2005).

80 16 U.S.C. §§ 3371–3378.

81 *Butler,* 694 F.3d at 1179.

82 *Id.* at 1180 ("The central point of controversy is the meaning of the term 'market value' as used in Guidelines § 2Q2.1.").

83 *Id.* at 1180–81. ("*Neither of these Guideline provisions defines 'market value.'* However, an application note instructs that: When information is reasonably available, 'market value' under subsection (b)(3)(A) shall be based on the fair-market retail price. Where the fair-market retail price is difficult to ascertain, the court may make a reasonable estimate using any reliable information, such as the reasonable replacement or restitution cost or the acquisition and preservation (*e.g.*, taxidermy) cost. Market value, however, shall not be based on measurement of aesthetic loss (so called 'contingent valuation' methods).") (emphasis added).

84 *Price,* BLACK'S LAW DICTIONARY (10th ed. 2014).

85 *Id.*

86 *Id*.

87 *Butler*, 694 F.3d at 1181. ("In ordinary usage, the phrase 'fair-market retail price' is most naturally read as the price a willing buyer would pay to a willing seller for the deer in question."). See *United States v. Dobbs*, 629 F.3d 1199, 1203 (10th Cir. 2011) (interpretation of an undefined term should be 'guided by its ordinary, everyday meaning'). *This court has previously interpreted the similar phrase 'fair market value'* as 'the price at which a willing buyer and willing seller with knowledge of all the relevant facts would agree to exchange the property or interest at issue.' We see no reason to depart from this definition.") (emphasis added).

illustrate the court's lack of consistency in its reasoning. The key distinctions here are the definitions of price and value. Black's Law Dictionary defines 'price' as "the amount of money or other consideration asked for or given in exchange for something else; the cost at which something is bought or sold."[88] Black's Law Dictionary defines 'value' as "[t]he monetary worth or price of something; the amount of goods, services, or money that something commands in an exchange."[89] The amount of money that is exchanged (price) may vary from the worth (value). Value is what the buyer perceives the commodity, good, item, product and/or service to be worth, and price is what the buyer pays for said commodity, good, item, product and/or service.

The Tenth Circuit also unjustifiably shifted the burden of proof of the claim from the defendant to the government by noting that the government argues that finding market value of trophy deer is difficult to ascertain but rejects this argument because the government did not prove there is no market.[90] Proving something does not exist is difficult, and thus supports the government's claim that it is "difficult to ascertain."[91] The court ironically concedes this point: "Perhaps there was no ready market for a trophy buck's meat and hide—making a true market price of the animal difficult to calculate—but there is no evidence in the record to support such a conclusion, and it is certainly conceivable that such a market exists."[92] Courts have repeatedly referred to the difficulty of shifting evidentiary burdens when it comes to proving that something does not exist.[93]

The *Butler* court erroneously centers its reasoning on the fact that the government provided a price guide, which is evidence that a mar-

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[88] BLACK'S, *supra* note 84.

[89] *Value*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[90] *Butler,* 694 F.3d at 1182 ("In ruling on the Butlers' objections to the presentence investigation report ('PSR'), the district court stated that '[i]n this instance, where there is no ready market value and out-of-the-ordinary 'trophy' animals are involved, the court concludes that the amount paid by hunters for guided hunts represents the most reasonable estimate of fair market value of the wildlife.' *Thus, the court—at least arguably—made the required finding that market value was difficult to ascertain. However, the government does not point to any evidence to support this conclusion, nor does independent examination of the record reveal any.*") (emphasis added).

[91] *See, e.g.*, Walker v. Carpenter, 57 S.E. 461, 461 (N.C. 1907) ("The first rule laid down in the books on evidence is to the effect that the issue must be proved by the party who states an affirmative, not by the party who states a negative.").

[92] *Butler,* 694 F.3d at 1182.

[93] *See, e.g.*, Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs, 629 F.2d 1327 (9th Cir. 1980) (explaining the availability of job opportunities); United States v. Wylie, 625 F.2d 1371 (9th Cir. 1980) (speaking to the adequacy of government denial of electronic surveillance); Carson v. United States, 560 F.2d 693 (5th Cir. 1977) (assessment of wagering excise tax); Slicer v. Quigley, 180 Conn. 252, 429 A.2d 855 (1980) (examining negligence in failing to control minor's operation of a motor vehicle); In re L.A.G., 407 A.2d 688 (D.C. Cir. 1979) (sexual assault); Van Hoozer v. Farmers Ins. Exchange, 219 Kan. 595 (1976) (uninsured motorist); Church of Scientology v. Minnesota State Medical Assoc., 264 N.W.2d 152 (Minn. 1978) (defamation); McFarland v. Skaggs Co., 678 P.2d 298 (Utah 1984) (proof of malice).

ket exists.[94] This is a logical fallacy, as the court has conflated price guide and market. A price guide is nothing more than a list of prices, often the 'suggested retail price' of commodities, goods, items, products, and/or services that are brand-new from the manufacturer and the 'book value' of the aforementioned which have depreciated. Black's Law Dictionary defines 'suggested retail price' as "the sales price recommended to a retailer by a manufacturer of the product."[95] Black's Law Dictionary defines 'book value' as "the value at which an asset is carried on a balance sheet."[96] Black's Law Dictionary defines 'market' as "a place of commercial activity in which goods or services are bought and sold."[97] The court does not point to any evidence showing that there is such a market but comments that there may be such a market.[98] While there may be a price guide, this is not evidence of a market. Perhaps the price guide is used in one transaction, or even a few transactions. While there is no bright line as to the number of transactions needed to establish a market, the issue with the *Butler* opinion is that a price guide is not sufficient to claim that a market exists in which buyers and sellers are able to exchange commodities, goods, items, products, and/or services for payment.

3. Ninth Circuit

In *United States v. Stenberg*, the court engages in judicial activism by making the argument that the price of guide services does not constitute the sale of wildlife as defined under the Lacey Act despite the fact that neither party raised this argument.[99] When parties forfeit arguments, appellate courts in particular will not consider issues that are not addressed[100] or sufficiently fleshed-out in briefs,[101] raised for

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[94] *Butler,* 694 F.3d at 1182 ("To the contrary, the government actually submitted evidence suggesting that a trophy deer could be readily priced: a table of the going price of 'typical' and 'non-typical' antlers of various sizes.").

[95] BLACK'S, *supra* note 84.

[96] *Book Value*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[97] *Market*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[98] *Butler,* 694 F.3d at 1182.

[99] *See Stenberg,* 803 F.2d at 436–37 ("The court's cursory treatment of the guiding services issue may be due to the fact that, as far as one can tell from the opinion, *the issue whether such services are covered by the Act was not even raised by the parties.*") (emphasis added).

[100] Courts and parties may refer to the failure to raise arguments timely as 'waiver.' However, 'forfeiture' is the correct term to use in this context. 'Waiver' means the affirmative disavowal of a claim or argument. *See* Wood v. Milyard, 566 U.S. 463, 470 n.4 (2012) ("A waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve.") (citations omitted); Kontrick v. Ryan, 540 U.S. 443, 458 n.13 (2004) ("Although jurists often use the words interchangeably, forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right.") (citations, internal quotation marks, and alterations omitted).

[101] *See* United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (stating arguments that are mentioned but are not developed are waived); Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983); United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) ("A

the first time in reply briefs,[102] raised for the first time during oral argument[103] or if a court determines that a party did not make the argument at the first time possible.[104]

The Ninth Circuit has acknowledged that their ruling in *United States v. Stenberg* led Congress to amend the Lacey Act.[105] In *Stenberg*, the court issued a ruling that leaves the Lacey Act vulnerable to mass exploitation by reasoning that the price of guided hunts does not equate the sale of wildlife, even if animals from previous hunts are sold during the guided hunt.[106] Remarkably, the court confesses that its holding undermines the purpose of the Lacey Act, stating that, "we acknowledge that the Lacey Act's goal of protecting wildlife may be as threatened where an individual provides guide services or a hunting license as where the individual actually kills wildlife."[107]

In January 1983, an undercover agent for the United States Fish and Wildlife Service (FWS) was guided by defendant-Ellison and two of his associates on an illegal hunt in which the undercover agent killed a game animal and the defendant transported it to another state.[108] Defendants quoted prices of $500 for illegal hunts; offered skin that was previously killed for $500; and when the undercover agent inquired about the price of a frozen grizzly bear, defendants stated it would cost $5,000.[109] In August 1983, Ellison led another FWS undercover agent on a guided hunt, but no game animals were killed. However, Ellison did sell the undercover agent "two sets of velvet antlers that he had acquired during previous illegal killings."[110]

The *Stenberg* court's reasoning conflates statutory construction with statutory interpretation, by a layperson nonetheless.[111] The court

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skeletal 'argument', really nothing more than an assertion, does not preserve a claim. . . . Especially not when the brief presents a passel of other arguments. . . . Judges are not like pigs, hunting for truffles buried in briefs.").

[102] *See* Amoco Oil Co. v. United States, 234 F.3d 1374, 1377 (Fed. Cir. 2000) (indicating that arguments not raised in the opening brief will not be addressed by the court); Carbino v. West, 168 F.3d 32, 34 (Fed. Cir. 1999); Becton Dickinson & Co. v. C.R. Bard, Inc., 922 F.2d 792, 800 (Fed. Cir. 1990).

[103] Frobose v. Am. Sav. & Loan Ass'n of Danville, 152 F.3d 602, 612–13 (7th Cir. 1998); Bank of Ill. v. Over, 65 F.3d 76, 78 (7th Cir. 1995).

[104] Hernandez v. Cowan, 200 F.3d 995, 997 (7th Cir. 2000); *In re* Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 790 (7th Cir. 1999).

[105] *Atkinson,* 966 F.2d at 1273 n.4 ("The express purpose of this amendment was to overturn our holding in *Stenberg.*") (citation omitted).

[106] *Stenberg,* 803 F.2d at 435–37.

[107] *Id.* at 436.

[108] *Id.* at 425.

[109] *Id.* at 425, 427 (stating "[w]hen Gavitt telephoned Ellison on November 4, 1982 to discuss the possibility of obtaining the grizzly bear, Ellison stated that he did not have a grizzly but that, if he did, it would cost $5,000"; explaining further that he would be willing to serve as a guide for Gavitt's clients, despite the fact that neither he nor the clients would have any of the necessary licenses, and quoted a price of $500 per hunt).

[110] *Id.* at 425.

[111] *Id.* at 435–36 ("We do not believe an ordinary person would consider the sale of guiding services or a hunting permit to be a sale of wildlife.").

held that the sale of guided services does not constitute 'selling' wildlife under the Lacey Act because it "do[es] not believe" that is how an ordinary person would construe the statute.[112] The court's rationale is erroneous for several reasons. First, the court argues that the statute cannot be interpreted by its plain meaning due to the word "sell."[113] Notwithstanding, the Ninth Circuit divulges that "to determine the price the wildlife would bring *'if sold on the open market between a willing buyer and seller.'* This formulation *corresponds to a typical definition of 'market value.'*"[114] The court did not articulate how sell could be construed differently through a canon of construction. In fact, the court admits that sell is not ambiguous at all when it states that sell should be interpreted according to its plain meaning. The first rule of plain meaning is its textual context.[115] The court makes a strawman argument by claiming that a person does not need to look "beyond the face of the statute" in order to determine its meaning.[116] However, the court does not explain how the plain meaning of the word 'sell' in the statute renders it ambiguous to the extent a person would need to look beyond the face of the statute.[117] The court does not offer any canons of construction in which to interpret 'sell' which would support its position.

Moreover, the court is examining the statute from the perspective of a layperson interpreting the statute rather than a person trained in

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[112] *Id.* ("A common definition of the word 'sell' is that it means the act of 'giv[ing] up (property) to another for money or other valuable consideration.' *Webster's Third New International Dictionary (Unabridged)* 2061 (1976). This common understanding contemplates the transfer of something that is possessed by, or is otherwise in the control of, the seller. An ordinary person, therefore, would understand 'sale of wildlife' to mean a conveyance to a buyer for valuable consideration of wildlife possessed or otherwise controlled by the seller. We do not believe an ordinary person would consider the sale of guiding services or a hunting permit to be a sale of wildlife. These acts would be viewed as providing the buyer the opportunity to kill wildlife, but they would not be considered as an actual sale of the wildlife itself. At the very least, one would have to speculate whether such conduct falls within the prohibition on 'selling wildlife.' Such uncertainty in meaning cannot be tolerated in a criminal provision.").

[113] *Id.* ("If Congress intends to prohibit the sale of hunting licenses or professional guide services, it must do so 'plainly and unmistakably.'") (citing United States v. Bass, 404 U.S. 336, 348 (1971) (quoting United States v. Gradwell, 243 U.S. 476, 485, (1917)).

[114] *Id.* at 433 (emphasis added).

[115] Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J. dissenting) ("[F]irst, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not-and especially if a good reason for the ordinary meaning appears plain-we apply that ordinary meaning."); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 661–62 (1990) (Textual context may be determined by: (1) the manner in which the word or phrase is used in the entirety of the statute or in other statutes; (2) the possible meanings fit with the statute as a whole; or (3) "the interaction of different statutory schemes to determine statutory plain meaning.").

[116] *Stenberg,* 803 F.2d at 436 ("A person is not required to look beyond the face of a statute and research its legislative history in order to determine whether acts not within the statute's language are nevertheless prohibited.").

[117] *Id.*

the law, while also disregarding the amendment in which Congress eliminated the double intent standard.[118] Congress amended the statute to explicitly state that if a person knows or should know they are engaged in illegal conduct, then the requisite *mens rea* for the Lacey Act has been met.[119] In *Stenberg*, the defendants knew they were engaged in illegal conduct with leading the hunts,[120] and thus the requisite *mens rea* for the Lacey Act had been met.

IV. INTERPRETATIONS OF SIMILAR STATUTES

Some statutes regarding animal protection have been interpreted broadly to give the law the proper breadth and depth. Congress was very concerned over animal rights when it enacted the Marine Mammal Protection Act (MMPA).[121] The legislative history of the MMPA shows the need for increased protection of the aforementioned mammals.[122] One congressman commented, "this legislation is designed to do exactly what its title implies-provide badly needed protection for mammals."[123] In *Committee for Humane Legislation v. Richardson*, the District of Columbia Circuit held that the primary purpose of the MMPA is to protect marine mammals; "the Act was not intended as a 'balancing act' between the interests of the fishing industry and the animals."[124] In *Animal Welfare Institute v. Kreps*, the District of Columbia struck down a permit granted by the Secretary of Commerce on a moratorium for the taking and importation of baby fur sealskins from South Africa.[125] The court ruled that the moratorium violated the

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118 *See* S. REP. NO. 97-123 (noting amendment to Lacey Act).

119 *Id.*

120 *See Stenberg,* 803 F.2d at 425–28 (providing an overview of all three defendants knowledge that the hunts in question were illegal).

121 Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1407 (1976).

122 *See* H.R. REP. NO. 92-707, (1972), *as reprinted in* 1972 U.S.C.C.A.N. 4144, 4144–45 ("Recent history indicates that man's impact upon marine mammals has ranged from what might be termed malign neglect to virtual genocide. These animals, including whales, porpoises, seals, sea otters, polar bears, manatees and others, have only rarely benefitted from our interest; they have been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to a multitude of other indignities, all in the interests of profit or recreation, with little or no consideration of the potential impact of these activities on the animal populations involved."); *id.* at 4147 ("[A]nother problem to which marine mammals may be inadvertently exposed is the operation of high-speed boats. Manatees and sea otters have been crippled and killed by motorboats and at present the Federal government is essentially powerless to force these boats to slow down or to curtail their operations."); 16 U.S.C. §1361(6) (Humanity's interest in protecting marine mammal populations may best be summarized by the following MMPA policy declaration: "Marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management.").

123 118 CONG. REC. 7685 (1972) (remarks of Rep. Garmatz).

124 Comm. for Humane Legislation v. Richardson, 414 F. Supp. 297, 297 (D.C. Cir. 1976).

125 Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1004, 1014 (D.C. Cir. 1977).

MMPA since some seals were still nursing when killed.[126] In *Kreps*, the court could have interpreted the MMPA narrowly, and held that it does not apply extraterritorially since the baby fur sealskins were in South Africa, not the United States. In *Richardson* and *Kreps*, the courts both placed the safety and protection of animals as the top priority.

In following with the cases above, which used a broad interpretation of statutes to fulfill the primary purposes of the legislation, a broad interpretation of market value under the Lacey Act will give the statute the necessary judicial reach to successfully execute the animal protection-based intent of the law while staying within the bounds of its plain meaning.

A. Bald and Golden Eagle Protection Act

In 1782, the Continental Congress proclaimed that the bald eagle is the symbol of the fledging country.[127] In 1940, Congress passed the Bald Eagle Protection Act in order to provide protection to the country's symbol.[128] In 1962, the statute was renamed the Bald and Golden Eagle Protection Act (BGEPA), when it was expanded to provide protection to golden eagles and allowed the Secretary of the Interior to provide permits to Native American tribes to take, possess, and, transport eagles for religious purposes.[129]

The BGEPA makes it illegal to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof."[130] In *Andrus v. Allard*, the BGEPA has been construed broadly by SCOTUS with the purpose of providing the maximum possible legal protections to the animals for which it is named after.[131] In *Andrus*, the Secretary of the Interior (Andrus) enforced the then recently enacted regulation in 1940, prohibiting the sale of all feathers from protected eagles, even if legally obtained before the regulation was enacted.[132] Plaintiff Allard sold Native American artifacts, which

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[126] *Id.* at 1012, 1014.

[127] *See* Matthew Perkins, *The Federal Indian Trust Doctrine and the Bald and Golden Eagle Protection Act: Could Application of the Doctrine Alter the Outcome in* U.S. v. Hugs*?* 30 ENVTL. L. 701, 705 (2000) ("Adopted by the Continental Congress as the symbol of a newly formed America in 1782, the bald eagle represents honor and dignity in American society.").

[128] Bald Eagle Protection Act, ch. 278, 54 Stat. 250, 250–51 (1940).

[129] Bald and Golden Eagle Protection Act, Pub. L. No. 87-884, 76 Stat. 1246, 1246 (1962).

[130] 16 U.S.C. § 668(a) (2010).

[131] *See* Andrus v. Allard, 444 U.S. 51, 51 (1979) (pointing out that the precise terminology used by Congress in the protection of bald and golden eagles leads to little wiggle room for creating exceptions to the Act).

[132] *Id.* at 58. ("The legislative draftsmen might well view evasion as a serious danger because there is no sure means by which to determine the age of bird feathers; feathers recently taken can easily be passed off as having been obtained long ago.").

in some instances included feathers from these now protected eagles.[133] Allard asserted that applying the regulation to previously legally acquired feathers and forbidding their sale was a violation of the Takings Clause of the Fifth Amendment.[134] The Court rejected this argument by interpreting BGEPA broadly when it stated that the statute was "sweepingly framed" in the context of "the exhaustive and careful enumeration of forbidden acts."[135] SCOTUS went on to explain that the regulation did not interfere with plaintiff's property rights because it did "not compel the surrender of the artifacts" nor did it restrain the possession of the feathers or place a physical restraint on the feathers.[136] By interpreting the BGEPA broadly, the Court noted that a taking does not occur when one right from the bundle of property rights is taken because the other rights are still available, and "the aggregate must be viewed in its entirety."[137]

In *United States v. Dion*, the issue before the Court was whether the BGEPA abrogated the treaty rights of Native Americans to hunt protected eagles on reservation lands for noncommercial purposes.[138] Defendant Dion asserted the Religious Freedom Restoration Act (RFRA) as a defense to the BGEPA.[139] Dion, a member of the Yankton Sioux Tribe of South Dakota, took four bald eagles by shooting and killing them on the Yankton Indian Reservation.[140] The Court broadly interpreted the BGEPA and, in a unanimous decision, it held that federal statutes abrogate treaty rights.[141]

In two SCOTUS cases, the Court has interpreted the BGEPA broadly to provide sufficient protection to the animals which it was enacted to safeguard. If the BGEPA were to be interpreted narrowly, the purpose of the statute would be defeated.

B. Animal Welfare Act of 1966

Congress was concerned over the treatment of animals by dealers due to the growing commercial demand for animals at research facili-

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[133] *Id.* at 51.

[134] *Id.* at 54–55.

[135] *Id.* at 56.

[136] *Id.* at 65.

[137] *Id.* at 65–66.

[138] United States v. Dion, 476 U.S. 734, 734 (1986).

[139] *Id.*

[140] *Id.*

[141] *Id.* at 739–40 ("Congressional intent to abrogate Indian treaty rights to hunt bald and golden eagles is certainly strongly suggested on the face of the Eagle Protection Act."); *id.* at 734 ("Congress' intention to abrogate Indian treaty rights must be clear and plain. Here, such intention is strongly suggested on the face of the Eagle Protection Act, and this view is supported by the legislative history. More particularly, Congress' action in 1962 in amending the Act to extend its ban to the golden eagle and authorizing the Secretary to issue permits for Indian hunting reflected an unmistakable and explicit legislative policy choice that Indian hunting of the bald or golden eagle, except pursuant to permit, is inconsistent with the need to preserve those species.").

ties.[142] This is similar to how we have seen the commercial demand increase for animals that are protected by the Lacey Act.[143]

Under the Animal Welfare Act of 1966 (AWA),[144] licensure was required[145] for laboratory experimentation of dogs, cats, hamsters, guinea pigs, rabbits, and nonhuman primates.[146] With the objective of expanding protections and giving the statute broader authority, "Congress amended the Animal Welfare Act in 1985 to provide for the mental well-being of primates."[147] While Congress did help to prevent certain methods of exploitation against animals by providing legal enforcement authority, there are still some ways in which the law may be gamed. For example, the AWA regulates how animals are transported and transacted, but there is no regulation concerning how the experiments are conducted.[148]

With regards to the Lacey Act, we see how it can be gamed with its current language and not providing a statutory definition of market value. While there will always be bad actors in the economy, it is imperative that there are sufficient laws to bring justice. If no amendment is made to the current language of the Lacey Act, it is an injustice to the animals in which it purports to protect.

V. REDUCTIO AB ABSURDUM

In *Stenberg*, the court confuses statutory construction with how a layperson would interpret the statute.[149] The court is arguing that an ordinary person would not understand the statute when the facts of the case show that the defendants were leading illegal activities.[150]

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142 S. REP. NO. 89-1281, at 4–6 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2635, 2636. ("The demand for research animals has risen to such proportions that a system of unregulated dealers is now supplying hundreds of thousands of dogs, cats, and other animals to research facilities each year . . . Stolen pets are quickly transported across State lines, changing hands rapidly . . . [and] State laws . . . proved inadequate both in the apprehending and conviction of the thieves who operate in this interstate operation.").

143 *See supra* Sections II.A, II.B.

144 Animal Welfare Act of 1966, Pub. L. No. 89-544, 80 Stat. 350 (1966).

145 *Id.* §§ 3–4.

146 *Id.* § 12.

147 Vania Gauthreaux, *Far from Fauvists: The Availability of Copyright Protection for Animal Art and Concomitant Issues of Ownership*, 7 J. ANIMAL L. 43, 59 (2011).

148 Shigehiko Ito, *Beyond Standing: A Search for a New Solution in Animal Welfare*, 46 SANTA CLARA L. REV. 377, 403 (2006); Douglas Starr, *A Dog's Life, When Scientists at the Tufts Veterinary School Fractured the Legs of Six Dogs to See How they Healed, and Then Euthanized the Dogs, All in the Name of Research, the Ensuing Outcry Reopened the Argument Over How Far is Too Far When it Comes to Using Animals to Advance Medicine*, BOSTON GLOBE (Apr. 18, 2004) http://archive.boston.com/news/globe/magazine/articles/2004/04/18/a_dogs_life?pg=full [https://perma.cc/3PNU-ABXX] (accessed Dec. 30, 2018).

149 *Stenberg*, 803 F.2d at 437.

150 *Id.* at 424–26 ("These three cases arose out of an undercover investigation by the United States Fish and Wildlife Service (FWS) into the *illegal taking and sale of wildlife* in interstate commerce. . . . As a result of several more exchanges, Ellison and two of his associates guided FWS Agent Adam O'Hara on an *illegal elk hunt* in January

This reasoning is illogical as it confuses mistake of law with *ignorantia juris non excusat*[151] ("ignorance of the law excuses not"). The defendants knew they were engaged in illegal conduct, and were violating laws,[152] but were unsure of which law they were violating. Allowing defendants to then be found not guilty would render the statute toothless as hunters would charge for guided tours, engage in illegal activities, and then claim they did not understand the law. Extrapolating this reasoning to other laws, a *reductio ad absurdum*[153] would be made: laypersons would claim they are not trained in the law and did not understand the law(s) with which they are charged in violating, and therefore they cannot be held guilty, creating an absurd result.

According to the plain meaning rule, if the text of a statute is clear and unambiguous no other considerations are to be given to its interpretation.[154] If a court is going to make the argument that it is departing from the plain language of the statute based on results of the statute, it must make a *reductio ad absurdum* argument.[155] The *Hughes* court does not claim that the result is absurd. Rather, the court claims that, "[s]uch a result is at odds with the plain language of the statute."[156] The court furtively avoids claiming that the result is

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1983. . . . On August 30, 1983, Gavitt met Ellison at his trailer just as Ellison was leaving for an off-season, and *therefore illegal, elk hunt*. . . . Ellison told Gavitt he would sell him the antlers and cape if he killed an elk. . . . The hunt proved unsuccessful, but on September 2, 1983 Ellison sold Gavitt two sets of velvet antlers that he had acquired during previous *illegal killings*. . . . Over the course of the investigation, Ellison had become a central figure. He claimed to support himself entirely by *his illegal wildlife transactions*. . . .") (emphasis added).

151 Edwin Roulette Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 77 (1908–09).

152 *Stenberg,* 803 F.2d at 425 ("Ellison asked whether Gavitt worked for 'Fish, Wildlife and Parks' and affirmed that he had been 'gettin' a lot of heat around there.'. . . Ellison told Gavitt he had originally intended to sell the antlers to K.L. Kim, but there had been too much 'heat.'. . . During the hunt Ellison stated that he killed fifteen deer and ten elk each year. He also fired a double-barreled shotgun into a tree and said that if a game warden confronted them he would 'blow his fucking head off.'").

153 *Reduction ad absurdum*, MERRIAM-WEBSTER https://www.merriam-webster.com/dictionary/reductio%20ad%20absurdum [https://perma.cc/EE5V-7CK3*]* (a *reductio ad absurdum* argument is when, if taken to its logical conclusion, it results in an absurd notion) (accessed Dec. 30, 2018).

154 Eric S. Lasky, *Perplexing Problems with Plain Meaning*, 27 HOFSTRA L. REV. 891, 892–93 (1999).

155 Transcript of Oral Argument at 51, Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018) ("JUSTICE GINSBURG: 'I thought—I thought the stock phrase was absurd, that you—if the statute gives a definition, you follow the definition in the statute unless it would lead not merely to an anomaly, but to an absurd result . . . JUSTICE GORSUCH: And you'd—and you agree you don't have an absurdity here."); *see also* Birmingham, *supra* note 54 (discussing how a broad interpretation of a whistleblower statute will lead to absurd results); *see also* Max Birmingham, *Strictly for the Birds: The Scope of Strict Liability Under the Migratory Bird Treaty Act*, 13 J. ANIMAL & NAT. RESOURCE L. 1, 14–15 (discussing a court that departed from a plain meaning interpretation of the Migratory Bird Treaty Act based on *reductio ad absurdum* arguments).

156 *Hughes*, 795 F.3d at 805.

absurd, and it proceeds to use a myopic scenario to illustrate its reasoning:

> The market value of, say, a whitetail deer with a Boone and Crockett Club score of 160 is the price that a willing buyer would pay to a willing seller for that deer on the open market. That is true whether the deer was killed by a hunter without the help of a guide, or by a hunter who paid a guide $200 to meet him in a nearby field, or by a hunter who paid a guide $5000 to provide air transportation to the site of the hunt, luxury accommodations, gourmet meals, taxidermy services, and other amenities. Equating the market value of the deer to the price of any guide services would mean that two defendants who sold deer with identical market values would be treated differently — one convicted of a felony, the other of a misdemeanor — based not on the market value of the wildlife, but based on the price of such things as meals and accommodations.[157]

The aforementioned result is myopic, as it does not respond to the alternative effects of its statutory interpretation. The dissenting opinion in *Hughes* called this scenario "inconsistent with the statute."[158] Under the reasoning of the *Hughes* court, the statute would be susceptible to *reductio ad absurdum* arguments. For example, a defendant could simply state that the price of the wildlife is free, or at the very least below the $350 threshold, and effectively evade the statute. By including the price of guide services as part of the sale of wildlife, a court is effectively disallowing the provision to be evaded by violators who could simply alter their guide service prices to a "freemium" business model by charging less than $350 for guide services, or even offering guide services for free, and then charge for other services.[159] Another example is that a hunter could kill a deer with a market value of $351 and pay a guide $5000 for services. The guide could then charge $1 for the hunt and $5350 for the services, and the defendants would be committing a felony but only be able to be charged with a misdemeanor.

When Congress amended the Lacey Act in 1981, it did so with the foresight to acknowledge that defendants would try to game the statute by employing financial stratagems:

> In recent years, investigations by agents of the various agencies charged with enforcing wildlife laws have uncovered a massive illegal trade in fish and wildlife and their parts and products. Evidence indicates that much of this illegal, and highly profitable, trade is handled by well-organized large volume operations run by professional criminals. The more sophisticated

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157 *Id.*

158 *Id*. at 808.

159 United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 46 (D.D.C. 2011) ("Thus, from the beginning, TaxACT's business strategy relied on promoting '*free*' or 'freemium' products, in which *a basic part of the service is offered for free and add-ons and extra features are sold for a price*. As Mr. Dunn put it, 'Free is an integral part of the value model. And the beauty of it is it has universal appeal. Everybody likes something for free.'") (emphasis added).

> operations utilize "white collar" crime tactics such as multiple invoicing and other fraudulent documentation to carry out and conceal their illicit activities.[160]

Congress also added the terms 'transported' and 'sold' when it amended the Lacey Act in 1981.[161] Courts that hold that market value only pertains to the wildlife have failed to include the transportation.[162] In addition, courts have failed to consider that without taking or possessing wildlife, hunters would not be paying for the guide services. Hunters were induced to pay for the guide services under the assumption they would be taking wildlife.[163] In each of these cases, hunters were led on illegal hunts where they acquired wildlife prohibited from being taken.[164] Courts that view the market value element being separate from the sale element have failed to take into consideration that commercial entities easily circumvent the Lacey Act by simply creating a pricing scheme that charges less than $350 for the wildlife, and then overcharge for amenities.[165] This interpretation renders the Lacey Act ineffective, and has led to absurd results.

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[160] S. REP. NO. 97-123.

[161] 16 U.S.C. § 3372 (2018) *amended by* Pub. L. No. 97-79, 95 Stat. 1074 (1981).

[162] *See Hughes*, 795 F.3d at 802; *Todd,* 735 F.2d at 148; *Stenberg,* 803 F.2d at 425, 427; *Butler,* 694 F.3d at 1179 (discussing how Hughes and Todd transported hunters' illegally taken wildlife out of state, and how Stenberg and Butler provided transportation to hunters).

[163] *See generally, Hughes*, 795 F.3d at 802; *Todd,* 735 F.2d at 148; *Stenberg,* 803 F.2d at 425, 427; *Butler,* 694 F.3d at 1179 (exhibiting how hunters paid guides with the intent of illegally killing wildlife).

[164] *Hughes*, 795 F.3d at 807 (Bye, J., dissenting) ("The Lacey Act unambiguously states that a person engages in the 'sale of fish or wildlife' whenever, for money or other consideration, the person 'offer[s] or provide[s] . . . guiding, outfitting, or other services' for the purpose of the illegal taking of wildlife. 16 U.S.C. § 3372(c)(1). That is, the act of guiding or outfitting an illegal hunt is synonymous with the 'sale of fish or wildlife.'"); *Todd*, 735 F.2d at 152 ("Both *Todd* and *Short* offered airborne hunts of wildlife at prices ranging from $1,000 to $5,000. A commercial arrangement whereby a professional guide offers his services to obtain wildlife illegally is an offer to sell wildlife."); *Stenberg*, 803 F.2d at 424 ("These three cases arose out of an undercover investigation by the United States Fish and Wildlife Service (FWS) into the illegal taking and sale of wildlife in interstate commerce . . . Gavitt first became aware that Loren Ellison might be involved in illegal activities as a result of a conversation with a man in Montana named Larry Myers."); *Butler*, 694 F.3d at 1179 ("The Butlers sold guided hunts to out-of-state hunters seeking to shoot trophy bucks in Comanche County, Kansas . . . charg[ing] approximately $3,500 to $5,000 for a guided tour.").

[165] Vineet Kumar, *Making "Freemium" Work*, HARV. BUS. REV. (May 2014), https://hbr.org/2014/05/making-freemium-work [https://perma.cc/JWY5-NCEH] (accessed Dec. 30, 2018) ("Over the past decade 'freemium'—a combination of 'free' and 'premium'—has become the dominant business model among internet start-ups and smartphone app developers. Users get basic features at no cost and can access richer functionality for a subscription fee.") (Applying this business model to the Lacey Act, the price of guide services and the wildlife may be free or nominal (as long as it is below $350), but customers must pay higher rates for board and lodging, or other amenities).

VI. DEFINITIONS

While the term *market value* is used in the Lacey Act, the apropos term would be *market price*.[166] Value is often determined based on comparisons with similar goods or services, and it may be subjective. For instance, certain goods may be of greater value to a person than another person or persons.[167] Price is objective, as it is "the cost at which something is bought or sold."[168] Value is intrinsic. Price is extrinsic.

The *Hughes* court surreptitiously acknowledges that the plain language of the statute does not separate the market value element from the sale element.[169] Rather, it reasons that the outcome of a plain meaning interpretation is in conflict with the statute. The Eighth Circuit proclaims that the market value of guide services is distinguished from the market value of wildlife.[170]

In *Hughes*, the court has mistakenly presumed that there are two separate transactions: one for the market value and one for the sale element. The court has failed to consider that there would be no guides or services if there was no hunt. Automobile dealers sometimes give consumers more money than the book value of their vehicles in a trade-in to induce transactions.[171] While it may be viewed as two separate transactions, automobile dealers would most likely not be paying above book value for a vehicle if the customer was not also agreeing to purchase or lease another car.

As we have seen with automobiles, there is negotiation between buyers and sellers, where often the actual price varies from book values, the suggested retail price, or both.[172] While automobiles may sell

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166 16 U.S.C. § 3373.

167 *Sentimental Value,* MERRIAM-WEBSTER, https://www.merriamwebster.com/dictionary/-sentimental%20value [https://perma.cc/8G2F-EU3Q] (accessed Dec. 30, 2018).

168 BLACK'S, *supra* note 84.

169 *Hughes*, 795 F.3d at 804 ("The government does not appear to disagree with this definition of 'market value.' Instead, the government argues that, to establish that the market value of the *wildlife* exceeded $350, all it must do is establish that the price of the *guide services* exceeded $350.").

170 *Id.* at 805 ("Clearly, then, the price of *guide services* is not the same thing as the market value of *wildlife*.").

171 Jerry Hirsch, *If You Must Trade in Your Car, Here's How to Get the Most for It*, L.A. TIMES (July 12, 2014), http://www.latimes.com/business/autos/la-fi-how-to-trade-a-car-20140713-story.html [https://perma.cc/7XJW-PYDN] (accessed Dec. 30, 2018).

172 *See, e.g.*, Neal E. Boudette, *Discounted Cars Benefit Buyers, but May Spell Trouble for Industry*, N.Y. TIMES (May 11, 2017), https://www.nytimes.com/2017/05/11/automobiles/wheels/car-dealers-discounts-price-cuts.html [https://perma.cc/G5YR-UQ4G] (accessed Dec. 30, 2018) ("Take the Nissan Altima, one of the country's top-selling cars. Some dealers around the country are now offering the midsize sedan for $6,000 to $8,000 *below list prices*. In Stafford, Va., Leckner Nissan has marked down 59 Altimas in stock, including a black 2017 Altima SV it is selling to sell for as little as $21,593 — $7,195 *below its sticker price.*") (emphasis added); Tara Siegel Bernard, *Car Dealers Wince at a Site to End Sales Haggling*, N.Y. TIMES (Feb. 10, 2012), https://www.nytimes.com/2012/02/11/your-money/car-dealers-wince-at-a-site-to-end-sales-haggling.html [https://perma.cc/955J-G3VH] (accessed Dec. 30, 2018) ("When it comes to

below the suggested retail price,[173] there are instances in which a commodity, good, item, product, or service sells above the suggested retail price, such as real estate.[174]

The following proposed definitions will clarify the differences between value, price, and related terms:

- *Market value* – the benefit, usefulness, or desirability of a good or service based on a rational and unbiased assessment in an arm's length transaction by buyers and sellers.
- *Market price* – the amount of currency or other consideration that is expected for a good or service in an arm's length transaction to execute a transaction.
- *Fair cash market value* – the amount of currency that a good or service can be sold for based on a rational and unbiased assessment in an arm's length transaction by buyers and sellers.
- *Fair market retail price* – the amount of currency or other consideration that a manufacturer or retailer recommends for a product or service.
- *Fair market price* – the amount of currency or other consideration that a buyer expects to pay for a product or service, based upon arm's length transactions of an identical or similar good or service.
- *Open market value* – the benefit, usefulness, or desirability of a good or service based on a competitive auction setting.

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negotiating a price on a new car, the script has not really changed much over the years: *The dealer's salesman writes down a price, you counter and then he walks to the back of the showroom to talk with the manager to 'see what we can do.'*") (emphasis added); Keith Bradsher, *Sticker Shocker: Car Buyers Miss Haggling Ritual*, N.Y. TIMES (June 13, 1996), https://www.nytimes.com/1996/-06/13/business/sticker-shock-car-buyers-miss-haggling-ritual.html [https://perma.cc/H2SD-8JFT] (accessed Dec. 30, 2018) ("Mark R. Smith was following the hottest trend in the auto industry two years ago when he plastered low, fixed prices on the cars and trucks at his family's Ford dealership here and banned haggling by his sales staff. But the result was not what the auto executives in Detroit or the high-priced dealership consultants had predicted. *For every customer who came in eager to dispense with the traditional, time-consuming and often distasteful dickering over the sticker price, there were four or five more who insisted on trying to knock several hundred dollars off the price.* When the salespeople refused to budge, the customers stalked off.") (emphasis added).

[173] *Supra* note 172.

[174] *See* Lisa Prevost, *Bidding Wars in the Suburbs*, N.Y. TIMES (June 17, 2016), https://www.nytimes.com/2016/06/19/realestate/bidding-wars-in-the-suburbs.html [https://perma.cc/MZ8H-RE3Y] (accessed Dec. 30, 2018) ("In Fairfield County, Stamford, Norwalk, Greenwich, Fairfield, Westport and Darien, *2 percent to 13 percent of properties sold at or over the asking price.*") (emphasis added); Michelle Higgins, *In a Seller's Market, Every Minute Counts*, N.Y. TIMES (May 31, 2013), https://www.nytimes.com/2013/06/02/realestate/new-york-city-is-a-sellers-market-so-every-minute-counts.html [https://perma.cc/9NUE-96WS] (accessed Dec. 30, 2018) ("In popular neighborhoods like the West Village, *it's not uncommon for sought-after properties to go into contract well above the asking price in the head-spinning span of 10 days or less.*") (emphasis added).

- *Actual value* – the benefit, usefulness, or desirability of a good or service computed on the basis of the value of similar or identical goods or services.
- *Actual cash value* – the benefit, usefulness, or desirability of a good or service which is calculated by subtracting depreciation from replacement cost.
- *Actual market value* – the benefit, usefulness, or desirability of a good or service which is determined by the amount of currency or other consideration that buyers and sellers agree upon in a competitive auction setting.
- *Cash value – Insurance.* The amount of currency offered to the policyowner by the issuing carrier upon cancellation of the contract.
- *Clear market value, or market-clearing value* – the equilibrium of a good or service after the supply of whatever the product or service is transacted is equated to the demand, so that there is no leftover supply or demand.
- *Fair and reasonable value* – an estimate of the benefit, usefulness, or desirability ofa good or service, based upon arm's length transactions of an identical or similar good or service.
- *Full value* – the total benefit, usefulness, or desirability of a good or service, encompassing all and underlying features.
- *Salable value* – the benefit, usefulness, or desirability of a good or service which places it fit for sale in the usual course of commerce.
- *True value* – the amount of consideration or other consideration that a buyer is willing to pay for a good or service.

These proposed definitions are meant to distinguish the various terms and provide a sufficiently broad contrast as they are meant to be applied to myriad concerns, issues, matters, *inter alia*. To remedy the delta between the Congressional intent of the term market value under the Lacey Act and its judicial interpretation, there needs to be a statutory definition of market value.[175]

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[175] *See Hughes*, 795 F.3d at 805 (A statutory definition of market value under the Lacey Act will prevent the gaming of the statute by changing prices of amenities or services and keeping the hunting price below the $350 threshold. "This does not mean, however, that the price of the guide services should be deemed to conclusively establish the market value of the wildlife. Put another way, it does not make sense to allocate, as a matter of law, one hundred percent of the cost of the guide services to the wildlife. This case illustrates the point: When a hunter paid $1,600 to $2,600 to Hughes, the hunter received not just the deer that he or she killed, but accommodations, meals, hunting stands, field dressing, carcass-cleaning facilities—and, of course, the services of a professional guide. Clearly, then, the price of *guide services* is not the same thing as the market value of *wildlife.*").

VII. PROPOSED LEGISLATIVE AMENDMENT

The *Hughes* court has stated that the amendment Congress made to the Lacey Act still leaves room for an interpretation that thwarts the purpose of the amendment.[176] This interpretation is confounding, as the court is openly acknowledging the clear, uncontested legislative intent but holds that the statute is ambiguous.[177] The Eighth Circuit followed a similar interpretation of the Lacey Act when it also held that the term *market value* is ambiguous.[178] SCOTUS has held that in the instances when legislative intent is not in dispute, and is at odds with the plain meaning of the statute, courts are allowed to effectuate the intent of Congress.[179]

In *Atkinson*, the Ninth Circuit grants that the term *market value* needs to be interpreted more broadly than its previous interpretation in *Stenberg*, but does add a caveat by proclaiming that: "*Stenberg* offers little guidance on the proper method for determining the market value of an animal taken during a guided hunt."[180] Defendant Atkinson argued that market value may be definitively established by the fine amount (which is below the $350 threshold established by the Lacey Act) of violating the state law from which the Lacey Act violation was brought.[181] The court rejected this argument since Atkinson did not provide evidence that said state law was intended to define the term *market value*.[182]

Without a statutory definition, there is a lack of clarity amongst courts about how to calculate market value. There is even confusion amongst the courts about how the other courts each defined market value.[183]

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[176] *See id.* ("Equating the market value of the deer to the price of any guide services would mean that two defendants who sold deer with identical market values would be treated differently. . . . Such a result is at odds with the plain language of the statute.").

[177] *See id.* (finding that market value may or may not include any guide services).

[178] *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. In such cases, the intention of the drafters, rather than the strict language, controls.") (citation and quotation omitted).

[179] *See Todd*, 735 F.2d at 151–52 (holding that despite evidence that a hunter had paid over $350, there was no proof that the value of the wildlife hunted exceeded $350); *see also* Geordie Duckler, *Two Major Flaws of the Animal Rights Movement*, 14 ANIMAL L. REV. 179, 179 (2008) (examining the a major hindrance of enforcing animal rights rests with political opposition: "[i]n its current guise, animal rights advocacy imposes few intellectual demands on its proponents, usually requiring little more than a colorful Web site and a *college dictionary* . . .") (emphasis added).

[180] *Atkinson*, 966 F.2d at 1273–74.

[181] *Id.* at 1274.

[182] *Id.*

[183] *Compare Todd*, 735 F.2d at 152 ("*The only evidence the government offered as to the actual value of the game taken was the price of $1,200 quoted in the offer by Short* and the $250 amount actually paid for the hunt by the hunter who killed the wildlife. *The government argues that this proof is adequate to support the conviction* inasmuch as one hunter paid $600 for the hunt, even though he did not kill wildlife; and the hunt

There needs to be a statutory definition of market value to clarify how it should be defined under the Lacey Act. The following definition should be added under 16 U.S.C. § 3371:

> (l) The term "market value" means the total amount of currency exchanged from one party to another party in an exchange during the course of or facilitation of any violation of any law, treaty, or regulation of the United States, any Indian tribal law, any foreign law, or any law or regulation of any State.

This definition is sufficiently broad enough to include the costs of price guides as well as transportation due to the phrase "course or facilitation of any violation." This definition is necessary because it can also be extended throughout the statute, to both conspiracy and substantive violations of the Lacey Act. One court has held that the cost of price guides is sufficient to establish market value for a conspiracy charge, but not sufficient to establish market value for a substantive violation.[184] Another court has held that preparation of interstate transportation of illegally taken fish, wildlife, or plants is sufficient to evidence a conspiracy violation of the Lacey Act, but not a substantive violation of the Lacey Act.[185]

This definition closes the interpretation gap that courts have cited in the statute and strengthens the Lacey Act to give it the enforcement power that Congress intended. The phrase "course or facilitation of any violation" is qualified by "total amount of currency," which makes the definition comprehensive enough to include the dollars included in the transaction or transactions that are used to lubricate commerce which results in a violation of the Lacey Act. This closes the loophole of separating the market value and sale elements, as well as eliminates the ambiguity of how to calculate market value.

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was part of a commercial operation, the target of the felony provision of the Act. *We cannot agree*. It is true that, had one of the animals been large enough to mount as a trophy, the proof would have supported a value of $1,200. Nonetheless, the statute requires proof of the value of the wildlife actually taken.") (citation omitted) (emphasis added), *with Atkinson*, 966 F.2d at 1273 ("Instead, as the Fifth Circuit recognized in *Todd,* its market value is best represented by the amount a hunter is willing to pay for the opportunity to participate in the hunt.").

184 *Todd*, 735 F. 2d at 152.

185 *See Atkinson*, 966 F.2d at 1275 ("Atkinson also argues the evidence failed to show he either sold or transported wildlife in interstate commerce as required under the Act. *See* 16 U.S.C. § 3372(a)(2)(A). We disagree. At the end of each hunt, Atkinson either arranged to ship the deer carcasses to hunters' homes outside the State of Montana or assisted the hunters in these shipments. *This satisfies the Act's interstate commerce requirement. See* United States v. Gay-Lord, 799 F.2d 124, 126 (4th Cir. 1986) (Lacey Act satisfied when defendant 'knew that [wildlife] would be transported in interstate commerce and took the steps that began their travel to interstate markets').") (emphasis added).

VIII. CONCLUSION

A legislative amendment to the Lacey Act is paramount to make it efficacious. With regard to the Lacey Act, one court proclaims, "I wish to make clear that violations of our nation's wildlife laws [are] serious business[. . . .]"[186] The Fifth, Eighth, and Tenth Circuits have each held that in the statute the term *market value* equates the price of the wildlife in question, in one form or another. This is despite the fact that a plain language interpretation of the statute holds that the price of guide services should be included in the calculation of market value. Furthermore, the aforementioned courts haven't even considered the cost of transportation when calculating market value, even though the term 'transporting' was added to the statute in the 1981 amendment.

From Congressman Lacey's consternation about actors escaping prosecution of state law through crude tactics as a basis for introducing the eponymous Act to Congress's cognizance of commercial enterprises employing white collar criminal stratagems to circumvent the statute, we have seen that certain actors will work to elude criminal liability. Until this gap is fixed, courts will continue to interpret the term in a manner that allows defendants to bypass liability, thereby rendering the statute effete.

A statutory definition of market value in the Lacey Act will close the loophole that is currently being exploited. The statutory definition that this Article proposes will provide the Lacey Act with the teeth it needs and deserves.

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[186] United States v. Kilpatrick, 347 F. Supp. 2d 693, 705 (D. Neb. 2004); *see also* David Favre, *Integrating Animal Interests into Our Legal System*, 10 ANIMAL L. REV. 87 (2004) (discussing the machinations of expanding legal protections of animals through both legislative and judicial changes).