UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	)	
Plaintiffs,	)	
v.	)	**Civ. No. 03-2006 (EGS/JMF)**
FELD ENTERTAINMENT, INC.,	)	
Defendant.	)	

PLAINTIFFS' BRIEF IN OPPOSITION TO POST-TRIAL BRIEF OF DEFENDANT FELD ENTERTAINMENT, INC.

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INTRODUCTION[1]

In its Post-Trial Brief ("FEI Br.") (DE 536), as at the closing argument, defendant Feld Entertainment, Inc. ("FEI") makes the extraordinary concession that if the Court applies the "plain language" and "literal" terms of the Endangered Species Act ("ESA") then the Court must conclude that FEI is violating the "take" prohibition of the ESA. FEI Br. at 5; id. at 9 (admitting that plaintiffs must prevail if the Court "appl[ies] the plain language meaning of wound or injury"). In light of that concession, FEI devotes much of its brief, as well as its proposed findings and conclusions, in an effort to convince the Court that applying the plain statutory language would both be "absurd," id. at 5, and render the ESA "unconstitutionally void for vagueness" because of hypothetical applications of the "take" prohibition that are *not* before the Court. Id. at 12.

As discussed below, however, none of these increasingly desperate attempts to sidestep the statutory language is persuasive. It is surely not this Court's role to rewrite the plain terms of a federal law because the "circus is a proud American tradition" that "predates baseball," FEI Br. at 2, or because FEI believes that Congress could not really have meant it when it said that it is "unlawful for ***any*** person subject to the jurisdiction of the United States to . . . take ***any***" member of an endangered species "within the United States." 16 U.S.C. § 1538(a)(1)(B) (emphasis added); see also Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) ("As we have explained, 'the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting United States v. Monsanto, 491 U.S. 600, 609 (1989)). As the Supreme Court has made clear in a seminal ESA case federal judges do not sit as super legislators, choosing those

[1] Virtually all of the various arguments advanced in FEI's Post-Trial Brief are adequately addressed either in plaintiffs' Proposed Findings of Fact and Conclusions of Law, plaintiffs' Post-Trial Brief, or in plaintiffs' Objections also being filed today. Accordingly, in this response brief, plaintiffs are simply highlighting some of the overarching legal flaws in FEI's analysis.

"American tradition[s]" that should abide by the law and those that may be excused. See Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) ("[o]nce the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.").

Rather, it is the Court's narrow but vital duty to apply the law as written to the facts as established at trial. If that is done, plaintiffs respectfully submit that the legally inescapable conclusion is that the specific practices at issue here plainly *do* "take" the Asian elephants in FEI's possession by "wounding," "harming," and/or "harassing" them within the plain meaning of those terms, and their regulatory definitions. Moreover, because the Supreme Court has also instructed that "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute," Hill v. Colorado, 530 U.S. 703, 733 (2000), FEI's eleventh hour constitutional attack on the ESA must also fail. Under these circumstances, FEI's recourse lies not in asking this Court to "distort or ignore Congress's words," but, rather, either in pursuing a permit from the Executive Branch agency charged with implementing the ESA, as provided by Section 10 of the Act, or in "ask[ing] Congress to address the problem." Coast Alliance v. Babbitt, 6 F. Supp. 2d 29, 37 (D.D.C. 1998) (Sullivan, J.).

I. THE ESA'S TAKING PROHIBITION CLEARLY APPLIES HERE, NOTWITHSTANDING FEI'S PROTESTATION OF "ABSURDITY."

While conceding that plaintiffs must prevail if the Court reads the ESA "literally," FEI Br. at 5, defendant urges the Court to reach a different result based on what FEI conceives to be the "statutory ***purpose*** of the ESA . . . ." Id. (emphasis added). Thus, because the "ESA is an anti-extinction statute" and because – according to FEI – "FEI's conduct is not causing its own, or any

other Asian elephants, to become extinct," the "ESA does not apply here." Id. at 2, 3.

This argument is fundamentally flawed. First and foremost, as this Court held in the course of rejecting a similar request that it "disregard a plain statutory command" on the rationale that doing so would somehow "further Congress's broader purpose," that is simply not how federal courts construe statutes. Coast Alliance, 6 F. Supp. 2d at 37. To the contrary, courts are ordinarily bound by the "plain language of the statute" in discerning Congress's intent, and hence the "'court's role is not to 'correct' the text so that it better serves the statute's purposes, for it is the function of the political branches not only to define the goals but also choose the means for reaching them.'" Id. (quoting Engine Mfr.'s Ass'n v. U.S. Envtl. Prot. Agency, 88 F.3d 1075, 1089 (D.C. Cir. 1996)).

In other words, the Court must ***presume*** that Congress determined that the ESA's conservation objective ***is*** indeed effectuated by reading the plain terms of the statute to mean precisely what they say, *i.e.*, as flatly prohibiting "any" person from "wounding," "harming," and/or "harassing" "any" member of a listed species without obtaining a permit from the FWS. See Conn. Nat. Bank v. Germain, 503 U.S. 249, 253-54 (2002) ("[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (internal quotation omitted); see also Barnhart v. Sigmon Coal Co., 534 U.S. 438, 460-61 (2002) (rejecting an argument that the Court should "search for and apply an overarching legislative purpose" instead of the "text of the statute").[2]

[2] Accordingly, FEI's contention that "there is no legislative history in the ESA that discusses circus elephants" is both irrelevant to the legal issue before the Court, and also based on a logical fallacy. FEI Br. at 3. It is irrelevant because "reference to legislative history is inappropriate when the text of the statute is unambiguous." Rucker, 535 U.S. at 132. Indeed, the Supreme Court rejected a functionally identical reliance on the *absence* of legislative history in

Moreover, contrary to FEI's claim, *see* FEI Br. at 4-10, a holding that FEI cannot take federally protected endangered elephants without even pursuing a section 10 permit is "most surely not the type of 'absurd or glaringly unjust' result . . . that would warrant departure from the plain language" of the ESA. Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co., 520 U.S. 510, 516 (1997). Both the D.C. Circuit and Supreme Court have stressed that it is only "rare cases [in which] literal application of a statute will produce a result" so "'demonstrably at odds with the intention of its drafters'" that a court may depart from the statute's plain meaning. Davis County Solid Waste Mgmt., 101 F.3d at 1405 (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989)). This can hardly be deemed such a "rare" case when the Supreme Court itself has "repeatedly described the Act as the 'most comprehensive legislation for the preservation of endangered species ever enacted by any nation,'" Sweet Home, 515 U.S. at 698 (quoting Hill, 437 U.S. at 180), and, even further, has explained that the "seriousness with which Congress viewed this

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TVA v. Hill. See 437 U.S. at 184 ("[*w]hile there is no discussion in the legislative history of precisely this problem*, the totality of congressional action makes it abundantly clear that the result we reach today is wholly in accord with both the words of the statute and the intent of Congress.") (emphasis added).

FEI's argument is also illogical because Asian elephants were not even listed as an endangered species when the ESA was enacted in 1973, and hence there would have been no reason for Congress to specifically address "circus elephants" in the legislative history. On the other hand, as plaintiffs have previously pointed out, *see* Plaintiffs' Post-Trial Brief ("Pf. Br.) at 4-5, and as the Supreme Court has squarely held, Congress most assuredly *did* reinforce in the legislative history what the plain statutory language provides, *i.e.*, that Congress wanted the "take" prohibition to be "defined . . . ***in the broadest possible manner*** to include every conceivable way in which a person can 'take'" a listed species. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704 (1995) (internal citation omitted; emphasis added). Under these circumstances, it would be especially anomalous for the Court to accept FEI's invitation to ignore the "literal" words of the statute. FEI Br. at 4-5; see also Davis County Solid Waste Mgmt. v. U.S. Envtl. Prot. Agency, 101 F.3d 1395, 1405 (D.C. Cir. 1996) ("there must be evidence that Congress meant something other than what it literally said before a court can depart from plain meaning") (internal quotation omitted).

issue" is demonstrated by the fact that "[v]irtually ***all dealings with endangered species including taking, possession, transportation, and sale*** were prohibited, except in extremely narrow circumstances." Hill, 437 U.S. at 181 (emphasis added).

In short, as embodied in the plain terms of the Act and as the FWS has also long recognized, see Pl. Br. at 4, Congress made the deliberate legislative judgment that a truly "comprehensive" regulatory scheme covering endangered species both in the wild *and* in captivity would best serve the conservation purposes of the Act. Although application of this scheme here may be "strict, [it] is not absurd," Dodd v. United States, 545 U.S. 353, 359 (2005), and, indeed this case well illustrates *why* Congress would have thought it necessary to devise such an all-encompassing scheme.

Thus, not only may captive members of a listed species prove to be essential for maintaining a "gene pool" necessary to "re-establish or rejuvenate wild populations," 42 Fed. Reg. 28052 (June 1, 1977), and for other scientific inquiries, see Hill, 437 U.S. at 178 ("[t]he value of this genetic heritage is, quite literally, incalculable"), but Congress plainly intended that "virtually all dealings with endangered species" be tightly regulated by the FWS to ensure that those handling the species are in fact proceeding (if at all) in a manner that promotes the ESA's overarching goal of species conservation. Id. at 181. This is precisely why "[a]ll persons . . . are specifically instructed not to 'take' endangered species," id. at 184, except when the *FWS* determines that the take is *in fact* "for scientific purposes or to enhance the propagation or survival of the affected species," and prescribes "such terms and conditions" as it deems appropriate to further the interests of the species. 16 U.S.C. § 1538(a)(1)(A). Accordingly, where, as here, a take of a listed species is occurring without having gone through the ESA permitting process – and, even more egregiously, where FEI is representing to the public (and to this Court) that its activities *are* somehow conserving Asian elephants, and yet

that assertion has never been tested in the regulatory process ordained by Congress – it is apparent not only that FEI's position undermines the legislative design, but that defendant is actually asking the *Court* to manufacture a gaping loophole in the Act's otherwise "comprehensive protection for endangered and threatened species." Sweet Home, 515 U.S. at 704.[3]

The Court, however, is simply not at liberty to create such an exception to the comprehensive legislative scheme. Rather, Congress "has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities," and thus the Court's "individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting" the ESA. Hill, 437 U.S. at 194. Accordingly, even if the end result of the Court's ruling were that FEI's circus operations could no longer proceed as they have – and before FEI applies for a Section 10 permit, it is impossible, or at least premature, for the Court to make any such assessment – that would not bolster FEI's legal position because "[i]t is for Congress, not this Court, to amend the statute if it believes" that the legislative scheme in effect is too "strict." Dodd, 545 U.S. at 359-60;

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[3] Indeed, although this case involves captive members of an endangered species, it is easy to see how FEI's focus on the "anti-extinction" purpose of the ESA in lieu of the Act's explicit requirements and prohibitions, FEI Br. at 2, 3, would result in courts disregarding unlawful "takes" of individual animals in the wild context as well. For good reason, however, courts have emphatically rejected any notion that only "takes" that would result in immediate extinction of an entire species are prohibited by the Act. See Loggerhead Turtle v. County Council of Volusia County, Fla., 896 F. Supp. 1170, 1180 (M.D. Fla. 1995) ("[T]he Act does not distinguish between a taking of the whole species or only one member of the species. *Any taking and every taking* – even of a single individual of the protected species – is prohibited by the Act. Hence the future threat of even a single taking is sufficient to invoke the authority of the Act.") (emphasis in original) (citing Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923, 938 (D. Mont. 1992)); see also Animal Welfare Inst. v. Martin, 588 F. Supp. 2d 70, 110 (D. Maine 2008) (although the death of a single Canada lynx from state-authorized trapping did not "threaten[] the species as a whole," the Court found a prohibited take and ordered the state agency to "take all action necessary to avoid the trapping of Canada lynx in Conibear traps").

id. at 359 ("[a]lthough we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted."); Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465, 480 (1997) ("[t]hese are [policy] arguments best addressed by Congress, not the courts. Lacking the expertise or authority to assess these important competing claims, we note only that 'a literal construction of a statute' does not 'yiel[d] results so manifestly unreasonable that they could not fairly be attributed to congressional design'") (internal quotation and citation omitted).[4]

Similarly untenable is FEI's contention that "[a]pplying the plain language meaning of wound or injury" would "lead to an absurd result" because it would somehow "outlaw acupuncture, medical care, husbandry, and safety precautions – all of which can and do break the skin but are nonetheless ***beneficial*** to the elephant." FEI Br. at 10 (emphasis in original). *This* case certainly does not entail the use of the bullhook or prolonged chaining in a manner that is "beneficial to the elephant"; nor is there any "absurdity" in holding that FEI's practices as described at trial are in fact wounding, harming, and injuring the elephants within the plain meaning of the ESA and implementing regulations.

In resolving *this* case, therefore, it is "not only unnecessary, but also unwise, for the Court

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[4] Plaintiffs have previously rebutted FEI's erroneous assertion that "[i]f the ESA is to even be applied to captive animals, then the only definitional component of 'take' that the [FWS] has ever indicated could apply to captive animals is 'harass.'" FEI Br. at 6 (citing 63 Fed. Reg. 48634). Even assuming the Service were free to apply only one "definitional component of 'take'" to captive members of listed species, nothing in the Federal Register Notice cited by FEI remotely suggests that it has done so. See Pf. Br. at 7-9. To the contrary, the Service not only explained that Congress's definition of "take" applies to "endangered or threatened wildlife, ***whether wild or captive***" and that the "statutory term ***cannot be changed administratively***," but the agency also stressed that "[s]ince captive animals can be subjected to improper husbandry ***as well as to harm and other taking activities***, the Service considers it prudent to maintain such protections, consistent with Congressional intent." 63 Fed. Reg. 48636 (emphasis added). Thus, it is difficult to imagine a more explicit statement that the FWS did not – and *could not* – administratively confine the "take" prohibition to the harassment proscription.

to issue an opinion on the entirely hypothetical question[s]" to which FEI improperly seeks to shift the Court's attention. Air Courier Conference of Am. v. Am. Postal Workers Union, AFL-CIO, 498 U.S. 517, 531-32 (1991) (Stevens, J., concurring); see also Fedorenko v. United States, 449 U.S. 490, 512 n.34 (1981) (because there was "no question" that the conduct before the Court "fit[] within statutory language about persons who assisted in the persecution of civilians," it was unnecessary for the Court to address other conceivable factual scenarios; "***Other cases may present more difficult line-drawing problems but we need decide only this case***.") (emphasis added); see also Grand ex rel. U.S. v. Northrop Corp., 811 F. Supp. 333, 336-67 (S.D. Ohio 1992) ("We are quite sure that strange problems and questions may arise in the application of the plain meaning of many statutes under particular facts. Still, the task of this Court is not to answer every conceivable question or hypothetical about a statute . . . Instead, it is this Court's duty to interpret and apply a statute to the facts of the case before it.").[5]

[5] Even if there were some justification for the Court to address FEI's hypothetical scenarios, they merely serve to underscore why the Court *should* apply the "ordinary meaning" of the statutory terms. Ingalls Shipbuilding, Inc. v. Dir., Office of Workers' Compensation Programs, Dep't of Labor, 519 U.S. 248, 255 (1997). For example, the ordinary meaning of the language "to . . . wound" in the ESA's definition of "take," 16 U.S.C. § 1532(19) – *i.e.* to "hurt or damage" or "inflict a wound upon," Webster's Third New International Dictionary (1993) – is obviously the *opposite* of providing an animal with necessary "medical care," FEI Br. at 10, although it surely encompasses FEI's use of the bull hook in such a manner as to regularly inflict lacerations, punctures, hook boils, and other physical wounds on the elephants.

Likewise, the "ordinary understanding of the word 'harm'" that the Supreme Court employed in Sweet Home – i.e., "to cause hurt or damage to: injure," 515 U.S. at 697 (internal quotation omitted) – is the anthesis of taking an action to *benefit* elephants, FEI Br. at 10, but it applies squarely to the practices at issue here. Along these lines, it is also noteworthy that the FWS only excluded from the "harassment" definition certain "[p]rovisions of veterinary care" when such "provisions ***are not likely to result in injury to the wildlife***." 50 C.F.R. § 17.3 (emphasis added). If even some forms of "veterinary care" may be deemed injurious to elephants, and hence an unlawful take – as the ESA regulations provide – it makes no sense whatsoever for FEI to maintain that *its* wounding and injuring of the elephants in order to make

II. FEI'S CONSTITUTIONAL ARGUMENT IS BASELESS.

At the same time that it essentially concedes that the practices at issue *are* covered by the "plain meaning" and "literal" terms of the statute, FEI Br. at 5, FEI also contends that the "ESA is too *vague* as plaintiffs seek to apply it in this case, and thereby violate's FEI's right to due process." *Id*. at 15 (emphasis added). Although it is difficult to understand how a statute can simultaneously be both "plain" and excessively "vague," even putting that anomaly aside, FEI's constitutional attack is baseless.

To begin with, rather than demonstrate, or even argue, that the ESA's take prohibition is unconstitutionally vague as applied to its *own* conduct, FEI again relies primarily on hypothetical applications of the statue that are not before the Court. Therefore, although all of plaintiffs' (and even FEI's own) experts agreed that the kind of sustained chaining on hard surfaces that the FEI elephants endure *are* causing and/or contributing to various maladies, and *are* otherwise harming and harassing the elephants, FEI maintains that application of the take prohibition here is "unconstitutionally vague" because plaintiffs' experts, unsurprisingly, did not present identical views on the *maximum* amount of chaining that *could* be done consistent with the elephants' well-being. FEI Br. at 18-19. Similarly, although all of plaintiffs' experts agreed that FEI's bullhook use in a manner that results in recurrent punctures, hook boils, lacerations, and scarring is in fact wounding, harming, and harassing the elephants – and even defendant's own expert, Michael Keele, agreed that when the bullhook is used in this manner, it is "bad for [the elephants'] well-being," Trial Tr. 87:15-

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them perform circus tricks is somehow beyond the statute's reach. See also 63 Fed. Reg. 48634 (Sept. 11, 1998) ("the Service believes that congressional intent supports the proposition that *measures necessary for the proper care and maintenance of listed wildlife in captivity* do not constitute 'harassment' or 'taking'") (emphasis added).

88:4, March 12, 2009 p.m. – FEI contends that application of the take prohibition here is unconstitutional because plaintiffs' experts did not present identical views on whether the bullhook *theoretically could* be used in a manner that does not cause these problems. FEI Br. at 17-18.

But these arguments are as legally unsound as they are logically bankrupt. Courts "apply the void-for-vagueness doctrine outside of the First Amendment context only rarely," Am. Iron & Steel Inst. v. Occupational Safety & Health Admin., 182 F.3d 1261, 1277 (11th Cir. 1999) and, indeed, a statutory provision that "implicates no constitutionally protected conduct" – as is indisputably the case here – must be upheld unless it is "impermissibly vague in *all of its applications.*" Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95 (1982) (emphasis added). Consequently, "[v]agueness challenges to statutes not threatening First Amendment interests ***are examined in light of the facts of the case at hand***; the statute is judged on an as-applied basis." Maynard v. Cartwright, 486 U.S. 356, 361 (1988) (emphasis added). A party "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." Hoffman Estates, 455 U.S. at 494-95.

Accordingly, where, as here, the factual record overwhelmingly demonstrates that ***FEI's*** practice of keeping elephants chained on hard surfaces for many hours and even for days at a time ***is*** physically and psychologically injurious to them, and that ***FEI is*** using the bullhook in a manner that is regularly wounding and harming the elephants, it is of no legal moment whatsoever whether a ***different*** institutional policy and practice involving a small fraction of the chaining now at issue, or a more benign use of the bullhook, would present a closer call or even a case on which plaintiffs' experts might reach divergent conclusions. Hill v. Colorado, 530 U.S. 703, 733 (2000) ("speculation

about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute"). In short, the fact that, "as with virtually all statutes, it is undoubtedly the case that a skilled legal 'imagination can conjure up hypothetical cases in which the meaning of the[] [statutory] terms will be in nice question,'" does not preclude "straightforward" application of the plain statutory language to the facts of ***this*** case. Finzer v. Barry, 798 F.2d 1450, 1470 (D.C. Cir. 1986) (quoting Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 412 (1950)).

Nor is there any merit to FEI's contention that "[p]rior to this lawsuit, nobody in the elephant community understood the ESA 'taking' prohibition to apply to elephants already in captivity as a welfare standard." FEI Br. at 13. Although FEI does not define what it means by a "welfare standard," in the very Federal Register Notice cited in FEI's Brief – which was published in 1998, two years "prior to this lawsuit" – the FWS stated point-blank that the ESA's taking prohibition applies to captive endangered species "whether wild or captive;" that "captive animals can be subjected to improper husbandry as well as to harm and other taking activities;" and, even further, that "maintaining animals in inadequate, unsafe or unsanitary conditions, physical mistreatment, and the like constitute harassment because such conditions might create the likelihood of injury or sickness. ***The Act continues to afford protection to listed species that are not being treated in a humane manner***." 63 Fed. Reg. 48634, 48636 48638 (Sept. 11, 1998) (emphasis added). Accordingly, even aside from the plain language of the statute and the repeated 60-day notices from *plaintiffs* advising FEI that its practices violated the law, if FEI has failed to grasp that it could be subject to ESA liability for practices that entail "physical mistreatment," the "likelihood of injury," and the failure to treat elephants in a "humane manner," then the problem was due to FEI's own willful ignorance, rather than any unconstitutional vagueness inherent in the statutory and regulatory

scheme. See Maynard v. Cartwright, 486 U.S. 356, 361 (1988) ("Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk.").[6]

Moreover, FEI's own conduct belies its rhetoric. If it were really the case that "nobody in the elephant community understood" that the ESA's taking prohibition applies to captive elephants, then *FEI never would have complied with the FWS's captive bred wildlife registration system* – a system that exists only *because* captive endangered animals *are* subject to the ESA's take prohibition. See 63 Fed. Reg. 48634. As for FEI's purported reliance (FEI Br. at 13) on a 34-year-old letter from the FWS regarding the need for a permit for the "interstate movement of wildlife," DX 5, nothing in that letter even specifically references the ESA's take prohibition or Asian elephants, let alone the particular chaining and bullhook practices at issue here. Id. More important, FEI neglects to mention that the letter was written seven years *before* Congress amended the ESA's grandfather clause in 1982 for the purpose of making explicit that "pre-Act" animals held in captivity ***are*** fully protected by the Act's take prohibition. See Pf. Br. at 3-4. Once again, this is precisely why this Court has already held that the ESA's "grandfather" clause does not exempt the elephants at issue from the take prohibition. See Order (Aug. 23, 2007) (DE 173) at 7-15. FEI's ongoing

[6] The weakness of FEI's argument is underscored by FEI's failure to cite any precedent sustaining a constitutional challenge in circumstances even arguably analogous to those here. Instead, the state statute at issue in Smith v. Goguen, 415 U.S. 566 (1974) – which FEI asserts is "no different than" the ESA, FEI Br. at 17 – made it a criminal offense to "treat[] contemptuously the flag of the United States." 415 U.S. at 573 (internal quotation omitted). Accordingly, the linchpin of the Court's ruling invalidating the statute was that it was a criminal law "capable of reaching expression sheltered by the First Amendment," and thus, once again, "demand[ing] a greater degree of specificity than in other contexts." *Id.* At the risk of understatement, it is difficult to comprehend how that ruling supports a finding of constitutional infirmity regarding a federal conservation statute that implicates no First Amendment rights and that plaintiffs are seeking to enforce through a civil action that seeks purely *prospective* relief.

refusal to acknowledge the significance of the 1982 amendment, or this Court's prior ruling based on it, further undermines its complaint that it must "suddenly" confront the legal ramifications of plaintiffs' nine-year-old take claim. FEI Br. at 13.

It is also easy to dispense with the remaining arguments that FEI advances under the rubric of its constitutional defense. FEI's assertion that plaintiffs' claims somehow turn on a "distinction regarding purpose as opposed to conduct," FEI Br. at 15, is simply a misstatement of plaintiffs' claims and the evidence on which they are based. Although the ESA implementing regulations do make clear that the purpose underlying a particular practice *is* in fact relevant to whether there is a prohibited take – indicating, *e.g.*, that "confining" an animal for "veterinary care" may not constitute "harassment," whereas confining an animal for other reasons may do so, 50 C.F.R. § 17.3 – plaintiffs' claims are fundamentally focused on whether FEI's *conduct* is wounding, harming, and/or harassing the elephants.

As set forth in detail in Plaintiffs' Proposed Findings, it is FEI's *conduct* in using the bullhook in such a manner as to regularly cause punctures, lacerations, abrasions, scarring, and other wounds that it is the gravamen of plaintiffs' bullhook claim. Likewise, it is FEI's *conduct* in chaining elephants in trains, on concrete, and on other hard surfaces for many hours and even days at a time – and the consequent impact that has on the animals' physical and psychological well-being – that is the gravamen of plaintiffs' chaining claim. Although the fact that these extremely intelligent, sociable, and mobile animals must endure such conditions merely to perform circus tricks for a few minutes during FEI's shows *reinforces* plaintiffs' claims, it is FEI's ***behavior and its adverse effects on the elephants*** that are at the factual core of plaintiffs' claims.

Finally, FEI's assertion that there are "no federal restrictions on the amount of time an

elephant can be" chained, and that the ESA "provides no standard for what kind of situations involving the [bullhook] would be unlawful," FEI Br. at 18, is still another red herring. The statutory "restrictions" and "standards" are that FEI's actions may not – without a Section 10 permit – "wound," "harm," and/or "harass" the elephants within the plain meaning of those terms or within their regulatory definitions. Indeed, in that fundamental respect, plaintiffs' claims are no different than any other Section 9 claim brought under the ESA's citizen suit provision.

For example, although the FWS has defined "harm" in the definition of "take" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns," 50 C.F.R. § 17.3 – and the Supreme Court sustained that regulation against a facial challenge in Sweet Home, 515 U.S. at 690 – the Service has never issued detailed "standards" for assessing whether particular practices as applied to particular species fall afoul of the regulation. Yet that has not stopped courts faced with citizen suits from finding "takings" based on case-by-case assessments of the expert testimony and other available factual evidence. See, e.g., Loggerhead Turtle, 896 F. Supp. at 1179 ("Under the [ESA], concepts such as 'harm' and 'harass' are subject to differing and complex analyses. An analysis of the concept of 'significant habitat modification,' for example, must take account of various fact-specific circumstances which can only be assessed within the context of the case itself."). Although this lawsuit involves a different kind of "fact-specific circumstance," id., the Court's task is not functionally different than in any other ESA section 9 case.[7]

[7] With regard to plaintiffs' chaining claim, it is noteworthy that FEI flatly concedes, as it must, that it is in violation of the standards issued by the Association of Zoos and Aquariums ("AZA"). See FEI Br. at 18; see also Trial Tr. 78:15-78:23, March 12, 2009 (p.m.) (Keele Test.) (traveling circuses would "clearly not meet existing AZA standards for elephant management and care"). FEI asserts, however, that the Elephant Husbandry Resources Guide ("EHRG") – *i.e.*, the

III. PLAINTIFFS CLEARLY MET THEIR BURDEN OF PROOF.

FEI asserts that plaintiffs did not meet their burden of proof because "[p]laintiffs presented virtually no evidence of any physical manifestations caused by the alleged taking" of the elephants. FEI Br. at 10. Although FEI does not explain precisely what it means by "physical manifestations," there was abundant trial testimony and evidence – including from FEI's own witnesses and documents – that the practices at issue have, and will continue to, wound, harm, injure, and harass the elephants in myriad ways. Indeed, it appears that, rather than confront this compelling evidence, FEI's approach is simply to pretend that it does not exist.

For example, FEI asserts that plaintiffs "presented no evidence that FEI's use" of the bullhook "wounds" any of its elephants, FEI Br. at 11, but FEI conveniently ignores the sworn deposition testimony of FEI's own long-time elephant handler ***with the blue unit*** that he ***alone*** sees puncture wounds caused by bullhooks "probably three to four times a month" – *i.e.*, on 36 to 48

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document that was co-authored by FEI's own employees, see DX 2 at Preface, and issued *after* this litigation was filed – "imposes a 16-hour limit on tethering per day," and that FEI "complies with the EHRG limit." FEI Br. at 18. Even assuming that such a document is entitled to any weight, FEI has mischaracterized it.

First, the EHRG does not "impose[]" chaining limits – or anything else for that matter – on anyone. Rather, in contrast to the AZA standards – which are mandatory and enforceable for all zoo and non-zoo member institutions, see Trial Tr. 29:13-29:20, 33:3-33:7, March 12, 2009 p.m. (Keele Test.), the EHRG is not binding on any entity. Id. Second, even the EHRG does not say that elephants should be chained on hard surfaces for 16 hours a day; to the contrary, it acknowledges that forcing elephants to live on "improper substrate[s]" – such as those to which the FEI elephants are chained for much of the day and night, both on the road and at the CEC – is among the generally accepted "causes of foot problems" in captive Asian elephants. DX 2 at 44, 46. Third, FEI does not even "compl[y]"with a 16-hour per day limit, FEI Br. at 18, because the elephants on the road are *frequently* chained on the train for *days* in a row. See, e.g., Trial Tr. 52:13-53:20, 59:15-61:23, March 9, 2009 p.m. (Friend Test.) (indicating that the Blue Unit elephants were chained for 82 ½ hours on a trip between Denver and Cleveland, and for 30 ½ hours on another trip between Los Angeles and San Diego).

separate occasions each year. PWC 180 at 55 (Ridley Dep.); see also Trial Tr. 52:23-52:25, 53:22-54:10, 54:17-55:12, March 12, 2009 p.m. (Keele Test.) (conceding, in response to the Court's questions, that it would be "proper to call" bullhook punctures "wounds"). Likewise, FEI asserts that there is "no evidence" that FEI's prolonged chaining on hard surfaces has caused any "medical or welfare problems," FEI Br. at 11-2 – conveniently ignoring not only FEI's own medical records admitting that there are "a lot of severe, not completely treatable foot problems" in the FEI elephants that "originated in the years that the elephants were on the road," PWC 23, but also the testimony of FEI's own experts agreeing with the consensus in the scientific literature that prolonged chaining on hard surfaces ***does*** contribute to foot and other musculoskeletal disorders. See, e.g., Trial Tr. 82:9-82:25, 83:14-84:1, 84:9-84:14, March 16, 2009 p.m. (Schmitt Test.). Indeed, the remarkable reality of this case is that the Court could easily find that plaintiffs carried their burden of proof based ***solely*** on FEI's own documents and testimony, and without even crediting a single statement made by plaintiffs' highly knowledgeable and credible experts.

Moreover, FEI's assertion that the revealing pattern of "injuries" that is suffered by virtually all of the FEI elephants – such as nail bed abscesses and nail cracks, as well as "sprains, strains, stiffness, and pressure sores" – are only "temporary conditions," FEI Br. at 11, is not only inaccurate, but constitutes yet another tacit concession of liability. Even if it were true that FEI's practices were only causing the elephants repeatedly to suffer "temporary" injuries, the ESA's take prohibition is not limited to permanent disability. Rather, once again, the plain language of the statute encompasses any "harm" or "wound" that is visited upon a listed species, and the regulatory definitions of "harm" and "harass" apply to any act that "injures wildlife" or that is "likely to result in injury to the wildlife." 50 C.F.R. § 17.3.

In any event, FEI's own medical records contradict its characterization of the medical conditions as "temporary." For example, with regard to the pressure or bed sores caused by chaining the elephants to hard surfaces so that the animals have no choice (if they wish to lay down) but to press the bones of their hips and cheeks against concrete, metal, or other unyielding surfaces, the medical records make clear that these wounds are "chronic" and recurrent problems – precisely because the elephants continue to be exposed to the same causative conditions. See Plaintiffs' Proposed Findings ("PPF") at ¶¶ 273-276 & endnote 33. Likewise, the records reflect that the nail bed abscesses and other foot disorders suffered by all of the elephants are ongoing, recurrent medical conditions – again because the underlying causes are not being ameliorated. PPF at ¶¶ 277-288. In addition, the records establish that the practices at issue not only result in frequent bouts of "temporary" lameness and stiffness – which are "harms" and "injuries" in their own right – but that they have caused and/or aggravated osteoarthritis, a degenerative joint disease. Id. at ¶¶ 289-296.

As for FEI's assertion that "[p]laintiffs experts generally avoided use of 'cause' or similar words when discussing the etiology of health conditions or alleged scars," FEI Br. at 12, FEI has not only misstated the testimony – which makes abundantly clear that FEI's practices have caused and/or exacerbated the "health conditions" – but has also misapprehended the law. The legal question before the Court is not whether plaintiffs' experts uttered particular "words" – although they did, see, e.g., Trial Tr. 22:7-22:20, 51:23-52:7, 55:15-55:20, 81:9-81:13, 89:13-91:3, Feb. 24, 2009 p.m. (Ensley Test.) (FEI's practices have "cause[d]," "exacerbat[ed]," "accentuat[ed]," and "precipitated" the elephants' medical conditions) – but, rather, whether the ***evidence*** demonstrates FEI's culpability.

On that score, FEI has no convincing response.[8]

IV. MR. RIDER AND API HAVE STANDING.

FEI repeats its well-worn attacks on Mr. Rider's standing (and on Mr. Rider). FEI Br. at 21-33. In their prior submissions, as well as in the Objections they are filing today, plaintiffs have explained at length why Mr. Rider, as well as the Animal Protection Institute ("API") clearly have standing, and plaintiffs will not belabor those arguments. It is worth emphasizing that FEI's challenge to Mr. Rider's standing is predicated on (1) patent distortions of the record – such as FEI's simply false assertion that Mr. Rider said that he "hated" Karen," FEI Br. at 25; see Pf. Obj. at 2-3; (2) FEI's counterintuitive position that virtually everyone who has worked with the elephants at FEI has formed an emotional bond with them ***except*** for the individual who has spent the last nine years of his life cross-crossing the country speaking on their behalf; and (3) various other attacks on Mr.

[8] For example, Dr. Ensley testified that the medical records repeatedly refer to abrasions, lacerations, and other wounds that occur on or near traditional "cuing" points on the ***left*** side of the elephants' bodies (the side on which everyone agrees the bullhook is used), and he further testified that there is "no other explanation I can think of" – *i.e.*, other than systemic bullhook use – for this "pattern" of wounds. Trial Tr. 51:23-52:7, 55:22-56:13, 74:17-74:23, Feb. 24, 2009 a.m.; Trial Tr. 49:1-49:16, 50:3-50:5, Feb. 24, 2009 p.m. As a factual matter, FEI has failed to offer any other plausible, let alone persuasive, explanation for this particular pattern of bullhook injuries and, as a legal matter, this is highly compelling circumstantial evidence on which the Court absolutely may (and should) rely, along with the reams of additional evidence (*e.g.*, videos, FEI e-mails, testimony of FEI's own employees, etc.) of harmful, injurious bullhook use. See United States v. Town of Plymouth, 6 F. Supp. 2d 81, 91 (D. Mass. 1998) (holding that inadequate regulation of off road vehicles ("ORVs") "in all probability" caused an unlawful take of a piping plover chick despite the absence of direct evidence; "While the Town maintains that no conclusions can be drawn about the cause of the death of the recently hatched plover - observed healthy in the morning and found dead in vehicle tracks just hours later – the reasonable inference to be drawn in this whodunit is that the chick was killed by an ORV."); see also Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 508 n.17 (1957) ("Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.").

Rider's "credibility" that, at the end of the day, are all smoke and no fire. FEI Br. at 27 n.16.[9]

FEI also, once again, confounds basic standing and mootness principles. Contrary to FEI's contention, see FEI Br. at 29-33, it is well-established that FEI cannot rely on its ***own post-litigation actions and assertions*** to argue that the Court has been deprived of Article III jurisdiction. See, e.g., NE Fla. Chapter of Associated General Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 661-62 (1993); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982). FEI also again misunderstands Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000), by arguing that Mr. Rider's occasional observations of the elephants to whom he is attached "remove[s] Mr. Rider from the rubric" of Laidlaw. FEI Br. at 28. The essence of the injury in Laidlaw was that the plaintiffs could not use the river at issue *without* suffering aesthetic harm. 528 U.S. at 182-85. That is functionally identical to the harm-inducing dilemma which Mr. Rider has alleged from the outset of this case, *i.e.*, ***either*** he must refrain from seeing the elephants with whom he has formed

[9] Indeed, FEI's purported "examples" of Mr. Rider's being "impeached," FEI Br. at 27 n.16, simply serve to highlight that FEI's concerted attacks on him are diversionary tactics, especially in view of FEI's own concessions in the case. Thus, particularly given the *undisputed* evidence that the elephants on the road are frequently chained for days at a time, and that the CEC elephants are chained for the majority of each day, minor discrepancies in Mr. Rider's estimates of the precise number of hours the elephants were chained when he worked with them hardly constitutes a "matter[] of material significance to his claims." Id. Likewise, it is, at the least, odd for FEI to attack Mr. Rider's assertions that the FEI elephant handlers systematically struck the elephants with bullhooks, id., when Mr. Feld himself testified to the same effect. The unavoidable reality is that, in marked contrast to FEI's expert and fact witnesses – many of whom have changed their positions over time to suit their (and FEI's) interests – Mr. Rider's explanations of what he observed have not only been remarkably consistent from when he left the circus to the present, but have now been corroborated on ***all*** key points by a multitude of other witnesses (including FEI's) and documents (including FEI's). See United States v. Morrow, 412 F.Supp. 2d 146, 163-64 (D.D.C. 2006) (discrepancies in testimony "involving where the pizza was delivered, who drove what vehicle, and the exact route of the group's pre- and post-attempt travels" were deemed to "pale in comparison to the great similarities between the two accounts, thereby significantly decreasing the 'impeachment' value").

an attachment, ***or*** he must see them in conditions in which he knows they are suffering. See Second Amended Complaint in Civ. No. 00-1641, at ¶ 22 (March 13, 2001) (alleging that Mr. Rider cannot visit or work with the elephants again "***without*** suffering more aesthetic and emotional injury") (emphasis added).

Finally, FEI's assertion that the Court is incapable of redressing plaintiffs' injuries is also groundless. FEI Br. at 29-33. Indeed, even the very modest initial step of issuing declaratory relief while FEI pursues a permit would pave the way for plaintiffs' access to the section 10 information that plaintiffs are being denied by virtue of FEI's circumvention of the statutory scheme; it would ensure that the FWS will "apply its expertise when it considers" whether, and under what conditions, FEI should be allowed to continue to take the elephants, Loggerhead Turtle, 896 F. Supp. at 177; and, should the Service issue a permit, it would at the very least be likely to improve the lives of the elephants (and hence Mr. Rider's ability to enjoy them). See 50 C.F.R. § 13.41 ("[a]ny live wildlife possessed under a [FWS] permit must be maintained under humane and healthful conditions"). Any further injunctive relief crafted by the Court while the permitting process is being pursued – even if only to curb FEI's most egregious practices (*e.g.*, multi-day chaining on trains, bullhook use that results in frequent puncture wounds, and the elephants' inexplicable chaining on concrete at the CEC beginning every afternoon) – would further ameliorate plaintiffs' injuries. See, e.g., Animal Prot. Inst. v. Holsten, 541 F. Supp. 2d 1073, 1081 (D. Minn. 2008) (ordering, as relief for section 9 violation in connection with state agency's authorization of trapping in lynx habitat, that the state agency defendant apply for a permit from the FWS and also submit a proposal to the Court to "restrict, modify, or eliminate . . . the incidental taking of Canada Lynx through trapping activities").

Respectfully submitted,

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