RINGLING BROTHERS ON TRIAL: CIRCUS ELEPHANTS AND THE ENDANGERED SPECIES ACT

By
Mark Eichelman*

In February 2009, the case of American Society for the Prevention of Cruelty to Animals, et al. v. Feld Entertainment, Inc. *was heard in the United States District Court for the District of Columbia. The plaintiffs, four animal rights organizations and one former elephant handler for Ringling Brothers and Barnum & Bailey Circus, brought a citizen suit against Feld Entertainment, Inc. (FEI), owner of Ringling Brothers, alleging that the Circus' use of bullhooks and leg tethers on its endangered Asian elephants constituted illegal "takings" under the Endangered Species Act (ESA). FEI argued that the plaintiffs did not have standing to bring suit, that the take provisions of the ESA do not apply to captive endangered species, and FEI's actions did not constitute takings. This Article, written as the case went to trial, analyzes the standing, ESA, and take issues presented in this case and ultimately concludes that the district court should find that the plaintiffs do have standing, the ESA does apply to the captive Asian elephants, and FEI's actions do constitute takings and should be enjoined.*

* © Mark Eichelman 2009. Lieutenant Colonel Eichelman is the Chief of the Resource Sustainment and Restoration Branch of the United States Army's Environmental Law Division. The views and opinions expressed herein are those of the author, not of the United States Army. The author holds a B.S. from the United States Military Academy, a J.D. *with honors* from the University of Tulsa College of Law, an LL.M. in Military Law from The Judge Advocate General's Legal Center and School, and an LL.M. in Environmental and Natural Resources Law from Lewis & Clark Law School. The author would like to thank Kathy Hessler, director of the Lewis & Clark Animal Law Clinic, for her comments and advice on this article.

I. INTRODUCTION

Elephants . . . are the pegs on which the circus is hung.

—P.T. Barnum (unsourced)

Elephants may not be the pegs to hang the Ringling Brothers and Barnum & Bailey Circus (Ringling Brothers) on for much longer if several animal rights organizations and a former Ringling Brothers employee prevail in their lawsuit against the circus' owner, Feld Entertainment, Inc. (FEI). In early February 2009, after nearly eight years of legal wrangling and maneuvering,[1] the trial of *American Society for the Prevention of Cruelty to Animals, et al. v. Feld Entertainment, Inc*. began in the United States District Court for the District of Columbia (district court).

The plaintiffs brought this action under the citizen-suit provisions[2] of the Endangered Species Act of 1973 (ESA)[3] alleging that FEI is "taking"[4] endangered Asian elephants by harming, harassing, and wounding them in violation of section 9 of the ESA.[5] Specifically, the plaintiffs take issue with FEI's use of bullhooks to train, guide, and discipline the elephants as well as FEI's chaining of the elephants for extended periods of time.[6] FEI counters by arguing that (1) all plaintiffs lack standing to bring suit; (2) the Animal Welfare Act of 1966 (AWA)[7] and not the ESA applies to captive animals such as the elephants at issue; and (3) even if the ESA does apply, FEI's use of bul-

[1] *See generally ASPCA v. Ringling Bros.*, 317 F.3d 334 (D.D.C. 2003) [hereinafter *ASPCA I*]; *ASPCA v. Ringling Bros*., 233 F.R.D. 209 (D.D.C. 2006) [hereinafter *ASPCA II*]; *Performing Animal Welfare Socy. v. Ringling Bros.*, 2001 U.S. Dist. LEXIS 12203 (June 29, 2001); *ASPCA v. Ringling Bros.*, https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2003cv2006-173 (D.D.C. Aug. 23, 2007) (mem.) [hereinafter *ASPCA III*]; *ASPCA v. Ringling Bros.*, https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2003cv2006-213 (D.D.C. Oct. 25, 2007) (mem.) [hereinafter *ASPCA IV*] (court opinions chronicling the nine-year legal battle).

[2] 16 U.S.C. § 1540(g)(1)(A) (2006).

[3] 16 U.S.C. §§ 1531–1544 (2006).

[4] 16 U.S.C. § 1532(19) (2006) (defining "take" as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct").

[5] Compl. for Decl. & Inj. Relief, *ASPCA I*, at ¶ 6, http://www.animallaw.info/pleadings/pb_pdf/pbusfdaspca_ringlingbros_complaint.pdf (Sept. 26, 2003) (last accessed Nov. 22, 2009); 16 U.S.C. § 1538(a) (2006).

[6] Compl. for Decl. & Inj. Relief, *ASPCA I*, *supra* n. 5, at ¶¶ 15–17.

[7] 7 U.S.C. §§ 2131–2159 (2006).

lhooks and chain tethers are generally accepted animal-husbandry practices that do not give rise to liability under the ESA.[8]

While disputed issues of fact may ultimately lead the district court to different conclusions, this Article asserts that, from a legal perspective, the plaintiffs in this case do have standing, the take provisions of the ESA do apply to captive animals, and FEI's actions do constitute takings under the ESA. This Article will begin in Part II by providing background information on the parties involved as well as the ESA and AWA. Part III analyzes the standing issue, Part IV analyzes the applicability of the ESA to captive animals, and Part V analyzes takings. Part VI summarizes the Article's thesis and major conclusions. It should be noted that this Article analyzes the case as it went to trial in February 2009 and accepts the prior rulings that shaped the posture of the case. Furthermore, this Article proceeds on the assumption that the plaintiffs' factual allegations are true and will be borne out at trial.

II. BACKGROUND

This Part begins with a look at the parties to the lawsuit as well as the elephants at the center of the controversy. It will end with a brief overview of the laws involved: the Endangered Species Act of 1973 (ESA) and the Animal Welfare Act of 1966 (AWA).

A. The Parties

1. The Plaintiffs

By the time the trial began in February 2009, there were four organizational plaintiffs: the American Society for the Prevention of Cruelty to Animals (ASPCA), the Animal Welfare Institute, the Fund for Animals, and the Animal Protection Institute; and one individual plaintiff, Tom Rider, a former Ringling Brothers employee who worked with the circus' Asian elephants in one of its three traveling shows.[9] The organizational plaintiffs all originally alleged identical informational injury—an inability to obtain information—for standing purposes. They claimed that FEI's failure to apply for permits before taking elephants in violation of the ESA deprived them of notice and comment opportunities as well as information regarding FEI's treatment of captive elephants.[10] The district court was not persuaded, however, and ruled that the organizational plaintiffs' informational injury was the result of a failure in the permit process and thus not at-

[8] Def. Amend. Pre-trial State., § I(A), *ASPCA I*, http://www.eswr.com/ringling/feldpretrialstatement.pdf (working copy) (Jan. 5, 2009) (last accessed Nov. 22, 2009)).

[9] Pl. 2d Amend. Pre-trial State., § I(B), *ASPCA I*, http://www.eswr.com/ringling/aspcapretrialstatement.pdf (Jan. 5, 2009) (last accessed Nov. 22, 2009).

[10] Compl. for Decl. & Inj. Relief, *ASPCA I*, *supra* n. 5, at ¶¶ 6–16.

tributable to FEI.[11] Accordingly, the organizational plaintiffs' standing is tied to Mr. Rider.[12]

Mr. Rider was a Ringling Brothers employee from June 1997 until November 1999.[13] He worked in the elephant barns and acted as an elephant handler.[14] In the course of his work, Mr. Rider spent many hours with the elephants—all of whom he knew by name—and became very fond of and attached to them.[15] Mr. Rider alleges that during his tenure with Ringling Brothers, he saw other elephant handlers and trainers routinely beat the elephants, including baby elephants, with wound-producing, sharp bullhooks.[16]

The bullhook or ankus, which FEI refers to as a guide, is a 2-to-3 foot wooden club or stick with a sharp metal hook at the end.[17] To organizations like the plaintiffs, the bullhook is a cruel device used by circus workers to repeatedly "beat, hit, and poke"[18] the elephants—most often on the extremely sensitive skin of the ears, head, and trunk—to "'train' and 'break'" the elephants.[19] To FEI, however, the bullhook serves "as an extension of the handler's arm" to cue the elephant to perform a desired behavior.[20]

FEI's use of bullhooks is not the only practice at issue in the case. Mr. Rider also alleges that, as the circus travels around the country, it keeps its elephants in chains each day for most of the day. He alleges that this mistreatment causes the elephants to engage in stereotypic behavior, such as constant, repetitive swaying back and forth, which is indicative of stress.[21] Circus elephants are typically chained by one front leg and the alternate back leg.[22] Often, several of the elephants' chains are collectively hooked to another chain that is anchored at each end by a picket.[23] Elephants chained on such "picket lines" are inhibited in their ability to engage in normal behaviors, interact with one another, and lie down.[24] Since circuses often establish the picket

11 *Performing Animal Welfare Socy. v. Ringling Bros.*, 2001 U.S. Dist. LEXIS 12203 at **14–15.

12 Def. Amend. Pre-trial State., *supra* n. 8, at § I(C)(3) (citing *Performing Animal Welfare Socy.*, 2001 U.S. Dist. LEXIS 12203; *cf. ASPCA IV*, at 5–6, https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2003cv2006-213)). R

13 Compl. for Decl. & Inj. Relief, *ASPCA I*, *supra* n. 5, at ¶ 18.

14 *Id.*

15 *Id.*

16 *Id.* at ¶ 19.

17 Wildlife Advocacy Project, *Tools of the Circus Trade*, http://www.wildlifeadvocacy.org/current/circus/tools_of_the_trade.php (last accessed Nov. 22, 2009).

18 *Id.*

19 *Id.*

20 Paul Courson, *Judge Hears Case Alleging Circus Elephant Abuse*, http://www.cnn.com/2009/CRIME/02/04/elephant.abuse.trial/index.html (Feb. 4, 2009) (last accessed Nov. 22, 2009) (quoting FEI lead attorney John Simpson).

21 Compl. for Decl. & Inj. Relief, *ASPCA I*, *supra* n. 5, at ¶ 19.

22 Wildlife Advocacy Project, *supra* n. 17. R

23 *Id.*

24 *Id.*

lines on hard surfaces like parking lots, the elephants suffer foot problems, arthritis, and other painful physical ailments.[25]

Mr. Rider alleges a personal and emotional attachment to the circus' elephants. He claims that their mistreatment by FEI, in violation of the ESA, caused and continues to cause him emotional and aesthetic injury.[26] Mr. Rider further alleges that he left the circus world because he could no longer tolerate the way the elephants were treated.[27] The grief allegedly experienced by Mr. Rider as a result of the elephants' treatment forms the plaintiffs' only grounds for standing.[28] The district court noted that Mr. Rider had the strongest case for standing, and because all the plaintiffs were seeking the same injunctive relief, the individual standing of the organizational plaintiffs was not addressed.[29]

2. The Defendant

FEI, a closely held Delaware corporation with its principal place of business in Vienna, Virginia, produces and presents the Ringling Brothers and Barnum & Bailey Circus, which consists of three separate traveling units or shows.[30] FEI maintains the largest herd of Asian elephants (currently fifty-three) in North America, and the herd is a sustainable population.[31] FEI runs the 200-acre Center for Elephant Conservation (CEC), a private facility in central Florida dedicated to Asian elephant research, reproduction, and retirement.[32] FEI claims it is committed to the safety and happiness of individual Asian elephants as well as to the entire species, having spent hundreds of thousands of dollars on its breeding, conservation, and research efforts.[33]

3. The Elephants

Though not named plaintiffs in *American Society for the Prevention of Cruelty to Animals, et al. v. Feld Entertainment, Inc.*, FEI's Asian elephants play a central role in the case. As noted *supra*, FEI maintains a sustainable herd of fifty-three Asian elephants. Asian ele-

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[25] *Id.*

[26] Compl. for Decl. & Inj. Relief, *ASPCA I*, *supra* n. 5, at ¶ 20.

[27] *Id.* at ¶ 21.

[28] Jordan Weissmann, *Ringling Bros. Elephant Trial Promises to Be a Circus*, http://www.law.com/jsp/article.jsp?id=1202427940908 (Feb. 3, 2009) (last accessed Nov. 22, 2009).

[29] *ASPCA I*, 317 F.3d at 335, 338.

[30] Def. Amend. Pre-trial State., *supra* n. 8, at § I(B). **R**

[31] *Id.*

[32] Feld Entertainment, Inc., *Feld Entertainment, Inc., Bringing Live Family Entertainment to Hometowns Around the World*, http://eswr.com/ringling/fei_companyprofile.pdf (last accessed Nov. 22, 2009).

[33] David Stout, *Suit Challenges Image of Circus Elephants as Willing Performers*, 158 N.Y. Times A22 (Feb. 1, 2009) (available at http://www.nytimes.com/2009/02/01/us/01circus.html (Jan. 31, 2009) (last accessed Nov. 22, 2009)).

phants were listed as an endangered species by the United States Fish and Wildlife Service (FWS) on June 14, 1976.[34] Under the ESA, an endangered species is "any species which is in danger of extinction."[35] Originally, the plaintiffs sought to include all of FEI's Asian elephants in their action, but the district court narrowed Mr. Rider's standing to only six elephants not born in captivity to which he alleged an emotional attachment.[36] The district court excluded all of the FEI elephants born into captivity because FEI had valid captive-bred-wildlife permits issued by the FWS.[37]

The FWS's captive-bred-wildlife regulation states in pertinent part that "any person may take . . . any endangered wildlife that is bred in captivity in the United States provided . . . that . . . [t]he purpose of such activity is to enhance the propagation or survival of the affected species . . . ."[38] It is worth noting, however, that "any . . . wildlife possessed under a permit must be maintained under humane and healthful conditions,"[39] and any person holding a permit "must comply with all conditions of the permit and with all applicable laws and regulations governing the permitted activity."[40]

The plaintiffs challenged the district court's exclusion of the captive-bred elephants in a motion for reconsideration. They claimed that FEI did not maintain the elephants in a humane and healthful condition, FEI's inhumane treatment of the elephants contradicts the captive-born-wildlife permit's purpose of enhancing the propagation or survival of the species, and FEI is not in compliance with all conditions of the permit and other applicable laws and regulations.[41] The district court held, however, that the ESA's citizen-suit provisions do not extend to enforcement of captive-born-wildlife permits as Congress reserved that power to the Secretary of the Interior.[42]

B. The Laws

1. The Endangered Species Act

In pertinent part, the ESA makes it unlawful, with certain exceptions, for any person subject to the jurisdiction of the United States to take any endangered species of fish or wildlife within the United States or the territorial sea of the United States.[43] To "take" an endangered species means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such con-

[34] 41 Fed. Reg. 24062, 24066 (June 14, 1976); 50 C.F.R. § 17.11 (2008).

[35] 16 U.S.C. § 1532(6).

[36] Def. Amend. Pre-trial State., *supra* n. 8, at § (I)(A). **R**

[37] *See* 50 C.F.R. § 17.21(g) (2008) (defining "captive bred wildlife").

[38] *Id*. at § 17.21(g)(ii).

[39] 50 C.F.R. § 13.41 (2008).

[40] 50 C.F.R. § 13.48.

[41] *ASPCA III*, https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2003cv2006-173, at § III(B).

[42] *Id.*

[43] 16 U.S.C. § 1538(a)(1)(B).

duct."[44] FWS regulations define "harass" to mean "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering."[45] In the context of captive wildlife, "harass" does not include generally accepted (1) "[a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act"; (2) "[b]reeding procedures"; or (3) "[p]rovisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife."[46] FWS regulations further define "harm" as "an act which actually kills or injures wildlife."[47] The ESA has a citizen-suit provision providing that "any person may commence a civil suit" to "enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof."[48]

2. The Animal Welfare Act

The AWA regulates the care, handling, and treatment of warm-blooded animals—as designated by the Secretary of Agriculture—used for research, exhibition, or the wholesale pet trade.[49] The AWA sets minimum standards for "handling, housing, feeding, watering, sanitation, shelter from extremes of weather and temperatures, [and] adequate veterinary care . . . ."[50] As it pertains to exhibition animals, the AWA's stated purposes are "to insure . . . humane care and treatment" and "to assure the humane treatment of animals during transportation."[51] Unlike the ESA, the AWA neither contains a citizen-suit provision nor allows interested parties to sue for its enforcement.[52]

III. STANDING

Much of the litigation prior to the February 2009 trial focused on issues associated with the plaintiffs' standing.[53] As previously noted, the district court narrowed the focus of the plaintiffs' standing to Mr. Rider's allegations of aesthetic injury, noting that general injury allegations may suffice at the pleading stage based on the assumption that

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[44] 16 U.S.C. § 1532(19).

[45] 50 C.F.R. § 17.3 (2008).

[46] *Id.*

[47] *Id.*

[48] 16 U.S.C. § 1540(g)(1)(A).

[49] 7 U.S.C. §§ 2131–2159 (2006).

[50] *Id.* at § 2143(a)(2)(A) (2006).

[51] *Id.* at § 2131(1), (2) (2006).

[52] Bruce A. Wagman, Pamela D. Frasch & Sonia S. Waisman, *Animal Law* 376 (3d ed., Carolina Academic Press 2006).

[53] *See ASPCA I*, 317 F.3d 334; *Performing Animal Welfare Socy. v. Ringling Bros.*, 2001 U.S. Dist. LEXIS 12203; *ASPCA III*, https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2003cv2006-173 (litigation regarding standing).

the plaintiffs will support their general claims at trial.[54] This Article likewise assumes that the plaintiffs will factually support their standing claims at trial and will instead focus on the legal standing issue.

To satisfy Article III standing requirements, a plaintiff must show that: (1) "he has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) "the injury is fairly traceable to the challenged action of the defendant"; and (3) "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[55] FEI does not focus on the causation element but instead maintains that Mr. Rider, and hence all the plaintiffs, can neither demonstrate an injury in fact nor redressability.[56]

A. Injury in Fact

FEI argues, correctly, that past harms do not constitute injury in fact for standing purposes.[57] A plaintiff seeking injunctive relief must demonstrate "a real or immediate threat that [he] will be wronged again."[58] While FEI disputes Mr. Rider's asserted plans to visit the elephants in question at the circus, it further argues that any future exposure to injury is entirely within his own control and that his voluntary exposure defeats standing requirements.[59]

To support this contention, FEI relies primarily on two cases: *Animal Legal Defense Fund v. Espy*[60] and *Alabama Freethought Assn. v. Moore*.[61] FEI misconstrues both cases. The court in *Espy* considered and rejected the standing of a psychobiologist who claimed aesthetic and professional injuries based on her future exposure to the inhumane treatment of lab rats and mice.[62] The court found that the plaintiff's injury was not impending and that her future exposure to the offending treatment of lab animals was within her own control.[63] FEI focuses on the plaintiff's control over exposure to injury, but the *Epsy* court based its decision on the plaintiff's lack of an impending injury.[64] Thus, the court's limited mention of the plaintiff's control over exposure to injury is dicta. The *Epsy* court was correct to base its decision

54 Def. Amend. Pre-trial State., *supra* n. 8, at ¶ II (citing *ASPCA I*, 317 F.3d at 335, 338). **R**

55 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180, 181 (2000).

56 Def. Pre-trial Brief, *ASPCA I*, 317 F.3d 334, at § II, http://www.ringlingbrostrial info.com/uploadedFiles/Pre-Trial%20Brief.pdf (Sept. 29, 2008) (last accessed Nov. 22, 2009).

57 *Id.*; *ASPCA I*, 317 F.3d at 336.

58 Def. Pre-trial Brief, *supra* n. 56, at § II (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)).

59 Def. Pre-trial Brief, *supra* n. 56, at § II(A)(1).

60 23 F.3d 496 (D.D.C. 1994).

61 893 F. Supp. 1522 (N.D. Ala. 1995).

62 23 F.3d at 499–500.

63 *Id.* at 500.

64 *Id.* at 501.

on the lack of impending injury because standing does require imminent injury, but the requirements are silent regarding voluntary exposure to injury.

From *Alabama Freethought*, FEI seizes on how voluntary exposure to purportedly offensive conduct cannot establish standing to obtain an injunction barring such conduct. To recognize standing in such circumstances would be to allow a plaintiff to "manufacture" her standing.[65] Even if FEI is correct that voluntary exposure to harm defeats standing, this is not the case here because Mr. Rider claims an understandable emotional attachment to these sensitive and intelligent animals that he worked with and cared for during his two-and-a-half-year tenure with the circus. His desire to see them again and know that they are not being mistreated is a natural and reasonable outgrowth of his affection for them. This type of situation cannot be what the *Alabama Freethought* court had in mind when it spoke of manufacturing standing. "Manufacturing" implies a disingenuous or opportunistic creation of a situation in order to establish standing. Ultimately, this is a factual determination for the district court to make based on the plaintiff's motives and sincerity and the totality of the circumstances. While truly manufactured standing should not be allowed, the *Alabama Freethought* decision should not be read as an outright prohibition on voluntary exposure to potential injury.

A plaintiff should not have to curtail his *lawful* voluntary behavior so as to avoid exposure to a defendant's unlawful behavior. To hold otherwise would limit standing to those plaintiffs who are *involuntarily* exposed to future injury, and no court has made such a bold assertion. In a case factually similar to the one at bar, *Animal Legal Defense Fund v. Glickman*,[66] the United States Court of Appeals for the District of Columbia Circuit found standing for a plaintiff who suffered aesthetic injury from seeing the inhumane conditions in which the primates were living at a local zoo. There, like here, the plaintiff alleged he would return to the zoo to see the primates he cared about and wanted to see treated humanely.[67] The court of appeals made no issue of the plaintiff's voluntarily exposure to further aesthetic injury.[68] Likewise, the district court should have no issue with Mr. Rider's desire to see the elephants, even though this could entail voluntary exposure to further aesthetic injury.

If voluntary exposure truly was an issue, the Supreme Court could have denied standing in the oft-cited standing decision of *Lujan v. Defenders of Wildlife*[69] by simply noting that the plaintiffs' potential future injury depended entirely on voluntary conduct, to wit, visiting Egypt and Sri Lanka. However, that was not the case; the lack of con-

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[65] Def. Pre-trial Brief, *supra* n. 56 (citing *Ala. Freethought Assn.*, 893 F. Supp. at 1536 n. 26).

[66] 154 F.3d 426, 445 (D.D.C. 1998).

[67] *Id.* at 431–32.

[68] *Id.*

[69] 504 U.S. 555 (1992).

crete and imminent plans to voluntarily return to Egypt and Sri Lanka, where the plaintiffs could be aesthetically injured by the destruction of endangered species and critical habitat, proved their undoing, not the voluntariness of their actions.[70]

Courts have not held that plaintiffs suffering aesthetic injuries should change their voluntary behaviors or plans to avoid further exposure to the injury in lieu of granting injunctions against defendants illegally causing the injury in the first place. Nor should the district court do so here. Mr. Rider alleges that when he sees the elephants, they are sad and beaten down, devoid of their spirits, extremely stressed, and exhibiting stereotypic behaviors—all as a result of their mistreatment by the circus.[71] Seeing the elephants in this state is Mr. Rider's aesthetic injury, and aesthetic injury has long been cognizable for satisfying standing requirements.[72] Thus, if the plaintiffs prove the facts as alleged, Rider's aesthetic injury will satisfy the injury-in-fact prong.

B. Redressability

FEI maintains that even if the plaintiffs succeed in securing an injunction against FEI's use of bullhooks and chain tethers on the elephants at issue, Mr. Rider's injury will still not be redressed.[73] Noting that Mr. Rider's aesthetic injury can only be remedied by an injunction if he is then able to enjoy seeing the elephants, FEI seeks to foreclose his ability to see the elephants again.[74]

Toward this end, FEI has taken four of the six elephants at issue from the traveling circus unit and sent them to the Center for Elephant Conservation (CEC) in Florida. FEI claims that they are no longer performing.[75] Since the CEC is a private facility closed to the public, FEI argues that an injunction will gain Mr. Rider nothing; with or without an injunction, he cannot see these elephants.[76] As for the two elephants who are still performing, FEI asserts that an injunction against its elephant handling practices will actually ensure that Mr. Rider never sees them again.[77] FEI claims that its experts will testify that there is "no way to exhibit an elephant in the circus without an ankus/guide/bullhook." Thus, FEI argues that if the use of the bullhook is enjoined the remaining two elephants will also be removed

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[70] *Id.* at 564.

[71] Compl. For Decl. & Inj. Relief, *ASPCA I*, *supra* n. 5, at ¶ 23.

[72] *See e.g. Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (noting that aesthetic injury "may amount to an 'injury in fact' sufficient to lay the basis for standing . . . .").

[73] Def. Pre-trial Brief, *supra* n. 56, at § II(B).

[74] *Id*. at § II(B)(1) (citing *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 107 (1998)).

[75] *Id*. at § II(B) n. 8.

[76] *Id*.

[77] *Id*. at § II(B)(1).

from the traveling circus and sent to the CEC where, again, Mr. Rider cannot see them.[78]

While Mr. Rider might never see the elephants again if the district court grants the requested injunction, how FEI would respond to an injunction and conduct its future operations is beyond the purview of the court. The standard of review for injunctive relief should not extend to a defendant's volitional, vice automatic response to the injunction. Additionally, following the logic of *Glickman*,[79] just the possibility that Mr. Rider could see the elephants subsequent to an injunction seems to be enough for redressability. In *Glickman*, the court of appeals found redressability, noting that if the plaintiff prevailed he would be able to visit the primates in a more humane setting at the zoo.[80]Alternatively, if the zoo chose to close rather than institute humane reforms, he might then have been able to visit the primates in new humane homes.[81] Implicit in this latter scenario, however, is the *possibility* that the plaintiff might never have seen the animals again, just as FEI argues here, but this potential outcome did not defeat redressability in *Glickman*.

Additionally, FEI's arguments are based on several legally unenforceable assertions: that the four elephants at the CEC will never perform again, that the two elephants still performing will be removed to the CEC if an injunction on the use of the bullhook is granted, and that none of these elephants will be accessible to Mr. Rider. Although the district court has focused on the six elephants to whom Mr. Rider claims an emotional attachment, it is an open question whether injunctive relief would be limited to only these animals. If the district court finds FEI's use of bullhooks and chain tethers to violate the ESA, it could enjoin their use on *all* of FEI's elephants or at least on all of the elephants not subject to captive-bred-wildlife permits. If this occurs, it is doubtful that FEI would forego the use of elephants in its traveling circuses because, after all, they are the pegs on which a circus is hung. It is also unlikely that FEI would retire all the elephants to the CEC and maintain them at great expense for years when no profit would be available to offset the cost. Thus, if the elephants were to continue in the circus without bullhooks and chain tethers, Mr. Rider could see them again without suffering aesthetic injury. Likewise, if FEI chose not to maintain a large herd of non-performing elephants at the CEC and instead sent the animals to zoos and sanctuaries—as it has done with some elephants in the past[82]—Mr. Rider could again see them under improved conditions, thus redressing his aesthetic injury.

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78 *Id.*

79 154 F.3d 426.

80 *Id.* at 443.

81 *Id.*

82 Def. Pre-trial Brief, *supra* n. 56, at § II(A)(1).

Furthermore, just as plaintiffs should not be able to manufacture standing, defendants should not be able to defeat redressability and standing by manufacturing a scenario whereby their (illegal) activity can continue out of the sight of someone who has standing to complain. Therefore, the district court should find that the redressability prong, like the injury-in-fact prong, has been met and that the plaintiffs have standing.

In sum, when Mr. Rider sees his favorite elephants at the circus, looking downtrodden, stressed, and abused, he suffers an aesthetic injury (injury in fact) directly traceable to FEI's mistreatment of the elephants (causation). The injunction being sought by all the plaintiffs against FEI's mistreatment of the elephants could result in Mr. Rider seeing the elephants again without having to suffer aesthetic injury (redressability). With the plaintiffs thus satisfying each prong of the test for standing, the district court should rule accordingly and turn its attention to the merits of the case.

IV. APPLICABILITY OF THE ESA TO CAPTIVE ANIMALS

In this case of first impression, FEI seeks to persuade the district court that the Endangered Species Act (ESA)'s take provisions do not apply to captive animals. Moreover, FEI maintains that even if the take provisions do apply to captive animals, they do not apply to animals held in captivity as of the date of their species' listing as endangered under the ESA. Lastly, FEI contends that the Animal Welfare Act (AWA)'s captive exhibition animal provisions take precedence over the ESA.[83] In the following part, each of FEI's arguments are analyzed and refuted.

A. The Taking of Captive Animals

FEI strives mightily in its pre-trial brief to overcome Congress's clear statutory language and intent regarding the ESA's take provisions.[84] The ESA makes it "unlawful for any person . . . to . . . take *any* [endangered species] within the United States."[85] The ESA lists ten different ways that an endangered species can be taken.[86] Ignoring both the prohibition on taking *any* endangered species and the fact that Congress delineated what constitutes a take, FEI turns instead to a Webster's dictionary definition of "take" to argue that only animals in the wild, not captive animals, can be taken.[87]

FEI tries to bolster this line of thought by assailing the Fish and Wildlife Service (FWS)'s definitions of "harm" and "harass," two of the ten listed ways that endangered species can be taken.[88] FEI notes that

[83] *Id*. at §§ III(A)(1)–(2).
[84] *Id*. at §§ III(A)(1)–(3).
[85] 16 U.S.C. § 1538(a)(1) (emphasis added).
[86] 16 U.S.C. § 1532(19).
[87] Def. Pre-trial Brief, *supra* n. 56, at § III(A)(1).
[88] *Id.*

significant habitat modification or degradation equals "harm" under FWS's definition.[89] Webster's defines "habitat" as "where . . . [an] animal species naturally lives . . .,"[90] and since captive animals are not where they naturally live, FEI concludes that captive animals cannot be harmed.[91] While this may be true, it carefully avoids the obvious. The FWS's definition of "harm" *includes* significant habitat modification or degradation as "an act which actually kills or injures wildlife" but is not limited to it.[92] Habitat modification or degradation is just one of innumerable acts that can kill or injure wildlife and thus meet the definition of "harm." FEI's reasoning thus fails to provide a basis for its claim that the elephants were not harmed.

FEI's reasoning with regard to the definition of "harass" is equally flawed. FEI points out that the definition of "harass" "turns upon, inter alia, a disruption of 'normal behavioral patterns' such as 'breeding, feeding or sheltering,'" and "[t]his concept has no meaning when applied to captive animals who have these things provided for, or taken . . . care of, by humans."[93] FEI again parses the definition to ignore that disruptions of normal behavioral patterns "*include*, *but are not limited to*, breeding, feeding, or sheltering."[94] Besides these three disruptions, there are myriad other normal behavioral patterns—such as the elephants' need to move, walk about freely, and socialize—that can be disrupted and hence meet the definition of "harass." Again, FEI is unpersuasive in its attempt to negate harassment.

Furthermore, "harass" is the one term that has a definition within the FWS's Endangered Species Act regulations that specifically mentions *captive* wildlife and provides liability exemptions for generally accepted animal-husbandry practices, breeding procedures, and provision of veterinary care.[95] FEI inconsistently attacks as inapplicable the one definition that explicitly applies to captive animals while simultaneously defending its use of bullhooks and chain-tethering practices under the definition's animal-husbandry exemption.

Ultimately, FEI's definition-based arguments must fail, as they fly in the face of both plain meaning and congressional intent. When Congress prohibited the taking of *any* endangered species, it meant just that: *any* endangered species, whether wild or captive. When a species faces extinction, all members of that species become important to the species' survival. It would be anomalous to allow the taking of captive, endangered animals while trying to achieve the ESA's purposes of conservation and recovery.[96] As the Supreme Court has noted, "Congress has spoken in the plainest of words, making it abundantly

[89] *Id.*

[90] *Webster's Third New International Dictionary* 1017 (Merriam-Webster 2002).

[91] Def. Pre-trial Brief, *supra* n. 56, at § III(A)(1).

[92] 50 C.F.R. § 17.3.

[93] Def. Pre-trial Brief, *supra* n. 56, at § III(A)(1) (citing 50 C.F.R. § 17.3).

[94] 50 C.F.R. § 17.3 (emphasis added).

[95] *Id.*

[96] 16 U.S.C. §§ 1531–1544.

clear that the balance has been struck in favor of affording endangered species the highest of priorities."[97]

FEI contends, without providing any supporting evidence, that Congress never intended the ESA's take provisions to apply to captive animals, but this simply and clearly is not true. In the ESA, Congress did provide some limited exemptions for "wildlife which was held in captivity or in a controlled environment" either on December 28, 1973, the date of the ESA's enactment, or on the date a species was listed in the Federal Register as endangered or threatened.[98] Thus, contrary to FEI's claim, Congress clearly showed its intent and that it "knew well how to exempt particular captive members of listed species from the ESA's safeguards" when it wanted to, and, conversely, how not to exempt them when it did not want to.[99]

B. The Captivity Exemption

All six of the Asian elephants at issue were being held in captivity in 1976 when the species was listed as endangered.[100] The captivity exemptions originally included, *inter alia*, the take prohibition. As amended in 1982, however, the captivity exemptions were limited to two of seven subsections and regarded only the import and export of endangered species and violations of any regulations pertaining to endangered or threatened species.[101] Notably absent is the subsection on the taking of endangered species, thus eliminating a safe harbor for the taking of a listed captive species.[102]

When Congress amends a statute and eliminates a prior exemption, courts must assume, absent convincing evidence to the contrary, that Congress knew what it was doing and that the change is no mere accident or oversight.[103] As the district court noted, "[h]ad Congress intended the [captive] exemption to continue to apply to the taking prohibition . . . and the other subsections excluded from the amendment, there would have been no reason to amend the statute in 1982."[104]

Despite this logic and the clear import of the statutory change, FEI still maintains that Congress must have intended otherwise and boldly asks the district court to disregard the statutory language and hold that the ESA's take prohibitions do not apply to these elephants

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97 *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

98 16 U.S.C. § 1538(b)(1).

99 Pl. Memo. Regarding Relevant Stat. & Reg. Auth., § II, *ASPCA II*, http://www.eswr.com/ringling/57995.pdf (last accessed Nov. 22, 2009).

100 Def. Pre-trial Brief, *supra* n. 56, at § III(A)(4).

101 16 U.S.C. §§ 1538(a)(1)(A), (a)(1)(G).

102 16 U.S.C. § 1538(a)(1)(B).

103 Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction*, Vol. 2A §§ 45:01–48A:19 (7th ed., West 2007).

104 *ASPCA v. Ringling Bros. and Barnum & Bailey Circus,* 502 F. Supp. 2d 103, 110 (D.D.C. 2007).

held in captivity in 1976.[105] This argument has already failed with the district court once,[106] and it should fail again as it has no legal support.

C. The Role of the AWA

The AWA sets minimum standards of care for captive exhibition animals. Recognizing this fact, the FWS exempted "generally accepted animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act" from its definition of "harass" under the ESA.[107] However, FEI seeks to make this limited exemption all-inclusive, claiming that "whether a captive endangered species' treatment violates the ESA depends on whether the treatment complies with the AWA."[108] This FEI theory would give the United States Department of Agriculture (USDA), the administrator of the AWA, jurisdiction over the ESA's take provisions for captive endangered species.[109] The FWS, not the USDA, however, is the congressionally designated administrator of the ESA. The fact that the FWS cross-referenced the AWA in its ESA definition of "harass" does not make the USDA the arbiter of what is a taking under a statute it does not administer.[110] The FWS, in its role as the administrator of the ESA, did not extend the AWA-compliance exemption to any of the nine other means of taking a captive animal under the ESA.

FEI contends that the USDA has never found FEI's use of bullhooks or chain tethers to be violations of the AWA.[111] This may be true and is also understandable given the USDA's lack of inspectors and notoriously lax enforcement of the AWA, especially with regard to FEI,[112] but it is also largely irrelevant. Even if it is determined that FEI's practices conform to AWA standards, this only protects FEI from violating the ESA's prohibition on harassment, just one of the ten means by which an endangered species can be taken in violation of the ESA. The plaintiffs have alleged that FEI has taken its Asian elephants not only by harassing them but also by harming and wounding them with bullhooks and chain tethers. Thus, illegal takings can still

105 Def. Pre-trial Brief, *supra* n. 56, at § III(B).

106 *ASPCA*, 502 F. Supp. 2d at 110.

107 50 C.F.R. § 17.3.

108 Def. Pre-trial Brief, *supra* n. 56, at § III(C).

109 *Id.*

110 Pl. 2d Amend. Pre-trial State., *supra* n. 9, at § III & n. 9.

111 Def. Pre-trial Brief, *supra* n. 56, at § III(C).

112 Pl. Memo. Regarding Relevant Stat. & Reg. Auth., s*upra* n. 99, at n. 9; *see generally* American Socy. for the Prevention of Cruelty to Animals, et al., *Government Sanctioned Abuse: How the United States Department of Agriculture Allows Ringling Brothers Circus to Systematically Mistreat Elephants, September 2003 (A Report by the American Society for the Prevention of Cruelty to Animals, the Fund for Animals, and The Animal Welfare Institute)*, http://www.awionline.org/www.awionline.org/wildlife/elephants/fullrpt.pdf (last accessed Nov. 22, 2009) (stating that the USDA inadequately enforces against elephant abuse at circuses).

be established under these latter prohibitions even in the unlikely event that harassment cannot be established.

V. TAKINGS

FEI contends that there is no probative evidence showing it violated any of the three take provisions in question under the Endangered Species Act (ESA): harassing, harming, and wounding.[113] Take determinations will, of course, ultimately depend upon the evidence presented at trial. However, a mere cursory glance through the plaintiffs' proffered list of exhibits and expected testimony should give FEI pause, because much of it comes either from FEI's own employees, documents, and elephant medical records or from video footage of FEI's mistreatment of its elephants.[114]

A. Harass

FEI claims it is exempt from harassment liability under the ESA through its use of generally accepted animal-husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act (AWA). This exemption may be in doubt, however, because the plaintiffs contend that "routinely striking Asian elephants with bullhooks, and chaining them in railroad cars and on concrete surfaces for prolonged periods, are not even 'husbandry practices,' let alone 'generally accepted' practices."[115] Even if this argument fails, the harassment exemption does not "permit the 'physical mistreatment' of captive animals, or any other conditions that 'might create the likelihood of injury or sickness,' or result in [the] animals 'not being treated in a humane manner.'"[116] If true, allegations of striking with bullhooks (resulting in bloody wounds); chaining for prolonged periods (resulting in foot, leg, and joint injuries, stereotypic behaviors, and significant impairment of essential behavioral patterns); general stress of confinement (impairing immunity and resulting in numerous FEI elephants testing positive for tuberculosis); and overall mistreatment (resulting in the premature death of several elephants),[117] should equate to a finding of harassment by exceeding the aforementioned bounds of the exception. If not, these allegations will more than suffice to establish that the elephants have been harmed or wounded.

B. Harm and Wound

If FEI's practices injure the elephants, then they have been harmed, and hence taken, under the ESA. Likewise, if FEI's practices

113 Def. Pre-trial Brief, *supra* n. 56, at § IV.
114 Pl. 2d Amend. Pre-trial State., *supra* n. 9, at §§ II(B)(2)–(3), IV. **R**
115 Pl. Memo. Regarding Relevant Stat. & Reg. Auth., *supra* n. 99, at n. 8.
116 *Id.* (citing 63 Fed. Reg. 48634, 48638 (Sept. 11, 1998)).
117 Pl. 2d Amend. Pre-trial State., s*upra* n. 9, at §§ II(B)(2)–(3). **R**

wound the elephants, they have also been taken. The definition of "injure" is to damage, hurt, or give pain to; the definition of "wound" is to inflict an injury to the body that involves breaking of the skin.[118] Hitting or hooking the elephants with bullhooks can break their skin and cause bleeding. FEI's own records speak of elephants with multiple "puncture wounds" from the bullhook and elephants trailing blood to and from their performances under the big top.[119] Likewise, chaining the elephants' legs can break their skin and leave "large visible lesions" and scars noticed by USDA inspectors.[120] These examples clearly meet the definitions for both "wound" and "harm."

FEI elephants are chained on hard surfaces, such as concrete, for most hours of the day, most days of the week, most weeks of the year.[121] The elephants' feet are not suited for standing on hard surfaces, and thus they suffer foot, leg, and joint problems and pain from this practice and are thereby harmed.[122] Furthermore, the confinement causes the elephants postural problems and prevents them from performing even normal behavioral activities like walking, exploring, and socializing with other elephants.[123] Such deprivations cause the elephants stress, making them more susceptible to diseases, and result in exhibition of stereotypic behaviors, such as constant repetitive swaying back and forth. The plaintiffs' experts say these effects are an outward manifestation of the harm the elephants are suffering.[124]

It is hard to imagine how the district court could not conclude that FEI's practices harass, harm, and wound the elephants. FEI seeks to persuade the district court that its use of bullhooks and chain tethers are customary practices in the elephant-handling world and without them no traveling show involving elephants could operate.[125] However, FEI's ability to continue to exploit elephants for its own commercial gain has no relevance as to whether FEI is violating either the ESA or the AWA. The ESA does not exist to protect commercial interests; it exists to protect animals and species. In this case, as in the early English case of *Waters v. Braithwaite*, an alleged abuse of an animal is defended on the ground that the offending act was a usual and customary practice.[126] The *Waters* court found that the offending act benefitted only the defendant-owner, not the animal who was caused unnecessary pain, and concluded by saying, "If the custom of doing this did exist, it was time that it ceased . . . ."[127] The district

118 *Webster's Third New International Dictionary*, *supra* n. 90, at 1164, 2638.

119 Pl. 2d Amend. Pre-trial State., *supra* n. 9, at § II(3).

120 Compl. for Decl. & Inj. Relief, *supra* n. 5, at ¶ 80.

121 Pl. 2d. Amend. Pre-trial State., *supra* n. 9, at § II(2) (The circus units travel forty weeks per year.). **R**

122 *Id.*

123 *Id.*

124 *Id.*

125 Def. Pre-trial Brief, *supra* n. 56, at § III(A)(2).

126 Wagman, Frash & Waisman, *supra* n. 52, at 504–05 (citing *Waters v. Braithwaite*, 30 T.L.R. 107, PPC (K.B. Div. 1913) (involving the alleged abuse of a cow)).

127 *Id.*

court should apply the same rationale to FEI's use of bullhooks and chains on Asian elephants.

VI. CONCLUSION

Much of the litigation leading up to this case, as well as much of FEI's pre-trial briefing and much of this Article, focused on the issue of the plaintiffs' standing to bring suit. Ultimately, the plaintiffs should be able to establish injury in fact (the threat that Mr. Rider will again suffer aesthetic injury at seeing the elephants' demeanor after being hit with bull hooks and chained), causation (FEI's use of bull hooks and chain tethers on the elephants), and redressability (Mr. Rider seeing the elephants free of the offending use of bull hooks and chain tethers). Unfortunately, all the legal machinations surrounding the standing issue must focus on the human plaintiffs even though the elephants are the truly injured parties. Borrowing from the language of Justice Douglas's dissent in *Sierra Club v. Morton* and applying it to endangered species instead of the environment,

> [t]he critical question of standing would be simplified and also put neatly in focus if we fashioned a federal rule that allowed [endangered species] issues to be litigated before federal agencies or federal courts in the name of the [endangered species] about to be [injured] and where injury is the subject of public outrage.[128]

If unable to defeat standing, FEI seeks to discount the applicability of the Endangered Species Act (ESA) to captive endangered species. FEI's contentions that only endangered species *not* in captivity can be taken, and that the Animal Welfare Act (AWA) exclusively governs the treatment of captive endangered species, cannot be squared with the plain statutory and regulatory language of the ESA, and should be rejected. With captive endangered species thus subject to taking under the ESA, the final question is whether FEI has taken its endangered Asian elephants.

FEI's use of bullhooks and prolonged chaining produce a host of negative physical and psychological effects on its elephants that meet the ESA's definitions of "harass," "harm," and "wound," any one of which is sufficient to establish that FEI has taken its elephants. The district court should find as much and should therefore enjoin FEI's use of these offending tools and practices on all of its elephants, not just the six elephants to which Mr. Rider is attached. Hopefully, such a decision will benefit all captive endangered species by both putting animal exhibitors on notice that mistreatment can result in violations of the ESA and by prompting the USDA and the Fish and Wildlife Service to more aggressively inspect animal exhibitors and enforce violations of the ESA and AWA.

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[128] 405 U.S. at 741 (Douglas, J., dissenting).