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Kaitlin Vigars

Boston College Law School, kaitlin.vigars@bc.edu

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BIGGER THAN *BLACKFISH*: LESSONS FROM CAPTIVE ORCAS DEMONSTRATE A LARGER PROBLEM WITH ANIMAL WELFARE LAWS

KAITLIN VIGARS*

Abstract: Recently, increased attention to the care that captive orcas receive at marine life parks has sparked a call for reform of the public display industry. In the face of this public outcry the nation's leading marine life park, SeaWorld, recently announced a shift in company policy that will eventually end the practice of holding orcas in captivity. This, though, does not signal the end of problem. Many other animals face problems that are analogous to the exact issues that sparked change for captive orcas. This note will argue that broad reform of captivity standards are necessary and should include greater protections for all captive animals.

INTRODUCTION

As a young boy growing up on the shores of Washington's Puget Sound, Ted Griffin spent much of his time in the water.¹ Using makeshift gear he taught himself to dive as deep as fifty or sixty feet.² The more he dove the more he fell in love with the underwater world, especially the creatures that called Puget Sound their home.³ When the World's Fair came to Seattle in 1962, Griffin saw an opportunity to share the animals of Puget Sound with the public and he opened an aquarium on the Seattle waterfront.⁴

The killer whales, or orcas, that he often saw and swam with during his childhood dives in Puget Sound had long fascinated Ted Griffin.⁵ His success in keeping dolphins at his aquarium led him to believe that he might be able to one day keep a killer whale as a pet.⁶ When the World's Fair ended, Griffin set out to do just that, going to great lengths to capture a killer whale in the wild.⁷

* Editor in Chief, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2016–2017.

¹ Frontline, *A Whale of a Business, Interview Ted Griffin*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/whales/interviews/griffin.html> [perma.cc/7APP-WDCN].

² *Id.*

³ SANDRA POLLARD, PUGET SOUND WHALES FOR SALE: THE FIGHT TO END ORCA HUNTING 35 (2014); Frontline, *supra* note 1.

⁴ POLLARD, *supra* note 3, at 35; Frontline, *supra* note 1.

⁵ Frontline, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

Believing nets would not be strong enough to hold a whale Griffin would jump from a helicopter into the water and try to loop a rope around the whales, like a lasso.⁸ His efforts, though unsuccessful, garnered him attention throughout the Pacific Northwest.⁹

Finally, in June of 1965 Griffin's dream to have a pet orca became a reality when a group of fisherman in British Columbia accidentally caught a killer whale in their fishing net.¹⁰ Ted Griffin immediately flew to remote Namu, British Columbia and bought the whale from the fishermen for \$8000.¹¹ The male orca was herded into a small steel pen and a tugboat towed him 400 miles south to Seattle where he would live for the next year in a natural cove enclosed to form a sea pen.¹² Namu, as he was now called, arrived in Seattle to great fanfare and drew thousands of paying visitors Griffin's aquarium.¹³ Almost immediately, Griffin began swimming with Namu and was able to climb on the whale's back and ride him.¹⁴ Namu became the first captive killer whale to perform tricks and was taught at Griffin's command to move left or right, jump out of the water, and retrieve salmon from his trainers.¹⁵

⁸ *Id.*

⁹ *See id.*

¹⁰ JOHN HARGROVE WITH HOWARD CHUA-EOAN, BENEATH THE SURFACE: KILLER WHALES, SEAWORLD, AND THE TRUTH BEYOND *BLACKFISH* 27 (2015); DAVID KIRBY, DEATH AT SEAWORLD: SHAMU AND THE DARK SIDE OF KILLER WHALES IN CAPTIVITY 151 (2012); POLLARD, *supra* note 3, at 36–38; Frontline, *supra* note 1.

¹¹ HARGROVE, *supra* note 10, at 27; KIRBY, *supra* note 10, at 151; Frontline, *supra* note 1. The fisherman had offered the whale to larger facilities on the West Coast of the United States, but they declined, unsure of how to transport the animal from British Columbia to their facilities. KIRBY, *supra* note 10, at 151. Initially, Griffin did not have the money to pay for the orca, so he took up a collection to raise the necessary funds. Frontline, *supra* note 1.

¹² KIRBY, *supra* note 10, at 152; POLLARD, *supra* note 3, at 38; Frontline, *supra* note 1. During the nineteen-day journey to his new home Namu was followed for over 150 miles by four whales, believed to be his mother and siblings, who repeatedly tried to free him. KIRBY, *supra* note 10, at 151–52. After a year in captivity Namu contracted a bacterial infection from the polluted waters, became disoriented, tangled himself in the steel net that closed his cove off from the open waters, and drowned. *Id.* at 152.

¹³ POLLARD, *supra* note 3, at 42; Frontline, *supra* note 1; Sarah Kaplan, *The Fate of SeaWorld's "Shamu" Show Was Forecast by the Very First Whale Performers*, WASH. POST, <https://www.washingtonpost.com/news/morning-mix/wp/2015/11/11/the-fate-of-seaworlds-shamu-show-was-forecast-by-the-very-first-whale-performers/> [perma.cc/Q6AH-N6PW]. Namu's image was plastered on memorabilia, and the front page of the Seattle Times. Kaplan, *supra*.

¹⁴ KIRBY, *supra* note 10, at 152.

¹⁵ *Id.*; Frontline, *supra* note 1. The first whale to be placed in captivity was captured off the coast of Southern California in 1961 and transported to Marineland of the Pacific in Vancouver. KIRBY, *supra* note 10, at 150; POLLARD, *supra* note 3, at 29. After being placed in the concrete pool at Marineland, the whale began acting erratically and swimming rapidly in circles, slamming her body into the walls of the tank. KIRBY, *supra* note 10, at 150. After two days, the whale swam straight into a concrete wall killing herself. *Id.* The Vancouver Aquarium had more success with a killer whale called Moby Doll who lived in captivity for eighty-seven days before succumbing to a skin disease the animal had developed as the result of problems with the salinity of the water in his enclosure. HARGROVE, *supra* note 10, at 28; KIRBY, *supra* note 10 at 151.

Fearing that Namu was lonely, Griffin caught a young, female killer whale in Puget Sound.¹⁶ He introduced her into Namu's pen, but the two whales did not get along and the new whale became aggressive.¹⁷ It was decided that the new whale could not stay and she was sold for \$75,000 to a marine life park in San Diego, California called SeaWorld.¹⁸ SeaWorld named the whale Shamu.¹⁹ Since Shamu's arrival at SeaWorld on December 20, 1965 trained orcas have been a cornerstone of the SeaWorld brand.²⁰

SeaWorld's collection of thirty orcas is the largest kept in human care.²¹ Twenty-three of these animals are located across their three marine parks in California, Florida, and Texas; the rest are on loan to public display facilities in Spain.²² Recently, amid renewed controversy over the care of their captive orca population, SeaWorld announced that they would be ending their captive breeding program and promised to continue their forty-year practice of not taking orcas from the wild.²³ Effectively, this change in the marine park's policy means that the current population of captive orcas will be the last to live in captivity.²⁴

¹⁶ KIRBY, *supra* note 10, at 152.

¹⁷ *Id.*; POLLARD, *supra* note 3, at 48.

¹⁸ KIRBY, *supra* note 10, at 152; POLLARD, *supra* note 3, at 48.

¹⁹ KIRBY, *supra* note 10, at 152; Kaplan, *supra* note 13.

²⁰ HARGROVE, *supra* note 10, at 30; Kaplan, *supra* note 13; *see* SEAWORLD PARKS & ENTMT INC., 2014 ANNUAL REPORT 19 (2014) [hereinafter 2014 ANNUAL REPORT], http://s1.q4cdn.com/392447382/files/doc_financials/Annual%20Reports/2014-SEAS-Annual-Report.pdf [perma.cc/6KLA-J42Q] (annual report to shareholders indicating the unique position of SeaWorld in the theme park market because of the presence of orcas at their parks).

²¹ *See* NAT'L MARINE FISHERIES SERVICE, NAT'L OCEANIC & ATMOSPHERIC ADMINISTRATION, MARINE MAMMAL INVENTORY REPORT (2016); 2014 ANNUAL REPORT, *supra* note 20, at 12; WHALE & DOLPHIN CONSERVATION, ORCAS IN CAPTIVITY (2015) [hereinafter ORCAS IN CAPTIVITY], http://uk.whales.org/sites/default/files/orcas-in-captivity_dec2015.pdf?_ga=1.200885224.730084266.1454019792 [perma.cc/2HBQ-LW3L]

²² *See* NAT'L MARINE FISHERIES SERVICE, *supra* note 21; *The Fate of Captive Orcas*, WHALE & DOLPHIN CONSERVATION, <http://us.whales.org/wdc-in-action/fate-of-captive-orcas> [https://perma.cc/627P-HJ55].

²³ Sewell Chan, *SeaWorld Says It Will End Breeding of Killer Whales*, N.Y. TIMES, Mar. 18, 2016, at B3; Joel Manby, Editorial, *SeaWorld CEO: We're Ending Our Orca Breeding Program. Here's Why.*, L.A. TIMES (Mar. 11, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-0317-manby-sea-world-orca-breeding-20160317-story.html> [https://perma.cc/D357-UQKL]. The announcement came days after SeaWorld announced that Tilikum, the whale at the heart of *Blackfish* and SeaWorld's main source of genetic material, had a serious lung infection. Katie Rogers, *Business Briefing: Orca Whose Killing of Trainer Was Focus of Film Is Ailing*, N.Y. TIMES, Mar. 10, 2016 at B2. Tilikum died on January 6, 2017 at the age of thirty-six. *The Life and Care of Tilikum at SeaWorld*, SEAWORLD PARKS & ENTMT INC. (Feb. 3, 2017), https://seaworldcares.com/tilikum?utm_source=Google&utm_medium=Search&utm_term=Tilikum&utm_content=Tiliupdate&utm_campaign=Consumer&gclid=C1bm1MGL69ECFUWewAodfN8LUA [https://perma.cc/P6QR-PE65]. SeaWorld did not immediately release Tilikum's cause of death, but attributed his passing, at least in part, to the bacterial lung infection. *Id.*

²⁴ Chan, *supra* note 23; Manby, *supra* note 23.

This is a considerable victory for the orcas; however it does not ensure more humane treatment for orcas, or other captive wild life, in the immediate future.²⁵ Broadly, orcas represent a problem with the legal protections afforded to captive wildlife.²⁶ Federal law is insufficient not just for orcas, but also for many other wild animals, particularly ones that are similar to orcas.²⁷ Using captive orcas as an example of the broader problem of holding wild animals in captivity, this note will argue that the federal government must act broadly and unilaterally to reform our nation's animal welfare laws and offer greater legal protection to captive animals.²⁸

Part I of this Note will state facts about orcas, describe the negative impact of taking orcas from the wild, and point out the disparities between life for wild and captive orcas.²⁹ Part II will critique the legislative landscape governing the care of captive orcas and analyze failed efforts by animal rights activists to enforce existing federal law.³⁰ Part III will describe the similarities between captive orcas and other captive animals and discuss the analogous difficulties those animals face in securing legal protection.³¹ Finally, Part IV will use the experience with captive orcas as a critical lens to argue that necessary reform is most properly effectuated at the federal level.³²

I. CAPTIVE AND WILD ORCAS SUFFER AS A RESULT OF CAPTIVITY

It took several attempts before an orca was successfully held in captivity for an extended period of time.³³ With each attempt, care methods evolved so

²⁵ See Chris Parsons, *Why SeaWorld Is Finally Doing Right By Orcas*, SCI. AM. (Mar. 18, 2016), <http://blogs.scientificamerican.com/guest-blog/why-seaworld-is-finally-doing-right-by-orcas/> [<https://perma.cc/BDS3-ZRK3>].

²⁶ See THE HUMANE SOCIETY OF THE U.S. & THE WORLD SOCIETY FOR THE PROT. OF ANIMALS, THE CASE AGAINST MARINE MAMMALS IN CAPTIVITY 43–46 (Naomi A. Rose, et al. eds. 2006) [hereinafter THE CASE AGAINST CAPTIVITY]; Dale Jamieson, *Against Zoos in IN DEFENSE OF ANIMALS: THE SECOND WAVE* (Peter Singer ed., 2006); KATHY RUDY, *LOVING ANIMALS: TOWARD A NEW ANIMAL ADVOCACY* 149 (2011); *Breaking: PETA's Campaign Wins Round One—Orca Breeding to End*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, <http://www.seaworldofhurt.com/breaking-seaworld-campaign-wins-round-one-orca-breeding-end/> [<https://perma.cc/QU8X-2339>].

²⁷ See THE CASE AGAINST CAPTIVITY, *supra* note 26, at 1; RUDY, *supra* note 26, at 149; Marla K. Conley, *Caring for Dolphins, Otters, and Octopuses: Speciesism in the Regulation of Zoos and Aquariums*, 15 ANIMAL L. 237, 249, 254, 259 (2009); Georgia J. Mason, *Species Differences in Responses to Captivity: Stress, Welfare and the Comparative Method*, 25 TRENDS IN ECOLOGY AND EVOLUTION 713, 715–16, (2010).

²⁸ See *infra* notes 271–294 and accompanying text.

²⁹ See *infra* notes 33–100 and accompanying text.

³⁰ See *infra* notes 101–243 and accompanying text.

³¹ See *infra* notes 244–270 and accompanying text.

³² See *infra* notes 271–294 and accompanying text.

³³ See ERICH HOYT, THE PERFORMING ORCA—WHY THE SHOW MUST STOP: AN IN-DEPTH REVIEW OF THE CAPTIVE ORCA INDUSTRY 49 (1992); KIRBY, *supra* note 10, at 150–152; POLLARD *supra* note 3, at 29, 33, 44.

that public display facilities were able to maintain orcas for longer periods of time.³⁴ Today, after more than fifty years of public display questions remain as to whether the care of captive orcas is sufficient.³⁵ Specifically, orcas physical attributes, complex social hierarchy, and species culture make it difficult for public display facilities care for these animals.³⁶

A. Orca Biology

Killer whales can be found in every ocean and sea in the world.³⁷ They tend to favor colder waters and populations are more abundant close to land than in the open ocean.³⁸ Male orcas can grow to be as long as thirty-two feet and weigh eleven tons, while female orcas can grow to be twenty-eight feet and weigh between eight and nine tons.³⁹ Depending on where they live, killer whales typically eat fish, seals, sharks, or birds.⁴⁰ Apex predators, they eat roughly four percent of their body weight per day.⁴¹

Although killer whales worldwide are considered to be one species, the extraordinary genetic diversity of wild populations has led some scientists to consider whether multiple subspecies exist.⁴² Scientists currently classify orcas into three ecotypes: resident, transient, and offshore.⁴³ These ecotypes often share some of their home range, but are not known to interact socially with whales from other ecotypes.⁴⁴ Within ecotypes, though, orcas are extremely

³⁴ See KIRBY, *supra* note 10, at 150–52; POLLARD, *supra* note 3, at 93–94; John Jett & Jeffrey Ventre, *Captive Killer Whale (Orcinus Orca) Survival*, 31 MARINE MAMMAL SCI. 1362, 1363 (2015).

³⁵ See KIRBY, *supra* note 10, at 7 (alleging that orcas suffer in captivity). *But see Health and Daily Care*, SEAWORLD PARKS & ENTMT INC., <https://seaworldcares.com/killer-whales/health-and-daily-care/> [<https://perma.cc/3AHA-HJWQ>] (alleging that captive orcas are healthy and well cared for).

³⁶ See Jett & Ventre, *supra* note 34, at 1374.

³⁷ John E. Heyning & Marilyn E. Dahlheim, *Orcinus Orca*, 304 MAMMALIAN SPECIES 1, 2 (1988). The only mammal more widely distributed throughout the world than the orca is the human. JOHN K.B. FORD ET AL., *KILLER WHALES: THE NATURAL HISTORY AND GENEALOGY OF ORCINUS ORCA IN BRITISH COLUMBIA AND WASHINGTON STATE* 11 (1994).

³⁸ Heyning & Dahlheim, *supra* note 37, at 2; *Killer Whale (Orcinus Orca)*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES (Jan. 2017), <http://www.nmfs.noaa.gov/pr/species/mammals/whales/killer-whale.html> [<https://perma.cc/UX5W-8PST>].

³⁹ *Killer Whale (Orcinus Orca)*, *supra* note 38.

⁴⁰ *Id.*

⁴¹ Heyning & Dahlheim, *supra* note 37, at 4.

⁴² *Killer Whale (Orcinus Orca)*, *supra* note 38.

⁴³ *Id.* An ecotype is a genetically distinct group within a species. FORD ET AL., *supra* note 37, at 17; Rudiger Riesch et al., *Cultural Traditions and the Evolution of Reproductive Isolation: Ecological Speciation in Killer Whales?* 106 BIOLOGICAL J. OF THE LINNEAN SOC'Y 1, 2 (2012). Marine biologists have noted physical and behavioral differences between ecotypes, including differences in pigmentation patterns and dietary specializations. Riesch et al., *supra* at 11; *Killer Whale (Orcinus Orca)*, *supra* note 38.

⁴⁴ FORD ET AL., *supra* note 37, at 17; *Killer Whale (Orcinus Orca)*, *supra* note 38.

social animals and live in stable groups.⁴⁵ Transient killer whales live in the smallest groups, typically less than ten whales, while offshore killer whales live in the biggest groups, which can range from twenty to seventy-five whales.⁴⁶ For killer whales in the resident ecotype, the groups where the whales live are called pods.⁴⁷ Each pod of resident orcas contains matrilineal groupings that are often—nearly fifty percent of the time—seen in association with one another.⁴⁸

Killer whales use a series of clicks, whistles, and calls to navigate their underwater world and to communicate with other whales in their social group.⁴⁹ The whales use vocalization patterns that are distinct to their social group; these vocalizations are analogous to human language dialects.⁵⁰ In fact, biologists have been able to identify a whale's social group based solely on their pattern of vocal communication.⁵¹ These specific sounds play an important role in strengthening the group's culture and are passed down to each new generation.⁵² Orcas are able to change the volume of their calls, using louder calls when there is a lot of noise in the ocean or making softer calls when they want to stalk prey quietly.⁵³

Much like language, hunting behavior is learned and is group specific.⁵⁴ Consistent across all groups are cooperative hunting techniques.⁵⁵ In this regard, whales will work together to herd schools of fish and then take turns swimming through the school to feed.⁵⁶ When hunting larger prey, such as grey whales, they adapt their swimming formation to approach and pursue the whales more effectively.⁵⁷ Cooperation with humans has also been noted and

⁴⁵ FORD ET AL., *supra* note 37, at 23; *Killer Whale (Orcinus Orca)*, *supra* note 38. Orcas observe a strict social hierarchy within these groups that they reinforce through different forms of behavior. Heyning & Dahlheim, *supra* note 37, at 5; Naomi A. Rose, *Let's Throw Shamu a Retirement Party*, TEDXTALKS (May 28, 2015), <http://tedxtalks.ted.com/video/Let-s-Throw-Shamu-a-Retirement> [<https://perma.cc/39AV-RA6K>].

⁴⁶ *Killer Whale (Orcinus Orca)*, *supra* note 38. Offshore killer whales have been observed in groups as large as 200 though this is atypical. *Id.*

⁴⁷ *Killer Whale (Orcinus Orca)*, *supra* note 38.

⁴⁸ FORD ET AL., *supra* note 37, at 24; *Killer Whale (Orcinus Orca)*, *supra* note 38. A matrilineal group means that the group contains a mother and her offspring. FORD ET AL., *supra* note 37, at 24. Most groups contain more than one generation—typically three, though up to four generations have been observed. *Id.*

⁴⁹ FORD ET AL., *supra* note 37, at 21; Heyning & Dahlheim, *supra* note 37, at 5; Riesch et al., *supra* note 43, at 7–8.

⁵⁰ FORD ET AL., *supra* note 37, at 21; Heyning & Dahlheim, *supra* note 37, at 5.

⁵¹ Heyning & Dahlheim, *supra* note 37, at 5.

⁵² FORD ET AL., *supra* note 37, at 21; Riesch et al., *supra* note 43, at 8.

⁵³ Riesch et al., *supra* note 43, at 8.

⁵⁴ *Id.*

⁵⁵ See FORD ET AL., *supra* note 37, at 29; Heyning & Dahlheim, *supra* note 37, at 5.

⁵⁶ Heyning & Dahlheim, *supra* note 37, at 5.

⁵⁷ *Id.*

killer whales have been reported to alert fishermen to the presence of smaller mammals in exchange for a share of the catch.⁵⁸

B. Orca Life in the Wild Is Vastly Different Than Life in Captivity

Opponents of captivity maintain that the needs of orcas are too complex to be met in captivity.⁵⁹ One point of contention between proponents and opponents of captivity is the impact of captivity on orca lifespan.⁶⁰ In the wild, male orcas can live as long as fifty or sixty years.⁶¹ Female orcas have been observed to live for one hundred years in the wild, though this is atypical and the average lifespan for female orcas is generally around fifty years.⁶² On the other hand, a 2015 study of captive killer whales found the average life expectancy for orcas living in captivity is sixteen years for females and thirteen for males.⁶³ The study credits the difficulty parks have in meeting the unique needs of these animals for the difference in life expectancy.⁶⁴ Animal rights activists, too, point to a number of factors that may be to blame for this discrepancy in lifespan.⁶⁵ They argue that the spatial limitations of captivity are insufficient for orcas because the animals are adapted to swimming one hundred miles of ocean each day and cannot get sufficient exercise in captivity.⁶⁶ Along similar lines, opponents of captivity believe that the orcas are not mentally stimulated in captivity like they are in the wild and that this results in boredom that negatively impacts the orcas' health.⁶⁷ Further, opponents theorize that captivity disrupts social dynamics, citing the common practice of mix-

⁵⁸ *Id.*

⁵⁹ THE CASE AGAINST CAPTIVITY, *supra* note 26, at 24; VANESSA WILLIAMS, WHALE & DOLPHIN CONSERVATION SOC'Y, CAPTIVE ORCAS: DYING TO ENTERTAIN YOU 9 (1996); Jett & Ventre, *supra* note 34, at 1; Letter from Courtney S. Vail & Cathy Williamson to California Coastal Commission (Aug. 5, 2015) (on file with author).

⁶⁰ HOYT, *supra* note 33, at 51; SEA WORLD PARKS & ENTMT'N INC., KILLER WHALE CARE, CONSERVATION AND EDUCATION 2 (2015) [hereinafter KILLER WHALE CARE, CONSERVATION AND EDUCATION], <https://seaworldcares.com/wp-content/uploads/2015/07/SWkillerwhalecare-booklet.pdf> [<https://perma.cc/Y3L3-ACDU>].

⁶¹ *Killer Whale (Orcinus Orca)*, *supra* note 38.

⁶² *Id.* SeaWorld disputes that whales are able to live this long in the wild and posits that their average lifespan is closer to thirty years for both males and females. HOYT, *supra* note 33, at 51; KILLER WHALE CARE, CONSERVATION AND EDUCATION, *supra* note 60, at 2.

⁶³ Jett & Ventre, *supra* note 34, at 1373. Sea World disputes this figure and says that their whales live to an average age of forty-six. KILLER WHALE CARE, CONSERVATION AND EDUCATION, *supra* note 60, at 2.

⁶⁴ Jett & Ventre, *supra* note 34, at 1374.

⁶⁵ WILLIAMS, *supra* note 59, at 9–10; see THE CASE AGAINST CAPTIVITY, *supra* note 26, at 24.

⁶⁶ THE CASE AGAINST CAPTIVITY, *supra* note 26, at 22; Jett & Ventre, *supra* note 34, at 1374.

⁶⁷ THE CASE AGAINST CAPTIVITY, *supra* note 26, at 24; Jett & Ventre, *supra* note 34, at 1374; ANIMAL WELFARE INST., MYTHS AND FACTS ABOUT ORCA CAPTIVITY 2 (2014) [hereinafter MYTHS AND FACTS], <https://awionline.org/sites/default/files/uploads/documents/AWI-OrcaCaptivity-FactSheet-02192014.pdf> [<https://perma.cc/2WCE-NZEK>].

ing whales from different social groups who would never live together in the wild, as well as the equally common practice of separating mothers from their offspring.⁶⁸

In spite of these critiques, proponents of captivity argue that the whales are healthy and well cared for according to the standards set by federal law.⁶⁹ At the same time, these proponents note that connecting orcas with people helps to promote conservation, fosters opportunities for research, and instills in the public an affinity for orcas.⁷⁰ This public appreciation for orcas is thought to give the public a better understanding of the marine environment, promote conservation generally, and instill in people a desire to take better care of the natural world.⁷¹

The plight of whales living in captivity has been a point of controversy since Namu was first brought to Seattle in 1965.⁷² In the subsequent five decades public perception and attention has oscillated.⁷³ Most recently, the wisdom of keeping whales in captivity came into question following the February 25, 2010 death of SeaWorld trainer Dawn Brancheau.⁷⁴ Brancheau died when Tilikum, SeaWorld's largest killer whale, pulled her into his tank, violently attacking and killing her as park visitors looked on.⁷⁵ Filmmakers chronicled the incident, and others like it, in the documentary *Blackfish*.⁷⁶ Widespread public viewing of the film sparked anew the long fought controversy surrounding holding killer whales living in captivity and is credited for changing attitudes towards captivity.⁷⁷

⁶⁸ THE CASE AGAINST CAPTIVITY, *supra* note 26, at 24; MYTHS AND FACTS, *supra* note 67, at 1–2. In the wild, the mother-child bond is maintained throughout the life of the whales. Jett & Ventre, *supra* note 34, at 1374–75.

⁶⁹ KILLER WHALE CARE, CONSERVATION AND EDUCATION, *supra* note 60, at 7.

⁷⁰ *Id.* at 7, 8. Indeed prior to the 1960s when orcas first were held in captivity the whales were feared as man-eaters, but have come to be loved by humans. Manby, *supra* note 23.

⁷¹ KILLER WHALE CARE, CONSERVATION AND EDUCATION, *supra* note 60, at 1.

⁷² Frontline, *supra* note 1.

⁷³ See KIRBY, *supra* note 10, at 197. The film *Free Willy* was a fictional account of a young boy's efforts to free a killer whale living in inadequate conditions. FREE WILLY (Warner Brothers 1993). The film's animal star, Keiko, became a celebrity in his own right and the public called for him to be set free from the Mexican theme park that kept him in conditions similar to those seen in the film. KIRBY, *supra* note 10, at 199–200; see FREE WILLY, *supra*. In December 2003, more than five years after his release, Keiko died before he could be fully re-acclimated to life as a wild whale. KIRBY, *supra* note 10, at 279. Keiko's cause of death remains unknown, though observers believe that he died of pneumonia. *Id.*

⁷⁴ See Associated Press, *Whale Kills a Trainer at SeaWorld*, N.Y. TIMES, Feb. 25, 2010 at A1.

⁷⁵ *Id.*

⁷⁶ BLACKFISH (Magnolia Pictures 2013). Tilikum had previously killed a trainer when he lived at Marineland of the Pacific and was believed to be responsible for the mysterious death of a man who had snuck into SeaWorld after hours and was found dead the next day in Tilikum's tank. HARGROVE, *supra* note 10, at 98; KIRBY, *supra* note 10, at 20, 258–59; BLACKFISH, *supra*.

⁷⁷ 160 CONG. REC. H5265, H5294 (2014); Caty Borum Chattoo, *Breaking Down the Impact of "Blackfish"*, CTR. FOR MEDIA & SOC. IMPACT (Jan. 5, 2015), <http://www.cmsimpact.org/blog/media->

Renewed attention to the issue has caused several states as well as the federal government to reconsider whether keeping orcas captive should continue.⁷⁸ On June 11, 2014 Congress unanimously voted to amend the Agriculture Appropriations Act to set aside one million dollars to fund the study of captive marine mammals.⁷⁹ It was intended that the results from this study would be used to update federal regulations governing the care of captive marine mammals.⁸⁰ Despite unanimous bipartisan support for this specific amendment, the larger bill has not yet passed.⁸¹ More recently, Congressman Adam Schiff proposed amendments to the Marine Mammal Protection Act that would phase out the public display of killer whales in the United States.⁸²

C. Whale Procurement for Public Display Contributes to Wild Orca Population Depletion

Initially, orcas were procured for public display by removing them from the wild.⁸³ In the early years, Ted Griffin and his partner Don Goldsberry took orcas from the area around Washington and British Columbia.⁸⁴ After working with Namu, Griffin had learned a great deal about orcas and was able to parlay

impact/breaking-down-impact-blackfish [<https://perma.cc/37PK-AVQB>]; Colby Itkowitz, *After "Blackfish," SeaWorld Hurt Financially But Keeps Up Political Spending*, WASH. POST (Aug. 19, 2014), <https://www.washingtonpost.com/blogs/in-the-loop/wp/2014/08/19/after-blackfish-seaworld-hurt-financially-but-keeps-up-political-spending/> [<https://perma.cc/CDC7-DVD4>].

⁷⁸ Orca Responsibility and Care Advancement Act of 2015, H.R. 4019, 114th Cong. (2015); Sandra Pedicini, *Orca Bills Being Studied in California, Florida*, ORLANDO SENTINEL (Jan. 25, 2015) [hereinafter Pedicini, *States*], <http://www.orlandosentinel.com/business/os-cfb-tourism-01-26-2015-20150125-story.html> [<https://perma.cc/PQ2C-BNQE>].

⁷⁹ Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2015, H.R. 4800, 113th Cong. (2014); H. Amdt. 855, 113th Cong. (2014); Press Release, Congressman Adam Schiff, Reps. Huffman and Schiff Pass Amendment Directing USDA to Update Rules Protecting Captive Orcas and other Marine Mammals (June 11, 2014) [hereinafter Amendment Press Release], <http://huffman.house.gov/media-center/press-releases/reps-huffman-and-schiff-pass-amendment-directing-usda-to-update-rules> [<https://perma.cc/KMG6-SE8W>].

⁸⁰ 160 CONG. REC. H5265, H5294 (2014); Nicole Charky, *Congress Attempts to Change Captivity Rules for Orcas, Marine Life*, L.A. TIMES (June 12, 2014), <http://www.latimes.com/tn-blr-congress-attempts-to-change-captivity-rules-for-orcas-marine-life-20140612-story.html> [<https://perma.cc/6TSD-QXQD>].

⁸¹ H.R. 4800; Amendment Press Release, *supra* note 79.

⁸² Press Release, Congressman Adam Schiff, Rep. Schiff to Introduce ORCA Act to Phase Out Display of Captive Killer Whales (Nov. 6, 2015), <http://schiff.house.gov/news/press-releases/rep-schiff-to-introduce-orca-act-to-phase-out-display-of-captive-killer-whales> [<https://perma.cc/9VYX-6SCU>]; *Orca Responsibility and Care Advancement ("ORCA") Act*, ANIMAL WELFARE INST., <https://awionline.org/content/orca-responsibility-and-care-advancement-orca-act> [<https://perma.cc/2FYN-LK44>]; see H.R. 4019.

⁸³ KIRBY, *supra* note 10, at 150; POLLARD, *supra* note 3, at 35.

⁸⁴ POLLARD, *supra* note 3, at 53; NAT'L MARINE FISHERIES SERV., NAT'L OCEANIC & ATMOSPHERIC ADMIN., RECOVERY PLAN FOR SOUTHERN RESIDENT KILLER WHALES (*ORCINUS ORCA*), at II-50 (2008).

that knowledge into a niche industry supplying marine mammal parks with orcas for display and performance.⁸⁵

Griffin and Goldsberry used a system of nets called purse seines to capture orcas.⁸⁶ Sometimes the whales would swim in to the netting on their own, but usually they were herded into the nets using boats, seaplanes, firecrackers, or whatever means necessary to move the whales.⁸⁷ The process of capturing whales in the wild often resulted in physical injury to the whales and caused the animals great emotional stress, both conditions which often led to the animals' death.⁸⁸

From 1962 to 1977, when Goldsberry ran his whale catching operation in the Puget Sound, between 275 and 307 orcas were captured; of those whales fifty-five were sold to public display facilities, approximately one dozen died, and the rest escaped or were released.⁸⁹ Most of the whales captured by Griffin and Goldsberry were members of a particular group known as the Southern Resident population.⁹⁰

Removal from the wild had an extreme adverse impact on the Southern Resident population.⁹¹ By 1971, the population of Southern Resident whales living off the coast of Washington and British Columbia had fallen to only sixty-seven, from a previous high of roughly two hundred orcas.⁹² On November 18, 2005, after years of study, the National Marine Fisheries Service and the National Oceanic Atmospheric Administration promulgated a final rule to list the Southern Resident Killer Whales as endangered.⁹³ The rule made specific note of the role that live capture for public display played in the dramatic reduction of the population.⁹⁴ As of December 31, 2015, the Southern Resident

⁸⁵ See POLLARD, *supra* note 3, at 46.

⁸⁶ KIRBY, *supra* note 10, at 79. Purse seines are nets commonly used in commercial fishing operations. *Id.* The nets are connected at the bottom by rings and when a fish or whale enters the netted area the net can be closed around them by pulling a rope to form a pouch trapping whatever has swam inside. *Id.*

⁸⁷ KIRBY, *supra* note 10, at 79; POLLARD, *supra* note 3, at 46; BLACKFISH, *supra* note 76.

⁸⁸ KIRBY, *supra* note 10, at 153; THE CASE AGAINST CAPTIVITY, *supra* note 26, at 9. This practice continues to be used for the live capture of dolphins and beluga whales. A FALL FROM FREEDOM: SEA MAMMALS IN CAPTIVITY (Films Media Group 2011).

⁸⁹ NAT'L MARINE FISHERIES SERV., *supra* note 84, at II-50, -51.

⁹⁰ *Id.* at II-52. Southern Resident Killer Whales are a subset of the resident ecotype comprised of three matrilineal groupings: J Pod, K Pod, and L Pod. *Id.* It is estimated that seventy percent of the whales taken during this fifteen-year period came from the Southern Resident Population. *Id.*

⁹¹ See *id.* at II-54.

⁹² *Id.* Population attrition over this period of time has also been attributed to a number of human factors including pollution by toxic chemicals, increased boat traffic, and oil spills. Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. 69,903, 69,908 (Nov. 18, 2005) (to be codified at 50 C.F.R. pt. 224). These man-made issues cause problems for the whales and have also led to a decrease in the orcas food supply. *Id.*

⁹³ Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. at 69,903.

⁹⁴ *Id.* at 69,908.

Orca population in the Puget Sound has made a small recovery, with a population size of eighty-four whales.⁹⁵

In 1985, SeaWorld became the first zoological institution to successfully breed killer whales in captivity and since that time SeaWorld's breeding program has produced thirty-two killer whales.⁹⁶ The ability to breed whales in captivity has allowed SeaWorld to maintain its orca population without taking animals from the wild.⁹⁷ Currently, the majority of SeaWorld's whale population was born in captivity.⁹⁸ In a historic announcement, SeaWorld announced on March 17, 2016 that it would end its captive breeding program.⁹⁹ Nearly one month later, the last orca was born in captivity.¹⁰⁰

II. LEGAL PROTECTION OF CAPTIVE ORCAS IS INADEQUATE

Concern for the welfare of animals is an essential part of civilized society.¹⁰¹ Much of this concern, though, is not rooted unselfishly in an interest in the wellbeing of animals, but rather is a human-centric concern.¹⁰² In this regard, philosophers have long noted that the mistreatment of animals eventually leads humans to mistreat one another.¹⁰³ Other theorists note that humans rec-

⁹⁵ *Orca Population*, CTR. FOR WHALE RESEARCH, <http://www.whaleresearch.com/#!orca-population/cto2> [<https://perma.cc/XT8R-WL6U>]. The goal to have the animals delisted is for the population to reach 155 by 2029. NAT'L MARINE FISHERIES SERV., *supra* note 84, at IV-4.

⁹⁶ KIRBY, *supra* note 10, at 43; 2014 ANNUAL REPORT, *supra* note 20, at 12. The success of the captive breeding program has created a secondary market for captive orcas, making it so that adult whales have significant reproductive value in addition to their display value. *See* KIRBY, *supra* note 10, at 326, 331; Meghan J. Rechberg, *Dying to Entertain Us or Living to Educate Us? A Comprehensive Investigation of Captive Killer Whales, Their Trainers, and How the Law Must Evolve to Meet Their Needs*, 31 J. OF THE NAT'L ASS'N OF ADMIN. L. 720, 749-50; Rose, *supra* note 45.

⁹⁷ KILLER WHALE CARE, CONSERVATION AND EDUCATION, *supra* note 60, at 2; *see* KIRBY, *supra* note 10, at 154; 2014 ANNUAL REPORT, *supra* note 20, at 12. SeaWorld has not taken any orcas from the wild in almost thirty years, even though it is still legal for them to do so with a permit under the Marine Mammal Protection Act. Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. at 69,908; Olivia Lowenberg, *Why SeaWorld Is Suing California to Keep Breeding Orcas*, CHRISTIAN SCI. MONITOR (Oct. 17, 2015), <http://www.csmonitor.com/Environment/2015/1017/Why-SeaWorld-is-suing-California-to-keep-breeding-orcas>. [<http://perma.cc/67S3-ZTCY>]; *see* 16 U.S.C. § 1374 (2012); 50 C.F.R. § 216.3 (2016).

⁹⁸ 2014 ANNUAL REPORT, *supra* note 20, at 12; ORCAS IN CAPTIVITY, *supra* note 21.

⁹⁹ Chan, *supra* note 23; Manby, *supra* note 23.

¹⁰⁰ Alex Johnson, *SeaWorld's Last Baby Killer Whale Born at Texas Park*, NBC NEWS (Apr. 19, 2017, 11:21PM), <http://www.nbcnews.com/news/us-news/seaworld-s-last-baby-killer-whale-born-texas-park-n748681> [<https://perma.cc/MTW2-JDJ2>].

¹⁰¹ *See* RUDY, *supra* note 26, at 4; *see also* Chief Seattle, *We May Be Brothers After All*, 13 ENV'T'L POL'Y & L. 148, 149 (1976) ("If all the beasts were gone, man would die from a great loneliness of spirit. For whatever happens to the beast also happens to the man.")

¹⁰² RUDY, *supra* note 26, at 9; *see* CHRISTOPHER BELSHAW, ENVIRONMENTAL PHILOSOPHY: REASON, NATURE AND HUMAN CONCERN 93 (2001).

¹⁰³ *See* Tom Regan, *Animal Rights, Human Wrongs* in ENVIRONMENTAL PHILOSOPHY: FROM ANIMAL RIGHTS TO RADICAL ECOLOGY 39 (Michael E. Zimmerman et al. eds., 2005) [hereinafter Regan, *Animal Rights*].

ognize in animals the capacity to feel pain and to suffer in a way that is analogous to the human experience.¹⁰⁴ The capacity of animals to feel harm and to suffer elicits an empathetic response that stimulates human action to put an end to this suffering.¹⁰⁵ Concurrently, this empathy towards animals is tempered by the desire to pursue important human interests.¹⁰⁶ As such, concern for the wellbeing of animals is not limitless, but rather is constrained by human desire to use animals towards personal aims, such as eating meat, medical research, and wearing fur and leather.¹⁰⁷

A. Federal Law Is Insufficient

In the United States, animal protection laws seek to harmonize the desire to use animals in furtherance of human aspirations with the competing desire to minimize animal suffering.¹⁰⁸ Under this utilitarian model, animal welfare laws in the United States subject public display facilities to a complex web of statutory and regulatory provisions that seek to allow these facilities to profit from displaying the animals, but to make sure that the animals are maintained in good health.¹⁰⁹ The facilities that display captive orcas contend that these legal protections are sufficient to keep captive orcas safe and healthy and in fact, SeaWorld spends hundreds of thousands of dollars on lobbying efforts to keep the current legislative and regulatory structure in place.¹¹⁰

¹⁰⁴ See TOM REGAN, ANIMAL RIGHTS, HUMAN WRONGS 31, 35 (2005); Regan, *Animal Rights* *supra* note 103, at 43.

¹⁰⁵ See BELSHAW, *supra* note 102, at 94; RUDY, *supra* note 26, at 9–10.

¹⁰⁶ See REGAN, *supra* note 104, at 31; Regan, *Animal Rights*, *supra* note 103, at 50; Joan E. Schaffner, *Blackfish and Public Outcry: A Unique Political And Legal Opportunity For Fundamental Change to the Legal Protection of Marine Mammals in the United States in ANIMAL WELFARE—INTERNATIONAL PERSPECTIVES* 237, 253 (Deborah Cao & Steven White eds., 2016).

¹⁰⁷ REGAN, *supra* note 104, at 31.

¹⁰⁸ See S. REP. NO. 92-1136, at 1 (1973); S. REP. NO. 92-863, at 1 (1972); H.R. REP. NO. 91-1651, at 2 (1970).

¹⁰⁹ See 7 U.S.C. § 2143 (mandating that public display facilities are subject to standards of care promulgated by the Secretary of the Department of Agriculture); 16 U.S.C. § 1371 (mandating that public display facilities must have a permit in order to take marine mammals from the wild); 16 U.S.C. § 1538 (mandating that public displays holding animals that have been listed as endangered are prohibited from taking them in the broad sense of the term); 9 C.F.R. § 3.104 (mandating that public display facilities comply with minimum space requirements).

¹¹⁰ KILLER WHALE CARE, CONSERVATION AND EDUCATION, *supra* note 60, at 2, 11; Itkowitz, *supra* note 77; Sandra Pedicini, *SeaWorld Boosts Lobbying, Campaign Spending as It Seeks Political Clout*, ORLANDO SENTINEL (Aug. 22, 2015) [hereinafter Pedicini, *Lobbying*], <http://www.orlando.sentinel.com/business/tourism/os-seaworld-lobbying-20150822-story.html> [https://perma.cc/PYR7-46A2].

1. The Marine Mammal Protection Act

Enacted in 1972, the Marine Mammal Protection Act (“MMPA”) makes it illegal to take marine mammals or marine mammal products without a permit.¹¹¹ Permits are available for a variety of uses, including research and public display.¹¹² This MMPA arises from congressional concern about the danger that human activity poses to marine mammal populations, specifically as it pushes those species towards extinction, and reflects a policy decision that recognizes the economic and biologic significance of marine mammals.¹¹³ As this law applies to marine parks, like SeaWorld and the Miami SeaQuarium, that display captive orcas, it governs their ability to obtain orcas from the wild.¹¹⁴ Under the MMPA, public display facilities may take orcas from the wild with a permit.¹¹⁵ Public Display facilities in the United States have not taken orcas from the wild since captive breeding became possible in the 1980s.¹¹⁶

The MMPA has been an important control on the practice of live capture for public display.¹¹⁷ The Act’s permitting process imposed much needed oversight on the live capture industry.¹¹⁸ Unregulated, the live capture of orcas depleted the population of Southern Resident orcas so that even some four decades after the MMPA effectively put a stop to live capture the Southern Resident orcas were still listed as endangered.¹¹⁹

So while it has done some good to limit population depletion, the MMPA fails to ensure whales that have been taken from the wild satisfy the education and conservation goals that justify their capture as required under the Act’s permitting structure.¹²⁰ In this manner, there are no mechanisms in place to

¹¹¹ Marine Mammal Protection Act, Pub. L. 92-522, 86 Stat. 1027 (1972) (codified as amended at scattered sections of 16 U.S.C.).

¹¹² 16 U.S.C. § 1371 (2012).

¹¹³ *Id.* §§ 1361, 1371.

¹¹⁴ *See id.* § 1371; 50 CFR § 216.3 (2016).

¹¹⁵ 16 U.S.C. § 1374 (2012). The permitting process vests significant discretion in the Secretary of Commerce to authorize permits under the Marine Mammal Protection Act (“MMPA”). *See id.*

¹¹⁶ *See id.*; ALEXANDER LLERANDI, CAL. COASTAL COMM’N, STAFF REPORT TH14A, at 21 (2015).

¹¹⁷ *See POLLARD, supra* note 3, at 123–24.

¹¹⁸ Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. at 69,908; PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS ET AL., BEFORE THE SECRETARY OF COMMERCE PETITION TO INCLUDE THE *ORCINUS ORCA* KNOWN AS LOLITA IN THE ENDANGERED SPECIES ACT LISTING OF THE SOUTHERN RESIDENT KILLER WHALES 7 (2013) [hereinafter *LOLITA LISTING PETITION*], <https://www.regulations.gov/document?D=NOAA-NMFS-2013-0056-0002> [<https://perma.cc/KCX6-6D8D>] (petition is available for download by selecting the PDF icon).

¹¹⁹ Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. at 69,908; *LOLITA LISTING PETITION, supra* note 118, at 7.

¹²⁰ Stephanie Dodson Dougherty, *The Marine Mammal Protection Act, Fostering Unjust Captivity Practices Since 1972*, 28 J. LAND USE & ENV’T L. 337, 343 (2013).

ensure that public display facilities who have been permitted to remove these animals from their natural habitat are using them for purposes consistent with the MMPA.¹²¹ This limits the reach of the MMPA so that it does not necessarily protect captive marine mammals, but rather has mostly been successful in protecting marine mammals in the wild.¹²²

2. The Animal Welfare Act

The care and maintenance of captive orcas is federally regulated pursuant to the Animal Welfare Act (“AWA”).¹²³ This piece of legislation sets minimum standards for handling, care, and treatment of a broad range of animals—from laboratory mice to apex predators like the orca.¹²⁴ Under the statute, marine mammal parks that hold orcas for public display are considered exhibitors.¹²⁵ As exhibitors, marine mammal parks are bound by the standards of care set out for large cetaceans.¹²⁶ The specific intent of this law is to set a federal floor and involve the states in regulating animal welfare.¹²⁷

The United States Department of Agriculture (“USDA”) enforces the AWA through the Animal and Plant Health Inspection Service (“APHIS”).¹²⁸ The USDA sets out minimum care standards through an informal rulemaking process and then APHIS is responsible for enforcing the standards.¹²⁹ Currently, the regulations set out by the USDA require that large cetaceans, a group that includes orcas as well as bottlenose dolphins, minke whales, narwhals, and belugas, be housed in a pool that is generally kept in good repair, protects the animals from the viewing public, provides shelter from weather and direct sunlight, and meets basic sanitation requirements.¹³⁰ The regulations also require that pools comply with minimum space requirements measured by four criteria, minimum horizontal dimension, depth, surface area, and volume.¹³¹

¹²¹ *Id.* at 344.

¹²² *See id.* at 341.

¹²³ *See* Animal Welfare Act, Pub. L. 89-544, 80 Stat. 350 (codified as amended at 7 U.S.C. §§ 2132–2159) (2012).

¹²⁴ 7 U.S.C. § 2132(h) (2012).

¹²⁵ *See id.* (defining exhibitor as “any person . . . exhibiting any animals, which were purchased in commerce, or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation”).

¹²⁶ *See* 7 U.S.C. §§ 2132(g), (h), 2143 (2012); 9 C.F.R. § 3.104 (2016).

¹²⁷ *See* 7 U.S.C. §§ 2143(a)(8), 2145(b).

¹²⁸ 7 U.S.C. §§ 2146, 2147 (2012); Jett & Ventre, *supra* note 34, at 1374.

¹²⁹ 7 U.S.C. § 2143; 9 C.F.R. § 3.104. The Administrative Procedure Act requires that agencies publish notice of the intent to promulgate a rule in the Federal Register, after this notice is published agencies must accept public comments on the proposed rule, and the comments must be considered before setting out the final rule. 5 U.S.C. § 553 (2012); Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 112, 114 (2003).

¹³⁰ 9 C.F.R. §§ 3.101–.103 (2016).

¹³¹ *Id.* § 3.104.

Legal practitioners and animal rights groups have argued that the regulations governing standards of care are inadequate; however courts generally have given great deference to agencies in promulgating the rules that set care standards.¹³² A primary criticism from these groups is that even in enclosures that comply with AWA standards captive orcas are generally unable to move and behave as they would in the wild.¹³³ Second, neither the law nor its implementing regulations set out particular nutritional requirements, rather the regulations require only that the food be of “sufficient quantity and nutritive value to maintain marine mammals in a state of good health.”¹³⁴ Third, the AWA’s implementing regulations do little to preserve the social bonds, such as between mother and child, that are so essential to orca life in the wild.¹³⁵ Finally, the AWA establishes no breeding criteria, leaving marine mammal parks to self police and conduct breeding programs without federal oversight.¹³⁶

On top of these shortcomings, the AWA, in practice, is seldom enforced.¹³⁷ An internal audit of enforcement procedures criticized APHIS inspectors for failing to properly document violations and for negotiating small financial penalties when a violation was identified.¹³⁸ Further, the report was critical of the AWA as a whole because the law provides no real process to force compliance beyond financial penalties.¹³⁹ Compounding this issue fur-

¹³² See Collette L. Adkins Giese, *Twenty Years Wasted: Inadequate USDA Regulations Fail to Protect Primate Psychological Wellbeing*, 1 J. ANIMAL L. & ETHICS 221, 234–35 (2006) (noting and disagreeing with the high level of deference afforded to the agency); *Animal Legal Defense Fund v. Glickman*, 204 F.3d 229, 233 (D.C. Cir. 2000) (upholding agency standard of care even though the court acknowledged that the standards were very low).

¹³³ HARGROVE, *supra* note 10, at 72; THE CASE AGAINST CAPTIVITY, *supra* note 26, at 35; 2014 ANNUAL REPORT, *supra* note 20, at 7; John S. Jett & Jeffrey M. Ventre, *Keto & Tilikum Express the Stress of Orca Captivity*, THE ORCA PROJECT (Jan. 20, 2011) [hereinafter *Stress of Orca Captivity*], <https://theorcaproject.wordpress.com/2011/01/20/keto-tilikum-express-stress-of-orca-captivity/> [https://perma.cc/5GHR-9FKE]. In the wild, orcas can swim as many as one hundred miles in a day. *Stress of Orca Captivity, supra*. The size of the enclosures force the whales to spend more time at the surface than they normally would in the wild. *Stress of Orca Captivity, supra*. This excess time at the surface makes the whales susceptible to physical stressors, such as sunburn and dorsal fin collapse. KIRBY, *supra* note 10, at 101; POLLARD, *supra* note 3, at 101; *Stress of Orca Captivity, supra*. Dorsal fin collapse is present in all captive male orcas; however it occurs in less than one percent of wild orcas. *Stress of Orca Captivity, supra*.

¹³⁴ 9 C.F.R. § 3.105.

¹³⁵ See *id.* § 3.109. This regulation merely states that animals that are primarily social in the wild must have a companion animal that is a biologically related species in their primary enclosure. *Id.*

¹³⁶ See *id.* §§ 3.100–.118 (regulations covering facilities standards, feeding, water quality, sanitation, employees, separation, veterinary care, and regulations of the animals in transit).

¹³⁷ Carole Lynn Nowicki, *The Animal Welfare Act: All Bark and No Bite*, 23 SETON HALL LEGIS. J. 443, 467 (1999); GIL H. HARDEN, U.S. DEP’T. OF AGRIC., OFFICE OF INSPECTOR GEN., ANIMAL AND PLANT HEALTH INSPECTION SERVICE ANIMAL CARE PROGRAM INSPECTIONS OF PROBLEMATIC DEALERS 8–9 (2010), <https://www.usda.gov/oig/webdocs/33002-4-SF.pdf> [https://perma.cc/RV8T-DK77].

¹³⁸ HARDEN, *supra* note 137, at 8–9.

¹³⁹ *Id.*

ther is that the AWA does not include a provision for citizen enforcement and oftentimes plaintiffs' claims under this act are dismissed for lack of standing because they cannot show the requisite harm.¹⁴⁰

An additional failing of the AWA is the lack of concurrent state regulation.¹⁴¹ Although the AWA intended for States to be involved in regulating animal welfare under their police power, States have largely failed to act, leaving zoos and aquariums to self-police.¹⁴² This self-regulation has created a conflict of interest for marine life parks that cannot address both the expensive needs of captive orcas and the fiscal demands of corporate shareholders.¹⁴³

Looking to the states where orcas are currently held for public display—California, Florida, and Texas—each state treats captive orcas differently.¹⁴⁴ Texas does not currently have legislation regarding the captive care of marine mammals.¹⁴⁵ In contrast, California recently banned captive breeding and theatrical shows, effectively enshrining SeaWorld's new corporate policy.¹⁴⁶ Under this new law, the eleven whales currently held at SeaWorld San Diego may still be held at the park, but they may only be used for education.¹⁴⁷ Florida strikes a more moderate tone in its legislation and imposes some permitting and inspections requirements owners of captive wildlife, though the state's regulations do not mention orcas specifically.¹⁴⁸ In an effort to ensure adequate care of captive wildlife, Florida state law subjects public display facilities to surprise inspections by Fish & Wildlife Commission Officers.¹⁴⁹ These inspec-

¹⁴⁰ Katharine M. Swanson, Note, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J.L. REFORM 937, 943–44 (2002); see *Animal Legal Defense Fund v. Espy*, 23 F.3d 496, 498, 503 (D.C. Cir. 1994) (dismissing plaintiff's case for failure to meet constitutional standing requirements).

¹⁴¹ See Alyce Miller & Anuj Shah, *Invented Cages: The Plight of Wild Animals in Captivity*, 1 J. OF ANIMAL L. 23, 56 (2005). Unlike the MMPA, the Animal Welfare Act ("AWA") specifically invites concurrent state regulation. Compare 7 U.S.C. § 2143(a)(8) (2012) (specifically allowing state action with regard to the actions covered by the AWA), with 16 U.S.C. § 1379 (2012) (specifically preempting state action with regard to the actions covered by the MMPA).

¹⁴² Dougherty, *supra* note 120, at 339; see RUDY, *supra* note 26 at 149.

¹⁴³ RUDY, *supra* note 26, at 125; see 2014 ANNUAL REPORT, *supra* note 20, at 3.

¹⁴⁴ See Kristin Hugo, *Orca Shows and Breeding Banned in California*, NAT'L GEOGRAPHIC (Sept. 14, 2016), <http://news.nationalgeographic.com/2016/09/california-bans-SeaWorld-orca-breeding-entertainment/> [<https://perma.cc/6HBA-BQCT>] (discussing California's new ban on breeding of orcas and similar laws in other states); Pedicini, *States*, *supra* note 78 (discussing the California bill and similar pieces of legislation being considered in other states).

¹⁴⁵ See Hugo, *supra* note 144.

¹⁴⁶ CAL. FISH & GAME CODE § 4502.5 (West 2017); see Hugo, *supra* note 144; *supra* notes 23, 99 and accompanying text (discussing SeaWorld's historic announcement).

¹⁴⁷ CAL. FISH & GAME CODE § 4502.5; see Hugo, *supra* note 144.

¹⁴⁸ See FLA. ADMIN. CODE ANN. r. 68A-6.002 (2017) (providing a list of the kinds of captive wildlife subject to state regulation, but not listing orcas specifically). Compare CAL. FISH & GAME CODE § 4502.5 (banning the breeding of captive orcas and their display except for educational purposes), with FLA. STAT. § 379.304 (2016) (regulating the exhibition of captive wildlife).

¹⁴⁹ FLA. STAT. § 379.304.

tions ensure that captive wildlife are not being mistreated or neglected.¹⁵⁰ Florida law does not offer additional guidance on what is required to successfully make a showing of proper treatment and the accompanying regulations do not set out any criteria for captive orcas, but rather indicate that this area of state legislation is intended to govern the care of wildlife kept as domestic pets and not wildlife kept in public display facilities.¹⁵¹

3. The Endangered Species Act

The Endangered Species Act (“ESA”) was enacted on December 28, 1973 in recognition of the need to impose restraint on human activity in the name of conservation.¹⁵² The legislation specifically notes the negative impact that human economic activity has had on certain species of wildlife, namely depleting certain populations until they near extinction, or in fact become extinct.¹⁵³ In this regard, the ESA sets out five criteria to determine whether a species is endangered or threatened to an extent that would merit inclusion on the list: (1) present or threatened destruction, modification, or curtailment of its habitat; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; and (5) natural or manmade factors affecting continued existence.¹⁵⁴

Species included on the Endangered Species List are subject to periodic monitoring of their population.¹⁵⁵ Once a species reaches the desired population indicated in their recovery plan they are removed from the endangered species list.¹⁵⁶ While the species is listed they are subject to special protections designed to aid in population recovery.¹⁵⁷ One such protection is a prohibition against the taking of any species listed as endangered.¹⁵⁸ Take is broadly defined under the act to include both harm and harassment of animals, and attempting to harm or harass endangered animals.¹⁵⁹ The implementing regulations further fleshes out this definition of take stating that any activity that is prohibitive of natural behavior patterns constitutes a take, but make a limited exception for standard captivity practices.¹⁶⁰

¹⁵⁰ *Id.*

¹⁵¹ FLA. ADMIN. CODE ANN. r. 68A-6.004, 68A-6.0023 (2017).

¹⁵² Endangered Species Act, Pub. L. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544).

¹⁵³ *Id.*

¹⁵⁴ 16 U.S.C. §1533 (2012).

¹⁵⁵ *Id.* § 1533(c)(2).

¹⁵⁶ *Id.* § 1533(f)(1).

¹⁵⁷ *Id.* § 1538.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* § 1532(19).

¹⁶⁰ *Id.*; 50 C.F.R. § 17.3 (2016).

In spite of this, the protections available to orcas under the ESA are limited in scope.¹⁶¹ Considered globally, orcas do not face the same threat of extinction that the Southern Resident orcas face.¹⁶² In this regard, orcas as a global species are not eligible for ESA protection, but the Southern Resident Killer Whales as a subspecies have been listed and accordingly receive the additional protection available under the ESA.¹⁶³ Only one of the total number of captive orcas, the Miami SeaQuarium's Lolita, is currently protected by the ESA because she has been genetically linked to the Southern Resident orcas.¹⁶⁴

Unlike the MMPA and the AWA, the ESA does allow private citizens to bring an action against any person or government agency to enjoin activity that would constitute a take.¹⁶⁵ Further the law makes it so that such actions can also be used to compel the Secretary of the Interior to adequately enforce the law.¹⁶⁶ Though outwardly very useful, this provision often poses a difficulty in that citizens struggle to establish standing in order to bring a claim.¹⁶⁷

¹⁶¹ See *Animal Legal Defense Fund v. U.S. Dep't of Agric.*, 789 F.3d at 1225; POLLARD, *supra* note 3, at 99, 101; *Questions and Answers on NOAA Fisheries Final Rule on a Petition to Include Lolita in the ESA Listing of Southern Resident Killer Whales*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES (Feb. 2015), http://www.westcoast.fisheries.noaa.gov/protected_species/marine_mammals/killer_whale/24_esa_status_-_lolita_final_rule.html [<https://perma.cc/Y6BM-Q7YP>].

¹⁶² *CTR. FOR BIOLOGICAL DIVERSITY ET AL., PETITION TO LIST THE SOUTHERN RESIDENT KILLER WHALE (ORCINUS ORCA) AS AN ENDANGERED SPECIES UNDER THE ENDANGERED SPECIES ACT 46 (2001)* [hereinafter *CBD LISTING PETITION*], http://www.biologicaldiversity.org/species/mammals/Puget_Sound_killer_whale/pdfs/petition.pdf [<https://perma.cc/5LDJ-RBEL>]; see 16 U.S.C. § 1533; *Endangered and Threatened Wildlife and Plants: 12-Month Finding or a Petition to List Southern Resident Killer Whales as Threatened or endangered Under the Endangered Species Act (ESA)*, 67 Fed. Reg. 44,133, 44,134 (July 1, 2002) (to be codified at 50 C.F.R. pts. 523, 524).

¹⁶³ See 16 U.S.C. § 1533; *Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales*, 70 Fed. Reg. at 69,903; *CBD LISTING PETITION*, *supra* note 162, at 46. *Compare* *Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales*, 70 Fed. Reg. at 69,907–08 (final rule stating that the Southern Resident Killer Whales are a distinct population segment and listing them as endangered pursuant to the Endangered Species Act), *with* *Endangered and Threatened Wildlife and Plants: 12-Month Finding or a Petition to List Southern Resident Killer Whales as Threatened or endangered Under the Endangered Species Act (ESA)*, 67 Fed. Reg. at 44,134 (final rule stating that the Southern Resident Killer Whales are not a distinct population segment and listing them as endangered pursuant to the Endangered Species Act is not warranted).

¹⁶⁴ See 16 U.S.C. § 1533; 50 C.F.R. § 224.101; *Listing Endangered or Threatened Species: Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment*, 80 Fed. Reg. 7380, 7382–83 (Feb. 10, 2015) (to be codified at 50 C.F.R. pt. 224).

¹⁶⁵ 16 U.S.C. § 1540 (2012).

¹⁶⁶ *Id.*

¹⁶⁷ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (holding the party bringing the claim must show the injury is particularized, so that that party is the one to suffer injury); *Am. Soc'y for the Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 28 (D.C. Cir. 2011) (holding the party bringing the suit must have sufficient personal attachment to animals in order to suffer injury to satisfy standing requirement).

4. Federal Reform Efforts Have Failed to Bring About Real Change

On November 16, 2015 Congressman Adam Schiff, representing California's Twenty-Eighth District, proposed the Orca Responsibility and Care Advancement ("ORCA") Act of 2015.¹⁶⁸ This piece of legislation would amend federal law as it pertains to the public display of orcas, but would not impact other captive animals.¹⁶⁹ The bill proposes that the MMPA ban altogether the taking, importation, and exportation of orcas for public display.¹⁷⁰ Under the current regulatory regime, those activities are allowed with a permit.¹⁷¹ Second, the legislation seeks to amend the AWA so as to prohibit breeding orcas for public display.¹⁷² In effect, the ORCA Act would gradually put an end to the public display of orcas because exhibitors bound by the law would have no means to replace the current population of orcas as they die off.¹⁷³

B. State Action Creates an Uncertain Future for Captive Orcas

Animal rights activists have long hoped that SeaWorld would move away from their current business model towards disbanding its captive killer whale population.¹⁷⁴ By SeaWorld's own admission, Dawn Brancheau's February 2010 death, the publicity it generated, and the subsequent release of the documentary *Blackfish*, caused a loss in consumer confidence.¹⁷⁵ In response, SeaWorld launched a massive public relations campaign aimed at changing public perceptions of how it treats its most famous residents.¹⁷⁶ As a part of the public

¹⁶⁸ Orca Responsibility and Care Advancement Act of 2015, H.R. 4019, 114th Cong. (2015); 28th District, CONGRESSMAN ADAM SCHIFF, <http://schiff.house.gov/28th-district> [<https://perma.cc/YD4S-LCPJ>].

¹⁶⁹ H.R. 4019.

¹⁷⁰ *Id.*

¹⁷¹ 16 U.S.C. § 1371 (2012).

¹⁷² H.R. 4019.

¹⁷³ *See id.*

¹⁷⁴ *See* KIRBY, *supra* note 10, at 147–48; Kaplan, *supra* note 13; *PETA and Orcas Prepare for Groundbreaking Legal Case*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, <http://www.peta.org/features/wild-captured-orcas-make-legal-history/> [<https://perma.cc/4FHA-SWB9>]. Experts differ on the best course of action for the immediate future as the feasibility of releasing the animals back into the wild or keeping them in sea pens is not clear. WILLIAMS, *supra* note 59, at 15; Stav Ziv, *How to Retire Captive Orcas: The Sea Sanctuaries of the Future*, NEWSWEEK (Nov. 11, 2015), <http://www.newsweek.com/retire-captive-orcas-sea-sanctuaries-392943> [<https://perma.cc/A9G5-4WNP>].

¹⁷⁵ *See* 2014 ANNUAL REPORT, *supra* note 20, at 22. In the years following the film's release SeaWorld reported a decrease in park attendance and earnings. Maya Rhodan, *SeaWorld's Profits Drop 84% After Blackfish Documentary*, TIME (Aug. 6, 2015), <http://time.com/3987998/seaworlds-profits-drop-84-after-blackfish-documentary/> [<http://perma.cc/DX3C-GJAN>]; *see* 2014 ANNUAL REPORT, *supra* note 20, at 42–43.

¹⁷⁶ *See* Olivia Lowenberg, *Why SeaWorld Wants Two New Tanks for Its Orcas*, CHRISTIAN SCI. MONITOR (Sept. 26, 2015), <http://www.csmonitor.com/Environment/2015/0926/Why-SeaWorld-wants-two-new-tanks-for-its-orcas> [<http://perma.cc/CR6U-V4WW>]. *See generally* Truth About Black-

relations campaign, SeaWorld announced the launch of the Blue World project.¹⁷⁷ This undertaking would dramatically increase the size of the killer whale habitats and make the habitats more closely mimic the natural environment.¹⁷⁸ SeaWorld San Diego was set to be the first park to make this change followed by Orlando and then San Antonio.¹⁷⁹ The cost of the new habitats is estimated to be \$100 million per park.¹⁸⁰

The project at the San Diego park sparked controversy when SeaWorld's coastal development permit was conditionally approved by the California Coastal Commission ("Commission") subject to the restriction that SeaWorld no longer breed killer whales at the San Diego facility.¹⁸¹ Early reports by the Commission recommended that the expansion be approved on the condition that SeaWorld not expand its collection of orcas, but allowed for the facility to replace whales lost to population attrition.¹⁸² After eight hours of public comment on the matter the Commission imposed the stricter condition.¹⁸³ This de-

fish, SEAWORLD PARKS & ENTMT' T INC., <http://seaworldcares.com/the-facts/truth-about-blackfish> [<http://perma.cc/52VY-X7J6>].

¹⁷⁷ News Release, SeaWorld Parks & Entm't Inc., SeaWorld Announces First-of-its-Kind Killer Whale Environment and More than \$10 Million in New Funding for Research and Conservation Projects (Aug. 15, 2014), <http://seaworldentertainment.com/en/media/company-news/blue-world-project/> [<http://perma.cc/E5FJ-ZRNU>].

¹⁷⁸ LLERANDI, *supra* note 116, at 16–17; 2014 ANNUAL REPORT, *supra* note 20, at 11; *Realm*, SEAWORLD PARKS & ENTMT' T INC., BLUE WORLD PROJECT, <http://blueworldproject.seaworld.com/realm/> [<http://perma.cc/BR3J-RCFU>]. The new habitats would be much bigger than the current system of pools and would feature deeper spaces for the whales to complete dives like wild whales as well as an area with fast water currents to allow the whales more exercise. LLERANDI, *supra* note 116, at 16–17; *Realm*, *supra*.

¹⁷⁹ 2014 ANNUAL REPORT, *supra* note 20, at 11.

¹⁸⁰ *Id.*

¹⁸¹ Lowenberg, *supra* note 97; Samantha Masunaga, *Can the Coastal Commission Tell SeaWorld What to Do With Its Orcas?*, L.A. TIMES (Oct. 9, 2015), <http://www.latimes.com/business/la-fi-seaworld-vote-reaction-20151009-story.html> [<https://perma.cc/263M-TT5X>]; Tony Perry, *Orca Dispute Between SeaWorld, Coastal Commission Could Go to Court*, L.A. TIMES (Oct. 11, 2015), <http://www.latimes.com/local/lanow/la-me-ln-orca-legal-dispute-20151011-story.html> [<https://perma.cc/6GPX-VV2L>]. A coastal development permit is required for any development within the coastal zone. CAL. PUB. RES. CODE § 30101.5 (West 2016). As it is used in the statute development has been broadly construed. *Gualala Festivals Comm. v. Cal. Coastal Comm'n*, 106 Cal. Rptr. 3d 908, 914–915 (Ct. App. 2010) (holding that a fireworks display is a development within the meaning of the statute); *Monterey Sand Co. Inc., v. Cal. Coastal Comm'n*, 236 Cal. Rptr. 315, 321 (Ct. App. 1987) (holding that sand excavation is a development within the meaning of the statute); *see* CAL. PUB. RES. CODE § 30106 (West 2016).

¹⁸² LLERANDI, *supra* note 116, at 7–9; Hugo Martin, *SeaWorld will sue Coastal Commission Over Orca Restrictions*, L.A. TIMES (Oct. 15, 2015), <http://www.latimes.com/business/la-fi-seaworld-challenge-coastal-commission-conditions-20151015-story.html> [<http://perma.cc/P5PD-VUUK>].

¹⁸³ LLERANDI, *supra* note 116, at 7–9; Martin, *supra* note 182.

cision meant that the killer whales currently on display at the San Diego park would be the last to live there in captivity.¹⁸⁴

Shortly after the Commission's October 8, 2015 decision SeaWorld announced plans to end the theatrical performances by killer whales that had made its park famous.¹⁸⁵ This is not to mean that it would cease to hold killer whales in captivity, but rather that its business model was moving towards a display that was more informative and conservation oriented.¹⁸⁶

Intent on continuing to display orcas at its San Diego park, SeaWorld filed suit on December 29, 2015 challenging the California Coastal Commission's authority to end its breeding program.¹⁸⁷ In the suit, SeaWorld alleges that the California Coastal Commission lacks the statutory authority to impose breeding conditions on the park's coastal development permit.¹⁸⁸

The Coastal Act gives the Commission authority over species of special biologic and economic significance.¹⁸⁹ Prior Commission decisions make clear that wild orcas would fall within the purview of the Commission; however whether the Commission can regulate captive orcas presents a novel legal question.¹⁹⁰ Traditionally, the power of the Commission has been construed broadly, but even in this context it is likely that this breeding condition exceeds the Commission's authority.¹⁹¹ The captive orcas are not within the marine zone, but rather are enclosed in a separate, artificial space.¹⁹² In this regard, the

¹⁸⁴ Martin, *supra* note 182; Hugo Martin & Samantha Masunaga, *What the Coastal Commission's Ban on Orca Breeding Means for SeaWorld*, L.A. TIMES (Oct. 10, 2015), <http://www.latimes.com/business/la-fi-1010-seaworld-followup-20151010-story.html> [<https://perma.cc/3YNY-ZCF5>].

¹⁸⁵ Daniel Victor, *Killer Whales to Take Final Bows at SeaWorld San Diego*, N.Y. TIMES (Nov. 9, 2015), http://www.nytimes.com/2015/11/10/business/seaworld-san-diego-killer-whales-shamu-show.html?_r=0 [<https://perma.cc/2VLB-WE9S>].

¹⁸⁶ *Id.*

¹⁸⁷ Petition for Writ of Mandate and Complaint for Declaratory relief at 17, *SeaWorld, LLC v. Cal. Coastal Comm'n*, No. 201500043163 (Cal. Super. Ct. Dec. 29, 2015).

¹⁸⁸ *Id.*

¹⁸⁹ CAL. PUB. RES. CODE § 30230 (West 2016); see Masunaga, *supra* note 181.

¹⁹⁰ See CAL. PUB. RES. CODE § 30230; LLERANDI, *supra* note 116, at 19 (citing prior coastal commission decisions that recognized wild orcas as a species of special significance); see also *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841–42 (1987) (challenging a condition imposed by the Commission that required property owners to allow public beach access across their property); *Sierra Club v. Cal. Coastal Comm'n*, 111 P.3d. 294, 308 (Cal. 2005) (challenging a decision by the Commission to approve a coastal development permit that straddled the coastal zone when the area outside the zone would violate the principles of the California Coastal Act); *Liberty v. Cal. Coastal Comm'n*, 170 Cal. Rptr. 247, 255 (Ct. App. 1980) (challenging a condition imposed by the Commission related to the provision of public parking spaces).

¹⁹¹ See CAL. PUB. RES. CODE §§ 30116, 30230, 30321, 30330; David Breemer, *What Property Rights: The California Coastal Commission's History of Abusing Land Rights and Some Thoughts on the Underlying Causes*, 22 UCLA J. ENVTL. L. & POL'Y 247, 251 (2004); David R. Carpenter, Note, *On the Separation of Powers Challenge to the California Coastal Commission*, 79 N.Y.U. L. REV. 281, 289–90 (2004).

¹⁹² LLERANDI, *supra* note 116, at 10; see CAL. PUB. RES. CODE § 30230; *Sierra Club v. Cal. Coastal Comm'n*, 111 P.3d. at 308; *Liberty*, 170 Cal. Rptr. at 255. Case precedent indicates that it

condition may more likely be successfully imposed if it were related to concerns about water pollution; however merely as it pertains to concerns about orca welfare the condition is likely improper.¹⁹³ In spite of this, SeaWorld has since dropped their lawsuit in the face of mounting public concern for captive orcas.¹⁹⁴

On March 17, 2016, when SeaWorld decided to voluntarily end their captive breeding program they came into compliance with the Commission's conditions.¹⁹⁵ As such, SeaWorld is able to move forward with their proposed habitat expansion.¹⁹⁶ Following the announcement of their change in policy, SeaWorld stated that the orca habitats would undergo changes to make them more closely resemble the orcas' natural habitat; however it is unclear whether the renovations will be as radical as those proposed in the Blue World Project.¹⁹⁷

C. Private Action Has Failed to Provide Relief For Captive Orcas

Efforts to improve the lives of captive animals, and in particular orcas, are nothing new.¹⁹⁸ To date, private action has had limited success.¹⁹⁹ The most recent failures to secure relief illustrate the dearth of options available to captive orcas under the current legislative and regulatory landscape.²⁰⁰ As animals

would be improper to base a permitting decision on an adverse environmental impact caused by something outside of the coastal zone, no matter how closely related to the coastal zone if the internal portion of the development on its own does not create the adverse impact. *See* CAL. PUB. RES. CODE §§ 30230, 30607; *Sierra Club v. Cal. Coastal Comm'n*, 111 P.3d at 301. Further, a commission decision that functions to legitimately to address a public policy concern cannot unduly burden a private party. *Liberty*, 170 Cal. Rptr. at 255. Applying this precedent to the SeaWorld permit, it is similarly unfair to use SeaWorld's land-use permit application to address a broader question about the propriety of keeping marine mammals in captivity. *See* CAL. PUB. RES. CODE §§ 30230, 30607; *Liberty*, 170 Cal. Rptr. at 255; Martin, *supra* note 182.

¹⁹³ *See* LLERANDI, *supra* note 116, at 10; *see* CAL. PUB. RES. CODE §§ 30230, 30607; *Sierra Club v. Cal. Coastal Comm'n*, 111 P.3d. at 308; *Liberty*, 170 Cal. Rptr. at 255.

¹⁹⁴ Hugo Martin, *SeaWorld San Diego Drops Lawsuit Over Breeding Ban*, L.A. TIMES (July 27, 2016), <http://www.latimes.com/business/la-fi-seaworld-breeding-lawsuit-20160727-snap-story.html> [<https://perma.cc/MR98-59R8>].

¹⁹⁵ *See* Chan, *supra* note 23; Manby, *supra* note 23.

¹⁹⁶ Lara Croft, *Do We Still Collect Whales? No We Do Not.*, SEAWORLD PARKS & ENTM'T INC., <https://seaworldcares.com/do-we-still-collect-whales-no-we-do-not/?gclid=CKL07dvV3MsCFVfZhg0d9p0Eig> [<https://perma.cc/KP3N-EA7S>]; Manby, *supra* note 23.

¹⁹⁷ *Educational Encounters and Experiences that Matter*, SEAWORLD PARKS & ENTM'T INC., <https://seaworldcares.com/en/Future/Educational-Encounters/> [<https://perma.cc/BM6Y-XKVC>].

¹⁹⁸ *See supra* notes 72–82 and accompanying text (discussing the evolution of public opinion as it pertains to keeping orcas captive for public display).

¹⁹⁹ *Compare* *Tilikum v. SeaWorld Parks & Entm't, Inc.*, 842 F. Supp. 2d 1259, 1261 (S.D. Cal. 2012) (dismissing the case for lack of standing because the thirteenth amendment does not apply to orcas), *with* *Ctr. for Biological Diversity v. Lohn*, 296 F. Supp. 2d 1223, 1243 (W.D. Wash. 2003) (ruling that National Marine Fisheries Service must reconsider their determination that listing of the Southern Resident Killer Whales was not warranted).

²⁰⁰ *See* *Animal Legal Defense Fund v. U.S. Dep't of Agric.*, 789 F.3d. 1206, 1209 (11th Cir. 2015); *Tilikum*, 842 F. Supp. 2d at 1261.

in the United States secure greater legal rights, there is a void in current law that continues to deprive orcas of substantive legal protection.²⁰¹

1. People for the Ethical Treatment of Animal's Thirteenth Amendment Claim is Denied

Counter to SeaWorld's public relations efforts, People for the Ethical Treatment of Animals ("PETA") brought suit against SeaWorld, on behalf of the whales, seeking their release.²⁰² PETA, acting for the whales, claimed that the whales were being held as slaves in violation of their rights under the Thirteenth Amendment.²⁰³ In response, SeaWorld argued that the animals themselves lacked standing, and that the animal rights activists lacked the capacity to act on behalf of the orcas.²⁰⁴ The United States District Court for the Southern District of California heard the case and, though it noted that PETA's intentions were commendable, held that the plaintiffs, as orcas, did not have standing.²⁰⁵

To prove standing, a plaintiff must show harm, causation, and that a favorable decision by the court is likely to provide redress.²⁰⁶ In this case, the court did not address the first two requirements, but merely noted that it could not provide redress because the Thirteenth Amendment prohibiting slavery only applied to humans.²⁰⁷ Though the animal rights activists on behalf of the orcas were ultimately unsuccessful in obtaining freedom for the whales the court was careful to note that animals do have some legal rights and that the harm alleged in this case might be better brought under a different state or federal law.²⁰⁸

²⁰¹ See *Tilikum*, 842 F. Supp. 2d at 1264.

²⁰² *Id.* at 1261.

²⁰³ *Id.* The thirteenth amendment prohibits slavery and involuntary servitude in the United States. U.S. CONST. amend. XIII.

²⁰⁴ *Tilikum*, 842 F. Supp. 2d at 1261–62. Article three of the Constitution restricts the power of the courts of the United States so that the judiciary may only hear "cases and controversies." U.S. CONST. art. III, § 2. Federal law requires that actions must be brought by interested parties, but in some instances it also allows for parties with certain relationships to interested parties bring actions on their behalf. FED. R. CIV. P. 17. In this case, that would require a statute to authorize the animal rights activists to bring suit on behalf of the whales. *Tilikum*, 842 F. Supp. 2d at 1262; see *Cetacean Cmty. v. Bush*, 386 F.3d. 1169, 1176 (9th Cir. 2004) (unsuccessful suit brought against the government in the name of whales, dolphins, and porpoises alleging that naval sonar would harm this community of animals and seeking to enjoin that activity).

²⁰⁵ *Tilikum*, 842 F. Supp. 2d at 1264; see *Cetacean Cmty.*, 386 F.3d at 1175–76 (noting that although animals do have some legal rights they cannot participate in judicial proceedings like humans).

²⁰⁶ *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009); *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

²⁰⁷ *Tilikum*, 842 F. Supp. 2d at 1264.

²⁰⁸ *Id.* Although the court suggested that there might be a different cause of action available to more adequately address the problems faced by the whales, state and federal law have left a dearth of

2. The Animal Legal Defense Fund Brings an Unsuccessful Enforcement Action

Of less renown than SeaWorld, the Miami SeaQuarium is home to only one orca, Lolita, who was taken by Don Goldsberry from Puget Sound in 1970.²⁰⁹ She is the last surviving captive killer whale taken from the waters off the coast of Washington and British Columbia.²¹⁰ Her identity as a member of the Southern Resident population, specifically the L Pod, has been verified based on her use of acoustic calls specific to that group of whales and a study of her genetic make up.²¹¹

In June 2015, animal rights activists brought suit in federal court challenging the United States Department of Agriculture (“USDA”) decision to renew the Miami SeaQuarium’s exhibitor permit.²¹² Citing the Miami SeaQuarium’s noncompliance with AWA standards for large cetaceans, the plaintiffs’ sought to have the renewal of the exhibitor permit set aside.²¹³ In response the USDA argued that compliance is necessary for issuance of an exhibitor license, but is not necessary for renewal.²¹⁴ Applying the high standard of deference first established in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, the court gave significant weight to USDA’s decision to create a renewal process that is administrative in nature and granted the defendant’s motion for summary judgment thereby allowing the Miami SeaQuarium to retain its exhibitor permit.²¹⁵

In some respect, the court’s deference to APHIS decision to renew the SeaQuarium’s permit is proper because the judiciary is not equipped, like

legal remedies for captive orcas. See 7 USC §§ 2132(g), (h), 2143 (2012); 16 U.S.C. §§ 1371, 1533 (2012); *Tilikum*, 842 F. Supp. 2d at 1264; 9 C.F.R. § 3.104 (2015); see also Joseph Mendelson III, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795, 820 (1997) (arguing that third parties may be able to assert standing on behalf of animals under the Animal Welfare Act through more careful plaintiff selection and that could make the act more forceful).

²⁰⁹ KIRBY, *supra* note 10, at 153; POLLARD, *supra* note 3, at 86.

²¹⁰ Listing Endangered or Threatened Species: Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment, 80 Fed. Reg. at 7383.

²¹¹ *Id.*

²¹² *Animal Legal Defense Fund v. U.S. Dep’t of Agric.*, 789 F.3d. at 1209. The permit renewal process is largely administrative in nature and the USDA is reluctant to allow for this process to function as an alternative method of enforcement. *Id.* at 1209–10.

²¹³ *Id.* at 1213.

²¹⁴ *Id.*; see 7 U.S.C. § 2133 (2012).

²¹⁵ *Animal Legal Defense Fund v. U.S. Dep’t of Agric.*, 789 F.3d at 1225. In *Chevron U.S.A., Inc. v. Nat. Res. Defense Counsel*, the Supreme Court of the United States set out a standard by which the lower must review agency decisions. 467 U.S. 837, 866 (1984). The standard requires a two step inquiry; first, look to whether Congress has spoken directly to the question at issue and second, examine whether the agency’s decision is a permissible reading of the statute. *Id.* at 842, 843; see *Animal Legal Defense Fund v. U.S. Dep’t of Agric.*, 789 F.3d at 1215, 1220 (applying *Chevron* deference).

APHIS is, to inspect marine mammal facilities for compliance.²¹⁶ Unfortunately, though, this leaves no available remedy to deal with under enforcement of the AWA requirements.²¹⁷ Noting this issue, the judiciary has made expressly clear that the AWA puts in place a generalized policy concern about the humane treatment of animals and as such, more stringent action requires more specific congressional intent.²¹⁸

3. Animal Rights Activists Cannot Use the Endangered Species Act to Force the SeaQuarium to Release Lolita

In 2005, the Southern Resident population of wild orcas was added to the Endangered Species list following successful petitions from the Center for Biological Diversity.²¹⁹ The result of this listing is that it may establish an additional avenue of recourse for Lolita.²²⁰ An assessment of the five factors considered when making a listing determination led the National Marine Fisheries Service (“NMFS”) and the National Oceanic and Atmospheric Administration (“NOAA”) to conclude that the Southern Resident population was at risk of becoming extinct.²²¹ In making the listing determination, the federal government identified pollution, increased boat traffic, depleted populations of their food source, live capture for public display, and oil spills as factors that make the wild Southern Resident orcas vulnerable to extinction.²²²

In the final rule, the listing was purposely split, excluding Southern Resident orcas placed in captivity prior to the listing determination and their cap-

²¹⁶ *Animal Legal Defense Fund v. U.S. Dep’t of Agric.*, 789 F.3d at 1215; see *Massachusetts v. Env’tl. Prot. Agency*, 549 U.S. 497, 533 (2007) (“we have neither the expertise nor the authority to evaluate these policy judgments”); *Chevron*, 467 U.S. at 865 (“judges are not experts in the field”); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Analysis of Chevron*, 73 U. CHI. L. REV. 823, 824 (2006) (“judgments of policy . . . should be made by political actors, not by the federal judiciary”).

²¹⁷ See *Animal Legal Defense Fund v. U.S. Dep’t of Agric.*, 789 F.3d at 1225; see also *Tilikum*, 842 F. Supp. 2d at 1264.

²¹⁸ See *Animal Legal Defense Fund v. U.S. Dep’t of Agric.*, 789 F.3d at 1218; see also *Nat’l. Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2014) (stating that the role of the judiciary is limited in scope and that policy decisions are better left to the legislature); *Chevron*, 467 U.S. at 844 (stating that the role of the judiciary is limited in scope so that a court may not substitute its own judgment on policy matters for that of the legislature).

²¹⁹ *Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales*, 70 Fed. Reg. at 69,907–08; see *Lohn*, 511 F.3d. at 963 (discussing the agency’s decision to list the Southern Resident population of orcas as endangered); 50 C.F.R. § 224.101; CBD LISTING PETITION, *supra* note 162, at 24 (arguing that Southern Resident orcas meet the criteria to be listed as endangered).

²²⁰ See 50 C.F.R. § 224.101 (this listing results in the additional Protection of the Southern Resident orcas under the ESA); *supra* notes 152–167 and accompanying text (discussing the ESA).

²²¹ *Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales*, 70 Fed. Reg. at 69,908; see *supra* note 154 and accompanying text.

²²² *Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales*, 70 Fed. Reg. at 69,908.

tive born progeny.²²³ PETA petitioned to have Lolita included in the listing, stating that the split listing served only to protect the financial interests of the Miami SeaQuarium.²²⁴ After accepting public comment on the matter NOAA and NMFS found that the Endangered Species Act (“ESA”) did not allow for this split listing because the law prohibits exclusion of captive members based solely on their captive status.²²⁵ On February 10, 2015 NOAA amended the Southern Resident listing to remove the language establishing the exclusion of captive animals.²²⁶

Now that Lolita has been added to the list with the rest of her pod, she is entitled to some additional protection under the ESA; however the recent ruling in *People for the Ethical Treatment of Animals v. Miami Seaquarium* indicates that these additional protections are limited in scope.²²⁷ On July 20, 2015, People for the Ethical Treatment of Animals and other animal rights groups brought suit in the United States District Court for the Southern District of Florida under the Endangered Species Act alleging that the Miami SeaQuarium’s treatment of Lolita constituted a take in violation of the ESA.²²⁸ Specifically, PETA pointed to the myriad of health issues and stereotypic behaviors exhibited by Lolita as evidence of her physical and mental suffering as a result of captivity.²²⁹ Interestingly, neither the SeaQuarium nor the court contested that Lolita did suffer from chronic health problems and exhibited signs of stress.²³⁰ Rather the SeaQuarium’s counter argument, and ultimately the court’s decision, came down to a matter of statutory interpretation and agency deference.²³¹

Specifically, the court held that take, as used in the ESA, prohibited different human activities for wild animals than it did for captive animals.²³² Looking to the captivity exception promulgated as a rule by Fish and Wildlife Service and giving deference to the agency’s interpretation of the ESA, the court found that the ESA was animated by distinctly different policy concerns

²²³ *Id.* at 69,910–11.

²²⁴ LOLITA LISTING PETITION, *supra* note 118 at 2, 24.

²²⁵ Listing Endangered or Threatened Species: Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment, 80 Fed. Reg. at 7388.

²²⁶ *Id.*

²²⁷ Schaffner, *supra* note 106, at 23; *see* 16 U.S.C. § 1538 (2012); *People for the Ethical Treatment of Animals v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1355 (S.D. Fla. 2016); 50 C.F.R. § 224.101 (2016); *supra* notes 152–167.

²²⁸ Complaint for Declaratory & Injunctive Relief at 1–2, *People for the Ethical Treatment of Animals v. Miami SeaQuarium*, 189 F. Supp. 3d 1327 (S.D. Fla. 2016) (No. 15-cv-22692), 2015 WL 4497930.

²²⁹ *People for the Ethical Treatment of Animals v. Miami Seaquarium*, 189 F. Supp. 3d at 1342–43.

²³⁰ *Id.* at 1343, 1355.

²³¹ *Id.* at 1343, 1354–55.

²³² *Id.* at 1350, 1355.

than the AWA.²³³ Namely, the court noted that the ESA was passed into law to deal with habitat destruction as a result of human commercial activity, whereas the AWA was intended to require humane care of captive animals.²³⁴ Insomuch as Lolita's case demonstrates possible conflict between the two laws, the court held that the ESA could not be used to override the very specific protections provided by the AWA both because the laws had very different purposes and also because to allow this would improperly substitute the judgment of the court for that of APHIS.²³⁵ Ultimately, as it pertains to captive wildlife, like Lolita, that are also listed as endangered take as defined under the ESA requires human behavior that puts the endangered animal at the risk of "grave harm"²³⁶

It should also be noted, that the court seemed troubled by the relief the plaintiffs sought—Lolita's release to a sea pen in her native Puget Sound.²³⁷ The court noted that NMFS had earlier posited that such an action would likely constitute a take under the ESA.²³⁸ In support of this assertion, NMFS noted the potential for Lolita to suffer and struggle in the sea pen, but also pointed out the potential for Lolita to pass on diseases to wild orcas.²³⁹ In this regard, the court seemed persuaded that this kind of solution was not feasible.²⁴⁰

Finally, the court concluded by noting that this litigation bumped up against the outer limits of the current law.²⁴¹ The court seemingly admitted that they were constrained not only by the current legislation, but also by the current pattern of enforcement.²⁴² So while the court expressed sympathy for Lolita's plight and seemed persuaded that the conditions of her captivity were inadequate, the court was nonetheless bound by the limits of current federal law and pointed the plaintiffs to take the issue up with Congress.²⁴³

III. CAPTIVE ORCAS ARE SIMILAR TO OTHER ANIMALS THAT SUFFER AS A RESULT OF CAPTIVITY

The problems that orcas face in captivity are not unique to just orcas, but rather are also faced by other animals that possess similar traits.²⁴⁴ Similarly,

²³³ *Id.* at 1350–51, 1355; *see* 50 C.F.R. § 17.3 (2016) (excluding animal husbandry practices from the definition of take).

²³⁴ *People for the Ethical Treatment of Animals v. Miami Seaquarium*, 189 F. Supp. 3d at 1354.

²³⁵ *Id.*

²³⁶ *Id.* at 1355.

²³⁷ *Id.* at 1349.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *See id.*

²⁴¹ *See id.* at 1355.

²⁴² *See id.* at 1334, 1354, 1355.

²⁴³ *Id.* at 1355.

²⁴⁴ THE CASE AGAINST CAPTIVITY, *supra* note 26, at 46; Mason, *supra* note 27, at 715 (2010).

the shortcomings of the legal protections available to captive orcas are not acutely felt by orcas alone, but rather leave other animals, particularly those with complex physical, psychological, and social needs, vulnerable to the inadequacy of the law.²⁴⁵

A. Similar Species, Animals With Complex Social Hierarchies, and Apex Predators Fare Poorly in Captivity

Particularly, as members of the same family, dolphins and orcas share many traits based on their genetic relatedness, most notably their intelligence and social characteristics.²⁴⁶ Given the similarities between their species and the similar circumstances of their captivity, dolphins suffer in captivity much in the same way that orcas do.²⁴⁷ Other toothed whales, particularly belugas, face analogous problems.²⁴⁸ Unlike the case with orcas, the belugas that populate marine parks and aquariums are still taken from the wild.²⁴⁹ In this regard, though these animals have received less public attention, their plight is nonetheless compelling.²⁵⁰

Of late, orcas have drawn a comparison to other animals that are not only kept in captivity, but are also forced to perform theatrical tricks for profit, such as circus elephants.²⁵¹ Elephants are similar to orcas in a number of ways that go beyond just their intelligence.²⁵² Like orcas, elephants are highly social creatures, and live in matrilineal groupings.²⁵³ These groupings have distinct

²⁴⁵ See Nowicki, *supra* note 137, at 477; Schaffner, *supra* note 106, at 247.

²⁴⁶ THE CASE AGAINST CAPTIVITY, *supra* note 26, at 22; Mason, *supra* note 27, at 715; see Heyning & Dahlheim, *supra* note 37, at 1.

²⁴⁷ See THE CASE AGAINST CAPTIVITY, *supra* note 26, at 22; Jamieson, *supra* note 26, at 141; Mason, *supra* note 27, at 715.

²⁴⁸ THE CASE AGAINST CAPTIVITY, *supra* note 26, at 22; Mason, *supra* note 26, at 715; A FALL FROM FREEDOM, *supra* note 88.

²⁴⁹ THE CASE AGAINST CAPTIVITY, *supra* note 26, at 10; A FALL FROM FREEDOM, *supra* note 88. The process of taking belugas from the wild is substantially similar to the process used to procure and catch wild orcas. A FALL FROM FREEDOM, *supra* note 88.

²⁵⁰ See THE CASE AGAINST CAPTIVITY, *supra* note 26, at 10; see also Ga. Aquarium, Inc. v. Pritzker, 135 F. Supp. 3d 1280, 1339 (N.D. Ga. 2015) (affirming the agency decision to deny the Georgia Aquarium's request for a permit to import eighteen live-caught belugas under the MMPA, reasoning that this action would likely result in additional takings of beluga whales and adversely impact the worldwide beluga population).

²⁵¹ Luke O'Neil, *Why Elephants in American Zoos Might be the New Blackfish*, ESQUIRE (Jan. 25, 2016), <http://www.esquire.com/news-politics/news/a41341/elephants-zoos-captivity/> [<https://perma.cc/5HF6-AYUJ>]; see Mason, *supra* note 27, at 714 (discussing the different types of species held in captivity and their varying responses to captive life); Trevor J. Smith, Note, *Bullhooks and the Law: Is Pain and Suffering the Elephant in the Room?*, 19 ANIMAL L. 423, 427 (stating that public opinion on the use of bullhooks is sharply divided).

²⁵² See THE CASE AGAINST CAPTIVITY, *supra* note 26, at 40–41; O'Neil, *supra* note 251.

²⁵³ T.M. Gruber et al., *Variation in Stereotypic Behavior Related to Restraint in Circus Elephants*, 19 ZOO BIOLOGY 209, 210 (2000).

cultural traditions and are very tight knit.²⁵⁴ The problems circus elephants face have received attention of late, and in response to ongoing criticism Ringling Brothers voluntarily retired the show's performing elephants in May 2016.²⁵⁵

Further, it should be noted that in general apex predators, like orcas, don't fare well in captivity because confinement constrains natural hunting behaviors.²⁵⁶ Great white sharks, the quintessential apex predator, provide a poignant example of how poorly these kinds of animals fare in captivity.²⁵⁷ Great whites have an especially difficult time adjusting to the confines of captivity because they must keep swimming constantly to breathe and regulate their body temperature.²⁵⁸ The Monterey Bay Aquarium has had limited success in displaying captive great whites, but for the most part no great white shark has been able to survive in captivity for a prolonged period of time.²⁵⁹ Most recently, in Japan, a great white shark died after being held in captivity for only three days.²⁶⁰ During the three days that the shark was captive it refused to eat and repeatedly swam into the sides of the tank, a behavior that is also seen in captive orcas under stress.²⁶¹ Eventually, the shark just stopped swimming and died.²⁶²

²⁵⁴ *Id.*

²⁵⁵ Susan Ager, *Ringling Will Retire Elephants Two Years Earlier than Planned*, NAT'L GEOGRAPHIC (Jan. 11, 2016), <http://news.nationalgeographic.com/2016/01/160111-ringling-elephants-retire/> [https://perma.cc/7FS7-XBJH]. Following the elephants' retirement, ticket sales for the circus fell and in May 2017, the circus closed. Sarah Maslin Nir, *After 146 Years, Ringling Brothers Circus Takes Its Final Bow*, N.Y. TIMES (May 21, 2017), https://www.nytimes.com/2017/05/21/nyregion/ringling-brothers-circus-takes-final-bow.html?_r=0 [https://perma.cc/4UQE-NPVH].

²⁵⁶ See Mason, *supra* note 27, at 715–16.

²⁵⁷ See Christopher Dean Hopkins, *Great White Shark Dies After Three Days in Captivity at Japan Aquarium*, NAT'L PUBLIC RADIO (Jan. 8, 2016), <http://www.npr.org/sections/thetwo-way/2016/01/08/462455785/great-white-shark-dies-after-just-3-days-in-captivity-at-japan-aquarium> [https://perma.cc/VDB8-NL9F]. Mike McPhate, *Great White Shark Dies After Three Days In Captivity*, N.Y. TIMES (Jan. 8, 2016), <http://www.nytimes.com/2016/01/09/science/great-white-shark-dies-after-three-days-in-captivity.html> [https://perma.cc/5MRZ-T8LG].

²⁵⁸ Yuri Kageyama, *Great White Shark Dies After Three Days in Aquarium*, ASSOC. PRESS: BIG STORY (Jan. 8, 2016), <http://bigstory.ap.org/article/265d95f79bd345fb947aead2dc7f1839/great-white-shark-dies-after-3-days-japanese-aquarium> [https://perma.cc/4K6J-WN3P].

²⁵⁹ Hopkins, *supra* note 257; McPhate, *supra* note 257; Phillip Molnar, *Monterey Bay Aquarium Takes a "Break" from Collecting Great White Sharks*, MONTEREY HERALD (June 19, 2013), <http://www.montereyherald.com/article/ZZ/20130619/NEWS/130618399> [https://perma.cc/W354-THCS].

²⁶⁰ Hopkins, *supra* note 257; Kageyama, *supra* note 258.

²⁶¹ Jun Hongo, *Great White Shark Dies at Aquarium in Japan*, WALL STREET J. (Jan. 8, 2016), <http://blogs.wsj.com/japanrealtime/2016/01/08/great-white-shark-dies-at-japan-aquarium/> [https://perma.cc/9KJE-EDWJ]; see KIRBY, *supra* note 10, at 150 (detailing the incident with one of the first whales in captivity who swam in circles in her enclosure slamming her body against the wall before finally slamming face first into the wall and killing herself).

²⁶² Kageyama, *supra* note 258.

B. Legal Protections for Similar Animals Are Similarly Unavailable

Other captive animals not only suffer similarly, but their suffering is exacerbated by the same insufficient legal protections that have created the problems faced by captive orcas.²⁶³ For example, consider the recent decision in *Georgia Aquarium v. Pritzker*, which affirmed an agency decision to deny the Georgia Aquarium's request for a Marine Mammal Protection Act ("MMPA") permit that would allow the aquarium to import eighteen beluga whales.²⁶⁴ The court, in affirming the agency's decision, focused its analysis on the potential impact this take would have on wild stocks of belugas.²⁶⁵ The importance of this decision is twofold because it demonstrates not only that the MMPA provides little protection to captive animals, but also shows that animals other than captive orcas feel the failings of federal law.²⁶⁶

Additionally, animal rights groups have alleged on a number of occasions that the AWA provides insufficient standards of care for a variety of animals, showing the problems the AWA creates for orcas, may be more widely felt throughout the captive animal community.²⁶⁷ Similarly, much like the recent case involving Lolita, animal rights groups attempted to use the ESA to require Ringling Brothers to treat their elephants more humanely.²⁶⁸ In *American Society for the Prevention of Cruelty to Animals v. Feld Entertainment, Inc.*, the court never even reached the ESA issue, but rather dismissed the case for lack

²⁶³ See *Am. Soc'y for the Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 28 (D.C. Cir. 2011) (holding that a former elephant handler did not have standing under the ESA's citizen suit provision because he did not have sufficient personal attachment to the elephants so as to suffer injury); *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1176 (9th Cir. 2004) (foreclosing cetaceans from bringing suit to enjoin naval activity that caused the cetacean community harm because animals lack standing); *Ga. Aquarium, Inc.*, 135 F. Supp. 3d at 1339 (affirming an agency decision to deny the Georgia Aquarium's request for a permit to import eighteen live-caught belugas because of the potential impact on the wild beluga population).

²⁶⁴ *Ga. Aquarium, Inc.*, 135 F. Supp. 3d at 1286–88.

²⁶⁵ *Id.* at 1295.

²⁶⁶ See *id.* at 1295; Miller & Shah, *supra* note 141, at 27.

²⁶⁷ See, e.g., *Animal Legal Defense Fund v. Vilsack*, 169 F. Supp. 3d 6, 19–20 (D.C. Cir. 2016) (applying *Chevron* deference to hold that the USDA's decision to reissue a permit to a small petting zoo did not violate the AWA because even if the permitting scheme might be flawed it was not an unreasonable interpretation of the statute); *Whispering Pines Animal Kingdom, LLC v. Kinde*, No. 02-cv-70595-DT, 2002 WL 484649, at *3, *5 (dismissing an action brought by a private citizen seeking to force an exhibitor of kangaroos and exotic cats to comply with the AWA because enforcement actions under the AWA must be brought by the USDA); *Animal Legal Defense Fund v. Glickman*, 204 F. 3d 229, 233 (D.C. Cir. 2000) (ruling that the existence of minimum engineering standards for primate enclosures was consistent with the AWA because the law only requires that minimum standards to be set by the agency).

²⁶⁸ *Am. Soc'y for the Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d at 17; see *People for the Ethical Treatment of Animals v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1332 (S.D. Fla. 2016).

of standing.²⁶⁹ Together, these cases demonstrate that although captive orcas receive an outsize amount of public attention, the issues that orcas face in captivity are not unique.²⁷⁰

IV. THE UNIQUE NATURE OF THE ZOO AND AQUARIUM INDUSTRY DEMANDS GREATER FEDERAL ACTION

Societal consensus on the public display industry's treatment of captive orcas has evolved since orcas were first taken into captivity for public display some fifty years ago.²⁷¹ Most recently, in response to shifting social mores, SeaWorld announced that they would phase out the public display of captive orcas by ending their captive breeding program and continuing their practice of not taking whales from the wild.²⁷² Undoubtedly, this is an immense victory for the orcas; however this guarantee for SeaWorld's orcas does not signal the end of the problem.²⁷³

One of the biggest problems with the current body of legislation is that it fails to provide adequate care standards for captive orcas and instead leaves to the states the job of creating more stringent standards.²⁷⁴ In this regard, broad sweeping legislative reform is needed despite recent voluntary changes by the public display industry.²⁷⁵ The nature of the public display industry, inasmuch

²⁶⁹ *Am. Soc'y for the Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d at 28; see *Tilikum v. SeaWorld Parks & Entm't, Inc.*, 842 F.Supp.2d 1259, 1264 (S.D. Cal. 2012) (dismissing a case seeking the release of captive orcas for lack of standing).

²⁷⁰ See *Animal Legal Defense Fund v. Vilsack*, 169 F. Supp. 3d at 19–20 (contesting the care of exotic cats, lemurs, farm animals, and others at a private zoo); *Ga Aquarium, Inc.*, 135 F. Supp. 3d at 1295 (criticizing the live capture of belugas); *Am. Soc'y for the Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d at 28 (asserting that circus training constituted a take of endangered elephants under the ESA); Mason, *supra* note 27, at 15–16 (listing various types of captive animals and assessing their ability to cope with the stress of captivity); Miller & Shah, *supra* note 141, at 27 (stating that animals generally suffer in captivity); Adkins Giese, *supra* note 132, at 937–38 (telling the story of a chimpanzee killed in a federal research facility); Chattoo, *supra* note 77 (discussing the exceptional popularity and influence of *Blackfish* and noting how it drew attention to the issues faced by captive orcas.).

²⁷¹ KIRBY, *supra* note 10, at 151; Manby, *supra* note 23; KILLER WHALE CARE, CONSERVATION AND EDUCATION, *supra* note 60.

²⁷² Chan; *supra* note 23; Manby, *supra* note 23.

²⁷³ See Chabeli Herrera, *Killer Whale Lolita Will Remain at Show in Miami SeaQaurium*, MIAMI HERALD (Mar. 22, 2016), <http://www.miamiherald.com/news/business/tourism-cruises/article67536097.html> [<https://perma.cc/9HNB-V5GW>]; Manby *supra* note 23.

²⁷⁴ See Nowicki, *supra* note 137, at 477 (1999); Schaffner, *supra* note 106, at 247; Letter from Jared Huffman et al., to Thomas Vilsack, Secretary, U.S. Dep't of Agric. (May 29, 2014), <https://huffman.house.gov/sites/huffman.house.gov/files/05.29.14.Vilsack.Captive%20Marine%20Mammal%20Regulations.pdf> [<https://perma.cc/X8B5-LK8Q>].

²⁷⁵ Press Release, Rep. Jared Huffman, Rep. Huffmann Applauds SeaWorld for Ending Breeding of Captive Orcas; Eventually Phasing Out Public Exhibition (Mar. 17, 2016), <http://huffman.house.gov/media-center/press-releases/rep-huffman-applauds-seaworld-for-ending-breeding-of-captive-orcas> [<https://perma.cc/PEM9-BAWM>]; see Schaffner, *supra* note 106, at 253.

as it drives tourism, demands that it be regulated at the federal level pursuant to the full breadth of Congress's powers under the Commerce Clause.²⁷⁶ Allowing for concurrent state regulation allows for states to impermissibly insulate themselves from a problem that is commonly shared.²⁷⁷

The notion of Federalism vests certain powers in the federal government and leaves others to the states.²⁷⁸ Under the police power, states have the power to legislate for the health, safety, and general welfare.²⁷⁹ One power specifically granted to the federal government is the Congressional authority to regulate interstate commerce.²⁸⁰ Vesting this substantial power in the federal government was intended to prevent balkanization between states and to promote a national economic market.²⁸¹ Historically, this power was construed broadly, but recent case law has cut back on the breadth of Congress's power.²⁸² Modern judicial interpretation of the Commerce Clause establishes outer bounds indicating that the Commerce Clause cannot be used as a mechanism to rectify social problems, and so whether Congress's power under the Commerce Clause can be used for sweeping reform of the public display industry is vul-

²⁷⁶ See U.S. CONST. art. I, § 8; *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999); *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 253, 257 (1964); *Gibbs v. Babbitt*, 214 F.3d 483, 497–98 (4th Cir. 2000); Blake Hudson, *Commerce in the Commons: A Unified Theory of Natural Capital Regulation Under the Commerce Clause*, 35 HARV. ENVTL. L. REV. 375, 427 (2011).

²⁷⁷ See U.S. CONST. art. I, § 8; CAL. FISH & GAME CODE § 4502.5 (West 2017); *Oregon Waste Systems, Inc. v. Dep't of Env'tl. Quality of the State of Oregon*, 511 U.S. 93, 99 (1994); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978); Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 586 (1997).

²⁷⁸ U.S. CONST. amend X; Alan Dickey, *Recent Development, United States v. Lopez: The Supreme Court Reasserts the Commerce Clause as a Limit on the Powers of Congress*, 70 TUL. L. REV. 1207, 1208 (1996); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544 (1954); see *United States v. Morrison*, 529 U.S. 598, 647–49 (2000) (discussing the framers intention for the states to share power with the national government); *United States v. Lopez*, 514 U.S. 549, 566 (1995) (noting that the states possess a general police power that the federal government cannot infringe upon).

²⁷⁹ See U.S. CONST. amend X; *Natl. Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012); *Morrison*, 529 U.S. at 647–49; *Lopez*, 514 U.S. at 566. The police power is guaranteed to the states under the tenth amendment. U.S. CONST. amend X. To invalidate a federal law under the tenth amendment requires a showing that the legislation attempts to regulate the states in their capacity as states, addresses matters that are indisputably matters of state sovereignty, and impairs the states ability to operate in traditional areas of governance. *Hodel v. Virginia Surface Mining & Reclamation*, 452 U.S. 264, 287–88 (1981); see U.S. CONST. amend X; *Lopez*, 514 U.S. at 557.

²⁸⁰ U.S. CONST. art. I, § 8.

²⁸¹ *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984); O'Grady, *supra* note 277, at 626; Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L. J. 569, 605 (1987).

²⁸² See *Morrison*, 529 U.S. at 617–18; *Lopez*, 514 U.S. at 567; Dickey, *supra* note 278, at 1216; Christine Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 26, 28 (2003).

nerable to some criticism.²⁸³ Nevertheless, given the role that public display industry plays in the broader national tourism industry, it is more likely than not that Congress would be able to effectuate more stringent regulations pursuant to their power under the Commerce Clause.²⁸⁴

Even under the modern, more restrictive analysis, Congress likely could fully assert their Commerce Clause powers to regulate the care of captive orcas.²⁸⁵ Orcas may arguably be articles of interstate commerce given SeaWorld's common practice of moving the whales between parks.²⁸⁶ However, stronger support for the full extension of the Commerce Clause comes from the direct affect orcas have on interstate commerce.²⁸⁷ SeaWorld's profit margins suggest that the orcas, as the corner stone of the brand play a significant role in driving tourism to these parks and their surrounding localities.²⁸⁸ This sets captive orcas apart from other times Congress has attempted to use the Commerce Clause to reach conduct that has come to be considered socially undesirable because the impact on interstate commerce is direct.²⁸⁹ Under this analysis, Congress can and should assert their full power under the Commerce Clause to make a more comprehensive piece of law that would pre-empt state action in governing the care of captive orcas.²⁹⁰ In light of the public display

²⁸³ See *Morrison*, 529 U.S. at 617–18 (2000); *Lopez*, 514 U.S. at 567; *Dickey*, *supra* note 278, at 1216; *Klein*, *supra* note 282, at 28.

²⁸⁴ See U.S. CONST. art. I, § 8; *Heart of Atlanta Motel, Inc.*, 379 U.S. at 253, 257; LLERANDI, *supra* note 116, add. 1 at Ex. No. 12 (featuring a collection of letters in support of Sea World, including a letter from the Chamber of Commerce stating the role the marine park plays in driving tourism to San Diego).

²⁸⁵ See U.S. CONST. art. I, § 8; *Morrison*, 529 U.S. at 608–09 (discussing the proposition set out in case precedent that there are three categories of activity that Congress may regulate under the Commerce Clause; channels of interstate commerce, instrumentalities of interstate commerce, and activities that substantially affect interstate commerce); *Lopez*, 514 U.S. at 567 (discussing the notion that federal anti-gun laws do not substantially affect interstate commerce); *Heart of Atlanta Motel, Inc.*, 379 U.S. at 253, 257 (discussing the notion that tourism is an activity that substantially affects interstate commerce).

²⁸⁶ See *Lopez*, 514 U.S. at 586; *KIRBY*, *supra* note 10, at 326; *Rechberg*, *supra* note 96, at 749–50.

²⁸⁷ See *Heart of Atlanta Motel, Inc.*, 379 U.S. at 253, 257; LLERANDI, *supra* note 116, add. 1 at Ex. No. 12 (featuring a collection of letters in support of Sea World, including a letter from the Chamber of Commerce stating the role the marine park plays in driving tourism to San Diego).

²⁸⁸ 2014 ANNUAL REPORT, *supra* note 20, at 4.

²⁸⁹ See U.S. CONST. art. I, § 8. *Compare Morrison*, 529 U.S. at 608–09 (holding that gender motivated violence is not an economic activity that can be regulated under the commerce clause because the impact on interstate commerce is too attenuated to justify federal action), and *Lopez*, 514 U.S. at 567 (holding that gun violence is not an economic activity that can be regulated under the commerce clause because the impact on interstate commerce is too attenuated to justify federal action), with *Heart of Atlanta Motel, Inc.*, 379 U.S. at 253, 257 (holding that racial discrimination is an economic activity that can be regulated under the commerce clause because the impact on interstate commerce is direct and federal action should not be barred just because the legislation seeks to address a social problem).

²⁹⁰ See U.S. CONST. art. I, § 8; *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 204; *Heart of Atlanta Motel, Inc.*, 379 U.S. at 253, 257.

industry's changing business model, these changes are needed now more so than ever to ensure that humane care stands are affirmed, even as the focus of public display industry's shift in practice.

Finally, in enacting this legislation, Congress should consider constructing reform so that it reaches all captive animals and provides more substantive protection.²⁹¹ Of late captive orcas, and to a lesser degree circus elephants, have garnered a great deal of attention lately, but the problems facing these animals are not unique to these species.²⁹² Rather, all animals currently held in captivity could benefit from additional legal protections that garner them more humane standards of care.²⁹³ Therefore, rather than focus solely on orcas in response to public opinion, Congress must act more broadly to effectuate change for all animals.²⁹⁴

CONCLUSION

The plight of captive orcas has recently received significant public attention. Public outcry against captivity practices has spurred important responses from lawmakers and the public display industry that may improve the lives of captive orcas in the long term. In spite of this limited progress, animal welfare laws in the United States are still riddled with deficiencies, not just for orcas, but for all captive animals. In the face of the law's stark inadequacy, reform of animal welfare laws must be effectuated at the federal level. This type of reform must ensure that standards of care for all animals are improved and that the agencies tasked with enforcing these standards take seriously their role in protecting the wellbeing of captive animals, even as public attention to the issue ebbs and flows.

²⁹¹ See *People for the Ethical Treatment of Animals v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1334, 1343 (S.D. Fla. 2016) (acknowledging that the captive orca, Lolita, faces a number of health problems caused by her captivity even though the Animal and Plant Health Inspection Service has consistently found that the SeaQuarium technically complies with the AWA); Miller & Shah, *supra* note 141, at 35 (stating that the conditions animals experience in the wild cannot be replicated in captivity); O'Neil, *supra* note 251 (discussing the unique plight of circus elephants); Schaffner, *supra* note 106, at 253 (suggesting that change to the U.S. legal system is necessary in order to secure better care of captive cetaceans).

²⁹² See *Animal Legal Defense Fund v. Vilsack*, 169 F. Supp. 3d 6, 19–20 (D.C. Cir. 2016) (alleging the AWA is insufficient for the proper care of lions, tigers, bears, baboons, lemurs, and pigs); *Whispering Pines Animal Kingdom, LLC v. Kinde*, No. 02-cv-70595-DT, 2002 WL 484649, at *3, *5 (alleging that the AWA is insufficient for the proper care of lions, tigers, monkeys, kangaroos, camels, and other exotic wildlife); *Animal Legal Defense Fund v. Glickman*, 204 F. 3d 229, 233 (D.C. Cir. 2000) (alleging that the AWA is insufficient for the proper care of primates).

²⁹³ Miller & Shah, *supra* note 141, at 35–36; see *Animal Legal Defense Fund v. Vilsack*, 169 F. Supp. 3d at 19–20; *Whispering Pines Animal Kingdom, LLC*, No. 02-cv-70595-DT, 2002 WL 484649, at *3, *5; *Animal Legal Defense Fund v. Glickman*, 204 F. 3d at 233; O'Neil, *supra* note 251; Schaffner, *supra* note 106, at 253.

²⁹⁴ See Miller & Shah, *supra* note 141, at 35–36. *But see* Orca Responsibility and Care Advancement Act of 2015, H.R. 4019 (amending the MMPA only as it pertains to captive orcas); CAL. FISH & GAME CODE § 4502.5 (West 2017) (codifying SeaWorld's new breeding policy only as it pertains to captive orcas).