ANIMAL WELFARE ACT: INTERACTION WITH OTHER LAWS

Ani B. Satz discusses the interaction of the Animal Welfare Act (AWA) with state laws, specifically focusing on perceived preemptive effects of the AWA on state anti-cruelty laws. Delcianna Winders discusses how these perceived preemptive effects play out on a federal level, focusing on how the AWA interacts with the Endangered Species Act (ESA). She expands upon how both laws apply to captive animals, who have been identified as threatened or endangered under the ESA.

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I. ANIMAL PROTECTION AND THE MYTH OF AWA PREEMPTION

By
Ani B. Satz*

I will be speaking about animal protection and the myth of Animal Welfare Act (AWA) preemption. My main argument is that the myth of AWA preemption undermines animal protections against cruelty, and that the U.S. Department of Agriculture (USDA), or its sub-agency, the Animal and Plant Health Inspection Service (APHIS), must either issue a policy statement or regulations clarifying that the AWA does not preempt more protective state laws targeting animal cruelty.

My presentation has three parts: (1) The myth of AWA preemption, (2) judicial stories supporting that myth, and (3) the positive implications for animal protection if the myth of AWA preemption is overcome.

I will start with the myth. Anecdotally, perceived preemption is one of the biggest challenges identified by lawyers litigating cruelty cases under state laws on behalf of animals covered by the AWA. In fact, some lawyers with whom I spoke believe preemption is an impedi-

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ment second only to the well-known standing issues that plague animal activists in litigation.[1]

The challenges posed by preemption are puzzling for a few reasons. First, they are supported by limited case law, with only a handful of courts applying the AWA instead of more protective state law.[2] About twenty jurisdictions do not apply the AWA when state law offers more protection.[3]

Second, the plain language of the AWA expressly permits states to enact laws pertaining to animals covered by the AWA. Section 2145(b), which is Section 15(b) in the original 1966 Act, states, "[t]he Secretary is authorized to cooperate with the officials of the various States or political subdivisions thereof in carrying out the purposes of this chapter and of any State, local, or municipal legislation or ordinance on the same subject."[4] Section 2143, which was amended in 1985 as part of the Improved Standards for Laboratory Animals Act, reinforced this position by stating, "[the AWA] shall not prohibit any State (or a political subdivision of such State) from promulgating standards in addition to those standards promulgated by the Secretary . . . ."[5] Thus, the 1985 amendment indicates that Congress sought to resolve any confusion about preemption. The bill largely addresses protections for laboratory animals, so perhaps Congress anticipated some uncertainty about whether state standards for laboratory animals would apply.[6] The leg-

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[1] *See, e.g.*, Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights) A Tribute to Kenneth L. Karst*, 47 UCLA L. REV. 1333, 1367 (2000) (discussing standing difficulties under major federal animal welfare statutes).

[2] Int'l Primate Prot. League v. Inst. for Behavioral Research, Inc., 799 F.2d 934, 936 (4th Cir. 1986); Pennsylvania v. Reynolds, 876 A.2d 1088, 1096–97 (2005); In Defense of Animals v. Cleveland Metroparks Zoo, 785 F. Supp. 100, 102 (N.D. Ohio, 1991); Taub v. State, 463 A.2d 819, 820 (Md. Ct. App. 1983); Salzer v. King Kong Zoo, 14-CVD-185, 1, 7 (N.C. App. Aug. 29, 2014), *overruled by* Salzer v. King Kong Zoo, 773 S.E.2d 548, 551 (N.C. App. 2015); Salk v. Regents of the Univ. of Cal., No. A120289, 2008 WL 5274536, at *20 (Cal. Ct. App. Dec. 19, 2008); Stop Animal Exploitation Now v. Santa Cruz Biotechnology, Inc., No. H039770, 2016 BL 215133, at *2 (Cal. App. July 5, 2016).

[3] *See, e.g.*, DeHart v. Town of Austin, Ind., 39 F.3d 718, 722 (7th Cir. 1994) ("[I]t is clear that the Animal Welfare Act does not evince an intent to preempt state or local regulation of animal or public welfare. Indeed, the Animal Welfare Act expressly contemplates state and local regulation of animals."); N.Y. Pet Welfare Ass'n Inc., v. City of N.Y., 143 F. Supp. 3d 50, 61 (E.D.N.Y. 2015) ("[C]ourts have consistently rejected claims that the AWA preempts local legislation concerning animals, even where the legislation bans activity that is otherwise authorized by the AWA."), aff'd, 850 F.3d 79 (2d Cir. 2017); *Salzer*, 773 S.E.2d at 551 (finding as a matter of first impression that AWA did not expressly preempt state animal cruelty statute, and Congress did not implicitly intend to occupy the entire field of animal welfare regulation with AWA); Good v. Zoning Hearing Bd. Heidelberg Twp., 967 A.2d 421, 426 (Pa. Commw. Ct. 2009) (finding AWA did not preempt local regulation of animal ownership, breeding, or sale).

[4] Animal Welfare Act of 1966, 7 U.S.C. § 2145(b) (2018).

[5] *Id.* § 2143(a)(8).

[6] 131 CONG. REC. H12499 (daily ed. Dec. 18, 1985) (statement of Rep. De La Garza) ("The bill revises standards for the humane handling of animals by research facilities, dealers and exhibitors. It directs the secretary to develop standards containing minimum requirements in areas including housing, feeding, shelter, veterinary care, and experimental procedures that minimize pain and distress.").

islative history of the amendment supports this hypothesis. Legislative testimony ranges from people stating there is no preemption[7] to those arguing the amendment is a problem because it would undermine preemption.[8]

Third, the myth of preemption is also perplexing because there is a general assumption that federal law does not preempt state law in this context.[9] States have reserved powers under the Tenth Amendment[10] to protect the "health, safety, and morals"[11] of their citizens, and animal welfare is recognized as falling within that power, given the relevance of animal welfare to human illness, safety, food production, domestic violence, and other areas.[12] In fact, federal law preempts state law only in three circumstances: When Congress explicitly states so (express preemption), implicitly indicates an intention to preempt an entire field of law (field preemption), or state law conflicts with federal law (conflict preemption).[13]

States address animal cruelty directly and indirectly. All fifty states, the District of Columbia, and U.S. territories have anti-cruelty statutes.[14] A few states also have statutes that may facilitate the litigation of anti-cruelty claims through private litigation, including stat-

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[7] *Improved Standards for Laboratory Animals Act and Enforcement of the Animal Welfare Act by the Animal and Plant Health Inspection Service: Hearing on H.R. 5725 Before the Subcomm. on Dep't Operations, Research, and Foreign Agric.*, 98th Cong. 102 (1894) (statement of Steven L. Kopperund, Legislative Director, American Feed Manufacturers Association) ("5725 would not preempt the States rights to pass stricter regulations. The current AWA allows for State regulation. This section allows the Secretary to cooperate with the States in carrying out rules, regulations on animal welfare.").

[8] *Id.* at 129 (statement of Gerald Van Hoosier, Director & Professor of Animal Medicare, University of Washington) ("Also of concern is Section 4(2) that, while written as a restriction on the federal privilege of preemption, provides an invitation to states and local governments to introduce their own regulations governing animal care.").

[9] David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 515 (2008) (citing Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341, 347 (2001)).

[10] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Brown v. Maryland, 25 U.S. 419, 453 (1827) (recognizing "police powers").

[11] Barnes v. Glen Theatre, 501 U.S. 560, 569 (1991).

[12] *See, e.g.*, Nicchia v. New York, 254 U.S. 228, 230–31 (1920) (upholding city dog licensing as lawful); DeHart v. Town of Austin Ind., 29 F.3d 718, 722 (7th Cir. 1994) (holding that a city ordinance making it unlawful to keep certain wild animals is not preempted by the AWA).

[13] 16 U.S.C. § 1535(f); *see also* Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 712 (1985) (holding that "[t]he FDA's blood plasma regulations pre-empt all provisions of the county's ordinances and regulations").

[14] *See Animal Protection Laws of the United States of America*, ANIMAL LEGAL DEF. FUND, https://aldf.org/article/animal-protection-laws-of-the-united-states-of-america [https://perma.cc/3QER-JQRW] (accessed Jan. 25, 2019) (providing an interactive map as well as a breakdown and full text of all state statutes).

utes that protect taxpayers against illegal or wasteful use of government funds.[15]

What is the significance of this confusion over preemption? The myth of preemption is problematic for several reasons. To begin, it is an inaccurate interpretation of the law, arguably disrupting the function of the law. Congress did not intend to preempt, and even encouraged, state laws protecting animals covered by the AWA.[16]

Next, and most importantly, the myth of preemption undermines protections for animals covered by the AWA. States often have stronger protections than the AWA, and the AWA contains well-known exceptions to its minimal protections, such as withholding anesthesia when it interferes with experimental results.[17] As a general matter, the AWA fails to address directly the question of whether suffering—psychological and physical—is ever justified.[18] On the other hand, state statutes do so by permitting actions that do not rise to abuse, neglect, or torture.[19]

Last, the myth of preemption has a possible chilling effect on district and other government attorneys and animal advocates bringing cases that affect animals covered by the AWA. One example involves the Massachusetts Attorney General's Office, which failed to prosecute a Northeastern University professor for fighting hamsters in violation of state anti-cruelty statutes because the research is largely covered by the AWA.[20] Failing to prosecute animal cruelty under state law is especially of concern because the AWA has limited enforcement. As of June 2018, APHIS was overseeing approximately 8,000 AWA licensees and employing only about 100 inspectors.[21] Data through the third finan-

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[15] *See, e.g.*, N.C. GEN. STAT. ANN. §§ 19A-1–19A-4 (providing a civil cause of action for violations of North Carolina's cruelty-to-animals law); CAL. CIV. CODE § 526(a)(2) (West 2018) (supporting a citizen action "[w]hen it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action").

[16] *See* 7 U.S.C. § 2143(a)(8) (stating the AWA "[s]hall not prohibit any State (or a political subdivision of such State) from promulgating standards in addition to those standards promulgated by the Secretary"); *see also id.* § 2145(b) ("The Secretary is authorized to cooperate with the officials of the various States or political subdivisions thereof in carrying out the purposes of this chapter and of any State, local, or municipal legislation or ordinance on the same subject.").

[17] *Id.* § 2143(a)(3)(E).

[18] Rather, it seeks to impose limited protections for "humane care and treatment" when human goals are not thwarted. *Id. See also* 9 C.F.R. § 2.131(b)(1) (discussing the handling of animals).

[19] *Animal Protection Laws of the United States of America*, *supra* note 13 (after clicking on a state from the interactive map, each state provides information for some of these definitions).

[20] *See* Justin Goodman, *Animal Experimenters Are Not Above the Law*, HARVARD LAW RECORD (Sept. 26, 2015), http://hlrecord.org/2015/09/animal-experimenters-are-not-above-the-law/ [https://perma.cc/6CXP-H7DS] (accessed Jan. 25, 2019) (noting that "Massachusetts animal neglect and animal-fighting statutes do not exempt experimenters").

[21] *How Many Animal Care Inspectors and Veterinary Medical Officers Are Employed by USDA's Animal and Plant Health Inspection Service*, ASK THE EXPERT (updated June

cial quarter of 2018 indicates only fifteen cases were initiated, resulting in thirty-nine warnings, seven settlements, and ten administrative law decisions, with approximately $163,000 in civil penalties.[22]

I now move to the second part of my presentation, which is about stories told by judges supporting the myth of AWA preemption. These stories may be divided into three broad categories: Stories that could support field preemption, conflict preemption, and a "grab bag" of preemption arguments. I will focus on the first category of stories. I say "stories that could support" preemption because, ironically, the courts that apply the AWA over more protective state laws do not, for the most part, invoke preemption doctrine. They are applying other arguments that have the effect of preemption. This contributes to the myth of AWA preemption, by generating a spirit of preemption in animal cruelty cases with no doctrinal hold.

Several stories support field preemption. I am going to list them, as I do not have time to elaborate on them:

- Federal oversight, through both the AWA and federal grant requirements;[23]
- The "delicate balance" of promoting the use of animals and protecting them;[24] and
- The equitable abstention doctrine, which hails largely from California case law, and is applied in complex policy matters involving equitable relief when a regulatory agency has primary enforcement authority.[25]

I will highlight the delicate balance within the context of animal research.

7, 2018), https://asktheexpert.custhelp.com/app/answers/detail/a_id/5560/~/how-many-animal-care-inspectors-and-veterinary-medical-officers-are-employed-by [https://perma.cc/8B3K-W6S9] (accessed Jan. 25, 2019).

[22] *Animal Care Enforcement Summary (AWA and HPA*), APHIS, USDA, https://www.aphis.usda.gov/aphis/ourfocus/business-services/ies/ies_performance_metrics/ies-ac_enforcement_summary [https://perma.cc/9N9C-6WA6] (accessed Jan. 25, 2019).

[23] *See Int'l Primate Prot. League*, 799 F.2d at 935 (indicating federal oversight through the AWA was the intention of Congress); Salazar v. King Kong Zoo, No. 14-CVD-185, 2014 WL 10123009 at *1, (N.C. Dist. Sept. 3, 2014) (arguing that defendant's USDA license supported AWA preemption), *overruled by* Salzer v. King Kong Zoo, 773 S.E.2d at 551; *see also* William A. Reppy, Jr., *Do State Anti-Cruelty Laws Apply to Animals Used in Scientific Research?*, DUKE LAW: FACULTY SCHOLARSHIP (2008), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2470&context=faculty_scholarship [https://perma.cc/J3EC-UEJ8] (accessed Jan. 25, 2019) (discussing that the federal AWA does not preempt state criminal laws concerning cruelty to animals).

[24] Another argument advanced to favor something like field preemption is based on the notion that the USDA must uphold a "delicate balance" between animal welfare and the advancement of science, and it will be disrupted if anyone from outside the agency enforces the humane treatment of animals. *Int'l Primate Prot. League,* 799 F.2d at 939; *Salk*, 2008 WL 5274536, at *1, *17–18.

[25] Stop Animal Exploitation Now v. Santa Cruz Biotechnology, Inc., No. CV176022, 2016 WL 3742783, at *2 (Cal. Ct. App. July 5, 2015).

The basic delicate balance argument is that the USDA must uphold a balance between animal welfare and scientific progress, and it would be disrupted if anyone from outside the agency enforces the humane treatment of animals.[26] I believe that this argument may be broken down into several parts: Scientific autonomy (free speech is not raised by the courts, but it could be), scientific progress, standing to sue, agency discretion, and agency bias.[27] Unfortunately, these different parts are often conflated and unexplained in cases marshaling the delicate balance argument. I am going to focus on the scientific autonomy part of the delicate balance argument.

The autonomy component of the delicate balance argument is first advanced in the 1986 Fourth Circuit case *International Primate Protection League*.[28] Here the court discusses the minimal standard of care for primates under the AWA and how animal welfare, in general, should not interfere with medical research and researchers' autonomy.[29] The court cites the congressional record and states that under the AWA, "[a] research scientist still holds the key to the laboratory door."[30]

A more extensive discussion of all aspects of the delicate balance argument, including scientific autonomy, appears in *Salk v. Regents of University of California*,[31] a 2008 case that involved taxpayers suing under the California Code of Civil Procedure Section 526(a). This section allows citizen suits for illegal or wrongful use of public funds and for injunctive relief for AWA violations.[32] The court held that the action is preempted, and the enforcement of the AWA is discretionary.[33] The appellate court affirmed, holding that Salk's action constituted a sufficient obstacle to agency enforcement of the AWA and thereby warranted preemption.[34] Again, the court cites the same laboratory key language from *International Primate Protection League*.[35]

There are several problems with the autonomy component of the delicate balance argument. To start, the court confuses autonomy and process with outcome. Scientific autonomy does not necessarily equate with scientific progress or clinically useful findings.[36] Presumably, the delicate balance argument refers to the goal of medical research bene-

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[26] *Int'l Primate Prot. League*, 799 F.2d at 939; *Salk*, 2008 WL 5274536, at *16–18.

[27] *See* DALE JAMIESON, MORALITY'S PROGRESS: ESSAYS ON HUMANS, OTHER ANIMALS, AND THE REST OF NATURE (2002) (presenting a series of essays regarding morality).

[28] *Int'l Primate Prot. League,* 799 F.2d at 935.

[29] *Id.* at 939.

[30] *Id.* (citing H.R. REP. NO. 91-1651 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 5103, 5104).

[31] *Salk*, 2008 WL 5274536 at *16.

[32] CAL. CIV. CODE § 526a (West 2018).

[33] *Salk*, 2008 WL 5274536 at *20.

[34] *Id*.

[35] *Int'l Primate Prot. League*, 799 F.2d at 939.

[36] This is, in fact, the thrust of opposition to animal testing. *See, e.g.*, PETER SINGER, ANIMAL LIBERATION 25–94 (2d ed. 1990) (providing a historical account of abusive animal research without clinical significance).

fiting patients, not scientific autonomy alone. Unfettered scientific experimentation need not result in useful clinical application, as history has painfully shown.[37]

Further, the court provides no evidence that scientific autonomy to experiment on animals fosters better research outcomes, or that alternative models could not be used.[38] It assumes that medical research supports clinical advances.[39]

Next, the court's position suggests that the USDA's enforcement of the AWA will not interfere with scientific autonomy. That need not be the case, as the USDA's recent $3.5 million settlement against Santa Cruz Biotechnology demonstrates.[40]

Finally, the argument presented by the court is not one of balance between animal and research interests—which I would argue is a false conflict anyway because humans place animals in laboratories—but one that tips the balance in favor of researchers.[41] *International Primate Protection League* and *Salk* both accept agency bias toward medical research (i.e., researchers are holding the key to the laboratory door). While the origin of this argument is unclear, it may stem from the fact that the USDA is perhaps the only federal government agency without a neutral mission.[42] It exists in part to advance commercial use of animals in agribusiness.[43] I believe it is not a large step to argue that it also supports the use of animal bodies in other contexts.[44] Addi-

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[37] *Id.*

[38] Alternative methods are increasingly being developed. *See, e.g.*, *Human Organs-on-Chips: Microchips Lined by Living Human Cells That Could Revolutionize Drug Development, Disease Modeling and Personalized Medicine*, WYSS INST., https://wyss.harvard.edu/technology/human-organs-on-chips/ [https://perma.cc/CF5U-XVYG] (accessed Jan. 25, 2019) (showing where human cells could be used for drug development).

[39] While the *Salk* court does not outline alleged clinical advances, some are provided in *Int'l Primate Prot. League*, 799 F.2d at 939–40 (noting "[r]esearch with primates helped to lead, for example, to the development of the polio vaccine, and other animal research has contributed to the discovery of insulin, the invention of transplantation techniques, and the improvement of cancer therapies. *Amici* predict that animal research will play some part in the prevention and treatment of such illnesses as multiple sclerosis, AIDS, and Alzheimer's disease").

[40] *Santa Cruz Biotechnology Agrees to $3.5M Fine, License Revocation*, ANIMAL WELFARE INST. (May 20, 2016), https://awionline.org/content/santa-cruz-biotechnology-agrees-35m-fine-license-revocation [https://perma.cc/9KQ5-9W6G] (accessed Jan. 25, 2019).

[41] *See* Gary Francione, *Equal Consideration and the Interest of Nonhuman Animals in Continued Existence: A Response to Professor Sunstein,* U. CHI. LEGAL F. 231, 247 (2006) ("We will abolish institutionalized animal exploitation and stop producing nonhumans for human purposes. We will thereby eliminate the overwhelming number of these false conflicts in which we are supposed to 'balance' human and nonhuman interests—an act that is made impossible by the property status of nonhumans.").

[42] *About USDA: Mission Areas*, USDA, https://www.usda.gov/our-agency/about-usda/mission-areas [https://perma.cc/CB34-HLKG] (accessed Jan. 25, 2019).

[43] *Id.*

[44] The only reference to animals in the descriptions of the mission areas of the USDA is under "marketing and regulatory programs," which refers to "domestic and interna-

tionally, the delicate balance argument reflects entrenched interest-convergence, that is, laws protect animals only when doing so benefits humans.[45] This inherently renders animal protections vulnerable to elimination.

If we can move beyond the myth of preemption, state and local rights in animal protection could be reinstated, and the function of state and federal laws restored. I believe this could have a profound effect on the prevention of animal cruelty on several fronts. First, it would allow courts to create precedent via federal-state cooperation in fighting animal cruelty. Settlements often involve no admission of fault and undisclosed details. Second, it would overcome assumptions about preemption, especially in the context of animal experimentation, where little case law exists. Third, it would mitigate the chilling effect on district and other government attorneys and animal advocates from bringing animal cruelty cases.

II. THE ENDANGERED SPECIES ACT AND THE AWA

By
Delcianna Winders*

I'm going to be talking about the interaction between the Endangered Species Act (ESA)[46] and the Animal Welfare Act (AWA).[47] I'll be talking about how these two laws operate—or should operate—in tandem. I'm going to give a very brief and vastly oversimplified background of the ESA and then talk about a key prohibition when we're talking about captive wildlife, which is the prohibition on "harassing" animals.

As we'll see, animals at AWA-regulated facilities who are also listed under the ESA are supposed to be protected against harassment, but in fact often are not.

The ESA was enacted in 1973.[48] The Supreme Court has described it as "the most comprehensive legislation for the preservation

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tional marketing of U.S. agricultural products and ensur[ing] the health and care of animals and plants." *Id.*

[45] *See* Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property, in* THE VULNERABILITY THESIS: RETHINKING THE LEGAL SUBJECT 171 (Martha A. Fineman & Anna Grear eds., Ashgate 2013) ("Animals receive legal protections only when their interests align with human interests."); *see also* Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 ANIMAL L. REV. 65, 65 (2009); Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property in* NUSSBAUM AND LAW CH. 4 (Robin West ed. 2015).

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[46] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2018).

[47] 7 U.S.C. §§ 2131–2159.

[48] Pub. L. No. 93-205, 87 Stat. 884 (1973).

of endangered species ever enacted by any nation."[49] It imposes very strict limitations on what you can do with animals who are members of listed species.[50] With very few exceptions, those limits apply to both wild animals and their captive counterparts.[51]

Anna Frostic, during the last panel, suggested some of the reasons underlying this, and they include the fact that captive breeding practices have impacts on the species as a whole, particularly genetic integrity.[52] The use of captive animals can also drive markets for poaching and other harmful uses of wild animals.[53] We're also learning more and more about how human interactions with captive wildlife can affect conservation efforts, so just a few examples. Studies are showing us now that allowing direct human interactions with dangerous wild animals can increase demand for those animals as so-called pets, and that in turn can increase demand for pulling them out of the wild.[54]

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[49] Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 698 (1995) (citation omitted).

[50] See 16 U.S.C. § 1538(a)(1) (prohibiting, inter alia, import, export, take, and sale).

[51] *See id.* § 1538(b)(1) (exempting "pre-Act" animals—animals held in captivity prior to December 28, 1973, or the date of listing, provided "was not in the course of a commercial activity"—from certain limited prohibitions). For a general discussion of the application of the Endangered Species Act to captive wildlife, see Delcianna J. Winders, Jared Goodman & Heather Rally, *Captive Wildlife Under the Endangered Species Act*, *in* ENDANGERED SPECIES ACT (Donald C. Baur & Ya-Wei Li eds., 3d ed.) (forthcoming 2019).

[52] *See* Anna Frostic, Humane Society of the United States, AWA Welfare Standards at the AWA at 50 Conference (Published in Volume 25.2 of *Animal Law* 157); *see, e.g.*, Captive Wildlife Regulation, 44 Fed. Reg. 30,044, 30,044 (May 23, 1979) (to be codified at 50 C.F.R. pt. 17) (showing "captive breeding populations" can provide "a source of known genetic stock to bolster or reestablish populations in the wild").

[53] *See, e.g.*, Endangered and Threatened Wildlife and Plants; Listing All Chimpanzees as Endangered Species, 80 Fed. Reg. 34,500, 34,502 (June 16, 2015) (noting incentive for poachers to "remove animals from the wild and smuggle them into captive-holding facilities in the United States for captive propagation or subsequent commercial use"); Endangered and Threatened Wildlife and Plants; Three Foreign Parrot Species, 79 Fed. Reg. 35,870, 37,879 (June 24, 2104) (listing three cockatoo species "because of habitat loss and degradation and poaching for the pet trade, which are the primary threats to the continued survival of these species").

[54] *See, e.g.*, Stephen R. Ross et al., *Specific Image Characteristics Influence Attitudes About Chimpanzee Conservation and Use as Pets*, 6 PLOS ONE (July 13, 2011), https://journals.plos.org/plosone/article/file?id=.1371/journal.pone.0022050&type=-printable [https://perma.cc/FRT9-CC2E] (accessed Jan. 25, 2019) ("Those viewing an image of a chimpanzee standing next to a human were 30.3% more likely to agree that a chimpanzee was appealing as a pet than those viewing an image of a chimpanzee standing alone."); *see also* Kara K. Schroepfer et al., *Use of "Entertainment" Chimpanzees in Commercials Distorts Public Perception Regarding Their Conservation Status*, 6 PLOS ONE (Oct. 12, 2011), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.&type=printable [https://perma.cc/4AG9-LGQH] (accessed Jan. 25, 2019) ("[O]ver 35% of those watching entertainment condition thought private citizens should have the right to own a chimpanzee as a pet – in comparison to 10% in . . . other conditions."); Michael P. Muehlenbein, *Primates on Display: Potential Disease Consequences Beyond Bushmeat*, 162 AM. J. PHYSICAL ANTHROPOLOGY 32, 35 (2016), https://onlinelibrary.wiley.com/doi/epdf/.1002/.23145 [https://perma.cc/3BQ8-FCU4] (accessed Jan. 25, 2019) (discussing the misrepresentation in imagery and media of primates make

We're also learning that humans in close contact with captive wildlife can have serious impacts on people. A number of studies coming out of the Lincoln Park Zoo have shown that seeing those kinds of interactions can make people believe that the populations are more stable and healthy, and can also make them less likely to donate to conservation.[55]

Captive animals that belong to protected species can and should be regulated under both the AWA and the ESA. One of the reasons that this is so significant for advocates is that the ESA, unlike the AWA,[56] has a citizen suit provision.[57] It allows any person to bring suit to enjoin violations.[58] There are limits on that of course—for instance, you still need to have standing—but it is a very broad grant.[59]

What kinds of things might be challenged in a citizen suit? One of the main ways the ESA protects endangered animals is by prohibiting a host of activities with them.[60] Most notably for our purposes today, it

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them appear as suitable pets); Katherine A. Leighty et al., *Impact of Visual Context on Public Perceptions of Non-Human Primate Performers*, 10 PLoS ONE 1 (2015), https://journals.plos.org/plosone/article/file?id=.1371/.pone.0118487&-type=printable [https://perma.cc/Q2KQ-7WL3] (accessed Jan. 25, 2019) ("There was a significant effect of human presence . . . and a human presence by context interaction . . . on likelihood of desiring the primate as a pet."); *see also* K. Anne-Isola Nekaris et al., *Tickled to Death: Analysing Public Perceptions of 'Cute' Videos of Threatened Species (Slow Lorises – Nycticebus spp.) on Web 2.0 Sites*, 8 PLoS ONE (2013), https://journals.org/plosone/article/file?id=10.1371/-journal.pone.0069215&type=printable [https://perma.cc/4SG4-SJDJ] (accessed Jan. 25, 2019) ("Internet trade is also used to offer legally protected species for sale as pets.").

[55] *See* Ross et al., *supra* note 53, at 1 ("[T]hose viewing a photograph of a chimpanzee with a human standing nearby were 35.5% more likely to consider wild populations to be stable/healthy compared to those seeing the exact same picture without a human."); Schroepfer et al., *supra* note 52, at 1 ("[W]hen participants were given the opportunity to donate part of their earnings from the experiment to a conservation charity, donations were least frequent in the group watching commercials with entertainment chimpanzees."); Muehlenbein, *supra* note 53, at 35 (discussing that misrepresentation in imagery and media of primates appear to make them "in less need of financial contributions for conservation."); *see also* Philip J. Nyhus et al., *Thirteen Thousand and Counting: Threat from Captive Tiger Populations, in* TIGERS OF THE WORLD 237 (Ronald Tilson & Philip J. Nyhus eds., 2d ed. 2010) ("People watch the films, they visit the zoos, and by the mesmeric power of these vicarious experiences, they come carelessly to believe that the [species] . . . is alive and well because they have seen it.").

[56] *See* Kathy Meyer, Meyer Glitzenstein & Eubanks, AWA Litigation and Other Efforts at the AWA at 50 Conference, (Published in Volume 25.2 of *Animal Law* 225); *Report of the Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York Regarding its Recommendation to Amend the Animal Welfare Act*, 9 ANIMAL L. 345, 345 (2003) ("The history of the efforts of concerned individuals to obtain enforcement of laws protecting animals from abuse is a clear demonstration of the absolute necessity of adequate access to justice in a functioning system of law.").

[57] 16 U.S.C. § 1540(g)(1).

[58] *Id*.

[59] *See* Bennett v. Spear, 520 U.S. 154, 164 (1997) (holding that the ESA's citizen suit provision "negates the zone-of-interests test (or, perhaps more accurately, expands the zone of interests)").

[60] 16 U.S.C. § 1538.

includes a prohibition on take,[61] and *take* is defined to include a host of things, including harassment, harming, pursuing, hunting, shooting, and wounding.[62]

The Supreme Court has noted that reports from both the Senate and the House committees at the time the ESA was passed made very clear that the take prohibition is supposed to be very broad.[63] The Senate said *take* should be defined "in the broadest possible manner to include every conceivable way in which a person can take or attempt to take fish or wildlife."[64] The House similarly noted that the broadest possible terms were used to define *take*.[65] The House also went on to note that this is so broad it could even reach, as an example, the activities of bird watchers, if those might disturb the birds.[66]

What does this mean for captive animals? None of these terms within the definition of *take* are defined by statute. Some of them are defined by regulation. *Harm* is defined by both the U.S. Fish and Wildlife Service (FWS) and the National Marine Fishery Service (NMFS)—the two agencies with primary enforcement responsibility—as an act which actually kills or injures fish or wildlife.[67] They then go on to give some examples of what those activities might be, providing a non-exclusive list.[68] To harm an animal under the regulation, you need an actual injury or death.[69] That can certainly arise for captive wildlife, but ideally, we would stop the problem before it actually reached the level of actual injury or death to an animal.

Enter the harassment prohibition. *Harass* is not defined by NMFS. The FWS does have a regulatory definition of the term: "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns."[70] Again, it gives examples—a non-exclusive list of normal behaviors that might be disrupted: breeding, feeding, sheltering.[71]

The regulation goes on to provide:

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[61] *See id.* § 1538(a)(1)(B) ("[I]t is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States.").

[62] *Id.* § 1532.

[63] *Babbitt*, 515 U.S. at 704–05 (citing S. REP. NO. 93-307, at 7 (1973), *as reprinted in* 1973 U.S.C.C.A.N. 2989, 2995; H.R. REP. NO. 93-412, at 15 (1973)).

[64] S. REP. NO. 93-307, at 7 (1973), *as reprinted in* 1973 U.S.C.C.A.N. 2989, 2995.

[65] H.R. REP. NO. 93-412, at 154 (1973).

[66] *Id.* at 150.

[67] 50 C.F.R. § 17.3 (2006); 50 C.F.R. § 222.102 (2015); *see also What Is the Endangered Species Act?*, NOAA FISHERIES, https://www.fisheries.noaa.gov/node/1221 [https://perma.cc/Q6WE-FMVP] (accessed Jan. 25, 2019) ("Generally, U.S. FWS manages land and freshwater species, while NOAA Fisheries is responsible for marine and anadromous species.").

[68] 50 C.F.R. § 17.3; 50 C.F.R. § 222.10.

[69] 50 C.F.R. § 17.3; 50 C.F.R. § 222.10.

[70] 50 C.F.R. § 17.3.

[71] *Id*.

> This definition, when applied to captive wildlife, does not include generally accepted:
>
> (1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,
>
> (2) Breeding procedures, or
>
> (3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.[72]

Why did the FWS put this regulatory exemption in place? Basically, the agency saw a tension between the fact that the ESA doesn't prohibit the mere possession of wildlife (i.e., it doesn't prohibit you from keeping wildlife), but it prohibits you from harassing that wildlife, and, arguably, merely keeping a wild animal in captivity could be considered harassment; this exception was the FWS's attempt to strike a balance between the fact that while possession is allowed, harassment is not.[73]

At the time that the agency promulgated this regulation, it made very clear that this exception is meant to exempt "humane and healthful care," but that "improper husbandry" and "maintaining animals in inadequate, unsafe or unsanitary conditions, physical mistreatment and the like constitute harassment, because such conditions might cre-

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[72] *Id*.

[73] *See, e.g.*, Captive-Bred Wildlife Regulation, 58 Fed. Reg. 32,632, 32,637 (proposed June 11, 1993) (codified in 50 C.F.R. pt. 17) ("On the subject of the term 'harass,' the Service believes that persons who legally hold listed wildlife without a permit have been inadvertently placed in a gray area. While a permit is not required to possess lawfully acquired listed wildlife, one cannot possess it without doing something to it that might be construed as harassment under a literal interpretation of the present definition, *e.g.*, keep it in confinement, feed it a diet that may be artificial, provide medical care, etc. Obviously, maintaining animals in inadequate, unsafe or unsanitary conditions, feeding an improper or unhealthful diet, and physical mistreatment constitute harassment because such conditions might create the likelihood of injury or sickness of an animal. It is proposed to modify the definition of 'harass' in 50 C.F.R. 17.3 to exclude normal animal husbandry practices such as humane and healthful care when applied to captive-born wildlife."); Captive-Bred Wildlife Regulation, 63 Fed. Reg. 48,634, 48,639 (Sept. 11, 1998) ("[A] person cannot possess wildlife without doing something to it that might be construed as harassment under a literal interpretation of the definition in use since 1979, e.g., keep it in confinement, provide veterinary care, etc. Under this scenario, a person who legally possessed wildlife without a permit could be considered in violation of the prohibition against harassment unless they obtained a specific permit that authorized them to conduct normal animal husbandry activities."); *see also* Captive-Bred Wildlife Regulation, 58 Fed. Reg. 32632, 32634 (June 11, 1993) (codified in 50 C.F.R. pt. 17) ("The Service is concerned that persons who legally hold . . . [captive-born] wildlife without a permit, and who provide humane and healthful care to their animals, would be held to an impossible standard by the concept that holding captive-born animals in captivity constitutes harassment simply because their behavior differs from that of wild specimens of the same species. Such a construction of the concepts of 'harass' and 'take' would virtually result in a comprehensive prohibition on the possession of listed wildlife species . . . .").

ate the likelihood of injury or sickness."[74] In other words, this is not a blanket exception.

How does this play out for captive animals in reality? In terms of enforcement, I was not able to find a single instance of a federal prosecution for harassment of captive wildlife under the ESA. We do see occasionally prosecutions pertaining to captive animals who are trafficked, but generally not for the conditions of their captivity.

We are seeing more and more citizen suits challenging harassment of protected animals.[75] I am going to talk about three such cases that are currently pending in federal courts of appeals. Each of these cases will have a significant outcome, not just for the plaintiffs in those cases and the animals at issue, but really for the future of the ESA and its application to captive wildlife going forward.

For that reason, I am going to focus the rest of our discussion on these cases. The first involves Lolita, who Dr. Naomi Rose and Georgia Hancock talked about a little bit before.[76] Lolita is at Miami Sea-

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[74] Captive-Bred Wildlife Regulation, 63 Fed. Reg. at 48638 (Sept. 11, 1998) (codified in 50 C.F.R. pt. 17); Captive-Bred Wildlife Regulation, 58 Fed. Reg. at 32637 (June 11, 1993).

[75] *See, e.g.*, PETA v. Miami Seaquarium, 879 F.3d 1142, 1145 (11th Cir. 2018) (stating that PETA is specifically suing Seaquarium because it is subjecting Lolita, a killer whale, to harm or harassment, citing thirteen separate injuries to Lolita); Hill v. Coggins, 867 F.3d 499, 508 (4th Cir. 2017) ("Plaintiffs contend that the manner in which the Zoo maintains its bears constitutes harassment and harm proscribed by the ESA."); Kuehl v. Sellner, 887 F.3d 845 (8th Cir. 2018) (holding that housing and care of endangered lemurs and tigers constituted "harassment"); Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entm't, Inc., 659 F.3d 13, 17 (D.C. Cir. 2011) ("Specifically, [plaintiffs] claim that Feld's use of two techniques for controlling the elephants—bullhooks and chains—harms the animals in violation of the Endangered Species Act."); Mo. Primate Found. v. PETA, No. 4:16 CV 2163 CDP, slip op. at 1 (E.D. Mo. Mar. 22, 2018) ("PETA's counterclaim alleges that MPF: fails to meet the chimps' fundamental social, physical, and psychological needs; confines them to a dangerous and unsanitary environment; restricts them to a dangerously unhealthy diet; and fails to provide them with adequate preventative and emergency veterinary care . . . MPF's actions caused the chimpanzees psychological harm . . . ."); PETA v. Wildlife in Need & Wildlife in Deed, Inc., No. 417CV00186RLYDML, slip op. at 1 (S.D. Ind. Feb. 12, 2018) ("[PETA] filed a complaint for injunctive relief against Defendants . . . alleging violations of the Endangered Species Act of 1973."); PETA v. Tri-State Zoological Park of W. Md., Inc., No. CV MJG-17-2148, slip op. at 1 (D. Md. Jan. 16, 2018) ("[PETA]. . . brings a citizen lawsuit alleging violations of Section 11(g)(1)(A) of the Endangered Species Act ('ESA')."); Graham v. San Antonio Zoological Soc'y, 261 F. Supp. 3d 711, 716 (W.D. Tex. 2017) ("Plaintiffs allege that the Zoo has violated Section 9 of the Endangered Species Act ('ESA') by unlawfully 'taking' an endangered species, which is defined to include 'harming' and 'harassing' such a species.").

[76] Dr. Naomi Rose & Georgia Hancock Snusz, Animal Welfare Institute, Welfare Standards at the AWA at 50 Conference, (Published in Volume 25.2 of *Animal Law* 157); *see Miami Seaquarium*, 879 F.3d at 1144 ("A member of the Southern Resident L Pod . . . Lolita was captured off the coast of Washington state when she was between 3 and 6 years old. Seaquarium purchased Lolita, and she has lived at Seaquarium since September 24, 1970. Lolita is about 20 feet long and weights around 8,000 pounds.").

quarium.[77] She is in the smallest orca tank in North America,[78] which has an obstruction in it.[79]

A little bit more background: Almost fifty years ago, Lolita was taken from her pod in the Puget Sound as a baby.[80] As you've heard and probably already knew, orcas are highly social animals.[81] But Lolita has not seen another orca since 1980, when her companion, Hugo, rammed his head into the side of their tank and died.[82] Despite the fact that Lolita has not seen another orca for decades, it's reported that she still uses vocalizations that are known only to her pod, and reportedly when she was played the recording of her pod's calls, she even seemed to recognize those calls.[83]

As you heard from Dr. Naomi Rose, orcas swim tremendous distances.[84] They can swim up to a hundred miles a day;[85] they dive hundreds of feet.[86] Lolita is about 20 feet long.[87] Her tank is 20 feet at its deepest and it's 80 feet across at its widest.[88] It's impossible for her to dive even a few feet; it's impossible for her to travel any meaningful distance.

What does the ESA have to do with this? In 2005, NMFS listed the population of orcas that Lolita was taken from, the Southern Resident

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[77] *Miami Seaquarium*, 879 F.3d at 1144.

[78] Chabeli Herrera, *Lolita May Never Go Free. And That Could Be What's Best for Her, Scientists Say*, MIAMI HERALD (updated Nov. 29, 2017), https://www.miamiherald.com/-news/business/article185517463.html [https://perma.cc/F5CE-YJNP] (accessed Jan. 25, 2019). In fact, Lolita appears to be held in the smallest orca tank in the *world*.

[79] *See Miami Seaquarium*, 879 F.3d at 1144–45 ("[a] portion of the tank is occupied by a concrete platform"); U.S. DEP'T OF AGRIC., APHIS: ANIMAL WELFARE ACT-MARINE MAMMALS (CETACEANS), AUDIT NO. 33601-0001-31, at 4–8 (May 30, 2017) (describing in detail the large work island that obstructs Lolita's tank).

[80] *Miami Seaquarium*, 879 F.3d at 1144.

[81] Dr. Naomi Rose & Georgia Hancock Snusz, Animal Welfare Institute, Welfare Standards at the AWA at 50 Conference, (Published in Volume 25.2 of *Animal Law* 157).

[82] *See Miami Seaquarium*, 879 F.3d at 1145 ("Lolita has not lived with another orca since 1980, when Hugo, her former companion, passed away.").

[83] Christopher Frizzelle, *The Fight to Free Lolita*, THE STRANGER (Sept. 30, 2015), https://www.thestranger./features/feature/2015/09/30/22939219/its-time-to-free-lolita-a-puget-sound-killer-whale-thats-been-trapped-in-miami-for-45-years [https://perma.cc/6QYP-3JU7] (accessed Jan. 25, 2019).

[84] Dr. Naomi Rose & Georgia Hancock Snusz, Animal Welfare Institute, Welfare Standrds at the AWA at 50 Conference, (Published in Volume 25.2 of *Animal Law* 157).

[85] Simon Worrall, *How Killer Whales Went from Hated, to Adored, to Endangered*, NAT'L GEOGRAPHIC (Aug. 10, 2018), https://www.nationalgeographic.com/animals/2018/08/orcas-killer-whales-endangered-cetaceans-news [https://perma.cc/YNJ7-QXXC] (accessed Jan. 25, 2019).

[86] *See* Fen Montaigne, *Mysteries of Killer Whales Uncovered in the Antarctic*, YALE ENVIRONMENT 360 (Feb. 2, 2012), https://e360.yale.edu/features/mysteries_of_killer_whales_uncovered-_in_the_antarctic [https://perma.cc/J3QC-PF8W] (accessed Jan. 25, 2019) (discussing that a depth tag affixed to an orca "[s]howed that the whales were repeatedly making deep, nighttime dives of up to 1,900 feet").

[87] *Miami Seaquarium*, 879 F.3d at 1144.

[88] *Id.*

Killer Whale population, under the ESA.[89] But when it did that, it excluded Lolita.[90] It excluded captive members of the population from the listing.[91] Lolita was the only one who was still alive at that point. The agency gave no explanation whatsoever for excluding her.[92]

A coalition of groups then challenged that exclusion, and ultimately were successful.[93] In 2015, finally, ten years after being excluded, Lolita was included in the listing and, shortly thereafter, an ESA citizen suit, brought again by a coalition, was filed on her behalf contending that she was unlawfully being harmed and harassed in violation of the ESA.[94]

The court in that case, despite recognizing that Lolita's conditions were disrupting her normal behavior patterns, concluded that they don't violate the ESA.[95] The court acknowledged that Lolita lacks social contact, Lolita engages in abnormal stereotypic behaviors that are well recognized signs of poor welfare, and "Lolita cannot engage in normal swimming or diving behaviors even as compared with other orcas

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[89] *Id.* at 1145 (citing Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. 69,903, 69,903, 69,911 (Nov. 18, 2005) (codified at 50 C.F.R. § 17.11)).

[90] *Id.*

[91] *Id.*

[92] *See* Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. at 69,911, 69,912 (discussing endangered status for Southern Resident Killer Whales). Such differential treatment of captive members of listed species was once common and is referred to as a 'split listing.' *See generally* Winders et al., *supra* note 50, at 7–12 (discussing split listings). The FWS and NMFS have recognized that such differential treatment of captive wildlife and their wild counterparts is not lawful under the ESA. *See, e.g.*, Listing Endangered or Threatened Species: Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment, 80 Fed. Reg 7,380, 7,395 (May 11, 2015) ("[S]everal courts have held, and NMFS agrees, that the ESA does not allow for captive held animals to be assigned separate legal status from their wild counterparts on the basis of their captive status or through designation as a separate DPS [distinct populating segment] . . . . [C]aptive members of a species have the same legal status as the species as a whole." (citing Safari Club Int'l v. Jewell, 960 F. Supp. 2d 17 (D.D.C. 2013); Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154 (D.Or. 2001)); Endangered and Threatened Wildlife and Plants; Listing the Scarlet Macaw, 81 Fed. Reg. 20,302, 20,303 (Apr. 7, 2016) (codified at 50 C.F.R. pt. 17) ("[T]he ESA does not allow for captive-held animals to be assigned separate legal status from their wild counterparts on the basis of their captive state, including through designation as a DPS."); Endangered and Threatened Wildlife and Plants; Listing All Chimpanzees as Endangered Species, 80 Fed. Reg. 34,500, 34,501, 34,522 (June 16, 2015) (to be codified at 50 C.F.R. pt. 17) ("Congress did not intend for captive specimens of wildlife to be subject to separate legal status on the basis of their captive state."); Endangered and Threatened Wildlife and Plants; 12-Month Findings on Petitions to Delist U.S. Captive Populations of the Scimitar-horned Oryx, Dama Gazelle, and Addax, 78 Fed. Reg. 33,790, 33,792 (June 5, 2013) (to be codified at 50 C.F.R. pt. 17) ("[W]e find that the Act does not allow for captive-held animals to be assigned separate legal status from their wild counterparts on the basis of their captive state . . . .").

[93] *Miami Seaquarium*, 879 F.3d at 1145.

[94] *Id.*

[95] PETA v. Miami Seaquarium, 189 F. Supp. 3d 1327, 1342–43, 1355 (S.D. Fla. 2016), *aff'd*, 879 F.3d 1142.

in captivity, causing her physical and psychological injury."[96] The court then went on to say, "[I]n a literal sense, these conditions and injuries of which Plaintiffs complain are within the ambit of the ordinary meaning of . . . harass."[97] But the court denied relief to Lolita.[98] What the court said was, an animal held by an AWA-licensed exhibitor *takes* a captive animal in violation of the ESA "only when its conduct gravely threatens or has the potential to gravely threaten the animal's survival."[99]

This requirement of a grave threat is certainly not in the regulatory definition.[100] It really has no basis in the law. It flies in the face of the Supreme Court's recognition that Congress intended the take prohibition to be interpreted very broadly.[101] This interpretation also impermissibly treats captive animals differently from their wild counterparts.[102] This decision is on appeal before the Eleventh Circuit.[103] Full disclosure, I'll be arguing that appeal. You know my point of view on the issue. The stakes are really high, not just for Lolita, but for all captive animals.

The second case was brought against the Cherokee Bear Zoo (CBZ).[104] It was brought by two elders of the Eastern Band of Cherokee Indians against a roadside zoo in North Carolina that confines four

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96 *Id.* at 1342–43.

97 *Id.* at 1355.

98 *Id.*

99 *Id.*

100 50 C.F.R. § 17.31.

101 *Babbitt*, 515 U.S. at 704–05 (citing S. REP. NO. 93-307, at 7 (1973) *as reprinted in* 1973 U.S.C.C.A.N. 2989, 2995; H.R. REP. NO. 93-412, at 15 (1973)).

102 See *supra* note 91.

103 On appeal the Eleventh Circuit upheld the district court's order but interpolated a "serious harm" requirement into the statute in lieu of "grave harm." *Miami Seaquarium*, 879 F.3d at 1150. Both are equally unsupported by the statutory and regulatory language as well as the legislative history and Supreme Court precedent. The Eleventh Circuit did, however, make clear that its decision was specific to Lolita's "unique case," PETA v. Miami Seaquarium, 905 F.3d 1307, 1308 (11th Cir. 2018) (denying petition for panel rehearing), and several district courts, including in the Eleventh Circuit, following the Lolita decision, have concluded that inadequate conditions at captive facilities can "harass" and "harm" protected wildlife in violation of the ESA, *see* Consent Judgment Order, PETA v. Mobile Veterinary Servs. Equine, Inc., No. 4:18-cv-00163 (S.D. Ind. Oct. 23, 2018) (finding that declawing captive endangered and threatened big and exotic cats when not medically necessary violates the ESA); PETA v. Dade City's Wild Things, Inc., No. 8:16-cv-02899-CEH-AAS (M.D. Fla. Oct. 10, 2018) (report and recommendation finding that prematurely separating tiger cubs from their mothers, forcing cubs to participate in public encounters, and confining them to inadequate enclosures threaten serious harm); PETA v. Wildlife in Need, No. 417-00186, 2018 WL 828461 (S.D. Ind. Feb. 12, 2018) (granting preliminary injunction enjoining defendant roadside zoo from declawing tigers and lions, using them in public encounters, or prematurely separating cubs from their mothers); PETA v. Tri-State Zoological Park of W. Md., Inc., No. CV MJG-17-2148, 2018 WL 434229 (D. Md. Jan. 16, 2018) (involving social isolation for lemurs and lion, absence of appropriate enrichment, enclosures, shelter, and sanitary environments for lemurs, tigers, and lion, and stressful public contact with tigers and lion).

104 Hill v. Coggins, 867 F.3d 499 (4th Cir. 2017).

grizzly bears to virtually barren concrete pits.[105] The district court here recognized that confining bears to pits is 'archaic,' advised against by experts, and harmful to the animals' well-being.[106] But because the U.S. Department of Agriculture (USDA) has tolerated these conditions under the AWA, the court found no violation of the ESA.[107]

The court completely disregarded the requirement that, to be exempt from the harassment prohibition, an activity needs to be "generally accepted."[108] What the court said is, "[w]hether the CBZ's practices are generally accepted . . . is not relevant . . . . Only when the exhibitor's practices fail to meet the minimum standards established by the Animal Welfare Act can such practices constitute 'harassment' of captive endangered or threatened species."[109] This interpretation would gut the ESA's protections for captive animals if upheld.[110] Again, the stakes are very high. This was set for oral argument in the Fourth Circuit for January. That's just been continued, we don't know why, but it will be heard early next year, like Lolita's case.[111]

The final case involves Cricket Hollow Zoo.[112] This is a bit of a happier story, at least so far. Cricket Hollow is a roadside zoo in Iowa. The lawsuit, brought by the Animal Legal Defense Fund and five individuals, challenged the treatment of endangered tigers and lemurs, including social isolation, inadequate vet care, and inadequate sanitation.[113] The district court held that lemurs and tigers were indeed being harmed and harassed in violation of the take prohibition of the ESA.[114] Among other things, the violative conditions were depriving lemurs, which are highly social animals, of adequate social companionship.[115]

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105 *Id.* at 502–03.

106 Hill v. Coggins, No. 2:13-cv-00047, 2016 WL 1251190, *14 (W.D.N.C. Mar. 30, 2016) ("It appears to be the general consensus of nearly all involved that the pit enclosures at issue are not ideal . . . . [T]hey are now generally considered archaic. Modern zookeeping standards, as well as the expectations of the general public, have evolved to require more natural environments for captive wildlife. Such environments not only benefit the animals by enhancing their overall well-being . . . . [T]he issue before the Court is whether the pit enclosures, archaic as they may be, are *so* harmful and harassing as to amount to a "taking" under the Endangered Species Act . . . . [T]he Court concludes that they are not." (emphasis added)).

107 *Hill*, 867 F.3d at 504.

108 50 C.F.R. § 17.31; *see also Hill*, 867 F.3d at 509 ("The district court's . . . interpretation renders meaningless the phrase 'generally accepted' in 50 C.F.R. § 17.3. It therefore conflicts with basic principles of legal interpretation.").

109 *Hill*, 867 F.3d at 515.

110 Thankfully it was not. *Id.* at 512.

111 The Fourth Circuit reversed and remanded the case to the district court. *Id.* at 510–11. At the time of publication, the district court had not yet issued an opinion.

112 *See Kuehl*, 887 F.3d at 845 (stating that the plaintiffs, which included the ALDF, brought suit against the defendants, Cricket Hollow Zoo, regarding the mistreatment of endangered species).

113 *Id.*

114 Kuehl v. Sellner, 161 F. Supp. 3d 678, 710–18 (N.D. Iowa 2016), *aff'd*, 887 F.3d 845.

115 *Id.* at 710–11.

Lucy, a red ruffed lemur, was kept completely alone despite being part of a highly social species.[116] Tigers were kept in filthy enclosures with excessive built-up feces and denied veterinary care.[117] The court noted that in just over two years, five tigers had died at the facility.[118] Of course, the roadside zoo is appealing the case and that's now pending in the Eighth Circuit.[119] Among other things, they argue the mere fact that Cricket Hollow is licensed by the USDA under the AWA should render it completely exempt from the ESA's take provision.

According to Cricket Hollow, the AWA provides a "safe harbor" for licensed facilities—as an AWA-licensed facility, they are exempt from the ESA.[120] These are really extreme arguments. This position goes further than the district courts that we saw in the other two cases. I hope the appeals court will see through this.[121] Again, we need to make sure that they do.

We have three high stakes cases pending on appeal. I just briefly want to discuss another effort that's pending on this issue. Last year, the Humane Society of the United States (HSUS) filed an omnibus petition for rule making with the FWS on issues pertaining to captive animals under the ESA.[122] It's a really great petition and, among many other things, it addresses the definition of "harass"—it urges the FWS to amend the regulatory definition of "harass" to completely get rid of the exception for captive wildlife.[123] The FWS has not yet formally responded to the petition. I'm hopeful that it will and that in the interim, HSUS will hold the agency's feet to the fire. I think that regulatory fix could also help provide guidance to the courts as these cases continue to arise.

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116 *Id.* at 703.

117 *Id.* at 713–18.

118 *Id.* at 714. Three big cats at the facility died in a single month (two tigers and a lion). *Id.* at 708.

119 The Eighth Circuit affirmed. *Kuehl*, 887 F.3d 845.

120 Brief of Defendants-Appellants, Kuehl v. Sellner, Nos. 16-1624 & 16-3147, 2016 WL 6134496, at *10.

121 Indeed, it did. *See Kuehl,* 887 F.3d at 852–54 (explaining that the AWA "does not provide blanket immunity" to ESA liability and upholding district court's take findings).

122 Humane Soc'y of the U.S., Petition for Rulemaking to Amend the Endangered Species Act Regulations Pertaining to Captive Wildlife (June 16, 2015).

123 *Id.*