UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 16-14814

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.,
ANIMAL LEGAL DEFENSE FUND,
ORCA NETWORK, and HOWARD GARRETT,

Appellants,

v.

MIAMI SEAQUARIUM and FESTIVAL FUN PARKS, LLC,
d/b/a PALACE ENTERTAINMENT,

Appellees.

On appeal from the United States District Court
for the Southern District of Florida, Miami Division
Case No. 15-Civ-22692-Ungaro/Otazo-Reyes

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The following is a list of all judges, attorneys, persons, associations of persons, firms, partnerships, corporations and other legal entities that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, any publicly-held company that owns ten percent or more of a party's stock, and other identifiable entities related to a party:

Trial Judges:

Otazo-Reyes, The Honorable Alicia M.; United States Magistrate Judge, Southern District of Florida

Ungaro, The Honorable Ursula; United States District Judge, Southern District of Florida

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Foundation to Support Animal Protection d/b/a PETA Foundation

Greenberg Traurig, LLP

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Miami Seaquarium and Festival Fun Parks, d/b/a Palace Entertainment

Orca Network

Palace Entertainment Holdings, LLC

People for the Ethical Treatment of Animals, Inc., et al. v. Miami Seaquarium, et al., Case No. 16-14814

Parques Reunidos Servicios Centrales SA (PQR)

People for the Ethical Treatment of Animals, Inc.

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs People for the Ethical Treatment of Animals, Inc. ("PETA"), Animal Legal Defense Fund ("ALDF"), and Orca Network state that they have no parent companies and that they have no stock that could be owned by a publicly held corporation.

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STATEMENT REGARDING ORAL ARGUMENT

PETA, ALDF, Orca Network, and Howard Garrett (collectively, "Plaintiffs" or "Appellants") seek oral argument and believe it would benefit the Court because this appeal presents complex issues that are a matter of first impression and that could set important precedent that will either preserve or reduce protections extended to captive members of an endangered species under the Endangered Species Act ("ESA").

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and Section 11(g) of the ESA, 16 U.S.C. § 1540(g). Plaintiffs complied with the ESA's pre-suit notice provisions. *See* 16 U.S.C. § 1540(g)(2)(A)(i). On May 11, 2015, Plaintiffs mailed a notice of violation and intent to file suit ("Notice of Intent") to Defendant Miami Seaquarium and Festival Fun Parks, LLC, d/b/a Palace Entertainment ("Defendant" or "Appellee"); the Secretary of the Department of Commerce; and the Assistant Administrator for the National Marine Fisheries Service ("NMFS"). (Docket Entry ("DE") 1-4.) Neither the Secretary nor the United States has commenced or is diligently prosecuting any action to redress the violations set forth in the Notice of Intent. 16 U.S.C. § 1540(g)(2)(A)(ii)–(iii). Plaintiffs filed the Complaint on July 20, 2015. (DE 1.)

The District Court entered a final judgment disposing of all claims on June 3, 2016 (DE 205), and Plaintiffs timely filed their Notice of Appeal on July 1, 2016 (DE 206). This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

A. Where (1) the plain language of the ESA and its implementing regulations define a prohibited "take" broadly to include "harm" and "harass[ment]," (2) the Supreme Court and Congress have recognized that "take" must be interpreted in the broadest possible manner to effectuate its important purpose, and (3) both agencies that administer the ESA have recognized that wild and captive animals alike are protected by the same "take" prohibition, the District Court erred in ruling that, to establish a "take" of a captive endangered animal, Plaintiffs must prove that the challenged "conduct gravely threatens or has the potential to gravely threaten [that] animal's survival." (DE 203 at 38.)

B. Under any definition of "harm" or "harass," the District Court erred in granting Defendant's motion for summary judgment because genuine issues of material fact remain with respect to (1) the conditions under which the endangered orca Lolita is maintained at the Miami Seaquarium and (2) the severity and nature of injuries that Lolita suffers as a result of these conditions.

STATEMENT OF THE CASE

In this action, Plaintiffs challenge Defendant's ongoing "take" under the ESA of the endangered orca Lolita. Specifically, Plaintiffs allege that Defendant "harms" and "harasses" Lolita by confining her to a small, shallow, barren concrete tank, without adequate protection from the sun and without appropriate

companionship. (DE 164, ¶¶ 12-121.) These conditions prevent Lolita from performing any natural behaviors (including socializing with compatible animals, diving, swimming any meaningful distance, and seeking shelter from the sun) (*id.* ¶¶ 30, 102-12), and cause her to suffer chronic illness (*id.* ¶¶ 21, 24, 116-18), various types of sun damage (*id.* ¶¶ 24, 68, 71, 74, 112), and to sustain repeated injuries in the form of rakes to her flesh by the incompatible dolphins in her tank (*id.* ¶¶ 52-54, 98, 105-07). As a consequence, Lolita manifests ongoing psychological injuries in the form of stereotypic (i.e., repetitive and abnormal) behavior. (*Id.* ¶ 113.)

This appeal follows the entry of an order granting, in part, Defendant's Motion for Summary Judgment on the novel and improper grounds that a captive endangered animal is not "taken" in violation of Section 9 of the ESA, 16 U.S.C. § 1538(a), except by conduct that "gravely threatens" that animal's survival. In addition to applying an erroneous legal standard, the District Court overlooked material factual disputes concerning the conditions in which Lolita is maintained and the nature and severity of her resulting injuries. (DE 203.) Summary judgment was therefore improper.

I. Course of Proceedings and Dispositions

Plaintiffs filed their Complaint on July 20, 2015. (DE 1.) Defendant filed an Answer on August 28, 2015 (DE 18) and an Amended Answer on September 18, 2015 (DE 22).

On September 23, 2015, Defendant filed a Motion to Dismiss and for Judgment on the Pleadings. (DE 25.) Briefing on that motion was complete as of November 6, 2015. (DE 30, 34.) The Court did not rule on the substantive issues in the motion and instead, on March 14, 2016, denied it as moot because Defendant filed its Motion for Summary Judgment on the March 11, 2016, dispositive motions deadline. (DE 139.)

Defendant's Motion for Summary Judgment (1) challenged Plaintiffs' standing and (2) argued that Plaintiffs failed to demonstrate that Defendant committed a "take" of Lolita under the ESA. (DE 126.) The latter contention forms the basis of Plaintiffs' appeal.[1] On June 1, 2016, the Court granted, in part, and denied, in part, the Defendant's motion. (DE 203.) The Court held that Plaintiff PETA has standing and that standing as to the remaining plaintiffs therefore need not be addressed, but concluded that Plaintiffs did not adequately establish that a

[1] Plaintiffs also filed a Motion for Partial Summary Judgment on Standing (DE 131), which was granted.

"take" is occurring because Defendant's conduct does not "gravely threaten" Lolita's survival. (*Id*. at 38.)

In reaching this result, the Court acknowledged that Plaintiffs presented evidence and expert testimony that Lolita is suffering from thirteen separate injuries (*id*. at 17-18), all of which implicate disputed facts (*see* DE 164, *passim*). Further, the Court recognized that, "in a literal sense [all of those injuries] . . . *are within the ambit of the ordinary meaning of 'harm' and 'harass.*'" (DE 203 at 38 (emphasis added).) Specifically, citing to record evidence, the Court noted:

1. Due to the size and configuration of the pool in which she is housed, Lolita cannot engage in normal swimming or diving behaviors, even as compared with other orcas in captivity, causing her physical and psychological injury.

2. The [Pacific white-sided dolphins ("PWSDs") in Lolita's tank] are not socially compatible animals and do not provide an appropriate substitute for social contact.

3. The PWSDs cause Lolita frequent physical injury in the form of raking her skin with their teeth. A rake is a skin abrasion occurring when one cetacean (which includes whales and dolphins) places its teeth on another cetacean swimming by. These rakes can cause bleeding, which require treatment with antibiotics to avoid infection.

4. Because Lolita has learned to anticipate certain aggressive behavior by the PWSDs, she shows physical signs of stress every time they approach.

5. The PWSDs engage in "inappropriate" sexual behavior toward Lolita that would not happen in the wild.

6. Since the 1980s, Lolita has suffered from an irreversible condition known as "surfer's eye" as a result of "prolonged exposure to UV

radiation" for which she is administered eye drops twice daily. The condition leads to "discomfort."

7. Lolita has exhibited blisters and wrinkles that might be caused by sun exposure.

8. Unlike orcas in the wild, she is treated with "antibiotics, antifungals, pain medication, hormones" and antacids to treat ulcers. These treatments might be necessary because of the stress of her tank dimensions and sun exposure, or stressful cohabitation with the PWSDs, or both.

9. Lolita is generally unhealthy as shown by the following: (a) she suffers from a mild, non-fatal kidney impairment; Lolita has a higher number of bacteria, "more than has been described in literature," compared to orcas in the wild and captivity combined; Lolita "appears to have had" treatments for infections to her respiratory tract, and, she might have a recurring lung condition.

10. Lolita engages in abnormal behavior known as "stereotypies," which includes listless floating, lying motionless near an inflow valve, bobbing, pattern swimming, and rubbing her body against her tank.

11. Lolita has significant wear in six of her teeth, which might result from a stereotypic behavior of biting the side of the tank or the gates within it.

12. Lolita has had at least one tooth drilled multiple times.

13. Lolita's captivity conditions "likely reduce the likelihood of realizing her potential lifespan than in the wild."

(*Id.* at 17-18 (internal citations omitted).)

However, rather than adopting the ordinary definitions of "harm" and "harass," which it acknowledged encompass these injuries, the Court manufactured a new definition that is inconsistent with the ESA, Supreme Court precedent, and

agency interpretation, and granted summary judgment for Defendant based upon a finding that these thirteen conditions do not "rise to the level of grave harm that is required to constitute a 'take' by a licensed exhibitor under the ESA." (*Id.* at 38.) In reaching this result, the Court also failed to acknowledge factual disputes regarding injuries that threaten Lolita's life and thereby constitute a "take" under any definition of the terms at issue.

II. Statement of Facts and Legal Framework

A. The Endangered Species Act

In adopting the ESA, "Congress intended endangered species to be afforded the highest of priorities." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174, 98 S. Ct. 2279, 2292 (1978). The statute is, as a result, "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Id.* at 180.

Under the ESA, it is unlawful to "take" an endangered species, 16 U.S.C. § 1538(a)(1)(B), or to "possess" any endangered species that has been unlawfully taken, *id.* § 1538(a)(1)(D). "Take" is defined to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). "Harm" and "harass" are not defined. *See id.* As the Supreme Court explained in *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, these terms must therefore be construed in a way that effectuates the "broad purpose of the ESA." 515 U.S. 687, 698, 115 S. Ct. 2407, 2414 (1995); *see*

also S. Rep. No. 307, 93rd Cong., 1st Sess., p. 7 (1973) ("take" should be defined "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."). Further, they must be construed such that the "take" prohibition remains applicable to both wild and captive endangered animals. *See, e.g.*, 63 Fed. Reg. 48634-02, 48636 (Sept. 11, 1998) ("take" was defined by Congress to apply to endangered or threatened wildlife "whether wild or captive"); 80 Fed. Reg. 7380-01, 7388 (Feb. 10, 2015) ("Section 9(a)(1)(A)-(G) of the ESA applies to endangered species regardless of their captive status").

To implement the ESA's broad purpose, NMFS, which administers the ESA with respect to endangered orcas, defined "harm" as:

> An act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

50 C.F.R. § 222.102.

NMFS has not defined "harass." The term should therefore be construed in accordance with its ordinary dictionary definition, i.e., "to vex, trouble, or annoy continually or chronically." DE 126 at 11 (Defendant's Motion for Summary Judgment, citing Webster's Third International Dictionary); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175, 129 S. Ct. 2343, 2350 (2009) ("Statutory

construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). In addition, the definition adopted by the Fish and Wildlife Service ("FWS"), the entity charged with enforcing the ESA with respect to certain species of animals other than orcas, is instructive. FWS defines "harass" to include an

> intentional or negligent act or omission which creates the likelihood of injury [to an endangered animal] by annoying [her] to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

50 C.F.R. § 17.3.[2]

The ESA authorizes a private right of action "to enjoin any person" from violating the statute or its implementing regulations. 16 U.S.C. § 1540(g)(1)(A).

1. Defendant's unlawful "take" of Lolita

Lolita is a member of the Southern Resident Killer Whale ("SRKW") Distinct Population Segment ("DPS"), a group of animals whose numbers were

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[2] FWS exempts from this definition "generally accepted . . . animal husbandry practices that meet or exceed the minimum standards for facilities and care under the [Animal Welfare Act] . . . when such practices . . . are not likely to result in injury to the wildlife." 50 C.F.R. § 17.3; *see also* Argument § III.B, *infra*. However, while NMFS has favorably cited FWS' definition of "harass," *see, e.g.*, *Strahan v. Roughead*, 910 F. Supp. 2d 358, 366 (D. Mass. 2012), Plaintiffs have been unable to identify any instance in which NMFS has applied this exemption.

drastically reduced during the 1960s and 70s due, in large part, to captures for marine parks such as Miami Seaquarium. (DE 164, ¶ 94.) Lolita was captured off the coast of Washington State in 1970 (*id.* ¶ 91) and, for the past forty-six years, has been confined to a tank at Seaquarium (DE 127 ¶ 13).

The SRKW DPS was listed as endangered on November 18, 2005. 50 C.F.R. § 224.101; 70 Fed. Reg. 69903-01 (Nov. 18, 2005). Lolita was added to the listing in 2015, following a lawsuit and petition by Plaintiffs PETA and ALDF, challenging NMFS' unlawful exclusion of her from the original listing. *See* 80 Fed. Reg. 7380 (Feb. 10, 2015). She is therefore protected against "take" under the ESA. 16 U.S.C. § 1538(a)(1)(B).

a) Defendant keeps Lolita in a grossly inadequate tank.

As explained by Plaintiffs' experts, orcas are far-ranging and deep-diving, capable of traveling 100 miles per day and diving nearly 1,000 feet. (DE 164-7, Ex. F-A at 18; DE 164-28 at 5, 8.) Lolita is twenty feet long and weighs approximately 8,000 pounds. (DE 184, ¶ 92.) She is confined to a tank that measures only eighty feet across at its widest point, allowing her to swim a maximum of sixty feet in a single direction. (DE 164 ¶¶ 30, 92-93, 95, 97, 102; *see also* DE 173, ¶ 5(g)-(r).) Lolita is completely unable to dive, as her tank is only as deep as she is long: it measures twenty feet at its deepest point and, in many areas, is only twelve feet. (DE 133-2, Ex. B.) These harmful conditions are unique within

the captive marine mammal industry. In fact, Defendant's own expert testified that he does not recall ever seeing an orca in a tank smaller than Lolita's. (DE 164, ¶ 95.)

Lolita's movement is further restricted by a solid concrete structure extending from the water's surface to the floor, which she must swim around to access the rear portion of the tank. (*Id.* ¶ 97; DE 133-2, No. 14.) And Lolita does not even have access to this back area of the tank at all times, as gates on either side of the platform are often closed. (DE 126 at 13-14; DE 164, ¶¶ 98-99; DE 164-11 at MSQ0003672, 3673; DE 164-18 at MSQ0003742; DE. 164-19 at MSQ0003568, 3698, and 3746.) In addition, the water levels in Lolita's tank are frequently dropped several feet. (DE 164, ¶¶ 37, 101; DE 164-19 at MSQ0003568, 3698, 3746, and 9047.)

b) Defendant fails to provide appropriate companionship for Lolita.

Orcas are highly social animals and are almost never solitary in the wild. (DE 164-7, Ex. F-A at 8-9; DE 164-28 at 9.) Lolita has nevertheless been held without another orca since 1980, a circumstance that is entirely unique within the captive marine mammal industry. (DE 127, ¶ 40.) Indeed, one of Defendant's experts testified that, in his thirty-five years at SeaWorld, he had never seen an orca held without another member of its species for as long as Lolita. (DE 164, ¶ 103; DE 164-24 at 51:17-18, 75:18-22.)

Rather than providing appropriate companionship, Defendant confines Lolita with socially incompatible PWSDs who frequently "mob" her, aggressively ganging up on her and "raking" her flesh by dragging their teeth across her body. (DE 164, ¶¶ 104-07; DE 164-18 at MSQ0003695, 3708; DE 164-19 at MSQ0003698; *see also* DE 164-21 at MSQ0014625-R [redacted].) Some of these rakes are so severe that they require antibiotics to prevent infection.[3] (DE 164, ¶ 105.) The PWSDs also exhibit unnatural sexual behavior toward Lolita. (*Id*. ¶ 107.) Lolita has learned to anticipate these behaviors and, as a result, shows physical signs of stress when the PWSDs approach. (*Id*. ¶ 107-08.) [redacted] (*Id*. ¶ 121.) To prevent these behaviors, Defendant often separates the animals by confining Lolita to only one side of the tank. (*Id*. ¶ 36.)

c) Lolita is unable to seek shelter from the sun.

Lolita lives in shallow water under the hot Florida sun, in conditions very different from her native Pacific Northwest. Nevertheless, the only shade over

[3] These rake injuries also constitute "wound[s]" within the ESA's definition of "take." 16 U.S.C. § 1532(19).

Lolita's tank comes from the surrounding stadium seating, which does not extend over the water. Shade is thus only available at limited times of day. (DE 133, ¶ 6; DE 164, ¶ 109.) Further, since the tank's maximum depth is only as deep as Lolita is long, and the water level is often dropped, *see supra* Statement of the Case ("SOC") § II.A.1.a, Lolita cannot dive to seek shade. Defendant's records show that Lolita suffers from injuries that can be caused by overexposure to the sun, including blisters, wrinkles, cracked skin, burns, and an eye condition known as "pterygium." (DE 164, ¶ 110-112.)

d) The conditions of Lolita's confinement cause her to sustain other physical and psychological injuries.

Female SRKWs in the wild can live up to ninety years. (DE 164, ¶ 119.) According to a foremost expert on the wild population, Lolita can live long beyond the average 50-year life expectancy of SRKWs, which factors in juvenile mortality. (DE 164-14 at 22:1-9.) However, continuing to keep Lolita in the conditions at Seaquarium will "reduce her likelihood of realizing her potential lifespan in the wild." (DE 164-7, Ex. F-A at 12.) Indeed, Lolita already suffers from many chronic physical health problems. She is given a variety of medications on a more frequent basis than would be done for a healthy animal. (DE 164, ¶ 116; DE 164-11, 164-18, and 164-19, *passim*.) She appears to have been treated for recurrent respiratory infections, has decreased kidney function (DE 164, ¶ 117), and has also been found to have excessive pathogens in her system (*id.* ¶ 118).

Further, Lolita's inadequate enclosure and lack of appropriate companionship so inhibit her natural behaviors that they inflict psychological injury, causing her to exhibit stereotypies including listless floating, lying motionless near an inflow valve, bobbing, pattern swimming, and rubbing her body against her tank. (*Id.* ¶ 113; DE 164-11 at MSQ0003532-33, 3672, 9466, 9470-71; DE. 164-19 at MSQ0003698-99.) She also exhibits significant wear in several teeth, which is uncommon in wild SRKWs and could result from the stereotypic behavior of biting on her tank or its gates. (DE 164, ¶ 114-15.)

B. The Animal Welfare Act is not applicable to this action and does not establish that Defendant is compliant with the ESA.

The Animal Welfare Act ("AWA") does not form the basis of this action, however Plaintiffs summarize its scope here as it was addressed extensively in the District Court's order. (*See* DE 203.) The AWA was passed in 1966 to ensure humane treatment of dogs and cats used in medical research. 112 Cong. Rec. 13,256 (1966). In 1970, Congress amended the statute to cover animals used in exhibitions. Pub. L. No. 91-579, § 2, 84 Stat. 1560 (1970); 7 U.S.C. § 2131(1).

The AWA and the regulations promulgated thereunder do not even mention species endangerment, and they certainly do not set forth standards as to the

heightened level of protection required for animals listed under the ESA.[4] Rather, AWA regulations merely set forth "*minimum* requirements . . . for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species" of *any* captive animal, without regard to its endangered or non-endangered status.[5] 7 U.S.C. § 2143 (emphasis added); *see also* 9 C.F.R. §§ 3.100–3.118 (marine-mammal-specific minimum standards).

The USDA's Animal and Plant Health Inspection Service ("APHIS") purportedly assesses compliance with AWA standards through inspections of exhibitors' facilities. *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 789 F.3d 1206, 1210 (11th Cir. 2015). Although APHIS has deemed Seaquarium to be compliant with AWA standards, Defendant provided no evidence that it was ever made aware of the numerous documents unearthed through discovery in this matter that show Lolita's various injuries. Further, as discussed *infra* at Argument § II.C.1, APHIS' standards and enforcement are known to be deficient. The following paragraphs detail Defendant's various violations of the AWA.

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[4] The AWA-related exemption in FWS' regulations is discussed at Argument § III.B, *infra*.

[5] The AWA does not apply to cold-blooded animals, 7 U.S.C. § 2132, and, by policy, is not enforced with regard to birds.

1. Lolita's tank fails to satisfy AWA space requirements.

AWA regulations require "primary enclosures" for marine animals to comply with "minimum space requirements." 9 C.F.R. § 3.104(a). They must "provide[] sufficient space, both horizontally and vertically, to be able to make normal postural and social adjustments with adequate freedom of movement[.]" *Id.* The primary tank in which cetaceans are kept must have a "minimum horizontal dimension (MHD)" that is "two times the average adult length" of the species, *id.* § 3.104(b), which, for an adult orca, is twenty-four feet, *id.* § 3.104, Table III. Lolita's tank must therefore have an MHD of at least forty-eight feet.

For an oblong pool like Lolita's, MHD is calculated as "the diameter of the largest circle that can be inserted within the confines of such a pool of water." 9 C.F.R. § 1.1. Because Lolita's tank is divided by a concrete platform, the area into which a circle may be inserted is reduced to a mere thirty-five feet, i.e., thirteen feet less than the required forty-eight-foot MHD. (DE 164, ¶ 28; DE164-12; DE 173, ¶ 5(q) ("The maximum distance between the platform (island) in Lolita's pool and the outer edge of [the front pool referred to as] A Pool is approximately 35 feet.").)

In applying this standard, APHIS initially found that Lolita's tank only meets the MHD requirement if the platform dividing it is "waivered" or "disregarded." (DE 164, ¶ 28.) Later, contrary to the plain language of the

regulation and proper mathematical calculation, APHIS took the position that the MHD could include areas with a partial obstruction. (*Id*.) Recently-proposed rulemaking, however, demonstrates that both of these actions exceeded APHIS' current authority. *See* 81 Fed. Reg. 5629-01, 5650 (Feb. 3, 2016) (*proposed* rulemaking that would allow "APHIS [to] determine if partial obstructions in a horizontal dimension compromise the intent of the regulations and/or significantly restrict freedom of movement of the animal(s) in the enclosure," thus demonstrating that APHIS does not *presently* have the authority to waive partial obstructions); *see also* Marine Mammal Comm'n, Comment on Proposed Rule to Amend AWA Marine Mammal Regulations (May 4, 2016), https://www.regulations.gov/document?D=APHIS-2006-0085-5090 ("All minimum space requirements should be met in an unobstructed manner, otherwise the definition of 'minimum' would be rendered meaningless."). Likewise, an APHIS representative recently stated that MHD is calculated only with regard to areas that are *unobstructed*, which would make Lolita's tank noncompliant—consistent with proper MHD calculation. (DE 164-13.)

2. Defendant fails to provide appropriate companionship for Lolita as required by the AWA.

AWA regulations require that marine mammals of a species known to be "primarily social in the wild" "must be housed in their primary enclosure with at least one compatible animal of the same or biologically related species," unless the

veterinarian believes it is not in the animal's best interest. 9 C.F.R. § 3.109. Orcas are highly social animals (DE 164-7, Ex. F-A at 8-9, Ex. DD at 9), yet Lolita is housed not with another orca, but with PWSDs who regularly injure and harass her, strongly supporting an inference that the two species are incompatible and that Defendant violates the AWA. *See* SOC § II.A.1.b, *supra*.

3. Defendant fails to provide Lolita with adequate shade under the AWA.

AWA regulations provide that natural or artificial shelter "which is appropriate for the species concerned, when the local climactic conditions are taken into consideration, shall be provided for all marine mammals kept outdoors to afford them protection from the weather or from direct sunlight." 9 C.F.R. § 3.103(b). Lolita's tank does not have *any* shade or weather protection for a significant portion of the day, a circumstance that may have caused her myriad sun-related injuries. *See* SOC § II.A.1.c, *supra*. The lack of shade over Lolita's tank is thus inappropriate for an orca in Miami, and violates the AWA.

III. Standard of Review

The Court of Appeals reviews a grant of summary judgment de novo, using "the same legal standards that bound the district court." *Fla. Pub. Interest Research Grp. Citizen Lobby, Inc. v. E.P.A.*, 386 F.3d 1070, 1082 (11th Cir. 2004). Summary judgment should be upheld only where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as

a matter of law." Fed. R. Civ. P. 56. "A factual dispute is 'material' if it would affect the outcome of the suit under the governing law, and 'genuine' if a reasonable trier of fact could return judgment for the non-moving party." *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008). In making this assessment, the Court "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party, and resolve all reasonable doubts about the facts in favor of the non-movant." *Fla. Pub. Interest Research Grp. Citizen Lobby, Inc.*, 386 F.3d at 1082 (internal citations and quotations omitted).

Here, the District Court erred by manufacturing a novel and unsupported legal standard to determine that Lolita is not being "harm[ed]" or "harass[ed]" under the ESA, and that Defendant is not committing a "take" as a matter of law. In addition, the District Court improperly granted summary judgment despite numerous genuine issues of material fact regarding Lolita's injuries.

SUMMARY OF THE ARGUMENT

Despite the ESA's stated purpose of affording "endangered species . . . the highest of priorities," *Tenn. Valley*, 437 U.S. at 174, 98 S. Ct. at 2292, the District Court held that "a [USDA-]licensed exhibitor 'take[s]' a captive animal in violation of the ESA's section 9(a)(1) *only* when its conduct gravely threatens or

has the potential to gravely threaten the animal's survival" (DE 203 at 38 (emphasis added)). This ruling must be reversed for three reasons.

First, narrowing the "take" provision as applied to captive animals directly contravenes Congressional intent, binding Supreme Court authority, the plain language of the Act, and interpretations of the agencies charged with implementing it. According to these authorities, the prohibition on "take" is expansive: it includes "every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife," S. Rep. No. 93–307, p. 7 (1973), and, absent a permit, prohibits all manner of "harm" and "harass[ment]," whether direct or indirect, deliberate or incidental, *Sweet Home*, 515 U.S. at 704-05, 115 S. Ct. at 2416; 16 U.S.C. § 1539(a)(1)(B). These terms must therefore be construed to include *any* injury to a protected animal—not just "grave" injury. *See* 50 C.F.R. § 222.102 (defining "harm" to include any injury); *see also* 50 C.F.R. § 17.3 (defining "harm" similarly and "harass" to include conduct creating "likelihood of injury").

Second, by announcing a new "grave threat" standard applicable only to captive animals at USDA-licensed facilities, the Court drew an impermissible distinction between wild and captive endangered species. Such a distinction is inconsistent with the ESA and has been explicitly rejected by both agencies responsible for administering it. The Court found that because the AWA, an entirely separate, but complementary statutory scheme, also regulates inhumane

conduct toward captive animals, the ESA should be limited in its application to such animals by covering only "life-threatening" actions. This holding has no basis in law—indeed, where two statutes addressing the same subject matter are capable of coexistence, the Supreme Court has held that "it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other." *POM Wonderful LLC v. Coca–Cola Co.*, — U.S. —, 134 S. Ct. 2228, 2238 (2014).

Third, even if the Court's construction of "harm" and "harass" were permissible, record evidence shows that the conditions in which Lolita is maintained will likely reduce her lifespan—i.e., that they are the very definition of "life-threatening." A genuine issue of material fact therefore remains as to the "harm" and "harass[ment]" that Lolita suffers. Further, when these terms are properly construed, the egregiousness of Defendant's conduct becomes all the more stark: As the District Court itself explained, at least thirteen "conditions and injuries of which Plaintiffs complain are within the ambit of the ordinary meaning of 'harm' and 'harass.'" (DE. 203 at 38.) Accordingly, the District Court's grant of summary judgment for Defendant should be reversed.

ARGUMENT

I. The District Court Erred by Requiring Plaintiffs to Prove that the Conditions of Lolita's Confinement Constitute "Grave Threats."

In enacting the ESA, "Congress intended endangered species to be afforded the highest of priorities," *Tenn. Valley*, 437 U.S. at 174, 98 S. Ct. at 2292, and therefore crafted the statute to provide the broadest conceivable protection, *Sweet Home*, 515 U.S at 704-05, 115 S. Ct. at 2416. The District Court impermissibly narrowed the scope of this effort by grafting a "grave threat" requirement onto the Act's "take" prohibition. (*See* DE 203 at 23-25.) This ruling leaves Lolita and all other captive endangered animals in the Eleventh Circuit vulnerable to abuse, contrary to Congressional intent, Supreme Court precedent, and NMFS' interpretation of the ESA.

A. Congress defined "harm" and harass" in the broadest possible terms.

As the Supreme Court observed in *Sweet Home*, the ESA's legislative history supports a generous reading of the words that define the statute's operative term. 515 U.S. at 704-05, 115 S. Ct. at 2416. The Senate defined "take" "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." *Id.* (citing S. Rep. No. 93–307, p. 7 (1973); U.S. Code Cong. & Admin. News 1973, pp. 2989, 2995). The House, likewise, used "the broadest possible terms," specifying that "take" "includes

'harassment, whether intentional or not.'" *Id.* at 704-05, 115 S. Ct. at 2416 (citing H.R. Rep. No. 93-412, pp. 11, 15 (1973)).

To illustrate the intended breadth of the "take" prohibition, the House explained that it could even reach "the activities of birdwatchers where the effect of those activities *might disturb* the birds and *make it difficult* for them to hatch or raise their young." *Id*. at 704-05, 115 S. Ct. at 2416 (citing H.R. Rep. No. 93–412, p. 11 (1973) (emphasis added)). When given the breadth Congress intended, "harm" and "harass" easily capture the "difficulties" and "disturbances" that Lolita endures. (*See* DE 203 at 17-18 (describing thirteen injuries that constitute "harm" and "harass[ment]" under the ordinary meanings of the terms).)

Nevertheless, ignoring Congress' call for a broad reading of "take" and disregarding the plain meanings of the terms that define it, the District Court joined the *Sweet Home* dissent in its "selective foray" through the ESA's legislative history, 515 U.S. at 705, 115 S. Ct. at 2416, redefining "harm" and "harass" to require a "grave threat" or "seizure" of an animal. (DE 203 at 23-25.) In doing so, the Court impermissibly narrowed the ESA's scope.

B. The District Court's definition of "harm" and "harass" is inconsistent with the plain meaning construction mandated by *Sweet Home*.

In *Sweet Home*, the Supreme Court examined FWS' definition of "harm" and established that, consistent with Congressional intent, the terms defining

"take" must be interpreted in the broadest possible manner. 515 U.S. at 698-700, 115 S. Ct. at 2416-17. The D.C. Circuit had determined that habitat modification alone was not a "take" because it did not involve a "direct application of force" to an animal. *See id.*, 515 U.S. at 694, 115 S. Ct. at 2411. The Supreme Court reversed, finding no direct force requirement in the ESA's legislative history, and that the plain, dictionary definition of "harm" did not "include the word 'directly' or suggest that only direct or willful action that leads to injury constitutes 'harm.'" *Id*. at 697, 115 S. Ct. at 2413; *see also Lamie v. U.S. Tr.*, 540 U.S. 526, 536, 124 S. Ct. 1023, 1031 (2004) (noting that the Court was "avoid[ing] the pitfalls that plague too quick a turn to the more controversial realm of legislative history" and would base its decision on the plain meaning of the statutory text as long as the result was "not absurd").

Like the "direct force" requirement rejected in *Sweet Home*, the District Court here created a "grave threat" requirement that lacks support in the text. NMFS' definition of "harm" is nearly identical to the FWS definition examined in *Sweet Home*. It includes conduct that merely "injures" an endangered animal, and does not further define the term "injury" or otherwise reference "grave" threat or seizure. 50 C.F.R. § 222.102 ("harm" is "an act which actually kills or injures fish or wildlife"). Similarly, "harass" is defined neither by the statute nor by NMFS. Thus, consistent with *Sweet Home*, the plain meanings of these terms control. *See*

Sweet Home, 515 U.S. at 697, 115 S. Ct. at 2413. On this point, the parties agree: Appellee's own brief noted that "[a]ny definition of 'harass' in the context of captivity must also be faithful to the plain meaning of the term 'harass.'" (DE 126 at 11.)

As in *Sweet Home*, the dictionary definitions of "harm" and "harass" do not reference grave or life-threatening injury. *See id.* at 11 (citing Webster's Third International Dictionary, harass means "to vex, trouble, or annoy continually or chronically"); *Sweet Home*, 515 U.S. at 697, 115 S. Ct. at 2412 (citing Webster's Third International Dictionary, "harm" means "to cause hurt or damage to: injure.").[6] These definitions thus lend no support to the District Court's construction, but amply support Plaintiffs' claims that Lolita has been unlawfully "taken." Plaintiffs provided evidence, acknowledged by the District Court, that Lolita is chronically vexed, annoyed, and tormented by the inadequate size of her

[6] While FWS incorporated an "injury" requirement into its definition of "harass," 50 C.F.R. § 17.3, courts cannot narrow the term in a manner inconsistent with the regulatory definition and its ordinary meaning. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866, 104 S. Ct. 2778, 2793 (1984) ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.").

tank, the incompatible dolphins that share these tight quarters, and the unrelenting Miami sun, to such a degree that she is sustaining at least thirteen ongoing physical and psychological injuries.[7] (DE 203 at 17-18.)

C. Canons of statutory construction and agency interpretation support plain meaning definitions of "harm" and "harass."

Although Congress declared that "take" should have its broadest meaning, *see* Argument § I.A, the District Court limited the term to conduct falling into three narrow categories: (1) seizing an animal by capturing, collecting, or trapping her; (2) gravely threatening an animal by killing or shooting her; or (3) having the potential to seize or gravely threaten the life of an animal, by pursuing, hunting, or wounding her. (*Id.* at 23.) As support for this novel interpretation, the District Court misapplied two canons of statutory construction: *noscitur a sociis* and *ejusdem generis*.

Properly applied, *noscitur a sociis* allows a word to gather meaning from the words around it. If the canon is taken too far, however, the word is swallowed by the company it keeps and rendered surplusage. *Sweet Home,* 515 U.S. at 697-98, 115 S. Ct. at 2412-13. Such an application was explicitly rejected in *Sweet Home*.

[7] Appellee characterizes these same facts as "humane care [that] could be improved," concluding this does not amount to "vexing, annoying, or tormenting." (DE 126 at 11.) As set forth at Argument § III, *infra*, the issue of Lolita's injuries is thus a factual dispute to be resolved at trial.

There, the D.C. Circuit called upon *noscitur a sociis* to harmonize the ten terms that define "take." Determining that nine of the terms involved a direct application of force, it imposed a "direct force" requirement on the tenth. *Id.* at 694, 115 S. Ct. at 2411.

The Supreme Court reversed, finding that "[t]he statutory context of 'harm' suggests that Congress meant that term to serve a particular function in the ESA, consistent with, but distinct from, the functions of the other verbs used to define 'take.'" *Id.* at 702, 115 S. Ct. 2415. Accordingly, the Court restored FWS' definition of "harm," which allowed the term to have a character of its own. *See id.* at 697-98, 115 S. Ct. at 2412-13 (noting "[a] reluctance to treat statutory terms as surplusage" and that "unless the statutory term 'harm' encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate" the others used to define "take").

Like the D.C. Circuit in *Sweet Home*, the District Court here attempted to invoke *noscitur a sociis* to harmonize the ten terms that define "take," examining the "essential character" of eight of the terms to construe "harm" and "harass." (DE 203 at 23-25.) Citing the *Sweet Home* dissent, the District Court insisted that the terms in the "take" definition do not have distinct meaning but overlap in that they share a "common denominator" of "grave threat" or "seizure" (*see id.* at 21-23)—a proposition that contradicts the majority's acknowledgment that terms must

not be rendered mere surplusage. "Harm" and "harass" must be allowed to serve a function consistent with, but distinct from, the functions of the other terms defining "take." To require that the terms be limited to "gravely threatening" conduct causes them to be "submerged by [their] association" with other terms in the definition, *Sweet Home*, 515 U.S. at 702, 115 S. Ct. at 2415, and, more importantly, denies the terms the flexibility they must retain to ensure that the ESA has the "broadest possible" reach, as Congress intended.[8]

The District Court's application of *ejusdem generis* is likewise flawed. The canon may not be invoked to limit "general words or principles" that merely appear "in conjunction with particular classes of things." (DE 203 at 23.) It applies only "[w]here general words *follow* specific words[.]" *Yates v. U.S.*, 135 S. Ct. 1074, 1086, 191 L. Ed. 2d 65 (2015) (emphasis added). Here, the so-called "general" terms ("harm" and "harass") *precede* the remaining words in the "take" definition. 16 U.S.C. § 1532(19). Further, it is questionable to invoke a canon

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[8] *See* Order, *Graham v. San Antonio Zoological Society*, No. 5:15-cv-01054-XR, DE 16, at 4 (W.D. Tex. Jan. 27, 2016) (allegations that a captive Asian elephant was deprived of companionship, kept in a small enclosure with no shelter from the sun, and forced to walk on unnatural substrate "could constitute a 'harm[.]'"); *Kuehl v. Sellner*, No. C14-2034, 2016 WL 590468, at *29 (N.D. Iowa Feb. 11, 2016) (maintaining lemurs, a highly social species, without appropriate companionship constituted "harassment").

meant to narrow general terms so they "will not be considered broadly," (DE 203 at 23), to a statutory term that Congress directed should be construed as broadly as possible. *See Sweet Home*, 515 U.S. at 704-05, 115 S. Ct. at 2416; *see also, e.g.*, *U.S. v. Frumento*, 563 F.2d 1083, 1090 (3rd Cir. 1977) (the canon "is applied as an aid in ascertaining the intention of the legislature, not to subvert it when ascertained.").

Even if this canon were applicable, the District Court used it incorrectly when it arbitrarily grouped the terms that define "take" in contravention of the statute's text, history, and regulatory and dictionary definitions. Indeed, to shoehorn "harm" and "harass" into its three chosen categories, the District Court denied the terms their plain and ordinary meanings and overlaid upon them the potential for seizure or grave injury suggested by the dictionary definitions of "hunt," "shoot," and "kill." (DE 203 at 23-24.)

There is no reason that the implied categories should be defined in this way. To the contrary, the terms "harm" and "harass" are more logically grouped with terms not requiring grave injury, including "pursue," "trap," and "wound," and can be understood as targeting conduct that disrupts normal behavior patterns. *See* New Oxford American Dictionary (3d ed. 2010) ("pursue" is to "follow (someone or something) in order to catch or attack them"; "trap" is to "catch (an animal) in a trap"; "wound" is to "inflict an injury on (someone)").

This arrangement is consistent with the regulatory definitions of "harm" and "harass," which explicitly prohibit such conduct. *See* 50 C.F.R. §§ 17.3, 222.102.[9] It is also consistent with the fact that both agencies' definitions of "harm" do not require demonstration of a "grave" injury, but only an "injury." *Id*. Likewise, FWS' definition of "harass" exempts generally accepted "[a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the [AWA] . . . when such practices, procedures, or provisions are not likely to result in *injury* to the wildlife."[10] 50 C.F.R. § 17.3 (emphasis added). That FWS

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[9] NMFS defines "harm" to include habitat modification that injures wildlife by "significantly impairing essential behavioral patterns." 50 C.F.R. § 222.102. FWS definition of the term, though not binding, is virtually identical, 50 C.F.R. § 17.3, and was examined and upheld by the *Sweet Home* majority, 515 U.S. at 708, 115 S. Ct. at 2418. Further, although NMFS does not provide a definition of "harass," it does prohibit behavior that is not life-threatening in nature, including approaching orcas with a drifting vessel. *See* 50 C.F.R. § 224.103(e).

[10] The exception to the definition of "harass" in 50 C.F.R. § 17.3 provides that:

> 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*."

(emphasis added). The italicized language is included in subsection (3) of the definition. However, because the word "practices" appears only in subsection (1),

saw the need to specifically state that mere *injury*—not grave injury—falls outside the scope of this exemption demonstrates that the District Court's holding conflicts with agency interpretation. In fact, FWS has recognized that "maintaining animals in inadequate, unsafe or unsanitary conditions, physical mistreatment, and the like constitute harassment because such conditions might create the likelihood of injury or sickness," and that "[t]he Act continues to afford protection to listed species that are not being treated in a humane manner." 63 Fed. Reg. at 48638.[11]

The only support the District Court offers to justify its application of *ejusdem generis* is *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1993), a case distinguished in *Sweet Home* and mooted by Congress.[12] In *Hayashi*, the Ninth Circuit considered the scope of "harass" as used to define "take" in the Marine

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"procedures" only appears in subsection (2), and "provisions" appears only in subsection (3), Plaintiffs understand this clause to apply to the full definition of "harass." Even if this were not the case, that FWS saw the need to exempt AWA-compliant, generally accepted husbandry practices from the coverage of this term demonstrates that it did not believe that "harass[ment]" requires a "grave" threat.

[11] If NMFS adopted FWS' exemption, it would not save Seaquarium from liability because Seaquarium also "harms" Lolita and because the exemption only applies to husbandry that satisfies the generally accepted standards of care *and* minimum AWA standards, *and* is not likely to result in injury to the animal. 50 C.F.R. § 17.3. *See* Argument § III.B, *infra*.

[12] The Court relied on *Hayashi* without acknowledging *Strong v. United States*, 5 F.3d 905, 907 (5th Cir. 1993), a Fifth Circuit case from the same year holding essentially the opposite—that merely *feeding* wild dolphins constituted harassment under the MMPA.

Mammal Protection Act ("MMPA"), and determined that a fisherman had not committed a "take" when he shot near but not at dolphins.[13] 22 F.3d at 861. As the *Sweet Home* majority noted, the case cannot be used to construe the ESA's "take" provisions because the statutes differ in significant ways, including in that the MMPA does not include in its list of terms defining "take" the word "harm" or other acts expressly prohibited under the ESA. 515 U.S. at 702 n.16, 115 S. Ct. at 2415 n.16; *see also* 16 U.S.C. § 1362(12).[14]

II. The District Court Impermissibly Imposed a Heightened Standard for Establishing a "Take" of a Captive Member of an Endangered Species.

A. The standard concocted by the District Court assigns a separate legal status to captive animals, inconsistent with the text of the ESA and Congressional intent.

In granting summary judgment, the District Court held that a "*licensed exhibitor 'take[s]' a captive animal* in violation of the ESA's section 9(a)(1) only

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[13] Even within the context of the MMPA, *Hayashi* became irrelevant when the MMPA's definition of "harass[ment]" was amended. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1225 (9th Cir. 2004).

[14] Because the MMPA applies to all marine mammals, including non-endangered populations, Congress did not define "take" in the broadest possible terms, and courts might reasonably invoke *ejusdem generis* to narrow liability. *But see Hayashi*, 22 F.3d at 867 ("A cramped construction of the term 'taking' will . . . restrict most aspects of the scheme envisioned by Congress for the protection of marine mammals.") (Browning, J., dissenting). In contrast, because the ESA applies to endangered populations, Congress determined that conflicts in interpretation should be resolved to protect them.

when its conduct gravely threatens or has the potential to gravely threaten that animal's survival." (DE 203 at 38 (emphasis added).) This holding thus imposed a novel "grave threat" requirement only with respect to "take" of captive animals regulated under the AWA, creating a drastic disparity between ESA protections afforded to wild and captive endangered animals. This dangerously narrow interpretation of the ESA is inconsistent with the statute's "context, 'structure, history, and purpose'," and should not be allowed to stand. *Abramski v. United States*, 134 S. Ct. 2259, 2267, 189 L.Ed.2d 262 (2014) (citation omitted).

Where Congress intended to exempt captive animals from specific protections of the ESA, it did so explicitly. For example, section 9(b)(1) of the ESA provides that import and export of certain endangered animals is permitted only if those animals are not held in the course of commercial activity. 16 U.S.C. § 1538(b)(1);[15] *see also* 78 Fed. Reg. 33790-01, 33793 (June 5, 2013) (FWS noting that "certain exceptions for animals held in captivity" "show that what Congress intended was that captive-held animals would generally have the same legal status as their wild counterparts."); 80 Fed. Reg. 34500-01, 34502 (June 16, 2015); 80 Fed. Reg. at 7388 (NMFS noting that "Section 9(a)(1)(A)-(G) of the ESA applies

[15] This exemption applies to animals held in captivity as of (1) the date of the ESA's passage or (2) the date of listing for their species. 16 U.S.C. § 1538(b)(1).

to endangered species regardless of their captive status"). Similarly, Congress amended the ESA in 1978 to exempt legally-held captive raptors from the "take" prohibition. 16 U.S.C. § 1538(b)(2)(A). Congress made no such exclusions with respect to prohibited "takes" of any other captive animals. Given that Congress demonstrated its ability to include unambiguous language where it intended to create an exclusion, it is improper to read one into the statute absent an explicit directive.

Nevertheless, in re-defining the terms "harm" and "harass" as to captive animals, the District Court effectively created a new exemption for captive members of an endangered species, excluding them from the full protection of the ESA—an action that both NMFS and FWS have recognized is inconsistent with the plain language and purpose of the statute. *See*, *e.g.*, 77 Fed. Reg. 431-01 (Jan. 5, 2012) (removing the exclusion of captive-bred and sport-hunted endangered antelopes from the prohibition of certain activities); 78 Fed. Reg. 33790-01 (June 5, 2013) (rejecting petitions to remove captive antelopes from the species' listings); 80 Fed. Reg. 34500-01 (June 16, 2015) (ending separate classification of captive and wild chimpanzees).

Indeed, the impropriety of disparate protections for wild and captive animals is precisely why NMFS belatedly included Lolita within the "endangered" listing for SRKWs. In so doing, NMFS stated 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," that "captive members of a species have the same legal status as the species as a whole," and that "captive members of a listed species are also subject to the relevant provisions of section 9 of the ESA as warranted." 80 Fed. Reg. at 7385. NMFS continued, "On its face the ESA does not treat captives differently. Rather, specific language in section 9 and section 10 of the ESA presumes their inclusion in the listed entity." *Id.* at 7387; *see also* 78 Fed. Reg. at 33798 (noting, with respect to certain species of antelopes, that "Congress did not intend for captive-held specimens of wildlife to be subject to separate legal status on the basis of their captive state").

To be sure, the agencies' conclusions that the ESA requires captive members of a species to be granted the same legal status as the species as a whole were not limited to the question of differential or "split" listings of wild and captive animals, but also addressed the extent to which the prohibitions apply. Indeed, FWS has made clear that even when *several* other statutes, policies, and guidelines—*including the AWA*—regulate captive endangered animals, the ESA "take" prohibition applies in the same manner and in equal force. For example, when FWS eliminated the split-listing of wild and captive chimpanzees, it addressed public comments that listing the captive members as endangered would impact "essential biomedical research" and that the captive members were "currently well-

regulated under other Federal statutes, including the [AWA], the Public Health Service Act, and the Chimp Act of 2000, as well as other Federal policies and guidelines." 80 Fed. Reg. at 34516. FWS specifically responded that, notwithstanding these other laws and policies:

> [R]esearch involving chimpanzees that could cause harm to the animal (*i.e.*, "take") will require a take permit under the Act. While take includes harassment of individual animals, our regulations specify that when captive animals are involved, harassment does not include [generally accepted] animal husbandry practices that meet or exceed AWA standards, breeding procedures, or veterinary care that is not likely to result in injury (see the definition of harass at 50 C.F.R. § 17.3).

Id. at 34516-17. The agency did not re-define "harass" or "take" to exclude certain conduct that was otherwise regulated by the AWA and other applicable federal statutes, policies, and guidelines, nor did it define those terms in any more restrictive way when applied to captive animals. And, while some degree of control must obviously be exercised over captive animals, the ESA nevertheless "continues to afford protection to [captive] listed species that are not being treated in a humane manner," 63 Fed. Reg. at 48638—precisely the gravamen of Plaintiffs' concerns in *this* case. *See also* 77 Fed. Reg. at 434 (FWS rejecting a public comment that "regulating the domestic management of [endangered antelope] is beyond the fundamental intent of the Endangered Species Act," and reiterating that "[t]he prohibitions apply to all listed specimens.")

B. Agency administration of the ESA with respect to captive animals does not support the District Court's imposition of a heightened "grave threat" requirement.

The District Court further erred in its interpretation of FWS' and NMFS' positions on the degree of "harm" or "harass[ment]" necessary to constitute a "take."[16] First, the Court misconstrued statements by NMFS as purported support for its textual interpretation of the "take" prohibition. *Cf.* Argument § II.A, *supra*. It interpreted NMFS' statement, in the final listing decision for Lolita, that "'*depending on the circumstances*, we would not *likely* find continued possession, care, and maintenance of a captive animal to be a violation of section 9,'" as indicating that the agency's "general" view supports the imposition of a "grave threat" requirement for captive animals. (DE 203 at 28-29 (quoting 80 Fed. Reg. at 7385) (emphasis added).)

Plaintiffs do not dispute that mere captivity likely would not be considered a take—whether a take occurs depends on the circumstances of that captivity. But, as NMFS explained, its statement did not represent "factual findings on Lolita's

[16] Where Congressional intent is clear, "that is the end of the matter." *Wilderness Watch & Pub. Employees for Envtl. Responsibility v. Mainella*, 375 F.3d 1085, 1091 (11th Cir. 2004). If the statute is silent or ambiguous, however, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. at 844, 104 S. Ct. at 2782; *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944) (some deference owed to non-binding administrative interpretation).

actual circumstances." 80 Fed. Reg. at 7385. Rather, NMFS recognized "the need for a more focused evaluation" of "the types of activities that might trigger section 9 concerns," but found that would not be "appropriately performed" in the listing rule. 80 Fed. Reg. at 7389. Put differently, NMFS' statement in no way narrows the take prohibitions for captive animals but, instead, merely recognizes that numerous factual questions regarding Lolita's circumstances have yet to be resolved. Whether Lolita's conditions "trigger section 9 concerns" is thus precisely what forms the basis of the present factual disputes between the parties. *See* Argument § III, *infra*.

As purported further support for its "grave threat" requirement, the District Court also cited NMFS' statement that "captive care requirements" are not within the agency's jurisdiction. (DE 203 at 29.) But the Court omitted a critical word from this citation—"*AWA* captive care requirements are not under NMFS jurisdiction." 80 Fed. Reg. at 7382 (emphasis added). This case does not arise under the AWA; it arises under the ESA. There is no question that FWS and NMFS have not delegated (and could not lawfully delegate) to the USDA any responsibility for administering the ESA. Accordingly, NMFS retains jurisdiction as to deficient captive care *under the ESA*, whether those deficiencies are gravely threatening or otherwise. In fact, consistent with this interpretation, FWS recently adopted additional regulations to protect threatened captive African elephants

(who, when used in exhibitions, are also protected by the AWA) for the express purpose of "ensur[ing] that elephants held in captivity receive an appropriate *standard of care*." 81 Fed. Reg. 36388-01, 36388 (June 6, 2016) (codified at 50 C.F.R. § 17.40(e)) (emphasis added). The agency explained that this "is a standard protection for threatened species and ensures an adequate level of care for wildlife held in captivity." *Id.*

Second, the District Court misinterpreted FWS' non-binding definition of "harass" as supporting a conclusion that the ESA is "distinct from concerns regarding the humane treatment and welfare of an animal in captivity," (DE 203 at 31), such that a heightened "grave threat" standard for ESA claims as to captive endangered animals is warranted. As discussed *supra* at Argument § I.C, however, even when FWS exempted from its definition of "harass" "generally accepted . . . animal husbandry practices that meet or exceed the minimum standards for facilities and care under the AWA," 50 C.F.R. § 17.3, it made clear that the definition continues to prohibit inhumane treatment of animals in captivity because the exemption is triggered only where practices "are not likely to result in injury to the wildlife." 50 C.F.R. § 17.3; *see also* 63 Fed. Reg. at 48636 (explaining that the exemption "exclude[s] proper animal husbandry practices that are not likely to result in injury"—plain injury, not grave or life-threatening injury.); Argument § II.C *infra* (explaining that the ESA and AWA do not conflict). Indeed, FWS

explained that, "[s]ince captive animals can be subjected to improper husbandry as well as to harm and other taking activities, the Service considers it prudent to maintain such protections, consistent with Congressional intent." 63 Fed. Reg. at 48636. The agency further found that "maintaining animals in inadequate, unsafe or unsanitary conditions, physical mistreatment, and the like constitute harassment because such conditions might create the likelihood of injury or sickness," and that "[t]he Act continues to afford protection to listed species that are not being treated in a humane manner."[17] *Id.* at 48638.

FWS' exemption thus does not categorically remove non-lethal conduct toward captive animals from the ESA's "take" prohibition. Rather, a determination as to whether conduct constitutes "harass[ment]" under this regulation requires a fact-finder to evaluate whether a challenged practice that otherwise falls under the agency's definition of "harass" is "generally accepted," compliant with AWA standards, and whether it would likely result in mere "injury." 50 C.F.R. § 17.3.

[17] FWS also rejected the suggestion that it could limit "harass" to apply only to animals in the wild, noting that the statute defined "take" to apply to all listed wildlife, "whether wild or captive," and that the definition with regard to captive wildlife can be "clarified," but "cannot be changed administratively." *Id.* at 48636.

C. The Court improperly found that the ESA must defer protection of captive animal welfare to the USDA unless challenged conduct rises to the level of "grave threat."

1. The ESA and the AWA are complementary statutes.

The District Court adopted its novel "grave threat" standard due, in part, to a perceived need to reconcile the protections of the ESA with those of the AWA. But the ESA and AWA are different statutes, with different standards and different enforcement mechanisms, and they do not conflict. The AWA, 7 U.S.C. §§ 2131-2159, and its implementing regulations, 9 C.F.R. §§ 1.1–4.11, provide only the "minimum requirements," 7 U.S.C. § 2143(a)(2), for *all* covered animals, including marine mammals held by exhibitors. And these "minimum requirements" are inadequately enforced and have been critiqued for failing to consider abundant data on the needs and well-being of marine mammals. *See, e.g.*, Marine Mammal Comm'n, Comment on Proposed Rule to Amend AWA Marine Mammal Regulations (May 4, 2016), https://www.regulations.gov/document?D=APHIS-2006-0085-5090 (Comments by the Marine Mammal Commission chastising the USDA for its failure to take into account, in its marine mammal standards, "abundant data . . . regarding daily movement patterns, foraging behavior, and social interactions" or "the physical and psychological well-being of the animals," failure to consult with experts, and prioritizing cost concerns for exhibitors over animal welfare); USDA, OIG Audit

Report, APHIS Oversight and Research Facilities (December 2014), https://www.usda.gov/oig/webdocs/33601-0001-41.pdf (USDA "did not follow its own criteria in closing at least 59 cases that involved grave (e.g., animal deaths) or repeat welfare violations" and issued penalties at an average 86% discount); USDA, OIG Audit Report: APHIS Animal Care Program, Inspection and Enf't Activities i-ii (Sept. 2005), http://www.usda.gov/oig/webdocs/33002-03-SF.pdf (the Eastern Region "is not aggressively pursuing enforcement actions against violators of the AWA"); USDA, OIG Audit Report: APHIS Animal Care Program, Inspections of Problematic Dealers 1-2 (2010), http://www.usda.gov/oig/webdocs/33002-4-SF.pdf (lack of appropriate enforcement "weakened the agency's ability to protect . . . animals").

The ESA, on the other hand, is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley*, 437 U.S. at 180, 98 S. Ct. at 2294. When deciding whether to list an animal under the ESA, the agencies may consider only "the best scientific and commercial data available" concerning the biological status of the species, 16 U.S.C. § 1533(b)(1)(A), and may not take into account any economic considerations, such as whether the listing would cause the holder of an endangered species economic harm, *id.*; S. Rep. No. 418, 97th Cong., 2d Sess., p.12 (1982). As discussed in Argument § I, *supra*, Congress has made clear that it intended to afford endangered

animals the highest of priorities. *See Tenn. Valley*, 437 U.S. at 185, 98 S. Ct. at 2297. This protection thus goes well beyond the minimum standards applicable to animals under the AWA, but it does not negate it.

Applying the ESA prohibitions on "harm" and "harass[ment]" to both wild and captive endangered animals in a manner that is consistent with the language of the statute, agency application, and Supreme Court precedent thus does not, as the District Court cautioned, "displace a long established regulatory framework providing for licensing and oversight of exhibitors and researchers by APHIS." (DE 203 at 37.) Rather, the ESA simply provides *additional* protections to a small subset of animals, held in regulated facilities, who are "endangered." 63 Fed. Reg. at 48638.[18] Because the ESA and AWA are not in conflict, the Court's narrowing of the ESA's protections is entirely unnecessary.

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[18] Even if it were proper for the Court to construe these statutes such that they were somehow mutually exclusive, its holding fails to do so: If the ESA applies only to "gravely threatening" conduct with respect to captive animals, it still overlaps with the AWA since such conduct is similarly prohibited under that statute. Indeed, rather than resolving any perceived conflict, the ruling actually leads to two perverse scenarios. First, with respect to captive animals, it causes the ESA to be subsumed by and afford *less* protection than the AWA because it is triggered only by grave injuries. Second, captive endangered animals held by other than a "licensed exhibitor," and thus not regulated by the AWA, either: (a) receive *no protection* until their "harm" or "harass[ment]" rises to the level of a grave threat; or (b) receive greater ESA protection than animals held by a licensee based solely on the captor's decision not to become licensed.

2. The Supreme Court found no conflict between statutes under analogous circumstances.

Because the ESA and AWA both, by their plain language, address treatment of animals in captivity, the District Court attempted to limit the subject matter overlap between the statutes by drastically narrowing the ESA's definitions of "harm" and "harass" with respect to captive animals.[19] However, "'when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1266 (11th Cir. 2006) (quoting *J.E.M. Ag Supply*, 534 U.S. at 143–44). Indeed, "it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other." *POM Wonderful LLC*, 134 S.Ct. at 2238.

[19] The District Court also asserted that the absence of any reference to "humane treatment" of captive animals in the ESA means that Congress left regulation of this subject matter to "the Secretary of Agriculture under the authority granted by the AWA and his delegee, APHIS." (DE 203 at 34-36.) However, "Congressional acquiescence can only be inferred when there is 'overwhelming evidence' that Congress explicitly considered the 'precise issue' presented to the court." *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007) (parallel citations omitted), *quoting Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 2231 (2006). Not only is there no "overwhelming evidence" that Congress considered this "precise issue" and determined that the ESA would be limited as to captive animals, but the agencies tasked with administering the law have conducted an exhaustive review of the "the language, purpose, operation, and legislative history of the Act" and determined that it prohibits them from assigning a separate legal status.

The Supreme Court addressed circumstances analogous to this case in *POM Wonderful*, which "concerns the intersection and complementarity of . . . two federal laws," *id.* at 2333: the Lanham Act and the Federal Food, Drug, and Cosmetic Act ("FDCA"). POM sued Coca-Cola under the Lanham Act, alleging that Coca-Cola's use of a juice label was deceptive and misleading. *Id.* The Lanham Act grants a cause of action to competitors against "any person who 'uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities.'" *Id.* at 2234 (quoting 15 U.S.C. § 1125(a)(1)). Coca-Cola contended that the claim was precluded because the accused label was proper under the FDCA, which more specifically forbids the misbranding of food by means of false or misleading labeling. *Id.* at 2333.

Food and Drug Administration ("FDA") regulations, which implement the FDCA, provide that "[i]f a juice blend does not name all the juices it contains and mentions only juices that are not predominant in the blend, then it must either declare the percentage content of the named juice or '[i]ndicate that the named juice is present as a flavor or flavoring[.]'" *Id.* at 2234-35 (internal citations omitted). While the Lanham Act "relies in substantial part for its enforcement on

private suits brought by injured competitors," the government has nearly exclusive authority to enforce the FDCA, and "[p]rivate parties may not bring enforcement suits." *Id.* at 2235 (internal citations omitted). The FDCA "does not address, or refer to, other federal statutes or the preclusion thereof." *Id.*

The label at issue appeared on a juice blend containing a "minuscule amount of pomegranate and blueberry juices," *id*, but displayed the words "pomegranate blueberry" in all capital letters. *Id.* POM sued under the Lanham Act, alleging that the name, label, marketing, and advertising of Coca–Cola's beverage misled consumers into believing the product consisted predominantly of pomegranate and blueberry juice. The District Court granted partial summary judgment for Coca-Cola, and the Ninth Circuit affirmed, reasoning:

> Congress decided "to entrust matters of juice beverage labeling to the FDA"; the FDA has promulgated "comprehensive regulation of that labeling"; and the FDA "apparently" has not imposed the requirements on Coca–Cola's label that are sought by POM. "[U]nder [Circuit] precedent," the Court of Appeals explained, "for a court to act when the FDA has not—despite regulating extensively in this area—would risk undercutting the FDA's expert judgments and authority." For these reasons, and "[o]ut of respect for the statutory and regulatory scheme," the Court of Appeals barred POM's Lanham Act claim.

Id. at 1136 (alterations in original).

The Supreme Court unanimously reversed for the following reasons directly analogous to this case:

- "If Congress had concluded . . . that Lanham Act suits could interfere with the FDCA, it might well have enacted a provision addressing the issue during these 70 years" the statutes have co-existed. *Id*. at 2237.
- It is of no significance that the FDCA and its regulations address food and beverage labeling with more specificity than the Lanham Act because "[they] are complementary and have separate scopes and purposes," can be implemented in full at the same time, *id.* at 2240, and each has its own enforcement mechanism, *id.* at 2238.
- "The centralization of FDCA enforcement authority in the Federal Government does not indicate that Congress intended to foreclose private enforcement of other federal statutes." *Id.* at 2239.
- Lanham Act claims are not precluded even to the extent that they challenge aspects of the label that are specifically regulated by the FDCA or regulations because they are not "a ceiling on the regulation of food and beverage labeling." *Id.* at 2240.
- The lawsuit is not "undermining an agency judgment, and in any event the FDA does not have authority to enforce the Lanham Act." *Id.* at 2241.
- And finally, the Court declined "to preclude private parties from availing themselves of a well-established federal remedy because an

> agency enacted regulations that touch on similar subject matter but do not purport to displace that remedy or even implement the statute that is its source." *Id.*

The Court's comprehensive reasoning applies equally here. Neither the ESA nor the AWA forbids or limits ESA claims challenging conditions regulated by the AWA, or purports to govern the relevant interaction between the laws, despite the fact that these statutes have co-existed for more than 40 years. If Congress had concluded that ESA suits could interfere with the AWA, it could have enacted a provision in that time. Its failure to do so is "powerful evidence that Congress did not intend [USDA] oversight to be the exclusive means" of ensuring humane conditions for endangered animals.[20] *See id.* at 2237. In fact, the AWA is even more permissive than the FDCA—whereas the latter expressly preempts some state laws, *id.* at 2238, Congress unquestionably intended the AWA to be a floor rather than a ceiling, as indicated by the provision that it "shall not prohibit any

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[20] Deferring to USDA on whether captive conditions constitute a "take" would also destroy the citizen suit "check" on NMFS' enforcement. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60, 108 S. Ct. 376, 383 (1987) (citizen suit provision in statute is meant to supplement governmental action); *Cal. Pub. Interest Research Grp. v. Shell Oil Co.*, No. C92-4023-TEH, 1996 WL 33982, at *3 (N.D. Cal. Jan. 23, 1996) (plaintiffs "enforc[e] the CWA on behalf of the public when government enforcement is lagging").

State (or a political subdivision of such State) from promulgating standards in addition to those" promulgated under the AWA. 7 U.S.C. § 2143(a)(8). The ESA and AWA complement each other, each with their own scope, purpose, and enforcement mechanism—the AWA is enforced exclusively by the government, while the ESA allows for private enforcement. The laws can be implemented in full at the same time—it is possible to comply with both statutes, which offer different levels of protection, but not conflicting requirements. And finally, the USDA has no authority to enforce the ESA with respect to captive animals, and Plaintiffs are not precluded from "availing themselves of a well-established federal remedy" because the AWA regulations—which "do not purport to displace that remedy or even implement the statute"—separately regulate those animals. *See also Ray v. Spirit Airlines, Inc.*, 767 F.3d 1220 (11th Cir. 2014) (holding that the Airline Deregulation Act of 1978 (ADA) did not preclude plaintiff's Racketeer Influenced and Corrupt Organizations Act (RICO) claim where there was no conflict between the statutes; nothing in its text or legislative history indicated that the ADA was intended to subsume the field of airline liability; the laws had different enforcement mechanisms, penalties, and "feature different requirements and offer different protections"; and "Congress expressly admonished that [RICO] is to 'be liberally construed to effectuate its remedial purposes.'").

For all of these reasons, the AWA and USDA regulation of exhibitors does not preclude the ESA from applying to *all* "harm" and "harass[ment]" of captive endangered animals, whether or not gravely threatening.[21]

3. The passage of the AWA did not preclude application of the ESA to captive animals.

The ESA applied to captive animals at the time it was enacted. *See* Argument § II, *supra*. Congress did not, when the USDA began regulating marine mammals under the AWA six years later, *see* 44 Fed. Reg. 36868, 36874 (June 22, 1979), express that it was to preclude application of the ESA in any matter whatsoever, nor has Congress done so over the ensuing thirty-seven years.

Indeed, the ESA and AWA are not even the only statutory schemes to apply to marine mammals simultaneously: NMFS and APHIS had co-jurisdiction over captive marine mammals under the MMPA until NMFS was, in its belief, stripped of its authority to regulate the care of captive animals under that statute when the MMPA was amended in 1994. During that period, NMFS proposed requiring a

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[21] Just as the Supreme Court in *POM Wonderful* rejected the notion that allowing the Lanham Act claim "would risk undercutting the FDA's expert judgments and authority" and must be dismissed "[o]ut of respect for the statutory and regulatory scheme," 134 S.Ct. at 2236, so too must this Court reject the District Court's position that Plaintiffs' interpretation of the ESA improperly "substitute[s] the judgment of a federal trial court judge for the technical expertise of the responsible agency," i.e. the USDA. (DE 203 at 37.)

"take" permit for all captive marine mammals, including those born in captivity, however, NMFS believed the 1994 amendments "eliminat[ed] the basis" for these and other proposed changes. 61 Fed. Reg. 21926-01 (May 10, 1996). There has been no such amendment to the ESA, and NMFS therefore retains its enforcement authority over captive endangered animals under that statute.

III. The Court Improperly Disregarded Material Disputes of Fact.

Regardless of the proper definition of "harm" and "harass" applicable under the "take" provision of the ESA, the District Court erred by granting summary judgment to the Defendant when disputed facts remain with respect to (1) the conditions under which Lolita is maintained, including their compliance or non-compliance with the AWA, and (2) the existence and severity of Lolita's physical and psychological injuries.[22] *See* Fed. R. Civ. P. 56(a); *see* SOC § II.A.1, *supra*.

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[22] Disputed facts also remain as to remedy. The District Court stated that "NMFS . . . interpreted section 9(a)(1) by stating that release of a captive animal into the wild could itself constitute a 'take.'" But NMFS did not make any determinations as to whether a take *would* actually occur if Lolita were relocated to a sea pen in her native waters. Rather, it listed potential concerns for which factual determinations would need to be made. 80 Fed. Reg. at 7386 (noting that further inquiry was warranted regarding disease transmission risk, the ability to forage, and behavior developed in captivity). Further, it is premature to decide on summary judgment whether relocating Lolita to a sea pen would constitute a "take" since this is only one of several potential remedies that the District Court could grant (*see* DE 203 at n.15), and inquiries regarding remedy have no bearing on whether *Defendant* is presently committing a "take" of Lolita. *See Lovelace v.*

A. Genuine issues of material fact remain as to the uniquely abusive circumstances of Lolita's captivity.

Even if "grave" injury were required for "harm" or "harass[ment]" to rise to the level of a "take," Plaintiffs have proffered evidence of injuries that reduce Lolita's long-term likelihood of survival and thus qualify as "life-threatening" under the District Court's standard. (*See, e.g.*, DE 164 ¶¶ 21, 24 (noting frequent infections, likely ulcers, possible lung disease, anemia, and kidney disease).) Since material factual disputes remain with respect to the gravity of the impact that the conditions of Lolita's confinement have on her health, summary judgment was inappropriate.

What is more, under a *correct*, plain meaning construction of "harm" and "harass," *see* Argument § I, *supra*, the thirteen specific injuries relating to Lolita's lack of appropriate companionship, inadequate space, and insufficient sun protection, acknowledged in the District Court's decision, clearly rise to the level of "take."[23] (DE 203 at 17-18.) Further, in addition to the evidence specifically

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Lee, 472 F.3d 174, 192 n.6 (4th Cir. 2006) ("It is premature and unnecessary to evaluate any remedy at this juncture because liability has not yet been considered, let alone decided, under the proper standard."); *United States v. Philip Morris USA, Inc.*, 319 F. Supp. 2d 9, 12 (D.D.C. 2004) (addressing the availability of remedy before determining liability was putting the "cart before the horse.").

[23] The District Court stated that evidence of these injuries was proffered "through expert testimony." (DE 203 at 17.) While this is correct and itself precludes a grant

listed in the Court's order, these injuries are also supported by other documentation included in Plaintiffs' summary judgment opposition papers, which further details the physical and psychological "harm" and "harass[ment]" that Lolita endures. This evidence includes:

- [redacted]

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of summary judgment, *see, e.g., U.S. ex rel. Armfield v. Gills*, No. 8:07-CV-2374-T-27TBM, 2013 WL 371327, at *8 (M.D. Fla. Jan. 30, 2013) ("Since the parties proffer competing expert opinions with regard to the scope and interpretation of the applicable regulatory provisions . . . the weight to be afforded those opinions will involve a credibility determination inappropriate for summary judgment."), it offers an incomplete picture of the record. Plaintiffs' experts' testimony only constitutes a *portion* of the materials on which Plaintiffs relied. Further, although the District Court suggested, in dicta as it has not yet ruled on *Daubert* motions, that Plaintiffs' experts' opinions were unreliable because they did not establish the ultimate fact of causation regarding skin injuries and certain medical problems (*see* DE 203, FN27), any individual expert's testimony need not establish an ultimate fact by itself. Rather, "[a]s expert evidence, the testimony need only *assist* the trier of fact . . . to understand the evidence or to determine a fact in issue." *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 564-65 (11th Cir. 1998) (emphasis in original); *see also Foreman v. Am. Rd. Lines, Inc.*, 623 F. Supp. 2d 1327, 1336 (S.D. Ala. 2008) (if expert opinions were required to be backed solely by objective test results, "precious few expert witnesses in the social sciences would ever be allowed to testify in federal court."); *see also Maiz v. Virani*, 253 F.3d 641, 669 (11th Cir. 2001) ("[T]here is no question that an expert may still properly base his testimony on 'professional study or personal experience.'"). And Plaintiffs' experts, who are some of the foremost authorities on marine mammals, also identified evidence that Lolita suffers *other* ongoing injuries including rakes, chronic illness, and stereotypies. (*see* DE 164-7.)

[redacted][24]

- [redacted][25]
- [redacted];
- [redacted];

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[24] [redacted] (DE164-20 at MSQ0009790; DE 164-7, Ex. F-D at 10.)

[25] The PWSDs are referred to in these documents as "lags," short for *Lagenorhynchus obliquidens*. (*See* DE 164-28 at 9.) Defendant refers to the front portion of Lolita's tank when the gates are closed as "A pool." (*See* DE 127 at ¶ 34.)

- [redacted];
- [redacted];
- [redacted]; and
- [redacted].

Thus, because there are material facts in dispute regarding whether Lolita is being "taken," summary judgment was clearly unwarranted.

B. Defendant's alleged AWA compliance, if relevant, is also a disputed fact.

As explained *supra* at Argument § II.C, the AWA and ESA are separate statutory schemes designed to enforce distinct sets of animal care standards. Accordingly, Defendant's compliance or non-compliance with the AWA is not determinative with respect to its compliance with the ESA. In fact, neither the ESA itself nor NMFS' regulations adopted thereunder reference the AWA at all. Rather,

only FWS' regulations, which apply to animals *other* than orcas, discuss compliance with AWA standards and, even there, the AWA is mentioned only with respect to the definition of "harass"—neither FWS' nor NMFS' regulations contain any AWA-related exemption in their definitions of "harm," *see* 50 C.F.R. § 17.3, and, as set forth above, Plaintiffs have provided ample evidence that Lolita is *both* harassed *and* harmed. *See* Argument § III.A, *supra*.

Further, even if the FWS "harass[ment]" exemption for "generally accepted . . . animal husbandry practices that meet or exceed" the AWA's minimum standards and "are not likely to result in injury," 50 C.F.R. § 17.3, somehow applies to species regulated by NMFS, significant disputes remain as to whether (1) the challenged practices constitute "generally accepted" husbandry and, if so, (2) they comply with the AWA, and (3) are not likely to result in injury to Lolita.

As to the first issue, Defendant's experts testified that they did not know of a facility that keeps an orca in a tank smaller than Lolita's. (DE 164 ¶¶ 95-96.) Plaintiffs' expert in orca training similarly opined that "Lolita's tank at Miami Seaquarium is without question the smallest and most barren I have ever seen an orca forced to live in." (DE 164-7, Ex. F-D at 4.) Likewise, one of Defendant's experts testified that, in his thirty-five-year career at SeaWorld, he had never seen an orca held without another member of its species for as long as Lolita. (DE 164,

¶ 103; DE 164-24 at 51:17-18, 75:18-22; *see also* DE 164-7, Ex. F-D (Plaintiffs' expert stating that "Of the 20 different orcas I have worked with between three different facilities, not one was held without an orca companion or with a Pacific white-sided dolphin or other non-orca dolphin species.").) Thus, there are genuine disputes as to whether the conditions in which Defendant maintains Lolita are "generally accepted" or whether they are uniquely deficient even within the captive marine mammal industry.

As to the second and third issues, Plaintiffs presented ample evidence that Lolita lacks appropriate companionship, adequate shade, and sufficient space, and that she sustains injuries resulting from these circumstances. *See* Argument § III.A, *supra*. Plaintiffs dispute whether any of these contested conditions meet the applicable AWA standards.

Moreover, the fact that APHIS has previously found Defendant's facility to be AWA-compliant is not dispositive as to whether "harass[ment]" is occurring even under the exemption. Unlike Plaintiffs, APHIS did not have the benefit of discovery in performing inspections of Defendant's facility. In making its compliance determinations, APHIS likely was unable to consider the frequency and severity of the physical injuries that Lolita suffers, the mobbing and sexually inappropriate behavior that the incompatible PWSDs display toward her, the injuries that she suffers as a result of sun exposure, and the stereotypical behavior

that she displays in an effort to comfort herself. (DE 164 ¶¶ 30, 36-37, 45-49, 52-54, 60, 63, 65, 67-68, 71, 74.)

Further, it is not clear that, even given the limited information that APHIS did consider, it presently would deem Defendant's facility to be AWA-compliant. Under the AWA, Lolita's tank must have a MHD of at least forty-eight feet. Lolita's tank, however, is divided by a solid platform and, by Defendant's own admission, "The maximum distance between the platform (island) in Lolita's pool and the outer edge of [the front pool referred to as] A Pool is approximately 35 feet," (DE 173, ¶ 5(q); *see also* DE 164, ¶¶ 28; DE 164-12)—i.e., the area of the pool into which the "largest circle . . . can be inserted," 9 C.F.R. § 1.1, does not satisfy the requisite forty-eight foot MHD. As explained above, APHIS has taken conflicting positions as to whether this obstruction may be disregarded. *See* SOC § II.B.1, *supra.* Accordingly, disputed facts remain as to whether the Seaquarium is compliant with AWA standards, and the FWS exemption cannot absolve Defendant of liability for "harass[ment]."

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CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the District Court's grant of partial summary judgment for Defendant and remand the case to the District Court for further proceedings.

Date: August 29, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 13,948 words, excluding the parts of the brief exempted by 11th Cir. R. 32-4.

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2016, a true and correct copy of the foregoing was filed with the Court of Appeals Eleventh Circuit Electronic Court Filing service with copies to be sent to the persons whose names and electronic mail addresses are listed below:

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