Spring | 19

10th Annual Animal Law Conference

Illinois State Bar Association

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Springfield, IL 62701-1779
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10th Annual Animal Law Conference

Presented by the ISBA Animal Law Section

Chicago
Friday, March 1, 2019
ISBA Regional Office
20 S. Clark Street, Suite 900
8:30 – 5:00 p.m.

–or –

Live Webcast
Friday, March 1, 2019
8:30 – 5:00 p.m.

7.50 hours MCLE credit, including 1.0* hour Professional Responsibility MCLE credit in the following category: *Mental Health and Substance Abuse MCLE credit*

Don't miss ISBA's 10th Annual Animal Law Conference, which highlights important animal law updates and examines the advances made in this rapidly-evolving area of practice. Animal law attorneys, general practitioners, environmental/natural resources lawyers, and counsel for municipalities with all levels of practice experience who attend this seminar will better understand:

- How to advise accredited sanctuaries for displaced chimpanzees;
- What's being done to facilitate the adoption of military dogs by their handlers;
- How "service animals" are defined under federal law;
- The issues that have arisen with Chicago's dangerous dog proceedings;
- How to use experts in animal-related litigation cases;
- The challenges facing the protection of wild horses;
- How coyotes are being targeted in killing contests, and the efforts that are being made to outlaw these type of events;
- The recent case law, legislation, and regulations affecting the animal law arena;
- How mindfulness practices can improve our wellbeing; and
- Much more.

Program Coordinator/Moderator:
Jane E. McBride*, Illinois Humane, Springfield*

The ISBA would like to offer a special thanks to this program's financial supporter – *Brooks McCormick Jr. Trust for Animal Rights Law and Policy* **– for helping to make this opportunity possible.**

8:00 a.m. Continental Breakfast (provided)

8:25 – 8:30 a.m. Welcome and Introductions

8:30 – 9:30 a.m. And Now We Must Provide … Creating Sanctuary
In 2013, the National Institutes of Health announced it would phase out the use of most chimpanzees in government-funded research and, in 2017, the U.S. Fish and Wildlife Service changed the status of non-wild chimpanzees from *threatened* to *endangered*, so that all chimpanzees are now considered endangered under the Endangered Species Act. There are nearly 2,000 chimpanzees in the U.S., with approximately 500 of those still living in research laboratories and over 500 living in sanctuaries. Another 200 chimps remain in private hands. Don't miss this presentation that offers insight into how negotiations with labs have been handled, how to provide legal counsel for the establishment of accredited sanctuaries, and the legal services that have been created for the permanent, long-term care of varied species.
***Bruce Wagman**, Riley Safer Holmes & Cancila, California*

9:30 – 10:30 a.m. Military Dogs: Bringing Them Home (To a Real Home)
In 2010, the Army developed the Tactical Explosive Detection Dog (TEDD) capability to support Brigade Combat Teams deployed to Afghanistan. Because of its temporary duration, the Army structured it as a nontraditional Military Working Dog program, rather than through the Air Force's 341st Training Squadron. The shortcoming of this temporary program's adherence to the Department of Defense policy to prioritize military handlers for adoption of retired TEDDs was brought to light in the case of Sgt. Ryan Henderson and Satan. Don't miss this opportunity to hear from our speaker, Marilyn Forbes Phillips, who represented Sgt. Henderson, as she provides an update on advocacy efforts to facilitate the handler adoption process, as well as the care and services provided for retired dogs.
***Marilyn R. Forbes Phillips**, Womble Bond Dickinson, North Carolina*

10:30 – 10:45 a.m. Break *(beverages provided)*

10:45 – 11:45 a.m. Differing Definitions: Service and Assistance Animals
Gain a better understanding of how "service and assistance animals" are defined under the American with Disabilities Act, Fair Housing Act, and Air Carrier Access Act. The use of therapy animals in hospitals and service animals in schools are also discussed. Other topic include: service versus assistance animals; fair housing considerations; the proposed rulemaking that has been announced under the Air Carrier Access Act; the legal status of service animals in training; and what happens if someone misrepresents the status of a companion animal as a service or assistance animal.
***Prof. Rebecca J. Huss**, Valparaiso University Law School, Indiana*

11:45 a.m. – 12:15 p.m. Lunch (provided)

12:15 – 1:15 p.m. Practice Tips: Chicago's Dangerous Dog Proceedings and Using Experts in Animal-Related Litigation

- **Dangerous Dog Proceedings**
  This session examines a number of issues regarding dangerous dog proceedings generally, with a focus on some of Chicago's ordinances – from jurisdiction concerns and the appeal process, to what should be presented as evidence and how to successfully challenge a flawed procedure.
- **Using Experts in Animal-Related Litigation**
  Don't miss this in-depth look at the use of experts in animal-related litigation, including veterinarians, dog trainers, behaviorists, and others.

***Bruce Wagman**, Riley Safer Holmes & Cancila, California*

1:15 – 2:00 p.m. The Nation's Love Affair with Its Wild Horses: A Hotbed of Litigation to Protect the Animals
Wild horses are protected in the U.S. under the Wild Free-Roaming Horses and Burros Act of 1971. However, the Bureau of Land Management and the U.S. Forest Service face multiple challenges in their role to manage wild horses – from controlling herd size where few natural predators live and limited solutions to slowing the herds' 20% annual population growth rate, to the competition for land between the protected species and other uses (such as mining) and the care/disposal for horses removed from public land. The agencies also confront active interest groups "for" and "against" the horses, which has led to a string of lawsuits challenging the agencies' actions and inactions. This presentation focuses on recent litigation that has challenged which methods the agencies can use to slow population growth rates and what the agencies can do with the horses removed from the range. With a segment of Illinois being equine enthusiasts who own horses – some of whom are actively involved in wild horse issues and who adopt wild horses and burros – it is important for Illinois attorneys to stay apprised of the confounding issues presented in the protection of these wild populations.
***Molly L. Wiltshire**, Schiff Hardin LLP, Chicago*

2:00 – 3:00 p.m. "Killing Games," Wildlife in the Crosshairs"
On February 21, 2017, The *Chicago Tribune* published an editorial entitled, "Slaughtering Illinois Coyotes in Contest Hunts is Poor Sport." A killing contest in Homewood, Illinois is what brought this issue to the paper's attention. Carbondale, Illinois hosts a similar contest each year called the "Southern Illinois Predator Challenge." The point of these contests? Kill as many predators as possible within the time limits of the contest. This presentation features a screening of Project Coyote's film "Killing Games, Wildlife in the Crosshairs," which was produced to raise public awareness. A discussion on these contests, the current legal framework that allows these contests to be conducted, and the efforts that have been made to outlaw them is included at after the screening.
***Camilla H. Fox**, Project Coyote, California*

3:00 – 3:15 p.m. Break *(refreshments provided)*

3:15 – 4:00 p.m. The Year in Review: Case Law, Legislation, and Regulation
This comprehensive review examines recent animal-related decisions and highlights local ordinances of particular consequence. A review of the recently enacted legislation and bills that are currently making their way through the legislature is also included.
***Chelsea E. Kasten**, Attorney at Law, Bloomington*
***Molly L. Wiltshire**, Schiff Hardin LLP, Chicago*

4:00 – 5:00 p.m. A Dog's Guide to Thriving in a Dog-Eat-Dog World*
As recent studies have confirmed, a significant percentage of lawyers experience chronic stress and high rates of depression and substance abuse. Don't miss this chance to hear from dog trainer and life-coach, Behesha Doan, as she combines her lifelong passion for dog behavioral psychology with mindfulness practices to show us how we can improve our wellbeing through the practice of presence, awareness, and balance (just like dogs keep trying to show us). Learn from Dr. Diana Uchiyama as she explains how mindfulness practices can help minimize stress and improve concentration and clarity.
***Behesha Doan**, This Able Veteran, Carbondale*
***Dr. Diana Uchiyama**, JD, PsyD, Illinois Lawyers' Assistance Program, Chicago*

**Professional Responsibility MCLE credit subject to approval*

TAB 1

And Now We Must Provide … Creating Sanctuary

- ***Bruce Wagman**, Riley Safer Holmes & Cancila, California*
  bwagman@rshc-law.com

This segment includes all materials received by the course book publication deadline.
Please contact the speaker for any other materials used at the program.

- "[C]himpanzees have emotions similar to those which in ourselves we label pleasure, joy, sorrow, boredom and so on." Jane Goodall, *The Chimpanzees of Gombe: Patterns of Behavior* 125 (1986).

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SHORT HISTORY OF A LONG ROAD

- 1920s – chimpanzees first brought to America for biomedical research
- 1960s thru 1980s – increased use of chimpanzees in research, especially for AIDS, HIV, hepatitis
- 1990s – wild chimpanzees designated as “endangered”, captive chimpanzees “threatened” under Endangered Species Act (ESA), in illegal (and first) ”split listing”
  - “Threatened” status provided no protection for chimps in research, entertainment
  - Wild chimp protection --> breeding boom in American labs
- 1995 – federal agency National Institutes of Health (NIH) institutes moratorium on breeding
  - Converted to permanent ban in 2007
  - Private labs could (and did) still breed
- 2000s and on – public opposition to chimpanzee research and use in entertainment increasing

IN THE BEGINNING

Over the years, chimpanzees have been subjected to many types of research experiments.

Most people had no idea that these experiments were being conducted, nor the physical and emotional impact that they had on chimpanzees.

- Chimpanzees suffer emotional and physical pain "just as we do and often for the same reasons." Roger Fouts, *On the Psychological Well-Being of Chimpanzees*, 1 Journal of Applied Animal Welfare Science 65, 69 (1998).

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THE END OF A LONG ROAD

- 2011 – Institute of Medicine (IOM), in report commissioned by NIH, recommends end to all chimpanzee research, with pool of 50 to be held back
- 2013 – NIH commits to following most of the IOM recommendations
- 2015 – split listing vacated by Fish and Wildlife Service in response to rulemaking petition: all chimpanzees, captive and wild, now endangered under ESA
  - Effectively an end to research and use in exhibition, film, entertainment
- NIH commits to retirement of all federally-owned chimpanzees
- CHIMP ACT (42 U.S.C. section 283m (2013))
  - Established a national sanctuary system for chimpanzees retired from laboratories
    - Interpretation has been limited to federally-owned chimpanzees
    - No parallel law or coverage for privately-owned chimpanzees
  - Amendments to close loopholes, add funding
  - Chimp Haven in Shreveport, Louisiana is the official National Chimpanzee Sanctuary

Serving a Life Sentence

for your viewing pleasure!

The case for ending the use of great apes in film and television

Animal Legal Defense Fund, et al.
v.
Sidney J. Yost

U.S. Dist. Ct., Central Dist. Cal.
(Filed Nov. 18, 2005)

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i. Beatings with various hard objects such as sticks, pieces of metal, broom handles, handles of a hammer, and copper rods.

ii. Punches with closed fists, and kicks to the head, back and arms…

* * *

iv. … hit the chimpanzees on the head with a metal lock….

v. Viciously beating the chimpanzees…

vi. Taunting and various forms of intimidation, including constant verbal abuse.

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* * *

33. Yost would encourage others … to "get angry and beat the s--t out of the [chimpanzees]" if they misbehaved.

34. … When referring to one of the chimpanzees, Yost would say "you cannot hurt her. Hit her as hard as you can. Kick her in the face." …

37. Yost once brutalized Teá so badly that she had a deep, long cut on her eyebrow, requiring stitches. As a result, Teá became extremely timid, frightened and withdrawn.

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VICTORY CREATED A NEW PROBLEM

With the victory of retiring all of the chimpanzees from research and entertainment, a new problem arose.

We couldn't just leave them, especially at the labs -- we had to give them their lives back.

Finding each and every one of them a new home is the goal.

Now that chimpanzees are not used for research or entertainment….

- Where do they go?
  - Roughly 300 federally-owned chimps
  - Roughly 350 privately-owned (laboratory) chimps
  - Hundreds in private homes
- Federal chimpanzees will eventually all go to Chimp Haven
- Why so much effort for "just" 600 animals?
  - Lifetime care costs probably over $200 million with capital costs

Where would they all go?

There simply wasn't enough room in existing sanctuaries.

So Project Chimps was born.

PROJECT CHIMPS

Save the Chimps
FULL

PUBLIC ONLY

CHIMPANZEE SANCTUARY NORTHWEST
FULL

CENTER FOR GREAT APES
FULL

What about the privately-owned chimps?

- Seven chimpanzee sanctuaries in America
  - Mostly at full or close-to-full capacity
  - Chimp Haven limits residents to federally-owned chimpanzees
- In 2014, Project Chimps formed in order to meet the needs of the privately-owned chimpanzees and to try to find permanent placement for them outside of the labs.
- At that time, Project Chimps began discussions with New Iberia Research Center ("NIRC") regarding an agreement whereby NIRC would send its chimpanzees to sanctuary.

"Sanctuary"

A reserved area in which animals are protected from harm, treated with respect, provided with care, and allowed to flourish to the greatest extent possible.

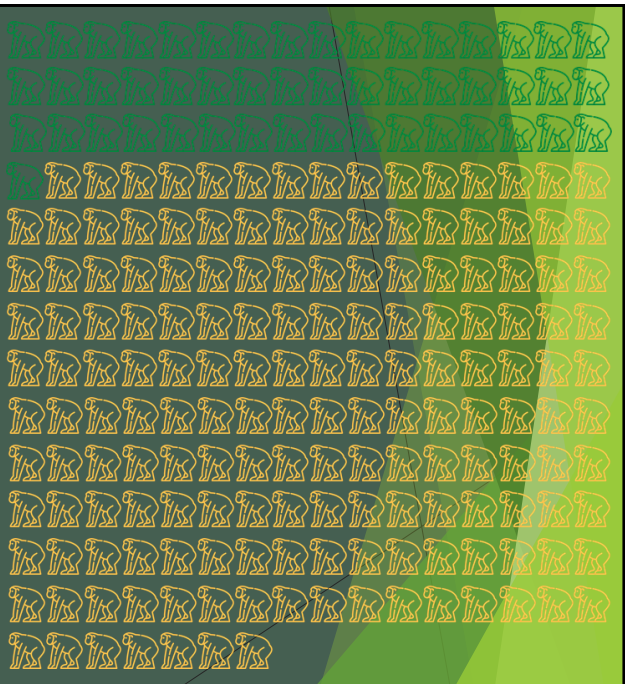
Project Chimps

Project Chimps is a 236-acre sanctuary in the Blue Ridge Mountains created specifically to help these former research chimps.

NIRC

Project Chimps negotiated an agreement with The New Iberia Research Center (NIRC) in southern Louisiana where the largest group of privately-owned research chimpanzees lived.

More than **220 chimpanzees.**



SECURING THE PROPERTY

Project Chimps founders learned of a former gorilla sanctuary for sale.

The owners had invested $6M in building the original facility and agreed to sell it for just $2M.

Through initial outlays from key donors, the property was purchased.

Starting a sanctuary…. before the animals

- Research
  - Legal requirements – federal, state and local
  - Species-specific professionals
    - Graduate level expertise in animal welfare
    - Organizational expertise
- Get the right people on board
  - Development professionals
  - Nonprofit professionals
  - Veterinarians
  - Sanctuary management team
  - Caregivers
- Raise lots and lots of money!

ESTABLISHING A NONPROFIT

- Incorporation
- 501(c)3 process
  - Public Support test
- Charitable solicitation rules
- State and Federal Compliance
- Lobbying expenditure restrictions

THE BOARD OF DIRECTORS

- Vital governing body for sanctuary/organization operations
  - Directs executive officer, who runs the show
- Crucial aspect of the sanctuary's public face and internal function
- Need a balanced combination
  - Knowledge about the animals
  - Knowledge about nonprofit business
  - Willingness to participate financially
  - Knowledge about various legal issues

Providing Counsel Regarding Sanctuary Development (and continued operations)

- All organizational aspects
  - Nonprofit
  - Business side
  - Regulatory issues
  - Human relations
  - Publicity/social media
  - Permitting
- Monitor ongoing operations
- Regular reports from executive to board chair
  - Board votes where appropriate
  - Regular meetings

RUNNING A SANCTUARY

- You must ask people for money!
  - Big and little donors important
  - Regional support base
  - Media and development intertwined
  - Bequests
  - Negotiating lower prices, pro bono assistance
- Managing staff and volunteers
- Other relevant areas of law:
  - Contracts
  - Wills and trusts
  - Real property/leases
  - Labor and Employment
  - Negotiations
  - Litigation

PUBLIC SUPPORT

Community leaders are eager to include us in meetings and events.

We participate in local festivals, even **winning** the chili cook-off with a vegan recipe two years in a row against all entries!

Getting started with the real deal....

- In 2016, as America's newest chimpanzee sanctuary, Project Chimps welcomed its first residents – a group of chimpanzees from NIRC – to its location in the Blue Ridge Mountains area of northern Georgia.
- As of March 2019: 59 moved in, 150 to go
- Like all of America's chimpanzee sanctuaries except for Chimp Haven, Project Chimps is a private nonprofit organization dependent solely on donations to support its chimpanzee residents.

2016 – THE FIRST GROUP

After much preparation and anticipation, the first group of chimpanzees finally arrived in the fall of 2016.

Latricia, Gertrude, Buttercup, Charisse, Gracie, Genesis, Jennifer, Samira, and Emma.

TRUE

SANCTUARY!

Devoted staff and management, lots of volunteers, experts, and a bunch of lawyers

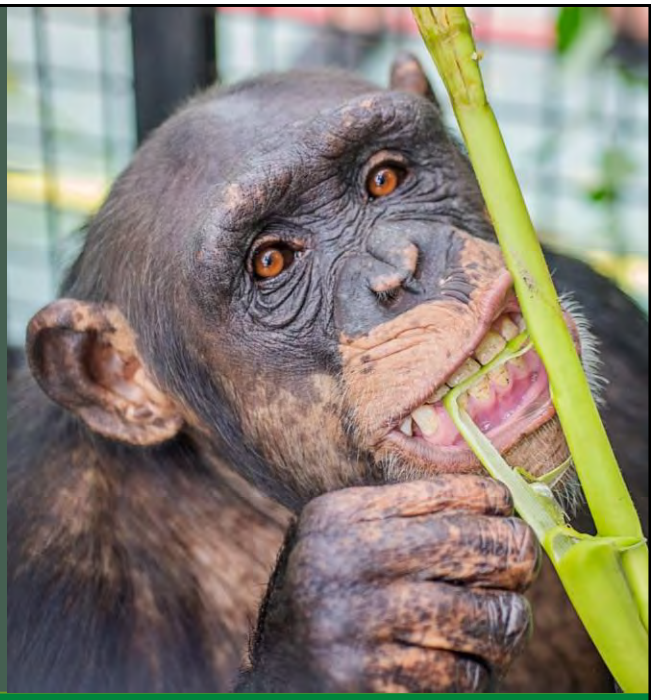
UPGRADING FACILITIES

With initial donor support, Project Chimps was able to quickly tackle the upgrades needed to convert gorilla houses into chimpanzee villas within the first year.

ACCLIMATION

Each new, arriving group must start in quarantine as they acclimate to their new environment.

They get introduced to new foods, new caregivers, and new experiences to enrich their lives.



PEACHTREE HABITAT

…and then the chimps have the chance to venture outdoors into the sanctuary's forested, 6-acre Peachtree Habitat…

EVERYONE IS VALUED AND AUTONOMOUS

Every chimp is individually and uniquely assessed for what is going to inspire them to be his or her to develop and prosper as much as possible.

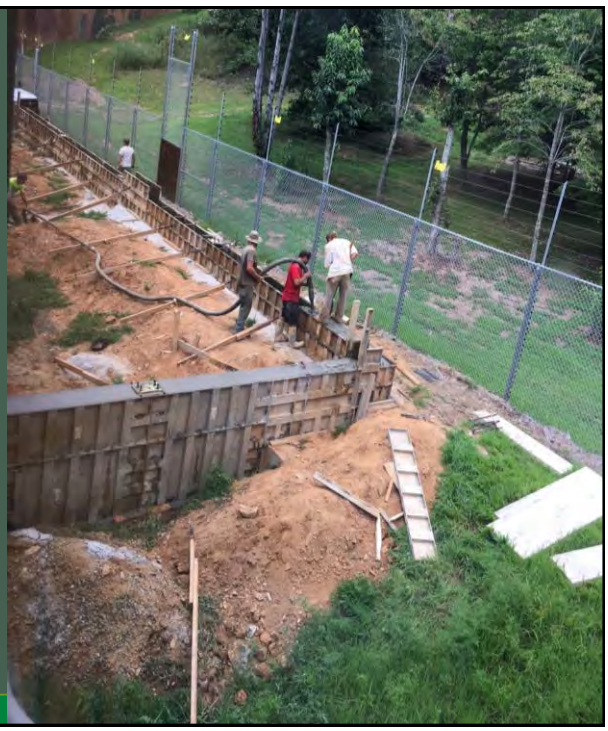
186 VOLUNTEERS

And 220 on the waiting list, adding 25 per month.

Everything from food prep to constructions to IT help and legal assistance, gardening, path development, and caregiving.

2019 – WHERE WE ARE NOW

We are finishing construction on a $1.2M remodel of the largest building (9 bedrooms vs. 2-3 in other villas). When finished with Phase One, we will be able to house 90 chimpanzees.



2019-2022 – WHERE WE NEED TO GO

Phase 2

- 3 additional habitats
- Room for 150 additional chimpanzees
- $10M capital campaign


farmsanctuary.org

SOUTH FLORIDA WILDLIFE CENTER

2015

- Over **13,000 animals annually** rehabilitated and rescued
- **Largest wildlife trauma hospital** in the country based on intake
- **Three full time veterinarians**
- Over **400 different species accepted**
- Veterinary Externship Program

The Fund for ANIMALS

Cleveland Amory Black Beauty Ranch

- Largest and most diverse animal sanctuary in the country
- Providing permanent sanctuary to over 40 species and almost 1,000 animals, all of which were rescued from cruelty, neglect and exploitation.
- A visitation program was launched in 2015 allowing guests to come, see the sanctuary and educate them on the issues and how the Humane Society of the United States, The Fund for Animals are working together to fight egregious cruelty towards animals.

The Fund for ANIMALS

Duchess Sanctuary

- Providing lifetime sanctuary **to over 190 horses**, many of whom were saved from the cruel **PMU industry**
- Also caring for **BLM mustangs** and horses **saved from slaughter, neglect**, and other dangerous situations
- **Innovative wildlife friendly fencing** is installed throughout the 1,120 acre property to ensure wildlife can continue to thrive on the **protected land**

The sanctuaries that are not

Calling something a sanctuary does not make it one.

The internet is the enemy of the truth when it comes to sanctuary conditions.

Investigate before you donate!


GRACIE


JASON


LANCE


LATRICIA


CHARISSE


TAZ


HARLEY


LORETTA


OSCAR

Hanging out (literally) in the Peachtree Habitat at Project Chimps

PROJECT CHIMPS

PROVIDING LIFELONG CARE TO CHIMPANZEES RETIRED FROM RESEARCH

PROJECT CHIMPS

TAB 2

Military Dogs: Bringing Them Home (To a Real Home)

- ***Marilyn R. Forbes Phillips**, Womble Bond Dickinson, North Carolina*
  forbes@law.duke.edu

This segment includes all materials received by the course book publication deadline.
Please contact the speaker for any other materials used at the program.

NORTH CAROLINA

RICHMOND COUNTY

FILED
2017 APR 18 PM 4:27
RICHMOND COUNTY, C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 17 CVS 409

JOE WESTLEY RYAN HENDERSON,

Plaintiff,

v.

SHAWN RICHARDSON, NORMA RICHARDSON

Defendants.

COMPLAINT AND REQUEST FOR JURY TRIAL

COMES NOW Plaintiff, Joe Westley Ryan Henderson, a retired U.S. Army Sergeant ("Sgt. Henderson"), by and through undersigned counsel, for his Complaint against Shawn Richardson and Norma Richardson, and alleges as follows:

THE PARTIES

1. Plaintiff Sgt. Henderson served with the 82nd Airborne, 1/504 PIR, 1st Brigade combat team. He is a resident of Arlington, Texas. He joined the U.S. Army on or about July 9, 2007, and initially served in Iraq, where he earned the rank of Sergeant. After his TEDD training, he was deployed to Afghanistan. He received an honorable discharge on July 9, 2013.

2. Defendant Shawn Richardson and Defendant Norma Richardson ("The Richardson Defendants") are residents of Chocowinity, North Carolina, and upon information and belief are husband and wife, and are currently in possession of Sgt. Henderson's Tactical Explosive Detector Dog, Satan.

PRELIMINARY STATEMENT

3. The U.S. Army's Tactical Explosive Detector Dog (TEDD) program was initiated in January 2011 to mitigate casualties associated with improvised explosive devices (IEDs) for American soldiers in Afghanistan as part of Operation Enduring Freedom. This program did not merely train man and dog for war. This program paired our soldiers with their most dependable and dependent comrades-in-arms. These relationships were based on unconditional love in the most dangerous of our war zones.

4. The TEDD program's success hinged on fostering an unbreakable bond of trust, an ability to understand non-verbal cues, and the detection of nuanced behaviors between dog and soldier. And successful it was. Each of the TEDDs is estimated to have saved the lives of at least 150 American soldiers. For many of the brave soldiers who proudly served our country, being united with their TEDDs upon the dogs' retirements was a day anxiously awaited. In training, soldiers were advised that they would be able to adopt their dogs, and would have the Right of First Refusal ("ROFR"). For Sgt. Henderson and his German Shepherd TEDD, Satan, this day has not yet come.

5. Sgt. Henderson and Satan successfully completed over a dozen multi-day missions, as well as daily checkpoint details. They were initially stationed at Bagram Air Force Base and then other Forward Operating Bases (FOBs) and Combat Outposts (COPs) in Afghanistan.

6. While preparing to go out on a mission with Satan, Sgt. Henderson was seriously injured in Afghanistan on or about July 18, 2012, and was separated from Satan, who was then two years old.

7. On or about July 24-25, 2012, when Sgt. Henderson was being medevacked out of

the explosion zone, his thoughts and questions were for his brother-in-arms, Satan. For the next twelve months, Satan and Sgt. Henderson remained separated while Sgt. Henderson, who had sustained significant injuries, including a traumatic brain injury, required emergency intensive medical care and then long-term medical attention.

8. Since his honorable discharge from the United States Army on or about July 9, 2013, Sgt. Henderson has spent significant time and resources attempting to locate and adopt his TEDD. Having located his comrade-in-arms in North Carolina, Sgt. Henderson seeks to exercise his contractual ROFR to adopt Satan, his fellow soldier and best friend.

9. Beginning on or about November 25, 2015, the Richardson Defendants have repeatedly refused to honor Sgt. Henderson's ROFR to adopt Satan. The Richardson Defendants' continued refusal is in breach of the U.S. Army Adoption Application and Covenant Not to Sue with Indemnity Agreement signed by the Richardson Defendants and notarized in Richmond County, North Carolina on or about February 19, 2014.

10. Satan became seven years old in April 2017. Due to the highly dangerous work environment of a military war dog, life expectancy is often shorter than that of the typical family companion dog. Here, justice delayed will be justice denied.

JURISDICTION AND VENUE

11. The amount in controversy exceeds twenty-five thousand dollars ($25,000), and pursuant to N.C. Gen. Stat. § 7A-243, this Court has jurisdiction over the subject matter of this action.

12. Venue for this case is properly in this Court as the contract was signed and notarized in Richmond County, North Carolina.

FACTS

I.
The TEDD Program

13. The Tactical Explosive Detection Dog ("TEDD") program was established in or about January 2011 as an Army-funded contract program to mitigate casualties from Improvised Explosive Devices ("IEDs") during Operation Enduring Freedom.

14. TEDDs were specifically enlisted to support Army Brigade Combat Teams by providing force maneuver units with canines trained in bomb, weapon, and drug detection, and tracking and attacking the enemy to save the lives of American troops and others.

15. The U.S. Army spent millions of dollars on the training and sustaining of TEDDs. Each of the TEDDs, including Satan, became extremely valuable due to their highly sophisticated explosive detection capability. Both on-leash and off-leash, TEDDs had to achieve a 100-meter distance 95% find rate for the following explosive odors: C-4, TNT, Smokeless Powder, Ammonium Dynamite, Water Gel, Det. Cord, Potassium Chlorate, Sodium Chlorate, Semtex, HMTD, TATP, and Ammonium Nitrate and Aluminum. Upon information and belief, each TEDD has had at least $100,000 worth of training.

16. By way of example of the value of the TEDD dogs and their training, the U.S. Army awarded Contract W911SR-10-D-0021 in the amount of $4,585,077.00 to Davis-Paige Management Systems, LLC ("DPMS") for, among other things, a training program to certify 150 handler and dog teams with the ability to conduct on-leash and off-leash explosive detections and to provide sustainment for 200 TEDDs both abroad and in the United States. Since DPMS did not have the expertise to provide the requisite training, sustaining, and handler services for TEDDs, on February 8, 2013, DPMS entered into a subcontract with K2 Solutions, Inc. ("K2"), a North Carolina corporation, to ensure the appropriate canine expertise. Because K-2 had the

canine expertise, their teaming agreement outlined a contractual relationship which was 51% DPMS and 49% K2.

17. The TEDDs were kenneled with K2 when returned to the United States from deployment and until the U.S. Army discontinued the TEDD program in or about February 2014.

II.
Sgt. Henderson & Satan

A. TEDD Training

18. Plaintiff, Sgt. Henderson, volunteered for the TEDD program in or about Fall 2011. Sgt. Henderson went through an extensive testing and rigorous selection process. Sgt. Henderson was not only selected to be part of the TEDD Program, but he also became an active leader in the program. While at Fort Bragg, Sgt. Henderson helped recruit, interview, and select additional TEDD handlers.

19. On or around January 5, 2012, Sgt. Henderson began TEDD handler training at Vohne Liche Kennels in Denver, Indiana.

20. The TEDD training program at Vohne Liche Kennels was run by four instructors. These instructors paired the TEDD handlers with TEDDs based on a psychological assessment.

21. At Vohne Liche Kennels, Sgt. Henderson was paired with Satan.

22. Satan is an all-black, male German Shepherd tattooed with the identification number "T383." Satan is also identified by microchip #96700000918856. His date of birth is April 11, 2010.

23. Satan was initially paired with two handlers before Sgt. Henderson. However, these prior handlers were deemed inadequate handlers for Satan due to lack of compatibility. As such, the TEDD program instructors eventually paired these handlers with different TEDDs.

24. Sgt. Henderson and Satan were a very successful match. They spent four weeks

training together at Vohne Liche Kennels. The training entailed both bomb detection training and bonding exercises between handler and dog. For instance, Sgt. Henderson would perform daily health checks on Satan, as well as feed, water, and groom him. He would perform daily training exercises with Satan as a means to teach Satan verbal and non-verbal commands.

25. The training exercises assessed the relationship between TEDD and handler to ensure they developed a relationship of trust strong enough to literally go to battle together. At the end of the four-week training program at Vohne Liche Kennels, Sgt. Henderson and Satan passed this evaluation.

26. Sgt. Henderson and Satan next went to the U.S. Marine Corps Proving Ground at Yuma, Arizona, for four additional weeks of training and testing. The training entailed both bomb detection training and bonding exercises between handler and dog. The last part of stateside training entailed a final week of testing at Yuma to ensure both handler and TEDD were ready for deployment together. Sgt. Henderson and Satan passed this evaluation and both graduated from the TEDD program.

27. Prior to deployment in 2012, and while training at Yuma Proving Grounds, the Vohne Liche trainers advised the TEDD handlers, including Sgt. Henderson, that they would have the ROFR in their dogs' adoptions after service. In Afghanistan, when TEDD handlers again raised questions about adoption of their TEDDs from time to time, they were reassured that, although the specific procedures had not been worked out, the soldiers would have the ROFR once the dogs could no longer serve.

28. On graduation night, March 15, 2012, Sgt. Henderson had a large tattoo emblazoned on his upper left arm, with a larger ribbon "Satan & Hendo" above a profile of Satan, along with Satan's TEDD number "T383." This tattoo is Plaintiff's only tattoo from his 6

years of military service. (Exhibit A).

B. Deployment

29. On or about March 17, 2012, two days after graduation, Sgt. Henderson and Satan were deployed and were initially stationed at Bagram Air Force Base in Afghanistan. A month later, they pushed out to Brigade Headquarters at Forward Operating Base Warrior in Ghazni Province.

30. While in Afghanistan, Sgt. Henderson was solely responsible for Satan's well-being on every level. On a daily basis, Sgt. Henderson (i) groomed and fed him; (ii) performed health checks; (iii) either went on mission with Satan or conducted mock training missions with him while on base; and (iv) ensured he was fully exercised. Sgt. Henderson welcomed this responsibility.

31. During their service together, Sgt. Henderson and Satan's bond deepened. Except for meals and the latrine, they spent 24 hours a day/7 days a week together. They risked their lives for each other every day, first at Bagram Air Force Base and then other FOBs. Satan was also a soldier, and he and Sgt. Henderson were partners in service.

32. When on patrol, it was a rare day when Sgt. Henderson and Satan were not exposed to explosions and hostile fire. When on base, they and other soldiers were frequently under rocket and mortar attack.

33. On July 18, 2012, Sgt. Henderson was severely injured while preparing to leave on a mission with Satan at Forward Operating Base Arian in Afghanistan. He suffered a grand mal seizure triggered by Repetitive Concussive Syndrome, developed as a result of being in close proximity to significant numbers of explosions. Upon regaining consciousness, Sgt. Henderson immediately asked for the whereabouts of Satan. After about a week of being transferred for medical treatment within Afghanistan, Sgt. Henderson was medevacked out of

Afghanistan and to a hospital in Germany. After a few days of treatment in Germany, Sgt. Henderson returned to Fort Bragg, North Carolina to continue his recovery.

34. Upon information and belief, Satan was sent back to the United States shortly after Sgt. Henderson left Afghanistan and assigned a second handler, Sgt. Peter Norton.

C. Plaintiff Applies and Searches for Satan

35. From in or about August 2012 until in or about April 2013, Sgt. Henderson remained stationed at Fort Bragg, North Carolina, while recovering from traumatic brain injuries.

36. Sgt. Henderson began his terminal leave from the U. S. Army in April 2013, and his expiration of term of service ("ETS") date came in July 2013.

37. Immediately upon retiring, Sgt. Henderson began to take the necessary steps to adopt Satan. Individuals at Lackland Air Force Base advised him to submit an online application for his dog. He complied. Sgt. Henderson filled out the on-line adoption application found on Lackland Air Force Base's website and submitted the completed application by U.S. mail during Summer 2013.

38. Beginning in or about Fall 2013, while still recovering from traumatic brain injuries in Texas, Plaintiff followed up on the adoption process, spending significant time and effort in a search for information about Satan from numerous military sources.

39. Sgt. Henderson called the U.S. Army Office of the Provost Marshal General ("OPMG") at the Pentagon on several occasions. No OPMG staffer was specified by the U.S. Army as a point of contact for TEDD adoptions though, and his inquiries were passed from staffer to staffer. Sgt. Henderson asked various staffers about Satan's whereabouts and the progress on his adoption papers filed in or about Summer 2013. No information was provided other than suggestions from military personnel to try calling someone else.

40. Sgt. Henderson also called Lackland Air Force Base numerous times seeking

information on Satan and the progress of his adoption papers filed in Summer 2013.

41. Sometime in February 2014, Sgt. Henderson twice contacted K2, the company who maintained the subcontract for kenneling the TEDDs, concerning the whereabouts of Satan. He spoke to the receptionist and the kennel master and was advised that someone would be back in touch with him about his dog. No employee of K2, however, ever returned Sgt. Henderson's calls.

42. Sometime in or about March or April 2014, Sgt. Henderson spoke directly with OPMG TEDD Program Director, Richard Vargus, about his continued desire to adopt Satan. At that point Vargus advised Sgt. Henderson that Satan had been adopted by his second handler, Sgt. Peter Norton.

43. Sgt. Henderson's address of record with the U.S. Army is his parents' home. Plaintiff's parents have lived in this home since 1986 and have never moved. Any communications sent to Sgt. Henderson by the U.S. Army concerning his ROFR at the address on file would have reached him.

44. Sgt. Henderson's telephone number of record with the U.S. Army is his current mobile telephone number. He has maintained the same telephone number since before he joined the Army. Any attempt by the U.S. Army concerning his ROFR to contact Sgt. Henderson via telephone would have been successful.

45. Sgt. Henderson's email address of record with the U.S. Army is still registered to Sgt. Henderson. Although not his current primary email address, Sgt. Henderson routinely checks this email account for communications. In 2013 and 2014, Sgt. Henderson checked this email account for communications daily. Any attempt by the U.S. Army to contact Sgt. Henderson via email would have been successful.

46. Robby's Law[1] applied to the disposition of TEDDs. At the time the TEDD program was terminated, Robby's Law read, in pertinent part, "Military working dogs may be adopted . . . by law enforcement agencies, former handlers of these dogs, and other persons capable of humanely caring for these dogs." 10 USCS § 2583(c) (2013). Pursuant to the equitable spirit of Robby's Law, common practice and policy throughout all Department of Defense kennels was to provide former TEDD handlers the ROFR when a TEDD was ready for adoption. According to the OPMG, handlers wounded in action or the families of handlers killed in action were to have the ROFR to adopt the dog. (Exhibit B, "Military dog adoptions: Army procedures to give former handlers priority," April 8, 2016 Fayetteville Observer news article).

47. Although Sgt. Henderson was injured and suffering from traumatic brain injury and none of his contact information had changed, Henderson has no indication that the U.S. Army ever made an effort to contact him or Satan's subsequent handler, Sgt. Peter Norton, regarding Satan's adoption so that Henderson's ROFR could be exercised.

III.
TEDD Termination and Adoptions

48. The TEDD program was terminated in early 2014 as part of the drawdown in Afghanistan. OPMG was charged with overseeing the disposition of the TEDDs. The OPMG selected seventy TEDDs for retention and retraining to fill other Military Working Dog ("MWD") requirements. Upon information and belief, K2 was directed to dispense of the remaining dogs, and beginning in February 2014, K2 began scheduling adoption events at its facilities.

49. Before the February adoption events began at K2, upon information and belief, no effort was made by the U.S. Army, K2, or DPMS to contact TEDD handlers concerning the

[1] Current version found at 10 USCS § 2583 (2017). Robby's Law was originally passed in 2000 to allow for the adoption of military dogs by their handlers.

ROFR.

50. During the February adoption events of more than 100 dogs, some TEDDs went to law enforcement and some TEDDs were adopted by civilians. At that time, numerous prior handlers of the dogs were trying to adopt their TEDDs. (Exhibit C, "Troops Betrayed as Army Dumps Hundreds of Heroic War Dogs," February 14, 2016 New York Post news article).

51. Upon information and belief, at the February 10, 2014, adoption event, OPMG Staffer Robert Squires was in attendance and adopted one TEDD.

52. Upon information and belief, during the February 2014 adoption events, Soliden Technologies ("Soliden") acquired thirteen TEDDs. At the same time, the prior handler of at least one of these dogs was actively trying to adopt his TEDD. (Exhibit D, "Retired Army Dogs Meant for Veterans Given to Company that Tried to Sell Them to Foreign Countries" Washington Free Beacon, January 27, 2017).

53. On or about February 14, 2014, after many of the TEDD dogs had been adopted by civilian families and others, Al Dimitro, an employee of Wyle,[2] made the first (and only known attempt) to contact TEDD Handlers. On information and belief, Mr. Dimitro posted on Facebook in the "Tactical Explosive Detector Dog" group that he was "one of the 'Operations' guys with the TEDD Program" and he needed "help tracking down [eight] handlers."

54. Sgt. Henderson was one of the handlers listed in Mr. Dimitro's February 14, 2014, Facebook post.

55. Sgt. Henderson did not see this Facebook post, nor was he notified about it by anyone until in or about Spring 2016.

56. No other attempt—let alone any attempt through U.S. Army official channels—was made to contact Sgt. Henderson regarding Satan's adoption other than this single Facebook

[2] Upon information and belief, Wyle held the TEDD Contract prior to the K2/DPMS contract.

post.

57. During the February 2014 adoption events, K2 was aware that standard military protocol adoption was not being followed, and upon information and belief was not at liberty to direct the adoptions according to that standard military protocol.

58. On or about February 19, 2016, as a result of negative media attention surrounding the TEDD adoptions, the Chairman and CEO of K2, Lane Kjellsen ("Kjellsen"), wrote to United States Representative Richard Hudson of North Carolina's 8th District asking that a Formal Congressional Inquiry into the U. S. Army's TEDD program be opened. Kjellsen advised Congressman Hudson that, during the adoption events, "K2 was not at liberty to direct actions that appeared to be standard to military adoption protocol with the Government. As a subcontractor on this effort K2 was without privity of contract with the Government, and K2 was reminded of this fact by the contracting office on at least one occasion." (Exhibit E, February 19, 2016 Letter from Lane Kjellsen, Chairman and CEO, K2 Solutions to U.S. Representative Richard Hudson).

59. Upon information and belief, the rushed adoptions that failed to follow U.S. Army standard military protocols were due in part to a significant payment dispute that had arisen between DPMS, the primary contractor, and K2. By mid-February 2014, one year into the subcontract and during the time the adoptions were being conducted, K2 claimed that DPMS had failed to pay K2 invoices totaling $1,782,960.04. According to Kjellsen's letter (Exhibit E), "as a result of DPMS' failure to pay, K2 elected not to pursue a 6-month follow on contract and then a two-week extension. Subsequently, OPMG elected to adopt out the 150 TEDD dogs that remained in the Program." Kjellsen closes his letter by stating "There is significantly more to this story than can be set out in a few pages. K2 is willing and ready to provide each and every

detail required to support an investigation into the TEDD Program as a whole – from the manner in which it was awarded to the unmitigated failure of the adoption process."

60. Three months later, on or about May 12, 2014, K2 sued DPMS for breach of contract in Moore County, North Carolina Superior Court. (*K2 Solutions, Inc. v. Davis-Paige Management Systems, LLC*, Moore County File No. 14 CVS 00593. The lawsuit was resolved in May 2015 upon DPMS's payment to K2 in the amount of $2,028,483.30.

IV.
Satan's Adoption Contract

61. On February 19, 2014, Defendants Shawn and Norma Jean Richardson (the "Richardson Defendants") adopted Satan at K2's facilities in North Carolina.

62. The USA Tactical Explosive Detection Dog TEDD Adoption Application that the Richardsons signed specified among other requirements that "USA TEDD Handlers receive first right of refusal for adoption of their TEDD. TEDD Handler Requests for the same TEDD are prioritized based on the date the adoption application was received." Adoptees were advised that the "Covenant not to Sue Agreement" that released the Federal Government from any liability relative to the retiring TEDD had to be notarized and provided to the USA when the TEDD was picked up. (Exhibit F, USA Tactical Explosive Detection Dog ("Tedd") Adoption Application and Covenant Not to Sue with Indemnity Agreement - "the Contract").

63. The Contract was signed by the Richardson Defendants and a representative of the Department of Defense, United States Government, and notarized on or about February 19, 2014, in Richmond County, North Carolina.

64. The Contract specified that "Recipient (the Richardsons) in consideration of the transfer of Satan, does hereby covenant and agree with the United States Government and the

Department of Defense, through its agents and representatives, that recipient ... will never institute or in any way aid in the institution of any suit, action at law, or make any claim against the United States Government, Department of Defense, or any employee or servant thereof, for or by reason of any damage, loss, or injury either to person or property or both or wrongful death which may be caused directly or indirectly" by Satan.

65. The Contract further specified that Satan was not to be "used for any illegal purpose, police or security related activity, private business activity, substance detection either public or private."

66. Upon information and belief, the Richardson Defendants read the language of the contract that Satan's handlers had the ROFR. Despite this knowledge, no effort was made to determine whether plaintiff had made an effort to exercise his ROFR.

67. In or about November 2015, eight months after Plaintiff had been advised by the OPMG TEDD Program Director Richard Vargus that Satan had been adopted by Peter Norton, Plaintiff learned that this was not correct. Through a fellow soldier in Texas, Plaintiff learned that Satan had not in fact been adopted by Norton, but was instead living with a family in North Carolina. Indeed, Plaintiff also learned that Norton had also been looking for Satan through Facebook and had discovered that Satan was living with the Richardsons.

68. Sgt. Henderson found the Richardson Defendants by searching Facebook in or about November 2015. Sgt. Henderson initially sent a Facebook message to Defendant Shawn Richardson and advised Richardson that he [Henderson] was the original handler for Satan. Sgt. Henderson further advised Defendant Shawn Richardson that Satan saved the lives of paratroopers from the 1-504 PIR, the 2-504, and the 3-73 CAV. In an effort to exercise his ROFR, he closed his initial message on or about November 25, 2015, by stating, "Please sir, I

beg you to return my son to me."

69. The following day, on or about November 26, 2015, Sgt. Henderson made initial contact with Defendant Norma Richardson, also by Facebook Messenger. He advised Defendant Norma Richardson that he had been looking for Satan for more than three years and that he had also reached out to her husband, Defendant Shawn Richardson. By Facebook Messenger, Plaintiff thanked them for caring for Satan, and told her that he harbored no ill will toward their family. He asked if she would speak to him about how they could all be part of Satan's life, rather than his being forced to pursue a legal claim.

70. Sgt. Henderson continued to attempt to exercise his ROFR with the Richardson Defendants through in or about May 2016. Sgt. Henderson offered the Richardson Defendants $5,000.00 and a new German Shepherd of their selection in exchange for returning Satan to him.

71. The Richardson Defendants declined to attempt to work out any possible solution, and declined his offer of a new German Shepherd and $5,000.00.

72. On May 1, 2016, the Richardson Defendants instead advised Sgt. Henderson by Facebook Messenger not to contact them again. Sgt. Henderson has since that time honored their request and made no further contact with the Defendants.

73. Upon information and belief, the Richardson Defendants take Satan to their shooting range when they are shooting firearms. The Defendants instruct Satan to practice clearing, by asking Satan to secure the perimeter, in breach of the Contract prohibiting the use of TEDDs for substance detection.

V.
The Catch 22

74. Following the February 2014 adoptions, persistent concerns were raised by former TEDD handlers regarding their inability to adopt their TEDDs.

75. On or about February 22, 2016, both of North Carolina's United States Senators, Richard Burr and Thom Tillis, sent letters to U.S. Army Acting Secretary Patrick J. Murphy seeking information as a result of their concerns about the TEDD adoptions.

76. On March 14, 2016, U.S. Army Major General Provost Mark S. Inch responded to the North Carolina Senators' requests on behalf of U.S. Army Acting Secretary Patrick Murphy. Major General Inch advised the Senators that OPMG was guided by the following priorities in TEDD disposition and adoption:

1) Fill Army Military War Dogs (MWD) vacancies;

2) Adopt out to former TEDD handlers who expressed interest in adopting their former TEDDs;

3) Adopt out to law enforcement agencies; and

4) Adopt to civilians.

77. Major General Inch's letter also acknowledged that, since K2 was a subcontractor hired to kennel and train TEDDs, it would have been inappropriate for K2 to take part in the disposition of Department of Defense property. Therefore, OPMG representatives traveled to the K2 facilities in North Carolina and administered the adoptions. Enclosure A of his letter captioned "Tactical Explosive Detector Dog (TEDD) Adoption Process" noted that "Services Secretaries can provide prioritization to handlers that were wounded in action or prioritization to the parents, child, spouse of sibling of a handler that was killed in action." (Exhibit G, March 14, 2016 letter and Enclosure A from Mark S. Inch Major General, U.S. Army, Provost Marshal General).

78. As a result of continuing concerns over the failed adoptions, The Secretary of the Air Force was directed to provide a Report to the House and Senate Committees on Armed

Services to address the problems surrounding the TEDD adoptions and notification processes. The House and Senate committees noted "that the Army's reluctance to review the adoption application process holistically to ensure that military working dog handlers were provided the first opportunity to adopt TEDDs failed to meet the intent of the military working dog adoption processes in law, instruction, and regulation." (House Report 114-537, p. 130.)

79. As mandated, the Office of Inspector General issued a TEDD Report to the Congressional Committees in August 2016. The Report found that the "Army was not prepared, nor did they have a sound process in place to dispose the TEDDs upon termination of the contract" and that "the TEDD handlers did not receive any written instructions detailing the TEDD adoption application process or the current MWD (military working dog) law." (Exhibit H, Tactical Explosion Detector Dog (TEDD) Adoption Report, Office of Inspector General, U.S. Air Force, August 2016).

COUNT I

BREACH OF CONTRACT

80. Paragraphs 1 through 79 of this Complaint are realleged and incorporated herein by this reference.

81. In or about Summer 2013, Sgt. Henderson completed and mailed the online military dog adoption application providing notice to the Department of Defense of his intent and desire to adopt Satan.

82. The Contract signed by the Richardson Defendants on or about February 19, 2014, states specifically that TEDD Handlers have the ROFR for their TEDDs and that adoptions would be prioritized by the date the adoption application was received.

83. The Contract between the Department of Defense, United States Government and

the Richardson Defendants was a valid and enforceable contract that was signed and notarized in Richmond County, North Carolina, on or about February 19, 2014.

84. Sgt. Henderson was the intended third party beneficiary of the Contract.

85. When the Richardson Defendants signed the Contract for Satan, the adoption was subject to Sgt. Henderson's ROFR.

86. At the time the Contract was signed by the Department of Defense, United States Government, and the Richardson Defendants, Plaintiff had attempted to exercise his ROFR with the Department of Defense (but had been incorrectly told that Satan had been adopted by his second handler.)

87. On or about November 25, 2015, immediately upon learning that Satan was not with a subsequent handler but was instead with the Richardson Defendants, Sgt. Henderson contacted the Defendants in an attempt to exercise his ROFR.

88. The Richardson Defendants rejected his ROFR and refused to return Satan.

89. The Richardson Defendants breached the Contract by failing to honor Plaintiff's ROFR.

90. The Richardson Defendants further breached the Contract by allowing Satan to be used for substance detection.

91. As a result of the Richardson Defendants' breach of contract by refusing to honor Sgt. Henderson's ROFR and allowing Satan to be used for substance detection, Sgt. Henderson has been injured and is therefore entitled to equitable relief as well as damages in an amount to be determined at trial.

COUNT II

CONVERSION

92. Paragraphs 1 through 91 of this Complaint are realleged and incorporated herein by this reference.

93. At the time of the signing of the Contract, Plaintiff had a possessory right for the ownership for Satan based on his ROFR.

94. Beginning on November 25, 2015, Sgt. Henderson has attempted to exercise his ROFR by repeated requests to the Richardson Defendants to return Satan to him.

95. The Richardson Defendants have refused to return Satan to Sgt. Henderson.

96. The Richardson Defendants have maintained an unauthorized assumption of dominion over Satan since November 2015.

97. The Richardson Defendants' wrongful refusal to surrender Satan constitutes a conversion of a chattel.

98. As a result of the Richardson Defendants' conversion, Sgt. Henderson has been injured and is entitled to equitable relief and damages in the amount to be determined at trial.

COUNT III

CONSTRUCTIVE TRUST

99. Paragraphs 1 through 98 of this Complaint are realleged and incorporated herein by this reference.

100. Prior to in or about November 2015, the Richardson Defendants were aware based on the contract they signed of Sgt. Henderson's beneficial property interest in Satan and that Sgt. Henderson had the ROFR to adopt Satan once Satan's military service was concluded.

101. Since in or about November 2015, the Richardson Defendants have been on

notice of Sgt. Henderson's efforts to exercise his ROFR to adopt Satan and his request that Satan be returned to him.

102. The Richardson Defendants continue to unconscientiously and inequitably retain possession of Satan despite Sgt. Henderson's efforts to exercise his ROFR and to have Satan returned to him.

103. The continued conduct of the Richardson Defendants has unfairly and inequitably deprived Sgt. Henderson of his beneficial property interest in Satan that he is otherwise entitled to have.

104. The factual circumstances in this case have created a constructive trust for Satan, of which Sgt. Henderson is the beneficiary.

105. It is inequitable and unjust enrichment for the Richardson Defendants to continue to retain Satan in violation of Sgt. Henderson's property rights to Satan in his capacity as the beneficiary of the constructive trust.

WHEREFORE, the Plaintiff respectfully requests that:

This Court enter judgment against Defendants and in favor of Plaintiff as follows:

1. Impose a constructive trust requiring the Richardson Defendants to convey Satan to Sgt. Henderson;

2. For compensatory damages in an amount to be determined on all issues triable by jury;

3. Additional equitable relief, including specific performance allowing Sgt. Henderson his ROFR and to reclaim Satan; and

4. For such other and further relief as this Court may deem just and proper.

This, the 17th of April, 2017.

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EXHIBIT A

Original Glass Bowl

EXHIBIT B

The Fayetteville Observer

Military dog adoptions: Army procedures to give former handlers priority

Friday
Posted Apr 8, 2016 at 12:01 AM
Updated Apr 8, 2016 at 5:16 PM

By Amanda Dolasinski Staff writer

The Army is working to establish dog adoption procedures that would give priority to former handlers.

Maj. Gen. Mark S. Inch said an Army dog adoption program didn't follow regulatory processes perfectly, but it complied with the law and intent. The two-star general made his response last month in a letter to North Carolina Sen. Richard Burr.

"The Army is working in conjunction with our sister services to establish and codify future adoption procedures," Inch said. "It is our intent that all former dog handlers be given the right of first refusal during future adoption processes, and we remain grateful for the sacrifices of our military working dogs and to those who support and work alongside them."

The adoption process previously followed Air Force procedures because the Air Force is the executive agency for military dog disposition. That process meant law enforcement agencies had a chance to adopt dogs before former handlers.

There also was no legal requirement at the time to notify former handlers that their dogs were available for adoption. The only requirement was to allow handlers wounded in action or the family of handlers killed in action to have the first opportunity to adopt the dog, according to the Office of the Provost Marshal General.

Both of those procedures have changed.

Maj. Olivia Nunn, a spokeswoman for the Office of the Provost Marshal, said the office tweaked prioritization for adoptions by giving former handlers priority over law enforcement agencies.

And last year an amendment was added to the National Defense Authorization Act requiring service members be contacted first for the opportunity to adopt.

The dog program - Tactical Explosive Detector Dog - was established in January 2011 as a contract solution to shortages in the Military Working Dog program, Inch said. The Army-funded program was designed to be temporary and to support Army brigade combat teams by providing maneuver units with bomb-sniffing dogs to mitigate casualties from improvised explosive devices.

The program came to the attention of the Office of the Provost Marshal General of the Army in 2013, before Inch took command, Nunn said.

The dogs in the program were trained by non-military police handlers at contracted facilities in Indiana, and later North Carolina, Inch said.

Once trained, the dogs were deployed with their handlers to search for explosives in support of Operation Enduring Freedom.

The program ended in February 2014 as U.S. Central Command curtailed the requirement for bomb sniffing dogs, Inch said.

The 341st Training Readiness Squadron should have handled the adoption process, but was unable to because of contractual time restraints and expedited disposition, Inch said. Instead, the Office of the Provost Marshal General oversaw the adoption process for 229 dogs, he said.

Representatives from the office contacted soldiers who expressed interest in adopting dogs. Forty handlers were reunited with their dogs, Nunn said.

It would be inappropriate for K2 Solutions, a center in Southern Pines that was the subcontractor hired to kennel and train the dogs, to administer the adoption process, according to the Office of the Provost Marshal General.

Representatives from the Office of the Provost Marshal General traveled to K2 Solutions to administer the adoptions.

The Office of the Provost Marshal, which had authority to determine dogs available for adoption, created documentation to reflect excess dogs, Inch said. The documents were then forwarded to the 341st Training Readiness Squadron at Joint Base San Antonio in Texas.

Inch's promise that the Army will codify future adoption procedures comes after Burr's office asked the military to review the adoption process.

Burr visited K2 Solutions on March 30 to see the military and law enforcement working dog training program, according to his press secretary, Taylor Holgate.

"Sen. Burr is aware of the controversy surrounding the military dog adoption program and has made a formal request to the military to examine the process," Holgate said.

Also in March, North Carolina Rep. Richard Hudson asked for a separate, formal investigation into the adoption process. Hudson's office made the request to Mac Thornberry, chairman of the House Armed Services Committee on March 24.

Hudson had been following the plight of a handler attempting to adopt his military working dog since 2013. Brent Grommet, a specialist with the 101st Airborne Division at Fort Campbell, Kentucky, struggled to adopt his German Shepherd Matty after both were injured by improvised explosive devices while serving in Afghanistan.

Grommet was sent to Fort Campbell to be treated for brain and spinal cord injuries, while Matty was sent to Fort Bragg Vet Services for a torn ACL, according to published reports.

Grommet was filing papers to adopt Matty when the dog was adopted by another family.

Hudson said he used his contacts within the Special Forces communities and the dog handler contractors to track down the family, who had Matty for about a year. Hudson persuaded the family to return the dog to Grommet.

The two were reunited in Fayetteville in November 2014.

Last year, Hudson and Rep. Frank LoBiondo of New Jersey pushed to include an amendment in the National Defense Authorization Act to give injured service members priority to adopt their military working dogs.

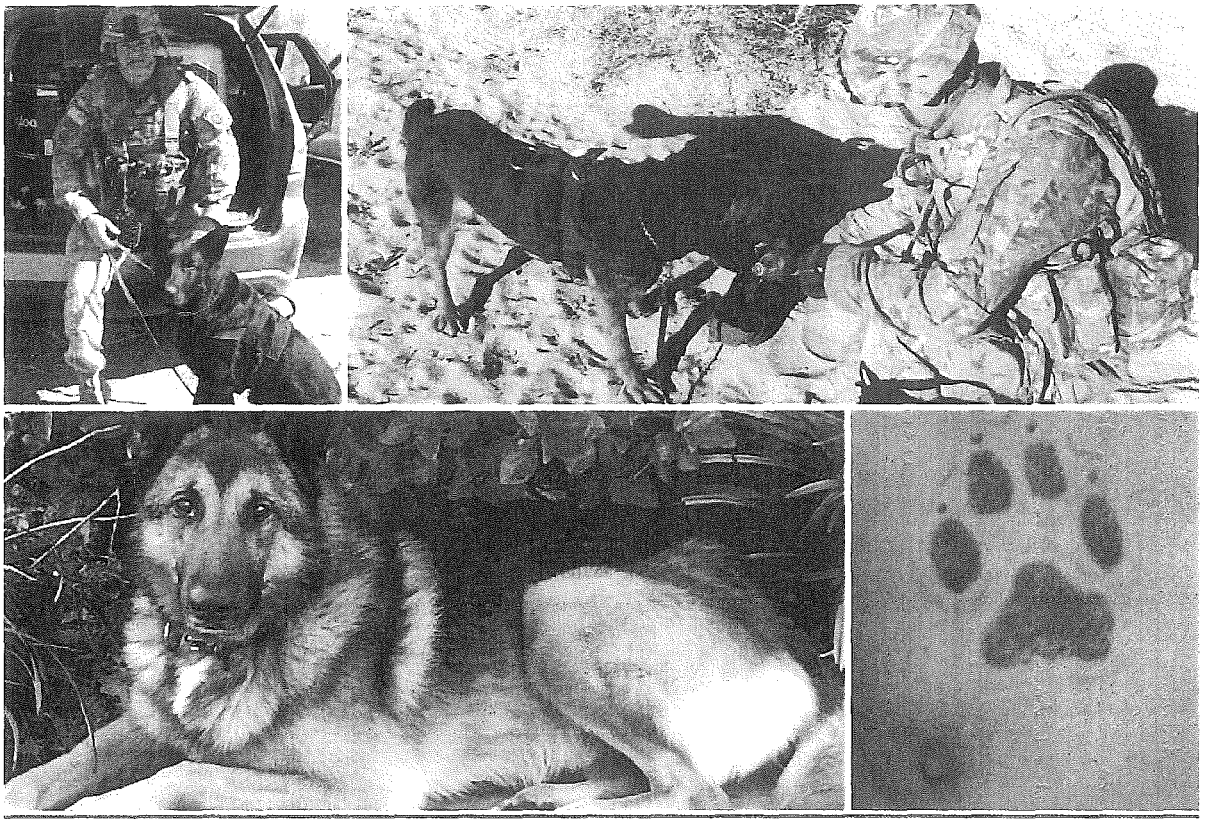
Before the amendment, the law did not require the Department of Defense to give the handler priority to adopt the dog upon its retirement.

Now, Hudson's concern is focused on all adoptions of military working dogs.

"Their situation is not an isolated case, but appears to be a common trend with (dog adoption program) handlers and their now separated (military working dogs)," he said.

Staff writer Amanda Dolasinski can be reached at dolasinskia@fayobserver.com or 486-3528.

EXHIBIT C



Troops betrayed as Army dumps hundreds of heroic war dogs

By Maureen Callahan

February 14, 2016 | 5:23am

By then, Daniel had been in Afghanistan two months. It was July 2012, his third tour of duty and his first with Oogie, his military working dog. They were leading their platoon on yet another patrol, clearing a no-name village with maybe 15 houses and one mosque, when they began taking fire.

"The first thing that went though my mind," he says, "was, 'S--t. My dog's gonna get shot.' "

It was a perfect L-shaped ambush, bullets coming from the front and the right, the platoon pinned down in a flat, open landscape. Along the road were shallow trenches, no more than 14 inches deep. Daniel grabbed Oogie, squeezed him in a hole, then threw himself over his dog.

Daniel with his dog, Oogie

It went against all his Army training. "They tell us it's better for a dog to step on a bomb than a US soldier," he says. The truth is Daniel, like just about every other dog handler in the armed forces, would rather take the hit himself.

Five weeks into their training, Daniel and Oogie were inseparable. They showered together. They went to the bathroom together. When Daniel ran on the treadmill, Oogie was on the one right next to him, running along.

That week, Daniel got Oogie's paw print tattooed on his chest.

"The few times you safeguard your dog are slim compared to what he does every time you go outside the wire," Daniel says. "That's your dog. The dog saves you and saves your team. You're walking behind this dog in known IED hot spots. In a firefight, the dog doesn't understand."

Bullets were coming closer now; the enemy had long ago picked up on how important the dogs were to the Americans, how successful they were at sniffing out bombs. "I

know there were three separate incidents where they shot at Oogie," Daniel says. And as he lay on top of his dog, he stroked him and whispered and kept him calm.

After five minutes, Daniel's platoon pushed the enemy back and away, and the first thing Daniel did was get Oogie to shade. "He's a black Lab, and it was very hot out," he says. He strapped two big bags of saline to Oogie's shoulders and hydrated him intravenously, then the two went back out to clear more villages.

"Oogie's always ready to go," Daniel says. "He'd hurt himself if I didn't stop him — he has that much prey drive."

In September 2012, Daniel and about 18 other soldiers boarded a flight back to North Carolina; their deployment was over.

Waiting on the tarmac were employees from a North Carolina-based company, K2 Solutions, which had the government contract for the dogs. Within moments of deplaning, the handlers got to pat their dogs on the head, say their goodbyes, then watch as the dogs — and all their equipment, down to their shredded leashes — were boarded on a truck and driven away.

"It's a bunch of infantry guys, and no one wants to be the first to start crying," Daniel says. "But it didn't take long. There wasn't a dry eye."

Daniel got Oogie's paw print tattooed on his chest

The only solace these soldiers had was the knowledge that they could apply to adopt their dogs, and that the passage of Robby's Law in November 2000 would protect that right.

More than three years later, Daniel still doesn't have Oogie. The dog has vanished.

Daniel, who doesn't want to use his real name because he's on active duty, is one of at least 200 military handlers whose dogs were secretly dumped out to civilians by K2 Solutions in February 2014, a Post investigation has found.

At least three government workers were also involved and may have taken dogs for themselves.

It's a scandal that continues to this day, with hundreds of handlers still searching for their dogs — and the Army, the Pentagon and K2 Solutions covering up what happened, and what may still be happening.

Dumping dogs

On Feb. 10, 2014, one of many adoption events was held on the grounds of K2 Solutions in Southern Pines, NC. The Army had recently ended its TEDD (Tactical Explosive Detection Dogs) program, and word quietly got out that "bomb dogs" would be available to civilians.

Kim Scarborough, 52, a project manager at East Carolina University, was one of them. "I called my husband and said, 'K2's dumping dogs. Do you mind if I go?' "

In quiet, well-manicured Southern Pines, K2 is a glamorous company. They own huge tracts of land where they covertly train dogs for combat, counterterrorism and catastrophes that will probably never occur in North Carolina. K2's owner, Lane Kjellsen, is a cryptic figure who claims to be ex-special forces.

The company is privately held. Their website advertises dogs for sale, but it's unclear whether they're former military working dogs. K2 has trained dogs for both the TEDD

program and the Marine Corps' IDD (Improvised Explosive Device Detector Dog) program, and each canine has about $75,000 to $100,000 worth of training.

Multiple handlers told The Post that they have called and emailed K2 repeatedly about their dogs, submitting adoption paperwork as they were instructed to do. Yet they have been given little to no information, and at times deliberate misdirection, they say. Finding military dogs isn't hard: They all have microchips, and the TEDD dogs have serial numbers tattooed on their ears.

These handlers also say K2 trainers who were with them in Iraq and Afghanistan told them they should contact K2, or K2 would contact them, once their dogs were available for adoption.

"When I contacted K2, they were like, 'She's gone and adopted out,' " says Brian Kornse, who did three tours of duty and has PTSD. "I got in contact with them in February of 2014" — the same month K2 was holding multiple adoption events.

Kornse believes his dog, a black Lab named Fistik, was given to a former Pentagon employee, Leo Gonnering, who may still have been working for the government in 2014. A man who left a voicemail for The Post from "Leo's phone" said Gonnering "adopted the dog from the Army two years ago. He and his family have no intention of giving the dog up to his prior handler." He named Kornse as the likely handler and has renamed the dog Mystic.

"I guess I had PTSD before, but I never really noticed till I gave Fistik up," Kornse says. "I started having nightmares. I never experienced that before. She made everything better for me — that's the best way I can describe it."

Other handlers say K2 would tell them information about their dogs was "privileged" and instruct them to call Lackland Air Force Base in Texas. Staff at Lackland, they say, would send them right back to K2.

> 'I guess I had PTSD before, but I never really noticed till I gave Fistik up … She made everything better for me — that's the best way I can describe it.'
>
> - Brian Kornse said about giving up his dog

"I called K2 in March 2014," says a handler who asked to remain anonymous. "I said, 'Can you please help me find my dog?' They said, 'No. Call Lackland.' "

This handler sent The Post an email exchange he had with Lackland. He asked for help, and a Sgt. Tia Jordan replied, "I'm sorry, but we don't have any control over TEDD dog adoptions." Under her signature is her office: the Military Working Dogs Adoptions and Dispositions Center.

"We got blown up together," he says of his dog. "Before I was even done with training, I knew I'd try to adopt him."

After months of obfuscation, many handlers give up, and they believe that's what K2, and some in the Army, want. "I have PTSD and traumatic brain injury," says Ryan Henderson, who has been searching for his dog, Satan, since 2014. "There are mornings I wake up with anxiety attacks. Dealing with normal life is more than I can handle anyway."

Henderson says K2 told him Satan had been adopted by his second handler "and they could not give me his information due to privacy laws."

He believes there's a thriving black market for the dogs.

"Ninety dogs adopted out, at the same time, under suspicious circumstances?" he says. "Subcontractors are literally another layer of insulation to cover the BS."

K2's website offers a standard reply to service members looking for their dogs: "All of the dogs in the TEDD program belonged to the Army," they state. K2 directs handlers to the Army's Office of the Provost Marshal General.

At least one staffer from the OPMG, Robert Squires, was at K2's adoption event on Feb. 10. Sources who were there tell The Post that Squires was overseeing it all. He also signed reams of paperwork, telling adopters that copies would be mailed to them.

Ryan Henderson with his dog, Satan

That paperwork was never sent. According to emails obtained by The Post, both Squires and another OPMG staffer, Richard Vargus, jointly play dumb.

"Everyone was under the impression that they tried to locate the handlers," Scarborough says.

Meanwhile, civilians in small North Carolina towns were electrified by the idea of owning a war dog — the ultimate status symbol — and several deputized themselves as prime "bomb dog" movers.

"On Feb. 7, I got a call from my dear friend . . . who asked me to help her with a favor," Kinston, NC, resident Jean Culbreth wrote on Facebook on Feb. 19, 2014. "The favor

was to place 72 retired bomb-sniffing dogs in new homes. Well, it's 10 days later and I am BEYOND thrilled to say that 92 dogs have been adopted! And with the 11 Ralph and I took for the Lenoir Co. SPCA, I had a part in 103 adoptions in 10 days. Man, I wish we could do this every week. To all involved: GREAT JOB."

When reached for comment, Culbreth hung up.

'The biggest clusterf@#&'

When Scarborough arrived at K2's adoption event, she was stunned. "I called my husband and said, 'This is the biggest clusterf–k I've ever seen.' We were a bunch of strangers who responded to Jean's Facebook post."

They had been told 140 dogs would be available, but just 30 were left. It was only 11 a.m. There were people claiming to be law enforcement who were not in uniform — and law enforcement was given first pick.

Some said they planned to contract out the dogs. One of the few officers in tiny Taylortown, population 1,012, took six dogs. Two men from Virginia, Dean Henderson and Jamie Solis, rolled up with a box truck and took 13.

"All of these dogs have PTSD," Scarborough says. "Squires said that to me."

None of the people who sought to adopt was vetted. None was asked what they planned to do with the dogs, or if they were capable of dealing with a dog with war wounds. None was asked whether they had small children.

"That was something that really bothered us," says an ex-K2 employee who was there that day. He asked not to be identified. "The dog I have, it took me more than a year to calm her down. She was a TEDD. I wouldn't let her be around children."

He believes no civilian should ever be allowed to adopt a military working dog. "Civilians don't understand what these dogs have been through in war," he says.

> ‘That was something that really bothered us … Civilians don’t understand what these dogs have been through in war.’
>
> - an ex-K2 employee

This employee says that during the event, he was “getting dogs out of the kennel and displaying them to people.” He knew it was wrong. “Too many civilians were getting dogs that should have gone to handlers. It wasn’t right.”

He says handlers were calling him constantly, complaining that the Army and K2 “keep losing my s--t.” He also says K2 was in collusion with Army officials. “Squires was there and signing paperwork. He adopted two TEDD dogs. One was Fistik” — Kornse’s dog. Vargus, he says, “was the head of the program. He knew what was going on.” Vargus is also believed to have taken at least two dogs.

This employee says he kept Squires from taking at least one dog. “I talked to Squires and said, ‘I know this handler wants this dog.’ They let me take him.”

The Army confirmed to The Post that Vargus was in charge of policy of the TEDD program, but refused to comment on any involvement he, Squires or Gonnering had in these adoptions, or dogs they are alleged to have taken.

“All TEDD adoptions were performed in accordance with the law,” the Army said in a statement. “The Army will continue to carry out standard adoptions in accordance with the disposition procedures established by the law and the Department of Defense.”

Scars of war

Once Scarborough got her dog, Ben, she was directed to a room where an Army veterinarian was waiting. The dogs were getting five-minute exams — temperature, teeth checks — before being shunted off K2 grounds.

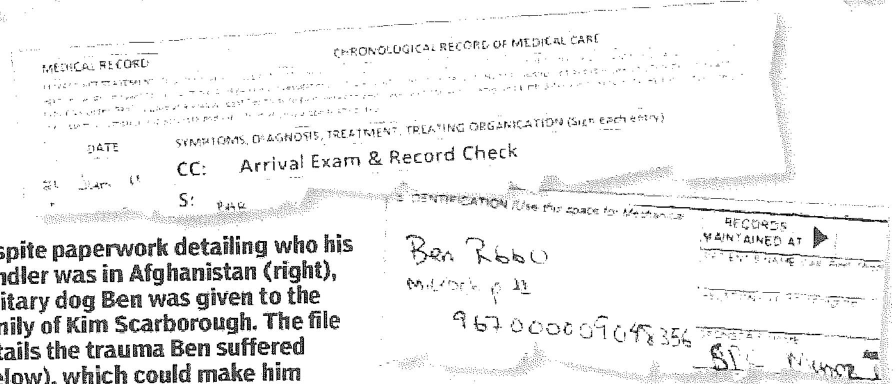
She was apparently the first civilian the doctor saw that day.

“They got to me and it stops,” she says. “The veterinarian was clearly very upset. She just stopped doing the exams.” The doctor left the room, but Scarborough and others

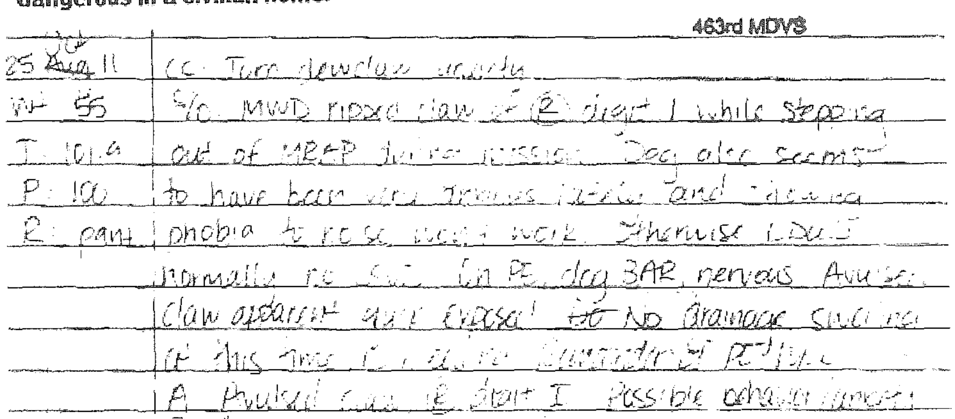
could overhear her. Scarborough believes the veterinarian was on the phone with superiors.

"She was saying, 'I don't know what to do. This is not what we normally do.' She was very disturbed, very distraught."

After several hours, the veterinarian returned. The dogs remained muzzled the entire time. "She said she was told, 'Let it go — proceed,' " Scarborough says. That doctor, Capt. Sarah T. Watkins, Branch OIC at Fort Bragg, signed Ben's medical records.



Despite paperwork detailing who his handler was in Afghanistan (right), military dog Ben was given to the family of Kim Scarborough. The file details the trauma Ben suffered (below), which could make him dangerous in a civilian home.



Scarborough was given those along with her dog's deployment records — something every handler who spoke with The Post had no idea existed. A copy obtained by The Post shows that next to each dog's name and serial number is the name of their handler, refuting claims by the Army and K2 that tracking down a dog's handler is too difficult.

Scarborough encountered similar stonewalling when she requested Ben's military papers.

"There is no 'official' Army record since he was technically a contract dog," Squires told Scarborough in an email dated July 25, 2014, "but by regulation he is classified as a Military Working Dog."

Scarborough realized she had no business adopting Ben.

"It wasn't till I got home that I said, 'Oh, my God. I've got a bomb dog that couldn't make it as a patrol dog and has PTSD." She says that on the way home from the K2 adoption event, Ben freaked out when he heard sirens.

> 'I've offered $5,000 cash, plus a new German shepherd of their choosing, for his return. I have heard nothing.'
>
> - Army veteran Ryan Henderson

When he hears thunder, or gunfire — Scarborough and her husband live on a farm where they allow hunting — Ben races through the house and hides under her husband's desk, or jumps into bed with her, "shaking like a leaf."

Scarborough says she and Ben's handler got in touch a few days ago with help from online group Justice for TEDD Handlers, run by Betsy Hampton, a civilian.

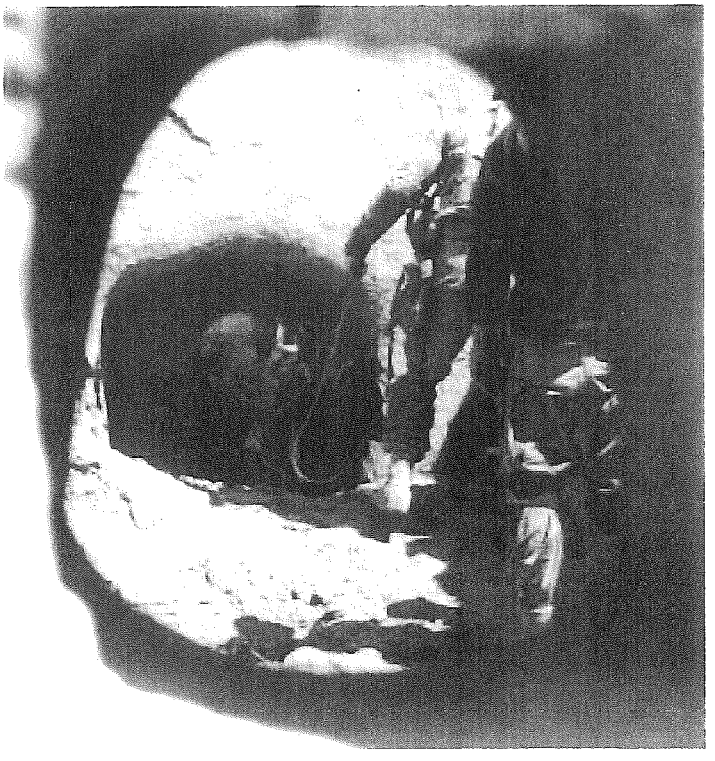
Scarborough says the handler is overwhelmed to have found Ben.

"He said to me, 'That's my Ben. That dog saved my life. I owe him.' I mean, ladies from the Daughters of the American Revolution have these dogs," she says. "If the handler wants Ben, it belongs to him. Period, the end."

Handlers don't typically get that response. Many who have found their dogs over social media are rebuffed. More than one has been told their dog ran away, or was hit by a car.

Army veteran Henderson has tracked his dog, Satan, to a family in Chocowinity, NC.

"I've offered $5,000 cash, plus a new German shepherd of their choosing, for his return," Henderson says. "I have heard nothing. They refuse to contact me."

Ryan Henderson with his dog, Satan, whom he has been trying to get back since 2014.

Every handler The Post spoke with stressed this point: The dogs are not just dogs, or "equipment," as the Army designates them. They are battle-scarred veterans who have saved lives.

'Destroy the dogs'

The 13 dogs Dean Henderson and Jamie Solis took from K2 were, in fact, treated like outdated equipment. On the night of Feb. 10, 2014, the two men drove up to Currituck Kennels at Mt. Hope in Chester, Va., the dogs sliding around the back of their truck the whole way.

"Half of the dogs were on human Prozac and Xanax," kennel master Greg Meredith tells The Post. "They were emaciated. They all had PTSD. One had an injury to his tail from shrapnel."

The men told Meredith they were ex-Secret Service, had just bought the dogs for $30,000 each, and had a contract to sell them to the Panamanian government for twice that amount.

The paperwork given out at K2 that day included a document stating the adopter could not give a dog away, sell it, or profit from it. "If they lied to K2 and were planning to sell, they'd be in serious amounts of s--t," says the ex-K2 employee. "That's illegal. And if K2 knew about that, that's even more illegal."

Seventeen months went by. Meredith had spent nearly $150,000 of his own money caring for the dogs and was broke. He pressed Henderson for help.

"Destroy the dogs" was the reply.

Meredith called K2, who sent him to Vargus. He provided The Post with emails between himself, Vargus and Squires.

In a phone call, "Vargus tells me they couldn't determine who had ownership at that point — the contractors or DoD," Meredith says. Vargus' office is at the Pentagon, which houses the Department of Defense.

"He told me he was there when Dean and Jamie picked them up," Meredith says. "He knows them. They're known to him. I said, 'I've been told these dogs can't be re-purposed or resold, but Dean and Jamie told me they paid $30K a piece for these dogs.' I said, 'There's a coverup going on here.' "

Henderson and Solis did not return calls for comment.

'My best friend'

The handlers, understandably, trust no one. Adam Wopat served for five years and did two tours. He spent a year in combat with his dog, Heijn, in Kandahar.

On May 30, 2012, while sweeping a compound with the 4th Infantry Division, an IED went off. One soldier lost a leg. Another was medevaced out. Wopat was knocked back and unconscious, and Heijn was blown way behind him.

Adam Wopat with his dog, Heijn

"Once I got up and came to my senses, I realized, 'Oh, I still have a dog,' because he had already returned to me and was laying down next to me."

Wopat is crying now. "After we hit our one-month mark of training — it's like when a son calls you 'Daddy,' " he says.

Last year, Wopat was contacted by a man named John Moreno, who said he founded an organization called Operation Releash in May 2015 to reunite veterans with their dogs.

"He told me US Capitol Police had him. He told me they were going to fly us up on Veterans Day, and to wear a suit and tie," Wopat recalls. Moreno said they were going to retire Heijn and re-home him with Wopat.

"On Oct. 19th, the day he told me to call him on his new cellphone, he ceases contact with me," Wopat says.

Moreno is ex-K2. He most recently worked as executive director of the Worcester County Humane Society in Maryland, a position he left after six weeks. "He was not caring for the dogs," a former colleague tells The Post.

Moreno confirms Wopat's version of events. Asked why he disappeared, Moreno told The Post: "A lot of stuff was going on at the time. I wanted to be left alone."

Former Marine Nick Beckham says he knows where his IDD dog, Lucky, is: Living with K2 CEO Lane Kjellsen in North Carolina. Beckham says he was tipped off by a K2 employee.

"K2 told me I had the right to adopt if I was the first handler and the dogs were retired," Beckham says. "I called K2 and asked for paperwork. I filled it out and mailed it in and I never heard back. I emailed again — they never responded."

Reached Wednesday, Kjellsen admitted many adoption events had taken place at K2. "Hundreds of dogs were adopted out," he said. "Let me take that back. Not hundreds, but more than 100."

K2 CEO Lane Kjellsen (left) adopted former Marine Nick Beckham's dog, Lucky. He went on to claim that "K2 had nothing to do with adopting those dogs."

Asked if he had an IDD dog named Lucky, he said, "Lucky? Is that true? Um . . . I don't know. I do have a dog named Lucky."

He then admitted he had sold Lucky to the Marine Corps, and, once retired, "the Marine Corps repeatedly reached out to the handler and had no luck. I properly adopted Lucky through normal channels. K2 didn't handle any adoption paperwork."

Kjellsen then suggested the Army was to blame for all the war dogs who have been wrongly and secretly re-homed, but he refused to give The Post specifics.

"I would say, 'Get an official investigation and let me talk,' " Kjellsen says. "I'd tell them what the Army did. I can't [tell you]. I need to be subpoenaed."

Beckham is disconsolate to this day. "Lucky was my first and only dog," he says. "He was my best friend."

EXHIBIT D

THE WASHINGTON FREE BEACON

Retired Army Dogs Meant for Veterans Given to Company that Tried to Sell Them to Foreign Countries

Handlers searched for dogs as Army gave them to company in violation of official policy

Jake Carlberg and Abby / Facebook

BY: Stephen Gutowski

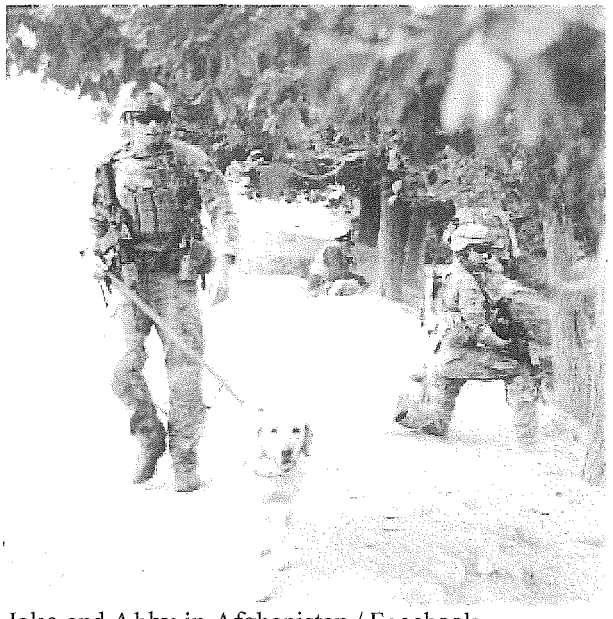
January 27, 2017 12:00 pm

Army Specialist Jake Carlberg and his dog Abby spent over a year sniffing out bombs in Afghanistan. They served with distinction, bonded, and saved lives.

"He would always say that she was his best friend," said Glenna Carlberg, Jake's wife. "They searched for bombs for his company. ... They found seven."

That was good enough to make them one of the top dog teams in their brigade, she said, but it was not enough to ensure they would be able to stay together after Abby was retired.

When they returned home, Jake tried for months to reunite with Abby. However, the Army, going against its own policy, had given Abby to a private contractor that tried to sell her to a foreign government before ultimately abandoning her in a Virginia kennel.



Jake and Abby in Afghanistan / Facebook

Abby is one of 13 dogs the Army gave to Soliden Technologies LLC, in contravention of procedures stating that the dogs' former handlers should have the first opportunity to adopt them. Instead of being reunited with the veterans with whom they had served overseas, the dogs became pawns in a complicated and ultimately failed scheme to sell them for more work overseas. When the plan to sell the dogs fell through, their caretaker at the time says he was told to "dispose" of them.

Coming Home

The Tactical Explosive Detection Dog program (TEDD) to which Jake and Abby belonged sent hundreds of bomb-sniffing dogs to Iraq and Afghanistan as a countermeasure to the threat of improvised explosive devices. The program was similar to, but distinct from, the Military Working Dog program (MWD).

When the program ended in February 2014, the Army's Office of the Provost Marshal General (OPMG) had to determine what to do with the remaining 229 dogs.

"Seventy were retained by the Army," Army spokesman Troy A. Rolan Sr. told the *Washington Free Beacon.* "The remaining 159 were made available for adoption at no cost to the individual or agency adopting the dogs. Sixty-three were adopted by law enforcement agencies, 47 were adopted by private citizens, and unfortunately due to medical or aggression issues, nine were euthanized."

Handlers were supposed to be given first preference in the adoption process, the Army said. Police departments and civilians would be able to adopt any dogs that were left.

Activists for the group Justice for TEDD Handlers claim the OPMG considered their program inferior to the MWD program and, as such, prioritized moving the dogs off their books as quickly as possible rather than giving handlers an opportunity to adopt the dogs they worked with. As proof, they point to a 2011 quote from Lt. Col. Richard A. Vargus, a TEDD program director.

"It's different from our military working dog community because they're not professional handlers," Vargus told the *Army Times*.

Activists say this attitude motivated the OPMG to conduct a mass adoption at the North Carolina facilities of K2 Solutions, a defense contractor that had housed the dogs since they returned from duty. The *New York Post* reported in February of last year that dozens of dogs were adopted out to civilians during an event in February 2014.

Two months before that adoption event, Glenna emailed OPMG to find out how she and Jake could adopt Abby. She was told by an OPMG coordinator that the dog was still a "viable asset" to the program, but that she would be informed when that changed. Glenna inquired again about Abby's status on Feb. 10, 2014. Two weeks later, she was told Abby had been adopted out.

All dogs go to ... contractors

12 of the dogs that ended up with Soliden / Mount Hope Kennel

Abby, along with a dozen other TEDD dogs, had been given to the private contractor Soliden Technologies LLC during the adoption event.

"The owners of Soliden Technologies came to the adoption event in North Carolina and advised Army representatives that they were training former MWDs to be service dogs for veterans," Rolan said. "They provided the requisite information and adopted 13 TEDDs."

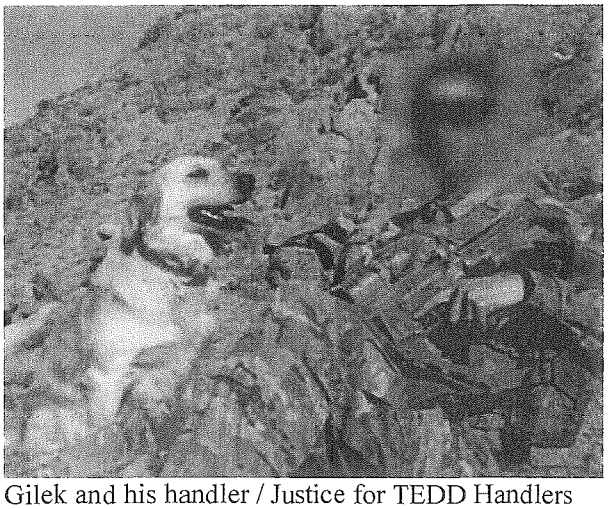
Despite Soliden's claim that they were training the dogs to become service animals for veterans, texts, emails, and eyewitness accounts show the company intended to sell the dogs to foreign countries to be reused in military roles.

That intention violated conditions the Army set for adopted military dogs: Records obtained by the *Free Beacon* show the dogs must not "be used for any illegal purpose, police or security related activity, private business activity, substance detection either public or private, nor be given or sold to another person." However, it appears there was no oversight to ensure those requirements were followed.

"Since the Army did not contract Soliden for any action concerning MWDs, any additional information pertaining to their intentions or actions must be obtained from Soliden," Rolan said when asked if the Army would have permitted the adoptions if it believed Soliden intended to sell the dogs.

The Army claims only three out of hundreds of TEDD adoptions were mishandled. Two of the three, Abby and another dog named Gilek, were given to Soliden. The Army did not answer why it considered those two adoptions mishandled but not the other 11 involving Soliden.

The lack of oversight and apparent negligence in the Army's TEDD adoption process had a dramatic effect on Gilek's handler, according to his wife "Anne Smith." Smith's real name is not being used at her request.



Gilek and his handler / Justice for TEDD Handlers

"It's hard because he's still active duty," Smith said. "I'm fearful that I don't want to cause problems for him because we've already witnessed corruption and disregard for military regulations and the law in general." She said reuniting with Gilek was on her husband's mind as soon as he returned home from the war. "My husband John had difficulty transitioning from his deployment without Gilek," Smith said. "Among the few sentences he spoke on the drive home from the airport were: 'I miss Afghanistan. I miss my dog.'" When the Smiths attempted to find Gilek, an OPMG official told them that she had been adopted on Feb. 3, 2014, by "an organization that trains service dogs for veterans."

"It didn't make sense why they wouldn't have followed regulation, why John wouldn't have been given priority," Smith said, lamenting changes she saw in her husband thanks to his separation from the dog. "He didn't come back from that deployment whole, in a way that was separate from how an infantryman returns from war a different man."

Where is Abby?

After contacting Soliden Technologies, which was registered in Virginia to Dean Henderson in 2013, Jake and Glenna Carlberg were told they could have Abby back.

"Dean was very knowledgeable as to which dog we were talking about, promised us we could have her, said he'd even give us the dog food that they had for her and her kennel," Glenna said. "We were finally given the OK to come and pick her up on Mother's Day weekend."

Jake was excited about reuniting with Abby, and was given a pass from work so he could pick her up. However, when Jake called Henderson the day before the trip, he was told the dog had been moved to Michigan to visit a veterinarian.

"Then he told us that she was going to be starting a contract in July with the Panama Canal and [Jake] just pretty much gave up at that point," Glenna said. "We had our child three months early so he was on leave. He offered to drive to Michigan to get her. He offered to drive to Virginia to get her."
"At that point, Dean just stopped responding."

Jake and Abby in Afghanistan / Facebook

A new Mount Hope

The families of other TEDD handlers told the *Free Beacon* of similar interactions with Henderson, who claimed the dogs were in Michigan or on their way to foreign countries.

Instead, the day they picked up the 13 TEDD dogs at K2's kennel, Henderson and associate Jaime Solis brought them to the Mount Hope kennel in Virginia, owned by Greg Meredith. The dogs remained there for the next 17 months.

Meredith said the two men came to him on Feb. 10, 2014, showed him Secret Service badges, and offered a thousand dollars and the promise of future payments to rehabilitate the dogs so they could be sold to the Panamanian government.

The Secret Service said Henderson and Solis do not appear on its current employee roster, but it could not rule out that they had previously been employed by the agency.

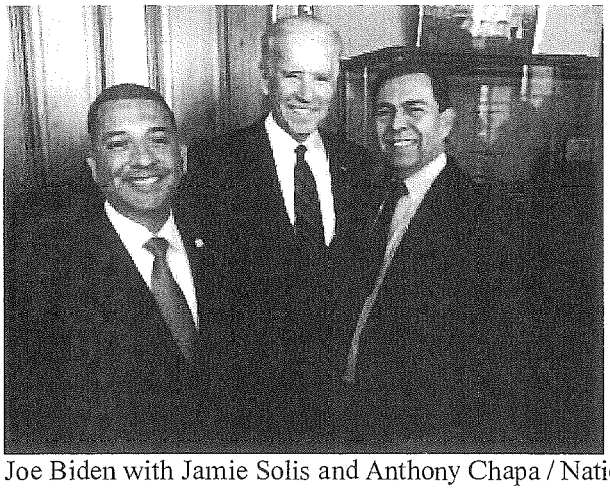
For Meredith, the meeting was the beginning of a yearlong ordeal that left him near bankruptcy and in fear of losing his kennel and home. During that time, Meredith said he incurred hundreds of thousands of dollars in debt caring for the dogs, endured threats from Army officials and their associates, and refused requests to euthanize the dogs.

He also got in a number of heated exchanges with Soliden over compensation for the dogs' care.

"I don't know where the disconnect is but the empty promises have got to stop and I need the money that I earned," Meredith texted Solis during one argument on May 16, 2015. "I need the truth and what is owed me. I have done my job above and beyond. I need you to do yours."

"Greg, your every word is our concern as well," Solis responded. "We are still working with our partner."
By the end of that month, more than a year after taking in the dogs, Meredith had not been paid and was feeling increasing pressure from his creditors. Henderson assured him that payment was on the way, saying his partner was close to finalizing a deal with a foreign country.

"Greg, the VP of Nastec is going to contact [the creditor] and talk to her about extending you for a few days," Henderson texted Meredith on May 30, 2015. "They believe the contract will be signed in a few days and they will front Jaime and I with the total amount of the contract. We will then be able to pay you for everything. This is straight from the horse, not watered down."



Joe Biden with Jamie Solis and Anthony Chapa / National Latino Peace Officers Association

Nastec is an international security contractor based in California. Solis and Henderson connected with Nastec through Anthony Chapa, according to Meredith. Chapa worked as an assistant director of the Secret Service, where both Solis and Henderson told Meredith they worked, and has been involved with a number of security contractors since he retired in 2008. Chapa and Solis met with Vice President Joe Biden to discuss law enforcement-related issues as representatives of Hispanic police groups. The two were also pictured together at an event for the National Law Enforcement Officers Memorial.

According to Meredith, Chapa's connections with foreign governments from his work in the Secret Service were key to the plan to sell the 13 dogs—and potentially many more.

"They even told me that they were going to get another hundred-plus dogs in here for me to rehab and train to get ready to go to Colombia," he said. "They were going to get paid to build the facility here to house them. They were going to do all this and everything."

Nastec, Henderson, Solis, and Chapa did not respond to requests for comment.

'Dispose of the dogs'

By June 2015, Meredith suspected that Soliden's money would never come, so he began searching for a way to adopt out the dogs while recouping his costs. The last straw came on June 5, 2015, when he got a call from Henderson telling him to "dispose" of the dogs.

Renee James, one of Meredith's friends who often cared for dogs at Mount Hope, witnessed the call. "[Henderson said] the dogs had aged out and that they're going to replace them with younger K9 police dogs, is what I remember," she said. "And that he can dispose of the dogs that he currently had. I looked at Greg and I was just like, I mean my heart just sank."

The same day, in emails seen by the *Free Beacon*, Meredith turned to Army officials Richard Vargus and Robert Squires on the recommendation of an employee at K2.

"I need help Sir and the sooner the better," Meredith wrote to Vargus. "My heart is heavy knowing that this group has even more dogs to be abandoned and abused. Thank you for speaking with me and any help will be most appreciated. I am out of money and out of time."

"I know there are some former handlers that will be ecstatic and more than willing to adopt their former wartime companion," responded Squires, who worked with Vargus on the TEDD program. "Once I receive the list of dogs from you, I will get the dogs adopted out as fast as I can. I appreciate you reaching out to us and looking out for these combat vets!"

But Meredith said shortly afterward he received a call with a dramatically different message.

"Squires told me I had two options," he said. "One, turn over the dogs to him because they were still [Defense Department] property or, two, he would come take them by force."

The phone call from Squires was not the only threat Meredith claims he received. On June 22, 2015, a man named Jerry Avery showed up unannounced at Mount Hope looking for Abby.

"[Avery] wanted to buy Abby from me," Meredith said. "He had $5,000 in cash in his hand and I told him the dog wasn't for sale. That's when they started threatening me that they were going to come take them all by force and if they didn't they were going to get a group of lawyers to put me out of business."

Squires denies he threatened to take the dogs from Meredith by force. In an email to the *Free Beacon*, he said the Army was willing to help him reunite the dogs with their handlers, but that any compensation for the dogs' care was a private matter between Meredith and Soliden.

He also said the Army has no say over what happens to TEDD dogs once they are adopted.

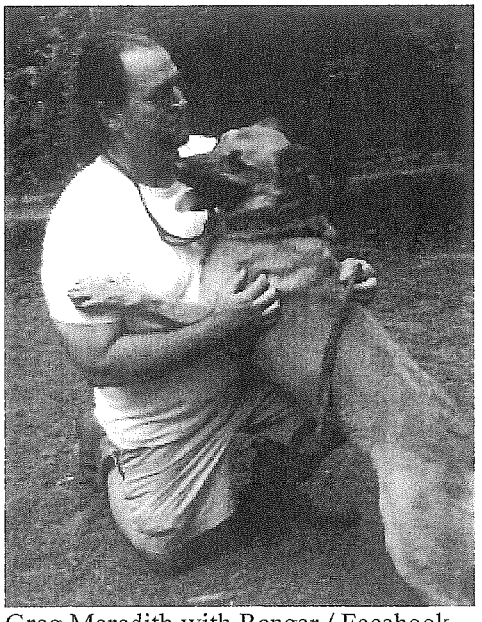
"Once Soliden Technology adopted the dogs, it's on them on what happens with the dogs," Squires said in a separate phone conversation with the *Free Beacon*. "The government no longer has any say-so with the dogs once they're adopted."

Squires became agitated as the interview continued, saying the handlers needed to "put their big boy pants on" and "grow up."

"It's not against the law to adopt the dogs to whoever the hell the government wants to," Squires said. "It's the government's dogs, it's not the damn handler's dogs. Do you understand that? It belongs to the Department of Defense; it does not belong to those individual handlers."

"Don't call me again, fucker, you understand me?" Squires said.

Vargus referred all questions to Army Public Affairs when contacted by the *Free Beacon*.



Greg Meredith with Ranger / Facebook

The day after Meredith's contentious call with Squires, he received an email from Vargus repeating the original offer to help adopt the dogs. The email went on to claim "it is apparent that your focus and intention is to sell these former Army Dogs."

"I'm offended by the tone you are taking with me making it seem like I am doing anything wrong," Meredith wrote. "No offer has been made to pay the cost in taking care of these dogs for the last 16 months. I have and will continue to uphold my obligation to these TEDD dogs. You are asking me to bankrupt myself an [sic] my business not offering any assistance in the cost of the care for these K9's."

Communication between the Army officials and Meredith became sporadic, then ceased. Meredith connected with Mission K9 Rescue and the United States War Dogs Association, which helped him track down many of the dogs' handlers.

Meredith's Mission

Many of the handlers believe Meredith saved their dogs.

"I strongly believe if it weren't for him being placed in their journey, they would have been murdered in an effort to cover up what had been done," Anne Smith said.

At the height of their search, the Smiths thought they would never see Gilek again.

"I really thought that whoever had her, especially if it was a veteran, would be attached to her and wouldn't want to give her back," Smith said. "So, I really didn't have much hope that we would find her or that we would ever have her back."

The Smith family is now happily reunited with Gilek, though they still fear retribution for speaking out.

Jake and Abby in Afghanistan / Glenna Carlberg

The Carlbergs' case was more tragic. In July 2014, Jake Carlberg wrote on Facebook that he suspected Soliden was being dishonest about Abby. "He's going to give us the run around in hopes that we will give up and he will continue to get his money's worth out of our battle buddy's," he wrote. "Sounds like the American dream right?"

Several months later, Jake posted a picture of him and Abby from their time in Afghanistan, but seemed resigned to her absence; when asked by a friend where Abby was, he responded "Ecuador or Panama."
On Feb. 12, 2015, two years after the Army had given away Abby to someone else, Jake was killed in a car accident.

He never got to see Abby again.

However, Glenna and her two young sons, Ian and Gavin, were reunited with the dog in August 2015.

"It was really emotional because I just know how many hours he spent trying to find her and the companionship they made over there," she said. "It was hard having her come home and he wasn't here to see it and have her, but I know that he's up there and loving every minute of it."

"It definitely helps my oldest child, who's about to be six, because he feels like the rest of us do: that we have a part of Jake there. Abby was with him and they did so much together that it feels like having a piece of him."

Justice delayed, likely denied

As the Department of Defense investigates the TEDD dog adoption process, it is unclear if anyone will face consequences for the ordeal.

Meredith recently obtained a judgment against Soliden, but he is worried he may never be paid. A fundraising campaign to recoup the $150,000 Meredith said he spent caring for the dogs has only raised about a third of its goal. He is still on the verge of losing his kennel.

Meredith said he is more upset by the idea that Henderson and Solis were prepared to kill the dogs for being an inconvenience than the costs he incurred.

"The one thing that bites me in the ass the most is that Dean and Jaime are supposed to be retired Marines and Secret Service and these dogs are veterans," he said.

TEDD reunions / Facebook

Most of the dogs Soliden brought to Mount Hope were reunited with their handlers in the end. A dog named Dakota remains unaccounted for after allegedly being given by Soliden to a veterinarian technician. Betsy Hampton, the founder of Justice for TEDD Handlers, hopes justice is coming.

"We believe the public needs to know what happened," said Hampton. "The people involved need to be punished, and the contractors like Soliden Technologies should not be given additional contracts. Military

working dogs need to stop being considered equipment and not be used up until every bit of life is gone. We don't want this to happen again."

Kaitlyn Ann Beiswanger contributed to this report.

EXHIBIT E

K2 Solutions, Inc.™
An Employee-Owned Company

5735 US Highway 1 North • Southern Pines, NC 28387
Phone: (910) 692-6898 • Fax: (910) 692-8114

February 19, 2016

Congressman Richard Hudson
Eight District, North Carolina
429 Cannon Building
Washington, DC 20515

Dear Congressman Hudson,

I am writing to request that a Congressional Inquiry of the Army's Tactical Explosives Dog Detector (TEDD) Program be commenced. Over the course of the last few weeks K2 Solutions, Inc. (K2) has received an incredible amount of negative media attention as a result of the Office of Provost Marshal General's disposition of canines under Contract W911SR-10-D-0021. While this issue has been percolating under the surface for some time, in the recent months it has actually caused a substantial disruption in the business of K2. The process related to the adoptions at issue, which is described in greater detail below, has already caused serious detriment to our company, and the inimical impact of the false reports being generated on social media are increasing by the moment. It is for these reasons that K2 is requesting a formal inquiry into the entirety of the TEDD contract, from the manner in which it was released to the manner in which the adoptions were conducted by OPMG.

The following is an abridged background of the events that transpired during the course of the contract. It is by no means exhaustive, but will hopefully provide enough information to initiate our request. In 2013, the US Army awarded the contract for the TEDD program to Davis-Paige Management Systems (DPMS) of Annandale, Virginia. During the bidding process, DPMS sought K2's support in providing the canine and handler training for the program. The RFP was released on an IDIQ vehicle under which DPMS was an awardee, and upon award of the TEDD contract DPMS engaged K2 to act as a subcontractor. DPMS had virtually no knowledge of the contractual requirements, particularly those related to canine and handler training, and K2 made every effort to carry the program while maintaining the work-share requirements mandated under the contract. Incidentally, similar issues arose under the earlier Contract held by a Prime Contractor. In that instance, the Prime also had no knowledge or subject matter expertise related to canine and/or handler training, but was awarded the Contract as a result of it being issued as a small business set-aside. As in the situation with K2 and DPMS, the bulk of the work under that Contract was performed by the Subcontractor, Vohne Liche Kennels, making the requirement that the Prime perform 51% of the workshare extremely difficult.

Payment issues, amongst others, arose months after the contract was awarded. Ultimately, K2 was forced to file a complaint for breach of contract against DPMS for non-payment. K2 settled the matter in May of 2015, and was finally able to recover over $2 million dollars as a result. The foregoing is a matter of public record and the details can be accessed through the Moore County, North Carolina Court System, or can be provided by K2 upon request.

K2 Solutions, Inc.™
An Employee-Owned Company

5735 US Highway 1 North • Southern Pines, NC 28387
Phone: (910) 692-6898 • Fax: (910) 692-8114

As a result of DPMS' failure to pay for services rendered, K2 elected to not pursue a 6-month follow on contract and then a two-week extension. Subsequently, OPMG elected to adopt out the 150 TEDD dogs that remained in the Program. At this point in time, K2 was housing the majority of the canines, but was doing so at risk and without payment by DPMS – both factors of which the Government was aware. Moreover, K2 had no role in placing the canines whatsoever, and though the canines were located at K2's facilities, all placements were performed 100% by OPMG without any coordination or involvement from K2. It is important to note that during this process K2 was not at liberty to direct actions that appeared to be standard to military adoption protocol with the Government. As a subcontractor on this effort, K2 was without privity of contract with the Government, and K2 was reminded of this fact by the contracting office on at least one occasion.

While the foregoing illustrates (to a very small degree) the difficulty that K2 faced in the actual performance of the contract, the entirely unjust, inaccurate and outlandish accusations being thrust at K2 from a variety of media outlets have caused more than a substantial disruption to business. At this juncture, our reputation as a company is entirely at stake, and through absolutely zero fault of our own. K2 is a service-disabled veteran owned small business. We take pride not only in supporting our active duty military members, but also our veterans. A bulk of our work force and executive leadership is comprised of military veterans, and without some serious intervention from you and our other Congressional representatives, we risk running aground, and dozens of veterans and military spouses risk losing their jobs.

There is significantly more to this story than can be set out in a few pages. K2 is willing and ready to provide each and every detail required to support an investigation into the TEDD Program as a whole – from the manner in which it was awarded to the unmitigated failure of the adoption process. K2 welcomes your queries, and hopes that this letter inspires action on the part of our Congressional Representatives to undertake a full investigation of the matter, and to clear the name of a company that has made supporting our men and women in arms our sole purpose.

Very truly yours,

Lane Kjellsen
Chairman and CEO
K2 Solutions, Inc.

Also sent to:
Representative Ellmers
Senator Burr
Senator Tillis

EXHIBIT F

USA TACTICAL EXPLOSIVE DETECTOR DOG (TEDD) ADOPTION APPLICATION

Thank you for your interest in adopting an USA Tactical Explosive Detector Dog (TEDD). Please fill out this application electronically using MS Word or print, complete, and scan the document. Please attach the saved file and email to: [redacted]

Veteran TEDDs have served our Country and Army honorably and are now eligible for retirement. Primarily, due to the reduction in forces in Afghanistan, the total number of TEDDs in the Army has been reduced and therefore, many TEDDs are eligible for retirement. In some cases, a TEDD may have developed performance issues such as low drive or aversions to gun fire that makes them ineffective at detecting explosives. In rare cases, a TEDD may retire due to medical conditions that prevent them from deploying. In all cases, retiring TEDDs are healthy, happy and will make terrific pets.

Based on availability, retiring veteran TEDDs will become available for adoption over the next 6 months (submitting an application does not guarantee adoption). Retiring veteran TEDDs are 4-7 year old breed Labrador retrievers, German Shepherd, Belgian Malinois, mixed breeds and either male or female. Female TEDDs are spayed prior to adoption.

The adoption process is not quick. Upon returning from deployment a TEDD is examined by a USA TEDD trainer and either returned to service or placed on a retirement list. Once a TEDD is eligible for retirement, it generally takes 3 to 4 weeks until the TEDD can be adopted. During this period, the following will occur:

- *The TEDD will receive a health and temperament assessment from a DoD veterinarian.*
- *The TEDD will be matched with an adoptee (based on the information on this application).*
- *The adoptee will be notified via email and receive a "Covenant Not to Sue Agreement." This agreement releases the Federal Government from any liability relative to the retiring TEDD. The Convent not to Sue must be notarized and provided to the USA when the TEDD is picked up.*
- *The TEDD pickup date will be scheduled as soon and conveniently as possibly.*
  TEDD pickup will be at:
  - [redacted]
- *It is the responsibility of the adoptee to make all of the travel arrangements to pick up the TEDD.*
- *The USA will not ship, transport, taxi, or hold (more than two weeks) a TEDD for Adoption.*

If you are requesting a specific TEDD, please include the TEDD's Name and Tattoo number on this application and email correspondence. USA TEDD Handlers receive first right of refusal for adoption of their TEDD. TEDD Handler Requests for the same TEDD are prioritized based on the date the adoption application was received. All other TEDD adoption requests are also prioritized based on the date the adoption application was received. The USA TEDD office is the single point of contact regarding TEDD adoptions.

ADOPTION APPLICANT INFORMATION

Last Name [redacted] First [redacted] M.I [redacted] Date 2/19/14

Street Address [redacted] Apartment/Unit #

City [redacted] State [redacted] ZIP [redacted]

Pho [redacted] E-mail Addre [redacted]

Age [redacted] Occupation [redacted]

Are you a citizen of the United States? [redacted]

SPOUSE INFORMATION

Last Name [redacted] First [redacted] M.I. [redacted] Date 2/19/14

Street Addr [redacted] Apartment/Unit #

City [redacted] State [redacted] ZIP [redacted]

Phone [redacted] E-mail Address [redacted]

Age [redacted] Occupation [redacted]

Are you a citizen of the United States? [redacted]

HOUSEHOLD INFORMATION

Ages of Children in Household [redacted]

Ages of Adults in Household
(Other than Adopter and Spouse) [redacted]

Would you like a specific age, color or gender?

Are you requesting a specific TEDD?
(Name & Tattoo Number)

Please describe your ideal dog:

How many other pets do you currently own or have living in your home?

Name of Pet Tito			Type / breed terrier mix		
Temperament good	Spayed/Neutered yes		Age 5	Sex male	
Name of Pet			Type / breed		
Temperament	Spayed/Neutered		Age	Sex	
Name of Pet			Type / breed		
Temperament	Spayed/Neutered		Age	Sex	
Name of Pet			Type / breed		
Temperament	Spayed/Neutered		Age	Sex	
Name of Pet			Type / breed		
Temperament	Spayed/Neutered		Age	Sex	

Maximum number of hours the dog will stay alone? 1

Where will the dog stay when no one is home? Kennel inside

Where will the dog stay during the day? with me

Where will the dog stay during at night? Kennel inside

Where will the dog stay when the family is out of town? Family house sits

Will the dog be left outside unattended at any time?

If yes, please explain: NO

Describe the area where you live.
(City, suburban, rural, yard size, etc.) rural 3acres no neighbors isolated area

Do you own or rent?

If you rent, please attach written permission from rental property owner.

Do you have a fenced yard? NO

How high is fowest part of the fence?

Describe your fencing and gates
(type of material, etc)

If the dog you adopt is not yet housebroken, what method of house training do you plan to use?

VETERINARIAN INFORMATION
(As part of our legal binding adoption agreement, your adopted dog MUST receive veterinarian care)

Name [redacted]

Street Ad [redacted] Apartment/Unit #

City [redacted] State [redacted] ZIP [redacted]

Phone [redacted] E-mail Address [redacted]

Are your dogs on heartworm preventative?
If yes, what type? yes trifexas

Do you agree to provide your adopted dog with monthly heartworm preventatives and yearly vaccinations? yes

Do you agree to provide appropriate medical care and yearly checkups for your dog? yes

REFERENCES

Name [redacted]

Street [redacted] Apartment/Unit #

City [redacted] State [redacted] ZIP [redacted]

Pho [redacted] E-mail Address [redacted]

Name [redacted]

Street Ad [redacted] Apartment/Unit #

City [redacted] State [redacted] ZIP [redacted]

Phone [redacted] E-mail Address [redacted]

How did you hear about the TEDD Adoption Program? [redacted]

Comments:

CONVENANT NOT TO SUE WITH INDEMNITY AGREEMENT

STATE OF: North Carolina

COUNTY OF: Richmond

Know all by these present that the Department of Defense, United States Government, has delivered by means of transfer, unto [redacted], thereafter referred to as ("RECIPIENT") the following described military working dog, thereafter referred to as ("MWD"), to wit: Satan (T383)

Recipient, in consideration of the transfer of above referenced MWD, the receipt of which is hereby acknowledged, does hereby covenant and agree with the United States Government and the Department of Defense, through its agents and representatives, that recipient, or his/her heirs, assigns, executors of administrators, will never institute or in any way aid in the institution of any suit, action at law, or make any claim against the United States Government, Department of Defense, or any employee or servant thereof, for or by reason of any damage, loss, or injury either to person or property or both or wrongful death, which may be caused directly or indirectly by the above described MWD, however and whenever the same may be caused.

And in further consideration of the transfer of said MWD, recipient hereby agrees to indemnify both at law and equity, the United States Government, and Department of Defense, and any and all servants or employees thereof, against any and all claims for injury or damages, compensation or otherwise, which may arise at anytime whatsoever, and which are attributable directly or indirectly to the above described MWD, or to any training given the above described MWD by the United States Government or Department of Defense, and to reimburse or make good any loss or damages or cost the United States Government, Department of Defense, or any servants or employees thereof may have to pay if litigation arises on account of any claims made by Recipient, its successors, or assigns, or by any other party, whatsoever, who may institute any type of claim against the United States Government and Department of Defense, or against any servant or employee thereof.

Notwithstanding any other provision of law, the United States Government and the Department of Defense shall not be held liable for any veterinary expense or treatment of any kind associated with the transfer of an MWD as stated herein for any condition of the MWD before transfer under this agreement, whether or not such condition is known at time of transfer under this agreement.

Recipient further makes the promise that the MWD will not be used for any illegal purpose, police or security related activity, private business activity, substance detection either public or private nor be given or sold to another person in consideration of the transfer of the above described MWD to recipient by the United States Government and the Department of Defense, through its agents or representatives' receipt of which is hereby acknowledged. In making this agreement, the recipient acknowledges that the above mentioned MWD has received Air Force aggressiveness (Patrol) training, and having such knowledge, said owner, as a condition of being the recipient of the MWD, thus freely and voluntarily accepts all risks and consequences of the future conduct and acts of the dog.

DOG'S NAME: Satan TATTOO: T383

[redacted] the United States

Number of adopting individual or Agency Rep Government

19 Feb 2015 RICHMOND COUNTY 19 FEB 2014

Date te

NOTARY PUBLIC [redacted]

MY COMMISSION EXPIRES ON: 4 July 2015

HAND RECEIPT/ANNEX NUMBER *For use of this form, se DA PAM 710-2-1.* *The Proponent agency is ODCSLOG.*	FROM: Department of the Army	T [redacted]	HAND RECEIPT NUMBER

FOR ANNEX/CR ONLY	END ITEM STOCK NUMBER	END ITEM DESCRIPTION	PUBLICATION NUMBER	PUBLICATION DATE	QUANTITY

STOCKNUMBER *a.*	ITEM DESCRIPTION *b.*	* *c.*	SEC *d.*	UI *e.*	QTY AUTH *f.*	*g.* QUANTITY A	B	C	D	E	F
	SATAN (T383) Microchip # 96700 00091 88565			EA	1	1					
						8/11/14					
						[redacted]					

* WHEN USED AS A:
HAND RECEIPT, enter Hand Receipt Annex number
HAND RECEIPT FOR QUARTERS FURNITURE, enter Condition Codes
HAND RECEIPT ANNEX/COMPONENTS RECEIPT, enter Accounting Requirements Code (ARC).

USA Tactical Explosive Detector Dog (TEDD)
Office of the Provost Marshal General
Washington D.C.

TEDD Name: Satan **Breed:** German Shepherd **Sex:** Male

Tattoo Number: T383 **Microchip Number:** 96700 00091 88565

TEDD described above is released to adopting party (indicated below) on condition that the TEDD will be spayed/neutered within 30 days of acquisition from TEDD Adoption Program (if the TEDD is to be spayed/neutered by a military Veterinary Corps officer, or by a licensed veterinarian in private practice), or on a date to be determined by the Fort Bragg Veterinarian (if the TEDD is to be the spayed/neutered at the Fort Bragg Working Dog Hospital, Fort Bragg, NC).

The adopting party will:

1. Set an appointment with the Fort Bragg Military Working Dog Hospital / their local Veterinary Corps Officer / private veterinarian (Circle one) for spay/neuter within 30 days of adoption.
2. In case of Veterinary Corps Officer or private veterinarian, provide proof of surgery in the form of a spay/neuter certificate (signed by veterinarian with contact information) via email. [redacted]
3. Assume responsibility for all expenses associated with spay/neuter, follow-up care, or complications (Fort Bragg Military Working Dog Hospital will provide spay/neuter surgical services and immediate post-operative care for the adopted TEDD free of charge to the adopting party).

I, (print) [redacted], understand in the event the stated TEDD is not neutered/spayed according to this agreement, Fort Bragg Veterinary Services reserves the right to repossess the TEDD (ownership of TEDD transfers back to the Fort Bragg Veterinary Services) or seek legal redress for the full value of the TEDD (value to be determined by the Fort Bragg Veterinary Services).

Signatur[redacted] Date: 2/19/14

[redacted]

"Our Goal Is To Make Your Pet Happy"

FOR: [redacted]

Printed: 03-06-14 at 5:00 p
Date: 03-06-14
Account: 7727
Invoice: 130761

Date	For	Qty	Description	Net Price
03-06-14	Satan	1	Office Visit, Pre-surgical evaluation	30.00
03-06-14		1	Hospitalization, post-op	0.00
03-06-14		1	Pain injection	0.00
03-06-14		1	Surgical Supplies	0.00
03-06-14		1	Castration - Canine	0.00
03-06-14		1	ECG/Respiratory Monitor	0.00
03-06-14		1	Anesthesia, >75lbs	0.00
03-06-14		1	Add'l Charge - Large Breed	0.00
03-06-14			Cash payment	-30.00
03-06-14	#SP		Cash Refund	30.00

Old Balance	Charges	Payments	Discount	New Balance
0.00	30.00	30.00	225.50 *	0.00

* Your invoice total reflects our Client Class 1 discount.

EXHIBIT G

DEPARTMENT OF THE ARMY
OFFICE OF THE PROVOST MARSHAL GENERAL
2800 ARMY PENTAGON
WASHINGTON, DC 20310-2800

MAR 14 2016

The Honorable Thom Tillis
United States Senate
185 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Tillis,

I have been asked to respond on behalf of Acting Secretary of the Army, Patrick J. Murphy, to your February 22, 2016 letter concerning the Army Tactical Explosive Detector Dog (TEDD) program which ended in February 2014.

The United States Army established the TEDD program in January of 2011 as a contract solution to shortages in the overall Military Working Dog (MWD) program. This was a temporary, Army-funded program created to support Army Brigade Combat Teams (BCTs) by providing maneuver units with explosive canine assets to mitigate casualties associated with Improvised Explosive Devices (IEDs). TEDDs were trained with non-Military Police handlers at contracted facilities in Indiana, and later North Carolina. Once trained, the dog teams deployed with BCTs to conduct "off-leash" explosive detection in support of Operation Enduring Freedom.

At the end of 2013, US Central Command curtailed the requirement for TEDDs. The Army terminated the TEDD program in February 2014. Neither the Army, the Air Force, nor the Department of Defense (DoD) had the space or the manpower to train and kennel the dogs required for the TEDD program. As a result, the Army, through the Office of the Provost Marshal General (OPMG), developed a disposition plan for the 229 TEDDs.

Generally speaking, 10 USC 2583, Air Force Instruction (AFI) 23-126/Army Regulation (AR) 700-81, and Army Regulation 190-12 govern the adoption process for MWDs. Although the TEDD adoption process did not adhere to the regulatory processes perfectly, it complied with the law and regulatory intent. Because of the contractual time constraints and expedited disposition, the 341st Training Readiness Squadron (TRS) was unable to support the normal disposition process. Therefore, it granted OPMG authority to manage the adoption process and disposition decision. Enclosure A provides the details of the TEDD adoption process.

K2 Solutions was a subcontractor hired to kennel and train TEDDs. As a contractor, it would have been inappropriate for K2 Solutions to take part in the disposition and distribution of DoD property. Therefore, representatives from the OPMG traveled to the K2 Solutions facility in North Carolina and administered the adoption process directly. In coordination with the Air Force, the Executive Agent for all MWDs, OPMG followed

established disposition procedures. The following priorities guided TEDD disposition and adoption: 1) fill Army MWD vacancies, 2) adopt out to former TEDD handlers who expressed interest in adopting their former TEDDs, 3) adopt out to law enforcement agencies, and 4) adopt to the civilian community.

Once adopted, OPMG created documentation reflecting the decision to declare each adopted dog excess. The USAF had given OMPG authority to make the excess determination for TEDDs. Those documents were forwarded to the 341st TRS and are included at enclosure B. Additionally, copies of the annual report to Congress for 2010, 2011 and 2012, and adoption packets are attached at enclosure C. Please note, this reporting requirement was eliminated as of the FY12 NDAA. Therefore, we are unable to provide reports for CY2013, 2014, and 2015.

The Army is working in conjunction with our sister services to establish and codify future adoption procedures in accordance with recent revisions to 10 USC 2853. It is our intent that all former dog handlers be given the right of first refusal during future adoption processes and we remain grateful for the sacrifices of our military working dogs and to those who support and work alongside them.

Sincerely,

Mark S. Inch
Major General, U.S. Army
Provost Marshal General

SUBJECT: Tactical Explosive Detector Dog (TEDD) Adoption Process

The United States Air Force, Executive Agent for the MWD program, provided guidance as to the disposition of the TEDDs and granted authority to the Office of Provost Marshal General to execute adoptions. TEDDS that were excluded from assignment to military installations were made available for adoption by former handlers, law enforcement agencies, and eligible civilians. A three step collaborative process was utilized to finalize the adoption of TEDDs: 1) TEDD's were medically assessed by the US Army Veterinarian from Fort Bragg, NC; 2) Adoptees adoption suitability checklists were verified by OPMG representatives; 3) Adoptees whose suitability checklist were approved and dogs medically cleared, executed the adoption documents and hold harmless agreement legally assuming ownership of the dog. Upon completion of the adoption process OPMG prepared an Excess letter to the Executive Agent (341st) as the final document to remove TEDD's from the rolls of the Department of Defense.

The provision of 10 USC 2583 recommending former handlers have the first right of refusal was not enacted until the FY 2016 National Defense Authorization Act. Therefore, in 2014 there was no requirement, by law, regulation or instruction, to notify former handlers that Military Working Dogs (MWDs) were available for adoption. The only requirement that existed was under Title 10 USC 2583, Military Animals: Transfer and Adoption commonly referred to as "Robby's Law" came into effect in November of 2000 and provides authority for the adoption of a military animal (military working dog or horse owned by the Department of Defense) which are suitable for adoption to be available for placement after their service. Within 10 USC 2583, Service Secretaries can provide prioritization to handlers that were wounded in action or, prioritization to the parents, child, spouse, or sibling of a handler that was killed in action. Based on the information provided to OPMG, none of the handlers met the criteria to grant them special priority.

As a result, we did not have an established process for collecting information from handlers interested in adopting dogs. However, in late 2012, an OPMG representative began briefing all Soldiers on the adoption process, while on-site at every TEDD pre-deployment/certification training event. The OPMG representative informed all of these Soldiers that if they were interested in adopting a TEDD, they should provide their contact information to the OPMG representative on-site at the training event. Furthermore, the OPMG representative informed the Soldiers that they could express interest later through their chain of command, or by emailing the representative directly. Therefore, TEDD handlers were given the opportunity to adopt TEDDs that were not required to fill Army MWD vacancies. The OPMG MWD Program Manager personally contacted former handlers who had expressed interest, affording them the opportunity to have the first right of refusal. It is important to note that a total of 58 handlers expressed a desire to adopt their former TEDDs. Of those TEDDs, 15 were retained by the Army, and 40 were adopted to their former handlers. Unfortunately, three handlers that expressed interest in adopting were unable to adopt their TEDD. In these cases, OPMG mistakenly placed one TEDD with a law enforcement agency and two TEDDs

with private citizens. Fortunately, even though the Army lacked the authority to overturn the adoption, a private organization, United States War Dogs Association, helped reunite two of the three dogs with the handlers who originally expressed an interest in adoption. Not all of the former TEDD handlers who had initially expressed adoption interest and we attempted to contact responded to our emails or calls. At that point, we offered the TEDD to Law Enforcement (LE) agencies. If LE agencies declined to adopt, we then offered the TEDD to the public for adoption.

The final disposition of all 229 TEDDs is below:

Transferred to Army Units: 70
Adopted by their TEDD handlers: 40
Adopted by Law Enforcement Agencies: 63
Adopted by Private Individuals: 47
Euthanized for medical or aggression reasons: 9

All adoptees (Former Handlers/LE Agencies/Private Citizens) completed a required Covenant Not to Sue with Indemnity Agreement, copies are included on 3 discs. OPMG is currently unable to locate the adoption packets for 19 former TEDDs (12 adopted from 341st TRS, 4 to former TEDD handlers and 1 to law enforcement). Military veterinarians were on site and completed required medical screenings of all TEDDs and provided copies of medical records to all adoptees. The USAF approved the disposition of all 229 TEDDs.

EXHIBIT H

United States Air Force

Report to Congressional Committees

Tactical Explosive Detector Dog (TEDD) Adoption Report

August 2016

The estimated cost of this report or study for the Department of Defense is approximately $4,160 for the 2016 Fiscal Year. This includes $10 in expenses and $4,150 in DoD labor.
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House Report 114-537, Page 130

Introduction

This report is provided to the congressional defense committees as directed on page 130 of House Report 114-537 to accompany the National Defense Authorization Act for 2017.

Adoption of Tactical Explosive Detection Military Working Dogs

The committee notes the Tactical Explosive Detection Dog (TEDD) program was established in January 2011 as a temporary, Army-funded contract program supporting Army Brigade Combat Teams by providing maneuver units with canine assets to mitigate casualties associated with improvised explosive devices. In 2013, U.S. Army Central Command curtailed the requirement for TEDDs, and the TEDD program was terminated in February 2014. The Department of the Air Force, the executive agent for all military working dogs, delegated development of a disposition plan for the 229 Army-procured TEDDs to the Department of the Army, through the Office of the Provost Marshal General (OPMG). The committee recognizes the challenge OPMG had in the disposition of TEDDs due to a limited transition window.

However, the committee is aware of persistent concerns raised by former TEDD handlers regarding their opportunity to adopt the TEDDs. The committee notes that the Department of the Army has, on multiple occasions, examined this issue in a singular fashion, examining a specific handler or TEDD. Despite these reviews, the committee believes the Army has not been sufficiently responsive in addressing generally known challenges in the TEDD adoption process. The committee believes that the Army's reluctance to review the adoption application process holistically to ensure that military working dog handlers were provided the first opportunity to adopt TEDDs failed to meet the intent of military working dog adoption processes in law, instruction, and regulation.

Therefore, the committee directs the Secretary of the Air Force to provide a report to the Senate Committee on Armed Services and the House Committee on Armed Services by August 31, 2016, that should address the following issues:

(1) How TEDD handlers were identified and contacted to verify intent to adopt TEDD military working dogs, including a listing of all TEDD handlers, the method by which they were contacted, the handlers' stated intentions regarding TEDD adoption, and instances of handlers reporting errors in the adoption process;

(2) What steps the Secretary has taken to ensure that all military working dog handlers have visibility into the adoption process of all military working dogs, including TEDDs;

(3) The factors that led to instances in the adoption process of TEDDs where handlers did not have the first opportunity to adopt the TEDD, and how the Secretary intends to prevent future process errors in military working dog adoptions;

(4) Any resource, legislative, or departmental policy changes needed to correct deficiencies in the adoption process; and

(5) The process for selection of a handler for military working dog adoption when more than one handler requests to adopt the military working dog.

Executive Summary

The Tactical Explosive Detector Dog (TEDD) program was initiated in January 2011 as a temporary, Army-funded contract supporting Army Brigade Combat Teams by providing maneuver units with canine assets to mitigate casualties associated with improvised explosive devices. The TEDD program was a non-standard military working dog program utilizing contracted trainers and "non-traditional"[1] military handlers. When the requirement surfaced in 2010, the 341st Training Squadron, DoD Military Working Dog Training Center was surging to produce traditional MWDs and had neither the kennel space, training areas, manpower resources, nor sufficient time to meet the emergent requirement. These on/off leash explosive search dogs were used in route and area clearance and enabled the Brigade Combat Teams to operate with their assigned infantry soldiers utilizing these critical assets.

In 2013, U.S. Central Command (USCENTCOM) curtailed the requirement for TEDDs, and the TEDD program contract was terminated in February 2014. The Army was challenged in the disposition of TEDDs due to the short time remaining on the contract after USCENTCOM's decision. However, the problems with the disposition could have been avoided if the Army extended the contract through the option year at a cost of $3.5M, allowing sufficient time to complete the disposition process. Coupled with this challenge, the U.S. Army did not adequately brief the TEDD handlers during their training at Yuma Proving Grounds (YPG). The U.S. Army relayed that they advised the handlers verbally to provide their contact information to Office of Provost Marshal General representatives if they desired to adopt their dog. Further, the Army admits that TEDD handlers did not receive anything in writing to clearly explain the TEDD adoption application process or the current MWD adoption law, which would have avoided confusion.

In February 2014, when the TEDD contract was terminated, the adoption process was executed in accordance with the law in place at the time (10 USC § 2583, subsection C) which stated military animals may be adopted under this section by law enforcement agencies, former handlers of these animals, and other persons capable of humanely caring for these animals. Former TEDD handlers have raised persistent concerns regarding their opportunity to adopt the TEDDs. The Department of the Army has, on multiple occasions, examined this issue, based upon several congressional inquiries. Despite these reviews, the HASC-Readiness committee believed the Army was not sufficiently responsive in addressing generally known challenges in the TEDD adoption process. This report reviews the adoption application process holistically to determine if the known TEDD military working dog handlers were provided an opportunity to adopt TEDDs according to MWD adoption law in 2014. This report makes recommendations for future special canine program contracts to ensure adherence to current military working dog adoption processes in law, instruction and regulation.

[1] TEDD handlers are not considered traditional as they did not attend the Joint Service formal course conducted by the 341st Training Squadron. Instead, they received contractor-provided training lasting 9 weeks at the contractor site and Yuma, AZ, which consisted of teaming, detecting change of behaviors, search patterns and basic care and feeding of the dog. Additionally, handlers had multiple Military Occupational Specialties rather than core law enforcement or security backgrounds.

Report

1) How TEDD handlers were identified and contacted to verify intent to adopt TEDD military working dogs, including a listing of all TEDD handlers, the method by which they were contacted, the handlers' stated intentions regarding TEDD adoption, and instances of handlers reporting errors in the adoption process;

The Army Office of the Provost Marshal General (OPMG) military working dog (MWD) program management staff reported that during training courses, which took place from late 2012 to late 2013, TEDD handlers were advised verbally while at Yuma Proving Grounds (YPG) to provide contact information to OPMG if they desired to adopt their dog[2]. Furthermore, the OPMG representative informed TEDD handlers they could express interest later through their chain of command, or by emailing OPMG directly. OPMG maintained a document containing the names and contact information for handlers that notified them of their desire to adopt a TEDD. Upon notification by USCENTCOM of the program curtailment and OPMG's assessment of the TEDD disposition process, OPMG representatives personally contacted the handlers via telephone and/or email.

U.S. Army Disposal of Tactical Explosive Detection Dogs		
Adopted by current handler	25	40
Adopted by former handlers	15	
Private Adoptions	47	180
Federal Agencies	17	
Law Enforcement Agencies	46	
Army Installations	70	
Deceased	9	9
TOTAL	229	

According to the OPMG staff members, there were only 25 dogs remaining in theater upon the decision to end the contract. OPMG reached out to USCENTCOM and asked whether these handlers desired to adopt their TEDD. As a result, all 25 handlers adopted their dog upon redeployment. For the remaining dogs, OPMG reported that they contacted 33 soldiers from their roster who expressed a desire to adopt their former TEDD.[3] All re-expressed their desire to adopt their dog. OPMG then started to review whether the TEDDs could continue to be utilized by the military, or a law enforcement agency, as a patrol explosive detection

[2] To answer these questions, the Air Force interviewed members of the U.S. Army OPMG staff and reviewed associated documents and contracts of the TEDD program.

[3] OPMG relayed that they did not keep records of completing this notification. During an April 2016 Congressional inquiry, it was discovered that one person on the list, SGT Norton, was not notified.

dog (PEDD). From this review, it was determined that 18 dogs could perform PEDD duties and the remaining 15 were adopted by their handler. The handlers contacted indicated they only wanted to adopt the dog they handled and not another dog. OPMG stated they did not have a complete roster of Soldiers who attended the training. For this reason, the Air Force is unable to provide a list of TEDD handlers for this report.

It is important to note that OPMG did not think any of the remaining handlers wanted to adopt their dogs because they previously communicated to the handlers that it was their responsibility to advise the OPMG office if they desired to adopt a dog.

Of the 229 TEDDs, 9 of them were reported deceased by OPMG. OPMG selected 70 TEDDs for retention and retraining to fill other MWD requirements. Due to time constraints at contract termination, OPMG conducted two Law Enforcement Weeks in February 2014 to allow law enforcement agencies to come to the contractor in North Carolina to assess the remaining 150 TEDDs and process for transfer to their departments.

In the two years since the termination of the TEDD contract, OPMG was made aware of three congressional inquiries by former handlers claiming errors in the adoption process. From an analysis of those inquiries, and other social media observations, it was determined that the TEDD handlers were misinformed by the contractors on the process to adopt a TEDD. In particular, some TEDD handlers submitted adoption packets directly to contractors, and failed to notify OPMG. OPMG staff stated the contractor did not provide any adoption applications to them.

In the first complaint, Specialist Grommett claimed authority to adopt TEDD Matty under 10 United States Code (USC) § 2583, "Robby's Law" due to combat injuries, when according to OPMG staff neither Specialist Grommett nor his TEDD Matty were injured in combat. OPMG never received an adoption application from Specialist Grommett, but the civilian adopter did give Matty to Specialist Grommett in November 2014 when the story gained national attention. The second and third cases involved two handlers, Sergeant Norton and the former Sergeant Henderson, who both worked with and desired to adopt TEDD Satan. At the time of disposition, OPMG had no record of intent to adopt and released TEDD Satan to a civilian adopter. After the disposition, both handlers contacted OPMG and learned that TEDD Satan had already been adopted and then, in turn, notified their respective congressman. During the inquiry, it was discovered that Sergeant Norton actually was on the list maintained by OPMG and Sergeant Henderson was not. In the end, OPMG has no record of contacting either handler prior to disposition and the dog remains with the civilian adopter.

2) What steps the Secretary has taken to ensure that all military working dog handlers have visibility into the adoption process of all military working dogs, including TEDDs;

The TEDD program was a non-standard military working dog program utilizing contracted trainers and non-traditional handlers. In conventional kennels across all services, the dog handlers are a close knit team of military police, security forces or master of arms, depending

on the representative service. TEDD handlers were not considered traditional as they did not attend the Joint Service formal course conducted by the 341st Training Squadron. Instead, they received training lasting 9 weeks at the contractor site and Yuma, AZ, which consisted mainly of teaming, detecting change of behaviors, search patterns and basic care and feeding of the dog. All traditional handlers have attended the basic dog handler course at the 341st Training Squadron and are capable of handling any dog assigned in their kennel. When an MWD is approaching the disposition phase, all handlers at the kennel are aware of the status and have relayed to the kennel master their desire or intent to adopt a retiring MWD. Any past handler that has relocated is aware they must keep in contact with the kennel master to ensure they may have an opportunity to adopt the dog they handled in the past. It remains the current and former dog handler's responsibility to make their adoption desires known and update personal information for the kennel master that prepares a disposition package for approval at the 341st Training Squadron.

In the case of the TEDDs, as well as a like contract the United States Marine Corps (USMC) used for the Improvised Explosive Device Detector Dog (IDD), the service MWD program manager conducted their dispositions and maintained a list of known handlers that wanted to adopt their dogs at the end of that dog's useful service to the Department of Defense. The difference between the programs was proper handler notification of the disposition process and affording the proper amount of time for disposition of dogs no longer required in the program. The MWD adoption process is codified in Air Force Instruction 31-126, *DoD Military Working Dog Program*, last updated 1 June 2015. At the time of the TEDD adoptions, that instruction was AFI 23-126 and contained most of the same language for adoptions. Further, even though handlers were not identified in 10 USC § 2583 as being the first option for MWD adoption in 2014, it was a common practice in all DoD kennels.

To preclude these issues reoccurring, the Joint Service Military Working Dog Committee will thoroughly review future contract considerations, such as the TEDD, that are processed outside of the traditional DoD Military Working Dog Training center, to ensure a proper disposition plan is part of the contract requirements, in accordance with current law. This is included in the current draft DoD policy that is in coordination. Further, the DoD will continue to utilize and transfer MWDs with useful working life when requirements exist in other services, except in the case of a severely wounded handler or handler that was killed in action and next of kin wants to adopt the dog.

3) The factors that led to instances in the adoption process of TEDDs where handlers did not have the first opportunity to adopt the TEDD, and how the Secretary intends to prevent future process errors in military working dog adoptions;

The Army was not prepared, nor did they have a sound process in place to dispose of the TEDDs upon termination of the contract. Upon initiation of the contract, OPMG should have begun the planning for disposition since they were aware it was a short-term requirement. The Army was provided recommended disposition instructions outlined in existing policy, however, they did not allow themselves enough time through contract extension with the care provider to properly review any shortfalls in their disposition process. Further, the TEDD

handlers did not receive any written instructions detailing the TEDD adoption application process or the current MWD adoption law.

In February 2014 when the TEDD contract was terminated, the adoption process was executed in accordance with the law in place at the time (10 USC § 2583, subsection C) which stated *military* animals may be adopted under this section by law enforcement agencies, former handlers of these animals, and other persons capable of humanely caring for these animals. The 2016 National Defense Authorization Act clearly mandates the handler be the first option for adoption when in the best interest of the dog. Further, the draft AFI 31-126, which has been updated and is out for coordination, ensures that the Joint Service Military Working Dog Committee reviews future contracts processed outside the traditional DoD Military Working Dog Training center and that a proper disposition plan is part of the contract requirements in accordance with current law.

4) Any resource, legislative, or departmental policy changes needed to correct deficiencies in the adoption process

Air Force Instruction 31-126, DoD Military Working Dog Program is an inter-service coordinated instruction into which language was added to ensure all DoD owned dogs are dispositioned in accordance with current law and policies of the DoD. If special program dogs are necessary under an urgent needs contract, those dogs will be evaluated for other DoD MWD requirements within the services and dispositioned in the same manner as all other traditional MWDs.

5) The process for selection of a handler for military working dog adoption when more than one handler requests to adopt the military working dog.

The unit kennel master and current dog handler are the most knowledgeable individuals of any specific MWD during the process of disposition of that dog. The kennel master is the individual point of contact for a handler/handlers to make their desires known in the event of an adoption disposition for a retiring MWD. Using the recommendation of the kennel master and attending veterinarian, the unit command authority will decide in the best interest of the dog, which handler is awarded the adoption. That commander will consider the dog's temperament, adoption living conditions, location, age of children if applicable, and handler rapport with the dog. In most instances, the dog's current handler is given the first consideration for adoption. The kennel master will also inform all handlers of the commander's decision.

Conclusion

The Tactical Explosive Detector Dog (TEDD) program was established in January 2011 as a temporary, Army-funded contract supporting Army Brigade Combat Teams by providing maneuver units with canine assets to mitigate casualties associated with improvised explosive devices. This program was established under contract with private industry because at that time 341st Training Squadron was surging to produce traditional MWDs and had neither the kennel space, training areas, manpower resources, nor time to meet the emergent requirement.

The Army was challenged in the disposition of TEDDs due to an avoidable limited transition window. Knowing the contract was pending renewal, the disposition process should have been planned in advance or the contract renewed for an option year at a cost of $3.5M until the TEDDs were properly dispositioned. Three former TEDD handlers submitted a privacy act release form regarding their opportunity to adopt the TEDDs; these resulted in separate Congressional inquiries being conducted in each case. The TEDD handlers did not receive a clear TEDD adoption application process and explanation of current MWD adoption law in writing to avoid confusion. This written hand-out could have presented an ample defense of handler notification for OPMG. During training at YPG, TEDD handlers were advised verbally to provide their contact information to OPMG representatives stating their intentions/desire to adopt a TEDD they were handling. OPMG selected 70 TEDDs for retention and retraining to fill other MWD requirements and then, due to time constraints at contract termination, conducted two Law Enforcement Weeks in February 2014 to allow law enforcement agencies to come to the contractor in North Carolina to assess the remaining 150 TEDDs and process for transfer to their departments. In the end, 40/220 TEDDs were adopted by their former handlers and 1 dog was transferred from the civilian adopter to the previous TEDD handler. An additional 9 TEDDs were reported as deceased during the period of the contract.

FUTURE

To preclude future issues with adoption, the appropriate legislation has now been enacted. In 2014, handlers were not required to be identified in accordance with 10 USC § 2583 as being the first option for MWD adoption, but it was the common practice in all DoD kennels. This is now mandated, when in the best interest of the dog, by the 2016 National Defense Authorization Act. Further, the DoD will continue to utilize and transfer MWDs with useful working life when requirements exist in other services, except in the case of a severely wounded handler or handler that was killed in action and next of kin wants to adopt the dog. DoD policy is now being updated and will require the Joint Service Military Working Dog Committee, composed of program managers from all services and the Director of the MWD hospital, to review future contract considerations such as TEDD. Problems encountered with hasty termination of the TEDD contract highlights the need to ensure a proper disposition plan is part of the contract requirements, in accordance with current adoption law. Lastly, any conflicts between handlers concerning an MWD adoption will be the decided by the accountable unit commander with input from the servicing kennel master.

	Name	Breed	Sex	Tattoo	Status at Contract Termination
1	AGBAR	BM	M	R559	Adoption
2	ABBY	LR	F	R558	SOLIDEN Technologies
3	AKIM 1	GS	M	R846	Adoption
4	AKIM 2	BM	M	T283	Put on Army installation (FORSCOM)
5	ALAN	BM	M	R560	Put on Army installation (FORSCOM)
6	ALAN 2	GS	M	R561	Fort Rucker (FORSCOM)
7	ALEX	GS	M	R686	Adoption by Former Handler
8	ALEX 2	GS	M	R562	Franklin Co Police
9	ALEX 3	GS	M	T365	Put on Army installation (FORSCOM)
10	AMIGO 1	GS	M	T366	Jones County Sheriff Dept (NC)
11	AMY	BM	F	R563	Ft Hood (FORSCOM)
12	ANOUSKA 1	BM	F	R564	USAREUR
13	ARCO 12	BM	M	R565	Adopted from JBSA-Lackland
14	ARES 1	GS	M	R566	Adoption by Former Handler
15	ARGO 6	GS	M	R567	Adoption
16	ARIES	GR	M	R568	Adoption by Former Handler
17	ARON	GS	M	T035	Adoption
18	ARON 8	GS	M	R569	USSS
19	ASIA	GS	F	V071	U.S. Dept of Energy
20	ASTOR 1	GS	M	R659	Put on Army installation (FORSCOM)
21	ATILLA	GS	M	R570	Adoption
22	BABY 1	GS	F	R657	Adoption by Former Handler
23	BAFFY	GS	M	R571	Bibb County Sheriff Dept.
24	BAK	GS	M	R572	University of Mississippi PD
25	BAK 1	GS	M	R691	Put on Army installation (FORSCOM)
26	BAKO	GS	M	T277	Adoption
27	BARAS	GS	M	R573	Adopted from JBSA-Lackland
28	BARO 2	GS	M	R574	Adoption
29	BARTJE	BM	M	T278	Adoption by Former Handler
30	BEAR	LR	M	R575	Adopted from JBSA-Lackland
31	BEN	BM	M	R660	Adoption
32	BESTAMI	BM	M	T720	Ft Hood (FORSCOM)
33	BETY	BM	F	T279	Virginia State Police
34	BILL 5	GS	M	R661	Put on Army installation (FORSCOM)
35	BLACKY 3	GS	M	R576	Adoption
36	BLACKY 5	GS	M	R5777	Deceased
37	BODI	GR	M	R578	Adoption
38	BOM	BM	M	R579	Deceased
39	BONA	GS	F	T469	Put on Army installation (FORSCOM)
40	BONO 2	GS	M	R580	Adoption by Former Handler
41	BORISZ	GS	M	R581	Duplin County Sheriff

	Name	Breed	Sex	Tattoo	Status at Contract Termination
42	BRANCO 1	BM	M	T056	Adoption by Former Handler
43	BREK	GS	M	R582	Virginia State Police
44	BRITT	WMR	M	R583	Adopted from JBSA-Lackland
45	BRONCO 1	BM	M	R584	Put on Army installation (TRADOC)
46	BRUCE	GS	M	V054	USAREUR
47	BRUNO 7	DS	M	R690	(Fort Bragg) U.S. Capitol Police
48	CALLIE	LR	F	T367	SOLIDEN Technologies
49	CASEY	GS	F	R585	Adoption by Former Handler
50	CASTOR	BM	M	R586	Fort Bliss (FORSCOM)
51	CEZAR 1	GS	M	R587	NYPD
52	CHACKY	GS	M	R588	Adopted from JBSA-Lackland
53	CHARLIE	LR	M	R589	Capital Police
54	CHARLIE	LR	M	R842	Franklin Co Police
55	CHATSI	BM	F	R688	Adoption
56	CHEYENNE	BM	F	R590	Put on Army installation (TRADOC)
57	CHICA 1	GS	F	R591	Adoption
58	COBA	LR	F	R592	SOLIDEN Technologies
59	CROCK	GS	M	T059	Put on Army installation (FORSCOM)
60	CSIK	GS	M	R593	Adoption
61	DAG 1	BM	M	T280	Capital Police
62	DAKOTA	SS	F	T721	SOLIDEN Technologies
63	DAN 5	GS	M	R594	Franklin Co Police
64	DARCA	BM	M	R595	Adoption by Former Handler
65	DAVID	BM	M	T451	Put on Army installation (FORSCOM)
66	DENY	GS	M	R568	Put on Army installation (MDW)
67	DERICK	DS	M	R596	Deceased
68	DIEGO	GS	M	R597	Adoption by Former Handler
69	DINO 1	BM	M	R598	Franklin Co Police
70	DODO	GS	M	V236	Adoption
71	DONNA 1	BM	F	R599	SOLIDEN Technologies
72	DORI	GS	F	R600	Fort Jackson, SC
73	DUMA	BM	F	T458	NYPD
74	DURY	BM	M	R655	Capital Police
75	DZES	GS	F	V237	Dept of State
76	EDY	BM	M	R601	Put on Army installation (FORSCOM)
77	ENO	GS	M	R602	Taylor Town Police
78	EROSZ	GS	M	R662	Adoption
79	EVERETT	LR	M	T284	Adoption by Former Handler
80	FALCO	GS	M	R695	Adoption
81	FAMA	GS	F	R689	Fort Bragg (FORSCOM)

	Name	Breed	Sex	Tattoo	Status at Contract Termination
82	FANTOM	GS	M	R603	Capital Police
83	FARA	GS	F	T379	Put on Army installation (FORSCOM)
84	FIL	GS	M	R693	Put on Army installation (TRADOC)
85	FILIP	GS	M	R694	Fort Bragg (FORSCOM)
86	FISTIK	LR	F	R604	Adoption
87	FRED	GS	M	R605	Georgia State Police
88	FREDY	GS	M	T285	Duplin County Sheriff
89	FREE	GS	M	R606	Adoption
90	FREIA	GS	F	R607	Put on Army Installation (ARNG)
91	FRODO	GS	M	T452	Adoption by Former Handler
92	GABY	BM	M	R608	Adoption by Former Handler
93	GEPARD	BM	M	R609	Put on Army installation (MDW)
94	GERI	GS	M	R610	Adoption
95	GILEK	GS	F	V072	SOLIDEN Technologies
96	GINA 3	DS	F	R838	Adoption by Former Handler
97	GREGOR	GS	M	R611	Adoption by Former Handler
98	GRIFF	BM	M	R685	Adoption by Former Handler
99	HANS	GS	M	R612	Adopted from JBSA-Lackland
100	HANZ 1	GS	M	T093	Franklin Co Police
101	HARCO	BM	M	R613	Adopted from JBSA-Lackland
102	HAVOC	DS	F	R614	Adoption by Former Handler
103	HECTOR	GS	M	R615	Adoption by Former Handler
104	HEIJN	BM	M	T368	Capital Police
105	HERON	BM	F	R616	Deceased
106	HINDY	GS	F	T281	Adoption
107	HOWARD	PB	M	T453	Taylor Town Police
108	HUGO 1	GS	M	T719	Put on Army installation (TRADOC)
109	IKAR	GS	M	T369	SOLIDEN Technologies
110	IKAR 1	GS	M	T380	Fort Bliss (FORSCOM)
111	ISAM	BM	M	R808	Put on Army installation (TRADOC)
112	ISI 1	GS	F	R617	Adoption by Former Handler
113	ITTY 1	GS	M	R618	Adopted from JBSA-Lackland
114	IZI	BM	M	R619	Adoption by Former Handler
115	JACK 1	GS	M	V228	Put on Army Installation (ARNG)
116	JAJO	GS	M	R620	Adoption by Former Handler
117	JASPER	PB	M	T457	Adopted from JBSA-Lackland
118	JERRY	GS	M	T460	Put on Army installation (TRADOC)
119	JESSIE	GS	F	R621	Adoption by Former Handler
120	KARO 2	GS	M	T286	Franklin Co Police
121	KAY 16	BM	M	R622	Adopted from JBSA-Lackland

	Name	Breed	Sex	Tattoo	Status at Contract Termination
122	KAY 19	BM	M	T282	Deceased
123	KAZAN 1	BM	M	R837	Fort Bragg (FORSCOM)
124	KEES	DS	M	R623	Adoption
125	KEJSY	GS	F	T055	Put on Army installation (TRADOC)
126	KELLY 3	DS	F	R892	Adoption by Former Handler
127	KEVIN	GS	M	R811	Put on Army installation (TRADOC)
128	KIM 3	GS	F	R893	Put on Army installation (TRADOC)
129	KIM 4	GS	F	R931	Put on Army installation (TRADOC)
130	KIRA 4	GS	F	R839	Georgia State Police
131	KOMA	GS	M	T287	Adoption by Former Handler
132	KRYNO	GS	M	T461	Put on Army installation (TRADOC)
133	KUTA	BM	M	R624	Taylor Town Police
134	KYRA 5	GS	F	R625	Adoption
135	LAIKA 5	BM	F	T381	Adoption by Former Handler
136	LEO	GS	M	R626	USAREUR
137	LEVI	BM	M	R627	Adopted from JBSA-Lackland
138	LIAM	BM	M	T288	Adoption
139	LION 1	BM	M	T382	USAREUR
140	LIVEE	LR	F	R628	Adoption by Former Handler
141	LIZZY	DS	F	R629	Fort Hood (FORSCOM)
142	LORD	GS	M	T462	Put on Army installation (TRADOC)
143	LUCAS	BM	M	R630	Adoption
144	LUCKY 1	GS	M	T454	U.S. Dept of Energy
145	LUCKY 6	GS	M	R631	Put on Army installation (TRADOC)
146	MACI 1	GS	M	R632	Franklinton Police Dept
147	MARCO 39	GS	M	R633	Adoption by Former Handler
148	MARLEY	LR	M	R634	Adoption by Former Handler
149	MARLEY 1	LR	M	T455	Adoption by Former Handler
150	MARSHALL	LR	M	R635	USASOC
151	MATTY	GS	M	V053	Adoption
152	MAX 17	GS	M	T456	Deceased
153	MAX 19	BM	M	T470	Virginia State Police
154	MEGIN	BM	M	R636	Put on Army installation (MDW)
155	MERCI	DS	F	R654	Fort Polk (FORSCOM)
156	MIDNIGHT	LR	M	R692	Adoption
157	MIMSY	PB	F	R894	Taylor Town Police
158	MISA	GS	M	T722	Put on Army installation (TRADOC)
159	MORIS 3	GS	M	R637	Adoption by Former Handler
160	MOTO	LR	M	R845	SOLIDEN Technologies
161	MYKA	BM	F	R638	Adoption

	Name	Breed	Sex	Tattoo	Status at Contract Termination
162	NERO 18	BM	M	R639	Adopted from JBSA-Lackland
163	NERO 23	GS	M	T058	MDW
164	NICK	GS	M	R640	MDW
165	NICK 2	BM	M	R641	Deceased
166	NINA 1	GS	F	R642	MDW
167	NINA3	BM	F	T289	Put on Army installation (TRADOC)
168	OOGIE	LR	M	R643	USASOC
169	PANTER	GS	M	T037	Taylor Town Police
170	PISTA	BM	M	R644	Capital Police
171	PONGO / BJ	LR	M	R843	SOLIDEN Technologies
172	PRINZ	DS	M	R645	Dept of State
173	QUATRO	BM	M	R646	Deceased
174	RANGER	BM	M	R647	SOLIDEN Technologies
175	RAYCO	BM	M	T459	Capital Police
176	REMY	BM	M	R648	Adoption
177	RENO 1	GS	M	T370	MDW
178	REX 54	BM	M	R649	Put on Army installation (TRADOC)
179	REXY	BM	M	V238	Virginia State Police
180	RICA	GS	F	R518	Virginia State Police
181	RICKY	BM	M	R807	Put on Army installation (IMCOM)
182	RICO 44	BM	M	R519	Adoption by Former Handler
183	RICO 45	BM	M	R520	Put on Army installation (TRADOC)
184	RIKY 3	BM	M	R521	Put on Army installation (IMCOM)
185	RILEY	LR	M	R844	Converted to SSD (FORSCOM)
186	ROBBY	BM	M	T060	Dept of State
187	ROCKY 42	GS	M	R522	USAREUR
188	ROCKY 53	GS	M	T034	Adoption by Former Handler
189	ROGER	GSP	M	R523	Adoption by Former Handler
190	ROMEO	BT	M	R665	Fort Leonard Wood (FORSCOM)
191	ROSSO	GS	F	T723	Adoption by Former Handler
192	ROXY	LR	F	R524	Adoption
193	ROY	BM	M	R809	USAREUR
194	RUDO	BM	M	R525	Deceased
195	RUDY 3	GS	M	R663	8th ARMY
196	SAKI	BM	M	R526	Capital Police
197	SANI	BM	M	T724	Adoption by Former Handler
198	SANTO 1	GS	M	R527	ARNG
199	SARIKA	GS	M	R664	Capital Police
200	SASSY	LR	F	T036	Virginia State Police
201	SATAN	GS	M	T383	Adoption

	Name	Breed	Sex	Tattoo	Status at Contract Termination
202	SEGY	GS	M	T471	Capital Police
203	SENNA	BM	F	R895	8th ARMY
204	SENNA 2	BM	F	R528	8th ARMY
205	SHADOW 3	BM	F	R835	Adoption
206	SHIRA	DS	F	R836	MDW
207	SIL	BM	M	R529	Adopted from JBSA-Lackland
208	SPIKE 31	BM	M	R530	Fort Polk (FORSCOM)
209	SPYK33	BT	M	R531	Put on Army installation (TRADOC)
210	TANK	PB	M	R532	Adopted from JBSA-Lackland
211	TAZ	PB	M	R687	Adoption by Former Handler
212	TESSA	BM	F	R534	Taylor Town Police
213	TESSA 1	BM	F	R810	Adoption
214	THEO	GS	M	T463	Carrollton PD
215	TIMBER 1	LR	M	T057	USASOC
216	TOKI	GS	M	R535	Franklinton Police Dept
217	TOKI 1	GS	M	R656	Put on Army installation (IMCOM)
218	TOMI 10	GS	M	V219	Adoption
219	TOMO	GS	M	R536	SOLIDEN Technologies
220	TORRES	GS	M	R537	Adoption by Former Handler
221	TOSCA 2	BM	F	R538	SOLIDEN Technologies
222	TUCKER	LR	M	V239	SOLIDEN Technologies
223	XSARA	BM	F	R539	Adoption by Former Handler
224	YANKEE	GS	M	R540	Franklin Co Police
225	YARIM	BM	F	R541	Jones County Sheriff Dept (NC)
226	ZINO	GS	M	R806	Jones County Sheriff Dept (NC)
227	ZOEY	DS	F	R542	Adoption by Former Handler
228	ZORA	GS	F	R897	ARNG
229	ZOZO	GS	M	R543	Adoption by Former Handler

List of Acronyms

BT Belgian Tervuren	ARNG Army National Guard
BM Belgian Malinois	FORSCOM Forces Command
DS Dutch Shepherd	IMCOM Installation Management Command
GS German Shepherd	MDW Military District of Washington
GSP German Shorthair Pointer	TRADOC Training & Doctrine Command
GR Golden Retriever	USAREUR US Army European Command
LR Labrador Retriever	USASOC US Army Special Operations Command
PB Pit Bull	SS Springer Spaniel

Distribution

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Committee on Appropriations
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U.S. House of Representatives
Washington, DC 20515-6035

The Honorable Adam Smith
Ranking Member
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515-6035

TAB 3

Differing Definitions: Service and Assistance Animals

- ***Prof. Rebecca J. Huss**, Valparaiso University Law School, Indiana*
  Rebecca.Huss@valpo.edu

ILLINOIS STATE BAR ASSOCIATION™

10th Annual Animal Law Conference
March 1, 2019
Chicago, Illinois

Differing Definitions: Service and Assistance Animals

Americans with Disabilities Act Titles I, II & III
Fair Housing Amendments Act
Air Carrier Access Act

Rebecca J. Huss
Associate Dean for Academic Affairs,
Professor of Law &
Phyllis and Richard Duesenberg Chair in Law
Valparaiso University Law School

VALPARAISO UNIVERSITY LAW

ILLINOIS LAW

210 ILCS 125/32 (Swimming Pools)

Humane Care for Animals Act Provisions
510 ILCS 70/2.01(c) (Defining Service Animal)
510 ILCS 70/4.03 & 4.04 (Harassment/Interference/Injury)
510 ILCS 70/7.15 (Harassment/Injury)

625 ILCS 60/15 (Pedestrians with Disabilities Safety Act)

720 ILCS 5/48-8 (Criminal Offenses Service Animal Access)

740 ILCS 13/1 et seq. (Assistance Animals Damages Act)

775 ILCS 5/3-104.1 (Housing)

775 ILCS 30/3 et seq. (Access Public Accommodations)

* Proposed Legislation 2018

Section 504 of the Rehabilitation Act

"no otherwise qualified individual with a disability . . . shall solely by reason of her or his disability . . . be denied the benefits of . . . any program or activity receiving Federal financial assistance."

Berardelli v. Allied Services Inst. of Rehabilitation Medicine, 900 F.3d 104 (3rd. Cir. 2018) (service animal as a requested accommodation is *per se* reasonable in the ordinary course).

AMERICANS WITH DISABILITIES ACT

Title I – Employment
Title II – State and Local Governments
Title III – Public Accommodations*

Department of Justice With
Various Other Agencies (EEOC, Education, Transportation)

*Silguero v. CSL Plasma Inc., 907 F.3d 323 (5th Cir. 2018)

Americans with Disabilities Act Title I

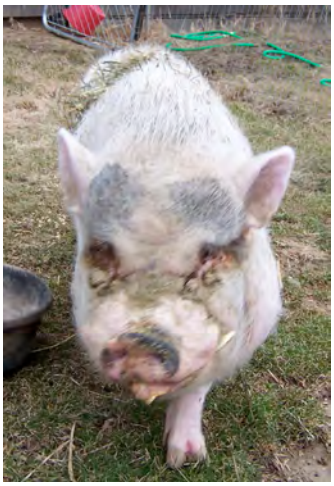
Obligations under Title I if person with a disability is a "qualified individual" = individual who *with or without accommodation,* can perform essential functions of employment position.

NO DEFINITION OF SERVICE ANIMAL IN REGULATIONS OR
SPECIFIC SERVICE ANIMAL REGULATIONS
Some references to service animals in examples in EEOC guidance.

INTERACTIVE PROCESS REQUIRED
Employer may provide an "equally effective accommodation."

REASONABLE ACCOMMODATION
Not required to *provide* service animal.
May be required to allow for leave relating to obtaining service animal.

Americans with Disabilities Act Title II & III Common Domesticated Species



Service animal = dogs - other animals whether wild or domestic, trained or untrained are not service animals

Miniature Horses

Only Dogs in Definition but Miniature Horses Included in Section Regarding Accommodation
Using Assessment Factors

Americans with Disabilities Act Service Animal Regulations

Individually Trained

Do Work or Perform Tasks

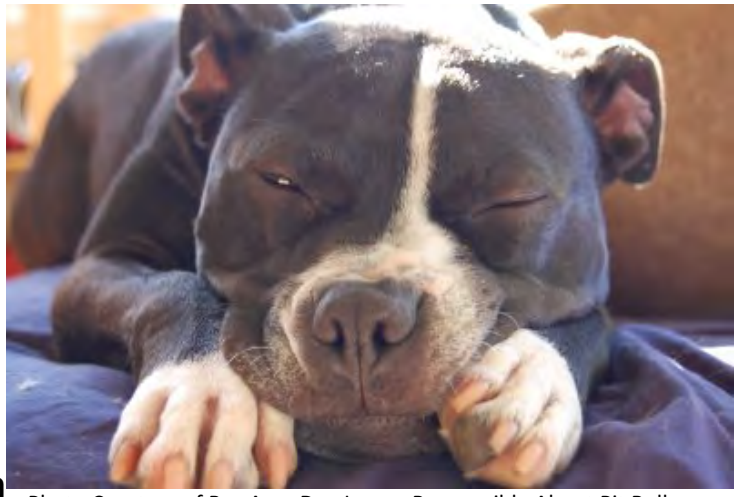
Includes Psychiatric Service Animals

Regulations – ADA

Exclusion of "Emotional Support Animals"

"[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not service animals"

No Restrictions on Types of Dogs



Uba

Photo Courtesy of Bay Area Dog Lovers Responsible About Pit Bulls

Sak v. City of Aurelia, Iowa

Jim Sak and Snickers

Animalfarmfoundation.org

U.S. District Court for the
Northern District of Iowa
Western Division

832 F.Supp. 2d 1026 (N.D. Iowa 2011)

Memorandum Opinion and Order
Regarding Plaintiff's Motion
for Preliminary Injunction
Dated December 28, 2011

Guidance to ADA Regulations

The Department does not believe that it is either appropriate or consistent with the ADA to defer to local laws that prohibit certain breeds of dogs based on local concerns that these breeds may have a history of unprovoked aggression or attacks. … [the DOJ reiterated that a public entity or public accommodation retained] the ability to determine, on a case-by-case basis, whether a particular service animal can be excluded based on that particular animal's actual behavior or history—not based on fears or generalizations about how an animal or breed might behave. This ability to exclude an animal whose behavior or history evidences a direct threat is sufficient to protect health and safety.

"This is one small but vital step for Sak, one giant leap for pit bull service dogs."

Mark W. Bennett,
U.S. District Court Judge
Northern District of Iowa

Allowable Inquiries?

#1 Is the animal required because of a disability.

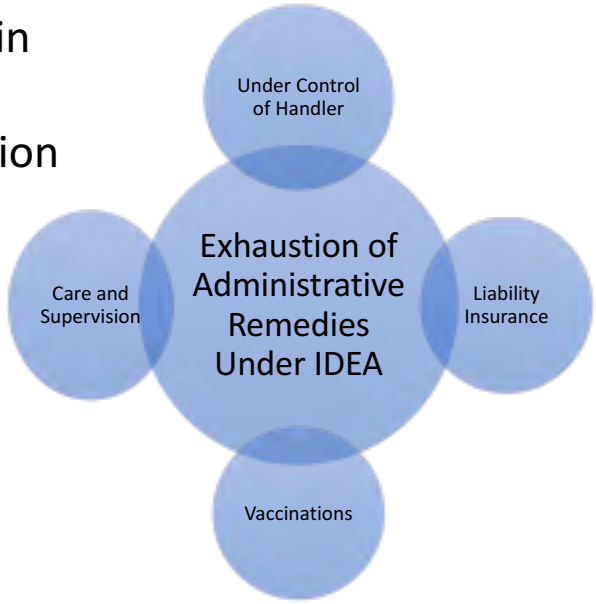
#2 What work or tasks the animal has been trained to perform.

When Can You Exclude?

#1 If the animal is out of control and the animal's handler does not take effective action to control it.

#2 The animal is not housebroken.

Issues in Recent Education Cases



Ehlena Fry and Wonder, Photo Credit: ACLU of Michigan

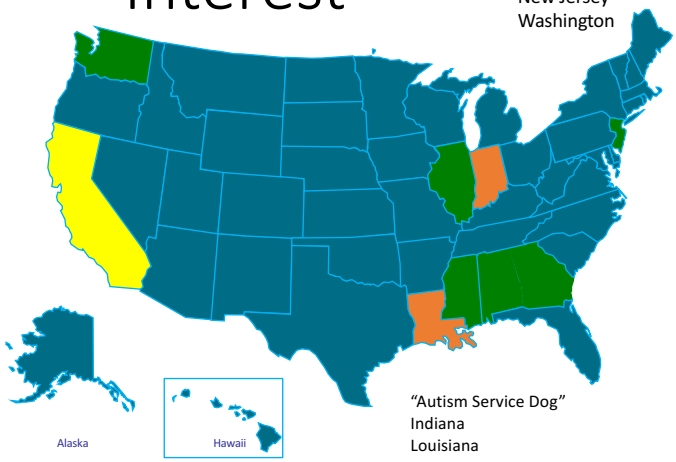
Fry v. Napoleon Comm. Schools (2017)

"court should look to the substance, or gravamen of the plaintiff's complaint"

20 U.S.C. § 1415(*l*)

State Laws of Interest

Alabama
Georgia
Illinois
Mississippi
New Jersey
Washington



"Autism Service Dog"
Indiana
Louisiana

Illinois Law

105 ILCS 5/14-6.02
"service animals . . . shall be permitted to accompany that student at all school functions, whether in or outside the classroom."

Fair Housing Amendments Act

Application of the Act

Wide Range of Housing Providers

Definition of Disability

Nexus Between the Animal and The Disability

Necessary to Use and Enjoy the Premises

HUD Handbook, Regulations and Policy

No Specific Training Language

Emotional Support Animals

"Breed, size and weight limitations may not be applied to an assistance animal."

WHAT INFORMATION CAN YOU REQUEST?

"Such documentation is sufficient if it establishes that an individual has a disability and that the animal in question will provide some type of disability-related assistance or emotional support." 2013 HUD Notice

WHO CAN PROVIDE THE DOCUMENTATION?

Persons who are seeking a reasonable accommodation for an emotional support animal may be required to provide documentation from "**a physician, psychiatrist, social worker, or other mental health professional**" 2013 HUD Notice

BUT – References in January 2017 Memorandum Regarding Virginia Bill to a 2004 HUD-DOJ Joint Statement – include "peer support group, non-medical service agency, or a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability"

Examples of Reasonable vs. Unreasonable Conditions (From a Practitioner)

Reasonable: Cleaning Up After Animal, Toileting in Specific Place, Proof of a Valid Rabies Shot

Unreasonable: Animal Cannot Relieve Him/Herself on the Premises, Cannot be Left Alone in Unit, Must Carry Animal At All Times If Outside the Unit

Cannot charge fee – can require reimbursement if damage to unit

WHEN CAN ANIMAL BE EXCLUDED?

Warren v. Delvista Towers Condo Ass'n, 49 F.Supp.3d 1082 (S.D. Fla. 2014)

FHA Would Preempt County Breed-Discriminatory Ordinance

Must Consider Whether *Specific* Animal Poses a Significant Risk

Friedel v. Park Place Community, 747 Fed. Appx. 775 (11th Cir. 2018)
Gill Terrace Retirement Apts. v. Johnson, 177 A.3d 1087 (Vt. 2017)

Assistance Animals on Campus

Distinguish between type of access requested:

ADA – Classrooms, Public Spaces

FHAA – Campus Housing

Remember: Possible State Laws That May Grant Access

Campus Cases

OTHER ADA & FHA RELATED ISSUES
Training & Misrepresentation

Note: Illinois Law Allows Trainers of Service Animals Access to Public Accommodations

INDIANA LAW EFFECTIVE JULY 1, 2018
EMOTIONAL SUPPORT ANIMALS IN HOUSING
Ind. Code § 22-9-7-1 *et seq.*

Defines Health Service Provider
- Licensed – Including Advanced Practice Nurse
- Excludes Persons "Whose Sole Service to the Individual is to Provide a Verification Letter for a Fee

To Be Prescribed – Must be Individual with Verifiable Disability
Defines Emotional Support Animals
- Benefit for Individual . . .Improving at Least One Symptom of Disability
- Animals Does Not Need Specific Training

If Disability Not Readily Apparent - May Require Written Notification from Health Service Provider
- Provision if Individual Moves from Another State (Ongoing Treatment Relationship)

Penalties (Class A Infraction) for *Individual and Health Service Provider* for False Statements or Misconduct Relating to Verification of Disability

Immunity (for Landlords) from Liability for Injury Caused by Emotional Support Animals of Tenants

Air Carrier Access Act
Proposed Legislation in 2017 and 2018

HISTORY

1986 Air Carrier Access Act Passed

1990 Regulation Published

2003 DOT Guidance Document on Service Animals

May 2009 New Regulation

April 2016 Intent to Establish Reg-Neg Committee

November 2016 ACCESS Committee Final Resolution (No Service Animal Recommendation)

ADVANCED NOTICE OF PROPOSED RULEMAKING MAY 2018

Definition for ACAA

Animals Covered by the ACAA as defined by the ACCESS Advisory Committee: "Any animal that is individual trained to provide assistance to a qualified person with a disability; or any animal shown by documentation to be necessary for the emotional well being of a passenger."

Advance Notice – 48 Hours

"Transportation of an emotional support or psychiatric service animal in the cabin"

"Transportation of a service animal on a flight segment scheduled to take 8 hours or more"

Evidence for Service Animal

Must accept:

"identification cards, other written documentation, presence of harnesses, tags or the *credible verbal assurances* of a qualified individual with a disability using the animal" (italics added)

Documentation for ESA and PSA

Airlines *may* request:

No older than one year from initial flight

Letterhead of licensed mental health professional

1. Mental or Emotional Disability
2. Needs ESA or PSA as an Accommodation for air travel and/or activity at destination
3. Passenger under the professional care of licensed mental health professional
4. Date and type of professional's license

Unusual Service Animals?

Never required to accommodate "certain" unusual service animals (snakes, other reptiles, ferrets, rodents and spiders).

All other animals – including miniature horses, pigs and monkeys must determine whether factors preclude their traveling: size, direct threat to health or safety of others, disruption of cabin service.

Southwest®

Effective September 17, 2018

Delta Air Lines

United Airlines

PSA = Service Animals
ESA = Service Animals
Confine ESAs
Limit Species
Limit Number
Public Setting Attestation
Control of Animals
Safety Concerns
Veterinary Form/Records

ACAA Proposed Rulemaking Questions

Department of Transportation - Interim Statement of Enforcement May 16, 2018

The Department "will focus its enforcement on clear violations of the current rules that have the potential to adversely impact the largest number of persons."

*Focus on ensuring carriers continue to accept commonly used service animals (dogs, cats and miniature horses)

*Cannot require advance notice for service animals (but can for ESA, PSA, flights over 8 hours)

*Does not intend to take action if airlines limit passengers to one ESA and total of three service animals

*Will not use its limited resources to pursue actions against airlines for documentation requirements for ESAs and PSAs

*Will not take enforcement action against airlines that impose reasonable restrictions on movement of ESAs in cabin

Access for Therapy Animals

Leo
Photo Courtesy of Our Pack, Inc.

Kansas § 39-1110 *et. seq*.

Rhode Island § 40-9.1.5

Hospitals & Animal-Assisted Therapy

77 Ill. Adm. Code 250.250 (Visiting Rules)

77 Ill. Adm. Code 250.890 (Animal-Assisted Therapy)

Written Goals and Objectives
Sanitation & Infection Control
Certification & Training Requirements for Animals and Handlers
Policies: Patient Screening, Where, What Type of Animals, Safety
Evaluated Annually

FACILITY DOG/ COURTHOUSE DOG

725 ILCS 5/106B-10 Conditions for Testimony by a Victim Who is a Child or a Moderately, Severely or Profoundly Intellectually Disabled person or Person Affected by a Developmental Disability
(Effective Jan. 2016)

Factors to Determine Whether to Permit Use of Facility Dog in Testimony: Age, Rights of Parties, Any Other Factors

"Facility Dog" must be a graduate of an assistance dog organization that is a member of Assistance Dogs International


Policy and Ethical Issues

DIFFERING DEFINITIONS: SERVICE AND ASSISTANCE ANIMALS
March 1, 2019

Americans with Disabilities Act Titles I, II & III
Fair Housing Amendments Act
Air Carrier Access Act

Rebecca J. Huss
Professor of Law and
Phyllis and Richard Duesenberg Chair in Law
Valparaiso University Law School

GENERAL INFORMATION

If you are researching the relevant state law on assistance animals a good place to begin is the *Table of State Assistance Laws* by Rebecca F. Wisch at the Animal Legal & Historical Center, https://www.animallaw.info/topic/table-state-assistance-animal-laws. Although you will want to confirm the current status of the law elsewhere, it can be useful to know generally where in the state laws the relevant provisions are located.

Several of my law review articles discussing the issues covered in this webinar can be downloaded for free from SSRN.com at http://ssrn.com/author=330506 Of particular interest for participants of this webinar would be *Why Context Matters: Defining Service Animals Under Federal Law* (discussing the then proposed ADA regulations and distinguishing the definition of service animal under the ADA with the coverage under the FHAA and the ACAA), *Canines on Campus: Companion Animals at Postsecondary Educational Institutions* (discussing issues relating to assistance animals on college campuses), *Hounds at the Hospital, Cats at the Clinic: Challenges Associated with Service Animals and Animal-Assisted Interventions in Healthcare Facilities* and *A Conundrum for Animal Activists: Can or Should the Current Legal Classification of Certain Animals Be Utilized to Improve the Lives of All Animals? The Intersection of Federal Disability Laws and Breed-Discriminatory Legislation* (discussing service animals in training and issue of misrepresentation). Shortly (likely by April 2019) I will be posting on SSRN a new document that updates the material in the *Why Context Matters* article. The forthcoming article is titled *Pups, Paperwork and Process: Confusion and Conflict Regarding Service and Assistance Animals Under Federal Law*.

AMERICANS WITH DISABILITIES ACT TITLE I

An excellent website providing information on handling a request for accommodation of a service animal under Title I is the Job Accommodation Network:
https://askjan.org/topics/servanim.cfm

AMERICANS WITH DISABILITIES ACT TITLES II & III

The United States Department of Justice Civil Rights Division has a helpful website with access to the relevant federal laws and regulations for the ADA. https://www.ada.gov That division has a document titled *Frequently Asked Questions about Service Animals and the ADA* (July 20, 2015) https://www.ada.gov/regs2010/service_animal_qa.pdf that addresses many common questions regarding the application of the ADA regulations regarding service animals to state and local governments and public accommodations.

SERVICE ANIMALS IN PRIMARY & SECONDARY SCHOOLS

Fry v. Napoleon Comm. Sch. 137 S.Ct. 743 (2017) (establishing gravamen test).

K.D. v. Villa Grove Cmty. Unit Sch. Dist. No. 302 Bd. Of Educ., 936 N.E.2d 690 (Ill. App. Ct. 2010) (applying Illinois law).

Kalbfleisch v. Columbia Cmty. Uni Sch. Dist. Unit No. 4, 920 N.E.2d 651 (Ill. App. Ct. 2009) (applying Illinois law).

FAIR HOUSING AMENDMENTS ACT

The United States Department of Housing and Urban Affairs document that sets forth the policy of the agency regarding assistance animals is titled *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-funded Programs* (April 25, 2013) at: https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF (distinguishing between the coverage of the ADA and FHA).

A few representative FHA cases:

Baugman v. City of Elkhart, Tx, No. 6:17-CV-326, 2018 WL 1510678 (E.D. Tex. 2018) (request for accommodation to keep lemur who had injured three people was not reasonable).

Manzke v. Jefferson County, No. 18-cv-505-bbc, 2018 WL 3998035 (W.D. Wis. 2018) (denying motion for injunctive relief in case involving request to keep goats and geese).

Castellano v. Access Premier Realty, Inc. 181 F. Supp. 3d 798 (E.D. Cal. 2016) (illustrating use of emotional support cat and documentation requirement).

Kennedy House, Inc., v. Philadelphia Comm. on Human Rights, 15=43 A.2d 476 (Pa. Commw. Ct. 2016) (illustrating importance of nexus requirement).

Bhogaita v. Alamonte Heights Condominium Assn., 765 F.3d 1277 (11th Cir. 2014) (illustrating documentation and process).

SERVICE AND ASSISTANCE ANIMALS ON CAMPUS

Entine v. Lissner, 2017 WL 5507619 (S.D. Ohio 2017) (motion for preliminary injunction granted in favor of student with service animal housed in sorority at The Ohio State University applying the ADA)

United States v. Kent State University, et al., 2016 WL 5107207 (N.D. Ohio 2016) (motion to approve the consent decree granted) and consent decree with university paying $130,000 at: https://www.justice.gov/crt/file/894751/download

Voluntary Compliance Agreement between the United States of America and Mercy College [Westchester, NY] (April 2016) (policy, training and apology) at: https://www.ada.gov/mercy_college_sa.html

United States v. University of Nebraska at Kearney, 940 F. Supp.2d. 974 (D. Neb. 2013) (student housing facilities are dwellings subject to the FHA), additional reported decisions regarding motions in 2013 and 2014 and a 2015 settlement with the university paying $140,000 at: https://www.justice.gov/opa/file/767276/download https://www.justice.gov/crt/file/777186/download

Velzen v. Grand Valley State University, 902 F. Supp.2d 1038 (W.D. Mich.) (some claims relating to request to keep guinea pig in campus housing survive)

Leland v. Portland State University, 2012 WL 1555185 (Or. Cir. 2012) (complaint alleging housing discrimination settled in 2014 with the university paying $160,000)

Alejandro v. Palm Beach State College, 843 F. Supp. 2 1263 (2011) (injunctive relief granted for student utilizing a psychiatric service animal)

United States Dep't of Housing v. Milliken University Charge of Discrimination in September 2009 at: https://www.hud.gov/offices/fheo/enforcement/09_HUD_v._Millikin_University.pdf and consent order with payment of $4,437 filed in January 2011 at: https://www.justice.gov/sites/default/files/crt/legacy/2011/01/21/millikinsettle.pdf

TRAINING AND MISREPRESENTATION

Service Animals in Training

There is little case law interpreting the state laws allowing for access for handlers of service animals in training. However, the recent case of Miller v. Fortune Commercial Corporation, 15 Cal. App. 5th 214 (Cal. Ct. App. 2017) illustrates the issue. The case of Waddell v Walt Disney Parks and Resorts, U.S., Inc, No. G054614, 2018 WL 4042670 (Cal. Ct. App. 2018) (unpublished) illustrates the issue of whether a dog is or is not trained.

Misrepresentation of Service Animals Articles

Tiffany Lee, *Criminalizing Fake Service Dogs: Helping or Hurting Legitimate Handlers?*, 23 ANIMAL L. 325, 329 (2017) (discussing issue of misrepresentation and state laws addressing it).

Sande L. Buhai, *Preventing the Abuse of Service Animal Regulations*, 19 NYU J. LEGIS. & PUB. POL'Y 771, 793-96 (2016) (discussing concerns over confusion and misrepresentation of assistance animals).

AIR CARRIER ACCESS ACT

Interim Statement of Enforcement
https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/310481/service-animal-enforcement-statement.pdf

Advanced Notice of Proposed Rulemaking
(Comment Period Officially Closed July 9, 2018)
https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/310476/service-animal-anprm-final.pdf
https://www.regulations.gov/document?D=DOT-OST-2018-0068-0001

As part of their work the Advisory Committee on Accessible Air Transportation (ACCESS Advisory Committee) Service Animal Working Group put together a helpful matrix titled Service Animal Definition Matrix – Air Carrier Access Act vs. Americans with Disabilities Act (July 1, 2016) available at: https://www.transportation.gov/sites/dot.gov/files/docs/P3.SA_.HUD Matrix.6-28-6.pdf The matrix compares the various definitions of service or assistance animals used in the ACAA, ADA (DOJ and DOT) and FHAA (HUD).

See also the following information relating to the ACAA:

https://www.transportation.gov/individuals/aviation-consumer-protection/service-animals-including-emotional-support-animals (general information)

Status of the ACCESS Advisory Committee Activities (last updated September 15, 2017)
https://www.transportation.gov/access-advisory-committee

Disability Training Materials on the U.S. Department of Transportation's website relating to air travel with service animals including videos and a brochure are available at:
https://www.transportation.gov/airconsumer/disability-training

Guidance Concerning Service Animals in Air Transportation dated May 9, 2003 (Federal Register) at: https://www.transportation.gov/sites/dot.gov/files/docs/20030509_2.pdf

New Horizons Information for the Air Traveler with a Disability dated August 2009
https://www.transportation.gov/sites/dot.gov/files/docs/Horizons_2009_Final_0.pdf

A *draft* technical assistance manual was published in the Federal Register on July 3, 2012 for public comment and contains insight in to the Department of Transportation's interpretation of

the Air Carrier Access Act and its implementing regulation. It can be found at: https://www.federalregister.gov/documents/2012/07/05/2012-15233/nondiscrimination-on-the-basis-of-disability-in-air-travel-draft-technical-assistance-manual or https://www.gpo.gov/fdsys/pkg/FR-2012-07-05/pdf/2012-15233.pdf The information on service animals is contained in Chapter 3, Section D. An earlier version of a technical assistance manual from 2005 is on the Department of Transportation's website at: https://www.gpo.gov/fdsys/pkg/FR-2012-07-05/pdf/2012-15233.pdf

Below are a few examples of cases involving the ACAA:

Kevin Crowell v. American Airlines, Consent Order and Order of Dismissal, January 11, 2017, available at: https://www.transportation.gov/sites/dot.gov/files/docs/eo-2017-1-11.pdf (based on issue in August 2014). Note that 14 C.F.R. § 382.81(c) provides "For a passenger with a disability traveling with a service animal, you must provide, as the passenger requests, either a bulkhead seat or a seat other than a bulkhead seat."

Goodman v. United Airlines, 2016 WL 1260727 (D. N.J. 2016) (case involving a purported psychiatric emotional support bird).

Code of Federal Regulations Provisions

Title 49 Transportation
Part 37 – Transportation Services for Individuals with Disabilities

49 C.F.R. § 37.3 Definitions

Service animal means any guide dog, signal dog, or other animal individually trained to work or perform tasks for an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.

Title 14 Aeronautics and Space
Part 382 – Nondiscrimination on the Basis of Disability in Air Travel (Air Carrier Access Act)

2009 ACAA Regulations: 14 C.F.R. § 382.117 Must carriers permit passengers with a disability to travel with service animals?

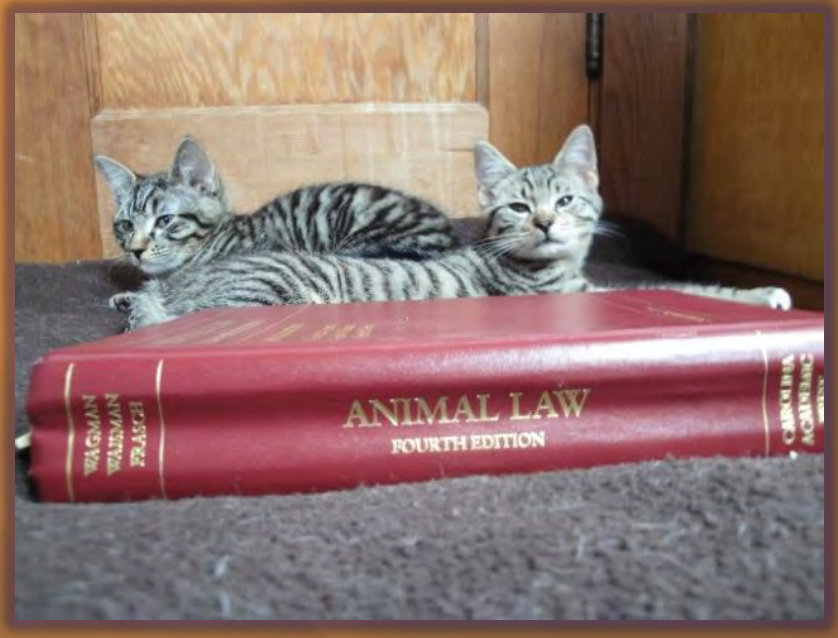
(a) As a carrier, you must permit a service animal to accompany a passenger with a disability.
(1) You must not deny transportation to a service animal on the basis that its carriage may offend or annoy carrier personnel or persons traveling on the aircraft.
(2) On a flight segment scheduled to take 8 hours or more, you may, as a condition of permitting a service animal to travel in the cabin, require the passenger using the service animal to provide documentation that the animal will not need to relieve itself on the flight or that the animal can relieve itself in a way that does not create a health or sanitation issue on the flight.
(b) You must permit the service animal to accompany the passenger with a disability at any seat in which the passenger sits, unless the animal obstructs an aisle or other area that must remain unobstructed to facilitate an emergency evacuation.
(c) If a service animal cannot be accommodated at the seat location of the passenger with a disability who is using the animal, you must offer the passenger the opportunity to move with the animal to another seat location, if present on the aircraft, where the animal can be accommodated.
(d) As evidence that an animal is a service animal, you must accept identification cards, other written documentation, presence of harnesses, tags, or the credible verbal assurances of a qualified individual with a disability using the animal.
(e) If a passenger seeks to travel with an animal that is used as an emotional support or psychiatric service animal, you are not required to accept the animal for transportation in the cabin unless the passenger provides you current documentation (*i.e.,* no older than one year from the date of the passenger's scheduled initial flight) on the letterhead of a licensed mental health professional (*e.g.,* psychiatrist, psychologist, licensed clinical social worker, including a medical doctor specifically treating the passenger's mental or emotional disability) stating the following:
(1) The passenger has a mental or emotional disability recognized in the Diagnostic and Statistical Manual of Mental Disorders—Fourth Edition (DSM IV);
(2) The passenger needs the emotional support or psychiatric service animal as an accommodation for air travel and/or for activity at the passenger's destination;

(3) The individual providing the assessment is a licensed mental health professional, and the passenger is under his or her professional care; and
(4) The date and type of the mental health professional's license and the state or other jurisdiction in which it was issued.
(f) You are never required to accommodate certain unusual service animals (*e.g.,* snakes, other reptiles, ferrets, rodents, and spiders) as service animals in the cabin. With respect to all other animals, including unusual or exotic animals that are presented as service animals (*e.g.,* miniature horses, pigs, monkeys), as a carrier you must determine whether any factors preclude their traveling in the cabin as service animals (*e.g.,* whether the animal is too large or heavy to be accommodated in the cabin, whether the animal would pose a direct threat to the health or safety of others, whether it would cause a significant disruption of cabin service, whether it would be prohibited from entering a foreign country that is the flight's destination). If no such factors preclude the animal from traveling in the cabin, you must permit it to do so. However, as a foreign carrier, you are not required to carry service animals other than dogs.
(g) Whenever you decide not to accept an animal as a service animal, you must explain the reason for your decision to the passenger and document it in writing. A copy of the explanation must be provided to the passenger either at the airport, or within 10 calendar days of the incident.
(h) You must promptly take all steps necessary to comply with foreign regulations (*e.g.,* animal health regulations) needed to permit the legal transportation of a passenger's service animal from the U.S. into a foreign airport.
(i) Guidance concerning the carriage of service animals generally is found in the preamble of this rule. Guidance on the steps necessary to legally transport service animals on flights from the U.S. into the United Kingdom is found in 72 FR 8268-8277, (February 26, 2007).
[Doc. No. DOT-OST-2004-19482, 73 FR 27665, May 13, 2008, as amended at 74 FR 11471, Mar. 18, 2009]

TAB 4

Practice Tips: Chicago's Dangerous Dog Proceedings and Using Experts in Animal-Related Litigation

- ***Bruce Wagman**, Riley Safer Holmes & Cancila, California*
  bwagman@rshc-law.com



DANGEROUS DOG CASES

- Initiating incidents
  - Dog bite (or other injury)
  - At-large, threatening behavior
  - Repeat offenders
  - Reported to animal control (by victim/police/hospital/animal control)

WHY SO MANY CASES?

- 124 million dogs and cats in U.S. households.
- One companion animal for every 2 Americans.
- 60% of American households have pets.
- 45% of dog guardians take their dogs on vacation.
- Estimated $43.4 billion spent annually on pets in the United States.

THE BIG PICTURE

- The tension in all these cases:
  - Client's/dog's interests
  - Outdated/one-sided view of dog bites

    vs.
  - Important public policy of protection and safety
  - Municipality's desire to avoid future liability.

VARIATIONS IN THE LAWS

- Wide disparity in coverage and sanctions
  - State law vs. local ordinances
    Potential preemption issues (state law)
  - Same action, 3 different Bay Area counties:
    1. Slap on the paw, time limited
    2. Case-specific restrictions (e.g., muzzle, leashing, confinement)
    3. Euthanasia

THE DEFINITIONS

- Wide variety:
  - The question is *__not__* necessarily whether the dog is dangerous or vicious in reality, or under common understanding of the terms
  - Only question is whether the dog is "dangerous" or "vicious" under the applicable law
  - Think of it as a status or classification, triggered by specific conduct

CHICAGO ORDINANCE 1

- "Bite" -- seizure with the teeth or jaws, "pierced or broken" skin and "contact of the saliva of the biting animal with any break or abrasion of the skin"

- "Dangerous animal"
  - Bites, inflicts injury on, kills or otherwise attacks human or domestic animal without provocation;
  - More than once chases or approaches people "in an apparent attitude of attack" without provocation outside of owner's property;
  - Fighting dogs and guard dogs, or "vicious" under state law.

- Even though provocation is a defense to human or animal incidents, Code definition only applies to human situation. 7-12-020 ("Definitions").

CHICAGO ORDINANCE 2

- Steps preceding Dangerous Dog designation
  - Triggering incident and complaint
  - Department "shall evaluate the seriousness … and, if the circumstances warrant, **may** conduct an investigation of the facts. Where necessary, practicable, and readily located, the investigation may include, but not be limited to, interviewing the complainant, the human victim, if any, the victim animal's owner, the biter animal's owner, any witnesses, and also include observation of the animal and the scene, and any other relevant information.
  - Must consider "the totality of the circumstances, including the behavior of all of the participants"
  - Written finding required

- Euthanasia
  - For death to a human -- mandatory
  - For severe injury to humans/animals, or death to animal – discretionary based on severity and circumstances

CHICAGO ORDINANCE 3

- Mandatory Dangerous Dog requirements
  - Indoors, outside enclosure on premises
  - Muzzle and not > 6 foot leash
  - Signage, sterilization, insurance, special license
- Possible Dangerous Dog requirements (discretionary)
  - Never off property except veterinary care, court order, emergency, training
- Alternative Dangerous Dog resolution
  - Banishment with notification of new location
- Provoked cases involving severe injury
  - In severe injury/death cases where no DD finding because of provocation, owner still must comply with mandatory conditions "to protect the public health, safety and welfare."

ILLINOIS STATE LAW

- "Potentially Dangerous Dog"
  - "Unsupervised and found running at large with 3 or more other dogs"
- "Dangerous Dog"
  - Unmuzzled/unleashed/unattended that "a reasonable person would believe poses a serious and unjustified imminent threat of serious physical injury or death"
  - Unjustified bite to human that does not cause serious physical injury
    - "Serious physical injury" – "physical injury that creates a substantial risk of death or that causes death, serious disfigurement, protracted impairment of health, impairment of the function of any bodily organ, or plastic surgery"
- "Vicious Dog"
  - Unjustified human attack with serious physical injury or death
  - Found to be a "dangerous dog" upon 3 separate occasions
  - Higher burden of proof on complainant/authorities and greater restrictions

ILLINOIS STATE LAW

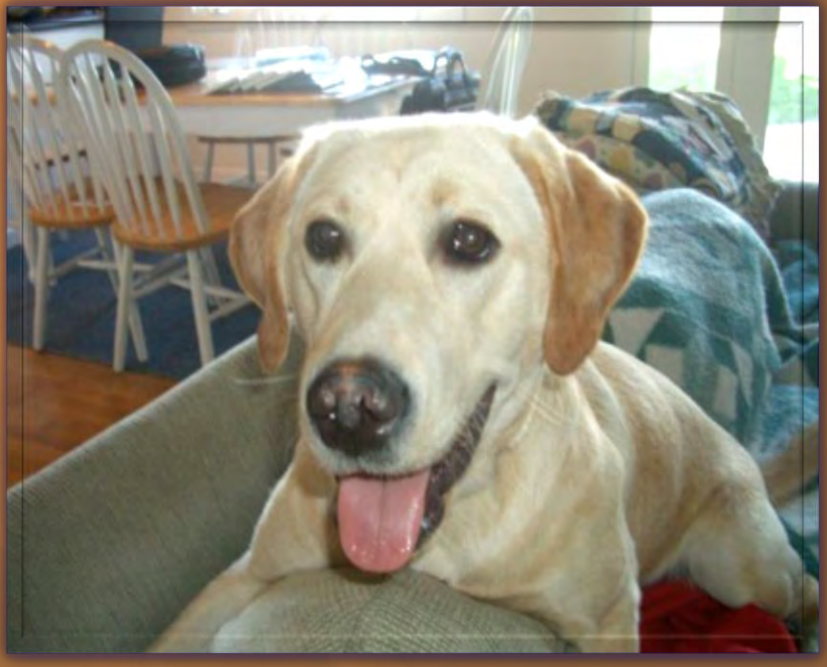
- "Reckless Dog Owner"
  - The right focus?
  - Defined as repeat offender with respect to dog killing
  - Complaint process, and if proven by clear and convincing evidence
    - Immediate impoundment and forfeiture of all dogs
    - Forfeiture to licensed shelter, rescue, or sanctuary
    - Prohibition on ownership for 1 – 3 years

FIRST STEPS

- Post-incident impound or just home quarantine?
- Best time to call a lawyer? Now!
  - Big mistakes can be made by owners acting without counsel
  - DD cases are a specialized area that need someone with expertise

POTENTIAL OUTCOMES

- Discuss early and often
  - Physical restrictions (muzzle, leash, enclosures)
  - Training
  - Transfer to another home/jurisdiction/sanctuary
  - Euthanasia



INITIAL EVALUATION

- Nature of incident and injuries
- Type of dog
- Prior history
- Victim
  - Relationship with client
- Witnesses?
- Status of dog (impound/home?)

CASE WORK-UP

- Contact agency post-determination or upon impound/interview with client
- Evaluate applicable local ordinances and/or state law
  - Procedures and timing
  - Personnel (animal control, hearing officers)
  - Continuance of hearing?

COLLECTING EVIDENCE

- Medical records
- Police reports
- Witness statements
- Photographs/video
- Dog's prior history records

INVESTIGATIONS

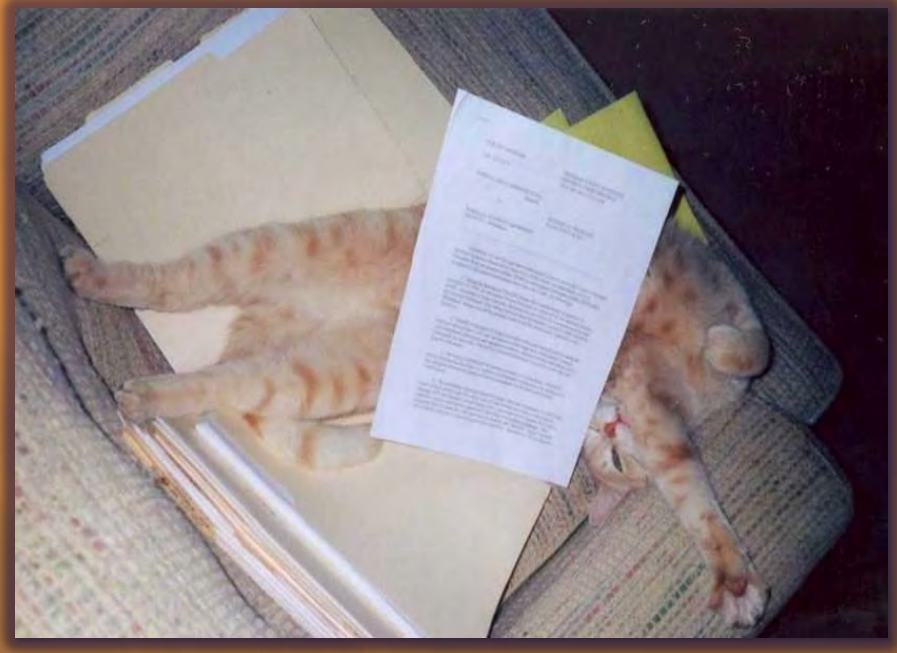
- Government agency
  - Focused on statutory language
  - Initial assessment → initial determination
  - May be focused more on victims than dog owners.
- Independent
  - Witness interviews
  - Videos? Photos?
  - History of prior incidents
  - Agency practices and protocols

PREPARING FOR THE HEARING I

- Interviews and preparing the pre-hearing brief
  - Factual Statement
  - Applicable law and defenses
    - Provocation?
    - Protection – of property, persons, pups?
    - Victim committing crime?
    - Animal victim attacking/threatening
    - Physical handicap service dogs and guard dogs “on duty”

PREPARING FOR THE HEARING II

- Testimonials (mitigating circumstances)
  - Friends and family of all shapes and sizes
  - Trainers
  - Evaluators/behaviorists
  - Veterinarians
  - Day care facilities
- Alternatives to remedies/restrictions
- Potential for settlement ?



THE HEARING

- Hearing officer usually not a lawyer
- Rules of evidence do not apply
- No, or limited, discovery/subpoenas
- Careful presentation of most vital evidence
- Both sides, and animal control, have an opportunity to present
- Burden of proof on government

APPEAL OF ADVERSE RULING

- Court Hearings
  - Jury is not available
  - Burden of proof is preponderance of the evidence in most cases
  - ILCS – C&C for vicious

CASE STUDIES

- The dog bite version of *Summers v. Tice*
- Compromise settlements
- Procedural challenges
- The permanent impound
- Placement cases

ANIMAL LAW EXPERT WITNESSES

- All the standard rules apply
- Certain areas benefit, others may be unnecessary
- Spend significant time evaluating case and areas of expertise needed
- Dearth of experts, so national search may be necessary
  - Exception for veterinary malpractice?
- Discuss costs with clients

SUBJECT MATTER EXPERTS – DOG BITES/DANGEROUS DOG

- Behaviorists
- Trainers
- Breed-specific expertise
- Veterinarians

SUBJECT MATTER EXPERTS – ANIMAL CRUELTY

- Veterinary care
- Forensics
- Investigations
- Statutory construction
- Costs of care


10/14/2006


5-K-1

SUBJECT MATTER EXPERTS – HOARDING

- Veterinarians
  - Physical pain
  - Specific conditions and diagnosis and treatment
  - Chronic suffering
  - Emotional harm
  - Hoarding phenomenon
    - Social services
    - Psychology of hoarding
  - Ammonia and other human health and welfare impacts

Ammonia Levels In the Woodleys' House and Kennels

Twenty to forty times the maximum ammonia level allowed for USDA-regulated, large-scale confined swine operations.

Trial Testimony, Dr. Kelli Ferris, NC State Veterinary College

BUDDY

VETERINARY ISSUES/HOARDING

DR. BARTFIELD: I looked at the fracture; I palpated it. I determined that it was in fact fractured, that there appeared to have been some bone loss. And then I observed the oral nasal fistulas.

MR. ZIMMERMAN: In your opinion, what does that type of condition derive from?

DR. BARTFIELD: From long-standing periodontal disease.

MR. ZIMMERMAN: And when you say "long-standing," what do you mean by that?

DR. BARTFIELD: **Probably years of infection and teeth rotting out one by one. And as we all know, whoever's had a tooth infection, it can be painful and** –

Expert Testimony – Medical Conditions and Hoarding

MR. ZIMMERMAN: Now, on to the periodontal conditions. What – tell us about that. Is that treatable?

DR. BARTFIELD: It's preventable, number one, and –

MR. ZIMMERMAN: Okay. How is it preventable?

DR. BARTFIELD: By proper dental hygiene, proper diet, proper husbandry, routine veterinary care.

"SUFFERING"

DR. HANSEN: And as far as we know, the experience of chronic pain and suffering *may even be worse for animals than for us* because they may have less appreciation for hoping for a better day tomorrow. They live in the here and now. And if the here and now is, you know, endless exposure to a toxic environment, that's, in my view, part of the experience of pain.

And these animals are in an environment that gives them nothing to focus on except their own pain.

"PROVING PSYCHOLOGICAL SUFFERING"

DR. HANSEN: That's one of the things that concerns me, is that *the environment itself is painful, that the isolation, the constant odors, I'm sure the noise*, … and you superimpose on that acute illness, it becomes *a collage of pain*. And the environment's just a part of that, and it makes it worse.

[T]hat environment is a crushing environment for any animal to be in.

PROVING HOARDING

MR. ZIMMERMAN: In your opinion, would having fewer dogs in any way resolve the problems that you've discussed here today?

DR. BARTFIELD: No, I don't think so because the conditions are not going to change. And even if you put five dogs in these conditions, those five dogs will get sick at some point in time.

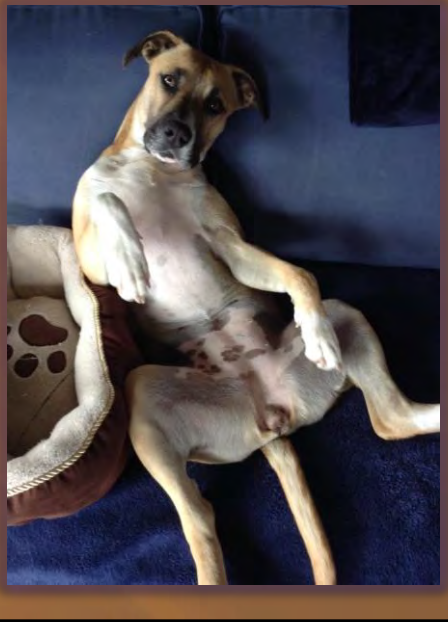
SUBJECT MATTER EXPERTS – VETERINARY MALPRACTICE

- Unlike other animal law areas, may be some "available" experts
- Nearest veterinary college is good place to look
- Standard of care re specific area
- E.g., cardiology, surgery, anesthesia, hospitalization protocols
- Locality specific?
- Costs

SUBJECT MATTER EXPERTS – WILDLIFE CASES

- Conservation biologists
- Species-specific behavior experts
  - Zoologists, academics, field researchers
    - Breeding
    - Birthing/denning/rearing
    - Impacts of challenged practices on individuals
- Professional experience with practices being challenged
  - Hunters
  - Trappers
  - Construction, developers
- May double as plaintiffs with standing

Dad, It's Time for My Walk!



TAB 5

The Nation's Love Affair with Its Wild Horses: A Hotbed of Litigation to Protect the Animals

- ***Molly L. Wiltshire**, Schiff Hardin LLP, Chicago*
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ISBA Animal Law Section Presentation: Wild Horses Litigation

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Schiff Hardin

Introduction and Agenda

Welcome – Introduction

Agenda:

- WHB Protection and Management Authorities
- Statistics and Challenges
- Recent Litigation

Wild Horses and Burros
Protection and Management Authorities

Schiff Hardin

Statutory Purposes and Mandate

- In 1971, Congress declared that "wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene." Wild Free-Roaming Horses and Burros Act, 16 U.S.C § 1331 *et seq*. ("Wild Horse Act")
- "Wild free-roaming horses and burros . . . are to be considered in the area where presently found, as an integral part of the natural system of the public lands." *Id*.
- The Wild Horse Act authorizes the government to maintain ranges on public lands as sanctuaries for the protection and preservation of wild horses and burros. 16 U.S.C. § 1333.

Agencies' Management Authority

- Congress delegated to the Secretary of Agriculture and the Secretary of the Interior jurisdiction over all wild free-roaming horses and burros "for the purpose of management and protection." *Id.* § 1333(a).
  - Bureau of Land Management (BLM)
  - U.S. Forest Service (USFS)
- "All management activities *shall be at the* ***minimal feasible level*** ... in order to protect the natural ecological balance of all wildlife species which inhabit such lands, particularly endangered wildlife species." *Id.*
- Designation of Herd Management Areas (HMA)
- Development of Herd/Territory Management Plans

Inventories and "Excess" Determinations

- § 1333(b)(1) requires the agencies to maintain a current inventory to:
  - determine **Appropriate Management Levels** (AML);
  - determine whether an overpopulation exists and whether excess animals should be removed; and
  - determine whether AML should be achieved by the removal or destruction of excess animals, or sterilization or other options.
- If agency determines that there is an "overpopulation," and if the removal of "excess" animals is necessary, the agency is entitled to remove them. *Id.* § 1332(b)(2).

Statistics and Management Challenges

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Herd Management Areas

Total Number of Herd Management Areas (HMAs)	**177**
Total Acreage of HMAs	**31.6 million acres**
HMA Acreage Managed by BLM	**26.9 million acres**

When the Wild Horse Act was passed, wild horses and burros roamed on approximately 53.8 million acres of land.
Today, the land available has been reduced to approximately 31.6 million acres.

Growing Populations

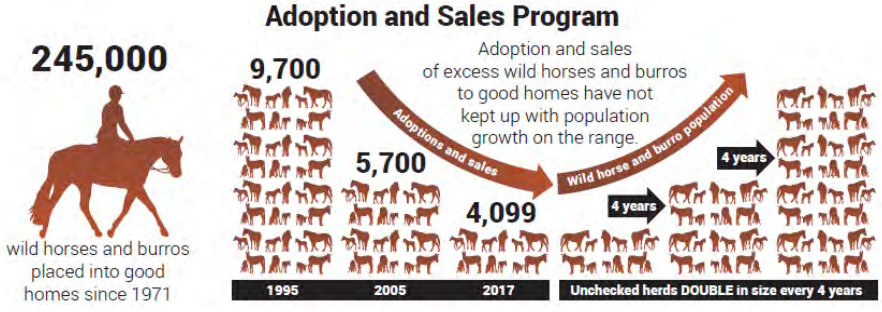
Source: https://www.blm.gov/sites/blm.gov/files/wildhorse_2018infographic_7.26.18.pdf

Competing and Conflicting Land Uses

- Grazing
- Mineral leasing
- Other land development and use
- Endangered species
- Recreation
- Drought and fire

Population Control & Off-Range Options

Adjusting sex ratios
PZP fertility control and other methods
Adoptions and sales to good homes



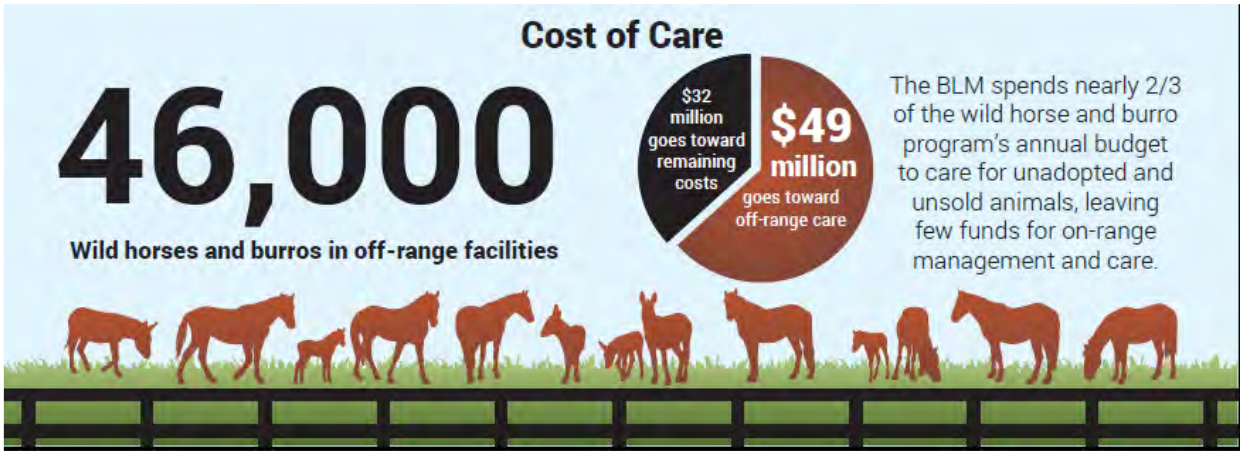
Source: https://www.blm.gov/sites/blm.gov/files/wildhorse_2018infographic_7.26.18.pdf

Thousands of Animals Removed Off-Range Each Year

Fiscal Year	Horses	Burros	Total
2017	3,735	474	4,209
2016	2,899	421	3,320
2015	3,093	726	3,819
2014	1,689	168	1,857
2013	4,064	112	4,176
2012	7,242	1,013	8,255

Wild Horse Gather Operation - Utah and California:
https://www.youtube.com/watch?v=OypwWizvLAo

Budget Restraints



Source: https://www.blm.gov/sites/blm.gov/files/wildhorse_2018infographic_7.26.18.pdf

Recent Wild Horses Litigation

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Devil's Garden and Unlimited Sales

- Devil's Garden Plateau Wild Horse Territory (WHT) is administered by the USFS Modoc National Forest in California.
- 230,000 acres jointly managed by USFS and BLM.
- 2013 Territory Management Plan set AML at 402 horses.
- 2018 inventory: ~3,900 horses.
- USFS decided to remove 1,000 "excess" horses.
- Surprise announcement to sell the removed horses "without limitation."
- USFS-operated corral built to facilitate sales without limitation.

Sterilization Litigation

- 2018- BLM withdrew plans after legal challenge to do research on 225 Warm Springs, OR HMA mares involving three methods of surgical sterilization:
  - *Ovariectomy via colpotomy*
  - *Endoscopic tubal ligation*
  - *Hysteroscopically-guided laser ablation of oviduct papilla*
- 2012- BLM abandoned its efforts to castrate Nevada's wild horses.
- 2011- BLM withdrew its plans to castrate Wyoming wild horses when challenged. *Am. Wild Horse Preservation Campaign v. Salazar*, 800 F. Supp. 2d 270, 272-73 (D.D.C. 2011). The court stated that the sterilization plans were of an "extreme and irreversible nature." *Id*.

Questions?

Schiff Hardin

Thank you!

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Schiff Hardin

TAB 6

“Killing Games,” Wildlife in the Crosshairs

- ***Camilla H. Fox**, Project Coyote, California*
  cfox@projectcoyote.org

WILD & SCENIC FILM FESTIVAL OFFICIAL SELECTION 2018

OFFICIAL SELECTION Santa Barbara International Film Festival

WINNER FILMOMUSIC 2018

WILDLIFE CONSERVATION FILM FESTIVAL 2016

2018 OFFICIAL SELECTION Rome INTERNATIONAL FILM FESTIVAL RIFF

GLEFF

KILLING GAMES

WILDLIFE IN THE CROSSHAIRS

PROJECT COYOTE PRESENTS

A FILM BY CAMILLA H. FOX MUSIC BY LEWIS RICHMOND

AND PERFORMED BY THE MELANTHIUM ENSEMBLE

EDITED BY CAROLINE KRAUS ADDITIONAL EDITING BY SARAH GORSLINE

CINEMATOGRAPHY BY CAROLINE KRAUS ADDITIONAL CINEMATOGRAPHY BY

JOE BROWN, TRISH CARNEY, DANIEL DIETRICH, BOB LANDIS,

MEG MCWHINNEY, MARTYN STEWART, MAX WAUGH

FEATURING PETER COYOTE DIRECTED & PRODUCED BY CAMILLA H. FOX

KILLING GAMES

WILDLIFE IN THE CROSSHAIRS

END WILDLIFE KILLING CONTESTS

Project Coyote is co-founder of the growing National Coalition to End Wildlife Killing Contests that is comprised of more than 30 national and state organizations. Our mission is to permanently abolish contests that promote the mass killing of coyotes, wolves, bobcats, foxes and other species for sport and prizes. Wildlife killing contests are still widespread across the U.S. – only California and Vermont have banned these gruesome events.

We need your help to put an end to wildlife killing contests everywhere!

Here is what you can do:

- Host a screening of Project Coyote's documentary film *KILLING GAMES ~ Wildlife In The Crosshairs*, and invite stakeholders to attend.
- Ask your state & local legislators and/or your state's wildlife management agency to ban killing contests.
- Write letters to the editor of your newspaper that raise awareness about killing contests and encourage readers to express their opposition to their lawmakers.
- Shut down individual contests in your state by firmly, but politely, urging the event hosts and sponsors to stop supporting killing for fun and prizes.
- Spread the word about killing contests on social media while encouraging your network to take action.
- Donate to Project Coyote to help us put an end to killing contests.

PROJECT COYOTE
FOSTERING COEXISTENCE

END WILDLIFE KILLING CONTESTS

PROJECT COYOTE
FOSTERING COEXISTENCE
WWW.PROJECTCOYOTE.ORG

KILLING CONTESTS: THE HIDDEN WAR ON WILDLIFE

While blood sports like dogfighting and cockfighting have been outlawed nationwide, thousands of native carnivores and other species perish every year in killing contests across the country. In these barbaric events, contestants win prizes for killing the most or the largest of the targeted species.

- **Baseless Myths:** Killing contests are justified by an outdated prejudice against native carnivores rooted in fear and misunderstanding.
- **Counterproductive to Sound Wildlife Management:** Mass killing of native carnivores disregards the critical role that these species play in healthy ecosystems and creates chaos in the family structures of the targeted species, which may result in increased conflicts with livestock, pets and people.
- **A Violation of the Public Trust Doctrine:** This doctrine maintains that wildlife is a shared public asset that must be conserved for future generations.
- **Cruel and Unsporting:** Countless animals are injured or orphaned during these events, and the use of lures and distress calls to attract target animals removes any notion of fair chase. Pets and endangered wildlife may also be harmed.
- **A Chilling Message:** Contest organizers are increasingly encouraging youth participation, which teaches children that killing is fun, life is cheap, and wild animals are disposable.

Visit ProjectCoyote.org to learn more.

KILLING GAMES ~ Wildlife In The Crosshairs
Bringing an End to Wildlife Killing Contests & Reforming Predator Management
Camilla H. Fox

On any given weekend, some of America's most iconic wildlife are massacred in wildlife killing contests, and prizes are awarded for killing the largest or most of a targeted species. Coyotes, bobcats, foxes, and even wolves fall prey to "hunters" as young as ten. These legally sanctioned contests ignore the critical role wild carnivores play in maintaining healthy ecosystems. In the groundbreaking exposé *KILLING GAMES ~ Wildlife In The Crosshairs* Project Coyote brings these shadowy contests to light and uncloaks this hidden war on wildlife, inspiring viewers to call on their state and local legislators to end these brutal contests where wild animals become living targets.

Project Coyote founder and executive director (and director and producer of *KILLING GAMES*) Camilla Fox will discuss how wildlife killing contests are symptomatic of a larger issue of predator mismanagement by state and federal wildlife agencies to illuminate both the problems and their solutions. Fox will also share a trailer for a new film Project Coyote is producing- *Wild & Woolly ~ Can Livestock & Wildlife Share a Home on the Range*?

Camilla H. Fox ~ Founder & Executive Director, Project Coyote
Camilla H. Fox is the founder and executive director of Project Coyote- a national non-profit organization based in Northern California that promotes coexistence between people and wildlife and compassionate conservation through education, science, and advocacy. With more than 20 years of experience working on behalf of wildlife and wildlands and a Masters degree in wildlife ecology, policy, and conservation, Camilla's work has been featured in several films, books and national media outlets. A frequent speaker on these issues, Camilla has authored more than 70 publications and is co-author of two books— *Coyotes in Our Midst* and *Cull of the Wild* and is co-producer of the award-winning documentary *Cull of the Wild ~ The Truth Behind Trapping.* She produced and directed the award-winning documentary film *KILLING GAMES ~ Wildlife in the Crosshairs*. Camilla has served as an appointed member on the U.S. Secretary of Agriculture's National Wildlife Services Advisory Committee and currently serves on several national non-profit advisory boards. In 2006, Camilla received the Humanitarian of the Year Award from the Marin Humane Society and the Christine Stevens Wildlife Award from the Animal Welfare Institute. She was named one of the 100 Guardian Angels of the Planet in 2013 and the 2014 Conservationist of the Year Award by the John Muir Association. In 2016 she was honored with the Grassroots Activist of the Year Award by the Fund for Wild Nature.
Learn more about Project Coyote here: http://www.projectcoyote.org

Fostering compassionate conservation and coexistence between people and wildlife through advocacy, education and science

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Project Coyote, a national nonprofit organization based in Northern California, is a North American coalition of scientists, educators, ranchers and citizen leaders working to change attitudes, laws and policies to protect native carnivores from abuse and mismanagement, advocating coexistence instead of killing. Project Coyote seeks to stop the wanton and cruel killing of native carnivores, to reform predator management, to create successful models of coexistence, and to inspire the next generation to care for Wild Nature. All our work strives to create fundamental changes in the way humans view and treat wild carnivores by replacing fear and misunderstanding with appreciation and respect.

Project Coyote envisions a world where human communities coexist peacefully with wildlife; science empowers lasting solutions for resilient carnivore populations; native carnivores are valued for their critical ecological role and intrinsic worth; compassionate conservation drives wildlife stewardship; and children understand the value of Wild Nature.

While the coyote serves as our ambassador, program initiatives benefit all predators who fall victim to prejudice, misunderstanding and cruelty, including bears, bobcats, foxes, mountain lions, lynx and wolves. We use education, grassroots mobilization, multi-media outreach, legislation, science and, when necessary, the courts to foment change. We have six core programs:

ProjectCoyote.org

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LARKSPUR, CA, 94977

PROMOTING COEXISTENCE
BETWEEN PEOPLE & WILDLIFE THROUGH
EDUCATION, SCIENCE, & ADVOCACY

REFORMING PREDATOR MANAGEMENT

Replacing killing with coexistence

In North America, publicly funded lethal government programs threaten native carnivores. The U.S. Department of Agriculture's "Wildlife Services" agency, for example, kills more than 100,000 predators across the nation each year—largely at the behest of ranchers and agribusinesses in the name of "livestock protection." Predators are also killed for their fur, for "sport," and in "body-count" killing contests. Federal, state and local governments, as well as private individuals, kill at least half a million coyotes each year in the United States. Taxpayers subsidize the carnage at a cost of more than $100 million annually. Indiscriminate lethal control persists despite scientific evidence that it is misguided and ineffective. Our *Reforming Predator Management* program shifts the approach from killing to coexistence by promoting:

- the reform of government agencies, particularly the USDA Wildlife Services;
- a nationwide ban on predator killing contests;
- the abolition of cruel and unethical trophy hunting, trapping, poisoning, and "penning"; and
- strong enforcement of the Endangered Species Act for imperiled predators like grizzly bears, lynx, and wolves.

RANCHING WITH WILDLIFE

Promoting nonlethal solutions to reduce conflicts

Livestock losses are an unfortunate reality of ranching. While predators do kill livestock, most losses are related to disease, weather, or birthing complications. Retaliation against predators for livestock losses has led to mass killing of carnivores to the detriment of healthy ecosystems and ranches. Indiscriminate killing of predators can increase conflicts with livestock because it disrupts pack structure that regulates breeding and behavior.

Through our *Ranching with Wildlife* program, Project Coyote works with ranching and farming communities to foster coexistence among people, livestock, and wildlife; reduce conflicts with livestock with an emphasis on nonlethal methods; develop and implement proactive, long-term carnivore coexistence programs; field test predator deterrents; and promote appreciation of the key ecological role of carnivores. We work cooperatively with ranchers and farmers—with every effort made for our representative to be one of the community within which we are working—to establish good animal husbandry practices and to employ strategic nonlethal predator control methods that considerably reduce livestock losses and meet the needs of individual operations. We also work with counties to end their contracts with USDA Wildlife Services and adopt a non-lethal program to assist ranchers with livestock-predator conflicts.

COYOTE FRIENDLY COMMUNITIES™

Developing coexistence programs in urban and rural communities

Conflicts with coyotes are increasing as coyotes expand their range into areas where wolves once lived and urban and rural sprawl encroach into wildlife habitat. When people intentionally or unintentionally feed wildlife, encourage a lack of fear of humans, or fail to protect domestic animals, conflicts can occur. Too often the solution to coyote conflicts is lethal and indiscriminate. Trapping, poisoning, killing pups in their den, and other lethal approaches are inhumane, ineffective, and fail to recognize the ecological value that coyotes provide to ecosystems including keeping rodent populations in check and helping to control disease transmission.

Our *Coyote Friendly Communities*™ program educates and equips urban and rural audiences with the tools, resources and expertise needed to foster coexistence through education, communication, science, and behavior modification. We work in collaboration with humane societies, municipalities, research institutions, schools and wildlife agencies to provide direct assistance and advice about living with coyotes. The program emphasizes consistent messaging, agency collaboration, and community empowerment.

SCIENCE & STEWARDSHIP

Creating a new conservation model based on compassionate coexistence and scientific integrity

The increasing threat to North America's native carnivores requires a new approach to carnivore conservation—one built on the best available science that integrates ethics and animal welfare. Project Coyote is working to create a model that embraces these principles to help guide local, state and federal wildlife management policies and practices. Consideration of the intrinsic value and interests of the individual animal—in addition to species preservation—is fundamental to furthering wildlife conservation.

Project Coyote's Science Advisory Board includes some of the most renowned canid and conservation biologists and ecologists in the world. Our scientists are on the front lines advocating for a responsible, modern approach to carnivore conservation. We build coalitions that bridge the gap between conservation and animal protection, united by goals of environmental health and stewardship.

KEEPING IT WILD

Educating today's youth to care for Wild Nature and to advocate for positive change

Project Coyote's *Keeping It Wild* program educates young people about predators and coexistence, fosters respect and compassion for wildlife, and contributes to students' environmental and scientific literacy. We believe that informed, inspired and empowered students will act conscientiously on behalf of animals and the planet. Learning about apex predators, asking meaningful questions, and conducting careful investigations teaches students about broader issues including the interconnectedness of ecosystems, community and public health, and the increasing scarcity of natural resources.

We provide educators with tools to teach about the important role that predators play in ecosystem health. The coyote's presence in urban settings, for example, provides a natural opportunity to reach urban youth and to connect them with the environment in which they live. We offer a flexible instructor-guided and youth-driven model. Educators guide students to identify problems that they care about and to develop means of solving them. Our program helps students design their own community service projects to make positive change a reality.

ARTISTS FOR WILD NATURE

Inspiring change through the power of art

Project Coyote partners with artists raising awareness about and appreciation for keystone predators, including their role in sustaining resilient ecosystems. A catalyst for meaningful change, the power of art lies in its ability to transcend and inspire and to guide us past established realities and prevailing ideologies. Artists are instrumental in shifting attitudes, evoking emotion, engaging the senses, and deepening the connection to Wild Nature through mediums including music, painting, photography, poetry, prose, and videography. Actor, conservationist, ordained Zen Buddhist priest, and Project Coyote Advisory Board member Peter Coyote helps guide *Artists for Wild Nature*.

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PROJECT COYOTE

FOSTERING COEXISTENCE

Why Killing Coyotes Doesn't Work

The coyote, our unique Song Dog who has existed in North America since the Pleistocene, is the most persecuted native carnivore in North America and the most frequent victim of wildlife killing contests. Killed for prizes, poisoned, trapped, and aerial gunned, an estimated half a million coyotes—one per minute—are slaughtered every year in the United States.

The best available, peer-reviewed science shows that indiscriminately killing coyotes is counterproductive and a threat to healthy ecosystems. There is no credible evidence that indiscriminate killing of coyotes effectively serves any genuine wildlife management purpose. Over 70 prominent conservation scientists condemn coyote killing contests—their signed statement is available here.

Coyotes play a crucial ecological role and provide a range of free, natural ecological services in urban and rural settings.

Coyotes directly or indirectly help to control disease transmission, keep rodent populations in check, consume animal carcasses, increase biodiversity, remove sick animals from the gene pool, and protect crops. Unexploited coyote populations can contribute to ecosystem health through trophic cascade effects such as indirectly protecting ground-nesting birds from smaller carnivores and increasing the biological diversity of plant and wildlife communities.[1] State wildlife management agencies across the country recognize the benefits that coyotes provide to ecosystems.

Indiscriminately killing coyotes does not reduce their populations—in fact, it can increase coyote populations.

It is nearly impossible to permanently reduce coyote populations.[2] More than 100 years of coyote killing has failed to do that. Since 1850—when mass killings of coyotes began—coyotes' range has tripled in the United States.[3] Indiscriminate killing of coyotes stimulates increases in their populations by disrupting their social structure, which encourages more breeding and migration.[4] Unexploited coyote populations are self-regulating based on the availability of food and habitat and territorial defense by resident family groups. Typically, only the dominant pair in a pack of coyotes reproduces, which behaviorally suppresses reproduction among subordinate members of the group. When one or both members of the alpha pair are killed, other pairs will form and reproduce, lone coyotes will move in to find mates, coyotes will breed at younger ages, and pup survival increases following temporary reduction of local populations. These factors work synergistically to increase coyote populations following exploitation events.[5]

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It's impossible to completely eradicate coyotes from an area.[6] New coyotes will quickly replace coyotes who have been removed. Coyote pairs hold territories, which leaves single coyotes ("floaters") continually looking for new habitat to occupy.[7]

There is no credible evidence that indiscriminate killing of coyotes succeeds in increasing the abundance of game species such as deer or pheasants.

Rather than focusing on any one species, coyotes are opportunists who eat a diverse diet including small mammals, birds, amphibians, reptiles, fish, insects, fruit, and vegetables. Rabbits and rodents are their top choice.[8]

In response to hunters' concerns that predators diminish populations of small game animals, the Pennsylvania Game Commission (PGC) emphatically stated in 2016 that "[predators] don't compete with our hunters for game" and "to pretend that predator control can return small game hunting to the state is a false prophecy."[9] The PGC emphasized that habitat protection is the most important factor in determining small game abundance.[10] The North Carolina Wildlife Resources Commission (NCWRC) similarly found that "most coyote diet studies document low to no prevalence of wild turkey or other game birds in diets" and that coyotes can benefit duck, quail, and waterfowl populations by controlling the presence of smaller predators like raccoons that prey on game birds and their nests.[11]

Killing coyotes also does not protect larger game animals such as deer. Deer populations are reliant upon a host of other factors including habitat, shelter, nutrition, and reproductive opportunity.[12] Comprehensive studies, including those conducted in Colorado[13] and Idaho,[14] show that killing native carnivores fails to grow deer herds. The NCWRC has stated, "while predation on adult deer has been documented, it is uncommon, and hunter harvest remains as the primary source of adult mortality in hunted populations" and "the most effective method to increase or stabilize deer numbers at statewide and regional scales is through regulatory changes in season lengths, bag limits, and timing of harvest."[15]

Claims that coyotes attack humans and pets and threaten livestock are greatly exaggerated.

A recent study of coyote attacks on humans over a 38-year period (1977-2015) found only 367 documented attacks by non-rabid coyotes in Canada and the U.S., two of which resulted in death.[16] In comparison, there are more than 4.5 million dog bites annually in the U.S., approximately 800,000 of which require medical attention.[17] While there is little data regarding how many pets are killed by coyotes annually, simple measures can be taken to greatly increase pet safety.[18]

Most coyotes do not prey on livestock. According to U.S. Department of Agriculture ("USDA") data, livestock losses to carnivores are minuscule. In 2015, less than 0.39 percent of the U.S. cattle and sheep inventories (including calves and lambs) were lost to all carnivores combined—including coyotes, wolves, cougars, bears, vultures, dogs, and unknown carnivores.[19] The predominant sources of mortality to livestock, by far, are non-predator causes including disease, illness, birthing problems, and weather.[20]

Wildlife killing contests and other indiscriminate, lethal control methods will not prevent conflicts with humans, pets or livestock—and may increase them.

Disrupting the coyote family structure may increase coyote attacks. Exploited coyote populations tend to have younger, less experienced coyotes that haven't been taught appropriate hunting behaviors. These

coyotes are more likely to prey on easy targets like livestock or pets. Additionally, exploited coyote packs are more likely to have increased numbers of yearlings reproducing and higher pup survival. Feeding pups is a significant motivation for coyotes to switch from killing small and medium-sized prey to killing sheep.[21]

Open hunts and killing contests do not target specific, problem-causing coyotes. Most killing contests target coyotes in woodlands and grasslands where conflicts with humans, livestock, and pets are minimal—not coyotes who have become habituated by human-provided attractants such as unsecured garbage, pet food, or livestock carcasses.

Prevention—not lethal control—is the best method for minimizing conflicts with coyotes in urban and rural settings.

Eliminating access to easy food sources, such as bird seed and garbage, supervising pets while outside, and keeping cats indoors reduces conflicts with pets and humans.[22] Practicing good animal husbandry and using strategic, nonlethal predator control methods to protect livestock (such as electric fences, guard animals, and removing dead livestock) are more effective than lethal control at preventing conflicts.[23]

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A BARBARIC BLOODSPORT: End Wildlife Killing Contests

"Wildlife killing contests are symptomatic of a broader problem of misguided wildlife governance by state agencies that fails to recognize and value the crucial ecological roles of native predators."

- Dave Parsons, MS
Wildlife biologist & Project Coyote Science Advisory Board member

ABOUT

Most Americans are shocked to learn that thousands of animals die every year in wildlife killing contests—barbaric events in which participants win prizes for killing the greatest number or the largest of a given wildlife species. Bobcats, cougars, coyotes, foxes, porcupines, prairie dogs, rabbits, raccoons, and even wolves die in these tournaments. Coyotes are the most common victims. Following the weekend-long events—such as the "Santa Slay" coyote tournament in Arizona or the "Squirrel Slam" in New York—participants gather at check-in locations to celebrate and count the slaughtered animals. State and federal wildlife agencies do not monitor the contests, which are legal in nearly every state.

A BLOODSPORT LIKE DOGFIGHTING

Wildlife killing contests are no different than dogfighting and cockfighting, which have been outlawed nationwide. Contest participants proudly post photos and videos on social media of winners posing with

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piles of dead animals—stacked like cords of wood—before disposing of the animals in "carcass dumps," away from the public eye. In some contests, children as young as 5 are encouraged to participate, and contestants receive hunting equipment and high-powered rifles—including AR-15s—as raffle prizes.

CRUEL AND UNSPORTING

Countless animals may be injured or orphaned during these events. Participants often use electronic calling devices that mimic the sounds of prey or young in distress, thereby manipulating animals' natural curiosity or compassion to lure them in for an easy kill. These events damage the reputation of sportsmen because they violate fundamental hunting ethics.

MYTHS FUEL THE KILLING

Killing contest organizers perpetuate myths to demonize coyotes and other targeted animals, claiming that their events will reduce conflicts with wildlife. Scientific studies refute this claim. There is no evidence that killing coyotes permanently limit coyote populations, increase the number of deer or other game species for hunters, or reduce conflicts with humans, pets or livestock.

CONTRARY TO MODERN, SCIENCE-BASED WILDLIFE MANAGEMENT PRINCIPLES

Randomly shooting coyotes in these events may increase coyote populations and lead to more conflicts. Coyotes self-regulate their populations when left alone, but lethal control can disrupt pack structure, allowing more coyotes to reproduce and increasing pup survival due to decreased competition for food and habitat. Contestants may also kill the more mature pack members who would pass down appropriate hunting behavior and knowledge to younger animals, increasing the likelihood that adolescent animals will prey on easy targets like livestock just to survive.

A SYMPTOM OF MISGUIDED WILDLIFE GOVERNANCE

Coyotes and other targeted animals receive almost no protections under the law because they are deemed vermin—a view perpetuated by special-interest agricultural and trophy hunting groups. This attitude persists in part because it is considered more expedient to kill than to implement responsible, science-based conservation and stewardship. State wildlife management agencies—beholden to these interest groups because they rely on them for funding—provide almost no protections to these animals. In most states, unprotected species like coyotes can be killed year-round and using almost any method.

DESTRUCTIVE TO HEALTHY ECOSYSTEMS

All wildlife species provide a crucial role in ecology. Coyotes, for example, provide a range of benefits to ecosystems including controlling rabbit and rodent populations, restricting rodent-borne disease transmission, cleaning up dead animal carcasses, and limiting populations of mesocarnivores—including raccoons, skunks and foxes—that prey on songbirds and consume their eggs.

A VIOLATION OF THE PUBLIC TRUST DOCTRINE

Wildlife killing contests are a violation of the Public Trust Doctrine, a foundational judicial principle mandating that governments hold natural assets, including wildlife, in trust for the general public and future generations. Allowing a minority of the population to slaughter wildlife en masse contravenes the rights of the majority of Americans, who value the intrinsic, ecological and aesthetic value of wild animals, and damages the reputation of state wildlife management agencies and sportsmen alike.

OUTLAWING WILDLIFE KILLING CONTESTS

In 2014 and 2018, respectively, California and Vermont banned wildlife killing contests, and the National Coalition to End Wildlife Killing Contests will work with local citizens in states across the nation to outlaw these events in 2019. In January 2019, the New Mexico State Land Commissioner prohibited killing contests for unprotected species on 9 million acres of State Trust Lands. In 2018, the city councils of Albuquerque, New Mexico, and Dewey-Humboldt, Arizona, passed resolutions condemning wildlife killing contests. The city of Tucson and Pima County in Arizona passed similar resolutions in recent years.

"There will always be an element of society that has no regard for the living world and you will never change their minds... They may derive a lot of personal delight in blowing away these animals but when you ask them why they do it, they can't provide a good answer because there isn't one."

- Chairman Mike Finley,
Oregon Fish and Wildlife Commission

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CAMILLA FOX & Song Dog PROJECT COYOTE

BY MARY HOLMES

PHOTO © CORY DESTEIN

Above: Coyote Pups

Right Top: Camilla Fox and Mokie

SPEAK had the opportunity to speak to Camilla Fox, Founder and Executive Director of Project Coyote, at the Animal Legal Defense Fund Conference 2017. It was held in Los Angeles in May; the topic was Wildlife. Learning about Project Coyote's work from Fox was fascinating.

Fox holds a master's in Wildlife Ecology, Policy and Conservation. Prior to founding Project Coyote, she already had amassed over 20 years of experience in the environmental and animal protection movements. After completing her master's in 2008, she saw a need for, as she put it, "a voice for predators, coexistence, and compassionate conservation." This was the birth of Project Coyote. Based in Mill Valley, CA, in the Bay Area, they work nationwide. The organization is mostly volunteer in nature, with a small core staff, and approximately 17 representatives scattered around the country. Like many organizations of this nature, they form alliances with like-minded groups to work on specific issues as the need arises.

Fox said that her thesis committee advisor became one of the founding advisors for Project Coyote. In her estimate, this was a key component of the organization. She feels, "... the development of a science advisory board with knowledge and expertise in predator conservation was a critical foundation so that we bring the best available science to our advocacy and political work for wildlife."

At any one time, Project Coyote is working on numerous projects simultaneously. At the time we spoke in May, they were working on the production of two films – one about "killing contests" and the other about the Marin Livestock & Wildlife Protection Program. Coyotes, otherwise known as song dogs, get a proverbial bad rap. Farmers and ranchers see them as predators, and want them eliminated. Many of Project Coyotes efforts are focused on ways coyotes and humans can peacefully coexist. Convincing people of this can often be an uphill battle, thus the need for the films.

As Fox wrote in an article for Earth Island Institute: "At least 19 subspecies of coyotes roam North and Central America. As the top carnivore in some environments, coyotes may function as 'keystone predators,' helping regulate the number and density of smaller mesocarnivores (skunks, raccoons, foxes, feral cats). In this way, coyotes help maintain healthy ecosystems and local biodiversity."

What Project Coyote is doing is helping to maintain biodiversity. We hear all sorts of buzzwords today. Discussions of biodiversity and climate change are ubiquitous. And the two are very much interrelated. Climate change has a deleterious effect on biodiversity, but so do "killing contests." Wildlife killing contests, where participants win cash and prizes for killing the most or largest of a given species, are unjustified ecologically and ethically according to Project Coyote, which led a successful effort to prohibit predator killing contests in California in 2014. Research has shown that killing adult coyotes often increases the coyote population, as more coyote pups survive.

Project Coyote is also working on a film about The Marin County Livestock & Wildlife Protection Program, which they describe to as a non-lethal model for coexistence. Thanks to the efforts of Camilla and a coalition of local and national groups that she helped form, the Marin County Board of Supervisors decided in 2000 to stop contracting with the U.S. Department of Agriculture's Wildlife Services predator control program. Instead, according to a Project Coyote Fact Sheet, "the Board approved an alternative non-lethal community-based program to assist ranchers with livestock-predator conflicts known as the Marin County Livestock and Wildlife Protection Program (hereafter MCLWPP), a collaborative effort involving multiple stakeholders from local wildlife protection organizations to ranchers, scientists, and county government officials." The program was extremely successful. The film documenting this project aims to highlight this model program and encourage other communities to consider adopting alternatives to federally subsidized lethal predator control.

Since we talked in May, Fox has brought yet another issue to our attention, the use of M-44 "Cyanide Bombs." These are being utilized indiscriminately by the USDA Wildlife Services for predator control (and were once used in Marin County and in California before they were banned). Project Coyote is a participant in a coalition of groups who are seeking to ban the use of M-44's after an Idaho family lost their dog to a cyanide bomb placed near the family home. The family's son was rushed to the hospital after suffering exposure to the sodium cyanide bomb and was severely traumatized having watched his beloved dog die from the deadly poison. On June 15, the Wildlife Services announced they had issued additional guidelines and an expanded review of their use as "predation damage management" devices.

PHOTO © TERRAY SYLVESTER

Fox states, "We work to change laws and policies to protect native carnivores from abuse and mismanagement, advocating coexistence instead of killing. We seek to change negative attitudes toward coyotes, wolves and other misunderstood predators by replacing ignorance and fear with understanding, respect and appreciation." She summarizes much of her organization's work in the Earth Island article thusly, "Project Coyote promotes innovative research into humane, practical, and ecologically based approaches to coyote-human/livestock conflicts. We work with researchers to identify areas that need further investigation and we organize collaborative enterprises between government agencies, carnivore experts, ecologists, and organizations that share a similar vision."

Through a combination of public education, coalition-building, scientific inquiry, and political activities, Fox and Project Coyote have accomplished much in a short lifetime. For further information on their projects, or to donate, please visit them at projectcoyote.org.

In closing, here is Project Coyote's vision, as stated on their website.

Project Coyote envisions a world where...

- Human communities coexist synergistically and peacefully with wildlife;
- Science empowers lasting solutions for resilient carnivore populations;
- Native carnivores are valued for their critical ecological role and their intrinsic worth;
- Children understand the value of Wild Nature;
- Compassionate conservation drives wildlife stewardship.

Additional Reading

"Stop Killing Coyotes" by Dan Flores
The New York Times | August 11, 2016
https://www.nytimes.com/2016/08/11/opinion/stop-killing-coyotes.html

TAB 7

The Year in Review: Case Law, Legislation, and Regulation

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This segment includes all materials received by the course book publication deadline.
Please contact the speaker for any other materials used at the program.

Animal Law

Year In Review

2018

Chelsea E. Kasten

Federal Legislation

- Dog and Cat Meat Prohibition Act
- Parity in Animal Cruelty Enforcement (PACE) Act
- Pet and Women's Safety (PAWS) Act

Dog and Cat Meat Prohibition Act: H.R. 6720: Effective December 20, 2018

- Illegal to slaughter dogs and cats for human consumption
  - Was still a legal practice in 44 states
  - Penalized consumption with fines up to $5,000
  - Prohibits shipping, sale, and transportation of animals for the purpose of slaughter for human consumption
    - Exception: Native American tribes performing religious ceremonies

Parity in Animal Cruelty Enforcement (PACE) Act: H.R. 4202: Effective December 20, 2018

PACE Act

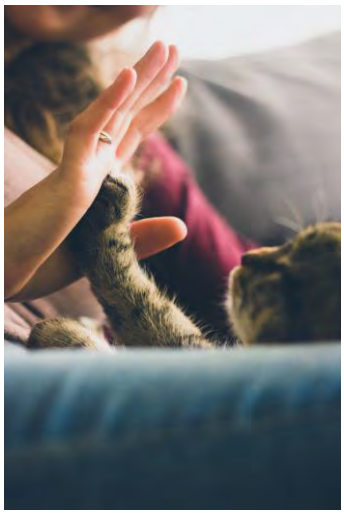
- United States territories are not exempt from the Animal Welfare Act's provisions against dogfighting and cockfighting.
  - US Territories: Guam, American Samoa, Puerto Rico, Northern Mariana Islands, and U.S. Virgin Islands

PACE Act

– Animal Welfare Act: 7 USC 2156

- Sponsoring or exhibiting an animal; attending or causing an individual under 16; buying, selling, delivering, possessing, training, or transporting animals for participation; use of Postal Service or other interstate instrumentality for promoting or furthering animal fighting venture
- Criminal Enforcement: Fine and/or period or imprisonment not more than 1 to 5 years, depending on which subsection of the Act is violated. 18 U.S.C. 49

Pet and Women Safety (PAWS) Act: H.R. 909: Effective December 20, 2018



PAWS Act

- Expands federal domestic violence protections to include protections for the pets of domestic violence victims.
- Support through grants to help with emergency and transitional shelter and housing assistance for domestic violence victims with pets.
  - Includes construction or operating expenses of newly developed or existing emergency and transitional pet shelter and housing, regardless is co-located at a victim service provider or within the community.

PAWS Act

- Pet is a domesticated animal like a dog, cat, bird, rodent, fish, turtle, horse, or other animal kept for pleasure rather than commercial purposes.
- Creates a criminal penalty for those who travel across state lines with the intent of violating an order of protection against a pet.

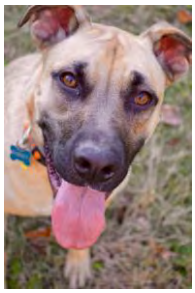
Illinois Legislation

- Animal Control Facilities –Licenses and Permits
- Bobcat Bill
- Illinois Exposure Provision
- Ivory Ban
- Justice for Buddy Bill: Animal Control Act
- Police Service Dog Protection Act
- Shelter Medicine Act

Animal Control Facilities –Licenses and Permits: 255 ILCS 605/2: S.B. 2380: Effective January 1, 2019

Animal Control Facilities

- Shelter Transparency Bill
- New reporting requirements for Animal Control Facilities.
- Now required to report the source of the animal, detail placement or transfer
  - Existing requirements: species, adoption, any deceased, euthanized, reclaims, and end inventory.



Animal Control Facilities

- All data will be published on the Department of Agriculture's website beginning December 31, 2021. 225 ILCS 605/7.1
  - Name of each licensed animal control facility or shelter and all report intake and outcome statistics.
  - Every December 31 of each year thereafter will report updated information.

Bobcat Bill Sunsets

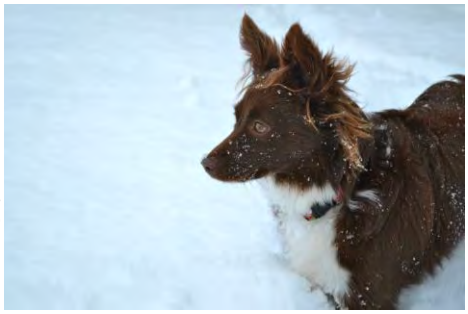
IL Exposure Provision

- Humane Care for Animal Act. 510 ILCS 70/3.01(c)
  - Gap in the existing law

Life-threatening situation to a companion animal for a prolonged period of time in extreme heat or cold temperatures. 510 ILCS 70/3.01(c)

Exposure Provision

Clarifies the right of law enforcement to take custody of abandoned or lost dogs and cats that appear to be suffering from exposure, without penalty. 510 ILCS 70/3.01(c—10)



Exposure Provision

- Civil immunity
- Law enforcement officers taking temporary custody must seek emergency veterinary care as soon as possible.
- Owner is held responsible for any costs associated with providing care.

Ivory Ban
815 ILCS 357; SB 4843; Effective January 1, 2019

- Enacted to compliment federal measures taken in 2016 to address most interstate commerce in ivory because there was a clear need to tightly regulate commerce in ivory and rhino horn

This Act prohibits the "Import, Sale, Offer for Sale, Purchase, Barter, or Possession with intent to sell any ivory, rhino horn, or product that contains those materials." 815 ILCS 357/10(a) (West 2018)

Ivory Ban

- "Reasonable Exceptions" under the Act
  - Antique guns and knives over 100 years old and musical instruments manufactured no later than 1975, where less than 20% volume of the item is ivory. 815 ILCS 357/12
  - Bona fide educational or scientific purposes, which are determined by the Department of Natural Resources. 815 ILCS 357/10(f)

Ivory Ban

- First time offender
  - ➢ Business offense and a fine not less than $1,000 or an amount equal to 2 times the total value. 815 ILCS 357/15(a)(1)
  - Second or subsequent offense
    - ➢ Class A misdemeanor, and a fine not less than $5,000 or an amount equal to 2 times the total value. 815 ILCS 357/15(a)(2)

"Justice For Buddy" Bill Animal Control Act: 510 ILCS 5/2.18b: 510 ILCS 5/15.5: S.B. 2386: Effective January 1, 2019

Reckless Dog Owner
510 ILCS 5/2.18b

- Someone who owns a dog that, while anywhere other than on the property of the owner, and without justification, the dog kills another dog that results in that dog being deemed a dangerous dog under Section 15.1 of the Animal Control Act. 510 ILCS 5/2.18b

- This owner must have knowingly allowed the dog(s) to violate Section 9 of the Animal Control Act on 2 occasions within 12 months of the incident where the dog was deemed dangerous or was involved in another incident that results in the dog being deemed dangerous on a second occasion within 24 months of the original dangerous determination. 510 ILCS 5/2.18b

510 ILCS 5/15.5

- Complaint & Penalty
  - Any citizen may file a complaint in a circuit court to determine whether someone is a reckless dog owner. 510 ILCS 5/15
  - Clear and convincing evidence
  - Immediate impoundment and forfeiture of all dogs has a property right in. 510 ILCS 5/15(a)
  - Prohibited from owning a dog for at least 12, no more than 36 months
  - Violation of forfeiture $500/day per dog

510 ILCS 5/15.5(a-5)

- An animal is not automatically defined by its owner
- A dog's history shall not be conclusive of its temperament and qualification for adoption or transfer.

510 ILCS 5/15.5(a-5)

- Temperament to be independently evaluated by a person qualified to conduct behavioral assessments
- If deemed adoptable, the receiving facility shall make a reasonable attempt to place the dog in another home, transfer to a rescue, or place in a sanctuary.

Police Service Dog Protection Act: 510 ILCS 83/: H.B. 1671: Effective January 1, 2019

Police Service Dog Protection

- Provide annual medical examination by licensed veterinarian and vaccinate against rabies prior to beginning police service. 510 ILCS 83/10
- Vehicles that transport police dogs
  - Equipped with a heat sensor monitor
    - Sends audible and visible notification remotely to responsible officer or the 24-hour law enforcement dispatch if the temperature reaches 85 degrees. 510 ILCS 83/15(2)

Police Service Dog Protection

- The vehicle shall have a safety mechanism to reduce interior temperature of the vehicle to protect the police dog. 510 ILCS 83/15(3)

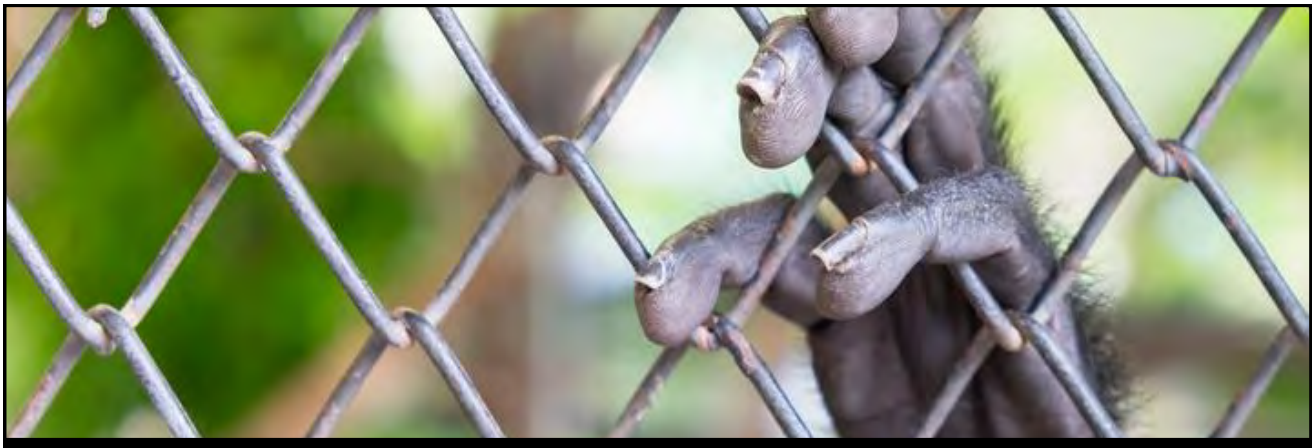
Shelter Medicine Act: 510 ILCS 92/: S.B. 2313: Effective August 10, 2018

- Amendment to the Illinois Public Health and Safety Animal Population Control Act
- The University of Illinois College of Veterinary Medicine now directs the Shelter Medicine Program. 510 ILCS 92/10
- Special Fund in the State for sterilization and vaccination of dogs and cats. 510 ILCS 92/45

Shelter Medicine Act

- Sterilization procedures may be performed by a University of Illinois veterinarian or supervised veterinary student. 510 ILCS 92/30
- Low-income families can participate in the program at a reduced rate with proof of ownership and proof of eligibility. 510 ILCS 92/25
- IL residents who manage a feral colony and humanely trap for TNR program recognized by municipality or county.

Thank You



ISBA Animal Law Section Presentation: 2018 Litigation Review

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Schiff Hardin

Introduction and Agenda

Welcome – Introduction

Agenda:

- Federal Animal Law Litigation
- Illinois Animal Law Litigation

Federal Animal Law Litigation

Schiff Hardin

Weyerhaeuser Co. v. U.S. Fish and Wildlife Service, et al., 586 U.S. ___, 139 S. Ct. 361 (2018)

- Dusky gopher frog listed as endangered in 2001 (group of 100 animals, in single pond in Mississippi, 98% habitat destroyed)
- 2012 agency designation of critical habitat includes so-called "Unit 1," 1,544 acres of private land in Louisiana.
- DGF not found in Unit 1 since 1965.
- DGF needs open canopy forests and ephemeral ponds; but Unit 1 doesn't have open canopy forest.
- Petitioners timber co. and landowners potentially impacted by habitat designation due to future permit requirements

Weyerhaeuser, Cont'd

- Questions presented:
  - What is "critical habitat" under the ESA?
  - Scope of judicial review of agency decisions
- Under ESA, when listing species, Secretary must "designate any *habitat* of such species . . . considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i).
- ESA defines critical habitat to include:
  - "specific areas . . .occupied by the species . . .[with] physical or biological features [ ] essential to [its] conservation. . .and []
  - "specific areas outside the [ ] area occupied by the species . . .[that Admin. determines] are essential for [its] conservation."
- Unanimous: it cannot be "critical habitat" if it is not habitat.

Weyerhaeuser, Cont'd

- ESA provision requires FWS to "tak[e] into consideration the economic impact" of the critical habitat designation. 16 U.S.C. § 1533(b)(2) (cost-benefit analysis).
- Timber Co. sought review of FWS's decision not to exclude Unit 1 from designation on a cost-benefit basis.
- FWS argued its action was committed to agency discretion.
- The Supreme Court held the "strong presumption" of judicial reviewability under the APA doomed FWS from insulating its determination from judicial review.
- Remanded for judicial review.

Crow Indian Tribe v. United States, 2018 WL 4568418, – F. Supp. 3d – (D. MT 2018)*

- Greater Yellowstone Ecosystem Grizzly Bears
- Challenged final ESA delisting rule (Jun. 30, 2017)
- FWS acted arbitrary & capriciously in its five-factor delisting "threats" analysis by delisting Distinct Population Segment ("DPS") without considering impact on remaining "lower-48."
- FWS acted A&C and contrary to "best available science" in determining it was not required to provide for natural connectivity or translocation of new genetic material into Yellowstone population.

Smith v. City of Detroit, 2018 WL 4961285, – Fed.Appx. – (6th Cir. 2018)

- Detroit PD executed search warrant in home of Smiths for allegedly selling marijuana.
- Officers shot and killed their 3 unlicensed dogs.
- Charged misdemeanor marijuana possession (dismissed when officers failed to appear for testimony).
- Since 2014, MI law requires prosecutors to bring proceedings against owner of unlicensed dogs. If owner doesn't comply, owner liable for penalties, but State cannot kill the dog.
- Because owners are entitled to process prior to seizure of unlicensed dogs, owners retain property interest in them.
- Seizure of dogs was unreasonable since officers did not know they were unlicensed.

ALDF v. Reynolds, 2019 WL 140069, – F. Supp. 3d – (S.D. IA 2019)

- 2012 Iowa criminal law, Iowa Code §717A.3A
- A person commits "agricultural production facility fraud" if the person willfully:
  - Obtains access to an agricultural production facility by false pretenses[, or]
  - Makes a false statement or representation as part of an application or agreement to be employed at an [agricultural facility], if the person knows the statement to be false, and makes the statement with intent to commit an act not authorized by the [facility] owner . . . .

ALDF v. Reynolds, Cont'd

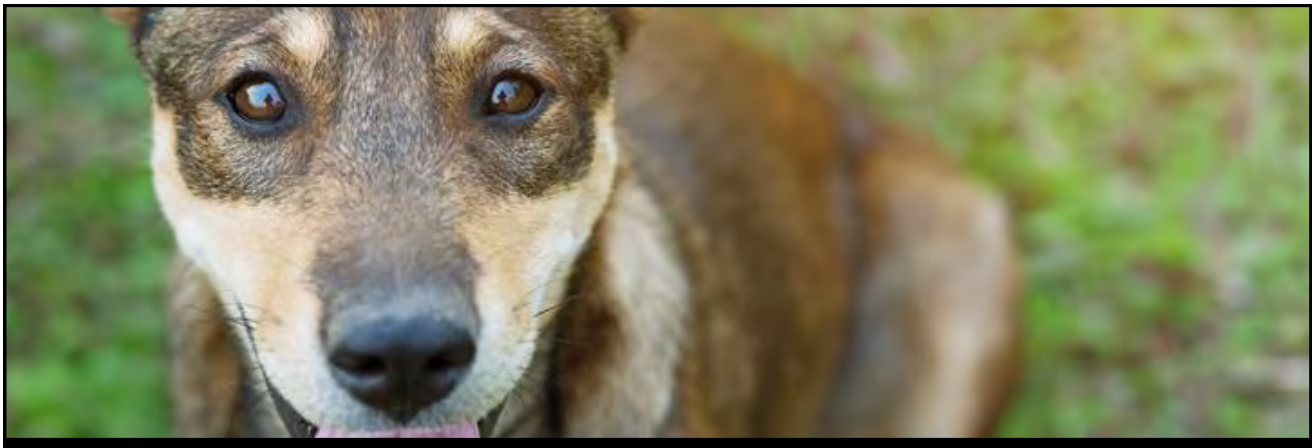
- Legislative purposes: biosecurity, security of private property, and harms that accompany investigative reports (protect agri. industry)
- First Amendment claim (subsumed 14A D/P claim):
  - False speech is protected speech under 1A if it doesn't cause a "legally cognizable harm" or provide "material gain" to speaker.
  - False statements implicated by §717A.3A don't do either, and therefore, are protected speech.
  - §717A.3A is content-based (targets "false" statements).
  - Scrutiny applied: strict (narrowly tailored for compelling gov't interest) or intermediate (gov't could achieve objectives w/ less restriction).
- Third defeat of state "ag-gag" laws (Idaho, Wyoming)

Naruto v. Slater, 888 F.3d 418 (9th Cir. 2018)

- Naruto, seven-year-old crested macaque
- Sulawesi, Indonesia island reserve
- David Slater's unattended camera and 2014 "Monkey Selfies" book
- Claimed copyright infringement, 17 U.S.C. §101

Naruto, Cont'd

- Next friend standing: no significant relationship; courts will not expand the doctrine
- Article III "case or controversy" standing: precedent controls
- No statutory standing under Copyright Act (for Naruto and all other non-humans): Congress can authorize statutory standing



Illinois Animal Law Litigation

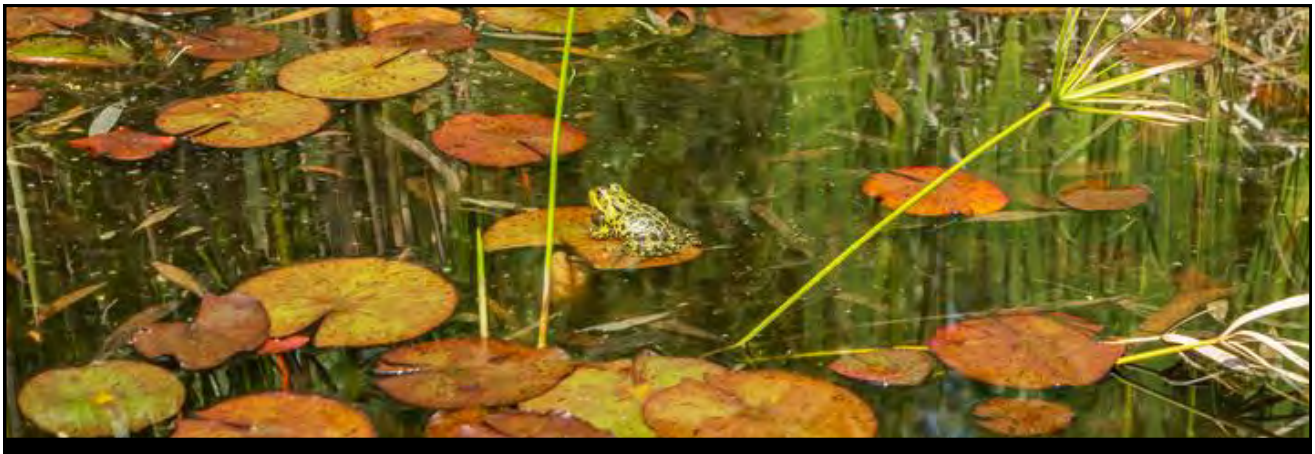
Schiff Hardin

People v. Robards, 2018 IL App (3d) 150832

- Robards left a house in July 2014 and left her two dogs there.
- In late November 2014, home owner discovered two emaciated, gaunt, dead dogs in deplorable conditions.
- Convicted of aggravated cruelty to companion animal, in violation of the Humane Care for Animals Act (510 ILCS 70/3.02(a)).
- Section 3.02(a): "No person may intentionally commit an act that causes a companion animal to suffer serious injury or death."
- Appealed based on lack of evidence of intent to commit a crime.
- Held: person intends "natural and probable consequences of his acts."
- Defendant's acts caused death "to two sentient creatures that suffered greatly from terminal starvation . . .[] which the Defendant callously inflicted on them. We find [ ] 12 months' probation [] Inexplicably lenient."

Questions?

Schiff Hardin



Thank you!

Molly L. Wiltshire
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Schiff Hardin

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ANIMAL LEGAL DEFENSE FUND; IOWA CITIZENS FOR COMMUNITY IMPROVEMENT; BAILING OUT BENJI; PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.; and CENTER FOR FOOD SAFETY, Plaintiffs, vs. KIMBERLY REYNOLDS, GOVERNOR; TOM MILLER, ATTORNEY GENERAL OF IOWA; and BRUCE E. SWANSON, MONTGOMERY COUNTY ATTORNEY, Defendants.	**4:17-cv-00362–JEG-HCA** **ORDER**

This matter is before the Court on cross-motions for summary judgment. Plaintiffs Animal Legal Defense Fund (ALDF), Iowa Citizens for Community Improvement (CCI), Bailing Out Benji, People for the Ethical Treatment of Animals, Inc. (PETA), and Center for Food Safety (CFS) (collectively, Plaintiffs), filed the first motion, ECF No. 49, which Defendants resist. Defendants Kimberly Reynolds, Tom Miller, and Bruce Swanson (collectively, Defendants), filed the second motion, ECF No. 57, which Plaintiffs resist. The parties agree that this matter is appropriate for resolution by summary judgment with each contending they are entitled to judgment as a matter of law. No party requested a hearing, and the Court finds a hearing unnecessary. The matter is fully submitted and ready for disposition.

I. BACKGROUND[1]

Iowa created the crime of "agricultural production facility fraud," Iowa Code § 717A.3A, in 2012, on the heels of several industrial farm investigations that brought critical national

[1] The facts set forth here are either not in dispute or viewed in the light most favorable to the nonmoving party. See Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc).

attention to Iowa's agricultural industry. For example, in 2011, an undercover investigation at Iowa Select Farms produced reports of workers hurling small piglets onto a concrete floor.[2] Another investigation at Iowa's Sparboe Farms, documented reported mistreatment of hens and chicks.[3] And yet another, conducted by PETA, exposed workers at a Hormel Foods supplier in Iowa "beating pigs with metal rods," "sticking clothespins into pigs' eyes and faces, and a supervisor kicking a young pig in the face, abdomen, and genitals to make her move while telling the investigator, 'You gotta beat on the bitch. Make her cry.'" Jeffrey S. Kerr Aff. ¶ 14, Pls.' App. 14, ECF No. 49-2. PETA's investigation, if not also the others, was an undercover, employment-based investigation in which the investigator also performed tasks assigned by the employer.

While the results of these investigations were being circulated by news media, the Iowa legislature considered H.F. 589, § 2 (Iowa 2012), which would eventually become § 717A.3A. Lawmakers described the bill as being responsive to two primary concerns of the agricultural industry: facility security (both in terms of biosecurity and security of private property) and harms that accompany investigative reporting.[4] For example, as to security, then-Representative

[2] Pls.' Br. 5, ECF No. 53 (citing Anne-Marie Dorning, Iowa Pig Farm Filmed, Accused of Animal Abuse, ABC News (June 29, 2011), https://abcnews.go.com/Business/iowa-pig-farm-filmed-accused-animal-abuse/story?id=13956009).

[3] Pls.' Br. 3, ECF No. 53 (citing McDonald's Cuts Egg Supplier After Undercover Animal Cruelty Video, L.A. Times (Nov. 18, 2011, 2:24 PM), https://latimesblogs.latimes.com /money_co/2011/11/mcdonalds-cuts-egg-supplier-after-undercover-animal-cruelty-video.html).

[4] To establish the existence of these concerns, the parties provided statements by lawmakers who were members of the Iowa legislature during the debate and passage of § 717A.3A. See Pls.' SUF ¶¶ 78-82, ECF No. 49-1; Defs.' SUF ¶¶ 1-7, ECF No. 57-1. Where other courts have relied upon similar types of statements by lawmakers, it has been for the limited purpose of providing history to enactment of a law, see, e.g., Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1191-92 (9th Cir. 2018); Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1198 (D. Utah 2017), or assessing whether the state's proffered interest served by the law was the actual interest served, see, e.g., Herbert, 263 F. Supp. 3d at 1212. In the absence of formalized legislative history, and because this Court conducts no animus analysis that could require

Annette Sweeney provided: "With this bill we want to make sure everybody involved in our livestock facilities and working within in those facilities is forthright, and want to make sure our livestock is being kept safe,"[5] and then-Senate President John "Jack" Kibbie supported an early draft of the bill because "[t]here's viruses that can put these producers out of business, whether it's cattle, hogs or poultry."[6] As to reputational harms, former Senator Tom Rielly commented on a draft version of the bill: "What we're aiming at is stopping these groups that go out and gin up campaigns that they use to raise money by trying to give the agriculture industry a bad name."[7]

The bill, signed into law on March 2, 2012, amended chapter 717A of the Iowa Code, which already prohibited disrupting, destroying, or damaging property at an animal facility, id. § 717A.2 (2003), or on crop operation property, id. § 717A.3 (2001), and also the use of pathogens to threaten animals and crops, id. § 717A.4 (2004). The new addition provides that a person commits "agricultural production facility fraud" if the person willfully:

a. Obtains access to an agricultural production facility by false pretenses[, or]

b. Makes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.

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reliance on legislative commentary, see infra note 13, the Court's use of the lawmakers' statements is similarly limited to illustrating the background for the current legal dispute.

[5] Defs.' SUF ¶ 4, ECF No. 57-1 (quoting Paul Yeager, "Ag Gag" Bill Passes Iowa Legislature, Iowa Pub. Television, (Mar. 2, 2012), http://www.iptv.org/mtom /story/13293/ag-gag-bill-passes-iowa-legislature).

[6] Defs.' SUF ¶ 5, ECF No. 57-1 (quoting Amanda Peterka, State Legislatures Take Up Bills Barring Undercover Videos of Confined Animal Feeding Operations, N.Y. Times, (May 5, 2011), https://archive.nytimes.com/www.nytimes.com/gwire/2011/05/05/05greenwire-state-legislatures-take-up-bills-barring-under-88103.html).

[7] Pls.' SUF ¶ 79, ECF No. 49-1 (quoting Mike Wesier, Iowa May be First to Ban Secret Video on Farms, Sioux City Journal (May 22, 2011), https://bit.ly/2kYYA9L).

Iowa Code § 717A.3A (2012). A first conviction under § 717A.3A is a serious misdemeanor, and a second or subsequent conviction is an aggravated misdemeanor. Id. § 717A.3A(2). A person can also be held criminally liable for conspiring to violate this statute, aiding and abetting a violation, or harboring, aiding, or concealing the person committing the violation, "with the intent to prevent the apprehension of the person." Id. § 717A.3A(3)(a). The law has the effect of criminalizing undercover investigations of certain agricultural facilities, including those mentioned above, and those of interest to the general public, such as puppy mills.[8]

Iowa Code § 717A.3A is similar, and in parts identical, to other states' laws that prohibit conduct and speech related to agricultural operations. In fact, Iowa is one of many states that have passed or attempted to pass such legislation in the last decade. See, e.g., Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1196-98 (D. Utah 2017) (providing a brief history of similar proposed and enacted legislation across the country). Of those in effect, several have been invalidated or limited based on First Amendment challenges. See W. Watersheds Project v. Michael, No. 15-CV-169-SWS, 2018 WL 5318261, at *10 (D. Wyo. Oct. 29, 2018) (invalidating, in part, a Wyoming statute criminalizing entry on private land for the purpose of resource data collection relating to land use, including animal species, as facially unconstitutional under the First Amendment); Herbert, 263 F. Supp. 3d at 1211-13 (finding a Utah law, very similar to Iowa's law, criminalizing acts of obtaining access to agricultural operations under false pretenses and recording images at such operations under false pretenses, to be facially unconstitutional

[8] An "agricultural production facility" is any "location where an agricultural animal is maintained for agricultural production purposes, including but not limited to a location dedicated to farming . . . , a livestock market, exhibition, or a vehicle used to transport the animal," as well as animal research locations, veterinary facilities, kennels, and pet shops. Id. § 717A.1(3), (5). An "agricultural animal" is defined as "[a]n animal that is maintained for its parts or products having commercial value." Id. § 717A.1(1)(a).

under the First Amendment); Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1200-09 (D. Idaho 2014) (finding an Idaho law criminalizing interference with agricultural production facilities to be facially unconstitutional under the First Amendment), aff'd in part, rev'd in part sub nom. Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018) (reversing as to the portion of the law related to offers of employment).

Plaintiffs and their *amici*—Iowa Freedom of Information Council and Iowa Center for Public Affairs Journalism—frame this legislative trend within the context of an on-going tension between members of the news media and the agricultural industry. The *amici* describe an American public eager to consume news about the food they eat, and a responsive group of defenders of the agricultural industry, understandably eager to have the news about them be positive, who have worked "to suppress any unflattering coverage of inhumane slaughterhouse practices, unsanitary factory conditions and worker abuses" through legislation such as § 717A.3A. *Amici Curiae* Br. 3, ECF No. 73. Plaintiffs and their *amici* argue that lawmakers, finding the First Amendment in the way of attempts to directly halt publication of these abuses, see, e.g., New York Times Co. v. United States, 403 U.S. 713 (1971), have attempted to suppress information from reaching the press "by prosecuting newsgathering activities that serve as the foundation of investigative journalism," *Amici Curiae* Br. 3, ECF No. 73; Pls.' Br. 1, ECF No. 53. Defendants counter that § 717A.3A is about defending the private property rights of Iowans who own agricultural facilities.

A. The Parties

Plaintiffs are non-profit organizations that engage in advocacy and investigative work related to animal cruelty, wellbeing of workers, and safety of food supply. They state they would like to conduct undercover investigations, or use the results of others' investigations, but

have not done so given the threat § 717A.3A would be enforced against them. Plaintiffs challenge § 717A.3A, arguing it impermissibly restricts their free speech under the First Amendment. Defendants are the Governor of Iowa, the Attorney General of Iowa, and the County Attorney for Montgomery County, who are sued in their official capacities and defend the constitutionality of § 717A.3A, arguing there is no First Amendment right to engage in the conduct prohibited by the statute.

B. Procedural History

Plaintiffs filed their Complaint on October 10, 2017, alleging that § 717A.3A is facially unconstitutional as a content-based, viewpoint-based, and overbroad regulation. Plaintiffs asserted claims under the First Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Defendants filed a Motion to Dismiss on December 8, 2017, under Federal Rules of Civil Procedure 12(b)(1) and (b)(6), arguing the Plaintiffs lacked standing to bring their claims, and alternatively, that the Plaintiffs failed to state claims under either the First or the Fourteenth Amendments. On February 27, 2018, this Court ruled on the motion, finding the Plaintiffs had standing, dismissed their Equal Protection claim, and denied the motion in all other respects. Animal Legal Def. Fund v. Reynolds, 297 F. Supp. 3d 901, 907-30 (S.D. Iowa 2018). Plaintiffs filed a Motion for Summary Judgment on June 22, 2018, ECF No. 49, which Defendants resist. Defendants filed a Cross-Motion for Summary Judgment on July 13, 2018, ECF No. 55, which Plaintiffs resist.

II. DISCUSSION

A. Jurisdiction

Because Plaintiffs bring this action under a federal statute, 42 U.S.C. § 1983, which provides relief based on violations of the United States Constitution, this Court has original

jurisdiction over the claims asserted pursuant to 28 U.S.C. § 1331. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the events giving rise to the claims occurred within this district.

B. Standing

As noted, Defendants previously moved to dismiss this case on standing grounds. Defendants argued Plaintiffs failed to establish an injury in fact. In a lengthy discussion of organizational standing, the Court found Plaintiffs had standing. Reynolds, 297 F. Supp. 3d at 912-17. The Court reasoned that Plaintiffs properly alleged an injury in fact that arose from the potential enforcement of § 717A.3A, which was fairly traceable to the conduct Plaintiffs sought to enjoin, and that the relief requested would redress the alleged injuries in fact by removing the threat of legal sanction, allowing Plaintiffs to reallocate resources. Id. Recognizing this Court's ruling on standing, Defendants do not contest standing for purposes of summary judgment, but preserve the issue for any appeal. See Defs.' Cross-Mot. Br. 5 n.1, ECF No. 58-1. The Court will not repeat its standing findings, but incorporates them herein. Reynolds, 297 F. Supp. 3d at 912-17.[9]

[9] In asserting Plaintiffs lacked standing, Defendants relied on People for the Ethical Treatment of Animals, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), rev'd per curiam, 737 F. App'x 122, 130-31 (4th Cir. 2018) (unpublished), arguing Plaintiff's claimed injuries were similarly too remote and speculative to support standing. The public interest organizational plaintiffs in Stein challenged a North Carolina law that created a civil cause of action against a person who "intentionally gains access to the nonpublic areas of [another's] premises and engages in an act that exceeds the person's authority." Id. at 372 (quoting N.C. Gen. Stat. § 99A–2(a)). The district court in Stein found the plaintiffs lacked standing, reasoning the state was not required to enforce non-criminal laws, thus private enforcement of the law against plaintiffs was premature and speculative. Id. at 383-84. While this Court found, and still maintains, that Stein is materially distinguishable from the present case based on the nature of the sanction alone, see Reynolds, 297 F. Supp. 3d at 913-14, it is noteworthy that subsequent to this Court's February 27 Order, the Fourth Circuit Court of Appeals reversed and remanded Stein, holding plaintiffs sufficiently alleged an actual and well-founded fear that the North Carolina law would be enforced against them, see Stein, 737 F. App'x at 130-31.

C. Summary Judgment Standard

The Federal Rules of Civil Procedure authorize "motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Gerlich v. Leath, 861 F.3d 697, 704 (8th Cir. 2017). On cross-motions for summary judgment, the Court evaluates each motion independently to determine whether there exists a genuine dispute of material fact and whether each movant is entitled to judgment as a matter of law. Sam's Riverside, Inc. v. Intercon Sols., Inc., 790 F. Supp. 2d 965, 975 (S.D. Iowa 2011).

D. The First Amendment Claims[10]

Through its "sometimes inconvenient principles," the First Amendment limits the government's ability to make laws that restrict speech. United States v. Alvarez, 567 U.S. 709, 715 (2012) (plurality); see U.S. Const. amend I. Under the First Amendment, the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983)). The First Amendment does not protect all speech, "but if a law restricts speech that is protectable, the State must justify the law by articulating the problem it is meant to address and demonstrating that the law is properly tailored to address that problem." Herbert, 263 F. Supp. 3d at 1200.

[10] Defendants, in their capacities as officials of the State of Iowa, are properly subject to Plaintiffs' claims under the First Amendment, as incorporated by the Fourteenth Amendment. See Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943).

Plaintiffs maintain § 717A.3A violates the First Amendment in two ways. First, it is a content- and viewpoint-based speech restriction that fails to withstand judicial scrutiny; and second, it is overbroad.[11] Defendants contend that § 717A.3A regulates conduct, not speech; and to the extent § 717A.3A regulates speech, it only prohibits false statements that do not receive First Amendment protection. Defendants alternatively argue that if § 717A.3A does regulate protected speech, the law can withstand intermediate scrutiny.

1. Judicial Scrutiny Analysis

Generally, a free speech challenge proceeds in three stages. Id. at 1201. First, the Court resolves whether the challenged statute implicates protected speech. Id. If it does, the Court determines what level of scrutiny applies. Id. Then, the Court applies the appropriate scrutiny and confirms whether the statute satisfies the applicable standard. Id.

a. Protected Speech

The Court resolved the first question in a prior order. Speech is necessarily implicated by § 717A.3A because "one cannot violate § 717A.3A *without* engaging in speech," Reynolds, 297 F. Supp. 3d at 918. The speech implicated is false statements and misrepresentations.

[11] In their Complaint, Plaintiffs request, *inter alia*, the Court (1) declare Iowa Code § 717A.3A unconstitutional on its face and as applied to Plaintiffs, (2) permanently enjoin Defendants from enforcing the statute, and (3) strike down the challenged statute in its entirety. Although Plaintiffs describe their challenge as both facial and as applied, "[t]he label is not what matters." John Doe No. 1 v. Reed, 561 U.S. 186, 194 (2010). "The important point is that plaintiffs' claim and the relief that would follow—[as outlined above and in Plaintiffs' Complaint]—reach beyond the particular circumstances of these plaintiffs. They must therefore satisfy our standards for a facial challenge to the extent of that reach." Id. While facial challenges under the First Amendment have, in some cases, been discouraged, see Republican Party of Minn., Third Cong. Dist. v. Klobuchar, 381 F.3d 785, 791 (8th Cir. 2004), the Court finds it appropriate in this case, as in the similar cases collected supra Part I.

To some degree, the concept of constitutional protection for speech that is false may be disquieting. However, as the Supreme Court has reasoned, "[t]he Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace." Alvarez, 567 U.S. at 729-30 (noting "few might find [the defendant]'s statements anything but contemptible," yet "his right to make those statements is protected by the Constitution's guarantee of freedom of speech and expression"). Further, not all false statements are protected speech. Id. at 721-22.

Ultimately, in assessing falsehoods in this context, the Court engages in a legal, not moral, analysis. The Supreme Court has recognized that "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." Id. at 718. Therefore, false statements will be protected by the First Amendment only if they *do not* cause a "legally cognizable harm" or provide "material gain" to the speaker. Id. at 718, 723. And, as the Court has already explained, the false statements implicated by § 717A.3A are protected speech because they do not cause either. Reynolds, 297 F. Supp. 3d at 920-24 (discussing Alvarez, 567 U.S. at 717-35).

Previously, Defendants offered argument to the contrary, none of which persuaded the Court.[12] Defendants now indicate they "respectfully reassert their prior arguments . . . in the

[12] Notably, Defendants assert, as they did on their motion to dismiss, that the First Amendment cannot be used to trample private property rights, nor as a defense to the trampling of private property rights. They express concern for the private property owner's ability to exclude individuals without the aid of this law. As to using the First Amendment as a defense, this line of argument applies to those who violate a content-neutral law (e.g., generic trespass) and ask for shelter under the First Amendment. See, e.g., Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 516 (4th Cir. 1999). While that defense was discussed in regard to the motion to dismiss, see Reynolds, 297 F. Supp. 3d at 920-21, the scrutiny analysis of § 717A.3A is different than the Court's prior analysis on the motion to dismiss because the challenged law is not one of general applicability, as explained *infra* Part II.D.1.b. Defendants' other argument, that without the aid of this law, private property rights would be wasted, is similarly inapplicable.

hope that the Court will view the arguments in a new light." Defs.' Comb. Br. 6, ECF No. 58-1. The Court, finding no reason to diverge and declining to do so, reaffirms its prior legal findings. Iowa Code § 717A.3A implicates protected speech.

b. Scrutiny

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the [state] proves that they are narrowly tailored to serve compelling state interests." Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226 (2015). In its prior order, the Court determined that "[b]oth regulations contained within § 717A.3A are content-based on their face." Reynolds, 297 F. Supp. 3d at 919. Iowa's "enforcement authorities must necessarily examine the content" of an individual's statement to determine whether the individual violates the statute. See FCC v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984). Not only must enforcement authorities know the content of the speech, but they must know the content's veracity. Iowa Code § 717A.3A is thus a content-based regulation.[13]

Given that § 717A.3A is a content-based regulation, the Court must now determine the appropriate level of scrutiny. The First Amendment requires heightened scrutiny whenever the state creates "a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). "In assessing content-based restrictions on protected speech, the Court has not adopted a free-wheeling approach, but rather has applied the 'most exacting scrutiny.'" Alvarez, 567 U.S. at 724 (citation omitted) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994)). That is, a statute that is content

[13] The parties provided argument as to whether § 717A.3A is also viewpoint-based, relying heavily on legislative commentary. Having found that the law is a content-based regulation on its face, there is "no need to consider the [state]'s justifications or purposes for enacting the [law] to determine whether it is subject to strict scrutiny." Reed, 135 S. Ct. at 2227.

based on its face, as § 717A.3A is here, must be able to survive strict scrutiny. Reed, 135 S. Ct. at 2228.

Defendants urge the Court to apply intermediate scrutiny, stating that the concurring opinion in Alvarez is controlling. See Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (citation and internal quotation marks omitted)). Plaintiffs, also referencing Alvarez, contend that strict scrutiny is the correct standard to apply. The parties' divergent interpretations of Alvarez, and how it should apply to this case, are understandable given that Alvarez was a plurality decision.

In Alvarez, the United States Supreme Court examined the Stolen Valor Act ("the Act"), which made it a crime for anyone to "falsely represent himself or herself" as having been awarded any decoration or medal authorized for the Armed Forces of the United States. Alvarez, 567 U.S. at 715. The defendant, Alvarez, falsely boasted during a public meeting that he was awarded the Congressional Medal of Honor and was subsequently convicted of violating the Act. Id. at 714. The Supreme Court invalidated the conviction and struck down the Act on First Amendment grounds. Id. at 715.

The Court's decision was fragmented, which has led to the somewhat uncertain legal framework for analyzing regulations that proscribe false speech.[14] Justice Kennedy wrote on

[14] In 281 Care Comm. v. Arneson (281 Care Comm. II), 766 F.3d 774 (8th Cir. 2014), the Eighth Circuit determined that neither the plurality, nor the concurring opinion in Alvarez, controlled the level of scrutiny that should be applied to a Minnesota law criminalizing false campaign speech. Instead, the Arneson court held that the statute must be subject to strict scrutiny because political speech "occupies the core of the protection afforded by the First Amendment." Id. at 784. In deciding that Alvarez did not control the level of scrutiny, the court explained that "it was largely (if not solely) because the regulation at issue in Alvarez concerned false

behalf of a four-Justice plurality, which found the Act was not narrowly tailored as strict scrutiny required. Id. at 729-30. Justice Breyer, who was joined by Justice Kagan, concurred in the judgment, but rejected the plurality's "strict categorical analysis," and instead applied a form of intermediate scrutiny. Id. at 730 (Breyer, J., concurring). Justice Breyer determined the Act could not survive intermediate scrutiny because "the statute work[ed] First Amendment harm, while the Government [could] achieve its legitimate objectives in less restrictive ways." Id. Justice Breyer recognized that strict scrutiny was necessary in some cases, id. at 731-32, but he found intermediate scrutiny more appropriate where "dangers of suppressing valuable ideas are lower," such as when "the regulations concern false statements about easily verifiable facts that do not concern" more complex subject matter. Id. at 732.

Based upon the regulation of false statements involved in the present case, this Court need not determine whether the plurality opinion or the concurring opinion in Alvarez is controlling. See Marks, 430 U.S. at 193. This Court, as have other courts considering similar statutes, reaches the same conclusion under either strict or immediate scrutiny. See, e.g., Wasden, 878 F.3d at 1197-98 (applying strict scrutiny and intermediate scrutiny to a law similar to § 717A.3A(a)); Herbert, 263 F. Supp. 3d at 1209-10 (applying strict scrutiny).

c. Application of Scrutiny

i. Strict Scrutiny

When the state seeks to regulate protected speech, it bears the heavy burden of showing that the prohibition satisfies constitutional scrutiny. Alvarez, 567 U.S. at 726. This burden is "for good reason" because "were we to give the Government the benefit of the doubt when it

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statements about easily verifiable facts that did not concern subjects often warranting greater protection under the First Amendment, that the concurring Justices applied intermediate scrutiny." Id. (citing Alvarez, 567 U.S. 731-32 (Breyer, J., concurring)). Precedents on "the regulation of *political* speech," and not Alvarez, "dictate[d] the level of scrutiny" applicable to its analysis of the Minnesota law. Id. (emphasis added).

attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas." United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000). Therefore, under strict scrutiny, a content-based law is presumptively unconstitutional and will be justified only if the state proves that the law is narrowly tailored to serve a compelling state interest. Id. at 813.

Plaintiffs argue § 717A.3A cannot survive strict scrutiny. Defendants make no attempt to directly argue otherwise, but instead focus on all the reasons why strict scrutiny should not apply. Defendants have not met their burden.

Defendants contend § 717A.3A protects the state's interests of private property and biosecurity. As factual support, they provide the statements of three lawmakers and then-Governor Branstad. As a preliminary matter, the record makes clear that these were not the only reasons motivating the enactment of § 717A.3A. Rather, as discussed above, and as admitted by Defendants, some lawmakers also wanted to stop "subversive acts" by "groups that go out and gin up campaigns . . . to give the agricultural industry a bad name."[15] Pls.' SUF ¶¶ 79-80, ECF No. 49-1. Other statements in the record illustrate that § 717A.3A serves the interest of protecting Iowa's agricultural industry from perceived harms flowing from undercover investigations of its facilities.

However, accepting Defendants' argument that property and biosecurity are the state's actual interests protected by § 717A.3A, the Court is persuaded these interests are important; but they are not compelling in the First Amendment sense. Herbert, 263 F. Supp. 3d at 1211-12 (assuming, despite record evidence to the contrary, that the state's proffered interests—protection from spread of disease; injury to animals and workers caused by unauthorized

[15] See supra note 4.

actions—were the actual reasons for enacting the statute, but finding that the harms targeted were "entirely speculative," and therefore could not be considered compelling); Otter, 118 F. Supp. 3d at 1207-08 (finding the state's "interest in protecting personal privacy and private property" to be important, but not compelling; furthermore, "even if the [s]tate's interest in protecting the privacy and property of agricultural facilities was 'compelling' in the First Amendment sense, [the statute] [wa]s not narrowly drawn to serve those interests").

Even if the state's proffered interests are compelling, § 717A.3A's prohibitions are not narrowly tailored to serve either interest. If the state is going to restrict protected speech, the restriction must be "actually necessary" to achieve the state's compelling interest. Alvarez, 567 U.S. at 725 (quoting Brown v. Enter. Merchs. Ass'n, 564 U.S. 786, 799 (2011)). A prohibition is actually necessary if there is a "direct causal link between the restriction imposed and the injury to be prevented." Id.

Defendants have produced no evidence that the prohibitions of § 717A.3A are actually necessary to protect perceived harms to property and biosecurity. Id. at 726-27 (stating that the government's reliance on "common sense" and not "evidence to support its claim" fails to establish the causal link necessary to show narrow tailoring); 281 Care Comm. II, 766 F.3d at 790 ("Even though the effect of election fraud or detecting the fraud itself, arguably, is a bit more amorphous and difficult to detect, *only* relying upon common sensibilities to prove it is taking place still falls short."). Defendants have made no record as to how biosecurity is threatened by a person making a false statement to get access to, or employment in, an agri-cultural production facility. Nor, in the absence of any record to the contrary, will the Court assume that biological harm turns on a human vector making a false statement unrelated to such harm in order to gain access to the facility. Protecting biosecurity is therefore purely speculative

and cannot constitute a compelling state interest. 218 Care Comm. II, 766 F.3d at 787 (rejecting the state's reliance on "common sense" instead of "empirical evidence"); Herbert, 263 F. Supp. 3d at 1212 (finding that a Utah law, which is almost identical to § 717A.3A(1)(a), was not "actually necessary" to achieve the state's interests of health and safety of employees and animals because the state offered no evidence that those interests were in danger, nor that the law would remedy those dangers).

Further, "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." McCullen v. Coakley, 134 S. Ct. 2518, 2540 (2014). "The existence of content neutral alternatives to" protect property rights and biosecurity, "'undercut[s] significantly' the defenses raised to the statutory content." Survivors Network of Those Abused by Priests, Inc. v. Joyce, 779 F.3d 785, 793-94 (8th Cir. 2015) (alteration in original) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992)). The Court need not look far to learn that both the state's proffered interests could be served by alternative measures. As to private property and trespass concerns, an already existing section of Chapter 717A of the Iowa Code provides that persons "shall not, without the consent of the owner" do various acts, including entering the facility to disrupt or otherwise harm the operation. Iowa Code § 717A.2. With similar interests in mind, the state could also rely upon Iowa's existing trespass law, Iowa Code § 716.7(2), to protect its proffered interests without chilling speech.[16] See Wasden, 878 F. 3d at 1196. Biosecurity is effectively and appropriately protected by the last

[16] Defendants argue that the trespass statute's penalties are clearly insufficient to prohibit trespass because the plaintiff-organizations did not seem to be deterred by them. This argument still fails to explain how amendment of the trespass statute would not adequately deter the behavior without suppressing speech. Therefore, Defendants fail to explain why the trespass law is insufficient to serve the interest of protecting property. McCullen, 134 S. Ct. at 2540.

section of Chapter 717A, which prohibits the willful possession, transportation, or transfer of "a pathogen with an intent to threaten the health of an animal or crop." See Iowa Code § 717A.4.

Not only is § 717A.3A unnecessary to protect the state's interests, it is also an under-inclusive means by which to address them. "Where a regulation restricts a medium of speech in the name of a particular interest but leaves unfettered other modes of expression that implicate the same interest, the regulation's underinclusiveness may 'diminish the credibility of the government's rationale for restricting speech in the first place.'" Johnson v. Minneapolis Park & Recreation Bd., 729 F.3d 1094, 1100 (8th Cir. 2013) (quoting City of Ladue v. Gilleo, 512 U.S. 43, 52 (1994)). That is, an underinclusive prohibition should raise "serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." Brown, 564 U.S. at 802. Here, § 717A.3A does nothing to deter the exact same alleged harms—trespass and biosecurity breaches—from individuals who proceed to access or enter a facility without false pretense or misrepresentation.

The prohibition is also overinclusive due to its lack of sufficient limitations. Section 717A.3A(1)(a) includes no limiting features whatsoever, allowing it to apply even to the most innocent of circumstances. Cf. Alvarez, 567 U.S. at 736-37 (Breyer, J., concurring) (finding under intermediate scrutiny that the lack of any "limiting features" should lead the court to believe that the statute "risks significant First Amendment harm"). By Defendants' own admission, § 717A.3A(1)(b) sweeps more broadly than a similar statute under Idaho law. See Wasden, 878 F.3d at 1201 (finding an Idaho law, which prohibited an individual from obtaining "employment with an agricultural production facility by force, threat, or misrepresentation with *the intent to cause economic or other injury*" was not subject to judicial scrutiny (emphasis

added)).[17] Here, Defendants argue that § 717A.3A's more expansive limiting feature should not be problematic because the language codifies the duty of loyalty, which they say provides that a "servant must do nothing hostile to the master's interest." Defs.' Comb. Br. 19, ECF No. 58-1 (quoting Condon Auto Sales & Serv., Inc. v. Crick, 604 N.W.2d 587, 599 (Iowa 1999)). But, something *not authorized* is not necessarily something *hostile* to the master's interest. An employer can choose not to authorize a wide variety of conduct, none of which may actually result in a breach of the employee's duty of loyalty (or cause harm). Here, Defendants seek to greatly expand the reach of the duty of loyalty. The Iowa Supreme Court has cautioned that even a *civil* cause of action based on the breach of the duty of loyalty must be limited in scope. Condon, 604 N.W.2d at 600 ("[E]ven in those jurisdictions which recognize a cause of action for breach of loyalty, the action is limited in scope. A broad cause of action would give employers more protection than needed and could create an unfair advantage."). To the extent that a violation of § 717A.3A can be likened to the common law breach of a duty of loyalty, to criminalize such a breach goes far beyond what is necessary to protect the state's interests and allows for expansive prosecution.

ii. Intermediate Scrutiny

Even if the Court applies the type of intermediate scrutiny advocated for by Justice Breyer and Defendants, Iowa Code § 717A.3A still fails. By its own terms, § 717A.3A "criminalizes speech that inflicts no 'specific harm' on property owners, 'ranges very broadly,' and risks significantly chilling speech that is not covered under the statute." Wasden, 878 F. 3d at 1198 (quoting Alvarez, 567 U.S. at 736-37 (Breyer, J., concurring)). While the First Amendment

[17] The Court already discussed Wasden in length, finding it largely unpersuasive as to § 717A.3A(1)(b). See Reynolds, 297 F. Supp. 3d at 924-25.

doctrine permits the regulation of some categories of lies—those that cause a legally cognizable harm or material gain—it does not permit § 717A.3A, which is so broad in its scope, it is already discouraging the telling of a lie in contexts where harm is unlikely and the need for prohibition is small. The right to make the kinds of false statements implicated by § 717A.3A—whether they be investigative deceptions or innocuous lies—is protected by our country's guarantee of free speech and expression. Alvarez, 567 U.S. 729-30. For all of these reasons, Iowa Code § 717A.3A fails to survive judicial scrutiny.[18]

E. The Fourteenth Amendment Due Process Claim

Defendants assert they are entitled to summary judgment as to a remaining due process claim. Plaintiffs do not provide argument on this issue. The Court's prior order clarified that Count III of the Complaint, brought under the Fourteenth Amendment, included two theories, one under the Due Process Clause and the other under the Equal Protection Clause. The Court dismissed the portion of Count III alleged pursuant to the Equal Protection Clause and found the portion alleged pursuant to the Due Process Clause was subsumed by Plaintiffs' Count I, under the First Amendment. Reynolds, 297 F. Supp. 3d at 926 ("The above discussion concerning First Amendment protection for the speech prohibited by § 717A.3A addresses the former theory, as the First Amendment only applies to Defendants via the Fourteenth Amendment."). The First Amendment fully addresses the claim, which cannot simultaneously survive as a Fourteenth Amendment due process claim. See Albright v. Oliver, 510 U.S. 266, 273 (1994)

[18] Plaintiffs invoke the First Amendment's overbreadth doctrine in Count II of their Complaint. Because the Court has already found § 717A.3A constitutionally invalid, it is unnecessary to determine whether the statute can survive overbreadth analysis. See United States v. Stevens, 559 U.S. 460, 473 (2010) (indicating that traditional facial analysis and overbreadth analysis are alternatives); Rideout v. Gardner, 838 F.3d 65, 72 n.5 (1st Cir. 2016) ("Because the statute fails under intermediate scrutiny, we also need not reach the plaintiffs' argument that the statute fails under the overbreadth doctrine.").

("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." (citation and internal quotation marks omitted)). Therefore, Count III is now dismissed as moot.

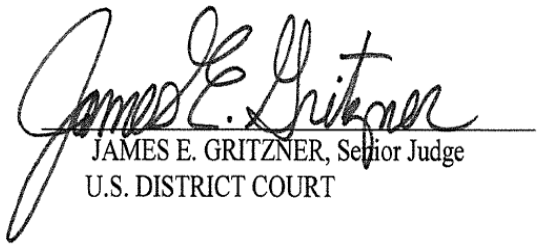
III. CONCLUSION

Based on the foregoing, Plaintiffs' Motion for Summary Judgment, ECF No. 49, must be **granted**, Defendants' Motion for Summary Judgment, ECF No. 57, must be **denied**, and the remaining due process claim in Count III must be **dismissed**.

On the issues of specific injunctive relief and the claim for legal fees, the Court will await additional briefing by the parties.

IT IS SO ORDERED.

DATED this 9th day of January, 2019.



JAMES E. GRITZNER, Senior Judge
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CROW INDIAN TRIBE; et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA; et al.,

Federal Defendants.

and

STATE OF WYOMING; et al.,

Defendant-Intervenors.

CV 17–89–M–DLC

(Consolidated with Case Nos.
CV 17–117–M–DLC,
CV 17–118–M–DLC,
CV 17–119–M–DLC,
CV 17–123–M–DLC
and CV 18–16–M–DLC)

ORDER

In this Order, the Court vacates the June 30, 2017 Final Rule of the United States Fish and Wildlife Service delisting the Greater Yellowstone Ecosystem population of grizzly bears, and restores Endangered Species Act status to the Greater Yellowstone grizzly.

The Court is aware of the high level of public interest in this case, as well as the strong feelings the grizzly bear evokes in individuals, from ranchers and big-game hunters to conservationists and animal rights activists. The policy

implications of the Greater Yellowstone grizzly delisting are significant, but they cannot affect the Court's disposition. Although this Order may have impacts throughout grizzly country and beyond, this case is not about the ethics of hunting, and it is not about solving human- or livestock-grizzly conflicts as a practical or philosophical matter. These issues are not before the Court. This Court's review, constrained by the Constitution and the laws enacted by Congress, is limited to answering a yes-or-no question: Did the United States Fish and Wildlife Service (hereinafter "Service") exceed its legal authority when it delisted the Greater Yellowstone grizzly bear?

Fully briefed and at issue here,[1] the Plaintiffs challenge the delisting decision under the Endangered Species Act ("ESA") and Administrative Procedure Act ("APA") on two primary grounds[2]: (1) the Service erred in delisting the Greater Yellowstone Ecosystem grizzly bear without further consideration of the impact on other members of the lower-48 grizzly designation; and (2) the Service acted arbitrarily and capriciously in its application of the five-factor threats

[1] As an effort to resolve the present claims prior to a fall hunting season, on May 14, 2018, the Court bifurcated and stayed proceedings on all claims other than those brought under the Administrative Procedure Act and Endangered Species Act. Thus, the present Order does not address Plaintiff Aland's Claims 2, 4, and 8 or Plaintiffs Crow Indian Tribe, et al.'s Religious Freedom Restoration Act claim.

[2] The Court does not reach the Plaintiffs' other arguments, as it finds the listed arguments dispositive.

analysis demanded by the ESA.

The Court finds for the Plaintiffs on both grounds. By delisting the Greater Yellowstone grizzly without analyzing how delisting would affect the remaining members of the lower-48 grizzly designation, the Service failed to consider how reduced protections in the Greater Yellowstone Ecosystem would impact the other grizzly populations. Thus, the Service "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Further, the Service's application of the ESA threats analysis is arbitrary and capricious for at least two reasons. First, by dropping a key commitment—the commitment to ensure that any population estimator adopted in the future is calibrated to the estimator used to justify delisting—the Service illegally negotiated away its obligation to apply the best available science in order to reach an accommodation with the states of Wyoming, Idaho, and Montana. Second, the Service relied on two studies to support its determination that the Greater Yellowstone grizzly can remain independent and genetically self-sufficient. However, the Service's reliance is illogical, as both studies conclude that the long-term health of the Greater Yellowstone grizzly depends on the introduction of new genetic material.

BACKGROUND

I. The Listing of the Lower-48 Grizzly Bear

Prior to European settlement, grizzly bears, *Ursus arctos horribilis*, ranged throughout western North America, from central Mexico to Alaska. Final Rule: Endangered and Threatened Wildlife & Plants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered & Threatened Wildlife, 82 Fed Reg. 30,502, 30,508 (June 30, 2017) [hereinafter Final Rule]. In the lower 48 states alone, an estimated 50,000 grizzlies roamed, occupying terrain far from the mountain climates with which they are currently associated. *Id.* Grizzly bears are the ultimate opportunists, with diets varying significantly between individual bears, seasons, years, and location. *Id.* at 30,505. "The ability to use whatever food resources are available is one reason grizzly bears are the most widely distributed bear species in the world, occupying habitats from deserts to alpine mountains and everything in between." *Id.*

The fate of the grizzly bear changed dramatically around the turn of the 19th Century, as European settlers moved west. The government implemented "bounty programs aimed at eradication, [and] grizzly bears were shot, poisoned, and trapped wherever they were found." *Id.* at 30,508. By the 1930s—just 125 years after European settlers moved into grizzly country—grizzly bears were found in

only two percent of their former range. *Id.* Nor did this mark the low point for the grizzly. While 37 separate grizzly populations were identified in the contiguous United States in 1922, only six populations remained in 1975. The Greater Yellowstone Ecosystem, covering portions of Wyoming, Montana, and Idaho, was home to one of the largest of those populations. In 1975, the total number of bears in the Greater Yellowstone Ecosystem was estimated at 136 to 312 individuals. *Id.*

The lower-48 grizzly bear was listed as threatened in 1975, only two years after Congress passed the ESA. Amendment Listing the Grizzly Bear of the 48 Coterminous States as a Threatened Species, 40 Fed. Reg. 31,734 (July 28, 1975). Indeed, as the Supreme Court recognized in *Tennessee Valley v. Hill*, Congress passed the ESA in part because it wanted to force the agencies' hand, particularly in regard to the grizzly bear. 437 U.S. 153, 183–84 (1978) (quoting 119 Cong. Rec. 42,913 (1973)) ("[T]he continental population of grizzly bears . . . may or may not be endangered, but . . . is surely threatened . . . . Once this bill is enacted, . . . [t]he agencies of Government can no longer plead that they can do nothing about it. *They can, and they must. The law is clear.*"). "The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184.

II. The Current Status of the Grizzly Bear

Since 1982, the Service has focused on fostering recovery in six ecosystems within the lower-48 states: (1) the Greater Yellowstone Ecosystem, covering portions of Wyoming, Montana, and Idaho; (2) the Northern Continental Divide Ecosystem of north-central Montana, (3) the Cabinet-Yaak area extending from northwest Montana to northern Idaho; (4) the Selkirk Mountains in northern Idaho, northeast Washington, and southeast British Columbia; (5) north-central Washington's North Cascades area; and (6) the Bitterroot Mountains of western Montana and central Idaho. Final Rule, 82 Fed. Reg. at 30,508–09. A substantial population of grizzly bears is found in only two of the six ecosystems—the Greater Yellowstone region with an estimated 700-plus bears, and the Northern Continental region with an estimated 900-plus bears. *Id.* 48 bears are estimated to reside in the Cabinet-Yaak, and there are an estimated 88 bears in the Selkirks. *Id.* The last documented sighting in the North Cascades was in 1996, and the Service estimates its population at fewer than 20 bears. *Id.* No bears are known to inhabit the Bitterroots. *Id.*

The six ecosystems are geographically isolated from one another, and there is no evidence of interbreeding. The Greater Yellowstone population's closest geographic neighbor is located in the Northern Continental Divide Ecosystem,

approximately 70 miles to the north and located on the other side of Interstate 90. *Id.* at 30,518. "[T]here is currently no known connectivity between these two grizzly populations." *Id.* Further, "[n]o grizzly bears originating from the [Greater Yellowstone Ecosystem] have been suspected or confirmed beyond the borders of the [Greater Yellowstone] grizzly bear [distinct population segment] . . . . Similarly, no grizzly bears originating from other ecosystems have been detected inside the borders of the [Greater Yellowstone] grizzly bear [distinct population segment]." *Id.* at 30,517–18.

The density and growth of the grizzly bear has proven difficult to estimate. *Id.* at 30,506. It takes at least six years of monitoring data and as many as 30 females with radio collars to accurately estimate average annual population growth. *Id.* "Grizzly bears have one of the slowest reproductive rates among terrestrial mammals, resulting primarily from . . . : [l]ate age of first reproduction, small average litter size, and the long interval between litters." Proposed Rule: Endangered and Threatened Wildlife & Plants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered & Threatened Wildlife, 81 Fed. Reg. 13,174, 13,177 (March 11, 2016). On average, a female grizzly first reproduces at the age of six and produces a litter every 2.78 years through her mid- to late-20s. *Id.* "Given [these] factors, it may take a

female grizzly bear 10 or more years to replace herself in a population." *Id.*

III. Procedural background

In 2007, the Service published its first final rule designating the Greater Yellowstone grizzly as a distinct population segment and delisting it. 72 Fed. Reg. 14,866 (Mar. 29, 2007). Shortly after, a conservation group challenged the rule on several grounds. *Greater Yellowstone Coalition, Inc. v. Servheen*, 672 F. Supp. 2d 1105 (D. Mont. Sept. 21, 2009). This Court vacated the 2007 Final Rule, finding that: (1) inadequate regulatory mechanisms existed to ensure a healthy and adequate grizzly population post-delisting; and (2) the Service failed to consider the threat posed to the Greater Yellowstone grizzly by a decline in whitebark pine seed, a substantial source of food. *Id.* at 1126. The Ninth Circuit reversed as to the first finding but affirmed as to the second, upholding this Court's vacatur of the final rule. *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011).

Following remand to the agency, the Service determined that decreased availability of whitebark pine seed did not pose a substantial threat to the continued viability of the Greater Yellowstone grizzly population. Final Rule, 82 Fed. Reg. at 30,536–540. The Service went forward with delisting, publishing its Proposed Rule in 2016 and the Final Rule on June 30, 2017.

Shortly after the Final Rule was published, the D.C. Circuit decided *Humane Society v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017).[3] The Service recognized that *Humane Society* had direct bearing on: (1) its authority to designate and contemporaneously delist a distinct population segment; and (2) the adequacy of its discussion of the grizzly bear's historical range. In response to *Humane Society*, the Service initiated a regulatory review and called for public comments on "what impact, if any, the . . . ruling has on the [Greater Yellowstone] grizzly bear final rule and what further evaluation should be considered regarding the issues raised in *Humane Society.*" Request for Comments: Endangered and Threatened Wildlife & Plants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered & Threatened Wildlife, 82 Fed. Reg. 57,698 (Dec. 7, 2017). Following a brief comment period, the Service issued its Regulatory Review, "announc[ing] [its] determination that [the] 2017 final rule . . . does not require modification." Regulatory Review: Endangered and Threatened Wildlife & Plants; Removing the Greater Yellowstone Ecosystem Population of

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[3] The lower district court decided *Humane Society* before publication of both the Proposed Rule and the Final Rule. *Humane Soc'y v. Jewell*, 76 F. Supp. 3d 69 (Dec. 19, 2014). The importance and relevance of the issues raised in *Humane Society* as they relate to the delisting of the Greater Yellowstone grizzly were presumably known to many of the parties in these consolidated cases, as reflected by the fact that the attorneys general for the states of Wyoming and Montana appeared as amici supporting the Service in the appeal before the D.C. Circuit.

Grizzly Bears from the Federal List of Endangered & Threatened Wildlife, 83 Fed. Reg. 18,737 (April 30, 2018) [hereinafter Regulatory Review].

Each of the Plaintiffs filed suit within months of the final delisting in June 2017, and the cases were consolidated on December 5, 2017. The parties filed motions and cross-motions for summary judgment, and this Court held a hearing on the motions on August 30, 2018. Shortly after the hearing, the Plaintiffs filed motions for a temporary restraining order and/or preliminary injunction. The Court issued a 14-day temporary restraining order enjoining the scheduled Greater Yellowstone grizzly hunts in Wyoming and Idaho on August 30, 2018. On September 13, 2018, the Court extended the temporary restraining order for another 14 days. Because it now orders that the Final Rule be vacated and the matter remanded to the Service, the Court will deny the motions for a preliminary injunction as moot.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the moving party demonstrates that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The standard is met when the parties produce documentary evidence permitting only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). A factual dispute

must be material to defeat summary judgment; a dispute that is irrelevant or unnecessary to the outcome cannot be considered. *Id.* at 248.

STANDARDS OF REVIEW

I. Judicial Review under the APA

Because the ESA does not contain an independent provision governing judicial review of agency action, the Court reviews the delisting determination under the APA. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1205–06 (9th Cir. 2004). Under the APA, the Court must "hold unlawful and set aside agency action, findings, and conclusions found . . . to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

"Review under the arbitrary and capricious standard is narrow, and [the Court] do[es] not substitute [its] judgment for that of the agency" whose decision is under review. *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1013 (9th Cir. 2012) (citations and internal quotation marks omitted). "An agency's decision can be set aside only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, . . . offered an explanation that runs counter to the evidence before the agency[,] or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* (emphasis removed) (citations and internal quotation

marks omitted).

II. Statutory Requirements under the ESA

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth.*, 437 U.S. at 180. Under the ESA, the Service must "identify and list species that are 'endangered' or 'threatened.'" *Center for Biological Diversity v. Zinke*, 868 F.3d 1054, 1057 (9th Cir. 2017) (quoting 16 U.S.C. § 1533). A threatened species "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range," 16 U.S.C. § 1532(20), while an endangered species is "in danger of extinction throughout all or a significant portion of its range," *id.* § 1532(6).

The Service must make listing and delisting determinations according to a five-factor analysis of potential threats, considering:

> (A) the present or threatened destruction, modification, or curtailment of [a species'] habitat or range;
> (B) overutilization for commercial, recreational, scientific, or educational purposes;
> (C) disease or predation;
> (D) the inadequacy of existing regulatory mechanisms; or
> (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1). The agency must make any determination "solely on the basis of the best scientific and commercial data available." *Id.* § 1533(b)(1)(A).

DISCUSSION

The Plaintiffs raise two significant challenges to the Final Rule: (1) the Service violated the APA by failing to consider an important factor in delisting the Greater Yellowstone grizzly, which is the impact of delisting on the other remaining populations within the continental United States; and (2) the Service violated the APA by arbitrarily and capriciously applying the five-factor threats analysis demanded by the ESA. The Court considers each in turn.

I. The Service did not fulfill its duties under the ESA because it failed to analyze the threat posed by the Final Rule outside of the Greater Yellowstone Ecosystem.

In 1975, when the grizzly was first listed, the ESA allowed only for the listing of species, subspecies, and "any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature." *Humane Soc'y*, 865 F.3d at 591 n.2 (quoting Endangered Species Act of 1973, § 3, Pub. L. No. 93-205, 87 Stat. 884, 886). Congress amended the ESA in 1978 by defining "species" to include "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532. Because the continental grizzly bear was listed prior to the 1978 amendment establishing the distinct population segment, it was listed as the lower-48 "species," even though the grizzlies living in the lower 48 states are not

taxonomically distinct from those found in Alaska, which have never enjoyed protected status under the ESA.

The Plaintiffs contend that the Service violated the APA's reasoned decisionmaking standard when it designated the Greater Yellowstone grizzly as a distinct population segment, carving it out of the lower-48 listing, and simultaneously delisted the segment. They argue that the ESA obligates the Service to analyze how the delisting of the Greater Yellowstone grizzly affects other continental grizzly populations, which may depend on the Greater Yellowstone grizzly for continued genetic health. The Service represents that the lower-48 designation is nothing more than a "historical artifact." (Doc. 203 at 44.) It goes on to argue that its decision to delist the Greater Yellowstone grizzly without conducting further analysis of the existing populations is to the grizzly's benefit, as the grizzly remains protected everywhere else in the continental United States, even in those regions in which grizzlies do not and never will live.

The Plaintiffs have the better argument. As the D.C. Circuit recently noted in *Humane Society*, "[t]he Service's power is to designate genuinely discrete population segments; it is not to delist an already-protected species by balkanization." 865 F.3d at 603. The Service's approach—evidenced first by this delisting and by its proposal to delist the other significant population, the

Northern Continental Divide population—does not square with the ESA as a matter of statutory interpretation or policy. Here, the Service is engaged in a process of real-time "balkanization" criticized by the D.C. Circuit in *Humane Society*:

> when a species is already listed, the Service cannot review a single segment with blinders on, ignoring the continuing status of the species' remnant. The statute requires a comprehensive review of the entire listed species and its continuing status. Having started the process, the Service cannot call it quits upon finding a single distinct population segment.

Id. at 601. Moreover, it is illogical for the Service to determine that, because the populations have not interbred for many generations—making them biologically distinct from one another—it is appropriate, without further analysis, to reduce the chance that they will interbreed in the future. The ESA does not permit the Service to use the distinct population segment designation to circumvent analysis of a species' overall well-being.

A. In the Final Rule, the Service designated the Greater Yellowstone grizzly as a distinct population segment consistent with its long-standing policy.

Since at least 1996, the Service has understood the goal of recognizing distinct population segments under the ESA to be

> to protect and conserve species and the ecosystems upon which they depend before large-scale decline occurs that would necessitate listing

> a species or subspecies throughout its entire range. This may allow protection and recovery of declining organisms in a more timely and less costly manner, and on a smaller scale than the more costly and extensive efforts that might be needed to recover an entire species or population.

Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act., 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996). The Service's interpretation is in accord with Congress's "instruct[ion]" that designation of a distinct population segment should occur "sparingly and only when the biological evidence indicates that such action is warranted." *Id.* at 4,722 (quoting S. Rep. No. 96–151, at 7 (1979)).

The Service understands the designation of a distinct population segment to demand an inquiry into three elements: (1) "discreteness . . . in relation to the remainder of the species to which it belongs"; (2) "significance . . . to the species to which it belongs"; and (3) "conservation status in relation to the Act's standards for listing (i.e., is the population segment, when treated as if it were a species, endangered or threatened?)." *Id.* at 4,725. A population segment is "discrete" *only* if it is either (a) "markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors"; or (b) "delimited by international governmental boundaries." *Id.*

Importantly, before designating a distinct population segment, "its biological

and ecological significance [must] be considered in light of Congressional guidance . . . that the authority to list [distinct population segments] be used 'sparingly' while encouraging the conservation of genetic diversity." *Id.*; *see* S. Rep. No. 96–151, at 7 ("[Congress] expects the [Service] to use the ability to list populations sparingly and only when the biological evidence indicates that such action is warranted"). Under the Service's interpretation of the ESA, significance is determined by the following mandatory but non-exclusive list of factors: (1) "[p]ersistence of the discrete[4] population segment in an ecological setting unusual or unique for the taxon"; (2) "[e]vidence that loss of the discrete population segment would result in a significant gap in the range of a taxon"; (3) "[e]vidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range"; or (4) "[e]vidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics." 61 Fed. Reg. at 4,725.

As in the 2007 Final Rule, 72 Fed. Reg. 14,866 (March 29, 2007), the

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[4] The Service has determined that "distinctiveness" is "consistent with the concept of 'discreteness,'" and it uses the terms "distinct" and "discrete" interchangeably. Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4,722, 4,722 (Feb. 7, 1996).

Service undertook a distinct population analysis in the 2017 Final Rule. It found the Greater Yellowstone population to be "discrete" because the Greater Yellowstone grizzly bear "has been physically separated from other areas where grizzly bears occur for at least 100 years" and "[g]enetic data also support the conclusion that grizzly bears from the [Greater Yellowstone Ecosystem] are separated from other grizzly bears." Final Rule, 82 Fed. Reg. at 30,518.

As required under its 1996 Distinct Population Segment Policy, the Service went on to consider the "significance" of the Greater Yellowstone segment to the lower-48 grizzly population. First, it determined that the Greater Yellowstone grizzly "persist[s] in an ecological setting unusual or unique for the taxon" because it "consume[s] a unique combination of food sources compared to other grizzly bear populations." *Id.* at 30,519. Second, it found that loss of the Greater Yellowstone grizzly "would represent a significant gap in the range of the taxon" because it "constitutes approximately half of the estimated number of grizzly bears remaining in the conterminous 48 states" and "represents the southernmost reach of the taxon," extending approximately 200 miles south of the nearest population. *Id.* "[B]ecause there are several other naturally occurring populations of grizzly bears in North America," the Service concluded that the third factor—whether the segment is the only surviving population segment within its historic range—was

inapplicable. *Id.* at 30,518. Finally, while the Service noted some documented "level of genetic differences between grizzly bears in the [Greater Yellowstone Ecosystem] and other populations in North America," it could not "say with certainty that the [Greater Yellowstone Ecosystem] grizzly bear population's genetics differ 'markedly' from other grizzly bear populations." *Id.* at 30,519. Thus, the Service determined the fourth and final factor to be inconclusive.

B. The Service violated the ESA under the standards set forth in the APA by delisting the Greater Yellowstone segment without analyzing the impact of delisting on other continental grizzly populations.

Following publication of the Final Rule, the D.C. Circuit Court of Appeals decided *Humane Society v. Zinke*, which involved a similar issue. As relevant to this discussion, the D.C. Circuit reviewed a final rule creating and simultaneously delisting a new distinct population segment, the Western Great Lakes gray wolf segment. *Id.* at 592. Applying general administrative law principles, the court held that the Service has the authority to create and delist a segment in a single action. *Id.* at 595–600. However, it went on to hold that the Service acted arbitrarily and capriciously when it failed to consider the effect of delisting on other members of the species. *Id.* at 601–03.

Here, unlike in *Humane Society*, the Plaintiffs do not challenge the Service's power to interpret the ESA as allowing for contemporaneous designation of a

distinct population segment and delisting of the same segment. Thus, for purposes of this Order, the Court assumes that the Service has the legal authority to create and delist a segment in one fell swoop. Rather, the Court's inquiry focuses on whether it must vacate the Final Rule because the Service did not consider whether delisting the Greater Yellowstone grizzly bear would impact other grizzlies living in the continental United States.

The Service concedes that it did not analyze the impact of delisting on grizzly bear populations outside the Greater Yellowstone Ecosystem, rationalizing this decision on the fact that the remainder of the lower-48 designation is still listed. The Service and the Intervenor-Defendants raise several arguments against application of *Humane Society*, contending that: (1) the Plaintiffs' arguments grounded in *Humane Society* are moot; (2) *Humane Society* was wrongly decided, and the Court should refuse to apply its logic; and (3) *Humane Society* is distinguishable. Thus, provided the Plaintiffs' claims are justiciable, if *Humane Society* is both analogous and correctly decided, the Court must "hold unlawful and set aside" the Final Rule as arbitrary and capricious. 5 U.S.C. § 706(2)(A).

1. The Court has subject matter jurisdiction over the Plaintiffs' claims.

As a threshold matter, the Service contends that the Court lacks jurisdiction

over any claim arising from the alleged inconsistency of the Final Rule with the D.C. Circuit's recent decision in *Humane Society v. Zinke*. The Service argues that these claims are mooted by its Regulatory Review of the Final Rule, issued following a comment period on April 30, 2018, after *Humane Society* was decided and the Plaintiffs initially filed suit. In its Regulatory Review and in response to *Humane Society*, the Service addressed in "greater detail" the "status" of the Greater Yellowstone segment and the rest of the lower-48 grizzly bear.[5]

"The doctrine of mootness, which is embedded in Article III's case or controversy requirement, requires that an actual, ongoing controversy exist at all stages of federal court proceedings." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1086 (9th Cir. 2011). "A claim is moot if it has lost its character as a present, live controversy." *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997). Thus, "[i]f an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed." *Id.*

The Regulatory Review did not moot the Plaintiffs' claims, and the Court

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[5] The Service also took advantage of the Regulatory Review to provide a fuller discussion of historical range, an issue raised in both *Humane Society* and this case. The Court is skeptical of this approach by the Service to backfill and provide analysis of an issue that had not been thoroughly analyzed before adopting the final delisting rule. Arguably, this constitutes an impermissible post-hoc rationalization. However, because the Court does not reach the Plaintiffs' historical range argument in this Order, no further discussion on this issue is required.

has jurisdiction in this case. Indeed, as the Service writes, "To be clear, we are not arguing that Plaintiffs' cases should be dismissed as moot, but rather only the claims alleging that [the Service] failed to address the D.C. Circuit's opinion in *Humane Society*." (Doc. 203 at 25.) However, the Plaintiffs have not argued that the Service "failed to address" *Humane Society*. Rather, they cite to *Humane Society* as legal support for their argument that the Final Rule is arbitrary and capricious. If the Plaintiffs had argued that the Final Rule is unlawful solely because the Service did not consider a judicial opinion, that argument would fail because the Service is not required to analyze the law but only to comply with it.

Moreover, the Regulatory Review is not a replacement for the Final Rule but only a summary of the Final Rule and a discussion of its sufficiency "in light of the *Humane Society* opinion." Regulatory Review, 83 Fed. Reg. at 18,742. Accordingly, there is no "supersed[ing]" agency action that moots the Plaintiffs' claims. *Am. Rivers*, 126 F.3d at 1124. Even if the Regulatory Review is not a post-hoc justification for the Final Rule, as the Plaintiffs contend, it has no bearing on justiciability.

2. *Humane Society v. Zinke* is not distinguishable.

When the Service delisted the Western Great Lakes gray wolf, "it left the remnant of [the] already-statutorily-protected [gray wolf species] in legal limbo

without any determination that the gray wolves in the continental United States outside of the Western Great Lakes segment were themselves a species, subspecies, or segment that could continue to be protected under the Endangered Species Act." *Humane Soc'y*, 865 F.3d at 602. The Service and the Intervenor-Defendants argue that *Humane Society* is distinguishable because the Service expressly determined that the lower-48 grizzly remains listed outside the Greater Yellowstone Ecosystem. Final Rule, 82 Fed. Reg. at 30,623 ("When this rule becomes effective, all areas in the lower 48 States outside the [Greater Yellowstone Ecosystem segment] boundary will remain protected as threatened under the Act."); Regulatory Review, 83 Fed. Reg. at 18,739 ("The 1975 listing remains valid.").

The only potentially significant difference between the Greater Yellowstone grizzly delisting and the Western Great Lakes gray wolf delisting is that the Service affirmatively stated that the lower-48 grizzly would remain listed outside the newly designated population segment. *Compare* 82 Fed. Reg. at 30,623, *with Humane Soc'y*, 865 F.3d at 602 ("When the Service attempted to carve the Western Great Lakes segment out of [the endangered gray wolf population], it left the remnant of that already-statutorily-protected group in legal limbo without any determination that the [remaining gray wolves] were themselves a species,

subspecies, or segment that could continue to be protected under the [ESA]."). However, the Service's express statement that the lower-48 grizzly remains listed at the time of the Greater Yellowstone grizzly delisting is not the end of the inquiry. Indeed, it is contradicted by the Service's position that "the management and potential status of other grizzly bear populations is outside the scope of [the] final rule." Final Rule, 82 Fed. Reg. at 30,552.

What is more, even as the Service asserted continuing protection for the lower-48 grizzly, it noted "that the population in the Northern Continental Divide Ecosystem may be eligible for delisting in the near future." Regulatory Review, 83 Fed. Reg. at 18,739; *see also* Final Rule, 82 Fed. Reg. at 30,552 ("The [Northern Continental Divide] grizzly bear population is likely biologically recovered . . . ."). In fact, the Service has initiated the delisting process in the Northern Continental Divide Ecosystem, home to the only other substantial grizzly population in the lower-48. *See* Department of the Interior, Notice, Endangered and Threatened Wildlife and Plants; Draft Conservation Strategy for the Northern Continental Divide Ecosystem Grizzly Bear, 78 Fed. Reg. 26,064 (May 3, 2013). If the Northern Continental Divide and Greater Yellowstone populations are both successfully delisted, the lower-48 grizzly listing will cover only two areas with fewer than 100 grizzlies, one area where grizzlies have not been affirmatively

located in over twenty years, and a fourth area where grizzlies have not been seen since at least 1975. Final Rule, 82 Fed. Reg. at 30,508–09. As the Service itself admits, "it would be difficult to justify a distinct population segment in an area where bears . . . have not been located for generations." (Doc. 203 at 35.)

Given the context surrounding the Greater Yellowstone segment delisting, the Service's argument—that the Court should, as it did, look no further than to note the continued listing of the lower-48 grizzly post-delisting of the Greater Yellowstone grizzly—is simplistic at best and disingenuous at worst. Again, the Service cannot abuse its power to "delist an already-protected species by balkanization." *Humane Soc'y*, 865 F.3d at 603. *Humane Society* is distinguishable only on a formalistic basis; here, as there, the cleaving of a newly designated segment from an existing listing demonstrates the Service's failure to grapple with the functional and legal impact of delisting on the listed entity.

3. The Service acted arbitrarily and capriciously by failing to consider the impact of delisting on both the Greater Yellowstone grizzly population and other members of the lower-48 grizzly population.

The Service does not have unbridled discretion to draw boundaries around every potentially healthy population of a listed species without considering how that boundary will affect the members of the species on either side of it. The

Service's piecemeal approach, isolating and delisting populations without questioning the effect on other populations, presents an irresolvable conflict with ESA's "policy of institutionalized caution." *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1167 (9th Cir. 2011).

Under the arbitrary and capricious standard, the Court may not vacate an agency's decision unless the agency "relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. Here, the issue is whether the Service "failed to consider an important aspect of the problem" when it determined that the ESA allows it to delist a newly created distinct population segment without examining the relationship between the segment and the rest of the species.

"Whether an agency has overlooked 'an important aspect of the problem' . . . turns on what a relevant substantive statute makes 'important.'" *Or. Natural Res. Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996). As relevant here, "the purposes of [the ESA] are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved[] [and] to

provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). Congress enacted the ESA in recognition of endangered and threatened species' "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3).

Broadly speaking, because extinction is irreversible, the ESA's policy is one of "institutionalized caution." *Tenn. Valley Auth.*, 437 U.S. at 194. Federal agencies may not ignore potential threats and instead choose to "take a full-speed ahead, damn-the-torpedoes approach to delisting." *Greater Yellowstone*, 665 F.3d at 1030. Rather, under the ESA, agencies must "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of" a listed species. 16 U.S.C. § 1536(a)(2).

More specifically, pursuant to § 4(c) of the ESA, 16 U.S.C. § 1533(c), the Service—which acts through authority delegated by the Secretary of the Interior—must maintain lists of all endangered and threatened species. "[F]rom time to time," the Service must "revise each list . . . to reflect recent determinations, designations, and revisions made in accordance with [§§ 4(a) and (b)]." Similarly, the Service must conduct a five-year review of all listed species and determine, again in accordance with §§ 4(a) and (b), whether to revise the listing status of the

reviewed species. 16 U.S.C. § 1533(c)(2). That review must cover the "species included in a list." § 1533(c)(2)(A). In other words, the Service has an obligation to consider the *already listed* species. *Id.*; *see* § 1533(c)(1), (b)(1)(A) (The Service shall "make [its] determinations . . . after conducting a review of the status of the [listed] species."); *Humane Soc'y*, 865 F.3d at 601.

Section 4(a), in turn, demands that the Secretary consider five potential threats when it reviews a listed entity's classification: (1) "the present or threatened destruction, modification, or curtailment of its habitat or range"; (2) "overutilization for commercial, recreational, scientific, or educational purposes"; (3) "disease or predation"; (4) "the inadequacy of existing regulatory mechanisms"; and (5) "other natural or manmade factors affecting its continued existence." 16 U.S.C. § 1533(a)(1). The final decision must be made "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1).

As the D.C. Circuit wrote in *Humane Society*, considering the statutory design of ESA § 4, 16 U.S.C. § 1533, "[t]he Endangered Species Act's text requires the Service, when reviewing and redetermining the status of a species, to look at the whole picture of the listed species, not just a segment of it." 865 F.3d at 601. Because § 4(c) incorporates the § 4(a) threats analysis, the Service's

review must be comprehensive of all identified and reasonably identifiable threats, and it must comport with the ESA's "best available science standard." *San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014).

Again, "when a species is already listed, the Service cannot review a single segment with blinders on, ignoring the continuing status of the species' remnant. The [ESA] requires a comprehensive review of the entire listed species and its continuing status." *Humane Soc'y*, 865 F.3d at 601. When it delisted the Greater Yellowstone population, the Service did not undertake the comprehensive review mandated by the ESA. Instead, it simply pointed to the continued listing of the continental grizzly as proof that the delisting would do no harm to members of the species outside the Greater Yellowstone Ecosystem. The Service then published its Regulatory Review, after litigation was initiated, in a last-ditch attempt to prove to the Court that its review was sufficient. The Court cannot agree with the Service that the Regulatory Review cures the inadequacy of the Final Rule.

In this instance, the Service must consider how the delisting affects other members of the listed entity, the lower-48 grizzly bear, because decreased protections in the Greater Yellowstone Ecosystem necessarily translate to decreased chances for interbreeding. That the Greater Yellowstone grizzly delisting may influence the other continental populations should come as no

surprise to the Service; indeed, the isolation and lack of connectivity between grizzly populations was a recognized threat at the time of the original listing. 40 Fed. Reg. 31,724.

The Service argues that the Court cannot follow the approach laid out in *Humane Society* because it is inconsistent with the Ninth Circuit's opinion in *Coos County Board of County Commissioners v. Kempthorne*, 531 F.3d 792 (9th Cir. 2008). The Service's reliance on *Coos County* is misplaced. It is true that in that case, the Ninth Circuit held that aspects of ESA § 4(c) cannot be reconciled with §§ 4(a) and (b). However, its analysis has no bearing on the question at hand, as the Court's focus was solely on whether § 4(c) incorporates the statutory deadlines outlined in § 4(b), which governs the process to be followed when a citizen petition is filed. *Id.* at 803–08. In this instance, however, *Coos County* supports the Plaintiffs' position, as there the Court noted that § 4(c) does incorporate those provisions that "generally direct how determinations regarding listings are to be made and implemented," including the requirements pertinent to the Service's review of "the status of the species." *Id.* at 806–07.

In sum, the Service arbitrarily and capriciously determined that it need not analyze the impact of delisting on grizzlies living outside the Greater Yellowstone Ecosystem. Section 4 of the ESA demands that the Service consider the legal and

functional effect of delisting a newly designated population segment on the remaining members of a listed entity. To conclude otherwise would be to ignore the ESA's policy of "institutionalized caution," *Tenn. Valley Auth.*, 437 U.S. at 194, which is necessary to promote the ESA's purpose of conservation, 16 U.S.C. § 1531(a)(3), (b).

II. The Service's failure to require a recalibration provision in the Conservation Strategy is arbitrary and capricious.

The Plaintiffs argue that the Service acted arbitrarily and capriciously in its ESA threats analysis because existing regulatory mechanisms are inadequate to ensure the Greater Yellowstone grizzly's survival. *See* 16 U.S.C. § 1533(a)(1)(D). Many of the Plaintiffs' arguments are foreclosed by the Ninth Circuit's opinion in *Greater Yellowstone*, and the Court cannot—as the Plaintiffs request—second-guess the states' willingness and ability to manage a delisted grizzly population.

However, one issue is distinguishable from those presented in *Greater Yellowstone*, and it is compelling. Between the draft and final versions of the Conservation Strategy, the Service removed its commitment to recalibration—the mechanism by which estimates generated by a new population estimator, if adopted, would be brought in line with those generated by the current estimator, the Chao2 model. This modification was made not on the basis of the best

available science, as demanded by the ESA, but rather as a concession to the states in order to reach a deal. Even under the deferential standard demanded by the ESA, the Court cannot conclude that the failure to address recalibration is anything other than a failure of reasoned decisionmaking.

A. The Service did not act arbitrarily and capriciously in relying on the states' general promises to manage mortality.

The Plaintiffs contend that existing regulatory mechanisms are inadequate to ensure that the states will effectively manage mortality among Greater Yellowstone grizzlies. In *Greater Yellowstone*, this Court considered a similar challenge to the 2007 delisting. The plaintiff in that case argued that "existing regulatory mechanisms" were inadequate, "demonstrat[ing] that the Yellowstone grizzly bear [distinct population segment] should not be removed from the threatened species list." *Greater Yellowstone*, 672 F. Supp. 2d at 1113. This Court agreed with the plaintiff, determining that "the Conservation Strategy, the centerpiece of the regulatory mechanisms relied on by the Service, cannot actually regulate anything." *Id.* at 1116.

Although this Court agreed with the plaintiff, the Ninth Circuit did not. Over a dissent that argued that the Service relied not on regulatory mechanisms but on "[m]ere citation to potentially applicable statutes and regulations without

analysis," *Greater Yellowstone*, 665 F.3d at 1036 (Thomas, J., dissenting), the majority held that it was enough that "[t]he Rule . . . cites to a wide range of other rules, regulations, and laws, both state and federal, which *could* facilitate the protection of the grizzly bear and the implementation of the Strategy," *id.* at 1031–32 (emphasis added).

The Plaintiffs argue that the current challenge is distinguishable from that presented in *Greater Yellowstone* because the Court relied upon the federal government's retained control over the Greater Yellowstone grizzly in that case. *See id.* at 1032 ("The National Forest Plans and National Park Compendia make legally binding the Strategy's standards on 98% of the [primary conservation area] and are buffered by the legal protections afforded by the Wilderness Act on a significant portion of grizzly habitat outside the PCA."). Here, while the Plaintiffs concede that the Conservation Strategy is largely the same as that considered in *Greater Yellowstone*, they contend that their challenge is legally distinguishable because the Ninth Circuit did not consider the fact that the states now have exclusive or nearly exclusive control over discretionary mortality. (*See* Hrg. Trans. 14–17, 29–31.)

The Court disagrees that the states' control over discretionary mortality presents a legally distinguishable issue from that presented in *Greater Yellowstone*.

The Plaintiffs' distinguishing principle appears to be that, while the Court must trust the federal government to protect the grizzly bear pursuant to *Greater Yellowstone*, it should not afford the same level of trust to the states. The Plaintiffs have not explained why the Court can second-guess the states' but not the federal government's intentions. The Service concluded that, given the states' decades-long commitment to "funding and performing the majority of grizzly bear recovery, management, monitoring, and enforcement efforts within their jurisdictions for decades," "[t]here is not a reasonable basis to believe the States will not adequately fund grizzly bear management of a delisted population." Final Rule, 82 Fed. Reg. at 30,603.

Following the Ninth Circuit's decision in *Greater Yellowstone*, the Court cannot find for the Plaintiffs on the basis that the Service erred in relying on state regulatory mechanisms to manage mortality among Greater Yellowstone grizzlies.

B. The Service acted arbitrarily and capriciously by determining that the final Conservation Strategy need not provide for a recalibration mechanism.

On one point, the Plaintiffs' challenges regarding regulatory mechanisms are distinguishable from those presented in *Greater Yellowstone*. As to the failure to include a recalibration provision, the Service could not "reasonably conclude that adequate regulatory mechanisms exist to protect the Yellowstone grizzly bear."

Greater Yellowstone, 665 F.3d at 1032.

Under the ESA, the Service must make listing and delisting determinations in consideration of "the inadequacy of existing regulatory mechanisms," and it must do so "solely on the basis of the best scientific and commercial data." 16 U.S.C. § 1533(a)(1)(D), (b)(1)(A). Here, the Service recognized that recalibration was a matter of significant concern. However, rather than rationally consider and apply the best available science, as demanded by the APA and the ESA, it made a concession to the states to secure their participation in the Conservation Strategy.

As the Service explains, "'recalibration' refers to calibrating a new model's estimates for a given year (*e.g.*, 1000 bears in 2020) to the Chao2 population estimates generated for the 2002–2014 time period (average of 674 bears)." (Doc. 203 at 91 n.17.) The Plaintiffs raise the concern that the states are free to adopt a new model, in which case the baseline population estimates upon which the Final Rule depend would no longer be relevant. In other words, if a new model estimates 1000 bears where Chao2 found 700, the states will be able to treat the jump in population as they would treat it on paper—as if 300 new individuals had moved into the Greater Yellowstone Ecosystem.

In the Final Rule, the Service represented that the Chao2 model may not remain the best available science but that it "will continue to be the method [for

estimating the population] until a new population estimator is approved." The Service argues that the Plaintiffs fail to recognize (1) that the Service and the states committed to choosing an estimator based on the best available science well into the future and (2) that the Interagency Study Team must agree to adopting a new estimator. However, the danger is not that a better estimator will become available and the state will choose to adopt it. The danger is that when science and technology progress, the better estimator will be indifferent to the estimates upon which the Final Rule stands.

The Service was aware that recalibration was a matter of significant concern; as staff members wrote, settling upon a method of recalibration was a "key commitment," and failure to do so would be a "show-stopper," likely to result in a "biologically and legally indefensible" delisting determination. FWS_Emails_008087, 008546–47, 008455-56. A provision need not be overly detailed; it would be enough "to just state clearly if the population estimator is changed [the agencies] will recalibrate." FWS_Emails_008546–47. In response to political pressure from the states, the Service dropped the provision despite its recognition of its importance. *See* FWS_Emails_007744, 063366, 063383. As the Service's former grizzly bear coordinator wrote at the time, the Service's willingness to negotiate away this important provision constitutes "a violation of

the mandate of the ESA that the Service implement adequate regulatory mechanisms prior to delisting. There cannot be a vote by other agencies to determine if the Service follows the ESA . . . ." FWS_Emails_063377.

The Service argues that Plaintiffs' arguments fail because: "Chao2 applies for the foreseeable future, experts cannot 'recalibrate' numbers based on an estimation method that has not been identified, and appropriate safeguards exist to ensure that any future changes accord with the science and grizzly bear recovery." (Doc. 203 at 103.). Although the Court agrees as to the first point—that the Conservation Strategy anticipates continued use of the Chao2 estimator for an unidentified period of time—it disagrees that the Service's arguments save the failure to address recalibration in the Conservation Strategy. First, the Final Rule is equivocal about the commitment to Chao2, which has recognized limitations. 82 Fed. Reg. at 30513. Second, while it is likely true that the mathematical formula for recalibration cannot be determined until a new estimator is selected, that has no bearing on the parties' ability to address recalibration as a general matter—even if it is only to state a commitment to recalibration. And finally, the Court does not question the commitment of the Service and each of the states to continued grizzly recovery; however, the general good intentions of the parties do not override the ESA's mandate that decisions be made in accordance with the best

available science.

Nor is the Court convinced that the risk posed by the potential adoption of a new estimator is too speculative or distant to require discussion within the Conservation Strategy. While it is true that the Court's review under the ESA cannot be speculative, *Bennett v. Spear*, 520 U.S. 154, 176 (1997), here the risk presented by recalibration is beyond mere speculation. As the Service continually asserts throughout its brief and at the hearing held by the Court, the Chao2 estimator is "highly conservative" and likely to underestimate population size. (Doc. 203 at 83–84.) Given that Chao2 is known to create low estimates, it stands to reason that a more accurate model would generate a higher population estimate.

Further, the Service was well aware of the threat presented by the parties' failure to prospectively dispose of recalibration. Rather than maintain heightened protections in the face of a recognized threat to the health of the Greater Yellowstone grizzly, the Service accepted a "compromise" that was in effect a capitulation. FWS_Emails_007721–22, 63366. Because it was "the strongest agreement the Service can get," the parties agreed that they would ignore recalibration and delete the "best available science" requirement for changing the estimator. *Id.* In return, the states agreed to continue to use Chao2 "for the foreseeable future." *Id.*

The Service contends that the Plaintiffs misconstrue the record, which shows only that there was a healthy, robust debate about recalibration. (Doc. 203 at 59, 101.) However, the Service points to nothing that suggests that it considered the best available science when it dropped the recalibration commitment from the final Conservation Strategy. Nor does it point to any record evidence suggesting that concerns about recalibration were overstated. Indeed, all the evidence cited by the parties supports the Plaintiffs' position that (1) the Service and other scientists viewed a recalibration provision as essential; and (2) the Service chose to forego such a provision in order to get a deal with the states.

The failure to address recalibration is irreconcilable with the ESA and the APA. Of course, the Court cannot second-guess reasoned decisionmaking and must defer to the agency's designation and interpretation of the best available science. However, here all available evidence demonstrates that the Service made its decision not on the basis of science or the law but solely in reaction to the states' hardline position on recalibration. The Service cannot negotiate away its obligation to make decisions "solely on the basis of the best available science." 16 U.S.C. § 1533(b)(1)(A).

III. The Service's determination that it need not provide for either natural connectivity or translocation is contrary to the best available science.

The Plaintiffs challenge the Service's delisting decision relating to its analysis of the Greater Yellowstone grizzly's genetic health. The Service must consider the "natural or manmade factors affecting [the Greater Yellowstone grizzly's] continued existence." 16 U.S.C. § 1533(b)(1)(A). The Service appropriately recognized that the population's genetic health is a significant factor demanding consideration under the ESA threats analysis. However, it misread the scientific studies it relied upon, failing to recognize that all evidence suggests that the long-term viability of the Greater Yellowstone grizzly is far less certain absent new genetic material.

As the Service noted in the Final Rule, "[t]he isolated nature of the [Greater Yellowstone] grizzly bear was identified as a potential threat when listing occurred in 1975." 82 Fed. Reg. at 30,535. Without an adequate gene pool, the Greater Yellowstone grizzly bear will be at increased risk of endangerment. 82 Fed. Reg. at 30,535–36. As discussed above, the Service refused to analyze the issue of connectivity between the Greater Yellowstone grizzly and other populations, determining that it could isolate and delist the Greater Yellowstone grizzly because the other populations remained listed. Thus, for the Rule to survive scrutiny under the APA and the ESA, the Service must have reasonably considered that the

Greater Yellowstone population is sufficiently diverse to support future generations.

The Court cannot substitute its judgment for that of the Service, and it must reject the Plaintiffs' challenge to the degree that the Plaintiffs seek to substitute their interpretation of the scientific data for that of the Service. *See Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 683–84 (9th Cir. 2016) ("[A]ll the ESA requires" is that "[the agency] demonstrated that it 'considered the relevant factors and articulated a rational connection between the facts found and the choices made." (quoting *Nw. Ecosys. All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007))).

Regarding the Greater Yellowstone grizzly's long-term genetic health, the Plaintiffs argue that, although the Service relied on the best available science, it did not interpret that science rationally. While the APA sets a high bar, the Court determines that the Plaintiffs have met it. The Service failed to logically support its conclusion that the current Greater Yellowstone population is not threatened by its isolation.

"Effective population size is a metric used by geneticists to distinguish between total population size and the actual number of individuals available to reproduce at any given time." 82 Fed. Reg. at 30,535. The total estimated

number of Greater Yellowstone grizzly bears—approximately 700—is not an estimate of the number of bears contributing to the gene pool. Instead, scientists must extrapolate from that total an estimate of the reproducing population. Because of the need for genetic diversity, "the 2007 Conservation Strategy recommended that if no movement or successful genetic interchange was detected by 2020, grizzly bears from the [Northern Continental Divide Ecosystem] would be translocated into the [Greater Yellowstone Ecosystem] grizzly bear population to achieve the goal of two effective migrants every 10 years (i.e., one generation) to maintain current levels of genetic diversity." 82 Fed. Reg. at 30,536. However, the Service did not renew this commitment in the 2017 delisting. It did

> not consider genetic concerns to be a threat for the following reasons: We have an effective population size more than four times that recommended by the best available science; we know levels of genetic diversity have not declined in the last century; we know current levels of genetic diversity are sufficient to support healthy reproduction and survival; and we know that genetic contribution from individual bears outside of the [Greater Yellowstone Ecosystem] will not be necessary for the next several decades.

Id. at 30,544.

To support these propositions, the Service relied primarily on two different studies addressing the Greater Yellowstone grizzly's genetic health. The first, Miller and Waits (2003), was also integral to the 2007 Rule. That study proposed

a minimum effective population size of 100 grizzly bears for the Greater Yellowstone Ecosystem and estimated that a total population of 400 individuals would support that minimum effective population. *Id.* at 30,535. When it considered the 2007 Rule in *Greater Yellowstone*, this Court agreed that the Service did not act arbitrarily and capriciously in relying on the Miller and Waits study to determine that "the Yellowstone grizzly population can avoid negative genetic consequences in the near future" by maintaining a total effective population of 100 individuals. *Greater Yellowstone*, 672 F. Supp. 2d at 1120–21. However, the Court also noted that "[i]t appears extremely unlikely that natural connectivity will occur in the foreseeable future," *id.* at 1121 n.6, and thus it relied upon the agencies' commitment to translocate grizzlies as necessary to maintain genetic diversity, *id.* at 1120–21.

In the 2017 Conservation Strategy, the Service continued to rely on the Miller and Waits study for the determination that "[f]or short-term fitness (i.e., evolutionary response), the effective population size of the [Greater Yellowstone Ecosystem] grizzly bear population should remain above 100 bears." 82 Fed. Reg. at 30535 (citation omitted). It also considered a more recent study, Kamath et al. (2015), for the proposition that the ratio between effective and total population is significantly higher than that estimated in the Miller and Waits study.

Id. at 30536. Considering both studies together, the Service concluded that the "effective population size . . . of the [Greater Yellowstone Ecosystem] population has increased from 102 . . . in 1982, to 469 . . . in 2010. The current effective population is more than four times the minimum effective population size suggested in [the Miller and Waits study]." *Id.* Relying on these numbers, the Service concluded that it no longer needed a concrete plan for translocation and could instead rely on Montana's "indicat[ion] they will manage discretionary mortality [in the area bridging the Greater Yellowstone and Northern Continental populations] in order to retain the opportunity for natural movements of bears between ecosystems." *Id.* Under the Final Rule, then, "'[t]ranslocation of bears . . . will be a last resort and will be implemented only if there are . . . genetic measures that indicate a decrease in genetic diversity." *Id.*

The Service illogically cobbled together two studies to reach its determination that the Greater Yellowstone grizzly population is sufficiently diverse at this time; in doing so, it ignored the clear concerns expressed by the studies' authors about long-term viability of an isolated grizzly population. Miller and Waits noted in 2003 that the "genetic consequences of inbreeding and isolation are likely to transpire over longer periods of time (decades and centuries)." FWS_Lit_009423. Similarly, Kamath determined that the Greater Yellowstone

grizzly does not currently meet the "long-term viable population criterion" but "may eventually" get there. FWS_Lit_005979. Kamath went on to recommend measures to ensure cross-breeding between ecosystems, "particularly given the unpredictability of future climate and habitat changes." *Id.* Neither study gives a threshold minimum effective or total population, although the Kamath study does support, as a general matter, that the threat of inbreeding in the Greater Yellowstone Ecosystem is not as dire as Miller and Waits suggested.

Moreover, the studies cited by the Service do not squarely support the assertions for which they are cited. Miller and Waits stated that it "is not known" what is an effective population size to prevent the "short term effects" of inbreeding; it only determined that the *current* (circa 2003) effective population size is likely to be near or greater than 100, on the basis of its estimate that 25 percent of the total population, which it estimated to comprise 400 individuals, constitute the effective population. FWS_Lit_009423; *see also* Pub_Cmt_004192. Thus, it does not support the Service's reading that 100 individuals constitute "the minimum effective population size suggested in the literature." (Doc. 203 at 110.)

The Kamath study is similarly limited. It only states that effective population size may equal 42 to 66 percent of the total population, rather than the approximately 25 percent applied in Miller and Waits. FWS-Lit_005979. In the

Final Rule, the Service applied the high end of the range listed in Kamath—66 percent—to determine that the Greater Yellowstone grizzly's current effective population size is 469. 82 Fed. Reg. 30,536. The Service offers no data supporting its conclusion that this number is sufficiently high that no intervention should occur unless scientists prove that the Greater Yellowstone grizzly's genetic health has already shown signs of compromise.

Indeed, the Service admits these limitations, stating in the Final Rule that the current estimated effective population size is "adequate to maintain genetic health in this population" but that natural connectivity or translocation "would maintain or enhance this level of genetic diversity and, therefore, ensure genetic health in the long term . . . and benefit the [population's] long-term persistence . . . ." *Id.* Despite its recognition that continued isolation poses a threat to the Yellowstone grizzly, there is no regulatory mechanism in place to address the threat, only Montana's commitment to "manage discretionary mortality" between populations in order to "retain the opportunity for natural movements of bears between ecosystems." *Id.* Of course, those natural movements have not yet occurred. Thus, it is illogical to conclude that the same opportunities for connectivity will produce different results in the future, particularly if one or both populations are delisted.

In short, the Service has failed to demonstrate that genetic diversity within the Greater Yellowstone Ecosystem, long-recognized as a threat to the Greater Yellowstone grizzly's continued survival, has become a non-issue. Although the Kamath study suggests that the situation is not as dire as was once predicted, it does not support the Service's conclusion that translocation should be implemented only after the Greater Yellowstone grizzly's genetic health is demonstrably weakened. The Service's determination is arbitrary and capricious because it is both illogical and inconsistent with the cautious approach demanded by the ESA.

CONCLUSION

The Service failed to make a reasoned decision, as required by the APA, when it delisted the Greater Yellowstone grizzly. By refusing to analyze the legal and functional impact of delisting on other continental grizzly populations, the Service entirely failed to consider an issue of extreme importance. Moreover, the Service's analysis of the threats faced by the Greater Yellowstone grizzly segment was arbitrary and capricious.

Accordingly, IT IS ORDERED that:

(1) the Plaintiffs' motions for partial summary judgment and motions for summary judgment (Docs. 75, 89, 182, 185, 188, 189, 191, and 193) are GRANTED;

(2) the Defendants' and Intervenor-Defendants' cross-motions for summary judgment (Docs. 202, 208, 210, 212, 213, 217, and 219) are DENIED;

(3) the Final Rule delisting the Greater Yellowstone Ecosystem grizzly bear is VACATED and REMANDED; and

(4) The Plaintiffs' motions for a preliminary injunction (Docs. 251 and 252) are DENIED as moot.

(5) Plaintiff Aland's motion to supplement the final administrative record and allow limited discovery (Doc. 171) is DENIED as moot.

DATED this 24th day of September, 2018.

Dana L. Christensen, Chief District Judge
United States District Court

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NARUTO, a Crested Macaque, by and through his Next Friends, People for the Ethical Treatment of Animals, Inc., *Plaintiff-Appellant*, v. DAVID JOHN SLATER; BLURB, INC., a Delaware corporation; WILDLIFE PERSONALITIES, LTD., a United Kingdom private limited company, *Defendants-Appellees.*	No. 16-15469 D.C. No. 3:15-cv-04324-WHO OPINION

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick, District Judge, Presiding

Argued and Submitted July 12, 2017
San Francisco, California

Filed April 23, 2018

Before: Carlos T. Bea and N. Randy Smith, Circuit Judges, and Eduardo C. Robreno,[*] District Judge.

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[*] The Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Opinion by Judge Bea;
Concurrence by Judge N.R. Smith

SUMMARY**

Copyright / Standing

Affirming the district court's dismissal of claims brought by a monkey, the panel held that the animal had constitutional standing but lacked statutory standing to claim copyright infringement of photographs known as the "Monkey Selfies."

The panel held that the complaint included facts sufficient to establish Article III standing because it alleged that the monkey was the author and owner of the photographs and had suffered concrete and particularized economic harms. The panel concluded that the monkey's Article III standing was not dependent on the sufficiency of People for the Ethical Treatment of Animals, Inc., as a guardian or "next friend."

The panel held that the monkey lacked statutory standing because the Copyright Act does not expressly authorize animals to file copyright infringement suits.

The panel granted appellees' request for an award of attorneys' fees on appeal.

Concurring in part, Judge N.R. Smith wrote that the appeal should be dismissed and the district court's judgment

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

on the merits should be vacated because the federal courts lacked jurisdiction to hear the case. Disagreeing with the majority's conclusion that next-friend standing is nonjurisdictional, Judge Smith wrote that PETA's failure to meet the requirements for next-friend standing removed jurisdiction of the court.

COUNSEL

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Justin Marceau, Denver, Colorado; Corey Page, San Francisco, California; for Amicus Curiae Agustin Fuentes.

OPINION

BEA, Circuit Judge:

We must determine whether a monkey may sue humans, corporations, and companies for damages and injunctive relief arising from claims of copyright infringement. Our court's precedent requires us to conclude that the monkey's claim has standing under Article III of the United States Constitution. Nonetheless, we conclude that this monkey—and all animals, since they are not human—lacks statutory standing under the Copyright Act.[1] We therefore affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Naruto was a seven-year-old crested macaque that lived—and may still live—in a reserve on the island of Sulawesi, Indonesia. In 2011, a wildlife photographer, David Slater, left his camera unattended in the reserve. Naruto allegedly took several photographs of himself (the "Monkey Selfies") with Slater's camera.

Slater and Wildlife Personalities, Ltd., ("Wildlife") published the Monkey Selfies in a book that Slater created through Blurb, Inc.'s ("Blurb") website in December 2014. The book identifies Slater and Wildlife as the copyright owners of the Monkey Selfies. However, Slater admits throughout the book that Naruto took the photographs at issue. For example, the book describes one of the Monkey Selfies as follows: "Sulawesi crested black macaque smiles at itself while pressing the shutter button on a camera."

[1] 17 U.S.C. § 101 *et seq*.

Another excerpt from the book describes Naruto as "[p]osing to take its own photograph, unworried by its own reflection, smiling. Surely a sign of self-awareness?"

In 2015 People for the Ethical Treatment of Animals ("PETA") and Dr. Antje Engelhardt filed a complaint for copyright infringement against Slater, Wildlife, and Blurb, as Next Friends on behalf of Naruto. The complaint alleges that Dr. Engelhardt has studied the crested macaques in Sulawesi, Indonesia for over a decade and has known, monitored, and studied Naruto since his birth. The complaint does not allege any history or relationship between PETA and Naruto.[2] Instead, the complaint alleges that PETA is "the largest animal rights organization in the world" and "has championed establishing the rights and legal protections available to animals beyond their utility to human beings . . . ."

Slater, Wildlife, and Blurb filed motions to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on the grounds that the complaint did not state facts sufficient to establish standing under Article III or statutory standing under the Copyright Act. The district court granted the motions to dismiss. In its order the district court stated the following with respect to Article III standing:

> The Ninth Circuit has stated that Article III "does not compel the conclusion that a

[2] At oral argument Appellant's counsel suggested that, upon remand, the complaint could be amended to state a significant relationship between PETA and Naruto. However, PETA and Engelhardt agreed not to seek amendment of the complaint, no doubt to procure our earlier hearing their appeal. Having procured the benefit of the bargain, we will hold them to their contract.

> statutorily authorized suit in the name of an animal is not a 'case or controversy.'" *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004). I need not discuss Article III standing further, because regardless of whether Naruto fulfills the requirements of Article III, he must demonstrate standing under the Copyright Act for his claim to survive under Rule 12(b)(6).

We are, of course, bound by the precedent set in *Cetacean Community* until and unless overruled by an en banc panel or the Supreme Court. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc).

The district court concluded that Naruto failed to establish statutory standing under the Copyright Act. PETA and Dr. Engelhardt timely appealed on Naruto's behalf. However, after the appeal was filed, and with the permission of Appellees, Dr. Engelhardt withdrew from the litigation. Therefore, on appeal, only PETA remains to represent Naruto as his "next friend."

STANDARD OF REVIEW

This court reviews *de novo* dismissals under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). *See Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007). "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

DISCUSSION

I. Next Friend Standing

We gravely doubt that PETA can validly assert "next friend" status to represent claims made for the monkey both (1) because PETA has failed to allege any facts to establish the required significant relationship between a next friend and a real party in interest and (2) because an animal cannot be represented, under our laws, by a "next friend."

First, "[i]n order to establish next-friend standing, the putative next friend must show: (1) that the petitioner is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability; and (2) the next friend has some significant relationship with, and is truly dedicated to the best interests of, the petitioner." *Coalition of Clergy v. Bush*, 310 F.3d 1153, 1159–60 (9th Cir. 2002) (*quoting Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192, 1194 (9th Cir. 2001)). Here, we are concerned with the second requirement. PETA does not claim to have a relationship with Naruto that is any more significant than its relationship with any other animal. Thus, PETA fails to meet the "significant relationship" requirement and cannot sue as Naruto's next friend.[3]

[3] We feel compelled to note that PETA's deficiencies in this regard go far beyond its failure to plead a significant relationship with Naruto. Indeed, if any such relationship exists, PETA appears to have failed to live up to the title of "friend." After seeing the proverbial writing on the wall at oral argument, PETA and Appellees filed a motion asking this court to dismiss Naruto's appeal and to vacate the district court's adverse judgment, representing that PETA's claims against Slater had been settled. It remains unclear what claims PETA purported to be "settling," since the court was under the impression this lawsuit was about Naruto's claims,

But, even if PETA had alleged a significant relationship with Naruto, it still could not sue as Naruto's next friend. In *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the Supreme Court discussed "next friend" standing in a habeas case in which a third-party litigant sought to challenge the death sentence of a capital defendant, Simmons, who had forsworn his right to appeal. In considering whether the third-party, Whitmore, had standing to sue on behalf of Simmons, the Court emphasized the limited nature of "next friend" standing and explained the rationale behind its limitations. For example, requiring a showing of incompetency and a "significant relationship" ensures that "the litigant asserting

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and per PETA's motion, Naruto was "not a party to the settlement," nor were Naruto's claims settled therein. Nevertheless, PETA apparently obtained something from the settlement with Slater, although not anything that would necessarily go to Naruto: As "part of the arrangement," Slater agreed to pay a quarter of his earnings from the monkey selfie book "to charities that protect the habitat of Naruto and other crested macaques in Indonesia." *See Settlement Reached: 'Monkey Selfie' Case Broke New Ground For Animal Rights*, PETA, https://www.peta.org/blog/settlement-reached-monkey- selfie-case-broke-new-ground-animal-rights/ (last visited Apr. 5, 2018). But now, in the wake of PETA's proposed dismissal, Naruto is left without an advocate, his supposed "friend" having abandoned Naruto's substantive claims in what appears to be an effort to prevent the publication of a decision adverse to PETA's institutional interests. Were he capable of recognizing this abandonment, we wonder whether Naruto might initiate an action for breach of confidential relationship against his (former) next friend, PETA, for its failure to pursue his interests before its own. Puzzlingly, while representing to the world that "animals are not ours to eat, wear, experiment on, use for entertainment, or abuse in any other way," *see* PETA, https://peta.org (last visited Apr. 5, 2018), PETA seems to employ Naruto as an unwitting pawn in its ideological goals. Yet this is precisely what is to be avoided by requiring next friends to have a significant relationship with, rather than an institutional interest in, the incompetent party—a point made by Chief Justice Rehnquist in *Lenhard v. Wolff*, 443 U.S. 1306, 1312 (1979). *See infra* page 9 for exact language.

only a generalized interest in constitutional governance" does not "circumvent the jurisdictional limits of Article III simply by assuming the mantle of 'next friend.'" *Id.* at 164. In short, requirements of a significant interest in the subject party protect against abuses of the third-party standing rule. As the Court noted in a prior case, "however worthy and high minded the motives of 'next friends' may be, they inevitably run the risk of making the actual [party] a pawn to be manipulated on a chessboard larger than his own case." *Lenhard v. Wolff*, 443 U.S. 1306, 1312 (1979). Based on the dangers inherent in any third-party standing doctrine, the Court declined to expand "next friend" standing beyond what was authorized by Congress in the habeas corpus statute. *Whitmore*, 495 U.S. at 164–165.

Here, we follow the Supreme Court's lead in holding that "the scope of any federal doctrine of 'next friend' standing is no broader than what is permitted by the . . . statute." *Id.* Although Congress has authorized "next friend" lawsuits on behalf of habeas petitioners, *see* 28 U.S.C. § 2242, and on behalf of a "minor or incompetent person," *see* Fed. R. Civ. P. 17(c), there is no such authorization for "next friend" lawsuits brought on behalf of animals. Our precedent on statutory interpretation should apply to court rules as well as statutes: if animals are to be accorded rights to sue, the provisions involved therefore should state such rights expressly. *See Cetacean Cmty.*, 386 F.3d at 1179. Because we believe the Supreme Court's reasoning in *Whitmore* counsels against court-initiated expansion of "next friend" standing, we decline to recognize the right of next friends to bring suit on behalf of animals, absent express authorization from Congress.

Even so, we must proceed to the merits because Naruto's lack of a next friend does not destroy his standing to sue, as having a "case or controversy" under Article III of the Constitution. Federal Rule of Civil Procedure 17, which authorizes "next friend" lawsuits, obligates the court "to consider whether [incompetent parties] are adequately protected," even where they have no "next friend" or "guardian." *U.S. v. 30.64 Acres of Land*, 795 F.2d 796, 805 (9th Cir. 1986). Within this obligation, the court has "broad discretion and need not appoint a guardian ad litem [or next friend] if it determines the person is or can be otherwise adequately protected." *Id*. (citing *Roberts v. Ohio Casualty Ins. Co.*, 2556 F.2d 35, 39 (5th Cir. 1958) ("Rule 17(c) does not make the appointment of a guardian ad litem mandatory.")). *See also Harris v. Mangum*, 863 F.3d 1133, 1139 n.2 (9th Cir. 2017) (noting circumstances in which "appointing a guardian ad litem . . . could hinder the purpose of Rule 17(c)," and thus was not required). For example, "the court may find that the incompetent person's interests would be adequately protected by the appointment of a lawyer." *Krain v. Smallwood*, 880 F.2d 1119, 1121 (9th Cir. 1989) (citing *Westcott v. United States Fidelity & Guaranty Co.*, 158 F.2d 20, 22 (4th Cir. 1946). Indeed, courts have done just this, and the fact that those courts did not then dismiss the case proves that the lack of a next friend does not destroy an incompetent party's standing. *See, e.g., Westcott*, 158 F.2d at 22 (affirming judgment against minor who was represented by an attorney but not a guardian ad litem).[4]

[4] Here, we find that this case was briefed and argued by competent counsel who represented the legal interests of the incompetent party, but not a person, Naruto. Thus, his interests up to submission of the case following oral argument were adequately protected, notwithstanding any deficiencies in PETA's "next friend" relationship.

Concluding otherwise would conflict with our precedent. In *Cetacean Community*, 386 F.3d at 1171, we held that a group of cetaceans could demonstrate Article III standing. There, the cetaceans had no purported "next friend." Thus, were we to vacate the case we have before us now and remand with instructions to dismiss because of PETA's failure to establish "next friend" standing, our jurisprudence would permit a case brought "directly" by animals without any allegation that the suit was brought by a "next friend"—as was the case in *Cetacean*—but would not permit a case brought by an organization as the "next friend" of the animal at issue if the organization failed to meet the relational requirements. That cannot be the law. We thus hold that Naruto's Article III standing under *Cetacean* is not dependent on PETA's sufficiency as a guardian or "next friend," and we proceed to our Article III standing analysis.[5]

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[5] This is where we depart from the concurring opinion. First, Judge N.R. Smith seems to posit that we must restrict our inquiry into Article III standing and its effect on jurisdiction to an examination of the validity of the claimed Next Friend status, because that is how the complaint is stated. *See infra*, note 8 (Smith, J., concurring in part). In other words, since Naruto's only stated basis for jurisdiction is Next Friend status, we can determine whether we have jurisdiction by examining only the validity of the Next Friend claim. But such a restriction is contrary to our long held and often restated duty to examine *sua sponte* whether jurisdiction exists, regardless how the parties have framed their claims. *See, e.g. Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* the issues that the parties have disclaimed or have not presented. Subject matter jurisdiction can never be waived or forfeited.") (internal citations omitted). We therefore respectfully reject this suggested limitation.

Next, although Judge N.R. Smith agrees that an animal cannot sue by next friend, he nevertheless limits his analysis to cases involving next friend suits under statutes which contain particular next friend provisions. Under *Whitmore* and *Coalition*, he argues, we must dismiss based on

II. Article III Standing

The *Cetacean* court held that all of the world's whales, dolphins, and porpoises (the "Cetaceans"), through their self-appointed lawyer, alleged facts sufficient to establish standing under Article III. 386 F.3d at 1175. The Cetaceans alleged concrete physical injuries caused by the Navy's sonar systems in a suit brought by the "self-appointed attorney for

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PETA's insufficiency as a "next friend." But if we all agree that suits by animals *cannot* be brought under FRCP 17, because the rule refers only to "persons," not "animals," why would we want to follow and be bound by habeas cases for humans for which the statute (§ 2242) expressly *provides* next friend standing? The concurrence does not explain this point.

In our view, the question of standing was explicitly decided in *Cetacean*. Although, as we explain later, we believe *Cetacean* was wrongly decided, we are bound by it. Short of an intervening decision from the Supreme Court or from an en banc panel of this court, *see Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003), we cannot escape the proposition that animals have Article III standing to sue. With this as a starting premise, how could it be that PETA's deficiency as Naruto's representative could destroy Naruto's otherwise valid Article III standing? Again, the concurrence fails to explain.

Judge N.R. Smith insightfully identifies a series of issues raised by the prospect of allowing animals to sue. For example, if animals may sue, who may represent their interests? If animals have property rights, do they also have corresponding duties? How do we prevent people (or organizations, like PETA) from using animals to advance their human agendas? In reflecting on these questions, Judge Smith reaches the reasonable conclusion that animals should not be permitted to sue in human courts. As a pure policy matter, we agree. But we are not a legislature, and this court's decision in *Cetacean* limits our options. What we *can* do is urge this court to reexamine *Cetacean*. *See infra* note 6. What we *cannot* do is pretend *Cetacean* does not exist, or that it states something other, or milder, or more ambiguous on whether cetaceans have Article III standing.

all of the world's whales, porpoises, and dolphins." *Id.* at 1171. The Ninth Circuit made clear that the "sole plaintiff in this case" is the Cetaceans and did not discuss "next friend" or third-party standing. *Id.* Although the Ninth Circuit affirmed the district court's dismissal because the Cetaceans lacked statutory standing under the environmental statutes at issue in that case, the court stated that "Article III does not compel the conclusion that a statutorily authorized suit in the name of an animal is not a 'case or controversy.'"[6] *Id.* at 1175.

Here, the complaint alleges that Naruto is the author and owner of the Monkey Selfies. The complaint further alleges

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[6] The use of the double negative here is problematic in that it creates unnecessary ambiguity in the court's holding. Better, we think, to say a petition is "timely" than that it is "not untimely," for example. Better here to have said the animal has Article III standing. "This type of litotes (the negation of an opposite) often makes language convoluted. George Orwell ridiculed it with this example: 'A not unblack dog was chasing a not unsmall rabbit across a not ungreen field.'" BRYAN GARNER, GARNER'S MODERN AMERICAN USAGE 545 (2003) (citing "Politics and the English Language" (1946), in *4 Collected Essays, Journalism and Letters of George Orwell* 127, 138 n.1 (1968)). But this language does not change our ultimate conclusion. If nothing about Article III *compels* the conclusion that animals lack standing, then it cannot also be true that animals lack standing simply by virtue of their being animals. In other words, *Cetacean* at the very least holds that it is *possible* for animals, like humans, to demonstrate the kind of case or controversy required to establish Article III standing. Although the claims in *Cetacean* sounded in physical harm to plaintiffs, and the claims in *Naruto* sound in economic harm to Naruto, that difference is not a point of distinction for Article III purposes. "Cases or Controversies" have described claims involving property interests, as well as claims involving personal injuries, since the Founding, and before, at common law. Thus, the sort of blanket exclusion of animals from Article III jurisdiction which Judge N.R. Smith advocates is, alas, fundamentally inconsistent with *Cetacean*'s holding.

that Naruto has suffered concrete and particularized economic harms as a result of the infringing conduct by the Appellees, harms that can be redressed by a judgment declaring Naruto as the author and owner of the Monkey Selfies. Under *Cetacean*, the complaint includes facts sufficient to establish Article III standing. Therefore, we must determine whether Naruto has statutory standing[7] to sue for

[7] Mindful that the term "standing" carries with it jurisdictional connotations, we clarify that our use of the term "statutory standing" refers to Naruto's ability to sue under the Copyright Act, not his ability to sue generally. Thus, as we have observed in previous cases, "[t]hough lack of *statutory* standing requires dismissal for failure to state a claim, lack of Article III standing requires dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)." *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). The former is a determination on the merits, while the latter is purely jurisdictional.

While we believe *Cetacean* was incorrectly decided, it is binding circuit precedent that non-human animals enjoy constitutional standing to pursue claims in federal court. *See Cetacean*, 386 F.3d at 1175–76; *see also Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1106 (9th Cir.), cert. denied sub nom. *FCA U.S. LLC v. Ctr. for Auto Safety*, 137 S. Ct. 38, 196 L. Ed. 2d 26 (2016) ("While we have the authority to distinguish precedent on a principled basis, we are not free to ignore the literal meaning of our rulings, even when the panel believes the precedent is 'unwise or incorrect.'") (quoting *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001)). Although we must faithfully apply precedent, we are not restrained from pointing out, when we conclude after reasoned consideration, that a prior decision of the court needs reexamination. This is such a case.

Animals have neither constitutional nor statutory standing. Article III standing "often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Other than *Cetacean*, no case has held that animals have constitutional standing to pursue claims in federal court. *See e.g., Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, Inc.*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012) (Thirteenth Amendment prohibition on slavery and

copyright infringement.

III. Statutory Standing under the Copyright Act

In *Cetacean*, this court stated the following with respect to statutory standing for animals:

> We agree with the district court in *Citizens to End Animal Suffering & Exploitation, Inc.*, that "[i]f Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly." *In the absence of any such statement* in the ESA, the MMPA, or NEPA, or the APA, we conclude that the Cetaceans do not have statutory standing to sue.

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involuntary servitude applied only to humans, and thus whales lacked Article III standing to bring action against operator of theme park under Thirteenth Amendment). Prior to *Cetacean*, no court ever intimated that animals possess interests that can form the basis of a case or controversy. As to statutory standing, Congress has never provided that animals may sue in their own names in federal court, and there is no aspect of federal law (other than *Cetacean*) that has ever recognized that animals have the right to sue in their own name as a litigant. To that point, Rule 17(a) requires that the suit be brought in the name of the "party in interest"; and that next friend or guardian representation obtains only for a *person*. *See* Fed. R. Civ. P. 17(c). Because animals do not possess cognizable interests, it stands to reason that they cannot bring suit in federal court in their own names to protect such interests unless Congress determines otherwise.

Id. at 1179 (emphasis added).[8] The court in *Cetacean* did not rely on the fact that the statutes at issue in that case referred to "persons" or "individuals." *Id.* Instead, the court crafted a simple rule of statutory interpretation: if an Act of Congress plainly states that animals have statutory standing, then animals have statutory standing. If the statute does not so plainly state, then animals do not have statutory standing. The Copyright Act does not expressly authorize animals to file copyright infringement suits under the statute.[9] Therefore,

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[8] In *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993), a dolphin and several animal-rights organizations filed suit against the United States Department of the Navy and the Department of Commerce under the Marine Mammal Protection Act (MMPA). The plaintiffs alleged that the dolphin's transfer from the New England Aquarium to the Department of the Navy violated its rights under the MMPA. Without distinguishing between "statutory standing" and Article III standing, the district court granted the defendants' motion for summary judgment because the dolphin lacked standing to sue under the MMPA. *Id.* ("This court will not impute to Congress or the President the intention to provide standing to a marine mammal without a clear statement in the statute."). The plaintiffs did not file an appeal. *Id*.

[9] PETA also argues that the Copyright Act contemplates statutory standing for animals because it permits statutory standing for corporations and unincorporated associations without express authorization for those non-human entities. That argument does not refute the requirement, established in *Cetacean*, that Congress plainly state any grant of statutory standing to animals. Also, the Supreme Court has held corporations to be "persons" for standing, both for constitutional and statutory purposes. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 341–42 (2010) (concluding that corporations—associations of persons—have speech rights under the First Amendment); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) (concluding that the plaintiff corporation was a "person" under the Religious Freedom Restoration Act of 1993). Moreover, corporations and unincorporated associations are formed and owned by humans; they are not formed or owned by animals.

based on this court's precedent in *Cetacean*, Naruto lacks statutory standing to sue under the Copyright Act.[10]

Several provisions of the Copyright Act also persuade us against the conclusion that animals have statutory standing to sue under the Copyright Act. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). For example, the "children" of an "author," "whether legitimate or not," can inherit certain rights under the Copyright Act. *See* 17 U.S.C. §§ 101, 201, 203, 304. Also, an author's "widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest." *Id.* § 203(a)(2)(A). The terms "children," "grandchildren," "legitimate," "widow," and "widower" all imply humanity and necessarily exclude animals that do not marry and do not have heirs entitled to property by law. Based on this court's decision in *Cetacean* and the text of the

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See Bank of the U.S. v. Deveaux, 9 U.S. 61, 92 (1806) (looking to "the character of the individuals who compose the corporation" in recognizing for the first time the capacity of corporations to sue in federal court).

[10] PETA also argues that *Cetacean* is distinguishable because the statutes at issue in *Cetacean* represented a waiver of the United States' sovereign immunity, and such waivers, unlike the Copyright Act, are narrowly construed. *See United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) ("[T]he Government's consent to be sued 'must be construed strictly in favor of the sovereign' . . . ."") (citation omitted). However this court never mentioned sovereign immunity in *Cetacean*, nor did it imply that it narrowly construed the statutory language of the four statutes at issue under the canon of construction described by PETA to reach its decision.

Copyright Act as a whole, the district court did not err in concluding that Naruto—and, more broadly, animals other than humans—lack statutory standing to sue under the Copyright Act.

IV. Attorneys' Fees

Counsel for Slater and Wildlife requests that the court grant him appellate-stage attorneys' fees and remand to the district court for the determination of the amount of those fees.[11] Counsel for Slater and Wildlife is entitled to attorneys' fees and costs for this appeal. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994). Thus, the request in the answering brief by Slater and Wildlife for an award of attorneys' fees on appeal is granted.[12] The determination of an appropriate amount of fees on appeal is transferred to the district court pursuant to Ninth Circuit Rule 39-1.8.

AFFIRMED.

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[11] *See* 17 U.S.C. § 505 ("In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs."). By stipulation, the parties have deferred the determination of trial-stage attorneys' fees until the resolution of this appeal.

[12] We do not speculate on the effect that any settlement agreement, such as that mentioned in the joint motion to dismiss and vacate, may have on Appellees' ability to realize any such award. We note that the joint motion recited that Appellant Naruto was not a party to the settlement agreement.

N.R. SMITH, Circuit Judge, concurring in part:

I concur that this case must be dismissed. Federal courts do not have jurisdiction to hear this case at all. Because the courts lack jurisdiction, the appeal should be dismissed and the district court's judgment on the merits should be vacated. *Coal. of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1162–65 (9th Cir. 2002) ("Because we conclude that the Coalition lacks [next-friend or third-party] standing, we decline to reach the remaining questions addressed by the district court . . . . We therefore vacate those portions of the district court's opinion which reached those questions."). Indeed, where there is no standing, any further ruling "is, by very definition, for a court to act ultra vires." *Id.* at 1165 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998)). The Majority misses this point. I write to express my disagreement with the Majority's conclusion that next-friend standing[1] is nonjurisdictional.[2]

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[1] People for the Ethical Treatment of Animals, Inc. (PETA) grounded the jurisdiction for this suit in the next-friend standing doctrine. As pleaded: "[PETA] brings this action on behalf of, and as next friend[] to, Naruto, pursuant to Rule 17(b) of the Federal Rules of Civil Procedure, because Naruto's rights cannot be effectively vindicated except through an appropriate representative." Complaint at 3, *Naruto v. Slater*, No. 15-cv-04324 (N.D. Cal. Sept. 21, 2015).

Next-friend standing is an "alternative basis for standing" where the litigant pursues the action on behalf of the "real party in interest." *Whitmore v. Arkansas*, 495 U.S. 149, 161–63 (1990). Next-friend standing requires (1) "an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action"; and (2) "the 'next friend' must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a 'next

As the Majority opinion highlights in its treatment of the merits, PETA brought a frivolous lawsuit here. The argument that animals have statutory standing to maintain a Copyright Act claim—or any property right claims—is an easy question. Under the holding in *Cetacean Community v. Bush*, 386 F.3d 1169 (9th Cir. 2004), the Copyright Act, and basic property law, animals have no such rights.

However, to reach its conclusion on the Copyright Act question, the Majority ignores its own conclusion regarding standing, instead determining that: (1) next-friend standing is nonjurisdictional; and (2) even if the elements of next-friend standing are not met, any third-party may still bring suit on behalf of anyone or anything—without the real party in interest's permission—as long as (A) the real party in interest has an Article III injury; and (B) the real party in interest is "adequately protected" by the purported next friend's (or self-appointed lawyer's) representation. Maj. Op. at 9–11. That determination fails to follow United States Supreme Court or Ninth Circuit precedent. Let me explain.

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friend' must have some significant relationship with the real party in interest." *Id.* at 163–64 (internal citations omitted).

[2] The Majority states that "Naruto's Article III standing under *Cetacean* is not dependent on PETA's sufficiency as a guardian or 'next friend.'" Maj. Op. at 11. Put another way, the Majority simply says that lack of next-friend standing is nonjurisdictional, and (regardless of "PETA's sufficiency" to advance Naruto's claim) it may nonetheless resolve this case.

The Supreme Court was explicit:

> The burden is on the "next friend" clearly to establish the propriety of his status and *thereby justify the jurisdiction of the court*.
>
> These limitations on the "next friend" doctrine are driven by the recognition that "[i]t was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends." Indeed, if there were no restriction on "next friend" standing in federal courts, *the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of "next friend."*

Whitmore, 495 U.S. at 164 (emphasis added & internal citations omitted) (quoting *United States ex rel. Bryant v. Houston*, 273 F. 915, 916 (2d Cir. 1921)). We have also been explicit: failing to meet the standing requirements for next-friend standing removes jurisdiction of the court. *Coalition*, 310 F.3d at 1162–65 (dismissing case and vacating lower ruling which reached the merits, after finding there was no next-friend standing); *see also Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192, 1198–99 (9th Cir. 2001) (per curiam) (dismissing emergency motion for a stay of execution because purported next friend failed to meet the standing requirements).

To buttress these conclusions, I (1) outline the basics of Article III standing and the next friend exception to Article

III standing; (2) summarize the Majority's reasoning and decision; and (3) demonstrate the legal errors in the Majority opinion.

I. The basics of Article III standing and next-friend standing.

Article III of the United States Constitution limits the Federal Judiciary's power to "cases" and "controversies." U.S. Const. Art. III, § 2, cl. 1. The "doctrine of standing" is one of the "landmarks" that "set[s] apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III—'serving to identify those disputes which are appropriately resolved through the judicial process.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (original alterations omitted) (quoting *Whitmore*, 495 U.S. at 155); *see also Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III."); *Coalition*, 310 F.3d at 1157 ("At its constitutional core, standing is a manifestation of the Article III case-or-controversy requirement; it is the determination of whether a specific person is the proper party to *invoke the power of a federal court*." (emphasis added)). "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560. Accordingly, the Supreme Court has "deduced a set of requirements that together make up the 'irreducible constitutional minimum of standing.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan*, 504 U.S. at 560).

Part of the Article III case-or-controversy requirement is the obvious derivative premise that "the plaintiff generally must assert his own legal rights and interests." *Warth*, 422 U.S. at 499 (citing *Tileston v. Ullman*, 318 U.S. 44, 46 (1943); *United States v. Raines*, 362 U.S. 17, 21 (1960); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953)); *see also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) ("Ordinarily, a party must assert his own legal rights and cannot rest his claim to relief on the legal rights of third parties." (alterations, internal quotation marks, and citations omitted)); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (identifying that "whether the litigant suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement" is the first of two questions the Court asks "[w]hen a person or entity seeks standing to advance the constitutional rights of others"). "This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in *actual controversies*." *Raines*, 362 U.S. at 21 (emphasis added).

With only a single, narrow exception, a person filing a claim must assert a personal injury in fact[3] to establish

[3] Even in third-party standing (where a party has an Article III injury, but she must advance *someone else's* rights to achieve redress), the plaintiff must have suffered an injury. *See, e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 129 n.2 (2004) (assuming without deciding that plaintiffs alleged an adequate individual injury to satisfy the "constitutional minimum of standing" before continuing to address the standards for permitting a third party "to assert the rights of another"); *Lexmark Int'l, Inc.*, 134 S. Ct. at 1387 n.3 (noting cases articulating that the Article III basis for third-party standing is "closely related to the question whether a

standing. *Lujan*, 504 U.S. at 560–61. This exception is next-friend standing, where a third-party—without alleging its own injury—is allowed to bring suit on behalf of the named-party, who is either (1) an incompetent or minor; or (2) unable to access the courts because of imprisonment. With next-friend standing, the party in interest has an Article III injury, but because of the disabling aspect (minority, incompetence, or imprisonment), the real party cannot advance the action, except where another person (the next friend) stands in and advances the cause on the actual party's behalf. *Whitmore*, 495 U.S. at 161–66.

A. The basics of next-friend standing.

The Supreme Court considers next-friend standing an "alternative basis" for standing in federal courts. *Id.* at 161. Specifically, it has "long been an accepted basis for jurisdiction in certain circumstances." *Id.* at 162. These "certain circumstances" are deeply rooted in history and narrowly limited to: (1) habeas corpus actions; and (2) "infants, other minors, and adult mental incompetents." *Id.* at 163, 163 n.4.

Next-friend standing allows a third-party to singularly advance a cause of action on another's behalf. "A 'next friend' does not himself become a party to the . . . action in which he participates, but simply pursues the cause on behalf

person in the litigant's position will have a right of action on the claim.") (quoting *Dep't of Labor v. Triplett*, 494 U.S. 715, 721 n.** (1990))). In this case, PETA does not (nor could it) allege either individual or third-party standing. It does not have any cognizable Article III injury for the alleged Copyright Act violations against Naruto. Hence, I do not further address either of these bases for standing.

of the . . . real party in interest." *Id.* at 163. To invoke next-friend standing, the purported next friend must establish: (1) "an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action"; and (2) "the 'next friend' must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a 'next friend' must have some significant relationship with the real party in interest." *Id.* at 163–64 (internal citations omitted). I agree with the Majority that there is no question PETA did not allege—in any way—sufficient facts to establish it could be Naruto's next friend.

B. Next-friend standing cannot apply to animals.

I also agree with the Majority that animals cannot be represented by a next friend; I write to expand on the reasoning provided in the Majority opinion.

1. Next-friend standing for animals is barred by Supreme Court precedent.

The Supreme Court has clearly delineated the limits of next-friend standing: "[T]he scope of any federal doctrine of 'next friend' standing is *no broader than what is permitted by . . . the historical practice*." *Id.* at 164–65; *cf. Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818–19 (2014) (recognizing legislative prayer as a "historical" exception to the Establishment Clause); *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 627 n.26, 626 (2008) ("[N]othing in our opinion should be taken to cast doubt on the *longstanding prohibitions* on the possession of firearms by felons and the mentally ill[.]" (emphasis added)). The Supreme Court noted

the two illustrations allowed by such "historical practice": imprisoned individuals using habeas corpus and mental incompetents or minors. *Whitmore*, 495 U.S. at 161–63, 163 n.4; *see also* 28 U.S.C. § 2242 (codifying next-friend standing for habeas corpus actions; Fed. R. Civ. P. 17(c)(2) (permitting next-friend standing for a "minor or an incompetent *person* who does not have a duly appointed representative" (emphasis added)). However, there is no historical evidence that animals have ever been granted authority to sue by next friend and, absent an act of Congress,[4] it would be improper to expand this narrow exception to the actual injury requirement of Article III.

2. There is no textual support in either the habeas corpus statute or Rule 17 for animal next friends.

Neither of the two existing grounds for next-friend standing allow animal next-friend standing. First, a writ for habeas corpus "shall be in writing signed and verified by the *person* for whose relief it is intended or by someone acting *in his behalf*." 28 U.S. C. § 2242 (emphasis added). Therefore, textually, only a natural person can have a petition filed on her behalf. Further, any argument that animals are akin to "artificial persons" such as corporations, which are allowed to sue, *see e.g.*, *Cetacean*, 386 F.3d at 1176 (concluding that animals are no different from various "artificial persons" such as ships or corporations), makes no sense in the context of

[4] Even if such a statute were enacted, such a statutory grant of standing would still need meet the Article III standing "case or controversy" requirement. Because it would lack the pre-constitutional historical use like habeas actions or actions on behalf of minors or incompetent persons, I have grave doubts this would succeed.

28 U.S.C. § 2242. Corporations cannot be imprisoned and, thus, there is no grounds to conclude "person" in 28 U.S.C. § 2242 could include anything other than natural persons.

Second, the Federal Rules only authorize next friend suits on behalf of "a minor or an incompetent *person*." Fed. R. Civ. P 17(c) (emphasis added). Per the text, this can only apply to human persons, not any "minor" or "incompetent" corporations or animals. Importantly, the historical background of Rule 17(c) limits the use of next friends to only human persons. Rule 17(c) incorporated Rule 70 of the Federal Equity Rules into the Federal Rules of Civil Procedure. Fed. R. Civ. P. 17(c), Note to Subdivision (c). Rule 70 specifically provided, "All infants and other persons so incapable may sue by their guardians, if any, or by their *prochei ami* [next friend]." Fed. Equity R. 70. Finally, the provisions for corporate capacity are articulated in Rule 17(b). Fed. R. Civ. P. 17(b). This separate enumeration of rules for non-human entities, Rule 17(b), is a clear textual indication that the use of the term "person" in Rule 17(c) does not include non-human entities, such as corporations or animals.

3. Allowing next-friend standing for animals would violate the public policy behind next-friend standing.

In addition to its historical limits, next-friend standing is narrowly tailored in light of the public policy concerns associated with expanding the doctrine. Next-friend standing "is by no means granted automatically to whomever seeks to pursue an action on behalf of another." *Whitmore*, 495 U.S. at 163. "Indeed, if there were no restriction on 'next friend' standing in federal courts, the litigant asserting only a

generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of 'next friend.'" *Id.* at 164. The specific requirements to become a next friend are intended to keep "intruders or uninvited meddlers, styling themselves next friends" out of the courts. *Id.* at 164 (quoting *Houston*, 273 F. at 916). Moreover, as Chief Justice Rehnquist (writing as the sole justice for the Supreme Court on a stay of execution) similarly noted: "however worthy and high minded the motives of 'next friends' may be, they inevitably run the risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case." *Lenhard v. Wolff*, 443 U.S. 1306, 1312 (1979).

Animal-next-friend standing is particularly susceptible to abuse. Allowing next-friend standing on behalf of animals allows lawyers (as in *Cetacean*) and various interest groups (as here) to bring suit on behalf of those animals or objects *with no means or manner to ensure the animals' interests are truly being expressed or advanced*. Such a change would fundamentally alter the litigation landscape. Institutional actors could simply claim some form of relationship to the animal or object to obtain standing and use it to advance their own institutional goals with no means to curtail those actions. We have no idea whether animals or objects wish to own copyrights or open bank accounts to hold their royalties from sales of pictures. To some extent, as humans, we have a general understanding of the similar interests of other humans.[5] In the habeas corpus context, we presume other

[5] I intentionally do not refer to the human-controlled entities such as corporations or ships, because those entities never have next-friend standing. They have corporate officers or owners to advance their claims. Indeed, a shareholder, who would likely meet the next-friend standing

humans desire liberty. Similarly, in actions on behalf of infants, for example, we presume the infant would want to retain ownership of the property she inherited. But the interests of animals? We are really asking what *another species* desires. Do animals want to own property, such as copyrights? Are animals willing to assume the duties associated with the rights PETA seems to be advancing on their behalf?[6] Animal-next-friend standing is materially different from a competent person representing an incompetent person. We have millennia of experience understanding the interests and desire of humankind. This is not necessarily true for animals. Because the "real party in interest" can actually *never credibly articulate its interests or goals*, next-friend standing for animals is left at the mercy of the institutional actor to advance its own interests, which it *imputes* to the animal or object with *no accountability*. This literally creates an avenue for what Chief Justice Rehnquist feared: making the actual party in interest a "pawn to be

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requirements, generally cannot even bring a suit on behalf of the corporation. *See e.g.*, *Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990) (holding that "generally . . . shareholders [are prohibited] from initiating actions to enforce the rights of the corporation").

[6] Participation in society brings rights and corresponding duties. The right to own property is not free from duties. One must pay taxes on profits from a royalty agreement for use of a copyrighted image. Are animals capable of shouldering the burden of paying taxes? Similarly, all people have a duty to obey the law and, for example, not commit intentional torts. Should animals liable for intentional torts as well? The concept of expanding actual property rights—and rights broadly—to animals necessitates resolving what *duties* also come with those rights and, because animals cannot communicate in our language, *who* stands in their shoes?

manipulated on a chessboard larger than his own case." *Lenhard*, 443 U.S. at 1312.

II. The Majority opinion.

Although the Majority opinion recognizes these principles, it ignores them. The Majority opinion *states* that animals cannot have next-friend standing, but it nevertheless determines that, because Naruto has an Article III injury and he is "adequately protected," the Majority may proceed to determine the merits of Naruto's statutory standing claim under the Copyright Act. Maj. Op. at 9–15. In order to get there, the Majority concludes that next-friend standing is nonjurisdictional: "[W]e must proceed to the merits because Naruto's lack of a next friend does not destroy his standing to sue, as having a 'case or controversy' under Article III of the Constitution," and concludes that "Naruto's Article III standing under *Cetacean* is not dependent on PETA's sufficiency as a guardian or 'next friend.'" Maj. Op. at 10, 11. I admit that the basis for the Majority's conclusion is primarily grounded in its reading of *Cetacean*, in which a "self-appointed attorney" brought a suit on behalf of the world's cetaceans. 386 F.3d at 1171–72. *Cetacean* concluded that animals may have an Article III injury—but, notably, did not examine whether next-friend standing was present. Given this analysis, the Majority concludes that, because the *Cetacean* panel allowed the case to go forward, it implicitly held that next-friend standing is nonjurisdictional. Maj. Op. at 11.

The Majority's conclusion on the first point—animals can never have next-friend standing—is correct[7] and should end

[7] As such, I concur in the Majority's opinion to that extent.

our inquiry. *See infra.* On the other hand, the second conclusion (that next-friend standing is nonjurisdictional) is not supportable. This conclusion is incorrect and the consequences associated with the Majority's holding are avoidable, if we follow precedent.

III. The Majority's conclusion that next-friend standing is nonjurisdictional is legally unsupportable.

A. The Majority's second conclusion violates Supreme Court and Ninth Circuit Precedent.

Both the United States Supreme Court and our Circuit have held next-friend standing is jurisdictional. In *Whitmore*, the petitioner brought suit on behalf of another death-row prisoner, Ronald Simmons. 495 U.S. at 152–54. Whitmore asserted both third-party standing and next-friend standing to justify the suit. *Id.* at 153–54. The Supreme Court held that Whitmore failed both standing tests and, ultimately held that "Jonas Whitmore lacks standing to proceed in this Court, and the writ of certiorari is dismissed *for want of jurisdiction*." *Id.* at 166 (emphasis added). The Supreme Court also clearly held that any purported next friend bears the burden "clearly to establish the propriety of his status *and thereby justify the jurisdiction of the court*." *Id.* at 164 (emphasis added) (citing *Mo. Pub. Def. Comm'n ex rel. Smith v. Armontrout*, 812 F.2d 1050, 1053 (8th Cir. 1987); *Grouseclose ex rel. Harries v. Dutton*, 594 F. Supp. 949, 952 (M.D. Tenn. 1984)); *see also Demosthenes v. Baal*, 495 U.S. 731, 737 (1990) (holding that "federal courts must make certain that an adequate basis exists for the exercise of federal power" and dismissing the suit for failure to demonstrate next-friend standing).

We have also held that next-friend standing is jurisdictional. In *Coalition*, a coalition of clergy, lawyers, and professors brought suit on behalf of the prisoners detained in Guantanamo, Cuba. 310 F.3d at 1156. The district court held that the Coalition did not have standing and, even if they did, no federal district court—including itself—could have jurisdiction over such a suit. *Id.* On appeal, we agreed that the Coalition could not establish next-friend standing. *Id.* However, we noted that "[t]he question before us is not the scope of the rights and privileges of the detainees themselves under either our Constitution or other international laws or agreements." *Id.* at 1164. Rather, we "consider[ed] only the rights of the members of the Coalition *to assert standing on behalf of the detainees and to seek habeas review of their detention*." *Id.* at 1165 (emphasis added). We then dismissed the suit *and* vacated the district court's other holding that no court, or itself, may entertain a habeas action on behalf of a detainee held in Guantanamo, Cuba. *Id.* Additional Circuit precedent stands for the same proposition. *See Massie*, 244 F.3d at 1199 (affirming the district court's conclusion that a litigant seeking a stay of execution on behalf of another person "lacked standing" as a next friend under *Whitmore*).[8]

[8] The Majority argues that I err by using next-friend cases to conclude that we lack jurisdiction in this case. Maj. Op. at 11–12 n.5. But, next-friend standing is the only basis for jurisdiction PETA has alleged. Compl. at 3 (stating PETA "b[rought] this action on behalf of, and as next friend[] to, Naruto"). Both the Majority and I agree that PETA does not have next-friend standing and that animals can never have next-friend standing. This should end our inquiry. Further, as a general rule, the proponent of a case must advance its own injury. *Warth*, 422 U.S. at 499. Next-friend standing is an exception to this rule. *Whitmore*, 495 U.S. at 161–63. Naruto did not bring his own claim, PETA does not assert its own injury, and both the Majority and I agree PETA cannot be Naruto's next friend. There are no other jurisdictional bases on which to rest our authority to resolve this case.

B. Standing must be jurisdictional because of its preclusive effect.

Judgments are preclusive. *See, e.g.*, *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) ("Res judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action." (citations omitted)). If the putative next friend is *not* the appropriate entity, but the case is allowed to go forward, an improper representative can create preclusive precedent that, forever, bars the real party in interest. This preclusive effect alone requires that the question of next-friend standing be decided before the merits question and, if there is no next-friend standing, the case must be dismissed so the proper party may bring the case if she so chooses.

C. *Cetacean* did not impliedly overrule *Coalition* or *Whitmore*.[9]

The Majority's conclusion that *Cetacean* somehow makes next-friend standing nonjurisdictional tortures the case and legal reasoning to reach such a conclusion. First, both *Whitmore* and *Coalition* were decided *before Cetacean*.

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[9] The Majority accuses me of "pretend[ing] *Cetacean* does not exist, or that it states something other, or milder, or more ambiguous on whether cetaceans have Article III standing" and arguing for a "blanket exclusion of animals from Article III jurisdiction." Maj. Op. at 11–12 n.5, 13 n.6. My conclusion does not "pretend *Cetacean* does not exist"; it simply requires *Cetacean* be applied within the legal framework that governs cases where a plaintiff's claims are *brought by someone else*. Such claims may only be advanced by a next friend and, if one is not available or legally possible, those claims cannot be redressed. As I demonstrate in this section, *Cetacean* does not hold to the contrary.

Accordingly, those binding cases, which directly answer the question of whether next-friend standing is jurisdictional, were binding on the *Cetacean* panel as well.

Second, *Cetacean* is silent on next-friend standing. Indeed, even the briefing did not raise the issue. Rather, the *Cetacean* court seemed to conclude that animals may have Article III standing,[10] and then examined the statutory standing questions before it. 386 F.3d at 1174–79. The *Cetacean* court did not (though it most certainly should have) examine whether it was appropriate for a "self-appointed attorney" to bring a case on behalf of the "Cetacean Community" and articulate "their" interests. *Id.* at 1171–72. There can be no reasonable argument that the lawyer in *Cetacean* spoke to, and received instructions from his client, the "Cetacean Community." Rather, he functioned as a purported next friend, arguing that certain Navy sonar technology injured the members of the "Cetacean Community." *Id.*

Third, it is simply incorrect to conclude that an implied holding from a case that did not even address the question—in any form—somehow overrules explicit prior United States Supreme Court and Ninth Circuit precedent. "[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions." *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985); *see also Morales-Garcia v. Holder*, 567 F.3d 1058, 1064 (9th Cir. 2009) (stating that panels are bound by "prior decision[s]," but "the term 'decision,' however, encompasses only those issues that are raised or discussed" (citations

[10] Although binding precedent, I agree with the Majority that granting Article III standing to animals was an incorrect conclusion.

omitted)). Indeed, *Cetacean* itself noted: "'[W]here a panel confronts an issue germane to the eventual resolution of the case, *and resolves it after reasoned consideration* in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.'" *Cetacean*, 386 F.3d at 1173 (emphasis added) (quoting *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (Kozinski, J., concurring)); *see also Brecht v. Abrahamson*, 507 U.S. 619, 630–31 (1993) (refusing to follow prior cases where the issue had not been "squarely addressed"). Rather, the appropriate reading of *Cetacean*, because a three-judge panel *cannot* overrule a prior panel, *see Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc), is that the *Cetacean* panel (1) ought not have reached the question it did; and (2) the fact that it seemed to conclude that an animal may have Article III standing does not remove the appropriate standing question that determines if the next friend may bring the action at all. It is simply unsupportable to conclude that a panel that *did not address an issue somehow overrules prior binding decisions that did address the issue*.

Fourth, the simple fact that *Cetacean* found that animals could have an Article III injury does not, automatically, create some form of right for third-parties to advance those claims (or, make next-friend standing nonjurisdictional and, as the Majority holds, simply inapplicable)! There are a multitude of Article III injuries that occur regularly, which people choose not to pursue. Because the individual with the injury opts *not* to pursue the claim does not somehow make the injury "public domain," so any random entity may bring the claim. Next-friend standing serves as a bar to such meddling, and *Cetacean* did not impliedly eviscerate that conclusion.

Not only did *Cetacean* not address animal next-friend standing, but no court has *ever* done so. *See Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1448 n.13 (9th Cir. 1992) ("No party has mentioned and, notwithstanding our normal rules, we do not consider, the standing of the first-named party [Mount Graham Red Squirrel] to bring this action."); *Palila v. Hawaii Dep't of Land & Nat. Res.*, 852 F.2d 1106, 1107 (9th Cir. 1988) ("As an endangered species . . . , the bird . . . also has legal status and wings its way into federal court *as a plaintiff in its own right*." (emphasis added)), *abrogated in part by*, *Cetacean*, 386 F.3d at 1173 (9th Cir. 2004) ("*Palila IV*'s statements [regarding standing] are nonbinding dicta."); *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 49–50 (D. Mass. 1993) (finding named dolphin, Kama, lacked standing because "[t]he MMPA does not authorize suits brought by animals," and addressing the fact that Rule 17(b) would hold that animals lack "capacity" to be sued because they are property of their owners, concluding that "the MMPA and the operation of F.R.Civ.P. 17(b) indicate that Kama the dolphin lacks standing to maintain this action as a matter of law," and allowing "the removal of Kama's name from the caption of [the] case"); *Hawaiian Crow ('Alala) v. Lujan*, 906 F.Supp. 549, 551–52 (D. Haw. 1991) (finding that in *Northern Spotted Owl*, *Palila*, and *Mount Graham Red Squirrel*, no party had challenged the named standing of the animal itself and the case had other parties in the litigation and ultimately concluding that "the cited cases do not directly support plaintiffs' position here" and concluding that "the plain language of Rule 17(c) and section 1540(g) [did] not authorize the 'Alala to sue" because it was "clearly neither a 'person' as defined in section 1532(13), nor an infant or incompetent person under Rule 17(c)"); *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621

(W.D. Wash. 1991) (failing to address standing for named first-party); *Northern Spotted Owl v. Hodel*, 716 F. Supp 479 (W.D. Wash. 1988) (failing to address standing for named first-party).

D. The Majority's reliance on both Rule 17 and cases discussing "adequate protection" in the context of Rule 17 are simply inapplicable.

There is a crucial distinction between the cases cited by the Majority for the proposition that the only requirement for next friend suits is to ensure the "[incompetent parties] are adequately protected," Maj. Op. at 10 (quotation marks omitted and alterations in original), and the facts of *this* case and next-friend standing broadly. Each case cited is an example of an incompetent person bringing suit on his own behalf or such a person being sued by another party. I list the cases cited by the Majority to emphasize:

- *Krain v. Smallwood*, 880 F.2d 1119, 1121 (9th Cir. 1989) ("Lawrence Krain appeals the dismissal with prejudice of eight lawsuits *he filed, in pro se*, in the district court." (emphasis added)).

- *United States v. 30.64 Acres of Land*, 795 F.2d 796, 797 (9th Cir. 1986) ("The United States *filed a complaint against Starr* . . . to establish just compensation for 30.64 acres of Starr's land taken by the government . . . ." (emphasis added)).

- *Harris v. Mangum*, 863 F.3d 1133, 1136 (9th Cir. 2017) ("Plaintiff-Appellant Jason

Harris, an Arizona state prisoner, *filed pro se a lawsuit* in state court that was subsequently removed . . . ." (emphasis added)).

- *Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35, 37, 39 (5th Cir. 1958) (finding where "Ohio Casualty Insurance Company . . . *filed suit* to set aside a ruling . . . *against the claimants*—the children and their grandmother," and children had not been represented by a guardian ad litem, the lower judgment granting relief to the plaintiff must be reversed and remanded for further proceedings (emphasis added)).

- *Westcott v. U.S. Fid. Guar. Co.*, 158 F.2d 20, 21 (4th Cir. 1946) ("The United States Fidelity & Guaranty Company . . . *brought a civil action* . . . seeking a declaratory judgment to the effect that it was not liable on a public liability policy . . . . The defendants in the civil action . . . were the insured, . . . George Mann, a minor." (emphasis added)).

Quite simply, there is *no* Article III jurisdiction question in *any* of these cases. Of course, the court would ensure such incompetent *persons* were adequately represented. The parties sought either redress in court as plaintiffs (but were not competent, and thus needed to be protected), or were pulled into court as defendants (and, thus, the court was required to ensure they were protected).

These circumstances do not exist here. Our question is whether a third-party (PETA) has next-friend standing—such that it can invoke the authority of this court—to stand in Naruto's shoes and advance his claims. It is not a question of whether Naruto was properly protected *or* was brought into this litigation as a defendant. Unlike the cases cited, Naruto (1) did not file this case himself; and (2) is not a defendant. PETA and Dr. Engelhardt initiated this suit on Naruto's behalf. As such, the cases cited by the Majority are simply inapplicable.

IV. Conclusion

The question of PETA's next-friend standing was squarely before our panel. It was briefed and argued. By both concluding that next-friend standing is nonjurisdictional *and* reaching the merits of the Copyright Act question, the Majority allows PETA (with no injury or relationship to the real party in interest) to sue on Naruto's behalf, because it obtained legal counsel to allegedly represent Naruto. I cannot support this conclusion.[11]

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[11] Indeed, this case is a prime example of the abuse the Majority opinion would now allow. In 2011, Slater (a photographer) went to the Tangkoko Reserve in Indonesia and setup a camera. Naruto, a crested macaque, pushed the shutter. Slater and Wildlife Personalities subsequently included the photographs in a book published by Blurb. In 2015, PETA—with no evidence it has any relationship whatsoever to Naruto—brought the instant suit claiming that Slater, Wildlife Personalities, and Blurb had violated Naruto's rights under the Copyright Act. PETA alleged that it "ha[d] a genuine concern for Naruto's well-being and [was] dedicated to pursing his best interests in this litigation" and that it "ha[d] the financial and operational resources and the professional expertise to administer and protect Naruto's copyright in the Monkey Selfies." Compl. at 4. PETA sought, *inter alia*, a court order

"[p]ermitting [PETA] to administer and protect Naruto's authorship of and copyright in the Monkey Selfies." *Id.* at 10.

PETA lost at the district court and appealed. When Dr. Engelhardt moved to be dismissed from the case, PETA twice affirmatively stated it would "fulfill the duties of a next friend." *Notice of Withdrawal of Next Friend Antje Engelhardt* (May 4, 2016); *see also Motion to Correct Caption* (May 10, 2016) ("PETA shall remain responsible for maintaining this litigation and fulfilling the *duties* of a [n]ext [f]riend pursuant to Federal Rule of Civil Procedure 17(c)." (emphasis added)).

However, PETA quickly changed its tune after oral argument. On September 11, 2017, PETA and Defendants moved to dismiss the appeal and vacate the lower court's judgment. *Joint Motion to Dismiss Appeal and Vacate the Judgment* (Sept. 11, 2017). But, unlike a normal settlement, the purported plaintiff, Naruto, *was not a party*. "Dismissal with vacatur is just and proper where, as here, the Plaintiff [Naruto] is *not a party to the settlement*." *Id.* at 1 (emphasis added). Rather, his purported next friend, PETA, *settled its own claims*: "the settlement resolves all disputes arising out of this litigation *as between PETA and Defendants*." *Id.* (emphasis added). It remains a mystery to me what "claims" PETA (a non-party) could settle. Nevertheless, even though PETA only settled its *own* claims, it maintained that "the settlement also renders moot the appeal filed on behalf of the Plaintiff Naruto." *Id.* Indeed, PETA went so far as to claim "[t]here is thus no longer any live case or controversy before this Court." *Id.* at 3.

Though it had previously attested it would "fulfill[] the duties of a next friend," PETA forgot its self-appointed role. "A 'next friend' *does not [itself] become a party to the . . . action* in which [it] participates, but *simply pursues the cause on behalf of [the party in interest]*." *Whitmore*, 495 U.S. at 163 (emphasis added). Whatever PETA did or did not do for Naruto (it only made representations to this court regarding what *it* obtained), PETA made sure to protect itself and with the *Joint Motion* sought to manipulate this court to avoid further negative precedent contrary to its institutional objectives. PETA cleverly argues that, because Naruto is not a party to the settlement and Defendants have maintained that PETA does not have next-friend standing, Naruto should not be bound by judgments entered because of PETA's actions. But, clever arguments

hardly conceal what is really occurring and the flip by PETA is quite surprising. One day, PETA maintains it will advance Naruto's interests, the next it maintains that Naruto cannot be bound by PETA's actions. It is clear: PETA's real motivation in this case was to advance its own interests, not Naruto's. PETA began this case purportedly seeking not only an injunction, but also a judgment "[d]eclaring Naruto to be the author and copyright owner of the Monkey Selfies with all attendant rights and privileges under law" and disgorgement. Compl. at 9–10. After oral argument, none of those objectives are, apparently, worth pursuing. Rather, when it came down to a possible negative, precedential ruling from the panel, PETA quickly sought to protect the *institution*, not the claimed real party in interest. PETA used Naruto as a "pawn to be manipulated on a chessboard larger than his own case." *Lenhard*, 443 U.S. at 1312 (Rehnquist, J., writing for the full Supreme Court).

Unfortunately, PETA's actions could be the new normal under today's holding.

NOT RECOMMENDED FOR PUBLICATION
File Name: 18a0507n.06

No. 17-1907

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 15, 2018
DEBORAH S. HUNT, Clerk

NIKITA T. SMITH; KEVIN D. THOMAS, Plaintiffs-Appellants, v. CITY OF DETROIT, MICHIGAN, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: BATCHELDER, SUTTON, and WHITE, Circuit Judges.

HELENE N. WHITE, Circuit Judge. In this § 1983 case, Detroit Police Officers obtained a search warrant based on information that marijuana was being sold from a home where Plaintiffs-Appellants Nikita Smith and Kevin Thomas ("Plaintiffs") lived. While executing the warrant, the Officers shot and killed Plaintiffs' three unlicensed dogs. The district court granted summary judgment in favor of Defendants because it found that Plaintiffs forfeited any property interest in the dogs by failing to license them. We disagree, and **REVERSE** in part.

I.

Plaintiffs began occupying an abandoned house in Detroit, Michigan in November 2015. They brought three dogs with them to the home: "Debo," a nine-year-old Pit Bull; "Smoke," a seven-year-old Rottweiler; and "Mama," a seventeen-month-old pregnant Pit Bull. None of the dogs were licensed under the City of Detroit Code § 6-2-1.

In January 2016, a neighbor called the narcotics hot line and reported that the occupants were selling marijuana from the house. On January 11, 2016, Defendant-Appellee Officer

Wawrzyniak and a confidential informant conducted a $10.00 controlled buy at the house. In response to Wawrzyniak's question whether there were any dogs in the residence, the informant replied that he "thought he heard a small dog." (R. 25-4 at PID 478.)

Officers obtained a search warrant and Defendant-Appellees, Detroit Police Officers Gaines, Howell, Morrison, Paul, Wawrzyniak, and Sergeant Harris (collectively "the Officers"), went to the residence to execute it. Roughly fifteen minutes before executing the search, the Officers conducted a briefing, during which Wawrzyniak discussed the information he had regarding the layout of the home, the controlled purchase, and the seller, and mentioned that a dog might be inside the residence.

After concluding the briefing, the Officers gathered on the front porch, knocked, and announced their presence and that they had a search warrant. The Officers did not hear anyone respond inside the home. Before breaching the door with a battering ram, the Officers heard dogs barking. According to Gaines, the police did not change their plans after they became aware of the dogs because they were concerned that an occupant would flush narcotics down the drain if they delayed conducting the search. Smith—who was the only Plaintiff present at the time—contends that when she saw the Officers and the dogs started barking, she called out that she was going to secure the dogs. Smith then put the two Pit Bulls (Debo and Mama) in the basement and, because the basement did not have a door, Smith pushed a stove against the doorway in front of the stairs leading down to the basement. The Rottweiler (Smoke) was already in the bathroom behind a closed door.

After attempting to secure the dogs, Smith walked into the living room, where the Officers were standing with their guns drawn. Debo had apparently escaped from the basement:

> The first thing after I put the dogs up, my dog Debo pushed the door – pushed the stove, and next thing you know he is standing beside

> me . . . . He got out the – the barricade, came to where I was at, stood there beside me, as the police officer was standing there with the guns already pointed, so as soon as that happened they – he shot him right next to me, right by my feet.

(R. 25-1 at PID 407.) Smith's recollection is that Debo was sitting or standing next to her when Morrison shot at least three or four rounds, hitting Debo in the body and the head.

The Officers, conversely, recall a "vicious" grey pit bull "immediately charging, trying to come out and attack us." (R. 25-3 at PID 463.) Morrison testified that he fired one shotgun shot at Debo's legs, and then allowed Smith to "put the dog up." (R. 25-2 at PID 432.) Morrison recalls that Debo "came charging back through the dining room back towards the living room again" after Smith apparently lost control of the dog. (*Id.*) Gaines then shot Debo seven times. Debo died next to Smith in the doorway to the living room.

The Officers then began to clear the home. After hearing barking from the bathroom, Morrison cracked the door open to check if Thomas or anyone else was inside with the dog. Morrison did not see a person, but saw Smoke, whom Morrison described as a "vicious" dog that was "growling and exhibiting a posture or other indicators that a[n] imminent attack is probably going to occur." (*Id.* at PID 437.) Morrison and Gaines testified that after opening the bathroom door, Smoke became trapped between the door and the bathroom vanity. The Officers say they shot Smoke through the door before he could break free. Later, Paul entered the bathroom, observed that Smoke had been mortally wounded, and shot Smoke in the head "to put it out of its misery." (R. 25-12 at PID 809.)

Smith disputes the Officers' accounts. According to Smith, Smoke was not attacking or expressing aggression toward the police; nor did Smoke get his head through the door. Smith testified that the Officers discussed whether or not to shoot the dog in the bathroom before shooting

through the door. Smith also testified that after the shooting, she heard Gaines say, "Did you see that? I got that one good." (R. 25-1 at PID 413.)

The Officers continued to clear the home. Wawrzyniak and Paul were at the top of the basement staircase and testified that the final dog, Mama, "started to charge up the stairs." (R. 25-4 at PID 486.) Paul stated that because Mama charged up the stairs and showed her teeth, he shot the dog four or five times with his shotgun. Mama was found dead in the basement.

Smith saw the Officers descend into the basement, but had been placed in handcuffs in the living room. As a result, Smith did not see what happened and did not see the Officers shoot Mama.

After the search concluded, the Officers called Detroit Animal Control, and they responded, and removed and disposed of the dogs' bodies. Officers found 25.8 grams of marijuana in the residence. Smith was arrested and charged with a misdemeanor violation of Detroit's marijuana law, which was dismissed when the Officers failed to appear in court to testify. Internal investigations into the incident concluded the shootings were justified.

II.

Plaintiffs filed suit under 42 U.S.C. § 1983, asserting claims against the Officers for illegal seizure of the dogs in violation of the Fourth Amendment, *Monell*[1] claims against the City of Detroit, and state-law claims for conversion and intentional infliction of emotional distress.

All Defendants moved for summary judgment, which the district court granted after finding that Plaintiffs did not have a legitimate possessory interest in their dogs because they were unlicensed:

> Thomas and Smith committed a misdemeanor violation of both the Michigan Dog Law of 1919 and the Detroit City Code by not licensing their dogs. Consequently, the dogs fit within the definition of

[1] *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978).

> contraband, and Plaintiffs do not enjoy a legitimate possessory interest protected by the Fourth Amendment under the particular facts of this case. . . .

(R. 27 at PID 947–48.)

Because this is "an issue of first impression," the district court also conducted a qualified immunity analysis and held that even if Smith and Thomas had a possessory interest in the dogs, the Officers' plan was reasonable because they only had notice of one "small dog,"[2] and the Officers' actions were reasonable when they shot Mama. However, because Defendants-Appellees conceded material issues of fact remained regarding whether two of the dogs posed an imminent threat, the district court held that if Smith and Thomas had a legitimate possessory interest, the Officer who initially shot Debo (Morrison) and the Officers who shot Smoke behind the bathroom door (Morrison and Gaines) were not entitled to summary judgment.[3]

Smith and Thomas timely appealed.

III.

We review a district court's grant of summary judgment de novo. *Brown v. Battle Creek Police Dep't*, 844 F.3d 556, 565 (6th Cir. 2016) (citing *Mullins v. Cyranek*, 805 F.3d 760, 764 (6th Cir. 2015)). We "must assume the truth of the non-moving party's evidence and construe all

[2] Wawrzyniak described in his deposition the plans the officers had in case they were confronted by dogs at the residence:

> [T]he first two guys . . . walks [sic] through that door with the long guns and if they can kick [the dogs] out of the way and they proceed to run to a corner, fine, but if they come back to attack then you just have to eliminate that threat so no one gets bit.

(R. 25-4 at PID 478–79.) When asked whether the only two options for dealing with dogs were to "either shoot or kick away," Wawrzyniak responded "Absolutely," and explained that the police "have no other tool to deal with a dog." (*Id.* at PID 479.) Wawrzyniak later acknowledged that the Officers could call Detroit Animal Control to remove the dogs. We agree with the district court that the plan was not unreasonable given that the Officers only had information suggesting the possible presence of "a small dog."

[3] The district court also granted summary judgment on the *Monell* claims against the city and on the state-law IIED claim. Again due to Defendants-Appellees concessions, the district court found material issues of fact precluded summary judgment against Officers Morrison and Gaines on Plaintiffs' state-law conversion claim. These rulings are not before us.

inferences from that evidence in the light most favorable to the non-moving party." *Id.* (quoting *Ciminillo v. Streicher*, 434 F.3d 461, 464 (6th Cir. 2006)).

Government officials are immune from civil liability under 42 U.S.C. § 1983, provided "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citation and internal quotation mark omitted). To determine whether a government official is entitled to qualified immunity, we analyze (a) whether the facts, when taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a constitutional right; and (b) whether that constitutional right was clearly established such that a "reasonable official would understand that what he is doing violates that right." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (citation and internal quotation marks omitted), *overruled on other grounds by Pearson*, 555 U.S. at 229.

Defendants concede that material issues of fact remain as to whether the seizure of two of the dogs—Debo and Smoke—was justified by exigent circumstances. Defendants further concede that a person has a Fourth Amendment right to not have his or her lawfully possessed dog unreasonably seized and that this right was clearly established in 2013. (R. 27 at PID 950 (citing *Brown*, 844 F.3d at 566–67).) The only question before us is whether Morrison and Gaines's seizures were nevertheless reasonable because Plaintiffs' dogs were "contraband" and therefore unprotected by the Fourth Amendment.

"It is settled in [Michigan] that dogs have value, and are the property of the owner as much as any other animal which one may have or keep." *Ten Hopen v. Walker*, 55 N.W. 657, 658 (Mich.

1893).[4] The district court recognized this principle but found that because the Michigan Dog Law of 1919 and Detroit City Code § 6-2-1 criminalize the possession of unlicensed dogs, the failure to license a dog forfeits any property interest in that animal. This reading is unsupported by the plain language of either provision.

Whether something is contraband—strictly unlawful to possess or produce—is defined by positive law. *United States v. Church*, 823 F.3d 351, 355 (6th Cir. 2016). The Michigan Dog Law, Mich. Comp. Laws § 287.261 *et seq.*, makes it "unlawful for any person to own any dog 6 months old or over, unless the dog is licensed." Mich. Comp. Laws § 287.262. Prior to 2014, the law authorized a county sheriff to "locate and kill, or caused to be killed, all such unlicensed dogs." But that authorization was eliminated by Public Act 32 of 2014, and the law now requires the county prosecutor, "[u]pon receipt of the name of an owner of an unlicensed dog from the county treasurer," to bring proceedings against the owner. Mich. Comp. Laws § 287.277. The law provides the process for notifying owners of unlicensed dogs of the proceedings:

> (1) A district court magistrate or the district or common pleas court shall issue a summons[5] . . . to show cause why a dog should not be killed, upon a sworn complaint that any of the following exist:
>
> (a) After January 10 and before June 15 in each year a dog over 6 months old is running at large unaccompanied by its owner or is engaged in lawful hunting and is not under the reasonable control of its owner without a license attached to the collar of the dog.

[4] Although the dissent correctly observes that *Ten Hopen* was decided before the Dog Law of 1919 was enacted, Michigan courts have nevertheless continued to apply it. *See, e.g.*, *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000) ("Pets have long been considered personal property in Michigan jurisprudence." (citing *Ten Hopen*, 55 N.W. at 657)).

[5] The summons shall be "similar to the summons provided for" in the case of a dog that damages livestock, which provides: "The summons may be served anyplace within the county in which the damage occurred, and shall be made returnable not less than 2 nor more than 6 days from the date stated in the summons and shall be served at least 2 days before the time of appearance mentioned in the summons." Mich. Comp. Laws § 287.280.

> (b) A dog, licensed or unlicensed, has destroyed property or habitually causes damage by trespassing on the property of a person who is not the owner.
>
> (c) A dog, licensed or unlicensed, has attacked or bitten a person.
>
> (d) A dog has shown vicious habits or has molested a person when lawfully on the public highway.
>
> (e) A dog duly licensed and wearing a license tag has run at large contrary to this act.

Mich. Comp. Laws § 287.286a. In the absence of the above criteria, the law does not authorize killing the dog, but penalizes the owner:

> Any person or police officer, violating or failing or refusing to comply with any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall pay a fine not less than $10.00 nor more than $100.00, or shall be imprisoned in the county jail for not exceeding 3 months, or both such fine and imprisonment.

Mich. Comp. Laws § 287.286.

Similarly, under Detroit City Code § 6–2–1, it is "unlawful for any person to own, harbor, keep, or shelter a dog more than four (4) months of age within the City without purchasing a license for the dog." The ordinance authorizes the Detroit Animal Control Division to enforce the provision "consistent with the Michigan Dog Law of 1919." *Id.* It is clear from these provisions that owners of unlicensed dogs are entitled to process prior to seizure as provided by the Michigan Dog Law, and therefore retain a property interest in the dogs. The district court erred in finding otherwise.

By guaranteeing process to dog owners before their unlicensed dogs are killed, Michigan law makes clear that the owners retain a possessory interest in their dogs. This is particularly so in the context of everyday property that is not inherently illegal, such as some drugs, but instead is subject to jurisdiction-specific licensing or registration requirements, such as cars or boats or

guns. Just as the police cannot destroy every unlicensed car or gun on the spot, they cannot kill every unlicensed dog on the spot.

Further, even assuming Plaintiffs' dogs were contraband, the result here would be the same. The district court held that the Fourth Amendment simply does not apply to protect contraband. That is wrong—and it has been wrong for at least forty years. In cases involving contraband, the Supreme Court has continued to ask whether a seizure was reasonable under the Fourth Amendment: A warrantless seizure of contraband is not reasonable if it was not "immediately apparent" to an officer that the item was contraband. *Horton v. California*, 496 U.S. 128, 136–37 (1990); *see also Arizona v. Hicks*, 480 U.S. 321, 326–28 (1987); *Payton v. New York*, 445 U.S. 573, 587 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971).[6]

Just like it applied to the stolen stereo equipment in *Hicks*, the Fourth Amendment applies to the unlicensed dogs here. And just like the seizure in *Hicks*, the officers' seizures here were unreasonable. This case does not involve a five-year-old holding an open beer can; the officers here could not look at the dogs and know whether they were licensed. Further, there is evidence that the officers did not see each dog before shooting it.

Although Michigan law required the dogs to wear license tags, Mich. Comp. Laws § 287.267, the Officers could not tell that the dogs were unlicensed simply because they were not wearing tags. Dogs can be licensed but not wearing a license tag. The dogs could also have been

[6] The dissent believes these cases are inapposite because they involve unreasonable searches, not seizures, and the remedy sought was suppression, not damages. We believe these distinctions are immaterial. The dissent cites no case that distinguishes between searches and seizures for these purposes. Rather, the Supreme Court in *Hicks* refused to make such a distinction. 480 U.S. at 328 ("Although the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures neither the one nor the other is of inferior worth or necessarily requires only lesser protection. We have not elsewhere drawn a categorical distinction between the two insofar as concerns the degree of justification needed to establish the reasonableness of police action, and we see no reason for a distinction in the particular circumstances before us here." (citation omitted)). Second, given the doctrine of qualified immunity, we see no basis to change our analysis of a constitutional violation based on the remedy sought. Indeed, § 1983 authorizes monetary compensation for constitutional violations.

under 6 months old and therefore not subject to the state licensing requirement. Mich. Comp. Laws § 287.262. Or the dogs could have been less than 4 months old or in Detroit for 30 days or less and thus not subject to the municipal licensing requirements. Detroit City Code §§ 6–2–1, 6–2–2. Under these circumstances, it would not be immediately apparent to the police officers that the dogs needed to be licensed and were not.

As the district court observed, "the officers did not shoot the dogs because they were unlicensed. Rather, the officers . . . were not even aware that the dogs were unlicensed." (R. 27 at PID 945.) Without that, the plain view exception does not apply to justify warrantless seizures. We emphasize, however, that even if the Officers had knowledge that the dogs were unlicensed, they still would not have been authorized to shoot them on the basis that they were contraband.

Based on Defendants' concession that issues of material fact precluded summary judgment on Plaintiffs' § 1983 and state-law conversion claims regarding two of the dogs, we **REVERSE** the judgment of the district court only as to Officers Morrison and Gaines and **REMAND** the case for further proceedings consistent with this opinion.

ALICE M. BATCHELDER, Circuit Judge, dissenting. The majority concludes that "[i]t is clear" under Michigan state law "that owners of unlicensed dogs . . . retain a property interest in the dogs." Maj. Op., at 8. But Michigan state law on this question is not nearly so clear as the majority claims. The district court analyzed Michigan state law and reached the opposite conclusion, and the majority has not shown why the district court was wrong as a matter of Michigan state law. And there are good reasons to think that the district court may have been correct. In any event, existing law at the time that the police officers killed the Plaintiffs' dogs did not establish beyond debate that the officers' conduct infringed on the Plaintiffs' Fourth Amendment rights, and so the majority errs by not affording the officers qualified immunity.

The majority also concludes that "even assuming Plaintiffs' dogs were contraband, the result here would be the same." *Id.* But the majority's constitutional analysis misinterprets the Supreme Court's Fourth Amendment cases and threatens to extend sweeping monetary liability to officers who seize contraband during searches and to the municipalities that employ them.

For these reasons, I respectfully dissent. But I echo the district court's recognition that this conclusion "may not sit well with dog owners and animal lovers in general." I am a long-time dog owner myself, and this conclusion does not sit well with me either. But my review of Michigan state law and the Supreme Court's qualified-immunity and Fourth Amendment cases makes me unable to join the majority's opinion.

I.

A.

"There is not a lot of law about the Fourth Amendment and dogs." *Hardrick v. City of Detroit*, 876 F.3d 238, 246 (6th Cir. 2017) (Sutton, J.). It is clear, generally speaking, that "a dog is property." *Id.* (quoting *Brown v. Battle Creek Police Dep't*, 844 F.3d 556, 566 (6th Cir. 2016)).

So, to the extent that a dog is property, "the killing of a dog constitutes a 'seizure' within the meaning of the Fourth Amendment." *Brown*, 844 F.3d at 566. This is because the killing of a dog constitutes a "meaningful interference with an individual's possessory interests" in his dog. *Id.* But we have never before answered the question of whether a person retains a legitimate possessory interest in an unlicensed or untagged dog where state law makes the ownership or possession of such a dog a criminal offense. No other circuit has addressed this question either, so there is even less law about the Fourth Amendment and unlicensed or untagged dogs.

The district court case concluded that owners of unlicensed dogs in Michigan do not retain a legitimate possessory interest in their unlicensed dogs because Michigan state law makes the ownership or possession of an unlicensed dog a criminal offense. Although Michigan state law is not clear, here are some reasons to think that the district court may have been correct.

As the majority recognizes, we must look to Michigan state law to determine the property status of unlicensed or untagged dogs in Michigan. *See* Maj. Op., at 7. The majority quotes an 1893 Michigan Supreme Court case which states that dogs in Michigan "have value, and are the property of the owner." *Id.* (quoting *Ten Hopen v. Walker*, 55 N.W. 657, 658 (Mich. 1893)). But *Ten Hopen* is not the last word on this question. Dogs "hold[] their lives at the will of the legislature," *Bugai v. Rickert*, 242 N.W. 774, 775 (Mich. 1932) (quoting *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 702 (1897)), and the Michigan legislature enacted its Dog Law of 1919 more than twenty years after *Ten Hopen* was decided. So it is the Dog Law of 1919 and the Michigan cases that follow it, and not the Michigan cases that precede it, to which we must turn to determine the property status of unlicensed or untagged dogs in Michigan.[1] *Cf. Sentell*, 166 U.S.

[1] The district court analyzed this question under both the Michigan Dog Law of 1919 and the Detroit City Code. I focus here on the Dog Law of 1919, but my analysis of the Detroit City Code would be similar.

at 704 ("Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the state, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens.").

Looking to the Michigan cases that follow the enactment of the Dog Law of 1919, we find that there is in Michigan a property interest in dogs, "but of an imperfect or qualified nature." *Bugai*, 242 N.W. at 775 (citing *Finley v. Barker*, 189 N.W. 197, 199 (Mich. 1922)); *see People v. Yeo*, 302 N.W.2d 883, 885–86 (Mich. Ct. App. 1981) ("The police power of the state has been used to regulate and control property in dogs to a greater extent than property in any other class of domestic animals. It is a peculiar kind of property.") (quoting *State v. Mueller*, 265 N.W. 103, 106 (Wis. 1936)). Dogs in Michigan may therefore "be subjected to peculiar and drastic police regulations by the state without depriving their owner of any federal right.'" *Bugai*, 242 N.W. at 775 (quoting *Nicchia v. New York*, 254 U.S. 228, 230 (1920)).

The Dog Law of 1919 makes owning or possessing an unlicensed or untagged dog a criminal offense which is punishable by up to three months in jail or a fine, or both. *See* Mich. Comp. Laws §§ 287.261(2)(c), 287.262, 287.286. In other contexts, at least, we have found items to be contraband where state law prohibits the possession of that item and attaches criminal penalties thereto. *See, e.g.*, *United States v. Church*, 823 F.3d 351, 355 (6th Cir. 2016) ("marijuana is contraband because its possession and production is prohibited under federal law and the criminal laws of most states") (citing *Black's Law Dictionary* 365 (9th ed. 2009) (contraband is "[g]oods that are unlawful to . . . possess")). And persons have no constitutionally protected property interest in possessing contraband. *See Illinois v. Caballes*, 543 U.S. 405, 408 (2005) ("any interest in possessing contraband cannot be deemed 'legitimate'" (citation omitted)); *United States v. Droganes*, 728 F.3d 580, 592 (6th Cir. 2013) ("Droganes lacks a sufficient property

interest in the [illegal unlicensed] display fireworks . . . because those items are contraband, and individuals have no property interest in contraband."); *accord United States v. Janik*, 723 F.2d 537, 547 (7th Cir. 1983) (where federal law prohibited possessing an unregistered submachine gun, the warrantless seizure of an unregistered submachine gun "invaded no interest that the Fourth Amendment protects" because defendant "did not have a lawful property interest in the unregistered gun").

Now, it is true that the Dog Law of 1919 does not contain as clear a statement that unlicensed or untagged dogs are contraband as exists elsewhere in Michigan state law. *See* Mich. Comp. Laws § 436.1235 ("A property right does not exist in any alcoholic liquor had, kept, transported, or possessed contrary to law . . . , and all such are hereby declared contraband and forfeited to the state and shall be seized."). But such a clear statement is not necessary. "[M]arijuana is contraband," *see Church*, 823 F.3d at 355, and Michigan's provision prohibiting possessing marijuana is more like the Michigan provisions prohibiting owning or possessing unlicensed or untagged dogs than it is like the Michigan provisions prohibiting possessing illegal liquor, *see* Mich. Comp. Laws §§ 333.7403 (prohibiting the knowing or intentional possession of controlled substances), 333.7212 (categorizing marijuana as a controlled substance).

Other provisions of the Dog Law of 1919 show that Michigan state law draws a line between licensed dogs and unlicensed dogs. These provisions confirm that licensed dogs in Michigan are property in which a person has a legitimate possessory interest protected by state law, but seem to indicate that unlicensed dogs in Michigan are either not property in which a person has a legitimate possessory interest protected by state law or are property in which a person has some kind of inferior property interest. The owner of a licensed dog may seek monetary damages from a police officer or other person who kills that dog, *see id.* § 287.287, but there is no indication

that owners of unlicensed dogs may seek such damages. *Cf. Finley*, 189 N.W. at 201 ("A presumption of value attends a licensed dog."). Persons who are not police officers may not "kill or injure or attempt to kill or injure any dog which bears a license tag for the current year," except in limited circumstances. *See* Mich. Comp. Laws § 287.279; *cf. Finley*, 189 N.W. at 201 (describing dog licenses in Michigan as "entitling [] dog[s] to live" and "protect[ing] their lives"). Persons also may not "steal, or confine and secrete any dog licensed under this act," except in limited circumstances. *See* Mich. Comp. Laws § 287.286b; *see also id.* § 287.308. But there are no provisions making it illegal to kill, steal, or confine and secrete unlicensed dogs. And any "dog required to be licensed under this act that is unlicensed is a public nuisance," and county prosecutors "shall commence proceedings against the owner of the dog as required by the act." *Id.* § 287.277.

Only one provision of the Dog Law of 1919 might undercut this conclusion, and it is this provision on which the majority relies. This provision authorizes Michigan authorities to kill certain licensed or unlicensed dogs, but only after following a prescribed legal process. *See id.* § 287.286a. To the majority, this provision makes it "clear" that "owners of unlicensed dogs are entitled to process prior to seizure . . . , and therefore retain a property interest in the dogs." Maj. Op., at 9. But this provision does not purport to protect all unlicensed dogs; rather, it applies to several categories of dogs, some licensed, some unlicensed, and some whether licensed or unlicensed. *See, e.g.*, Mich. Comp. Laws § 287.286a(1)(e) ("[a] dog duly licensed and wearing a licensed tag [that] has run at large contrary to this act"); *id.* § 287.286a(1)(c) ("[a] dog, licensed or unlicensed, [that] has attacked or bitten a person"); *see also Finley*, 189 N.W. at 201 ("The owner who has complied with the law, paid for and obtained a license entitling his dog to live, is at least entitled to notice and a hearing before the dog is killed."). Still, even if this provision protects all

unlicensed dogs, the Dog Law of 1919 does not authorize persons to seek monetary damages from a police officer who kills an unlicensed dog without following the prescribed legal process. *See* Mich. Comp. Laws § 287.287. The only remedy the Dog Law of 1919 provides for a police officer's failure to comply with any of its provisions, other than the illegal killing of a licensed dog, is potential criminal liability for the police officer. *See id.* §§ 287.286, 287.287.

For all of these reasons, I disagree with the majority that it is "clear" under Michigan state law that owners of unlicensed dogs "retain a property interest in the dogs."

B.

Although it is not "clear" under Michigan state law that owners of unlicensed dogs "retain a property interest in the dogs," I concede that it also may not be "clear" under Michigan state law that unlicensed or untagged dogs are contraband in which a person retains no legitimate possessory interest whatsoever. But we need not decide this question. This lack of clarity in Michigan state law means that existing law at the time that the officers killed the Plaintiffs' dogs did not establish beyond debate that the officers' conduct impinged on the Plaintiffs' Fourth Amendment rights. The majority therefore errs by not affording the officers qualified immunity.

Under the Supreme Court's precedents, police officers are entitled to qualified immunity from claims under 42 U.S.C. § 1983 unless they violate a federal statutory or constitutional right *and* unless the unlawfulness of their conduct was "clearly established at the time." *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (citation omitted). "'Clearly established' means that, at the time of the officer[s'] conduct, the law was sufficiently clear that every reasonable official would understand what he was doing is unlawful." *Id.* (internal quotation marks and citation omitted). "In other words, existing law must have placed the constitutionality of the officer[s'] conduct beyond debate." *Id.* (internal quotation marks and citation omitted). This is a

"demanding standard" that "protects all but the plainly incompetent or those who knowingly violate the law." *Id.* (internal quotation marks and citation omitted).

It is not clear that the first prong of qualified immunity is satisfied here, but we need not decide that question in order to afford the officers qualified immunity, since the second prong certainly is satisfied. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Existing law at the time that the officers killed the Plaintiffs' unlicensed dogs did not establish beyond debate that a person retains a legitimate possessory interest in his unlicensed or untagged dog where state law makes the ownership or possession of such a dog a criminal offense. The panel majority has not "identified a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation," *see Wesby*, 138 S. Ct. at 591, in circumstances where police officers killed unlicensed or untagged dogs in a state where owning or possessing an unlicensed or untagged dog is a criminal offense. Every reasonable official therefore would not have known that the Fourth Amendment was implicated in circumstances like these, where the Plaintiffs have neither alleged that their dogs were licensed nor alleged any facts from which we may infer that there was any way for the officers to know that the Plaintiffs' dogs were anything other than unlicensed, such as the presence of collars with license tags.

The majority states that the "officers here could not look at the dogs and know whether they were licensed." Maj. Op., at 9. But the officers here could look at the dogs and know whether they were wearing collars with license tags, as is specifically required by Michigan state law. *See* Mich. Comp. Laws § 287.267. And the absence of collars with license tags alone made the Plaintiffs' dogs illegal to own or possess under Michigan state law. *See id.* § 287.262 (making it "unlawful for any person to own . . . any dog 6 months old or over that does not at all times wear a collar with a tag . . . .").

The only thing that existing law at the time established beyond debate was that the Fourth Amendment protected licensed dogs from unreasonable seizures, *see Brown*, 844 F.3d at 566 (finding that this was clearly established in 2013), but the clearly-established standard requires a "high degree of specificity," *Wesby*, 138 S. Ct. at 590, and this specificity is "especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts," *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (citation omitted). *Brown* is therefore not sufficient to have established beyond debate that the killing of an unlicensed or untagged dog implicated the Fourth Amendment's prohibitions.

Because existing law at the time that the officers killed the Plaintiffs' dogs did not establish beyond debate that the officers' conduct infringed on the Plaintiffs' Fourth Amendment rights, the majority errs by not affording qualified immunity to the officers.

II.

I must also dissent from the majority's conclusion that, "even assuming Plaintiffs' dogs were contraband, the result here would be the same." Maj. Op., at 9. There is a significant problem with the majority's constitutional analysis which could have sweeping ramifications.

In each Supreme Court case the majority cites, the alleged constitutional harm was an unreasonable *search* under the Fourth Amendment and in each case the remedy sought was *suppression* of the allegedly illegally obtained evidence. *See Horton v. California*, 496 U.S. 128, 141–42 (1990) (rejecting an "inadvertence" requirement and affirming the denial of a motion to suppress evidence found in plain view during a search pursuant to a valid search warrant); *Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987) (affirming the suppression of evidence where police officers conducted an additional search unjustified by the exigent circumstances that validated entry into

the home); *Payton v. New York*, 445 U.S. 573, 577–82 (1980) (reversing the denial of four motions to suppress evidence found in plain view during warrantless entries into homes to make felony arrests); *Coolidge v. New Hampshire*, 403 U.S. 443, 453–54, 472 (1971) (reversing in a case "not . . . involving contraband" the denial of a motion to suppress evidence found during a seizure and search pursuant to an invalid warrant). None of these cases involves plaintiffs seeking monetary damages for the seizure of contraband during a search. For example, in *Hicks*, the Fourth Amendment's prohibition of unreasonable *searches* required the suppression of the contraband found as a result of an illegal search. But nothing in the Fourth Amendment required the police officers to pay James Thomas Hicks the value of the stolen stereos that the officers later seized. *See generally Hicks*, 480 U.S. 324–29.

The majority's failure to cite a single Supreme Court case authorizing similar 42 U.S.C. § 1983 lawsuits seeking to recover monetary damages for contraband seized during a search is telling, but is not surprising. Police officers regularly seize contraband during searches, much of it quite valuable. The majority's reasoning would authorize lawsuits seeking damages for the seizure of, among other things, illegal drugs and illegal firearms. *See generally, e.g.*, *Church*, 823 F.3d at 354 (police seized marijuana, pills, and a firearm from a convicted felon); *Janik*, 723 F.2d at 541 (police seized unlicensed submachine gun and sawed-off shotgun). Nothing in the Supreme Court cases cited by the majority requires, much less supports, such a result, and we should be careful not to mangle the Supreme Court's Fourth Amendment cases to create such sweeping monetary liability for police officers and the municipalities that employ them.

III.

For the foregoing reasons, I respectfully dissent.

are forfeited and do not preclude summary judgment in defendant's favor.

¶ 97 III. CONCLUSION

¶ 98 For the reasons stated, we affirm the trial court's judgment.

¶ 99 Affirmed.

Justices Steigmann and Turner concurred in the judgment and opinion.

2018 IL App (3d) 150832
420 Ill.Dec. 718

The PEOPLE of the State of Illinois, Plaintiff–Appellee,

v.

Regina F. ROBARDS, Defendant–Appellant.

Appeal No. 3–15–0832

Appellate Court of Illinois,
Third District.

Opinion filed March 12, 2018

Rehearing denied March 28, 2018

Background: Defendant was convicted following a bench trial in the 10th Judicial Circuit, Tazewell County, No. 14-CF-577, Paul Gilfillan, J.P., of aggravated cruelty to a companion animal. Defendant appealed.

Holding: The Appellate Court, Holdridge, J., held that evidence was sufficient to show that defendant had requisite intent to be found guilty of aggravated cruelty to a companion animal.

Affirmed.

1. Animals ⚿3.5(5)

Evidence was sufficient to show that defendant had requisite intent to be found guilty of aggravated cruelty to a companion animal by failing to provide water for dogs pursuant to the Humane Care for Animals Act; defendant was keeping dogs at a home that she no longer resided, defendant was the only person caring for the dogs, had been caring for them, and was responsible for their care, defendant told her friend that she was going to the home every day to care for the dogs, there was no water source available anywhere in the house, the dogs' died from dehydration and starvation due to lack of access to water, and there was no evidence that the dogs had any sort of disease, infection, parasite, or cancer that would have contributed to their death. 510 Ill. Comp. Stat. Ann. 70/3.02(a).

2. Animals ⚿3.5(5)

In order for a defendant to be convicted of aggravated cruelty to a companion animal, the State must prove both that the defendant (1) intentionally committed the act and (2) intended to seriously injure or kill the animal. 510 Ill. Comp. Stat. Ann. 70/3.02(a).

3. Animals ⚿3.5(5)

An omission to perform a duty may qualify as an "act," as an element of the crime of aggravated cruelty to a companion animal, which requires proof that a defendant intentionally committed an act that caused serious injury or death to a companion animal. 510 Ill. Comp. Stat. Ann. 70/3.02(a); 720 Ill. Comp. Stat. Ann. 5/4-1.

4. Criminal Law ⚿568

Intent can rarely be proved by direct evidence because it is a state of mind.

5. Criminal Law ⚿568

Where intent is not admitted by a defendant, it could be shown through circumstantial evidence from surrounding circumstances, the character of the acts committed, and the nature and seriousness of the injury to the victim.

Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illi-

nois, Circuit No. 14–CF–577, Honorable Paul Gilfillan, Judge, Presiding.

Michael J. Pelletier, Thomas A. Lilien, and Christopher McCoy, of State Appellate Defender's Office, of Elgin, for appellant.

Stewart J. Umholtz, State's Attorney, of Pekin (Patrick Delfino, Lawrence M. Bauer, and Stephanie L. Raymond, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

OPINION

JUSTICE HOLDRIDGE delivered the judgment of the court, with opinion.

¶ 1 The defendant, Regina F. Robards, appeals her conviction for aggravated cruelty to a companion animal, arguing that the State failed to prove her guilty beyond a reasonable doubt.

¶ 2 FACTS

¶ 3 On December 23, 2014, the defendant was charged with four counts of aggravated cruelty to a companion animal in violation of section 3.02(a) of the Humane Care for Animals Act (Act) (510 ILCS 70/3.02(a) (West 2014)), alleging that she had intentionally committed an act that caused serious injury or death to her two dogs by depriving them of adequate water and failing to seek adequate medical care for them. The case proceeded to a stipulated bench trial solely on the two counts related to the dogs' deprivation of water.

¶ 4 The stipulated evidence provided that Loretta Joachim would testify that she owned a house on Howard Court in Pekin, Illinois, that she rented to the defendant. The defendant had lived in the Howard Court house for some time but had moved out in July 2014 and came to live with Joachim at her personal residence. When the defendant moved out of the Howard Court house, she left her two dogs, Walker and Sparky, living at the Howard Court house. "[The defendant] told Ms. Joachim that she was going to the house on Howard every day to take care of the dogs. And Ms. Joachim would testify that she had reason to believe that [the defendant] was returning to that residence on a regular basis."

¶ 5 On November 24, 2014, Joachim went to check on the Howard Court house. When she entered the house, "she found extremely poor conditions there." "She would testify that she observed feces and urine on the floors as well as extensive damage to the walls and floors of the home." Joachim called the police. The police officers who responded would also testify as to the condition of the house. "Officers and Ms. Joachim would both testify that they observed inside that residence an emaciated, gaunt and obviously deceased dog on the floor of the living room." Joachim and the officers would testify "that there was no water source available in the home and there was no water anywhere in the home available for drinking or for consumption." According to the officers, the defendant stated "that she had seen this particular dog alive four days earlier; but later had found it had died."

¶ 6 On November 29, 2014, Joachim again contacted the police, who subsequently went to the Howard Court house.

> "Joachim and the officers would all testify that they had again observed a second dog that was obviously dead lying in a garbage bag in the back bedroom of the residence. They would all testify that the dog's skeleton was visible through its skin and fur. It was extremely emaciated; and again, that the conditions in the home * * * were deplorable."

On this occasion, the defendant told the officers "that the second dog was named Sparky and that she had been caring for it at the Howard Court residence."

¶ 7 Tazewell County Animal Control officers would testify that they removed each dog from the Howard Court house after

each was discovered and took them back to animal control. "They each would also testify as to the conditions in the house being extremely unsanitary. And they would also testify as to the extremely wasted, emaciated and poor conditions of the dogs that were found at the residence."

¶ 8 Veterinarian Joel Jess would testify that he had seen Walker, the first dog found, at his clinic in March and April 2014 but not since that time. "[A]t that time, Walker was in good physical condition and had no immediate health concerns." According to defense counsel, in April 2014, Jess had written a prescription "for some kind of ringworm or something or other," and the records contained a note that the defendant "was concerned about the dog's weight."

¶ 9 Veterinarian Arthur Herm would testify that he had examined both of the dogs postmortem. "[B]oth of them had no evidence of any kind of disease, no evidence of cancer, no evidence of viral or bacterial infection, no evidence of any sort of parasites; and that both of them were determined to have their death caused by dehydration and starvation due to a lack of access to water." Herm would further testify "regarding the condition of dehydration and that it's a condition that is easily remedied when a dog is provided timely access to medical treatment."

¶ 10 The defendant stipulated to the evidence presented by the State but stated that she did not believe the evidence was sufficient to convict. The defendant further stipulated that she "was the only person caring for the dogs, had been caring for them and was responsible for their care." The court found the defendant guilty of both counts of aggravated cruelty to a companion animal, stating,

> "[B]ased on that stipulated evidence, [the defendant] was the party in charge of the care of the dogs and her actions were intentional in that she did not physically kill the dogs as if by gun or some weapon, but rather her acts were intentional in that the death of the dogs was reasonably expected to follow from her voluntary actions of leaving them alone and depriving them of adequate water."

The defendant was sentenced to 12 months' probation, with the condition that she not care for, own, or provide for any companion animals during that time.

¶ 11 ANALYSIS

[1] ¶ 12 On appeal, the defendant argues that she was not proven guilty beyond a reasonable doubt. Specifically, the defendant argues that the evidence regarding her intent in committing the crime was insufficient to convict her for aggravated cruelty to a companion animal.

[2, 3] ¶ 13 Section 3.02(a) of the Act states, in relevant part: "No person may intentionally commit an act that causes a companion animal to suffer serious injury or death." 510 ILCS 70/3.02(a) (West 2014). Therefore, in order to be convicted of aggravated cruelty to a companion animal, the State must prove both that the defendant (1) intentionally committed the act and (2) intended to seriously injure or kill the animal. *People v. Lee*, 2015 IL App (1st) 132059, ¶ 51, 397 Ill.Dec. 343, 41 N.E.3d 994. Under the statute, the "act" requirement includes " 'an omission to perform a duty.' " *People v. Land*, 2011 IL App (1st) 101048, ¶ 121, 353 Ill.Dec. 71, 955 N.E.2d 538 (quoting 720 ILCS 5/4–1 (West 2006)). The defendant does not dispute that she intentionally committed an act but solely argues that the State did not prove that she intended to seriously injure or kill the dogs.

[4, 5] ¶ 14 Because intent is a mental state, it can rarely be proven by direct evidence. *People v. Witherspoon*, 379 Ill. App. 3d 298, 307, 318 Ill.Dec. 494, 883 N.E.2d 725 (2008). Instead, circumstantial

evidence from the surrounding circumstances, the character of the acts, and the nature and seriousness of the injury is often the only way to prove intent. *People v. Williams*, 165 Ill. 2d 51, 64, 208 Ill.Dec. 341, 649 N.E.2d 397 (1995); *People v. Rudd*, 2012 IL App (5th) 100528, ¶ 14, 361 Ill.Dec. 214, 970 N.E.2d 580. Our supreme court has held that every individual intends " ' "all the natural and probable consequences flowing from his own deliberate act." ' " *People v. Smith*, 402 Ill. App. 3d 538, 547, 341 Ill.Dec. 967, 931 N.E.2d 864 (2010) (quoting *People v. Koshiol*, 45 Ill. 2d 573, 578, 262 N.E.2d 446 (1970), quoting *People v. Coolidge*, 26 Ill. 2d 533, 537, 187 N.E.2d 694 (1963)).

¶ 15 Here, the evidence presented at the stipulated bench trial showed that (1) the defendant moved out of the Howard Court house in July but kept her dogs there until they died in November, (2) the defendant "was the only person caring for the dogs, had been caring for them and was responsible for their care," (3) the defendant told Joachim that she was going to the Howard Court house every day to care for the dogs, (4) there was no water source available anywhere in the house, (5) the cause of the dogs' death was determined to be "dehydration and starvation due to a lack of access to water," and (6) there was no evidence that the dogs had any sort of disease, infection, parasite, or cancer. The court could have inferred from the evidence presented that the defendant knew she needed to feed and water her dogs or they would die. See *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60, 354 Ill.Dec. 484, 958 N.E.2d 227 (the trier of fact need not disregard inferences that normally flow from the evidence or to seek all possible explanations consistent with the defendant's innocence and elevate them to reasonable doubt). The natural consequence of not feeding or providing water to pets is that they will die, particularly when they are locked in a house without outdoor access. As a person intends "the natural and probable consequences of his acts" (*People v. Terrell*, 132 Ill. 2d 178, 204, 138 Ill.Dec. 176, 547 N.E.2d 145 (1989)), it follows that the defendant had the requisite intent necessary to be found guilty of aggravated cruelty to a companion animal. Therefore, taking the evidence in the light most favorable to the State (see *People v. Collins*, 106 Ill. 2d 237, 261, 87 Ill.Dec. 910, 478 N.E.2d 267 (1985)), a rational trier of fact could have found all of the essential elements of the crime beyond a reasonable doubt.

¶ 16 In coming to this conclusion, we reject the defendant's reliance on *Lee* and *Land* for the proposition that it was necessary for the State to present evidence (1) that the defendant had prior notice that her conduct was improper and (2) regarding the length of time the conditions would have had to persist for the dogs to die. *Lee*, 2015 IL App (1st) 132059, 397 Ill.Dec. 343, 41 N.E.3d 994; *Land*, 2011 IL App (1st) 101048, 353 Ill.Dec. 71, 955 N.E.2d 538. In *Lee*, the defendant was charged with aggravated cruelty to a companion animal when several horses were found on his property locked in stalls filled with several feet of petrified manure with no visible food or water. *Lee*, 2015 IL App (1st) 132059, ¶¶ 8–11, 397 Ill.Dec. 343, 41 N.E.3d 994. He had been issued a citation one year earlier for the poor condition of the horses. *Id.* ¶ 32. In *Land*, the defendant was charged with aggravated cruelty to a companion animal for using a heavy tow chain on her dog's neck, which became embedded in the dog's neck, resulting in his euthanasia. *Land*, 2011 IL App (1st) 101048, ¶¶ 5, 28, 353 Ill.Dec. 71, 955 N.E.2d 538. Four months earlier a police officer had told the defendant, when responding to a citizen's complaint, that the collar was not proper. *Id.* ¶ 27.

¶ 17 First, the additional evidence presented in *Lee* and *Land* is not necessary to

obtain a conviction under section 3.02(a) of the Act. The evidence need only establish that the defendant intentionally committed an act that caused the death of a companion animal. See 510 ILCS 70/3.02(a) (West 2014). Both elements were proven beyond a reasonable doubt in the instant case. *Supra* ¶ 16. Second, the evidence of prior notice in *Lee* and *Land* showed that those two defendants knew that their conduct was improper. Here, the defendant told Joachim that she was going to the Howard Court house every day to care for the dogs. Therefore, it can be inferred that she knew she needed to provide them with food and water, yet the subsequent state of the dogs shows that she failed to do so. Third, regarding the length of time the conditions had to have persisted, the court in *Lee* noted that there was no testimony regarding how long it would have taken for the manure to pile up but that, based on the amount of manure, the jury could have concluded that the "conditions persisted over a very lengthy period of time." *Lee*, 2015 IL App (1st) 132059, ¶ 56, 397 Ill.Dec. 343, 41 N.E.3d 994. Similarly, based on the emaciated and gaunt condition of the dogs and the fact that they died from starvation and dehydration, the court could have concluded that they were without food and water for some time.

¶ 18 We further reject the defendant's contention that "[t]here was no evidence of a possible motive or any suggestion why [the defendant] would want to harm her dogs." Proof of motive for the commission of a charged crime is not required. *People v. Reed*, 23 Ill. App. 3d 686, 693, 320 N.E.2d 249 (1974).

¶ 19 Finally, we would be remiss if we did not note that the defendant is very fortunate to have only received a sentence of 12 months' probation for these heinous crimes. Each Class 4 felony carries a sentence of up to 3 years or up to 30 months' probation. 730 ILCS 5/5–4.5–45 (West 2014). We take issue with the fact that the circuit court found as a factor in mitigation that the "defendant's conduct did not cause or threaten serious physical harm to another person." Section 5–5–3.1(a)(1) of the Unified Code of Corrections states that one factor in mitigation is, "The defendant's criminal conduct neither caused nor threatened serious physical harm to *another*." (Emphasis added.) *Id.* § 5–5–3.1(a)(1). Assuming *arguendo* that the word "another" in section 5–5–3.1(a)(1) refers only to another human being, as opposed to an animal, this mitigating factor should have no application in this case. The defendant was convicted of aggravated cruelty to a companion animal in violation of section 3.02(a) of the Act. That section prescribes the commission of any act that "causes *a companion animal* to suffer serious injury or death." (Emphasis added.) 510 ILCS 70/3.02(a) (West 2014). It does not address acts that cause harm to human beings. Nor does it condition punishment for animal cruelty on proof of harm to a human being or provide for enhanced penalties in cases involving harm to human beings. Harm to a human being is neither an element of the offense nor a statutory aggravating factor. Thus, it makes no sense to consider the absence of harm to a human being as a mitigating factor in cases involving aggravated cruelty to a companion animal. In arguing for mitigation on this ground, a convicted defendant is essentially saying, "Yes, I abused and killed a dog, but at least I didn't abuse and kill the owner too." While such restraint should be applauded, it does not support a reduced sentence for aggravated cruelty to a companion animal. In this case, the defendant abandoned her dogs and left them alone to die. There can be no doubt that the defendant's acts caused serious physical harm and death to two sentient creatures that suffered greatly from terminal starvation and dehydration, which the defendant callously inflicted

on them. We find the circuit court's sentence of 12 months' probation to be unjustly and inexplicably lenient. If it were up to this court to impose a sentence, the defendant would likely be facing a harsher penalty.

¶ 20 CONCLUSION

¶ 21 The judgment of the circuit court of Tazewell County is affirmed.

¶ 22 Affirmed.

Presiding Justice Carter and Justice Wright concurred in the judgment and opinion.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WEYERHAEUSER CO. *v.* UNITED STATES FISH AND WILDLIFE SERVICE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17–71. Argued October 1, 2018—Decided November 27, 2018

The Fish and Wildlife Service administers the Endangered Species Act of 1973 on behalf of the Secretary of the Interior. In 2001, the Service listed the dusky gopher frog as an endangered species. See 16 U. S. C. §1533(a)(1). That required the Service to designate "critical habitat" for the frog. The Service proposed designating as part of that critical habitat a site in St. Tammany Parish, Louisiana, which the Service dubbed "Unit 1." The frog had once lived in Unit 1, but the land had long been used as a commercial timber plantation, and no frogs had been spotted there for decades. The Service concluded that Unit 1 met the statutory definition of unoccupied critical habitat because its rare, high-quality breeding ponds and distance from existing frog populations made it essential for the species' conservation. §1532(5)(A)(ii). The Service then commissioned a report on the probable economic impact of its proposed critical-habitat designation. §1533(b)(2). With regard to Unit 1, the report found that designation might bar future development of the site, depriving the owners of up to $33.9 million. The Service nonetheless concluded that the potential costs were not disproportionate to the conservation benefits and proceeded to designate Unit 1 as critical habitat for the dusky gopher frog.

Unit 1 is owned by petitioner Weyerhaeuser and a group of family landowners. The owners of Unit 1 sued, contending that the closed-canopy timber plantation on Unit 1 could not be critical habitat for the dusky gopher frog, which lives in open-canopy forests. The District Court upheld the designation. The landowners also challenged the Service's decision not to exclude Unit 1 from the frog's critical habitat, arguing that the Service had failed to adequately weigh the

benefits of designating Unit 1 against the economic impact, had used an unreasonable methodology for estimating economic impact, and had failed to consider several categories of costs. The District Court approved the Service's methodology and declined to consider the challenge to the Service's decision not to exclude Unit 1. The Fifth Circuit affirmed, rejecting the suggestion that the "critical habitat" definition contains any habitability requirement and concluding that the Service's decision not to exclude Unit 1 was committed to agency discretion by law and was therefore unreviewable.

Held:

1. An area is eligible for designation as critical habitat under §1533(a)(3)(A)(i) only if it is habitat for the species. That provision, the sole source of authority for critical-habit designations, states that when the Secretary lists a species as endangered he must also "designate any habitat of such species which is then considered to be critical habitat." It does not authorize the Secretary to designate the area as critical habitat unless it is also habitat for the species. The definition allows the Secretary to identify a subset of habitat that is critical, but leaves the larger category of habitat undefined. The Service does not now dispute that critical habitat must be habitat, but argues that habitat can include areas that, like Unit 1, would require some degree of modification to support a sustainable population of a given species. Weyerhaeuser urges that habitat cannot include areas where the species could not currently survive. The Service, in turn, disputes the premise that the administrative record shows that the frog could not survive in Unit 1. The Court of Appeals, which had no occasion to interpret the term "habitat" in §1533(a)(3)(A)(i) or to assess the Service's administrative findings regarding Unit 1, should address these questions in the first instance. Pp. 8–10.

2. The Secretary's decision not to exclude an area from critical habitat under §1533(b)(2) is subject to judicial review. The Administrative Procedure Act creates a "basic presumption of judicial review" of agency action. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140. The Service contends that the presumption is rebutted here because the action is "committed to agency discretion by law," 5 U. S. C. §701(a)(2), because §1533(b)(2) is one of those rare provisions "drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Lincoln* v. *Vigil*, 508 U. S. 182, 191.

Section 1533(b)(2) describes a unified process for weighing the impact of designating an area as critical habitat. The provision's first sentence requires the Secretary to "tak[e] into consideration" economic and other impacts before designation, and the second sentence authorizes the Secretary to act on his consideration by providing that he

Syllabus

"may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of " designation. The word "may" certainly confers discretion on the Secretary, but it does not segregate his discretionary decision not to exclude from the mandated procedure to consider the economic and other impacts of designation when making his exclusion decisions. The statute is, therefore, not "drawn so that a court would have no meaningful standard against which to judge the [Secretary's] exercise of [his] discretion" not to exclude. *Lincoln*, 508 U. S., at 191. Weyerhaeuser's claim—that the agency did not appropriately consider all the relevant statutory factors meant to guide the agency in the exercise of its discretion—is the sort of claim that federal courts routinely assess when determining whether to set aside an agency decision as an abuse of discretion. The Court of Appeals should consider in the first instance the question whether the Service's assessment of the costs and benefits of designation and resulting decision not to exclude Unit 1 was arbitrary, capricious, or an abuse of discretion. Pp. 10–15.

827 F. 3d 452, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which all other Members joined, except KAVANAUGH, J., who took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 17–71

WEYERHAEUSER COMPANY, PETITIONER *v.* UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[November 27, 2018]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Endangered Species Act directs the Secretary of the Interior, upon listing a species as endangered, to also designate the "critical habitat" of the species. A group of landowners whose property was designated as critical habitat for an endangered frog challenged the designation. The landowners urge that their land cannot be *critical* habitat because it is not *habitat*, which they contend refers only to areas where the frog could currently survive. The court below ruled that the Act imposed no such limitation on the scope of critical habitat.

The Act also authorizes the Secretary to exclude an area that would otherwise be included as critical habitat, if the benefits of exclusion outweigh the benefits of designation. The landowners challenged the decision of the Secretary not to exclude their property, but the court below held that the Secretary's action was not subject to judicial review.

We granted certiorari to review both rulings.

I

A

The amphibian *Rana sevosa* is popularly known as the "dusky gopher frog"—"dusky" because of its dark coloring and "gopher" because it lives underground. The dusky gopher frog is about three inches long, with a large head, plump body, and short legs. Warts dot its back, and dark spots cover its entire body. Final Rule To List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62993 (2001) (Final Listing). It is noted for covering its eyes with its front legs when it feels threatened, peeking out periodically until danger passes. *Markle Interests, LLC* v. *United States Fish and Wildlife Serv.*, 827 F. 3d 452, 458, n. 2 (CA5 2016). Less endearingly, it also secretes a bitter, milky substance to deter would-be diners. Brief for Intervenor-Respondents 6, n. 1.

The frog spends most of its time in burrows and stump holes located in upland longleaf pine forests. In such forests, frequent fires help maintain an open canopy, which in turn allows vegetation to grow on the forest floor. The vegetation supports the small insects that the frog eats and provides a place for the frog's eggs to attach when it breeds. The frog breeds in "ephemeral" ponds that are dry for part of the year. Such ponds are safe for tadpoles because predatory fish cannot live in them. Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35129–35131 (2012) (Designation).

The dusky gopher frog once lived throughout coastal Alabama, Louisiana, and Mississippi, in the longleaf pine forests that used to cover the southeast. But more than 98% of those forests have been removed to make way for urban development, agriculture, and timber plantations. The timber plantations consist of fast-growing loblolly pines planted as close together as possible, resulting in a closed-canopy forest inhospitable to the frog. The near

eradication of the frog's habitat sent the species into severe decline. By 2001, the known wild population of the dusky gopher frog had dwindled to a group of 100 at a single pond in southern Mississippi. That year, the Fish and Wildlife Service, which administers the Endangered Species Act of 1973 on behalf of the Secretary of the Interior, listed the dusky gopher frog as an endangered species. Final Listing 62993–62995; see 87 Stat. 886, 16 U. S. C. §1533(a)(1).

B

When the Secretary lists a species as endangered, he must also designate the critical habitat of that species. §1533(a)(3)(A)(i). The ESA defines "critical habitat" as:

> "(i) the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> "(ii) specific areas outside the geographical area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." §1532(5)(A).

Before the Secretary may designate an area as critical habitat, the ESA requires him to "tak[e] into consideration the economic impact" and other relevant impacts of the designation. §1533(b)(2). The statute goes on to authorize him to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of [designation]," unless exclusion would result in extinction of the species. *Ibid.*

A critical-habitat designation does not directly limit the rights of private landowners. It instead places conditions on the Federal Government's authority to effect any physical changes to the designated area, whether through

activities of its own or by facilitating private development. Section 7 of the ESA requires all federal agencies to consult with the Secretary to "[e]nsure that any action authorized, funded, or carried out by such agency" is not likely to adversely affect a listed species' critical habitat. 16 U. S. C. §1536(a)(2). If the Secretary determines that an agency action, such as issuing a permit, would harm critical habitat, then the agency must terminate the action, implement an alternative proposed by the Secretary, or seek an exemption from the Cabinet-level Endangered Species Committee. See *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 652 (2007); 50 CFR 402.15 (2017).

Due to resource constraints, the Service did not designate the frog's critical habitat in 2001, when it listed the frog as endangered. Designation, at 35118–35119. In the following years, the Service discovered two additional naturally occurring populations and established another population through translocation. The first population nonetheless remains the only stable one and by far the largest. Dept. of Interior, U. S. Fish and Wildlife Serv., Dusky Gopher Frog (*Rana sevosa*) Recovery Plan iv, 6–7 (2015).

In 2010, in response to litigation by the Center for Biological Diversity, the Service published a proposed critical-habitat designation. Designation, at 35119. The Service proposed to designate as occupied critical habitat all four areas with existing dusky gopher frog populations. The Service found that each of those areas possessed the three features that the Service considered "essential to the conservation" of the frog and that required special protection: ephemeral ponds; upland open-canopy forest containing the holes and burrows in which the frog could live; and open-canopy forest connecting the two. But the Service also determined that designating only those four sites would not adequately ensure the frog's conservation.

Because the existing dusky gopher frog populations were all located in two adjacent counties on the Gulf Coast of Mississippi, local events such as extreme weather or an outbreak of an infectious disease could jeopardize the entire species. Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31394 (2010) (proposed 50 CFR Part 17).

To protect against that risk, the Service proposed to designate as *unoccupied* critical habitat a 1,544-acre site in St. Tammany Parish, Louisiana. The site, dubbed "Unit 1" by the Service, had been home to the last known population of dusky gopher frogs outside of Mississippi. The frog had not been seen in Unit 1 since 1965, and a closed-canopy timber plantation occupied much of the site. But the Service found that the site retained five ephemeral ponds "of remarkable quality," and determined that an open-canopy forest could be restored on the surrounding uplands "with reasonable effort." Although the uplands in Unit 1 lacked the open-canopy forests (and, of course, the frogs) necessary for designation as occupied critical habitat, the Service concluded that the site met the statutory definition of unoccupied critical habitat because its rare, high-quality breeding ponds and its distance from existing frog populations made it essential for the conservation of the species. Designation, at 35118, 35124, 35133, 35135.

After issuing its proposal, the Service commissioned a report on the probable economic impact of designating each area, including Unit 1, as critical habitat for the dusky gopher frog. See 16 U. S. C. §1533(b)(2); App. 63. Petitioner Weyerhaeuser Company, a timber company, owns part of Unit 1 and leases the remainder from a group of family landowners. Brief for Petitioner 16. While the critical-habitat designation has no direct effect on the timber operations, St. Tammany Parish is a fast-growing part of the New Orleans metropolitan area, and the land-

owners have already invested in plans to more profitably develop the site. App. 80–83. The report recognized that anyone developing the area may need to obtain Clean Water Act permits from the Army Corps of Engineers before filling any wetlands on Unit 1. 33 U. S. C. §1344(a). Because Unit 1 is designated as critical habitat, Section 7 of the ESA would require the Corps to consult with the Service before issuing any permits.

According to the report, that consultation process could result in one of three outcomes. First, it could turn out that the wetlands in Unit 1 are not subject to the Clean Water Act permitting requirements, in which case the landowners could proceed with their plans unimpeded. Second, the Service could ask the Corps not to issue permits to the landowners to fill some of the wetlands on the site, in effect prohibiting development on 60% of Unit 1. The report estimated that this would deprive the owners of $20.4 million in development value. Third, by asking the Corps to deny even more of the permit requests, the Service could bar all development of Unit 1, costing the owners $33.9 million. The Service concluded that those potential costs were not "disproportionate" to the conservation benefits of designation. "Consequently," the Service announced, it would not "exercis[e] [its] discretion to exclude" Unit 1 from the dusky gopher frog's critical habitat. App. 188–190.

C

Weyerhaeuser and the family landowners sought to vacate the designation in Federal District Court. They contended that Unit 1 could not be critical habitat for the dusky gopher frog because the frog could not survive there: Survival would require replacing the closed-canopy timber plantation encircling the ponds with an open-canopy longleaf pine forest. The District Court nonetheless upheld the designation. *Markle Interests, LLC* v.

United States Fish and Wildlife Serv., 40 F. Supp. 3d 744 (ED La. 2014). The court determined that Unit 1 satisfied the statutory definition of unoccupied critical habitat, which requires only that the Service deem the land "essential for the conservation [of] the species." *Id.,* at 760.

Weyerhaeuser also challenged the Service's decision not to exclude Unit 1 from the dusky gopher frog's critical habitat, arguing that the Service had failed to adequately weigh the benefits of designating Unit 1 against the economic impact. In addition, Weyerhaeuser argued that the Service had used an unreasonable methodology for estimating economic impact and, regardless of methodology, had failed to consider several categories of costs. *Id.,* at 759. The court approved the Service's methodology and declined to consider Weyerhaeuser's challenge to the decision not to exclude. See *id.*, at 763–767, and n. 29.

The Fifth Circuit affirmed. 827 F. 3d 452. The Court of Appeals rejected the suggestion that the definition of critical habitat contains any "habitability requirement." *Id.,* at 468. The court also concluded that the Service's decision not to exclude Unit 1 was committed to agency discretion by law and was therefore unreviewable. *Id.,* at 473–475. Judge Owen dissented. She wrote that Unit 1 could not be "essential for the conservation of the species" because it lacked the open-canopy forest that the Service itself had determined was "essential to the conservation" of the frog. *Id.,* at 480–481.

The Fifth Circuit denied rehearing en banc. *Markle Interests, LLC* v. *United States Fish and Wildlife Serv.*, 848 F. 3d 635 (2017). Judge Jones dissented, joined by Judges Jolly, Smith, Clement, Owen, and Elrod. They reasoned that critical habitat must first be habitat, and Unit 1 in its present state could not be habitat for the dusky gopher frog. *Id.,* at 641. The dissenting judges also concluded that the Service's decision not to exclude Unit 1 was reviewable for abuse of discretion. *Id.,* at 654, and

n. 21.

We granted certiorari to consider two questions: (1) whether "critical habitat" under the ESA must also be habitat; and (2) whether a federal court may review an agency decision not to exclude a certain area from critical habitat because of the economic impact of such a designation. 583 U. S. ___ (2018).[1]

II

A

Our analysis starts with the phrase "critical habitat." According to the ordinary understanding of how adjectives work, "critical habitat" must also be "habitat." Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality. It follows that "critical habitat" is the subset of "habitat" that is "critical" to the conservation of an endangered species.

Of course, "[s]tatutory language cannot be construed in a vacuum," *Sturgeon* v. *Frost*, 577 U. S. ___, ___ (2016) (slip op., at 12) (internal quotation marks omitted), and so we must also consider "critical habitat" in its statutory context. Section 4(a)(3)(A)(i), which the lower courts did not analyze, is the sole source of authority for critical-habitat designations. That provision states that when the Secretary lists a species as endangered he must also "designate any *habitat of such species* which is then considered to be critical habitat." 16 U. S. C. §1533(a)(3)(A)(i) (em-

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[1] Intervenor Center for Biological Diversity raises an additional question in its brief, arguing that Weyerhaeuser lacks standing to challenge the critical-habitat designation because it has not suffered an injury in fact. We agree with the lower courts that the decrease in the market value of Weyerhaeuser's land as a result of the designation is a sufficiently concrete injury for Article III purposes. See *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 386 (1926) (holding that a zoning ordinance that "greatly . . . reduce[d] the value of appellee's lands and destroy[ed] their marketability for industrial, commercial and residential uses" constituted a "present invasion of appellee's property rights").

phasis added). Only the "habitat" of the endangered species is eligible for designation as critical habitat. Even if an area otherwise meets the statutory definition of unoccupied critical habitat because the Secretary finds the area essential for the conservation of the species, Section 4(a)(3)(A)(i) does not authorize the Secretary to designate the area as *critical* habitat unless it is also *habitat* for the species.

The Center for Biological Diversity contends that the statutory definition of critical habitat is complete in itself and does not require any independent inquiry into the meaning of the term "habitat," which the statute leaves undefined. Brief for Intervenor-Respondents 43–49. But the statutory definition of "critical habitat" tells us what makes habitat "critical," not what makes it "habitat." Under the statutory definition, critical habitat comprises areas occupied by the species "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," as well as unoccupied areas that the Secretary determines to be "essential for the conservation of the species." 16 U. S. C. §1532(5)(A). That is no baseline definition of habitat—it identifies only certain areas that are indispensable to the conservation of the endangered species. The definition allows the Secretary to identify the subset of habitat that is critical, but leaves the larger category of habitat undefined.

The Service does not now dispute that critical habitat must be habitat, see Brief for Federal Respondents 23, although it made no such concession below. Instead, the Service argues that habitat includes areas that, like Unit 1, would require some degree of modification to support a sustainable population of a given species. *Id.*, at 27. Weyerhaeuser, for its part, urges that habitat cannot include areas where the species could not currently sur-

vive. Brief for Petitioner 25. (Habitat can, of course, include areas where the species does not currently *live*, given that the statute defines critical habitat to include unoccupied areas.) The Service in turn disputes Weyerhaeuser's premise that the administrative record shows that the frog could not survive in Unit 1. Brief for Federal Respondents 22, n. 4.

The Court of Appeals concluded that "critical habitat" designations under the statute were not limited to areas that qualified as habitat. See 827 F. 3d, at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations."). The court therefore had no occasion to interpret the term "habitat" in Section 4(a)(3)(A)(i) or to assess the Service's administrative findings regarding Unit 1. Accordingly, we vacate the judgment below and remand to the Court of Appeals to consider these questions in the first instance.[2]

B

Weyerhaeuser also contends that, even if Unit 1 could be properly classified as critical habitat for the dusky gopher frog, the Service should have excluded it from designation under Section 4(b)(2) of the ESA. That provision requires the Secretary to "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat" and authorizes him to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U. S. C.

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[2] Because we hold that an area is eligible for designation as critical habitat under Section 4(a)(3)(A)(i) only if it is habitat for the species, it is not necessary to consider the landowners' argument that land cannot be "essential for the conservation of the species," and thus cannot satisfy the statutory definition of unoccupied critical habitat, if it is not habitat for the species. See Brief for Petitioner 27–28; Brief for Respondent Markle Interests, LLC, et al. in Support of Petitioner 28–31.

§1533(b)(2). To satisfy its obligation to consider economic impact, the Service commissioned a report estimating the costs of its proposed critical-habitat designation. The Service concluded that the costs of designating the proposed areas, including Unit 1, were not "disproportionate" to the conservation benefits and, "[c]onsequently," declined to make any exclusions.

Weyerhaeuser claims that the Service's conclusion rested on a faulty assessment of the costs and benefits of designation and that the resulting decision not to exclude should be set aside. Specifically, Weyerhaeuser contends that the Service improperly weighed the costs of designating Unit 1 against the benefits of designating *all* proposed critical habitat, rather than the benefits of designating Unit 1 in particular. Weyerhaeuser also argues that the Service did not fully account for the economic impact of designating Unit 1 because it ignored, among other things, the costs of replacing timber trees with longleaf pines, maintaining an open canopy through controlled burning, and the tax revenue that St. Tammany Parish would lose if Unit 1 were never developed. Brief for Petitioner 53–54. The Court of Appeals did not consider Weyerhaeuser's claim because it concluded that a decision not to exclude a certain area from critical habitat is unreviewable.

The Administrative Procedure Act creates a "basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'" *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) (quoting 5 U. S. C. §702). As we explained recently, "legal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 575 U. S. ___, ___–___ (2015) (slip op., at 7–8). The presumption may be rebutted only if the relevant statute precludes review, 5 U. S. C. §701(a)(1), or if the action is "committed to agency

discretion by law," §701(a)(2). The Service contends, and the lower courts agreed, that Section 4(b)(2) of the ESA commits to the Secretary's discretion decisions not to exclude an area from critical habitat.

This Court has noted the "tension" between the prohibition of judicial review for actions "committed to agency discretion" and the command in §706(2)(A) that courts set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Heckler* v. *Chaney*, 470 U. S. 821, 829 (1985). A court could never determine that an agency abused its discretion if all matters committed to agency discretion were unreviewable. To give effect to §706(2)(A) and to honor the presumption of review, we have read the exception in §701(a)(2) quite narrowly, restricting it to "those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Lincoln* v. *Vigil*, 508 U. S. 182, 191 (1993). The Service contends that Section 4(b)(2) of the ESA is one of those rare statutory provisions.

There is, at the outset, reason to be skeptical of the Service's position. The few cases in which we have applied the §701(a)(2) exception involved agency decisions that courts have traditionally regarded as unreviewable, such as the allocation of funds from a lump-sum appropriation, *Lincoln*, 508 U. S., at 191, or a decision not to reconsider a final action, *ICC* v. *Locomotive Engineers*, 482 U. S. 270, 282 (1987). By contrast, this case involves the sort of routine dispute that federal courts regularly review: An agency issues an order affecting the rights of a private party, and the private party objects that the agency did not properly justify its determination under a standard set forth in the statute.

Section 4(b)(2) states that the Secretary

> "shall designate critical habitat . . . after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area . . . unless he determines . . . that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U. S. C. §1533(b)(2).

Although the text meanders a bit, we recognized in *Bennett* v. *Spear*, 520 U. S. 154 (1997), that the provision describes a unified process for weighing the impact of designating an area as critical habitat. The first sentence of Section 4(b)(2) imposes a "categorical requirement" that the Secretary "tak[e] into consideration" economic and other impacts before such a designation. *Id.,* at 172 (emphasis deleted). The second sentence authorizes the Secretary to act on his consideration by providing that he may exclude an area from critical habitat if he determines that the benefits of exclusion outweigh the benefits of designation. The Service followed that procedure here (albeit in a flawed manner, according to Weyerhaeuser). It commissioned a report to estimate the costs of designating the proposed critical habitat, concluded that those costs were not "disproportionate" to the benefits of designation, and "[c]onsequently" declined to "exercis[e] [its] discretion to exclude any areas from [the] designation of critical habitat." App. 190.

Bennett explained that the Secretary's "ultimate decision" to designate or exclude, which he "arriv[es] at" after considering economic and other impacts, is reviewable "for abuse of discretion." 520 U. S., at 172. The Service dismisses that language as a "passing reference . . . not necessarily inconsistent with the Service's understanding,"

which is that the Secretary's decision not to exclude an area is wholly discretionary and therefore unreviewable. Brief for Federal Respondents 50. The Service bases its understanding on the second sentence of Section 4(b)(2), which states that the Secretary "*may* exclude [an] area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of [designation]."

The use of the word "may" certainly confers discretion on the Secretary. That does not, however, segregate his discretionary decision not to exclude from the procedure mandated by Section 4(b)(2), which directs the Secretary to consider the economic and other impacts of designation when making his exclusion decisions. Weyerhaeuser's claim is the familiar one in administrative law that the agency did not appropriately consider all of the relevant factors that the statute sets forth to guide the agency in the exercise of its discretion. Specifically, Weyerhaeuser contends that the Service ignored some costs and conflated the benefits of designating Unit 1 with the benefits of designating all of the proposed critical habitat. This is the sort of claim that federal courts routinely assess when determining whether to set aside an agency decision as an abuse of discretion under §706(2)(A). See *Judulang* v. *Holder*, 565 U. S. 42, 53 (2011) ("When reviewing an agency action, we must assess . . . whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." (internal quotation marks omitted)).

Section 4(b)(2) requires the Secretary to consider economic impact and relative benefits before deciding whether to exclude an area from critical habitat or to proceed with designation. The statute is, therefore, not "drawn so that a court would have no meaningful standard against which to judge the [Secretary's] exercise of [his] discretion" not to exclude. *Lincoln*, 508 U. S., at 191.

Because it determined that the Service's decisions not to

exclude were committed to agency discretion and therefore unreviewable, the Court of Appeals did not consider whether the Service's assessment of the costs and benefits of designation was flawed in a way that rendered the resulting decision not to exclude Unit 1 arbitrary, capricious, or an abuse of discretion. Accordingly, we remand to the Court of Appeals to consider that question, if necessary, in the first instance.

* * *

The judgment of the Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KAVANAUGH took no part in the consideration or decision of this case.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WEYERHAEUSER CO. *v.* UNITED STATES FISH AND WILDLIFE SERVICE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17–71. Argued October 1, 2018—Decided November 27, 2018

The Fish and Wildlife Service administers the Endangered Species Act of 1973 on behalf of the Secretary of the Interior. In 2001, the Service listed the dusky gopher frog as an endangered species. See 16 U. S. C. §1533(a)(1). That required the Service to designate "critical habitat" for the frog. The Service proposed designating as part of that critical habitat a site in St. Tammany Parish, Louisiana, which the Service dubbed "Unit 1." The frog had once lived in Unit 1, but the land had long been used as a commercial timber plantation, and no frogs had been spotted there for decades. The Service concluded that Unit 1 met the statutory definition of unoccupied critical habitat because its rare, high-quality breeding ponds and distance from existing frog populations made it essential for the species' conservation. §1532(5)(A)(ii). The Service then commissioned a report on the probable economic impact of its proposed critical-habitat designation. §1533(b)(2). With regard to Unit 1, the report found that designation might bar future development of the site, depriving the owners of up to $33.9 million. The Service nonetheless concluded that the potential costs were not disproportionate to the conservation benefits and proceeded to designate Unit 1 as critical habitat for the dusky gopher frog.

Unit 1 is owned by petitioner Weyerhaeuser and a group of family landowners. The owners of Unit 1 sued, contending that the closed-canopy timber plantation on Unit 1 could not be critical habitat for the dusky gopher frog, which lives in open-canopy forests. The District Court upheld the designation. The landowners also challenged the Service's decision not to exclude Unit 1 from the frog's critical habitat, arguing that the Service had failed to adequately weigh the

benefits of designating Unit 1 against the economic impact, had used an unreasonable methodology for estimating economic impact, and had failed to consider several categories of costs. The District Court approved the Service's methodology and declined to consider the challenge to the Service's decision not to exclude Unit 1. The Fifth Circuit affirmed, rejecting the suggestion that the "critical habitat" definition contains any habitability requirement and concluding that the Service's decision not to exclude Unit 1 was committed to agency discretion by law and was therefore unreviewable.

Held:

1. An area is eligible for designation as critical habitat under §1533(a)(3)(A)(i) only if it is habitat for the species. That provision, the sole source of authority for critical-habit designations, states that when the Secretary lists a species as endangered he must also "designate any habitat of such species which is then considered to be critical habitat." It does not authorize the Secretary to designate the area as critical habitat unless it is also habitat for the species. The definition allows the Secretary to identify a subset of habitat that is critical, but leaves the larger category of habitat undefined. The Service does not now dispute that critical habitat must be habitat, but argues that habitat can include areas that, like Unit 1, would require some degree of modification to support a sustainable population of a given species. Weyerhaeuser urges that habitat cannot include areas where the species could not currently survive. The Service, in turn, disputes the premise that the administrative record shows that the frog could not survive in Unit 1. The Court of Appeals, which had no occasion to interpret the term "habitat" in §1533(a)(3)(A)(i) or to assess the Service's administrative findings regarding Unit 1, should address these questions in the first instance. Pp. 8–10.

2. The Secretary's decision not to exclude an area from critical habitat under §1533(b)(2) is subject to judicial review. The Administrative Procedure Act creates a "basic presumption of judicial review" of agency action. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140. The Service contends that the presumption is rebutted here because the action is "committed to agency discretion by law," 5 U. S. C. §701(a)(2), because §1533(b)(2) is one of those rare provisions "drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Lincoln* v. *Vigil*, 508 U. S. 182, 191.

Section 1533(b)(2) describes a unified process for weighing the impact of designating an area as critical habitat. The provision's first sentence requires the Secretary to "tak[e] into consideration" economic and other impacts before designation, and the second sentence authorizes the Secretary to act on his consideration by providing that he

Syllabus

"may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of " designation. The word "may" certainly confers discretion on the Secretary, but it does not segregate his discretionary decision not to exclude from the mandated procedure to consider the economic and other impacts of designation when making his exclusion decisions. The statute is, therefore, not "drawn so that a court would have no meaningful standard against which to judge the [Secretary's] exercise of [his] discretion" not to exclude. *Lincoln*, 508 U. S., at 191. Weyerhaeuser's claim—that the agency did not appropriately consider all the relevant statutory factors meant to guide the agency in the exercise of its discretion—is the sort of claim that federal courts routinely assess when determining whether to set aside an agency decision as an abuse of discretion. The Court of Appeals should consider in the first instance the question whether the Service's assessment of the costs and benefits of designation and resulting decision not to exclude Unit 1 was arbitrary, capricious, or an abuse of discretion. Pp. 10–15.

827 F. 3d 452, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which all other Members joined, except KAVANAUGH, J., who took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 17–71

WEYERHAEUSER COMPANY, PETITIONER *v.* UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[November 27, 2018]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Endangered Species Act directs the Secretary of the Interior, upon listing a species as endangered, to also designate the "critical habitat" of the species. A group of landowners whose property was designated as critical habitat for an endangered frog challenged the designation. The landowners urge that their land cannot be *critical* habitat because it is not *habitat*, which they contend refers only to areas where the frog could currently survive. The court below ruled that the Act imposed no such limitation on the scope of critical habitat.

The Act also authorizes the Secretary to exclude an area that would otherwise be included as critical habitat, if the benefits of exclusion outweigh the benefits of designation. The landowners challenged the decision of the Secretary not to exclude their property, but the court below held that the Secretary's action was not subject to judicial review.

We granted certiorari to review both rulings.

I

A

The amphibian *Rana sevosa* is popularly known as the "dusky gopher frog"—"dusky" because of its dark coloring and "gopher" because it lives underground. The dusky gopher frog is about three inches long, with a large head, plump body, and short legs. Warts dot its back, and dark spots cover its entire body. Final Rule To List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62993 (2001) (Final Listing). It is noted for covering its eyes with its front legs when it feels threatened, peeking out periodically until danger passes. *Markle Interests, LLC* v. *United States Fish and Wildlife Serv.*, 827 F. 3d 452, 458, n. 2 (CA5 2016). Less endearingly, it also secretes a bitter, milky substance to deter would-be diners. Brief for Intervenor-Respondents 6, n. 1.

The frog spends most of its time in burrows and stump holes located in upland longleaf pine forests. In such forests, frequent fires help maintain an open canopy, which in turn allows vegetation to grow on the forest floor. The vegetation supports the small insects that the frog eats and provides a place for the frog's eggs to attach when it breeds. The frog breeds in "ephemeral" ponds that are dry for part of the year. Such ponds are safe for tadpoles because predatory fish cannot live in them. Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35129–35131 (2012) (Designation).

The dusky gopher frog once lived throughout coastal Alabama, Louisiana, and Mississippi, in the longleaf pine forests that used to cover the southeast. But more than 98% of those forests have been removed to make way for urban development, agriculture, and timber plantations. The timber plantations consist of fast-growing loblolly pines planted as close together as possible, resulting in a closed-canopy forest inhospitable to the frog. The near

eradication of the frog's habitat sent the species into severe decline. By 2001, the known wild population of the dusky gopher frog had dwindled to a group of 100 at a single pond in southern Mississippi. That year, the Fish and Wildlife Service, which administers the Endangered Species Act of 1973 on behalf of the Secretary of the Interior, listed the dusky gopher frog as an endangered species. Final Listing 62993–62995; see 87 Stat. 886, 16 U. S. C. §1533(a)(1).

B

When the Secretary lists a species as endangered, he must also designate the critical habitat of that species. §1533(a)(3)(A)(i). The ESA defines "critical habitat" as:

> "(i) the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> "(ii) specific areas outside the geographical area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." §1532(5)(A).

Before the Secretary may designate an area as critical habitat, the ESA requires him to "tak[e] into consideration the economic impact" and other relevant impacts of the designation. §1533(b)(2). The statute goes on to authorize him to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of [designation]," unless exclusion would result in extinction of the species. *Ibid.*

A critical-habitat designation does not directly limit the rights of private landowners. It instead places conditions on the Federal Government's authority to effect any physical changes to the designated area, whether through

activities of its own or by facilitating private development. Section 7 of the ESA requires all federal agencies to consult with the Secretary to "[e]nsure that any action authorized, funded, or carried out by such agency" is not likely to adversely affect a listed species' critical habitat. 16 U. S. C. §1536(a)(2). If the Secretary determines that an agency action, such as issuing a permit, would harm critical habitat, then the agency must terminate the action, implement an alternative proposed by the Secretary, or seek an exemption from the Cabinet-level Endangered Species Committee. See *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 652 (2007); 50 CFR 402.15 (2017).

Due to resource constraints, the Service did not designate the frog's critical habitat in 2001, when it listed the frog as endangered. Designation, at 35118–35119. In the following years, the Service discovered two additional naturally occurring populations and established another population through translocation. The first population nonetheless remains the only stable one and by far the largest. Dept. of Interior, U. S. Fish and Wildlife Serv., Dusky Gopher Frog (*Rana sevosa*) Recovery Plan iv, 6–7 (2015).

In 2010, in response to litigation by the Center for Biological Diversity, the Service published a proposed critical-habitat designation. Designation, at 35119. The Service proposed to designate as occupied critical habitat all four areas with existing dusky gopher frog populations. The Service found that each of those areas possessed the three features that the Service considered "essential to the conservation" of the frog and that required special protection: ephemeral ponds; upland open-canopy forest containing the holes and burrows in which the frog could live; and open-canopy forest connecting the two. But the Service also determined that designating only those four sites would not adequately ensure the frog's conservation.

Because the existing dusky gopher frog populations were all located in two adjacent counties on the Gulf Coast of Mississippi, local events such as extreme weather or an outbreak of an infectious disease could jeopardize the entire species. Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31394 (2010) (proposed 50 CFR Part 17).

To protect against that risk, the Service proposed to designate as *unoccupied* critical habitat a 1,544-acre site in St. Tammany Parish, Louisiana. The site, dubbed "Unit 1" by the Service, had been home to the last known population of dusky gopher frogs outside of Mississippi. The frog had not been seen in Unit 1 since 1965, and a closed-canopy timber plantation occupied much of the site. But the Service found that the site retained five ephemeral ponds "of remarkable quality," and determined that an open-canopy forest could be restored on the surrounding uplands "with reasonable effort." Although the uplands in Unit 1 lacked the open-canopy forests (and, of course, the frogs) necessary for designation as occupied critical habitat, the Service concluded that the site met the statutory definition of unoccupied critical habitat because its rare, high-quality breeding ponds and its distance from existing frog populations made it essential for the conservation of the species. Designation, at 35118, 35124, 35133, 35135.

After issuing its proposal, the Service commissioned a report on the probable economic impact of designating each area, including Unit 1, as critical habitat for the dusky gopher frog. See 16 U. S. C. §1533(b)(2); App. 63. Petitioner Weyerhaeuser Company, a timber company, owns part of Unit 1 and leases the remainder from a group of family landowners. Brief for Petitioner 16. While the critical-habitat designation has no direct effect on the timber operations, St. Tammany Parish is a fast-growing part of the New Orleans metropolitan area, and the land-

owners have already invested in plans to more profitably develop the site. App. 80–83. The report recognized that anyone developing the area may need to obtain Clean Water Act permits from the Army Corps of Engineers before filling any wetlands on Unit 1. 33 U. S. C. §1344(a). Because Unit 1 is designated as critical habitat, Section 7 of the ESA would require the Corps to consult with the Service before issuing any permits.

According to the report, that consultation process could result in one of three outcomes. First, it could turn out that the wetlands in Unit 1 are not subject to the Clean Water Act permitting requirements, in which case the landowners could proceed with their plans unimpeded. Second, the Service could ask the Corps not to issue permits to the landowners to fill some of the wetlands on the site, in effect prohibiting development on 60% of Unit 1. The report estimated that this would deprive the owners of $20.4 million in development value. Third, by asking the Corps to deny even more of the permit requests, the Service could bar all development of Unit 1, costing the owners $33.9 million. The Service concluded that those potential costs were not "disproportionate" to the conservation benefits of designation. "Consequently," the Service announced, it would not "exercis[e] [its] discretion to exclude" Unit 1 from the dusky gopher frog's critical habitat. App. 188–190.

C

Weyerhaeuser and the family landowners sought to vacate the designation in Federal District Court. They contended that Unit 1 could not be critical habitat for the dusky gopher frog because the frog could not survive there: Survival would require replacing the closed-canopy timber plantation encircling the ponds with an open-canopy longleaf pine forest. The District Court nonetheless upheld the designation. *Markle Interests, LLC* v.

United States Fish and Wildlife Serv., 40 F. Supp. 3d 744 (ED La. 2014). The court determined that Unit 1 satisfied the statutory definition of unoccupied critical habitat, which requires only that the Service deem the land "essential for the conservation [of] the species." *Id.,* at 760.

Weyerhaeuser also challenged the Service's decision not to exclude Unit 1 from the dusky gopher frog's critical habitat, arguing that the Service had failed to adequately weigh the benefits of designating Unit 1 against the economic impact. In addition, Weyerhaeuser argued that the Service had used an unreasonable methodology for estimating economic impact and, regardless of methodology, had failed to consider several categories of costs. *Id.,* at 759. The court approved the Service's methodology and declined to consider Weyerhaeuser's challenge to the decision not to exclude. See *id.*, at 763–767, and n. 29.

The Fifth Circuit affirmed. 827 F. 3d 452. The Court of Appeals rejected the suggestion that the definition of critical habitat contains any "habitability requirement." *Id.,* at 468. The court also concluded that the Service's decision not to exclude Unit 1 was committed to agency discretion by law and was therefore unreviewable. *Id.,* at 473–475. Judge Owen dissented. She wrote that Unit 1 could not be "essential for the conservation of the species" because it lacked the open-canopy forest that the Service itself had determined was "essential to the conservation" of the frog. *Id.,* at 480–481.

The Fifth Circuit denied rehearing en banc. *Markle Interests, LLC* v. *United States Fish and Wildlife Serv.*, 848 F. 3d 635 (2017). Judge Jones dissented, joined by Judges Jolly, Smith, Clement, Owen, and Elrod. They reasoned that critical habitat must first be habitat, and Unit 1 in its present state could not be habitat for the dusky gopher frog. *Id.,* at 641. The dissenting judges also concluded that the Service's decision not to exclude Unit 1 was reviewable for abuse of discretion. *Id.,* at 654, and

n. 21.

We granted certiorari to consider two questions: (1) whether "critical habitat" under the ESA must also be habitat; and (2) whether a federal court may review an agency decision not to exclude a certain area from critical habitat because of the economic impact of such a designation. 583 U. S. ___ (2018).[1]

II

A

Our analysis starts with the phrase "critical habitat." According to the ordinary understanding of how adjectives work, "critical habitat" must also be "habitat." Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality. It follows that "critical habitat" is the subset of "habitat" that is "critical" to the conservation of an endangered species.

Of course, "[s]tatutory language cannot be construed in a vacuum," *Sturgeon* v. *Frost*, 577 U. S. ___, ___ (2016) (slip op., at 12) (internal quotation marks omitted), and so we must also consider "critical habitat" in its statutory context. Section 4(a)(3)(A)(i), which the lower courts did not analyze, is the sole source of authority for critical-habitat designations. That provision states that when the Secretary lists a species as endangered he must also "designate any *habitat of such species* which is then considered to be critical habitat." 16 U. S. C. §1533(a)(3)(A)(i) (em-

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[1] Intervenor Center for Biological Diversity raises an additional question in its brief, arguing that Weyerhaeuser lacks standing to challenge the critical-habitat designation because it has not suffered an injury in fact. We agree with the lower courts that the decrease in the market value of Weyerhaeuser's land as a result of the designation is a sufficiently concrete injury for Article III purposes. See *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 386 (1926) (holding that a zoning ordinance that "greatly . . . reduce[d] the value of appellee's lands and destroy[ed] their marketability for industrial, commercial and residential uses" constituted a "present invasion of appellee's property rights").

phasis added). Only the "habitat" of the endangered species is eligible for designation as critical habitat. Even if an area otherwise meets the statutory definition of unoccupied critical habitat because the Secretary finds the area essential for the conservation of the species, Section 4(a)(3)(A)(i) does not authorize the Secretary to designate the area as *critical* habitat unless it is also *habitat* for the species.

The Center for Biological Diversity contends that the statutory definition of critical habitat is complete in itself and does not require any independent inquiry into the meaning of the term "habitat," which the statute leaves undefined. Brief for Intervenor-Respondents 43–49. But the statutory definition of "critical habitat" tells us what makes habitat "critical," not what makes it "habitat." Under the statutory definition, critical habitat comprises areas occupied by the species "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," as well as unoccupied areas that the Secretary determines to be "essential for the conservation of the species." 16 U. S. C. §1532(5)(A). That is no baseline definition of habitat—it identifies only certain areas that are indispensable to the conservation of the endangered species. The definition allows the Secretary to identify the subset of habitat that is critical, but leaves the larger category of habitat undefined.

The Service does not now dispute that critical habitat must be habitat, see Brief for Federal Respondents 23, although it made no such concession below. Instead, the Service argues that habitat includes areas that, like Unit 1, would require some degree of modification to support a sustainable population of a given species. *Id.*, at 27. Weyerhaeuser, for its part, urges that habitat cannot include areas where the species could not currently sur-

vive. Brief for Petitioner 25. (Habitat can, of course, include areas where the species does not currently *live*, given that the statute defines critical habitat to include unoccupied areas.) The Service in turn disputes Weyerhaeuser's premise that the administrative record shows that the frog could not survive in Unit 1. Brief for Federal Respondents 22, n. 4.

The Court of Appeals concluded that "critical habitat" designations under the statute were not limited to areas that qualified as habitat. See 827 F. 3d, at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations."). The court therefore had no occasion to interpret the term "habitat" in Section 4(a)(3)(A)(i) or to assess the Service's administrative findings regarding Unit 1. Accordingly, we vacate the judgment below and remand to the Court of Appeals to consider these questions in the first instance.[2]

B

Weyerhaeuser also contends that, even if Unit 1 could be properly classified as critical habitat for the dusky gopher frog, the Service should have excluded it from designation under Section 4(b)(2) of the ESA. That provision requires the Secretary to "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat" and authorizes him to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U. S. C.

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[2] Because we hold that an area is eligible for designation as critical habitat under Section 4(a)(3)(A)(i) only if it is habitat for the species, it is not necessary to consider the landowners' argument that land cannot be "essential for the conservation of the species," and thus cannot satisfy the statutory definition of unoccupied critical habitat, if it is not habitat for the species. See Brief for Petitioner 27–28; Brief for Respondent Markle Interests, LLC, et al. in Support of Petitioner 28–31.

§1533(b)(2). To satisfy its obligation to consider economic impact, the Service commissioned a report estimating the costs of its proposed critical-habitat designation. The Service concluded that the costs of designating the proposed areas, including Unit 1, were not "disproportionate" to the conservation benefits and, "[c]onsequently," declined to make any exclusions.

Weyerhaeuser claims that the Service's conclusion rested on a faulty assessment of the costs and benefits of designation and that the resulting decision not to exclude should be set aside. Specifically, Weyerhaeuser contends that the Service improperly weighed the costs of designating Unit 1 against the benefits of designating *all* proposed critical habitat, rather than the benefits of designating Unit 1 in particular. Weyerhaeuser also argues that the Service did not fully account for the economic impact of designating Unit 1 because it ignored, among other things, the costs of replacing timber trees with longleaf pines, maintaining an open canopy through controlled burning, and the tax revenue that St. Tammany Parish would lose if Unit 1 were never developed. Brief for Petitioner 53–54. The Court of Appeals did not consider Weyerhaeuser's claim because it concluded that a decision not to exclude a certain area from critical habitat is unreviewable.

The Administrative Procedure Act creates a "basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'" *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) (quoting 5 U. S. C. §702). As we explained recently, "legal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 575 U. S. ___, ___–___ (2015) (slip op., at 7–8). The presumption may be rebutted only if the relevant statute precludes review, 5 U. S. C. §701(a)(1), or if the action is "committed to agency

discretion by law," §701(a)(2). The Service contends, and the lower courts agreed, that Section 4(b)(2) of the ESA commits to the Secretary's discretion decisions not to exclude an area from critical habitat.

This Court has noted the "tension" between the prohibition of judicial review for actions "committed to agency discretion" and the command in §706(2)(A) that courts set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Heckler* v. *Chaney*, 470 U. S. 821, 829 (1985). A court could never determine that an agency abused its discretion if all matters committed to agency discretion were unreviewable. To give effect to §706(2)(A) and to honor the presumption of review, we have read the exception in §701(a)(2) quite narrowly, restricting it to "those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Lincoln* v. *Vigil*, 508 U. S. 182, 191 (1993). The Service contends that Section 4(b)(2) of the ESA is one of those rare statutory provisions.

There is, at the outset, reason to be skeptical of the Service's position. The few cases in which we have applied the §701(a)(2) exception involved agency decisions that courts have traditionally regarded as unreviewable, such as the allocation of funds from a lump-sum appropriation, *Lincoln*, 508 U. S., at 191, or a decision not to reconsider a final action, *ICC* v. *Locomotive Engineers*, 482 U. S. 270, 282 (1987). By contrast, this case involves the sort of routine dispute that federal courts regularly review: An agency issues an order affecting the rights of a private party, and the private party objects that the agency did not properly justify its determination under a standard set forth in the statute.

Section 4(b)(2) states that the Secretary

> "shall designate critical habitat . . . after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area . . . unless he determines . . . that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U. S. C. §1533(b)(2).

Although the text meanders a bit, we recognized in *Bennett* v. *Spear*, 520 U. S. 154 (1997), that the provision describes a unified process for weighing the impact of designating an area as critical habitat. The first sentence of Section 4(b)(2) imposes a "categorical requirement" that the Secretary "tak[e] into consideration" economic and other impacts before such a designation. *Id.,* at 172 (emphasis deleted). The second sentence authorizes the Secretary to act on his consideration by providing that he may exclude an area from critical habitat if he determines that the benefits of exclusion outweigh the benefits of designation. The Service followed that procedure here (albeit in a flawed manner, according to Weyerhaeuser). It commissioned a report to estimate the costs of designating the proposed critical habitat, concluded that those costs were not "disproportionate" to the benefits of designation, and "[c]onsequently" declined to "exercis[e] [its] discretion to exclude any areas from [the] designation of critical habitat." App. 190.

Bennett explained that the Secretary's "ultimate decision" to designate or exclude, which he "arriv[es] at" after considering economic and other impacts, is reviewable "for abuse of discretion." 520 U. S., at 172. The Service dismisses that language as a "passing reference . . . not necessarily inconsistent with the Service's understanding,"

which is that the Secretary's decision not to exclude an area is wholly discretionary and therefore unreviewable. Brief for Federal Respondents 50. The Service bases its understanding on the second sentence of Section 4(b)(2), which states that the Secretary "*may* exclude [an] area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of [designation]."

The use of the word "may" certainly confers discretion on the Secretary. That does not, however, segregate his discretionary decision not to exclude from the procedure mandated by Section 4(b)(2), which directs the Secretary to consider the economic and other impacts of designation when making his exclusion decisions. Weyerhaeuser's claim is the familiar one in administrative law that the agency did not appropriately consider all of the relevant factors that the statute sets forth to guide the agency in the exercise of its discretion. Specifically, Weyerhaeuser contends that the Service ignored some costs and conflated the benefits of designating Unit 1 with the benefits of designating all of the proposed critical habitat. This is the sort of claim that federal courts routinely assess when determining whether to set aside an agency decision as an abuse of discretion under §706(2)(A). See *Judulang* v. *Holder*, 565 U. S. 42, 53 (2011) ("When reviewing an agency action, we must assess . . . whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." (internal quotation marks omitted)).

Section 4(b)(2) requires the Secretary to consider economic impact and relative benefits before deciding whether to exclude an area from critical habitat or to proceed with designation. The statute is, therefore, not "drawn so that a court would have no meaningful standard against which to judge the [Secretary's] exercise of [his] discretion" not to exclude. *Lincoln*, 508 U. S., at 191.

Because it determined that the Service's decisions not to

exclude were committed to agency discretion and therefore unreviewable, the Court of Appeals did not consider whether the Service's assessment of the costs and benefits of designation was flawed in a way that rendered the resulting decision not to exclude Unit 1 arbitrary, capricious, or an abuse of discretion. Accordingly, we remand to the Court of Appeals to consider that question, if necessary, in the first instance.

* * *

The judgment of the Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KAVANAUGH took no part in the consideration or decision of this case.

TAB 8

A Dog's Guide to Thriving in a Dog-Eat-Dog World

- ***Behesha Doan**, This Able Veteran, Carbondale*
  servicedog@thisableveteran.org
- ***Dr. Diana Uchiyama**, JD, PsyD, Illinois Lawyers' Assistance Program, Chicago*

“A Dog's Guide to Thriving in a Dog-Eat-Dog World”

I. What Dogs Can Teach Lawyers About Mental Well Being

A. Living in the Real World
   1. Dogs operate intuitively from the wisest parts of them and so can you.
   2. Story vs Reality - Stories are for kids. Reality is where wisdom is found.

B. Awareness Is Key
   1. Dogs know the difference between Being and Doing and how to make the shift.
   2. Awareness is key for humans.

C. Energy Wise On/Off Switch (State changes)
   1. Humans have to quiet/still thoughts to stop useless rumination.
   3. Humans can learn to give their different states a name and teach them to come when they’re called. (Important for emotional regulation.)

D. Respond Don’t React
   1. Well-balanced dogs engage from a place of calm and certainty.
   2. Lawyers are trained to think reactively (how to counter argument).

E. When to “High Tail It”
   1. Dogs instinctively know when to do this.
   2. Humans have to discern when avoidance helps vs. hurts.

F. When to Release Energy
   1. Dogs instinctively know when they need to run/play and do it.
   2. Lawyers often sedentary to complete their work and put off physical movement exercise to complete tasks.

G. When to Rest
   1. Dogs know when to stop because recuperative time is critical to survival of pack.
   2. Lawyers often work long hours, don’t get enough sleep, put off vacations, etc.

H. Move Toward Source of Problem
   1. Dogs will move right away toward the source of a disturbance.
   2. Humans often avoid thinking about or confronting source of stress or problem. Might use alcohol or drugs or develop other unhealthy habits.

3. When notice negative emotions/stressful thoughts, look at them so they can be resolved.
4. Mindfulness is a skill/tool to help with this.

II. Introduction to Mindfulness (Gain the Edge)

A. Definition

: The practice of maintaining a nonjudgmental state of heightened or complete awareness of one's thoughts, emotions, or experiences on a moment-to-moment basis. *Merriam-Webster*

B. Key components
1. Presence
2. Awareness
3. Non-Judgmental
4. Open minded

C. Neuroscience

1. "MRI scans show that after an eight-week course of mindfulness practice, the brain's "fight or flight" center, the amygdala, appears to shrink. This primal region of the brain, associated with fear and emotion, is involved in the initiation of the body's response to stress.

   As the amygdala shrinks, the pre-frontal cortex – associated with higher order brain functions such as awareness, concentration and decision-making – becomes thicker.

   The "functional connectivity" between these regions – i.e. how often they are activated together – also changes. The connection between the amygdala and the rest of the brain gets weaker, while the connections between areas associated with attention and concentration get stronger."

   From "What Does Mindfulness Meditation Do to Your Brain?" by Tom Ireland, SCIENTIFIC AMERICAN

2. Video overview "The Scientific Power of Meditation" https://youtu.be/Aw71zanwMnY

III. Thriving in Stressful Environments

A. How Dogs Thrive and Why

1. Pack Leader (alpha) Behaviors
   (a) Subtle – catch small problems and correct right away
   (b) Vigilant
   (c) Willing
   (d) Able
   (e) Consistent

2. Stillness/Rest Before Hunt
   (a) Pack has period of stillness before a hunt so they have access to all of their resources.
   (b) If lawyers are always "on" and don't learn how to rest and be still, will burn out.

3. Dealing with Failure
   (a) Only one in four hunts are successful in wild.
   (b) This increases the pack's drive and their need to cooperate.
   (c) They don't tell themselves stories about the failed hunts, just move forward.

Other Reading

Articles

"The Benefits of Mindfulness for Lawyers" by Jan L. Jacobowitz, American Bar Association, www.americanbar.org
https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/work-life/the_benefits_mindfulness_lawyers/

"Mindfulness in the Heat of Conflict: Taking STOCK," Leonard L. Riskin and Rachel Vohl, *Harvard Negotiation Law Review*, Vol. 20:121, Spring 2015
http://www.hnlr.org/wp-content/uploads/HNR103_crop.pdf

"Minds 'At Attention': Mindfulness Training Curbs Attentional Lapses in Military Cohorts." Jha AP, Morrison AB, Dainer-Best J, Parker S, Rostrup N, Stanley EA (2015). PLoS ONE 10(2): e0116889. https://doi.org/10.1371/journal.pone.0116889

"Mindfulness Can Literally Change the Brain," by Christina Congleton, Britta K. Hölzel, Sara W. Lazar, *Harvard Business Review*
https://hbr.org/2015/01/mindfulness-can-literally-change-your-brain

Books

MEDITATION FOR FIDGETY SKEPTICS by Dan Harris, Carlyle Adler, Jeff Warren

THE SIX-MINUTE SOLUTION: A MINDFULNESS PRIMER FOR LAWYERS by Scott L. Rogers

THE ANXIOUS LAWYER: AN 8-WEEK GUIDE TO A HAPPIER, SANER LAW PRACTICE USING MEDITATION, by Jeena Cho and Karen Gifford

Other Resources

Mindfulness in Law Society https://mindfulnessinlawsociety.com/

Mindfulness for Lawyers Starter Kit https://mindfulnessinlawsociety.com/wp-content/uploads/2018/08/MILS-General-Starter-Kit-Final.pdf

Free Guided Meditations https://www.uclahealth.org/marc/body.cfm?id=22&iirf_redirect=1

Apps

"10% Happier: Meditation for Fidgety Skeptics"

"Calm"

LAP LAWYERS' ASSISTANCE PROGRAM

Recognizing, Understanding, and Referring a Colleague in Need

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Agenda

I. Introduction about LAP (1 minutes)
   a. What is the Illinois Lawyers' Assistance Program?
   b. What can we help with and confidentiality.

II. Attorneys are a vulnerable population (5 minutes)
   a. Study results: Attorneys and seeking help.
   b. Study results: Who are the most at risk attorneys?
   c. Why attorneys are particularly vulnerable.

III. Substance Abuse (5 minutes)
   a. Warning signs.
   b. What to do when you spot the warning signs for substance abuse.

IV. Anxiety (5 minutes)
   a. Clinical symptoms.
   b. How to spot anxiety in an office setting.

V. Depression (5 minutes)
   a. Clinical symptoms.
   b. How to spot depression in an office setting.

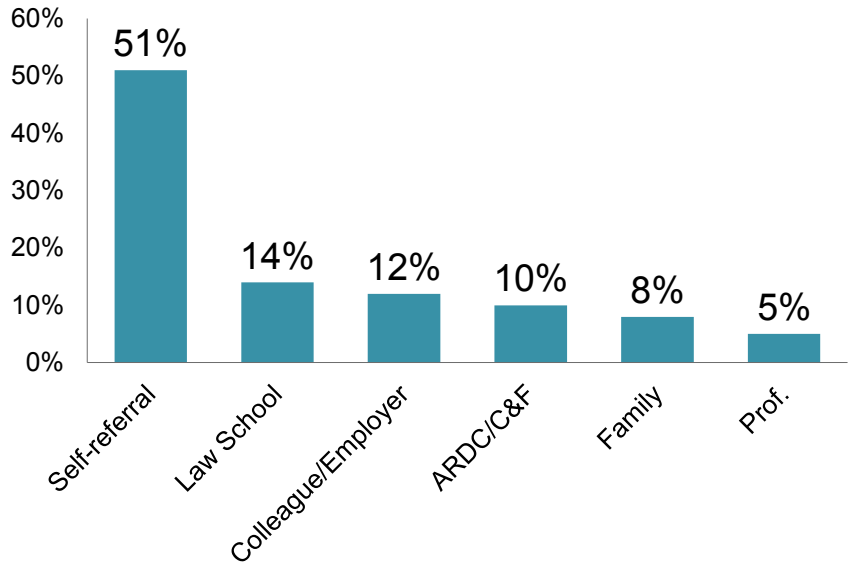
VI. Suicide (5 minutes)
   a. Clinical symptoms.
   b. What to do.
   c. What not to do.
   d. ACE questionnaire.

VII. How to refer someone to LAP (5 minutes)
   a. Talking to a colleague about LAP.
   b. Calling LAP with a colleague for whom you are concerned.
   c. Anonymously calling LAP about a colleague you are concerned about.

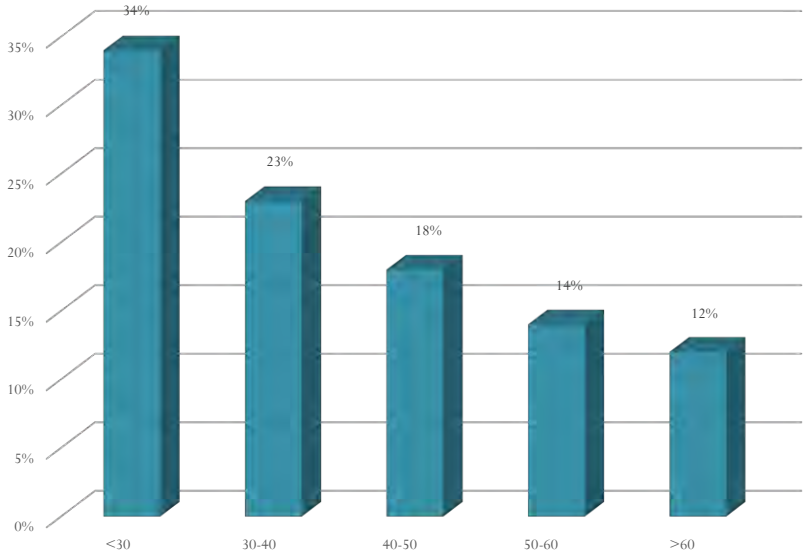
Recognizing, Understanding, and Referring a Colleague in Need

Illinois Lawyers' Assistance Program
20 S. Clark Street, Suite 450, Chicago, IL
1-800-LAP-1233

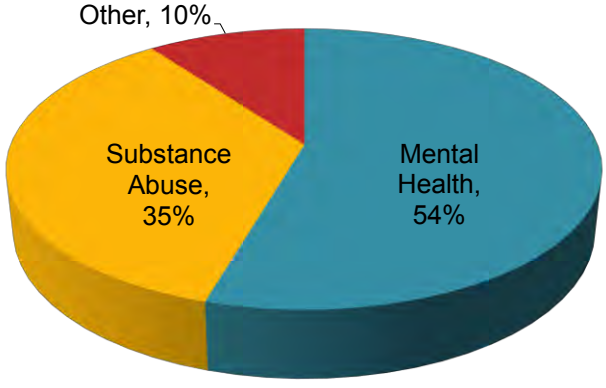
How Clients Got to LAP



Age Range of LAP Clients

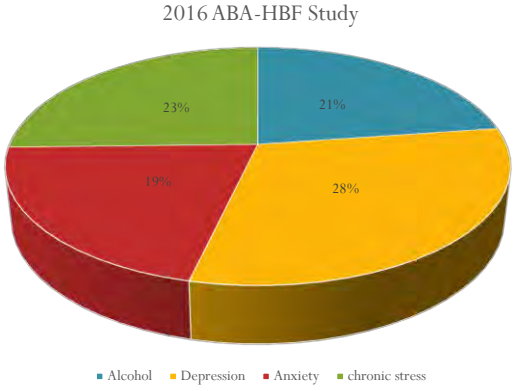


Issues



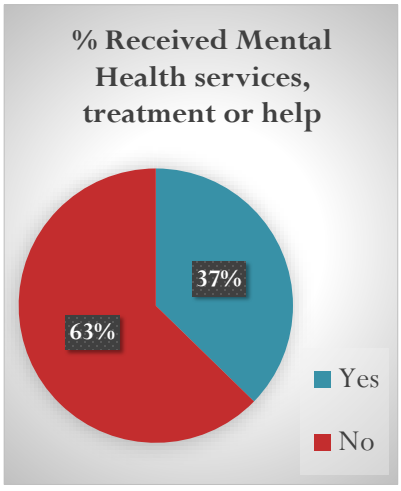
2016 National Study of 12,825 Licensed Employed Lawyers

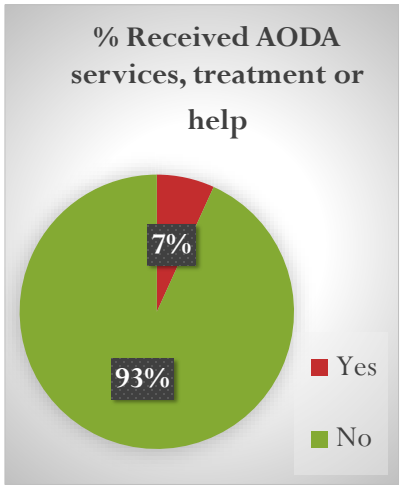
Funded by ABA, Hazelden Betty Ford Foundation



LAP LAWYERS' ASSISTANCE PROGRAM

Reported Treatment Rates from Study





Individual Factors

- Pessimism
- Competitive Nature
- Perfectionism

Life Situation Factors

- Spouse/Partner
- Children
- Health
- Finances
- College/Law School Debt

Organizational Factors

- High pressure, little credit
- Zero sum game
- Excessive work load
- Client expectations
- Definition of success

Substance Abuse: What to look for

Follow the MAP

(Pacione & Belleau, ABA Solo Practice Journal, May 2015)

Substance Abuse: What to look for

Follow the MAP

(Pacione & Belleau, ABA Solo Practice Journal, May 2015)

1. **M**ood or attitudinal disturbances
2. **A**ppearance or physical changes
3. **P**roductivity and quality of work

unexplained trembling

Irritability

Increased worry

Fatigue

Anxiety

headaches

digestive problems

Perfectionism

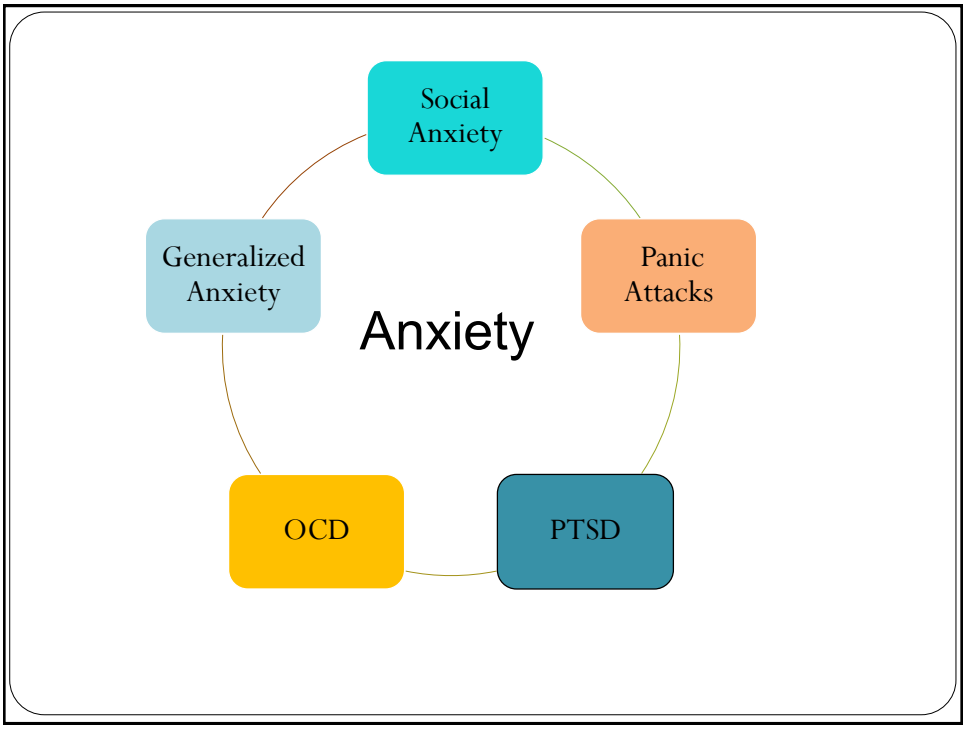
Decrease in productivity

Rumination

Unexplained pains

Listen for:

- “I can’t cope.”
- “Get off my back.”
- “I can’t come in today.”
- “I need more time to get this done.”
- “I’m scared I will get fired.”
- “I just couldn’t get it done.”



Changes in appetite

Thoughts/plans/attempts of suicide

Fatigue

Depression

Feelings of worthlessness or guilt

Changes in sleep

Difficulty thinking, concentrating or making decisions

Loss of interest in previously enjoyable activities

Listen for:

- "I don't feel right"
- "I feel like I am on an emotional rollercoaster."
- "I just don't feel like doing anything. Nothing is fun anymore."
- "I just can't get things done on time anymore."
- " I have to constantly redo everything over again."
- "I can't get anywhere on time and I just want to be left alone."
- " I have a hard time feeling happy or interested in anything these days."

Suicide

Giving away possessions

Acquiring means to commit suicide (buying a gun, stockpiling prescriptions)

Declining performance and interest in work

Dis-regulation of sleeping and eating habits

Thoughts or feelings about suicide

Feelings of worthlessness or guilt

Despondent mood or alcohol or drug use

Making a plan (where, when, how)

Isolation

Expressions of hopelessness, powerlessness, worthlessness, shame, guilt, self-hatred, inadequacy

Loss of interest and participation in social activities, hobbies, relationships

Listen for:

- "What's the point?"
- "I can't get out of bed anymore."
- "I don't see a future with me in it."
- "I hate being a burden."
- "My family would be better off without me."
- "I just want to be left alone."
- " I have nothing to live for or to be excited about."
- "I feel hopeless and worthless."

What Not to Do

- Do not argue about the "right or wrong" of suicide
- Avoid platitudes like:
  - "You have so much to live for"
  - "It will be better tomorrow"
- Do not discount their problems
- Refuse to be sworn to secrecy

What to Do

(CSSRS: Columbia Suicide Severity Rating Scale)

- ACE Card questionnaire
  - Ask
  - Care
  - Escort
- Only 6 questions
- Designed for peers

	In the Past Month	
Answer Questions 1 and 2	YES	NO
1) Have you wished you were dead or wished you could go to sleep and not wake up?		
2) Have you actually had any thoughts about killing yourself?		
If YES to 2, answer questions 3, 4, 5 and 6 If NO to 2, go directly to question 6		
3) Have you thought about how you might do this?		
4) Have you had any intention of acting on these thoughts of killing yourself, as opposed to you have the thoughts but you definitely would not act on them?		
5) Have you started to work out or worked out the details of how to kill yourself? Do you intend to carry out this plan?		
Always Ask Question 6	In the Past 3 Months	
6) Have you done anything, started to do anything, or prepared to do anything to end your life? Examples: Collected pills, obtained a gun, gave away valuables, wrote a will or suicide note, held a gun but changed your mind, cut yourself, tried to hang yourself, etc.		

Any YES must be taken seriously. Seek help from friends, family, co-workers, and inform them as soon as possible. If the answer to 4, 5 or 6 is YES, immediately ESCORT the person to Emergency Personnel for care.

REFERRING

Why LAP

- Free
- Confidential
- Familiar with legal environments
- Services tailored to judges, lawyers and law students (i.e. support groups)
- Peer Support
- Referrals for ARDC & Character and Fitness issues

Talking to someone about LAP

- Call or email LAP. We will coach you on what to say to your colleague
- Show them the LAP website/social media
- Highlight LAP's guaranteed confidentiality
- Say:
  - "Calling LAP is easy, free and totally confidential. No one has to know."
  - "Let's call LAP together right now." (and dial the phone)
  - "Do you want me to call LAP for you?"

What happens next

- If the person is willing to come in or be contacted an assessment will be done and a treatment/action plan created
- If the person is not willing, then LAP will:

  Reach out to the person and invite them to come in.

  Contact trained LAP Volunteers (bound by confidentiality) who may already have a relationship with the person to see if they can help connect the person with LAP.

  Intervention

ILLINOIS LAWYERS' ASSISTANCE PROGRAMS

Always Free + Confidential

WE CAN HELP WITH

Stress – Anxiety – Grief
Depression
Career Transitions
Addiction – Substance Abuse
& Much More

Services tailored to the legal profession:

- Short-term counseling
- Support Groups
- Referrals
- Interventions
- Help with ARDC Concerns

CONTACT US//
Email// gethelp@illinoislap.org
Phone// 312-726-6607
www.illinoislap.org

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Chicago, IL 60603

LAP LAWYERS' ASSISTANCE PROGRAM

ILLINOIS STATE BAR ASSOCIATION™

Illinois Bar Journal

March 2018 • Volume 106 • Number 3 • Page 28

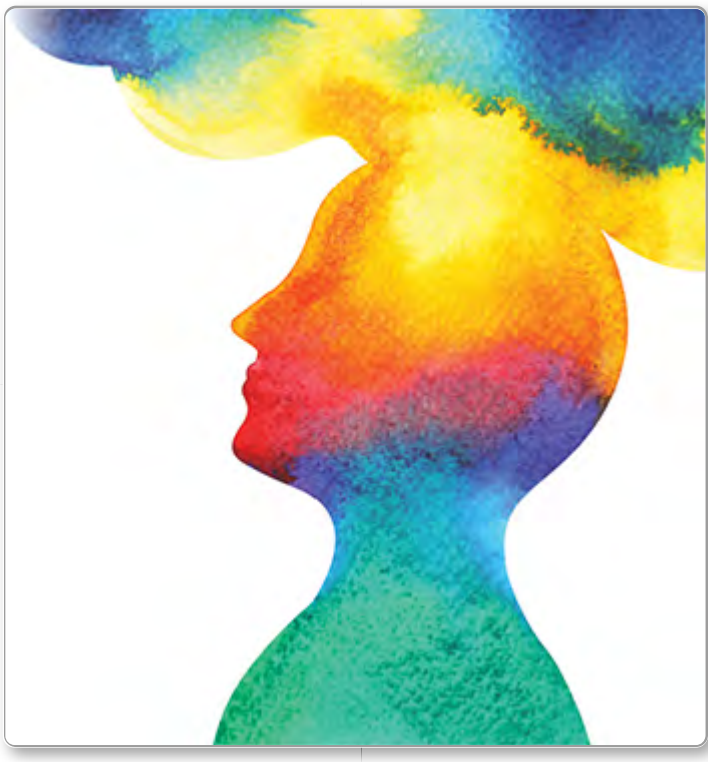
The Magazine of Illinois Lawyers

Lawyer Well-Being

The Mindful Lawyer

By **Ed Finkel**

Mindfulness and meditation - even a few minutes daily - can reduce stress, help you connect with clients, enable you to concentrate better, and empower you to respond thoughtfully instead of reacting. And now you can earn MCLE credit as you learn meditation techniques.



Naperville business and estate planning attorney Mark C. Metzger regularly gives presentations on mindfulness for lawyers, as he will be doing at the ISBA Solo and Small Firm Practice Institute in Bloomington March 16 (find out more at **www.isba.org/cle/2018/03/16/momentum**). And he regularly encounters a couple of misconceptions, the first of which is that mindfulness and meditation are one and the same, when in fact the latter is a technique commonly used to achieve the former.

The second misconception? "To most buttoned-down Midwesterners, meditation still has connotations of woo-woo hippie weirdness, sitting on a rock somewhere," Metzger says.

In fact, Metzger recalls a recent experience that underscored for him the reluctance of many people to engage in meditation and other mindfulness practices due to the social stigma. After one presentation, an attendee approached Metzger furtively and "confessed" that he had been meditating for 20 years - and that Metzger was the first person he had ever told.

"That's the standard-bearer for the level of unease," he said. "He had somehow constructed a story that it was incompatible with being an upstanding professional. I want to 'de-ickify' it."

Jeena Cho, a San Francisco-based bankruptcy attorney and mindfulness trainer, notes that lawyers often deal with people during unhappy times in their lives, which can add to attorneys' own stress. "We need to have some level of objectivity and distance, without being detached," she says. "Being with someone who is going through a personal injury, or some type of issue, that is not easy for us to do. It's a wonderful tool we can use in these really difficult moments when it doesn't seem like the law is an adequate tool to remedy the situation."

Cho, who is also author of the American Bar Association-published *The Anxious Lawyer: An 8-Week Guide to a Joyful and Satisfying Law Practice Through Mindfulness and Meditation*, notes that as a bankruptcy attorney, she can get rid of her clients' debt but not the circumstances that led to it. "I can't remedy that they went into debt to save their daughter by paying for her medical expenses, or because there was unexpected injury, or death, or divorce," she says. "Mindfulness practice gives me [emotional] stability."

Strengthening mind muscles

Mindfulness represents a "bigger sphere" of techniques than meditation, even if that's the most commonly practiced one, Metzger says. For example, he notes that weight-loss coaches will tell people to pause for a moment after each mouthful as they're eating, which amounts to being mindful about what they're ingesting. Being similarly conscious rather than just "shoveling it in" can help in ingesting a case, too, Metzger says.

"It's a given that most people's experience with the practice of law is stressful," he says. "Meditation provides the ability to respond to a situation rather than just react to it. That's all the difference in the world. That reaction is the 'fight or flight response' taking over in a less well thought out way."

Meditation sessions help strengthen the mind in the same way that doing curls with a dumbbell strengthens your arms, Metzger says. "Every time you notice your mind has wandered, you've strengthened that muscle," he says. "You notice a difference in your thoughts. You develop the ability to respond rather than just immediately react."

Cho notes that people's minds tend to wander to their grocery list, or something the opposing counsel said in court. "In that moment, when you notice you become distracted, you practice bringing yourself back to the present moment," she says. "Mindfulness can be more of an attitude you bring, an intention to just be present to what's happening in the moment. It's possible to practice mindfulness without meditation. But having a meditation practice helps. It allows you to see your mind in a natural state. Often, we don't notice how distracted or busy our minds are."

Fighting fight or flight

The fight or flight response in the human subconscious dates to caveman times and was significantly more useful then than it is now, Metzger says. "Our brains are equipped with a series of things to protect us from a saber-toothed tiger ready to eat us," he says. "One of the problems is that it doesn't realize the difference between a threat to our continued existence and your iPhone e-mail saying you have 10,000 unread e-mails. You get an adrenaline surge, and stress, from your boss raising his eyebrow."

Because it's designed to save you, your brain doesn't recognize the difference between that raised eyebrow and the saber-toothed tiger, either, Metzger says. "From that raised eyebrow, your brain can quickly manufacture a situation where he's angry about something," he says, and you might think to yourself, "It's probably one of those 17 things I've been beating myself up about for the past two weeks." From there, your brain can imagine you losing your employment, which could lead to your marriage falling apart and a cavalcade of further misfortunes. "There's a lot of stress [as attorneys] because there are lots of opportunities for us to be self-critical," he adds.

Mindfulness techniques help Cho stabilize her own emotions. "It's helpful in terms of not having automatic reactions," she says. "When 'A' happens, I automatically do 'B.' Rather than reacting in that emotional state, we can have less of a knee-jerk reaction. Sometimes an opposing counsel acts badly because that has worked for them [in the past]. Not giving them an automatic [angry] reaction can shift the power dynamic. Some lawyers do this as a matter of course -

they see if they can provoke some sort of reaction from you. It takes practice [not to react] because we're humans."

Reasons for resistance

Although the benefits seem to sell themselves, when Metzger talks to attorneys about mindfulness and meditation, he hears a number of common reasons why they can't imagine meditating to relieve their stress.

"One, 'I don't have the time.' Well, you can get pretty amazing benefits from three minutes a day," he says. "The second one is, 'I'm a Christian, or I'm a Jew, and I don't need a new religion,'" at least partly based on the misconception that meditation is necessarily associated with Buddhism or another Eastern religion. "Modern mindfulness meditation doesn't require a religious belief," he adds. "It's simply a matter of focusing your thoughts."

Another reason that Metzger describes as "an advanced excuse" is the fear that "I can't clear my mind," he says. "Meditation is not about clearing your mind. Even the best meditators, the Dalai Lama, these guys will have dozens of thought interruptions per minute. Our minds will have hundreds. No one can quiet their mind and make it perfectly still." Focusing on one word or phrase can help you notice your mind has wandered and bring it back, he adds. And we all know one of the words: "Ooooooooommmmm."

Beyond that, attorneys and other professionals - probably including the gentleman who "confessed" to Metzger - have another objection that's expressed with varying degrees of honesty. "The honest response is, 'That's too hippie, woo-woo, or weird to me,'" he says. "Then there's the artful version of the same thing, the thinking man's or woman's version of that, which is, 'I can't afford to lose my edge. If I'm soft, I'm not going to be as effective.' That's a fancy way of saying, 'That's too weird for me.'"

Similarly, Cho finds that attorneys have "all kinds of misconceptions about what meditation is. They think it means you have to sit on the floor, cross-legged on a cushion. It's about training your mind. If you're an athlete, you train your body for optimal performance. We don't think about training the brain all that often, even though it's the tool we use and value the most."

And attorneys have either internal or external expectations about who they should be, how they should act, and what they should or shouldn't do, Cho says. "There is a feeling that meditation is for hippies, or people who live in California," she says. "But the science is so compelling. That's why it's such a hot topic right now."

Anecdotal testimony

In contrast to those who believe they will lose their edge as attorneys, Metzger believes mindfulness and meditation have bolstered his law practice and ability to attract and retain clients - and even he jokes that "my wife would tell you that I'm less of a jerk."

"I'm more empathetic to my clients, which makes me more effective," he says. "I've seen a dramatically increased percentage of people who I meet with initially, who elect to hire me. They feel connected. It's hard to pin down one specific thing and say, 'This has increased by X percent.' But what I've noticed is, when people are engaging us, I frequently hear people…[say to] their spouse, 'I like this guy.' We're not having a price discussion anymore. For whatever reason, I'm able to and willing to be much more present for people than I was before."

And when he doesn't meditate in the morning, Metzger says he notices a difference. "From time to time, I may get up late, or the day may start earlier than anticipated, something crazy may happen at the house," he says. "I notice a difference in those days when I don't [practice mindfulness] in the morning. Can I quantify that? I'm not sure. But it definitely feels different."

Cho has felt much different since she took up mindfulness six years ago, after years of feeling chronically anxious and judging herself - and finally discovering she had social anxiety disorder. "It validated all my experiences," she says. "I

sort of hit a wall. I had a panic attack in front of a group of people. I was also planning my wedding and started to lose clumps of hair. I thought I was dying."

A psychiatrist prescribed anti-anxiety and anti-depression medications, but Cho didn't feel like those were the right solutions for her. A psychotherapist friend thought she might have anxiety disorder and referred her to a program at Stanford University. Cho told her friend, "You're crazy." But, she says, "Sure enough, I did."

Research and the power of mindfulness

Researchers have attempted to quantify the difference that mindfulness and meditation make, Metzger says. "There's astonishing amounts of research that talks about building new brain pathways - and for that matter, new brain matter," he says. "When I started reading the science on this, I was overwhelmed."

Harvard University researchers have performed imaging studies, for example, that show those who have practiced mindfulness have experienced growth in the parts of their brain that moderate behavior, bring emotions under control, and enhance logic while decreasing the density of parts of the brain engaged in immediate reactions, Metzger says.

Another study involved a group of Marines serving in Iraq and Afghanistan, who retired Army Captain and Georgetown Professor Elizabeth Stanley divided into three groups: a control group that did not practice meditation, a second group that meditated for three minutes a day, and a third group that did so for 12 minutes a day.

After eight weeks, the first group reported feeling more stressed than earlier, which Metzger notes "is entirely unsurprising in a war zone." Testing showed their cognitive skills declined, which also does not surprise him because under extreme stress, "the body will devote more and more effort to survival and sacrifice the ability to logically think through things."

The second group reported less stress than when they started the process and did not suffer any cognitive losses, while the third group - which meditated for 12 minutes a day - not only reported less stress but showed cognitive gains despite their environment. "That, to me, is kind of astonishing," Metzger says.

Another study that he finds "amazing" employed a statistical norm in the pharmaceutical industry called "effect ratio" that measures the before and after effects of whatever drug is being tested. This study by Johns Hopkins researchers found that meditation has roughly the same effects on anxiety and depression as did Xanax.

"Meditation is as effective as the best pharmaceuticals we have," he says. "Why do lawyers have problems with alcohol? Some of those reasons revolve around the need to escape from stress. The reason you should start with focusing on your breath is, you don't have to buy anything, you don't need to bring anything with you. If you can use that as a tool, why not? If repeated practice can make you smarter and more effective, why wouldn't you do this?"

Getting help

Based on this "indisputable evidence," Cho encourages all attorneys to pay attention to their well-being. "It's easy to fall into a trap of letting your stress or anxiety get out of control," she says. "It's about regularly checking in with yourself and noticing how you are.…So many lawyers are so detached from their emotional landscape, or even their physical well-being."

Female attorneys are especially likely to fall into the trap of thinking they're selfish if they take any time for themselves outside of work and family, Cho says. "If I'm practicing self-care, I'm putting on my own oxygen mask before helping others," she says. "There's no doubt that lawyers burn out, and the only cure for burnout is rest and self-care practices. It's critical for lawyers to care for their own well-being. It's not something lawyers can outsource. I can't hire somebody to exercise for me."

Cho encourages attorneys who are struggling to see a therapist or call the Lawyers Assistance Program in their state. Illinois LAP (**www.illinoislap.org**) offers CLE programming in mindfulness, among other stress-reduction and mental-health resources.

"I often talk to lawyers who have been struggling unnecessarily for years before they'll get help," she says. "This mentality of, 'I just have to grin and bear it, this is something that's a personal failure,' it's just not true."

Another incentive for Illinois lawyers to learn meditation techniques is that recently amended Illinois Supreme Court Rule 794(d) requires them to take one hour of mental health and substance abuse CLE as part of their six hour professional responsibility requirement. MCLE Board-approved mindfulness training fulfills that requirement.

But for Metzger, the reasons to engage in mindfulness and meditation go far beyond CLE requirements. "I am at the point where, not only do I believe this is right, but I'm trying to proselytize," he says. "We will get to the point where we can't afford not to do this. It improves your thinking, makes you smarter, and it will provide you with the skill to more thoughtfully respond to questions uttered by other people. I can't find a reason not to do it. If you feel weird about it - don't tell anybody, but do it."

Ed Finkel *is an Evanston-based freelance writer.*
edfinkel@earthlink.net

MINDFULNESS/MEDITATION RESOURCES >>

Books (beginner)

- Jeena Cho, *The Anxious Lawyer*
- Dan Harris, *10% Happier* and *Meditation for Fidgety Skeptics*
- Joseph Goldstein, *Mindfulness* and *The Experience of Insight*
- Jon Kabat-Zin, *Mindfulness for Beginners* and *Wherever You Go, There You Are*
- Roland Merullo, *Breakfast with the Buddha*

Books (advanced)

- Michael Singer, *The Untethered Soul*
- Anything by author Shinzen Young

Smartphone apps

All apps below offer "guided" and "unguided" meditations. Guided meditations are the best choice for those starting out - even seasoned meditators use them from time to time. All offer free trials as well.

- *Headspace*
- *10% Happier*

- *Brightmind*
- *Calm*

CLE

- Mark Metzger, *Mindfulness in the Age of Technology* (find the program by title at **http://onlinecle.isba.org**).

TAB 9

Behesha Doan has more than 29 years as a Certified Dog Trainer & Certified Service Dog Trainer through the International Association of Canine Professionals (IACP). She currently operates two professional dog trainer schools: the Canine Behavioral Psychology Academy and the Post Traumatic Stress Disorder Service Dog Trainers Academy, from her training facility located in Carbondale, IL. She has conducted dog behavior seminars throughout the United States, Canada and Europe.

Ms. Doan pioneered methods to train service dogs to assist individuals with post-traumatic stress. She was a contributing author for the "PTSD Service Dog Best Practices Paper" for Assistance Dogs International, and speaks extensively about her work with veterans and service dogs and the unique Trauma Resiliency Program developed at This Able Veteran. In 2011 she was an invited speaker to Harvard's Kennedy School of Government on the topic.

Ms. Doan is also a certified life coach specializing in trauma resiliency. She serves as a subject matter expert in trauma resilience with the Illinois Fire Service Institute (IFSI), and as a trainer for the Trauma Based Behavioral Health Fellowship, a project of Southern Illinois University's School of Medicine.

Ms. Doan is a formerly approved instructor for the Illinois Law Enforcement Training & Standards Board for Law Enforcement Narcotic Detection, K-9 Certification, Remote Collar Training for K-9 Reliability; and Police K-9 Unit Tactical Operations.

Marilyn Forbes is a senior lecturing fellow at Duke University School of Law. She teaches classes in Negotiation, Pretrial Litigation, Ethics for Civil Litigators, and Animal Law. She is an experienced mass tort and products liability lawyer. She entered private practice with Womble Carlyle Sandridge & Rice, PLLC after first clerking for the United States District Court for the Eastern District of North Carolina. She has been named to *Best Lawyers in America*,® annually from 2008-2018. In both 2015 and 2017, she was named "*Lawyer of the Year*," Product Liability Litigation, Defendants – Raleigh NC. Before joining the Duke faculty, she spent her career handling cases throughout the United States, including California, Louisiana, Mississippi, West Virginia, New York and Florida. Forbes received her JD from Wake Forest University School of Law and her BA with high honors from The Pennsylvania State University.

Forbes has served the Bar as a NITA Faculty Member, UNC Chapel Hill Trial Skills Program. She has been active in the American Bar Association, and has previously served as co-chair of the Corporate Counsel Subcommittee of the ABA Litigation Section's Woman Advocate Committee and as a vice chair of the ABA TIPS Animal Law Section. Forbes has been active in community service and has served on numerous nonprofit boards. Forbes has also served on the Board of Visitors for the Wake Forest University School of Law, the Board of Directors for the Animal Legal Defense Fund, and the Advisory Board for the Wake County SPCA. She lives in North Carolina with her spouse Tim Phillips and their two golden retrievers, Ranger and Charlie.

Camilla H. Fox is the founder and executive director of Project Coyote - a national non-profit organization based in Northern California that promotes coexistence between people and wildlife and compassionate conservation through education, science, and advocacy. With more than 20 years of experience working on behalf of wildlife and wildlands and a Master's degree in wildlife ecology, policy, and conservation, Camilla's work has been featured in several films, books and national media outlets. A frequent speaker on these issues, Camilla has authored more than 70 publications and is co-author of two books— *Coyotes in Our Midst* and *Cull of the Wild* and is co-producer of the award-winning documentary *Cull of the Wild ~ The Truth Behind Trapping.* She produced and directed the award-winning documentary film *KILLING GAMES ~ Wildlife in the Crosshairs*. Camilla has served as an appointed member on the U.S. Secretary of Agriculture's National Wildlife Services Advisory Committee and currently serves on several national non-profit advisory boards. In 2006, Camilla received the Humanitarian of the Year Award from the Marin Humane Society and the Christine Stevens Wildlife Award from the Animal Welfare Institute. She was named one of the 100 Guardian Angels of the Planet in 2013 and the 2014 Conservationist of the Year Award by the John Muir Association. In 2016 she was honored with the Grassroots Activist of the Year Award by the Fund for Wild Nature.
Learn more about Project Coyote here: http://www.projectcoyote.org

Prof. Rebecca J. Huss began teaching at Valparaiso University Law School in 1999 and is the Associate Dean for Academic Affairs, a Professor of Law and the Phyllis and Richard Duesenberg Chair in Law. In addition to Animal Law, Professor Huss has taught Business Associations, Mergers & Acquisitions, Professional Responsibility, Non Profit Organizations, and other business law courses during her academic career. Prior to beginning her academic career, Professor Huss practiced in law firms focusing on corporate issues as well as in-house in the animal health division of a pharmaceutical company. Professor Huss is currently licensed to practice law in Iowa and Missouri. A link to her publications and other biographical information can be found at her faculty webpage available through valpo.edu/law.

She is a past Chair of the American Bar Association's Tort Trial and Insurance Practice Section's Animal Law Committee and was the 2011 recipient of that committee's Excellence in the Advancement of Animal Law Award. In 2007, Professor Huss was appointed by the District Court of the Eastern District of Virginia as the guardian/special master of the dogs seized during the Bad Newz Kennels case.

Professor Huss has a Master of Laws in International and Comparative Law from the University of Iowa College of Law (1995) and graduated *magna cum laude* from the University of Richmond School of Law (1992).

Chelsea E. Kasten is a licensed, practicing attorney in both the State of Illinois (2016) and Missouri (2015). A graduate of Southern Illinois University School of Law (2015), Ms. Kasten received her Bachelor of Fine Arts in History with a Minor in Legal Studies from Western Kentucky University (2011). During her undergraduate career, she published an Honors Thesis on the history of the Clean Air Act. Throughout law school, Ms. Kasten served, among other activities, as the 1L, 2L, and 3L Environmental Law Society Representative and Student Animal Legal Defense Fund President from 2013-2015. Ms. Kasten is a member of the Illinois State Bar Association and serves on the ISBA Animal Law Section Council.

Jane E. McBride is founder and president of Illinois Humane. Illinois Humane's primary mission is cruelty and neglect investigations, recovery of the animals who are the subject of these cases, and advocacy. Ms. McBride herself has served as an approved humane investigator since 1999. She has been directly involved in the prosecution of a variety of neglect and cruelty matters. Ms. McBride has been active in numerous state animal welfare legislative efforts, as well as work with local governmental units crafting local ordinances and spearheading private/public animal welfare initiatives.

Ms. McBride is currently chair of the American Bar Association's Animal Law Committee. She is a member of the ISBA Animal Law Section Council – serving as CLE chair for the past 8 years. Ms. McBride's career practice area is environmental law. She is licensed in Illinois and Wisconsin. She has a Bachelor's of Science in Fisheries and Wildlife Biology and a Bachelor of Science in Agricultural Journalism from Iowa State University. She earned her J.D. with a Certificate in Environmental and Energy Law from Chicago-Kent College of Law.

Dr. Diana Uchiyama joined the Illinois Lawyers' Assistance Program (LAP) in 2018. Prior to joining LAP, she was the Administrator of Psychological Services for DuPage County where she oversaw a DASA licensed substance use treatment program, including a Mentally Ill Substance Abuse (MISA program) and Seeking Safety program, and DHS Domestic Batterer Intervention Program for a court mandated population of clients. Dr. Uchiyama has also worked for the Kane County Diagnostic Center, as both a Staff Psychologist and Juvenile Drug Court Coordinator, and has an extensive background doing court ordered evaluations including psychological, sanity, fitness, fitness to parent, and sex offender evaluations. She is a licensed sex offender evaluator in the State of Illinois. Dr. Uchiyama also conducts therapy with adults and adolescents. She has implemented numerous changes to court ordered programs both in Kane and DuPage County and is a SAMSHA certified trauma informed care trainer. Prior to obtaining her masters and doctorate in Clinical Psychology, Dr. Uchiyama was an Assistant Public Defender in Cook County working in various felony courtrooms at 26th and California. She obtained her law degree from Pepperdine University School of Law.

Bruce A. Wagman has been using his legal education and well-honed skills to help animals in all sectors of society and benefit both society and the animals themselves for almost three decades. He is the only lawyer running an exclusive animal law practice in a major United States firm. He litigates, drafts animal-friendly legislation, oversees rescue operations, and consults clients who care for and protect animals. He has published two major works, the leading casebook for law schools nationwide -- Animal Law: Cases and Materials -- and a global survey of animal laws, A Worldview of Animal Law, the only global survey of animal law. Bruce also founded Project Chimps, a chimpanzee sanctuary that is home to chimpanzees retired from a research laboratory.

Bruce's forte is the kind of creative lawyering it takes to fit animal interests into the legal world, and his clients regularly applaud his ability to model solutions and take on the toughest problems. His practice covers a broad range of animal-related legal issues -- including cases involving the use of animals in entertainment, biomedical research, animal agriculture/food production, animal cruelty, and wildlife control. He has a long history of wide-ranging "impact litigation," but he also loves to work with individuals on cases involving dog bites, animal custody disputes, and injuries to, and caused by, animals. Bruce brings an undeniable passion for each of his cases, a dedication to both his human clients and the animals involved, and he has a proven ability to turn that passion into winning arguments both in and out of the courtroom. He takes an "eyes on the prize" approach to all of his matters.

Bruce's clients include numerous animal protection organizations as well as private individuals. He has worked on behalf of many species, including birds, cats, chickens, chimpanzees, cows, deer, dogs, dolphins, ducks, elephants, elk, gorillas, horses (domestic and wild), lions, mice, monkeys, pigs, sharks, turkeys, whales, and wolves.

Molly Wiltshire earned her B.A. at Columbia University in New York and her J.D. at The University of Chicago Law School. Prior to law school, she was an international contracts paralegal with The Nature Conservancy. Today, Ms. Wiltshire a Partner at Schiff Hardin in Chicago where she represents companies and individuals in diverse legal areas, including government regulatory and grand jury investigations, complex civil and commercial disputes, and environmental and animal litigation. In addition to litigating, she has presented to corporate counsel and bar association groups on the attorney-client privilege and ethical rules regarding confidentiality, especially as they relate to the in-house counsel role, and diversity and inclusion in the legal profession.

Ms. Wiltshire is a member of the Leadership Council on Legal Diversity, Pathfinder; Social Impact Incubator, Institute for Inclusion in the Legal Profession; Illinois State Bar Association (ISBA) Animal Law Section Council; and the American Bar Association (ABA) TIPS Animal Law Committee where she also serves as Newsletter Editor.

The National Immigrant Justice Center selected Chicago associate Molly L. Wiltshire as a 2016 Rising Star.

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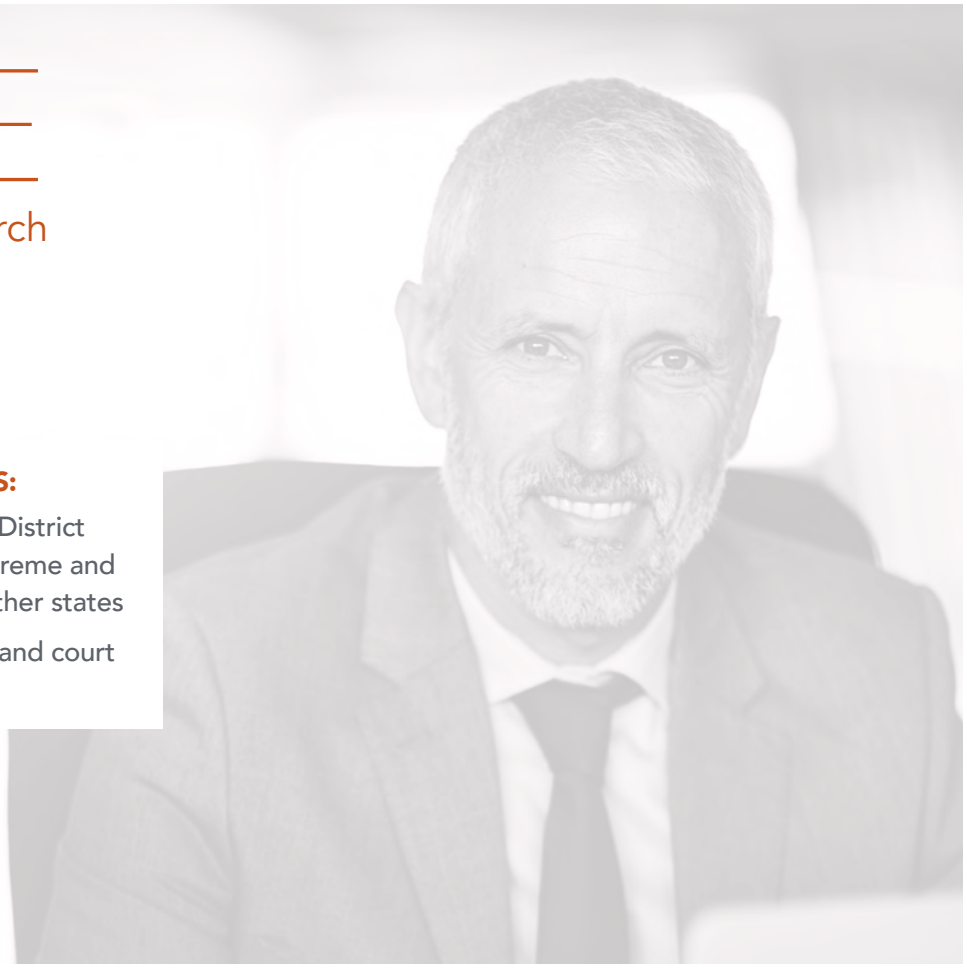

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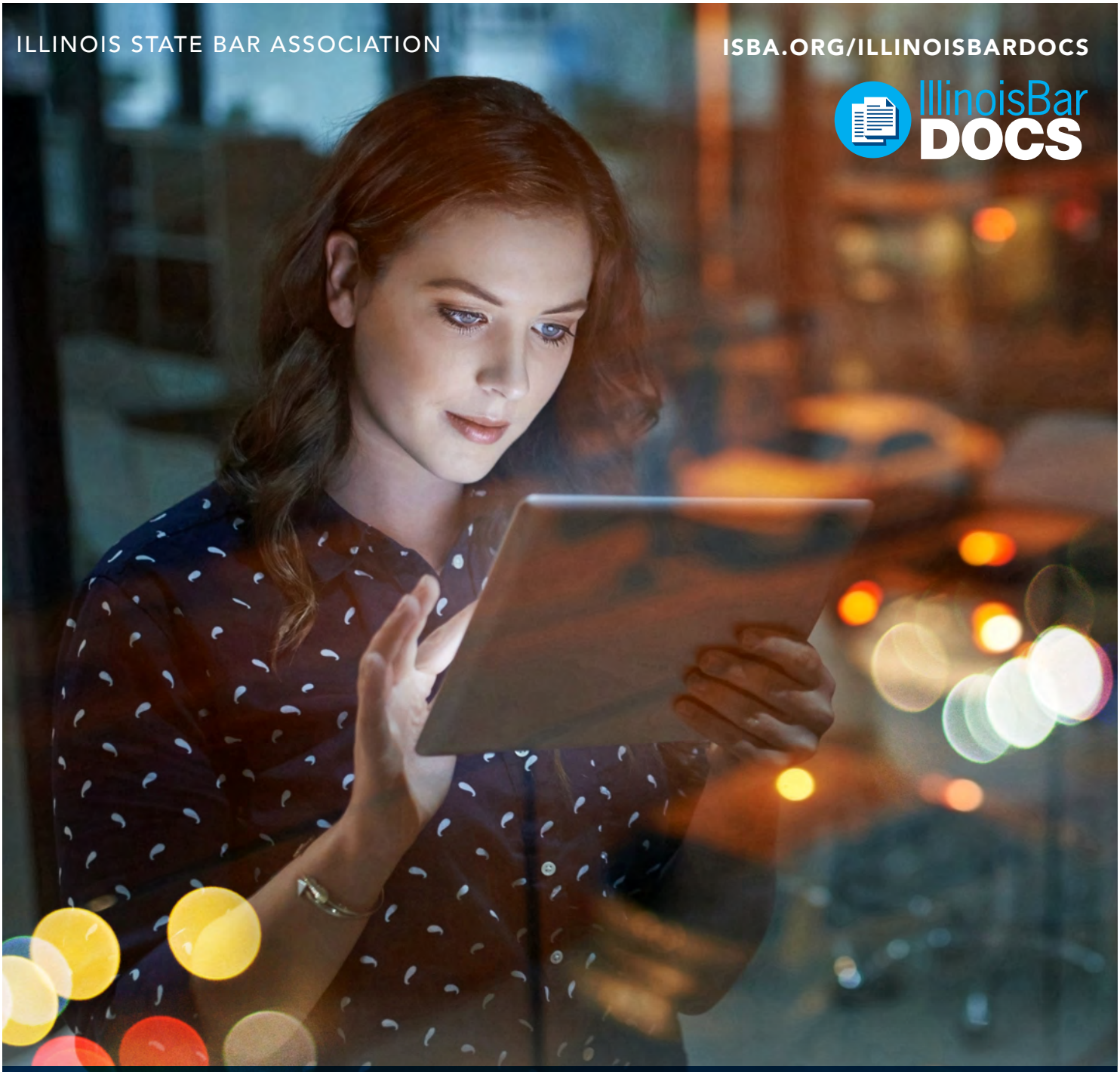

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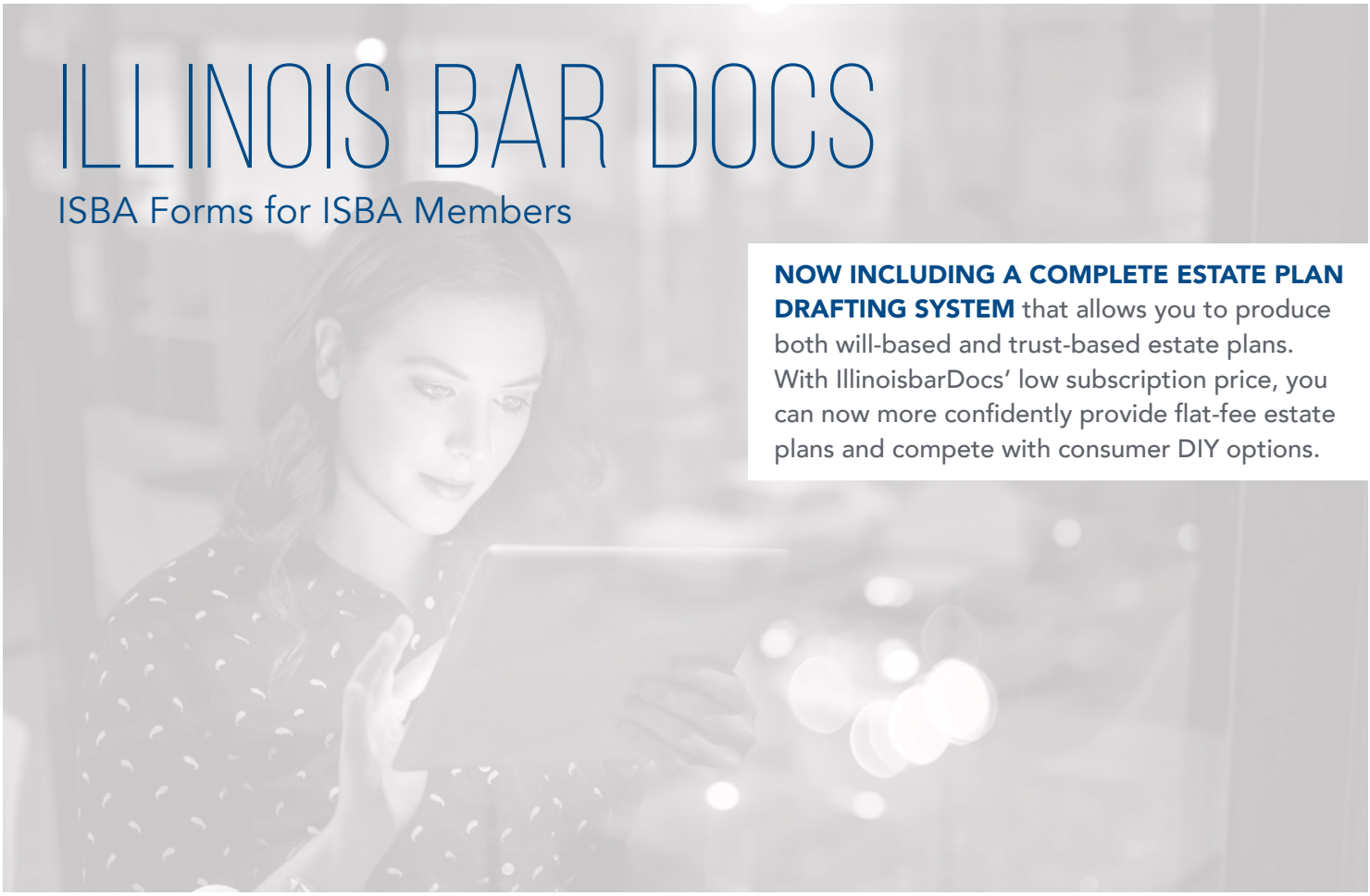

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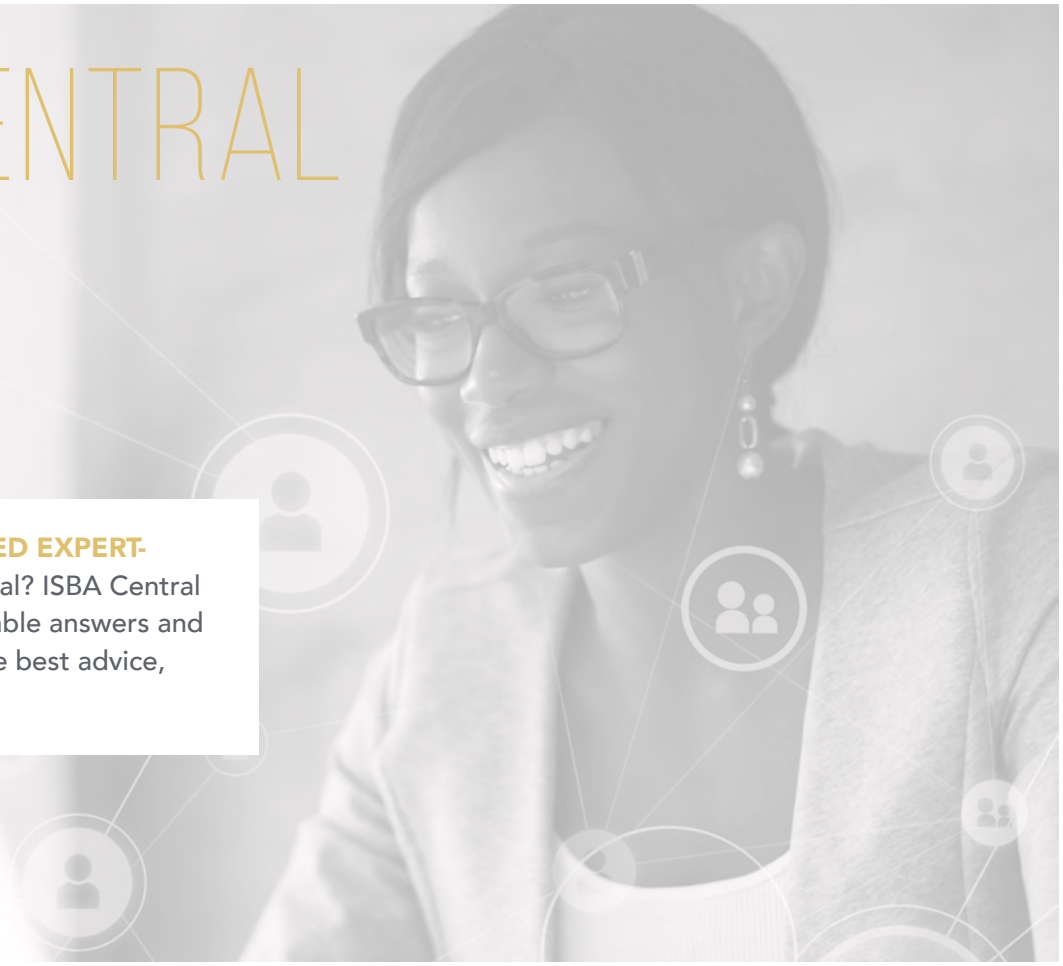

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