No. 19-2000

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOYCE ROWLEY,
Plaintiff-Appellant,

v.

CITY OF NEW BEDFORD, MASSACHUSETTS,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, CASE NO. 1:17-CV-11809

BRIEF OF ANIMAL LEGAL DEFENSE FUND AND PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC. AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

Jeffrey P. Richter (No. 1191489)
K&L GATES LLP
210 Sixth Ave.
Pittsburgh, PA 15222
T: +1 412 355 6500
F: +1 412 355 6501
jeff.richter@klgates.com

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Animal Legal Defense Fund and People for the Ethical Treatment of Animals, Inc. state that they have no parent corporation nor any stock and, therefore, no publicly held company owns ten percent or more of their stock.

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INTEREST OF *AMICI CURIAE*

Amici curiae are nonprofit animal rights organizations dedicated to preventing the abuse of animals.[1]

Animal Legal Defense Fund (ALDF) is headquartered in Cotati, California with over 200,000 members and supporters nationwide. ALDF's mission is to protect the lives and advance the interests of animals through the legal system, including by filing high-impact lawsuits to protect animals from harm.

People for the Ethical Treatment of Animals, Inc. (PETA) is based in Norfolk, Virginia. PETA is the largest animal rights organization in the world, with more than 6.5 million members and supporters. PETA is dedicated to protecting animals, including those used in entertainment, from abuse, neglect, and cruelty.

Amici submit this brief to examine the legal standards under the Endangered Species Act (ESA) and address certain harmless errors regarding those standards as articulated by the district court. *Amici* regularly file and litigate lawsuits under the ESA and have a significant interest in its correct interpretation and application.[2] This

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[1] This brief is authored solely by *Amici* and their counsel. No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel funded its preparation or submission.

[2] ALDF's pending cases include *Animal Legal Def. Fund v. Lucas*, No. 2:19-cv-40, 2019 WL 5068531 (W.D. Pa. Oct. 9, 2019) (denying motion to dismiss); *Animal Legal Def. Fund v. Olympic Game Farm, Inc.*, 387 F. Supp. 3d 1202 (W.D. Wash. May 21, 2019) (denying motion to dismiss); and *Animal Legal Def. Fund v. Fur-Ever Wild*, No. 17-cv-4496, 2018 WL 5840046 (D. Minn. Nov. 8, 2018) (affirming order partially granting plaintiff's motion to compel).

brief clarifies the correct legal standards for the Court, while recognizing that even adopting the correct standards will not cure the evidentiary deficiency in plaintiff-appellant's case. *Amici* take no position on the other issues on appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ms. Joyce Rowley sued the City of New Bedford alleging the treatment of two Asian elephants at the Buttonwood Park Zoo violates the ESA. After a bench trial, the district court decided that Rowley failed to adduce sufficient evidence to demonstrate a violation. Based on the limited evidence she put forth at trial—particularly the lack of any expert testimony—that decision is correct.[3] The Court should accordingly affirm based on the record below.

In addition, ALDF litigated *Kuehl v. Sellner*, 887 F.3d 845 (8th Cir. 2018) and *Graham v. San Antonio Zoological Soc'y*, 261 F. Supp. 3d 711 (W.D. Tex. 2017). PETA's pending cases include *People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Md., Inc.*, 397 F. Supp. 3d 768 (D. Md. Jul. 8, 2019) (granting partial summary judgment); *People for the Ethical Treatment of Animals, Inc. v. Wildlife in Need & Wildlife in Deed, Inc.*, No. 4:17-cv-00186, 2018 WL 828461 (S.D. Ind. Feb. 12, 2018) (granting preliminary injunction); *People for the Ethical Treatment of Animals, Inc. v. Dade City's Wild Things, Inc.*, No. 8:16-cv-2899, 2019 WL 245343 (M.D. Fla. Jan. 17, 2019) (denying motion to dismiss); and *Mo. Primate Found. v. People for the Ethical Treatment of Animals, Inc.*, No. 4:16-cv-2163, 2018 WL 1420239 (E.D. Mo. Mar. 22, 2018) (granting temporary restraining order). In addition, PETA and ALDF litigated *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142 (11th Cir. 2018) (per curiam), *adhered to on denial of reh'g*, 905 F.3d 1307 (11th Cir. 2018).

[3] *Amici* take no position on whether a more fulsome prosecution of these claims or similar claims in the future could have established a violation.

Nevertheless, the district court misinterpreted the ESA's "harass" exception for captive wildlife, created at 50 C.F.R. § 17.3. The ESA makes it illegal to harass endangered wildlife, while the regulatory definition of "harass" makes a limited exception for certain practices regarding captive wildlife. The district court stated that this exception applies to "a generally accepted and Animal Welfare Act-compliant animal husbandry practice,"[4] but failed to mention that such husbandry practices must also be "not likely to result in injury to the wildlife," 50 C.F.R. § 17.3. Further, the district court did not articulate that the defendant bears the burden to show the exception applies. Since applying the correct standards would not cure the evidentiary deficiency, these errors were harmless and this Court need not wade into *Amici*'s analysis to resolve this appeal. However, should the Court decide to address the legal standards, it should adopt the framework provided in this brief.

ARGUMENT

I. The district court correctly determined that Rowley failed to meet her evidentiary burden.

This is a "citizen suit" under the ESA. 16 U.S.C. § 1540(g). Rowley alleges the City of New Bedford is violating the ESA by "harming" and "harassing" two Asian elephants at the Buttonwood Park Zoo.[5] Following a three-day bench trial, the

[4] Findings of Fact, Rulings of Law, and Order for Judgment, ECF No. 91, at 13 [Abb. R. 49].

[5] *See* Am. Compl. for Declaratory & Injunctive Relief, ECF No. 47 [Appellant's Br. 88-125].

district court found the City did not violate the ESA. In so holding, the district court erroneously (1) misinterpreted the requirements of the harass exception for captive wildlife and (2) failed to identify the burdens of the parties.

Ultimately, these errors were harmless. Applying the correct standards will not cure the evidentiary deficiencies. Rowley's complaint alleges several ESA violations—inadequate shelter, space, social opportunities, veterinary care, feeding, and enrichment, and failing to prevent one elephant from attacking the other.[6] A complete review of the evidence is beyond the scope of this brief, but the absence of expert testimony frequently informed the district court's ruling, as with regard to the allegation that the City failed to protect one elephant from attacking the other—characterized by the district court as "the most difficult issue in this case":[7]

> In the absence of directly applicable expert testimony about elephant behavior, and recognizing that Rowley bears the burden of proof, this Court concludes that she has not proved that the City was harassing or harming Ruth in violation of the law by negligently allowing Emily to attack her.[8]

The absence of expert testimony is by no means fatal *per se* to a citizen suit under the ESA. But given the fact-specific nature of such cases, which are inherently rooted

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6 *Id.* ¶¶ 104-134 [Appellant's Br. 115-124].

7 Findings of Fact, Rulings of Law, and Order for Judgment, ECF No. 91, at 29 [Abb. R. 65].

8 *Id.* at 31 [Abb. R. 67].

in scientific issues such as animal physiology and psychology, expert testimony is often vital. Rowley did not provide any here.

Accordingly, the Court should affirm the district court's determination that Rowley failed to meet her burden of demonstrating an ESA violation, and need not resolve the question of the appropriate legal standard under the harass exception for captive wildlife. However, should the Court determine that addressing the appropriate legal standard is necessary, *Amici* offer the below explanation of the correct standard.

II. The district court misinterpreted the ESA's harass exception for captive wildlife.

The ESA makes it illegal to "take" endangered wildlife. 16 U.S.C. § 1538(a)(1)(B). Among other actions, the ESA defines "take" to mean "harm" and "harass." *Id.* § 1532(19).

Under the ESA's implementing regulations, the term "harm" means an act which "kills or injures wildlife" and "may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. The term "harass" means "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns," including "breeding, feeding, or sheltering." *Id*.

The definition of "harass" contains an exception for captive wildlife, which provides that

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

Id. The district court interpreted the first subsection of this language as meaning that the exception applies if "the conduct is a generally accepted and Animal Welfare Act-compliant animal husbandry practice."[9] This reading is incomplete. The plain text of the harass exception as applied to husbandry practices shows that it is triggered only when the challenged conduct is (1) generally accepted, (2) meets or exceeds the Animal Welfare Act (AWA) standards of care, ***and*** (3) is not likely to result in injury to the wildlife.[10] Although the district court correctly identified the first two requirements, it failed to identify or apply the third.

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[9] Findings of Fact, Rulings of Law, and Order for Judgment, ECF No. 91, at 13 [Abb. R. 49].

[10] All three of these requirements must be satisfied to trigger the exception with regard to animal husbandry practices, but the AWA-compliance requirement does not, on its face, apply to "[b]reeding procedures" or "[p]rovisions of veterinary care for confining, tranquilizing, or anesthetizing." 50 C.F.R. § 17.3. The district court

A. The district court correctly identified the first two requirements of the harass exception as applied to husbandry practices.

When applied to husbandry practices, the first two requirements of the harass exception for captive wildlife require the challenged conduct to be (1) generally accepted and (2) meet or exceed the AWA standards of care. The district court correctly identified these requirements.

"Generally accepted" conduct differs from meeting the minimum standard of animal care under the AWA. *See Hill v. Coggins*, 867 F.3d 499, 509-10 (4th Cir. 2017) (holding that compliance with AWA standards does not mean that the challenged conduct is also "generally accepted"), *cert. denied*, 138 S. Ct. 1003 (2018). The AWA sets forth only the bare minimum requirements for certain animal husbandry practices. *See* 7 U.S.C. § 2143(a)(2) (the standards are "minimum requirements"); *id.* § 2143(a)(8) (allowing states to promulgate additional standards). The phrase "generally accepted" implies a higher standard of care for threatened or endangered species than the AWA, which applies more broadly. *See People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Md., Inc.*, No. MJG-17-2148, 2018 WL 434229, at *6 (D. Md. Jan. 16, 2018) ("[T]he ESA and AWA do not pursue conflicting objectives. Rather, the ESA provides for separate and heightened protections for the subset of captive animals that are

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did not examine these other two avenues of exception, which must also be both "generally accepted" and "not likely to result in injury." *Id*.

threatened or endangered."). By requiring "generally accepted" practices rather than only cementing specific standards, the harass exception for captive wildlife allows for the evolution of animal husbandry practices. For example, as the district court recognized, it is no longer generally accepted to manage elephants with bullhooks, despite their prevalence in the past.[11] Whether conduct is generally accepted should be determined by reference to the relevant scientific community, such as the standards of care from the Association of Zoos & Aquariums, the Global Federation of Animal Sanctuaries, the American Association of Zoo Veterinarians, or testimony from expert witnesses.

Additionally, as the district court acknowledged, a lack of AWA citations is not sufficient to show AWA compliance. The United States Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) enforces the AWA through inspections and investigations. 7 U.S.C. § 2146(a). Because such methods do not identify all violations, courts must independently assess AWA compliance.[12]

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[11] Findings of Fact, Rulings of Law, and Order for Judgment, ECF No. 91, at 17 [Abb. R. 53].

[12] Findings of Fact, Rulings of Law, and Order for Judgment, ECF No. 91, at 8-9 [Abb. R. 44-45] (citing *Graham v. San Antonio Zoological Soc'y*, 261 F. Supp. 3d at 745-46; *Kuehl v. Sellner*, 161 F. Supp. 3d 678, 710-18 (N.D. Iowa 2016)).

B. The district court failed to apply the third requirement of the harass exception.

The third requirement of the harass exception for captive wildlife is that the husbandry practices are "not likely to result in injury to the wildlife." 50 C.F.R. § 17.3. The district court failed to address this requirement in its analysis. The requirement is evident from the plain text of the exception:

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

Id. (emphasis added). The exception applies to three types of activity: (1) "Animal husbandry practices," (2) "Breeding procedures," and (3) "Provisions of veterinary care." *Id*. Although the language "when such practices, procedures, or provisions are not likely to result in injury" appears only in the third subsection, the terms "practices, procedures, or provisions" clearly correspond and thus apply to all three types of listed activities—animal husbandry ***practices***, breeding ***procedures***, and ***provisions*** of veterinary care. If "practices" and "procedures" did not refer to their antecedents from subsections (1) and (2), these terms would be redundant if not unintelligible since subsection (3) refers only to "provisions" of veterinary care.

See United States v. Alaska, 521 U.S. 1, 59 (1997) ("The Court will avoid an interpretation . . . 'that renders some words altogether redundant.'" (quoting *Gustafson v. Alloyd, Co.*, 513 U.S. 561, 574 (1995))). Accordingly, the harass exception for captive wildlife does not apply to animal husbandry practices that are "likely to result in injury to the wildlife," even if those practices are both generally accepted and AWA-compliant.

In addition to the plain meaning of the text, this interpretation is supported by guidance from the U.S. Fish and Wildlife Service (FWS), which implements the ESA and promulgated the regulation containing the harass exception. *See* 16 U.S.C. § 1537a(a). When the FWS amended the definition of "harass" to create the exception for captive wildlife, the FWS made clear that the exception applies only when the conduct is "not likely to result in injury to the wildlife." *See* 63 Fed. Reg. 48634, 48638 (Sept. 11, 1998) ("[T]he definition of 'harass' in 50 CFR 17.3 is modified to exclude normal animal husbandry practices ***that are not likely to result in injury*** such as humane and healthful care when applied to captive wildlife." (emphasis added)). It explained that "[t]he purpose of amending the [FWS]'s definition of 'harass' is to exclude proper animal husbandry practices ***that are not likely to result in injury*** from the prohibition against 'take.'" *Id.* at 48636 (emphasis added). Indeed, the FWS further emphasized that "maintaining animals in inadequate, unsafe or unsanitary conditions, physical mistreatment, and the like

constitute harassment because such conditions might ***create the likelihood of injury or sickness***." *Id.* at 48638 (emphasis added).[13]

The third requirement of the harass exception has yet to be squarely addressed by other courts because its application has never been dispositive. For instance, where a court finds the exception does not apply because a husbandry practice is not AWA-compliant or generally accepted, it need not reach the third prong. Here, Rowley failed to provide sufficient evidence of harassment in the first instance. Thus, examining the application of the harassment exception is unnecessary.

If the Court reaches the issue, it should recognize the third requirement and hold that the harass exception applies only if the challenged conduct is also "not likely to result in injury to the wildlife."

III. Defendants have the burden to prove the harass exception applies.

In addition to failing to identify the substantive requirements of the harass exception for captive wildlife, the district court also failed to address the parties'

[13] The National Marine Fisheries Service is responsible for administering the ESA with regard to endangered marine mammals. It has not defined "harass" or created an analogous exception. *Miami Seaquarium*, 879 F.3d at 1149. *Miami Seaquarium* is thus inapposite here because it involved a marine mammal. *See* Findings of Fact, Rulings of Law, and Order for Judgment, ECF No. 91, at 11 n.3 [Abb. R. 47]. Moreover, as the district court in this case noted, the Eleventh Circuit fashioned a novel, unsupported "threat of serious harm" standard. *Id*. at 11 [Abb. R. 47].

relative burdens of proof under the exception. None of the courts that have opined on the exception have addressed the issue of the parties' burdens.

It is a "general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *Nat'l Labor Relations Bd. v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) (quoting *Fed. Trade Comm'n v. Morton Salt Co.*, 334 U.S. 27, 44-45 (1948)). This rule applies equally to regulations. *See Morales v. Sociedad Espanola de Auxilio Mutuo y Beneficencia*, 524 F.3d 54, 59 (1st Cir. 2008) ("To determine the regulation's meaning, an inquiring court first should apply the same set of principles that inform statutory construction.").

Under this rule, if a plaintiff successfully proves harassment under the ESA, the burden then shifts to the defendant—as the party claiming the exception's benefits—to assert that the exception applies. Again, because Rowley failed to meet her burden of demonstrating harassment or harm under the ESA, adopting this burden-shifting framework would not change the result here. Nevertheless, if the Court reaches the issue, it should adopt this framework.

CONCLUSION

The Court should affirm the district court's determination that Rowley failed to demonstrate an ESA violation without resolving the question of the appropriate

legal standards under the harass exception for captive wildlife. Alternatively, if the Court deems it necessary to address the legal standard, it should recognize that the harass exception applies only if the challenged conduct is also "not likely to result in injury to the wildlife," as well as adopt a burden-shifting framework that places the burden on the defendant to show the exception applies.

If oral argument in this case is granted, *Amici* respectfully ask for the opportunity to be heard pursuant to Federal Rule of Appellate Procedure 29(a)(8), to discuss the legal issues set forth above and to respond to any of the Court's questions, which might not be adequately addressed by the parties.

Respectfully submitted,

Dated: December 16, 2019

/s/ *Jeffrey P. Richter*

Jeffrey P. Richter (1st Cir. 1191489)
K&L GATES LLP
210 Sixth Ave.
Pittsburgh, PA 15222
jeff.richter@klgates.com
Phone: 412-355-8970
Fax: 412-355-6501
Counsel for Animal Legal Defense Fund and People for the Ethical Treatment of Animals, Inc.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3693 words, excluding the portions exempted by Rule 32(f).

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Dated: December 16, 2019

/s/ *Jeffrey P. Richter*
Jeffrey P. Richter

CERTIFICATE OF SERVICE

I certify that on December 16, 2019, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. Once the brief is accepted for filing by the Clerk's Office, I will send nine (9) copies to the Clerk of Court.

Dated: December 16, 2019

/s/ *Jeffrey P. Richter*
Jeffrey P. Richter