DEPARTMENT OF JUSTICE
JOURNAL OF FEDERAL LAW AND PRACTICE

Volume 72 November 2024 Number 4

United States Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

The Department of Justice Journal of Federal Law and Practice is published pursuant to 28 C.F.R. § 0.22(c).

The Department of Justice Journal of Federal Law and Practice is published by the Executive Office for United States Attorneys

Office of Legal Education

1620 Pendleton Street
Columbia, SC 29201

Cite as:

72 DOJ J. FED. L. & PRAC., no. 4, 2024.

Internet Address:

https://www.justice.gov/usao/resources/journal-of-federal-law-and-practice

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Animal Welfare

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Introduction

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I am delighted to present this edition of the Department of Justice Journal of Federal Law and Practice (DOJ Journal), which focuses primarily on federal animal-welfare laws, with additional articles addressing federal wildlife laws. While the Environment and Natural Resources Division (ENRD) plays a key role in coordinating federal litigation, facilitating training, and developing enforcement policy on these laws, the U.S. Attorneys' Offices (USAOs) are important partners with concurrent authority. I hope this edition proves useful to USAOs across the country dealing with these important topics.

Federal animal-welfare laws are intended to address the humane treatment of captive animals that are in either interstate or foreign commerce or that substantially affect such commerce. Examples of captive animals include animals bred to be pets, animals used for medical testing, and animals exhibited in zoos. In contrast, wildlife and wildlife-trafficking laws focus on conservation of wildlife and the ecosystems on which they depend. Wildlife and wildlife-trafficking laws also address the well-being of animals but do so less directly than animal-welfare laws. Such laws generally protect animals at the species level, whereas animal-welfare laws focus on individual animals.

ENRD coordinates civil and criminal affirmative enforcement litigation relating to animal welfare under the following statutes:

- the Animal Welfare Act, 7 U.S.C. §§ 2131–2159;[1]
- the Animal Fighting Venture Prohibition Act, 18 U.S.C. § 49;[2]
- the Horse Protection Act, 15 U.S.C. §§ 1821–1831;[3]
- the Humane Methods of Slaughter Act, 7 U.S.C. §§ 1901–1907;[4]
- the Transportation of Animals law, also known as the Twenty-Eight Hour Law, 49 U.S.C. § 80502;[5] and

[1] 7 U.S.C. §§ 2131–2159.
[2] 18 U.S.C. § 49.
[3] 15 U.S.C. §§ 1821–1831.
[4] 7 U.S.C. §§ 1901–1907.
[5] 49 U.S.C. § 80502.

- the Preventing Animal Cruelty and Torture (PACT) Act, also known as the Animal Crush Video Prohibition Statute, 18 U.S.C. § 48.[6]

ENRD coordinates federal litigation on wildlife laws under, but not limited to, the following statutes:

- the Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371–3378, 18 U.S.C. § 42;[7]
- the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544;[8]
- the Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712;[9]
- the Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1423h;[10] and
- the Magnuson-Steven Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1891d.[11]

Within ENRD, the Wildlife and Marine Resources Section is responsible for civil judicial enforcement of these laws, and the Environmental Crimes Section is responsible for criminal enforcement of these laws.

The Department of Justice (Department) delegated animal-welfare enforcement authority to the ENRD in 2014.[12] Over the past decade, the ENRD has expanded both its civil and criminal animal-welfare work. On the civil side, the Department has pursued injunctive relief to enforce the Animal Welfare Act and has developed a program for the civil forfeiture of dogs seized in criminal dog-fighting cases. This civil enforcement work is highlighted in the article in this edition titled *Evolution of Civil Judicial Enforcement of the Animal Welfare Act at the Department of Justice*. In another article, *Hey, All You Cool Cats and Kittens: Consider Forfeiture in Your Endangered Species Act Cases*, authors from the Money Laundering and Asset Recovery Section in the Department's Criminal Division introduce the various types of asset forfeiture and explain that criminal and civil forfeiture proceedings may be used independently or in conjunction with one another to ensure the purpose and effect of a criminal statute is honored. *Federal Dog-Fighting Prohibition and the U.S. Marshals Service's Seized Canine Program* explains how the U.S. Marshals

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[6] 18 U.S.C. § 48.
[7] 16 U.S.C. §§ 3371–3378; 18 U.S.C. § 42.
[8] 16 U.S.C. §§ 1531–1544.
[9] 16 U.S.C. §§ 703–712.
[10] 16 U.S.C. §§ 1361–1423h.
[11] 16 U.S.C. §§ 1801–1891d.
[12] *See Animal Welfare*, Env't and Nat. Res. Div., U.S. Dep't Just., https://www.justice.gov/enrd/animal-welfare (last visited Oct. 31, 2024).

Service facilitates the seizure of fighting dogs, coordinates veterinary intakes, and transfers dogs to approved vendors for boarding pending final legal dispositions. And *United States v. Mikirtichev: An Animal Welfare Act Case Study* outlines what to consider when pursuing a civil judicial action for injunctive relief under the Animal Welfare Act by walking through a case involving a cat-breeding facility in Virginia.

The Department has also expanded its animal-welfare work on the criminal front by pursuing cases against large-scale operations including breeders of fighting birds and medical test subjects. For example, business models involving roosters bred for cockfighting and illegal gambling are described in *Combating Cockfighting: Case Considerations*. Additionally, *More than Probable Cause: Preparing for the Search of a Large-Scale Animal Operation* describes a facility that kept thousands of beagles bred for medical testing in horrid conditions. ENRD has also pursued enforcement actions seeking to prevent animal torture, and the evolution of that practice is discussed in *The Preventing Animal Cruelty and Torture Act and the Evolution of Section 48*. This article provides tools to assist prosecutors in assessing potential PACT Act cases. Another article, *Intersection of Animal-Fighting Venture Prosecutions and Crime Victim Services and Rights*, provides guidance for prosecutors to consider with respect to children attending animal fighting ventures.

This edition also builds in wildlife articles, including *Congressional Involvement in Endangered Species Act Implementation: The Case of the North Atlantic Right Whale*, which walks through the legal saga of the North Atlantic right whale, and *Revisiting the Lacey Act: Overview and Considerations for Use in Animal Welfare*, which provides an overview of the nation's oldest federal criminal-wildlife statute.

For more context, press releases on the Department's animal-welfare efforts can be found on ENRD's Animal Welfare News page, and wildlife-trafficking work can be found on ENRD's Wildlife Trafficking News page.[13] For more articles on the Department's work in these areas, look at previous journal volumes: *Wildlife Trafficking I* (May 2015) and *Wildlife Trafficking II* (September 2015), the latter of which includes a helpful article titled *An Introduction to the Federal Animal Protection Laws*.[14]

I should note that ENRD and the USAOs rely heavily on the work and support of investigative agencies, including the U.S. Department of

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[13] *Animal Welfare News*, Env't and Nat. Res. Div., U.S. Dep't Just., https://www.justice.gov/enrd/animal-welfare-news (last visited Oct. 31, 2024); *Wildlife Trafficking News*, Env't and Nat. Res. Div., U.S. Dep't Just., https://www.justice.gov/enrd/wildlife-trafficking-news (last visited Oct. 31, 2024).

[14] *Wildlife Trafficking I*, 63 U.S. Att'ys' Bull. 3 (2015); *Wildlife Trafficking II*, 63 U.S. Att'ys' Bull. 5 (2015).

Agriculture; the U.S. Department of the Interior; the Federal Bureau of Investigation; the U.S. Marshals Service; and many other federal, state, and local agencies. I thank them all for their hard work and partnership.

I would also like to thank all the authors for their exceptional contributions to this edition, and for all those whose energy and passion have been pivotal in developing a robust and ever-evolving animal-welfare portfolio. I also thank the Executive Office for U.S. Attorneys and the editors of the DOJ Journal for their assistance in making this edition possible. We hope readers find the articles engaging and helpful.

Evolution of Civil Judicial Enforcement of the Animal Welfare Act at the Department of Justice

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I. Introduction

Offices and components across the Department of Justice (Department) have aided efforts to combat animal cruelty for years. This includes prosecuting abusers, convening roundtable discussions with law enforcement personnel, litigators, policymakers, and animal welfare experts, and identifying ways to better assist law enforcement response in this arena. To enhance these efforts, on November 6, 2014, then-Acting Associate Attorney General Stuart Delery announced that authority for handling cases under the federal animal welfare statutes would be consolidated in the Environment and Natural Resources Division (ENRD), with ENRD and U.S. Attorneys' Offices (USAOs) having concurrent civil and criminal enforcement authority.[1] Previously, no centralized body tracked and coordinated federal litigation, facilitated training, or developed enforcement policy in this specialized area. ENRD's Environmental Crimes Section (ECS) and Wildlife and Marine Resources Section (WMRS) have delegated responsibility for criminal and civil enforcement, respectively, of the federal animal welfare statutes.

Since this delegation occurred, ENRD has taken many steps to incorporate these new authorities into its work, without the aid of additional permanent funding or other resources. ENRD has trained—and continues

[1] *See* U.S. Dep't of Just., Justice Manual 5-10.120(U)–(Y); 5-10.310.

to train—Department litigators and attorneys on federal animal welfare statutes. ENRD also conducts outreach to the relevant investigative and partner agencies to improve communication, coordination, and the case referral process. Further, ENRD has worked to develop policies and practices to improve enforcement efforts in the following ways: advocating for improved sentencing policies; convening with relevant state and local law enforcement, animal protection organizations, and academic institutions; and working with other Department components to improve its work in this area.

This article focuses on the evolution since late 2014 of WMRS's civil enforcement work under one of the statutes in its animal welfare portfolio: the Animal Welfare Act (AWA).[2] This work falls into two broad categories. The first supports enforcement of the Animal Fighting Venture Prohibition (AFVP), first enacted in 1976 as an amendment to the AWA and amended on several occasions since.[3] The AFVP forbids sponsoring, exhibiting, or attending animal fights and subjects violators to criminal prosecution and penalties.[4] Since 2014, WMRS, together with other parts of the Department, has devoted substantial efforts to developing a parallel civil dog-fighting program aimed at filing civil forfeiture actions to more promptly acquire title to dogs involved in criminal fighting operations. The program is now well established and has been extremely successful.

WMRS's other AWA work took a little longer to develop but has become the largest part of WMRS's animal welfare portfolio. The AWA regulates research facilities, exhibitors, dealers, and certain carriers engaged in commercial activity to ensure they humanely treat animals in their care.[5] WMRS can bring civil judicial enforcement actions under the AWA seeking remedies that support and complement administrative actions and other enforcement actions where there is a relevant statutory basis and a referral from a federal agency. The U.S. Department of Agriculture (USDA) implements the AWA, and in 2020, referred the first AWA civil judicial enforcement matter to WMRS.[6] Since that time, WMRS has brought and resolved six more AWA cases and expects this upward trend to continue, due in part to a March 2024 Memorandum of Understanding ENRD entered with the USDA to enhance their collaboration on civil judicial enforcement of the AWA.[7]

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[2] 7 U.S.C. §§ 2131–2160.
[3] *Id.* § 2156.
[4] *Id.*; 18 U.S.C. § 49.
[5] 7 U.S.C. §§ 2131–2160.
[6] United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. filed Nov. 19, 2020).
[7] United States v. Gingerich, No. 4:21-cv-283, 2021 WL 6144690 (S.D. Iowa Sept. 28, 2021); United States v. Envigo RMS, LLC, No. 6:22-cv-28, 2022 WL 1607840

II. Parallel civil forfeitures for dog-fighting cases under the Animal Fighting Venture Prohibition included in the Animal Welfare Act

In the first few years after WMRS received primary responsibility for civil enforcement of the federal animal protection statutes, WMRS devoted the bulk of its energies to working within the Department to develop a civil judicial forfeiture process to use in parallel with criminal dog-fighting cases. At that time, the federal government had initiated criminal cases against about 40 dog-fighting defendants since *United States v. Peace*, also known as the Michael Vick case.[8] In those cases, USAOs relied largely on the criminal forfeiture process to obtain title of the dogs.[9] As will be discussed below, that approach had numerous problems the Department's civil forfeiture strategy solves.

A. Animal Fighting Venture Prohibition forfeiture authority

The AFVP gives the United States authority to investigate animal fighting operations and to obtain search and seizure warrants based on probable cause.[10] The Prohibition also provides forfeiture authority: "[A]ny animal seized under such a warrant shall be held by the [U.S.] marshal or other authorized person pending disposition thereof by the court in accordance with this subsection. Necessary care including veterinary treatment shall be provided while the animals are so held in custody."[11] The United States can pursue civil or criminal forfeiture of any animal involved in a violation of the AFVP.[12] To do so, the United States must file a com-

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(W.D. Va. May 21, 2022); United States v. Keeler, No. 2:23-cv-11748 (E.D. Mich. filed July 20, 2023); United States v. Mikirtichev, No. 3:23-cv-552 (E.D. Va. filed Aug. 30, 2023); United States v. Weaver, No. 6:23-cv-422 (E.D. Okla. filed Dec. 14, 2023); United States v. Teeny Tiny Farm, LLC, No. 2:24-cv-70 (E.D. Va. filed Jan. 29, 2024); United States v. Mt. Hope Auction Co., No. 5:24-cv-1520, 2024 WL 4188303 (N.D. Ohio filed Sept. 13, 2024); Memorandum of Understanding Between the United States Department of Agriculture (USDA) Animal and Plant Health Inspection Service, the USDA Office of the General Counsel, and the United States Department of Justice Environment and Natural Resources Division on Civil Judicial Enforcement of the Animal Welfare Act (Mar. 6, 2024).

[8] Indictment, United States v. Peace, 3:07-cr-274 (E.D. Va. July 17, 2007).

[9] *See, e.g.*, United States v. Anderson, No. 3:15-mc-3713 (M.D. Ala. Jun. 15, 2016).

[10] 7 U.S.C. § 2156(f).

[11] *Id.* § 2156(e).

[12] *Id.*

plaint in "any [U.S.] district court or other court of the United States for any jurisdiction in which the animal is found."[13] After the court issues a "judgment of forfeiture," the animal must be "disposed of by sale for lawful purposes or by other humane means, as the court may direct."[14]

B. Parallel civil forfeiture's importance in dog-fighting cases

Relying on the criminal forfeiture process to obtain title to seized dogs can take several years to result in a final order of forfeiture because forfeiture occurs at the end of the criminal proceeding as part of sentencing. The problems with such a lengthy process were readily apparent.

First, under the AFVP, the United States is responsible for providing necessary care to the dogs from the time of seizure until a judgment of forfeiture. Providing necessary care involves finding appropriate facilities to care for live animals, which is challenging because animals require immediate care that investigative agencies have not developed resources to provide. Second, the AFVP also requires the United States to pay for the cost of care while the animals are in custody, which can become restrictive the longer it must pay for care. Third, long-term shelter stays are bad for the dogs, both physically and behaviorally. This can make it difficult to place the animals in adoptive homes after forfeiture and increase the chances that authorities will need to euthanize the animals instead. These issues served as a practical deterrent to law enforcement agencies bringing dog-fighting cases or seizing dogs.

To address these issues, WMRS worked within the Department to develop and implement a strategy to use civil forfeiture in appropriate cases to quickly obtain title of dogs seized based on violations of the AFVP. This strategy had two complementary aims: (1) to benefit the seized animals by minimizing stress from long stays in shelters and allowing officials to adopt out more dogs in a relatively short period after seizure; and (2) to benefit the government fisc by minimizing the cost of care of seized dogs. Implementation of the strategy consisted of two interrelated parts: (1) training and outreach; and (2) the Seized Canine Program.

1. Training and outreach

The assignment of primary responsibility for civil enforcement of federal animal welfare laws initially required a significant amount of education and outreach because it added not only new statutes to WMRS's portfolio, but also a docket of fully affirmative case work with different

[13] *Id.*
[14] *Id.*

counterparts both within the Department and at WMRS's agency partners.

WMRS started its education efforts by conducting training sessions to familiarize attorneys with the substance of these animal welfare laws. The first Section-wide introductory training session occurred on February 20, 2015, providing an overview of the statutes. WMRS holds an updated version of the training each year, primarily for new attorneys, but the training is open to any attorney or support staff who is interested. WMRS has held additional training sessions on the specific provisions of each statute, particularly those related to civil enforcement. As relevant here, WMRS combined forces with ECS to develop trainings both for their own attorneys and those in USAOs about the use of civil forfeiture to obtain title to dogs seized from dog-fighting operations.

The Department has also worked to build greater capacity for federal, state, and local officials to enforce this law. Since 2015, ENRD has participated in two regional animal fighting investigation trainings. Nearly 200 federal, state, and local investigators and prosecutors received guidance on how to properly identify, investigate, and prosecute dog fighting throughout the country, as well as seize and forfeit animals. ENRD also included a segment on animal fighting prosecutions in its 2019 Environmental Crimes Seminar held at the National Advocacy Center. Approximately 100 Assistant U.S. Attorneys from across the country attended. ENRD has presented at three USDA Office of the Inspector General (USDA-OIG) conferences attended by all USDA-OIG criminal investigators to stress the Department's commitment to prosecuting animal-cruelty crimes and to encourage referrals; the most recent conference was in September 2020. ENRD has provided additional training to federal, state, and local law enforcement officials regarding forfeiture authorities relevant to animal fighting cases.

WMRS also provides practical help to USAOs. WMRS developed template pleadings for use by civil forfeiture attorneys in the USAOs to bring civil forfeiture cases promptly after seizure of the fighting dogs. WMRS attorneys also serve as a national resource for USAOs around the country interested in bringing such cases and can draft pleadings to assist USAOs to promptly use in the civil forfeiture process.

2. Seized canine program

One of the initial steps WMRS took to increase the use of civil forfeiture in dog-fighting cases was to work closely with the Department's Criminal Division Asset Forfeiture Management Staff on guidance making clear to federal investigative agencies that they may use the Asset Forfeiture Fund (AFF) to pay for the care of any dogs seized as part of

a dog-fighting case. As noted above, the AFVP requires both that the U.S. Marshal or other authorized persons pending disposition thereof by a court hold seized animals and that they provide seized animals "necessary care including veterinary treatment" while they are held in custody.[15] Establishing that authorities could use the AFF to pay for this required care pending disposition removed a consistent impediment raised by federal investigative agencies as a reason why they were hesitant to pursue dog-fighting cases. But it was not enough just to establish the availability of the AFF to pay for the care of seized dogs. Instead, WMRS had to make use of the AFF sustainable by pursuing prompt civil forfeiture of seized dogs to minimize the costs of care and ensure the continued availability of funds in the long term.

In the early stages of the program, WMRS worked with the U.S. Marshals Service (USMS) to develop a template contract that they could use for procuring shelter services with local shelters to house seized dogs. The template contract avoided the need for the USMS in each district to reinvent the wheel in each case. Perhaps, more importantly, the template contract allowed the USMS to enter an arrangement with a local shelter in advance of a proposed criminal raid and dog seizure. In so doing, agents did not have to scramble to find suitable arrangements immediately after the enforcement operation. Instead, this difficult logistical issue became routinized, removing another practical impediment to bringing action in dog-fighting cases.

Over time, the program evolved to create additional efficiencies. Specifically, with input from WMRS, the USMS transitioned from case-by-case contracts to a global contract.[16] The global contract is periodically awarded to qualified vendors to provide case support and care of seized dogs for all USMS district offices. Thus, while USAOs or ECS still must coordinate with the USMS to obtain assistance with the care of seized dogs, the global contract allows the USMS to provide that assistance much more quickly. It also saves significant time and resources because it eliminates several steps for getting a contract in place. Moreover, having the global contract assures consistency and continuity with facilities and expertise in animal care.

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[15] 7 U.S.C. § 2156(e).

[16] *See USMS—National Seized Animal Program*, U.S. Gen. Servs. Admin., SAM.gov (Sept. 19, 2024), https://sam.gov/opp/10fbd9d5bac54439851846ab1156a0b6/view; *Help a Rescue Dog*, U.S. Marshals Serv., https://www.usmarshals.gov/what-we-do/asset-forfeiture/help-rescue-dog (last visited Oct. 7, 2024).

C. Current status and future of the Wildlife and Marine Resources Section's parallel civil forfeiture work

By all accounts, establishing a parallel civil forfeiture process in the dog-fighting context has been extremely successful. Since the outset of the Seized Canine Program, there have been 100 seizures of approximately 3,400 dogs. WMRS continues to get the word out to USAOs, including through a recorded training held in October 2024 that is available for future viewing. WMRS also works to ensure USAOs are aware of the civil forfeiture process and that WMRS is available to assist in that process.

III. Civil judicial enforcement of the Animal Welfare Act

Starting with *United States v. Lowe*, filed in November 2020, WMRS has devoted significant resources to bringing affirmative civil cases to enforce the AWA's requirements for the humane care of animals held by exhibitors, breeders, dealers, and research facilities.[17] The *Lowe* case was the first of its kind in several ways and established helpful precedent for subsequent AWA cases WMRS has brought.[18] This article will discuss the relevant AWA authorities, the *Lowe* case in detail, and then summarize the development of WMRS's AWA enforcement practice after *Lowe*.[19]

A. Two Animal Welfare Act provisions providing authority for civil judicial enforcement

WMRS has utilized two provisions of the AWA as the bases for these cases: (1) the serious danger provision in 7 U.S.C. § 2159; and (2) the general jurisdiction provision in 7 U.S.C. § 2146(c).[20]

First, the serious danger provision requires the Secretary of Agriculture to notify the Attorney General whenever he has "reason to believe that any dealer, carrier, exhibitor, or intermediate handler . . . is placing the health of any animal in serious danger in violation of" the AWA or its implementing regulations and standards.[21] The Attorney General, whose authority under this provision has been delegated to WMRS, then may file suit in federal district court "for a temporary restraining order

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[17] Complaint for Declaratory and Injunctive Relief, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Nov. 19, 2020), ECF No. 2.
[18] *Id.*
[19] *Id.*
[20] 7 U.S.C. §§ 2146(c), 2159.
[21] *Id.* § 2159(a).

or injunction to prevent any such person from operating in violation of" the AWA or its regulations or standards.[22] Upon a proper showing that the health of any animal is in serious danger, the court "shall . . . issue a temporary restraining order or injunction."[23] The serious danger provision is designed to work in conjunction with an administrative complaint brought by the USDA. The temporary restraining order or injunction issued in federal district court remains in effect until the USDA complaint reaches a final resolution, for example, when an administrative complaint is dismissed, a cease-and-desist order becomes final, or the order is set aside on appellate review.[24]

Second, 7 U.S.C. § 2146(c) provides that the U.S. district courts "are vested with jurisdiction specifically to enforce, and to prevent and restrain violations of [the AWA], and shall have jurisdiction in all other kinds of cases arising under [the AWA]."[25] This provision creates jurisdiction in federal courts for actions arising under the serious danger provision in section 2159 and several other types of cases, including suits "to enforce, and to prevent and restrain violations" of the AWA, outside of section 2159.[26] WMRS has used section 2146(c) to enforce violations that are not presently causing serious danger or to obtain permanent injunctive relief.[27]

Additionally, while not the primary subject of this article, WMRS has at times brought Endangered Species Act (ESA) claims in addition to AWA claims. In relevant part, section 9 of the ESA forbids the "take" of any species listed as endangered under the ESA and allows the Secretaries of Interior and Commerce to extend take protections to species listed as threatened under the ESA.[28] The ESA defines the term "take" to include "*harass*, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[29] These prohibitions apply to ESA-listed fish and wildlife held in captivity or a controlled environment.[30] WMRS, again with delegated authority from the Attorney General, may file suit in federal district court "to enjoin any person who is alleged to be in violation of any provision of" the ESA or its imple-

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[22] *Id.*
[23] *Id.* § 2159(b).
[24] *Id.*
[25] *Id.* § 2146(c).
[26] *Id.*
[27] *Id.*
[28] 16 U.S.C. § 1538(a)(1); *id.* § 1533(d).
[29] *Id.* § 1532(19) (emphasis added).
[30] *Id.* § 1538(b).

menting regulations.[31] The ESA also contains a civil forfeiture provision which allows the United States to obtain and quiet title to animals that have been taken in violation of the ESA.[32] Facilities subject to AWA enforcement do not always have ESA-listed species. If they do, and when the evidence demonstrates that ESA-listed species have been harmed, harassed, or killed in violation of the ESA, there may be an opportunity to bring ESA claims.[33]

B. The *Lowe* case

In November 2020, WMRS filed the first civil judicial enforcement action under the AWA against Jeffrey and Lauren Lowe and affiliated companies.[34] The *Lowe* case was also the first ESA enforcement action brought by the United States to protect captive endangered or threatened species.[35] This groundbreaking case exemplifies the potential to enforce the AWA and ESA and obtain meaningful relief for animals subject to inhumane care in captivity.

The Lowes, who garnered public attention in the Netflix documentary series *Tiger King*, took over a facility known as the Greater Wynnewood Exotic Animal Park in Wynnewood, Oklahoma, from Joe Maldonado-Passage.[36] After issuing numerous citations to the Lowes for serious violations of the AWA and its implementing regulations and standards, the USDA suspended Jeffrey Lowe's license to exhibit animals on August 13, 2020, and filed an administrative complaint seeking permanent revocation of his license on August 17, 2020.[37] On August 21, 2020, Jeffrey Lowe voluntarily terminated his AWA license.[38] The Lowes, however, continued to exhibit animals, including through online platforms, and planned to open a new facility known as "Tiger King Park" in Thackerville, Oklahoma.[39]

On November 19, 2020, based on a referral from the USDA, WMRS filed a complaint asserting that the Lowes violated the AWA by unlawfully exhibiting animals without a valid USDA exhibitor license and by

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[31] *Id.* § 1540(g)(6).
[32] *Id.* § 1540(e)(4).
[33] Inclusion of claims under the ESA generally require consultation with the U.S. Fish and Wildlife Service.
[34] Complaint for Declaratory and Injunctive Relief, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Nov. 19, 2020), ECF No. 2.
[35] *Id.*
[36] *Tiger King* (Netflix Mar. 20, 2020).
[37] Complaint for Declaratory and Injunctive Relief at 5, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Nov. 19, 2020), ECF No. 2.
[38] *Id.*
[39] *Id.* at 2–4.

placing the health of their animals in serious danger.[40] The complaint also included numerous ESA claims alleging that the Lowes had violated ESA section 9 by taking, possessing, and transporting ESA-listed species, including tigers, lions, tiger-lion hybrids, ring-tailed lemurs, and a grizzly bear.[41] The complaint recounted a litany of past AWA violations, deficient care, and cruel and inhumane treatment of animals that had led to suffering, injuries, and unnecessary deaths of animals in the Lowes' care.[42] These included long-standing failures to provide adequate and timely veterinary care, as well as providing inadequate nutrition and sanitation and inhumanely separating big cat cubs and lemur pups from their mothers for baby animal "playtimes" with the public or for other purposes.

Promptly after the filing of the complaint, the United States moved for a preliminary injunction to enjoin the defendants from placing the health of the animals in their care in serious danger, under section 2159 of the AWA, and from taking ESA-listed big cats.[43] Through negotiations with defendants' counsel, the United States achieved most of the relief sought in the preliminary injunction motion through a stipulation that required the Lowes to: (1) provide the United States with a complete inventory of the animals in their possession or control; (2) not acquire or dispose of any animals without leave of the court; and (3) allow an immediate inspection of Tiger King Park and future inspections up to every three weeks thereafter.[44]

Under the stipulation, the USDA inspected Tiger King Park and confirmed the United States' allegations that the health of animals at the Lowes' facility were in serious danger and that animals were being harmed and harassed in violation of the ESA.[45] Additionally, the Lowes continued to exhibit animals through online activity and by inviting members of the public and press to the facility.[46] WMRS promptly filed a second preliminary injunction motion, requesting that the court: (1) enjoin the defendants from exhibiting animals without a valid license; (2) require the defendants to retain a qualified attending veterinarian within

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[40] *Id.*

[41] *Id.* at 45–46.

[42] *See id.*

[43] Motion for Preliminary Injunction, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Nov. 25, 2020), ECF No. 9; Memorandum in Support of Motion for Preliminary Injunction, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Nov. 25, 2020), ECF No. 10.

[44] Stipulation on Motion for Preliminary Injunction, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Dec. 14, 2020), ECF No. 23.

[45] Memorandum in Support of Motion for Preliminary Injunction at 13–14, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Dec. 23, 2020), ECF No. 28.

[46] *Id.* at 1–2.

14 days; (3) submit veterinary records to the United States within seven days of a veterinarian treating any animal; (4) provide acquisition and disposition records for any animals added to or removed from the facility since June 2020 to help determine the whereabouts and condition of missing animals; and (5) provide acquisition and disposition records to the United States within seven days of any change to the Lowes' animal inventory.[47]

Before the court could rule on the motion for a preliminary injunction, the United States discovered the Lowes had euthanized a young male tiger due to complications from metabolic bone disease—a painful but preventable disorder caused by poor diet that affected several of the Lowes' big cats.[48] The Lowes had violated the court-ordered stipulation by not obtaining leave of court before euthanizing the young tiger.[49] The United States moved for a temporary restraining order requesting the immediate surrender of all big cat cubs under the age of one, and their mothers, to prevent further suffering or unnecessary death.[50]

On January 15, 2021, Judge John F. Heil III ruled in favor of the United States on both the second motion for a preliminary injunction and the motion for a temporary restraining order, granting all the relief requested in the two motions.[51] The opinion also provided valuable precedent on several issues. For example, the court found that the United States was likely to succeed on the merits of its ESA claim, determining that "(1) subjecting the animals to unsanitary conditions; (2) providing the animals with inadequate nutrition; and (3) failing to provide adequate and timely veterinary care" constitute an unlawful take under the ESA.[52] Additionally, Judge Heil agreed with the United States that lion–tiger hybrids, the offspring of two ESA-listed species, were protected under the ESA.[53] On the AWA side, the court also found that the United States was likely to succeed, finding—for the first time in a judicial opinion—that posting online and selling photographic or video content featuring the animals

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[47] Motion for Preliminary Injunction, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Dec. 23, 2020), ECF No. 27; Memorandum in Support of Motion for Preliminary Injunction, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Dec. 23, 2020) ECF No. 28.

[48] Motion for Temporary Restraining Order, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Dec. 30, 2020), ECF No. 31.

[49] *Id.*

[50] *Id.*; Memorandum in Support of Motion for Temporary Restraining Order, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Dec. 30, 2020), ECF No. 32.

[51] United States v. Lowe, No. 20-cv-423, 2021 WL 149838 (E.D. Okla. Jan. 15, 2021).

[52] *Id.* at 5, 11.

[53] *Id.* at 4–5.

counted as exhibiting under the AWA.[54] Finally, the opinion provides valuable precedent on the applicable test for injunctive relief under AWA section 2159, confirming that an injunction is "mandated" upon a showing that the health of the animals is in serious danger, without going through the traditional four-factor test for injunctive relief.[55] The temporary restraining order required the Lowes to immediately relinquish all big cat cubs under one year of age to the United States for placement in reputable facilities.[56]

In February, the defendants moved to dismiss the AWA claim and moved to dismiss the claims against one of the Lowes' business entities, Tiger King, LLC.[57] The defendants argued that showing the animals in online videos and allowing press and film crews on the property did not constitute exhibiting when Tiger King Park had not been opened to the public.[58] The court denied the motion.[59] Judge Heil determined, as he found likely in the preliminary injunction decision, that "a person acts as an exhibitor 'simply by making animals available to the public'" and the United States had plausibly stated a claim for exhibiting without a license.[60] The court also rejected the defendants' argument that the United States' interpretation of the AWA infringed on the Lowes' First Amendment right to free speech.[61] Finally, the court found that the United States had raised sufficient allegations to state a claim against Tiger King, LLC.[62]

Despite the early losses before the court, the Lowes did not come into compliance with the AWA and the ESA and repeatedly violated the court's orders. In February 2021, the United States moved to enforce the preliminary injunction order, explaining that the Lowes had not provided the required acquisition and disposition records, failed to demonstrate that their attending veterinarian had the necessary qualifications and formal arrangements mandated by the AWA, and were breeding ani-

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[54] *Id.* at 12–13.
[55] *Id.* at 14; *see also* Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (identifying the typical four-factor test for granting a preliminary injunction).
[56] Opinion and Order at 34, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Jan. 15, 2021), ECF No. 65.
[57] Motion to Dismiss Case for Failure to State a Claim, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Feb. 15, 2021), ECF No. 73.
[58] *Id.*
[59] United States v. Lowe, No. 6:20-cv-423, 2021 WL 3161551 at *6 (E.D. Okla. July 26, 2021).
[60] *Id.* at 3 (quoting In re Lloyd A. Good, Jr., 49 Agric. Dec. 156, 174 (1990)).
[61] *Id.* at 4–6.
[62] *Id.* at 6.

mals despite the court-ordered ban on acquiring new animals.[63] The court granted the motion to enforce and ordered defendants to show cause why they should not be subject to contempt sanctions.[64] Over the next few months, the United States repeatedly informed the court the defendants continued to fall short of the court-ordered requirements.[65] On May 14, 2021, Judge Heil found the defendants in civil contempt and began fining the defendants $1,000 per day until they came into compliance.[66]

With ongoing evidence that ESA-listed animals were being taken, the United States obtained federal seizure warrants and on May 6, 17, and 18, 2021, seized 68 big cats from the facility.[67] The United States then filed a complaint seeking civil forfeiture of all ESA-listed animals taken from or still at the Tiger King Park facility under 16 U.S.C. § 1540(e)(4).[68]

Despite the contempt sanctions and removal of the big cats, the Lowes did not secure an attending veterinarian or provide the United States with accurate and complete records.[69] Animals continued to suffer from illnesses and injuries with no veterinary treatment, including a red fox with chronic illness that a prior veterinarian had recommended be humanely euthanized.[70] Moreover, new animals were born and animals were going

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[63] United States' Motion to Enforce the Court's January 15, 2021 Order & the Parties' Stipulation, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Feb. 12, 2021), ECF No. 72.

[64] Opinion and Order, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Mar. 22, 2021), ECF No. 78.

[65] Notice of Defendants' Noncompliance, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Apr. 12, 2021), ECF No. 83; United States' Notice of Defendants' Continued Noncompliance, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. May 11, 2021), ECF No. 93; Minute Sheet—Video Conference Show Cause Hearing, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. May 12, 2021), ECF No. 94.

[66] Minute Order, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. May 14, 2021), ECF No. 96. The court also invited the United States to apply for damages, which it did. United States' Motion for Costs, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. May 28, 2021), ECF No. 100.

[67] Press Release, U.S. Dep't of Just., Off. of Pub. Affs., U.S. Government Seizes 68 Protected Big Cats and a Jaguar from Jeffrey and Lauren Lowe (May 20, 2021).

[68] Complaint, United States v. Approximately 85 Big Cats, 1 Jaguar, and 11 Ring-Tailed Lemurs, No. 6:21-cv-228 (E.D. Okla. Aug. 4, 2021), ECF No. 2; 16 U.S.C. § 1540(e)(4). For more information about the forfeiture of ESA-listed animal from Tiger King Park, see Press Release, U.S. Dep't of Just. Off. of Pub. Affs., U.S. Government Seizes 68 Protected Big Cats and a Jaguar from Jeffrey and Lauren Lowe (May 20, 2021).

[69] United States' Notice of Defendants' Continued Noncompliance, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. June 18, 2021), ECF No. 106.

[70] *Id.* at 3–5.

missing without notice to the United States or leave of the court.[71] The United States continued to notify the court of these failures.[72]

With ongoing pressure from the United States' aggressive enforcement efforts and the court's contempt sanctions, the Lowes finally agreed to abandon their interest in the remaining animals at Tiger King Park.[73] In August 2021, the United States took possession of the last 52 animals.[74]

With the animals safe, WMRS turned to resolving the litigation. The Lowes had been unable to produce complete and accurate records, and therefore remained in contempt of court even after officials removed the animals. The United States was finally able to secure the Lowes' agreement to a favorable Consent Decree.[75] In the Consent Decree, the Lowes agreed not to file a claim in the forfeiture action for the ESA-listed animals taken from their facility, not to challenge the abandonment of the non-ESA-listed animals, and to "permanently refrain from exhibiting any animals covered by the AWA" or from applying for any AWA license or registration.[76] In the separate ESA forfeiture action, no claims on the animals were filed and the United States obtained a final forfeiture order in September 2022.[77]

The *Lowe* litigation was WMRS's first case under the AWA and has been the longest.[78] The Lowes' blatant disregard for court orders, untruth-

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[71] *Id.* at 5–7.

[72] *Id.* at 1–12.

[73] Notice, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Aug. 16, 2021), ECF No. 115.

[74] Status Report, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Aug. 23, 2021), ECF No. 116.

[75] The Lowes' business entities were not represented by counsel during the later part of the litigation, and therefore could not participate in the proceedings or the Consent Decree. The United States obtained a default judgment against the business entities on December 23, 2021, which permanently enjoined the businesses from exhibiting animals to the public or taking any ESA-listed species and relinquished any interests the businesses had in the animals taken into the United States' possession. Opinion and Order, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Dec. 23, 2021), ECF No. 157.

[76] Consent Decree, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Dec. 6, 2021), ECF No. 155.

[77] Default Judgment and Final Order of Forfeiture, United States v. Approximately 85 Big Cats, 1 Jaguar, and 11 Ring-Tailed Lemurs, No. 6:21-cv-228 (E.D. Okla. Sept. 9, 2022), ECF No. 16.

[78] United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Nov. 19, 2020); United States v. Gingerich, No. 4:21-cv-283, 2021 WL 6144690 (S.D. Iowa Sept. 28, 2021); United States v. Envigo RMS, LLC, No. 6:22-cv-28, 2022 WL 1607840 (W.D. Va. May 21, 2022); United States v. Zachary Keeler, No. 2:23-cv-11748 (E.D. Mich. filed July 20, 2023); United States v. Mikirtichev, No. 3:23-cv-552 (E.D. Va. filed Aug. 30, 2023); United States v. Weaver, No. 6:23-cv-422 (E.D. Okla. filed Dec. 14, 2023);

ful communications, and unwillingness to surrender animals led to over a year of active litigation and required persistence and creativity on the part of the United States.[79] WMRS obtained critical assistance from the USAO in the Eastern District of Oklahoma, the Money Laundering and Asset Recovery Section in the Department's Criminal Division, and the USMS. WMRS also coordinated extensively with the USDA's Office of the General Counsel, Animal and Plant Health Inspection Service, and the Department of the Interior's Fish and Wildlife Service. The results were worth the extensive efforts of this team: The Lowes can never again exhibit AWA-covered animals or harm, harass, or kill ESA-listed species.[80] Moreover, working with the USDA, sanctuaries, and organizations around the country, WMRS coordinated placements in reputable facilities for nearly 140 animals rescued from the Lowes, providing a more humane future for those animals. The *Lowe* case also demonstrated that the United States could bring and successfully resolve AWA claims. Further, *Lowe* developed favorable caselaw and provided examples and lessons learned that prosecutors can incorporate into future litigation.

C. Animal Welfare Act enforcement after *Lowe*

Since *Lowe*, WMRS has brought and resolved six lawsuits to enforce the AWA.[81] Cases have been brought against exhibitors, pet breeders, and a company that breeds and deals animals for research. Through these efforts, thousands of animals have been relocated from facilities where their health was in serious danger to more suitable and humane placements. Violators of the AWA have been held accountable in federal court, and a message has been sent to AWA licensees that will hopefully deter future bad actors.

WMRS filed its second AWA enforcement action in September 2021 against Daniel Gingerich, a dog breeder based in Iowa, after a referral

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United States v. Teeny Tiny Farm, LLC, No. 2:24-cv-70 (E.D. Va. filed Jan. 29, 2024).

[79] *See, e.g.*, United States' Motion to Enforce the Court's Jan. 15, 2021 Order, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Feb. 12, 2021), ECF No. 72; United States' Notice of Defendants' Noncompliance, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Apr. 12, 2021), ECF No. 83; United States' Notice of Defendants' Continued Noncompliance, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. May 11, 2021), ECF No. 93; United States' Notice of Defendants' Continued Noncompliance, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. June 18, 2021), ECF No. 106.

[80] Consent Decree, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Dec. 6, 2021), ECF No. 155.

[81] Wildlife and Marine Resources Section has filed two additional AWA cases that are still pending as of the publication of this article. *See* United States v. Mt. Hope Auction Co., No. 5:24-cv-1520, 2024 WL 4188303 (N.D. Ohio filed Sept. 13, 2024); United States v. Vernon Miller, No. 1:24-cv-00448 (N.D. Ind. filed Oct. 23, 2024).

from the USDA.[82] The suit alleged that Gingerich placed the health of his dogs in serious danger by failing to provide adequate veterinary care, failing to provide adequate nutrition and potable water, and exposing them to unsafe and unsanitary conditions.[83] The United States quickly prevailed on motions for a temporary restraining order and a preliminary injunction, including an order requiring Gingerich to surrender animals in acute distress to the United States.[84] Gingerich was unable to comply with the court's orders, and the United States was able to successfully negotiate a Consent Decree submitted on October 29, 2021.[85] The Consent Decree, in relevant part, required Gingerich to surrender all dogs in his control to the Animal Rescue League of Iowa and to permanently refrain from any activity requiring an AWA license.[86] In the end, the United States was able to secure the surrender of more than 500 dogs and puppies, including dogs that were emaciated, malnourished, or suffering from easily preventable diseases, and place those dogs with an organization that could properly care for them and provide the possibility of adoption into appropriate homes.[87]

In 2022, WMRS brought another AWA case against Envigo RMS (Envigo), a company that bred and sold dogs for use in research.[88] After a history of frequent AWA violations and hundreds of unexplained dog or puppy deaths, law enforcement officials carried out a criminal search warrant at the facility.[89] The search confirmed that numerous dogs were in acute distress and Envigo was failing to meet the AWA's minimum standards for handling, housing, feeding, watering, sanitation, recordkeeping, adequate staffing, and veterinary care.[90] The United States succeeded on an immediate motion for a temporary restraining order.[91] When the United States moved for a preliminary injunction, Envigo agreed to close

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[82] Complaint for Injunctive Relief, United States v. Gingerich, No. 4:21-cv-283 (S.D. Iowa Sept. 27, 2021), ECF No. 1.
[83] *Id.*
[84] United States v. Gingerich, No. 4:21-cv-283, 2021 WL 6144690 (S.D. Iowa Sept. 28, 2021); United States v. Gingerich, No. 4:21-cv-283, 2021 WL 6144693 (S.D. Iowa Oct. 13, 2021).
[85] Consent Decree, United States v. Gingerich, No. 4:21-cv-283 (S.D. Iowa Oct. 29, 2021), ECF No. 26.
[86] *Id.*
[87] Order Granting Plaintiff's Motion for Voluntary Dismissal, United States v. Gingerich, No. 4:21-cv-283 (S.D. Iowa Nov. 10, 2021), ECF No. 29.
[88] Complaint for Declaratory and Injunctive Relief, United States v. Envigo RMS, LLC, No. 6:22-cv-28 (W.D. Va. May 19, 2022), ECF No. 1.
[89] United States v. Envigo RMS, LLC, No. 6:22-cv-28, 2022 WL 1607840 (W.D. Va. May 21, 2022).
[90] *Id.*
[91] *Id.* at 10–12 (issuing a temporary restraining order).

the facility at issue.[92] The court granted the United States' motion for a preliminary injunction, and the parties subsequently filed a plan for the orderly closure of the facility and a Consent Decree resolving the case.[93] Ultimately, roughly 4,000 beagles were rescued from the facility and transferred to the Humane Society of the United States for care, rehabilitation, and eventual adoption into suitable homes.[94]

WMRS brought subsequent AWA cases against a breeder in Virginia who placed cats and dogs in serious danger and a Michigan exhibitor who violated both the AWA and ESA.[95] Both cases resulted in Consent Decrees that forbade the defendants from engaging in AWA-regulated activities and provided for the surrender of animals for placement in reputable facilities.[96]

More recently, WMRS has brought cases against a dog breeder and a traveling petting zoo that both refused to allow USDA inspectors to access their facilities[97] The petting zoo operator promptly terminated her AWA exhibitor license within days of the case's filing.[98] The dog breeder, based in Oklahoma, did not. After prevailing on a preliminary injunction motion and gaining access to the facility, USDA inspectors identified numerous AWA violations at the breeding facility.[99] The United States

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[92] Notice of Submission of the Parties' Joint Transfer Plan, United States v. Envigo RMS, LLC, No. 6:22-cv-28 (W.D. Va. July 1, 2022), ECF No. 35.

[93] United States v. Envigo RMS, LLC, No. 6:22-cv-28, 2022 WL 2195030 (W.D. Va. June 17, 2022) (issuing a preliminary injunction); Notice of Submission of the Parties' Joint Transfer Plan, United States v. Envigo RMS, LLC, No. 6:22-cv-28 (W.D. Va. July 1, 2022), ECF No. 35; Consent Decree, United States v. Envigo RMS, LLC, No. 6:22-cv-28 (W.D. Va. July 14, 2022), ECF No. 37.

[94] *Id.*

[95] Complaint for Declaratory and Injunctive Relief, United States v. Mikirtichev, No. 3:23-cv-552 (E.D. Va. Aug. 30, 2023), ECF No. 1. *See* Bonnie Ballard and Kamela Caschette, *United States v. Mikirtichev: An Animal Welfare Act Case Study*, 72 Dep't of Just. J. of L. & Prac. (2024); Complaint for Declaratory and Injunctive Relief, United States v. Zachary Keeler, No. 2:23-cv-11748 (E.D. Mich. July 20, 2023), ECF No. 1.

[96] Consent Decree, United States v. Mikirtichev, No. 3:23-cv-552 (E.D. Va. Jan. 3, 2024), ECF No. 24; Consent Decree, United States v. Zachary Keeler, No. 2:23-cv-11748 (E.D. Mich. Aug. 15, 2023) ECF No. 7.

[97] Complaint, United States v. Angela Weaver, No. 6:23-cv-422 (E.D. Okla. Dec. 14, 2023), ECF No. 1; Complaint for Declaratory and Injunctive Relief, United States v. Teeny Tiny Farm, LLC, No. 2:24-cv-70 (E.D. Va. Jan. 29, 2024), ECF No. 1.

[98] United States' Notice of Voluntary Dismissal at 2, United States v. Teeny Tiny Farm, LLC, No. 2:24-cv-70 (E.D. Va. Feb. 1, 2024), ECF No. 7.

[99] *See* First Supplemental Complaint for Declaratory and Injunctive Relief, United States v. Weaver, No. 6:23-cv-422 (E.D. Okla. Mar. 7, 2024), ECF No. 27; *id.* Exhibits G, H, ECF Nos. 27-7, 27-8.

ultimately negotiated a Consent Decree with the breeder, requiring her to significantly downsize her operation, providing for the surrender of nearly 50 dogs to the Nashville Humane Society, and mandating significant actions to improve her facilities and provide safe and sanitary conditions to the remaining animals in her care.[100]

Most of these cases have followed a similar pattern—first established in *Lowe*—of obtaining early injunctive relief, diligently pursuing compliance with the injunctive relief, and then negotiating a Consent Decree to resolve the case and quickly and safely rehome the animals. The specific relief requested in the early preliminary injunction or temporary restraining order motions has been critical to maintain the status quo and protect the animals involved in the case until a resolution can be reached. In particular, the following three provisions are often strategically valuable to include in early requests for relief.

First, the United States almost always seeks a full inventory of the animals at the facility, copies of acquisition, disposition, and veterinary care records, and prompt notice of any changes to the inventory. Timely access to records is key to monitoring compliance with the more substantive aspects of the injunctions. While licensed facilities are already required to maintain acquisition, disposition, and veterinary records, the AWA does not require licensees to notify the USDA of these events or send the USDA the records on a regular basis.[101] Typically, the USDA would only see those records during an inspection of the facility. Getting complete copies of records and notice of changes allows the United States to more quickly and accurately monitor future changes to the inventory and incidents that demonstrate specific animals are in danger. Prosecutors can use these records to support subsequent preliminary injunction motions or motions to enforce the injunctive relief. Moreover, many AWA violators struggle to maintain proper records due to disorganization, a disregard for the AWA's requirements, or attempts to conceal deaths or unlawful dealings. If the defendant cannot produce the required records, the United States can pursue further relief or contempt motions, while encouraging the defendant to surrender animals or resolve the case through a Consent Decree.

Second, the United States frequently requests access to the facility for USDA inspections, particularly in a case where the defendant is unlicensed (like *Lowe*) or has a history of denying access (which arose to varying degrees in *Keeler*, *Gingerich*, *Weaver*, and *Harrington*).[102] Access

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[100] Motion to Enter the Consent Decree, United States v. Weaver, No. 6:23-cv-422 (E.D. Okla. Mar. 28, 2024), ECF No. 32.
[101] 7 U.S.C. §§ 2131–2160.
[102] *See* Motion for Preliminary Injunction, United States v. Lowe, No. 6:20-cv-423

allows the United States to gain more information, which can support later motions for relief and help identify animals that are in acute distress and need to be removed from the facility quickly. Access is critical to ensure compliance with other injunctive relief provisions intended to maintain the status quo during the pendency of the case.

Third, the United States typically requests the defendant be barred from acquiring or disposing of animals during the pendency of the case, which is defined broadly to include births, deaths, sales, donations, or transfers. Exceptions are only made if the defendant obtains the consent of the United States or leave of the court. A provision like this is essential to maintain the status quo during the case and to ensure more animals are not exposed to conditions and care that could cause them suffering or harm. It also prevents defendants from temporarily transferring animals to relatives, friends, or associates, sending animals to similarly inhumane facilities, or euthanizing animals to conceal evidence of mistreatment or improper care. Minimizing the movement of animals makes it easier to track what is happening at the facility and makes it harder for a defendant to conceal deaths or unlawful sales.

When a defendant requests consent to euthanize an animal that is sick or injured, WMRS can confer with experienced veterinarians from the USDA or other experts to determine if euthanasia is the most humane course and, if it is not, advocate for the animal to receive appropriate care or for authorities to move the animal to a facility equipped to provide that care. Finally, this provision prevents defendants from profiting from their USDA license when they have failed to comply with the terms of that license and creates a financial incentive to resolve the case.

In almost every AWA case brought by WMRS, early preliminary injunctive relief has helped to improve the conditions for the animals, provide a stronger evidentiary basis for future filings, and encourage a quick and just resolution of the case.

(E.D. Okla. Nov. 25, 2020), ECF No. 9; Memorandum in Support of Motion for Preliminary Injunction, United States v. Lowe, No. 6:20-cv-423 (E.D. Okla. Nov. 25, 2020), ECF No. 10; Complaint for Declaratory and Injunctive Relief, United States v. Zachary Keeler, No. 2:23-cv-11748 (E.D. Mich. July 20, 2023), ECF No. 1; Complaint for Injunctive Relief, United States v. Gingerich, No. 4:21-cv-283 (S.D. Iowa Sept. 27, 2021), ECF No. 1; United States' Motion for Preliminary Injunction, United States v. Weaver, No. 6:23-cv-422 (E.D. Okla. Dec. 15, 2023), ECF No. 6; Motion for Temporary Restraining Order, United States v. Teeny Tiny Farm, LLC, No. 2:24-cv-70 (E.D. Va. Jan. 29, 2024), ECF No. 3.

D. Looking forward

One of the AWA's central purposes is to ensure that animals intended for research, exhibition, or use as pets are provided humane care and treatment.[103] WMRS is committed to promoting this goal through civil judicial enforcement of appropriate cases to hold AWA violators accountable.

Since the first case was filed in 2020, WMRS has relied upon the support of the USDA, other federal agencies (including the U.S. Fish and Wildlife Service), USAOs, and other state and local government actors. WMRS is committed to continuing and strengthening these partnerships to identify and successfully resolve future cases.

In March 2024, ENRD entered a Memorandum of Understanding (MOU) on Civil Judicial Enforcement of the AWA with the USDA Animal and Plant Health Inspection Service and the USDA Office of the General Counsel.[104] Building upon the agencies' existing relationship and successful past partnerships, the MOU is intended to enable the agencies to prepare for and coordinate on potential civil enforcement actions more effectively.[105] The MOU formalized procedures for coordination, information sharing, and training between the agencies.[106] Both agencies have worked diligently to implement the provisions of the MOU by meeting regularly, sharing information, coordinating on potential referrals, discussing policy questions that affect the agencies' work, and developing a plan for future trainings. ENRD is hopeful the MOU will strengthen the agencies' relationship and lead to additional successful enforcement outcomes in the future.

IV. Conclusion

WMRS's enforcement of the AWA has developed rapidly over the last 10 years. From developing procedures for the forfeiture of dogs used in dog fighting to pursuing injunctive relief to enforce the AWA, WMRS remains committed to developing and strengthening this critical enforcement program.

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[103] 7 U.S.C. § 2131(1).

[104] Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Justice Department and USDA Enter into Memorandum of Understanding on Civil Enforcement of the Animal Welfare Act (Mar. 8, 2024).

[105] Memorandum of Understanding Between the United States Department of Agriculture (USDA) Animal and Plant Health Inspection Service, the USDA Office of the General Counsel, and the United States Department of Justice Environment and Natural Resources Division on Civil Judicial Enforcement of the Animal Welfare Act (Mar. 6, 2024).

[106] *Id.*

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Federal Dog-Fighting Prohibition and the U.S. Marshals Service's Seized Canine Program

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In 1780, Jeremy Bentham—a British philosopher and early animal welfare advocate—argued for better treatment of animals on the basis of their ability to feel pleasure and pain in *An Introduction to the Principles of Morals and Legislation*.[1] He wrote, "The question is not, Can they *reason*? Nor, Can they *talk*? But, Can they *suffer*?"[2] In 1966, 186 years after Bentham penned this language, Congress enacted the Animal Welfare Act (AWA).[3] The AWA establishes minimum standards for the interaction with and handling of animals and requires the use of more humane practices in certain circumstances, thereby reducing animal suffering.[4] Ten years later, Congress amended the AWA, specifically banning a particularly heinous form of animal abuse that causes untold levels of suffering to humankind's best friend: dog fighting.[5]

This article discusses the implementation of the forfeiture authority contained in the AWA's Animal Fighting Venture Prohibition (AFVP)

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[1] Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (Clarendon Press 1907) (1780).
[2] *Id.* at 311.
[3] 7 U.S.C. §§ 2131–2160.
[4] *Id.*
[5] Although the Animal Welfare Act prohibits all animal fighting, this article focuses on dog fighting. *See* 7 U.S.C. § 2156(a), (f)(4). *See also* Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, 90 Stat. 417.

through the U.S. Marshals Service's (USMS's) Seized Canine Program (SCP).[6] First, we discuss the practice and history of dog fighting to contextualize the purpose and need for the SCP. We then provide a brief history of the federal prohibition on dog fighting. In the last section, we introduce the SCP and provide best practices for Assistant U.S. Attorneys (AUSAs) pursuing surrender or civil forfeiture in rem of dogs seized under the AWA's AFVP to facilitate their rehabilitation and timely rehoming.

I. Introduction to dog fighting

In the United States, dog-fighting ventures involve pit bull-type dogs, which dog fighters prefer for their compact muscular build, short coat, and the aggression that some display toward other dogs.[7] A dog fight occurs when two dogs are baited against one another for entertainment or gain.[8] Handlers and a referee accompany the dogs in the "pit," a 14–20 square foot structure designed to contain the dogs.[9] Numerous spectators watch the fight and begin betting on the outcome once the fight begins.[10]

Fights can last a matter of minutes or several hours. One or both animals may suffer severe injuries, including broken bones, puncture wounds, and lacerations, as well as shock and blood loss. The goal is to have one's dog inflict so much damage that the opposing dog's owner "picks up" their dog and forfeits, or the opposing dog itself abandons the fight.[11] In the latter case, fighting continues until one of the dogs "turns" its head and shoulders away from the opponent. At that stage, to avoid being declared the loser, that dog must "scratch" by crossing a line drawn at the center of the pit and lunging at the opponent within a matter of seconds.[12] The

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[6] 7 U.S.C. § 2156. *See USMS—National Seized Animal Program: Description*, U.S. Fed. Contractor Registration (USFCR) ¶ 2 (Sept. 19, 2024), https://usfcr.com/search/opportunities/?oppId=10fbd9d5bac54439851846ab1156a0b6.

[7] Verified Complaint for Forfeiture *in Rem* at 7–11, United States v. 14 Pit Bull-Type Dogs, No. 1:21-cv-385 (D. Md. Feb. 16, 2021), ECF No. 1; Verified Complaint for Forfeiture in Rem at 6–11, United States v. 7 Pit Bull-Type Dogs, No. 3:19-cv-3355 (N.D. Fla. Aug. 29, 2019), ECF No. 1.

[8] 14 Pit Bull-Type Dogs, *supra* note 7, at 7.

[9] *Id.*

[10] Bill Burke, *Once Limited to the Rural South, Dog Fighting Sees a Cultural Shift*, Virginian-Pilot (Aug. 7, 2019), https://www.pilotonline.com/2007/06/17/once-limited-to-the-rural-south-dogfighting-sees-a-cultural-shift-2/ (Dog fighters have been known to shave their dog's "fur and mix roach killer with its food, hoping the bitter taste of the new fur will repel a foe.").

[11] 14 Pit Bull-Type Dogs, *supra* note 7, at 7.

[12] Jonathan Edwards, *A Pit Bull Was Killed After Being Forced to Fight Another Dog. His Owner Will Now Spend 10 Years in Prison.*, Wash. Post (Sept. 29, 2021), https://www.washingtonpost.com/nation/2021/09/29/georgia-dog-fighting/ (noting

fight can also end if one or both dogs die.[13]

A. How dog fighters prepare for and arrange dog fights

Because of their conditioning and training, dogs used in animal-fighting ventures are housed separately from other dogs—in pens, cages, or on chains—so that they will not hurt or kill other dogs when the handler is absent. Dog fighters fight dogs with a goal of obtaining "Champion" or "Grand Champion" status for their dogs, which is achieved by winning three or five fights, respectively.[14] They maintain contact with other dog fighters around the country and can generate substantial income from gambling on dog fights. Handlers can also generate income from the sale and breeding of fighting animals.

Dog fighters select the strongest, most capable fighting dogs and selectively breed, sell, and fight only those dogs that display particular traits. Some of these traits include the following: (1) "gameness," or aggressiveness and propensity to fight other dogs; (2) a willingness to continue fighting another dog to the bitter end, despite traumatic or mortal injury, including broken and mutilated limbs; and (3) cardiovascular endurance to continue fighting for long periods of time and through fatigue and injury.[15] Dogs displaying these attributes are often bred with other dogs displaying similar traits to enhance the bloodline of these dogs for fighting purposes. Dog fighters keep such dogs solely for fighting purposes.

The most common way a dog fighter tests a particular dog to ascertain whether the dog is "game" is to "roll" the dog.[16] A "roll" is a dog fight conducted for purposes of testing game rather than for wagering.[17] Roll fights generally last from 5 to 15 minutes, at which point the handlers usually stop the fight.[18] Roll fights can still result in serious injury or death to one or both dogs.[19]

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after a win, dog owner "unleashed [his] pit bull one last time for a 'courtesy scratch,' a dog-fighting ritual in which the victor attacks a vanquished opponent—or its corpse—to show its 'gameness[,]'" which can bring "prestige to a handler," but later hung his winning dog with a belt from a tree, choking him to death because the dog "refused to attack . . . the pit bull he had just defeated in a gruesome 45-minute brawl").

[13] 14 Pit Bull-Type Dogs, *supra* note 7, at 7.

[14] Burke, *supra* note 10 (noting "first victory for a fighting dog is the beginning of his 'campaign,'" and once dog deemed a champion, dog can command stud fees of $100,000 per year for services).

[15] 14 Pit Bull-Type Dogs, *supra* note 7, at 7–8, 11.

[16] 14 Pit Bull-Type Dogs, *supra* note 7, at 8.

[17] *Id.*

[18] *Id.*

[19] *Id.*

Not all dogs in a litter of puppies bred from fighting dogs will show an inclination to fight.[20] Dog fighters refer to dogs who do not demonstrate fighting instinct by the time they reach maturity as "cold" or "shy."[21] Because such dogs have no value to a dog-fighting operation, they are often "culled."[22] To avoid public scrutiny, dog fighters typically do not sell these dogs to non-dog fighters or take them to an animal shelter.[23] "Culling" generally results in the death of these animals.[24] Likewise, it is not uncommon for dogs that lose matches to be killed in cruel, torturous, and inhumane ways as punishment (for example, hanging).[25] Defendants in dog-fighting cases have killed dogs by shooting, strangling, bludgeoning, or drowning them.[26]

It is common practice for those involved in training and exhibiting fighting dogs to possess several dogs at one time.[27] Dog fighters follow this practice for several reasons. First, dog fighters maintain a stock of dogs of different weights and both sexes because dogs are matched against other dogs of the same sex and within a pound of the same weight.[28] Maintaining a stock of several dogs thus increases the odds of owning a dog whose weight meets the requirements for a match solicited by an opponent.[29]

Second, dog fighters maintain multiple dogs to selectively breed, sell, and fight dogs displaying certain traits or to otherwise advance a particular dog-fighting bloodline.[30] Third, dog fighters possess an inventory of dogs because dogs often die or incur injuries during fights.[31] Possessing multiple dogs also increases the prospects of owning a dog who will become a Champion or Grand Champion.[32] Dog fighters also routinely test and roll their dogs, including against their own dogs.[33] Dog fighters commonly keep these inventories in places that are easily accessible, like

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[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] Indictment at 6, 17, United States v. Peace et al., No. 3:07-cr-274 (E.D. Va. July 17, 2007), ECF No. 1 (shooting and hanging, drowning, or slamming eight dogs' bodies on the ground, respectively).
[27] 14 Pit Bull-Type Dogs, *supra* note 7, at 8–9.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 9.
[33] *Id.*

inside or behind their homes.[34] Owners often kill dogs that lose fights or fail to show gameness.[35]

Dog fights typically involve consistent practices leading up to and during the fight. Fighting dog owners or handlers enter into a verbal or written contract with their opponent several weeks before the dog fight, often referred to as a "match" or "show."[36] The owners or handlers agree upon the following: (1) the sex and weight of the dogs at the time of the fight; (2) the geographic area in which the fight will occur (the exact location is often a guarded secret until shortly before the fight); (3) a referee; (4) the payment of "forfeit" money that is lost if one participant pulls out of the match or if a participant's dog does not arrive at the agreed-upon weight; and (5) monetary wagers placed by the respective dog fighters.[37]

To find an opponent with a dog of the same weight and sex, who is looking to fight that dog at the same time of year and for a wager that is mutually agreeable to both parties, dog fighters rely on each other and on their network of contacts.[38] The practice is known as "calling out a weight."[39] Dog fighters often will call out a weight to known dog fighters in several states to increase their odds of finding a match.[40] Calling out a weight is done by phone call, text message, email, or other electronic communication.[41]

Once a dog fighter locates an opponent and agrees upon terms, the match is "hooked," or set up.[42] The dog then undergoes a conditioning process that dog handlers refer to as a "keep."[43] A keep is typically conducted for six to eight weeks before the scheduled match and involves a training program, including the following: (1) treadmills to exercise the dogs away from public view;[44] (2) weighted chains and pulling devices to increase the dog's strength and stamina; (3) "spring poles" and "flirt poles" to build jaw strength and increase aggression; (4) water-based

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[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 9–10.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 10.
[43] Dina Siegel & Daan van Uhm, *Illegal Dogfighting: Sport or Crime?*, 24 Trends in Organized Crime, 563, 570–71 (2021).
[44] Burke, *supra* note 10 (noting "circular above-ground pool discovered at the house owned by" Michael Vick was "typical of those used for getting fighting dogs into shape," and "[o]ne hour on the treadmill and two in the pool is a common regimen").

training such as tethering a dog to a cable running across a pool; and (5) the administration of drugs, legal and illegal, including steroids to build muscle mass and aggression.[45]

Dogs matched for future fights are expected to achieve their established target weight by the scheduled match, much like in human boxing matches, which requires close attention to dogs' routines.[46] Training can take place in a dog fighter's yard or indoors away from public view, such as in a basement.[47] Although dogs used for fighting are often housed outside, as the match date approaches, a dog in a keep may be housed indoors or near the owner or handler for several reasons. One reason is to prevent the dog from becoming sick or injured by other dogs before the match, which could cause the dog to forfeit and the owner to pay a forfeit fee.[48] Another reason is that dogs in a keep require constant exercise and monitoring, which is easier when the dog is in close vicinity rather than off-site or outside.[49] Dogs intended for fighting purposes are also often housed inside residences if they are injured, ill, pregnant, or weaning; if a dog fighter does not have another location to keep them; or if a dog fighter wants to keep them out of view.[50]

B. Breeding and bloodlines

Dog fighters breed their own fighting dogs from dogs they already own or buy fighting dogs from other dog fighters, either as adult dogs or puppies.[51] Rearing a competitive dog can take up to two years.[52] When dog fighters acquire dogs from other dog fighters, they sometimes do so to integrate desired fighting traits or bloodlines from other dog fighters into their own stock.[53] Some dog fighters are selective about who they will sell fighting dogs to because the success of that dog in the fighting

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[45] 14 Pit Bull-Type Dogs, *supra* note 7, at 10. *See also* Justin Jouvenal, *Pit Bulls Seized from Fairfax Man Suspected of Running Dogfighting Operation*, Wash. Post (Sept. 10, 2012), https://www.washingtonpost.com/local/crime/pit-bulls-seized-from-fairfax-man-suspected-of-running-dogfighting-operation/2012/09/10/11953680-fb87-11e1-b2af-1f7d12fe907a_story.html (noting execution of warrant resulted in recovery of treadmill, an electric collar, a break stick (stick used to pry dog's jaws apart), a "rape stand," which is used to restrain female dogs while they are bred with aggressive male dogs, according to the warrant, as well as taxidermized pit bulls).
[46] 14 Pit Bull-Type Dogs, *supra* note 7, at 10.
[47] *Id.*
[48] *Id.* at 10–11.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 11.
[52] Burke, *supra* note 10.
[53] 14 Pit Bull-Type Dogs, *supra* note 7, at 11.

ring will reflect on the seller whose bloodline is represented by the dog.[54] A dog that produces multiple offspring that go on to be Champions (by winning three or more dog fights) is bestowed the "Register of Merit" or "Producer of Record" title.[55] This provides incentive to sellers to sell dogs to capable dog fighters.[56]

C. Preparation for fights

Today, dog fighters communicate with each other via phone calls, text messages, social media platforms, emails, or website chat rooms dedicated to game dogs.[57] Starting in the mid-1990s and accelerating in the early 2000s, the widespread availability of the internet and cell phones has facilitated such communications.[58] Dog fighters routinely set up matches and exchange documents, expertise, photographs, or videos relating to dog-fighting activities through text messages and other electronic means.[59] They exchange photographs and videos of dogs, for example, to demonstrate a dog's build, gameness, and other fighting qualities when soliciting or advertising a dog for purposes of buying, breeding, or arranging a fight.[60]

D. Dog-fighting participants' motivations

There are several reasons people are drawn to dog fighting. The primary reason is pecuniary. Raids of major dog fights have resulted in seizures of close to $500,000 and bets can amount to anywhere from $20,000 to $30,000 for a fight.[61] Stud fees and the sale of puppies from a promising bloodline also drive up interest in dog fighting. Second, some find enjoyment in witnessing the brutal spectacle of a dog fight. Third, dog fighters can view their dogs as a reflection of themselves, with their dog's prowess standing for their own projected power, toughness, strength, and tenacity.

To justify their actions, some dog fighters profess a belief that they are

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] Burke, *supra* note 10 (observing that advent of internet facilitated dog fighting's move from rural south to cities, the rendering of pit bull icons in rap, hip-hop, and gang cultures, and made it easier for dog fighters to research how to treat injuries, training techniques, and tactics).
[59] 14 Pit Bull-Type Dogs, *supra* note 7, at 11.
[60] *Id.*
[61] *Id.* (noting "suspected dog fighter in Texas bled to death after was shot by intruders who apparently intended to torture him into revealing where he had hidden $100,000 wagered in a high-stakes dog match").

involved in a cultural phenomenon, akin to hunting, and that they have a privilege or right to fight their dogs.[62] Dog fighters "have their own codes of behavior and professional argot" while "[r]eputation, status[,] and trust feature prominently in their communications."[63] Dog fighters also inaccurately characterize pit bulls as inherently aggressive, attributing fighting as part of their character.[64] To counter the assumption that dog owners and organizers of dog-fighting events manipulate and coerce dogs to make them fight, dog fighters contend that "in their natural environment, dogs attack and fight each other for territory, mating partners[,] or food, or to protect their owner or [their owner's] property, led by their natural instincts."[65] Dog fighters further assert that fights between stray dogs serve as an example.[66] In this way, pit bulls are inaccurately depicted as expressing their "free will" when they fight. This allows the fighting community to neutralize their deviance and justify their crime as a natural sport.[67]

E. The harmful impacts of dog fighting on society

The impact of dog fighting also negatively affects society more broadly. Young children are often present, raising child welfare issues. Dog fight attendees or dog fighters may present the fight as a family event. Children who have attended dog fights can come to view dog fighting as routine and exciting. "Violence becomes a nonchalant part of everyday life . . . ."[68] There is some evidence that attendance at dog-fighting events can negatively impact childhood development by teaching children that the pain of another creature can be entertaining, and their own affection (often for the family pet) is expendable. This can promote insensitivity

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[62] Siegal & van Uhm, *supra* note 43, at 568 (explaining that in addition to material gain, esteem, honor, dignity, respect, and status are at stake, and thus dog fighting could be conceptualized as form of "status gambling").

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id. See also* Des Bieler, *Michael Vick '30 for 30' Seeks to Add Context to His Dogfighting Saga*, Wash. Post (Jan. 30, 2020), https://www.washingtonpost.com/sports/2020/01/30/michael-vick-30-30-seeks-add-context-his-dogfighting-saga/ (noting Mr. Vick suggested he had "seen [dog fighting] so much [growing up], and [had] never seen anyone be condemned for doing [it], and [had] seen them doing it in the open," and explained his involvement by saying he "was really, really competitive, and . . . loved dogs . . . and somehow, some way, that got intertwined, and [he] never got away from it, never walked away from it").

[68] Francesca Ortiz, *Making the Dogman Heel: Recommendations for Improving the Effectiveness of Dogfighting Laws*, 3 Stan J. Animal L. and Pol'y 1, 46 (2010).

to suffering and violence.[69]

Moreover, dog fighters often commit other crimes such as cruelty to animals.[70] Mistreatment may include harsh living conditions, like insufficient food, water, medical treatment, and little socialization. Animal abuse, including dog fighting, is positively correlated with domestic and elder abuse.[71] The sale of illegal drugs, firearms, and other weapons and organized crime, such as illegal gambling and money laundering, are commonplace at dog fights.[72] Although, as the next section shows, legal sanction has not always been the norm, evidence concerning these broader societal impacts has tended to buttress its criminalization.[73]

II. History and evolution of the federal prohibition of dog fighting

Dog fighting arrived in the United States from Great Britain at the beginning of the 19th century.[74] As in England, states began to ban dog fighting in the second half of the 19th century.[75] The founder of the American Society for the Prevention of Cruelty to Animals, Henry Bergh, drafted the first known animal-fighting law in 1867 in New York.[76] Most states, however, did not begin enacting dog-fighting laws until the 1980s.[77] Today, all 50 states have declared dog fighting a felony offense.[78]

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[69] Ortiz, *supra* note 68, at 39; Rachel Weiner, *Two Sentenced to 18 Months in Dogfighting Ring That Spanned D.C., Maryland and Virginia*, Wash. Post (Oct. 7, 2021), https://www.washingtonpost.com/local/public-safety/dogfighting-ring-convictions-virginia/2021/10/07/3e8069b8-277d-11ec-8831-a31e7b3de188_story.html (describing seven-year-old boy brought to a dog fight in which his father fought the boy's favorite family dog in 2016).

[70] Burke, *supra* note 10 (noting law enforcement "effort in Newton, [Massachusetts], turned up dogs with broken legs and one whose tongue had been ripped out" and "'bait animals' such as cats are sometimes placed in cages just out of range of the charging dog, which is rewarded by getting to feast on cat after the training session").

[71] *Id.* at 47–48.

[72] Siegal & van Uhm, *supra* note 43, at 567 ("A recent case investigated . . . in the United States targeted a drug trafficking organization that had allegedly organized and conducted large-scale illegal dogfighting operations throughout the Northern District of Florida between 2014 and 2019."); Ortiz, *supra* note 68, at 51–54.

[73] Ortiz, *supra* note 68, at 42–47.

[74] Burke, *supra* note 10 (Americans used pit bulls on the farm or as companions, not just fighting); Ortiz, *supra* note 68, at 6 (discussing the Little Rascal's dog, "Petey," and companies' use of pit bulls, such as Buster Brown Shoe Company's use of their image to promote trust in products).

[75] *Id.* at 10.

[76] *Id.* at 21.

[77] *Id.*

[78] *Id.* at 10.

Federal lawmaking concerning dog fighting began nearly a century after states began doing so, with the 1976 amendments to the 1966 AWA.[79] That year, Congress added a prohibition of certain forms of animal fighting.[80] Since then, Congress has amended the AWA provisions concerning dog fighting four times: in 2007, 2008, 2014, and 2018.[81] In 2007, Congress strengthened the applicable penalties, upgrading dog fighting to a felony punishable by up to three years in prison under Title 18 of the U.S. Code.[82] This provision passed with a significant majority—368 members in the House of Representatives and all 100 senators.[83] Over 400 law enforcement agencies supported the 2007 AWA amendments.[84] In the 2008 Farm Bill, Congress increased the maximum imprisonment for violations again, this time from three to five years.[85] In 2014, Congress banned attendance at animal-fighting ventures for adults and minors.[86] Finally, in 2018, Congress banned animal fighting in the U.S. territories.[87]

In the early years of federal criminal enforcement of the AFVP, major dog-fighting cases included the prosecution of important dogmen such as "Fat Bill" Reynolds of Henry County, Virginia, in 2003 and then-National Football League quarterback Michael Vick in August 2007. That month, Vick entered a watershed guilty plea for engaging in dog fighting in violation of the AWA in Richmond, Virginia.[88] The plea resulted in,

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[79] Regarding the legislative history of animal-fighting prohibition, see Wayne Pacelle & Richard L. Pacelle Jr., *A Legislative History of Nonhuman Animal Fighting in the U.S. and Its Territories*, 29 Soc'y & Animals 523 (2021).

[80] Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, § 17, 90 Stat. 421 (providing misdemeanor penalty, with violators subject to a maximum of one year imprisonment and $5,000 fine); Ortiz, *supra* note 68, at 21–22.

[81] Over the years, Congress has also amended the prohibition on bird fighting. *See* Farm Security and Rural Investment Act of 2022, Pub. L. No. 107–171, 116 Stat. 134; Agricultural Act of 2014, Pub. L. No. 113–79, 128 Stat. 649.

[82] Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88. *See also* H.R. Rep. No. 110-27(1), at 2 (2007), *reprinted in* 2007 U.S.C.C.A.N. 37, 38 (noting that "[b]y increasing penalties to the felony level, [the bill under consideration] will give prosecutors greater incentive to pursue cases against unlawful animal fighting ventures[] and strengthen deterrence against them").

[83] Ortiz, *supra* note 68, at 23.

[84] *Id.*

[85] Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14207, 122 Stat. 1651. Members had introduced this language in bills introduced shortly after the 2007 indictment of National Football League quarterback Michael Vick on charges related to dog fighting, discussed *infra* section II, ¶ 3.

[86] Agricultural Act of 2014 (2014 Farm Bill), Pub. L. No. 113-79, § 12308(b), 128 Stat. 649, 990–91.

[87] Agriculture Improvement Act of 2018 (2018 Farm Bill), Pub. L. No. 115-334, § 12616, 132 Stat. 4490, 5015–16.

[88] Emily Giambalvo, *A Second Chance: Twelve Years Ago, 47 dogs Were Rescued*

inter alia, a one-year prison sentence—the maximum available sentence at the time.[89] More recently, last year a defendant prosecuted as part of an investigation into a multi-state dog-fighting ring was sentenced to 46 months in prison in Richmond, Virginia.[90]

III. A new path for the rescue and rehabilitation of fighting dogs

As noted above, the AFVP was added to the AWA through the AWA amendments of 1976.[91] The AFVP makes it unlawful to do any of the following: (1) knowingly sponsor or exhibit an animal in an animal-fighting venture; (2) knowingly attend, or cause a minor under 16 years of age to attend, an animal-fighting venture; (3) knowingly sell, buy, possess, train, transport, deliver, or receive any animal for purposes of participation in an animal-fighting venture; or (4) knowingly use the U.S. Postal Service or any other instrumentality of interstate commerce to advertise an animal for use in an animal-fighting venture or to promote—or further in any other manner—an animal-fighting venture.[92]

The AFVP authorizes the Secretary of Agriculture to investigate violations of the section with the assistance of federal law enforcement agencies and state and local governmental agencies.[93] Any person authorized to conduct these investigations may apply for and execute a warrant to "search for and seize any animal which there is probable cause to believe was involved in any violation of [the AFVP]."[94] The statute then provides that any seized animal "shall be liable to be proceeded against and forfeited to the United States" through a complaint for civil forfeiture in rem in the federal district court for the jurisdiction in which law enforcement found the animal.[95] Pending a final order of forfeiture, the seized animals

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from Michael Vick's Dogfighting Operation and Allowed to Live. They've Enriched the Lives of Countless Humans and Altered the Course of Animal Welfare, Wash. Post (Sept. 18, 2019), https://www.washingtonpost.com/graphics/2019/sports/michael-vick-dogfighting-dogs/.

[89] Plea Agreement, United States v. Peace et al., No. 07-cr-274 (E.D. Va. July 30, 2007), ECF No. 30.

[90] Judgment in a Criminal Case at 2, United States v. Stukes, et al., No. 3:22-cr-132 (E.D. Va. July 25, 2023), ECF No. 198.

[91] Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, 90 Stat. 417.

[92] 7 U.S.C. § 2156(a)–(c). *See also id.* § 2156(d) (making it unlawful to knowingly sell, buy, transport, or deliver in interstate or foreign commerce a knife, gaff, or any other sharp instrument intended to be attached to the leg of a bird for use in an animal-fighting venture).

[93] *Id.* § 2156(e).

[94] *Id. See also id.* § 2156(a)–(d) (prohibitions).

[95] *Id.*

"shall be held by the United States marshal or other authorized person" and provided "[n]ecessary care[,] including veterinary treatment."[96]

To facilitate federal dog-fighting prosecutions, the USMS developed its SCP to take custody of and care for dogs seized pursuant to section 2156(e) pending final disposition of the animals. This section first introduces the SCP and the services it provides, and then describes several best practices for the judicial civil forfeiture of seized dogs, as contemplated by section 2156(e).

A. The U.S. Marshals Service's Seized Canine Program

Despite Congress' addition of the AFVP to the AWA in 1976, no federal investigative agency had developed a routinized means to house and care for animals seized pursuant to that authority. To facilitate the government's authority to seize canines from illegal fighting situations, the USMS began to take custody of seized dogs on an ad hoc basis in the mid-2010s. By 2019, the USMS began offering organized services through the SCP on a national level. The SCP represents a partnership between the USMS, the Department's Environment and Natural Resources Division (ENRD), and U.S. Attorneys' Offices (USAOs) nationwide. The SCP is housed within the USMS's Asset Forfeiture Program and funded by the Assets Forfeiture Fund. Because it is tied to the Assets Forfeiture Fund, the SCP can be used only to support the care of seized animals pending forfeiture, not for the maintenance of seized dogs as evidence. Both the USMS and the Department of Justice (Department) generally hold a deep commitment to enforcing our nation's animal welfare laws and protecting vulnerable animals from exploitation and abuse. Since 2019, the SCP has taken custody of over 3,200 dogs.

Under the SCP, the USMS will facilitate the seizure and care of dogs seized pursuant to warrants issued under the AWA's AFVP.[97] Specifically, upon request from a federal prosecutor, the USMS will coordinate to be on site at the time of seizure with trained animal care professionals to facilitate a safe and orderly seizure of fighting dogs. At the time of seizure, the USMS will assist with documenting the physical state of the dogs and the conditions in which they are found, as well as identifying and documenting dog-fighting paraphernalia on site. After seizure, the USMS coordinates a full veterinary intake of each dog seized, both to triage necessary medical care for any injured or ill dogs and to fully document the state of the dogs at the time of seizure for evidentiary purposes.

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[96] *Id.*
[97] 7 U.S.C. § 2156(e).

This veterinary intake includes a full exam, any necessary medical care, and extensive photography, videography, and recordation of the dogs' physical and behavioral conditions. The intake team will timely provide a full, organized evidence package to the prosecutorial team, including all photographs and videos, detailed veterinary reports, the body condition score of each dog, and scar or injury charts.

After veterinary intake, the dogs are transferred to an approved vendor's care for boarding pending final legal disposition. The SCP can also make the dogs available for defense inspection while the seized dogs are in vendor custody.[98] Once the dogs are in the care of the vendors, evaluation and rehabilitation efforts begin to ensure that as many dogs as possible are rendered adoptable. The approved vendors care for the seized animals pending a final transfer of title to the United States. As required by the AWA, the vendors provide all necessary care, including regular and specialized veterinary care, to the dogs while they remain in custody.[99] The SCP funds the custody and care of the seized dogs through the Assets Forfeiture Fund, ensuring that no USAO, investigative agency, or other litigating component need be discouraged from pursing criminal charges in dog-fighting cases due to associated costs of care for the dogs and the immense logistical burden of finding alternative temporary placements for seized fighting dogs. This also avoids burdening local and charitable animal shelters, which already function at maximum kennel capacity in most areas.

Once title to the seized dogs clears, the USMS and the approved vendors transfer the dogs out of the SCP. Although some dogs ultimately require euthanasia due to health or behavioral issues, many dogs remain adoptable. The USMS and their vendors find loving homes to permanently place adoptable dogs.

The funds and resources of the SCP, however, are not without limit. The SCP has never received congressionally appropriated funds, and thus is currently funded exclusively through the Assets Forfeiture Fund. The fund pays select vendor facilities that operate with a limited number of kennel runs to house seized dogs. To protect program funding and ease space restrictions, dogs must be cycled through the program relatively quickly. For this reason, attorneys must pursue timely transfer of title of seized dogs as a condition of participation in the SCP.

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[98] Fed. R. Crim. P. 16(a)(1)(E)(iii).
[99] 7 U.S.C. § 2156(e).

B. Best practices for judicial civil forfeiture of seized dogs

Common wisdom in the asset forfeiture community holds that "if it eats and poops, leave it—don't seize it!" But dogs involved in an animal-fighting venture are highly vulnerable victims of circumstance. Following warrant execution and a dog fighter's arrest, a dog fighter's associates may take the dogs and continue to abuse and fight them. Alternatively, if a dog fighter is arrested and no one arrives to care for the dogs, the animals may be neglected and abandoned—or even die—with no guarantee that local animal control will learn of the dogs or be able to accommodate them. These circumstances levy unnecessary suffering on victimized animals. By contrast, the SCP provides a way to safely seize and care for these otherwise high-maintenance assets until their final disposition.

Although forfeiture of live animals may implicate additional considerations that forfeiture of inanimate assets does not, we still find most actions for civil forfeiture of dogs seized pursuant to section 2156(e) proceed smoothly and without novel issues.[100] The following best practices are based on our office's near decade of experience pursuing judicial civil forfeiture of dogs involved in an animal-fighting venture, both through assisting USAOs around the country and supporting the numerous ENRD criminal prosecutions of animal fighting. Complying with these best practices may help federal prosecutors anticipate and handle the quirks associated with live animal forfeiture and will increase the likelihood that seized dogs are rehabilitated, rehomed, and given the life they deserve.

1. Pre-seizure

Coordinate with all necessary stakeholders. When it is known before execution of a search and seizure warrant that fighting dogs will be seized from the premises, we recommend coordinating with all necessary stakeholders as early as possible. A non-exhaustive list of necessary stakeholders may include the USMS, the relevant federal law enforcement involved in the investigation, civil forfeiture AUSAs in your district, subject matter experts within the ENRD, and local law enforcement agencies. Early coordination helps to align everyone's expectations and can avoid complications at the time of seizure, as well as delays in clearing title to the dogs once seized.

Federal prosecutors interested in utilizing the SCP should contact the USMS as soon as the possibility of seizing dogs arises. Sharing the estimated count of dogs to be seized and the location (or locations, if more

[100] *Id.*

than one) at which the seizure will occur early in the process allows the USMS to coordinate vendors, designate kennel space, and fund the anticipated seizure.

Federal agents may or may not be expecting to encounter fighting dogs at a seizure site. It is not uncommon for agents to stumble upon a dog fighting operation during the execution of a search warrant related to a different crime. Where the discovery of dogs is unexpected, pre-seizure coordination is less feasible. We still recommend, however, that you promptly contact the USMS to inquire about their ability to assist in any matter that yields fighting dogs.

2. At the time of seizure

Cooperate with state and local authorities. The laws of some states provide for civil forfeiture on a quicker timeline than in the federal courts. One option is to determine whether local infrastructure (including animal control, shelters, and rehabilitation programs) is sufficient to board, rehome, and, if necessary, rehabilitate seized dogs and whether local law provides a more efficient forfeiture process. If so, after collection of all necessary evidence, consider allowing state law enforcement partners to pursue dog-fighting-related criminal charges (that is, in lieu of pursuing federal charges under the AFVP). Local authorities can then take custody and arrange care of the dogs according to the relevant jurisdiction's controlling law.

State and local authorities may also assist on site by taking custody of animals not otherwise covered by the AFVP's seizure authority. As explained above, the federal government's seizure authority extends only to those animals believed to be involved in a violation of the AWA's specific animal-fighting prohibitions.[101]

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[101] *See* 7 U.S.C. § 2156(e) ("A warrant to search for and seize any animal . . . involved in any violation of this section may be issued by any judge of the United States or of a [s]tate court of record or by a [U.S.] magistrate judge within the district wherein the animal . . . is located."). *See also id.* § 2156(a)–(d) (prohibitions); 18 U.S.C. § 983(c)(1), (3).

> In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property[] the burden of proof is on the [g]overnment to establish, by a preponderance of the evidence, that the property is subject to forfeiture . . . [and] if the [g]overnment's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the [g]overnment shall establish that there was a substantial connection between the property and the offense. Accordingly, federal agents may not seize a neglected animal if the circumstances do not otherwise indicate that animal is involved in an animal-fighting operation. By contrast,

Collect and record necessary evidence. Often, the most compelling evidence that the dogs were involved in an animal-fighting venture is the condition of the dogs at the time of seizure and other physical evidence found during the search warrant execution. Properly documenting the physical state of the dogs is of paramount importance, as such evidence is ephemeral. The state of the dogs, the conditions in which they were found, and other dog-fighting paraphernalia found on site can be cited in a civil forfeiture complaint to present a robust case that the seized dogs are subject to forfeiture as animals involved in a fighting venture. When working with the USMS, the SCP will dispatch qualified experts to document all of the above as part of their standard evidentiary package.

3. Post-seizure

Aggressively pursue surrender. Surrender of seized animals to the federal government is the most efficient way to handle animals involved in a fighting venture. If the owner of the dogs is on site during a seizure, search teams have been instructed to inquire whether the owner will surrender the dogs on the spot. If so, they will have the owner sign a form identifying the dogs and renouncing ownership interest. Be aware that multiple individuals may have an ownership interest in the seized dogs. To proceed with surrender, all owners must renounce their ownership interest. Targets who surrender their dogs may also be willing to identify others that may have an ownership interest in the dogs. On the other hand, if owners are not willing to surrender their dogs at the time of seizure, agents or prosecutors should renew the request in the following days or weeks, and if applicable, through defense counsel. Dog fighters may change their minds after obtaining legal counsel and considering the implications of claiming an ownership interest in the dogs upon any related criminal proceeding.

Whether or not dog fighters surrender seized animals, title may be cleared through judicial forfeiture. In dog-fighting cases, civil judicial forfeiture takes 4–12 weeks on average. In contrast, criminal forfeiture generally takes much longer and is dependent on the pacing of the criminal matter.[102]

Promptly initiate judicial civil forfeiture proceedings. If an owner refuses to surrender the dogs at the time of seizure, double track

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> state and local law authorities will likely have jurisdiction to take custody of the animal.

Id.

[102] *See* Fed. R. Civ. P. G(4) (prescribing minimum periods for direct notice and publication of notice).

the surrender and civil forfeiture processes. While continuing to pursue surrender, begin drafting a complaint for civil forfeiture of the seized dogs. This way, if the owner still refuses to surrender the dogs weeks later, you can file a complaint for civil forfeiture in rem immediately once finalized.

Supplemental Rule G prescribes the timeline for a forfeiture proceeding, and specifically requires between 21 and 35 days of notice, depending on the circumstances of the case and the type of notice provided.[103] Because the governing rule includes at least a 21-day process before title can clear, exclusive of the additional time required to draft the complaint, it is extremely important to timely pursue civil forfeiture. In nearly every case, potential claimants decline or fail to claim their dogs, and a final order of forfeiture can be obtained relatively quickly after the notice period expires.

In the unlikely event that an owner comes forward to file a verified claim for the dogs, a contested civil forfeiture should not negatively affect any related criminal investigation.[104] Importantly, the government is entitled to a stay of the civil forfeiture proceedings if "civil discovery will adversely affect the ability of the [g]overnment to conduct a related criminal investigation or the prosecution of a related criminal case."[105] Given these backstops, it is better to move forward with the forfeiture proceedings in the first instance and later discern whether these unlikely circumstances arise than it is to wait and pursue criminal forfeiture at the end of the related criminal case.

Paint a picture through the complaint. Supplemental Rule G dictates the required elements of the complaint for civil forfeiture. Specifically, the complaint must be verified; state the grounds for subject-matter jurisdiction, in rem jurisdiction over the defendant's property, and venue; describe the property with reasonable particularity; describe the location where the seizure occurred and the location of the property at the time of filing; identify the statute under which the forfeiture action is brought; and state facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.[106]

In addition to these threshold requirements, ensure that the complaint

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[103] *See* Fed. R. Civ. P. G(4)(a)(iii)(A) (requiring 3-week notice period for notice published in a newspaper); Fed. R. Civ. P. G(4)(a)(iv)(C) (requiring 30-day notice period for notice published on official internet government forfeiture site); Fed. R. Civ. P. G(4)(b)(ii)(B) (requiring 35-day notice period for direct notice to potential claimants).

[104] The authors are aware of only a handful of cases where owners contested a civil forfeiture complaint.

[105] 18 U.S.C. § 981(g)(1).

[106] Fed. R. Civ. P. G(2)(a)–(f).

conveys the message that the seized dogs were not kept or cared for as pets. Often this can be accomplished by simply incorporating the probable cause section of the search and seizure warrant affidavit and then briefly touching on additional evidence found during the search. For example, highlight abnormalities in the dogs' physical states and storage at the time of seizure, as well as paraphernalia that a regular pet owner would not typically possess. We recommend identifying the dogs by their USMS identification numbers, sex, color, and any other identifying physical characteristics (for example, emaciated, three-legged) to ensure the property is described with sufficient particularity.

We then recommend providing the locations subject to the search and seizure warrant and a summary of the evidence recovered through the seizure. Describe the conditions in which the dogs were found, detailing both the physical state of the dogs from the veterinary intake and the conditions in which the dogs were kept at the target property. Catalogue the paraphernalia found on site and provide a brief descriptor of items unfamiliar to a lay person (for example, break sticks, jenny mills, or medications). Highlight all evidence that suggests involvement in a dog-fighting venture, with particular emphasis on evidence that clearly indicates that the dogs were not kept in conditions expected for pets. For example, specifically note any fresh, untreated wounds—as a responsible dog owner would immediately seek care for such condition, while a dog fighter likely would not.

Smaller anomalies, while not an outright smoking gun, can help paint the picture in the aggregate that a dog is kept as part of a fighting venture, not as a pet. For example, possession of veterinary supplies, on its own, is not necessarily incriminating. But when a target possesses a bounty of medications (for example, doses of vaccines, fertility drugs, or dewormer) and other medical supplies (for example, wound dressings and skin staplers) that an average pet owner would not possess, it suggests the target was providing at-home veterinary care for the dogs instead of bringing the dogs to a veterinarian. This deviation from the norm furthers the message that the dogs were not maintained as pets and—when paired with other evidence—indicates the dogs were maintained as part of an animal-fighting operation. Case agents and subject matter experts within ENRD's Wildlife and Marine Resources Section (WMRS) can assist AUSAs with the drafting of complaints and determining the significance of the evidence collected.

Personally-serve notice. Supplemental Rule G requires the government to provide notice to potential claimants of the defendant property

after filing a complaint for forfeiture.[107] We recommend that prosecution teams have case agents provide direct notice through personal service, as opposed to mail service. Personal service is often accomplished more quickly than mail service. For example, if notice is mailed to the wrong address, the clock for filing a claim restarts. It may be weeks before anyone realizes and corrects such a mistake, further delaying the final disposition of the seized dogs. Additionally, if publication of notice is required in your case, immediately publish notice after successfully serving direct notice so that the timeline for publication and for a potential claimant to file a claim run concurrently, rather than consecutively.[108]

Promptly finalize the forfeiture. After filing a complaint for civil forfeiture, take all necessary steps to pursue a timely final disposition. Serve direct notice on all known potential claimants as soon as possible after filing the complaint and, if necessary, publish notice immediately after serving direct notice. Mark on your calendar the date the notice period ends and move for default that day if no verified claims and answers have been filed. Prepare the motion for default judgment and final order of forfeiture in advance and file it with the court as soon as the court enters the default.

Promptly finalizing the forfeiture serves two important purposes. First, boarding seized dogs and providing "necessary care" as required by the AFVP generates significant costs.[109] For example, a dog seizure of modest scope can cost tens of thousands of dollars for each month the USMS maintains custody of the dogs. Predictably, larger quantities of dogs seized yield exponentially larger costs. Whether the USMS's SCP or some other entity bears these costs, pursue all possible paths to minimize these costs to ensure that funds remain to take custody of dogs in future cases.

The second reason to promptly pursue final disposition is the health and well-being of the seized dogs. After an extended period in a shelter setting, dogs' behavior declines, and they can manifest aggressive tendencies or self-destructive behaviors. This can require the euthanasia of dogs that would otherwise have been adoptable had title cleared earlier. The purpose of the SCP is to give a second chance to victimized animals, not to hold the dogs as evidence indefinitely. As such, permitting the civil forfeiture action to languish to the point where euthanasia is required or

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[107] Fed. R. Civ. P. G(4)(b).

[108] Fed. R. Civ. P. G(4)(a). *See also* Fed. R. Civ. P. G(4)(i)(A) (directing that notice need not be published if the defendant property is worth less than $1,000 and direct notice is sent to every person the government can reasonably identify as a potential claimant); Fed. R. Civ. P. G(4)(a)(iii)–(iv) (directing period and means of required notice).

[109] 7 U.S.C. § 2156(e).

where such changes take place for otherwise adoptable dogs is antithetical to the purpose of the AWA and SCP. It also fails the dogs—the real victims of this crime—for a second time.

Recover costs, where possible. The AFVP authorizes the government to recover the cost of care of seized and forfeited animals.[110] Additionally, at the tail-end of the related criminal case, the court may award the cost of care for the dogs incurred by the USMS, either as a condition of a plea or as a separate request in sentencing after a guilty verdict. Although not every criminal defendant or potential claimant will have the resources to pay back the significant costs incurred, attempting to recover costs where it appears feasible allows the government to be made whole, as provided by Congress. It also helps ensure future funding for the SCP so that the government can continue to pursue this important work.

IV. Conclusion

As stated in the AWA's AFVP, dog fighting is beyond the moral and legal pale. The SCP operationalizes and furthers the purpose of the AWA by providing an efficient and effective means for housing, managing, rehabilitating, and placing dogs seized in dog-fighting cases in safe homes. To act as conscientious stewards of USMS funds and the SCP and to mitigate the suffering endured by the dogs bred, sold, and trafficked so they can fight to the death, Department attorneys should endeavor to follow the best practices outlined above.

About the Authors

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[110] 7 U.S.C. § 2156(e) ("Costs incurred for care of animals seized and forfeited under this section shall be recoverable from the owner of the animals (1) if he appears in such forfeiture proceeding, or (2) in a separate civil action brought in the jurisdiction in which the owner is found, resides, or transacts business.").

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Special thanks to our partners at the USMS: Jenny Crane, Cindy Bridges, and Justin Wilson; and our colleague Ethan Eddy of the Environmental Crimes Section, who provided valuable insights and information relevant to this article.

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Hey, All You Cool Cats and Kittens: Consider Forfeiture in Your Endangered Species Act Cases

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I. Did you watch *Tiger King*?

Netflix's *Tiger King* documentary captured viewers' attention during the height of the coronavirus pandemic.[1] Season one, subtitled *Tiger King: Murder, Mayhem, and Madness*, chronicles the feud between Oklahoma-based zookeeper Joseph Maldonado-Passage—better known as Joe Exotic—and Florida-based, big-cat sanctuary owner Carole Baskin.[2] Critics described Exotic as "a delusional protagonist . . . equal parts Joe Dirt and Gob Bluth," who "dabbled in magic, drugs, homemade country-music videos, and polygamy" before being convicted of and sentenced to federal

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[1] *See, e.g.*, Nick Romano, *Netflix's Tiger King Clawed 34 Million U.S. Viewers in 10 Days, Thanks to Quarantine*, Ent. Wkly. (Apr. 8, 2020), https://ew.com/tv/tiger-king-ratings-34-million/; Kate Knibbs, Tiger King *Is Cruel and Appalling—Why Are We All Watching It?*, Wired (Mar. 31, 2020), https://www.wired.com/story/tiger-king-coronavirus-covid-19/ ("Over the past week, as countless stressed-out people have found themselves cocooned on their couches with a Netflix subscription and no place to go, one miniseries has grabbed viewers more than others: *Tiger King: Murder, Mayhem, and Madness*.").

[2] *See, e.g.*, Alyssa Lukpat, *Court Orders Resentencing of Joe Exotic in 'Tiger King' Murder-for-Hire Plot*, N.Y. Times (July 14, 2021), https://web.archive.org/web/20211116232236/https:/www.nytimes.com/2021/07/14/arts/television/joe-exotic-tiger-king-sentence.html (describing the Exotic-Baskin feud as "one of the main plot lines of 'Tiger King'").

prison for Endangered Species Act (ESA) violations and an attempted murder-for-hire plot targeting Baskin.[3]

But beneath the "layers of bizarre spectacle"[4] and "circus-ready characters and cartoonish theatrics"[5] lay a serious story about the abuse of exotic animals housed in privately-owned roadside zoos like Exotic's Greater Wynnewood Exotic Animal Park and the successor Tiger King Park facility in Thackerville, Oklahoma, from which the animals were seized[6] (operated by Exotic's successors, fellow *Tiger King* show participants, Jeffrey and Lauren Lowe, to whom Exotic fraudulently transferred ownership of the Greater Wynnewood facility in 2016[7]).[8] Roadside zoos often lack the ethical missions of big zoos and sanctuaries, which focus on conservation and education or caring for unwanted animals.[9] Instead, roadside zoos may be used "to justify trading, breeding, or oth-

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[3] *See* Julie Miller, *Netflix's Wild Tiger King Is Your Next True Crime TV Obsession*, Vanity Fair (Mar. 10, 2020), https://www.vanityfair.com/hollywood/2020/03/netflix-tiger-king-trailer-joe-exotic; *see also* Lukpat, *supra* note 2 (explaining that Joe Exotic "twice tried to hire people—including an undercover [FBI] agent—to kill Ms. Baskin"); Knibbs, *supra* note 1 (stating that Joe Exotic "wound up in federal prison after an attempted murder-for-hire scheme"); Robert Moor, *American Animals*, N.Y. Mag. (Sept. 3, 2019), https://nymag.com/intelligencer/2019/09/joe-exotic-and-his-american-animals.html (detailing the history behind Joe Exotic and Carole Baskin's rivalry and how Joe Exotic offered Allen Glover $5,000 up front and $10,000 afterwards for killing Carole Baskin).

[4] Halle Kiefer, *Joe Exotic Says He's 'Ashamed of Myself' (Over Treatment of Animals, Not All The Other Stuff*, Vulture (Apr. 3, 2020), https://www.vulture.com/2020/04/joe-exotic-ashamed-of-animal-treatment-in-netflix-interview.html.

[5] Miller, *supra* note 3.

[6] *See, e.g.*, Complaint for Declaratory and Injunctive Relief, United States v. Lowe, No. 20-cv-423 (E.D. Okla. Nov. 19, 2020), ECF No. 2; *see also* Complaint for Forfeiture, United States v. 85 Big Cats, 1 Jaguar, and 11 Ring-Tailed Lemurs, 6:21-cv-228 (E.D. Okla. Aug. 4, 2021), ECF No. 2, at 11 (Lowe transferred 175 wild and exotic animals to Tiger King Park at the end of September 2020); Natasha Daly, *Court Orders 'Tiger King' Zoo to be Surrendered, But Its Animals Remain in Limbo,* Nat'l Geographic (June 2, 2020), https://www.nationalgeographic.com/animals/article/joe-exotic-former-zoo-ordered-to-big-cat-rescue (describing Lowe's intent to transfer Exotic's animals to the new Tiger King Park facility following a federal court's ruling that Exotic's property be turned over to Baskin's Big Cat Rescue).

[7] *See* Big Cat Rescue Corp. v. Schreibvogel, No. CIV-16-155, 2020 WL 2842845 (W.D. Okla. June 1, 2020); *see also, e.g.*, Moor, *supra* note 3 (stating that Exotic "effectively" transferred ownership to Lowe in exchange for Lowe's help continuing the feud with Baskin).

[8] *Miller, supra* note 3; *see also* Dina Fine Maron, *How 'Tiger King' Helped Kill the Industry it Made Famous*, Nat'l Geographic (Dec. 20, 2022), https://www.nationalgeographic.com/animals/article/tiger-king-cub-petting-illegal (arguing that *Tiger King* led to the passage of the Big Cat Public Safety Act of 2022, Pub. L. No. 117-243, 136 Stat. 2336, which, *inter alia*, prohibits the practice of cub petting).

[9] Moor, *supra* note 3.

erwise exploit" wildlife,[10] and "are motivated purely by profit."[11] These zoos' conditions accordingly "vary widely—from seemingly professional to downright grim."[12]

Tiger King Park's conditions tended toward the "downright grim."[13] On September 9, 2022, the United States forfeited 85 big cats, 1 jaguar, and 11 ring-tailed lemurs under the ESA.[14] The animals were seized from Tiger King Park and forfeited to the United States because the zoo's operators failed to provide adequate veterinary care, nutrition, and housing for the animals, violating the ESA's "take" prohibition.[15] The government then ensured the animals' continued care by placing them with accredited sanctuaries across the country.[16]

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[10] *See* Financial Action Task Force, Money Laundering and the Illegal Wildlife Trade 18 (2020).

[11] Moor, *supra* note 3.

[12] Kiefer, *supra* note 4; *see also* Miller, *supra* note 3

> Because these cats can only be used for play sessions and photo ops—and large adult cats are expensive to feed—the most lucrative income stream for large-cat owners lies within cuddly lion and tiger cubs; once they reach adulthood, many of these animals are either inhumanely housed or euthanized altogether.

Id.

[13] Kiefer, *supra* note 4.

[14] 16 U.S.C. § 1540(e)(4)(A); Default Judgment and Final Order of Forfeiture, United States v. 85 Big Cats, 1 Jaguar, and 11 Ring-Tailed Lemurs, 6:21-cv-228 (E.D. Okla. Sept. 9, 2022), ECF No. 17. *See also* Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Justice Department Ensures Jeffrey and Lauren Lowe Are Permanently Prohibited from Exhibiting Animals and Terminates Their Interests in Seized Animals (Jan. 3, 2022) (under the terms of a consent decree, the Lowes agreed not to file any claim in the parallel civil forfeiture proceeding, in which the United States took title to animals seized from Tiger King Park).

[15] 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.21(c). *See generally* Complaint for Forfeiture, *supra* note 6, at 7 (describing factual basis for forfeiture). *See also* Press Release, U.S. Dep't of Just., Off. of Pub. Affs., U.S. Government Seizes 68 Protected Big Cats and a Jaguar from Jeffrey and Lauren Lowe (May 20, 2021); Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Jeffrey Lowe and Tiger King LLC Ordered to Relinquish Big Cat Cubs to United States for Placement in Suitable Facilities (Jan. 19, 2021); Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Justice Department Files Complaint against Jeffrey Lowe and Tiger King LLC for Violations of the Endangered Species Act and the Animal Welfare Act (Nov. 19, 2020) (describing civil complaint alleging recurring inhumane treatment and improper handling of animals protected by the ESA and alleging violations of the ESA and the AWA). *See, e.g.*, Daniel Villarreal, *Jeff Lowe from 'Tiger King' Permanently Banned From Exhibiting Animals*, Newsweek (Jan. 3, 2022), https://www.newsweek.com/jeff-lowe-tiger-king-permanently-banned-exhibiting-animals-1665197.

[16] *See, e.g.*, Brad Witter, *Here's What Happened to Joe Exotic's Big Cats After the Events of Tiger King*, Bustle (July 25, 2020) https://www.bustle.com/entertainment

But how did we get here? How did the federal government come to own—and then ultimately find new homes for—the animals at the center of the drama in *Tiger King*?

II. *Tiger King*: An asset forfeiture case study

The answer is civil asset forfeiture. The government civilly forfeited the lions, tigers, lion-tiger hybrids (collectively, "big cats"), jaguar, and ring-tailed lemurs housed at Tiger King Park because it was able to show that Jeffrey and Lauren Lowe, who assumed ownership of Exotic's zoo and its animals, "harmed" and "harassed" the animals, constituting an unauthorized "taking" in violation of the ESA.[17]

A. The Endangered Species Act legal framework

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, and to provide a program for the conservation of such species."[18] Species listed as endangered or threatened receive the protections provided by the ESA, which aim "to aid its conservation and recovery and to protect its habitat."[19] Ring-tailed lemurs, tigers, lions, and jaguars are all listed as either endangered or threatened under the ESA.[20]

Among the legal tools the ESA provides is its prohibition on the "taking" of endangered or threatened species.[21] Except as authorized by permit, the ESA makes it unlawful for any person to "take" any endangered species within the United States.[22] Except as authorized by permit, ESA regulations prohibit any person from taking any listed threatened species within the United States unless the U.S. Fish and Wildlife Service has issued a species-specific rule under ESA section 4(d) providing otherwise.[23]

/where-are-joe-exotics-big-cats-now.

[17] Complaint for Declaratory and Injunctive Relief, *supra* note 6, at 24. *See* 50 C.F.R. § 17.21(c); Default Judgment and Final Order of Forfeiture, *supra* note 14.

[18] 16 U.S.C. § 1531(b) (cleaned up); Pervaze A. Sheikh & Erin H. Ward, The Endangered Species Act: Overview and Implementation 1 (2021). *See also* Cong. Rsch. Serv., The Endangered Species Act: A Primer 1 (2016).

[19] Sheikh & Ward, *supra* note 18, at 1.

[20] 50 C.F.R. §§ 17.11(h), 17.31(a), (c), 17.40(r); Conservation of Endangered Species and Other Fish or Wildlife, 35 Fed. Reg. 8491 (June 2, 1970); List of Endangered Foreign Fish and Wildlife, 37 Fed. Reg. 6476 (Mar. 30, 1972); Listing Two Lion Subspecies, 80 Fed. Reg. 80000, 80043 (Dec. 23, 2015); Final Rule to Extend Endangered Status for the Jaguar in the United States, 62 Fed. Reg. 39147 (July 22, 1997).

[21] Sheikh & Ward, *supra* note 18, at 23.

[22] 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.21(a), (c)(1).

[23] 16 U.S.C. §§ 1533(d), 1538(a)(1)(G); 50 C.F.R. § 17.31(a), (c).

The ESA also makes it unlawful for any person subject to the jurisdiction of the United States to attempt to commit taking, to solicit another to commit taking, or to cause taking to be committed with such endangered or threatened species.[24] These prohibitions apply to fish and wildlife held in captivity or a controlled environment.[25]

The ESA defines the term *take* to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[26] The term *harm* is defined by regulation as an act that "kills or injures" an endangered or threatened species.[27] Courts have held that the failure to provide timely veterinary care by a qualified veterinarian, if it results in injury or death to an ESA-protected species, constitutes harm under the ESA.[28]

Regulations define the term *harass* to include 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."[29] A lack of sanitary conditions, inadequate shelter, or a lack of appropriate environmental enrichment in violation of Animal Welfare Act (AWA) standards can constitute harassment of ESA-listed captive species.[30]

Under the ESA, it is also illegal to possess, deliver, carry, or transport any unlawfully taken endangered or threatened species, unless otherwise provided by a species-specific 4(d) rule.[31] Violations of the ESA can give rise to civil administrative penalties and criminal liability.[32] The ESA also authorizes the Attorney General to seek civil injunctive relief to enjoin any person alleged to violate the ESA or its implementing regulations.[33]

Finally, the ESA authorizes forfeiture for all ESA-protected fish and wildlife taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported

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[24] 16 U.S.C. § 1538(g); 50 C.F.R. §§ 17.21(a), 17.31(a), (c).
[25] 16 U.S.C. § 1538(b) (ESA section 9 prohibitions generally applicable to captive species subject to specified exceptions, none of which are applicable here).
[26] 16 U.S.C. § 1532(19).
[27] 50 C.F.R. § 17.3.
[28] Kuehl v. Sellner, 887 F.3d 845, 853 (8th Cir. 2018); People for Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Md., Inc., 424 F. Supp. 3d 404, 430–32 (D. Md. 2019), *aff'd,* 843 F. App'x 493 (4th Cir. 2021).
[29] 50 C.F.R. § 17.3.
[30] *See Kuehl*, 887 F.3d at 849, 852–54; *Tri-State Zoological Park*, 424 F. Supp. 3d at 407, 430–33.
[31] 16 U.S.C. § 1538(a)(1)(D), (G); 50 C.F.R. §§ 17.21(d), 17.31(a).
[32] 16 U.S.C. § 1540(a), (b).
[33] 16 U.S.C. § 1540(e)(6).

contrary to the provisions of the ESA, any regulation made pursuant to the ESA, or any permit or certificate issued under the ESA.[34]

B. The Endangered Species Act applied to *Tiger King*

After Exotic transferred Greater Wynnewood Exotic Animal Park to the Lowes, the Lowes exhibited wild and exotic animals at the zoo, including ESA-protected big cats and ring-tailed lemurs.[35] Members of the public paid a fee to interact directly with big-cat cubs and ring-tailed lemurs and to view other animals at the zoo.[36] The Lowes later transferred approximately 175 wild and exotic animals to a property in Thackerville, Oklahoma, naming the facility "Tiger King Park" and continuing to exhibit the animals.[37] The Lowes, however, had a history of failing to provide their animals with sufficient nutrition or timely, adequate veterinary care, and they continued that practice at Tiger King Park.[38]

As to nutrition, the Lowes consistently failed to provide their big cats with a diet containing the necessary nutrients to allow them to grow properly and thrive.[39] For example, between the end of September and mid-December 2020, at least three of the Lowes' young big cats died from complications caused by metabolic bone disease, an easily preventable condition caused by providing the big cats a nutritionally deficient diet.[40] The U.S. Department of Agriculture's (USDA's) Animal and Plant Health Inspection Service inspections revealed that only kibble designed for bears, dogs, and cats was available to the ring-tailed lemurs, and there appeared to be dog kibble contaminated by flies in a food receptacle for the macaques.[41] Dog food does not provide an appropriate diet for nonhuman primates, setting aside the contamination from the flies.[42]

The Lowes also failed to employ a qualified attending veterinarian and provide the animals under their care timely and adequate veterinary care, causing the animals to suffer needlessly.[43] In just over one

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[34] 16 U.S.C. § 1540(e)(4)(A).
[35] Complaint for Forfeiture, *supra* note 6, at 10.
[36] *See id.* at 10, 54–56 (describing ring-tailed lemurs pups separated from their mothers and placed with tiger cubs for "playtime" sessions available to the public).
[37] *See id.* at 11.
[38] *See id.* at 10, 16–41.
[39] *See id.* at 16.
[40] *Id.* at 16–17. *See also id.* at 17–26 (describing specific animals harmed by complications from metabolic bone disease).
[41] *See id.* at 26, 54.
[42] *See id.*
[43] *See id.* at 26–27.

year, at least 10 ESA-protected big cats that had been in the custody or control of the Lowes died.[44] Several of the Lowes' big cats suffered complications resulting from overbreeding, for which the Lowes failed to seek adequate medical care; others suffered complications from medical issues that were not timely or adequately addressed or went untreated entirely.[45] The Lowes' failure to provide adequate care ultimately resulted in the animals' deaths.

The Lowes' lack of veterinary care affected the ring-tailed lemurs, as well, because they are primates that require specialized care.[46] A qualified veterinarian was also required to direct and approve an environment enhancement plan, as required by law, to include provisions addressing the social needs of nonhuman primates of species known to exist in social groups in nature—like ring-tailed lemurs.[47] The Lowes had neither a qualified veterinarian nor an environment enhancement plan, and they appeared to decide the ring-tailed lemurs' social groups based primarily on breeding, rather than any accepted professional standards.[48]

The Lowes also improperly housed their exotic animals. For example, they failed to provide their big cats adequate shelter to protect them from the elements and failed to provide many animals with enclosures of sufficient size to permit normal activity.[49] The big cats' housing conditions were also unsanitary: Rotting animal carcasses, spoiled meat, trash, and biological debris attracted many flies, which then attacked the animals, causing harm.[50]

On these facts, the court concluded that the big cats, jaguar, and ring-tailed lemurs had been harmed and harassed and therefore "taken" in violation of the ESA, and the Lowes lacked authorization to "take" ESA-protected animals under the statute.[51]

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[44] *See id.* at 27.
[45] *See id.* at 27–28.
[46] *See id.* at 53.
[47] *See id.* at 53–54.
[48] *See id.*
[49] See *id.* at 42–46.
[50] *See id.* at 46–52.
[51] *See id.* at 16; Default Judgment and Final Order of Forfeiture, *supra* note 14. *See also* Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Justice Department Ensures Jeffrey and Lauren Lowe Are Permanently Prohibited from Exhibiting Animals and Terminates Their Interests in Seized Animals (Jan. 3, 2022) (under the terms of a consent decree, the Lowes agreed not to file any claim in the parallel civil forfeiture proceeding, in which the United States took title to animals seized from Tiger King Park).

III. What is asset forfeiture?

Asset forfeiture is when the government takes property without compensation because the property is connected to criminal activity.[52] Forfeiture is sometimes confused with restitution. Both are mandatory in criminal cases, and they may be imposed in identical amounts.[53] But restitution and forfeiture differ in purpose. While restitution compensates victims for losses, forfeiture punishes criminals and seeks to deprive them of their ill-gotten gains.[54]

Forfeiture must be authorized by statute. No single statute authorizes the forfeiture of all proceeds of any crime or all property used to commit or facilitate the commission of the crime; instead, various federal statutes authorize forfeiture of property connected to criminal activity.[55] Depending on the crime, the government can forfeit property if the property constitutes proceeds of crime and is traceable to proceeds, if it facilitates crime, or if it is involved in certain offenses.[56]

The most frequently used forfeiture statutes relate to drugs, firearms, money laundering and fraud, terrorism, organized crime, and child sexual exploitation.[57] But forfeiture authority also exists for violations of many commonly charged wildlife-related statutes.[58] For example, the government has forfeiture authority in connection with violations of the ESA,[59]

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[52] *See* U.S. Dep't of Justice, Money Laundering and Asset Recovery Section, *Civil Asset Forfeiture: Purposes, Protections, and Prosecutors*, 67 DOJ J. Fed. L. & Prac. 3, 6 (2019) [hereinafter *Civil Asset Forfeiture*]. *See also* Lynn A. Long, *The Lacey Act and Civil Forfeiture: Can the Government Sell Forfeited Wildlife and Plants?*, 31 Geo. Env't L. Rev. 65, 70 (2018) ("Forfeiture is 'the taking by the government of property that is illegally used or acquired, without compensating the owner.'") (citation omitted).

[53] *See* Sharon Cohen Levin, *The Interplay Between Forfeiture and Restitution in Complex Multivictim White-Collar Cases*, 26 Fed. Sent'g Rep. 10 (2013).

[54] *See id.* at 10–11 (citing United States v. Awad, 598 F.3d 76, 78 (2d Cir. 2010)).

[55] Katharine Goepp & Elinor Colbourn, *Forfeiture Primer for Plant and Wildlife Cases*, 60 U.S. Att'ys' Bull. 17 (July 2012).

[56] *See, e.g.*, 18 U.S.C. §§ 981, 982.

[57] 21 U.S.C. §§ 853, 881 (drugs); 18 U.S.C. §§ 924(d), 934; 26 U.S.C. § 5872 (firearms); 18 U.S.C. §§ 981–982 (money laundering and fraud); 18 U.S.C. § 981(a)(1)(G) (terrorism); 18 U.S.C. § 1963 (organized crime); 18 U.S.C. §§ 2253–2254 (child sexual exploitation).

[58] Goepp & Colbourn, *supra* note 55, at 19–21 (listing plant and wildlife-related forfeiture statutes).

[59] 16 U.S.C. §§ 1531–1544, 1538(a)(1). The ESA is also a specified unlawful activity (SUA) for money laundering. *See* 18 U.S.C. § 1956(c)(7)(G) (identifying ESA offenses as SUAs for money laundering); 18 U.S.C. § 981(a)(1)(C) (authorizing civil forfeiture for proceeds traceable to violations of any offense constituting an SUA); 28 U.S.C. § 2461(c) (authorizing criminal forfeiture for any offense for which civil

the AWA,[60] and the Lacey Act,[61] among other wildlife-related statutes.

Many wildlife-related statutes authorize forfeiture of the animals or plants involved in or used to facilitate the violation.[62] For example, the ESA authorizes the forfeiture of "[a]ll fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported" contrary to the ESA.[63] The ESA also authorizes the forfeiture of certain property used to facilitate ESA violations, such as "guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation" used in the violation, upon a criminal conviction.[64]

Other statutes authorize forfeiture of the proceeds of criminal violations. Specifically, for crimes that are statutory specified unlawful activities (SUAs) for money laundering under the money laundering statutes, the government has authority to forfeit the proceeds of those violations.[65] The ESA is an SUA for money laundering.[66] For ESA violations, the government has authority to forfeit not just the proceeds of those violations, but also any facilitating property used to commit the violation, including the wildlife itself.

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forfeiture authority exists).

[60] *See* 7 U.S.C. § 2156(e) (authorizing forfeiture of animals involved in violations of the prohibition on animal fighting ventures).

[61] *See* 16 U.S.C. § 3374 (authorizing forfeiture of all fish or wildlife or plants bred, possessed, imported, exported, transported, sold, received, acquired, or purchased in violation of the Lacey Act and its implementing regulations, as well as forfeiture of all vessels, vehicles, aircraft, and other equipment used in connection with a violation that results in a felony conviction). *See also* Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 Pub. Land L. Rev. 27, 72 (1995) (describing forfeiture under the Lacey Act).

[62] *See* Andrea Gelatt & Sheila Einsweiler, *Civil and Administrative Remedies for Wildlife and Plant Violations*, 63 U.S. Att'ys' Bull. 69, 76 (2015).

[63] 16 U.S.C. § 1540(e)(4)(A).

[64] *Id.* at § 1540(e)(4)(B).

[65] *See* 18 U.S.C. § 1956(c)(7)(G) (identifying certain ESA, African Elephant Conservation Act, and the Rhinoceros and Tiger Conservation Act of 1994 offenses as SUAs for money laundering); 18 U.S.C. § 981(a)(1)(C) (authorizing civil forfeiture for proceeds traceable to violations of any offense constitution an SUA); 28 U.S.C. § 2461(c) (authorizing criminal forfeiture for any offense for which civil forfeiture authority exists). For a discussion of the importance of money laundering charges in a wildlife investigation and prosecution, see *infra* section IV.

[66] *See* 18 U.S.C. § 1956(c)(7)(G) (identifying certain ESA, African Elephant Conservation Act, and the Rhinoceros and Tiger Conservation Act of 1994 offenses as SUAs for money laundering).

A. Types of asset forfeiture: criminal and civil

The federal government may pursue criminal or civil forfeiture of property connected to crime.[67] Criminal and civil forfeiture proceedings, independently or in conjunction with one another, ensure the underlying purpose and effect of the criminal statute is honored.[68]

Different authorities and practices govern each type of forfeiture.[69] In all forfeiture cases, however, the government bears the burden of proving the property subject to forfeiture is connected to criminal activity.

1. Criminal forfeiture

Criminal forfeiture is part of the criminal prosecution of a defendant. It requires a criminal conviction and is part of the defendant's sentence.[70] Criminal forfeiture is limited to the property interests of the defendant, including any proceeds earned through the defendant's illegal activity.[71] It is also limited to the property involved in the counts on which the defendant is convicted or to which they plead guilty.[72]

As part of sentencing, a court may order the forfeiture of a specific piece of property listed in the indictment or—if the proceeds themselves were dissipated or are otherwise unrecoverable—a sum of money or other property equivalent to proceeds obtained through the criminal act.[73] As with the conviction itself, the sentence, including forfeiture, may be appealed to a higher court.[74]

2. Civil forfeiture

Civil forfeiture is available when a crime has been committed, but for any number of reasons, the criminal process is insufficient. There are two types of civil forfeiture proceedings.

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[67] *See generally* 18 U.S.C. § 981 (authorizing civil forfeiture); 18 U.S.C. § 982 (authorizing criminal forfeiture); 21 U.S.C. § 853 (authorizing criminal forfeiture).

[68] *See Civil Asset Forfeiture, supra* note 52, at 6. *See also* Goepp & Colbourn, *supra* note 55, at 21 (stating that administrative, civil judicial, and criminal forfeiture "are not mutually exclusive and may be employed together or alternatively in a given case"); U.S. Dep't of Just., Crim. Div., Asset Forfeiture Policy Manual 5–8 (2023).

[69] *See* 18 U.S.C. §§ 981, 983; 21 U.S.C. § 853; 19 U.S.C. §§ 1602–1621; Goepp & Colbourn, *supra* note 55, at 21–28 (describing procedures for administrative, civil judicial, and criminal forfeiture). *See generally* U.S. Dep't of Just., Crim. Div., Asset Forfeiture Policy Manual (2023).

[70] *See Civil Asset Forfeiture, supra* note 52, at 6.

[71] *See id.*

[72] *See id.*

[73] *See id.*

[74] *See id.*

Civil judicial forfeiture is a court action against property linked to a criminal offense, rather than against the wrongdoer.[75] It is an *in rem* action in which the property to be forfeited is named as the defendant. It does not depend upon criminal proceedings or a criminal conviction.[76]

Administrative forfeiture is an administrative agency action against certain types of property linked to a criminal offense, civil in nature but without judicial intervention.[77] Like civil judicial forfeiture, administrative forfeiture does not depend upon criminal proceedings or a criminal conviction. Administrative forfeiture may occur only for certain statutorily enumerated types of property and only if no one asserts a claim to the property subject to forfeiture.[78] If an agency receives a timely claim contesting an administrative forfeiture, the administrative forfeiture process stops and the agency refers the matter to the U.S. Attorney's Office, which must either commence a civil judicial or criminal forfeiture action or return the property.[79]

B. Why isn't criminal forfeiture enough?

Criminal forfeiture takes place only after a conviction and is part of a defendant's criminal sentence. While obtaining a criminal conviction is ideal, sometimes it is not possible to charge an individual—or even to identify a culprit.[80]

For example, criminally tainted property may be in the possession of someone other than the person who committed the crime.[81] Criminals frequently hide assets in the possession of third parties, like family members or trusted confederates, or use shell or shelf companies to conceal assets connected to crime.[82]

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[75] *See* Goepp & Colbourn, *supra* note 55, at 23–26 (describing civil forfeiture).
[76] *See Civil Asset Forfeiture, supra* note 52, at 7.
[77] *See* 19 U.S.C. § 1607 (authorizing administrative forfeiture for certain types of property under $500,000).
[78] *See id.*; *Civil Asset Forfeiture, supra* note 52, at 12–13; Goepp & Colbourn, *supra* note 55, at 21.
[79] *See* 18 U.S.C. § 983(a)(3)(A). *See Civil Asset Forfeiture, supra* note 52, at 12–13.
[80] *See Civil Asset Forfeiture, supra* note 52, at 18.
[81] *See id.* at 18.
[82] *See id.* at 18–19. *See, e.g.*, Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Justice Department Files Complaint against Jeffrey Lowe and Tiger King LLC for Violations of the Endangered Species Act and the Animal Welfare Act (Nov. 19, 2020)

> Lowe has previously claimed to be above the law and, "If we lose a lawsuit, we simply change the name and open another business someplace else." Days later, Lowe unilaterally terminated his license and sought to put his operation beyond USDA inspection and investigation. The Lowes then moved animals to a property in Thackerville, Oklahoma, located in

In other cases, the government may be able to identify the criminals, but the bad actors are located outside the United States.[83] When criminals are beyond the reach of the U.S. judicial system, a criminal conviction with associated criminal forfeiture may be impossible.[84] While some bad actors are never subject to U.S. courts' jurisdiction, other defendants become fugitives and flee the jurisdiction.

In some cases, a criminal defendant may die before conviction, sentencing, or while an appeal is pending.[85] In those circumstances, the criminal case ceases and terminates criminal forfeiture authority over the property.[86]

In other cases, criminal defendants may be difficult or even impossible to identify.[87] For example, stolen art and other items of cultural significance may appear for sale in an auction house or gallery with no clear path to the person or group that originally stole the artifact.[88] The current possessor of the artifact may have no knowledge of its history and no culpability in the original theft, but could not be considered a lawful owner of the artifact or antiquity.[89]

Some cases may not result in criminal prosecution. For example, a bad actor may be committing a violation of regulatory or licensing requirements, but not of criminal law. Or even if there is a criminal prosecution, the defendant may be charged with a crime that does not support the forfeiture, or the defendant may not be convicted of the offense that gave rise to the property seized for forfeiture.[90]

In still other cases—including the Tiger King case—the property subject to forfeiture may be living.[91] Living or perishable property requires

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> the middle of a rural, residential area. The Lowes have made public statements that the new Thackerville facility will be named "Tiger King Park" and will operate as a film set for television shows and other video content. The Lowes do not have a license to exhibit animals.

Id.

[83] *See Civil Asset Forfeiture, supra* note 52, at 19–22.

[84] *See id.* at 18.

[85] *See id.* at 23.

[86] *See id.*

[87] *See id.* at 24–26.

[88] *See id.*

[89] *See id.*

[90] Goepp & Colbourn, *supra* note 55, at 28.

[91] *See id.* at 24, 29. *See also, e.g.*, *Help Rescue a Dog*, U.S. Marshals Service, https://www.usmarshals.gov/what-we-do/asset-forfeiture/help-rescue-dog (last visited Oct. 18, 2024) ("The [U.S.] Marshals Service (USMS) supports the removal of canines from illegal fighting situations nationwide as a part of its integral role in the Department of Justice Asset Forfeiture Program. The enforcement of animal welfare laws is very important to the USMS . . . .").

significant, costly, and sometimes cumbersome maintenance pending resolution of the criminal case.[92] For wild animals, for example, law enforcement may need to "mak[e] special arrangements for temporary housing with an accredited wildlife sanctuary or zoo" during the pendency of the legal proceedings.[93]

Civil forfeiture actions fill these gaps. Civil forfeiture permits the government to recover tainted assets in the circumstances described in the paragraphs above,[94] even in cases where a criminal conviction may not be possible, because it is an action against the property itself, and does not depend on a criminal conviction.[95]

Civil forfeiture serves an important purpose in cases involving living or perishable assets. Criminal cases can last for years—with criminal forfeitures completed only at criminal sentencing, and stayed pending appeal.[96] To minimize harm to the animals and to control the costs of their housing and maintenance pending final resolution, forfeiture actions involving live animals should be expedited to the extent possible.[97] Administrative and civil judicial forfeiture actions are often resolved more expeditiously than criminal forfeitures; therefore, they provide a practical solution to resolve questions about title and care of living animals seized in connection with

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[92] *See Civil Asset Forfeiture, supra* note 52, at 24; Goepp & Colbourn *supra* note 55, at 29. *See, e.g.*, *Cost of Care Toolkits: State-by-State*, The Humane Soc'y of the U.S. https://humanepro.org/page/cost-care-toolkits-state-state (last visited Oct. 18, 2024) (describing the costs associated with the seizure of animals by law enforcement); Governor's Commission on the Humane Treatment of Animals, Cost Analysis of Animal Cruelty in New Hampshire 5–7 (2008) (describing costs of animal cruelty investigations and prosecutions).

[93] Goepp & Colbourn*, supra* note 55, at 29.

[94] *See* discussion *supra* section III.B.

[95] *See Civil Asset Forfeiture*, *supra* note 52, at 7–8; Goepp & Colbourn*, supra* note 55, at 26 ("Because civil forfeiture is completely separate from the criminal case, the forfeiture action may be filed before indictment, after indictment, or with no criminal case at all."); *id.* at 28

> A parallel civil forfeiture proceeding provides forfeiture authority when a criminal forfeiture proceeding falls through, such as when the defendant is a fugitive or dies or when the defendant is acquitted of the offense giving rise to the forfeiture. . . . [T]he government may wish to use civil forfeiture on its own if prosecutors decide not to pursue the related criminal case or if the property at issue is forfeitable based on an offense that is not being charged in the criminal prosecution.

Id.; Gelatt & Einsweiler*, supra* note 62, at 76 (the government may pursue civil forfeiture in the trophy hunter example because the government need not show the knowledge and intent of the violator in the civil forfeiture action).

[96] *See Civil Asset Forfeiture, supra* note 52, at 24.

[97] Goepp & Colbourn*, supra* note 55, at 29.

criminal activity.[98]

Additionally, wildlife-related cases often present unique challenges to criminal prosecution and forfeiture that civil forfeiture actions may address. For example, importation cases may challenge a prosecutor's ability to prove knowing violations of the ESA. Consider a trophy hunter who attempts to import hides and skulls with missing or improper permits, in violation of law, and "claim[s] that the airline lost the paperwork, or that the export country or import broker acted improperly with respect to the permits."[99] In that circumstance, prosecutors may lack sufficient evidence to prove the trophy hunter committed a knowing violation of the ESA, as required to pursue ESA criminal charges.[100] The government, however, may pursue civil forfeiture of the items imported contrary to law, even if it cannot pursue a criminal investigation of the trophy hunter.[101]

IV. Why forfeiture?

Criminal activity is often carried out for the primary purpose of financial gain.[102] The abuse or exploitation of exotic animals, like those housed in Tiger King Park, is no different; big money lies in tiger sales,[103] cub petting,[104] and illegal wildlife trafficking in general.[105]

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[98] *See id.* at 22 ("An administrative forfeiture is the simplest and most efficient mechanism for forfeiture and the vast majority of forfeitures are uncontested administrative forfeitures.").

[99] Gelatt & Einsweiler, *supra* note 62, at 76.

[100] *Id.*

[101] *Id.* at 76–77.

[102] *See Civil Asset Forfeiture*, *supra* note 52, at 8; Financial Action Task Force, Money Laundering and the Illegal Wildlife Trade 36 (2020) [hereinafter FATF] (wildlife trafficking is motivated by profit).

[103] For example, captive tigers sold by "tiger zoos" may range in price from $2,000 to $30,000, depending on the tigers' age, color pattern, and breeding potential. *See* FATF, *supra* note 102, at 18.

[104] *See* Miller, *supra* note 3 ("[T]he most lucrative income stream for large-cat owners lies within cuddly lion and tiger cubs."). Public reporting indicates that Exotic raked in cash via a mobile petting zoo, through which he charged customers to pet and take photos with tiger cubs; his business partner, and later the owner of Tiger King Park, Jeff Lowe, at one time raised money by sneaking tiger cubs into Las Vegas hotel rooms and charging clients $2,000 apiece to pet them. *See* Moor, *supra* note 3. Cub-petting is now prohibited under federal law. *See* Big Cat Public Safety Act, Pub. L. No. 117-243, 136 Stat. 2336 (2022) (amending the Lacey Act Amendments of 1981, 16 U.S.C. § 3371).

[105] FATF, *supra* note 102, at 13. *See also* U.S. Dep't of the Treasury, National Money Laundering Risk Assessment 29–30 (2022) [hereinafter NMLRA 2022] (highlighting wildlife trafficking as a money laundering risk; noting that in a study of three dozen wildlife trafficking cases between 2019 and 2021, total criminal proceeds exceeded $30 million); Dep't of the Treasury, National Money Laundering

Although precise figures are difficult to quantify, global international wildlife trafficking proceeds are estimated to be between $7 and $23 billion per year.[106] This comprises the fourth-largest global illegal trade, after narcotics, human trafficking, and counterfeit products.[107] Elephant ivory, pangolin scales, rhinoceros horns, big cats, and protected turtles, among other wildlife and wildlife parts, can generate huge profits for traffickers.[108]

Forfeiture thus serves an important role in wildlife cases. Because these crimes are profit-driven, one of the most effective ways to combat them is to deprive criminals of the proceeds of their crimes through forfeiture.[109] But asset forfeiture also serves to recover the wildlife itself, remove the tools or instrumentalities of the crime from the bad actors so that they cannot continue their illicit conduct, deter others from committing similar crimes, and provide incentive for others dealing in wildlife to take affirmative steps to ensure their products are legally acquired and traded; this in turn helps to diminish the market for illegally sourced wildlife.[110]

Risk Assessment 41–42 (2024) [hereinafter NMLRA 2024] (updating money laundering risk assessment for illegal wildlife trafficking, nothing that wildlife trafficking poses a "unique money laundering threat to the United States").

[106] FATF, *supra* note 102, at 13.

[107] *See Wildlife: Why Should We Care?*, Dep't of Homeland Sec., Immigr. & Customs Enf't, https://www.ice.gov/features/wildlife#:~:text=Wildlife%20trade%20threatens%20the%20local,other%20forms%20of%20habitat%20destruction (last visited Oct. 18, 2024); Financial Crimes Enforcement Network, Financial Threat Analysis: Illicit Finance Threat Involving Wildlife Trafficking and Related Trends in Bank Secrecy Act Data 4 (2021) [hereinafter FinCEN] (citing United Nations Off. on Drugs & Crime, World Wildlife Crime Report: Trafficking in Protected Species 14 (2016)).

[108] *See* NMLRA 2022, *supra* note 103, at 30 (noting that in a study of three dozen wildlife trafficking cases between 2019 and 2021, total criminal proceeds exceeded $30 million). *See also, e.g.*, Press Release, U.S. Att'y's Off., S.D.N.Y., Fifth Defendant Sentenced to 48 Months in Prison for Large-Scale Trafficking of Rhinoceros Horns and Elephant Ivory and Heroin Conspiracy (May 11, 2023) (defendant trafficked large quantities of rhinoceros horns and elephant ivory worth more than $7 million); Press Release, U.S. Att'y's Off., S.D.N.Y., Teo Boon Ching Sentenced to 18 Months in Prison for Large-Scale Trafficking of Rhinoceros Horns (Sept. 19, 2023) (trafficked rhinoceros horns had an estimated value of $2.1 million); Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Foreign National Sentenced for Money Laundering Funds to Promote Turtle Trafficking (Oct. 6, 2021) (defendant smuggled at least 1,500 protected turtles value at more than $2.25 million).

[109] *See generally* Off. of the Att'y Gen., The Attorney General's Guidelines on the Asset Forfeiture Program (2018) [hereinafter AG Guidelines] (encouraging the Department to "use asset forfeiture to the fullest extent possible" to combat crime).

[110] *See* Goepp & Colbourn, *supra* note 55, at 17; FATF, *supra* note 102, at 58 ("To diminish the profit motive and deprive criminals of facilitating property, countries inves-

Forfeiture serves several important law enforcement purposes. As the U.S. Supreme Court has recognized:

> Forfeitures help to ensure that crime does not pay: They at once punish wrongdoing, deter future illegality, and 'lessen the economic power' of criminal enterprises. . . . The [g]overnment also uses forfeited property to recompense victims of crime, improve conditions in crime-damaged communities, and support law enforcement activities like police training.[111]

Accordingly, the Attorney General has authorized prosecutors to "use asset forfeiture to the fullest extent possible to investigate, identify, seize, and forfeit the assets of criminals and their organizations" because "forfeiture plays a critical role in disrupting and dismantling illegal enterprises, depriving criminals of the proceeds of illegal activity, deterring crime, and restoring property to victims."[112]

A. Forfeiture deters crime

If the purpose of a crime is to make money,[113] then forfeiture is a highly effective tool of deterrence.[114] If a criminal actor is willing to serve a few years in prison and able, upon release, to return to the life of luxury their criminal lifestyle afforded them—fancy homes, cars, jewelry—the benefits of crime may be worth the cost.[115] But if a criminal actor risks not only incarceration but also deprivation of the proceeds of their crime, the risks of crime are higher and crime does not pay.[116] The Department of Justice (Department) has had success in forfeiting the proceeds of various wildlife

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tigating IWT [illegal wildlife trafficking] and related ML [money laundering] should, wherever possible, identify, freeze, seize and confiscate associated assets, including those that extend beyond the trafficked products themselves.").

[111] Kaley v. United States, 571 U.S. 320, 323 (2014) (citing Caplin & Drysdale, Chartered v. United States 491 U.S. 617, 630 (1989)).

[112] AG Guidelines, *supra* note 111, at 1.

[113] *See* FATF, *supra* note 102, at 36 ("As with all criminals, illegal wildlife traffickers are motivated by financial gain."). *See also, e.g.*, Elizabeth Paton, *Celebrity Bag Designer Sentenced to Jail for Smuggling Exotic Skins*, N.Y. Times, https://www.nytimes.com/2024/04/23/fashion/nancy-gonzalez-smuggling-wildlife.html (Apr. 23, 2024) ("'It's all driven by the money,' Thomas Watts-Fitzgerald of the U.S. [A]ttorney's [O]ffice in Miami said on Monday."); Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Luxury Handbag Company, Founder and Co-Conspirator Sentenced for Smuggling Handbags Made from Caiman and Python Skin (Apr. 22, 2024) (protected species exploited for profit).

[114] *See Civil Asset Forfeiture, supra* note 52, at 8.

[115] *See id.*

[116] *See id.*

trafficking schemes.[117]

The seizure and forfeiture of illegal wildlife itself is also a valuable deterrent.[118] Property owners who did not commit (or could not be held liable for) the underlying criminal violation—but who are tempted not to ask basic questions about legality before purchasing wildlife—may nonetheless lose the property acquired or traded illegally via civil forfeiture action.[119] And owners whose property is forfeited because their suppliers were dealing in illegal wildlife will likely take greater care to find a legal source in the future.[120]

B. Forfeiture disrupts criminal activity

Failure to forfeit the instrumentalities of the offense or the facilitating property—anything that makes a crime easier to commit or harder to detect—often leaves criminals with the resources to continue illegal activity.[121] By removing these resources from the hands of wrongdoers through forfeiture, the government thwarts criminals' ability to carry out continued criminal acts.[122] For example, if a drug cartel purchases a boat to transport drugs to the United States, forfeiting the boat disrupts the

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[117] Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Florida Couple Pleads Guilty to Trafficking Indonesian Wildlife (Jan. 15, 2020) (defendants imported and resold taxidermy mounts, bones, skins, belts, and wallets of protected species, valued at a total of $211,212); Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Antiques Dealer Sentenced in Manhattan to Two Years in Prison for Smuggling Cups Made from Rhinoceros Horns (Nov. 13, 2015) (defendant ordered to forfeit $1 million, the market value of "libation cups" carved from rhinoceros horns smuggled from the United States to China); Press Release, U.S. Dep't of Just., Off. of Pub. Affs., New Jersey Man Sentenced to 33 Months in Prison for Trafficking in Illegally-Imported Narwhal Tusks and Money Laundering (Jan. 12, 2015) (defendant ordered to forfeit $85,089, six narwhal tusks and one narwhal skull, noting that the market value of teeth and tusks was between $120,000 and $200,000); Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Ringleader of International Rhino Smuggling Conspiracy Sentenced in New Jersey to 70 Months in Prison for Wildlife Trafficking Crimes (May 28, 2014) (defendant ordered to forfeit $3.5 million in proceeds, and admitted to selling 30 smuggled, raw rhinoceros horns worth approximately $3 million to factories in China where they were carved into fake antiques).

[118] Goepp & Colbourn, *supra* note 55, at 14.

[119] *Id.*

[120] *Id.* at 17.

[121] *See Civil Asset Forfeiture, supra* note 52, at 9; Cohen Levin, *supra* note 53, at 10 (citing 21 U.S.C. § 853(e), (f); 18 U.S.C. §§ 981, 984).

[122] *See, e.g.*, FATF, *supra* note 102, at 36 ("[O]ne of the most effective ways to combat IWT is to deprive criminals of the proceeds and instrumentalities of these crimes and the means to commit further offences (e.g. arms, hunting tools and animals, vehicles, and equipment used to preserve the wildlife.").

cartel's ability to continue to transport narcotics.[123]

The same is true in wildlife cases. Where permitted by statute, forfeiting facilitating property used in a wildlife violation—like guns, traps, or vessels used to transport animals—disrupts criminals' ability to continue their illegal operations.[124]

C. Forfeiture allows for victim compensation and repatriation

Federal forfeiture laws have provisions that allow the government to take steps to preserve assets so they may be returned to victims.[125] Moreover, Congress vested the Attorney General with the discretion to use forfeited assets to compensate victims.[126] Under the Attorney General's discretionary authority, the Department may compensate victims with forfeited assets through remission or restoration procedures.[127]

Wildlife trafficking-related crimes are less likely than other federal crimes to have direct victims compensable under the regulations governing remission and mitigation or the restoration procedures.[128] Forfeited assets are often the trafficked species or parts themselves.[129] In appropriate cases, however, the Department may be able to return illegally trafficked wildlife to the country of origin.

For example, the United States repatriated seven rare boa constrictors to the government of Brazil in 2015.[130] The seven boa constrictors were the offspring of a rare and extremely valuable white boa constrictor found in the Niteroi district of Rio de Janeiro in 2006.[131] Because of the snake's

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[123] *See Civil Asset Forfeiture, supra* note 52, at 9.

[124] *See, e.g.*, 16 U.S.C. § 1540(e)(4), (5) (authorizing forfeiture of guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid the violation).

[125] *See Civil Asset Forfeiture, supra* note 52, at 9.

[126] *See* 21 U.S.C. § 853(e); 18 U.S.C. § 981(e); 28 C.F.R. Part 9.

[127] *See* AG Guidelines, *supra* note 111, at 14–15.

[128] *See generally* 28 C.F.R. Part 9 (regulations governing remission or mitigation of forfeitures).

[129] *See* FATF, *supra* note 102, at 36

> [T]here are often no assets linked to the underlying offences that can be legally converted into assets to fund compensation for victims or otherwise benefit law enforcement or even wildlife conservation causes. In many cases, the assets confiscated in wildlife crime seizures consist primarily of the trafficked species or parts.

Id.

[130] Press Release, U.S. Dep't of Just., Off. of Pub. Affs., United States Repatriates Seven Boa Constrictors to Brazil (June 17, 2015).

[131] *See id.*

rarity, Brazilian authorities housed the white boa at the Niteroi Zoo, a private foundation that rescued and rehabilitated injured wild animals.[132] In 2009, a U.S.-based collector, breeder, and seller of reptiles traveled to Brazil, secured possession of the snake, and unlawfully returned with it back to the United States.[133] After learning that the U.S. collector was marketing snakes bred from a rare white boa, the Brazilian government requested assistance from the United States in securing the return of the boa and any offspring.[134] Although the white boa later died, as part of the U.S. collector's guilty plea to unlawfully transporting wildlife into the United States, he agreed to forfeit the boa's offspring to the United States.[135] The United States asked the court to amend the preliminary order of forfeiture to recognize the government of Brazil's claim of ownership of the reptiles because the boa had been caught in the Brazilian wild.[136] The court entered a final order of forfeiture awarding the offspring of the white boa to the government of Brazil, and the United States was able to repatriate them.[137]

V. What about money laundering?

As described above, asset forfeiture is a critical part of an overall strategy in wildlife cases.[138] But money laundering charges are no less important. The broad forfeiture provisions of the money laundering statutes make money laundering charges some of the most powerful tools in a federal prosecutor's arsenal.

A. What is money laundering?

Money laundering is taking criminal profits and moving them in a prohibited manner.[139] Money launderers make "dirty" money—money derived from the proceeds of SUAs[140]—appear "clean" by hiding its source, nature, location, ownership, or control; they move the proceeds of crime to conceal, promote, or expand a criminal scheme or to avoid suspicion or reporting obligations.[141]

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[132] *See id.*
[133] *See id.*
[134] *See id.*
[135] *See id.*
[136] *See id.*
[137] *See id.*
[138] *See* discussion *supra* section III.
[139] *See* 18 U.S.C. §§ 1956–1957.
[140] *See* 18 U.S.C. § 1956(a)(1); *id.* § 1956(c)(7) (listing all crimes identified as SUAs for money laundering).
[141] *See* Congressional Research Service, Money Laundering: An Overview

B. Money laundering statutes

Title 18, U.S. Code, Sections 1956–1957 are the key federal statutes prohibiting money laundering.[142] Title 18, U.S. Code, Section 1956 prohibits several types of money laundering: promotional money laundering, concealment money laundering, international money laundering, and "sting" money laundering.[143] The "promotion" prong of the statue prohibits using dirty money to commit or facilitate the commission of another SUA offense.[144] The "concealment" prong of 18 U.S.C. § 1956 prohibits conducting a financial transaction involving SUA proceeds in a way that conceals or disguises the source, nature, location, ownership, or control of the money.[145] The international prong of 18 U.S.C. § 1956 prohibits the transfer or transportation of money into or out of the United States to commit an SUA offense, even if the money was clean at the time it was transferred or transported.[146] Finally, the sting provision of 18 U.S.C. § 1956 makes it a crime for a person to launder money they think is dirty because an undercover law enforcement officer represented that the money was SUA proceeds.[147]

Title 18, U.S. Code, Section 1957 makes it a crime to engage in a financial transaction of more than $10,000 using proceeds derived from an SUA.[148] This is known as the "spending statute." It is intended to make it hard for criminals to spend their ill-gotten gains.

The money laundering statutes carry broad forfeiture authorities; in addition to authorizing forfeiture of the proceeds of a money laundering offense and facilitating property, the statutes also authorize the forfeiture of property involved in the money laundering offense.[149] This means that, in appropriate cases, the government may forfeit both the money being laundered and the money or other property that is commingled with it when the money laundering takes place. For example, in a money laundering case, the government may forfeit "clean money the defendant used to conceal or disguise laundered funds, the legitimate business he used as

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of 18 U.S.C. § 1956 and Related Federal Criminal Law 1–2 (2017) [hereinafter Money Laundering] (citing 18 U.S.C. §§ 1952, 1956, 1957; 31 U.S.C. § 5324).

[142] 18 U.S.C. §§ 1956–1957. Other federal statutes relevant to money laundering include: 18 U.S.C. §§ 1952, 1956–1957, 1960; 31 U.S.C. §§ 5322, 5324, 5332. For an overview of money laundering-related federal statutes, *see generally* Money Laundering, *supra* note 143.

[143] 18 U.S.C. § 1956.

[144] *Id.* § 1956(a)(1)(A)(i).

[145] *Id.* § 1956(a)(1)(B)(i).

[146] *Id.* § 1956(a)(2)(A).

[147] *Id.* § 1956(a)(3).

[148] *Id.* § 1957. *See* Money Laundering, *supra* note 143, at 21–24.

[149] *See* 18 U.S.C. § 981(a)(1)(A), 982(a)(1); 31 U.S.C. §§ 5317(c), 5332.

a front for his money laundering operations, and real property, securities, and luxury items in which he invested the laundered funds to keep them hidden from view."[150]

C. Why focus on money laundering?

Because of the broad reach of the money laundering statutes' forfeiture authorities, the pursuit of money laundering investigations and charges, when appropriate, complements the goals of the Department's Asset Forfeiture Program.[151] Just as "forfeiture plays a critical role in disrupting and dismantling illegal enterprises, depriving criminals of the proceeds of illegal activity, deterring crime, and restoring property to victims," so too can money laundering investigations and prosecutions.[152]

And in a broader sense, efforts to combat illicit finance of all kinds are critical. "Illicit finance threatens U.S. national security, prosperity, and the viability of democracy."[153] Combating money laundering has broad effects in protecting the national and global financial systems. International cooperation to combat money laundering—including specifically that connected to illegal wildlife trade—helps mitigate the threats.[154]

D. Why charge money laundering in a wildlife-related case?

When authorized by statute, investigators and prosecutors should consider pursuing money laundering cases predicated on wildlife-related crimes.[155]

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[150] Stefan D. Cassella, *The Forfeiture of Property Involved in Money Laundering Offenses*, 7 Buff. Crim. L. Rev. 583, 585–86 (2004).

[151] *See* AG Guidelines, *supra* note 111, at 1.

[152] *See id.*

[153] U.S. Dep't of the Treasury, 2024 National Strategy for Combating Terrorist and Other Illicit Financing (2024).

[154] *See* FATF, *supra* note 102.

[155] *See* 18 U.S.C. § 1956(c)(7)(G) (identifying ESA, African Elephant Conservation Act, and the Rhinoceros and Tiger Conservation Act of 1994 offenses as specified unlawful activities (SUAs) for money laundering); *id.* § 981(a)(1)(C) (authorizing civil forfeiture for proceeds traceable to violations of any offense constituting an SUA); 28 U.S.C. § 2461(c) (authorizing criminal forfeiture for any offense for which civil forfeiture authority exists). Other wildlife-related crimes—the Lacey Act, for example—are not currently predicate offenses for money laundering. This article does not take a position on whether the money laundering statutes should be amended to include other wildlife-related crimes as SUAs for money laundering. For a discussion of potential changes, however, *see* Vanessa Dick, *Dirty Money and Wildlife Trafficking: Using the Money Laundering Control Act to Prosecute Illegal Wildlife Trade*, 49 Env't L. Rep. News & Analysis 10334 (2019).

1. Money laundering charges carry significant penalties

Wildlife trafficking has been described "as a crime with high profit and low risk," because "the majority of criminal prosecutions involve charges limited to violations of wildlife statutes that primarily have low fines, minimal jail time, and forfeiture provisions restricted to the illegal wildlife products."[156] Financial charges generally carry harsher penalties than many wildlife trafficking statutes.[157] And as described above, money laundering charges carry more fulsome forfeiture authorities.[158] Therefore, pursuit of appropriate financial charges and corresponding forfeitures may serve to disrupt and deter wildlife traffickers more than would convictions and forfeitures under individual wildlife-related statutes.[159]

2. Wildlife crime is often connected with other criminal activity

Wildlife traffickers use the international financial system to move, hide, and launder the proceeds of their crimes.[160] And those crimes are often not limited to wildlife trafficking; they are tied to foreign corruption, drug trafficking, and other organized crime.[161] For these reasons, wildlife trafficking poses a unique threat to the U.S. financial system.[162]

The 2024 National Money Laundering Risk Assessment highlighted an example of a wildlife trafficking case with ties to other criminal activity—and *Tiger King*, no less. On November 6, 2023, Bhagavan "Doc" Antle, owner and operator of a South Carolina-based safari park, pleaded guilty to money laundering and conspiracy.[163] Antle, who appeared on season one of *Tiger King*, conducted financial transactions with cash he

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[156] *Id.* (internal citations omitted). *See also* FinCEN, *supra* note 109, at 2.
[157] Dick, *supra* note 158, at 10335 (internal citations omitted).
[158] *See* discussion *supra* section IV.C.
[159] *See generally id.*
[160] *See* NMLRA 2024, *supra* note 103, at 41–42; FinCEN, *supra* note 109, at 4 ("To move, hide, and launder their proceeds, wildlife traffickers exploit weaknesses in financial and non-financial sectors, enabling further wildlife crimes and damaging financial integrity.").
[161] *See* NMLRA 2024, *supra* note 103, at 41–42. *See also* NMLRA 2022, *supra* note 103, at 29–30; FinCEN, *supra* note 109, at 2, 4–5 (describing wildlife trafficking's "convergence" with corruption and transnational criminal organizations).
[162] *See* NMLRA 2024, *supra* note 103, at 41–42. *See also* NMLRA 2022, *supra* note 103, at 29–30; FinCEN, *supra* note 109, at 2, 4–5 (describing wildlife trafficking's "convergence" with corruption and transnational criminal organizations).
[163] Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Doc Antle, Owner of Myrtle Beach Safari, Pleads Guilty to Federal Wildlife Trafficking and Money Laundering Charges (Nov. 6, 2023).

believed was obtained from transporting and harboring illegal aliens. He also directed the sale or purchase of ESA-protected animals, violating the Lacey Act, among other crimes.[164]

VI. Conclusion

Leveraging money laundering and asset forfeiture authorities will strengthen law enforcement's response to wildlife-related cases. These authorities can immediately benefit mistreated individual animals in the early days of a case because they authorize the animals' removal. Ultimately, quieting title through forfeiture can also help the government ensure that illegally trafficked wildlife may be placed with accredited sanctuaries across the country.

Environmental crime investigations that also include financial investigations can help take the profits of environmental crimes and disrupt and dismantle criminal activity that may involve not only environmental crimes, but other crimes as well. These investigations and prosecutions enhance the government's efforts to combat illicit finance in all forms.

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[164] *See id.*

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MLARS would like to thank our colleagues at the Department's Environmental and Natural Resources Division (ENRD), especially former ENRD attorney Mary Hollingsworth, and the team in the Wildlife and Marine Resources Section, the USDA, U.S. Marshals Service, U.S. Fish and Wildlife Service, and the U.S. Attorneys' Offices for the Eastern and Western Districts of Oklahoma, for their invaluable contributions to the Tiger King *case described in this article.*

Combating Cockfighting: Case Considerations

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I. Introduction

Chickens have inhabited various roles integral to the human experience over the millennia, from being a major food source to backyard pets.[1] They are also in homes—on dish towels, sports swag, and even condiment bottles. Why do they capture so much attention? Perhaps it is because chickens are surprisingly complex. They have the capacity for self-control and deductive reasoning, and they demonstrate behaviors similar to other "highly intelligent" animals.[2] Chickens also have the potential to be fierce fighters, a trait that people have exploited for profit and entertainment.

In the cockfighting world, owners force their adult male chickens—roosters—to fight each other to the death for human entertainment and money. Cockfighting often involves sharp weapons and results in violent and disturbing consequences for the animals. Cockfighting can also pose a threat to public health and the economy. In the United States, such behavior is a criminal offense at the federal level, as codified in the Animal

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[1] Organisation for Economic Co-operation and Develpoment & Food and Agriculture Organization of the United Nations, OECD-FAO Agricultural Outlook 2023–2032 (2023) (noting that poultry production "comprises 59% of total meat production" globally with an expected increase to 62% by 2032); *Backyard Chickens: A Compre-Hen-Sive Guide*, Texas A&M Univ. Coll. of Veterinary Med. & Biomedical Scis. (Sept. 24, 2020), https://vetmed.tamu.edu/news/pet-talk/backyard-chickens-a-compre-hen-sive-guide/ (describing chickens as pets that "provid[e] companionship to make your days a little more sunny side up").

[2] Lori Marino, *Thinking Chickens: A Review of Cognition, Emotion, and Behavior in the Domestic Chicken*, 20 Animal Cognition 127, 141 (2017) (open-source article in National Institute of Health's National Library of Medicine).

Welfare Act's (AWA's) Animal Fighting Venture Prohibition.[3] Additionally, cockfighting is frequently accompanied by other illegal activities such as obstruction, corruption, and gambling.[4]

While humans may have a complex relationship with chickens, prosecuting cockfighting crime does not have to be this way. This article provides a pecking order for strategic planning—from the initial phases of a cockfighting investigation through the prosecution of cockfighting and other related offenses.

II. Cockfighting is a prohibited animal-fighting venture

An essential first step in prosecuting a cockfighting matter is learning about the components of a cockfighting enterprise. The brutality of the practice and the relative lack of statutory deterrence at the state level demonstrate the need for federal enforcement.

A. Cockfighting basics[5]

1. The fight, the weapons, and the pit

A cockfight is a contest in which a person attaches a knife, gaff, or other sharp instrument to the leg of a rooster to fight another rooster.[6] After a cockfighter straps a weapon of choice to a rooster, they face the bird toward another similarly-armed rooster and set it down within a few inches of the other rooster, encouraging them to face off.[7] This results in a fight during which the roosters flap their wings, jump, and kick while stabbing each other with the weapons that are fastened to their legs.[8] In an effort to keep a wounded bird fighting longer, a rooster's handler may place their mouth over the injured rooster's beak to suck fluids from the

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[3] 7 U.S.C. § 2156.

[4] These activities are discussed further *infra* sections III.C and D.

[5] Much of the information in this section comes from federal and state law enforcement agents who are familiar with cockfighting through numerous investigations and covert operations. The authors have worked closely with agents from the U.S. Department of Agriculture Office of the Inspector General, the Federal Bureau of Investigation, and other law enforcement agencies, including state police and local sheriffs' offices, who have assisted in prosecuting various cockfighting operations across the country.

[6] Press Release, U.S. Dep't of Just., Seven Alabama Residents Charged with Conspiracy, Animal Fighting and Gambling Charges in Cockfighting Operation (Oct. 29, 2021).

[7] *Id.*

[8] *Id.*

bird's airways.[9] A cockfight ends when one rooster is dead or refuses to continue to fight. Commonly, one or both roosters die after a fight.

When arming a bird, cockfighters will trim the bird's natural leg spurs and fit a "boot" over the trimmed spurs on which they attach a sharp weapon. The weapons come in different sizes (such as short or long knife) and are designed to cause slashing or stabbing damage.

The sole purpose of cockfighting weapons is "to inflict lethal wounds."[10] Some cockfighting knives, referred to as "gaffs," even resemble "curved ice picks or needles" and tend to cause puncture wounds.[11] Weapons are sold online, in person, and at merchandise tables at cockfights. Cockfighting blades are so sharp that they are often handled with a cover, or "scabbard." These scabbards can be as simple as a folded-over playing card with tape, or as elaborate as jewel-encrusted keepsakes with engravings. Because the weapons cause such devastating injuries to the birds, cockfights may last only 5–10 minutes.[12]

The weapons and the fights themselves, however, are only two parts of the cockfighting enterprise. Cockfighting is a spectator "sport" that draws large crowds of people, frequently from across state borders, to fighting venues where illegal gambling is encouraged. Owners of these entertainment venues, or cockfighting "pits," hold organized fights enabling people to fight their trained, armed birds against other fighting birds. A series of individual cockfights or matches is referred to as a "derby," which usually consists of dozens of individual cockfights that can last for several hours or days. Organizers of the cockfights promote the events on Facebook and other social media, targeting the distribution to known private groups or calling the events "fishing tournaments" or "poultry shows" to obscure the criminal conduct. The pit owners charge attendees admission fees and charge participating cockfighters an additional fee to enter a set number of roosters into a derby, which may be anywhere from $100 to tens of thousands of dollars, depending on the event. Because the fights are fast and the birds are often mortally injured, a participant must enter multiple birds at the event. The number of birds and type of weapon required at a particular fight are typically noted in the promotional material or schedule. For example, a "five-cock" event would require each participant to enter five birds in the derby, and *sk* or *lk* would denote "short knives"

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[9] *See, e.g.*, Tim Rogers, *Is that a Rooster in Your Mouth?*, Time (Feb. 16, 2007), https://time.com/archive/6940174/is-that-a-rooster-in-your-mouth/. This practice has also been observed by law enforcement during undercover operations.
[10] People v. Baniqued, 85 Cal. App. 4th Supp. 13, 18 (2000) (referencing testimony of an expert witness from the Humane Society of the United States).
[11] *Id.*
[12] *Id.*

or "long knives" as the required weapon. Birds are weighed the day of the fight and matched according to weight. Each fight has a referee who determines the victor. Successful cockfighters win large pots of prize money and trophies. In addition to the organized gambling by the participants in a derby, attendees routinely engage in informal side-betting during a fight.

Cockfighting venues vary in size and sophistication. For instance, some may be in the basement of a building, while others may have arena-style seating for 150 or more people, an announcer who emcees the main event, and multiple fighting pits. "Main fights" occur in the main pit, while "drag pits" are used to finish fights from the main pit that have lasted too long to maintain the spectators' interest. Venues typically have an office or a specific location to receive entry fees and weigh each bird to assign specific pairings for matches. Established venues will host weekly fights according to a published schedule from approximately November through August, with a break during molting season. For example, at the Blackberry Chicken Pit, in Pike County, Kentucky, the venue hosted weekly cockfights with stadium seating, charged attendees a $25 admission fee, and hosted fights with a weekly purse of more than $30,000.[13] Security was essential to the operation, and announcers gave instructions over the loudspeaker about how to respond if law enforcement arrived.

Typically, merchandise and food are sold to the crowds at the venues. The merchandise often includes items that glorify the gruesome violence that is central to each cockfight, from t-shirts and cups to cockfighting weapons. For example, a cockfighting venue in Whitesburg, Kentucky, known as American Testing Facility, also hosted a professional gaff sharpener and seller at the weekly fights.[14] Pit owners can make additional money by keeping a percentage of the merchandise and food sales, keeping a portion of the winnings pot, charging participants for extra "options" (which may increase a participant's chance of winning more money), charging spectators for parking and entrance fees, and charging cockfighters boarding fees to house their birds at the pit location.

2. Breeding operations

Although every fighting bird is a chicken—to date, chickens are the only known birds used in animal-fighting ventures—not every chicken is a fighting bird. Therefore, cockfighters use chickens that are specially bred for cockfighting. The cockfighters may breed, buy, sell, and traffic in these

[13] Superseding Indictment at *9–10, United States v. Hubbard et al., 6:22-CR-6 (E.D. Ky. Apr. 28, 2022), ECF No. 73.
[14] *Id.*

specialized birds. Cockfighting birds are typically larger and leaner than a commercial chicken intended for consumption. A fighting-bird breeder will market a fighting breed using certain names—for example, "Bruner," "Kelso," or "Jacobs"—which refer to the "bloodline" of the bird. Highly prized breeds are known for their fighting prowess, such as cutting skills, or the winning records of birds that came from the same bloodline or breeder. Doping or using steroids or other performance enhancing drugs is also common in cockfighting. The sale and handling of such performance enhancement drugs can lead to separate violations of the Food, Drug, and Cosmetic Act.[15]

A well-known breeder can sell fighting birds for hundreds of dollars each. Sometimes purchasers will get the birds directly from breeders, or breeders may ship the birds to purchasers using the U.S. Postal Service, a parcel service, or another method of transport. Importantly, while only roosters fight at the pits, the hens are fundamental to any fighting-bird breeding operation. The District Court for the Middle District of Alabama has recognized their significant role, stating that "hens are an important part of the cockfighting operation, in that they are used to breed the fighting roosters, and thereby are involved in the cockfighting venture."[16] In this matter involving the Easterling family, the United States obtained a restraining order requiring the defendants to feed and maintain 2,400 chickens for an extended period. The court found that without restraint, the birds would almost certainly be used or sold for "cockfighting or for breeding more birds for cockfighting."[17]

B. Overview of cockfighting laws

Cockfighting is illegal in all 50 states and the U.S. territories and commonwealths.[18] But disparities among federal and state enforcement

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[15] *See, e.g.,* Information as to Kevin Duayne Johnson (1) count 1, Marsha Deon Addington-Johnson (2) count 1, with Forfeiture Allegation at *11–16, United States v. Johnson, 7:20-CR-10 (E.D. Ky. June 22, 2020), ECF No. 6 (charging a conspiracy to introduce adulterated and misbranded drugs for sale of Gamefowl Black Vitamins).

[16] In re Restraint of Approximately 400 Roosters, Hens, Young Chickens, & Unhatched Chickens Located at & Around 4295 Cnty. Rd. 528, Verbena, Ala., 36091, No. 21-CM-3634, 2021 WL 4262379, at *3 (M.D. Ala. Sept. 20, 2021).

[17] *Id.*

[18] *See, e.g.,* Salas v. United States, No. 1:22-CV-8, 2022 WL 16964141, at *3 (D. N. Mar. I. Nov. 17, 2022), *aff'd*, No. 22-16936, 2024 U.S. App. LEXIS 21623 (9th Cir. Aug. 27, 2024) (noting that the 2018 Animal Welfare Act amendments resulted in the "prohibition of animal fighting ventures, including live-bird fighting, in every United States jurisdiction") (citing Club Gallistico de Puerto Rico Inc. v. United States, 414 F. Supp. 3d 191, 200 (D.P.R. 2019), *aff'd sub nom.* Hernández-Gotay v. United States, 985 F.3d 71 (1st Cir. Jan. 14, 2021)). Notably, in *Hernández-Gotay*, the First Circuit rejected

mechanisms make the deterrent effect of federal enforcement more necessary for cockfighting crimes.

1. Federal law prohibits conduct related to cockfighting ventures

The Supreme Court has recognized that "the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies."[19] This includes the AWA, which is "sharply focused on the humane treatment of captive animals."[20] In promulgating prohibitions against animal fighting, "members of Congress . . . emphasized the nexus between animal fighting and interstate commerce," citing "the spread of avian influenza" and the economic impact of avian diseases as grounds for strengthening prohibitions against cockfighting specifically.[21] Section 2156 of the AWA prohibits certain activities related to animal-fighting ventures, which includes cockfighting.[22] An "animal fighting venture" is defined as "any event, in or affecting interstate or foreign commerce, that involves a fight conducted or to be conducted between at least two animals for purposes of sport, wagering, or entertainment."[23] The term "animal" includes "any live bird."[24] Thus, in the cockfighting context, an "animal fighting venture" includes any event involving the fighting—past or prospective—of at least two birds for purposes of sport, wagering, or entertainment if that event was in or affecting interstate or foreign commerce.

Generally, there are five categories of prohibited conduct related to cockfighting ventures: (1) sponsorship, (2) attendance, (3) possession, (4) advertisement or promotion, and (5) weapons-related transactions. First, it is a crime for any person to "knowingly sponsor or exhibit an animal in an animal fighting venture."[25] Second, it is a crime to "knowingly attend an animal fighting venture" or to "knowingly cause an individual who has not attained the age of 16 to attend an animal fighting venture."[26] Third,

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plaintiffs' argument that cockfighting in Puerto Rico is expressive conduct entitled to First Amendment protection and also rejected plaintiffs' argument that the ban on cockfighting in Puerto Rico violated their Due Process rights. *Id.* at 80–81.

[19] United States v. Stevens, 559 U.S. 460, 469 (2010).

[20] United States v. Lowe, No. 20-cv-423, 2021 WL 3161551, at *5 (E.D. Okla. July 26, 2021).

[21] United States v. Gibert, 677 F.3d 613, 620 (4th Cir. 2012) (citing 153 Cong. Rec. S451–52 (daily ed. Jan. 11, 2007) (statement of Sen. Cantwell)).

[22] 7 U.S.C. § 2156.

[23] *Id.* § 2156(f)(1) (codified as 7 U.S.C. § 2156(g)(1) before December 20, 2019).

[24] *Id.* § 2156(f)(4) (codified as 7 U.S.C. § 2156(g)(4) before December 20, 2019).

[25] *Id.* § 2156(a)(1).

[26] *Id.* § 2156(a)(2).

it is a crime to "knowingly sell, buy, possess, train, transport, deliver, or receive any animal for purposes of having the animal participate in an animal fighting venture."[27] Fourth, it is a crime to

> knowingly use the mail service of the United States Postal Service or any instrumentality of interstate commerce for commercial speech for purposes of advertising an animal, or [a cockfighting weapon], for use in an animal fighting venture, promoting or in any other manner furthering an animal fighting venture except as performed outside the limits of . . . the United States.[28]

And fifth, it is a crime to "knowingly sell, buy, transport, or deliver in interstate or foreign commerce a knife, a gaff, or any other sharp instrument attached, or designed or intended to be attached, to the leg of a bird for use in an animal fighting venture."[29]

Each prohibited act is a felony punishable by imprisonment of up to five years and fines of up to $250,000, or possibly more under the applicable alternative fine, except for attending an animal-fighting venture (a misdemeanor) and causing a minor under the age of 16 to attend a fight (a three-year maximum felony).[30] The U.S. Sentencing Guidelines (U.S.S.G.) set the base offense level for cockfighting crimes at 16.[31] Notably, in 2016, the Sentencing Commission *increased* the base offense level for animal fighting to 16.[32] In doing so, the Sentencing Commission specifically considered the violent and brutal nature of cockfighting, but it also acknowledged that the penalty associated with the base offense level 16 may "understate the seriousness of the offense."[33] Accordingly, the Sentencing Commission provided a note in U.S.S.G. Application Note 2 recommending upward departures in instances of *extraordinary cruelty* or animal fighting on an *exceptional scale*.[34]

In *United States v. Easterling*, the District Court for the Middle District of Alabama applied U.S.S.G. Application Note 2 during the sentencing of three defendants in a cockfighting matter, each of whom had

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[27] *Id.* § 2156(b).
[28] *Id.* § 2156(c).
[29] *Id.* § 2156(d) (codified as 7 U.S.C. § 2156(e) before December 20, 2019).
[30] 18 U.S.C. § 49 (enforcement of animal-fighting prohibitions); *id.* § 3571; *see* 7 U.S.C. § 2156(a)(2).
[31] U.S. Sent'g Guidelines Manual § 2E3.1 (U.S. Sent'g Comm'n 2018) (but note one exception: a base level of 10 is identified for convictions under 7 U.S.C. § 2156(a)(2)(B) for causing a minor to attend an animal fighting venture).
[32] *See* U.S.S.G. supp. to app. C, amend. 800 (2023).
[33] *Id.*
[34] U.S.S.G. § 2E3.1, Application Note 2.

been involved in fighting-bird breeding businesses and the operation of a large, well-attended fighting pit.[35] The court determined that their conduct involved animal fighting on an "exceptional scale," which warranted an upward departure from the base offense level in the U.S.S.G.[36]

2. State laws vary in treatment of cockfighting

While cockfighting is a felony at the federal level and in most states, a handful of states enforce cockfighting violations with a misdemeanor citation and a minimal fine. Cockfighting is a misdemeanor in Alabama, Arkansas, California, Hawaii, Idaho, Kentucky, Louisiana, Mississippi, South Carolina, and Texas.[37] Therefore, in those states, cockfighters remain largely undeterred by their perception of such state laws.

For example, in Alabama, any person who "keeps a cockpit or who in any public place fights cocks shall, on conviction, be fined not less than $20.00 nor more than $50.00."[38] This fact is not lost on the cockfighting community. To illustrate, evidence in a federal cockfighting prosecution in Alabama included statements by the defendant to another person about whether cockfighting was legal in Alabama. In the exchange, the defendant highlighted the state law and wrote that it did not matter in Alabama because it was only a "$25 fine if you get caught," and he added that, in neighboring Georgia, it would only be a misdemeanor.[39] While the defendant's understanding of the applicable state laws might not have been entirely accurate in that instance, the criminals were emboldened by the perception of the lack of meaningful deterrence at the state level. For example, in 2023, the Georgia Attorney General's Office issued "Official Opinion 2003-7" stating that "cockfighting constitutes cruelty to animals in violation of O.C.G.A. § 16-12-4(b)" which, in certain instances, can be a felony under O.C.G.A. § 16-12-4(c).[40]

In Kentucky, while cruelty to dogs is a Class D felony, cockfighting re-

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[35] United States v. Easterling, No. 2:21-cr-455, 2022 WL 1671871 (M.D. Ala. May 9, 2022).

[36] Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Seven Alabama Residents Sentenced for Felony Violations of the Animal Welfare Act, Ending One of the Largest Cockfighting Operations in the Country (Dec. 7, 2022).

[37] *See* Ala. Code § 13A-12-4 (1975); Ark. Code Ann. § 5-62-120 (West 2009); Cal. Penal Code § 597 (West 2024); Haw. Rev. Stat. § 711-1109 (West 2021); Idaho Code Ann. § 25-2506 (West 1993); Ky. Rev. Stat. Ann. § 525.130 (West 2017); La. Stat. Ann. § 14:102.23 (2014); Miss. Code Ann. § 97-41-11 (West 1987); S.C. Code Ann. § 16-17-650 (2006); Tex. Penal Code Ann. § 42.105 (West 2011).

[38] Ala. Code § 13A-12-4 (1975).

[39] *Easterling*, 2022 WL 1671871.

[40] Cockfighting Constitutes Cruelty to Animals, Op. Att'y Gen. No. 2003-7 (2003); Ga. Code Ann. § 16-12-4 (West 2023).

mains a Class A misdemeanor.[41] This disparate treatment has contributed to Kentucky becoming a destination for cockfighting. In a federal prosecution in Kentucky, a defendant specifically stated he would keep participating in cockfighting as long as it was a misdemeanor under state law. Federal law enforcement, with substantial assistance from Kentucky State Police, recently prosecuted 26 individuals for cockfighting offenses involving 5 different pits and executed a search of an active fight.[42] At those Kentucky pits, individuals routinely drove from Ohio, West Virginia, Virginia, Tennessee, Georgia, North Carolina, South Carolina, and Maryland to attend and participate in cockfighting. In Kentucky, local law enforcement's ability to address cockfighting in rural areas is hampered by the misdemeanor classification, which must be prosecuted by locally elected county attorneys. In this context, federal enforcement of this criminal conduct becomes even more significant and valuable to deterrence and maintaining the rule of law.

III. Investigating cockfighting

An investigation of cockfighting-related activities should focus on connections with an "animal fighting venture" as defined in the AWA.[43] The connection may be obvious when a crowd is cheering on bloody roosters in the ring. But it may take additional effort to identify connections when looking at activities outside the ring and to establish the interstate nexus required by the federal statute.

A. Investigations

As with any criminal investigation, video and audio monitoring of the activity is crucial. While prosecutions can prevail without such forms of evidence, video and audio documentation can serve as proof of the activity, help identify the individuals involved in profiting off the fights, and demonstrate the arrangements between the various operators of a fight. An established cockfighting operation will involve the landowner, the organizer of the fights, and individuals providing security, taking admission fees, weighing the birds, matching the birds, refereeing the fights, and selling concessions and merchandise. Understanding and identifying each

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[41] Ky. Rev. Stat. Ann. § 525.125 (West 2016); *id.* § 525.130 (West 2017).
[42] Indictment, United States v. Saylor, No. 7:23-CR-14 (E.D. Ky. July 20, 2023), ECF No. 1; Superseding Indictment, United States v. Hubbard, 6:22-CR-6 (E.D. Ky. Apr. 28, 2022), ECF No. 73; Superseding Indictment, United States v. Johnson, 6:22-CR-7 (E.D. Ky. Apr. 28, 2022), ECF No. 97; Indictment, United States v. Mercado-Vasquez, 2:22-CR-19 (E.D. Ky. Feb. 24, 2022), ECF No. 1; Indictment, United States v. Mitchell, 5:22-CR-21 (E.D. Ky. Feb. 24, 2022), ECF No. 1.
[43] 7 U.S.C. § 2156. *See* discussion *supra* section II.B.1.

of these individuals and their relationship to each other is essential and further highlights the need for video and audio surveillance.

A recent initiative in the Eastern District of Kentucky highlighted the need for this evidence. In *United States v. Hubbard*, undercover recordings substantiated the relationship between the landowner and the operator of the cockfights at a pit called Riverside in Clay County, Kentucky.[44] The investigation confirmed the financial relationship between the two individuals, including the responsibilities of the two men and the details of the operations, such as how many trailers they made available to participants; how much revenue the weekly fights and trailer rentals generated; how long the fights had been taking place at Riverside; and additional details about the operation of the pit.[45] All of that evidence directly informed jurisdictional elements, individuals charged, and overt acts in furtherance of the conspiracy.

Any investigation must establish the interstate nature of the activity to meet the elements of the federal statute. Several avenues meet this interstate requirement, such as attendees, participants, and employees traveling interstate to attend fights; interstate shipping of birds participating in the fights; and promoting the fights using interstate communications. The recordings in *Hubbard* confirmed that fights were routinely attended by out-of-state individuals and that the owner of the pit boasted about the interstate nature of the operation, noting individuals attended from Texas and displayed a plaque depicting a rooster and the claim: "Riverside . . . Where dreams come true and World Champions are made! Thank you, Oscar, Tim and Staff."[46]

As with any known criminal activity, as enforcement increases, so do efforts to hide and protect the activity through vetting of attendees and participants and using code to promote the fights. The insular nature of the cockfighting community further complicates the feasibility and risk in using confidential informants or undercover law enforcement, especially as federal enforcement of cockfighting increases.

B. Animal welfare considerations—plan ahead

Once the investigation indicates that cockfighting crimes are occurring, a key consideration is what will happen with the impacted birds. A plan for managing the birds is essential, and it must be discussed before seeking any search warrant for the premises where the birds are located.

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[44] United States's Sentencing Memorandum at 500–01, United States v. Hubbard, 6:22-CR-6 (E.D. Ky. Dec. 2, 2022), ECF No. 169.
[45] *Id.*
[46] *Id.* at 504.

The AWA offers two potential avenues: (1) a warrant to seize the birds; or (2) a forfeiture action.[47] First, the statute authorizes a court to issue a warrant to search for and seize any animal for which there is probable cause to believe was involved in an animal-fighting venture.[48] Notably, if the government executes such a warrant and seizes the animals, the statute requires the government to hold the birds pending their disposition by the court *and* to provide "necessary care including veterinary treatment" while the birds are in government custody.[49] Such care could range from housing and feeding the birds to possibly euthanizing the birds, depending on the scenario.[50] This requires planning that takes into account the circumstances of the birds at issue. For example, certain birds can be housed together while others should be in separate enclosures to prevent injuries. In addition, the potential for onsite and offsite disease transmission should be considered when determining how to handle the birds.

Second, the statute authorizes the government to seek civil or criminal forfeiture of the birds.[51] Should the government take this approach, it may only "dispose of" the birds by sale or by other humane means "upon a judgment of forfeiture."[52] Accordingly, any plan involving forfeiture must take into account the likelihood that a forfeiture judgment will not be entered before the execution of a search warrant on the premises, and the prosecution team will have to plan how to manage the birds in the interim.

The use of expert opinions may assist the United States and the court in evaluating a proposed plan for handling the animals. In prior criminal enforcement actions, regional representatives of the U.S. Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS), individual State Veterinarians, and the Program Manager of Animal Crimes and Investigations for the Humane Society International have consulted and provided opinions on the best and most humane course of action for handling animals involved in cockfighting. Those experts could also potentially be noticed as expert witnesses should a criminal case proceed to trial or at sentencing.[53] Their opinions focus

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[47] 7 U.S.C. § 2156(e).
[48] *Id.*
[49] *Id.*
[50] The authors encourage you to contact the Department of Justice's Environmental Crimes Section when considering scenarios that may require humane euthanasia.
[51] 7 U.S.C. § 2156(e); 28 U.S.C. § 2461.
[52] 7 U.S.C. § 2156(e).
[53] *See, e.g.*, Expert Opinion of Dr. Dallas Meek at 1094–95, United States v. Johnson, 6:22-CR-7 (E.D. Ky. Mar. 14, 2023), ECF No. 309-2. *See also* United States' Notice of Intent to Present Expert Testimony at Sentencing, United States v. Crow, 1:17-CR-242

not only on animal welfare, but the public health and economic concerns inherent in cockfighting. Safeguarding poultry health and its contribution to the U.S. economy is a top priority for USDA-APHIS as it relates to avian influenza and virulent Newcastle disease, both of which are Tier I high-consequence diseases of national concern.[54]

In addition to the two options above, prosecution teams can pursue other avenues to manage the birds. Examples include incorporating a plea agreement provision that requires a defendant to surrender the birds to the government, seeking a criminal restraining order requiring a defendant to maintain the birds on site pending disposition of the matter, or, if necessary, leaving the birds on site. Before owners surrender their birds to the government, prosecution teams must plan for the logistics and costs of handling the surrendered birds; this can include considerations for humane euthanasia or facilitating placements of birds with vetted individuals or organizations. No matter which path forward the prosecution team takes, their plan for managing the birds should always involve documenting the birds on site. Documentation can take the form of photos, video, reports, or other means of recording information about the birds. This information can include the number of roosters, number of hens (the ratio of roosters to hens can be an indicator of a fighting operation), and the condition of the birds, among other pertinent details.

In short, any plan for managing birds affected by cockfighting crimes should be mindful of the policy underpinning the AWA—the humane treatment of animals and health concerns about disease spread.[55]

C. Obstruction and corruption

Cockfighting is rife with potential corruption, as organizers of fights seek to gain law enforcement protection of a known criminal activity. In *United States v. Mercado-Vasquez*, the defendant attempted to bribe the local sheriff, explicitly offering a bribe of $10,000 to protect a planned cockfighting operation by alerting the defendant to any known law enforcement activity.[56] Mercado-Vasquez was an experienced cockfighter and local businessman who also bred birds and sold them to purchasers in Mexico. He planned to open his own pit and sought the protection of local law enforcement in advance. With the cooperation of the sheriff, the offered bribe was documented on multiple recordings, leading

(E.D. Ca. Dec. 3, 2018), ECF No. 20.

[54] U.S. Dep't of Agric., APHIS Veterinary Services Factsheet: High-Consequence Foreign Animal Diseases and Pest (2013).

[55] 7 U.S.C. § 2131 (congressional statement of policy).

[56] Indictment, United States v. Mercado-Vasquez, 2:22-CR-19 (E.D. Ky. Feb. 24, 2022), ECF No. 1.

Mercado-Vasquez to plead guilty to attempted bribery in violation of 18 U.S.C. § 666(a)(2).[57] He was sentenced to 15 months in jail, 3 years of supervised release, and a $10,000 fine.[58] As part of his plea agreement, he voluntarily forfeited the flock of chickens he bred and sold to fight, many of which were rehomed through the assistance of animal rescue organizations after being tested for disease.[59]

In *United States v. Johnson*, one of the defendants, Jacklyn Johnson, was employed as a deputy sheriff while continuing to run her family's pit.[60] She admitted her involvement in cockfighting to her law enforcement colleagues, including that she would hide her sheriff's vehicle at the fights so as not to deter fighters and spectators.[61] She was specifically warned by a colleague not to get involved in running a particular pit because of its reputation as a destination for other criminal conduct, including attracting criminals from other states.[62] Despite this, she and her father began operating a new pit, Bald Rock, which was raided by Kentucky State Police and ultimately charged federally.[63] All nine individuals charged in the case pleaded guilty.[64]

The *Johnson* case highlights another potential area for obstruction in the insular cockfighting community. Before the scheduled trial date, Jacklyn Johnson and her co-defendant, Oakley Whitey Hatfield, approached

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[57] *Id.*; Plea Agreement at 72, United States v. Mercado-Vasquez, 2:22-CR-19 (E.D. Ky. Sept. 9, 2022), ECF No. 31; 18 U.S.C. § 666(a)(2).

[58] Judgment at 181–85, United States v. Mercado-Vasquez, 2:22-CR-19 (E.D. Ky. March 28, 2023), ECF No. 48.

[59] Plea Agreement, *supra* note 57, at 72.

[60] Superseding Indictment at 237, United States v. Johnson, 6:22-CR-7 (E.D. Ky. Apr. 28, 2022), ECF No. 97.

[61] United States's Supplemental Rule 404(b) Notice at 1029–30, United States v. Johnson, 6:22-CR-7 (E.D. Ky. Mar. 3, 2023), ECF No. 296.

[62] *Id.*

[63] Superseding Indictment, *supra* note 60, at 237.

[64] Plea Agreement for Rickie D. Johnson, United States v. Johnson, 6:22-CR-7 (E.D. Ky. May 3, 2022), ECF No. 112; Plea Agreement for Hiram B. Creech, Jr, United States v. Johnson, 6:22-CR-7 (E.D. Ky. May 10, 2022), ECF No. 138; Plea Agreement for Harold "Fuzzy" Hale, United States v. Johnson, 6:22-CR-7 (E.D. Ky. July 20, 2022), ECF No. 181; Plea Agreement for Joshua A. Westerfield, United States v. Johnson, 6:22-CR-7 (E.D. Ky. July 22, 2022), ECF No. 187; Plea Agreement for Dallas M. Cope, United States v. Johnson, 6:22-CR-7 (E.D. Ky. July 26, 2022), ECF No. 198; Plea Agreement for Cye Bradley Rose, United States v. Johnson, 6:22-CR-7 (E.D. Ky. July 26, 2022), ECF No. 200; Plea Agreement for Orville D. Asher, United States v. Johnson, 6:22-CR-7 (E.D. Ky. Aug. 5, 2022), ECF No. 215; Minute Entry for Arraignment of Oakley D. "Whitey" Hatfield, United States v. Johnson, 6:22-CR-7 (E.D. Ky. May 8, 2023), ECF No. 343; Minute Entry for Arraignment of Jacklyn Johnson, United States v. Johnson, 6:22-CR-7 (E.D. Ky. May 16, 2023), ECF No. 350.

a childhood friend of Johnson's who was also present at the cockfight the night of the raid.[65] Hatfield tried to get the friend to testify falsely at the federal trial that Johnson was not involved in organizing the fights. Upon discovery by the Federal Bureau of Investigation, the obstruction attempt led to bond revocation and an obstruction enhancement at sentencing following Hatfield and Johnson's guilty pleas.[66] As criminal enforcement of cockfighting increases, the potential for corruption, witness tampering, or other obstructive conduct further escalates.

D. Gambling

Cockfighting pits are entertainment venues, frequently attracting cockfighters and spectators from across state lines. One crucial reason so many are drawn to the events is the ability to win money, either by winning fights or betting among the spectators. The prohibition against illegal gambling businesses addresses this.[67] The statute states that "[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both."[68] The statute defines "illegal gambling business" and includes its own forfeiture provision.[69]

Generally, to prove a defendant is conducting an illegal gambling business, one must show the following: (1) the business violates state law; (2) the business involves five or more people who "conduct, finance, manage, supervise, direct, or own all or part of the business"; and (3) the business was in "continuous operation" for 30 or more days or had at least 1 day with a gross revenue of $2,000.[70] Various types of evidence specific to cockfighting can help satisfy these requirements. Accordingly, prosecution teams should contact agents with specialized knowledge of cockfighting, such as USDA Office of the Inspector General, who can help identify items potentially relevant to the investigation.

Under the gambling statute's forfeiture provision, "any property, including money, used in violation of the provisions of this section may be

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[65] Affidavit of FBI Special Agent C.J. Freihofer in Support of Motion to Revoke Bond, United States v. Johnson, 6:22-CR-7 (E.D. Ky. Apr. 4, 2023), ECF No. 319-1; Order Granting Motion to Revoke Pretrial Release, United States v. Johnson, 6:22-CR-7 (E.D. Ky. Apr. 10, 2023), ECF No. 332.

[66] Order Granting Motion to Revoke Pretrial Release, *supra* note 65, ECF No. 332, at 1150–53; United States's Sentencing Memorandum for Oakley D. "Whitey" Hatfield at 1311–12, United States v. Johnson, 6:22-CR-7 (E.D. Ky. Aug. 15, 2023), ECF No. 382.

[67] 18 U.S.C. § 1955.

[68] *Id.* § 1955(a).

[69] *Id.* § 1955(b)(1), (d).

[70] *Id.* § 1955(b)(1).

seized and forfeited to the United States."[71] In addition, there is authority for forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of" the gambling statute.[72] These provisions are broader than the forfeiture provision in the AWA, which only authorizes the forfeiture of the fighting birds.[73]

In *United States v. Saylor,* contemporaneously with the filing of criminal charges, the United States filed a civil forfeiture action against the real property used in the American Testing Facility cockfights and the money seized on the day of the raid, relying on the violation of the gambling statute and corresponding forfeiture authority.[74] Pursuant to a plea agreement in the criminal case, the defendant ultimately agreed to the civil forfeiture of the seized money and to a cash-in-lieu payment equal to the value of the real property.[75] The Defendant also agreed to dismantle and render inoperative for future use the cockfighting structure located on the real property, and the agreement to accept a payment of cash in lieu of forfeiture was dependent upon his taking such action.[76]

IV. Charging decisions and post-indictment considerations

A. Charging options

As with many federal crimes, prosecutors typically have several charging options depending on the type of cockfighting activity uncovered. These options can range from simple to nuanced. For example, individuals who are actively involved in the cockfights—such as bird owners or bird handlers—could be charged with a straightforward violation of the "knowingly sponsor or exhibit an animal in an animal fighting venture" prong of the AWA.[77] Similarly, individuals attending a cockfight could be charged with the misdemeanor provision making it illegal to "knowingly attend an animal fighting venture," and individuals who brought children to a cockfight could be charged with the three-year max felony provision

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[71] *Id.* § 1955(d).
[72] *Id.* § 981(a)(1)(C); 28 U.S.C. § 2461.
[73] 7 U.S.C. § 2156(e).
[74] United States v. Saylor, No. 7:23-CR-14, 2024 WL 3528639 (E.D. Ky. July 24, 2024); Verified Complaint for Forfeiture in Rem at 1–18, United States v. Real Property Known as 7279 Hwy. 15, Isom, Letcher Cnty., Ky. & $15,395 in U.S. Currency, No. 7:2023-CV-56 (E.D. Ky. July 21, 2023), ECF No. 1.
[75] Plea Agreement, United States v. Baker, No. 7:23-CR-14 (E.D. Ky. Nov. 28, 2023), ECF No. 57.
[76] *Id.*
[77] 7 U.S.C. § 2156(a)(1).

making it illegal to "knowingly cause an individual who has not attained the age of 16 to attend an animal fighting venture."[78]

Charging decisions related to illegal activities that do not directly involve a cockfighting pit can be a bit more nuanced. For example, individuals involved in fighting-bird breeding operations, with the proper intent evidence, can be charged under the AWA provision making it illegal to "knowingly sell, buy, possess, train, transport, deliver, or receive any animal for purposes of having the animal participate in an animal fighting venture."[79] Note that this language is more prospective than the direct sponsoring or attending charges discussed above. Likewise, fighting-bird breeders and organizers of cockfights could also be charged with use of the mail or an instrumentality of interstate commerce, such as the internet, for promoting fights or advertising fighting birds in the United States.[80] Finally, those involved in the gaff or knife side of the business can be charged if they "knowingly sell, buy, transport, or deliver" a sharp cockfighting weapon in interstate or foreign commerce.[81] Note that possession is not mentioned in this provision of the AWA; therefore, knife possession alone is not a criminal violation of this provision.[82] Corruption, obstruction, gambling, or Federal Drug and Cosmetic Act offenses could also be implicated, depending on the conduct.

For established cockfighting venues, a conspiracy to violate the AWA—in violation of 18 U.S.C. § 371—permits prosecutors to incorporate and differentiate the different roles individuals have in running a fight.[83] For example, in *United States v. Hubbard*, the indictment charged five individuals involved in running Riverside, including the landowner, the organizer of the fights, a referee, and individuals involved in weighing the birds.[84] In a superseding indictment, the operation of another pit called Blackberry, run by the same organizer of the Riverside operation but owned by a different individual, was incorporated.[85] Overt acts can include the following: (1) operating weekly fights; (2) collecting admission fees; (3) organizing animal-fighting participants and tracking wins and losses; (4) distributing advertising material about the fights; (5) selling merchandise,

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[78] *Id.* § 2156(a)(2).
[79] *Id.* § 2156(b).
[80] *Id.* § 2156(c).
[81] *Id.* § 2156(d) (codified as 7 U.S.C. § 2156(e) before December 20, 2019).
[82] 7 U.S.C. §§ 2131–2160.
[83] 18 U.S.C. § 371.
[84] Indictment, United States v. Hubbard, 6:22-CR-6 (E.D. Ky. Feb. 24, 2022), ECF No. 1.
[85] Superseding Indictment, United States v. Hubbard, 6:22-CR-6 (E.D. Ky. Apr. 28, 2022), ECF No. 73.

concessions, and gaffs; (6) paying employees; and (7) specific fights.[86] As always, the quality of the evidence and the principles of federal prosecution will inform charging decisions.

B. Constitutional challenge

Despite the clearly and congressionally intended connection to interstate commerce, defendants charged with violations of section 2156 may challenge the statute on constitutional grounds. These challenges may come in one of two forms: (1) facial challenges, meaning the statute is attacked as unconstitutional in all aspects of its application; or (2) as-applied challenges, meaning the statute is attacked as unconstitutional only as-applied to a specific defendant's alleged conduct.[87] Regardless of the type of challenge, Congress's Commerce Clause power must be analyzed through the framework provided by the Supreme Court in *United States v. Lopez* and *United States v. Morrison*.[88] Broadly, cockfighting may be regulated because it has a "substantial relation to interstate commerce."[89]

To determine if an activity has a substantial relation to interstate commerce, courts consider the four-factor test in *Morrison*: (1) whether the regulated activity is commercial or economic in nature; (2) whether the statute contains an "express jurisdictional" element that limits its reach; (3) whether Congress made findings regarding the regulated activity's impact on interstate commerce; and (4) whether the link between the regulated activity and the effect on interstate commerce is attenuated.[90] Generally, courts have held that section 2156 satisfies the *Morrison* four-factor test and, as such, is facially valid.[91]

First, animal-fighting ventures are "a quintessential economic activ-

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[86] *See, e.g.,* Superseding Indictment at 212–24, United States v. Hubbard, 6:22-CR-6 (E.D. Ky. Apr. 28, 2022), ECF No. 73.

[87] *See* United States v. Rife, 429 F. Supp. 3d 363 (E.D. Ky. 2019); United States v. Hill, 700 F. App'x 235 (4th Cir. 2017).

[88] United States v. Morrison, 529 U.S. 598, 609 (2000); United States v. Lopez, 514 U.S. 549, 558–59 (1995).

[89] Nat'l Lab. Rels. Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

[90] *Morrison*, 529 U.S. at 610–15.

[91] *See, e.g.*, Club Gallístico de P.R. Inc. v. United States, 414 F. Supp. 3d 191, 206 (D.P.R. 2019)("When analyzing these Congressional findings as a whole, the Court finds that they are sufficient to support the assertion that live-bird fighting events have a substantial effect on interstate commerce."); United States v. Thompson, 118 F. Supp. 2d 723, 726 (W.D. Tex. 1998) (denying Commerce Clause challenge on grounds that "activities substantially affect interstate commerce" for defendant charged with refereeing a fight between two dogs who had not traveled interstate).

ity."[92] These ventures are gambling events, where sport, wagering, and entertainment cannot be unraveled from "economics and elements of commerce."[93] Attendees pay an entry fee and may purchase concessions or animal-fighting weapons. They may sponsor animals and compete to win a pot of money raised by participants. They often engage in side-betting. Cockfights are inextricably economic.

Second, section 2156 contains an express jurisdictional element that limits its reach.[94] By definition, an animal-fighting venture must be in or affect interstate or foreign commerce.[95] This language satisfies the Supreme Court's concern in *Lopez* and *Morrison* that a statute must have "a nexus to interstate commerce."[96]

Third, Congress made clear findings supporting cockfighting's impact on interstate commerce. Congress noted: (1) participants, spectators, and animals routinely travel across state lines for fights; (2) these fights are often advertised interstate and accompanied by the sale of game foul and animal-fighting weapons, which are then shipped in interstate or foreign commerce; and (3) the interstate travel and shipment of game foul has potential to contribute to the spread of avian influenza and other diseases, a concern that is "of particular importance" in the aftermath of the COVID-19 pandemic.[97]

Fourth, and finally, the link between cockfighting and interstate commerce is not attenuated. Cockfighting is highly organized, pulling funds from across state and national borders, and is a public health and economic risk to the areas in which it occurs. The poultry industry is a driving economic force in many parts of the United States, employing over 240,000 workers in poultry processing alone during 2020 and totaling over $76 billion in sales in 2022.[98] Moreover, U.S. poultry has "a competitive advantage" globally.[99] But the actions of cockfighters—such as bringing game foul across borders or sucking the blood out of roosters' necks to

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[92] *Club Gallístico de P.R. Inc.*, 414 F. Supp. 3d at 206.
[93] *Gibert*, 677 F.3d at 624.
[94] 7 U.S.C. § 2156.
[95] *Id.* § 2156(f)(1).
[96] *Club Gallístico de P.R. Inc.*, 414 F. Supp. 3d at 206.
[97] *Aff'd sub nom.* Hernández-Gotay v. United States, 985 F.3d 71, 79 (1st Cir. 2021).
[98] Counties with Highest Concentrations of Jobs in Poultry and Animal Slaughtering, June 2020, U.S. Bureau of Lab. Stat., The Econ. Daily (Feb. 4, 2021), https://www.bls.gov/opub/ted/2021/counties-with-highest-concentrations-of-jobs-in-poultry-and-animal-slaughtering-june-2020.htm; Poultry Sector at a Glance, U.S. Dep't of Agric., Econ. Rsch. Serv. (June 1, 2023), https://www.ers.usda.gov/topics/animal-products/poultry-eggs/sector-at-a-glance/#:~:text=Total%20poultry%20sector%20sales%20in,broilers%20increased%20production%20from%202021.
[99] Poultry Sector at a Glance, *supra* note 99.

allow them to fight more rounds—threaten to spread disease and upend this economically significant industry.[100]

As-applied Commerce Clause challenges routinely fail as well. Although some courts have hinted that a particular cockfight could potentially be wholly intrastate, no federal court has found a cockfight to be wholly intrastate—and no court likely ever will, given the inherently economic nature of cockfighting and the strong nexus between animal fighting and interstate commerce as highlighted by Congress.[101] It is so, in short, because the very fabric of cockfighting is forged in economics.

C. U.S. Sentencing Guidelines sentencing framework

The U.S.S.G. set the base offense level for cockfighting crimes at 16.[102] The base offense is the same for the full range of potential defendants—from a defendant who participated in a single fight to a defendant who organized dozens of fights involving thousands of birds. A conspiracy charge, if convicted, incorporates further differentiation between organizers of the cockfighting and more minor participants in the conspiracy. In *United States v. Hubbard*, the owner of Riverside received a three-level enhancement pursuant to U.S.S.G. § 3B1.1(b) for being a manager or supervisor of the criminal activity.[103] This finding was based on detailed evidence showing his involvement in collecting admissions fees, renting trailers, and paying employees.[104] The owner of another pit, Blackberry, did not receive the same enhancement, as the operator of the fight handled all of the logistics, and the owner was minimally involved in running the fights.

Tim Sizemore, who ran the fights at both Riverside and Blackberry, and had even traveled to Mexico to run a fight, received an uncontested four-level leadership enhancement under U.S.S.G. § 3B1.1.[105] The United States moved for an upward variance based on the exceptional scale on which Sizemore sponsored animal fighting in Kentucky, illustrat-

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[100] *See, e.g.*, Rogers, *supra* note 8.

[101] *See* United States v. Gibert, 677 F.3d 613, 627 (4th Cir. 2012) ("[I]f the cockfighting activities . . . were wholly an intrastate activity . . . the government would be unable to establish one of the elements of the offense . . . .").

[102] U.S.S.G. § 2E3.1 (but note one exception: a base level of 10 is identified for convictions under 7 U.S.C. § 2156(a)(2)(B) for causing a minor to attend an animal fighting venture).

[103] United States's Sentencing Memorandum for Oscar Millard Hubbard at 499–500, United States v. Hubbard, 6:22-CR-6 (E.D. Ky. Dec. 2, 2022), ECF No. 169; U.S.S.G. § 3B1.1(b).

[104] United States's Sentencing Memorandum for Oscar Millard Hubbard, *supra* note 103, at 499–500.

[105] U.S.S.G. § 3B1.1.

ing that thousands of birds and hundreds of thousands of dollars in illegal gambling were involved in the years Sizemore spent organizing cockfighting.[106] Sizemore, a state employee with no criminal history, ultimately received a guideline sentence of 26 months.[107]

In 2022, seven members of the Easterling family were sentenced for various cockfighting and gambling crimes, with three defendants sentenced to incarceration ranging from 20 to 24 months, two of whom had no prior convictions.[108] As stated above, the court applied Application Note 2 and determined that the Easterlings engaged in animal fighting on an "exceptional scale," given their business model relied on the death or injury of thousands of birds for entertainment and profit.

V. Conclusion

In conclusion, there are numerous reasons to prosecute cockfighting crimes. Cockfighting is organized, moneymaking, and cold-blooded entertainment at the expense of the animals involved. Cockfighting is not only a barbaric form of animal cruelty, but also a public health risk and a potential risk to the national economy. Enforcing the AWA at the federal level is essential to confront an industry built around animal cruelty and uphold the rule of law, ensuring a consistent legal standard across the country.

About the Authors

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[106] United States's Sentencing Memorandum for Timothy Sizemore at 574–76, United States v. Hubbard, 6:22-CR-6 (E.D. Ky. Dec. 30, 2022), ECF No. 189.
[107] Timothy Sizemore Judgment at 605, United States v. Hubbard, 6:22-CR-6 (E.D. Ky. Jan. 17, 2023), ECF No. 194. His sentence is under appeal.
[108] Judgment as to Brent Colon Easterling, United States v. Easterling, 2:21-cr-455 (M.D. Ala. Dec. 9, 2022), ECF No. 384; Judgment as to William Tyler Easterling, United States v. Easterling, 2:21-cr-455 (M.D. Ala. Dec. 9, 2022), ECF No. 388; Judgment as to George William Easterling, United States v. Easterling, 2:21-cr-455 (M.D. Ala. Dec. 14, 2022), ECF No. 390.

District of Kentucky, where she prosecutes white collar, public corruption, and health care offenses. Previously, she was in private practice in New York, New York, and clerked for U.S. Magistrate Judge James Orenstein in the Eastern District of New York. Before law school, she worked as a program analyst for the Department's Office of Prosecutorial Development, Assistance, and Training.

The authors offer special thanks to ECS Senior Trial Attorney Gary Donner who assisted in prosecuting seven individuals for cockfighting offenses in the Middle District of Alabama; AUSA Andrea Mattingly-Williams, who volunteered to help prosecute 26 individuals for cockfighting offenses in the Eastern District of Kentucky; AUSA Haley McCauley, who handled the unusual forfeiture issues; AUSA Karen Escobar who has provided advice and assistance based on her prosecution of cockfighting crimes in the Eastern District of California; and legal intern Peyton Mills, who assisted with this article.

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More than Probable Cause: Preparing for the Search of a Large-Scale Animal Operation

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I. Introduction

On June 3, 2024, Envigo RMS, LLC pleaded guilty to conspiring to knowingly violate the Animal Welfare Act (AWA), and Envigo Global Services, Inc. pleaded guilty to felony conspiracy to knowingly violate the Clean Water Act.[1] Both pleas related to a large-scale, commercial animal-breeding facility located in Cumberland County, Virginia (Cumberland Facility), which was searched in 2022 pursuant to a federal warrant based principally on violations of the AWA.[2] The warrant's execution resulted in the immediate seizure of hundreds of beagles and the ensuing surrender of over 4,000 beagles.[3] Together, the companies agreed to pay $35 million in monetary penalties and mitigation.[4] Beyond this resolution, the investigation and prosecution highlight the strengths and advantages of collaboration between federal, state, and local law enforcement, state attorneys generals' offices, non-governmental organizations (NGOs), and civil and criminal components within the Department of Justice (Department), especially in the context of a multi-day federal search warrant of a large-scale, live-animal facility.[5]

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[1] Plea Agreement at 1–2, United States v. Envigo RMS, LLC, No. 6:24-cr-16 (W.D. Va. June 3, 2024), ECF No. 5. *See also* 7 U.S.C. § 2131 (Animal Welfare Act); 33 U.S.C. § 1251 (Clean Water Act).

[2] Information at 1–2, United States v. Envigo RMS, LLC, No. 6:24-cr-16 (W.D. Va. June 3, 2024), ECF No. 5-3.

[3] *Id.* at 41.

[4] Plea Agreement, *supra* note 1, at 9–10.

[5] In addition to the authors, the prosecution and investigation team consisted of

II. Investigative challenges

The AWA and its applicable standards and regulations establish minimum standards of care and treatment to be provided for certain animals bred and sold for use as pets, used in biomedical research, transported commercially, or exhibited to the public including adequate veterinary care, housing, and sanitation.[6] Licensees are subject to regular inspections which document non-compliances.[7]

In our case, in less than one year, the Cumberland Facility amassed over 60 citations for non-compliance with the AWA.[8] More than half of those citations were deemed critical or direct, the most serious types of citations.[9] In July 2021, the Cumberland Facility received violations for 18 different provisions of the AWA, 10 of which were deemed to be direct or critical.[10] The Inspector noted that over 300 beagle puppies died in seven months due to "unknown causes."[11] Further inspections of the Cumberland Facility over the next several months resulted in additional violations, including multiple repeat violations for non-compliant items

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Paralegal Jillian Grubb of the Environmental Crimes Section in the Department's Environment and Natural Resources Division; Assistant U.S. Attorneys (AUSAs) Randy Ramseyer, Corey Hall, and Carrie Macon for the Western District of Virginia; Special AUSA Michelle Welch (an Assistant Attorney General with the Virginia Attorney General's Office); Special Agent Stanley Wojtkonski of the Department of Agriculture's Office of the Inspector General; and Special Agent Allison Landsman of the Environmental Protection Agency's Criminal Investigation Division. The civil enforcement team consisted of Senior Trial Attorney Mary Hollingsworth and Trial Attorney Shampa A. Panda, both formerly of the Department's Wildlife and Marine Resources Section, and AUSA Anthony P. Giorno of the Western District of Virginia. The success of the criminal and civil cases was a collective effort supported by the commitment and expertise of each member.

[6] 7 U.S.C. § 2131; 9 C.F.R. §§ 2.1–3.20.

[7] 9 C.F.R § 2.3.

[8] Complaint for Declaratory and Injunctive Relief ¶ 4, United States v. Envigo RMS, LLC, No. 6:22-cv-28, 2022 WL 3357784 (W.D. Va. May 19, 2022), ECF No. 1. *See Inspection Report Public Search Tool*, U.S. Dep't Agric., Animal & Plant Health Inspection Serv., https://aphis.my.site.com/PublicSearchTool/s/inspection-reports (last visited Sept. 6, 2024) (locating "inspection reports prepared by Animal Care inspectors").

[9] U.S. Department of Agriculture: Animal Welfare Inspection Guide 2-8, 2-9 (2024).

[10] U.S. Department of Agriculture, Animal & Plant Health Inspection Service: Inspection Report (2021) [hereinafter Inspection Report]. *See also* U.S. Department of Agriculture, Animal & Plant Health Inspection Service: Animal Welfare Act and Animal Welfare Regulations (2023) (listing animal welfare regulations as referenced in the Inspection Report).

[11] Inspection Report, *supra* note 10, at pt. 2, at 1.

identified during the July 2021 inspection.[12] The non-compliant items spanned the facility's operations, including incomplete records, excessive temperatures, insufficient staffing, and inadequate veterinary care.[13] In March 2022, eight months after the July inspection, a beagle was discovered with wounds to his ear that had not been identified or treated by the facility, some beagles were found actively stuck in the flooring, others were injured from being housed in incompatible groupings, and many of the feeders at the facility contained wet kibble, mold, and excessive grime.[14] Each of these issues was a repeat violation.

As one might expect, the prosecution's success turned on our ability to document the violations—both historical and ongoing. Our initial challenge, given the breadth of citations, was determining which standards and regulations to focus on given the information then-known to the team. We eventually decided to concentrate on six general allegations: (1) inadequate veterinary care; (2) inadequate housing and primary enclosures, including the failure to provide sufficient heating and cooling; (3) unsanitary conditions; (4) contaminated feed and deprivation of food to nursing mothers; (5) failure to maintain records; and (6) insufficient employee staffing.[15] Our second challenge came shortly thereafter, namely, how to execute a search warrant of a large animal operation in a manner that ensured we gathered evidence, if any, to corroborate those allegations. Our experience will hopefully counsel the next such warrant.

A. "An ounce of prevention is worth a pound of cure." (Benjamin Franklin, 1735)[16]

Nothing could be truer when it comes to a multi-day search warrant of any property, but it is especially true with one that involves live animals. In our case, the Cumberland Facility was a large-scale, commercial animal-breeding facility, covering 197 acres and consisting of 11 large kennel buildings, as well as office buildings, storage facilities, medical facilities, maintenance buildings, an incinerator, and a wastewater treatment plant.[17] The facility housed upwards of 5,000 dogs at any given time and

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[12] Complaint for Declaratory and Injunctive Relief, *supra* note 8, ¶¶ 51–55.
[13] Complaint for Declaratory and Injunctive Relief, *supra* note 8.
[14] U.S. Department of Agriculture, Animal & Plant Health Inspection Service: Inspection Report (2022).
[15] Affidavit in Support of an Application Under Rule 41 for a Warrant to Search and Seize, In re the Search of Envigo, No. 6:22-mj-3 (W.D. Va. July 20, 2022), ECF No. 10 [hereinafter Affidavit for Search Warrant].
[16] Benjamin Franklin, *On Protection of Towns from Fire,* The Pa. Gazette, Feb. 4, 1735.
[17] Affidavit for Search Warrant, *supra* note 15, at 10–11.

maintained enough staff to care for those dogs.[18] Early on, we knew we would face significant logistical challenges with security, evidence gathering, and ensuring the well-being of any dogs on the property. Thus began several months of planning, resulting in a search warrant that contemplated the search of all computers, the seizure of cell phone evidence on site, the seizure of voluminous physical records, the assessment of every dog, the removal of dogs in acute distress, and the assistance of an NGO.

1. Adequate staffing and confidentiality

Any search warrant of a large facility or business requires upwards of a dozen agents dedicated to the day-after-day efforts. Here, Special Agents with the U.S. Department of Agriculture's Office of Inspector General (USDA-OIG) shared responsibility to secure the facility, conduct document searches, create mirror-image electronic evidence for off-site review, interview witnesses, and secure the facility overnight. We knew, however, that law enforcement alone would not be enough in a situation with the possibility of ongoing harm to thousands of animals.

a. Examination of live animals

After determining that every animal on site needed to be evaluated by a veterinarian (and possibly evacuated) for potential violations of the AWA,[19] we needed to decide the following: (1) how to staff the search with the expertise and personnel to assist; and (2) how to document their findings. At this point, the team looked to the Environmental Crimes Section's (ECS's) experience in dog-fighting investigations where NGOs were contracted to assist with the examination and care of dogs seized during the search of a dog-fighting operation. Using that model, we searched for organizations with access to sufficient staffing, expertise, and resources. The Humane Society of the United States (HSUS) ultimately agreed to assist with the examinations and the transport, care, and treatment of any dogs found to be in acute distress, as well as the surrender and placement of the remaining dogs.[20] To support the warrant, HSUS brought volunteers, a mobile veterinary clinic, examination carts with equipment for basic exams, hundreds of crates, additional supplies, and transport vehicles.

Recognizing that a defendant might challenge the neutrality of any medical determination made by an NGO volunteer or employee, we de-

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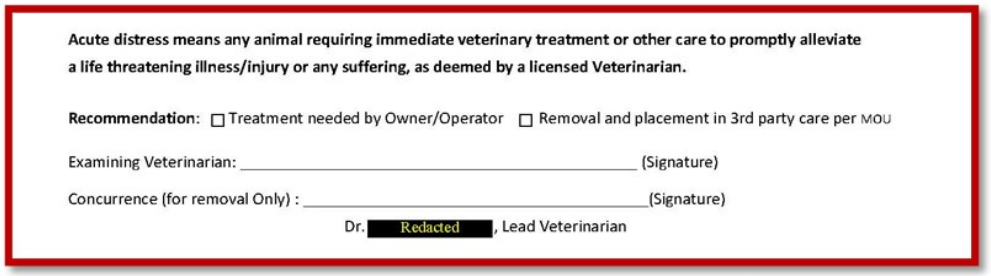
[18] *Id.*

[19] The search warrant contemplated the seizure of only those "animals which a veterinarian has opined are in acute distress." *Id.* 46–47.

[20] Notice by United States of America of Joint Transfer Plan, United States v. Envigo RMS, LLC, No. 6:22-cv-28 (W.D. Va. July 1, 2022) ECF No. 35.

cided to hire a team of independent veterinarians to examine each animal. To guarantee a thorough and expeditious assessment of each animal, the prosecution team employed 12 veterinarian experts. Eleven of those veterinarian experts each led one of the eleven assessment teams, one team for each kennel building. The 12th veterinarian expert was the person to whom each assessment team reported. To provide each veterinarian with sufficient support, each assessment team consisted of a veterinarian, at least one animal control officer from the Virginia Animal Fighting Task Force, and one or two professional dog handlers.[21]

The next hurdle was how to promote consistency between the examinations of 4,000 beagles by the 11 veterinarian-led assessment teams. With the help of the experts, the prosecution team adopted standard forms for the initial field intake and the follow-up veterinary exam for any dog removed from the facility, as well as a guidance document for acute distress determinations. Figure 1 is a concurrence signature block for our lead veterinarian for any removal of an animal from the Cumberland Facility. Figure 1 also purposes to dissuade challenges to removal decisions.


Acute distress means any animal requiring immediate veterinary treatment or other care to promptly alleviate a life threatening illness/injury or any suffering, as deemed by a licensed Veterinarian.

Recommendation: ☐ Treatment needed by Owner/Operator ☐ Removal and placement in 3rd party care per MOU

Examining Veterinarian: _____ (Signature)

Concurrence (for removal Only) : _____(Signature)

Dr. [Redacted], Lead Veterinarian

Figure 1: Signature Block Excerpt from In-Field Exam Form

Beyond the standard forms and guidance materials, we also met with the veterinarians before the warrant: (1) to review the body condition scoring chart that would be consulted during examinations; and (2) to confirm the lead veterinarian's decisions were binding on the teams.[22] The

[21] The Virginia Animal Fighting Task Force is a 501(c)3 nonprofit organization composed of animal control officers, law enforcement officers, prosecutors, attorneys, licensed veterinarians, and animal welfare workers. *Protecting Fur and Feather,* Va. Animal Fighting Task Force, https://vaftf.org/ (last visited Sept. 6, 2024). According to their webpage, the organization assists in dog-fighting and cockfighting investigations. *Id.*

[22] With the help of the experts, the prosecution team selected a body condition scoring system adapted from the Purina 9-Point Body Condition System which is a tool used to assess the health of pets. *See, e.g., Defining Healthy Body Condition,* Purina Inst., https://www.purinainstitute.com/science-of-nutrition/managing-healthy-weight/defining-healthy-body-condition/healthy-body-condition-score#:~:text=

search warrant planning meetings led to two other concerns: confidentiality and secrecy.

With third parties participating in the search, protecting the confidentiality and secrecy of operations became paramount. To safeguard against unauthorized disclosures, USDA-OIG entered into contracts and nondisclosure agreements with each veterinarian. Similarly, USDA-OIG entered into a confidentiality agreement with HSUS, ensuring all information shared with or observed by HSUS personnel remained confidential.[23]

b. Examination of buildings

At the onset of the search, law enforcement videorecorded and photographed the Cumberland Facility and labeled buildings and kennels to facilitate documentation of search-related notes. But the prosecution team needed more details. The AWA requires indoor and outdoor housing facilities to be structurally sound and maintained in good repair to protect animals from injury and to contain the animals.[24] They must also be subject to a sanitation protocol.[25] There are also size, safety, and temperature regulations to ensure the well-being of the animals.[26]

To document potential violations of these standards, we established a single team led by Investigator Amy K. Taylor with the Virginia Office of the Attorney General, and a standardized form to document the team's observations and findings. The form, titled "Enclosure Evaluation," required measurements of each kennel, the number of dogs in each kennel, and details regarding construction, sanitation, ventilation, flooring, food, water, and compatibility of the animals. The form also included a field for photo identification so conditions noted on the form could be cross-referenced with photographic evidence.

Using a single lead investigator for enclosure evaluations and a single lead for the veterinary teams proved helpful. Having both leads allowed us to submit two comprehensive affidavits to support the civil case for injunctive relief. We also had the benefit of two witnesses with first-hand knowledge available to testify if necessary.

c. Security

Given the large number of law enforcement personnel, veterinary experts, and volunteers (approximately 144 in total), we needed to ensure

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Using%20Purina's%209%2Dpoint%20BCS,or%209%20are%20considered%20obese (last visited Sept. 6, 2024).

[23] For Department prosecutors, please reach out to the ECS or counsel for your investigating agency for sample confidentiality language.

[24] 9 C.F.R. § 3.1(a), (c).

[25] *Id.* at § 3.1(c).

[26] *Id.* at §§ 3.2, 3.3, 3.6, 3.7.

unauthorized persons did not attend search warrant preparation briefings or enter the Cumberland Facility. Here, we went old school: a clipboard and a vetted list of names along with a requirement to show a driver's license or other form of federal identification. Anyone who entered or sought to re-enter the briefing or Cumberland Facility during the warrant was subjected to a security clearance.[27]

d. Paper Paper Everywhere and Not a Copier Nearby!

Managing the volume of evidence seized from the facility was another hurdle. We anticipated that a high volume of physical documents would be seized, requiring our team to coordinate the transport, storage, and scanning of the documents. We needed to find a nearby scanning company that could not only handle voluminous documents but also possessed the requisite clearance to handle sensitive documents. The rural location of the Cumberland Facility added difficulty to this task and others. We had to look beyond the surrounding communities to metropolitan areas with industry capable of assisting our needs. Using services in distant towns, however, meant longer transport, more inconvenience, and increased cost. We also needed a team of agents to transport and supervise the transfer of evidence. Furthermore, we could not execute a contract with the vendor until we were on site and knew exactly what we needed. We simply added this challenge to our ever-growing "to-do list" during the search.

2. Authorization for third-party assistance and filter team protocols

It likely goes without saying, but an affiant needs to secure the court's permission to have the assistance of third parties. Here, the search-warrant affidavit noted:

> Because of the unusual nature of these violations, and that a dog's physical condition constitutes evidence of a crime, the requested warrant authorizes the United States to seize live animals. However, to limit the number of animals seized, the United States will only seize animals which a veterinarian has opined are in acute distress. Because the United States is not adequately equipped to care for such animals seized the United States has sought and obtained a commitment by the [HSUS] to assist in the assessment of the dogs on the premises and in the temporary placement of dogs seized so that the dogs

[27] Many thanks to the Virginia State Police who provided security at the facility during the execution of the warrant.

may be appropriately cared for.[28]

The affidavit also sought permission for third-party help: "Permission is also sought to allow the assistance of [NGOs] with expertise in animal welfare to assist law enforcement officers executing this search and evaluating and caring for the animals found on the [subject premises]."[29] In addition, given the request to seize electronic evidence, we sought court approval for a filter team protocol in advance of the search. During the search, we used a privilege-identification form to document any potential attorney-client, spousal, or psychoanalyst privileged relationships identified by electronic device owners. We used the forms to identify and exclude potentially privileged material from any subsequent search of the devices.

3. Coordination of injunctive relief

Realistically, complex criminal investigations take significant time to gather and review evidence before a charging decision is made. While documentation of the pain and suffering of dogs is important corroborative evidence, we knew we could not leave behind an animal in acute distress or allow continued suffering because of AWA violations. Therefore, we reached out to attorneys in the Department's Wildlife and Marine Resources Section and the Civil Division of the Western District of Virginia to be prepared to file a complaint and motion for a temporary restraining order (TRO) if the first day of the search confirmed the allegations of AWA violations.

We made certain to provide the civil team, in real time, with the facts from the animal intake forms and arranged for our lead veterinarian and lead investigator to prepare affidavits to support the motion.[30] We gathered the intake forms at regular intervals during the warrant and drove them to the staging area being used by the civil team who was waiting in the wings to request emergency relief.

Unfortunately, the allegations were confirmed. On May 19, 2022, just one day after the search began, the civil team filed a complaint seeking declaratory and injunctive relief and an emergency motion for a TRO. The civil team's work paid off. The court issued a TRO later followed by a preliminary injunction, which helped lead to the company's surrender of nearly 4,000 beagles.[31]

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[28] Affidavit for Search Warrant, *supra* note 15, at 46–47.
[29] *Id.* at 57.
[30] *See* Emergency Motion for Temporary Restraining Order at Exhibits G, I, J, United States v. Envigo RMS LLC., No. 6:22-cv-28, (W.D. Va. May 19, 2022), ECF No. 2.
[31] *See id.* at ECF Nos. 1, 2, 3, 21, 22, 37, 38.

B. "The best laid schemes o'mice an' men." (Robert Burns, 1785)[32]

Even the best-laid plans will encounter unforeseen hurdles, and the Cumberland Facility search warrant was no exception. We quickly encountered the following issues: (1) feeding and caring for the dogs; (2) tracking the movement of the dogs between kennels; and (3) ensuring records and evidence were not destroyed or hidden by individuals on site.

We were flexible as issues arose and prioritized the well-being of the animals. With thousands of live animals requiring care, we needed to make sure employees could resume their activities as quickly as possible while also maintaining the integrity of the site for the warrant. We allowed employees to resume activities in kennel buildings unescorted once the building's conditions were fully documented with photographs, kennel measurements, and food receptacle examinations. We also escorted employees to provide food and water to dogs as needed. Finally, we allowed employees to transfer dogs between kennels while escorted and we documented the transfers. Documenting transfers and the conditions of the dogs before any movement helped us rebut any contentions that our team harmed the animals.

Another logistical challenge was tending to a search warrant team of nearly 150 people. While HSUS brought food and beverages for its employees and volunteers, we had to make sure the law enforcement team's basic needs were met during the hours they spent at the facility, especially when confronted with outdoor temperatures exceeding 90°C during the warrant.[33] Everyone adapted and brought tents, coolers, and drinks—lots of drinks. Law enforcement members constantly supplemented the supplies to safeguard the well-being of the teams, particularly those who worked inside the kennels, where temperatures were higher, and airflow was extremely limited.

The final challenge was the logistics—hotel space, transportation, and parking on site for all search warrant participants. Given the rural location of the site, we ended up staying in a hotel nearly 30 miles from the site. Then, USDA-OIG bore the burden of finding an area close to the site to stage all of us—in such a way as to not tip off the facility—before and while they went ahead of us to enter and secure the facility. Once allowed on-site, individuals parked vehicles in designated spots and primarily walked to their assigned locations.

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[32] Robert Burns, To a Mouse (1785).

[33] *See, e.g., Charlottseville, VA Weather History*, The Weather Underground, https://www.wunderground.com/history/daily/us/va/charlottesville/KCHO/date/2022-5-20 (last visited Sept. 4, 2024).

Finally, we made the decision to have prosecutors on site to address any legal issues or challenges that arose. And sure enough, issues arose within hours of entry. Ultimately, we adopted a practical "in the field" mentality to troubleshoot and overcome unanticipated challenges as they arose, often taking a divide-and-conquer approach to quickly resolve issues.

III. "Learn from the mistakes of others. You can't live long enough to make them all yourself." (Eleanor Roosevelt, 1884–1962)[34]

The investigation presented unique challenges and required a team effort. We leave you with these takeaways from our experience:

- Plan early.
  - Build your team with law enforcement, experts, and if necessary, third parties.
  - Make sure your warrant seeks permission for third-party assistance.
  - Consider a court-approved filter protocol.
- Review plans often.
  - Ensure confidentiality.
  - Set regular meetings with the prosecution team.
- Figure out how to document violations.
  - Work with your experts to develop standard forms. Consider the following forms:
    - Field Intake Form;
    - Vet Field Examination Form;
    - Building or Enclosure Form; and
    - Privilege Form.
  - Meet with experts and team leads to ensure a common understanding of terminology and expectations.

[34] Tomas Kutac, *Quote of the Day Vol 2—Eleanor Roosevelt—Learn from the Mistakes of Others . . .* , MEDIUM (Apr. 28, 2023), https://tomaskutac.medium.com/quote-of-the-day-vol-2-eleanor-roosevelt-learn-from-the-mistakes-of-others-9563c3353074.

- Hold pre-search briefings.
    - Meet with everyone who will participate in the search.
        - Ensure an understanding of the purpose and scope of the search.
        - Reinforce confidentiality requirements.
        - Identify points of contact for questions that arise during the search.
- Coordinate with civil components.
- Embrace flexibility.

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Intersection of Animal-Fighting Venture Prosecutions and Crime Victim Services and Rights

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I. Introduction

Congress has enacted a number of federal animal welfare statutes designed to ensure humane treatment of animals. Key among those is the Animal Fighting Venture Prohibition, which is contained in the Animal Welfare Act (AWA).[1] The Animal Fighting Venture Prohibition prohibits sponsoring or exhibiting an animal in an "animal fighting venture" or buying, selling, delivering, possessing, training or transporting animals for participation in an "animal fighting venture."[2]

While the public views animals used in animal-fighting ventures as "victims" as the term is used in the vernacular, animals are not considered "victims" within the statutory definition of "victim" and "crime victim" of the Victims' Rights and Restitution Act (VRRA) and the Crime Victims' Rights Act (CVRA), respectively.[3] The determination of victimhood from a legal perspective is governed by the VRRA and the CVRA. Under the AWA, "knowingly caus[ing] an individual who has not attained the age of 16 to attend an animal fighting venture"[4] is a felony punishable by up to three years of imprisonment and a fine of up to

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[1] 7 U.S.C. § 2156. The Fighting Prohibition provisions were initially added to the AWA in 1976 and have since been amended four times resulting in the provision as it exists today.

[2] *Id.* § 2156(a)(1), (b). An "animal fighting venture" is defined as "any event, in or affecting interstate or foreign commerce, that involves a fight conducted or to be conducted between at least 2 animals for purposes of sport, wagering, or entertainment," but does not include "any activity the primary purpose of which involves the use of one or more animals in hunting another animal." *Id.* § 2156(f)(1).

[3] 34 U.S.C. § 20141(e)(2) (Victims' Rights and Restitution Act); 18 U.S.C. § 3771(e)(2) (Crime Victims' Rights Act).

[4] 7 U.S.C. § 2156(a)(2)(B).

$250,000.[5] Minors under 16 years of age may have suffered harm, and, depending on the causation of that harm, may qualify as victims under the VRRA or the CVRA, thereby entitling them to certain services and rights, respectively.[6]

This article purposes to raise awareness of the existence of human victims in AWA cases among law enforcement, prosecutors, and victim–witness personnel. The Department has statutory responsibilities to these human victims under the VRRA and the CVRA. This article also assists personnel in providing these human victims with statutory services rights consistent with the 2022 Attorney General Guidelines for Victim and Witness Assistance (AG Guidelines).[7]

II. Animal-fighting amendments to the Animal Welfare Act

The passage of the Animal Fighting Prohibition Enforcement Act of 2007, which amended the AWA, criminalized animal fighting at the federal level.[8] This amendment prohibits the sponsoring or exhibition of animals (that is, live birds or any animal) in a fighting venture, as well as the buying, selling, delivery, possession, training, and transporting of animals for participation in an animal-fighting venture.[9] The Act further criminalizes the buying, selling, delivery, and transport of sharp instruments for use in animal-fighting ventures with live birds.[10] This amendment only addresses the conduct of those who sponsor or exhibit animals in animal-fighting ventures and take certain actions to conduct these activities.

The Animal Fighting Spectator Prohibition Act of 2013 further criminalized attendance at animal-fighting ventures, including knowingly causing a person who has not attained the age of 16 to attend such ventures.[11] This amendment helps cover the full scope of conduct supporting animal-fighting ventures by criminalizing the attendance of those who create a monetary incentive for these illicit ventures through admission fees and gambling wagers on fights. It also addresses the harm to minors under 16 years of age, who are still at critical stages of their development, which

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[5] 18 U.S.C § 49(c).
[6] 34 U.S.C. § 20141; 18 U.S.C. § 3771.
[7] U.S. Dep't of Just., The Attorney General Guidelines for Victim and Witness Assistance (2022) [hereinafter AG Guidelines].
[8] Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88.
[9] 7 U.S.C. § 2156(a)(1), (b).
[10] *Id.* § 2156(d).
[11] *Id.* § 2156(a)(2).

results from forcing them to witness these extremely violent and deadly acts.

Since the AWA was amended to include knowingly causing minors under the age of 16 to attend an animal-fighting venture, there have been at least two cases that resulted in charges and sentences. Both cases were resolved with plea agreements.

The first case, *United States v. Slone et al.*, was sentenced in 2017.[12] One of the defendants, Russell D. Peaks, raised fighting roosters and transported them from his home in Virginia to fight them in Kentucky.[13] On one occasion, Peaks allowed a minor under the age of 16 to be present at a cockfight.[14] He pleaded guilty to knowingly causing an individual who had not attained the age of 16 to attend an animal-fighting venture in violation of 7 U.S.C. § 2156(a)(2)(B).[15] He also pleaded guilty to one count of "knowingly sponsor[ing] and exhibit[ing] an animal in an animal fighting venture" and "conduct[ing], financ[ing], manag[ing], supervis[ing], direct[ing], and own[ing] all or part of an illegal gambling business" and one count of "distributing hydrocodone."[16] He was sentenced to 24 months of imprisonment for each of the three charges, which ran concurrently.[17] He was also sentenced to one year of supervised release for causing a minor to attend an animal-fighting venture and three years of supervised release for the other two charges.[18]

The second case, *United States v. Anderson et al.,* was sentenced in 2021.[19] One of the defendants, Odell S. Anderson, pleaded guilty to causing a minor under age 16—his seven-year-old son—to attend an animal-fighting venture.[20] The defendant also pleaded guilty to one count of knowingly conspiring to sponsor, engage in, and train for an animal-fighting venture.[21] The defendant trained, exhibited, and sponsored dogs

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[12] Indictment, United States v. Slone et al., No. 1:16-cr-35 (W.D. Va. Aug. 8, 2016), ECF No. 6.
[13] *Id.* at 7.
[14] *Id.* at 8.
[15] 7 U.S.C. § 2156(a)(2)(B); Plea Agreement at 2, United States v. Peaks, No. 1:16-cr-35 (W.D. Va. Nov. 7, 2016), ECF No. 68.
[16] Plea Agreement at 1–2, United States v. Peaks, No. 1:16-cr-35 (W.D. Va. Nov. 7, 2016), ECF No. 68.
[17] Press Release, U.S. Att'y's Off., W.D. Va., Cockfighting Pit That Operated for More Than 30 Years Destroyed; Men Who Owned the Property Sentenced (June 9, 2017).
[18] Judgment in a Criminal Case, United States v. Slone et al., No. 1:16-cr-35 (W.D. Va. Jan. 30, 2017), ECF No. 97.
[19] United States v. Anderson et al., No. 3:21-cr-26 (E.D. Va. June 1, 2021).
[20] Press Release, U.S. Att'y's Off., E.D. Va., Four Plead Guilty to Multi-State Dogfighting Conspiracy (June 1, 2021).
[21] *Id.*

at dog fights with other co-conspirators.[22] He was sentenced to 18 months' imprisonment for each count, which ran concurrently.[23] He was also sentenced to one year of supervised release for causing a minor to attend an animal-fighting venture and three years' supervised release for the other count.[24]

In each case, a minor was subjected to the trauma of watching animal-fighting ventures. The next section discusses why these minors may be statutory victims under the VRRA and CVRA, and thereby entitled to certain services and rights.

III. Application of the Victims' Rights and Restitution Act, Crime Victims' Rights Act, and the Attorney General Guidelines for Victim and Witness Assistance

The information provided in this section highlights the provisions of the VRRA, CVRA, and AG Guidelines to consider in animal-fighting cases with minor victims, though it does not address all provisions of each authority. When considering each of these authorities, remember that the VRRA and CVRA are each compulsory statutory mandates, but only the CVRA is court enforceable. Failure to comply with the CVRA can have litigation consequences on a criminal prosecution. The AG Guidelines is the Department's policy document that interprets how Department personnel should apply the VRRA and CVRA, even requiring enhanced actions beyond what is statutorily required in some instances.

A. New Attorney General Guidelines for Victim and Witness Assistance

The revised AG Guidelines became effective on March 31, 2023.[25] The key provisions to consider in animal-fighting cases with minors are discussed below with the application of the VRRA and CVRA.[26] It is important, however, to highlight a couple of key overarching policy statements

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[22] *Id.*

[23] *Environmental Crimes Bulletin December 2021*, U.S. Dep't of Just., Env't & Nat. Res. Div. (Dec. 15, 2021), https://www.justice.gov/enrd/blog/environmental-crimes-bulletin-december-2022#Harvey.

[24] *Id.*

[25] AG Guidelines, *supra* note 7.

[26] *See* discussion *infra* sections III.B and III.C.

at the outset that should be kept in mind when applying the VRRA, CVRA, and AG Guidelines. First, the Foreword and the AG Guidelines emphasize that the policy "prioritizes a victim-centered, trauma-informed, and culturally sensitive approach."[27] Second, "a strong presumption exists in favor of providing, rather than withholding, assistance and services, including assistance from Department personnel to victims of crime."[28]

These cases pull at the heartstrings of those who even hear about these violent and deadly acts of animal cruelty, but they are especially brutal for the minors who are forced to witness these violent acts that affect their emotional and psychological development. When undertaking these investigations and prosecutions, it is important to address the full scope of the criminal conduct so that any statutory victims—including child victims—are properly considered, provided services, and accorded their rights consistent with the AG Guidelines.

B. Providing victim services

The VRRA defines *victim* as "a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime."[29] The emotional and psychological impact of witnessing animal cruelty has been studied and discussed by a range of experts. The impacts of the viewing animal cruelty on a person's psyche have no definitive answers; however, the critical mass of research supports that viewing such violent activity has a negative effect on the development of children. In their systematic review of the relationship between interpersonal violence and animal cruelty, authors Claudio Longobardi and Laura Badenes-Ribera assert the following:

> Overall, the results show that episodes of animal cruelty during childhood and adolescence tend to co-occur alongside other forms of violent and antisocial behaviors. Cruelty to animals was associated with bullying, behavioral problems, experiences of abuse (emotional, physical[,] and sexual), and juvenile delinquency. Furthermore, recurrent animal cruelty during childhood and adolescence was a significant predictor of the future adult perpetration of interpersonal violence.[30]

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[27] AG Guidelines, *supra* note 7, at i.
[28] *Id.* at 4.
[29] 34 U.S.C. § 20141(e)(2).
[30] Claudio Longobardi & Laura Badenes-Ribera, *The Relationship Between Animal Cruelty in Children and Adolescent and Interpersonal Violence: A Systematic Review*, 46 Aggression & Violent Behav. 201 (2019).

Thus, in cases involving underage attendance at an animal-fighting event, the emotional and psychological harm minors under the age of 16 suffer can result in long-term impacts on their continued mental and developmental growth. Under both definitions, the harm must be a direct result of criminal conduct and can be emotional if it is directly related to the criminal conduct. The impact of experiencing or witnessing a traumatic event cannot be overstated.

The VRRA proscribes the services to which victims are entitled. Department personnel are required to provide VRRA services "at the earliest opportunity after the detection of a crime at which it may be done without interfering with an investigation."[31] The AG Guidelines define this as the "opening of a criminal investigation."[32] After opening an investigation, Department personnel should prioritize the following services: (1) informing victims of where they "may receive emergency medical and social services";[33] (2) informing victims of "public and private programs that are available to provide counseling, treatment, and other support,";[34] and (3) arranging "reasonable protection from a suspected offender and persons acting in concert with or at the behest of the suspected offender."[35]

The counseling and treatment services are of utmost importance to provide early and ongoing intervention to counter the psychological and emotional harm that may result from witnessing the violence and abuse associated with animal fighting. Victim–witness personnel at law enforcement agencies and U.S. Attorneys' Offices (USAOs) are critical in identifying these services and connecting victims with these services.

The service of providing reasonable protection to minor victims is a complicated and nuanced issue. Department personnel should consider the relationship between the minor and the adult who caused them to attend the animal-fighting venture. While we do not have a critical mass of cases charging this crime, it is likely that a familial relationship exists between the adult and the minor, such as in the abovementioned *United States v. Anderson et al.* prosecution.[36] It is important to remember these minor victims may also be witnesses in your case. Law enforcement and prosecutors should involve victim–witness personnel as early as possible to evaluate whether any measures are needed to protect the minor from the adult. The health of the relationship between the minor and

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[31] 34 U.S.C. § 20141(b).
[32] AG Guidelines, *supra* note 7, at 13, 48.
[33] 34 U.S.C. § 20141(c)(1)(A).
[34] *Id.* § 20141(c)(1)(C).
[35] *Id.* § 20141(c)(2).
[36] United States v. Anderson et al., No. 3:21-cr-26 (E.D. Va. June 1, 2021). *See* discussion *supra* section II.

the adult will range from an objectively stable and nurturing household to an unstable household where the child experiences abuse and interpersonal violence, which may trigger certain Department and mandatory reporting obligations as discussed further below.[37] Also determine if the adult under investigation is the only caregiver in the minor child's home. These will be case- and fact-specific determinations.

The AG Guidelines provide detailed guidance for specific victim populations that are identified by certain common characteristics and are considered vulnerable.[38] Child victims are one of these specific victim populations; therefore, read the AG Guidelines carefully when child victims are part of a criminal matter.[39] As noted in the AG Guidelines, Department policy requires that "Department personnel who, in the course of official business, learn of facts that give reason to suspect child abuse shall promptly report the suspected child abuse to the appropriate law enforcement or Child Protective Services agency, and should also notify the Department personnel designated to receive such reports in their agency, component, or office."[40] This policy is in addition to statutory reporting requirements that may apply. The AG Guidelines describe additional responsibilities Department personnel have to child victims as a matter of law or policy including heightened privacy protections, investigation and forensic interviewing protocols, well-being considerations, appointment of a guardian ad litem, and protections during judicial proceedings.[41]

The application of these additional responsibilities is case and fact specific, and law enforcement, prosecutors, and victim–witness personnel should discuss the issues related to child victims as early as possible, including considering them in the investigation planning. The ability to communicate with child victims without fear of intimidation from the adults in the household or fear of getting their caretakers in trouble with law enforcement can hamper the ability of Department personnel to provide children with services. It is crucial to plan for these types of circumstances.

Further, the AG Guidelines provide additional information to support victims who may have limited or no proficiency in English.[42] Consider this when working with child victims with limited English skills. This issue is even more important in situations where adults in the household have

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[37] See AG Guidelines, *supra* note 7, at 25–29 (Department child abuse reporting requirements).
[38] *Id.* at 24.
[39] *Id.* at 25–33.
[40] *Id.* at 25.
[41] *Id.* at 25–32.
[42] *Id.* at 44.

limited English skills, even though the minor does not, especially when one of the adults in the household is accused of causing the minor to attend an animal-fighting venture. Language issues can complicate providing services to child victims; Department personnel should consider how they will address this language barrier, such as having an interpreter or additional Department personnel with the necessary language skills present to be part of interactions with the child victim. Department personnel might also have adults in the child's household present to ensure the child victim is properly supported.

C. According victim rights

The AG Guidelines set forth as a matter of policy that Department personnel "make their best efforts to accord to victims the rights set forth in the [CVRA], as early in the criminal justice process as is feasible and appropriate, including [before] the execution of a non-prosecution agreement, deferred prosecution agreement, pretrial diversion agreement, or plea agreement."[43] The CVRA and the VRRA have some overlap, and there are few key provisions in the CVRA that Department personnel should consider early in the investigation.

The CVRA defines *crime victim* as "a person directly and proximately harmed as a result of the commission of a [f]ederal offense or an offense in the District of Columbia."[44] The CVRA further provides that for crime victims under 18 years of age, a legal guardian, representative of crime victims' estate, family member, or other person appointed as suitable by the court can assume the rights of the victim.[45] The CVRA also includes the additional protection that "in no event shall the defendant be named as such guardian or representative."[46] This is of particular importance when providing reasonable protection from the accused as required by 18 U.S.C. § 3771(a)(1) as well as the overlapping VRRA service to also provide reasonable protection to the victim.[47]

Again, Department personnel should consider the relationship between the minor and the adult who caused them to attend the animal-fighting venture when providing services and rights. The AG Guidelines provide guidance on the appropriateness of seeking a guardian ad litem, which Department personnel should consider when a child is a victim of or witness to a crime.[48] This is to ensure the accused is not the represen-

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[43] *Id.* at 14.
[44] 18 U.S.C. § 3771(e)(2)(a).
[45] *Id.* § 3771(e)(2)(B).
[46] *Id.*; AG Guidelines, *supra* note 7, at 87.
[47] 18 U.S.C. § 3771(a)(1); 34 U.S.C. § 20141(c)(2).
[48] AG Guidelines, *supra* note 7, at 32.

tative of the child victim for the purposes of receiving services or being accorded their rights.

In addition to the CVRA right to be reasonably protected from the accused, the CVRA also provides that victims have the "right to be treated with fairness and with respect for [their] dignity and privacy" and to "be informed of [their] rights . . . and the services described in . . . the [VRRA]."[49] Department personnel involved in animal-fighting cases should ensure the accused is not able to interfere with their ability to accord child victims their rights or provide them with services when there is a familial relationship giving the accused's custodial responsibilities over child victims.

Lastly, Department personnel should consider the child victim's right to be reasonably heard and the reasonable right to confer with the prosecutor.[50] Both provisions have the fundamental premise that victims should be able to provide information to inform the decisions of the courts and prosecutors, respectively. The AG Guidelines advise the minor crime victims may submit victim impact statements, which should be in an age-appropriate format that allows the child to express their views concerning their victimization.[51] Prosecutors should carefully consider the information provided by child victims when making litigation decisions and sentencing recommendations, especially when there is a familial relationship between the child victim and the adult who caused them to attend an animal-fighting venture.

Department personnel may have to consider other conditions as well, such as counseling for the defendant and the child victim as a condition of supervised release or other measures to address the emotional and psychological harm of the child victim. Additionally, certain considerations may determine whether to call the child victim as a witness at trial or to speak at sentencing. Consult with the child victim and their guardian, for purposes of the CVRA, to obtain information at appropriate times during the investigation and prosecution and minimize re-traumatization of the child victim, especially if the child may be a witness at trial against an adult in the child's household.[52]

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[49] 18 U.S.C. § 3771(a)(8)–(10).
[50] *Id.* § 3771(a)(4)–(5).
[51] AG Guidelines, *supra* note 7, at 32.
[52] "Department personnel should be aware of the trauma that child victims and witnesses may experience when they are asked to recount the crime during the investigation and prosecution of a criminal case, particularly when testifying in court. A primary goal of Department personnel, therefore, shall be to reduce the potential trauma to child victims and witnesses that may result from their contact with the criminal justice system." *Id.* at 25.

IV. Conclusion

The fundamental first step is understanding who the statutory victims are in these cases—minors—and identifying them at the outset of an investigation. Providing these minor victims with services and according them their rights in animal-fighting cases require forethought and planning by Department personnel. Ensuring child victims are fully considered and supported in these investigations and prosecutions—along with the animals—is worth the additional preparation. In addition to the victim–witness personnel within law enforcement agencies and USAOs, the environmental crime victim assistance team within the Environment and Natural Resources Division (ENRD) has expertise and resources available to assist in these cases.[53]

About the Author

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[53] *See Environment and Natural Resources Division*, U.S. Dep't of Just., https://www.justice.gov/enrd (last visited Oct. 23, 2024).

United States v. Mikirtichev: An Animal Welfare Act Case Study

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I. Introduction

Few topics trigger greater public outrage than cases of animal cruelty and neglect. Many are familiar with the criminal prosecutions of the perpetrators of these crimes, like the case brought against former professional football quarterback Michael Vick for his infamous involvement in a dog-fighting ring.[1] Perhaps less familiar to the public—but also crucial—is the federal government's enforcement of federal animal welfare laws. The U.S. Department of Agriculture (USDA) brings administrative enforcement actions under the Animal Welfare Act (AWA) seeking cease-and-desist orders, license revocation, and other penalties from violators of the statute.[2] These criminal and administrative actions, while critical to enforcement efforts, can take months to years to be adjudicated, even when ongoing acts of animal mistreatment are occurring.

Civil judicial actions for injunctive relief can fill this gap. They are a tool available to Department of Justice (Department) attorneys to prevent ongoing violations of federal animal welfare laws under certain circumstances. This tool can complement the USDA's administrative enforcement actions and criminal actions by the Department and provide faster results for animals enduring inhumane treatment caused by bad actors. The Justice Manual gives responsibility for civil enforcement of the AWA to the Department's Wildlife and Marine Resources Section (WMRS) in

[1] United States v. Peace, No. 3:07-cr-274 (E.D. Va. filed July 17, 2007).
[2] 7 U.S.C. §§ 2131–2160.

the Environment and Natural Resources Division (ENRD).[3] U.S. Attorneys' Offices interested in pursuing a specific AWA case should consult with the WMRS to determine if prior authorization is needed to initiate the action.[4]

United States v. Mikirtichev is a recent example of one such action pursued by the WMRS under the AWA.[5] The defendants in the *Mikirtichev* case operated a cat- and dog-breeding facility in Virginia.[6] The USDA cited the facility for violations of the AWA over 50 times within five months, and much of the conduct leading to those citations caused the needless suffering and sometimes deaths of the animals in the defendants' care.[7] After the USDA referred the case, the Department worked with the USDA, the Attorney General of Virginia, and the Humane Society of the United States to halt the defendants' unlawful operations and, ultimately, to rescue more than 150 animals from the facility.[8] This article outlines the steps taken to bring and successfully resolve this action.

II. Background

A. The Animal Welfare Act

The AWA focuses on ensuring humane care and treatment for certain animals used in the pet industry, in research, and for exhibition at zoos or similar facilities.[9] The statute protects only warm-blooded animals, and it does not protect birds, rats, and mice bred for research; horses not used for research; or farm animals used for food, fiber, or research related to food or fiber production.[10] The statute and its regulations and standards impose "minimum requirements" for various aspects of animal care, including handling, housing, feeding, watering, sanitation, and adequate veterinary care.[11] These requirements include standards specifically governing the humane handling, care, treatment, and transportation of dogs and cats.[12] Any facility engaging in AWA-regulated activities must apply for and receive an AWA license or registration, and must comply

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[3] U.S. Dep't of Just., Justice Manual 5-10.120.
[4] *Id.* at 5-10.321.
[5] Complaint for Declaratory and Injunctive Relief, United States v. Mikirtichev, No. 3:23-cv-552 (E.D. Va. Aug. 30, 2023), ECF No. 1.
[6] *Id.* at 2.
[7] *Id.*
[8] Press Release, U.S. Dep't of Just. Off. of Pub. Affs., Virginia Animal Breeders Surrender Approximately 200 Dogs and Cats (Jan. 9, 2024).
[9] 7 U.S.C. § 2131(1).
[10] *Id.* § 2132(g).
[11] *Id.* § 2143(a)(2)(A); 9 C.F.R. §§ 3.1–3.168.
[12] 9 C.F.R. §§ 3.1–3.20.

with these requirements.[13]

The AWA establishes a comprehensive enforcement scheme that is primarily administered by the USDA. Under the AWA, the USDA created a licensing system for animal dealers.[14] The AWA and its regulations define a "dealer" as the following:

> [A]ny person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes.[15]

Anyone who falls within the statutory definition of a dealer must obtain and maintain a valid Class A or Class B license under the AWA.[16]

Class A and Class B licenses cover breeders and brokers, respectively.[17] A Class A breeder license is for a person whose animal business "consists only of animals that are bred and raised on the premises in a closed or stable colony and those animals acquired for the sole purpose of maintaining or enhancing the breeding colony."[18] And the USDA may issue a Class B broker license to a person "whose business includes the purchase [or] resale of any animal."[19]

The AWA empowers the USDA to investigate and inspect dealer facilities to ensure compliance with the statute and its regulations.[20] The USDA's Animal and Plant Health Inspection Service (APHIS) carries out these investigations and inspections. APHIS records its findings during inspections—and any violations of AWA regulations or standards—in documents called inspection reports. If APHIS finds evidence that a dealer has violated the AWA or its regulations, the agency may engage in an administrative enforcement process.[21] APHIS has authority to temporarily suspend a dealer's license for 21 days and, after an administrative hearing, to suspend the license for longer or to revoke it.[22]

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[13] *Id.* § 2.100.
[14] 7 U.S.C. § 2133; 9 C.F.R. §§ 2.1–2.13.
[15] 7 U.S.C. § 2132(f); *see* 9 C.F.R. § 1.1.
[16] 7 U.S.C. § 2134.
[17] U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Animal Care: Animal Welfare Act and Animal Welfare Regulations 37 (2023).
[18] 9 C.F.R. § 1.1.
[19] *Id.*
[20] 7 U.S.C. § 2146.
[21] *Id.* § 2149.
[22] *Id.* § 2149(a).

If the USDA believes a dealer's violations place the health of an animal in "serious danger," the USDA notifies the Department.[23] The Department may then apply for a temporary restraining order (TRO) or injunction in the U.S. district court where the dealer resides or conducts business to prevent the dealer from operating in violation of the AWA, its regulations, and its standards.[24] Any order issued by a court under this provision, known as the "serious-danger provision," remains in effect until the USDA's administrative proceedings conclude.[25] As discussed *infra* section III.D.2, the serious-danger provision falls within a category of statutes that limit a court's traditional equitable discretion as described in *Winter v. Natural Resources Defense Council, Inc.*, and several courts have determined that if the Department properly demonstrates that animals in a defendant's care are in serious danger, injunctive relief is mandatory.[26]

The AWA also allows for civil enforcement claims outside of the serious-danger provision. The AWA vests federal district courts "with jurisdiction specifically to enforce, and to prevent and restrain violations of this chapter, and shall have jurisdiction in all other kinds of cases arising under this chapter," except in cases for judicial review of a final order in an administrative action (for which U.S. Courts of Appeals have jurisdiction).[27] This means that a lawsuit bringing AWA claims may seek injunctive relief for violations that do not fall within the purview of the serious-danger provision, although any preliminary injunctive relief sought for such a claim must meet the traditional four-factor test under *Winter*.[28]

B. The Mikirtichevs' facility

Andrey Mikirtichev and Elena Mikirticheva (the Mikirtichevs) were commercial breeders of Maine Coon cats and French bulldogs who operated a breeding facility in North Chesterfield, Virginia.[29] They were also affiliated with at least one breeding facility in Russia and transported cats and dogs between Russia and the United States.[30] When the USDA

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[23] *Id.* § 2159(a).
[24] *Id.*
[25] *Id.* § 2159(b).
[26] 555 U.S. 7 (2008). *See* United States v. Gingerich, No. 4:21-cv-283, 2021 WL 6144690, at *3 (S.D. Iowa Oct. 13, 2021); United States v. Lowe, No. 20-cv-423, 2021 WL 149838, at *10 (E.D. Okla. Jan. 15, 2021).
[27] 7 U.S.C. § 2146(c). *See also id.* § 2149(c) (exclusive jurisdiction of U.S. Courts of Appeals).
[28] *See* United States v. Envigo RMS, LLC, No. 6:22-CV-28, 2022 WL 2195030, at *1 (W.D. Va. June 17, 2022).
[29] Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 2.
[30] *Id.* at 14, 16, 35.

referred the case to the Department in 2023, the Mikirtichevs held a Class B broker license under the AWA.[31]

Issues with the Mikirtichevs began in 2021.[32] Between 2021 and 2022, the USDA was unable to access the Mikirtichevs' facility during four attempted inspections.[33] Title 9, Code of Federal Regulations, Section 2.126(a) requires a dealer to allow APHIS officials to enter and inspect the dealer's place of business during business hours.[34] When the USDA did gain access to the facility, inspectors noted multiple violations, mostly for failing to provide adequate veterinary care to the animals.[35] When the USDA inspectors returned for reinspection, the Mikirtichevs had sometimes addressed the issues from the previous inspection, but new violations often presented instead.

The situation continued to escalate, with the number of animals at the Mikirtichevs' facility increasing exponentially from 2021 to 2023. There were 35 animals at the facility in January 2020, but by March 2023 there were 78 cats, 23 kittens, and 10 dogs, bringing the total number of animals to 111.[36] And with the greater number of animals came a greater number of violations—the Mikirtichevs racked up over 50 citations in just five months.[37] The violations fell into four major categories: (1) failure to provide adequate veterinary care; (2) housing the animals in a way that was detrimental to their health and well-being; (3) exposing animals to unsanitary and unsafe conditions; and (4) failing to make and maintain complete and accurate records.[38]

The most alarming of these violations was the failure to provide adequate veterinary care. The AWA and its regulations require a dealer to have an attending veterinarian as either an employee or a consultant.[39] If, as with the Mikirtichevs, the attending veterinarian is a consultant, arrangements must be made for the attending veterinarian to create a written program of veterinary care and to regularly visit the dealer's premises.[40] The attending veterinarian must have "appropriate authority" to provide adequate veterinary care; for instance, the dealer must

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[31] *Id.* at 2.
[32] *Id.* at 12.
[33] *Id.*
[34] 9 C.F.R. § 2.126(a). *See also* 7 U.S.C. § 2149(a) (USDA shall, at all reasonable times, have access to the places of business, facilities, and animals for purposes of investigations or inspections).
[35] Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 12.
[36] *Id.* at 10.
[37] *Id.* at 2.
[38] *Id.* at 36–38.
[39] 9 C.F.R. § 2.40(a).
[40] *Id.* § 2.40(a)(1).

follow any care instructions given by the attending veterinarian.[41] The dealer is also required to ensure the daily observation of all animals to assess their health and well-being and to directly and frequently communicate problems to the attending veterinarian.[42] APHIS repeatedly cited the Mikirtichevs for violating these requirements.

As documented by APHIS inspection reports, the Mikirtichevs consistently neglected to bring sick or injured animals to the attending veterinarian, waited weeks to bring seriously ill animals to Russia for treatment instead, and used Russian medications that may have been expired to try and treat animals themselves.[43] They also misrepresented the circumstances surrounding the deaths of certain kittens, claiming that some were stillborn or died just after birth when records showed that the kittens were days or weeks old when they died.[44] Additionally, APHIS inspectors were aware of at least four animals with serious dental issues that did not receive adequate dental care.[45]

One particularly egregious example of inadequate veterinary care was the failure to treat, and then refusal to treat, a cat with a potentially life-threatening hernia.[46] An APHIS inspector noticed the cat during a March 16, 2023, inspection.[47] The cat was dehydrated, in poor body condition, and had a large abdominal mass near her hind legs.[48] But instead of having a plan to bring the cat to the attending veterinarian for treatment, the APHIS inspector discovered that Mr. Mikirtichev intended to have the animal treated in Russia in six weeks.[49] The inspector instructed Mr. Mikirtichev to bring the cat to the attending veterinarian in the United States immediately and by the next business day following the inspection's completion.[50] When the veterinarian examined the cat, the cat was diagnosed with a severe, potentially life-threatening hernia through which some of her organs had prolapsed.[51] The attending veterinarian recommended surgery to operate on the hernia and recommended the cat

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[41] *Id.* § 2.40(a)(2).
[42] *Id.* § 2.40(b)(3).
[43] Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 14.
[44] Memorandum in Support of Ex Parte Motion for Temporary Restraining Order at 20, United States v. Mikirtichev, No. 3:23-cv-552 (E.D. Va. Aug. 30, 2023), ECF No. 6.
[45] Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 19.
[46] *Id.* at 16.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] Memorandum in Support of Ex Parte Motion, *supra* note 44, at 14.

be spayed to prevent future hernias.[52] The APHIS inspector documented that while Mr. Mikirtichev agreed to the hernia surgery, he initially refused to allow the spay, and he only agreed to spay the cat when the attending veterinarian insisted it was within their authority to mandate care.[53]

Perhaps the starkest instance of the failure to provide adequate veterinary care for the animals at the Mikirtichevs' facility is what happened to a brown tabby male kitten that APHIS inspectors identified as having a chest malformation during a July 24, 2023 inspection.[54] The kitten had severe trouble breathing when handled and had obviously poor body condition. As documented by APHIS inspection reports, Mr. Mikirtichev said he noticed the malformation but insisted that a vet could not treat the condition until the kitten was at least six months old.[55] APHIS inspectors instructed Mr. Mikirtichev that this was inaccurate, and he needed to take the kitten to the vet as soon as possible.[56] It was not until APHIS inspectors followed up with the attending veterinarian about the kitten's condition that the kitten was finally taken to the vet—11 days after the inspection.[57] The vet recommended surgery for the kitten within two weeks or humane euthanasia.[58] Despite this instruction, during another inspection on August 9, 2023, APHIS inspectors observed the kitten being housed with multiple other cats and in much worse condition.[59] The kitten's worsening condition was not communicated to the attending veterinarian, and the kitten was not taken to the required follow-up appointment.[60] At the instruction of APHIS inspectors, the kitten was taken to the vet, but the kitten died hours later at the Mikirtichevs' facility.[61]

While inadequate veterinary care was the most alarming aspect of the Mikirtichevs' violations, APHIS inspectors cited the Mikirtichevs for many other concerning practices.[62] For example, the housing conditions for the animals were unsanitary and dangerous.[63] Too many cats and kittens were housed in too-small enclosures, forcing the animals to lie or sit

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[52] *Id.*
[53] *Id.* at 14–15.
[54] Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 2.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at 3.
[63] *Id.*

in their litter boxes and soil their fur.[64] Moreover, incompatible cats were often housed together, causing them physical injury or exclusion from access to food and water.[65] The French bulldogs were housed outside year-round despite the sensitivity of the breed to hot and cold temperatures, which in Chesterfield, Virginia, can range from 28 to 90 degrees Fahrenheit.[66] The dog enclosures also contained piles of junk and hazardous materials, including electrical wires that the dogs chewed, making the dogs susceptible to injury.[67] The dog enclosures were not secured, and the animals frequently escaped. APHIS inspectors cited the Mikirtichevs for these and many other similar infractions.

On top of these serious violations, accurate records were not kept at the Mikirtichevs' facility, which prevented APHIS inspectors from tracking the animals over time and following up on issues that they had cited or otherwise noted.[68] There was also no accurate inventory of animals at the Mikirtichevs' facility or accurate disposition records (records that include essential information about any animal's sale, removal, death, or euthanasia).[69] Dates of birth for kittens were not recorded, and information like gender or color was not identified for the kittens on APHIS forms.[70] The medical records for the dogs at the facility were also incomplete. The records omitted the name and administration date for vaccines and prescribed medical treatments, as well as diagnostic test results.[71]

C. The federal case

The USDA served the Mikirtichevs with a Notice of Suspension on August 14, 2023, suspending their Class B license for a period of 21 days.[72] The USDA then filed an administrative complaint against the Mikirtichevs for numerous willful violations of the AWA and its regulations on August 25, 2023.[73] The USDA sought civil penalties for the violations, a cease-and-desist order, and to permanently revoke the Mikir-

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[64] *Id.* at 26.
[65] *Id.* at 25.
[66] *Climate and Average Weather Year Round in Chesterfield*, Weather Spark, https://weatherspark.com/y/20883/Average-Weather-in-Chesterfield-Virginia-United-States-Year-Round#google_vignette (last visited Oct. 15, 2024).
[67] Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 32–34.
[68] *Id.* at 34.
[69] *Id.* at 34–35.
[70] *Id.*
[71] *Id.* at 35.
[72] *Id.* at 4.
[73] *Id.*

tichevs' license.[74]

After the USDA referred the matter to the Department for a civil injunctive action under the AWA's serious-danger provision,the Department filed a complaint in the Eastern District of Virginia, Richmond Division on August 30, 2023, seeking declaratory and injunctive relief to address violations of the AWA and its implementing regulations and standards.[75] Claim I alleged that the Mikirtichevs placed the health of certain animals in serious danger in violation of the AWA.[76] Claims II through IV alleged that the Mikirtichevs violated the AWA by failing to meet numerous minimum standards as required by the statute.[77] And Claim V addressed the Mikirtichevs' recordkeeping violations.[78]

The same day, the Department filed an ex parte motion for a TRO.[79] The motion requested that the court enjoin the Mikirtichevs from operating their cat- and dog-breeding business in violation of the AWA and its regulations and standards.[80] Specifically, the Department asked that the Mikirtichevs be ordered to cease selling, offering for sale, transporting, or offering for transport any animal at their facility until they came into compliance with the AWA, as well as to cease acquiring or euthanizing dogs or cats at their facility without the United States' consent or a court order.[81] The Department also asked the court to enter various other forms of relief to address the conditions placing the animals in serious danger.

The court entered the TRO hours after the motion was filed.[82] On September 11, 2023, the parties filed a Joint Stipulation asking the court to convert the TRO to a preliminary injunction (PI).[83] The court entered the PI the next day.[84] Following entry of the PI, the Mikirtichevs surrendered dozens of animals to the USDA, which secured care and placement for each of the surrendered animals.[85]

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[74] Press Release, U.S. Dep't of Just. Off. of Pub. Affs., Virginia Animal Breeders Surrender Approximately 200 Dogs and Cats (Jan. 9, 2024).
[75] Complaint for Declaratory and Injunctive Relief, *supra* note 5.
[76] *Id.* at 36; 7 U.S.C. § 2159(a).
[77] Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 36–38.
[78] *Id.* at 38.
[79] *Id.* at 4; Ex Parte Motion for Temporary Restraining Order, United States v. Mikirtichev, No. 3:23-cv-552 (E.D. Va. Aug. 30, 2023), ECF No. 5.
[80] Ex Parte Motion for Temporary Restraining Order, *supra* note 79, at 2.
[81] *Id.*
[82] Order, United States v. Mikirtichev, No. 3:23-cv-552 (E.D. Va. Aug. 30, 2023), ECF No. 7.
[83] Notice of Joint Agreement, United States v. Mikirtichev, No. 3:23-cv-552 (E.D. Va. Sept. 11, 2023), ECF No. 15.
[84] Order (Converting TRO into Preliminary Injunctive Relief), United States v. Mikirtichev, No. 3:23-cv-552 (E.D. Va. Sept. 12, 2023), ECF No. 16.
[85] Press Release, U.S. Dep't of Just. Off. of Pub. Affs., Virginia Animal Breeders

On October 9, 2023, the Virginia Attorney General's Office executed a search-and-seizure warrant for the Mikirtichevs' facility, and the Mikirtichevs surrendered all their remaining AWA-regulated animals to a nonprofit organization, the Humane Society of the United States, which had been working with the Virginia Attorney General's Office.[86] In total, the Mikirtichevs surrendered more than 150 animals.[87]

After the surrender of the animals, the USDA and the Department negotiated settlements of the federal administrative and district-court cases. The USDA negotiated a resolution of the administrative action with the Mikirtichevs that led to the permanent revocation of the Mikirtichevs' AWA license, a cease-and-desist order, and assessment of a civil penalty.[88] The Department and the Mikirtichevs also entered into a court-ordered consent decree that prohibits the Mikirtichevs from engaging in any activity that would require an AWA license or registration moving forward.[89]

III. Building an Animal Welfare Act case under the serious-danger provision

A. Is there engagement in regulated activity?[90]

The first step when evaluating if a matter is a good candidate for a case under the AWA's serious-danger provision is to determine if the potential defendant is a "dealer, carrier, exhibitor, or intermediate handler" under the AWA.[91] The potential defendant must engage in AWA-regulated activity to fall within the statute's purview. This threshold determination can be met in one of two ways. First, the potential defendant can engage in regulated activity and possess an AWA license. Second, a person can (ille-

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Surrender Approximately 200 Dogs and Cats (Jan. 9, 2024).

[86] Katelyn Harlow, *Chesterfield Breeding Facility Operators Sued After Around 129 Cats, 6 Dogs Allegedly Found in 'Serious Danger' with Unsanitary, Unsafe Conditions*, ABC 8News (Oct. 11, 2023), https://www.wric.com/news/local-news/chesterfield-county/chesterfield-breeding-facility-operators-sued-after-around-129-cats-6-dogs-allegedly-found-in-serious-danger-with-unsanitary-unsafe-conditions/.

[87] Press Release, U.S. Dep't of Just. Off. of Pub. Affs., Virginia Animal Breeders Surrender Approximately 200 Dogs and Cats (Jan. 9, 2024).

[88] *Id.*

[89] *Id.*

[90] Animals that are the subject of serious-danger cases may sometimes be regulated by both the AWA and the Endangered Species Act (ESA) if the animal is listed as threatened or endangered. 16 U.S.C. § 1531. In such cases, additional claims under the ESA may be considered. Such claims are beyond the scope of this article, and we recommend reaching out to the Department's WMRS if such situations arise.

[91] 7 U.S.C. § 2159(a).

gally) engage in AWA-regulated activity without a license.[92] Because the vast majority of breeder and broker serious-danger cases involve entities that fall within the first category, including the *Mikirtichev* case, this article focuses on potential defendants operating with an AWA license. Any potential serious-danger matter that involves engaging in AWA-regulated activity without a license should be discussed with attorneys at the Department's WMRS and the USDA to evaluate if the potential defendant is exempt from the AWA's requirements.

A list of entities with a valid AWA license is available on the USDA's website.[93] The USDA's online inspection report search tool includes the current licensure status for an entity, including if the license was terminated or revoked.[94] The search tool allows the user to look up a potential licensee by type of license, city, state, zip code, customer or organization name, or license (certificate) number.[95] This tool should be used to determine if the potential defendant has an AWA license and is engaging in AWA-regulated activity.

The Mikirtichevs were "dealers" under the AWA and possessed an AWA Class B broker license.[96] After establishing their licensure status, the next step was for the USDA to bring an administrative enforcement action and determine if the AWA violations placed the Mikirtichevs' animals in serious danger.

B. Has the U.S. Department of Agriculture brought an administrative enforcement action and referred the matter to the Department?

The AWA's serious-danger provision authorizes the Department to bring injunctive actions in federal court to accompany administrative enforcement actions brought by the USDA.[97] If the USDA has reason to believe a licensee is violating the AWA and its regulations and standards, the USDA can initiate a number of enforcement actions, including a 21-day license suspension and filing of a formal administrative complaint against the licensee.[98] For example, the USDA issued a 21-day license suspension

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[92] *See Lowe*, 2021 WL 149838, at *11–13 (holding that exhibiting animals without an AWA license violates the AWA).
[93] Animal & Plant Health Inspection Serv., Active License Report (2024).
[94] *Inspection Reports Search*, U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., https://aphis.my.site.com/PublicSearchTool/s/inspection-reports (last visited Oct. 10, 2024).
[95] *Id.*
[96] Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 11.
[97] 7 U.S.C. § 2159(a).
[98] *Id.* § 2149(a)–(b).

to the Mikirtichevs after multiple inspections revealed significant AWA violations.[99] The USDA subsequently filed a formal administrative complaint against the Mikirtichevs alleging numerous AWA violations and referred the matter to the Department for civil injunctive relief.

While an administrative complaint against a dealer the USDA believes is placing the health of their animals in serious danger may result in the permanent revocation of the dealer's license, the procedures governing the resolution of such complaints often prompt a months-long or even years-long administrative adjudication process.[100] Title 7, Code of Federal Regulations, Sections 1.130–1.151 outline the Rules of Practice applicable to proceedings under multiple statutes, including complaints brought under section 2149 of the AWA.[101] Because serious-danger cases often involve animals in urgent need of veterinary care (as discussed *infra* section III.C), the Department can play a vital role in such cases by quickly obtaining injunctive relief to ensure the health and welfare of at-risk animals while the USDA's administrative action is ongoing.

Once a district court grants the Department's requested relief, the injunction or order remains until the USDA's enforcement action is either dismissed or fully adjudicated, which can prevent needless animal suffering that—absent a court-ordered injunction—might otherwise occur over the course of the USDA's administrative case. The Department can bring such an action once the USDA makes a serious-danger referral.

C. Have there been Animal Welfare Act violations that place the animals in "serious danger"?

If the USDA believes that a licensee is violating the AWA and those violations rise to the level of placing the health of an animal in serious danger, the USDA will refer the matter to the Department.[102] The Department can then bring a lawsuit in district court to apply for a TRO or injunction that prevents a potential defendant from operating in violation of the AWA.[103]

When preparing for a potential lawsuit, the Department reviews the USDA's inspection reports for the facility and interviews the inspectors who carried out those inspections. The USDA conducts several different kinds of facility inspections. Before the USDA licenses a facility, it conducts a pre-license inspection to ensure the facility complies with the

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[99] Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 14.
[100] 7 U.S.C. § 2149(a) (after "notice and opportunity for hearing" the Secretary may "revoke" a dealer's license if an AWA violation is determined to have occurred).
[101] 7 C.F.R. §§ 1.130–1.151; 7 U.S.C. § 2159.
[102] 7 U.S.C. § 2159(a).
[103] *Id.*

AWA and its regulations and standards. The USDA also performs unannounced routine inspections, which are complete inspections of every aspect of the AWA-regulated facility.[104] In addition, the USDA can conduct focused inspections in response to a public complaint concerning animal welfare or after finding certain violations, as described in the following paragraph.[105]

During an inspection, the USDA may note several types of AWA violations, also referred to as noncompliant items (NCIs). A general NCI occurs when the licensee has not complied with an AWA standard. In the inspection report, the inspector notes the following: (1) the section number and most specific subsection of any noncompliance; (2) a description of the noncompliance, including the number of animals affected if appropriate; (3) an explanation of why the item is noncompliant and its impact on the animals; and (4) what the licensee should do to correct the problem and a deadline for those corrections.[106] If an NCI in the same section and subsection has been noted on several inspections, the NCI may be categorized as "repeat," "recurring," or "chronic."[107] A more serious type of NCI is a "critical" NCI, defined (as relevant to the Mikirtichev matter) as an NCI that has "a serious or severe adverse effect on the health and well-being of the animal."[108] The most serious NCI is a "direct" NCI—a critical NCI happening during the time of inspection.[109] If an inspector records a direct NCI, the USDA policy is to perform a focused reinspection within 14 days.[110] The USDA records NCIs in inspection reports. Inspection reports for each licensee or registrant are also available on the USDA's website.[111]

Depending on the specific circumstances of a USDA serious-danger referral, the Department may bring an action for injunctive relief to prevent further AWA violations. The number and severity of direct, critical, or repeat NCIs cited during inspections, as well as when those NCIs occurred, are crucial to note when preparing an injunctive relief action.

One common type of NCI in serious-danger cases is for inadequate

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[104] *See* U.S. Dep't of Agric., Animal Welfare Inspection Guide 3-26 to -27 (2024).
[105] *Id.* at 3-27.
[106] *Id.* at 2-6.
[107] *Id.* at 2-7.
[108] *Id.* at 2-8.
[109] *Id.* at 2-9.
[110] *Id*.
[111] *Inspection Reports Search, supra* note 94. After you find the licensee or registrant, you can access the inspection reports by selecting "Query Inspection Reports." That page summarizes the types of NCIs recorded for each inspection (if any) and makes each inspection report available to download.

veterinary care.[112] AWA standards and regulations require licensees to ensure their methods of care prevent and treat diseases and injuries, and that they and their personnel accurately communicate with APHIS inspectors and the attending veterinarian.[113] An attending veterinarian is required to have authority to ensure a licensee provides their animals with adequate veterinary care.[114] If the licensee hired the attending veterinarian in a part-time or consulting capacity (as is usually the case), the licensee is required to have a formal program of veterinary care from the attending veterinarian and to schedule regular visits to the premises by the attending veterinarian.[115]

In this case, the USDA inspection reports revealed that the Mikirtichevs engaged in a pattern of providing inadequate veterinary care for their animals. The USDA cited the Mikirtichevs over 50 times within five months, with nine direct NCIs for failure to provide adequate veterinary care.[116] Those direct NCIs included repeatedly failing to provide care as instructed by the Mikirtichevs' contracted attending veterinarian, and at least one such NCI resulted in the suffering and death of a kitten three weeks before the Department filed suit.[117] The sheer number of violations within such a short period and the number of direct NCIs made the *Mikirtichev* matter a strong case for pursuing injunctive relief.

Another type of common NCI in serious-danger cases is for dangerous housing situations. For example, the Mikirtichevs received a direct NCI for housing incompatible cats in the same enclosure: A sick cat was housed with more than 12 other cats that excluded the sick cat from accessing food or water.[118] APHIS inspectors also observed two cats with a history of fighting being housed together, with one cat exhibiting multiple scratch and bite wounds.[119] And the Mikirtichevs reported that two of their French bulldogs escaped from their outdoor enclosures and were never recovered.[120]

It is also common in serious-danger cases to have NCIs that do not rise to the level of serious danger, which Department attorneys must parse out before filing to ensure the strength of the lawsuit. Ultimately, the Department has discretion to select which violations to use to establish

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[112] *See, e.g.*, *Gingerich*, 2021 WL 6144690, at *2–3; *Lowe*, 2021 WL 149838, at *7–8.
[113] 9 C.F.R. §§ 3.13(a), 2.40(a)–(b).
[114] *Id.* §§ 1.1, 2.40(a).
[115] *Id.* § 2.40(a)(1).
[116] Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 2, 12–13.
[117] *Id.* at 2.
[118] *Id.* at 25.
[119] *Id.*
[120] *Id.* at 30.

serious danger in a lawsuit based on the specific circumstances of the case.

D. What court filings should I expect to prepare?

1. Complaint

Once the Department decides to bring a serious-danger case in federal court, the next step in building a case is drafting a complaint. Because serious-danger cases often necessitate an expedited timeline, it is common for Department attorneys to begin this step before the USDA files its own administrative enforcement action. At this point in the process, Department attorneys often have an overview of the facts surrounding the case, but it is important to carefully examine the inspection reports provided by the USDA to adequately capture the details of each recorded NCI and to determine which violations to allege in the complaint. APHIS inspectors are also vital resources at this stage. Interviewing inspectors who authored inspection reports or who have visited the defendant's facility can help fill in any gaps in inspection reports and add context to help bolster the overall narrative of the complaint. Department attorneys and support staff may also look for relevant information from publicly available sources, including the facility's website, social media pages, and public reviews. Finally, USDA's Investigative and Enforcement Services often investigate and provide useful information to inform the case.

In deciding which NCIs to allege in a complaint, Department attorneys have discretion to determine which claims make for the strongest case. As explained above, it is essential to prioritize including NCIs that are most likely to support a serious-danger finding under 7 U.S.C. § 2159(a).[121] Some of the strongest examples of such NCIs in this case include failure to provide adequate veterinary care, failure to provide sanitary housing; failure to provide adequate food and water; handling violations; and exposing animals to unsafe conditions. APHIS inspectors are also a helpful resource in assessing which NCIs to allege, as they may point out NCIs amounting to serious danger that may not be obvious to those without specialized knowledge in animal care.

2. Motion for a temporary restraining order and preliminary injunction

Because, by definition, serious-danger cases almost always involve serious and imminent threats to the health and welfare of the animals, serious consideration should be given to seeking emergency injunctive relief in the form of a motion for TRO and PI under 7 U.S.C. § 2159(a)

[121] 7 U.S.C. § 2159(a).

contemporaneously with the filing of the complaint or promptly after its filing.[122] If successful, a TRO and PI will enjoin a defendant from continuing to violate the AWA and its regulations and, in turn, ensure the health and welfare of animals in the defendant's care.

Ordinarily, cases involving a request for emergency injunctive relief require the moving party to satisfy the four-factor test outlined in *Winter v. Natural Resources Defense Council, Inc.*[123] To satisfy the requirements for a TRO, a moving party normally must demonstrate four criteria: (1) a likelihood of success on the merits; (2) that the moving party will suffer irreparable harm if the injunction is denied; (3) that the balance of equities tips in the moving party's favor; and (4) that the public interest favors such relief.[124] Section 2159(b) of the AWA, however, falls within a category of the statute that limits a court's traditional equitable discretion, as it explicitly states that "upon a proper showing" that a defendant is "placing the health of any animal in serious danger" in violation of the AWA, the presiding court "*shall*" issue a TRO or injunction.[125] Accordingly, several courts have determined that if the Department properly demonstrates the animals in a defendant's care are in serious danger, injunctive relief is mandatory.[126] Thus, it is important to demonstrate a strong showing of serious danger to the animals in the defendant's care.

To support a showing of serious danger, we recommend requesting declarations from APHIS inspectors who have personal knowledge of a defendant's history of AWA violations. Declarations of APHIS inspectors can help fill in any missing details from inspection reports and provide context for specific NCIs. Moreover, declarations provide a way for inspectors—who are generally licensed veterinarians—to explain why, in their professional opinion, certain violations are critically harmful to an animal's health. Such descriptions significantly strengthen the showing of serious danger required to obtain a TRO or PI in serious-danger cases. Any declarants relied upon in support of a TRO or PI motion may need to be available as witnesses if the court decides to hold an evidentiary hearing.

Because serious-danger cases frequently involve defendants with a his-

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[122] *Id.*
[123] 555 U.S. 7, 20 (2008).
[124] *Id.*
[125] 7 U.S.C. § 2159(b).
[126] *See Gingerich*, 2021 WL 6144693, at *3 (holding that in cases brought under the AWA's serious-danger provision, the court must "decide if a 'proper showing' has been made to issue a TRO" rather than "applying the traditional four-factor test"); *Lowe*, 2021 WL 149838, at *10 (interpreting 7 U.S.C. § 2159 as mandating injunctive relief upon showing of "serious danger").

tory of disposing of or hiding animals to conceal AWA violations, it may be necessary to move for an ex parte TRO. For example, the defendants in the *Mikirtichev* case had a pattern of selling or rehoming animals with serious medical conditions rather than providing them necessary veterinary care.[127] This sparked concern that if defendants received notice of the TRO motion, they might transfer or even euthanize sick animals at their facility to evade a potential court order requiring that they provide animals with necessary veterinary care. Accordingly, the Department requested that the court issue a TRO without notice to defendants so that the order would be effective before they attempted to dispose of any animals.

If the factual circumstances of a case necessitate filing a TRO motion ex parte, such motion must be supported by: (1) specific facts in an affidavit or verified complaint clearly showing that irreparable harm will result before the opposing party can be heard in opposition; and (2) a declaration from the movant's attorney identifying efforts made to give notice and the reasons why it should not be required.[128] In addition, declarations from APHIS inspectors may also need to be tailored to help address the need for seeking a TRO ex parte.

3. Proposed order accompanying motion for a temporary restraining order or preliminary injunction

The final document to prepare for filing is a proposed order to accompany a motion for a TRO or PI. We recommend filing a proposed order even if your district's local rules do not require one so that the requested relief includes requirements tailored specifically to address the circumstances of the case.

For example, the proposed order accompanying the Department's motion for a TRO in the *Mikirtichev* case included provisions that required defendants to correct inadequate housing conditions, to ensure all animals had proper access to food and water, and to promptly take any animal showing signs of illness or injury to be examined by the facility's attending veterinarian in accordance with corresponding AWA regulations and standards.[129] The Department argued that these provisions directly reflected the alleged AWA violations that placed the animals in serious danger to begin with.

Other provisions may also be necessary to ensure the health and wel-

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[127] Memorandum in Support of Ex Parte Motion, *supra* note 44, at 1–2.
[128] Fed. R. Civ. P. 65(b)(1)(A), (B).
[129] Order, *supra* note 84, at 4.

fare of a defendant's animals. In the *Mikirtichev* case, the defendants had poor documentation of medical treatment for their animals and an incomplete inventory of the animals at their facility, meaning inspectors had no way to confirm how many animals were at the Mikirtichevs' facility or if they were receiving adequate veterinary care. Thus, the Department included specific recordkeeping requirements and a requirement that defendants notify the Department if any animal was born at their facility in the proposed order. Moreover, because of the defendants' history of refusing to pay for necessary veterinary care, the proposed order also included a requirement to refrain from selling, transferring, or euthanizing any animals without first obtaining the Department's consent or a court order.

E. What can I expect about animal placement?

In the serious-danger cases we have brought thus far, we have seen that defendants like those in the *Mikirtichev* case often are not willing to provide proper care for their animals in compliance with a TRO or PI order and thus opt to surrender some or all of their animals to the government. As such, a common factor in these cases is the need to find placements for surrendered animals. Because these cases usually involve animals in harrowing living conditions, surrendered animals commonly possess characteristics that may complicate finding adequate placement options.

To start, the large number of animals may make finding placement difficult. A defendant may surrender dozens or sometimes hundreds of animals, either across a period or all at once. In the *Mikirtichev* case, defendants surrendered approximately 45 cats to the USDA.[130]

Moreover, most of the time surrendered animals can be hard to place due to their condition, size, or need for specialized care. Several of the cats surrendered in the *Mikirtichev* case had serious medical conditions that required expensive treatment, while other cats had behavioral issues that made them extremely hard to handle or properly examine.

Defendants also commonly choose to surrender animals with little notice to the Department in serious-danger cases, which requires finding placement for an animal sometimes within mere hours of being notified of a defendant's intent to surrender it. In the *Mikirtichev* case, there were several instances where defendants notified the Department late in the evening that they intended to surrender several animals the next morning or even that same night.

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[130] Press Release, U.S. Dep't of Just. Off. of Pub. Affs., Virginia Animal Breeders Surrender Approximately 200 Dogs and Cats (Jan. 9, 2024).

Accordingly, it is important at the beginning stages of a case to identify potential shelters, sanctuaries, and rescue organizations to help with placement in case animals are surrendered on short notice. When researching potential placement options, it is also essential to thoroughly scrutinize each option to ensure surrendered animals are placed with a reputable facility. APHIS and trial attorneys in the Department's WMRS within the ENRD have experience with this process and are a valuable resource for navigating placement options.

F. Is it possible to coordinate with other government entities?

Depending on state or local animal welfare laws, working with other government entities can complement or strengthen a federal case. For example, in the *Mikirtichev* case, we coordinated with the Virginia Attorney General's Office.[131] After we filed the serious-danger case in federal court, Virginia decided to proceed with a criminal case against the Mikirtichevs under state law and executed a search-and-seizure warrant on their facility. The warrant led to the rescue of approximately 110 animals which were surrendered to the Humane Society of the United States.[132] While the Mikirtichevs had surrendered around 45 animals to federal officials up to that point, the involvement of the Virginia Attorney General's Office undoubtedly led to the swifter removal and rehoming of the Mikirtichevs' AWA-regulated animals.[133]

IV. Conclusion

While animal welfare cases can last months or even years before an action is resolved, the AWA's serious-danger provision provides a lifeline for animals in such cases that might otherwise not receive essential care until it is too late. In the *Mikirtichev* case, the Department's serious-danger action formalized a coordinated effort that resulted in the rescue of more than 150 animals in the span of only a few weeks, preventing the needless suffering or deaths of dozens of animals.[134] As ENRD or USAO civil litigators continue to bring more of these cases in districts across the country, we hope this article raises awareness of circumstances that warrant investigating whether a serious-danger violation occurred and what to expect if an investigation confirms the need for an injunctive relief action.

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[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*

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The Preventing Animal Cruelty and Torture Act and the Evolution of Section 48

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Although federal law contains a host of statutes to protect animals in various specific contexts—some of those laws being more than a century old—it was not until 2019 that Congress enacted something resembling an animal cruelty statute of general application. The Preventing Animal Cruelty and Torture Act (PACT Act) of 2019 grew out of a 1999 law that more narrowly prohibited trafficking in animal torture or "crush" videos, as explained *infra* section I.A.[1] This law—18 U.S.C. § 48—is not regulatory, but rather a felony criminal prohibition punishable by up to seven years in prison per violation.[2] In the first part of this article, we track the 20-year evolution of the law, including its ill-fated stop at the Supreme Court in *United States v. Stevens*.[3] Then we examine Congress's swift resurrection of the law with the Animal Crush Video Prohibition Act of 2010 and examine how those previous versions of 18 U.S.C. § 48 led to the PACT Act.[4] We conclude this article with a detailed analysis of the statute in its modern form, which includes both video and non-video related offenses.

[1] 18 U.S.C. § 48.
[2] *Id.*
[3] 559 U.S. 460 (2010).
[4] 18 U.S.C. § 48.

I. 1999 Bill—The initial federal "Anti-Crush Video" Act

On December 9, 1999, President Bill Clinton signed H.R. 1887, which established criminal penalties for the "creation, sale, or possession" of "a depiction of animal cruelty" with the intent of placing that depiction in interstate commerce for commercial gain.[5] Congress titled the new law the "Crush Video Statute" for reasons explained *infra* section I.A. The bill contained exceptions for depictions that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value."[6] This law criminalized the *depiction* of cruelty, not the underlying cruel act itself. The focus on a depiction is notable because it both responded to specific markets that traffic in animal cruelty and—because of the statute's focus on expression-based limitations—exposed it to First Amendment challenges.

A. The 1999 Animal Cruelty Bill sought to criminalize the creation, sale, and possession of depictions of animal cruelty

Tom Connors, the Deputy District Attorney assigned to prosecute animal-abuse cases for Ventura County, California, testified to Congress that, in 1998, he became aware of a company that sold films depicting women taping or tying small animals to the floor and stepping on various portions of the animals' bodies, slowly crushing them to death—hence the "crush video" moniker.[7] The women spoke to the animal in a domineering manner, which could be heard alongside breaking bones and animal screams.[8] These videos were created for audiences seeking sexual and fetish gratification. In 1998, buying or selling these types of films was not illegal under any state or federal law, though animal cruelty laws at the time were applicable to aspects of the actual production of the video.

Prosecution was challenging even with respect to the production, however, because filming occurred in different locations, making it difficult to determine the appropriate enforcement jurisdiction.[9] Typically, only

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[5] Depiction of Animal Cruelty–Punishment, Pub. L. No. 106-152, § 48, 113 Stat. 1732 (1999).
[6] *Id.*
[7] *Prisoner Health Care and Animal Cruelty: Hearing Before the H. Comm. on the Judiciary*, 106th Cong. (1999) (statement of Tom Connors, Deputy District Attorney for Ventura County, CA).
[8] *Id.*
[9] *Id.*

the lower portion of the women doing the crushing was shown, making it difficult to identify the criminal actors.[10] Also, proving when the videos were produced was problematic, making it difficult to establish that the cruel acts took place within the statute-of-limitations period.[11]

When the House Judiciary Committee submitted its report to accompany H.R. 1887, it largely mirrored these concerns when setting out the need for the proposed legislation.[12] This report went on to explain that these depictions of animal torture are often purchased through the internet by persons who find them sexually arousing.[13] Customized animal torture was readily available on the internet, and these films were distributed through interstate commerce for commercial gain.[14]

B. First Amendment concerns raised by the 1999 Bill

The 1999 statute had legal vulnerabilities.[15] Specifically, there were concerns raised during Congress' deliberations that the broad limitations on depictions of animal cruelty could violate the First Amendment of the Constitution.[16] The First Amendment establishes that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the [g]overnment for a redress of grievances."[17] These concerns were significant enough that President Clinton, in his signing statement, took the un-

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[10] *Id.*
[11] *Id.*
[12] H.R. Rep. No. 106-397, at 2 (1999).
[13] *Id.* at 2–3.
[14] *Id.* at 3.
[15] Unlike later bills to amend section 48, this initial bill was not given a short title, so we refer to it as the 1999 Bill, 1999 Act, 1999 Animal Cruelty Bill, or 1999 Animal Cruelty Act.
[16] *See, e.g.*, *Prisoner Health Care and Animal Cruelty: Hearing Before the H. Comm. on the Judiciary,* 106th Cong. (1999) (opening statement of Chairman Bill McCollum)

> At the same time, we want to make sure that we do not chill forms of speech that should be protected. For example, we should consider whether the bill will unintentionally bring within its reach education programs that might depict a bullfight as part of the native culture of Spain or illustrate the illegal activities of elephant poachers in Africa. I know that Rep. Gallegly shares this concern and intends to offer an amendment at the markup of this bill to address this concern. I look forward to working with him to strike the right balance in this regard.

Id. See also 145 Cong. Rec. H10267-01 (daily ed. Oct. 19, 1999) (statement of Rep. Scott).
[17] U.S. Const. amend. I.

usual steps of both acknowledging the free speech implications of the 1999 Animal Cruelty Bill and seeking to minimize those concerns by promising to direct the Department of Justice (Department) to broadly construe the exceptions to the act to ensure this legislation did not chill protected speech.[18]

Though the House Judiciary Committee did not foresee that any reasonable person would find any redeeming value in the types of material prohibited by the 1999 Animal Cruelty Bill, the Committee believed that it drafted the statute to narrowly restrict prohibited content, not viewpoint, and focused on "the commercial pandering of graphic depictions of the actual torture of a real animal."[19] The Committee also found that harm from the continued commercial sale of the prohibited material outweighs any value of the material.[20]

II. *United States v. Stevens* and the Supreme Court's holding that the 1999 Bill was facially invalid under the First Amendment

United States v. Stevens involved dog-fighting instructional and exhibition videos.[21] The defendant, Robert J. Stevens, ran a business that sold videos of pit bull-type dogs engaging in dog fights and attacking other animals.[22] He was arrested and charged in the Eastern District of Pennsylvania with violating section 48 for distributing these videos, which depicted acts of horrific cruelty. Stevens went to trial and was convicted by a federal jury after a swift deliberation. He appealed his conviction to the Third Circuit Court of Appeals on First Amendment grounds, arguing that the videos were inherently protected speech or in the alternative that the law was overbroad as written.[23] The case ultimately went before the Supreme Court, where the majority opined that while dog fighting was unlawful in all 50 states, the defendant claimed that the footage was of dog fights in Japan (where such conduct was allegedly legal), as well as historic footage of American dog fights in the 1960s and 1970s.[24]

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[18] Presidential Statement on Signing H.R. 1887, 34 Weekly Comp. Pres. Doc. 324 (Dec. 9. 1999).
[19] H.R. Rep. No. 106-397, at 5 (1999).
[20] *Id.*
[21] 559 U.S. 460, 466 (2010).
[22] *Id.*
[23] United States v. Stevens, 533 F.3d 218 (3d Cir. 2008).
[24] *Stevens*, 559 U.S. at 466.

The United States argued that the banned depictions of animal cruelty, as a class, were categorically unprotected by the First Amendment.[25] The United States also argued that even if the 1999 Act reached some protected speech, it was not facially invalid because it was not substantially overbroad—in part because it applies only to depictions of cruelty to live animals where such depictions are illegal and lack societal value.[26]

In concluding that the 1999 version of the Crush Video Statute was facially overbroad under the First Amendment, the Supreme Court first established that the First Amendment protects some depictions (not conduct) of animal cruelty, such as bullfighting or hunting videos.[27] The Court recounted that government restrictions on the content of speech are permitted in limited cases, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.[28] Although the Court recognized that animal cruelty has been legally prohibited in America for hundreds of years, they distinguished between the historic laws prohibiting animal cruelty and the 1999 Crush Video Statute's focus on *depictions* of cruel acts.[29] In *Stevens*, the Supreme Court rejected the notion that proscribed limits on speech should be assessed solely under a balancing test that weighs the value of the speech against its social costs.[30]

The focus of the Supreme Court analysis next shifted to the distinction between laws forbidding depictions of animal cruelty and constitutional laws prohibiting depictions of child pornography. The Court viewed the sale of depictions of child pornography as "an integral part" of the underlying crime of sexual abuse of children.[31] The Court did not find the same integral link between the sale of depictions of animal abuse and the underlying crime of animal torture. Put another way, even in an instance where the prohibited speech had extremely limited value and the underlying act was extremely harmful, the Supreme Court in *Stevens* held that a balancing test alone is insufficient to establish a category of speech outside of the protection of the First Amendment.[32] Instead, to establish that a type of speech is categorically not covered by the First Amendment, the Court indicated that an additional link, such as the causal relationship between the market for child pornography and the underlying abuse, is

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[25] Brief for United States, United States v. Stevens, 559 U.S. 460 (2010) (No. 08-769), 2009 WL 1615365.
[26] *Id.* at *38.
[27] *Stevens*, 559 U.S. at 468.
[28] *Id.* at 468–69.
[29] *Id.* at 460.
[30] *Id.* at 470.
[31] *Id.* at 471.
[32] *Id.* at 472.

necessary.[33]

The Supreme Court went on to consider *Stevens*' First Amendment challenge under existing doctrine. The Court's consideration turned on whether the 1999 Crush Video Statute should be interpreted broadly or narrowly. The government proposed to read the terms of the 1999 Act narrowly. Where the text applied, the government would criminalize "any depiction in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed."[34] The United States' reading would have required an additional element of "accompanying acts of cruelty."[35] The Supreme Court found that the United States' preferred reading was not grounded in the text and did not spell out such a limitation.[36] Without the limitation of "accompanying acts of cruelty," the 1999 Animal Cruelty Act is too broad and effectively criminalized all depictions of any intentional animal wounding or killing where the underlying actions was illegal in *any* state but may have been lawful in the state where the wounding or killing took place.[37] This would have criminalized many videos of hunting, which may show hunting that was legal where it was filmed, but illegal elsewhere in the country.[38]

The Supreme Court's ultimate concern was that the prosecution of depictions of hunting videos was only prevented by the exercise of prosecutorial discretion and by the application of the statute's exceptions clause. But the language in the exceptions clause could not be read broadly to protect hunting or similar activities. For example, the exceptions language in section 48(b) required "serious" value in the exception speech, and the Supreme Court found that while hunting videos may have entertainment value, many did not have "serious" instructional value.[39] And the Supreme Court was unwilling to rely entirely on prosecutorial restraint, pointing out that "[t]he First Amendment protects against the [g]overnment; it does not leave us at the mercy of *noblesse oblige*," (that is, the concept that wealthy and privileged have a moral obligation to help those less fortunate).[40] As a result, the Supreme Court's majority opinion affirmed the judgment of the Third Circuit Court of Appeals and held that the 1999 Animal Cruelty Act was substantially overbroad and

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[33] *Id.* at 467.
[34] 18 U.S.C. § 48(c)(1) (1999) (cleaned up).
[35] *Stevens*, 559 U.S. at 474.
[36] *Id.*
[37] *Id.* at 475–76.
[38] *Id.*
[39] *Id.* at 478–79.
[40] *Id.* at 480.

therefore invalid under the First Amendment.[41]

III. The Animal Crush Video Prohibition Act of 2010—the next iteration of 18 U.S.C. § 48

Responding swiftly to *United States v. Stevens*, Congress passed the Animal Crush Video Prohibition Act of 2010 very early in the session immediately following the Supreme Court's decision.[42] The 2010 bill begins with 10 congressional findings that formally spell out the bill's legislative history in plain language.[43] The 2010 bill was more narrowly drafted than the original law with specific language prohibiting the creation and distribution of an "animal crush video," which is defined as photo, film, or video that is "obscene" and depicts crushing or otherwise seriously injuring an animal.[44] Crush videos could be constitutionally prohibited in line with the obscenity doctrine formulated by the Supreme Court in *Miller v. California*.[45] *Miller* and its progeny firmly established the term "obscene" as a legal term of art.[46] Obscenity is defined under *Miller v. California* and its progeny of cases defining that term.[47] Congress addressed a key flaw in the original statute because obscenity is outside the protections of the

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[41] *Id.* at 482.
[42] 18 U.S.C. § 48 (2010).
[43] Animal Crush Video Prohibition Act of 2010, Pub. L. No. 111-294, § 2, 124 Stat. 3177, 3177–78.
[44] *Id.* at 3178.
[45] 413 U.S. 15 (1973).
[46] Hamling v. United States, 418 U.S. 87, 105, 113 (1974); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 505 n.13 (1985); H.R. Report 111-549 (2010).
[47] *Miller*, 413 U.S. at 20–21.

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the (First Amendment) guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id.

First Amendment. In so doing, however, Congress also significantly narrowed the scope of the prohibited videos to those involving sexual acts or torture of animal genitalia. The Committee on the Judiciary noted that crush videos could be constitutionally prohibited in line with the obscenity doctrine formulated by Supreme Court cases that established the word *obscene* as a legal term of art. Although obscenity may generally apply to materials that depict or describe a more obviously sexual act, caselaw shows that obscenity can also cover unusual deviant acts.[48] To prove obscenity, the government has the burden of proving that the animal crush video lacks serious literary, artistic, political, or scientific value; depicts sexual conduct in a patently offensive way; and that the average person, applying contemporary community standards, would find that the work appeals to the prurient interest.[49] On December 9, 2010, President Barack Obama signed the bill into law.[50]

IV. The current version of section 48—the Preventing Animal Cruelty and Torture Act of 2019

A. Congressional impetus and findings

While the 2010 law banned trade in obscene videos of live animals being crushed, burned, or subjected to other forms of heinous cruelty, it did not address the underlying act of cruelty itself. Congressional sponsors and legal observers emphasized the lack of a federal counterpart to state anti-cruelty laws.[51] Thus, Congress introduced and passed the PACT Act of 2019 with the intention of criminalizing the underlying acts of animal cruelty.[52] On November 19, 2019, President Donald Trump signed the

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[48] H.R. Report 111-549, at 5 (2010).

[49] *Id.*; *Miller*, 413 U.S. at 20–21.

[50] Press Release, Off. of the Press Sec'y, Statement by the Press Secretary (Dec. 9, 2010).

[51] *See*, *e.g.*, Ben Buell, *The Animal Crushing Offense Loophole*, 109 Va. L. Rev. Online 99, 104 (2023).

[52] 165 Cong. Rec. H8355 (daily ed. October 22, 2019) (statement of Rep. Reschenthaler); "The PACT Act addresses this gap by prohibiting the underlying acts of animal cruelty that occur on Federal property or affect interstate commerce, regardless of whether a video is produced." *Id.* at H8356; "The bipartisan PACT Act goes a step further and outlaws this malicious animal cruelty, regardless of the presence of video evidence." *Id.* at H8357 (statement of Rep. Fitzpatrick);

> And while the Animal Crush Video Prohibition Act prohibits trade in obscene video depictions of live animals being tortured, as Representative Deutch said, the bill did nothing to prohibit the underlying conduct of

PACT Act into law.[53]

B. How the Preventing Animal Cruelty and Torture Act modified section 48

The PACT Act went into effect November 25, 2019.[54] Its central premise was the creation of a new substantive animal cruelty offense of "crushing," a prohibition on certain conduct that is no longer tethered to videography or obscenity requirements.[55] It is now "unlawful for any person to purposely engage in animal crushing in or affecting interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States."[56] The term *crushing* is broader than literal crushing. The word *crush* is a misnomer that has followed the law since its inception, when the primary target was the dominant strain of torture fetish videos the 1999 Bill sought to suppress. These videos generally involved the actual crushing to death of kittens, puppies, and other small animals, typically by people wearing fetish footwear. But the law's application was never limited to this variant of torture. It encompasses all the following:

> [A]ctual conduct in which one or more living non-human mammals, birds, reptiles, or amphibians is purposely crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury (as defined in section 1365 and including conduct that, if committed against a person and in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242).[57]

This language is taken from what previously had been the definition of "animal crush video," but omits the obscenity and videography elements.

> the cruelty itself. This is what the PACT Act does. It strengthens the animal crush video law by prohibiting animal cruelty, regardless of whether a video is produced. There is documented connection between animal cruelty and violence to people. In fact, studies show animal abusers are five times more likely to commit violent crimes against people, and it is linked to domestic violence, as well as child and elder abuse.

Id. at H8356 (statement of Rep. Axne).

[53] Donald Trump, President, Remarks by President Trump in a Signing Ceremony for H.R. 724, The preventing Animal Cruelty and Torture (PACT) Act (Nov. 25, 2019).

[54] Preventing Animal Cruelty and Torture Act, Pub. L. No. 116-72, 133 Stat. 1151 (2019).

[55] 18 U.S.C. § 48(a)(1).

[56] *Id.*

[57] *Id.* § 48(f)(1). These cross-references will be explained further *infra* section IV.C.

This and the prior offenses of creating and distributing obscene animal torture videos are now in subsection (a).[58]

Thus, section 48 now criminalizes four things, some of which can overlap:

1. "crushing" as described above, without more;
2. knowingly creating an animal crush video, intending or having reason to know it will be distributed in or using a means or facility of interstate or foreign commerce;
3. knowingly creating an animal crush video that is distributed in, or using a means or facility of, interstate or foreign commerce; and
4. knowingly selling, marketing, advertising, exchanging, or distributing an animal crush video in, or using a means or facility of, interstate or foreign commerce.[59]

The Flowchart for Section 48 Offenses that depicts the three different substantive offenses, and the elements of each, can be found in the appendix to this journal issue. "Animal crush video" is now given the definition of "any photograph, motion-picture film, video or digital recording, or electronic image that—(A) depicts animal crushing; and (B) is obscene."[60] This is not a substantive change. It reflects the law's reorganization. There is still no offense of note for possessing or receiving such a video.

Definitions are now found in section (f), including the newly added definition of "euthanasia," given as "the humane destruction of an animal accomplished by a method that—(A) produces rapid unconsciousness and subsequent death without evidence of pain or distress; or (B) uses anesthesia produced by an agent that causes painless loss of consciousness and subsequent death."[61] This definition gives meaning to one of a new set of exceptions Congress added to cover both the "crushing" and videos depicting "crushing." The new exceptions are:

- "customary and normal veterinary, agricultural husbandry, or other animal management practice;"[62]
- "the slaughter of animals for food;"[63]

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[58] *Id.* § 48(a).
[59] *Id.*
[60] *Id.* § 48(f)(2).
[61] *Id.* § 48(f)(3).
[62] *Id.* § 48(d)(1)(A).
[63] *Id.* § 48(d)(1)(B).

- "hunting, trapping, fishing, a sporting activity not otherwise prohibited by [f]ederal law, predator control, or pest control;"[64]
- "medical or scientific research;"[65]
- where "necessary to protect the life or property of a person;"[66]
- conduct "performed as part of euthanizing an animal;"[67] and
- unintentional conduct.[68]

The law retains its existing exemption for good-faith distribution for law enforcement purposes.[69]

Section 48's extraterritoriality and preemption provisions also remain.[70] In particular, the "knowing sale, marketing, advertising, exchange, distribution, or creation of an animal crush video outside of the United States" is illegal where either "(1) the person engaging in such conduct intends or has reason to know that the animal crush video will be transported into the United States or its territories or possessions," or "(2) the animal crush video is transported into the United States or its territories or possessions."[71] If local or state law is more protective of animals, section 48 shall not be construed to preempt it.[72] Finally, unlike most other federal domestic animal protection laws, section 48 is a general Title 18 statute, meaning investigative jurisdiction lies principally with the Federal Bureau of Investigation.

C. "Serious bodily injury"

Most types of animal abuse banned within the statutory definition of crushing are self-explanatory, but the two statutory cross-references require an additional step to explain. Congress incorporated the existing definition of "serious bodily injury" in 18 U.S.C. § 1365(h)(3), thereby prohibiting intentional animal abuse that causes "(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty."[73] Thus, if the abusive act at issue is not crushing, burning, drowning, suffocating, or impaling, but causes

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[64] *Id.* § 48(d)(1)(C).
[65] *Id.* § 48(d)(1)(D).
[66] *Id.* § 48(d)(1)(E).
[67] *Id.* § 48(d)(1)(F).
[68] *Id.* § 48(d)(3).
[69] *Id.* § 48(d)(2).
[70] *See id.* § 48(b), (e).
[71] *Id.* § 48(b).
[72] *Id.* § 48(e).
[73] *Id.* § 1365(h)(3).

one of the harms listed in section 1365(h)(3), it would fall within the definition.[74]

An intentional act resulting in death by necessity carries with it the "substantial risk of death," which, in that instance, came to pass.[75] Accordingly, this cross-reference bars acts of killing unless an enumerated exception in section 48(d) applies.[76] Expert witness veterinary testimony may help the government meet its burden when using the "serious bodily injury" prong.[77]

D. Bestiality

The other cross-reference—"conduct that, if committed against a person and in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242"—refers to the federal sexual abuse and aggravated sexual abuse statutes.[78] This amounts to a ban on bestiality (also called animal sexual abuse).[79] But not all the components of these two sex abuse laws make sense when applied in the context of animals. For instance, both sections 2241 and 2242 ban forcing someone to have sex by threatening them.[80] Other subsections could be valid depending on the facts.[81]

Likely the best code section to apply in most bestiality scenarios would be 18 U.S.C. § 2242(2), which prohibits engaging in a sexual act if the other person is "(A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act," or 18 U.S.C. § 2242(3), which bars "engag[ing] in a sexual act with another person without that other person's consent, to include doing so through coercion."[82] At least one of these would seem to apply in every circumstance involving animals. Notably, both sections 2241 and 2242, and thus section 48, also prohibit attempt.[83]

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[74] *Id.*
[75] *Id.* § 1365(h)(3)(A).
[76] *Id.* § 48(d).
[77] *Id.* § 1365(h)(3).
[78] *See* United States v. Richards, 755 F.3d 269, 272 (5th Cir. 2014).
[79] *Id.* at 272 n. 6.
[80] *See*, *e.g.*, 18 U.S.C. §§ 2241(a)(2), 2242(1).
[81] *See id.* § 2241(a)(1), (knowingly causing another person to engage in a sexual act by using force against that other person); *id.* § 2241(b)(1) (rendering another person unconscious and then engaging in a sexual act with that other person); *id.* § 2241(b)(2) (administering a drug that substantially impairs a person's ability to appraise or control conduct and then engaging in a sexual act with that other person).
[82] 18 U.S.C. § 2242(2)–(3).
[83] 18 U.S.C. §§ 2241–2242; *id.* § 48.

United States v. Vincent is an important case to examine when considering a section 48 charge based on an act of bestiality.[84] In *Vincent*, the defendant was charged with child pornography and bestiality.[85] He sought to dismiss the PACT Act charges against him on the theory that animal sexual abuse alone, without evidence of *additional* serious bodily injury, was not a valid charge or in the alternative was unconstitutionally vague as applied.[86] In particular, the defense argued that while certain animal sex acts could be so violent as to rise to the level of inflicting serious bodily injury, section 48 did not criminalize bestiality in and of itself without evidence of such acts also causing serious bodily injury.[87]

The court rejected this construction, finding, based on the plain text, that Congress had deemed bestiality to be one of two ways to illegally inflict serious bodily injury on an animal—the other being through the cross-reference to section 1365.[88] This holding stands for the principle that the government need not show that a sexually abused animal *also* suffered serious bodily injury as defined in section 1365.[89] Further, the *Vincent* court confirmed that section 2242(2)(B) and (3) apply in the bestiality context because "[i]t is a reasonable understanding that what he did involved sexual acts upon an animal that could not refuse to participate."[90]

In support of these holdings, the *Vincent* court cited *United States v. Richards*, a case under the pre-PACT Act version of section 48.[91] *Richards* involved literal "crush" videos, in which defendant Brent Justice filmed co-defendant Ashley Richards doing the following:

> [B]inding animals (a kitten, a puppy, and a rooster), sticking the heels of her shoes into them, chopping off their limbs with a cleaver, removing their innards, ripping off their heads, and urinating on them. Richards is scantily clad and talks to both the animals and the camera, making panting noises and using phrases such as "you like that?"[92]

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[84] *See* No. 3:21-cr-10, 2022 WL 1401463 (N.D. Ga. May 3, 2022).
[85] *Id.* at *7.
[86] *Id.* at *4.
[87] *Id.* at *3–5.
[88] *Vincent,* 2022 WL 2452301, at *6 ("A reasonable reading of [section] 48 does proscribe bestiality. . . . Congress . . . incorporated the language of 18 U.S.C. §§ 2241[–]2242 into [section] 48 to proscribe bestiality."). *See* 18 U.S.C. § 1365.
[89] 18 U.S.C. § 1365(h)(3).
[90] *Vincent,* 2022 WL 2452301, at *6.
[91] *Id.* (citing *Richards*, 755 F.3d at 272 n.6).
[92] *Richards,* 755 F.3d at 272.

After the *Richards* district court dismissed the charges on First Amendment grounds, the Fifth Circuit reversed and reinstated the case, finding that the law as amended in 2010 (which applied to videos only until 2019) was "limited to unprotected obscenity and therefore is facially constitutional."[93] The Fifth Circuit observed that "18 U.S.C. § 2241 criminalizes aggravated sexual abuse, and 18 U.S.C. § 2242 criminalizes sexual abuse, both of which require causing another to engage in a sexual act. Thus, by referencing these two sections, [section] 48 proscribes bestiality."[94]

E. Obscenity requirement for charges under section 48(a)(2) and (3)

As noted *supra* section III, following the decision in *Stevens*, Congress added the requirement that animal crush videos involved in video distribution offenses be "obscene."[95] This requirement does not apply to charges under section 48(a)(1) (which references crushing in and of itself).[96] Obscenity—first defined by the Supreme Court in *Miller v. California*—imposes, among other limitations, a requirement that the material in question depict "sexual conduct."[97] A full discussion of obscenity is beyond the scope of this article. But we note in summary that the obscenity element limits prosecutions under sections 48(a)(2) and 48(a)(3) in an important way: It limits prosecutions to depictions of animal torture that have a sexual component.[98] The distribution and creation of depictions of purely nonsexual torture, no matter how horrific, cannot be charged under sections 48(a)(2) and 48(a)(3).[99]

In *United States v. Justice*, the companion case to *Richards* and premised on the same videos, the Fifth Circuit vacated the jury's guilty verdict as to one of four counts, which involved a video of the torture of a puppy with a knife.[100] Unlike the other counts of conviction, which stood on appeal, the Fifth Circuit found that the puppy video "does not 'portray sexual conduct' and, therefore, while horrific, is not obscene."[101]

The issue of what constitutes "sexual conduct" in the animal-abuse context has not been thoroughly litigated yet, but, so far, courts have in-

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[93] *Id.* at 279.
[94] *Id.* at 272.
[95] *See* Animal Crush Video Prohibition Act of 2010, Pub. L. No. 111-294, 124 Stat. 3177.
[96] 18 U.S.C. § 48(a)(1).
[97] 413 U.S. 15, 24 (1973).
[98] 18 U.S.C. § 48(a)(2)–(a)(3).
[99] *Id.*
[100] United States v. Justice, 703 F. App'x 345, 347 (5th Cir. 2017) (per curiam).
[101] *Id.*

terpreted it more broadly than bestiality involving only human-on-animal intercourse with sex organs. For instance, the counts affirmed in *Justice* involved videos of "masturbation with a chicken and . . . simulated sodomy of a cat."[102] *United States v. Webster* and *United States v. Kamran* involved videos of the torture of hamster and guinea pig genitals.[103] Federal prosecutors should contact the Department's Environmental Crimes Section to discuss further if they are unsure whether a fact pattern constitutes obscenity in this context.

F. Interstate and foreign commerce elements

Since 2019, the government has pursued approximately 15 cases charging the new, conduct-based prong of section 48 (subsection (a)(1)).[104] As noted *supra* section IV.B, the government must prove that the "crushing" occurred on federal land or "in or affecting interstate or foreign commerce."[105] Several different types of proof can satisfy the commerce element. For instance, in *Kamran* and *Webster*, the government was prepared to present proof that defendants Sheheryar Kamran and Samuel Webster purchased the guinea pigs and hamsters that they horrifically tortured from retail pet stores that, in turn, had obtained the animals from wholesale dealers in other states.[106]

Other section 48(a)(1) cases have involved internet platforms. Defendant Krystal Scott, in *United States v. Scott*, used social media and the internet to procure a pregnant cat and a kitten from two private families who had posted online "free to good home" advertisements for the cats.[107] Scott then suffocated the pregnant cat by hanging and cut her open to extract the unborn kittens.[108] Scott likewise hung the kitten to death, complaining after the first attempt that "[l]ittle shit was still alive so [I] rehanged it."[109] She livestreamed some of these acts and posted other videos and photos on social media after she completed the torture.[110] Although there was no evidence that Scott had paying customers for these

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[102] *Id.*
[103] United States v. Webster, No. 1:22-cr-68 (D. Utah June 1, 2022); United States v. Kamran, No. 1:22-cr-20 (E.D. Va. July 28, 2022).
[104] 18 U.S.C. § 48(a)(1).
[105] *Id.*
[106] *Webster*, No. 1:22-cr-68 (D. Utah June 1, 2022); *Kamran*, No. 1:22-cr-20 (E.D. Va. July 28, 2022); Press Release, U.S. Att'y's Off., Dist. of Utah, Davis County Man Sentenced for Animal Torture (Dec. 11, 2023).
[107] United States v. Scott, No. 1:20-mj-571 (S.D. Ind. July 15, 2020).
[108] Petition to Enter Plea of Guilty and Plea Agreement at 129, United States v. Scott, No. 1:21-cr-49 (S.D. Ind. Feb. 17, 2021), ECF No. 41.
[109] *Id.*
[110] *Id.* at 128.

videos (as was the case in *Richards*), some of the evidence indicated that Scott may have done this with an eye toward building commerce-related internet exposure for herself.[111]

In *United States v. Ramos-Corrales*, the defendant, Angel Ramos-Corrales, and his sister had purchased a 10-week-old puppy from another California resident through a Craigslist internet advertisement.[112] Ramos-Corrales then tortured this puppy by stabbing him in the neck and kicking him violently around a room, all while filming it.[113] Ramos-Corrales posted this video to Snapchat, in which he can be heard bragging that he "smoked his little ass" and that this proved he (Ramos-Corrales) was "no bitch."[114] A concerned social media user called the police, and officers went to the defendant's residence within a few hours of the posting.[115] The puppy was still alive but was suffering from fractures to the skull, a deep laceration to the neck, a left rib fracture, and whole-body tremors caused by the head trauma.[116] All this compelled the veterinarian to whom the puppy had been rushed by police to humanely euthanize the puppy.[117] The government could prove that the video was viewed by the defendant's acquaintance in Mexico and retransmitted back to California using the internet.[118]

These cases and similar others all involved the transmission of torture videos, but because the perpetrators of the cruelty were known in each instance, and there was sufficient evidence as to venue, the government also or instead charged defendants under section 48(a)(1) to get at the cruel conduct itself. In such cases, the defendant's use of the internet has sufficed to demonstrate an interstate or foreign commerce connection even without a charge under subsections (a)(2) or (a)(3). This was in line with cases in other contexts in which Courts of Appeals found that internet transmissions constitute the use of channels of interstate commerce, thereby satisfying the jurisdictional nexus element of various federal crimes.[119]

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[111] *Id.* at 121, 128–29.

[112] United States v. Ramos-Corrales, No. 5:21-cr-123 (C.D. Cal. May 20, 2021). *See also* Complaint by Telephone or Other Reliable Electronic Means, United States v. Ramos-Corrales, No. 5:21-mj-309 (C.D. Cal. Apr. 23, 2021), ECF No. 1.

[113] Complaint by Telephone or Other Reliable Electronic Means, *supra* note 112.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *See, e.g.*, United States v. MacEwan, 445 F.3d 237, 245 (3d Cir. 2006), *cert. denied*, 549 U.S. 882 (2006) (stating that "downloading an image from the Internet" is "inter-

Since social media platforms exist on the internet, a defendant's use of them can also meet the government's burden on this element.[120] Instrumentalities of commerce can also include the devices by which users make calls and access the internet, such as mobile phones.[121]

Internet and phone use can also satisfy the interstate commerce element because it involves the use of an interstate "instrumentality," even where individual transmissions at issue are solely intrastate.[122] Although these doctrines are well established, prosecutors should also consult their circuit's model criminal jury instructions defining "interstate commerce," and caselaw construing those instructions in the context of internet and cell phone use.

G. Sentencing

The United States Sentencing Guideline (U.S.S.G.) assigned to violations of section 48 is U.S.S.G. § 2G3.1, which has a focus on non-violent, non-child pornography, and other obscene materials and sets a base offense level of 10.[123] But with the passage of the PACT Act in late 2019, section 2G3.1, for multiple reasons, is no longer a serviceable guideline for section 48. First, section 48 now encompasses actual conduct, unlike other violations keyed to section 2G3.1.

Second, although a person inflicting the severe cruelty at issue in section 48(a)(1) is objectively more culpable than a person who distributes a video of it contrary to section 48(a)(3), the former may face a significantly *lower* guidelines exposure. For instance, a violation of section 48(a)(1) alone does not require the use of a computer facility; is less likely to have been done for monetary gain (since there is not necessarily a customer to distribute anything to); and may not qualify for the "depictions of

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twined with the use of the channels . . . of interstate commerce"); United States v. Roof, 10 F.4th 314, 385 (4th Cir. 2021) (finding that the internet constitutes a channel of commerce).

[120] *See*, *e.g.*, United States v. Baston, 818 F.3d 651, 664 (11th Cir. 2016), *cert. denied*, 137 U.S. 850 (2017) (holding that communications via "phone, text message, and Instagram . . . [were] sufficient to prove that Baston's conduct" was in interstate commerce).

[121] *See* United States v. Pipkins, 378 F.3d 1281, 1295 (11th Cir. 2004).

[122] *See*, *e.g.*, United States v. Weathers, 169 F.3d 336, 341 (6th Cir. 1999), *cert. denied*, 120 U.S. 101 (1999) (stating that "[i]t is well established that telephones, even when used intrastate, constitute instrumentalities of interstate commerce"); United States v. Marek, 238 F.3d 310, 313–14 (5th Cir. 1999) ("federal jurisdiction is supplied by the nature of the instrumentality or facility used" in the commission of the offense, "not by separate proof of interstate movement").

[123] U.S. Sent'g Guidelines Manual § 2G3.1 (U.S. Sent'g Comm'n 2016).

violence" characteristic, as the offense relates to conduct, not images.[124] Without those potential enhancements, an offender pleading guilty to a section 48(a)(1) violation nets a total offense level of 8, which results in a recommended guidelines range of zero to six months for an offender in criminal history category I.[125] Such an outcome grossly undervalues the extreme cruelty prohibited by the offense.

But even where one or more enhancements apply, the resulting total offense level is unlikely to reflect the seriousness, cruelty, and violence of the offense. By way of example, since the 2019 statutory amendment, the Department has prosecuted:

- the defendant in *Ramos-Corrales*, who slit the throat of a puppy and then viciously kicked the mortally wounded puppy;[126]
- the defendant in *Scott*, who filmed herself suffocating a cat and a kitten to death by hanging them;[127]
- the defendant in *Kamran*, who lethally scalded and sexually tortured hamsters while making remarks about sexual violence toward women (such as "stabbing the v because women deserve it");[128]
- two men in *Williams*, who poisoned a cat, punted the ill cat like a football, doused the cat (still alive) with an accelerant, and burned the cat to death;[129] and
- the defendant in *Webster*, who pulled the eyeballs out of a live guinea pig with plyers and disemboweled another live guinea pig with a knife, using the guinea pig's body as a hand puppet, while discussing stalking and killing people.[130]

These offenses resulted in prison sentences of only 24, 30, 13, 18, and 12 months, respectively. In light of the sentences imposed so far under U.S.S.G. § 2G3.1 for the new PACT Act offense, the outdated guideline plainly does not yield a high enough total offense level to meaningfully deter extreme animal abuse, nor to protect community safety from the threat that such actors often pose to humans.[131] Of note, the judge who imposed sentence in the case involving the torture of hamsters, observed

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[124] *Id.* at (b).
[125] U.S.S.G. § 5 Part A (Table).
[126] United States v. Ramos-Corrales, No. 5:21-cr-123 (C.D. Cal. May 20, 2021).
[127] United States v. Scott, No. 1:20-mj-571 (S.D. Ind. July 15, 2020).
[128] United States v. Kamran, No. 1:22-cr-20 (E.D. Va. July 28, 2022).
[129] United States v. Williams, No. 1:22-cr-83-2 (E.D. Tex. Oct. 24, 2023).
[130] United States v. Webster, No. 1:22-cr-68 (D. Utah June 1, 2022).
[131] U.S.S.G. § 2G3.1.

on the record that the guideline was deficient and needed to "catch[] up with the latest version of this offense."[132]

Section 2G3.1 is not in line with the statutory maximum penalty of seven years per offense or the guideline for a comparable offense—animal fighting. In 2016, the U.S. Sentencing Commission raised the offense level for most animal-fighting offenses, which have a 5-year statutory maximum sentence, from 10 to 16.[133] Hence, some section 48 offenders currently face less guideline exposure than animal-fighting defendants despite engaging in objectively torturous conduct.

In sum, section 48 is no longer constrained to obscene images, and has outgrown its assigned obscenity guideline. Thus, it would be helpful to update the sentencing guidelines for animal-crush offenses to reflect the updated section 48.

In the meantime, prosecutors striving to achieve appropriate sentencing outcomes should consider seeking an upward departure under U.S.S.G. § 5K2.0(a)(2)(B).[134] This guideline provides for an upward departure where a case presents circumstances that the U.S. Sentencing Commission did not adequately consider in formulating the substantive guideline. Its application is appropriate here, because Congress created a new substantive offense barring certain violent and cruel conduct in 2019, yet the old guideline has not been amended to reflect this significant change.

V. Conclusion

Since the law's original enactment—when purveyors still mailed VHS tapes to one another—the problem has gotten worse, thanks mostly to the internet. The internet provides ease of distribution and money flow, as well as a broad platform for those who are willing to commit deplorable acts for attention and money. The scarcity of prosecutions, compounded by the saga of the *Stevens* case, has not helped.[135] Having flourished in a near-total vacuum of law enforcement, offenders have demonstrated that they are willing to take their chances. Some of what we see can best be described as brazen internet narcissism.

The PACT Act was a much-needed augmentation of section 48. Its enactment received enormous media attention and was heralded as a bipartisan federal animal cruelty law of broad application. With the PACT

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[132] *See* Transcript of Sentencing Proceedings at 6:11–13, United States v. Kamran, No. 1:22-cr-20 (E.D. Va. July 28, 2022).
[133] *See* U.S.S.G. § 2E3.1.
[134] U.S.S.G. § 5K2.0(a)(2)(B).
[135] United States v. Stevens, 559 U.S. 460 (2010).

Act, Congress signaled its intention for federal law enforcement to play a larger role in confronting egregious acts of intentional cruelty, rather than leaving enforcement up to the states. Five years in, however, the PACT Act is grossly under-enforced compared to the magnitude and urgency of the problem. For instance, the kittens and other baby animals used in these videos can be seen at the beginning of the videos seeking and conveying affection to their human handlers before those people commence torturing them. The American people, acting through their Congress, have made it clear that this horrific conduct must stop.

To give full effect to the law's crucial objectives, it is essential to dedicate more agents and prosecutors to the detection and pursuit of these heinous and violent crimes and to the deterrence of these offenses through prosecution.

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Congressional Involvement in Endangered Species Act Implementation: The Case of the North Atlantic Right Whale

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I. Introduction

For centuries, humans hunted North Atlantic right whales (*Eubalaena glacialis*) for their meat in Europe and North America.[1] The species was known as the "first commercial whale" and the "right whale" to hunt because they tend to float when killed, making them easier to retrieve than other targeted whale species. Centuries later, in the United States, "different whaling fisheries developed different customs on when and how whalers could obtain possession of a whale."[2] The "'fast-fish, loose-fish' rule . . . gave ownership to the whaler who held a whale, dead or alive, attached to their ship by a line."[3] "This rule worked well for right whales, because they did not respond particularly violently when attacked, . . . [and] boats could reasonably expect to maintain a line to a wounded right whale without being capsized or damaged."[4] A more recent moniker for North Atlantic right whales is the "urban whale," due to its tendency to

[1] Alex Aguilar, *A Review of Old Basque Whaling and Its Effect on the Right Whales (Eubalaena glacialis) of the North Atlantic*, 10 Reps. Int'l Whaling Comm'n 191 (1986).
[2] Dale D. Goble et al., Wildlife Law: Cases and Materials 127 (3d ed. 2017).
[3] *Id.*
[4] *Id.*

migrate close to the Canadian and U.S. coastlines near urban areas.[5] As such, ship strikes and entanglement in vertical lines that fishers use to locate and haul lobster and Jonah crab traps from the seafloor are the most important threats to the North Atlantic right whale today. Entanglements can be lethal or cause painful or debilitating sublethal injuries. For example, vertical lines attached to traps can cut into a whale's flippers or skin, and even when female right whales survive an entanglement, the event can severely reduce their reproductive success.[6] Cumulatively, centuries of human activity have left their mark. Only a small population of fewer than 360 North Atlantic right whales remain today.[7] And within the last decade, the population has significantly declined.

This article focuses on litigation brought on by this decline and related to the interaction between the fixed gear fisheries and the North Atlantic right whale, which became so contentious that Congress intervened. This article first provides background on the species, the relevant statutes affecting it, and actions related to fixed gear fisheries taken by the National Marine Fisheries Service (NMFS)—the federal agency tasked with protecting right whales—that were challenged in court.

Next, this article discusses the history of lawsuits involving protection of right whales and the American lobster fishery, particularly focusing on the last six years. The Department of Justice (Department) has defended NMFS in many lawsuits brought in that time under the Endangered Species Act (ESA), challenging NMFS's regulation of the American lobster fishery as it relates to the North Atlantic right whale. This litigation has made national news, often in unexpected ways. For example, in 2022, the Monterey Bay Aquarium Seafood Watch and the Marine Stewardship Council (MSC) changed the sustainability rating of Maine lobster, reportedly as a result of a decision issued in one of the right whale cases discussed below: *Center for Biological Diversity v. Raimondo*.[8] Then, grocery retailer Whole Foods stopped selling Maine lobster.[9] One lobster industry

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[5] *See* The Urban Whale: North Atlantic Right Whales at the Crossroads (Scott D. Kraus & Rosalind M. Rolland eds., Harv. Univ. Press 2007).

[6] *See, e.g.,* The Urban Whale, *supra* note 5, at 273, 369; Macquarie University, *Rope Entanglement Cause of Low Breeding Rates in Right Whales, Analysis Finds*, ScienceDaily (Mar. 13, 2024), https://www.sciencedaily.com/releases/2024/03/240313135554.htm.

[7] *North Atlantic Right Whale: About the Species*, Nat'l Oceanic & Atmospheric Admin. Fisheries (Oct. 22, 2024), https://www.fisheries.noaa.gov/species/north-atlantic-right-whale.

[8] Ctr. for Biological Diversity v. Raimondo, No. 18-112, 2022 WL 17039193 (D.D.C. Nov. 17, 2022).

[9] *MSC Certificate Suspended for Gulf of Maine Lobster Fishery,* Marine Stewardship Council (Nov. 16, 2022), https://www.msc.org/en-us/media-center/news-

group, the Massachusetts Lobstermen's Association, filed suit in federal court against MSC's decision.[10] Shortly after the change in sustainability ratings, the White House controversially served Maine lobster at a state dinner honoring the French president.[11]

This article also describes how, in 2022, Congress stepped into the breach by passing the Consolidated Appropriations Act (CAA), with provisions written directly in response to *Center for Biological Diversity v. Raimondo*.[12] The CAA includes a provision placing a moratorium on further U.S. lobster fishery regulation under the ESA or Marine Mammal Protection Act (MMPA) to protect the North Atlantic right whale until December 31, 2028. Finally, this article provides some historical context, noting that the CAA is one of a handful of instances in which Congress has become involved in how federal agencies should implement the ESA.

II. Factual and statutory background

A. The North Atlantic right whale

The North Atlantic right whale is one of three species of right whales in existence and is found along the east coasts of the United States and Canada.[13] These massive black whales develop knobby white patches of rough skin called callosities as they grow, creating unique patterns

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media/news/msc-certificate-suspended-for-gulf-of-maine-lobster-fishery; Press Release, Monterey Bay Aquarium, Seafood Watch™ Assigns Red Ratings to Canadian and U.S. Fisheries That Pose Dire Risk to the Endangered North Atlantic Right Whale (Sept. 5, 2022).

[10] Class Action Complaint for Damages at 28, Sawyer v. Monterey Bay Aquarium, No. 2:23-cv-796 (E.D. La. Mar. 2, 2023), ECF No. 1 (seeking damages in excess of $75,000 for defamation, later transferred to N.D. Cal.); Sawyer v. Monterey Bay Aquarium, No. 5:2023-cv-4994 (N.D. Cal. Sept. 29, 2023) (dismissed for failure to meet class certification requirements). *See also* Bean Maine Lobster, Inc. v. Monterey Bay Aquarium Found., No. 2:2023-129 (D. Me. Mar. 14, 2023) (suit for defamation).

[11] *See, e.g.*, Kristina Peterson & Jon Kamp, *Maine Lobster Controversy Pinches Biden's State Dinner With Macron*, Wall Street J. (Dec. 1, 2022), https://www.wsj.com/articles/biden-white-house-macron-state-dinner-lobster-maine-11669928651; Nicholas Reimann, *Biden's First State Dinner Serves Up Lobster—And Controversy*, Forbes (Dec. 1, 2022), https://www.forbes.com/sites/nicholasreimann/2022/12/01/bidens-first-state-dinner-serves-up-lobster-and-controversy/; Alex Seitz-Wald, *Biden State Dinner Serves Up Lobster À La Controversy*, NBC News (Dec. 1, 2022), https://www.nbcnews.com/politics/biden-state-dinner-serves-lobster-la-controversy-rcna59639.

[12] *Ctr. for Biological Diversity*, 2022 WL 17039193.

[13] *See North Atlantic Right Whale: About the Species, supra* note 7.

that enable scientists to identify individual whales.[14] North Atlantic right whales are baleen whales, which means they strain huge volumes of ocean water through hair-like teeth called baleen that act like a sieve, leaving behind the copepods (tiny crustaceans) and zooplankton that make up their diet.[15] Typically, these whales follow their food to Canadian waters and the coast of New England where they mate; then, they migrate seasonally to their calving grounds off the coasts of South Carolina, Georgia, and northeastern Florida.[16] In recent years, the waters around Nantucket have been an important area for right whales nearly year-round.[17] As the climate changes and the ocean warms, scientists have noticed a northward shift of North Atlantic right whale prey.[18]

These enormous mammals mature slowly—female right whales mature around age 10—and reproduce one calf at a time after a year-long pregnancy.[19] North Atlantic right whales should live upwards of 70 years, however, their lifespans have been dramatically cut in modern times, with females only living around 45 years at most.[20] Similarly, North Atlantic right whales have historically grown up to 52 feet in length but recently have been documented as growing to shorter adult lengths.[21] Unlike some cetaceans (like dolphins) that travel in groups, right whales are usually solitary.[22]

Before humans started hunting North Atlantic right whales, estimates suggest the population size was as large as 21,000 individuals.[23] Basque whalers in the Strait of Belle Isle region of Canada are thought to have significantly reduced the North Atlantic right whale population by the time colonists in Massachusetts started whaling in the 1600s.[24] Colonists targeted these whales for over three centuries.[25] For example, records indicate that 29 right whales were killed in Cape Cod Bay in a single day

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *North Atlantic Right Whale: Species Status*, Marine Mammal Comm'n, https://www.mmc.gov/priority-topics/species-of-concern/north-atlantic-right-whale/ (last visited Oct. 28, 2024).
[18] Erin L. Meyer-Gutbrod et al., *Ocean Regime Shift Is Driving Collapse of the North Atlantic Right Whale Population*, 34 Oceanography 22, 26–27 (2021). *See also* U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments 2022, at 33 (2023) [hereinafter Stock Assessments].
[19] *See North Atlantic Right Whale: About the Species, supra* note 7.
[20] *See id.*
[21] Stock Assessments, *supra* note 18, at 22.
[22] *See* The Urban Whale, *supra* note 5, at 19.
[23] *Id.* at 18.
[24] *Id.*
[25] *See North Atlantic Right Whale: About the Species, supra* note 7.

in January 1700.[26] The League of Nations declared hunting right whales illegal in 1935, at which time the population may have numbered fewer than 100.[27] It took some time, however, for the international community to adopt an effective, legally binding ban on right whale hunting.[28]

North Atlantic right whales have never recovered to pre-whaling numbers, but scientists believed the population was growing steadily in the mid-to-late 1900s.[29] From 1980–1992, at least 145 calves were born to 65 identified females.[30] From 1990–2011, the population showed a slow increase to about 480.[31] A 2017 scientific paper demonstrated for the first time that the population had actually begun to decline six to seven years before in the 2010–2011 timeframe.[32] That publication led to a major shift in prevailing scientific understanding and was the main factor behind NMFS's decision to reinitiate ESA consultation in 2017. This discovery of a decreasing population also lent urgency to the work of the Atlantic Large Whale Take Reduction Team (TRT).[33] In 2017, researchers additionally documented 17 right whale deaths, and the NMFS declared an Unusual Mortality Event that continues today.[34] An "Unusual Mortal-

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[26] *See* Stock Assessments, *supra* note 18, at 19.

[27] *Id.*; Convention for the Regulation of Whaling, Sept. 24, 1931, 155 L.N.T.S. 351 (1935).

[28] International Agreement for the Regulation of Whaling, June 8, 1937, 190 L.N.T.S. 80 (1938); Protocol Amending the International Agreement of 8 June 1937, and the Protocol of 24 June 1938, for the Regulation of Whaling, Signed at London, on 26 November 1945, Mar. 3, 1947, 11 U.N.T.S. 43; International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 74; Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J 226 (Mar. 31). *Cf.* Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 Am. J. Int'l L. 21 (1991) (arguing that history of international institutions concerned with whaling suggests that policies have generally moved from treating whales as a free, open-access resource to regulation, conservation, protection, and preservation; then policies emerged that entitled whales to live and be left alone); *He Whakaputanga Moana Treaty (Declaration for the Ocean),* Eco Juris. Monitor, https://ecojurisprudence.org/initiatives/he-whakaputanga-moana-declaration-for-the-ocean-treaty/ (last visited Oct. 25, 2024) (non-binding treaty between indigenous leaders of New Zealand—including the Maori, who trace their ancestry directly back to whales—Tahiti, and Cook Islands that recognizes whales as legal persons).

[29] *See* Stock Assessments, *supra* note 18, at 19.

[30] *Id.* at 21.

[31] *Id.* at 19.

[32] Richard M. Pace et al., *State—Space Mark—Recapture Estimates Reveal a Recent Decline in Abundance of North Atlantic Right Whales,* 7 Ecology & Evolution 8730 (2017).

[33] *Atlantic Large Whale Take Reduction Team*, Nat'l Oceanic & Atmospheric Admin. Fisheries (Aug. 29, 2024), https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/atlantic-large-whale-take-reduction-team.

[34] *2017–2024 North Atlantic Right Whale Unusual Mortality Event*, NOAA

ity Event" is an MMPA designation for an unexpected and "significant die-off of any marine mammal population" that requires an immediate response.[35] As of 2022, 100% of non-calf deaths are believed to be caused by humans.[36] Today, approximately 360 right whales remain, including fewer than 70 reproductively active females.[37]

NMFS determined that the primary causes of right whale mortality and serious injury are entanglement in fishing gear and vessel strikes.[38] Because North Atlantic right whales live in and travel along the eastern coast of North America, they are vulnerable to entanglement in the stationary or "fixed" gear that many people use in their fishing businesses.[39] The two most common types of fixed gear used in the North Atlantic Ocean are pots (also known as traps) in lobster fishing and gillnets in groundfish, monkfish, and spiny dogfish fishing.[40] An illustration of the fixed vertical buoy line gear used in lobster fishing is shown in Figure 1.[41] When a right whale encounters lines or nets of fishing gear, it cannot swim backward to disentangle itself, so it may roll, turn, or drag the gear hundreds of miles in an attempt to get free.[42] Unless the gear is weak enough to break, the right whale may end up wrapping the fishing line around its tail, flippers, body, or even inside its mouth.[43] Human efforts to cut off the gear is hampered by the right whale's nature—massive, free-swimming, uncooperative, and immensely strong, which are all elements that spell danger for a human trying to saw off embedded rope.[44] A 2021 study concluded that, between 1980 and 2017, over 86% of right whales (642 of 746) had evidence of entanglement interactions, such as scarring.[45]

Fisheries (Oct. 22, 2024), https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2024-north-atlantic-right-whale-unusual-mortality-event.

[35] 16 U.S.C. § 1421h(9).

[36] *See* Stock Assessments, *supra* note 18, at 24.

[37] *See North Atlantic Right Whale: About the Species, supra* note 7.

[38] *See 2017–2024 North Atlantic Right Whale Unusual Mortality Event*, *supra* note 34.

[39] *See* The Urban Whale, *supra* note 5, at 382.

[40] *Id.* at 382–83.

[41] *North Atlantic Right Whale: About the Species*, *supra* note 7.

[42] *Id.* at 384–85.

[43] The Urban Whale, *supra* note 5, at 384–85.

[44] *Id.* at 390–93.

[45] *See* Stock Assessments, *supra* note 18, at 26.

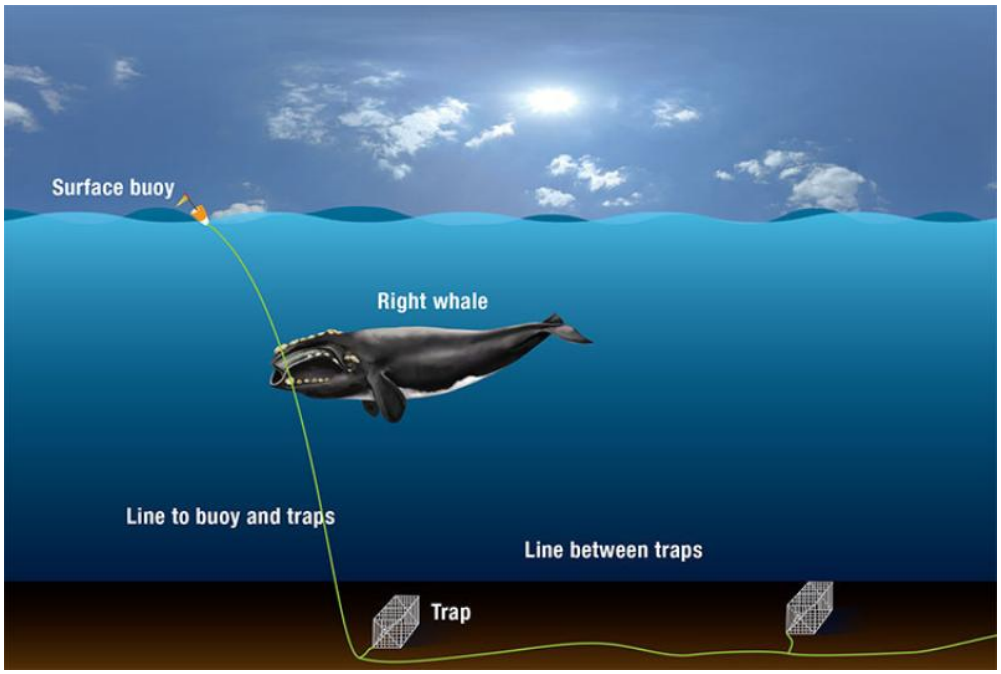

Figure 1: Right Whale Approaching Fixed Vertical Fishing Line

B. Endangered Species Act protections for right whales

North Atlantic right whales have been protected in the United States since species protection legislation was passed, first under the Endangered Species Preservation Act of 1970 and then under the ESA in 1973.[46] NMFS designated critical habitat for the right whale under the ESA in the 1990s and revised the designation in 2016 to support the species' recovery.[47]

As a listed species, the right whale is entitled to certain protections. For example, it is illegal to "take" right whales without pre-approved authorization.[48] Whenever an action is authorized, funded, or carried out by a federal agency, like authorization of the American lobster fishery in federal waters, NMFS must consult on the action and determine whether

[46] Endangered Species Conservation, 35 Fed. Reg. 6069 (Apr. 14, 1970) (codified at 50 C.F.R. pt. 17); Bureau of Sport Fisheries and Wildlife, Fish and Wildlife Service, Dep't of the Interior, 35 Fed. Reg. 8491 (June 2, 1970) (codified at 50 C.F.R. pt. 17).
[47] Designated Critical Habitat; Northern Right Whale, 58 Fed. Reg. 38553 (July 19, 1993) (codified at 50 C.F.R. 226); Definition of Critical Habitat, 59 Fed. Reg. 28794 (June 3, 1994) (codified at 50 C.F.R. 226); Critical Habitat for Endangered North Atlantic Right Whale, 81 Fed. Reg. 4838 (Jan. 27, 2016).
[48] 16 U.S.C. § 1538(a)(1)(B)–(C). *Take* is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19); 50 C.F.R. § 222.102.

the action is likely to jeopardize the continued existence of North Atlantic right whales or lead to destruction or adverse modification of the right whale's critical habitat.[49] If the action is likely to adversely affect North Atlantic right whales, NMFS issues a biological opinion that uses the best available scientific and commercial data to anticipate the expected impact of the action on the species.[50] If the biological opinion concludes that the action is not likely to jeopardize the continued existence of the right whales but will result in an incidental take of right whales, the biological opinion must include an incidental take statement that specifies "reasonable and prudent measures" that NMFS considers necessary or appropriate to minimize such impact.[51]

C. Marine Mammal Protection Act benefits for right whales

North Atlantic right whales (and all marine mammals) have benefited from the protections of the MMPA since Congress passed the statute in 1972. The main purpose of the MMPA is to prevent marine mammal stocks from falling below their "optimum sustainable population" levels, defined as the "number of animals which will result in the maximum productivity of the population or species."[52] To promote this objective, the MMPA establishes a general moratorium on the "taking" of marine mammals unless authorized and requires NMFS to "prevent the depletion" of marine mammals from incidental take by commercial fisheries.[53] The MMPA requires NMFS to prepare a stock assessment report for each marine mammal population in U.S. waters, which must document the population's abundance and trend, describe the fisheries that interact with the stock, and estimate the level of mortality and serious injury caused by those fisheries each year.[54] Based on the stock assessment report, the

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[49] 16 U.S.C. § 1536(a)(2).

[50] *Id.*; 50 C.F.R. § 402.14.

[51] 16 U.S.C. § 1536(b)(4)(C)(ii); 50 C.F.R. § 402.14(i)(1)(ii). The ESA has also been referred to as a "statutory ark" (Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act's Best Available Science Mandate*, 34 Env't. L. 397, 399 (2004)), embodying "institutionalized caution" (Tennessee Valley Authority v. Hill (*TVA*), 437 U.S. 153, 194 (1978)). *See also id.* at 174 ("[E]xamination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.").

[52] 16 U.S.C. §§ 1361(2), 1362(9). A *stock* is "a group of marine mammals of the same species or smaller taxa in a common spatial arrangement[] that interbreed when mature." 16 U.S.C. § 1362(11).

[53] 16 U.S.C. §§ 1372(a), 1387(f)(1).

[54] 16 U.S.C. § 1386(a). *Serious injury* is defined as "any injury that will likely result in mortality." 50 C.F.R. § 216.3.

agency estimates the "potential biological removal" level for each stock, defined as the "maximum number of animals . . . that may be removed from a marine mammal stock" (excluding natural mortalities) while still "allowing that stock to reach or maintain its optimum sustainable population."[55] The North Atlantic right whale is considered one of the most critically endangered populations of large whales in the world, and the potential biological removal level is currently 0.7.[56] In other words, less than one whale can die each year for it to have a chance of attaining its optimum sustainable population.

The MMPA also instructs NMFS to prepare a "take reduction plan" for each strategic marine mammal stock that interacts with certain types of fisheries.[57] The goals of a take reduction plan are to reduce mortality and serious injury to less than the marine mammal stock's potential biological removal level, and it aims to reduce mortality and serious injury to insignificant levels approaching a zero rate.[58] TRTs, made up of representatives from relevant fisheries, conservation groups, the academic community, and federal and state agencies, develop recommendations for measures to be included in the take reduction plans.[59] In 1997, NMFS established the Atlantic Large Whale TRT to develop an Atlantic Large Whale Take Reduction Plan. Until 2010, NMFS and the TRT oversaw the steady population growth from about 270 to about 481.[60]

D. The 2021 Atlantic Large Whale Take Reduction Plan Amendment Rule

After NMFS declared the Unusual Mortality Event in 2017 and determined that the right whale population had been in decline since 2010, the agency reconvened the TRT and urged action.[61] The stakeholders engaged in extensive debate and negotiations about how regulated fisheries could minimize harm to the declining right whale population.[62] On September 17, 2021, NMFS published a final Atlantic Large Whale Take Reduction

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[55] *Id.* §§ 1386(a), 1362(20).
[56] *See* Stock Assessments, *supra* note 18, at 34.
[57] 16 U.S.C. § 1387(f)(1). *See also id.* § 1362(19)(C) (defining *strategic stock* as "a marine mammal stock" listed "under the Endangered Species Act").
[58] 16 U.S.C. § 1387(f)(2).
[59] *Id.* § 1387(f)(6).
[60] *See* Stock Assessments, *supra* note 18, at 19.
[61] Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery, 86 Fed. Reg. 51970, 51970–71 (Sept. 17, 2021) (codified at 50 C.F.R. 229, 697).
[62] *Id.* at 51971.

Plan Amendment Rule (2021 Rule) that included a carefully-designed suite of mitigation measures to reduce incidental mortality and serious injury to right whales in fisheries that use vertical buoy line gear (that is, the American lobster and Jonah crab fisheries).[63] The 2021 Rule included: (1) reductions in the number of vertical buoy lines; (2) gear modifications to reduce the strength at which lines will break if a whale gets entangle; (3) one expanded and two new seasonal area closures off the coasts of Massachusetts and Maine; and (4) expanded gear marking requirements to connect ropes more precisely to their respective fisheries.[64]

E. The 2014 and 2021 biological opinions

NMFS has issued several biological opinions as a result of formal consultation under the ESA on the impacts of the American lobster fishery on right whales.[65] In 2014, NMFS issued a biological opinion that anticipated "take" under the ESA would occur as the result of continued operation of the lobster fishery in federal and state waters managed by NMFS.[66] The biological opinion, however, did not include an incidental take statement.[67] NMFS explained that it could not include an incidental take statement because it had not issued an incidental take authorization for right whales under the MMPA.[68] As described above, the protections for right whales under these two statutes are linked. Before issuing an incidental take statement as part of an ESA biological opinion, the NMFS must make a negligible impact determination under the MMPA. In 2018, environmental non-profit groups challenged NMFS as to this biological opinion.[69]

In 2017, after scientific evidence revealed that the right whale population was declining, NMFS reinitiated consultation. In 2021, NMFS issued a new biological opinion that considered the 2021 Rule measures, all public comments submitted during a comment period, and the Con-

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[63] *See generally id.*
[64] *Id.* at 51972–74.
[65] U.S. Nat'l Marine Fisheries Servs., Greater Atlantic Regional Fisheries Off., Authorization of Ten Fisheries as Authorized by NMFS; the Implementation of Omnibus EFH Amendment 2 (2021), at 3 (chart listing prior formal consultations) [hereinafter Authorization of Ten Fisheries].
[66] U.S. Nat'l Marine Fisheries Serv., Greater Atlantic Regional Fisheries Off., Section 7 Consultation on the American Lobster Fishery (2014).
[67] *Id.* at 161.
[68] *Id.*
[69] *See* Complaint for Declaratory and Injunctive Relief, Ctr. for Biological Diversity v. Raimondo, No. 1:23-cv-809 (D.D.C. Mar. 27, 2023), ECF No. 1.

servation Framework.[70] The Conservation Framework was a unique part of the proposed action that committed NMFS to achieving near-zero serious injuries and mortalities from U.S. fisheries for right whales by 2030 through a series of regulatory measures.[71] The 2021 biological opinion anticipated "take" under the ESA would occur as the result of continued operation of the American lobster fishery, but this time, the opinion included an incidental take statement authorizing zero-lethal take of right whales and a determined amount of sublethal take.[72] In light of the Conservation Framework's commitment to achieving near-zero take by 2030, the 2021 biological opinion concluded that continued operation of the fishery was not likely to jeopardize North Atlantic right whales.[73] Environmental groups and stakeholders in the lobster industry sued NMFS on this biological opinion.[74] The 2021 biological opinion was ultimately vacated by the U.S. Court of Appeals for the District of Columbia Circuit as to the portions of the opinion addressing right whales and the federal lobster fishery.[75]

III. Litigation and congressional involvement

For years, the tension between federal protection of North Atlantic right whales and regulation of fishing with fixed vertical buoy line gear has led to litigation. Conservation advocates, industry groups, and state stakeholders have all sought rulings favoring their positions, while both state and federal agencies continued to regulate, and Congress looked on. The following subsections summarize the key cases, including some ongoing litigation.

A. Early right whale litigation (First Circuit, District of Massachusetts)

Between 1995 and 2019, one pro se plaintiff interested in protecting the North Atlantic right whale from entanglement in fishing gear brought

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[70] Authorization of Ten Fisheries, *supra* note 65.
[71] *Id.* at 7–8.
[72] *Id.* at 389–91.
[73] *Id.* at 341.
[74] *See* Amended Complaint, Ctr. for Biological Diversity v. Ross et al., No. 1:18-cv-112 (D.D.C. Sept. 17, 2021), ECF No. 170; Complaint for Declaratory and Injunctive Relief, Maine Lobstermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv., No. 1:21-cv-2509 (D.D.C. Sept. 27, 2021), ECF No. 1.
[75] Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., 70 F.4th 582, 602 (D.C. Cir. 2023).

over 20 cases.[76] From these cases, four rulings stand out. The first significant ruling dates to 1997, when the U.S. Court of Appeals for the First Circuit upheld, in part, the issuance of an injunction against the Commonwealth of Massachusetts.[77] In Massachusetts, all commercial fishing vessels in state waters were required to obtain a take permit from the state Division of Marine Fisheries (DMF).[78] DMF allowed gillnet and lobster-pot fishing gear in certain areas of state waters, as long as a 500-yard buffer zone existed around any right whales.[79] In the underlying case, the pro se plaintiff challenged DMF's issuance of commercial fishing licenses as violating the ESA and MMPA because the fishing purportedly resulted in take of right whales from entanglement in vertical buoy line gear.[80] The U.S. District Court for the District of Massachusetts held that it had jurisdiction under the ESA.[81] The district court, however, found that it did not have jurisdiction over the plaintiff's MMPA claim because there is no MMPA citizen-suit provision.[82]

Finding evidence supporting the allegation that right whales had been entangled in gillnet and lobster-pot fishing gear in Massachusetts waters, the district court granted summary judgment in favor of the plaintiff on his ESA claim and entered a preliminary injunction (PI).[83] Instead of implementing the plaintiff's requested protective measures, however, the district court ordered Massachusetts to do the following: (1) apply for an ESA incidental take permit for right whales from NMFS; (2) apply for a take authorization for right whales from NMFS under the MMPA; (3) develop and prepare a proposal to restrict, modify, or eliminate the use of fixed fishing gear in coastal waters of Massachusetts as critical habitat for right whales; and (4) convene an Endangered Whale Working Group to engage in substantive discussions with the plaintiff and other interested parties regarding modifications of fixed fishing gear and other measures to minimize harm to right whales.[84] On appeal, the First Circuit upheld the district court's finding that Massachusetts' issuance of commercial

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[76] *See, e.g.*, Strahan v. Sec'y, Mass. Exec. Off. of Energy & Env't Affairs, 458 F. Supp. 3d 76 (D. Mass. 2020); Strahan v. Roughead, 910 F. Supp. 2d 358 (D. Mass. 2012); Strahan v. Holmes, 595 F. Supp. 2d 161 (D. Mass. 2009); Strahan v. Rumsfeld, No. 1:05-cv-10275, 2005 WL 8176060 (D. Mass. Feb. 11, 2005); Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997); Strahan v. Linnon, 966 F. Supp. 111 (D. Mass. 1997).
[77] *Coxe*, 127 F.3d at 158.
[78] *Id.* at 159.
[79] *Id.*
[80] Strahan v. Coxe, 939 F. Supp. 963, 966 (D. Mass. 1996).
[81] *Id.* at 988–89.
[82] *Id.* at 984–85.
[83] *Id.* at 984–985, 992.
[84] *Id.* at 989–92.

fishing permits violated the ESA.[85] It also affirmed all injunctive relief, except for the instruction requiring defendants to apply for an MMPA permit.[86]

In 2005, the pro se plaintiff filed suit again in district court, alleging that endangered whales had continued to become entangled in gear licensed by DMF.[87] After three days of testimony on the plaintiff's motion seeking emergency relief, the district court concluded that the plaintiff had not demonstrated a likelihood of success on the merits.[88] Nevertheless, the district court established that, in its view, the fishing gear posed a threat to endangered whales and ordered that the state engage in "careful monitoring."[89]

In 2019, the same plaintiff filed another lawsuit in the same vein.[90] After filing numerous motions requesting emergency injunctive relief, the plaintiff got a hearing before the U.S. District Court for the District of Massachusetts.[91] In its order, the district court found the plaintiff had demonstrated a strong likelihood of success on the merits of his claim that state agency defendants were licensing vertical buoy line gear in a manner which proximately caused right whale entanglement in violation of the ESA.[92] The court, however, declined to grant a PI for equity reasons.[93] Instead, the court ordered the state agency defendants to promptly seek an ESA incidental take permit from NMFS.[94]

The same court held an 11-day trial on an expedited basis to get to the merits. The court dismissed the claims for lack of jurisdiction because the plaintiff had not sufficiently established standing with evidence at the trial.[95] The court issued an "indicative ruling" as to liability and remedies, in case the plaintiff appealed and the First Circuit reversed its ruling on

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[85] *Coxe*, 127 F.3d at 158.
[86] *Id.* at 163–64.
[87] *See* Verified Amended Complaint for Declaratory and Injunctive Relief and Request for a Jury Trial, Strahan v. Pritchard, No. 1:05-cv-10140 (D. Mass. Sept. 30, 2005), ECF No. 66.
[88] Strahan v. Pritchard, 473 F. Supp. 2d 230, 238 (D. Mass. 2007).
[89] *Id.*
[90] Verified Complaint for Declaratory, Injunctive, and Other Relief and a Request for a Jury Trial, Strahan v. Sec'y, Mass. Exec. Off. of Energy & Env't Affs., No. 1:19-cv-10639 (D. Mass. Apr. 4, 2019), ECF No. 1.
[91] Strahan v. Sec'y, Mass. Exec. Off. of Energy & Env't Affairs, 458 F. Supp. 3d 76, 80–84 (D. Mass. 2020).
[92] *Id.* at 89.
[93] *Id.* at 93–95.
[94] *Id.*
[95] Strahan v. Sec'y, Mass. Exec. Off. of Energy & Env't Affs., No. 1:19-cv-10639, 2021 WL 9038570 (D. Mass. Nov. 30, 2021).

standing.[96] In this 60-page "indicative ruling," the court opined on the plight of right whales, the take caused by entanglement, and the need for new ropeless gear technology to obviate the need for vertical lines.[97] The district court stated:

> [I]f the First Circuit concludes that Plaintiff has standing, [this] court will enter an injunction directing [DMF] to continue its good faith effort to obtain an Incidental Take Permit, and in the event that these efforts are finally rejected, to cease permitting the deployment of vertical buoy ropes in Massachusetts state waters.[98]

These rulings deeply affected the Commonwealth and led it to make substantial efforts to reduce the unintended but real effect of lobster-pot and gillnet fishing in state waters, including restrictions on the use of certain fishing gear and seasonal closures.[99]

B. *Center for Biological Diversity v. Raimondo* (District of Columbia)

In 2018, four environmental non-profits—the Center for Biological Diversity, Defenders of Wildlife, the Humane Society of the United States, and Conservation Law Foundation—challenged NMFS's 2014 biological opinion that analyzed the effect of various fisheries on the endangered North Atlantic right whale.[100] Conservation Law Foundation initially brought a separate suit that was consolidated with this one.[101] These groups alleged that: (1) the 2014 biological opinion was inadequate under the Administrative Procedure Act (APA) because it did not include an incidental take statement and instead included a "numeric trigger"; (2) NMFS failed to ensure against jeopardy by relying on the inadequate 2014

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[96] Indicative Ruling as to Liability and Remedies, Strahan v. Sec'y, Mass. Exec. Off. of Energy & Env't Affs., No. 1:19-cv-10639 (D. Mass. Nov. 30, 2021), ECF No. 614.
[97] *See generally id.*
[98] *Id.* at 60.
[99] *See Strahan*, 458 F. Supp. 3d at 88 (describing "serious efforts" Massachusetts had taken as of 2020 "to mitigate the risks" of vertical buoy line fishing gear in Massachusetts coastal waters). *See also North Atlantic Right Whale: In the Spotlight*, NOAA Fisheries (Oct. 22, 2024), https://www.fisheries.noaa.gov/species/north-atlantic-right-whale/spotlight (describing how the Massachusetts Division of Marine Fisheries has led the way in reducing entanglement risk for right whales in state waters).
[100] Ctr. for Biological Diversity v. Ross, 349 F. Supp. 3d 38 (D.D.C. 2018).
[101] *See* Minute Order, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112, (D.D.C. May 2, 2018), ECF No. 19 (consolidating with Conservation L. Found. v. Ross, No. 1:18-cv-283 (D.D.C.)).

biological opinion in violation of ESA section 7; (3) NMFS unlawfully allowed take of right whales in violation of ESA section 9; and (4) NMFS unlawfully continued authorizing the American lobster fishery without an MMPA take authorization.[102] After briefing on transferring the case to Massachusetts (which the district court denied),[103] discovery (which the district court allowed for two of the plaintiffs' claims),[104] lodging of the administrative record,[105] and intervention by the Maine Lobstermen's Association and Massachusetts Lobstermen's Association,[106] the parties briefed the merits in cross-motions for summary judgment.[107]

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[102] Complaint for Declaratory and Other Relief, Ctr. for Biological Diversity v. Raimondo, No. 1:18-cv-112 (D.D.C. Jan. 18, 2018), ECF No. 1.

[103] Ctr. for Biological Diversity v. Ross, 310 F. Supp. 3d 119 (D.D.C. 2018).

[104] Ctr. for Biological Diversity v. Ross, 349 F. Supp. 3d 38 (D.D.C. 2018).

[105] Notice of Filing the Certified Index for the Administrative Record as to Count I, Ctr. for Biological Diversity v. Raimondo, No. 1:18-cv-112 (D.D.C. Aug. 10, 2018), ECF No. 36; Notice of Filing Index to Partial Administrative Record Concerning Defendants' Implementation of the MMPA and ESA, Ctr. for Biological Diversity v. Raimondo, No. 1:18-cv-112 (D.D.C. Aug. 17, 2018), ECF No. 37 (the administrative record was supplemented in September 2018, November 2018, and June 2019); Notice of Filing Index to First Supplement to the Administrative Record, Ctr. for Biological Diversity v. Raimondo, No. 1:18-cv-112 (D.D.C. Sept. 18, 2018), ECF No. 39; Notice of Filing the Index to the Third Supplement to the Administrative Record, Ctr. for Biological Diversity v. Raimondo, No. 1:18-cv-112 (D.D.C. Nov. 1, 2018), ECF No. 46; Notice of Filing Index to Third Supplement to the Administrative Record, Ctr. for Biological Diversity v. Raimondo, No. 1:18-cv-112 (D.D.C. June 3, 2019), ECF No. 64.

[106] *See* Motion to Intervene, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. May 30, 2018), ECF No. 24; Motion to Intervene, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Aug. 2, 2018), ECF No. 31 (Maine Lobstering Union and Little Bay Lobster, LLC intervened after the Court's 2020 ruling on summary judgment briefing); Motion to Intervene by Maine Lobstering Union, Ctr. for Biological Diversity, No. 1:18-cv-112 (D.D.C. May 12, 2020), ECF No. 98; Motion to Intervene by Little Bay Lobster, LLC, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. May 13, 2020), ECF No. 102 (the State of Maine filed an amicus brief during the 2020 remedy phase of the case); Amicus Brief by State of Maine, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. June 22, 2020), ECF No. 118.

[107] Motion for Summary Judgment, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. June 14, 2019), ECF No. 66; Cross Motion for Summary Judgment, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Nov. 15, 2019), ECF No. 81; Memorandum in Opposition to re Motion for Summary Judgment, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. June 14, 2019), ECF No. 82; Reply to Opposition to Motion re Motion for Summary Judgment, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Dec. 17, 2019), ECF No. 83; Memorandum in Opposition to re Cross Motion for Summary Judgment, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Dec. 17, 2019), ECF No. 84 (federal defendants first moved to stay the case due to the agency's intent to issue a new biological opinion by July 31, 2020 and issue a regulation amending the Atlantic Large Whale Take Reduction Plan); Motion to Stay, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112

In April 2020, the U.S. District Court for the District of Columbia granted summary judgment on the environmental non-profit plaintiffs' first claim, holding that NMFS's "failure to include an [incidental take statement] in its 2014 [biological opinion] after finding that the American lobster fishery had the potential to harm the North Atlantic right whale at more than three times the sustainable rate is about as straightforward a violation of the ESA as they come."[108]

The court invited briefs and held oral argument on the issue of remedy.[109] In August 2020, the court vacated and remanded the portion of the 2014 biological opinion pertaining to the American lobster fishery and the North Atlantic right whale; however, the vacatur was stayed until May 31, 2021.[110] On May 28, 2021, NMFS notified the court that it had completed a new, superseding biological opinion.[111]

In September 2021, three environmental plaintiff groups filed an amended complaint challenging the new 2021 biological opinion and 2021 Rule.[112] The new complaint alleged four new claims, adding to the previous four claims: (1) the 2021 biological opinion was substantively improper; (2) the 2021 biological opinion again included an unlawful incidental take statement; (3) the 2021 Rule failed to contain measures to reduce right whale mortality and serious injury to below the potential biological removal level within six months of implementation as required by

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(D.D.C. Aug. 19, 2019), ECF No. 68 (the court denied the stay); Ctr. for Biological Diversity v. Ross, 419 F. Supp. 3d 16 (D.D.C. 2019).

[108] Ctr. for Biological Diversity v. Ross, 613 F. Supp. 3d 336, 347 (D.D.C. 2020).

[109] *See* Minute Order, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Apr. 24, 2020), ECF No. 98; Motion for Order on Remedy, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. May 15, 2020), ECF No. 105; Response re Motion for Order on Remedy, Motion to Vacate, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. June 15, 2020), ECF No. 111; Memorandum in Opposition to re Motion for Order on Remedy, Motion to Vacate, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. June 18, 2020), ECF No. 112; Memorandum in Opposition to re Motion for Order on Remedy, Motion to Vacate, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. June 18, 2020), ECF No. 114; Response re Motion for Order on Remedy, Motion to Vacate, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. June 18, 2020), ECF No. 115; Reply to Opposition to Motion re Motion for Order on Remedy, Motion to Vacate, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. July 10, 2020), ECF No. 119.

[110] Ctr. for Biological Diversity v. Ross, 480 F. Supp. 3d 236 (D.D.C. 2020).

[111] Notice of Filing Status Update Regarding Completion of New Biological Opinion, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. May 28, 2021), ECF No. 135.

[112] Amended Complaint, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Sept. 10, 2021), ECF No. 171 (the complaint was amended a few days later); Second Amended Complaint, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Sept. 17, 2021), ECF No. 170.

the MMPA; and (4) NMFS's ongoing failure to reduce right whale mortality and serious injury to below the potential biological removal level within the MMPA's timeline constituted action unlawfully withheld or unreasonably delayed.[113] NMFS lodged a new administrative record in January 2022.[114] Having previously only filed an amicus brief at the prior remedy stage, the state of Maine now successfully moved to intervene as a party.[115]

After the parties briefed the merits in cross-motions for summary judgment, the court once again granted the environmental plaintiffs' motion for summary judgment on July 8, 2022.[116] The court identified the "crux of the problem":

> [T]he 2021 [biological opinion] projects that in the coming years the American lobster fishery will continue to potentially kill and seriously injure North Atlantic right whales at over three times the sustainable rate . . . even after the implementation of the 2021 Final Rule . . . and even though zero lethal take is authorized [by the 2021 biological opinion].[117]

The court found two main legal violations. First, NMFS did not meet the "antecedent 'negligible impact' requirement" under the MMPA before issuing the incidental take statement and could not make up for this "failure . . . by setting the level of lethal take authorized at zero."[118] Second, the district court held that section 118 of the MMPA requires NMFS to reduce incidental take to a level that is at or below the North Atlantic right whale's potential biological removal level within six months of any amendment to the Atlantic Large Whale Take Reduction Plan.[119] Throughout its opinion, the court recognized the difficult role of all parties, including the agency's "considerable effort," the "importance of lobster fishing to the economies of several states," and the environmental plaintiffs' advocacy based on "strict requirements imposed by the MMPA and ESA."[120]

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[113] Second Amended Complaint at 4, 31–34, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Sept. 17, 2021), ECF No. 170.
[114] Notice of Filing Administrative Record Indices, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Jan. 14, 2022), ECF No. 193. A supplemented administrative record was lodged in February 2022. Notice of Filing Revised Indices for Supplemented Administrative Records, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Feb. 11, 2022), ECF No. 196.
[115] Motion to Intervene, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Sept. 24, 2021), ECF No. 172.
[116] Ctr. for Biological Diversity v. Raimondo, 610 F. Supp. 3d 252 (D.D.C. 2022).
[117] *Id.* at 279.
[118] *Id.* at 269.
[119] *Id.* at 279–80.
[120] *Id.* at 264–65, 280.

As before, the court invited briefing and held a hearing on the issue of remedy.[121] In its brief, NMFS explained to the court that the "scope of the measures required to reach [the potential biological removal level] will have severe economic and social consequences to the affected fisheries and surrounding communities."[122] In November 2022, the court remanded the 2021 Rule without vacatur and ordered NMFS to finalize a new rule by December 9, 2024, which reduces right whale mortality and serious injury in U.S. commercial fisheries to below the species' potential biological removal level.[123]

After the passage of the CAA and the D.C. Circuit's ruling in *Maine Lobstermen's Association*, discussed below, the *Center for Biological Diversity* court vacated its July 2022 and November 2022 orders and dismissed the case as moot.[124]

C. *Maine Lobstering Union v. National Marine Fisheries Service* (District of Maine)

In 2021, several industry groups from Maine took specific umbrage with one of the new area closures implemented by the 2021 Rule. A group of plaintiffs led by the District 4 Lodge of the International Association of Machinists and Aerospace Workers (IAMAW), Local Lodge 207, formerly known as the IAMAW Maine Lobstering Union—Local 207 "Maine Lobstering Union" sued NMFS in the U.S. District Court for the District of

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[121] Motion for Order on Remedy, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Aug. 12, 2022), ECF No. 226; Response re Motion for Order on Remedy, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Sept. 19, 2022), ECF No. 228; Memorandum in Opposition to re Motion for Order, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Oct. 7, 2022), ECF No. 231; Response re Motion for Order on Remedy, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Oct. 7, 2022), ECF No. 233; Memorandum in Opposition to re Motion for Order, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Oct. 7, 2022), ECF No. 234; Response re Motion for Order on Remedy, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Oct. 7, 2022), ECF No. 235; Response re Motion for Order on Remedy, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Oct. 7, 2022), ECF No. 236; Reply to Opposition to Motion re Motion for Order on Remedy, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Oct. 21, 2022), ECF No. 237.

[122] Response re Motion for Order on Remedy, Exhibit A, at 4, Ctr. for Biological Diversity v. Ross, No. 1:18-cv-112 (D.D.C. Sept. 19, 2022), ECF No. 228 (Declaration of Michael Pentony).

[123] Ctr. for Biological Diversity v. Raimondo, No. 1:18-cv-112, 2022 WL 17039193, at *3 (D.D.C. Nov. 17, 2022).

[124] Ctr. for Biological Diversity v. Raimondo, No. 1:18-cv-112, 2024 WL 324103 (D.D.C. Jan. 29, 2024).

Maine.[125] While generally in disagreement with the measures regulating lobster fishermen in the 2021 Rule, the Maine Lobstering Union particularly objected to a new measure that closed approximately 970 square miles to lobster fishing in Gulf of Maine Federal waters—known as the Lobster Management Area 1 Restricted Area closure—between October and January.[126] The Lobster Management Area 1 closure, as well as several other restricted areas, are depicted in Figure 2.[127] The closure banned vertical buoy line fishing, including lobster fishing, to protect North Atlantic right whales that had been documented as using the same area from October to January.[128]

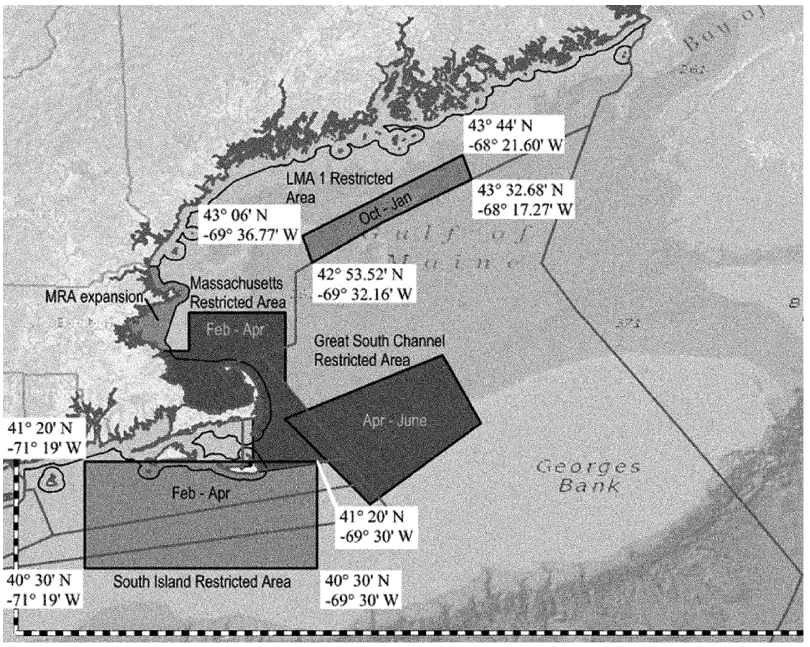

Figure 2: Restricted Areas for Lobster Fishing

Having filed suit days before the closure was scheduled to begin, the Maine Lobstering Union sought an emergency ruling from the district court to prevent implementation of the closure.[129] After emergency brief-

[125] Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers v. Raimondo, No. 1:21-cv-275, 2021 WL 4616231 (D. Me. Oct. 6, 2021).

[126] Complaint for Expedited Declaratory and Injunctive Relief at 4–5, 35–36, Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers v. Raimondo, No. 1:21-cv-275 (D. Me. Sept. 27, 2021), ECF No. 1.

[127] Taking of Marine Mammals Incidental to Commercial Fishing Operations, 86 Fed. Reg. 51970, 51973 (Sept. 17, 2021) (codified at 50 C.F.R. pts. 229, 697).

[128] *See id.* at 51970, 51996–97.

[129] Emergency Motion for Temporary Restraining Order, Preliminary Injunction and Order for Expedited Briefing, Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers v. Raimondo, No. 1:21-cv-275 (D. Me. Oct. 3, 2021), ECF No. 10.

ing, on the Saturday following oral argument, the district court granted Maine Lobstering Union's PI, preventing the closure from going into effect.[130]

NMFS appealed and sought an emergency stay of the district court's relief pending appeal, which the First Circuit granted.[131] In other words, although a bit later than originally scheduled, the First Circuit allowed the closure to go into effect while the appeal was pending. The First Circuit reversed the district court's grant of injunctive relief and sent the case to proceed at the district court level.[132] The First Circuit's remand specifically addressed the gear that fishers might have placed into the closure area during the time the district court's injunction was in place.[133] Several months later, on a non-emergency basis, the First Circuit overturned the district court's ruling on the PI.[134] Maine Lobstering Union voluntarily dismissed the suit about a month after the First Circuit's ruling.[135]

D. *Maine Lobstermen's Association v. National Marine Fisheries Service* (District of Columbia)

Also in 2021, the Maine Lobstermen's Association—a non-profit trade association representing more than 1,200 lobster harvesters fishing off the Maine coast—filed suit challenging NMFS's 2021 Rule and 2021 biological opinion on the effects of lobster fishing on the North Atlantic right whale.[136] The Maine Lobstermen's Association argued that the 2021 biological opinion improperly took an overly protective, "worst case scenario" approach that led to overregulation of the American lobster industry, and because the biological opinion was improper, the 2021 Rule relying on that biological opinion was also improper.[137] The Maine Lobstering Union, the Massachusetts Lobstermen's Association, and the State of Maine inter-

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[130] Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers v. Raimondo, No. 1:21-cv-275, 2021 WL 4823269 (D. Me. Oct. 16, 2021).
[131] Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers v. Raimondo, 18 F.4th 38 (1st Cir. 2021).
[132] *Id.* at 43.
[133] *Id.* at 50.
[134] Dist. 4 Lodge of the Int'l Ass'n of Machinists and Aerospace Workers v. Raimondo, 40 F.4th 36 (1st Cir. 2022).
[135] Stipulation of Dismissal, Dist. 4 Lodge of the Int'l Ass'n of Machinists and Aerospace Workers v. Raimondo, No. 1:21-cv-275 (D. Me. Aug. 24, 2022), ECF No. 81.
[136] Complaint for Declaratory and Injunctive Relief, Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:21-cv-2509 (D.D.C. Sept. 27, 2021), ECF No. 1.
[137] *Id.* at 26–30.

vened in support of the Maine Lobstermen's Association.[138]

The case was filed in the District Court for the District of Columbia and assigned to the same judge presiding over the *Center for Biological Diversity v. Raimondo* matter challenging the same 2021 biological opinion and 2021 Rule.[139] The parties were also identical, as the environmental groups intervened in support of NMFS in this case.[140] The court, however, declined to consolidate the cases.[141] As explained above, on July 8, 2022, the court granted summary judgment for the environmental plaintiffs in the *Center for Biological Diversity* challenge, holding that the 2021 biological opinion and 2021 Rule did not go far enough toward meeting the ESA and MMPA requirements to protect right whales.[142] Given that holding, the court asked the parties to submit briefs regarding whether a stay would be appropriate in this case while the parties simultaneously briefed, and the court simultaneously considered a remedy in the *Center for Biological Diversity* case.[143] Ultimately, the court concluded that a stay would not be appropriate; since the parties spent "significant time and effort" briefing summary judgment, deciding the issues could be helpful for NMFS on remand, and the parties "deserve a determination."[144]

The court denied summary judgment on September 8, 2022 for the industry-side plaintiffs.[145] Going through each industry-side objection raised against the merits of the 2021 biological opinion, the court deferred to NMFS's analysis, finding that "NMFS suitably considered the data available at the time of its action and reasonably explained its sci-

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[138] Motion to Intervene by State of Maine Department of Marine Resources, Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:21-cv-2509 (D.D.C. Dec. 16, 2021), ECF No. 21; Motion to Intervene by Massachusetts Lobstermen's Association, Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:21-cv-2509 (D.D.C. Dec. 22, 2021), ECF No. 24; Motion to Intervene by District 4 Lodge of the International Association of Machinists and Aerospace Workers, Local Lodge 207, Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:21-cv-2509 (D.D.C. Dec. 28, 2021), ECF No. 26.

[139] *See* discussion *supra* section III.B (discussing Ctr. for Biological Diversity v. Raimondo, No. 18-112, 2022 WL 17039193 (D.D.C. Nov. 17, 2022)).

[140] Motion to Intervene by Conservation Law Foundation, Inc., Ctr. for Biological Diversity, Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:21-cv-2509 (D.D.C. Dec. 8, 2021) at ECF No. 16.

[141] Minute Order, Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:21-cv-2509 (D.D.C. Dec. 6, 2021), ECF No. 15.

[142] Ctr. for Biological Diversity v. Raimondo, 610 F. Supp. 3d 252 (D.D.C. 2022).

[143] Minute Order, Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:21-cv-2509 (D.D.C. July 22, 2022), ECF No. 66.

[144] Minute Order, Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:21-cv-2509 (D.D.C. Aug. 18, 2022), ECF No. 74.

[145] Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., 626 F. Supp. 3d 46 (D.D.C. 2022).

entific conclusions."[146] Regarding challenges to the Conservation Framework, the court found that it "forms a necessary part of the agency's action" and is therefore reviewable as such, but its analysis and projections are not arbitrary and capricious.[147] Finally, because the court found that the 2021 biological opinion survived against the industry's challenges, it found that the 2021 Rule's reliance on the opinion was lawful.[148]

Before remedy briefing concluded in *Center for Biological Diversity*, the industry plaintiffs in *Maine Lobstermen's Association* appealed the summary judgment ruling to the D.C. Circuit.[149] In the midst of briefing, but before oral argument, the district court issued its remedy order in the environmental-side case.[150] Then, Congress passed the CAA (described below) with provisions effectively pausing the implementation of the remedy order in *Center for Biological Diversity*.[151] The parties filed supplemental briefs to the D.C. Circuit about whether the CAA mooted out this challenge.

On June 16, 2023, the D.C. Circuit issued a decision reversing the district court's denial of summary judgment for industry plaintiffs.[152] As a threshold matter, the D.C. Circuit found that the CAA did not moot the case because it is "best read to set a temporary ceiling, not a floor, for compliance" by industry plaintiffs.[153] Unlike the environmental-side challenge, the industry plaintiffs in this case cared about whether the rule went too far, which was not addressed by the CAA's provisions deeming the rule "sufficient."[154] On the merits, the D.C. Circuit concluded that the challenged 2021 biological opinion lacked the necessary scientific substance to be upheld and was contrary to law.[155] The D.C. Circuit warned that ESA section 7 requires agencies to "use the best available scientific data, not the most pessimistic" information.[156] Moreover, while it agreed that agencies faced with limited data need not present "scientific reasons

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[146] *Id.* at 57.
[147] *Id.* at 65–68.
[148] *Id.* at 68–69.
[149] Notice of Appeal to D.C. Circuit Court, Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:21-cv-2509 (D.D.C. Sept. 20, 2022), ECF No. 81.
[150] Ctr. for Biological Diversity v. Raimondo, No. 18-CV-112, 2022 WL 17039193 (D.D.C. Nov. 17, 2022).
[151] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. JJ, Tit. I, 136 Stat. 4459, 6089–90.
[152] Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., 70 F.4th 582 (D.C. Cir. 2023).
[153] *Id.* at 593–94.
[154] *Id.*
[155] *Id.* at 596–601.
[156] *Id.* at 599.

or calculated probabilities when no reasons or calculations are possible," it cautioned that if an agency "lacks a clear and substantial basis for predicting an effect is reasonably certain to occur," then the effect must be "disregarded in evaluating the agency action."[157] The D.C. Circuit then vacated the 2021 biological opinion, reasoning that the vacatur would harm no party given the language in the CAA.[158] Finally, the D.C. Circuit remanded the 2021 Rule without vacatur because NMFS "may well be able to explain why [it] does not depend upon the validity of the [2021 biological opinion]."[159]

E. 2022 Emergency Rule

After the 2021 Rule went into effect, in January 2022, the Massachusetts DMF sent a letter to alert NMFS to an emerging right whale entanglement risk. Massachusetts' expansion of a seasonal closure in state waters in 2021 and the subsequent incorporation of that closure into the 2021 Rule inadvertently left an approximately 200 square mile wedge-shaped (Wedge) area open to trap and pot fishing. The Wedge overlapped with an area often used by right whales, creating a significant entanglement risk.[160] Data indicated that lobstermen were parking their gear in the open ocean ("wet storing" their gear), resulting in a significant concentration of trap and pot gear during the closure period. This created an unusually high density of gear in the Wedge from February to April.[161] NMFS determined that the Wedge presented an imminent entanglement threat and issued an emergency rule to prohibit trap and pot fishery buoy lines within the area to reduce the incidental mortality and serious injury to right whales.[162] The closure was in effect for the month of April 2022.[163]

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[157] *Id.* at 595–96, 599–600.
[158] *Id.* at 601–02.
[159] *Id.* at 602.
[160] Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 87 Fed. Reg. 11590, 11592 (Mar. 2, 2022) (codified at 50 C.F.R. pt. 229).
[161] *Id.*
[162] *See generally id.*; 16 U.S.C. § 1387(g) (MMPA emergency rulemaking authority, requiring NMFS to "prescribe emergency regulations that, consistent [to the maximum extent practicable] with [any take reduction plan currently in place,] reduce incidental mortality and serious injury in that fishery" if it "finds that the incidental mortality and serious injury of marine mammals from commercial fisheries is having, or is likely to have, an immediate and significant adverse impact on a stock or species").
[163] Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 87 Fed. Reg. at 11590.

F. Consolidated Appropriations Act

After the 2022 summary judgment and remedy rulings in *Center for Biological Diversity* and while *Maine Lobstermen's Association* was pending before the D.C. Circuit, the TRT reconvened to discuss recommending measures that could comply with the district court's strict timetable set in its 2022 remedy ruling. Since the best potential technological fix—on-demand or "ropeless" systems that do not require a gear-to-buoy tether—was not ready for large-scale deployment, one option would have been to institute more or larger seasonal closures to vertical buoy lines.[164]

Before NMFS could formulate or propose any new regulation recommended by the TRT, Congress passed the CAA, and on December 29, 2022, President Biden signed it.[165] The CAA included provisions specific to NMFS's regulation of the American lobster and Jonah crab fisheries with respect to right whales.[166] Senator Angus King from Maine described the toll that the *Center for Biological Diversity* remedy ruling's requirement for future regulations would have on Maine lobster fishers, but he emphasized that he and his colleagues viewed the CAA as "in no way" diminishing "the standards of the [ESA] or the [MMPA]"; rather "it merely pauses that economic death sentence until we have time to know how to navigate the solution."[167]

For example, the CAA deems the 2021 Rule "sufficient to ensure that the continued [f]ederal and [s]tate authorizations of the American lobster and Jonah crab fisheries are in full compliance" with the MMPA and the ESA until December 31, 2028.[168] In section 101(b), however, Congress carved out an exception for "an existing emergency rule, or any action taken to extend or make final an emergency rule that is in place on" the date of enactment that affects the American lobster and Jonah crab fisheries.[169]

Section 101(a) also directs NMFS to take a series of actions between enactment and December 31, 2028, to facilitate the development of new fishing gear technologies intended to protect right whales and then to incorporate those technologies into a regulation to take effect by that

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[164] *Developing Viable On-Demand Gear Systems*, Ne. Fisheries Sci. Ctr., NOAA Fisheries (July 18, 2024), https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/developing-viable-demand-gear-systems.
[165] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459.
[166] *Id.*
[167] 168 Cong. Rec. S9591, S9608 (daily ed. Dec. 20, 2022) (statement of Sen. King).
[168] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 101(a), 136 Stat. 4459.
[169] *Id.* § 101(b).

date.[170] The CAA further instructs NMFS to establish a grant program to facilitate the development of those technologies and to submit annual reports to Congress describing "the actions taken and plans to implement measures expected to not exceed potential biological removal level by December 31, 2028," the "amount of mortality and serious injury by fishery and country," and the "proportion of the American lobster and Jonah crab fisheries that have transitioned to innovative gear technologies that reduce harm to" the right whale.[171] The CAA authorizes appropriations of up to $50 million per year between 2023 and 2032—not less than $40 million of which must be dedicated to the development of innovative gear and technology.[172]

G. *Massachusetts Lobstermen's Association v. National Marine Fisheries Service* (District of Columbia)

In February 2023, citing the MMPA and CAA as authority, NMFS published a rule extending the 2022 Emergency Rule to close the Wedge off the coast of Massachusetts from February 1 to April 30, reopening May 1, 2023.[173] This area is shown in Figure 3.[174]

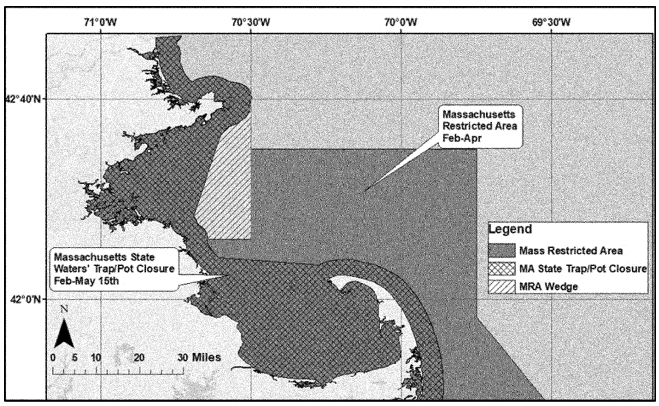

Figure 3: Map Depicting the Wedge Closed by 2022 Emergency Rule Between Other Closure Areas

On February 1 and 2, 2023, the Massachusetts Lobstermen's Association filed a complaint and motions seeking emergency injunctive relief in

[170] *Id.* § 101(a)(1)–(3).
[171] *Id.* § 101(a)(3), 201(a)(1).
[172] *Id.* § 203(a)(1).
[173] Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 88 Fed. Reg. 7362 (Feb. 3, 2023) (codified at 50 C.F.R. pt. 229).
[174] *Id.* at 7362, 8336.

the U.S. District Court for the District of Columbia, specifically seeking to enjoin the 2023 Emergency Rule as violating the CAA.[175] The case was assigned to the same judge presiding in *Center for Biological Diversity* and *Maine Lobstermen's Association*.[176]

After briefing and oral argument on the emergency injunction motion, the court denied the Massachusetts Lobstermen's Association's motion for emergency relief, finding that Plaintiff failed to establish irreparable harm.[177] The court construed the first motion as seeking a temporary restraining order (TRO) and gave Plaintiff an opportunity to file a PI motion with additional testimony substantiating irreparable harm.[178] Plaintiff, however, did not file such a motion. NMFS then successfully moved to dismiss the case as moot when the Wedge reopened on May 1, 2023.[179]

H. *Massachusetts Lobstermen's Association v. National Marine Fisheries Service* (District of Massachusetts)

In September 2023, NMFS published a proposed rule to amend the Atlantic Large Whale Take Reduction Plan to permanently create a seasonal closure of the Wedge by expanding the boundaries of the already-existing Massachusetts Restricted Area to include the Wedge.[180] After a public comment period in February 2024, NMFS issued the Final Wedge Rule.[181]

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[175] Complaint for Declaratory and Other Relief, Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:23-cv-293 (D.D.C. Feb. 1, 2023), ECF No. 1; Motion for Temporary Restraining Order, Preliminary Injunction, and Stay Pursuant to 5 U.S.C. § 705, Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:23-cv-293 (D.D.C. Feb. 2, 2023), ECF No. 2.

[176] *See* Notice of Related Case, Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:23-cv-293 (D.D.C. Feb. 3, 2023), ECF No. 13 (federal defendants' notice relating the cases); Case Directly Reassigned to Judge James E. Boasberg, Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:23-cv-293 (D.D.C. Feb. 7, 2023), ECF No. 15 (reassigning case to Judge James Boasberg as there is an earlier related case).

[177] *See* Minute Entry, Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:23-cv-293 (D.D.C. Feb. 16, 2023), ECF No. 29 (transcript of proceedings).

[178] *See id.* at 31.

[179] Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 23-CV-293, 2023 WL 3231450 (D.D.C. May 3, 2023).

[180] Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Reduction Plan Regulations, 88 Fed. Reg. 63917 (Sept. 18, 2023) (codified at 50 C.F.R. pt. 229).

[181] Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 89 Fed. Reg. 8333 (Feb. 7, 2024)

The Massachusetts Lobstermen's Association filed suit again, this time in the U.S. District Court for the District of Massachusetts.[182] The Massachusetts Lobstermen's Association simultaneously filed a complaint and motion for a TRO and PI, challenging NMFS's decision to permanently establish a seasonal emergency closure of lobster trap and pot fisheries in the Wedge off the coast of Massachusetts as in violation of the APA, the CAA, and the D.C. Circuit's ruling in *Maine Lobstermen's Association v. National Marine Fisheries Service*.[183]

The district court merged the motion for a PI with a "trial on the merits," pursuant to Federal Rule of Civil Procedure 65(a), concerning whether the CAA precluded NMFS from issuing the Final Wedge Rule.[184] After a hearing as to that statutory question, the district court ruled the plaintiff had standing and that the Final Wedge Rule was inconsistent with the CAA.[185] The court entered judgment for the Massachusetts Lobstermen's Association and declared that NMFS's Final Wedge Rule violates the CAA "through December 31, 2028," and the Final Wedge Rule is "therefore void and unenforceable during that period."[186] NMFS appealed to the First Circuit where the case is currently pending.[187]

IV. Congressional involvement in Endangered Species Act implementation

The CAA changed the state of play for all stakeholders in right whale litigation and regulation, but it was not the first time Congress waded into ESA implementation. It has sought to inject flexibility into the ESA

(codified at 50 C.F.R. pt. 229).

[182] *See* Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:24-cv-10332, 2024 WL 2194260 (D. Mass. Apr. 16, 2024).

[183] *See* Complaint for Declaratory and Other Relief, Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:24-cv-10332 (D. Mass. Feb. 9, 2024), ECF No. 1; Motion for Temporary Restraining Order, Preliminary Injunction, and Administrative Stay, Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:24-cv-10332 (D. Mass. Feb. 9, 2024), ECF No. 3.

[184] *See* Electronic Clerk's Notes, Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:24-cv-10332 (D. Mass. Mar. 7, 2024), ECF No. 51.

[185] *See* Electronic Clerk's Notes, Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:24-cv-10332 (D. Mass. Mar. 14, 2024), ECF No. 59; Judgment, Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:24-cv-10332 (D. Mass. Mar. 15, 2024), ECF No. 60; Memorandum of Decision, Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:24-cv-10332 (D. Mass. Apr. 16, 2024), ECF No. 67.

[186] *See* Judgment, Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:24-cv-10332 (D. Mass. Mar. 15, 2024), ECF No. 60.

[187] *See* Notice of Appeal, Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 1:24-cv-10332 (D. Mass. May 14, 2024), ECF No. 79.

or sought to mitigate regulatory uncertainty regarding its administration four noteworthy times before enacting the CAA.

A. The God Squad and Tellico Dam

Congress first amended the ESA in response to its on-the-ground effects in 1978. That year, after several years of litigation, the Supreme Court decided *Tennessee Valley Authority v. Hill* concerning completion of Tennessee Valley Authority's (TVA's) Tellico Dam.[188] At the time of the court's decision, the Tellico Dam was "virtually completed."[189] If finished, TVA projected it would impound water over approximately 16,500 acres of farmland and create a 30-mile long reservoir.[190] The reservoir would cover all of the known habitat of the snail darter—a fish species discovered in proximity to Tellico in 1973 by a University of Tennessee ichthyologist and professor.[191] Fish and Wildlife Service (FWS) listed the darter as endangered in 1975 and declared the area around the Tellico Dam to be critical habitat in 1976.[192]

Pursuant to ESA section 7, TVA consulted with FWS as to whether the Tellico Dam would jeopardize the snail darter or adversely modify its critical habitat.[193] There were no modifications that TVA could make to avoid that adverse modification.[194] FWS concluded, based on the "best scientific and commercial data available," that the Tellico Dam was likely to destroy the snail darter's critical habitat.[195] At the district court stage, the court found that it was also "highly probable" that the Tellico Dam would jeopardize the snail darter's continued existence.[196]

TVA urged the Supreme Court to rule that the ESA did not prohibit Tellico's completion because it had been authorized, funded, and over 50% constructed before Congress had passed the ESA.[197] Even though Congress had been funding the project since 1966 and halting it would cause the loss of millions of dollars, the court affirmed the Sixth Cir-

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[188] *TVA*, 437 U.S. 153 (1978).
[189] *Id.* at 157.
[190] *Id.*
[191] *Id.* at 158.
[192] Amendment Listing the Snail Darter as an Endangered Species, 40 Fed. Reg. 47505, 47505–06 (Oct. 9, 1975). *See also* Endangered and Threatened Wildlife and Plants: Snail Darter, 41 Fed. Reg. 13926–28 (Apr. 1, 1976) (designating critical habitat for the snail darter).
[193] *TVA*, 437 U.S. at 165.
[194] Hill v. Tenn. Valley Auth., 419 F. Supp. 753, 758 (E.D. Tenn. 1976).
[195] *Id.*
[196] *Id.* at 757.
[197] *TVA*, 437 U.S. at 163.

cuit's injunction.[198] Justice Burger's majority opinion stated that "[i]t may seem curious . . . that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million" but concluded that "the explicit provisions of the [ESA] require precisely that result."[199] The court made that finding despite the fact that the Tellico Dam was supposed to improve local economic conditions.[200] It noted that the final version of the legislation omitted qualifying language, such as a proposal which would have required action agencies to ensure against jeopardy only "insofar as is practicable and consistent with the[ir] primary purposes."[201]

Congress responded to *Tennessee Valley Authority v. Hill* by creating the Endangered Species Committee (also known as "the God Squad") in October 1978, empowering it to exempt an action agency's federal action from the section 7 "no jeopardy" or "adverse modification" requirement.[202] The God Squad is composed of the Secretary of the Interior; the Secretary of Agriculture; the Army; the Chairperson of the Council of Economic Advisors; the Environmental Protection Agency Administrator; the Administrator of the National Oceanic and Atmospheric Administration; and one individual from each affected state.[203] If the God Squad grants an exemption, it must also establish reasonable mitigation and enhancement measures that are "necessary and appropriate to minimize the adverse effects" of an approved action on the species or critical habitat.[204] It has received six applications, convened twice, and only once provided an exemption.[205] The God Squad exempted the Grayrocks dam project in Nebraska from compliance with ESA section 7 concerning effects to the whooping crane, and another time for 13 logging projects that

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[198] *Id.* at 174 n.19. *See also* Hill v. Tenn. Valley Auth., 549 F.2d 1064, 1072 (6th Cir. 1977) (Sixth Circuit, noting "continued work [on the dam] violates [ESA section 7]"); *id.* at 1074 (Sixth Circuit, declining to grant itself "license to rewrite" the ESA based on "economic exigencies").

[199] *TVA*, 437 U.S. at 172–73.

[200] *Id.* at 157 (citing *Hearings on Public Works for Power and Energy Research Appropriation Bill, 1977, Before the Subcomm. of the H. Comm. on Appropriations*, 94th Cong. 261 (1976)).

[201] *Id.* at 181 (internal citation omitted).

[202] *Id. See also* Patrick Parenteau, *The Exemption Process and the God Squad, in* Endangered Species Act: Law, Policy, and Perspectives 131, 132–33 (3d ed. 2002) (discussing the origination of the committee, which "reflects the tension between the oft-competing goals of species conservation and economic development").

[203] 16 U.S.C. § 1537a(e).

[204] Cong. Res. Serv., Endangered Species Act (ESA): The Exemption Process 8 (2017) [hereinafter Endangered Species Act].

[205] *Id.* at 14–24.

would impact the northern spotted owl.[206] The latter came in reaction to district judge Redden's order halting logging on Pacific Northwest federal lands managed by the Bureau of Land Management (BLM).[207] The Ninth Circuit overturned the logging exemption in spotted owl habitat, finding that the president had improperly discussed the exemption with his cabinet.[208] At least one commentator has asserted that the committee did not function as conceived; the committee unanimously declined to exempt Tellico Dam, which they referred to as, *inter alia*, a "turkey" of a project and "ill-conceived."[209]

In creating the God Squad, Congress did not task the Committee with determining what the impact of the project on the species would be, using the best scientific and commercial data available.[210] Instead, Congress directed the Committee to determine whether: (1) there are any reasonable and prudent alternatives to the agency action; (2) the project is in the public interest, and its benefits outweigh those of alternative courses of action, consistent with conserving the species or its critical habitat; (3) the action is of regional or national significance; or (4) the action agency made any irreversible or irretrievable commitment of resources.[211] When it met concerning the dam, the God Squad declined to exempt the dam from ESA section 7 compliance. Congress intervened again in 1979, specifically exempting the dam from ESA section 7 compliance.[212] TVA completed the dam in 1979, but TVA collected snail darters from the Little Tennessee River in 1975 and transplanted them to the Hiawassee and Holston rivers and, later, elsewhere.[213] In the years that followed, actions taken by FWS, TVA, and other stakeholders eventually led FWS to delist it in 2022.[214] The species can now be found in Alabama, Georgia, Tennessee, and Mississippi.[215]

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[206] *Id.*
[207] *Id.*
[208] Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534 (9th Cir. 1993).
[209] Parenteau, *supra* note 202, at 144. *See also* Transcript of Endangered Species Comm. Mtg., Dep't of the Interior (Jan. 23, 1979).
[210] Endangered Species Act, *supra* note 204, at 14–24 (2017).
[211] 16 U.S.C. § 1536(h). *See also* Bd. of Governors of Fed. Rsrv. Sys. v. Dimension Fin. Corp., 474 U.S. 361, 374 n.7 (1986) (citing Pub. L. No. 95-632, § 5, 92 Stat. 3760); Anthony Lewis, *The Ultimate Corruption*, N.Y. Times, Jan. 17, 1980, at A23S.
[212] Endangered Species Act, *supra* note 204, at 14–24 (2017).
[213] *Id.*
[214] Endangered and Threatened Wildlife and Plants; Removing the Snail Darter from the List of Endangered and Threatened Wildlife, 87 Fed. Reg. 60298 (Oct. 5, 2022) (codified at 50 C.F.R. pt. 17).
[215] *Id.*

This new process, however, did not result in an exemption for TVA. In January 1979, the committee unanimously rejected TVA's exemption application for the Tellico Dam, with its Chair, Interior Secretary Cecil Andrus, characterizing the dam as "ill-conceived and uneconomical in the first place."[216] Congress, however, intervened a second time. Tennessee Representative John Duncan offered an amendment to a 1980 appropriations bill exempting Tellico from ESA section 7.[217] The Senate approved Representative Duncan's language in September 1979.[218] President Carter, while expressing regret about the Tellico provision, signed it on September 25, 1979.[219]

B. The Northern Rocky Mountains gray wolf distinct population segment

Congress again directly responded to a court's decision regarding ESA implementation involving the listing status of the gray wolf (*Canis lupus*). In the 1990s, administrative reforms sought to build on the flexibility that Congress had added to the ESA in 1978 and 1982. FWS operationalized habitat conservation plans, "no surprises" and "safe harbors" policies, and candidate conservation agreements allowing for permits for incidental take of listed species.[220] While the species once occupied a large portion of the United States, after the arrival of European settlers, its range began to shrink due to deliberate killings and human agricultural and industrial development. As a result, its range and population substantially declined by the 1970s. Between 1966 and 1976, FWS declared regional subspecies of the gray wolf endangered. In 1995, reintroduction efforts began in Yellowstone National Park. The species began to disperse and re establish itself in the lower 48 states.[221]

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[216] Endangered Species Act, *supra* note 204, at 15.
[217] *Id.*
[218] *Id.*
[219] *Id.* (citing Energy and Water Development Appropriation Act, Pub. L. No. 96-69, 93 Stat. 437 (1980)). As approved, the statute provided that notwithstanding ESA Section 7, TVA "is authorized and directed to complete construction, operate and maintain the Tellico Dam and Reservoir project for navigation, flood control, electric power generation and other purposes . . . ." An Act Making Appropriations for Energy and Water Development for the Fiscal Year Ending Sep. 30, 1980, and for Other Purposes, Pub. L. 96-69, 93 Stat 437, Title IV.
[220] Goble et al., *supra* note 2, at 1098–99 (discussing "the administrative amendment" from 1994–2001, which amounted to a "fourth Endangered Species Act of 1973"); J.B. Ruhl, *While the Cat's Asleep: The Making of the 'New' ESA,* 12 Nat. Res. & Env't 187 (1998) (discussing how Clinton administration overhauled ESA administratively from 1994–2001, which two ESA experts likened to "fourth Endangered Species Act of 1973.").
[221] In parallel to this federal effort, the citizens of Colorado approved Ballot Initiative

In the early 2000s, FWS sought to reorganize its gray wolf listings and delist certain listed entities known as "distinct population segments."[222] Each attempt, however, was met by court challenges and mixed litigation results.[223] In 2009, FWS published final rules designating and delisting

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114 in the November 2020 state election, requiring the Colorado Parks and Wildlife Commission to reintroduce gray wolves in Colorado. Colorado Parks and Wildlife, Colorado Wolf Restoration and Management Plan (2023).

[222] 16 U.S.C. 1532(16), 1532(a).

[223] Endangered and Threatened Wildlife and Plants; Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States; Establishment of Two Special Regulations for Threatened Gray Wolves, 68 Fed. Reg. 15804, 15818 (Apr. 1, 2003) (codified at 50 C.F.R. pt. 17) (FWS dividing listing into three DPSs: an (1) Eastern; (2) Western; and a (3) Southwestern segment (designating Eastern and Western segments as threatened, rather than endangered)); Defs. of Wildlife v. Dep't of the Interior, 354 F. Supp. 2d 1156, 1170–72 (D. Or. 2005) (vacating 2003 Rule, finding FWS ignored species' status in its full range by downlisting it based solely on viability of small population within that segment); Nat'l Wildlife Fed'n v. Norton, 386 F. Supp. 2d 553, 584–65 (D. Vt. 2005) (invalidating attempt to designate and delist Eastern DPS because it had impermissibly lumped any gray wolves in Northeast region into Eastern DPS, without determining whether population existed in Northeast of U.S.); Endangered and Threatened Wildlife and Plants; Final Rule Designating the Western Great Lakes Populations of Gray Wolves as a Distinct Population Segment; Removing the Western Great Lakes Distinct Population Segment of the Gray Wolf from the List of Endangered and Threatened Wildlife, 72 Fed. Reg. 6052 (Feb. 8, 2007) (codified at 50 C.F.R. pt. 17) (FWS issuing new rule creating and delisting Western Great lakes gray wolf DPS); Humane Soc'y of the U.S. v. Kempthorne, 597 F. Supp. 2d 7 (D.D.C. 2008) (invalidating 2007 Rule concerning Western Great lakes DPS for failing to address statutory ambiguities concerning creation of DPSs for purpose of delisting); Designated Critical Habitat; Northern Right Whale, 58 Fed. Reg. 38553 (Apr. 2, 2009) (codified at 50 C.F.R. pt. 226) (delisting Western Great lakes DPS again); Order of Stipulated Settlement, Humane Soc'y of the U.S. v. Salazar, No. 09-cv-1092 (D.D.C. July 2, 2009), ECF No. 27 (2009 stipulated settlement, vacating and remanding 2009 Rule concerning Western Great Lakes DPS to FWS and returning it to prior listing status); Endangered and Threatened Wildlife and Plants; Final Rule to Identify the Western Great Lakes Populations of Gray Wolves as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15070 (Apr. 2, 2009) (codified at 50 C.F.R. pt. 17) (FWS delisting or Northern Rocky Mountains gray wolf). In 2012, FWS delisted the species' populations in Wyoming, which the D.C. Circuit upheld. Endangered and Threatened Wildlife and Plants; Removal of the Gray Wolf in Wyoming from the Federal List of Endangered and Threatened Wildlife and Removal of the Wyoming Wolf Population's Status as an Experimental Population, 77 Fed. Reg. 55530 (Sept. 10, 2012) (codified at 50 C.F.R. pt. 17); Defs. of Wildlife v. Zinke, 849 F.3d 1077, 1093 (D.C. Cir. 2017). Congress members continue to propose gray wolf-specific legislation to this day. H.R. 764, 118th Cong. (2024) (Trust the Science Act, seeking to "require the Secretary of the Interior to reissue regulations removing the gray wolf from the list of endangered and threatened wildlife under the [ESA].").

the Western Great Lakes Distinct Population Segment and the Northern Rocky Mountain Distinct Population Segment, except it did not delist the gray wolf in Wyoming after finding the state's management plan inadequate.[224] In litigation concerning the case, Judge Donald Molloy of the U.S. District Court for the District of Montana overturned FWS's delisting decision for the Northern Rocky Mountains distinct population segment.[225]

Similar to the State of Maine congressional delegates, which spearheaded the effort behind the CAA, the congressional delegates for states impacted by gray wolf presence (that is, Montana and Idaho) introduced and advocated for language in an appropriations bill directing FWS to reissue the 2009 rule delisting the Northern Rocky Mountains distinct population segment.[226] Congress ultimately enacted legislation directing FWS to do so, "without regard to any other provision of statute or regulation," further declaring that FWS's reissued rule would not be subject to judicial review.[227] FWS did as instructed in May 2011.[228] Several environmental groups challenged the constitutionality of the gray wolf appropriations rider, which the district court and the Ninth Circuit rejected.[229]

With the gray wolf appropriations bill rider, Congress drew a proverbial line in the sand, demarcating the limits of federal agency power to regulate and judicial review as to an individual species. The groups that pushed for settlement of the issue and deregulation were pleased with this outcome,[230] while conservation advocates were not.[231] In the district

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[224] Endangered and Threatened Wildlife and Plants; Final Rule to Identify the Western Great Lakes Populations of Gray Wolves as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15070 (Apr. 2, 2009) (codified at 50 C.F.R. pt. 17); *id.* at 15123.

[225] Defs. of Wildlife v. Salazar, 812 F. Supp. 2d 1205, 1207 (D. Mont. 2009).

[226] Press Release, Jon Tester, Tester Successfully Delists Wolves in Montana, Returns Management to State (Apr. 14, 2011) (thanking Representative Mike Simpson from Idaho as co-sponsor).

[227] Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1713, 125 Stat. 38, 150 (2011).

[228] Endangered and Threatened Wildlife and Plants; Reissuance of Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, 76 Fed. Reg. 25590 (May 5, 2011) (codified at 50 C.F.R. pt. 17).

[229] All. for the Wild Rockies v. Salazar, 800 F. Supp. 2d 1123 (D. Mont. 2011).

[230] *See, e.g.*, *U.S. Congress Passes Historic Wolf Legislation*, Game & Fish Mag. (Apr. 15, 2011), https://www.gameandfishmag.com/editorial/u.s.-congress-passes-historic-wolf-legislation/347452#replay ("Rep. Simpson and Sen. Tester, as well as others in the Congressional Sportsmen's Caucus, are to be congratulated for their leadership in this historic move towards delisting of wolves and rightfully returning the species management to professional state wildlife managers . . . .").

[231] *See, e.g.*, Press Release, Ctr. for Biological Diversity, Tester, Simpson Sneak

court opinion upholding the rider—reflecting some of the tension underlying Congress's action—the district judge opined:

> Inserting environmental policy changes into appropriations bills may be politically expedient, but it transgresses the process envisioned by the Constitution by avoiding the very debate on issues of political importance said to provide legitimacy. Policy changes of questionable political viability, such as occurred here, can be forced using insider tactics without debate by attaching riders to legislation that must be passed.[232]

C. The greater sage-grouse

Congress again took control over ESA implementation with respect to the potential listing of the greater sage-grouse (*Centrocercus urophasianus*). "[Before] the European settlement of western North America in the 19th century, greater sage-grouse occurred in 13 states and three Canadian provinces."[233] Currently, the sage-grouse inhabits areas across 11 western states, stretching from eastern Washington, Oregon, and California to western North and South Dakota, south to Colorado, and north into Canada (roughly half of its historical range). Fragmentation and loss of sagebrush habitat are the species' primary threats.[234] Multiple factors—habitat conversion for agricultural, energy development and urbanization, and physical biological factors such as encroachment by exotic grasses and amplified wildfire cycles—modify the sagebrush habitat on which the species relies. These human-made factors have caused "significant and ongoing population declines" across the bird's range.[235]

Petitions to list the grouse were first filed with FWS in 1999. In 2010, FWS determined that the species merited listing.[236] But FWS also found listing was temporarily precluded by higher-priority listing actions and designated it as a "candidate species."[237] This designation required FWS to conduct yearly status reviews.

Wolf-Killing Rider into Budget Bill: Precedent-setting Move Would Strip Endangered Species Act Protection from Wolves in Montana, Wyoming, Idaho, Washington, Oregon (Apr. 12, 2011).

[232] *All. for the Wild Rockies*, 800 F. Supp. 2d at 1125.

[233] U.S. Forest Service, Frequently Asked Questions: Greater Sage-Grouse Status Review (2015).

[234] Press Release, BigGame Forever, USFWS Seeks Science, Data Related to Greater Sage-Grouse and Efforts to Protect Sagebrush Habitat (Aug. 12, 2014).

[235] *Id.*

[236] Endangered and Threatened Wildlife and Plants; 12-Month Findings for Petitions to List the Greater Sage-Grouse (Centrocercus urophasianus), 75 Fed. Reg. 13910 (Mar. 23, 2010) (codified at 50 C.F.R. pt. 17).

[237] Expanding the Economic and Innovation Opportunities of Spectrum through In-

This indeterminate status, development pressure, and the controversial nature of the issues led to litigation. In 2015, the FWS determined that a listing for the species writ large was unnecessary because certain conservation plans for the species were sufficiently protective.[238] FWS, however, has reopened comment on the potential listing for a two-state distinct population segment located in Nevada and California.[239] One of the lawsuits resulted in a settlement agreement in which FWS agreed to decide whether to list or remove the bird as a candidate species by September 30, 2015. With that deadline looming, federal and state authorities proposed certain conservation measures to avoid an ESA listing.[240] In accordance with that plan, BLM, in cooperation with the U.S. Forest Service (USFS), incorporated species-specific conservation measures in regional planning documents, revising nearly 100 management plans governing tens of millions of public land acres.

At this stage, in December 2014, members of Congress from affected states intervened. They introduced and passed language precluding FWS from listing the grouse. Congress had placed a general moratorium on listing from 1995–1996.[241] But the 2014 appropriations rider represented the first time Congress had intervened to prevent the listing of a specific species.[242]

The legislative rider expressly prohibited federal regulators from devoting funds to ESA rulemakings to protect the greater sage-grouse, and Congress did not stop there.[243] Similar language was included in the ap-

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centive Auctions, 77 Fed. Reg. 699934, 70015 (Nov. 21, 2012) (codified at 47 C.F.R. pts. 1, 2, 73).

[238] Endangered and Threatened Wildlife and Plants, 12-Month Finding on a Petition to List Greater Sage-grouse (Centrocercus urophasianus) as an Endangered or Threatened Species, 80 Fed. Reg. 59858, 59874 (Oct. 2, 2015) (codified at 50 C.F.R. pt. 17).

[239] Endangered and Threatened Wildlife and Plants; Threatened Status for the Bi-State Distinct Population Segment of Greater Sage-Grouse with Section 4(d) Rule and Designation of Critical Habitat, 88 Fed. Reg. 25613 (Apr. 27, 2023) (codified at 50 C.F.R. pt. 17).

[240] *Historic Conservation Campaign Protects Greater Sage-Grouse*, U.S. Dep't Interior (Sep. 22, 2015), https://www.doi.gov/pressreleases/historic-conservation-campaign-protects-greater-sage-grouse.

[241] Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, 109 Stat. 73, 86.

[242] *Id.*

[243] Sage-Grouse and Endangered Species Conservation and Protection Act, H.R. 4419, 113th Cong. (2013–2014); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 122, 128 Stat. 2130, 2422 (2014).

propriations bills for the 2015–2023 fiscal years.[244] BLM, which manages the largest single share of sage-grouse habitat in the United States (just under 50%), published a draft plan regarding greater sage-grouse conservation and management on public lands in March 2024.[245]

V. Conclusion

The North Atlantic right whale is an interesting ESA case study. All parties agree that the species' population is at a low level, and that it is critically endangered. All concur that federal laws protect it to some degree. And most of the parties recognize that the state and federal governments and regulated entities must improve the species' outlook. That said, universal agreement has remained out of reach as to how best to move forward. Congress entered the fray in 2022, crafting a compromise involving funds for the development of ropeless fishing gear and a five-year regulatory pause.

The CAA was also part of a long-term pattern of congressional involvement. In keeping with its occasional practice, Congress waded into an ESA implementation situation once again. One Senator asserted that in passing the CAA, Congress was avoiding an "economic death sentence" not just for the Maine American lobster fishery, but for the State of Maine.[246] The North Atlantic right whale story sheds light on Congress's willingness to step in when it perceived the costs associated with ESA implementation were too high. Whether the threat that is apparent to Congress is a judicial injunction resulting from enforcement of the adverse modification prohibition (snail darter), continued listing of a controversial species (gray wolf), a potential future listing (greater sage-grouse), or possible future regulation (North Atlantic right whale), Congress has demonstrated its willingness to find new ways to inject flexibility into the ESA.

Congress has used different approaches, introducing a new ESA-wide process (snail darter and the God Squad) but subsequently pivoting to employ project- (snail darter), species- (gray wolf and greater sage-grouse), and industry-specific approaches (North Atlantic right whale). In

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[244] Consolidated Appropriations Act, 2016, H.R. 2029, 114th Cong. § 117 (2016); Consolidated Appropriations Act, 2017, H.R. 244, 115th Cong. § 113 (2017); Maxine Joselow, *U.S. Moves to Save Imperiled Bird of the West by Limiting Oil Drilling*, Wash. Post (Mar. 14, 2024), https://www.washingtonpost.com/climate-environment/2024/03/14/greater-sage-grouse-biden-plan/.

[245] Press Release, U.S. Dep't of the Interior, Bureau of Land Mgmt., BLM Proposes Stronger Greater Sage-Grouse Conservation Plans (Mar. 14, 2024).

[246] Press Release, Senator Angus King, "An Economic Death Sentence" Averted, King Champions Provision to Pause Lobster Gear Regulations on Senate Floor (Dec. 21, 2022).

addition to the gray wolf and greater sage-grouse, Congress has sought to make species-specific changes to the listing process for at least 11 species. Some of those efforts concerned species that had already been listed.[247]

One could also view the CAA as part of a long-term conversation between the executive, legislative, and judicial branches about how to balance real human economic interests with society's need to protect wildlife. The ESA recognizes that imperiled species of wildlife and plants "are of [a]esthetic, ecological, educational, historical, recreational, and

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[247] Polar Bear Delisting Act, H.R. 39, 112th Cong. § 2 (2011) (seeking to delist polar bear, originally listed in 2008); State Sovereignty Wildlife Management Act, H.R. 6485, 111th Cong. 1 (2010) (providing that "inclusion of the gray wolf on lists of endangered species and threatened species under the [ESA] shall have no force or effect"); Restoring State Wildlife Management Act of 2010, S. Res. 3864, 111th Cong. 1 (2010) (seeking "[t]o remove a portion of the distinct population segment of the Rocky Mountain gray wolf from the list of threatened species or the list of endangered species"); Delisting Gray Wolves to Restore State Management Act of 2011, S. Res. 321, 112th Cong. 1 (2011) (seeking "[t]o provide for the status of the Northern Rocky Mountain distinct population segment of the gray wolf"); A Bill to Amend the Endangered Species Act of 1973 to Provide that Act Shall Not Apply to Any Gray Wolf (Canis lupis), S. 249, 112th Cong. § 1 (2011) (attempting to delist gray wolf, listed in 1967); H.R. 509, 112th Cong. § 1 (2011) (same); 133 Cong. Rec. 35046 (1987) (statement of Rep. Charles Marlenee) (same); 133 Cong. Rec. 35039 (1987) (statement of Rep. Charles Stenholm) (advocating for delisting of Concho water snake, listed in 1986 and delisted in 76 Fed. Reg. 66780 (Oct. 27, 2011) (codified at 50 C.F.R. pt. 17)); 133 Cong. Rec. 36088 (1987) (statement of Rep. Wes Watkins) (advocating for delisting of leopard darter, listed in 1987); Discredit Eternal Listing Inequality of Species Takings Act, H.R. 1042, 112th Cong. 1 at § 2(3) ("The Delhi Sands Flower-loving Fly's listing . . . may be in conflict with construction or other development projects or other forms of economic activity."). *But see* 133 Cong. Rec. 36091 (1987) (statement of Rep. James Jones, arguing that exception for leopard darter would establish a "very bad precedent," because "[w]hile the U.S. [FWS] may be well equipped to assess complicated and often contradictory biological information, we in Congress are not"). *See also id.* at 35040 (statement of Rep. Gerry Studds, stating that congressionally removing specific species "would set an extraordinarily bad precedent"). Others sought to prevent the listing of species under consideration by FWS. Salamander Community Conservation Act, H.R. 6219, 112th Cong. § 2 (2012); Salamander Community Conservation Act, S. Res. 3446, 112th Cong. § 2 (2012) ("Section 4(a) [of the ESA] shall not apply to—(1) the Austin blind salamander; (2) the Georgetown salamander; (3) the Jollyville Plateau salamander; or (4) the Salado salamander."); S. Amdt. 2507 to S. Res. 429, 112th Cong. (2011–2012) ("[t]his Act shall not apply to the lesser prairie chicken"); S. Amdt. 392 to S. Res. 782, 112th Cong. (June 7, 2011) ("[t]his Act shall not apply to the sand dune lizard;"); S. Amdt. 1978 to S. Res. 2204, 112th Cong. (Mar. 28, 2012) (same); Bluefin Tuna Fishermen Employment Preservation Act, H.R. 1806, 112th Cong. 1 (2011) ("[t]he Bluefin tuna may not be treated as an endangered species or threatened species"); Managing Predators Act, H.R. 286, 117th Cong. (Jan. 12, 2021) (seeking to "amend the [ESA] to exclude the gray wolf from the authority of such Act, to remove the gray wolf from the lists of threatened species and endangered species published pursuant to such Act, and for other purposes.").

scientific value to the [n]ation and its people."[248] Some 50 years after Congress passed the ESA, our understanding of the value of species like the North Atlantic right whale continues to evolve. One scholar argues that large whales like North Atlantic right whales are "international public goods," playing important roles in ocean ecology by redistributing nutrients needed by phytoplankton (nitrogen and phosphorous) through the water column via food consumption and waste.[249] And one recent estimate values one large whale over its lifetime and the unwanted carbon that it sequesters from the atmosphere at $2 million.[250] It seems likely that Congress will remain involved to some level in ESA implementation and administration going forward. Time will tell.

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[248] 16 U.S.C. § 1531(a)(3).
[249] Ralph Chami et al., *Nature's Solution to Climate Change: A Strategy to Protect Whales Can Limit Greenhouse Gases and Global Warming*, Int'l Monetary Fund (2019) (discussing "whale conveyor belt").
[250] *Id.*

Revisiting the Lacey Act: Overview and Considerations for Use in Animal Welfare

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I. Introduction

Although there has been a progression of conservation and, more recently, anti-cruelty legislation since the 1970s, the nation's oldest wildlife statute plays an outsize role in combating illegal wildlife trafficking. The Lacey Act was created in 1900 and has become the country's primary enforcement tool against wildlife trafficking. The first part of this article revisits the evolution of this law, including recent amendments in the Big Cat Public Safety Act of 2022.[1] Then, it provides an overview of the enforcement provisions of the statute. Finally, the article examines the intersection between the Lacey Act and preventing and deterring animal cruelty.

II. Legislative history

A. The original Lacey Act (1900)

The Lacey Act was passed in 1900.[2] The law's main innovation was to criminalize the interstate shipment of any such prohibited foreign animals or birds, or the interstate shipment of dead wild animals or birds, or their parts, "where such animals or birds have been killed in violation of the laws of the [s]tate."[3] Shippers were required to mark packages containing such dead animals, birds, or parts thereof, so the nature of the contents could be readily ascertained. The shipper was strictly liable for a violation of the Lacey Act. Common carriers and recipients were liable for knowing

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[1] *See* Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking,* 16 Pub. Land L. Rev. 27 (1995) (the starting point for this article and for anyone interested in the history of the Lacey Act).
[2] Lacey Act, ch. 553, § 2, 31 Stat. 187 (1900) (current version at 16 U.S.C. §§ 3371–3378; 18 U.S.C. § 42).
[3] *Id.* § 3.

violations. The maximum penalty was a fine.[4] In addition, the Lacey Act authorized the Secretary of Agriculture to regulate the importation of foreign animals and birds, including the authority to prohibit importation of those declared "injurious to the interest of agriculture or horticulture."[5]

The purpose of the bill, as reflected in the House Report, was threefold: (1) introduce and restore game, song, and insectivorous wild birds; (2) prevent the unwise introduction of foreign birds and animals; and (3) supplement state laws for the protection of game and birds.[6] Congress deemed this last purpose "most important" because appropriate laws adopted by the United States were being evaded by those who do "not merely kill a few for [their] own use, but [who] slaughter[] or trap[]" animals and birds "indiscriminately for the purpose of sending them for sale in the market."[7] These animals and birds "are shipped concealed in various methods to other [s]tates."[8]

In statements on the House floor, Congressman John Lacey of Iowa lamented the introduction of foreign competitor species (like the English sparrow and various plant species) that aggravated the decline in native birds (such as the wild pigeon and grouse) and the deleterious effect of these changes on agriculture.[9] Beyond the practical justification for legislative action, however, Congressman Lacey expressed dismay at the wanton destruction of native wildlife. Regarding the orphaning of young egrets whose mothers are shot, and the sheer volume of birds being killed, he lamented that "[i]t is a pitiful thing to contemplate the slaughter of such a multitude of these beauties for the gratification of human vanity."[10] Congressman Lacey seems to have adhered at least in part to a biocentric philosophy, stating that "[t]here is a compensation in the distribution of plants, birds, and animals by the God of nature. Man's attempt to change and interfere often leads to serious results."[11] He embraced criticism of the bill as "sentimental," arguing that "it is a proper, a legitimate, sentiment," and that "[t]he love of birds is something that ought to be taught in every school."[12]

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[4] *Id.* § 4.
[5] *Id.* § 2 (currently codified, as amended, in 18 U.S.C. § 42(a)).
[6] H.R. Rep. No. 56-474, at 1–2 (1900).
[7] *Id.* at 2.
[8] *Id.*
[9] 33 Cong. Rec. 4872 (1900) (statement of Rep. Lacey).
[10] *See id.*
[11] *Id.*
[12] *Id.*

B. Humane transport and other updates (1935–1969)

Over the next 50 years, the Lacey Act was amended in keeping with parallel legislation that was developed for the protection of black bass and other fish.[13] In 1935, Congress expanded Lacey Act liability to any "firm, corporation, or association" (in addition to any person) by three methods: (1) expanding the predicate offense to animals and birds "captured, . . . taken, shipped, transported, carried, purchased, sold, or possessed" (in addition to those killed) in violation of state, federal, or foreign law (not just in violation of state law); (2) criminalizing transport "by any means whatever" (not just by common carrier); and (3) introducing a penalty for fraudulent marking (in addition to the simple failure to mark).[14] Congress increased the maximum penalty, added up to six months' imprisonment, and made the illegal wildlife subject to forfeiture after conviction.[15]

In 1948, Congress further prohibited the transport of any wild animal or bird to the United States, or any territory or district thereof, under inhumane or unhealthful conditions or in violation of regulations to be promulgated by the Department of the Interior.[16] Pursuant to this "humane transport" provision—currently codified at 18 U.S.C. § 42(c)—any person, including any importer, who knowingly causes or permits inhumane or unhealthful transport may be criminally liable.[17] The 1948 amendments also provide that the condition of the vessel, conveyance, or enclosure upon its arrival to the United States, U.S. territory, or district "shall constitute relevant evidence" in determining a violation.[18] In addition, the presence in the vessel or conveyance of "a substantial ratio of dead, crippled, diseased, or starving wild animals or birds" is prima facie evidence of a violation.[19] The law was designed to extend to wild animals the protections already afforded to domestic animals in transit.[20] In 1873, Congress passed a law establishing a 28-hour limit on how long domestic animals could be in transit without a 5-hour rest and proper feeding and watering, subject to civil penalties.[21] Committee reports indicate

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[13] Black Bass Act, Pub. L. No. 69-256, ch. 346, 44 Stat. 576 (1926), *repealed by* Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1079.
[14] Migratory Bird Hunting Stamp Act Amendments, Pub. L. No. 74-148, § 201, ch. 261, 49 Stat. 378, 380 (1935).
[15] *Id.* § 202.
[16] Wild Animals and Birds Humane Transportation Regulations Act, § 241, ch. 716, 62 Stat. 1096 (1948).
[17] *Id.*
[18] 18 U.S.C. § 42(c)(1).
[19] *Id.* § 42(c)(2).
[20] S. Rep. No. 80-1447, at 3 (1948).
[21] *See* An Act to Prevent Cruelty to Animals While in Transit by Railroad or Other Means of Transportation Within the United States, ch. 252, 17 Stat. 584 (1873),

that the legislature was motivated by examples of individuals shipping animals without concern for weather, not properly securing or protecting them from high seas, or crew members deliberately mistreating the animals.[22]

Congress modernized the injurious wildlife provision in 18 U.S.C. § 42 in 1960, allowing the Secretary Secretary of the Interior to prohibit the import of fish, amphibians, reptiles (in addition to birds and mammals), and any offspring or eggs of the same deemed injurious not only to agriculture or horticulture, but also to human beings, forestry, wildlife, or wildlife resources of the United States.[23] The provision now bars shipments between the continental United States and its territories or possessions and import into the United States.[24] The additional prohibition on "shipments" was the subject of recent litigation.[25] Congress also added an exception for zoos to the existing exception for museums.[26] It clarified that only wild birds and mammals could be prohibited and defined "wild" as creatures "normally . . . found in a wild state," even if "raised in captivity."[27]

Congress continued to expand the Lacey Act in 1969 by extending its protections to amphibians, reptiles, mollusks, and crustaceans, and by adding civil penalties for negligence by those who "in the exercise of due care should" have known they were violating the Lacey Act.[28] Although more expansive in other ways, the new definition of "wildlife" also excluded birds protected by the Migratory Bird Treaty Act.[29] Congress also increased the maximum criminal penalty to $10,000 and one year of prison and raised the required mental state to "knowingly and willfully."[30]

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amended by Grand Canyon Forest Reserve Animal Protection Act, ch. 3594, 34 Stat. 607 (1906), *repealed and reenacted by* Pub. L. No. 103-272, § 80502, 108 Stat. 745, 1346, 1380 (1994) (transportation of animals).

[22] S. Rep. No. 80-1447, at 2–3 (1948). These are illustrative examples. For a more complete picture, see *To Prohibit the Importation of Foreign Wild Animals and Birds Under Conditions Other Than Humane, and for Other Purposes: Hearing Before the Subcomm. of the Comm. on Interstate and Foreign Com.*, 80th Cong. (1948).

[23] 18 U.S.C. § 42(a)(1).

[24] Public Works Appropriation Act, 1961, Pub. L. No. 86-702, § 42(a)(1), 74 Stat. 753.

[25] *See* discussion *infra* section III.B.

[26] 18 U.S.C. § 42(a)(2)–(4).

[27] *Id.*

[28] Endangered Species Act of 1969, Pub. L. No. 91-135, § 7, 83 Stat. 275, 279, 281, *repealed by* Lacey Act Amendments of 1981, Pub. L. No. 97-79, § 9(b)(2), 95 Stat. 1073.

[29] 16 U.S.C. §§ 703–712.

[30] Endangered Species Act of 1969 § 7, 83 Stat. at 280.

C. Lacey Act amendments of 1981

The most significant reworking of the Lacey Act, however, was in amendments passed in 1981.[31] By this time, the illegal wildlife trade had grown from a primarily domestic problem to a global business "handled by well[-]organized large volume operations run by professional criminals."[32] Similarly, the focus shifted in the 80 years since the law was passed from preventing the circumvention of state hunting laws to warding off "grim environmental consequences," including to the survival of certain species.[33] The 1981 amendments combined the Lacey Act with the Black Bass Act in Title 16 of the U.S. Code.[34] The combined law unwound some of the 1969 changes. It removed the addition of "and willingly" and restored a "knowingly" mental state for criminal penalties. With these changes, Congress made clear that criminal liability attaches if defendants knew that their conduct was illegal, even if they were not aware of the Lacey Act itself.[35] The maximum criminal penalty was increased to $20,000 and five years in prison.[36] The Alternative Fines Act has increased fines to $250,000 for all five-year felonies.[37]

As a counterweight to lowering the mental state and making a knowing criminal violation a felony, Congress added certain elements that prosecutors are required to prove in cases where the Lacey Act violation is transporting, selling, receiving, acquiring, or purchasing the illegal fish, wildlife, or plant (in contrast to a Lacey Act violation for importing or exporting the illegal fish, wildlife, or plant). Prosecutors must now show that the defendant knowingly engaged in certain commercial conduct with a market value of at least $350.[38] Congress also created a misdemeanor offense where the defendant did not know but "in the exercise of due care should" have known that the predicate conduct was unlawful.[39] The misdemeanor was punishable by a maximum fine of $10,000 and one year in prison.[40]

Significantly, the prohibitions in the Lacey Act were also extended for

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[31] Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073 (current version at 16 U.S.C. §§ 3371–3378; 18 U.S.C. §§ 42–43).
[32] S. Rep. No. 97-123, at 1 (1981).
[33] *Id.*
[34] H.R. Rep. No. 97-276, at 1, 5 (1981).
[35] S. Rep. No. 97-123, at 3 (1981). The 1981 amendments also restored coverage of migratory birds. *Id.* at 4.
[36] Lacey Act Amendments § 4(d)(1).
[37] *See* 18 U.S.C. § 3571(b)(3).
[38] *Compare* Lacey Act Amendments § 4(d)(1)(A), *with id.* § 4(d)(1)(B).
[39] *Id.* § 4(d)(2).
[40] *Id.*

the first time to plants. The definition limited application of the Lacey Act to plants "indigenous to any [s]tate," listed in the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES),[41] or pursuant to state laws designed to conserve species threatened with extinction.[42] Unlike its fish and wildlife counterparts, however, it was not unlawful under the 1981 amendments to violate the Lacey Act if the predicate conduct was illegal only under foreign law (and not also illegal under federal, tribal, or state law).[43]

The Lacey Act amendments of 1981 eliminated the legislative requirement that individuals mark packages so the nature of the contents could be readily ascertained.[44] Instead, the 1981 amendments tied marking violations to regulations issued by the executive branch.[45] Illegal wildlife was subject to forfeiture on a strict liability basis, and vessels, vehicles, and equipment used in the offense could be forfeited after a felony conviction involving commercial conduct if the owner was privy to the violation (including negligently).[46]

The cruelty of illegal trade in wildlife was a motivating factor in the amendments. Senator Chafee noted that, in addition to depleting populations of rare species, "grisly tales abound of the illegal wildlife trade's acts of cruelty and wanton disregard of the natural environment."[47] He cited examples of entire flocks of birds hit with buckshot so that hunters might recoup and sell the few survivors; chopping down trees to harvest more profitable young birds from nests; and killing the parents of birds, chimpanzees, and gibbons to capture their young. He found these examples of animal transportation "[e]qually as shocking."[48] "It is estimated that as many as 90[%] of captured animals die lingering and painful deaths from freezing, overheating, thirst, starvation, overcrowding[,] or suffocation during their transport."[49] In support of his statement, Senator Chafee entered a National Geographic article into the record that

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[41] Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 1, 1973, 27 U.S.T. 1087. CITES is implemented through the Endangered Species Act. 16 U.S.C. §§ 1531–1544 (2024).
[42] Lacey Act Amendments § 2(f).
[43] *Compare id.* § 3(a)(2)(A), *and id.* § 3(a)(3)(A), *with id.* § 3(a)(2)(B), *and id.* § 3(a)(3)(B). The 1981 Amendments also expanded predicate offenses to include violations of tribal law. *See id.* § 2(c)–(d).
[44] S. Rep. No. 97-123, at 4 (1981) (explaining congressional intent to be more flexible and accommodating of existing industry marking practice).
[45] Lacey Act Amendments § 3(b).
[46] *Id.* § 5(a).
[47] 127 Cong. Rec. 4737 (1981) (statement of Sen. Chafee).
[48] *Id.*
[49] *Id.*

"describ[ed] the extent of the international wildlife smuggling problem."[50]

D. Hunting guide fix and other updates (1988)

In response to recommendations from the Department of Justice (Department), Congress again amended the Lacey Act in 1988.[51] The primary motivation was to reverse the holding of the Ninth Circuit that guides or outfitters providing hunting services to clients were not engaged in the "sale" of wildlife for purposes of finding a violation of the Lacey Act.[52] The Lacey Act now defines both the "sale" and the "purchase" of fish or wildlife to include offering or obtaining for money or other consideration, either guide services or a permit, for the illegal taking, and so on.[53]

Congress accepted two additional recommendations from the Department. First, the Department recommended allowing the predicate offenses for the prohibition in 16 U.S.C. § 3372(a)(1) to include not just fish or wildlife "taken or possessed," but also those "transported, or sold" in violation of the underlying law (as already existed in section 3372(a)(2) and (3)).[54] Second, the Department recommended making false labeling a violation where the fish, wildlife, or plants were *intended* to be imported, exported, transported, sold, purchased, or received, and so on, without needing to prove that the goods actually had been so imported or exported.[55] Congress made a knowing false labeling violation a felony if it involved import, export, or certain commercial conduct with a market value of at least $350. All other knowing false labeling violations are misdemeanors.[56]

E. Captive Wildlife Safety Act (2003)

In 2003, Congress passed the Captive Wildlife Safety Act to curb private ownership of big cats, which often results in the animals being

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[50] *Id.* at 4740–43 (reprinting *Noel Grove, Wild Cargo: The Business of Smuggling Animals*, Nat. Geo., Mar. 1981, at 287 (describing smugglers transporting birds by boat in cages loaded with rocks so that the birds can be thrown overboard if overtaken by a patrol)).

[51] H.R. Rep. No. 100-732, at 5 (1988).

[52] *See, e.g.*, United States v. Stenberg, 803 F.2d 422 (9th Cir. 1986).

[53] Wildlife and Fishery Laws Amendments of 1988, Pub. L. No. 100-653, § 101, 102 Stat. 3825 (current version at 16 U.S.C. § 3372(c)).

[54] *Compare* Lacey Act Amendments § 3(a)(1), *with* Wildlife and Fishery Laws Amendments § 101(1). *See* 16 U.S.C. § 3372(a)(1).

[55] *Compare* Lacey Act Amendments § 3(a)(4), *with* Wildlife and Fishery Laws Amendments § 101(3).

[56] Wildlife and Fishery Laws Amendments § 102(b).

"abandoned, euthanized, or harvested for their pelts and meat."[57] The legislation added a prohibition in the Lacey Act for the import, transport, and so on, in interstate or foreign commerce of "prohibited wildlife species," which the law defined as a live "lion, tiger, leopard, cheetah, jaguar, or cougar or any hybrid of such species."[58] The prohibition did not apply to federal licensees; state agencies and colleges; state-licensed rehabilitators or veterinarians; accredited, tax-exempt wildlife sanctuaries that do not engage in commercial trade or breeding of prohibited wildlife species and do not allow the public direct contact with the animals; or those transporting the species to an excepted person.[59]

F. Adding protection for plants (2008)

Despite the 1981 amendments extending the Lacey Act to plants, the Lacey Act's ability to protect plants was limited by its narrow focus on indigenous and formally "listed" plants and by the failure to incorporate predicate offenses under foreign law. In 2008, as part of the Food, Conservation, and Energy Act, Congress addressed these concerns and created a new requirement to declare plant imports.[60]

"Plants," as newly defined, encompasses "any wild member of the plant kingdom" and includes "trees from either natural or planted forest stands."[61] This is "consistent with the longstanding interpretation of the Lacey Act to cover wild species whether . . . taken from the wild or captive bred."[62] The broad definition is given shape by exclusions, which perpetuate the existing exclusion of common cultivars (though the amendments specify that common tree cultivars are not excluded from the definition) and common food crops, but which also excludes scientific specimens to be used only for laboratory or field research and plants that are to remain planted, to be planted, or replanted. Plants that otherwise would be excluded are nonetheless covered by the Lacey Act, however, if they are listed under CITES, the Endangered Species Act (ESA), or a comparable state law for the conservation of its own indigenous species that are threatened with extinction.[63] The definition of "taken" was also

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[57] Captive Wildlife Safety Act, Pub. L. No. 108-191, 117 Stat. 2871 (2003); H.R. Rep. No. 108-629, at 3 (2003).
[58] Captive Wildlife Safety Act § 2–3(a)(1) (currently at 16 U.S.C. § 3371(g)).
[59] *Id.* § 3(a)(2).
[60] These changes are covered in more depth and presented in context with other laws for the protection of plants in an earlier issue of the Department of Justice Journal of Federal Law and Practice. *See* Kristen Jenkins et al., *When the Case Agent Brings You Lemons: Prosecuting Plant Cases*, 63 U.S. Att'ys' Bull. 55 (2015).
[61] 16 U.S.C. § 3371(g)(1).
[62] H.R. Rep. No. 110-627, at 895 (2008).
[63] Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 8204(a)(1),

amended to encompass, with respect to plants, those that are "harvested, cut, logged, or removed."[64] Congress directed the Secretary of Agriculture to promulgate regulations to define common cultivars and food crops for purposes of the exclusion.[65]

Because they did not prohibit import of plants that were taken in violation of *foreign* law, the Department observed that the 1981 amendments provided "no legal mechanism . . . to preclude the importation of wood and wood products known to be illegally harvested in other countries."[66] To align plant protections with those available for fish and wildlife, Congress made it unlawful to import under 16 U.S.C. § 3372(a)(2) and to possess (within the special maritime jurisdiction of the United States) plants taken in violation of foreign laws protecting plants or regulating the theft or taking of plants under section 3372(a)(2).[67] It is also a predicate offense for purposes of these sections to take plants without paying fees or taxes or in violation of plant export or trans-shipment limitations under state or foreign law.[68]

Finally, Congress required that all plant imports be accompanied by a declaration that include the scientific name, a description of the value and quantity (including the unit of measure) of the import, and the name of the country from where the plant was taken.[69] Plants used as packing materials are excluded.[70] The Secretary of Agriculture is authorized to promulgate regulations making any necessary modifications to the required contents of the declaration or to limit the scope of the exclusion.[71] Until then, the law outlines what should provisionally be included in declarations where the species or country is unknown, or for recycled plant products.[72] The Animal and Plant Health Inspection Service has introduced these regulations in at least seven phases, with the most recent regulations being issued this year for implementation on December 1, 2024.[73] Violations of these regulations are punishable in the same way as

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122 Stat. 923, 1291.

[64] Food, Conservation, and Energy Act § 8204(a)(3).

[65] *Id.* § 8204(e)(2). These regulations are set forth at 7 C.F.R. § 357.2.

[66] H.R. Rep. No. 110-627, at 894–95 (2008).

[67] *Id.* at 895; 16 U.S.C. § 3372(a)(2).

[68] Food, Conservation, and Energy Act § 8204(b)(1), 122 Stat. at 1292 (currently at 16 U.S.C. § 3372(a)(2)(B), (a)(3)(B)).

[69] 16 U.S.C. § 3372(f)(1).

[70] *Id.* § 3372(f)(3).

[71] Food, Conservation, and Energy Act § 8204(a)(2), 122 Stat. at 1292 (currently at 16 U.S.C. § 3372(f)).

[72] *Id.* § 8204(a)(2) (currently at 16 U.S.C. § 3372(f)(2)).

[73] *See* Implementation of Revised Lacey Act Provisions, 89 Fed. Reg. 47122 (proposed May 31, 2024).

the marking violations in 16 U.S.C. § 3372(b).[74]

G. Big Cat Public Safety Act (2022)

In 2022, Congress passed the Big Cat Public Safety Act to end private ownership of big cats as pets and to prohibit exhibitors from allowing public contact with big cats (including cubs).[75] Whereas the Captive Wildlife Safety Act of 2003 prohibited the import, transport, and so on, of big cats in interstate or foreign commerce, it did not establish any federal policy regarding possession or breeding of big cats, instead leaving whether to prohibit private tiger ownership to the many states.[76] The Big Cat Public Safety Act fills the federal policy void by defining a new "captive wildlife offense" in the Lacey Act that incorporates the existing prohibition under the Captive Wildlife Safety Act on import, transport, and so on in interstate or foreign commerce of prohibited wildlife species, and the Lacey Act adds a prohibition on breeding or possessing the same species.[77] The Secretary of the Interior is directed to pass regulations necessary to implement the new captive wildlife offenses.[78]

The updated Lacey Act defines the verb "breed" as facilitating (including negligently) or failing to prevent propagation or reproduction.[79] Like the Captive Wildlife Safety Act, the Big Cat Public Safety Act lists persons to whom the prohibitions do not apply, but the requirements are significantly more detailed and rigorous than in the predecessor act. Possession of big cats by current owners is grandfathered in, but owners must register with the U.S. Fish and Wildlife Service and may not breed, acquire, or sell prohibited wildlife species, nor allow the public to have direct contact with them.[80] It is a felony to knowingly violate a captive wildlife offense, and offenders may be imprisoned for up to five years.[81] As with the felony trafficking provisions, the captive wildlife provisions of the Lacey Act proscribe fines of up to $20,000, but the Alternative Fines Act allows fines up to $250,000.[82] The civil forfeiture provisions of the Lacey Act were also expanded to include strict liability forfeiture of

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[74] Food, Conservation, and Energy Act § 8204(c), 122 Stat. at 1292 (currently at 16 U.S.C. § 3373). For more on penalties for Lacey Act violations with respect to plants, see Elinor Colbourn & Thomas Swegle, *The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber*, 59 U.S. Att'ys' Bull. 91 (2011).
[75] Big Cat Public Safety Act, Pub. L. No. 117-243, § 3(2), 136 Stat. 2236 (2022).
[76] H.R. Rep. No. 117-428, at 4 (2022).
[77] 16 U.S.C. § 3372(e)(1).
[78] Big Cat Public Safety Act § 6 (currently at 16 U.S.C. § 3376(a)(3)).
[79] *Id.* § 2(a)(2) (currently at 16 U.S.C. § 3371(a)).
[80] *Id.* § 3(2) (currently at 16 U.S.C. § 3372(e)(2)).
[81] *Id.* § 4(b)(4) (currently at 16 U.S.C. § 3373(d)(4)).
[82] Big Cat Public Safety Act. *See also* 18 U.S.C. § 3572(b)(3) (Alternative Fines Act).

fish, wildlife, or plants bred or possessed contrary to the prohibitions in 16 U.S.C. § 3372 (other than failure to mark in section 3372(b)).[83]

III. Lacey Act enforcement

Because the Lacey Act has been amended many times and recodified, it can be confusing to apply. The Lacey Act is presently codified in two places: (1) Title 16, which hosts the trafficking and labeling provisions; and (2) Title 18, which contains the prohibition on importing injurious species and inhumane transport.[84] The trafficking provisions at the heart of the statute require a predicate offense based in some cases on a violation of another jurisdiction's laws. Discerning the elements of the trafficking and labeling offenses is further complicated by the fact that each can be prosecuted as a felony, misdemeanor, civil violation, or by seizing the wildlife, fish, or plants at issue. The requirements for proving these offenses can only be understood by reading 16 U.S.C. § 3372 on prohibited acts and section 3373 on penalties in concert.[85] This section walks through the elements of the Lacey Act offenses and discusses the legal requirements for their enforcement.

A. Trafficking, false records, plant declaration, failure to mark, and captive wildlife offenses (16 U.S.C. §§ 3372–3373)

The Lacey Act provisions in 16 U.S.C. §§ 3372–3373 prohibit five categories of conduct.[86] First, section 3372(a) prohibits trafficking illegal fish, wildlife, or plants under federal jurisdiction.[87] Federal jurisdiction can be established either because the fish, wildlife, or plants are illegal under federal or tribal law; they were trafficked in interstate or foreign commerce; or they were possessed within the United States' special maritime and territorial jurisdiction.[88] Second, section 3372(d) prohibits making or submitting a false record regarding imports of fish, wildlife, or plants or regarding their transport in interstate or foreign commerce.[89] Federal jurisdiction here is established either because the fish, wildlife, and plants were or were intended to be from a foreign country, or because

[83] Big Cat Public Safety Act § 5 (currently at 16 U.S.C. § 3374(a)(1)).
[84] 16 U.S.C. §§ 3372–3373; 18 U.S.C. § 42.
[85] 16 U.S.C. §§ 3372–3373.
[86] *Id.* § 3372.
[87] *Id.* § 3372(a).
[88] *Id.* § 3372(a)(1)–(3).
[89] *Id.* § 3372(d).

they were transported in interstate commerce.[90] Third, it is unlawful to import a plant without a declaration, as required in section 3372(f).[91] Fourth, section 3372(c) prohibits import, export, or transport of fish or wildlife in interstate commerce in violation of labeling regulations.[92] Fifth, and finally, section 3372(e) prohibits unlicensed commercial breeding or possessing of prohibited wildlife species, except by persons and entities specified in section 3372(e)(2).[93]

Conduct must be analyzed in two steps to determine if it is a Lacey Act trafficking offense under section 3372(a).[94] First, prosecutors must consider the predicate offense—whether fish, wildlife, or plants were taken, possessed, transported, or sold in violation of an underlying law. What jurisdiction's law may be considered for purposes of the predicate offense varies between subsections 3372(a)(1)–(3).[95] Federal jurisdiction over the trafficking offense is based on an underlying violation of federal or tribal law, so the predicate offense cannot arise under state or foreign law.[96] The requirement that the trafficking offense be in interstate or foreign commerce creates federal jurisdiction, so the underlying violation may arise under state or foreign law.[97] An underlying violation of federal law would not require additional proof of interstate or foreign commerce.[98] Trafficking in plants under subsections (a)(2)(B) and (a)(3)(B) further requires that the plant be illegal under specific kinds of state or foreign law.[99] Finally, it is required to provide proof that the conduct is within the special maritime and territorial jurisdiction of the United States.[100] Federal jurisdiction being thus established, a trafficking offense may be based on state or foreign law, and there is no need for the contraband to change hands—mere possession is enough to describe a violation.[101] The underlying law must relate or refer to fish, wildlife, or plants. In the committee report for the 1981 amendments, Congress clarified that the underlying offense need not violate a law "designed and intended for the protection of wildlife," as the Third Circuit had once held.[102] Laws that relate or

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[90] *Id.* § 3372(d)(1)–(2).
[91] *Id.* § 3372(f).
[92] *Id.* § 3372(c).
[93] *Id.* § 3372(e).
[94] *Id.* § 3372(a).
[95] *Id.* § 3372(a)(1)–(3).
[96] *Id.* § 3372(a)(1).
[97] *Id.* § 3372(a)(2).
[98] *Id.*
[99] *Id.* § 3372(a)(2)(B), (a)(3)(B).
[100] *Id.* § 3372(a)(3).
[101] *Id.*
[102] S. Rep. No. 97-123, at 6 (1981) (quoting United States v. Molt, 599 F.2d 1217

refer to fish, wildlife, or plants satisfy the statutory requirement, even if they are also revenue-producing (for example, hunting laws) or protect public health (for example, quarantine laws).[103] In contrast, a violation of public safety laws otherwise unrelated to fish, wildlife, or plants—like a law prohibiting firing a gun across a street—would not create a Lacey Act predicate, even if the violation occurred while lawfully hunting.[104]

Second, prosecutors should consider the Lacey Act offense—namely, whether the defendant imported, exported, transported, sold, received, acquired, or purchased the illegal fish, wildlife, or plants—or, for the trafficking offense in subsection (a)(3), whether the defendant possessed the illegal fish, wildlife, or plants. The predicate offense and the Lacey Act offense must be distinct conduct.[105] In fact, the defendant in a Lacey Act prosecution need not be the same person who committed the predicate offense.[106] As elements of the overall trafficking offense, however, prosecutors must prove the predicate as well as the Lacey Act offense beyond a reasonable doubt.

A trafficking offense can be a felony or a misdemeanor. To prove a felony, prosecutors must show that the defendant knew the fish, wildlife, or plants were taken illegally. The defendant need not know which underlying law was violated or exactly how—only that the predicate offense was somehow illegal.[107] The prosecution must show *either* that defendant knowingly imported or exported the illegal fish, wildlife, or plants, *or* that defendant knowingly transported, sold, received, acquired, or purchased the same by engaging in commercial activity for a market value of more than $350.[108] The minimum market value was intended to exclude small scale commercial activity that may not warrant a felony.[109] Commercial activity is represented in the statute as "engaging in conduct that involves the sale or purchase of, the offer of sale or purchase of, or the

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(3d Cir. 1979)).

[103] *See* United States v. Lewis, 240 F.3d 866 (10th Cir. 2001).

[104] *See* H.R. Rep. No. 97-276, at 14 (1981). *See also* 16 U.S.C. § 3377(a)–(b) (excluding activities regulated by certain federal fisheries laws from the trafficking offenses).

[105] *See* United States v. Carpenter, 933 F.2d 748 (9th Cir. 1991); United States v. Romano, 137 F.3d 677 (1st Cir. 1998) (requiring the predicate offense to precede the Lacey Act offense in time).

[106] S. Rep. No. 97-123, at 11 (1981) ("[R]arely, if ever is the importer the same individual who has taken the wildlife . . . ."). *See also* United States v. Todd, 735 F.2d 146 (5th Cir. 1984).

[107] S. Rep. No. 97-123, at 11 (1981).

[108] 16 U.S.C. § 3374(d)(1)(A)–(B). *See also* S. Rep. No. 97-123, at 11 (1981) (noting that knowingly importing goods "contrary to law" is already a felony under customs law and explaining the creation of a second trafficking felony for "unlawful commercial activity").

[109] S. Rep. No. 97-123, at 12 (1981).

intent to sell or purchase" the fish, wildlife, or plants.[110] In keeping with precedents requiring that the predicate and Lacey Act offense comprise separate conduct, the "sale" for purposes of establishing commercial activity (and the felony penalty) must be distinct from any sale that is the basis for the predicate offense.[111] If the predicate offense is not a sale, however, the Lacey Act offense may be a sale, even if the Lacey Act sale is the consequence of or otherwise related to the predicate offense.[112]

Trafficking is a misdemeanor if, in the exercise of due care, the defendant should have known that the fish, wildlife, or plants were taken illegally and *either* knowingly imported or exported them *or* knowingly transported, sold, received, acquired, or purchased the same (without needing to prove either commercial activity or market value greater than $350).[113]

The Lacey Act also criminalizes knowingly making or submitting any false record, account, label, or false identification for any fish, wildlife, or plant.[114] Unlike the trafficking offenses, no predicate offense is required to prove a false record. The fish, wildlife, or plant must have been (or intended to be) imported, exported, transported, sold, purchased, or received from a foreign country *or* transported in interstate or foreign commerce.[115] Like the trafficking offenses, a false record may also be a felony or a misdemeanor. Prosecutors can prove a felony for a knowing violation of section 3372(d) if defendant *either* actually imported or exported the fish, wildlife, or plants, *or* engaged in commercial activity with a market value of greater than $350.[116] Fish, wildlife, or plants intended for import or export but not actually imported or exported give rise to a misdemeanor, not a felony. Any other knowing violation of section 3372(d) is a misdemeanor. Note that making a false record carries the same penalties as trafficking but requires proof of fewer elements.[117]

Similarly, the Lacey Act makes it unlawful to import plants without filing a declaration containing the information required in section 3372(f).[118] Like a false record offense, not filing the required declaration

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[110] United States v. Kraft, No. CRIM03-315, 2005 WL 578313 (D. Minn. Mar. 11, 2005).
[111] *See id.*
[112] *Id.*
[113] 16 U.S.C. § 3774(d)(2).
[114] For a more detailed discussion of the elements of the trafficking and false record offenses, see Robert Anderson & Mary Dee Caraway, *Current Issues Arising in Lacey Act Prosecutions*, 63 U.S. Att'ys' Bull. 3 (2015).
[115] 16 U.S.C. § 3372(d).
[116] *Id.* § 3373(A)(i)–(ii).
[117] *See* Colbourn & Swegle, *supra* note 74, at 11.
[118] 16 U.S.C. § 3372(f).

when importing plants may be a felony or a misdemeanor. A defendant who knowingly does not declare a plant import, as required by law, may be subject to felony penalties if the offense involves *either* import or export of fish, wildlife or plants, *or* commercial activity with a market value more than $350.[119] Any other knowing violation of section 3372(f) is a misdemeanor.[120]

In addition to the criminal penalties for trafficking, false records, or failing to declare plant imports as required by law, the Lacey Act provisions in Title 16 authorize civil penalties for importing, exporting, or transporting in interstate commerce containers or packages containing fish or wildlife without marking, labeling, or tagging it as required by regulation.[121] The failure to mark, label, or tag as required by regulation may be subject to up to a $250 civil penalty.[122] Only civil penalties are authorized for a marking violation, but civil penalties may be assessed for the offenses of trafficking, false records, and failure to declare plant imports as required by law as well.[123] Captive wildlife offenses in section 3372(e), discussed *supra* section II.A, are also subject to civil penalties.[124]

Finally, the only criminal penalties available for a captive wildlife offense in section 3372(e) make it a felony offense. A defendant who knowingly imports, exports, transports, sells, receives, acquires, or purchases a prohibited wildlife species in interstate or foreign commerce (or in a manner substantially affecting interstate or foreign commerce), or who knowingly breeds or possesses a prohibited wildlife species, may be punished by a fine of up to five years in prison.[125] Like all five-year felonies, individuals may also be fined up to $250,000.[126]

B. Injurious species and inhuman transport offenses (18 U.S.C. § 42)

The prohibition on importing "injurious" species is one of the oldest parts of the Lacey Act. Originally limited to mongoose, fruit bats, starlings, and other species that "the Secretary . . . may from time to time declare injurious to . . . agriculture or horticulture," the provision is codified in 18 U.S.C. § 42(a).[127] It now extends to zebra and quagga mussels

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[119] *Id.* § 3374(d)(3)(A).
[120] *Id.* § 3374(d)(3)(B).
[121] *Id.* § 3372(b).
[122] *Id.* § 3374(a)(2).
[123] *See id.* § 3374(a)(1)–(2).
[124] *Id.*
[125] *Id.* § 3374(d)(4).
[126] *See* 18 U.S.C. § 3571(b)(3).
[127] Lacey Act § 2; 18 U.S.C. § 42(a).

and bighead carp, as well as species of wild mammals and birds, fish (including mollusks and crustacea), amphibians, reptiles, brown tree snakes, and eggs or offspring from them that are "injurious" to human beings, forestry, wildlife, or the wildlife resources of the United States.[128] Starlings are no longer named in the statutory text.[129] It also prohibits "any shipment [of injurious species] between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States."[130] The prohibition does not extend to importation of injurious plant species, and at least one federal court of appeals has concluded that it does not prohibit interstate shipments.[131] Hawaii was not yet a state when the injurious species provision was passed in 1948. The D.C. Circuit held that 18 U.S.C. § 42(a)(1) did not authorize the Fish and Wildlife Service to prohibit shipment of injurious species within the continental United States.[132] Rather, the plain language of the "shipment clause" prohibited shipments into the continental United States from or between its territories and possessions.[133] The Secretary of the Interior may permit importation for zoological, educational, medical, and scientific purposes or by federal agencies for their own use.[134] Violators are strictly liable for a misdemeanor and may be imprisoned up to 6 months, fined up to $5,000 for individuals ($10,000 for organizations), or both.[135]

The humane transport provision is in 18 U.S.C. § 42(b).[136] It prohibits knowingly causing or permitting any wild animal or bird to be transported to the United States under inhumane or unhealthful conditions or in violation of regulations for humane and healthful transport.[137] The defendant must know about the transport of the wild animal or bird and that the conditions were inhumane or unhealthful.[138] The law provides support for using the condition of the vessel and conveyances upon arrival as relevant evidence and for a rebuttable presumption that a violation has occurred if a substantial ratio of the animals on board at arrival

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[128] 18 U.S.C. § 42(a)(1).
[129] *See also* 50 C.F.R. pt. 16 (Injurious Wildlife).
[130] 18 U.S.C. § 42(a)(1).
[131] U.S. Ass'n of Reptile Keepers, Inc. v. Zinke, 852 F.3d 1131 (D.C. Cir. 2017).
[132] 18 U.S.C. § 42(a)(1).
[133] *U.S. Ass'n of Reptile Keepers, Inc.*, 852 F.3d at 1142; 18 U.S.C. § 42(a)(1).
[134] 18 U.S.C. § 42(a)(3).
[135] *Id.* § 42(b). *See also* 18 U.S.C. § 3571(b)–(c).
[136] 18 U.S.C. § 42(b).
[137] *Id.* § 42(c). *See also* Standards for the Humane and Healthful Transport of Wild Mammals and Birds to the United States, 50 C.F.R. pt. 14, subpt. J.
[138] United States v. Bronx Reptiles, Inc., 217 F.3d 82, 83 (2d Cir. 2000).

are dead, crippled, diseased, or starving.[139] Like the injurious species offense, a humane transport offense is a misdemeanor punishable by up to six months in prison or fines of up to $5,000–$10,000.[140]

C. Lacey Act sentencing (United States Sentencing Guidelines Section 2Q2.1)

Section 2Q2.1 of the United States Sentencing Guidelines (U.S.S.G.) provides guidance for sentencing "offenses involving fish, wildlife, and plants," including most Lacey Act violations.[141] Because the most severe punishment available for a violation of the injurious species or humane transport provisions in Title 18 is six months in prison, these offenses are Class B misdemeanors, are considered petty offenses, and are not covered by the U.S.S.G.[142] Sentencing for all other Lacey Act offenses, including all criminal violations in Title 16, falls under U.S.S.G. § 2Q2.1.[143]

Section 2Q2.1(a) provides a base level of six for a wildlife offense, which may be increased based on any special characteristics of the offense listed in subsection (b).[144] The offense level may be increased 4 levels (to 10) if the species involved is listed as depleted under the Marine Mammal Protection Act, endangered or threatened under the ESA, or an Appendix I species under CITES.[145] Alternatively, the offense level may also be increased one level if the market value of the fish, wildlife, or plants is greater than $2,500; where the market value is greater than $6,500, the U.S.S.G. refer the user to the loss chart in section 2B2.1.[146] "Market value" for purposes of sentencing should be the fair market retail price. Where that is difficult to ascertain, however, the court may make a reasonable estimate using any reliable information (for example, reasonable replacement cost, restitution cost, or cost of acquisition and preservation), but the court may not base market value on aesthetic loss.[147] If a species is both protected as defined above and has a market value of over $2,500, the guidelines instruct that the larger increase in offense level should apply.[148] According to the current section 2B1.1 chart, the market value of the fish, wildlife, or plant must be greater than

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[139] 18 U.S.C. § 42(c)(1)–(2).
[140] *Id.* § 42(b).
[141] U.S. Sent'g Guidelines Manual § 2Q2.1 (U.S. Sent'g Comm'n 2015).
[142] *See id.* § 1B1.9 cmt. n.1 (2010).
[143] *Id.* § 2Q2.1.
[144] *Id.* § 2Q2.1(b).
[145] *Id.* § 2Q2.1(b)(3)(B).
[146] *Id.* § 2Q2.1(b)(3)(A).
[147] *See id.* § 2Q2.1 cmt. n.4.
[148] *Id.* § 2Q2.1(b)(2)–(3)(A).

$40,000 to make the offense level higher than the guidelines permit for trafficking in a protected species alone.[149]

Prosecutors may also recommend increasing the base offense by two levels if the offense was *either* for pecuniary gain or otherwise involved a commercial purpose *or* if it involved a pattern of similar violations.[150] "For pecuniary gain" is defined as "for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services."[151] It could include an offense committed for purposes of bartering for goods or services, or any activity designed to increase gross revenue.[152] Likewise, "commercial purpose" is defined broadly to include acquiring fish, wildlife, or plants for display to the public by an individual or an organization for a fee or donation.[153] In addition, a two-level increase is available if the fish, wildlife, or plants were *either* not quarantined as required by law *or* otherwise created a "significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants."[154]

Finally, an upward departure may be warranted if market value does not adequately measure the seriousness of the offense, and "the offense involved the destruction of a substantial quantity of fish, wildlife, or plants."[155] Proposed amendments would convert this from grounds for upward departure to grounds for a variance.[156] This upward departure was added as part of an amendment "to strengthen the deterrent effect of the sanctions for violations covered by this guideline."[157]

The guidelines also indicate that, where the offense involved a cultural heritage or paleontological resource, section 2B1.5 should apply if it would result in a greater offense level than determined under section 2Q2.1.[158] In either case, the sentence cannot exceed the statutory maximum of five years in prison for a Lacey Act felony, a $250,000 fine for an individual, or a $500,000 fine for an organization.[159] For a misdemeanor violation of the

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[149] *Id.* § 2B1.1.
[150] *Id.* § 2Q2.1(b)(1).
[151] *Id.* § 2Q2.1 cmt. n.1
[152] *See id.*
[153] *See id.* § 2Q2.1 cmt. n.2. Organizations include a governmental entity, a private non-profit organization, or a private for-profit organization.
[154] *Id.* § 2Q2.1(b)(2). This includes quarantine regulations at 9 C.F.R. pt. 92 (2024) and 7 C.F.R. subtitle B, ch. III (2024) as well as state quarantine laws. *See* U.S.S.G. § 2Q2.1 cmt. n.3.
[155] *See id.* § 2Q2.1 cmt. n.5.
[156] *See* U.S. Sent'g Comm'n, Proposed Amendments to the Sentencing Guidelines 123, 330 (2023).
[157] *See* U.S.S.G. app. C, amend. 452 (1992).
[158] *See id.* § 2Q2.1 cmt. n.6.
[159] *See* 16 U.S.C. § 3373(d)(1), (3)(A), (4) (referring to 18 U.S.C. § 3571 for the

same offenses, the statute provides for a maximum of one year in prison, a fine of up to $10,000 for trafficking, and up to $100,000 (individual) or $200,000 (organization) for a false records offense or failing to declare plant imports.[160]

IV. The Lacey Act's overlap with cruelty

Although the Lacey Act is not considered an anti-cruelty statute, the legislative history shows that Congress's concerns included the cruel treatment of animals caught in the wildlife trade. From the needless slaughter and inhumane concealment of these animals for trafficking, to the casualties that all too often result from inexperienced or unethical owners of animals in captivity, Congress believed that prohibitions on the trade in wildlife in the Lacey Act would ameliorate animal suffering and threats to the survival of these species. Because violations of the Lacey Act are tied to the commercial aspects of the trade, however, the Lacey Act has an indirect effect on combating animal cruelty.

The only provision of the Lacey Act that is directly linked to animal cruelty is the humane transport provision in 18 U.S.C. § 42(c).[161] Courts have not often enforced this provision, likely because the requirements for proof are high and a violation is only a misdemeanor. Among other elements, prosecutors must prove that the defendant knew the conditions of transport were inhumane, unhealthful, or in violation of the regulations.[162] This can be difficult without either testimony from the foreign shipper—who is typically beyond the jurisdiction of the court—or an admission by the defendant. In *United States v. Bronx Reptiles, Inc.*, the court acknowledged that, absent "testimony from the Solomon Islands shipper, who is beyond the jurisdiction of this [c]ourt, or admissions of the defendant, the government has no way of proving what instructions or steps were taken [] to ensure that the frogs here would be shipped in accordance with the recognized humane standards."[163] Although Congress likely intended to streamline humane transport prosecutions by establishing that a substantial ratio of animals harmed is prima facie evidence of a violation, one court would have required that ratio to be so high that it would be unlikely to be of use in most cases.[164] In dicta, the court considered that the examples relied upon by Congress in passing the humane

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appropriate fine).

[160] *See id.* § 3373(d)(2), (3)(B).

[161] 18 U.S.C. § 42(c).

[162] *Id.*

[163] United States v. Bronx Reptiles, Inc., 949 F. Supp. 1004, 1012 (E.D.N.Y. 1996), *rev'd on other grounds by* 217 F.3d 82 (2d Cir. 2000).

[164] United States v. States Marine Lines, Inc., 334 F. Supp. 84 (S.D.N.Y. 1971).

transport provisions were "far more tragic," even though as many as 30% of the animals on board defendants' ship died as a result of being transported.[165] In that case, the court found that any prima facie case had been rebutted by evidence that the animals had been adequately crated, fed, and cared for, and they had refused to eat merely due to the stress of being removed from their native habitat.[166] Even without relying on the inference in 18 U.S.C. § 42(c)(2), however, prosecutors can demonstrate that transport conditions were inhumane and unhealthful through expert testimony, by reference to the regulations, or by inspecting the vessel or conveyance upon arrival.[167]

A violation of animal welfare law might also serve as a predicate for a trafficking offense under the Lacey Act. The underlying animal welfare law would have to be "related or referring to fish [or] wildlife," and the violation would have to be with respect to a wild species covered by both the Lacey Act and the underlying welfare or anti-cruelty law, and the violation would have to be with respect to a wild species covered by both the Lacey Act and the underlying welfare or anti-cruelty law.[168] For example, a violation of state law for the welfare of captive animals might serve as a predicate offense if the law's protections extended to captive wild animals also covered by the Lacey Act.[169] Or, in states where animal welfare laws extend to all animals—not just pets or farm animals—a wild animal that is the subject of a violation would also be protected by the Lacey Act.[170] Although there are limits on how closely related to fish or wildlife an underlying law must be for a violation to qualify as a Lacey Act predicate, laws designed for the welfare of fish and wildlife would seem to fit comfortably within these requirements.[171] Indeed, violations of hunting

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[165] *Id.* at 89.

[166] *Id.*

[167] 18 U.S.C. § 42(c)(2). *See, e.g.*, *Bronx Reptiles*, 949 F. Supp. at 1009, 1009 n.10 (finding that transport conditions for the frogs in question were inhumane and unhealthful based on expert testimony that they needed moisture to be able to breathe, as well as the fact that the conveyances did not conform to industry standards).

[168] S. Rep. No. 97-123, at 5–6 (1981). Plants would not be the subject of any welfare or anti-cruelty law.

[169] *See, e.g.*, 720 Ill. Comp. Stat. 5/48-11 (2017) (making it unlawful to use an elephant in a traveling act, "where animals are required to perform tricks, give rides, or act as accompaniments for entertainment, amusement, or benefit of a live audience"); Elephant Protection Act, N.Y. Agric. & Mkts. Law § 380 (McKinney 2017) (prohibiting use of elephants in any type of entertainment act); California Orca Protection Act, Cal. Fish & Game Code § 4502.5 (West 2016) (making it unlawful to hold an orca in captivity, including for display, performance, or entertainment).

[170] *See, e.g.*, Minn. Stat. § 343.20(5) (West 2024) (defining "animal" for purposes of animal welfare statute as "every living creature except members of the human race").

[171] S. Rep. No. 97-123, at 5–6 (1981) (noting that a violation of a gun safety law

laws designed in part to prevent the slaughter of wildlife have served as predicate offenses in the past, including a violation of the Airborne Hunting Act and state laws against baiting.[172]

Most of the offenses in the Lacey Act do not require proof of cruel treatment as an element of the offense. Even so, the failure to provide humane or healthful conditions in transport can be evidence that a defendant knew or should have known the fish or wildlife were taken, transported, and so on, in violation of underlying law. In a press release about Operation Jungle Book out of the Central District of California, for example, the U.S. Attorney's Office described defendants smuggling 3 king cobras from Hong Kong in potato chip cans (1 of which died); 5 monitor lizards from the Philippines in speakers (2 of which died, and a third had its foot crushed); 8 arowana fish from Indonesia in bags hidden inside porcelain teapots (none survived); and 93 Asian songbirds on a flight from China (85 of which died).[173] As a federal agent wrote in his affidavit in support of a warrant, "wildlife smugglers conceal wildlife in shipments to evade law enforcement and they do so because they know their conduct is illegal."[174] Therefore, the fact that the monitor lizards were hidden in speakers, among other evidence, led the agent to believe that the defendant knew it was not lawful to bring the lizards into the United States without a permit.[175]

There may also be room in the U.S.S.G. to seek an upward departure for a situation in which the market value of the fish, wildlife, or plant does not adequately measure the seriousness of the offense. This may apply where a substantial quantity of fish, wildlife, or plants was destroyed.[176] An upward departure using these criteria might account for a scenario in which the fish, wildlife, or plants were captured in a way that caused significant collateral damage to fish, wildlife, or plants other than the

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would not count as a predicate offense under the Lacey Act, even if the gun was used to take wildlife).

[172] *See* United States v. Todd, 735 F.2d 146 (5th Cir. 1984). Although the underlying law in *Todd* was federal, some states also ban the use of aircraft for hunting. *See, e.g.,* Mont. Code Ann. § 87-6-208 (2023) (making it unlawful to shoot a game animal from an aircraft). *See also* United States v. Rodebaugh, 798 F.3d 1281 (10th Cir. 2015) (upholding Lacey Act conviction for outfitter whose predicate offense was baiting tree stands for elk hunter clients).

[173] Press Release, U.S. Att'y's Off., C.D. Cal., Operation Jungle Book Targets Wildlife Trafficking, Leading to Federal Criminal Cases and Recovery of Numerous Animal Species (Oct. 20, 2017).

[174] Affidavit of Special Agent Juan Ramirez Amezcua at 10–11., United States v. Simpson, No. 17-cr-567 (C.D. Cal. Aug. 9, 2017), ECF No. 1.

[175] *Id.* at 11.

[176] *See* U.S.S.G. § 2Q2.1 cmt. n.5.

target species. For example, live reef fish for human consumption and for marine aquariums are sometimes harvested by dispersing a cyanide mixture into the reef. The poison stuns the targeted fish but "kills a multitude of invertebrates and nontargeted fish on the spot."[177] If the seriousness of the damage to these other species and to the ecosystem is not captured by the offense level that correlates to the market value of the target species, recommending an upward departure could help deter such cruel fishing techniques in the future.

About the Author

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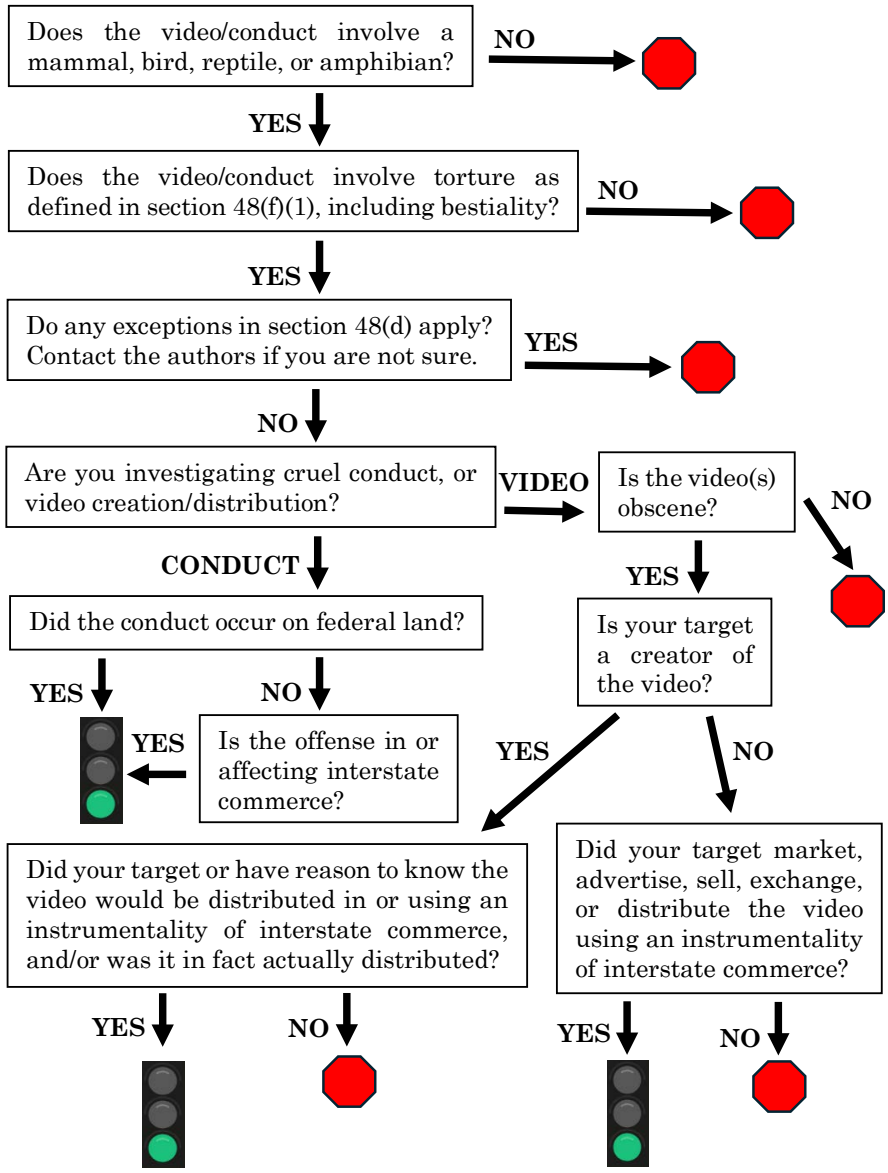
[177] Ricardo Calado et al., *Caught in the Act: How the U.S. Lacey Act Can Hamper the Fight Against Cyanide Fishing in Tropical Coral Reefs*, 7 Conservation Letters 499, 562 (2014).

Appendix: Flowchart for Section 48 Offenses[1]



[1] This flowchart was created by Ethan Eddy and Matthew Oakes to supplement their article, "The Preventing Animal Cruelty and Torture Act and the Evolution of Section 48."

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Note from the Editor-in-Chief

While watching the Netflix documentary series *Tiger King* during the pandemic, I was struck by how the beautiful animals were more intelligent and better behaved than the human antagonists.[1] But more importantly, I appreciated that the documentarians highlighted something that it is not well known: Federal attorneys and agents work hard every day, doggedly cataloging evidence to protect not just exotic creatures, but all animals. As you read these articles, you'll understand the importance and complexity of their work, which deals with horrific things like squalid animal preserves, dog fighting, cockfighting, animal cruelty and torture, and trafficking in endangered species. I know that you'll find this issue as illuminating as my team and I did.

For this issue, my thanks to Lucy Chiu from the Environment and Natural Resources Section who acted as point of contact. She helped select the topics and recruit our authors. And to those authors, thank you for all that you do and for taking the time to write for us. As always, I'm lucky to work with the most knowledgeable, not to mention meticulous, team at the Office of Legal Education: Managing Editor Kari Risher, Associate Editor Abbie Hamner, and our University of South Carolina law clerks, not to mention Jim Scheide, a typesetting wizard, who made the layout of this issue look as elegant as a Bengal tiger.

I wish you the best during the upcoming holidays, and I hope that you'll continue to read and enjoy this journal.

Chris Fisanick
Columbia, South Carolina
November 2024

[1] *Tiger King* (Netflix Mar. 20, 2020).