

THE BEAR NECESSITIES: WHY CAPTIVE EXHIBITED ANIMALS NEED STRONGER REGULATION BASED ON THEIR SPECIES-SPECIFIC BIOLOGICAL NEEDS

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INTRODUCTION

Across the United States, countless exotic animals including tigers, bears, primates, elephants, and kangaroos are exhibited to the public.¹ Many of these captive exhibited animals are confined in deplorable conditions in “roadside zoos” that deprive them of their species-specific needs² and everything that is natural and important to

1. See Laura Fravel, *Critics Question Zoos’ Commitment to Conservation*, NAT’L GEOGRAPHIC (Nov. 13, 2003), <https://www.nationalgeographic.com/animals/2003/11/news-zoo-commitment-conservation-critic/> [<https://perma.cc/WV5P-UMPV>] (noting that animal captivity has existed since at least 1250 B.C.).

2. See *Roadside Zoos*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/issue/roadside-zoos/> [<https://perma.cc/NQJ7-G8CN>] (last visited

them.³ Recently, *Tiger King*, a Netflix documentary showcasing notorious black market tiger breeder and exhibitor Joe Exotic, captured the world's attention.⁴ What is missing from *Tiger King*, however, is an explanation of how Joe Exotic's zoo, Greater Wynnewood Exotic Animal Park, was able to obtain and keep its

Nov. 25, 2019). No bright-line definition for a roadside zoo exists, but a handout from the Humane Society of the United States differentiates reputable zoos and roadside zoos by a measure of care for animal welfare and conservation. *Roadside Zoos Are Not Zoos*, HUMANE SOC'Y OF THE U.S., https://animalstudiesrepository.org/cgi/viewcontent.cgi?article=1027&context=cu_reps [<https://perma.cc/XDH7-W85D>] (last visited Nov. 25, 2019) ("Concern for the welfare of animals and a dedication to learning and wildlife conservation is what distinguishes the zoological garden from the roadside menagerie. The roadside menagerie is usually a place created to attract and entice people to other facilities such as amusement parks, service stations, diners, motels, and gift shops."). Additionally, People for the Ethical Treatment of Animals (PETA) asserts that roadside zoos are typically "small-scale operations where animals are kept in ramshackle concrete and chain-link cages. Most don't even have a blade of grass, much less any meaningful enrichment. Animals are often deprived of adequate food, water, shelter, and veterinary care." *Zoos and Other Captive-Animal Displays*, PETA, <https://www.peta.org/issues/animals-in-entertainment/zoos-pseudo-sanctuaries/> [<https://perma.cc/D8HT-6TPQ>] (last visited Nov. 25, 2019). Further, a roadside zoo will typically not be able to pass the accreditation standards of the Association of Zoos and Aquariums (AZA). Brian Palmer, *How Can You Tell If a Zoo Takes Good Care of Its Animals?*, WASH. POST (Apr. 4, 2011), https://www.washingtonpost.com/national/how-can-you-tell-if-a-zoo-takes-good-care-of-its-animals/2011/03/28/AFBb3HeC_story.html?utm_term=.5f981e761188 [<https://perma.cc/ZZ9R-7PQY>] ("Approximately 2,700 animal exhibitors have a USDA license, but fewer than 10 percent have earned AZA's accreditation, which requires that the facility submit reams of paperwork on its enclosures, veterinary care and financial stability To stay accredited, zoos must participate in wildlife conservation and community education. They also must provide the animals with appropriate stimulation to keep their minds and muscles active"). *But see* Rachel Garner, *What's in a Word? Why It's Time to Retire "Roadside Zoo"*, WHY ANIMALS DO THE THING (Apr. 7, 2017), <https://www.whyanimalsdothething.com/whats-in-a-word-roadside-zoo/> [<https://perma.cc/4KCN-Z34X>] (arguing that the term "roadside zoo" is a blanket term that animal rights groups keep intentionally vague so that it can be applied fluidly to discredit any facility).

3. *See generally* Martha Nussbaum, *Beyond Compassion and Humanity: Justice for Nonhuman Animals*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* (Cass R. Sunstein & Martha Nussbaum eds., 2004) (arguing that dignity is based on species-specific properties which are integral to the identifying characteristics of that species). A species' normal functioning properties allow the individual to live a typical life as a member of that species, and when an individual is forcibly denied the ability or opportunity to behave in a way befitting of their species, the individual's dignity is undermined. *See id.*

4. *See* Todd Spangler, *'Tiger King' Ranks as TV's Most Popular Show Right Now, According to Rotten Tomatoes*, VARIETY (Mar. 29, 2020, 6:53 AM), <https://variety.com/2020/digital/news/tiger-king-most-popular-tv-show-netflix-1203548202/> [<https://perma.cc/YY52-G4DP>].

federal licensing despite obvious abuse and mistreatment of its exhibited animals.⁵ For another particularly macabre example, a Bengal tiger named Tony was kept in a cage at a truck stop in rural Louisiana for nearly his entire life, and after his death his captors wanted to stuff and mount his corpse next to his deceased mate's taxidermized corpse for display.⁶ Society accepts that animals deserve dignity—a 2015 Gallup poll found that one-third of Americans believe that animals deserve the same rights against cruelty that humans have, and 97% of respondents believed that animals need at least minimum legal protection from harm and exploitation.⁷ However, Congress has not passed federal anti-cruelty laws specifically for animals that society collectively understands to be “zoo” animals.⁸

Roadside facilities often capitalize on the public's perception of the grandeur of exotic animals by offering lucrative hands-on experiences such as bottle-feeding infant exotic animals, playtime with cubs, or photo opportunities.⁹ In another extreme example of exploitation, a Minnesota petting zoo and fur farm named Fur-Ever

5. See Sharon Guynup, *'Tiger King' Sentenced to 22 Years for Violations Against Tigers and People*, NAT. GEOGRAPHIC (Jan. 24, 2020), <https://www.nationalgeographic.com/animals/2020/01/tiger-king-joe-exotic-sentenced-22-years-violence-tigers-murder-hire/> [https://perma.cc/8BCM-E7XM] (noting that Joe Exotic was convicted of seventeen wildlife harm charges, including killing five tigers).

6. See Terry Jones, *Truck Stop Owner Plans to Pursue Another Tiger, Stuff Tony for Display; Critics Call that "Disrespectful"*, ADVOC. (Oct. 17, 2017, 1:04 PM) https://www.theadvocate.com/baton_rouge/news/communities/westside/article_46251bf8-b357-11e7-b2b6-afcbb7a5925b.html [https://perma.cc/S9SG-8U3M].

7. See Rebecca Riffkin, *In U.S., More Say Animals Should Have Same Rights as People*, GALLUP (May 18, 2015), <https://news.gallup.com/poll/183275/say-animals-rights-people.aspx> [https://perma.cc/HX4H-SJJD]; see also Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 389 (2003) (“We can build on existing law to define a simple, minimal position in favor of animal rights: The law should prevent acts of cruelty to animals.”) (emphasis omitted).

8. See Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2018). The AWA is the only law that applies to every single zoo because it is the only law that regulates all animal exhibitors, and although its purpose is to ensure that such animals are provided humane care and treatment, all cold-blooded animals are excluded from the AWA. See *id.*

9. See Jennifer Jacquet, *America, Stop Visiting Roadside Zoos—They Make Money from the Inhumane Treatment of Animals*, GUARDIAN (Nov. 26, 2016, 9:29 AM), <https://www.theguardian.com/sustainable-business/2016/nov/27/roadside-zoos-america-animal-cruelty-welfare> [https://perma.cc/C4ZB-NKJ3] (“You might have thought that bottle feeding bears, cuddling chimpanzees and swimming with tigers are not things you would be allowed to do, even if you wanted to. But at least 75 roadside zoos in the U.S. sell interactions with dangerous animals, such as tigers, lions, primates and bears.”).

Wild charged the public to hold, feed, and play with endangered gray wolf puppies, but once the puppies reached adulthood and could no longer be safely handled by the public, the fur farm killed and skinned them to sell their pelts for profit.¹⁰ Fur-Ever Wild's own reports state that at least sixty-eight wolves had died on its property in just five years.¹¹

Certain roadside zoos, in full compliance with the law, provide only the bare necessities for their animals.¹² Animals in these facilities are often held in concrete or muddy enclosures, surrounded by chain-link fences.¹³ The enclosures might not adequately protect them from the elements and rarely include features that engage their species-specific behaviors other than perhaps a plastic pool or a few ropes to swing on, an environment hardly comparable to what the animals would experience in their natural habitat.¹⁴ Their feces may constantly surround them, and they may have little social interaction and few enrichment activities.¹⁵

Of course, not all zoos fail as drastically as Fur-Ever Wild did at maintaining their animals' well-being.¹⁶ Such deplorable conditions

10. See Erin Adler, *Animal Rights Groups Seek Court Order to Stop Lakeville-Area Fur Farm from Killing, Neglecting Wolves*, STAR TRIB. (Nov. 1, 2017, 9:54 AM), <http://www.startribune.com/animal-rights-groups-seek-court-order-to-stop-lakeville-fur-farm-from-killing-neglecting-wolves/454363943/> [https://perma.cc/5E3W-4K2D].

11. Stephen Montemayor, *Lakeville Area Fur Farm Agrees Not to Kill Wolves While Animal Rights Suit Proceeds*, STAR TRIB. (Jan. 8, 2018, 8:21 PM), <http://www.startribune.com/lakeville-area-fur-farm-agrees-not-to-kill-wolves-while-animal-rights-suit-proceeds/468388263/> [https://perma.cc/BJU4-PK4S] (“In a motion filed last year, and citing reports submitted by Fur-Ever Wild to the Minnesota Department of Natural Resources, the animal rights groups said 68 wolves had died at Petter’s properties in the past five years.”).

12. See Kevin Hardy, *USDA Revokes License of Troubled Iowa Roadside Zoo*, DES MOINES REG. (Dec. 5, 2017, 12:22 PM), <https://www.desmoinesregister.com/story/money/business/2017/12/05/usda-revokes-license-troubled-iowa-roadside-zoo/923138001/> [https://perma.cc/QZ83-58GE] (providing photos of the conditions at Cricket Hollow Zoo, which had incurred more than 100 AWA violations in just five years).

13. See *id.*

14. *Kuehl v. Sellner*, 161 F. Supp. 3d 678, 717 (N.D. Iowa 2016) (“Plaintiffs testified, however, that when they visited the Zoo they did not see any enrichment, other than a scratch log and a bowling ball.”).

15. *Id.* at 716 (“[The veterinarian] reported ‘a large accumulation of feces within two of the tiger enclosures and two of the lion enclosures. There are large piles of feces in the corners and smaller piles scattered throughout each enclosure.’”).

16. See Alexandra Ossola, *The Future of Zoos Is Being Nice to The Animals—Not Making It Easy to Watch Them*, FAST CO. (Feb. 25, 2015), <https://www.fastcompany.com/3042458/the-future-of-zoos-is-being-nice-to-the->

arise, however, more frequently within smaller enterprises because they have fewer employees, less resources, less specialized husbandry knowledge, and less animal behavior knowledge than larger zoos.¹⁷ Even accredited zoos with dedicated professional staff and adequate funds are fundamentally unable to provide the space and social compositions that many of the complex species they own require for optimal physical and psychological health.¹⁸ Proponents of animal rights argue that captivity is inherently damaging to animals.¹⁹ However, public exhibition of animals is a societal norm that is unlikely to disappear in the near future.²⁰ So long as humans benefit

animals-not-making-it-easy-to-watch-them [https://perma.cc/9B2V-FAAL] (highlighting the Detroit Zoo's decision to send its two elephants, Winky and Wanda, to a sanctuary so that they would have better lives). The Detroit Zoo has led the field in prioritizing its animals' needs over the needs of the institution. *See id.*

17. *Roadside Zoos Are Not Zoos*, *supra* note 2 (“These municipal menageries were often started by well-meaning people who lacked the expertise to undertake such a complex venture. A parks and recreation person may have suggested a collection of animals to ‘improve’ the local parks in the belief that a zoo would provide an educational and enjoyable experience for local citizens. The end result is a menagerie that has not been planned, is not staffed by professionals, and receives inadequate financial support.”); Lia Kvatum, *This Va. Roadside Zoo Is Unaccredited. Its Owner Says That’s What Makes It Humane.*, WASH. POST (June 1, 2017), https://www.washingtonpost.com/lifestyle/magazine/this-va-roadside-zoo-is-unaccredited-its-owner-says-thats-what-makes-it-humane/2017/05/30/40e05140-2f58-11e7-9dec-764dc781686f_story.html?utm_term=.7c5abb9cbf59

[https://perma.cc/787P-UT5J] (“James Serpell, a professor of ethics and animal welfare at the University of Pennsylvania School of Veterinary Medicine, says he has no problem with zoos that are run well. ‘The problem,’ he explains, ‘is that most roadside zoos have neither the space nor the expertise to do it well. You have large animals kept in small enclosures. Those accredited by organizations like the [Association of Zoos and Aquariums] are able to hire and keep experts, and their captive-breeding programs have a purpose.’”). *Husbandry*, MERRIAM-WEBSTER DICTIONARY (2019).

18. Jessica Pierce & Marc Bekoff, *A Postzoo Future: Why Welfare Fails Animals in Zoos*, 21 J. APPLIED ANIMAL WELFARE SCI. 43, 45 (2018) (“We already know that certain species simply do not and cannot thrive in the zoo setting: elephants, bears, wolves, whales, dolphins, chimpanzees, orangutans, lions, and tigers, just to name a few.”).

19. *See* Nussbaum, *supra* note 3, at 305 (“[T]here is waste and tragedy when a living creature has the innate, or ‘basic,’ capability for some functions that are evaluated as important and good, but never gets the opportunity to perform those functions.”); *see also* Lori Gruen, *The Ethics of Captivity*, NAT’L HUMAN. CTR. (June 19, 2011), <https://nationalhumanitiescenter.org/on-the-human/2011/06/the-ethics-of-captivity/> [https://perma.cc/6WXJ-TS3S] (arguing that captivity infringes on the freedom and dignity of both humans and animals).

20. Kali S. Grech, *Detailed Discussion of the Laws Affecting Zoos*, ANIMAL LEGAL & HIST. CTR. (2004), <https://www.animallaw.info/article/detailed-discussion->

from exhibiting animals, whether occupationally in the case of exhibitors or enjoyment in the case of zoo-goers, society owes captive exhibited animals a duty of care to provide at least their most basic needs.²¹

The lack of uniformity in laws governing the treatment of captive exhibited animals has resulted in vast and illogical disparities.²² For example, the Animal Welfare Act (AWA) only applies to warm-blooded species, leaving reptiles and other cold-blooded animals completely unprotected.²³ Additionally, endangered and threatened species in zoos have significantly more protections than their non-endangered, non-threatened exhibited compatriots.²⁴ To illustrate, most species of cougar, a popular zoo animal, are not

laws-affecting-zoos#id-7 [https://perma.cc/ZFH3-D734] (“Zoos exist in today’s society for a myriad of reasons including, as the American Zoological Association . . . claims, conservation, education, science, and recreation. Whatever purpose they exist for, the status of the animals is the same: The animals are property owned by the Zoo. This severely limits their protection under the law, as well as the ability of people concerned about their care and welfare to bring suit on their behalf. Proponents of animal rights, however, argue that regardless of their intent, zoos reinforce the notion of human domination over non-human animals, which is never beneficial to animals. Animal rights advocates argue that the existing laws are insufficient to protect the welfare of animals kept in captivity.”).

21. See Pierce & Bekoff, *supra* note 18, at 44–47 (arguing that keeping animals in prolonged captivity invariably causes suffering and calling for reform of zoological ethics standards, including the shutting down of bad zoos, ceasing exhibiting animals that will never do well in captivity, ending captive breeding programs, and ending the use of animal cognition science on behalf of individual animals). *But see* Gruen, *supra* note 19 (“When captives have their physical and immediate psychological needs met and are free from suffering, so they are not being harmed in those ways, we can . . . still ask if there [is] something wrong with holding them captive.”).

22. See Grech, *supra* note 20 (providing a detailed discussion of federal laws that affect zoos and arguing that they have proven inadequate to protect zoo animals); see also Kuehl v. Sellner, 161 F. Supp. 3d 678, 719 (N.D. Iowa 2016) (holding that a roadside zoo had to remove the animals it owned that belonged to endangered species, but the zoo’s other animals were allowed to remain at the negligent zoo because the ESA did not protect those animals).

23. 9 C.F.R. § 1.1 (1990) (“*Animal* means any live or dead dog, cat, nonhuman primate, guinea pig, hamster, rabbit, or any other *warm-blooded* animal, which is being used, or is intended for use for . . . exhibition purposes.”) (second emphasis added).

24. See generally 50 C.F.R. §§ 17.11, 17.12 (1976) (listing species that are endangered or threatened and protected by the ESA); see also Grech, *supra* note 20 (“The Act applies to listed species being imported, exported, bought or sold in interstate or foreign commerce, or taking of those species. Therefore, only some zoo animals will be protected, and only some actions regarding these animals will be limited or regulated.”).

endangered or threatened under the Endangered Species Act (ESA).²⁵ Yet other popular commonly exhibited big cats, such as tigers, cheetahs, jaguars, and leopards, have significantly greater protection than the non-endangered, non-threatened cougars that might be in an enclosure twenty feet away from them.²⁶

The Eighth Circuit recently interpreted the ESA to prohibit the confinement of ESA-protected species under conditions that subject them to physical and psychological distress.²⁷ Animal rights advocates hailed the interpretation because it strengthened protections for endangered species.²⁸ However, non-endangered and non-threatened animals that are not protected by the ESA at the same zoo are not afforded the same protections.²⁹ A species-specific standard for captive exhibited animals is necessary because it would apply a uniform, yet specialized, protection to captive animals, which require extra protection because humans directly control every aspect of their lives.³⁰ Consistent enforcement and stronger regulations that focus on fulfilling a species' specific biological needs at the federal level, in combination with heightened private accreditation standards, are the first steps in creating uniform, sufficient protections for captive exhibited animals.³¹

25. See *Which Wildcats Are Endangered or Threatened?*, BIG CAT RESCUE (July 10, 2011), <https://bigcatrescue.org/which-wildcats-are-endangered-or-threatened/> [<https://perma.cc/9526-SF8Q>] (explaining that cougars in the western United States are not protected by the ESA).

26. See *id.*

27. See *Kuehl v. Sellner*, 887 F.3d 845, 856 (8th Cir. 2018) (holding that Cricket Hollow Zoo, a roadside zoo in Iowa, violated the ESA by neglecting to provide species-specific care to its tigers and lemurs).

28. See Matt Reynolds, *Court Upholds Removal of Tigers & Lemurs from Roadside Zoo*, COURTHOUSE NEWS SERV. (Apr. 11, 2018), <https://www.courthousenews.com/court-upholds-removal-of-tigers-lemurs-from-roadside-zoo/> [<https://perma.cc/PVT3-ZKTA>].

29. See *Kuehl v. Sellner*, 161 F. Supp. 3d 678, 719 (N.D. Iowa 2016) (holding that the court had no jurisdiction as to any other animals at Cricket Hollow Zoo other than those the Zoo had harassed under the ESA).

30. See Nussbaum, *supra* note 3, at 305 (arguing that species have properties which individuals of those species must be allowed to exhibit, lest their dignity be undermined).

31. See *id.* (noting the importance of species-specific properties); see also Pierce & Bekoff, *supra* note 18, at 44–47 (proposing standards for zoological care of captive animals); *Captive Animals*, ANIMAL LEGAL DEF. FUND https://aldf.org/focus_area/captive-animals/ [<https://perma.cc/G3FZ-HRBV>] (last visited Nov. 25, 2019) (arguing that captive animals have insufficient protection under the current framework).

Part I of this Comment examines the federal framework for the regulation of exhibitors of captive animals and a brief overview of the role of accreditation organizations.³² Part II discusses past and current legal challenges to the treatment of animals in roadside zoos across the United States.³³ Part III provides a multi-faceted proposal for protecting captive animals, principled on the notion that exhibitors must meet the species-specific needs of their captive wildlife.³⁴

I. FEDERAL AND PRIVATE OVERSIGHT OF CAPTIVE EXHIBITED ANIMAL TREATMENT

The treatment of captive exhibited animals is regulated through federal, state,³⁵ and local laws,³⁶ as well as private accreditation institutions.³⁷ Exhibitors are subject to their jurisdictions' local ordinances as well as state laws. Due to the extensive patchwork of local and state laws, however, exhibitors in different jurisdictions are subject to vastly different standards.³⁸ Therefore, the broad-reaching

32. See *infra* Part I (explaining the statutory framework of the AWA and ESA, the two federal laws that govern animal exhibitors, as well as the standards of private accreditation organizations).

33. See *infra* Part II (providing examples of administrative shortfalls of litigation under the AWA and the limited scope of ESA litigation to highlight the difficulty in holding zoological parks accountable).

34. See *infra* Part III (proposing that higher standards be implemented, either through federal legislation, rulemaking, policy, or private accreditation standards, based on species-specific needs, as well as prioritizing the needs of individual animals instead of animals as collections).

35. See, e.g., N.C. GEN. STAT. § 19A-2 (2013) (providing a civil remedy for animal cruelty); see also N.Y. ENVTL. CONSERV. LAW § 11-0538 (McKinney 2015) (banning public contact with big cats and big cat infants).

36. See Erin Adler, *Dakota County Fur Farm Meets Deadline for Moving Wild Animals*, STAR TRIB. (Apr. 23, 2018, 9:23 PM), <http://www.startribune.com/dakota-county-fur-farm-meets-deadline-for-moving-animals/480622921/> [<https://perma.cc/4RUQ-JZRE>] (providing an example of local governments utilizing zoning laws to regulate both private ownership of exotic animals and public exhibitors). Fur-Ever Wild, the fur farm that killed gray wolves for pelts once they were too old to be handled by the public, had to move its animals because the county it was located in passed a zoning ordinance banning exotic animals. See *id.*

37. See Grech, *supra* note 20 (detailing the framework of federal, local, and state laws that affect zoos, as well as private accreditation standards).

38. See Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 69 (1999) (providing a detailed summary of common provisions in state animal anti-cruelty statutes); see also ANIMAL LEGAL DEF. FUND, *2018 U.S. Animal Protection Laws State Rankings*, <https://aldf.org/project/2018-us-state-rankings/> [<https://perma.cc/6B5U-5DJ6>] (last visited Nov. 25, 2019) (providing a detailed analysis of state-by-state animal protection laws and a ranking system for

federal laws and private accreditation organizations provide a more consistent analysis for the treatment of animals in all zoos across the United States and are a more useful and efficient vehicle for change than state and local laws.³⁹ At the federal level, all animal exhibitors in the nation are subject to the Animal Welfare Act and the Endangered Species Act.⁴⁰ Zoos also often choose to obtain accreditation through either the Association of Zoos and Aquariums (AZA) or the Zoological Association of America (ZAA), which hold zoos accountable for more specific standards than the AWA and ESA.⁴¹

top, middle, and bottom-tier states). Every state in the United States has some kind of law prohibiting cruel treatment of animals, but the range of restrictions, definitions, and penalties is vast. *See id.* (comparing state laws). Furthermore, even exhibitors in states with strong criminal anti-cruelty laws often go unprosecuted due to a lack of prosecutorial knowledge and resources. *See* Jennifer Rackstraw, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, 9 ANIMAL L. 243, 245–46 (2003). Although statistics for animal abuse prosecution are limited, studies show that such cases are drastically under-prosecuted. *Id.* at 246 (“A 1997 study conducted by the Massachusetts Society for the Prevention of Cruelty to Animals (MSPCA) and Northeastern University showed that of the 80,000 complaints investigated by MSPCA officers between 1975 and 1996, only 268 of the complaints resulted in prosecution efforts. Furthermore, less than half of these 268 cases resulted in guilty findings, and the sentences handed down were paltry. In 1996, Ohio State University undertook a survey of Ohio Animal Care and Control agencies that highlighted a lack of prosecution of animal cruelty crimes. One hundred three agencies reported 25,564 animal cruelty complaints for 1996, but prosecutors filed criminal charges in only two percent of those cases.”).

39. *See* Frasch, *supra* note 38, at 70 (noting that state and local laws can provide protection for animals in roadside zoos, but the scope, enforcement, and efficacy of such laws varies widely by jurisdiction). Federal legislation and private accreditation are discussed at length in this Comment because changes in federal law will immediately affect every animal in every zoo in the United States, and changes in accreditation standards will similarly affect most, if not all, zoos. *See* Animal Welfare Act, 7 U.S.C. § 2133 (2018) (indicating that all exhibitors of animals must comply with the AWA and apply for licenses with the USDA); *see also* Endangered Species Act, 16 U.S.C. § 1538(a) (2018) (declaring it unlawful for anyone to “take” endangered or threatened species). For purposes of brevity, therefore, state and local laws are only mentioned briefly in this Comment.

40. *See generally* 7 U.S.C. §§ 2131–2159 (2018) (regulating the care and treatment of certain animals); 16 U.S.C. §§ 1531–1544 (2018) (protecting endangered and threatened animals). Exhibitors are only subject to the ESA if they exhibit endangered or threatened animals, but due to the inherent popularity and profitability of such animals, this Comment will assume that most, if not all, exhibitors include endangered or protected species in their collections. *See* 16 U.S.C. §§ 1531–1544.

41. *See* Rachel Garner, *How to Understand Zoo Accreditation*, WHY ANIMALS DO THE THING (July 4, 2016), <https://www.whyanimalsdothething.com/how-to-understand-zoos-accreditation> [<https://perma.cc/LAN5-GH98>] (explaining that zoological institutions often choose to associate with private accreditation

A. Overview of Federal Laws Applicable to Captive Exhibited Animals

Animal exhibitors are subject to the AWA and ESA, but their statutory framework has pitfalls that some exhibitors exploit.⁴² Any individual or entity wishing to exhibit certain species of warm-blooded animals is under the purview of the AWA, which Congress intended to protect certain animals that are used for research and exhibition.⁴³ Additionally, exhibitors frequently have to comply with the ESA, which regulates certain commercial uses of endangered and threatened species.⁴⁴ However, the AWA provides only minimal care standards, does not apply to all types of animals, and is underenforced.⁴⁵ The ESA provides stronger protections, but it only applies to endangered species.⁴⁶ As a result of the substantial gaps in the federal captive exhibited animal protection framework, captive

organizations); *see also* ASS'N OF ZOOS & AQUARIUMS, THE ACCREDITATION STANDARDS & RELATED POLICIES (2019 ed.) (explaining the standards for zoological institutions accredited by the AZA); ZOOLOGICAL ASS'N OF AM., ANIMAL CARE & ENCLOSURE STANDARDS AND RELATED POLICIES (2016) (explaining the standards for zoological institutions accredited by the ZAA).

42. *See* Carney Anne Nasser, *Welcome to the Jungle: How Loopholes in the Federal Endangered Species Act and the Animal Welfare Act are Feeding a Tiger Crisis in America*, 9 ALB. GOV'T L. REV. 194, 198 (2016) (stating that tigers are federally regulated through the AWA and ESA, but loopholes in those laws have allowed for exploitation and unconscionable breeding practices).

43. 7 U.S.C. § 2132(g) (“The term ‘animal’ means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for . . . exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes.”).

44. *See* 16 U.S.C. §§ 1531–1544.

45. Grech, *supra* note 20 (“[The AWA’s] scope, however, is greatly limited by the statute’s definitions. The Act’s effect is also limited by lack of enforcement both because of the limited resources of the department charged with enforcing the act, and the lack of a citizen suit provision.”).

46. § 1531(b) (“The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species . . .”).

exhibited animals routinely suffer from physical and psychological trauma.⁴⁷

1. *The Animal Welfare Act*

The AWA is the primary law governing the bare minimum standards of housing, care, and transportation for exhibited animals.⁴⁸ Congress passed the AWA in 1966 after *Sports Illustrated* and *Life* magazines published stories about thieves who stole companion animals and sold them for use in inhumane laboratory experiments.⁴⁹ Congress granted power to enforce the statute to the United States Department of Agriculture (USDA), which typically regulates agriculture in the context of food and natural resources.⁵⁰ Thus, the AWA's first iteration was a response to public outcry to improve the welfare of animals that are subject to research or exhibition.⁵¹ Its scope is limited to protect only certain warm-blooded animals.⁵² Notably, the AWA lacks a citizen suit provision, which prevents animal advocates from directly litigating violations of the AWA.⁵³ As a result, legal

47. See, e.g., *Kuehl v. Sellner*, 161 F. Supp. 3d 678, 716 (N.D. Iowa 2016) (describing Cricket Hollow Zoo's mistreatment of tigers and lemurs); see also Adler, *supra* note 10 (detailing Fur-Ever Wild's exploitation of gray wolves).

48. See 7 U.S.C. § 2132 (delegating authority to enforce the AWA to the Secretary of the Department of Agriculture).

49. See Benjamin Adams & Jean Larson, *Legislative History of the Animal Welfare Act: Introduction*, U.S. DEP'T OF AGRIC. NAT'L AGRIC. LIBR. ANIMAL WELFARE INFO. CTR., <https://www.nal.usda.gov/awic/legislative-history-animal-welfare-act-introduction> [<https://perma.cc/PE8W-D4M5>] (last visited Nov. 25, 2019) (summarizing the 1966 *Life* article, "Concentration Camp for Dogs," that sparked the public outcry leading to Congress's passage of the AWA).

50. See *U.S. Department of Agriculture*, USA.GOV, <https://www.usa.gov/federal-agencies/u-s-department-of-agriculture> [<https://perma.cc/58Q3-G53D>] (last visited Nov. 25, 2019).

51. See § 2131(1) (stating that one purpose of the AWA is "to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment").

52. See § 2132(g).

53. *Zimmermann v. Wolff*, 622 F. Supp. 2d 240, 243–44 (E.D. Pa. 2008) ("Though this issue has not been determined by the Court of Appeals, other courts have uniformly held that the AWA does not create a private cause of action and that Congress intended that only the Secretary of Agriculture be able to enforce the law Plaintiff provides no cases to the contrary and merely argues that the AWA does not preclude a private right of action. I agree with the overwhelming weight of authority that the AWA does not provide a private cause of action. Therefore this Court lacks subject matter jurisdiction over plaintiff's AWA claim."). For a discussion on creating a private cause of action under the Animal Welfare Act, see generally

challenges are often brought against the USDA's enforcement policies instead of the offending zoo.⁵⁴ Plaintiffs must overcome judicial review that is highly deferential to regulatory agencies, making it all the more difficult to challenge regulations.⁵⁵ Additionally, the AWA's intentionally minimal standards and underenforcement have come under criticism in the animal rights field and even in the USDA's own internal auditing department.⁵⁶

a. The USDA's Licensing Policy Under the AWA Allows Routine Violators to Renew Their Licenses

Animal exhibitors must obtain a license from the USDA even if they are not exhibiting animals for profit.⁵⁷ All zoos in the United States must obtain an exhibitor's license from the Animal and Plant Health Inspection Service (APHIS).⁵⁸ Facilities must pass a pre-

Karen L. McDonald, Comment, *Creating a Private Cause of Action Against Abusive Animal Research*, 134 U. PA. L. REV. 399 (1986).

54. See *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 609 (D.C. Cir. 2017) (stating that the plaintiffs brought suit against the USDA to challenge the agency's decision to renew the exhibitor license for Cricket Hollow Zoo when the USDA had an open investigation regarding the Zoo's recurring AWA violations). The plaintiffs were not able to overcome judicial deference to the USDA's interpretation of the AWA. See *id.* at 620.

55. See *id.*

56. See Justin Marceau, *How the Animal Welfare Act Harms Animals*, 69 HASTINGS L.J. 925, 946–47 (2018) (“In a variety of contexts, ranging from media talking points to political lobbying endeavors to litigation, the AWA is increasingly invoked as a reason for rejecting additional scrutiny of current animal welfare practices. The AWA has come to be viewed as a vaunted ceiling, rather than a bare minimum set of animal welfare standards: The law is invoked to justify deference to the practices of any business that is licensed by the AWA.”); Courtney G. Lee, *The Animal Welfare Act at Fifty: Problems and Possibilities in Animal Testing Regulation*, 95 NEB. L. REV. 194, 204 (2016) (providing criticisms of the AWA in the context of animal testing); see also U.S. DEP'T OF AGRIC. OFFICE INSPECTOR GEN., ANIMAL AND PLANT HEALTH INSPECTION SERVICE ANIMAL CARE PROGRAM INSPECTIONS OF PROBLEMATIC DEALERS 1 (2010) (noting APHIS's lack of enforcement of the AWA).

57. See § 2132(h) (defining “exhibitor” as “any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not”).

58. U.S. DEP'T OF AGRIC., *Regulated Businesses (Licensing and Registration)*, https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/ct_awa_regulated_businesses [<https://perma.cc/94YA-HYLD>] (last modified Apr. 29, 2019) (“Individuals or businesses with warm-blooded animals that are on display, perform for the public, or are used in educational presentations must be licensed as exhibitors with APHIS.”).

license inspection per the USDA's standards and pay a fee.⁵⁹ However, once a facility obtains a license, the USDA uses a "rubber-stamping" policy for license renewals.⁶⁰ The policy only requires facilities to fill out the requisite paperwork and pay a small fee for the renewal.⁶¹ The USDA's own regulations suggest that license renewals can only be approved if the facility has no AWA violations, yet the USDA has renewed facilities' licenses even when the USDA cited the facility numerous times for AWA violations.⁶² This policy allows exhibitors to boast that they are "federally licensed" when being federally licensed is the threshold requirement for legally operating an animal exhibition business.⁶³ Further, the rubber-stamping policy allows "federally licensed" exhibitors to benefit from the public's perception of legitimacy when the USDA itself has cited that exhibitor for AWA violations.⁶⁴

59. See Animal Welfare Act, 7 U.S.C. § 2133 (2018) (stating that the USDA "shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: *Provided*, That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title").

60. See Delcianna Winders, *Administrative License Renewal and Due Process under the Animal Welfare Act—A Case Study*, 45 FLA. ST. U. L. REV. 539, 541–42 (2018) (criticizing the USDA practice of distributing animal exhibition permit renewals under the Animal Welfare Act to animal exhibitors who, as evidenced by records from the USDA's own inspections, repeatedly violated the AWA). *But see Animal Legal Def. Fund, Inc.*, 872 F.3d at 608–610, 613 (holding that the USDA's renewal process was consistent with the Animal Welfare Act because Congress explicitly delegated authority to the USDA to establish such procedures).

61. See *Animal Legal Def. Fund, Inc.*, 872 F.3d at 606.

62. See *id.* at 613; see also Winders, *supra* note 60, at 585 (describing the USDA's renewal of Cricket Hollow Zoo's exhibitor license despite the Zoo's frequent violations).

63. Marceau, *supra* note 56, at 943 ("The AWA lends an imprimatur of humane animal care to every seller, exhibitor and research facility that holds an AWA license. One assumes that, if the federal government has sanctioned a zoo as AWA-compliant, the welfare of the animals at the facility is well attended. As one animal protection group explained in a pleading, an AWA license 'creates the misperception among the public, and especially parents and their children, that these facilities are treating the animals in their possession lawfully and humanely.'").

64. *Id.* at 951 ("Simply by waving the flag of AWA-compliance, breeders, researchers, and exhibitors quell discontent and bypass the scrutiny that befalls them in the wake of a tragic accident or an undercover whistleblowing expose. The paradoxical effect of the AWA is that it creates a space for federal law to be deployed in defense of the mistreatment of animals.").

b. The AWA's Standards Are Minimal by Design

Animal advocates criticize the AWA's standards for exhibitor animal care because the standards do not serve the animals' best interests.⁶⁵ For example, the AWA merely requires that enclosures allow an animal enough room to stand up and turn around.⁶⁶ Facilities are not required to make potable water available to their animals at all times.⁶⁷ Feces only need to be cleaned often enough to prevent contamination or disease.⁶⁸ The public is allowed to handle animals, even infants.⁶⁹ Following a petition from several advocacy organizations, the USDA issued guidance stating that members of the public may not handle big cats under four weeks of age, but the USDA provides no similar guidance for infant animals of other species.⁷⁰ Ultimately, under the USDA's regulations, a zoo could obtain an exhibitor's license and hold itself out as a federally licensed facility if it forces animals to live in transport cages barely large enough to stand in, fails to ensure access to sufficient quantities of potable water at all times, forces animals to stand in their own waste, and facilitates public

65. See Animal Welfare Act, 7 U.S.C. §2143 (a)(2) (2018) (emphasis added) (imposing “*minimum* requirements—(A) for handling, housing, feeding, watering, sanitation, shelter from extremes of weather and temperatures, adequate veterinary care”); Marceau, *supra* note 56, at 929 (“The AWA’s prominence paired with its meagerness set the stage for a powerful duality—the AWA is invoked as the centerpiece, or even the exclusive source, of restrictions on the treatment of many animals, but the protections it provides are actually minimal and almost never enforced. In this way, the AWA has allowed the public to feel good about itself and its concern for animal welfare, but it has not improved the lives of most animals, and its existence reinforces norms that actually exacerbate animal suffering.”).

66. 9 C.F.R. § 3.128 (2012) (“Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.”).

67. § 3.130 (“If potable water is not accessible to the animals at all times, it must be provided as often as necessary for the health and comfort of the animal. Frequency of watering shall consider age, species, condition, size, and type of the animal. All water receptacles shall be kept clean and sanitary.”).

68. § 3.131(a) (“Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors.”).

69. §§ 2.131(a), (b)(1), (b)(2) (providing standards for public handling of animals).

70. See U.S. DEP’T OF AGRIC., HANDLING AND HUSBANDRY OF NEONATAL NONDOMESTIC CATS (2016).

play sessions and photo opportunities with big cats and other exotic animals.⁷¹

Additionally, most exotic animals are categorized in the same subsection in the regulatory framework rather than individually by species.⁷² Thus, the same regulations that apply to elephants apply to tigers, kangaroos, zebras, camels, and other similar animals.⁷³ Even though the USDA is the only federal agency that regulates the standards of care for exhibited animals, its regulations lack specific standards for many popular zoo species.⁷⁴ In this sense, the AWA's broad, minimal, and non-specific requirements make it difficult to fulfill the AWA's purpose to ensure the "humane care and treatment" of animals that have individual, complex, and particular needs.⁷⁵

c. The USDA's Own Auditing Department Considers the AWA Underenforced

Animal rights advocates and the USDA's own internal auditing department, the Office of the Inspector General, have repeatedly criticized the USDA for underenforcing the AWA.⁷⁶ The Animal Care unit of APHIS enforces the AWA and employs about a hundred inspectors to oversee approximately 8,000 facilities.⁷⁷ Even when an

71. See §§ 2.131(a), 3.128, 3.130, 3.131(a).

72. See §§ 3.125–3.142 (including general regulations for all animals other than those listed in the title and those excluded by the AWA's statutory restrictions); see also §§ 3.75–3.92 (regulating the care of primates); § 3.100–3.118 (regulating the care of marine animals).

73. See §§ 3.125–3.142.

74. See, e.g., *id.*

75. See 7 U.S.C. § 2131 (2018).

76. See Marceau, *supra* note 56, at 929 (criticizing the AWA's minimal standards and enforcement); see also U.S. DEP'T OF AGRIC. OFFICE OF INSPECTOR GEN., ANIMAL AND PLANT HEALTH INSPECTION SERVICE ANIMAL CARE PROGRAM INSPECTIONS OF PROBLEMATIC DEALERS 1–3 (2010). The Office of the Inspector General's audit found deficiencies in APHIS's enforcement of the AWA, including that the Animal Care unit enforcement was ineffective against problematic dealers; Animal Care inspectors did not cite or document violations properly to support enforcement actions; APHIS's penalty worksheet calculated minimal penalties; APHIS misused penalties for lower guidelines for AWA violators; and some large breeders circumvented the AWA by selling animals over the internet. See *id.*

77. Karin Brulliard, *USDA's Enforcement of Animal Welfare Laws Plummeted in 2018, Agency Figures Show*, WASH. POST (Oct. 18, 2018, 11:12 AM), https://www.washingtonpost.com/science/2018/10/18/usdas-enforcement-animal-welfare-laws-plummeted-agency-figures-show/?noredirect=on&utm_term=.e115968f4bac [<https://perma.cc/ZH8H-ATF4>]. The 8,000 facilities include research facilities and breeders, as well as exhibitors. See generally U.S. DEP'T OF AGRIC.

inspector finds a violation, APHIS is more likely to issue warnings instead of penalties, and APHIS itself has acknowledged that fines are “very rare.”⁷⁸ If penalties are assessed, they are often substantially smaller than the maximum allowable penalty.⁷⁹ Further, the USDA records indicate a sharp drop in the agency’s already-low enforcement since 2016.⁸⁰ The number of cases the Animal Care unit initiated dropped from 239 in 2016 to just fifteen in the first three fiscal quarters of 2018.⁸¹ In that same time, the number of warnings dropped from 192 to thirty-nine.⁸² Only one administrative complaint had been filed in 2018, compared to twenty-three in 2016.⁸³ The civil penalties assessed in 2016 totaled \$3.84 million.⁸⁴ In 2018, that number dropped to \$163,000—less than 5% of the penalties assessed in 2016.⁸⁵

The agency attributes the drop in administrative hearings to its decision to work more closely with licensees, which results in fewer violations and thus fewer hearings.⁸⁶ For example, the USDA is considering giving frequent AWA violators notification for scheduled visits rather than continuing its practice of surprise visits.⁸⁷ These

APHIS, *Listing of Certificate Holders*, https://www.aphis.usda.gov/animal_welfare/downloads/List-of-Active-Licensees-and-Registrants.pdf [https://perma.cc/BD74-47PR] (last updated Nov. 1, 2019, 2:55 PM) (listing about 8,000 licensees).

78. See Delcianna Winders, *Administrative Law Enforcement, Warnings, and Transparency*, 79 OHIO ST. L.J. 451, 483 (2018).

79. See U.S. DEP’T OF AGRIC. APHIS, *IES Frequently Asked Questions* https://www.aphis.usda.gov/aphis/ourfocus/business-services/ies/ies_faq [https://perma.cc/LVL2-JEVS] (last modified May 24, 2017); U.S. DEP’T OF AGRIC. OFFICE OF INSPECTOR GEN., *supra* note 76, at 2 (“Although APHIS previously agreed to revise its penalty worksheet to produce ‘significantly higher’ penalties for violators of AWA, the agency continued to assess minimal penalties that did not deter violators. This occurred because the new worksheet allowed reductions up to 145 percent of the maximum penalty. While we are not advocating that APHIS assess the maximum penalty, we found that at a time when Congress tripled the authorized maximum penalty to ‘strengthen fines for violations,’ the actual penalties were 20 percent less using the new worksheet as compared to the worksheet APHIS previously used.”).

80. See U.S. DEP’T OF AGRIC. APHIS, *Animal Care Enforcement Summary (AWA and HPA)*, https://www.aphis.usda.gov/aphis/ourfocus/business-services/ies/ies_performance_metrics/ies-ac_enforcement_summary [https://perma.cc/LVL2-JEVS] (last updated Apr. 18, 2019).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. See Brulliard, *supra* note 77.

87. *Id.* (“The agency is also piloting the use of announced inspections with chronic violators, which Juarez said allows the scheduling of multiple visits and helps ensure relevant staff, including attending veterinarians, are present. Critics have

changes are possibly due to the new presidential administration that favors deregulation.⁸⁸ On top of the decrease in enforcement statistics, the USDA removed inspection reports from its website in February 2017, depriving the public of access to information about standards of care for commercial animal enterprises.⁸⁹ The USDA advised that interested parties may submit requests for inspection reports through Freedom of Information Act (FOIA) requests.⁹⁰ However, the agency has responded to FOIA requests with heavily redacted reports that, in many cases, take months or even years to produce.⁹¹

Although the AWA certainly filled a federal gap in animal welfare law in 1966, its standards still allow roadside zoos to profit from USDA certification even if their animals are suffering.⁹² The license process allows negligent facilities to benefit from the

lambasted the idea as an early warning system for bad actors who could clean up problems before inspections.”).

88. *Id.* (“It’s all part of this pro-industry, anti-regulatory agenda,” said Eric Kleiman, a researcher who has tracked the USDA’s animal care enforcement for the Animal Welfare Institute, an advocacy organization. “We’ve never seen this kind of attack on the fundamental tenets of the most basic precepts of a law that has enjoyed long-standing bipartisan and public support for over 50 years.”).

89. *See* U.S. DEP’T OF AGRIC. APHIS, *Animal Welfare Enforcement Actions*, <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/enforcementactions> [<https://perma.cc/VPU4-M58Q>] (last modified Aug. 10, 2018) (“Based on our commitment to being transparent, remaining responsive to our stakeholders’ informational needs, and maintaining the privacy rights of individuals, APHIS is implementing actions to remove documents it posts on APHIS’s website involving the Horse Protection Act (HPA) and the Animal Welfare Act (AWA) that contain personal information These documents include inspection reports, research facility annual reports, regulatory correspondence (such as official warnings), lists of regulated entities, and enforcement records (such as pre-litigation settlement agreements and administrative complaints) that have not received final adjudication.”); *see also* Karin Brulliard, *USDA Abruptly Purges Animal Welfare Information From Its Website*, WASH. POST (Feb. 3, 2017, 6:57 PM), https://www.washingtonpost.com/news/animalia/wp/2017/02/03/the-usda-abruptly-removes-animal-welfare-information-from-its-website/?utm_term=.d8b6e9586dd4 [<https://perma.cc/SQ2H-X5C5>] (documenting animal welfare activists’ responses to the blackout).

90. *See* Brulliard, *supra* note 89 (explaining that as a part of its announcement that it was removing records from its website, the USDA assured that documents would still be available via FOIA).

91. *See id.* (noting that FOIA requests can take years to fulfill and the documents received may be heavily redacted).

92. *See* Winders, *supra* note 60, at 585 (criticizing the USDA for renewing Cricket Hollow Zoo’s permit, despite the Zoo’s frequent violations and the USDA’s open investigation on the Zoo at the time of the renewal).

legitimacy of being a USDA-compliant institution.⁹³ Finally, on top of these fundamental issues with the AWA, it is loosely enforced, which incentivizes exhibitors to flout its standards and recidivate after noncompliance warnings.⁹⁴ On the other hand, the ESA provides more stringent standards for the species it protects, but it only applies to certain species and has similar regulatory enforcement issues as the AWA.⁹⁵

2. The Endangered Species Act

The ESA applies to all zoos that exhibit protected species.⁹⁶ The Department of the Interior oversees its enforcement.⁹⁷ As of 2014, approximately 1,000 endangered and threatened species were represented in AZA-accredited zoos and aquariums across the United States.⁹⁸ Many roadside zoos display protected species such as Bengal tigers, snow leopards, gray wolves, brown bears, and lemurs and are therefore subject to certain ESA standards.⁹⁹ Although exhibitors are

93. Marceau, *supra* note 56, at 928, 946 (“Nearly every roadside zoo or animal exhibitor in the country, when facing allegations of animal suffering, responds with assurances of AWA compliance.”).

94. See Winders, *supra* note 78, at 457 (explaining that almost 40% of facilities with AWA warnings later received six or more citations for AWA violations and even if facilities were eventually penalized, their penalties were discounted and they paid an average of 3.6 cents per violation).

95. Grech, *supra* note 20 (“While the ESA provides a citizen suit provision and stiffer enforcement penalties, zoos are not typically subject to suits under the ESA. As with the AWA, adequate enforcement and application to foreign acquisition of species remains difficult.”).

96. See Endangered Species Act, 16 U.S.C. §§ 1532(6), (20) (2018) (providing statutory protection for all endangered and threatened species); *see also* § 1538 (prohibiting the “take” of endangered and threatened species); 50 C.F.R. § 17.2(a) (2019) (“The regulations of this part apply only to endangered and threatened wildlife and plants.”).

97. See § 1532(15) (delegating responsibility of the ESA to the Secretary of the Interior).

98. ASS’N OF ZOOS & AQUARIUMS, *Zoo & Aquarium Statistics*, <https://www.aza.org/zoo-and-aquarium-statistics> [<https://perma.cc/A7S6-QHU2>] (last updated Sept. 2019).

99. See ANIMAL WELFARE INST., *List of Endangered Species* (last visited Mar. 8, 2020), <https://awionline.org/content/list-endangered-species> [<https://perma.cc/RCY2-EBVS>]; Kali S. Grech, *Brief Summary of Laws Affecting Zoos*, ANIMAL LEGAL & HISTORICAL CTR. (2004), <https://www.animallaw.info/intro/laws-affecting-zoos> [<https://perma.cc/65GM-TSUD>] (“The Endangered Species Act (ESA) applies only to animals designated as ‘endangered’ or ‘threatened’ by the Secretary of the Interior, or the US Fish and Wildlife Service, who administers the Act. The ESA prohibits ‘taking’ or harassing listed animals, but the regulations

subject to the ESA, its effectiveness as animal protection legislation is limited because its purpose is to conserve species as a whole rather than protect individual animals, it has a flawed permitting system, and it is in danger of being repealed due to partisan attacks.¹⁰⁰ Concerned citizens are able to bring private suits against violators of the ESA because it has a civil cause of action, but standing is still difficult to establish.¹⁰¹

a. The ESA's "Take" Provision Protects Species Conservation, Not Individual Animals

The ESA prohibits "taking" any animal that belongs to a protected species.¹⁰² The ESA differentiates between "endangered" species, which are species that are in danger of extinction, and "threatened" species, which are species that are likely to become endangered in the foreseeable future.¹⁰³ Some standards are different

exempt normal animal husbandry, including exhibition of animals. Therefore, exhibiting an endangered species alone is not a violation of the Act.").

100. See § 1531(b) (stating that Congress's purpose for enacting the ESA is to promote conservation); Sarah Jane Keller, *PETA Says "Pay to Play" Scheme Allows Circuses and Big Game Hunters to Import Endangered Animals*, VICE NEWS (May 12, 2015, 6:40 PM), https://news.vice.com/en_us/article/8x3994/peta-says-pay-to-play-scheme-allows-circuses-and-big-game-hunters-to-import-endangered-animals [<https://perma.cc/BEB6-BRNT>] (reporting on criticisms of the ESA's permitting system); see also CONG. W. CAUCUS, *Endangered Species Act & Wildlife*, <https://westerncaucus.house.gov/issues/issue/?IssueID=14890> [<https://perma.cc/D4Z2-EMHH>] (last visited Nov. 25, 2019) (stating the Congressional Western Caucus's proposal to overhaul the ESA in favor of delegating conservation duties to states rather than the federal government).

101. See § 1540(g) (providing a civil cause of action for alleged ESA violations); see also Grech, *supra* note 20 (stating that zoos are not usually subject to ESA suits).

102. See § 1538.

103. §§ 1532(6), (20) ("(6) The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta (20) The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."); *What Is the Difference Between Endangered and Threatened?*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/midwest/wolf/history/e-vs-t.html> [<https://perma.cc/K334-LNVJ>] (last updated May 7, 2019) ("In simple terms[,] Endangered species are at the brink of extinction now. Threatened species are likely to be at the brink in the near future. All of the protections of the Act are provided to endangered species. Many, but not all, of those protections also are available to threatened species. However, the U.S. Fish and Wildlife Service (Service) has the authority to determine which

based on whether a species is threatened or endangered, but the “take” provision applies equally to both categories of protected species.¹⁰⁴ The definition of “take” under the ESA includes “harassment,” which is an act or omission that is likely to injure wildlife by harassing it to the extent that it “significantly disrupt[s] normal behavioral patterns.”¹⁰⁵ “Take” also includes harm, which is any act that results in the injury or death of wildlife.¹⁰⁶ However, Section 9 of the ESA exempts generally accepted practices that meet or exceed the AWA’s minimum standards for husbandry practices, facilities, and care.¹⁰⁷ Thus, if an exhibitor fails to meet the minimum standards of the AWA, it is not exempt from the “take” prohibition and is in violation of the ESA.¹⁰⁸ The “take” provision affirmatively protects individual animals that belong to endangered species from harm.¹⁰⁹ However, the ESA’s main purpose is species preservation rather than cruelty prevention.¹¹⁰ Therefore, the United States Fish and Wildlife Service (USFWS) enforcement of the ESA is predicated on the preservation of a species as a whole rather than the protection of individual animals from harm.¹¹¹

protections should apply to each threatened species; in other words, we can select and fine tune the protections that best meet the species’ recovery needs.”).

104. See §§ 1532(6), (20); see also § 1538(a).

105. 50 C.F.R. § 17.3 (“*Harass* in the definition of ‘take’ in the Act means 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.”).

106. *Id.* (“*Harm* in the definition of ‘take’ in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”).

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

108. See § 17.3(c)(1). *But cf.* Hill v. Coggins, 867 F.3d 499, 509–10 (4th Cir. 2017) (holding that the term “generally accepted,” under statutory construction, did not explicitly mean generally accepted practices were AWA standards; facilities have to comply with both AWA standards *and* generally accepted practices in order to qualify for the § 17.3(c)(1) exemption).

109. See § 1538(a).

110. See § 1531(b).

111. See *id.* (“The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be *conserved*”); see also § 1532(3) (emphasis added) (“The terms ‘conserve,’ ‘conserving,’ and ‘conservation’ mean to use and the use of all methods and

b. The USFWS Permit System Allows Roadside Zoos to Obtain Exotic, Endangered, or Threatened Animals

The ESA permitting system has significant enforcement loopholes.¹¹² USFWS issues permits that allow parties to legally “take” endangered species for specific acts, typically for importing or trading animals.¹¹³ The act must further scientific purposes, enhance the survival or propagation of the species, or be an “incidental” take.¹¹⁴ For permits that purport to “enhanc[e] the propagation or survival” of the species, applicants have to demonstrate that the permit will contribute to the species’ conservation.¹¹⁵ Zoos often obtain their permits based on enhancing conservation, but USFWS’s current policy for permits based on conservation purposes merely requires the applicant to donate money to a conservation-based organization.¹¹⁶ USFWS has granted permits for donations as low as \$500.¹¹⁷ The “pay-to-play” donation scheme frustrates the intent and purpose of the ESA to protect endangered species because the act for which the permit is required does not have to actually enhance conservation.¹¹⁸ By merely donating money to conservation-based organizations, rather than

procedures which are necessary to bring any endangered *species* or threatened *species* to the point at which the measures provided pursuant to this chapter are no longer necessary.”) (emphasis added). Thus, the purpose of the ESA is to conserve, and the focus of conservation is species preservation rather than animal care. See §§ 1531(b), 1532(3).

112. See Keller, *supra* note 100 (reporting that USFWS granted a circus a permit to transport elephants when the circus donated just \$500 to a conservation nonprofit, even though the circus had been cited by the USDA multiple times for AWA violations for mistreating elephants that contracted tuberculosis).

113. See § 1539(a) (providing a statutory basis for USFWS to provide permits for acts prohibited by § 1538).

114. See 50 C.F.R. § 17.9 (2014) (providing permit application and information collection requirements for take licenses). An incidental take is one that results from an otherwise lawful activity, such as economic development. See § 1539(a)(1)(B).

115. See § 17.22.

116. See Keller, *supra* note 100.

117. *Id.*

118. See *Dub Wallace Ranch Wants to Kill Endangered Animals: PETA Says No Way*, PETA (June 19, 2018), <https://www.peta.org/media/news-releases/dub-wallace-ranch-wants-to-kill-endangered-animals-peta-says-no-way/> [https://perma.cc/9NVW-WF8V] (“The Endangered Species Act prohibits killing protected animals and makes exceptions only in extremely rare circumstances that will directly help the species in the wild—but under its much-criticized ‘pay-to-play’ scheme, the FWS has issued permits in exchange for trivial donations to pseudo-conservation organizations.”).

actually enhancing conservation, roadside zoos can more easily take and exploit endangered or threatened species.¹¹⁹

c. The ESA Is Endangered Itself and Might Be Repealed or Gutted

The ESA is a controversial piece of legislation.¹²⁰ Proponents of the ESA often cite its success with the bald eagle, a species that was delisted from the Federal List of Endangered and Threatened Wildlife and Plants in 2007.¹²¹ Additionally, about 99% of all species protected in the Act's history have so far avoided extinction.¹²² However, critics of the ESA point out that only fifty-four additional species have recovered enough to be removed from the list since 1973.¹²³ More than 2,340 species remain on the list, approximately 1,660 of which are native to the United States.¹²⁴ The Western Caucus of the United States Senate has proposed a series of bills that would reallocate much of the ESA's purview to states.¹²⁵ Due to decades of deregulation efforts, mostly by hunting and firearm enthusiasts rather than animal advocates, there will likely be other challenges to the standards, or even existence, of the ESA in the future, even if the Western Caucus's proposed series of bills do not pass.¹²⁶ Without considering federal

119. See Keller, *supra* note 100.

120. Robert L. Fischman et al., *State Imperiled Species Legislation*, 48 ENVTL. L. 81, 82 (2018) ("The Endangered Species Act (ESA) may well be the most contentious of the federal environmental statutes.").

121. See *Bald Eagle Removed from Endangered Species List*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/pacific/ecoservices/BaldEagleDelisting.htm> [<https://perma.cc/V987-7TS4>] (last updated Mar. 18, 2011). Conservation efforts supported by the ESA helped the bald eagle's total number of nesting pairs in the contiguous forty-eight states to increase from 400 in 1963 to nearly 10,000 in 2007. *Id.*

122. Bill Theobald, *Republicans Say Iconic Endangered Species Act No Longer Working, Call for Major Makeover*, USA TODAY, <https://www.usatoday.com/story/news/politics/2018/08/28/endangered-species-act-gop-wants-overhaul-savior-bald-eagle/1061476002/> [<https://perma.cc/Y7HB-BTL2>] (last updated Sept. 4, 2018, 5:28 PM).

123. *Id.*

124. *Listed Species Summary (Boxscore)*, U.S. FISH & WILDLIFE SERV., <https://ecos.fws.gov/ecp0/reports/box-score-report> [<https://perma.cc/G6XJ-URBR>] (last updated Nov. 1, 2019, 2:41 PM).

125. See CONG. W. CAUCUS, *Modernizing the Endangered Species Act*, <https://westerncaucus.house.gov/issues/issue/?IssueID=14890> [<https://perma.cc/N4ZT-PY94>] (last visited Nov. 25, 2019).

126. See *id.*; Coral Davenport & Lisa Friedman, *Lawmakers, Lobbyists and the Administration Join Forces to Overhaul the Endangered Species Act*, N.Y. TIMES

oversight through the AWA or the ESA, zoos are still regulated via the market through private accreditation bodies.¹²⁷

B. The Role of Private Accrediting Bodies

Private accreditation institutions do not enforce their standards through the law, but they are still an important consideration when discussing zoological standards for animal treatment.¹²⁸ As an industry standard, animal exhibitors want accreditation from some private body to assert to the public that they are legitimate institutions comparable in prestige and care to other accredited exhibitors.¹²⁹ An indicator of how a zoo treats its animals is whether it is privately accredited and which institution it is accredited with.¹³⁰ Two main organizations accredit zoological institutions: the AZA and the ZAA.¹³¹ In addition, non-zoological animal sanctuaries obtain accreditation through the Global Federation of Animal Sanctuaries (GFAS).¹³²

1. Zoos: *The AZA and ZAA*

The AZA and ZAA accredit zoological parks.¹³³ Several parks opt to accredit with both organizations, but the AZA's standards are higher and more stringent.¹³⁴ Larger, more prestigious operations are often accredited under the AZA, which has higher standards than the ZAA.¹³⁵ Only 10% of facilities with USDA exhibitor licenses also

(July 22, 2018), <https://www.nytimes.com/2018/07/22/climate/endangered-species-act-trump-administration.html> [<https://perma.cc/5H33-W6FQ>] (“The myriad proposals reflect a wish list assembled over decades by oil and gas companies, libertarians and ranchers in Western states, who have long sought to overhaul the law, arguing that it represents a costly incursion of federal regulations on their land and livelihoods.”).

127. See Palmer, *supra* note 2.

128. Grech, *supra* note 20 (“Organizations where membership is voluntary seem to offer more meaningful regulations and protections for zoo animals. They set forth strict, specific standards, and additional enforcement mechanisms are provided to ensure members adhere.”).

129. Garner, *supra* note 41 (“Facilities can also opt for accreditation by independent organizations in order to gain notoriety associated with that standing.”).

130. See Palmer, *supra* note 2.

131. See Garner, *supra* note 41.

132. See *id.*

133. See *id.*

134. See *id.*

135. See *id.* Compare ASS'N OF ZOOS & AQUARIUMS, *supra* note 41 (outlining the standards of the AZA), with ZOOLOGICAL ASS'N OF AM., ANIMAL CARE &

have AZA accreditation.¹³⁶ Zoos that did not wish to conform to the AZA formed the ZAA in 2005 to provide an alternative to the AZA.¹³⁷ The AZA existed long before the ZAA.¹³⁸ Some ZAA critics argue that the ZAA chose to make its acronym substantially similar to the AZA's acronym so that zoo-goers would conflate the two, giving ZAA-accredited institutions the ability to tangentially benefit from AZA accreditation.¹³⁹

The AZA has more specific and generally higher standards of care that its member organizations must follow.¹⁴⁰ AZA-accredited institutions are subject to longer, more probative inspections.¹⁴¹ They also must follow a specific breeding regime that tracks the genetic history of its animals and does not breed genetic anomalies like ligers, tigons, or genetically deficient white tigers.¹⁴² AZA-accredited zoos are not all perfect, however, and zoos without AZA accreditation are not all poorly run.¹⁴³ One example of a questionable AZA-accredited zoo is the Wildlife Safari Zoo in Oregon, which was publicly scorned in 2016 for having elephant "car washes" where patrons could pay to have trainers guide elephants with bull hooks to spray the patrons' cars with the elephants' trunks.¹⁴⁴ However, the AZA's standards are

ENCLOSURE STANDARDS AND RELATED POLICIES (2016) (outlining the standards of the ZAA).

136. Palmer, *supra* note 2.

137. See Garner, *supra* note 41.

138. See *id.*

139. See BIG CAT RESCUE, *AZA vs ZAA* (Apr. 18, 2016), <https://bigcatrescue.org/aza-vs-zaa/> [<https://perma.cc/S7EN-UUXJ>] ("It is our belief that some of the current AZA zoos, who don't like the more strict and humane standards being adopted by AZA, are choosing to be accredited by both ZAA and AZA so that when they lose their prestigious AZA accreditation they will be able to dupe patrons into thinking that ZAA is the same thing.").

140. See Garner, *supra* note 41.

141. See CatCarole, *What is ZAA?*, 911 ANIMAL ABUSE (Apr. 22, 2017), <http://911animalabuse.com/zaa-zoological-association-of-america/> [<https://perma.cc/R3BJ-NPWK>].

142. See *id.*

143. Garner, *supra* note 41 ("At the end of the day . . . AZA facilities are still the cream of the crop and that accreditation status has a lot of validity. It's just important to keep in mind that a ZAA accreditation and/or lack of AZA accreditation is not automatically a condemnation of an [sic] zoo/aquarium/sanctuary.").

144. See *Currently Accredited Zoos & Aquariums*, ASS'N ZOOS & AQUARIUMS <https://www.aza.org/current-accreditation-list#W> [<https://perma.cc/88CG-NFFS>] (last updated Sept. 2019). Wildlife Safari in Oregon is accredited through September 2020. See *id.*; see also *2016 10 Worst Zoos for Elephants*, IN DEF. OF ANIMALS, <https://www.idausa.org/campaign/elephants/10-worst-zoos-2016/> [<https://perma.cc/KL9Q-EA84>] (last visited Nov. 25, 2019). Wildlife Safari was listed as the seventh worst zoo for elephants in the United States. See *id.*

considered within the industry as the highest standards that zoological parks are currently held to.¹⁴⁵ The prestige, heightened standards, and strict conservation requirements have made AZA accreditation all but necessary for any institution wanting to designate itself as a legitimate, conservation-focused zoological park.¹⁴⁶

Due to the AZA's higher standards for animal care and requirements for conservation-focused breeding, institutions that do not wish to meet these requirements often turn to a different accreditation organization, the ZAA.¹⁴⁷ The ZAA's standards are intended to allow member organizations more leeway in their business decisions than the AZA allows.¹⁴⁸ With business independence in mind, ZAA member organizations are subject to fewer and less probative inspections and breeding policies.¹⁴⁹ One significant difference in breeding policy is that genetically deficient color morphs, such as white tigers, can be bred in ZAA zoos because "they are a draw for the public."¹⁵⁰ Roadside zoos are more likely to be accredited through the ZAA due to its lower standards.¹⁵¹

Although the AZA's standards are the highest in the zoological park industry, they still have shortcomings.¹⁵² For example, Bengal tigers are popular zoo animals and have a natural roaming area that can span more than a hundred square kilometers.¹⁵³ No AZA-accredited zoo could adequately provide the space or enrichment to even minimally replicate the environment the tiger would experience

145. See Garner, *supra* note 41.

146. See CatCarole, *supra* note 141.

147. Garner, *supra* note 41 ("ZAA was formed in 2005 as the merger of two pre-existing organizations—the International Society of Zooculturists and the United Zoological Association. The ISZ was founded by one of the co-founders of the AZA in 1987 in order to deal more directly with 'animals only' issues for zoological facilities, without getting involved in the business aspects of facility management. The United Zoological Association was created in the year 2000 by people in both private and publicly owned animal collections that felt there were issues that were not being addressed by 'other organizations' (a phrase which here pretty heavily indicates—although it's rarely said directly—that they didn't like the way AZA was handling things and felt there needed to be an alternate accrediting organization facilities could work with).").

148. See *id.*

149. See CatCarole, *supra* note 141.

150. Garner, *supra* note 41.

151. See CatCarole, *supra* note 141.

152. Grech, *supra* note 20 ("While the AZA may promulgate and impose standards to ensure the welfare of zoo animals, its obvious bias must be considered when evaluating their effectiveness.").

153. Naha Dipanjan et. al., *Ranging, Activity and Habitat Use by Tigers in the Mangrove Forests of the Sundarban*, PLOS ONE (Apr. 6, 2016).

in the wild, and smaller environments can be harmful to species with large home ranges.¹⁵⁴ Elephants, another popular zoo animal, socialize in close-knit herds, yet the AZA's species survival breeding program interferes with their social bonds by trading elephants like baseball cards.¹⁵⁵ In a move that rocked the zoological industry, the Detroit Zoo sent its elephants to a sanctuary because elephants are unfit for captivity.¹⁵⁶ The Detroit Zoo has been criticized by the zoological industry for shifting its focus from animals as collections to animals as individuals, but animal advocacy organizations hailed the zoo for prioritizing the health and wellness of its animals.¹⁵⁷

2. Sanctuaries: GFAS

GFAS is an organization that accredits animal sanctuaries, which it defines as a facility that rescues and cares for "animals that

154. Mark Derr, *Zoos Too Small for Some Species*, *Biologists Report*, N.Y. TIMES (Oct. 1, 2003), <https://www.nytimes.com/2003/10/01/science/zoos-are-too-small-for-some-species-biologists-report.html> [<https://perma.cc/96PT-54U3>] ("The direct relationship of home range size to abnormal behavior and high infant mortality existed independent of such factors as the size and design of the enclosure and feeding schedules, the researchers report. They based their findings on an analysis of some 1,200 journal articles covering four decades of observations of animals in the wild and at 500 zoos worldwide.").

155. *2016 10 Worst Zoos for Elephants*, *supra* note 144 ("Some AZA accredited zoos are even keeping highly social elephants in virtual isolation, such as New York's Bronx Zoo, where the ironically named female elephant, 'Happy,' is separated from two other females. Other AZA accredited zoos simply ignore incompatibility issues, such as the Buttonwood Park Zoo in Massachusetts that confines two females who are so incompatible that one of them has repeatedly sustained serious injuries from the other elephant. Other zoos keep male elephants in isolation and move them around for breeding purposes with little to no regard for their distinctive social needs. There are more examples of elephants who are bullied, seriously injured or, in past years, even killed by other traumatized elephants in their enclosures.").

156. *See Winky and Wanda—A Tale of Two Elephants*, DET. ZOO, <https://detroitzoo.org/about/your-detroit-zoo/elephants/> [<https://perma.cc/RS9Q-Q4Z2>] (last visited Nov. 25, 2019) (describing the Zoo's decision to relocate its two elephants, Winky and Wanda, because they were suffering and living in an unnatural physical and social environment for elephants).

157. *See* Hugh McDiarmid, Jr., *Zoo Told It Can't Send Elephants to Sanctuary*, DET. FREE PRESS (Feb. 13, 2015), <https://www.freep.com/story/news/local/michigan/oakland/2015/02/13/detroit-zoo-winky-wanda-sanctuary-denial/23359841/> [<https://perma.cc/LE8P-HD9D>] (reporting that the AZA pushed back on the Detroit Zoo's application to relocate its elephants to a sanctuary); *see also* Ossola, *supra* note 16.

have been abused, injured, abandoned, or are otherwise in need.”¹⁵⁸ GFAS only accredits what it considers “true” sanctuaries that do not participate in forced captive breeding, do not trade in animals or animal parts, provide only guided tours of facilities, and do not allow public contact with animals.¹⁵⁹ Specifically, GFAS is focused on the treatment and wellness of individual animals rather than collections of animals.¹⁶⁰ Its standards are significantly stricter than either the AZA or ZAA because sanctuaries are meant as either lifetime care or temporary care of animals with the goal of placing them in permanent or foster care, rather than merely profit through exhibition.¹⁶¹ Unlike AZA accreditation, GFAS accreditation is highly indicative that animals in the facility are being treated properly due to GFAS’s strict care-oriented standards.¹⁶² However, the Wild Animal Sanctuary in Colorado is highly regarded by the animal welfare community but is not accredited by GFAS.¹⁶³ The Wild Animal Sanctuary offers unguided tours, which GFAS prohibits, on an elevated walkway that allows the public to observe wildlife in a truly natural setting without being surrounded by stressors, like those that animals in zoos are subjected to.¹⁶⁴

GFAS, AZA, and ZAA have different standards based on different ideas: GFAS’ standards are predicated on the care of individual animals rather than animals as collections;¹⁶⁵ the AZA prioritizes conservation;¹⁶⁶ and the ZAA provides accreditation for

158. *Who Can Apply*, GLOB. FED’N ANIMAL SANCTUARIES, <https://www.sanctuaryfederation.org/accreditation/definitions/> [https://perma.cc/Z3E2-7PXD] (last visited Nov. 25, 2019).

159. *See id.*

160. *Id.* (“Adherence to standards of animal care including housing, veterinary care, nutrition, animal well-being and handling policies, as well as standards on physical facilities, records and staff safety, confirmed by an extensive questionnaire, site visit, and interviews.”).

161. *See id.*

162. *See How to Tell If a Place Is a REAL Animal Sanctuary*, PETA, <https://www.peta.org/features/real-animal-sanctuary-zoo/> [https://perma.cc/WKX2-AEZW] (last visited Nov. 25, 2019).

163. *See Our “Mile Into The Wild” Walkway*, WILD ANIMAL SANCTUARY, <https://www.wildanimalsanctuary.org/mile-into-the-wild-walkway> [https://perma.cc/67H8-KDML] (last visited Nov. 25, 2019).

164. *See id.*; *see also* Pierce & Bekoff, *supra* note 18, at 44.

165. *See Who Can Apply*, *supra* note 158.

166. Grech, *supra* note 20 (“The AZA’s bias results from the fact that it is an organization of zoo professionals. It is in the business of zoo keeping, so its main goal is to keep zoo animals in zoos. It is debatable whether its aim is to truly ensure the welfare of zoo animals. In imposing the AZA rules and policies, these zoo professionals are highly influenced by the bottom line—money. On one hand they

organizations that prefer autonomy in running their facilities.¹⁶⁷ Due to the ZAA's more lax standards that allow for member organizations to have independence, roadside zoos are more likely to have ZAA accreditation and will rarely have AZA accreditation.¹⁶⁸

Even though all zoos are controlled to some extent by the AWA, the ESA, and private accreditation organizations, the multitude of issues within their standards and enforcement leaves significant gaps in the regulation of captive exhibited animal care.¹⁶⁹ The AWA is the only animal care law that applies to all zoos, and yet its care standards are minimally enforced.¹⁷⁰ The ESA only applies to endangered or threatened species.¹⁷¹ Finally, although private accreditation standards provide additional supervision of animal care in zoos, zoological accreditation organizations are associations for zoological businesses, unlike sanctuaries which prioritize individual animal care.¹⁷²

II. FEDERAL LEGAL CHALLENGES TO ANIMAL MISTREATMENT IN ROADSIDE ZOOS

Federal claims regarding laws that affect zoos are often strategic litigation initiated in order to get favorable interpretations of law that affect not only the zoo at issue but all zoos.¹⁷³ However, animal welfare litigators are substantially limited by procedural roadblocks, such as standing and discovery issues.¹⁷⁴ Additionally, advocates run the risk

would not want to jeopardize their chosen career-path, but it must be remembered that a healthy animals [sic] is worth more to them than an abused or dead one. However, if the welfare of the animals is the AZA's main concern, it's questionable whether they would still be keeping zoo animals in cages.”)

167. See Garner, *supra* note 41.

168. See CatCarole, *supra* note 141.

169. See Grech, *supra* note 20.

170. See *id.*

171. See Endangered Species Act 16 U.S.C. §§ 1532(6), (20) (2018) (granting ESA protection to only endangered and threatened species).

172. See Garner, *supra* note 41.

173. See Joseph Mendelson III, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795, 806 (1997) (“Since the passage of the AWA, animal rights advocates have sought to use the Act as a means of enforcing statutory requirements for the treatment of animals in an ethical and humane manner.”); see also Reynolds, *supra* note 28 (providing that an animal rights attorney stated after the favorable ruling in *Kuehl* that the precedent would be used as “a blueprint going forward to guide other district courts that are dealing with these types of cases”).

174. See *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 454 (D.C. Cir. 1998) (holding that plaintiff had standing to sue under the AWA for “aesthetic injury” to him after seeing distressed primates in a zoo); see also Grech, *supra* note

of disgruntled parties filing strategic lawsuits against public participation (SLAPP), which are lawsuits designed to burden public critics with exorbitant legal fees and obligations to prevent them from continuing public criticism.¹⁷⁵ Procedural and retaliatory issues aside, actually litigating the AWA and ESA is uniquely difficult.¹⁷⁶ The AWA does not have a private cause of action, which forces advocates to turn to protracted and agency-deferential administrative proceedings.¹⁷⁷ Alternatively, the ESA does have a private cause of action, but the scope of the ESA is limited to only protect endangered and threatened species.¹⁷⁸ Thus, plaintiff-favorable judgments in ESA litigation regarding zoos are usually only limited to animals that belong to endangered species, not all the other animals a noncompliant zoo might exhibit.¹⁷⁹

A. Animal Welfare Act Litigation

Congress did not write a private cause of action into the AWA.¹⁸⁰ Therefore, AWA challenges are often directed at the USDA's administrative processes that fail to prevent captive animal mistreatment rather than against the zoos themselves.¹⁸¹ Because plaintiffs must bring challenges to a federal regulatory agency, they must overcome the broad deference that courts grant to agencies.¹⁸²

20 (indicating that private citizens have a difficult time gaining standing to challenge AWA violations).

175. See *Landry's, Inc. v. Animal Legal Def. Fund, Inc.*, 566 S.W.3d 41, 52 (imposing sanctions on Landry's Aquarium in Houston because it had filed SLAPP litigation against ALDF and ALDF attorneys, who had publicly decried Landry's captive possession and exhibition of white tigers in concrete enclosures with no access to sunlight).

176. See Grech, *supra* note 20 (noting that the AWA lacks a citizen suit provision and the ESA is limited only to certain species of animals).

177. See *id.*

178. See *id.*

179. See *Kuehl v. Sellner*, 161 F. Supp. 3d 678, 718–19 (N.D. Iowa 2016) (finding that Cricket Hollow Zoo violated the ESA regarding its tigers and lemurs, which were removed, but it was allowed to keep animals not related to the suit).

180. See Grech, *supra* note 20.

181. See generally *Animal Welfare Act: Related Cases*, ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/cases/topic/animal-welfare-act> [<https://perma.cc/YWW5-R6X5>] (last visited Nov. 25, 2019) (providing a database of cases related to the AWA, many of which have the USDA, USDA directors, or other administrative organizations as parties).

182. See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 865 (1984) (establishing a standard of deference for administrative rulemaking); *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 613, 617–20 (D.C. Cir. 2017) (affording

Strategic administrative interventions regarding the AWA have had mixed results due to strict standing requirements, the lack of a private cause of action, and the judicial system's broad deference to administrative decision-making.¹⁸³

1. Glickman v. Animal Legal Defense Fund

No plaintiff was able to establish standing to challenge the USDA's AWA regulations until 1998 in *Glickman v. Animal Legal Defense Fund*.¹⁸⁴ In *Glickman*, a plaintiff with an extensive zoological background claimed "aesthetic injury" upon seeing distressed primates in a roadside zoo in New York.¹⁸⁵ Under the AWA, the

Chevron and arbitrary and capricious deference to the USDA); see also 5 U.S.C. § 706(2)(A) (2018) (providing for a cause of action to challenge arbitrary and capricious regulatory rulemaking).

183. See *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 445 (D.C. Cir. 1998) (holding that plaintiff had standing to sue and could litigate the merits of the claim); see also *Perdue*, 872 F.3d at 620–21 (upholding the Secretary of Agriculture's regulations and rejecting all plaintiffs' claims due to administrative deference).

184. See *Glickman*, 154 F.3d at 429 (citations omitted) ("For his entire adult life, Mr. Jurnove has 'been employed and/or worked as a volunteer for various human and animal relief and rescue organizations.' 'By virtue of [his] training in wildlife rehabilitation and [his] experience in investigating complaints about the treatment of wildlife, [he is] very familiar with the needs of and proper treatment of wildlife.' 'Because of [his] familiarity with and love of exotic animals, as well as for recreational and educational purposes and because [he] appreciates these animals' beauty, [he] enjoys seeing them in various zoos and other parks near [his] home.' . . . Mr. Jurnove's first visit to the Game Farm, in May 1995, lasted approximately six hours. While there, Mr. Jurnove saw many animals living under inhumane conditions. For instance, the Game Farm housed one primate, a Japanese Snow Macaque, in a cage 'that was a distance from and not in view of the other primate cages.' 'The only cage enrichment device this animal had was an unused swing.' Similarly, Mr. Jurnove 'saw a large male chimpanzee named Barney in a holding area by himself. He could not see or hear any other primate.' Mr. Jurnove 'knew that chimpanzees are very social animals and it upset [him] very much to see [Barney] in isolation from other primates.' The Game Farm also placed adult bears next to squirrel monkeys, although Jurnove saw evidence that the arrangement made the monkeys frightened and extremely agitated."); see also Grech, *supra* note 20 (explaining that *Glickman* was the first instance in which a plaintiff gained standing to sue under the AWA for non-economic reasons).

185. See *Glickman*, 154 F.3d at 429; see also Grech, *supra* note 20 ("Mr. Jurnove claimed aesthetic injury, caused from viewing the primates being kept inhumane conditions during various visits to the park in the past. Mr. Jurnove planned to return to the zoo, so future injury was imminent. Mr. Jurnove's experience and past work enabled him to identify signs of stress amongst the primates. In response to Mr. Jurnove's various complaints to the USDA, inspections were done, all of which found

plaintiff needed to establish standing by showing injury in fact, causation, and redressability.¹⁸⁶ The injury in fact requirement is typically difficult to achieve in any animal rights case because the complained-of harm is usually done to animals and not the plaintiff.¹⁸⁷ The “aesthetic injury” claim in *Glickman*, however, was sufficient to satisfy injury in fact because the plaintiff had specific knowledge of normal primate behaviors, and he witnessed primates living in inhumane conditions and showing signs of distress.¹⁸⁸ The “aesthetic injury” became a common standing argument in animal welfare cases.¹⁸⁹ However, the *Glickman* plaintiffs lost on all merit claims against the zoo because the D.C. Circuit Court later found that the USDA’s regulations were “sufficient” to fulfill the minimal requirements of the AWA.¹⁹⁰ *Glickman*’s result underscores the significant hurdles in AWA claims, from the difficulty of bringing a claim to overcoming administrative deference.¹⁹¹

2. Animal Legal Defense Fund v. Perdue

In *Animal Legal Defense Fund, Inc. v. Perdue*, the Animal Legal Defense Fund (ALDF) brought a complaint against the USDA based on its decision to renew the license for Cricket Hollow Zoo (Cricket Hollow), a roadside zoo in Iowa, in an attempt to end the USDA’s

that the facility was in compliance with all USDA regulations. The court found that the USDA’s regulations caused Mr. Jurnove’s aesthetic injury, which could be redressed by a favorable decision by the court. Therefore, Mr. Jurnove met the Article III requirements for standing, and could sue on behalf of the welfare of those particular primates.”). Even after Mr. Jurnove was able to establish standing, all claims against the USDA failed. *See id.*

186. *See Glickman*, 154 F.3d at 431.

187. *See Mendelson*, *supra* note 173, at 796 (noting difficulties for third parties, such as animal advocacy organizations, to obtain standing under the AWA).

188. *See Glickman*, 154 F.3d at 433. The court also held that causation was satisfied because the USDA had “caused” the harm by not enacting and enforcing regulations consistent with the purpose of the AWA to protect animal welfare. *See id.* at 438. Further, the plaintiff testified that he planned to return to the zoo, making the future injury imminent and redressable. *See id.* at 444.

189. *See, e.g., Kuehl v. Sellner*, 161 F. Supp. 3d 678, 683–84 (N.D. Iowa 2016) (holding that plaintiffs had “aesthetic interest in observing animals living under humane conditions”) (quoting *Glickman*, 154 F.3d at 429).

190. *See Animal Legal Def. Fund, Inc. v. Glickman*, 204 F.3d 229, 236 (D.C. Cir. 2000).

191. *See id.* (denying the plaintiff relief and holding that the USDA’s regulations were afforded deference).

practice of rubber-stamping AWA-controlled license renewals.¹⁹² The USDA's renewal process regulations specifically require compliance with the Act in order to receive renewal.¹⁹³ The plaintiffs argued that the USDA's renewal process, which requires facilities to pay a fee, keep their facilities open for inspection, and assure compliance with the AWA, was contrary to the AWA's requirement that the USDA could not issue licenses unless the exhibitor had demonstrated compliance.¹⁹⁴

To demonstrate the problem, the plaintiffs brought evidence that the USDA had renewed an AWA exhibitor's license to Cricket Hollow, even though the USDA had an open investigation against Cricket Hollow at the time, and cited the zoo in the past for AWA noncompliance.¹⁹⁵ However, the court found that the USDA was

192. See *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 608–10, 613 (D.C. Cir. 2017); see also *Winders*, *supra* note 60, at 541–42, 591 (criticizing the USDA's policy of rubber-stamping license renewals for routinely noncompliant roadside zoos).

193. See 9 C.F.R. §§ 2.1–2.12, 2.2(b) (2012).

194. *Perdue*, 872 F.3d at 606 (quoting 7 U.S.C. § 2133) (“Tom and Pamela Sellner own and operate the Cricket Hollow Zoo in Manchester, Iowa. USDA granted their initial license application in 1994, and it has renewed their license each year since. Appellants Tracey and Lisa Kuehl, along with the [ALDF], a non-profit animal rights organization, brought suit against the agency challenging its most recent renewal of the Sellners’ license. Appellants alleged that, at the time of the renewal, the agency was aware that Cricket Hollow was in violation of numerous animal welfare requirements under the Act and its implementing regulations. Accordingly, they argued, the agency’s decision to renew the Sellners’ license was contrary to AWA’s requirement that ‘no . . . license shall be issued until the . . . exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary.’ They also asserted that the agency’s reliance on the Sellners’ self-certification of compliance as part of its renewal determination, despite having knowledge that the certification was false, was arbitrary and capricious in violation of the Administrative Procedure Act (‘APA’).”).

195. Animal Welfare Act, 7 U.S.C. § 2133 (2018) (“[N]o . . . license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary”); *Perdue*, 872 F.3d at 608 (citations omitted) (“Sisters Tracey and Lisa Kuehl . . . allege that they visited Cricket Hollow Zoo on several occasions . . . [and] claim that they experienced distress and anguish as a result of witnessing animals in what they felt were inhumane and harmful conditions. Tracey Kuehl asserts that she observed animals in enclosures that had ‘standing water and accumulating excrement,’ and that ‘a lion was repeatedly ramming itself against the cage wall,’ which she interpreted as a sign of obvious psychological distress. She later learned that three Meishan piglets had died in their enclosure and that their bodies had not been removed before the facility was opened to the public. Lisa Kuehl similarly alleges that she witnessed animals in isolated confinement and in cages that lacked drinking water. She asserts that she observed ‘lions and wolves covered with flies . . . [which] filled up the interior of the animals’

permitted to determine its own renewal proceedings, based on the broad deference that Article III courts give to executive administrative agency decision-making.¹⁹⁶ The court afforded the regulations *Chevron* deference, the highest level of deference afforded to agency notice-and-comment rulemaking, and said that although the noncompliant zoo was being investigated by the USDA for repeated violations at the time of the license renewal, the AWA had designated broad authority to the USDA to create standards and regulations, and its interpretation of its mandate was not unreasonable.¹⁹⁷

Although *Glickman* and *Perdue* are just two of many challenges to the USDA's purview over the AWA, they highlight the difficulties that arise at the AWA's intersection of animal law and administrative law.¹⁹⁸ Animal advocates often have difficulty even finding standing to sue on behalf of animals if the animals are not their own.¹⁹⁹ Challenges to administrative law are enormously difficult to overcome because of the deference courts give to agencies.²⁰⁰ As such, the AWA has been a difficult tool for animal advocates to wield against roadside zoos that fail to meet its standards.²⁰¹ By contrast, advocates have been more successful in establishing standing and suing negligent exhibitors under the ESA.²⁰²

ears,' as well as a baby baboon who was 'separated from the other animals and being continuously handled by humans.'").

196. *Perdue*, 872 F.3d at 617–18 (“The agency has never said that self-certification alone is positive proof of compliance. Rather, the agency’s regulations and the regulatory history make clear that self-certification and availability for inspection are enough, in the context of renewal, to satisfy the demonstration requirement because a renewal involves an applicant who has already survived a compliance inspection when the agency initially granted its license. To put it simply, the agency has concluded that (1) the initial inspection that was necessary to secure the initial license, plus (2) the self-certification of continued compliance, plus (3) availability for inspection at and beyond the time of renewal are enough to satisfy the statute. Considered in the context of the enforcement authority provided for elsewhere in the statute, and the attendant procedural protections afforded to license-holders in revocation and suspension proceedings . . . we find that the agency’s administrative renewal scheme embodies a reasonable interpretation of the statutory demonstration requirement.”).

197. *See id.*

198. *See id.* at 620; *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 445 (D.C. Cir. 1998).

199. *See Mendelson, supra* note 173, at 810.

200. *See Perdue*, 872 F.3d at 620.

201. *See Mendelson, supra* note 173, at 809 (stating that precedent “set a judicial tone against standing for third parties under the AWA”).

202. *See, e.g., Kuehl v. Sellner*, 887 F.3d 845, 856 (8th Cir. 2018) (granting plaintiffs relief against Cricket Hollow Zoo for its violations of the ESA); *see also*

B. Endangered Species Act Litigation

The ESA provides a civil cause of action, unlike the AWA.²⁰³ As a result, animal advocacy organizations have used the ESA in strategic litigation to sue roadside zoos that they believe “harass” or “harm” animals.²⁰⁴ The ESA is a limited tool, however, because it only regulates actions against animals that belong to protected species.²⁰⁵ For example, the Animal Legal Defense Fund was able to bring suit against the Minnesota fur farm Fur-Ever Wild, which solicited the public to pay for playtime with wolf puppies and killed and skinned those same wolves once they reached adulthood to sell their pelts.²⁰⁶ The wolves that Fur-Ever Wild killed were gray wolves, which are protected by the ESA.²⁰⁷ If the wolves had belonged to an unprotected species, as Fur-Ever Wild asserted in their defense, there would be no federal basis to hold the fur farm accountable for its actions.²⁰⁸

Although many roadside zoos exhibit protected species, plaintiffs have no standing under the ESA regarding the other non-protected species that may also experience neglect or abuse in the same zoo.²⁰⁹ Although persistent, expensive civil litigation may put a significant financial strain on defendant exhibitors, a violation of the ESA is not a basis on which a court has forced a zoo to close or surrender its non-protected animals.²¹⁰ Thus, the ESA is a useful but

Hill v. Coggins, 867 F.3d 499, 502–03 (4th Cir. 2017) (remanding the case with instructions to review the defendants’ ESA violations).

203. Endangered Species Act, 16 U.S.C. § 1540(g)(1) (2018) (“Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf . . . against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.”).

204. See *Kuehl*, 887 F.3d at 856.

205. See § 1538(a)(1).

206. See Adler, *supra* note 10.

207. See *id.*

208. See §§ 1532(6), (20) (providing statutory protection for all endangered and threatened species); see also § 1538 (prohibiting the “take” of endangered and threatened species); 50 C.F.R. § 17.2(a) (2018) (“The regulations of this part apply only to endangered and threatened wildlife and plants.”).

209. See *Kuehl v. Sellner*, 161 F. Supp. 3d 678, 681, 687 (N.D. Iowa 2016) (binding the court’s decision to only the animals that had been harassed under the ESA and providing no instructions as to the other animals at Cricket Hollow Zoo).

210. *Kuehl v. Sellner*, 887 F.3d 845, 856 (8th Cir. 2018) (“Plaintiffs now seek to use the Act as a vehicle to close Cricket Hollow. During trial, plaintiffs submitted several exhibits and testified about the general conditions at the zoo for all animals, not just the endangered species. Plaintiffs acknowledged in their reply brief that even though ‘the Sellners lack [the] ability to adequately pay for the necessary care and

incredibly narrow tool to assist endangered animals held in unacceptable conditions in roadside zoos.²¹¹

1. Kuehl v. Sellner

Dairy farmers Tom and Pamela Sellner opened Cricket Hollow in Iowa.²¹² Cricket Hollow was the same noncompliant zoo at issue in *Perdue* that had been charged with about seventy-seven AWA violations in a three-year period.²¹³ It offered visitors a close-up look at more than 300 animals, including horses, cattle, deer, and sheep, and more exotic creatures like cougars, tigers, lions, wolves, lemurs, and baboons.²¹⁴ At least some of the animals were kept behind chain-link fences with unclean environments with little to keep them entertained.²¹⁵ One red-ruffed lemur, Lucy, was kept in isolation, despite the fact that red-ruffed lemurs are extremely social creatures.²¹⁶ The Sellners were the only full-time employees of Cricket Hollow, and despite their hard work, they fell behind on taking care of their animals.²¹⁷ The ALDF became aware that the Cricket Hollow animals were living in squalid conditions and filed suit, arguing that the owners

maintenance their animals need,’ plaintiffs are entitled to attorney fees because ‘the Sellners do not have a right to continue [the] operation of their non-complian[t] business enterprise.’ The conclusion to be drawn from such argument is that plaintiffs seek to close Cricket Hollow by obtaining \$239,979.25 in attorney fees, costs, and other expenses We . . . are concerned with plaintiffs’ attempt, assisted as it is by at least five of such organizations, as evidenced by their corporate-level-counsel amici briefs, to fashion the Act into a weapon to close small, privately owned zoos—a circumstance never discussed during the Act’s passage. We hold that those circumstances justify the district court’s decision to deny the motion for attorney fees.”)

211. *See id.*

212. *See Kuehl*, 161 F. Supp. 3d at 681.

213. *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 618 (D.C. Cir. 2017); *see also Hardy*, *supra* note 12.

214. *Kuehl*, 161 F. Supp. 3d at 689–90.

215. *See id.* at 691, 718. For photos of the conditions at Cricket Hollow Zoo, *see Court: Iowa Roadside Zoo Violated Endangered Species Law*, DES MOINES REG. (Apr. 12, 2018, 10:40 AM), <https://www.desmoinesregister.com/story/news/crime-and-courts/2018/04/12/court-iowa-cricket-hollow-roadside-zoo-violated-endangered-species-law/510739002/> [<https://perma.cc/ZM2V-JZVC>]. *See also Hardy*, *supra* note 12.

216. *See Kuehl*, 161 F. Supp. 3d at 703.

217. *Id.* at 712 (“I believe the Sellners care about the animals housed at Cricket Hollow, and it is clear they are extremely hard-working, but they are simply unable to keep up with the demands of caring for 300 animals.”). “Neis noted that because the owners have outside work obligations and no additional employees, ‘the work load continues to exceed the staffing level.’” *Id.* at 697.

had “harassed” their endangered animals under the provisions of the ESA.²¹⁸

The district court interpreted the definition of “harass” in the ESA to include the inadequate administering of veterinary care, housing and caging, environmental enrichment, and social stimulation.²¹⁹ It determined that Cricket Hollow had violated the ESA in regard to the care of its tigers and lemurs because the zoo failed to meet the animals’ specific biological needs,²²⁰ and the Eighth Circuit affirmed.²²¹ Four tigers that had died in Cricket Hollow’s care, Raoul, Casper, Luna, and Miraj, were “harmed” by the Sellners’ insufficient veterinary care.²²² Further, all tigers in the zoo’s care were “harassed” through insufficient sanitation.²²³ Additionally, the district court found that the lemurs, Lucy, Chuki, and Zaboo, were “harassed” at Cricket Hollow through social isolation, lack of environmental enrichment, and sanitation issues.²²⁴ The Eighth Circuit agreed with the district

218. See *id.* at 681.

219. See *id.* at 710–18.

220. See *id.* at 718.

221. See *Kuehl v. Sellner*, 887 F.3d 845, 856 (8th Cir. 2018); see also Debra Cassens Weiss, *Animal Park Must Move Lemurs And Tigers Because of Endangered Species Act Violation, Court Says*, A.B.A. JOURNAL (Apr. 17, 2018, 8:00 AM), http://www.abajournal.com/news/article/animal_park_must_move_lemurs_and_tigers_because_of_endangered_species_act/ [<https://perma.cc/9T3C-J36K>] (adding that the Cricket Hollow Zoo has renamed itself to The Cricket Hollow Animal Park).

222. *Kuehl*, 161 F. Supp. 3d at 714–16 (“On June 1, 2013, Raoul—a tiger born at Cricket Hollow in August 2012—developed what Pamela Sellner described as ‘quick pneumonia.’ Sellner drove to Dr. Pries’ clinic in Elkader and retrieved medicine prescribed by Dr. Pries. Raoul died, however, on June 13, 2013, without having been examined by Dr. Pries. No necropsy was performed.”).

223. *Id.* at 716–717 (“In concluding that Cricket Hollow has failed to comply with standard animal husbandry practices, Plaintiffs’ expert, Dr. Jennifer Conrad, opined that the ‘most egregious’ violation is the failure to timely remove the animals’ feces Following an inspection on November 22, 2010, . . . [a USDA inspector] reported that ‘[i]mmediately to the east of the lion, leopard, tiger, and bear enclosures are piles of waste that have been removed from the enclosures in the course of the prior week.’ On November 26, 2012, the Zoo was inspected by [a USDA veterinarian] [The veterinarian] reported ‘a large accumulation of feces within two of the tiger enclosures and two of the lion enclosures. There are large piles of feces in the corners and smaller piles scattered throughout each enclosure.’”).

224. *Id.* at 710 (“According to Dr. Klopfer, ‘isolation for [lemurs] is an extremely harmful proceeding.’ Studies have shown that lemurs living in isolation exhibit behavioral abnormalities and physiological changes. Cricket Hollow has three lemurs. Lucy, a red ruffed lemur, arrived at the Zoo in April 2009 and has lived alone since that time When the lemurs are enclosed indoors during the winter, Lucy is completely isolated. Being able to see one another while in the outside portion of the enclosures mitigates the problem somewhat, according to Dr. Klopfer, but does not

court that neglecting to fulfill an animal's species-specific biological needs—for example, isolating a social species like lemurs to the point of psychological harm—is a violation of the ESA.²²⁵ Animal rights groups lauded the decision as a step in the right direction for the rights and safety of exotic animals.²²⁶ Animal advocacy groups will likely use this precedent to bring suit against other abusive private owners and roadside zoos.²²⁷

2. Hill v. Coggins

Hill v. Coggins arose when the plaintiffs in the case visited the Cherokee Bear Zoo in North Carolina and saw four grizzly bears in concrete pits that were displaying signs of psychological distress.²²⁸ Grizzly bears are protected by the ESA in the lower forty-eight states.²²⁹ The pits did not provide any shade or shelter, and there was

meet the lemurs' needs. Lucy living in isolation is, according to Dr. Klopfer, 'unacceptable.'"); *id.* at 703 ("According to Dr. Klopfer, environmental enrichment can mitigate, but not overcome, the effects of isolation. Dr. Klopfer testified, however, that Cricket Hollow does not have an appropriate enrichment program. Dr. Klopfer did not visit the Zoo, but described the photographs as showing 'a barren looking cage with an unhappy looking lemur.' According to Dr. Klopfer, the 'hunched posture' shown on Exhibit 63 at 3 shows a 'depressed' lemur. Dr. Klopfer opined that 'this animal is probably in a near catatonic state; probably has a very high heart rate; undoubtedly has elevated noradrenaline levels and probably is relatively insensitive at this moment to acoustic stimuli, which is pathological for these animals.' Dr. Klopfer then admitted, however, that his opinion is 'in part, speculative, of course.'"); *id.* at 712 ("In September 2013, Dr. Cole found a build-up of food waste and/or animal waste on the floor of the red-ruffed lemur and also found a large amount of dust, dirt, debris, and/or cobwebs within the reptile house, where the lemurs were located.").

225. See *Kuehl*, 887 F.3d at 856.

226. Reynolds, *supra* note 28 ("The court's decision affirms that endangered animals enjoy the same protections whether in captivity or the wild,' [ALDF's executive director] said in a statement. 'The Eighth Circuit's ruling puts roadside zoos, circuses and private owners on notice that they can no longer ignore endangered animals' unique biological and psychological needs.'").

227. *Id.* ("It sets a blueprint going forward to guide other district courts that are dealing with these types of cases as to how they should apply the Endangered Species Act to captive, wild animals, and it does it in a very favorable way for plaintiffs and the animals,' [an ALDF staff attorney] said in a phone interview.").

228. See 867 F.3d 499, 502–03 (4th Cir. 2017).

229. See *Grizzly Bear (Ursus Arctos Horribilis)*, U.S. FISH & WILDLIFE SERV <https://www.fws.gov/mountain-prairie/es/grizzlybear.php> [<https://perma.cc/89EH-YGMV>] (last visited Nov. 25, 2019). The defendants in *Hill* argued that the bears at issue were not Grizzly bears but actually European brown bears and were only advertised as Grizzly bears. See *Hill*, 867 F.3d at 506–07. The defendants' veterinarian testified that the bears were European brown bears, but both the district court and the Fourth Circuit court determined that the veterinarian's testimony "was

no enrichment for the bears other than a water pool.²³⁰ The plaintiffs observed the bears pacing and begging for food from the public, which are both abnormal behaviors indicative of psychological distress.²³¹ Cherokee Bear Zoo even sold bread and dried apples for the public to toss down the pit for the bears to eat, and the ALDF's expert witness alleged that the zoo likely malnourished the bears so they would beg from the public.²³²

The plaintiffs brought a claim against the zoo, alleging that the owners had violated the ESA by "taking" the bears through psychological harassment, similar to the plaintiffs in *Kuehl*.²³³ The "take" prohibition has an exception for "generally accepted" practices of animal husbandry, if those practices meet or exceed the AWA's standards.²³⁴ The plaintiff's expert witness urged the court to use AZA standards to define "generally accepted" because the AZA is the preeminent zoological accreditation association, but the court instead chose to apply AWA standards to the term.²³⁵ The district court found that although it considered the bears' concrete pit "archaic," the zoo

undermined by contrary representations in his veterinary certifications." *Id.* The defendants had also repeatedly referred to the subject bears as Grizzly bears in "online representations, signs, and veterinary records—as well as USDA reports." *Id.*

230. *Id.* at 503 ("The pits were compact and made entirely of concrete. Each pit had a small pool of water, but neither had any vegetation nor any shade.").

231. *Id.* ("Plaintiffs observed the bears in listless form, pacing around in their pits. They also witnessed the bears begging for food, with patrons responding by feeding the bears apples and dry bread sold by the Zoo."). Pacing is a behavior frequently seen in psychologically distressed bears. See HUMANESOCIETY OF THE U.S., *Factsheet: Captive Bear Welfare Issues*, <http://www.humanesociety.org/assets/pdfs/wildlife/captive/captive-bear-welfare.pdf> [<https://perma.cc/VHC9-CCUU>] (last visited Nov. 25, 2019).

232. *Hill*, 867 F.3d at 504 ("[T]he bears' act of begging for food [was identified] as an abnormal behavior that was attributable to the Zoo's practice of public feeding and its inadequate nourishment of the bears.").

233. See 50 C.F.R. § 17.3 (2014); see also *Hill*, 867 F.3d at 509 ("The district court interpreted this exclusion to excuse animal husbandry practices that are compliant with applicable AWA standards, without regard to whether those practices are 'generally accepted.'") The plaintiffs also argued that the defendant Zoo had harmed the animals under 50 C.F.R. § 17.3. See *id.* at 503. The District Court found that the Grizzly bears were not harmed, but the Fourth Circuit reserved the issue. See *id.* at 510–11.

234. § 17.3.

235. *Hill v. Coggins*, No. 2:13-cv-00047-MR-DLH, 2016 WL 1251190 at *6 (W.D.N.C. Mar. 30, 2016) ("According to Ms. Poulsen, public feeding is not a standard husbandry practice as it encourages the bears to beg for food, which is an abnormal behavior, and presents a risk of disease being transferred to the bears from members of the public. For these reasons, public feeding is prohibited by the standards established by the Association of Zoos and Aquariums ('AZA').").

had not harmed or harassed the bears under its construction of the ESA because the zoo had complied with the AWA's minimum standards, thus complying with "generally accepted" husbandry practices.²³⁶

On appeal, however, the Fourth Circuit rejected the North Carolina District Court's interpretation of "generally accepted" husbandry practices, finding that "generally accepted" could not mean AWA standards because the ESA specified that those generally accepted standards had to meet or exceed the AWA.²³⁷ If Congress had intended "generally accepted" standards to mean AWA compliance, the court reasoned, it would have said so explicitly.²³⁸ The Fourth Circuit vacated and remanded the district court's decision, admonishing it as a "protection-narrowing, Secretary of Agriculture-centered outcome" that frustrated the intent of Congress in passing the ESA to protect threatened and endangered wildlife.²³⁹

Litigation under the ESA, made possible through its civil suit provision, has created precedent stating that endangered and threatened animals must be cared for in a way that suits their species-specific biological, psychological, and social needs.²⁴⁰ Although the ESA's private citizen provision means it is not limited to administrative proceedings like the AWA, and can thus avoid administrative deference, its scope is limited only to the species it protects.²⁴¹ The other exhibited animals at Cricket Hollow Zoo and Cherokee Bear Zoo, for example, had no such protections afforded to

236. *See id.* at *14.

237. *Hill*, 867 F.3d at 509–10 ("The first enumerated exclusion specifically requires AWA compliance, and it is preceded by a 'generally accepted' requirement that applies to the disjunctive list of enumerated exclusions. It is therefore clear that the first enumerated exclusion is comprised of both a 'generally accepted' requirement and an AWA compliance requirement.").

238. *See id.* at 509.

239. *Id.* at 509–10 (quoting *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 700, 708 (1995)) ("Moreover, by reading the 'generally accepted' requirement out of the first enumerated exclusion from 50 C.F.R. § 17.3's definition of harass, the district court narrows the scope of what constitutes harassment and, by extension, the scope of what constitutes a proscribed taking of protected animals under the ESA. The district court's interpretation also makes it so that the first enumerated exclusion is necessarily satisfied whenever a defendant complies with the Secretary of Agriculture-administered AWA. This . . . outcome is in tension with what the Supreme Court has explained Congress had in mind in enacting the ESA: a 'broad purpose to protect endangered and threatened wildlife,' which was to be advanced in large part through 'broad administrative and interpretive power [delegated] to the Secretary [of the Interior].'").

240. *See Kuehl v. Sellner*, 887 F.3d 845, 856 (8th Cir. 2018).

241. *See* 16 U.S.C. § 1540 (2018) (providing a private cause of action against alleged ESA violations).

them.²⁴² The AWA, which covers most warm-blooded species, was insufficient to prevent the negligent care at those zoos.²⁴³ The extensive statutory and regulatory gaps in the laws overseeing the care of captive exhibited animals have allowed roadside zoos to capitalize on animals that they harm.²⁴⁴ To decrease instances of exploitation and cruelty in zoos across the United States, Congress must make changes to the federal legal framework and private accreditation organizations.²⁴⁵ Changes in the standards for federal law or private accreditation organizations are the fastest and most efficient way of updating standards to improve the lives of zoo animals.²⁴⁶

III. PROPOSALS TO PROTECT CAPTIVE EXHIBITED ANIMALS BASED ON THEIR SPECIES-SPECIFIC NEEDS

Ultimately, no roadside zoo can even marginally provide for the incredibly complex species-specific needs of the dangerous or exotic animals they exhibit.²⁴⁷ Because animals cannot advocate for themselves, their captors must be held accountable through external standards.²⁴⁸ Federal law and private accreditation hold sway over nearly all exhibitors in the United States, and as such, changes to standards in federal laws or private accreditation organizations would

242. See §§ 1532(6), (20) (providing statutory protection for all endangered and threatened species); see also § 1538 (prohibiting taking endangered and threatened species); *Kuehl v. Sellner*, 161 F. Supp. 3d 678, 719 (N.D. Iowa 2016) (limiting the holding to only the animals that had been harassed and harmed under the ESA).

243. See 9 C.F.R. § 1.1 (2018) (limiting the AWA to cover only warm-blooded species); *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 613 (D.C. Cir. 2017) (applying deference to the USDA's interpretation of the AWA that allowed Cricket Hollow Zoo to renew its license); see also Marceau, *supra* note 56, at 946 (arguing that the AWA's standards and implementation actually harms animals).

244. See Grech, *supra* note 20; see also Marceau, *supra* note 56, at 946.

245. See Grech, *supra* note 20.

246. See Animal Welfare Act, 7 U.S.C. § 2133 (2018) (indicating that the AWA applies to all exhibitors of animals); see also 16 U.S.C. § 1538(a) (2018) (declaring it unlawful for anyone to "take" endangered or threatened species); *Garner*, *supra* note 41 (noting that many zoological institutions choose to obtain accreditation).

247. See Derr, *supra* note 154 (reporting that studies have shown that animals with broad home ranges, such as elephants, have shorter life expectancy and higher infant mortality in captivity compared to their wild counterparts); see also Nussbaum, *supra* note 3, at 305 (arguing that denying animals the opportunity to exhibit their innate characteristics undermines their dignity).

248. See Sunstein, *supra* note 7, at 389 (arguing that the law should prevent cruelty to animals).

have an immediate effect on exhibitors.²⁴⁹ Although the patchwork of state and local anti-cruelty laws are certainly better than no progress, state changes occur far too slowly to achieve uniform, sufficient animal protection.²⁵⁰ The bears in the San Diego Zoo in California must have the same standards of care as the bears in the Central Park Zoo in New York.²⁵¹ State-level changes can add an extra layer of protection, but changes state by state take significantly longer than sweeping federal changes.²⁵² Thus, exhibitor accountability is best accomplished through changes in federal law and private accreditation because these changes would affect most, if not all, zoos.²⁵³ Alongside statutory changes, stronger regulation with consistent and effective enforcement must be implemented, or the changes in the law will be rendered meaningless.²⁵⁴ Finally, zoological accreditation organizations must focus their standards on the needs of individual animals in addition to the needs of species as a whole.²⁵⁵

A. Increasing Federal Regulation of Captive Exhibited Animals Will Improve Their Lives

The federal statutory and regulatory frameworks for the welfare of zoo animals have fallen short of ensuring that exhibited animals have quality lives.²⁵⁶ Three options could remedy the failing legislative framework: reform existing laws, alter the regulations to those laws,

249. See § 2133; see also 16 U.S.C. § 1538(a) (2018); Garner, *supra* note 41 (explaining that many zoological institutions choose to accredit with the AZA or ZAA).

250. See ANIMAL LEGAL DEF. FUND, *supra* note 38. The ALDF releases an annual ranking of state animal anti-cruelty laws, with vast disparities between the “top tier” and “bottom tier” states. See *id.*

251. See *id.*

252. See *id.*

253. See § 2133 (requiring all exhibitors to be licensed under the AWA with the USDA); see also Garner, *supra* note 41 (indicating that most zoological institutions choose to accredit with private accreditation organizations).

254. Marceau, *supra* note 56, at 946 (“The AWA has come to be celebrated by animal-related industries as imposing an exacting standard of federal oversight, but these same operations will then labor under a minimal set of standards that are rarely enforced.”).

255. See Pierce & Bekoff, *supra* note 18, at 47 (advocating for zoos to change their ethical standards to focus on the welfare of individual animals rather than animals as a business).

256. See Grech, *supra* note 20 (describing the AWA’s failures in standards, enforcement, and lack of a citizen suit provision); see also Marceau, *supra* note 56, at 939–58 (detailing the AWA’s actual and conceptual harms against animals and their advocates).

or create entirely new laws and regulations.²⁵⁷ Any changes must implement both species-specific harassment and harm standards in the ESA and prioritize individual animal care as opposed to treating animals as a business.²⁵⁸ At a minimum, USFWS must adopt into its regulations the Eighth Circuit's interpretation in *Kuehl* that the ESA's "take" prohibition includes denying captive animals their species-specific needs.²⁵⁹ Although the Eighth Circuit's interpretation would greatly improve the standard of care for animals that belong to endangered and threatened species, other animals in the same exact zoos without that classification would not benefit from that standard.²⁶⁰ Therefore, a more wide-reaching legislative solution is amending the AWA to apply to all zoo animals, including cold-blooded animals, and increasing the standards of care for each individual species.²⁶¹

257. See Grech, *supra* note 20.

258. See *Kuehl v. Sellner*, 887 F.3d 845, 854–55 (8th Cir. 2018) (finding that Cricket Hollow had "harassed" and "harmed" some of its animals under the ESA); see also Nussbaum, *supra* note 3 (advocating for the rights of animals to experience their natural, species-specific properties so that they can have lives typical of any member of their species); Pierce & Bekoff, *supra* note 18, at 47 (noting that animal science indicates that animals' well-being should be predicated on their individual needs rather than their needs as a collective).

259. See *Kuehl*, 887 F.3d at 855–56.

260. See 16 U.S.C. § 1532(6), (20) (2018) (limiting the ESA's scope to only endangered or threatened species); see also 50 C.F.R. § 17.2(a) (2018) (limiting USFWS' regulations to only endangered or threatened species).

261. See 7 U.S.C. § 2132(g) (2018) (limiting the AWA's scope in part to warm-blooded animals); see also 9 C.F.R. §§ 3.125–3.142 (2012) (providing general standards of care for most zoo animals rather than species-specific standards); Grech, *supra* note 20 ("Additionally, the USDA should adopt species-specific regulations providing for care and handling. Currently, under the regulations in §3 Subpart F, which covers the majority of zoo animals, species as diverse as giraffes, zebras, elephants, prairie dogs, and polar bears are provided protections."); Nussbaum, *supra* note 3, at 305 (advocating for captive animals to be afforded the dignity of being able to experience the traits and properties of a typical member of their species); Pierce & Bekoff, *supra* note 18, at 47 ("The science of animal well being [sic] that we developed in *The Animals' Agenda* focuses on *individual* animals and would not allow animals to be used and abused in the way that welfarism allows. Welfarism puts human needs first and tries to accommodate animals within the 'human needs first' framework. Well being [sic] broadens the question of 'what *individual* animals want and need' beyond the welfare box and tries to understand animal preferences from the animals' point of view. For example, welfarism asks whether elephants would prefer one acre or three acres; well being [sic] challenges the idea that elephants should be in cages in zoos in the first place, because they cannot have true well being [sic] or 'good lives' under such conditions—no matter how many welfare modifications we make."); Ossola, *supra* note 16 (reporting a shift in the zoological industry to welfare of individual animals).

Alternatively, a brand-new law specifically protecting captive exhibited animals could begin with a clean slate.²⁶²

1. *Changes in Laws and Regulations to Species-Specific Standards Will Improve the Lives of Individual Animals*

The first approach to federal reform should be to examine the AWA because it is the most far-reaching and controlling of the federal statutes governing zoos.²⁶³ Congress could amend the AWA's lacking statutory care requirements,²⁶⁴ or the USDA could choose to implement regulations that apply the AWA to all captive exhibited animals, regardless of species.²⁶⁵ The AWA could impose higher care standards on exhibitors to meet the specific biological needs of captive exhibited animals, similar to the Eighth Circuit's interpretation of the ESA in *Kuehl*.²⁶⁶ By requiring all exhibitors to accommodate for individual animals' specific biological needs, the standards of care for captive exhibited animals will necessarily increase.²⁶⁷ When exhibitors are criticized for their treatment of animals, whether it be their enclosure sizes, enrichment activities, or cleanliness, they often deflect by asserting their USDA accreditation.²⁶⁸ By raising those

262. Grech, *supra* note 20 ("First, zoo animal welfare protections are only found in State and Federal anti-cruelty statutes [sic]. The majority of existing statutes and regulations govern only the transport or trade of animals or animal products, ensuring their status in the world market is assured without eradicating the species. These laws purport to protect the well-being of the species as a whole, rather than a specific animal.").

263. See Animal Welfare Act, 7 U.S.C. § 2133 (2018) (requiring all exhibitors of animals to comport with the AWA); see also Grech, *supra* note 20 (noting that the AWA is the furthest-reaching statute that affects zoos).

264. See § 2143 (a)(2)(A) (imposing explicitly minimal standards of care under the AWA by statute).

265. See 9 C.F.R. § 1.1.

266. See §§ 3.125–3.142 (providing general standards of care rather than species-specific standards of care for all animals not listed, including most zoo animals); see also *Kuehl v. Sellner*, 887 F.3d 845, 855–56 (8th Cir. 2018) (finding that the ESA can be violated by failing to provide for an animal's species-specific needs, such as psychological or social needs); Nussbaum, *supra* note 3, at 305 (arguing that animals deserve the dignity of experiencing their species-specific properties); Pierce & Bekoff, *supra* note 18, at 47 (supporting a shift in the zoological industry's ethical standards to caring for animals' individual needs rather than animals as a collective).

267. See §§ 3.125–3.142 (failing to provide species-specific care standards for most exotic animals); see also Nussbaum, *supra* note 3, at 305; Pierce & Bekoff, *supra* note 18, at 47.

268. See Marceau, *supra* note 56, at 951.

accreditation standards, negligent roadside zoos will no longer be able to purport USDA compliance and will have to choose to either remodel their facilities and practices or close and relocate their animals to sanctuaries or other compliant zoos.²⁶⁹

A significantly beneficial change to the AWA would be to amend it to provide a civil cause of action, which would provide private citizens an easier method to challenge a zoo's AWA violations directly rather than relying on administrative adjudication.²⁷⁰ Further, a private cause of action would allow animal advocates to assist the USDA in enforcing care standards.²⁷¹ Private suits would thus conserve government resources.²⁷² Opponents to an AWA private cause of action argue that it would flood the courts with frivolous suits.²⁷³ However, due to the difficulties of establishing standing like in *Glickman*²⁷⁴ and the high cost of litigation, the nation's courts will not likely become overwhelmed with AWA citizen suits.²⁷⁵

Instead of amending a law that many consider to be a failure, Congress could opt instead to propose an entirely new law with a specific purpose and intent to provide affirmative protections for captive exhibited animals.²⁷⁶ New legislation would have the benefit

269. *See id.*

270. *See* *Zimmermann v. Wolff*, 622 F. Supp. 2d 240, 244 (E.D. Pa. 2008) (refusing to read a citizen suit provision into the AWA); *see also* Grech, *supra* note 20 (noting that the AWA does not have a citizen suit provision); Mendelson, *supra* note 173, at 809 (noting the difficulties of standing in AWA litigation).

271. Grech, *supra* note 20 (“If the AWA had a citizen suit provision, any concerned citizen who sees a zoo animal kept in inadequate provisions could bring suit to enforce provisions that protect that animal’s welfare. This would compensate for the Service’s lack of resources that currently results in the inadequate enforcement of the AWA’s provisions.”).

272. *See id.* (noting that APHIS lacks adequate funding to enforce the AWA properly).

273. *See generally* Mendelson, *supra* note 173 (discussing arguments regarding standing in animal welfare cases); *see also* Landry’s, Inc. & Hous. Aquarium, Inc. v. Animal Legal Def. Fund, 566 S.W.3d 41, 52 (Tex. App. 2018) (holding that an ALDF suit against an animal exhibitor was not frivolous and imposing anti-litigation penalties on the exhibitor).

274. *See* *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 445 (D.C. Cir. 1998) (granting plaintiff standing for an “aesthetic injury”).

275. *See* *Kuehl v. Sellner*, 887 F.3d 845, 855–56 (8th Cir. 2018) (refusing to grant plaintiff attorney’s fees totaling nearly \$240,000).

276. *See generally* Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2018). The AWA fails to provide protections for cold-blooded animals, and its purpose is limited. *See id.*; *see also* ANIMAL LEGAL DEF. FUND, *supra* note 31.

of a clean slate and a specific purpose.²⁷⁷ Further, a law that applies to all zoo animals would solve the absurdity of some captive exhibited animals having extensive federal protections and others having none at all.²⁷⁸ Any law regarding captive exhibited animals can be enforced by the USFWS through the Department of the Interior, like the ESA, instead of the USDA.²⁷⁹ The USDA's purpose is overseeing agriculture typically in the context of food.²⁸⁰ Captive exhibited animals are not agricultural, and their regulation is better suited with the USFWS because its mandate to conserve wildlife is more suited to the regulation of captive exhibited animals.²⁸¹

New legislation regulating captive exhibited animals must call for species-specific regulation.²⁸² For example, elephants suffer from psychological harm from being in captivity and being torn away from their herd.²⁸³ Strong regulations for enclosure sizes and social dynamics of elephant herds would help protect elephants from

277. See Endangered Species Act, 16 U.S.C. § 1531(b) (2018) (stating that Congress' purpose for enacting the ESA is to promote conservation); see also 7 U.S.C. § 2131(1) (stating that the purpose of the AWA is "to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment[]").

278. See 7 U.S.C. § 2132(g) (limiting the AWA's protections to only certain warm-blooded species); see also 16 U.S.C. § 1538(a) (limiting the ESA's "take" protection to endangered or threatened species); Grech, *supra* note 20 (noting that only some zoo animals are protected by the AWA and ESA).

279. See *U.S. Department of Agriculture*, *supra* note 50.

280. See *U.S. Department of the Interior*, USA.GOV, <https://www.usa.gov/federal-agencies/u-s-department-of-the-interior> [<https://perma.cc/8MEY-WP8Z>] (last visited Nov. 25, 2019); see also *U.S. Department of Agriculture*, *supra* note 50.

281. See 16 U.S.C. § 1532(15) (delegating responsibility of the ESA to the Secretary of the Interior).

282. See Nussbaum, *supra* note 3, at 305 (arguing that animals deserve the dignity of experiencing their species-specific properties); see also Pierce & Bekoff, *supra* note 18, at 47 (supporting a shift in the zoological industry's ethical standards to caring for animals' individual needs rather than animals as a collective); Grech, *supra* note 20 (listing species-specific protection statutes for elephants).

283. See Pierce & Bekoff, *supra* note 18, at 47 (arguing that elephants can never flourish in captivity); see also Derr, *supra* note 154 (reporting that a study indicates that some species, including elephants, inevitably suffer in captivity because their enclosures are too small); *Winky and Wanda—A Tale of Two Elephants*, *supra* note 156 (explaining that the Detroit Zoo chose to relinquish ownership of its elephants because elephants, as a species, suffer in captivity); *2016 10 Worst Zoos for Elephants*, *supra* note 144 (ranking the worst zoos for elephants in the United States and noting that elephants have complex social structures, like families).

suffering.²⁸⁴ The Detroit Zoo trailblazed this approach when it became the first zoo to relinquish its elephants to a sanctuary so that they would no longer suffer in captivity.²⁸⁵ In doing so, the Detroit Zoo sent a message that the future of zoos can look more like sanctuaries caring for the needs of individual animals rather than collections in cramped exhibits solely for the public's enjoyment.²⁸⁶

The zoological industry may oppose these propositions and argue that under higher standards, some zoos would be forced to close due to noncompliance, which would leave their animals homeless.²⁸⁷ Further, they would argue that animal exhibition as an industry is a benefit to the public and the economy.²⁸⁸ While zoos may close under the yoke of regulation and re-homing animals is difficult, the statutory framework could provide for allocations to re-home animals in sanctuaries.²⁸⁹ Although the animal exhibition industry's economic interests are valid, financial interests must be weighed against the safety and best interests of the animals that zoos hold captive.²⁹⁰

On the other hand, animal activists will likely argue that zoos, even when run well by any standard, inherently deprive animals of their most basic rights and freedoms and that exhibited animals cannot possibly live healthy or normal lives based on their species-specific biological needs.²⁹¹ Zoo critics allege that animals belong in their natural habitats or as close an environment to their natural habitat as

284. See Pierce & Bekoff, *supra* note 18, at 47; see also Derr, *supra* note 154; 2016 10 *Worst Zoos for Elephants*, *supra* note 144.

285. See *Winky and Wanda—A Tale of Two Elephants*, *supra* note 156; see also Ossola, *supra* note 16.

286. See *Winky and Wanda—A Tale of Two Elephants*, *supra* note 156; see also Ossola, *supra* note 16 (“Though the Detroit Zoo’s decision to find its elephants a new home is extreme, many zoos today are putting concerns about the well-being and happiness of their animals more front and center than in the past. This is reshaping how zoos are designed and, in some cases, drastically changing how the public views animals and what they experience during their visit. ‘We have taken animals into captivity, we are making the decisions they should be making themselves—things like how they get their food and how they spend their time,’ Carter says. ‘And now we are returning some of that decision making to them.’”).

287. See Garner, *supra* note 41.

288. See *id.*

289. See *Who Can Apply*, *supra* note 158.

290. See Gruen, *supra* note 19 (arguing that captivity inherently undermines the dignity and freedom of animals); see also Pierce & Bekoff, *supra* note 18, at 44–47 (questioning the ethics of captivity in the zoological industry).

291. Pierce & Bekoff, *supra* note 18, at 43 (“What is the root of the problem? Captivity itself. The fact that an entire literature is dedicated to so-called captivity effects should leave us in no doubt that being caged causes major problems for individual animals.”).

possible and that zoos fail to achieve that because animals are exhibited for human entertainment.²⁹² Although wild animals are, by any standard, better off in the wild or in expansive, legitimate sanctuaries, exhibition of animals in the form of zoos is unlikely to cease any time soon.²⁹³ Until the time when zoos no longer exist, current and future zoo animals deserve higher standards of living than those they currently have.²⁹⁴

Proposing a law, amending a law, or even updating a regulation is no easy task because new amendments and legislation are at the mercy of the political process, and regulations must pass lengthy, protracted notice-and-comment periods.²⁹⁵ The best course for effective policy change would be creating an entirely new law outside of the AWA because starting anew would allow lawmakers to focus specifically on the needs of captive exhibited animals, rather than work with the convoluted framework of the AWA.²⁹⁶

2. *Stricter Enforcement Will Prevent Exploitation in Roadside Zoos*

In addition to changing the AWA's standards, either under the AWA itself or a new law, the government must strengthen its enforcement.²⁹⁷ APHIS's Animal Care unit has approximately a hundred inspectors, yet records show dramatically decreased enforcement statistics for the first three fiscal quarters of 2018.²⁹⁸ Although the agency has said that this decrease is a result of working more closely with its licensees, the duty of a regulating committee is to regulate, not accommodate, its charges.²⁹⁹ The USDA, or potentially

292. Grech, *supra* note 20 (“Proponents of animal rights, however, argue that regardless of their intent, zoos reinforce the notion of human domination over non-human animals, which is never beneficial to animals. Animal rights advocates argue that the existing laws are insufficient to protect the welfare of animals kept in captivity.”); Pierce & Bekoff, *supra* note 18, at 43 (“The basic moral principle we might draw from looking at the scientific database on how captivity affects animals, then, is this: It is *prima facie* unethical to hold animals in prolonged captivity, because captivity imposes suffering and it is wrong to deliberately impose suffering on a sentient creature. Clearly, zoos exist on a morally tenuous foundation.”).

293. See Grech, *supra* note 20.

294. See Gruen, *supra* note 19.

295. See Administrative Procedure Act (APA), 5 U.S.C. § 553 (1966) (imposing notice-and-comment rulemaking).

296. See Grech, *supra* note 20.

297. See Winders, *supra* note 78, at 457.

298. See U.S. DEP'T OF AGRIC. APHIS, *supra* note 79.

299. See Brulliard, *supra* note 77.

a different department, must devote significant resources to enforcement and hold violators accountable, rather than continue its current practice of merely sending warnings.³⁰⁰ Further, APHIS must be more thorough with the permit and renewal process to prevent the rubber-stamping that allowed routine violators like Cricket Hollow to renew their licenses despite clear lack of care for their animals.³⁰¹

Critics will argue that advocating for enforcement is futile because so much of the animal industry operates “underground.”³⁰² However, the assumption that nefarious activity will inevitably go unanswered does not mean that increasing enforcement will have no effect whatsoever.³⁰³ Although spotting and sanctioning every instance of wrongdoing is impossible, any increase in enforcement measures would mean fewer captive exhibited animals in untenable living situations.³⁰⁴

A new law and its accompanying regulations must require all exhibitors to be licensed, similar to the AWA.³⁰⁵ However, unlike the AWA, its licensing renewal scheme and enforcement standards must be stricter.³⁰⁶ Exhibitors with open investigations for repeat violations, like Cricket Hollow in *Perdue*, must be subject to stricter scrutiny when applying for a renewal, rather than merely being able to pay a fee.³⁰⁷ In addition, the inspector-to-facility ratio must be greater than APHIS’s current ratio, which is merely a hundred Animal Care Unit inspectors for the 8,000 facilities it oversees.³⁰⁸ Those inspectors must

300. See Winders, *supra* note 78, at 494. Winders suggests that the USDA “(1) Set and follow a clear rubric for escalating penalties when entities that have received warnings continue to violate the law; and (2) Revise the stipulated penalty guidelines to ensure higher and more meaningful civil penalty settlements.” *Id.*

301. See *id.* at 577.

302. See Grech, *supra* note 20.

303. See *id.*

304. See *id.*

305. See Animal Welfare Act, 7 U.S.C. § 2133 (2012) (requiring all exhibitors of animals to obtain an exhibitor license).

306. See Winders, *supra* note 60, at 494 (criticizing the AWA’s license renewal policy for rubber-stamping license renewals even for facilities with open violations); see also Brulliard, *supra* note 77 (reporting on the USDA’s underenforcement of the AWA); Grech, *supra* note 20 (criticizing the enforcement of the AWA because APHIS is underfunded).

307. See Animal Legal Def. Fund, Inc. v. Perdue, 872 F.3d 602, 608–10, 613 (D.C. Cir. 2017); see also Winders, *supra* note 60, at 542; Winders, *supra* note 78, at 479 (criticizing APHIS’s practice of over-using warnings to enforce the AWA).

308. See Brulliard, *supra* note 77; see also Grech, *supra* note 20 (noting the underenforcement of the AWA); Marceau *supra* note 56, at 946 (describing how the underenforcement of the AWA harms animals).

be instructed to examine facilities objectively for violations rather than work alongside the owners.³⁰⁹ Inspections must subject facilities to surprise visits so that the inspectors can see the facility's animal care standards on a normal business day.³¹⁰ Finally, the law must have a civil cause of action like the ESA so that citizens can bring suit against negligent zoos.³¹¹ These changes at the federal level, however, could also be accompanied by changes in the private accreditation organization standards that zoos adhere to.³¹²

B. Private Accreditation Organizations Can Provide Additional Species-Specific and Individual Animal Protections

In addition to strengthening the government's regulation of captive exhibited animals, private accreditation organizations must update their standards to prioritize the best interests of individual animals like sanctuaries rather than treat animals as collections.³¹³ Although the AZA, like any private accreditation system, will never be perfect, its standards are a better guideline for the welfare of exhibited animals than both the AWA and ZAA.³¹⁴ Although well-run accredited zoos fundamentally fail to replicate the wild, they are better equipped than roadside zoos to accommodate their animals' species-specific needs because they have more resources, collective knowledge, and employees, and their heightened standards could provide insight for changes in legislation to improve the lives of captive exhibited animals.³¹⁵

309. See Brulliard, *supra* note 77 (describing the USDA's change in policy to work alongside exhibitors rather than regulate them).

310. See *id.* (reporting that the USDA is considering giving facilities notice before inspections rather than their previous practice of surprise visits).

311. See Grech, *supra* note 20 (advocating for a citizen suit provision to aid in enforcing the AWA).

312. See generally *id.* (describing the AZA, ZAA, and GFAS).

313. See *id.* (criticizing the AZA for its bias as a business-based organization rather than an animal welfare-based organization).

314. See Garner, *supra* note 41.

315. *Roadside Zoos Are Not Zoos*, *supra* note 2 (“These municipal menageries were often started by well-meaning people who lacked the expertise to undertake such a complex venture . . . The end result is a menagerie that has not been planned, is not staffed by professionals, and receives inadequate financial support.”); see also Kvatum, *supra* note 17 (“James Serpell, a professor of ethics and animal welfare at the University of Pennsylvania School of Veterinary Medicine, says he has no problem with zoos that are run well. ‘The problem,’ he explains, ‘is that most roadside zoos have neither the space nor the expertise to do it well. You have large animals

Although the AZA already has high standards, the AZA and the ZAA must *both* be encouraged to adopt standards that focus on the wellness of individual animals, similar to those of GFAS.³¹⁶ Changing private accreditation standards will benefit captive exhibited animals more quickly in comparison to slow-moving legislation or administrative rule-making processes.³¹⁷ The AZA and ZAA are likely to reject suggestions to change their standards so drastically and argue that animal-based standards would run their member organizations out of business.³¹⁸ However, the very existence of sanctuaries rebuts this notion; if sanctuaries can be successful by focusing on animals as individuals, rather than as exhibitions, the business model is clearly plausible.³¹⁹

The future of zoos could come to look more like the Wildlife Sanctuary in Colorado, which is not accredited by GFAS because it allows un-guided tours on its mile-long walkway.³²⁰ Although it is not GFAS-accredited, the Wildlife Sanctuary gives its animals a non-captivity setting where its animals are free to experience their species' natural behaviors, yet people can still observe them from a safe, non-stressful distance.³²¹ Ultimately, whether current laws are amended or new laws are proposed, any change in laws affecting zoo animals must prioritize the individual needs of individual animals.³²² Even if new legislative or executive changes are made, private accreditation organizations can implement those changes and hold zoos to species-specific, individual standards.³²³

kept in small enclosures. Those accredited by organizations like the [AZA] are able to hire and keep experts, and their captive-breeding programs have a purpose.”).

316. See generally *Who Can Apply*, *supra* note 158.

317. See 5 U.S.C. § 553 (2018).

318. See Garner, *supra* note 41.

319. CatCarole, *supra* note 141 (“And, importantly, this mistreatment is totally [unnecessary] from a business standpoint. There are many financially successful sanctuaries and zoos that treat animals well and that provide a truly educational experience for visitors. The claim by ZAA zoos that they need engage in activities that inherently mistreat animals like cub petting and performances in order to survive financially is contradicted by the many good operators who succeed because they do [not] engage in these abusive practices.”).

320. See *Our “Mile Into The Wild” Walkway*, *supra* note 163; see also Pierce & Bekoff, *supra* note 18, at 47 (arguing that zoos should reform their ethical priorities to focus on animals as individuals).

321. See *Our “Mile Into The Wild” Walkway*, *supra* note 163.

322. See Pierce & Bekoff, *supra* note 18, at 47 (supporting a change in zoological ethics standards to focus on animals' individual, species-specific needs).

323. See *id.*; Garner, *supra* note 41.

CONCLUSION

Captive exhibited animals have specific, biological, physical, and psychological needs that their owners need to meet.³²⁴ Zoo animals are suffering in roadside zoos due to inadequate regulation,³²⁵ incompetent enforcement,³²⁶ and the prohibitive difficulty and expense of litigating exotic animal protection cases.³²⁷ Congress must raise exhibitor minimum care standards imposed by federal law to match species-specific standards for every species.³²⁸ Additionally, regulatory agencies must strengthen their enforcement policies to ensure that licensed exhibitors actually meet those standards.³²⁹ To ensure that captive exhibited animals have the best possible lives in captivity, there must be a massive overhaul of the federal statutory system that regulates zoos and strong enforcement of animal welfare regulations.³³⁰

324. See Nussbaum, *supra* note 3, at 305 (arguing that animals deserve the ability to experience their species-specific properties); see also Grech, *supra* note 20 (listing species-specific protection statutes for elephants); Pierce & Bekoff, *supra* note 18, at 47 (advocating for a zoological industry reform that prioritizes individual animal care).

325. See, e.g., 9 C.F.R. § 1.1 (2019) (limiting the AWA's scope to only certain warm-blooded species); see also §§ 3.125–3.142 (2018) (regulating most exotic animals through an umbrella of generalized standards rather than species-specific standards); *supra* notes 66–69 and accompanying text (describing the minimal care regulations for animals under the AWA).

326. See Marceau, *supra* note 56 (criticizing the lacking enforcement of the AWA); see also U.S. DEP'T OF AGRIC. OFFICE OF INSPECTOR GEN., *supra* note 76 (criticizing APHIS's enforcement of the AWA). See generally Grech, *supra* note 20 (discussing the laws that affect zoos and their failures in standards and enforcement).

327. See *Kuehl v. Sellner*, 887 F.3d 845, 856 (8th Cir. 2018) (rejecting the plaintiffs' request for a total of nearly a quarter of a million dollars to be paid by the defendant).

328. See Nussbaum, *supra* note 3, at 305; see also Pierce & Bekoff, *supra* note 18, at 47; Grech, *supra* note 20.

329. See generally Grech, *supra* note 20.

330. See *id.*