CASE NO. 16-14814

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.,
ANIMAL LEGAL DEFENSE FUND,
HOWARD GARRETT, and ORCA NETWORK,
Appellants,

vs.

MIAMI SEAQUARIUM and FESTIVAL FUN PARKS, LLC
d/b/a PALACE ENTERTAINMENT,
Appellees.

On appeal from the United States District Court
for the Southern District of Florida, Miami Division

APPELLANTS' PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following is a list of all judges, attorneys, persons, associations of persons, firms, partnerships, corporations, and other legal entities that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, any publicly-held company that owns ten percent or more of a party's stock, and other identifiable entities related to a party (additions appear in **bold**):

Trial Judges

Otazo-Reyes, The Honorable Alicia M.; United States Magistrate Judge, Southern District of Florida

Ungaro, The Honorable Ursula; United States District Judge, Southern District of Florida

Panel Judges

Black, The Honorable Susan H.; Senior Judge, U.S. Court of Appeals for the Eleventh Circuit

Hull, The Honorable Frank M.; Senior Judge, U.S. Court of Appeals for the Eleventh Circuit

Restani, The Honorable Jane A.; Senior Judge, U.S. Court of International Trade

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Garrett, Howard

Corporations and Other Entities

Animal Legal Defense Fund

Arle Capital Partners, Ltd.

Birch Horton Bittner and Cherot P.C.

Coffey Burlington, P.L.

Festival Fun Parks, LLC, d/b/a Miami Seaquarium

Foundation to Support Animal Protection d/b/a PETA Foundation

Greenberg Traurig, LLP

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Orca Network

Palace Entertainment Holdings, LLC

Parques Reunidos Servicios Centrales SA (PQR)

People for the Ethical Treatment of Animals, Inc.

Sea Shepherd Legal

The Fund for Animals

The Humane Society of the United States

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs People for the Ethical Treatment of Animals, Inc., Animal Legal Defense Fund, and Orca Network state that they have no parent

companies and that they have no stock that could be owned by a publicly held corporation.

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

- *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995), which recognized that Congress intended "take" to be interpreted broadly and that the canon of *noscitur a sociis* could not properly be applied to narrow the terms that define it in a manner that contravenes congressional intent;
- *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014), which cautioned against restricting the application of one law to yield to a merely complementary law, with reasoning remarkably analogous to the intersection of the Endangered Species Act (ESA) and Animal Welfare Act (AWA) in this case; and

- *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986), which holds that summary judgment is improper if there are genuine disputes of material fact such that a reasonable factfinder could find for the nonmoving party.

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

- Whether the standard for the statutory prohibition of a "take" in violation of the ESA is to be interpreted broadly, consistent with the ESA's "broad purpose to protect endangered … wildlife," or instead is a heightened one for captive animals because the U.S. Department of Agriculture's (USDA) later-promulgated AWA standards also regulate the captive care of animals used for exhibition—a "protection-narrowing" outcome that has been rejected by the Fourth Circuit.
- Whether the Court improperly concluded, without analysis, that the documentary and expert evidence Plaintiffs presented of the physical and psychological injuries suffered

by Lolita—the last captive member of one of the most critically endangered populations on earth—which are caused by the uniquely inadequate conditions in which the Seaquarium holds her and are likely to reduce her lifespan, do not even raise material issues of fact as to whether those injuries are "sufficiently serious" to constitute harm or harassment in violation of the ESA under any definition of those terms.

Respectfully submitted,

By: s/ Paul J. Schwiep

Attorney of Record for
Appellants

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STATEMENT OF ISSUES MERITING EN BANC CONSIDERATION

Whether unlawful "harm" and "harassment" of endangered animals requires satisfaction of a "serious threat" standard not reflected in the plain language of the ESA, and inconsistent with (1) the ordinary and regulatory definitions of the terms; (2) agency implementation of the statute; (3) Supreme Court decisions regarding the broad protections the statute affords to endangered animals and the impropriety of finding a conflict between statutes where none exists; and (4) the law of the Fourth Circuit.

Whether, under any standard, summary judgment can be granted when a party has presented extensive evidence of a critically endangered animal's physical and psychological injuries, including those that are likely to reduce her lifespan, and the parties dispute the cause, severity, and nature of those injuries.

COURSE OF PROCEEDINGS AND DISPOSITION

Plaintiffs filed their Complaint in the Southern District of Florida on July 20, 2015. (DE 1.) Defendant filed its Answer on August 28 (DE 18), and Amended Answer on September 18 (DE 22).

Defendant filed a Motion for Summary Judgment on March 11, 2016, challenging Plaintiffs' standing and arguing that Plaintiffs failed to demonstrate a "take" of Lolita under the ESA. (DE 126.) Plaintiffs filed a Motion for Partial Summary Judgment on Standing. (DE 131.) On June 1, 2016, the district court granted Plaintiffs' motion and granted Defendant's in part, concluding as a matter of law that Plaintiffs did not establish a "take." (DE 203 at 38.)

In reaching this result, the court acknowledged that Plaintiffs presented evidence and expert testimony that Lolita suffers from thirteen injuries (*id.* at 17-18)—all of which implicate disputed facts (DE 164, *passim*)—that "are within the ambit of the ordinary meaning of 'harm' and 'harass.'" (DE 203 at 38.)

However, rather than adopting their ordinary or regulatory definitions, the Court granted Defendant's motion based upon a cursory finding that Lolita's conditions do not "rise to the level of grave harm

that is required to constitute a 'take' by a licensed exhibitor under the ESA." (*Id.*) The Court failed to acknowledge factual disputes regarding injuries that threaten Lolita's life and thereby constitute a "take" under any standard.

On July 1, 2016, Plaintiffs submitted a notice of appeal. (DE 206.) Briefing was complete on April 4, 2017, and the Court held oral argument on December 6.

On January 12, 2018, the Court held that PETA has standing, but affirmed summary judgment for Defendant. The Court rejected the district court's "grave threat" standard, but instead adopted a novel "serious threat" standard and, without analysis, held that Lolita's conditions are not a "take" as a matter of law. This interpretation is inconsistent with the ESA, Supreme Court precedent, Fourth Circuit precedent, and agency interpretation. Further, it overlooks material factual disputes concerning Lolita's conditions and the nature and severity of her resulting injuries. Plaintiffs request reconsideration of this decision.

STATEMENT OF NECESSARY FACTS

Plaintiffs challenge, under the ESA, Defendant's "take" of endangered orca Lolita. Plaintiffs allege that Defendant "harms" and "harasses" Lolita—who would, in nature, be highly social, far-ranging, and deep-diving—by confining her to a small, shallow, barren concrete tank, without adequate protection from the sun, without another orca, and with highly incompatible dolphins. (DE 164, ¶¶ 12-121.) These conditions, which are unique among all captive orca enclosures, prevent Lolita from performing natural behaviors (including socializing, diving, swimming any meaningful distance, and seeking shade) (*id.* ¶¶ 30, 102-12), and cause her to suffer chronic illness (*id.* ¶¶ 21, 24, 116-18), sun damage (*id.* ¶¶ 24, 68, 71, 74, 112), and to sustain repeated injuries in the form of rakes to her flesh by the dolphins in her tank (*id.* ¶¶ 52-54, 98, 105-07). Consequently, Lolita manifests psychological injuries in the form of stereotypic (i.e., repetitive and abnormal) behavior. (*Id.* ¶ 113.)

ARGUMENT

I. The Panel Decision Contravenes Supreme Court Precedent.

The panel's decision rests on two primary points. First, it held that the statutory terms "harm" and "harass" in the definition of "take" must be interpreted more narrowly than their ordinary meanings. This holding contravenes the Supreme Court's recognition in *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995), that Congress intended "take" to be interpreted broadly, and that *noscitur a sociis* may not narrow its defining terms in a manner inconsistent with that intent. Second, the panel held that the AWA's regulation of captive animal exhibitions supports a narrow reading of the statute, despite the Supreme Court's holding in *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014), that one law does not yield to a complementary law simply because it addresses similar subject matter.

The panel also erred by affirming summary judgment when disputed facts remain regarding the conditions under which Lolita is held and the severity of her injuries, contrary to *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248 (1986). Accordingly, en banc reconsideration is necessary.

A. The Panel Decision Contravenes the Supreme Court's Interpretation of "Take."

In enacting the ESA, "Congress intended endangered species to be afforded the highest of priorities." *Tenn. Valley Auth. v. Hill,* 437 U.S. 153, 174 (1978). In *Sweet Home*, the Supreme Court explained that "take," and specifically "harm," must be construed to effectuate this "broad purpose." 515 U.S. at 698.

The Supreme Court interpreted "harm" consistent with the ESA's legislative history, finding that Congress defined "take" "'in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife.'" *Id.* at 704-05 (quoting S. Rep. No. 93–307, p. 7 (1973)); *accord id.* (citing H.R. Rep. No. 93-412, pp. 11, 15 (1973)). Indeed, the Supreme Court noted that Congress "went out of its way to add" the "obviously broad" word "harm" to the definition of "take," and that intended breadth "deserves a respectful reading." *Id.* at 706.

The panel distinguishes *Sweet Home* on the ground that "this case concerns an issue of statutory construction, whereas *Sweet Home*

concerned a regulation entitled to deference." Add. at 10. Yet just like *Sweet Home*, the specific issue in this appeal is the proper interpretation of the terms that define "take," which are further defined by the National Marine Fisheries Service (NMFS) and Fish and Wildlife Service (FWS), the agencies responsible for administering the law. These agencies have longstanding practices of applying their regulations under the controlling precedent of *Sweet Home*.

As the panel recognized, the NMFS and FWS definitions already restrict "harm" and "harass" to conduct that actually causes or is likely to cause injury, respectively, and if that conduct involves the impairment or disruption of behavioral patterns, that impairment or disruption must be "significant[]." Add. at 13-14 (citing 50 C.F.R. § 222.102, 50 C.F.R. § 17.3). Accordingly, these definitions provide the threshold that conduct must meet to violate the ESA. The panel acknowledged that the agency definitions are entitled to *Chevron* deference, Add. at 13-14, and that Plaintiffs produced evidence of physical harms and significant impairment of essential behavioral patterns that pose a threat to Lolita's survival, *id.* at 6, n.4. Instead of analyzing Lolita's injuries pursuant to those definitions, however, the

panel instead reasoned that the regulations support an even more restrictive interpretation of the statutory terms, holding without analysis that the injuries do not satisfy its novel "serious threat of harm" standard.

The panel also disregarded decades-long agency interpretations of "take." Just as an agency's regulations are due deference, so is its "reasonable interpretation of regulations it has put in force," *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008), and its "reasonable judgments … with regard to the meaning of ambiguous terms in statutes that [it is] charged with administering," *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 739 (1996). While the panel cites FWS's definition of "harass,"[1] it ignores the exception for (1) "generally accepted" (2) husbandry practices, breeding procedures, or veterinary care that are AWA-compliant and (3) unlikely to injure captive animals. 50 C.F.R. § 17.3. FWS understood "harass" to cover mere possession of an animal in captivity *but for* this exception. *See, e.g.*, 58 Fed. Reg. 32,632, 32,635 (June 11, 1993) (without the exception "the concepts of 'harass' and 'take' would virtually result in a

[1] NMFS has favorably cited FWS's definition of "harass." *See Strahan v. Roughead*, 910 F. Supp. 2d 358, 366 (D. Mass. 2012).

comprehensive prohibition on the possession of listed wildlife species"). It did not interpret the ESA to be triggered only where there was a "serious threat," and included the only limitation it felt was necessary.

FWS made clear that this exception applies only when all three prongs are met: "Obviously, maintaining animals in inadequate, unsafe or unsanitary conditions, feeding an improper or unhealthful diet, and physical mistreatment constitute harassment because such conditions might create the likelihood of injury or sickness of an animal." *Id.* at 32637; *see also* 63 Fed. Reg. 48,634, 48,638 (Sept. 11, 1998) ("The Act continues to afford protection to listed species that are not being treated in a humane manner.").[2] By disregarding FWS's interpretation of the statute, the panel, which expressed concern about substituting its judgment for the USDA's, substituted its judgment for that of the agencies that administer the ESA.

Accordingly, the panel's decision is inconsistent with *Sweet*

[2] The panel suggests that only "annoyances … that bear [a] reasonable relationship to extinction" fall within the ESA, but ignores FWS's acknowledgment that the "take" prohibition for captive Asian elephants was necessary "to ensure that elephants held in captivity receive an appropriate standard of care" even though their take "is not a threat to the species"—clearly indicating that captive care bears a reasonable relationship to extinction. 81 Fed. Reg. 36,388, 36,388 (June 6, 2016).

Home's recognition of Congress' clear intent that the "take" prohibition be interpreted broadly, as reflected in agency administration of the ESA.

B. The Panel Decision Contravenes the Supreme Court's Applications of *Noscitur a Sociis*.

Despite the panel's recognition that the ordinary meanings of "harm" and "harass" require actual "hurt or damage" or "continual[] or chronic[]" annoyances, respectively, it concluded that these definitions would improperly encompass "*de minimis* annoyances to endangered animals" and applied *noscitur a sociis* to further restrict the meaning of "harm" and "harass." Add. at 8-9, 12. This restriction was improper for at least three reasons.

First, the Supreme Court expressly rejected the use of this canon to restrict the scope of "harm" in the ESA. *Sweet Home*, 515 U.S. at 702. Contrary to the panel's determination that the list of terms defining "take" "raises the implication that the words … should be given related meaning," Add. at 8-9, the Supreme Court recognized that "harm" was added to the statute not because it was related to the other terms, but to expand the scope of the law's protections because it was "obviously broad." *Sweet Home* at 706. The application of *noscitur a sociis* is

intended to avoid "*unintended* breadth," *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (emphasis added), not to restrict terms used precisely because of their breadth.

Second, the Supreme Court has cautioned against implying a "related meaning" where, as here, terms are "connected in the disjunctive." *Garcia v. United States*, 469 U.S. 70, 73 (1984) ("the use of the term 'or' indicates an intent to give the nouns their separate, normal meanings").

Finally, the Supreme Court rejected using *noscitur a sociis* in similar circumstances. In *United States v. Stevens*, 559 U.S. 460, 464–65 (2010), the Court considered the overbreadth of a prohibition on conduct related to a "depiction of animal cruelty," "defined as one 'in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed.'" The government argued that although "wounded" and "killed" do not *require* cruelty, they should be construed narrowly as such in light of the "definiendum" and "the commonsense canon of *noscitur a sociis*." *Id.* at 474. The Court rejected the argument, reasoning that the terms "contain[] little ambiguity[,] … should be read according to their ordinary meaning," and "[n]othing about that

meaning requires cruelty." *Id.* at 474–75. So too here—harm and harassment contain little ambiguity, and nothing about their ordinary meanings requires any more of a "serious threat" than those meanings provide.[3]

C. The Panel Decision Contravenes the Supreme Court's *POM Wonderful* Decision.

The panel posits that the AWA's regulation of captive conditions supports its newly-announced standard. Add. at 15. The Supreme Court rejected reasoning virtually identical to the panel's in the directly analogous case of *POM Wonderful*.

In *POM Wonderful*, POM sued Coca-Cola under the Lanham Act, alleging that Coca-Cola's use of a juice label was misleading. 134 S. Ct. at 2233. The Lanham Act grants a cause of action to competitors for false or misleading product descriptions. *Id.* Coca-Cola contended that the claim was precluded because the label was proper under the Federal

[3] The panel improperly concluded that *noscitur a sociis* led to "plain and unambiguous meaning[s]" of harm and harass. Add. at 11. Rather, its opinion *created* ambiguity for all of the terms used to define "take." It proposes no new definition of "harm" or "harass," but instead notes that they must refer to "conduct that poses a similarly serious threat" as the other terms used in the statute, which themselves do not all require the same level of threat—e.g., animals are commonly "capture[d]" or "collect[ed]" without "risk of considerable harm," such as humanely trapped feral cats.

Food, Drug, and Cosmetic Act ("FDCA"), which more specifically forbids false or misleading food labeling, and its specific juice-labeling regulations. *Id.* at 2333. The Ninth Circuit affirmed partial summary judgment for Coca-Cola, in reasoning that mirrors the panel's in this case:

> Congress decided "to entrust matters of juice beverage labeling to the FDA"; the FDA has promulgated "comprehensive regulation of that labeling"; and the FDA "apparently" has not imposed the requirements on Coca–Cola's label that are sought by POM. "[U]nder [Circuit] precedent," the Court of Appeals explained, "for a court to act when the FDA has not—despite regulating extensively in this area—would risk undercutting the FDA's expert judgments and authority." For these reasons, and "[o]ut of respect for the statutory and regulatory scheme," the Court of Appeals barred POM's Lanham Act claim.

Id. at 2236 (alterations in original).

The Supreme Court unanimously reversed for reasons directly analogous to this case. Like the Lanham Act and FDCA:

- Neither the ESA nor AWA limits ESA claims challenging AWA-regulated conditions, or purports to govern their interaction, even though they have co-existed for 45 years. If Congress felt that ESA citizen suits interfered with the AWA, it would have explicitly addressed it during that time. *Cf. id.* at 2237.

- It is irrelevant that the AWA addresses captive conditions more specifically than the ESA because (1) "[they] are complementary and have separate scopes and purposes," *cf. id.* at 2240; (2) they can be implemented in full at the same time, *id.*—they offer no conflicting requirements in that it is possible to comply with both; and (3) each has its own enforcement mechanism, *cf. id.* at 2238—only the ESA allows for private enforcement.
- "The centralization of [AWA] enforcement authority in the Federal Government does not indicate that Congress intended to foreclose private enforcement of other federal statutes." *Cf. id.* at 2239.
- AWA regulations are, indisputably, not "a ceiling on the regulation" of captive animal care. *Cf. id.* at 2240; *see* 7 U.S.C. § 2143(a)(8).
- The lawsuit is not "undermining an agency judgment, and in any event the [USDA] does not have authority to enforce the [ESA]." *Cf.* 134 S. Ct. at 2241.
- The Court should not "preclude private parties from availing themselves of a well-established federal remedy because an agency enacted regulations that touch on similar subject matter

but do not purport to displace that remedy or even implement the statute that is its source." *Cf. id.*

In addition to the fact that endangered animals are only a small subset of animals held by AWA-licensed facilities, this reasoning makes clear that the panel substantially overstated that the co-application of the laws, without a "serious threat" threshold, "could nullify the AWA's regime of administrative enforcement." Add. at 16.[4]

D. The Panel Affirmed Summary Judgment Despite Issues of Material Fact.

Even under its "serious threat" standard, the panel erred by affirming summary judgment when disputed facts remain regarding the conditions under which Lolita is maintained, including AWA compliance, and the severity of Lolita's injuries.

The Supreme Court has made clear that "summary judgment will not lie" if there are genuine disputes of material fact such that a reasonable factfinder could find for the nonmoving party. *Anderson,* 477

[4] Even a "serious threat" standard does not resolve the panel's concern that the ESA's broad application would "abrogat[e] the complex regulatory scheme crafted and administered by APHIS." Under its standard, the ESA applies to conduct that "poses a threat of serious harm" *and* is prohibited by AWA standards, thereby still allowing for citizen suits despite USDA's decision not to enforce the AWA standards.

U.S. at 248. Here, Plaintiffs proffered extensive evidence of Lolita's injuries, including that they reduce her likelihood of survival and therefore present not only "serious threats," but existing harm. In addition to the thirteen categories of injury acknowledged by the panel, Add. at 6 n.4, Plaintiffs' summary judgment opposition detailed the physical and psychological harm that Lolita endures, including being raked to the extent that it caused open wounds—which the panel cited as an example of a "serious threat," *id.* at 9. Whether these injures are sufficiently significant to amount to a "take" is the critical issue in this case.

While the panel purports to have viewed this evidence, including Seaquarium's documents and Plaintiffs' expert reports, in the light most favorable to Plaintiffs, it provided no analysis of why the evidence "does not support the conclusion that the conditions of her captivity pose a threat of serious harm to Lolita." *Id.* at 3.

Whether the frequent infections, anemia, kidney disease, possible ulcers and lung disease, and raking that Lolita suffers while confined to a uniquely inadequate tank present a "serious threat" to her, under a standard not applied by the lower court, is not a question of law, but of

fact. Clearly, there remain genuine issues of material fact as to the scope and extent of Lolita's injuries, and the conditions in which she is held, and a reasonable factfinder could find for Plaintiffs. *See Harris v. Prison Health Servs.*, 706 F. Add. 945, 949, 951 (11th Cir. 2017) (plaintiff alleged injuries, disputed by medical records, raised "disputes of material fact as to the extent of [his] injuries").

Accordingly, regardless of the standard applied, summary judgment was improper and the panel was required to remand for further proceedings consistent with that standard.

II. This Appeal Involves Questions of Exceptional Importance.

A. The Panel Decision Creates Intercircuit Conflict.

As discussed above, the panel improperly reasoned that the "relationship between" the ESA and AWA "lends still more support for the conclusion that 'harm' or 'harass[ment]' is only actionable if it poses a threat of serious harm." Add. at 15. Not only is this reasoning inconsistent with *POM Wonderful*, but it has been specifically rejected by the Fourth Circuit.

In *Hill v. Coggins*, 867 F.3d 499 (4th Cir. 2017), the Court reversed the district court's conclusion that all AWA-compliant

husbandry practices are excluded from the FWS' definition of "harass," holding that:

> [T]he district court narrows the scope of what constitutes harassment and, by extension, the scope of what constitutes a proscribed taking of protected animals under the ESA. The district court's interpretation also makes it so that the first enumerated exclusion is necessarily satisfied whenever a defendant complies with the Secretary of Agriculture-administered AWA. This protection-narrowing, Secretary of Agriculture-centered outcome is in tension with what the Supreme Court has explained Congress had in mind in enacting the ESA: a "broad purpose to protect endangered and threatened wildlife," which was to be advanced in large part through "broad administrative and interpretive power [delegated] to the Secretary [of the Interior]."

Hill, 867 F.3d at 510 (quoting *Sweet Home*, 515 U.S. at 708). A similar interpretation has been adopted by district courts. *Kuehl v. Sellner*, 161 F. Supp. 3d 678, 711 (N.D. Iowa 2016) (social isolation harassed lemurs at zoo despite no corresponding AWA citations); *Graham v. San Antonio Zoological Soc'y*, 261 F. Supp. 3d 711, 743 (W.D. Tex. 2017) (the "invocation of statutory canons of construction and foray into legislative history" in Lolita's case "overlook that the FWS has promulgated clear, straightforward definitions of these terms, obviating the need for such inquiries"); *People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Maryland, Inc.*, No. CV MJG-17-2148, 2018

WL 434229, at *6 (D. Md. Jan. 16, 2018) ("the ESA and AWA do not pursue conflicting objectives" and "the ESA provides for separate and heightened protections for the subset of captive animals that are threatened or endangered").[5]

The panel's interpretation of the ESA is the "protection-narrowing, Secretary of Agriculture-centered outcome" that *Hill* rejected as inconsistent with the statutory breadth. It does not provide endangered animals with "an additional layer of protection," Add. at 17, as it must, but actually provides *less* robust protections than the AWA's minimum standards.[6]

B. The Panel Failed to Allow Plaintiffs the Opportunity to Meet the Standard.

The panel's novel standard of "take" was further compounded by its failure to allow Plaintiffs any opportunity to demonstrate that they can meet the heightened standard.

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[5] The AWA standards have been critiqued by the federal Marine Mammal Commission for failing to consider "abundant data" on marine mammal needs and physical and psychological well-being, failing to provide them with sufficient space, and prioritizing exhibitor costs over welfare. (Appellants' Opening Brief ("Br.") at 41.)

[6] Many captive endangered animals are held by non-licensed entities, to which the AWA does not apply. (Br. at 43 n.18.) The panel's standard leaves these animals without protection from conduct that even violates AWA standards.

When an appellate court adopts a different standard than the one used below, particularly where it requires a fact-specific inquiry, it is appropriate to remand for reconsideration of whether summary judgment was appropriate pursuant to the correct standard. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 631 (2009) ("When this Court formulates a new legal rule, the ordinary course is to remand and allow the lower courts to apply the rule in the first instance."); *Basic Inc. v. Levinson*, 485 U.S. 224, 240–41 (1988) (remanding for a "fact-specific inquiry" to reconsider summary judgment based on new "materiality" standard); *Malat v. Riddell*, 383 U.S. 569, 572 (1966) ("[T]he appropriate disposition is to remand the case … for fresh fact-findings, addressed to the statute as we have now construed it."); *Bigge v. Albertsons, Inc.*, 894 F.2d 1497, 1503 (11th Cir. 1990) ("the district court's use of the wrong legal standard sufficiently taints and infects its finding … to remand the case for a determination under the proper standard").

In this case, the panel applied a heightened and never-before-articulated "serious threat" standard to the district court's representation of the record. Even if this standard is upheld, the panel's

application of it through the lens of the district court's "grave threat" analysis "taints and infects its finding," and the case must be remanded to the district court for determination under the proper standard.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this petition be granted.

Date: February 2, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation of 11th Cir. R. 35-1 because it contains 3,900 words. This petition has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in 14-point Century font.

s/ Paul J. Schwiep

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed through CM/ECF, this 2nd day of February, 2018, with the United States Court of Appeals for the Eleventh Circuit, and served via Notice of Docket Activity. In addition, I electronically served copies to:

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s/ Paul J. Schwiep

Addendum

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-14814

D.C. Docket No. 1:15-cv-22692-UU

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.,
ANIMAL LEGAL DEFENSE FUND,
HOWARD GARRETT,
ORCA NETWORK,

Plaintiffs - Appellants,

versus

MIAMI SEAQUARIUM,
FESTIVAL FUN PARKS, LLC,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(January 12, 2018)

Before BLACK and HULL, Circuit Judges, and RESTANI,* Judge.

PER CURIAM:

This case concerns Lolita, an *Orcinus orca* living in captivity at Miami Seaquarium. People for the Ethical Treatment of Animals, Inc., Animal Legal Defense Fund, Orca Network, and Howard Garrett (collectively, PETA) sued Miami Seaquarium and Festival Fun Parks, LLC (collectively, Seaquarium), alleging Seaquarium is perpetrating an unlawful "take" by "harm[ing]" or "harass[ing]" Lolita in violation of section 9(a)(1)(B) of the Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(1)(B).

The district court determined that "a licensed exhibitor 'take[s]' a captive animal . . . only when its conduct gravely threatens or has the potential to gravely threaten the animal's survival" and granted summary judgment for Seaquarium, citing PETA's failure to identify any conduct satisfying that standard. On appeal, PETA contends the district court imposed too high a standard and, alternatively, that the district court erred by concluding Seaquarium's conduct does not, as a matter of law, pose a grave threat to Lolita.[1]

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* Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

[1] PETA also asserts the district court "imposed a novel 'grave threat' requirement only with respect to a 'take' of captive animals regulated under the [Animal Welfare Act], creating a drastic disparity between [Endangered Species Act] protections afforded to wild and captive endangered animals." Like this opinion, the district court's order pertains only to captive

We affirm the district court's determination that Seaquarium is entitled to summary judgment; however, we do not agree that actionable "harm" or "harass[ment]" includes only deadly or potentially deadly harm. Rather, Seaquarium is entitled to summary judgment because the evidence, construed in the light most favorable to PETA, does not support the conclusion that the conditions of her captivity pose a threat of serious harm to Lolita.

I. BACKGROUND

A. Lolita

A member of the Southern Resident L Pod of the Southern Resident Killer Whale (SRKW) Distinct Population Segment, Lolita was captured off the coast of Washington state when she was between three and six years old. Seaquarium purchased Lolita and she has lived at Seaquarium since September 24, 1970. Lolita is about twenty feet long and weighs around 8,000 pounds.

Lolita lives in an oblong tank that, at its widest and deepest points, is eighty feet wide and twenty feet deep.[2] A portion of the tank is occupied by a concrete

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endangered animals because this case concerns only a captive endangered animal. The standard applicable to wild endangered animals is not decided in this case.

[2] In the district court, PETA sought an order enjoining Seaquarium from continuing to violate the Endangered Species Act (ESA), requiring Seaquarium to forfeit possession of Lolita, and requiring Seaquarium to transfer Lolita to a sea pen. At oral argument, counsel for PETA acknowledged the sea pen has not yet been built, but represented that PETA has funding for the project. We asked counsel for a submission directing us to the portion of the record discussing Lolita's proposed relocation. PETA's response acknowledges that the relocation plan is not itself in the record and, instead, cites a hyperlink included in an interrogatory response.

platform on which Lolita's trainers stand. Stadium seating surrounds the tank. Lolita has not lived with another orca since 1980, when Hugo, her former companion, passed away. Lolita now lives with Pacific white-sided dolphins (PWSDs). Like Lolita, the PWSDs are cetacean mammals.

B. The Instant Case

The Endangered Species Act of 1973 (ESA), 87 Stat. 884, 16 U.S.C. § 1531 *et seq.* (1988 ed. and Supp. V), protects species of fish and wildlife designated as endangered or threatened. Until recently, the ESA did not cover Lolita. The National Marine Fisheries Service (NMFS), the agency that administers the ESA with respect to marine mammals, recognized SRKWs as an endangered species in 2005; however, the listing excluded captive SRKWs. *Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales,* 70 Fed. Reg. 69,903-01, 69,911 (Nov. 18, 2005) (codified at 50 C.F.R. § 17.11).

In January 2013, PETA successfully petitioned the NMFS to recognize Lolita as a protected SRKW and to remove the "captive member" exclusion from the ESA. Since May 11, 2015, NMFS has recognized Lolita as a SRKW covered by the ESA. *Listing Endangered or Threatened Species: Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct*

Although the hyperlinked document describes the relocation plan, it does not demonstrate that PETA has funded the sea pen's construction in whole or in part.

Population Segment, 80 Fed. Reg. 7380-01 (Feb. 10, 2015) (codified at 50 C.F.R. pt. 224). On July 20, 2015, approximately two months after Lolita came within its coverage, PETA sued under section 9(a)(1)(B) of the ESA.

Section 9(a)(1) protects "any endangered species of fish or wildlife listed pursuant to section 1533."[3] 16 U.S.C. § 1538(a)(1). Section 9(a)(1)(B) makes it unlawful to "take any such species within the United States or the territorial sea of the United States." *Id.* § 1538(a)(1)(B). "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). PETA specifically contends Seaquarium is subjecting Lolita to "harm" or "harass[ment]." When PETA filed suit, Lolita was approximately fifty-one years old. Wild female SRKWs have a median life expectancy of approximately 38 years according to Seaquarium and approximately 50 years according to PETA. Lolita has exceeded the median life expectancy of wild female SRKWs by either measure. In support of its claim that Seaquarium is subjecting Lolita to "harm" or "harass[ment]," PETA cites thirteen separate injuries to Lolita, alleging each is attributable to the configuration of Lolita's tank, the PWSDs with which Lolita shares her tank, sun exposure, or some combination

[3] 16 U.S.C. § 1533(a)(1)(A)–(E) sets forth several factors used "to determine whether any species is an endangered species or a threatened species."

thereof. [4]

The case came before the district court on cross-motions for summary judgment. PETA moved for partial summary judgment on the threshold issue of standing. Seaquarium moved for summary judgment on standing and the merits. Although the district court concluded PETA had standing to assert its ESA claims, the district court nevertheless entered summary judgment in Seaquarium's favor.[5] PETA appealed.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo*, applying the same legal standards as the district court. *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc). We will affirm if, construing the evidence in the light most favorable to the non-moving party, no genuine issue of material

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[4] The injuries PETA cites are: (1) Physical and psychological injury caused by Lolita's inability to engage in normal swimming and diving behaviors in her tank; (2) Psychological injury attributable to the absence of a socially compatible companion; (3) Rakes inflicted when the PWSDs scrape Lolita with their teeth while swimming past her; (4) Stress caused by the PWSDs' aggressive behavior; (5) Stress caused by the PWSDs' inappropriate sexual behavior; (6) "Surfer's eye," a condition caused by exposure to UV radiation for which Lolita requires twice-daily eye drops; (7) Blisters and wrinkles potentially caused by sun exposure; (8) Treatment with antibiotics, antifungals, pain medication, hormones, and antacids not used on wild orca; (9) General unhealthiness illustrated by: a mild kidney impairment, a high number of bacteria, past treatment for respiratory infections, and a potential recurring lung condition; (10) Abnormal behavior like listless floating, lying motionless near her tank's inflow valve, pattern swimming, etc.; (11) Significant wear in six teeth; (12) A tooth that has been drilled multiple times; and (13) Captivity conditions likely to reduce Lolita's lifespan.

[5] Seaquarium filed a cross-appeal to preserve its argument that PETA lacks standing. This Court dismissed the cross-appeal, noting Seaquarium could argue the point in its response brief. Seaquarium did so. We conclude PETA has standing to bring its ESA claim.

fact exists and the moving party is entitled to judgment as a matter of law. *Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1262–63 (11th Cir. 2003).

III. ANALYSIS

Confronted with a question of statutory construction, we begin with the words of the statute. *See Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc). "If the statute's meaning is plain and unambiguous, there is no need for further inquiry." *United States v. Fisher*, 289 F.3d 1329, 1338 (11th Cir. 2002). Section 9(a)(1)(B) makes it unlawful to "take [any endangered species of fish or wildlife listed pursuant to section 1533] within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(B). "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). PETA contends Lolita is being "harm[ed]" and "harass[ed]"; however, neither "harm" nor "harass" is defined in the ESA.

"In the absence of a statutory definition of a term, we look to the common usage of words for their meaning." *Consolidated Bank, N.A. v. U.S. Dep't of Treasury*, 118 F.3d 1461, 1464 (11th Cir. 1997). Dictionary definitions speak to common usage. *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1223 (11th Cir. 2001). "Harm" is defined as "to cause hurt or damage to: injure." Webster's Third New International Dictionary 1034 (1986). "Harass" means "to

vex, trouble, or annoy continually or chronically." *Id.* at 1031. Although both definitions clarify what acts constitute "harm" or "harass[ment]," they do not resolve the critical issue in this case: What degree of "harm" or "harass[ment]" is actionable? Accordingly, neither definition reveals a "plain and unambiguous meaning with regard to [this] particular dispute." *Fisher*, 289 F.3d at 1337–38 (quotation omitted).

But dictionary definitions are not the end of plain meaning analysis. As the Supreme Court has often reiterated, construing statutory language is not merely an exercise in ascertaining "the outer limits of [a word's] definitional possibilities." *See, e.g.*, *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486, 126 S. Ct. 1252, 1257 (2006). "We [] have long recognized that our authority to interpret statutory language is constrained by the plain meaning of the statutory language in the context of the entire statute, as assisted by the canons of statutory construction." *Edison v. Douberly*, 604 F.3d 1307, 1310 (11th Cir. 2010).

We turn to the canons of statutory construction for assistance. The interpretive maxim *noscitur a sociis* counsels that "a word is known by the company it keeps." *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 378 126 S. Ct. 1843, 1849 (2006) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S. Ct. 1061, 1069 (1995)). It is frequently employed where, as here, "a string of statutory terms raises the implication that the words grouped in a list should be

given related meaning." *Id.* (quotation omitted). The terms "harm" and "harass" are listed alongside "pursue, hunt, shoot, wound, kill, trap, capture, [and] collect." 16 U.S.C. § 1532(19). Each of the terms accompanying "harm" and "harass" refers to conduct that poses a threat of serious harm to an endangered animal. "Hunt," "shoot," and "kill" each refer to deadly harm. "Trap," "capture," and "collect," which have limited relevance to animals already in captivity, all indicate a seizure. Seizures pose a threat of serious harm because efforts to gain bodily control over an animal come with a risk of considerable harm to the creature itself.[6] The two remaining terms, "pursue" and "wound," also concern seriously threatening conduct. The verb "wound" means "to inflict a wound upon." Webster's Third New International Dictionary at 2638. A "wound" is "an injury to the body consisting of a laceration or breaking of the skin or mucous membrane [usually] by a hard or sharp instrument forcefully driven or applied." *Id.* Similarly, "pursue" means "to follow [usually] determinedly in order to overtake, capture, kill, or defeat." *Id.* at 1848. "Harm" and "harass," which gather meaning from the surrounding terms, should be read as referring to conduct that poses a similarly serious threat.

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[6] "Trap" means "to provide or set (a place) with traps." Webster's Third New International Dictionary at 2431. A "trap" is defined as "a device (as a pitfall, snare, or clamp that springs shut suddenly) for taking game or destructive animals." *Id.* "Collect" means "to bring together into a band . . . ." *Id.* at 444. "Capture" means "to take, seize, or catch [especially] as captive or prize by force, surprise, stratagem, craft or skill . . . ." *Id.* at 334.

PETA contends applying *noscitur a sociis* is inappropriate, citing *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 115 S. Ct. 2407 (1995). But this case concerns an issue of statutory construction, whereas *Sweet Home* concerned a regulation entitled to deference. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984). The regulation addressed in *Sweet Home* interpreted "'harm' to include indirectly injuring endangered animals through habitat modification . . . ." 515 U.S. at 702, 115 S. Ct. at 2415. The D.C. Circuit Court of Appeals, relying heavily on *noscitur a sociis*, concluded the regulation was unreasonable because the other terms listed in the definition of "take" refer to direct applications of force. *Id.* at 694, 115 S. Ct. at 2411. The Supreme Court reversed, emphasizing the inappropriateness of "giv[ing] 'harm' essentially the same function as other words in the definition, thereby denying it independent meaning." *Id.* at 702, 115 S. Ct. at 2415.

Contrary to PETA's position, *Sweet Home* does not counsel against applying *noscitur a sociis* in this case. Using the canon to determine what degree of "harm" or "harass[ment]" is actionable does not deprive "harm" and "harass" of independent meaning. "Harm" brings injury inflicted by means other than pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting within the ESA's ambit. The same is true of "harass," which reaches annoying,

vexatious, and troubling conduct not covered by the other terms listed in the definition of "take." This application of *noscitur a sociis* is distinct from the D.C. Circuit's use of the canon, which removed a category of action (*i.e.* indirect action) from the ESA's purview.

No further inquiry is needed because common usage, as informed by the application of *noscitur a sociis*, reveals that "harm" and "harass" have a "plain and unambiguous meaning with regard to [this] particular dispute." *Fisher*, 289 F.3d at 1337–38 (quotation omitted). We will nevertheless discuss the ESA's purpose, as it is consistent with the conclusion that "harm" and "harass" should be read as referring to conduct that poses a threat of serious harm. The ESA's stated purpose is threefold: (1) providing "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," (2) providing "a program for the conservation of such endangered species and threatened species," and (3) taking appropriate steps to achieve the purposes of certain treaties and conventions set forth in the ESA. 16 U.S.C. § 1531(b). Those stated purposes, which focus on conservation, are broad; however, it is critical to keep in mind that conservation is a broad means aimed at preventing a specific end: extinction. *See, e.g.*, 16 U.S.C. § 1531(a)(1)–(2) (finding and declaring that "various species of fish, wildlife, and plants in the United States have been rendered extinct" while "other species . . . have been so depleted in numbers that

they are in danger of or threatened with extinction . . . ."); *see also* S. Rep. No. 93-307, at 2 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990 (noting "some sort of protective measures must be taken to prevent the further extinction of many of the world's animal species" and characterizing "hunting and destruction of natural habitat" as "[t]he two major causes of extinction"). Accounting only for the dictionary definitions of "harm" and "harass" would bring *de minimis* annoyances to endangered animals that bear no reasonable relationship to extinction within the ESA's coverage—a result inconsistent with its purpose.

PETA contends that reading "harm" and "harass" to include only conduct that poses a serious threat to an animal is inconsistent with the Supreme Court's characterization of the ESA's purpose as "broad." *See Sweet Home*, 515 U.S. at 698, 115 S. Ct. at 2413. But when the Supreme Court remarked on the ESA's broad purpose in *Sweet Home*, it did so in the context of a facial challenge to a regulation that interpreted "harm" as covering indirect action. 515 U.S. at 699, 115 S. Ct. at 2414. Had the Supreme Court invalidated the regulation, no indirect action affecting an endangered animal could have been deemed covered "harm"—even habitat destruction that an actor knew would cause a particular endangered species to go extinct. *Id.* "The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184, 98 S. Ct. 2279, 2297 (1978). Therefore,

the Court declined to exclude all indirect action from coverage, recognizing that activities like habitat destruction "cause the precise harms that Congress enacted the statute to avoid." *Sweet Home*, 515 U.S. at 698, 115 S. Ct. at 2413. Read in context, the Supreme Court's statements about the breadth of the ESA's purpose do not compel the reading PETA urges. Quite the opposite, interpreting "harm" and "harass" as covering any conduct that falls within those terms' dictionary definitions would be out of step with the ESA's purpose.

Agency interpretations also support the conclusion that only serious "harm" or "harass[ment]" is actionable under the ESA. The NMFS, which administers the ESA with respect to marine mammals, including Lolita, has defined "harm" as follows:

> Harm in the definition of "take" in the Act means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns including, breeding, spawning, rearing, migrating, feeding or sheltering.

General Endangered and Threatened Marine Species, 50 C.F.R. § 222.102 (2016). This definition is entitled to deference. *See Chevron*, 467 U.S. at 844, 104 S. Ct. at 2782. PETA contends the NMFS's use of the unadorned term "injures" conflicts with the "grave threat" standard the district court imposed. Several aspects of the definition, however, indicate a serious threat is required. First, "injure[]" is juxtaposed with "actually kill[]," an extremely serious alternative. 50 C.F.R.

§ 222.102. Second, the example provided is "*significant* habitat modification or degradation" that "actually kills or injures fish or wildlife by *significantly* impairing essential behavioral patterns including, breeding, spawning, rearing, migrating, feeding or sheltering." *Id.* (emphasis added). Although any impairment of essential behavioral patterns is "harm" in the literal sense, the NMFS cabined its example to significant impairment. This decision indicates not just any "harm" will do.

The NMFS has not defined "harass"; however, the Fish and Wildlife Service, which administers the ESA with respect to terrestrial species, interprets "harass" as follows:

> Harass in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.3 (2016). This definition of "harass" only covers acts or omissions that create a likelihood of a sufficiently serious threat. Although even *de minimis* harassment creates some likelihood of injury, the definition specifically mentions acts or omissions that annoy wildlife "to such an extent as to significantly disrupt normal behavioral pattern" like breeding, feeding, and sheltering. *Id.* Therefore, like "harm," "harass[ment]" is only actionable under the ESA if its impact on an endangered

animal is sufficiently serious.

The relationship between the ESA and the Animal Welfare Act (AWA), 7 U.S.C. § 2131 *et seq.*, lends still more support for the conclusion that "harm" or "harass[ment]" is only actionable if it poses a threat of serious harm. The AWA aims to ensure the humane treatment of captive animals used for exhibition and research purposes. To that end, it authorizes the Secretary of Agriculture to license exhibitors, *see* 7 U.S.C. § 2133, and to promulgate standards for the treatment of animals under their care, *see* 7 U.S.C. § 2146. The Secretary delegated this authority to the Administrator of Animal and Plant Health Inspection Services (APHIS). Pursuant to that delegation APHIS has established, and occasionally amended, a set of detailed regulations governing the humane handling, care, treatment, and transportation of marine mammals used for exhibition purposes. *See* Animal Welfare; Marine Mammals, 81 Fed. Reg. 5629-01 (Feb. 3, 2016) (to be codified at 9 C.F.R. pts. 1, 3). As the district court recognized, the regulations promulgated under the AWA address many of the aspects of Lolita's activity PETA puts forward in this case as "harm[ing]" or "harass[ing]" Lolita in violation of the ESA, including natural and artificial shelter, 9 C.F.R. § 3.103(b), enclosure dimensions, *id.* at §3.104, and companionship, *id.* at § 3.109. APHIS has even announced its intention to revise its regulations relating to artificial shelter to account for concerns about UV exposure, stating: "Because marine mammals are

susceptible to overheating and sunburn and/or eye damage from direct and/or reflected sunlight, and UV light reflections can cause or exacerbate damage to marine mammal eyes, we are proposing to amend § 3.103(b) by adding that the shade must be accessible and must cover sufficient area to afford all the animals within the enclosure protection from direct sunlight while not limiting their ability to move or not be too close to another animal." Animal Welfare; Marine Mammals, 81 Fed. Reg. at 5635 (footnote omitted).

PETA's expansive reading of "harm" and "harass" would effectively nullify the AWA in the context of captive endangered animals. If given their dictionary definitions, "harm" and "harass" would sweep so broadly as to deprive AWA compliance of practical significance. Any continual annoyance, trouble, or vexation could, for example, be actionable "harass[ment]." It is not difficult to imagine that captivity, however humane, could often be challenged as continually annoying, troublesome, or vexatious. PETA urges that we ought not be concerned about interpreting the ESA aggressively because Congress intended the ESA to provide added protections for endangered animals. But the interpretation PETA presses could nullify the AWA's regime of administrative enforcement. Even after APHIS had approved a particular aspect of an endangered animal's conditions of captivity, plaintiffs could expose the exhibitor to ESA liability by framing that condition as an impermissible "take," no matter how *de minimis* the harm it

caused. For example, if APHIS had approved a captive endangered marine mammal's companions, plaintiffs could invite a federal court to substitute its judgment for APHIS's by bringing an ESA lawsuit characterizing the chosen companions as a "continual annoyance." Our conclusion that "harm" or "harass[ment]" is actionable if it poses a threat of serious harm provides captive endangered animals with an additional layer of protection from harmful conditions of captivity without abrogating the complex regulatory scheme crafted and administered by APHIS.

IV. CONCLUSION

Under the ESA, "harm" or "harass[ment]" is only actionable if it poses a threat of serious harm. None of the thirteen injuries PETA cites satisfies that standard. The judgment of the district court is

AFFIRMED.