ANIMAL WELFARE ACT: RELATED LITIGATION AND OTHER EFFORTS

Joyce Tischler discusses the background of the Animal Welfare Act from the 1971 definitional change of the term "animal" to the 1985 Amendment for improved standards. Her organization, Animal Legal Defense Fund, was the first to litigate the Animal Welfare Act's terms and the U.S. Department of Agriculture's regulations. Valerie Stanley expands upon the 1985 Amendment's requirements regarding primates and the regulatory struggles Animal Legal Defense Fund faced therein. Jenni James discusses Article III standing and the difficulties in getting into court due to a general reluctance to recognize plaintiffs as satisfying standing under the Animal Welfare Act. She also discusses the courts preference to give agencies deference and the subsequent consequences that imposes on the regulatory scheme. Katherine Meyer discusses the effects of the U.S. Department of Agriculture's tendency to not aggressively enforce the Animal Welfare Act and the necessity of adding a citizen suit provision to the Act.

I. ANALYSIS OF EARLY REGULATORY AND LITIGATION EFFORTS TO ENFORCE THE ANIMAL WELFARE ACT

By
Joyce Tischler and Valerie Stanley*

Joyce Tischler: In 1985, my organization, Animal Legal Defense Fund (ALDF)[1] was about six years old. We were pretty bright-eyed

 As founder of the Animal Legal Defense Fund in 1979, California attorney Joyce Tischler has helped create and shape the emerging field of animal law. Joyce litigated some of the Animal Legal Defense Fund's earliest cases, including a 1981 lawsuit that halted the U.S. Navy's plan to kill 5,000 feral burros, and a 1988 challenge to the U.S. Patent and Trademark Office's rule allowing the patenting of genetically altered animals. She served as the Animal Legal Defense Fund's first executive director for twenty-five years. Valerie Stanley was a founding partner of the law firm of Galvin, Stanley & Hazard and served as an Assistant Public Defender for Montgomery County, Maryland before serving as senior staff attorney at the Animal Legal Defense Fund. She now practices animal law with an emphasis on litigation and advocacy to protect wild horses and burros as integral parts of the public lands.

[1] *Animal Legal Defense Fund*, http://www.aldf.org [https://perma.cc/SWT6-XFJR] (accessed Jan. 25, 2019).

and bushy-tailed—naive in many ways. When the 1985 Amendment (to the federal Animal Welfare Act (AWA))[2] passed, we thought, "This offers great potential for improvement of the treatment given to animals used in research." In fact, the title of the Amendment was *Improved Standards for Laboratory Animals Act of 1985*.[3] We focused on that word *improved*. What we wanted to do was to flesh out the terms of the AWA.[4] It had been in existence for twenty years, but neither its terms, nor the U.S. Department of Agriculture's (USDA) implementing regulations had been litigated.

We hoped that lawsuits would ensure that the protections written into the law, especially with the amendment, would actually be delivered to these animals. Our first action came in 1986, when our then-New York staff attorney, Jolene Marion, prepared a response to the USDA's request for information on pain and anesthesia, with reference to the 1985 Amendment. Our response included 141 examples of painful procedures that had been performed in U.S. laboratories on fully conscious animals,[5] where, as far as we could tell, anesthetics or analgesics had been withheld.

Jolene worked closely with Eleanor Seiling, the founder of United Action for Animals.[6] Eleanor's career advocating for animals used in research was largely spent reviewing and critiquing published information in scientific journals.

We'll never know for sure if anesthesia or analgesics had been withheld, but they weren't mentioned in any of the articles cited, and so we presumed and contended that the withholding of pain relief violated the AWA. The submission of the report was as far as that effort went.

You have already heard, from previous speakers, the tortured history of the AWA.[7] I'd like to provide some background to a sore wound: the fight to protect rats, mice, and birds. Ultimately, in 2002, the Act was amended to exclude rats, mice, and birds from the definition of "animal."[8] But earlier, in 1970, Congress had substantially broadened the definition of "animal."[9] When I teach law students about the AWA,

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[2] Improved Standards for Laboratory Animals Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (1985) (the ISLAA was an amendment to the AWA and was included in the omnibus farm bill known as the Food Security Act of 1985, Subtitle F–Animal Welfare).

[3] *Id.*

[4] The Animal Welfare Act, 7 U.S.C. §§ 2131–59 (2014).

[5] *See* David S. Favre, *Some Thoughts on Animal Experimentation*, 2 ANIMAL L. 161 (1996) (discussing the work the author did in conjunction with Jolene Marion to produce the report).

[6] *Eleanor E. Seiling, 78, Dies; Headed Animal-Rights Unit*, N.Y. TIMES (Aug. 14, 1985), https://www.nytimes.com/1985/08/14/nyregion/eleanor-e-seiling-78-dies-headed-animal-rights-unit.html [https://perma.cc/LS78-UMBU] (accessed Jan. 25, 2019).

[7] *See* Henry Cohen, *The Animal Welfare Act*, 2 J. ANIMAL L. 13 (2006) (discussing the early history of the AWA).

[8] Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10301, 116 Stat. 134, 359 (2002).

[9] Animal Welfare Act, Pub. L. No. 91-579, § 2131, 84 Stat. 1560, 1561 (1970).

I start with the words that appear in the Act, "The term animal means . . . such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, [or] experimentation . . . ."[10]

In 1971, the USDA promulgated a regulation that specifically excluded rats, mice, and birds from the 1970 definitional change.[11] We thought that the 1971 regulation clearly violated the plain language of the 1970 Amendment. ALDF and The Humane Society of the United States (HSUS) filed a petition for rulemaking with the USDA,[12] and when the USDA eventually declined to change its rule,[13] we sued the agency in the U.S. District Court, D.C.[14] The judge assigned to that case was Charles Richey.[15] In response to the lawsuit, the USDA had some colorful and far-fetched arguments as to why they were not including rats, mice, and birds, and you had to give them points for creativity. First, they claimed that Congress gave the USDA absolute discretion to interpret the meaning of the word "animal."[16]

Their second argument was that the phrase, "as the Secretary may determine," gave the USDA discretion to choose which species to include.[17] Judge Richey labelled the USDA's interpretation "strained and unlikely."[18] At oral argument before the D.C. Circuit, the USDA asserted, for the first time, that it had not determined that rats, mice, and birds were being used in research.

In granting our motion for summary judgment, Judge Richey held that the USDA's construction of the Act was arbitrary and capricious.[19] He began by quoting the stated purpose of the AWA, "to ensure that animals intended for use in research . . . are provided humane care and treatment."[20]

Judge Richey reasoned that if the stated purpose of the Act is to insure that animals used in research are provided humane care, the inclusion of 95% of those animals would help to insure that the pur-

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[10] *Id.*

[11] Title 9—Animals and Animal Products, Miscellaneous Amendments to Chapter, 36 Fed. Reg. 24897, 24919 (Dec. 24, 1971) (to be codified at 9 C.F.R. pt. 1).

[12] Letter from Dr. Martin L. Stephens, Dir. of Laboratory Animals, HSUS and Valerie Stanley, Esq., ALDF, to James Glosser, Animal and Plant Health Inspection Service (APHIS) Adm'r, USDA (Nov. 15, 1989) (on file with ALDF).

[13] Letter from James Glosser, APHIS Adm'r, USDA, to Dr. Martin L. Stephens, Dir. of Laboratory Animals, HSUS, and Valerie Stanley, Esq., ALDF (June 8, 1990) (on file with ALDF).

[14] Animal Legal Def. Fund v. Madigan, 781 F. Supp. 797 (D.D.C. 1992). When the complaint was filed in this case, the Secretary of Agriculture was Clayton Yeutter. Secretary Yeutter was replaced by Edward Madigan in 1991. Thus, some documents in Civil Action Number 90-1872 are labeled Animal Legal Def. Fund v. Yeutter and some are labeled Animal Legal Def. Fund v. Madigan.

[15] *Id.* at 798.

[16] *Id.* at 800.

[17] *Id.* at 801.

[18] *Id.*

[19] *Id.* at 806.

[20] *Id.* at 801; 7 U.S.C. § 2131(1).

pose of the Act is met.[21] Exclusion of that 95% would not serve the purpose.[22] Since the USDA acknowledged that rats, mice, and birds are, indeed, used in research, testing, and experimentation, its argument was "inconsistent with the plain meaning of the statute . . . ."[23] To us, this lawsuit seemed like a no-brainer on the merits, but on appeal, we could not get to the merits because we lost on standing.[24] The Court of Appeals for the D.C. Circuit vacated, holding that none of our four plaintiffs had standing.[25] Now, for those of you who are not familiar with standing, lucky you.

Standing to sue is the requirement that the plaintiff has suffered a concrete and direct injury that can be remedied by the lawsuit.[26] It is also the legal system's way to keep unpopular plaintiffs out of court. In the mid-1980s, believe me, there was no plaintiff more unpopular than animal rights attorneys trying to protect animals in research. We were painted as mindless, overly-emotional, people-haters, who were anti-science. Eight years later, as Sue Leary told you, Alternatives Research and Development Foundation brought a very similar case.[27]

Thankfully, their plaintiffs were found to have standing,[28] and the USDA agreed to promulgate regulations.[29] But, our hopes for an AWA that met the mandate of Congress were quickly dashed when the Helms Amendment[30] simply eliminated rats, mice, and birds from the

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[21] *Madigan*, 781 F. Supp. at 801. According to the National Association for Biomedical Research, "Approximately 95 percent of all laboratory animals are rats and mice." *Mice and Rats*, NAT'L ASS'N FOR BIOMEDICAL RES., http://www.nabr.org/biomedical-research/laboratory-animals/species-in-research/mice-and-rats/ [https://perma.cc/U78K-67LL] (accessed Jan. 25, 2019).

[22] *Madigan*, 781 F. Supp. at 801.

[23] *Id.*

[24] Animal Legal Def. Fund v. Espy, 23 F.3d 496, 498 (D.C. Cir. 1994). Mike Espy replaced Edward Madigan as Secretary of Agriculture in 1993.

[25] *Id.* at 503–04.

[26] The U.S. Supreme Court's three-part test to determine whether a party has standing to sue is: (1) The plaintiff must have suffered an "injury in fact," an injury to "a legally protected interest which is (a) concrete and particularized" and "(b) actual or imminent"; (2) there "must be a causal connection between the injury and the conduct" of the defendant; and (3) a favorable decision by the court must be likely to redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

[27] Alt. Research & Dev. v. Glickman, 101 F. Supp. 2d 7, 9 (D.D.C. 2000). Mike Espy left his role as Secretary of Agriculture on December 31, 1994. *Dan Glickman Agricultural Secretary*, WASHINGTONPOST.COM: POLITICS, http://www.washingtonpost.com/wpsrv/politics/govt/admin/-glickman.htm?noredirect=ON [https://perma.cc/GZK9-DEVM] (accessed Jan. 25, 2019). Dan Glickman became the next Secretary on March 30, 1995.

[28] *Glickman*, 101 F. Supp. 2d at 16.

[29] *See* Rick Weiss, *Animal Regulations to Expand*, WASH. POST (Oct. 3, 2000), https://www.washingtonpost.com/archive/politics/2000/10/03/animal-regulations-to-expand/3bb5f815-b104-4684-a79b-c7077260de82/ [https://perma.cc/T6LG-C3U8] (accessed Jan. 25, 2019) (indicating the USDA agreed to begin a formal rulemaking process to expand the regulation of research animals to cover mice, rats, and birds).

[30] Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10301, 116 Stat. 134, 491 (2002). Senator Jesse Helms added an amendment to the 2002 Farm

law. It was quite breathtaking. I have often felt that we failed miserably, and in failing, we were powerless to protect those animals.

In the mid-1980s, the research community and animal activists were at war with each other. There was little willingness, on either side, to engage in reasoned discussion. The animal activists were staging mass demonstrations, even engaging in civil disobedience. The media would expect the two sides to debate and both sides would give them a great show, including high-pitched yelling at each other, name-calling, and posturing.

These sorts of simplistic debates benefited the researchers far more than they benefited us, because if you can narrow the debate to "that rat or your child," guess who wins? Show's over, they won; animals [were] denied basic protections. But I've often wondered: shouldn't humane treatment (as well as replacement and reduction of use) have been the *beginning* of the discussion between activists and researchers? Sadly, in the 1980s and '90s, it was not; neither side was willing to move toward the middle ground, and the real losers were the animals.

What does that say about all of us? When, on the one hand, our society accepts as necessary that we will use other animals to protect our own human well-being, and we assuage our feelings of guilt by promising humane care and treatment to those animals, if that humane care is never delivered, doesn't that make us liars?

I'm thankful to the planners of this conference for giving us the opportunity to revisit what are very painful issues. My sense is that both communities, science and animal protection/rights, have matured. As we're bringing this conference to a close, I sense the possibility that now, unlike in the 1980s, scientists and animal protectionists can engage in reasoned discussions. We can treat each other respectfully. No more name-calling.

We can acknowledge that while we may disagree on some, perhaps many points, we are not as far apart as it once seemed. There are common interests. Personally, I would welcome such conversations. I'm not saying it's going to be easy, but worthwhile conversations never are, and it starts by reaching out and talking.

Valerie Stanley: I'm going to be talking about the 1985 Amendments' requirement that U.S. Department of Agriculture (USDA) establish standards for a physical environment that would be adequate to promote the psychological well-being of primates.[31]

The 1985 Amendments were to take effect one year later. However, in 1988, USDA had still not promulgated any regulations to implement the provisions. Using a provision of the Administrative

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Bill to change the definition of "animal" to exclude birds, rats of the genus *Rattus*, and mice of the genus *Mus*.

[31] Improved Standards for Laboratory Animals Act of 1985, Pub. L. No. 99–198, § 1752 (1985).

Procedure Act (APA),[32] which allows one to sue for agency action that is unreasonably delayed, we brought suit in federal court,[33] and we said to the court, "it's now three years later, where are these proposed regulations?" At our first status conference in the case, the USDA lawyers announced that in that very morning's Federal Register, the proposed regulations had, indeed, been published.[34] The judge said to us, "well, if she files a motion for attorney's fees, you're going to be hard-pressed for me not to grant it." In one day, we got what we wanted, and the government was going to pay us!

Unfortunately, the regulatory struggle began immediately. In addition to research industry resistance to being regulated, there was still much discussion as to what could be done to further the psychological well-being of primates used in experimentation. Unbelievably, many said they didn't agree that primates had psyches. A conference was arranged at Harvard to discuss what, in fact, was primate psychological well-being. Believe it or not, there were so many people there who asserted that primates did not have psyches. There were some, though, who had seen primates in distress, and they chided their colleagues for not understanding and not believing this.

That was one of the first public efforts to try to figure out what could we do for primates, what could we do to improve their psychological well-being. At that point, that concept was at the ridicule stage and then it graduated to the discussion stage. Now, it is at the acceptance stage. The challenge early on was in how to implement this provision. This turned out to be a major, multi-year battle.

The primate regulations that USDA initially issued were very good as far as regulations go.[35] In fact, they were too good. They required larger cages,[36] they required social housing.[37] They were really what we were dreaming of and, unfortunately, this galvanized the industry to fight against them. Industry's argument was, "we can't have this utopia for primates in labs because there are too many types of primates, there are too many sizes of facilities, one size would not fit all, and it would all cost too much."

Industry got USDA to believe that since they were the primate holders and they had all this experience housing primates that they were really the experts, that USDA should leave working out all the details to the facilities that really had the most experience with them. It should leave it to the experts. This made no sense to us. We said, "wait a minute, USDA is going to leave the setting of standards to the very entities who say that primates don't have psyches, that primates

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[32] Administrative Procedure Act, 5 U.S.C. § 706(1) (2018).

[33] Animal Legal Def. Fund v. Yeutter, 760 F. Supp. 923, 924, 928 (D.D.C. 1991).

[34] Animal Welfare; Proposed Rules 49 Fed. Reg. 10822, 10913 (proposed Mar. 15, 1989) (to be codified at 9 C.F.R. pt. 3).

[35] *Id.*

[36] *Id.* at 10917.

[37] *Id.*

are doing fine, and everything is working well so don't fix it?" We saw a huge disconnect there.

One of the other challenges in developing regulations was that the 1985 Amendments required USDA to consult with Health and Human Services (HHS) to ensure that the Animal Welfare Act (AWA) regulations did not differ from the guidance that HHS provided in its Guide for the Care and Use of Laboratory Animals.[38] The Guide governed all of the research facilities who got federal grants from the National Institutes of Health. Industry argued that USDA couldn't require larger cages because they would be incompatible with the Guide.

Where did these horrible, small, tiny, cramped cages established in the Guide come from? They actually came from the Institute for Laboratory Animal Research guide, the first guide for the care and use of laboratory animals in 1963.[39] The cage sizes being required were merely the cage sizes being used in 1963. What we have and what we've been trying to fight against was the status quo back in 1963.

USDA's disappointing primate regulations were finalized in 1991. Essentially, those regulations required only that each regulated entity had to develop a "plan" for how it would promote the psychological well-being of its primates.[40] The plans could be kept at the facility and presented to USDA upon inspection.

We had to figure out what kind of plaintiffs we could have to challenge the final regulations. We were very leery of bringing people who were upset about primates' poor treatment into court because, frankly, we didn't believe that the court would accept such plaintiffs. We just didn't think that the time was right, that we had to utilize more of a traditional approach to standing.

We considered that we had to have a plaintiff who had suffered an economic harm. We thought surely the court would buy that, that was something they were comfortable with. We had a member of an Institutional Animal Care and Use Committee (IACUC) as a plaintiff who claimed that because the regulations didn't have standards, he was not able to perform the annual inspection because there was just nothing [that] was required. We had a researcher, Dr. Roger Fouts, who had the same complaint.

After we won at the District Court, USDA appealed and on appeal the D.C. Circuit, believe it or not, found that none of our plaintiffs had standing.[41] But, we had Judge Abner Mikva's concurrence where he opined that if the plaintiffs had brought in a person who was concerned about animal welfare, that person surely would have had standing.[42] Armed with that guidance and Judge Williams' dissent in

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[38] Farm Security and Rural Investment Act of 2002 § 10304, 116 Stat. 134, 492.

[39] U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, GUIDE FOR LAB. ANIMAL FACILITIES AND CARE (1963), http://dels.nas.edu/resources/static-assets/ilar/miscellaneous/GUIDE 1963.pdf [https://perma.cc/X6XL-V2B9] (accessed Jan. 25, 2019).

[40] 9 CFR § 3.81 (1991).

[41] Animal Legal Def. Fund, Inc. v. Espy, 29 F.3d 720, 720 (D.C. Cir. 1994).

[42] *Id.* at 726 (Mikva, J., concurring).

the birds, rats, and mice case,[43] we said we've got to come up with plaintiffs who are really injured in an aesthetic way by the regulations' failure to promote psychological wellbeing of nonhuman primates.

I went down to the People for the Ethical Treatment of Animals (PETA) and PETA graciously allowed me to look through their correspondence files from people who had been to zoos where primates were on display to the public and complained about what they saw. We found Mark Jurnove, who had gone to the Long Island Game Farm and seen primates in horrible conditions.

The first time we sued using that theory, the District Court determined we had standing, however, on appeal, we lost on standing. We had a very hostile opinion from the judge. He started his opinion this way: "This appeal is but the latest chapter in the ongoing saga of the Animal Legal Defense Fund, Inc.'s (ALDF) effort to enlist the courts in its campaign to influence USDA's administration of the Animal Welfare Act . . . ."[44]

Now, think about that. If this is a Fortune 500 company bringing suit, if this is a utility, if this is an oil and gas company bringing suit for an agency's continued recalcitrance to do what it was supposed to do, will the court say, "This is an ongoing saga?" No, it wouldn't. It would just be business as usual and this is what we're used to, but this is a bunch of animal people coming in here and presenting things that we would rather not think of.

In any event, Katherine Meyer filed a petition for rehearing and it was granted.[45] Judge Wald had issued a dissenting opinion which said that she thought Judge Sentelle was far off the mark in terms of standing.[46] Eventually, we were able to get standing.[47]

About eight years after USDA had been administering the 1991 regulations, it came to the realization that the "plan" regulations were completely inadequate.

In 1999, USDA published in the Federal Register this admission: USDA took a survey of USDA inspectors responsible for § 3.81's enforcement. Based on this survey, it published a "Final Report on Environment Enhancement to Promote the Psychological Well-Being of Nonhuman Primates" ("Final Report") on July 15, 1999. The Final Report noted that "[a]lmost half the responding employees felt that the criteria in the regulations were not adequate for [regulated] facilities to understand how to meet them and for inspectors to judge if a facility was in compliance." Inspectors complained that § 3.81 provided "few solid criteria" to judge compliance, and a "common refrain" among those surveyed was that "too many enhancement programs consisted

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[43] Animal Legal Def. Fund, Inc. v. Espy, 23 F.3d 496, 504–05 (D.C. Cir. 1994) (Williams, J., concurring in part and dissenting in part).

[44] Animal Legal Def. Fund, Inc. v. Glickman, 130 F.3d 464, 466 (D.C. Cir. 1997).

[45] *Id.* (rehearing granted en banc Mar. 10, 1998).

[46] *Id.* at 471 (Wald, J., dissenting).

[47] Animal Legal Def. Fund, Inc. v. Glickman (*Glickman I*), 154 F.3d 426, 445 (D.C. Cir. 1998) (en banc).

of only one or two types of enrichment . . . in an otherwise barren, stimulus-poor environment." Stressing the "urgency of these problems[,]" the Final Report insisted that "[a] strategy had to be developed to fulfill the original intent and language of the Animal Welfare Act . . . .[48]

After eight years, USDA finally had to acknowledge that the criticisms we had of those regulations turned out to be valid.

II. UNCHECKED—HOW THE ANIMAL WELFARE ACT EVADES JUDICIAL REVIEW

By
Jenni James**

I'm going to continue on with *Glickman*.[49] Really, I want to talk about the fact that this weekend, the Animal Welfare Act (AWA) has taken really quite a beating and I want to shift our focus and beat up on the judiciary for a little bit.

The judiciary is the branch of government that's supposed to provide a check on the executive branch when they're not really fulfilling congressional intent for whatever reason. As litigators, we face so many hurdles and pitfalls seeking judicial review that really meaningful relief is so far pretty much lacking.

The biggest one, as you've heard from pretty much every panel, is standing and I was the person designated to talk about standing so I'll get into it a little bit deeper, but those of you who are lawyers know it far too well.

I'm just going to give a brief overview for the rest of you. I like Joyce's definition of standing better than my own. I think standing is just a way to get your foot into the courtroom door. Her definition, that it's a way to keep unpopular plaintiffs out, is an interesting interpretation. If you're trying to sue in federal court, you have to satisfy what's called Article III standing—that's from the Constitution.[50] Really, the language in the Constitution is just that federal judges can only hear live cases and controversies, but that's been interpreted to have these

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[48] Animal Legal Def. Fund v. Veneman, 469 F.3d 826, 830 (9th Cir. 2006) (quoting APHIS, USDA, FINAL REPORT ON ENVIRONMENT ENHANCEMENT TO PROMOTE THE PSYCHOLOGICAL WELL-BEING OF NON-HUMAN PRIMATES (July 15, 1999)). In response to the Final Report, the USDA published a draft policy. Animal Welfare: Draft Policy on Environment Enhancement for Nonhuman Primates 64 Fed. Reg. 38145, 38146 (July 15, 1999).

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[49] *Glickman I*, 154 F.3d at 445.

[50] U.S. CONST. art. III, § 2, cl. 1.

three standards: an injury in fact, causation, and redressability.[51] In the case that Valerie is talking about Mark Jurnove, the plaintiff who had gone to see the isolated primates at the game farm, he had all of these.[52] His injury in fact was that he had seen and suffered from seeing these primates in this terrible condition.[53]

Your injury has to be cognizable, it cannot be speculative, and it pretty much has to be ongoing.[54] For causation, we often have a problem there because really who is causing those primates to suffer was the game farm. Sometimes there's a little bit of an attenuation problem that we have there. In this case, the game farm couldn't have been doing that if the U.S. Department of Agriculture's (USDA) regulations had been up to snuff and so the court found causation there.[55]

Then redressability just means that a favorable ruling has to at least have some potential to relieve some amount of the injury that the plaintiff has suffered.[56] That's why the injury has to be ongoing because if the primates that Mark Jurnove had seen were all dead, his harm [would] not [be] redressable.[57]

In addition to satisfying Article III standing, statutes sometimes impose their own requirements.[58] A very common one is from the Administrative Procedure Act (APA)[59]—which is the way we get into court to talk about the AWA[60]—and requires that you fall under the zone of interest.[61] That's an interesting challenge here to the Animal Welfare Act, it's supposed to protect the animals so how do humans get standing? And that's a lot of how we're kicked out of court.

In this case, because the AWA is in part to facilitate the viewing of animals for education or entertainment then Mark Jurnove was protected or had standing.[62] In contrast, some of the earlier standing problems that the Animal Legal Defense Fund (ALDF) had in the earlier suit, were that they were harmed because the USDA was not col-

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[51] *Lujan*, 504 U.S. at 560–61.

[52] *Glickman I*, 154 F.3d at 431.

[53] *Id.* at 431–32.

[54] An "injury in fact" must be "concrete and particularized," and "actual or imminent, not 'conjectural or hypothetical,'" and must be "trace[able] to the challenged action of the defendant" and it must be "'likely' as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (internal citations omitted).

[55] *Glickman I*, 154 F.3d at 443.

[56] *Lujan*, 504 U.S. at 561.

[57] *See Glickman I*, 154 F.3d at 443–44 (showing how the redressability analysis included Jurnove's ability to visit particular animals under more humane conditions).

[58] *Id.* at 444.

[59] Administrative Procedure Act, 5 U.S.C. § 701(a) (2018).

[60] 7 U.S.C. §§ 2131–59.

[61] 5 U.S.C. § 702.

[62] *See Glickman I*, 154 F.3d at 444 (reasoning that because "the very purpose of animal exhibitions is, necessarily, to entertain and educate people; exhibitions make no sense unless one takes the interests of their human visitors into account").

lecting the primate environment enhancement plans.[63] If the USDA had collected them, they would have been public and ALDF could have reviewed them.[64] But the AWA isn't about transparency, and so they didn't fall within the zone of interest of the statute and that's why they didn't have standing in that case.[65]

You can imagine, it's difficult to find people like Mark Jurnove, but even within People for the Ethical Treatment of Animals rosters, not everybody is harmed in this way and it's always good to come to court with lots of standing theories so one of them might stick. Because once you have one successful standing theory, the case can proceed. If any of you are emotionally attached to any animals in terrible conditions that you might want to see addressed, just let us know.

We would see if we can do anything about that. It's good to know that organizations themselves can also go in and sue and they accomplish this two different ways. They can sue on behalf of a member who is harmed in a way like Jurnove was, and that's representational standing,[66] or the one we like to use more is suing on their own behalf for their own injuries; it's organizational standing but we really call it *Havens* standing.[67]

You can have *Havens* standing if your organization's mission is frustrated and if the organization is forced to divert resources to combat this wrongful behavior, that frustrates their mission.[68] *Glickman I* is what we call the case where Marc Jurnove won standing.[69] If I got everything right, and ladies feel free to correct me because you were there and I was not, there was a win at the district court level and that was great.[70] On appeal, it was the circuit court that raised the issue of standing and that's another reason why standing is such a terrible hurdle for us.[71] It can be raised at any time and courts can and do raise it *sua sponte*. So, you already won on the merits and now you lost

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[63] *See Espy*, 29 F.3d at 724 (indicating the organization's "standing claims rest on their alleged inability, without sufficiently detailed regulations, to monitor compliance with the Act and to disseminate information about compliance to their members").

[64] *See id.* (indicating the claim was "of 'informational' injury").

[65] *See id.* (explaining informational injury "satisfies the minimum standing requirements of article III but, . . . 'does not fall within the "zone of interests" protected or regulated by the Animal Welfare Act'").

[66] Representational standing, also called associational standing, is found when (1) the organization's members would have standing to sue on their own; (2) the interests at issue are germane to the organization's purpose; and (3) there is no reason that the individual members would be required to participate in the litigation direct. United Food & Commercial Works Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 553 (1996).

[67] Havens Realty Corp. v. Coleman, 455 U.S. 363, 378, 379 n.19 (1982).

[68] *Id.* at 378–79.

[69] *Glickman I*, 154 F.3d at 429.

[70] Animal Legal Def. Fund, Inc. v. Glickman, 943 F. Supp. 44, 49 (D.D.C. 1996).

[71] *Glickman*, 130 F.3d at 466, 470.

on standing. That happened in the D.C. Circuit Court in 1997.[72] On a rehearing, en banc, they did find that Marc Jurnove had standing.[73]

However, in *Glickman II*, we end up losing on the merits in 2000 and that was because the issue here was whether or not the USDA had fulfilled its statutory duty.[74] Its duty was to promulgate regulations for the well-being of primates and their psychological well-being.[75]

There the court found that the agency had met its burden just because there were some of those engineering standards[76]—remember yesterday we talked about engineering versus performance standards[77]—the fact that there were some engineering standards such as minimum cage size that were enforceable, that counts.[78] The USDA had promulgated regulations, that's what they were told to do. We still lost *Glickman* and that was tough.

That brings me to one of my other least favorite hurdles or pitfalls. This is really more of a pitfall and it's *Chevron* deference and it comes up in basically every case filed against an administrative agency.[79] It's basically this: courts don't want to be in the business of second-guessing agencies.[80] Agencies have expertise, they're the ones charged with balancing these delicate policy questions.[81] They have limited resources and so courts want to show them deference anyway.[82]

In *Chevron*, deference works two ways. The first step is, did Congress speak clearly?[83] If Congress spoke clearly on the question issue, you're done.[84] The court identifies the mandate and decides whether the agency met it.[85] But if there's any ambiguity you move on to step two.[86] You don't really like to go to step two. That's where the court just asks if the agency's interpretation of this ambiguous duty was reasonable.[87] That bar is really pretty low because the court could agree with the plaintiff that there's a better way to interpret it.[88] There's a

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[72] *Glickman I*, 154 F.3d at 429.

[73] *Id.*

[74] Animal Legal Def. Fund, Inc. v. Glickman (*Glickman II*), 204 F.3d 229 (D.C. Cir. 2000).

[75] *Id.* at 231.

[76] *Id.*

[77] Welfare Standards at the AWA at 50 Conference, (Published in Volume 25.2 of *Animal Law* 157), THE PETRIE-FLOM CENTER FOR HEALTH LAW POLICY, BIOTECHNOLOGY AND BIOETHICS AT HARVARD LAW SCHOOL (Dec. 2, 2016), http://petrieflom.law.harvard.edu/events/details/animal-welfare-act-at-50 [https://perma.cc/HS7F-PC4N] (accessed Jan. 25, 2019).

[78] *Glickman II*, 204 F.3d at 232.

[79] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[80] *Id.* at 844.

[81] *Id.* at 865.

[82] *Id.* at 865–66.

[83] *Id.* at 842.

[84] *Id.*

[85] *Id.* at 842–43.

[86] *Id.* at 843.

[87] *Id.* at 865.

[88] *Id.* at 865–66.

much more satisfying way but as long as the agency made a reasoned choice, they pretty much prevail. We do not love *Chevron* deference.

Then there's enforcement discretion which comes from *Heckler v. Chaney* and that keeps us from bringing a fair number of cases.[89] In *Heckler*, what the Court was doing was really distinguishing between when an agency takes affirmative action, in which case judicial review is presumptively there.[90] The APA says, when the agency does something to you, you can ask for review.[91] But when the agency doesn't take an action, it's sort of presumptively unreviewable.[92] In part, that's because in the language of the APA it says that courts can't review a matter that's committed to agency discretion by law.[93]

Again, it gets back to kind of that *Chevron* deference, is there a clear requirement? If there's not, there's no law to apply, then courts don't want to hear it. It prevents challenges to individual enforcement decisions but it's not a total bar to what we do, to seeking judicial review, because we had footnote four of the *Heckler* opinion. In footnote four, the Court said they could consider some agency inaction, particularly if the agency didn't take action, because it thought it didn't have jurisdiction.[94] Because that's not enforcement discretion, that's just the agency not understanding the scope of its power.[95]

Then, also under footnote four, the courts can step in if the agency consciously and expressly adopted a general policy so extreme it amounts to an abdication of statutory responsibilities.[96] I mean, as much as we've been beating up on the AWA and the USDA, that's tough—abdication of duty—but we tried it. PETA tried it in the failure to regulate birds.[97]

In the birds case, PETA was suing because, similar to the primate regulations, Congress had made clear that birds that weren't bred for use in research, birds were and should be covered under the AWA.[98] But they weren't being regulated; the facilities that have them weren't licensed.[99]

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89 *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985) (stating that the presumption of judicial review does not apply when agencies refuse "to take enforcement steps").

90 *Id.* at 832.

91 5 U.S.C. § 702.

92 *See Heckler*, 470 U.S. at 832 (noting that an agency refusing to act generally does not "infringe upon areas that the courts often are called upon to protect").

93 5 U.S.C. § 701(a)(2).

94 *Heckler*, 470 U.S. at 833 n.4. *See also* Crowley Caribbean Transport, Inc. v. Pena, 37 F.3d 671, 676–77 (D.C. Cir. 1994) (distinguishing between general enforcement policies, which are reviewable, and individual enforcement decisions, which are committed to agency discretion).

95 *Heckler*, 470 U.S. at 833 n.4.

96 *Id.*

97 PETA v. USDA, 797 F.3d 1087, 1097 (D.C. Cir. 2015).

98 *Id.* at 1090–91. *See* 7 U.S.C. § 2132(g) (excluding from the definition of "animal" birds "bred for use in research"). *See also* Definition of Animal, 69 Fed. Reg. 31,513 (proposed June 4, 2004) (to be codified at 9 C.F.R. pt. 1) (acknowledging that the AWA applied to birds not bred for use in research)).

99 *PETA*, 797 F.3d at 1090–91.

If you were finding terrible conditions in exhibitors, they weren't being written up and so the agency had said, "Sure, we're going to regulate birds, we'll get around to it when we've got bird specific regulations. We really need those."[100]

PETA said, "Well, let's go to court, can we please have those regulations? In the meanwhile, can you please enforce just these basic regulations?" The basic regulations are food, water, shelter, vet care.[101] I mean really radical stuff, it's what we were looking for here. But the district court in 2014 found that there wasn't a specific enough policy.[102] We had tons of statements from the agency that said, you know, we would Freedom of Information Act (FOIA),[103] and they would say, "We don't have inspection reports in that because we don't regulate birds."[104] We would have the agency saying, "We don't regulate birds."[105] We had the agency saying, "We're going to regulate birds when we get around to those regulations we haven't made,"[106] but it was not sufficient.

As for the promulgation of the specific regulations, the court just found that because the agency only has to promulgate regulations as it deems necessary,[107] this wasn't a specific case like with the dog exercise and the primate well-being. There was no specific language from the statute, so they just said they haven't deemed it necessary yet so don't bother us with that.[108]

When the case went before the circuit court in 2015, PETA was really then only focusing just on the general regulations.[109] Like, "Come on, let's just get back to food, water, shelter. It's not that bad." But they still lost for just a slightly different reason, and that was that the court found that the USDA didn't have a clear duty to regulate birds before these bird specific regulations were out.[110] Basically, they gave them a pass on having this interim time of no regulation even though it had been a decade.

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100 *See* Animal Welfare; Regulations and Standards for Birds, Rats and Mice, Advanced Notice of Proposed Rulemaking, 69 Fed. Reg. 31,537, 31,538–39 (proposed June 4, 2004) (to be codified at 9 C.F.R pt. 2) (emphasizing avian-specific animal welfare regulations).

101 *See* 9 C.F.R. §§ 3.128–30 (indicating requirements for enclosure spaces, feeding, and watering). *See also id.* at § 2.40 (indicating requirements for adequate veterinary care).

102 PETA v. USDA, 60 F. Supp. 3d 14, 18 (D.D.C. 2014).

103 Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2018).

104 Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, PETA v. USDA, (D.D.C. 2013) (No. 13-cv-976), 2013 WL 5669160.

105 *Id.*

106 *Id.*

107 *See PETA*, 60 F. Supp. 3d at 18 (commenting that because the agency did not release a statement regarding their intent to not follow AWA bird regulations, the court cannot know if that policy exists).

108 *Id.* at 19–20.

109 *PETA,* 797 F.3d at 1090–91.

110 *Id.* at 1098–99.

The final cases, and the ones that I really want to talk about, are the ones that involve the AWA's licensing regime and Carney Anne Nasser teed this up for us.[111] I think we've all heard that exhibitors, dealers, breeders, they need to hold a license to engage in that encumbered activity.[112]

The USDA inspects them from time to time and if they're really bad, they might go after them and try to get suspensions, fines, or even a revocation. Then licensees must apply for renewal every year but if they fail to apply on time, their license will be automatically terminated. Note that all of these cases are taking place in roadside zoos because, as Alka Chandna said yesterday,[113] labs aren't licensed, they're registered, and registrations cannot be revoked.[114] So we can't even touch them.

The first case I want to talk about doesn't even have to do with the renewal, it was that the Louisiana Purchase Garden Zoo let its license lapse and so it needed to demonstrate compliance before it could have a license reissued.[115] We knew that it was not able to demonstrate compliance. We knew it was operating without a license for four months all summer.[116] We knew that it was isolating primates, including this heartbreaking agile gibbon that I later learned was named Kiki, and pictures were taken by Delci Winders who had to go and document all of the terrible things that were happening at this zoo that should not have been opened.[117] They also had facility problems, their fence was not tall enough, like really, really obvious black and white stuff.[118]

I was so excited, I had great law, I had great facts, everybody agrees you have to demonstrate compliance, and I still lost.[119] That's because agencies enjoy a presumption of regularity.[120] In this case, there was an inspection report that happened before the license was issued that said no non-compliant items were found.[121] All of this evidence that I brought to court was not enough to rebut that presumption that the agency had done its job and that inspector had looked all around and no non-compliant items were found. Apparently, the zoo was not open that day but was open every other day we went for four months.

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111 Carney Anne Nasser, Animal Legal Defense Fund, Panel 6: Relocating Animals Under the AWA at the AWA at 50 conference (Dec. 3, 2016).

112 7 U.S.C. § 2134.

113 Alka Chandna, People for the Ethical Treatment of Animals, Panel 3: Regulating Animals Used in Research at The AWA at 50 conference (Dec. 2, 2016).

114 7 U.S.C. § 2136.

115 PETA v. USDA, 183 F. Supp. 3d 1137, 1140–41 (D. Colo. 2016); 7 U.S.C. § 2133.

116 *PETA,* 183 F. Supp. 3d at 1140–41.

117 *Id.* at 1140.

118 *Id.* at 1141.

119 *See id.* at 1148 (noting that a license was reissued because no noncompliance issues were found).

120 *Id.* at 1146.

121 *Id.* at 1147.

The rubberstamping cases, though, are the really interesting ones and it did start with Ben the Bear. Carney Anne [Nasser] talked about the state law case that freed Ben the Bear.[122] The companion case, the AWA case, was over the renewal of this terrible facility's license.[123]

We've talked about what the agency itself calls rubberstamping[124] and this was the first time really, to my knowledge, that we were challenging it in court. We ended up losing there on mootness, in part because we got Ben the Bear out and that was one of the chief complaints and one of the chief harms.[125] Also because the agency ended up taking away, but really just suspending, Jambbas' license, but required them to demonstrate compliance again before they ever got it back.[126] Basically, we got the relief we were seeking, sort of, but we didn't get the great ruling that we wanted and we'd gotten some really good language on the motion to dismiss so we were really hopeful. We were like, "Rubber stamping, we're going to get it."

Then we went after Lolita.[127] You've heard about Lolita, the tiny tank, it's totally noncompliant.[128] This is math, just black and white. We also sued over the renewal of Miami Seaquarium's license.[129] There, the fight was really over the language of "issue." The statute says that no license may be issued without a demonstration of compliance[130] and the agency said, "Well, a license is renewed, that's not issued," and we said, "Well you are *issuing* a renewal license."[131] It was this silly fight over words but the court ended up saying, "You know the statute is actually silent on renewals, it doesn't require renewals one way or the other, and so the agency gets to fill that gap."[132]

When the case went up to the Eleventh Circuit on appeal, we also got some really bad language about due process. They said that if you

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122 Permanent Injunction by Consent, Ray v. Jambbas Ranch Tours, (D.N.C. 2012) (No. 12 CVD 669); Carney Anne Nasser, Panel 6, *supra* note 111.

123 Ray v. Vilsack, No. 5:12-CV-212-BO, 2014 WL 3721357, at *1 (E.D.N.C. 2014).

124 Pursuant to the USDA's "rubberstamping" policy, the USDA automatically renews exhibitor's licenses upon receipt of a timely and complete renewal application and does not require the demonstration of compliance with the AWA standards of care. *See* 7 U.S.C. § 2133 (requiring a demonstration of compliance before a license may be issued). *See also Ray*, 2014 WL 3721357, at *3 (referencing the rubberstamping policy).

125 *Ray*, 2014 WL 3721357, at *2.

126 *Id.* at *4.

127 *See* Animal Legal Def. Fund v. USDA, 789 F.3d 1206, 1210 (11th Cir. 2015) (describing Lolita as a 20-foot long endangered orca captured from the wild who has been held by the Miami Seaquarium since 1970).

128 *See id.* at 1210–11 (comparing tank dimensions to the requirements under 9 C.F.R. § 3.104(b)).

129 Animal Legal Def. Fund v. USDA, No. 13-20076-CIV, 2014 WL 11444100, at *1 (S.D. Fla. 2014).

130 7 U.S.C. § 2133.

131 *Animal Legal Def. Fund*, 2014 WL 11444100, at *4–5.

132 *Id.* at *8.

have to go through all this process to revoke an exhibitor's license,[133] then you should have to do that to terminate it automatically too,[134] which is really just wrong because revocation is permanent,[135] termination you can reapply.[136] Also, somebody whose license was terminated does have a process, they can sue under the APA in the same way that we do.[137] And so that's tough. That language just keeps coming back to haunt us because we have this other case currently on appeal before the Fourth Circuit.[138] It's basically Jambbas all over again, but with five different exhibitors so we can't be mooted, which is great because one of the exhibitors did get their license revoked, Mobile Zoo. And so, we're hoping that the Fourth Circuit will get right what the Eleventh Circuit got wrong. Our brief was written by Kathy Meyer, we have amicus briefs from Delci Winders and Anna Frostic, so this is our best chance. We're going to try to really get the rubber-stamping regime gone.

ALDF also has a similar case on appeal before DC Circuit over Cricket Hollow Zoo,[139] which you heard about from Delci.[140] What pitfalls lie ahead? Only time will tell. Hopefully, one of these days we'll walk away with a high score.

III. CONTEMPLATING A CITIZEN SUIT PROVISION FOR THE ANIMAL WELFARE ACT

By
Katherine (Kathy) Meyer**

We have been contemplating a citizen suit provision for a long time, you won't be shocked to hear. Of course, despite the laudable

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133 *See* 7 U.S.C. § 2149 (providing that a license can only be revoked by the Secretary, following a temporary suspension, if notice and opportunity for hearing are given and a violation of the Act and/or regulations is determined to have occurred).

134 *ALDF,* 789 F.3d at 1217.

135 9 C.F.R. § 2.9.

136 *See* 9 C.F.R. § 2.5(b)–(c) (licenses will be automatically terminated if an applicant does not submit the renewal fee on time, but they can be reinstated).

137 5 U.S.C. § 706(2).

138 PETA. v. USDA, 194 F. Supp. 3d 404, 407 (E.D.N.C. 2016). The Fourth Circuit subsequently affirmed the ruling below. PETA v. USDA, 861 F.3d 502, 505 (4th Cir. 2017).

139 Animal Legal Def. Fund v. Vilsack, 169 F. Supp. 3d 6, 8 (D.D.C. 2016); The D.C. Circuit subsequently remanded for further findings on the USDA's reliance on the applicant's self-certification of compliance. Animal Legal Def. Fund, Inc. v. Perdue, 872 F.3d 602, 607 (D.C. Cir. 2017).

140 Delcianna Winders, People for the Ethical Treatment of Animals, AWA Interaction with Other Laws at The AWA at 50 Conference (Published in Volume 25.2 of *Animal Law* 185).

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goals of the Animal Welfare Act—you've heard that one of its main purposes is "to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment."[141] That is the congressional statement. That is the stated purpose of the statute in the very first section of the AWA.

Despite that laudable goal, as you've heard over the last couple of days, the Act has fallen very short of accomplishing that very important goal. One glaring reason for that is that unlike most of the environmental laws and other laws,[142] there is no citizen suit provision in the AWA. What that means is the only entity that can enforce the AWA is the U.S. Department of Agriculture (USDA).

Unfortunately, the USDA, as you've also heard over the last couple of days, is notorious for not aggressively enforcing the statute. You don't have to take our word for it, and other people have mentioned some of these reports, but starting back in the early 1990s, the Inspector General of the USDA itself has written report after report basically explaining that this agency is not aggressively enforcing the statute. I have cited a couple of them [referring to power point]. I don't know if I included them all, but some of the more recent Office of Inspector General reports you can see state that the Animal Care Eastern Region is not aggressively pursuing enforcement actions.[143]

They've been saying this for years—that the agency, after examining their enforcement records, is just not doing it. Here we have a statute with a laudable goal to ensure humane care and treatment of animals, but the only entity that can enforce it is just basically *not* enforcing it. Now somebody asked yesterday, I think it was David Favre, "What's that all about? What's going on there?" And I think there was a pretty big consensus that's its politics, power, money, and I would add to that the revolving door that we see all the time.

For example, in the *Ringling Brothers* case, after the case was over, and after years of battling with the USDA to do something about Ringling Brothers' mistreatment of Asian elephants, the General Counsel of the agency, Kenneth Vail, became the new head of Animal Care for Feld Entertainment (which owns the circus).[144] That's not an isolated incident; that's happened over and over during the years.

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141 7 U.S.C § 2131(1).

142 *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1540(g) (2018); Clean Water Act, 33 U.S.C. § 1365 (2018); Clean Air Act, 42 U.S.C. § 7604 (2018); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (2018); Solid Waste Act, 42 U.S.C. § 6972 (2018); Toxic Substances Control Act, 15 U.S.C. § 2619 (2018); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (2018); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (2018) (providing citizen suit provisions).

143 *See* APHIS, OFFICE OF INSPECTOR GENERAL, USDA OVERSIGHT OF RESEARCH FACILITIES, AUDIT NO. 33601-0001-41, 2, (Dec. 2014), https://www.usda.gov/oig/webdocs/33601-0001-41.pdf [https://perma.cc/US2R-W3G6] (accessed Jan. 25, 2019) (summarizing series of audits).

144 Delcianna Winders, *When Three Years Feels Like an Eternity*, PETA (Mar. 31, 2015), https://www.peta.org/blog/when-three-years-feels-like-an-eternity/ [https://perma.cc/8NY2-36RA] (accessed Jan. 25, 2019).

I would submit that this also has something to do with the USDA's lax enforcement record. If you're a bureaucrat, you've been working for an agency for a long time and you're looking to your future, and you want to get a nice cushy job, you might not be doing the work of trying to curry favor with Valerie Stanley, but you might be more interested in being more receptive to the arguments of facilities that you might want to go work for.

What we have found is that it is so frustrating because the rare enforcement cases that are brought, and there have been some allusions to this as well, are usually brought after we, the community represented *here*, bring a case against the USDA. For example, for rubber stamping renewal licenses or issuing an inadequate standard. That's when the USDA jumps into action. Why do they do that? Well, they do that to moot out our case. That's when they finally bring an enforcement action. That has happened time and time again where only because we brought a case on behalf of some clients. Delci [Winders] or someone else brought a case, the USDA decides to start aggressively enforcing the statute against a particular facility.

That is what mooted out the *Vilsack* case,[145] when the USDA went in and shut down the facility. We were happy about that, but part of the reason they did it was to moot out our case so that we could not get a ruling that the agency's practice and policy of every single year renewing the licenses of exhibitors who could not show that they were in compliance with the statute—and, in fact, where the records show that they were operating in flagrant violation of the statute—was unlawful. That's the ruling that Jenny was just referring to, with that issue now pending in both the Fourth Circuit and the DC Circuit. So hopefully, we will get a more favorable ruling on that than we did in the Eleventh Circuit with the Lolita case.[146]

In any event, when I say the USDA is not enforcing the statute, by no means am I impugning the integrity or the fervor of the people on the ground—the inspectors, the people out in the field. I'm talking about the people at the top. These are ultimate enforcement decisions, policy decisions that are made at the top. So, this [referring to power point] is a metaphor for USDA sleeping on the job here.

Anyway, it is pretty obvious that we're not going to get aggressive enforcement by the USDA of the AWA. And that cries out for the need

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[145] *Ray*, 2014 WL 3721357 at *1–2.

[146] After this conference, the Fourth Circuit ruled in the USDA's favor, PETA v. USDA, 861 F.3d 502, 504–05 (4th Cir. 2017). The D.C. Circuit upheld the agency's renewal scheme but ruled that under the special circumstances of that case—where the record demonstrated that the USDA knew the zoo was operating in violation of the AWA *when* the agency renewed its license—the district court should have entertained the Plaintiffs' challenge under the arbitrary and capricious standard of review of the Administrative Procedure Act. *Perdue*, 872 F.3d at 602.

for a citizen suit provision, and I have a list of examples of environmental statutes that have citizen suit provisions.[147]

The Endangered Species Act (ESA), is one we use often, the Clean Water Act, Clean Air Act, et cetera. Somebody talked about the Toxic Substances Control Act the other day—and these kinds of provisions were fairly routine. And if you look, I put the date each statute was enacted and that tells you a lot. For example, the ESA, 1973, Richard Nixon signed that one into law. Who would ever have thought I would be praising him twice in the same speech? But as I say, those were the "good old days." But these are provisions which basically allow citizens to bring these cases, as what are called "private attorney generals." Congress recognized that agencies don't always have the resources, the capacity to fully enforce what were considered to be very important statutes when they were passed, and therefore Congress provided citizen suit provisions that allow citizens, albeit those who have Article III standing, which is as you heard is always a hurdle, to go into court and bring a lawsuit directly against the violator of the statute.

Those are obviously extremely important provisions in statutes, because they allow for much more enforcement than otherwise would occur. Now, it's pretty clear that I actually should change the name of my topic from *Contemplating a Citizen Suit for the Animal Welfare Act* to *We Desperately Need a Citizen Suit Provision in the Animal Welfare Act*. I've just, by administrative fiat, changed the title of my speech. It's really going to be the only way to ensure that animals are adequately protected under that statute. And, there's no shortage of information available, particularly with respect to exhibitions. The inspection reports are available on the internet. You can see with your own eyes what is going on. There is no real impediment to gathering the information to show that an entity is in violation of a particular standard. I think it is pretty clear that if we had a citizen suit provision, and we had people with Article III standing, which I'm going to get to in a minute, this would be an effective way to enforce the AWA. And it's something that many of us have been advocating for many years.[148]

Now, standing is going to be an important part of this. Having a cause of action is great, that's one step, you need a cause of action, but having a cause of action isn't all you need if you want to bring a case against someone who has allegedly violated a federal law. In *Bennett v. Spear,*[149] a case under the Endangered Species Act decided in 1997,

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147 *See, e.g.*, 16 U.S.C. § 1540(g); 33 U.S.C. § 1365; 42 U.S.C. § 7604; 42 U.S.C. § 9659; 42 U.S.C. § 6972; 15 U.S.C. § 2619; 30 U.S.C. § 1270; 42 U.S.C. § 300j-8 (providing citizen suit provisions).

148 Since this conference was held, the USDA has removed from inspection reports and other documents posted on its website the names, license numbers, and other identifying information for facilities owned by individuals. That practice is currently being challenged by numerous organizations and individuals in PETA v. Perdue, Civ. No. 18-887 (D.D.C. 2018).

149 Bennett v. Spear, 520 U.S. 154 (1997).

the Supreme Court held that the citizen suit provision of the ESA was so broad that it completely eliminated the zone of interest test that Jenny referred to.

That prudential consideration is taken care of completely if you have a broad citizen suit provision. Then you're left with the other requirements of Article III standing: injury-in-fact, causation, and redressability. It's also pretty clear, at this point and I think scholars, and even courts agree—*some* courts agree—that Congress can create a right that someone is entitled to, and then the deprivation of that right creates the necessary injury-in-fact needed for standing purposes.[150]

One case that I would draw your attention to that made that very clear is *Cetacean Community v. Bush*.[151] In that case, which was brought by Lanny Sinkin to address the military's use of sonar and its adverse effects on cetaceans, unfortunately there were no human plaintiffs that had standing, and he was trying to establish that the animals themselves had standing, and the court said no, that doesn't work under Article III. But the Court went on to say that if Congress creates a right by statute that a human or animal is entitled to, the deprivation of that right would allow that individual, or arguably that animal, to have Article III standing.

And, just to give you an example in a different context, it is very well established that there is something called informational injury. You probably all know about the Freedom of Information Act (FOIA)[152]—everyone has a right to request access to government records. If your request is denied, you have standing to go to court and bring a lawsuit challenging that decision. That is your standing—you don't have to show anything else other than you asked for the information and it wasn't provided to you, that's the end of the standing inquiry.

That informational injury was well established as enough for Article III purposes in a Supreme Court case argued by my partner Eric Glitzenstein, *Public Citizen v. Department of Justice*,[153] and has also been established in *FEC v. Akins*,[154] where the issue was the right to have access to reports that political committees regulated by the Federal Election Commission are required to file with the agency.

We've been successful in using that informational injury argument under the ESA with respect to some canned hunting cases that we brought with the Humane Society of the United States and others. And we argued that the deprivation of the information that is required

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150 *See, e.g.*, Federal Election Com'n v. Akins, 524 U.S. 11, 21 (1998) (the Court held that because the Federal Election Campaign Act of 1971 gives voters the right to have access to certain reports submitted by political committees, voters had standing to challenge the decision that a particular entity was not a political committee required to submit such reports).

151 Cetacean Community v. Bush, 386 F.3d 1169 (9th Cir. 2004).

152 5 U.S.C. § 552.

153 Pub. Citizen v. Dep't of Just., 491 U.S. 440, 448–49 (1989).

154 Fed. Election Comm'n v. Akins, 524 U.S. 11, 20–21 (1998).

under section 10 of the ESA in order for someone to obtain a permit to engage in otherwise illegal activities, is a basis for standing if you're deprived of the information that the Fish and Wildlife Service is required to provide to the public.

Theoretically, it would be fairly easy to craft some amendments to the AWA that would give everyone informational injury standing. For example, somebody mentioned yesterday, these plans for the psychological well-being of primates that are required by the 1985 amendments to the AWA.[155]

When the USDA finally issued the implementing regulation, it said to the regulated entities, "Don't send the required enrichment plants into the agency. We don't want to have them here, keep them at the plant." Well, why did they do that? Because they didn't want anybody to be able to get access to these records under FOIA. You could amend the AWA and say that the plans that are required to promote psychological well-being must be submitted to the agency, and then members of the public should be able to get them under FOIA. There's an example of a way to establish standing.

Another important factor we have to include in a citizen suit provision, in addition to an injury that would provide Article III standing, is a good attorney's fees provision, because if you don't have the financial resources to bring these cases, you're out of luck, especially when you're up against a well-heeled opponent. These cases are very expensive. In Pennsylvania—and this is a provision that we used to stop the Hegins pigeon shoot—the Animal Cruelty Act provides that any agent of any humane society basically can bring a case to request a civil injunction to *prevent* cruelty to animals.[156]

The Pennsylvania statute perhaps is a good model. And I think we could take Pennsylvania's model and marry it with the ESA citizen suit provision, and include a good attorney's fees provision, to craft an effective citizen suit provision for the AWA. However, we need a legislative strategy.

There are a couple of impediments there, so we need a strategy. What I propose is that we need to literally get in a room with the lobbyists, the litigators, the organizers, the PR people as Ron Kagan said—very important, media—the funders, and we need to map out a strategy for including a citizen suit provision in the AWA, because protection of animals is not a partisan issue.

Everyone has a story about their love of animals. Dean Minor told her story about her science fair project yesterday. Everyone has a story like that. We've got the videos and photographs and stories. And we need to get those stories out to the world at large, to the Congress,

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155 Food Security Act of 1985; Subtitle F – Animal Welfare Pub. L. No. 99-198, §1752, 99 Stat. 1354 (1985).

156 18 PA. CONS. STAT. § 5511 (repealed 2017); *see also* Hulsizer v. Labor Day Comm., 734 A.2d 848, 853 (Pa. 1999) (stating how the Pennsylvania Society for the Prevention of Cruelty to Animals was specifically created by the legislature "'to provide effective means for the prevention of cruelty to animals . . . .'").

people who will be making these decisions, and educate them on these issues. Because I think, as Bernie Roland said earlier today, "courage and compassion transcends politics." I think that is absolutely right. We've got the compassion, we've got the evidence—we've just got to have the courage to do it.