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No. 20-1802

SUPREME COURT OF THE UNITED STATES

JOYCE ROWLEY, *PETITIONER*

V.

CITY OF NEW BEDFORD, *RESPONDENT*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April 7, 2021

QUESTIONS PRESENTED FOR REVIEW

QUESTION #1

1.A. Does the harassment exception only apply to members of endangered species in captivity for breeding to promulgate the selected species to meet the goals of the Act?

1.B. Did the First Circuit err in affirming the lower court's decision without performing a de novo review on the question of the harassment exception and on harm?

1.C. Is the First Circuit opinion inconsistent with other courts by affirming substitution of the AZA for the USDA in determining compliance with the Animal Welfare Act?

QUESTION #2

Is the First Circuit opinion consistent with Federal Rule 65(a)(2) case law on consolidation of a preliminary injunction hearing with a trial on the merits and is it inconsistent with its own and Supreme Court rulings regarding consolidation?

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

Opinions Below and References

United States Court of Appeals, First Circuit

19-2000

Opinion on Appeal (Unpublished)	September 24, 2020
Petition for Rehearing Denied	November 10, 2020

United States District Court, Massachusetts

17-cv-11809

Opinion, Published	September 24, 2019
Order, Consolidation	February 12, 2019

JURISDICTION

Petitioner respectfully prays that a writ of certiorari issue to review and vacate the opinion of the First Circuit Court of Appeals issued on September 24, 2020. A timely petition for rehearing was filed on October 8, 2020 and denied on November 10, 2020. This petition is timely filed. (Order 589, April 15, 2020)

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Service has been provided to defense counsel as noted in the declaration pursuant to 28 U.S.C. §1746.

STATEMENT OF CASE

After a three-day bench trial and a view of the Buttonwood Park Zoo, the lower court rendered its decision on Petitioner Joyce Rowley's 16 U.S.C. §1540 Endangered Species Act (the "Act") citizen's suit against the City of New Bedford, Massachusetts, owner of the zoo where Asian elephants Ruth and Emily reside. The court found no violations of the Act.

Rowley appealed raising three issues: that the lower court decision was clearly erroneous and misinterpreted the definition of harm and harassment; that the harassment exception did not apply as Ruth and Emily were not kept for breeding; and that the decision to consolidate a preliminary injunction for Ruth with the trial on the merits was a reversible error. The Animal League Defense Fund and People for the Ethical Treatment of Animals filed an amici curiae brief in support of neither party.

On September 24, 2020, the U.S. Court of Appeals, First Circuit three-member panel affirmed the lower court's decision. Rowley

sought a rehearing *en banc*, which was denied.

Rowley asks that the First Circuit opinion be vacated and that this Court remand with instruction to reverse the lower court's opinion accordingly.

ARGUMENT

Even as this Court sits during a zoonotic-based pandemic, and as the world faces a sixth extinction, this time with anthropomorphic origins, the Endangered Species Act is being subverted.

Because this case is precedent setting for all captive wildlife, it will have far-reaching effects. But it may have also unintended consequences to statutory construction that reach even further.

There were two key elements of the lower court's decision that were at odds with standards for interpreting the governing statute relative to implementing regulations. One element has frequently been misinterpreted, and petitioner asks the Court to review it for statutory construction. The second is in conflict with other cases in the Fourth and Fifth circuits, and with at least two other district

courts.

The lower court granted an exception to the harassment "take" of the Act, identified as 50 CFR §17.3 of the implementing regulations. It then used a trade organization as a substitute for the USDA to determine whether the zoo met or exceeded the Animal Welfare Act (AWA), a federal statute (7 U.S.C. §2131). These two errors leave a door open to similar errors in other types of cases.

A second error in the lower decision was one of settled law: consolidating an injunction with the trial on the merits before discovery began. The First Circuit failed to reverse, despite a conflict with its own prior decisions.

BACKGROUND

The term "take" (16 USC §1532(19)) includes "harass" and "harm" as prohibited under 16 USC 1538(a)(1)(B) of the Act:

> "The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

Under §1539 of the Act, "takes" are allowed if permitted by the U.S.

Fish & Wildlife Service (FWS). In 1978, FWS implemented regulations to permit "captive-bred wildlife" (CBW) defined as having been produced from parents that mated in captivity (50 CFR §17.3). FWS required CBW to be registered under §17.21(g).

Between 1993-1998, the CBW regulations were being revised during which an exception to the "harassment" take was created for "captive wildlife," but only if the husbandry practices (which must meet or exceed the Animal Welfare Act (AWA) standards), the breeding procedures and veterinary care provisions are not likely to cause injury (Id). "Captive wildlife" was not defined in the regulations.

Coming out of the CBW revisions, the new exception can only have applied to endangered species of CBW, not generally to all captive endangered species, in order to comply with the Act, for reasons described in detail below. Otherwise, the regulations would be in conflict with the statute.

As this exception has been interpreted by some circuits to apply to *all* captive endangered species, not just those regulated for

breeding, clarification is needed by the Supreme Court.

The First Circuit affirmed the lower court's decision, which assumed captive wildlife meant all endangered species held captive.

But Asian elephants Ruth and Emily, the subjects of this litigation, were not held at the zoo for breeding (19-2000, Dkt. 14, Appeal Br., 5). Nor are they captive-bred (Id). Applying the three-prong exception does not make sense, as they are not subject to breeding procedures or veterinary care that routinely confines, tranquilizes or anesthetizes them.

Additionally, to analyze the first prong of the exception, the lower court used an accreditation report from the Association of Zoos & Aquariums (AZA), which did not mention the zoo's elephant husbandry practices or the AWA, as meeting or exceeding the AWA.

Consequently, the First Circuit used the wrong standard of review. As a question of law--determining whether the exception applied to Ruth and Emily, the First Circuit should have performed a de novo review.

The First Circuit's decision to affirm the lower court decision on the issues of consolidating the preliminary injunction with the trial on the merits is inconsistent with its prior decisions, with those of other U.S. Circuit Courts, and with this Court.

QUESTION #1 ARGUMENT

1.A. Properly interpreted, the harassment exception only applies to members of endangered species in captivity for breeding to promulgate the selected species to meet the goals of the Act.

The Endangered Species Act (16 USC §1532(19)) definition of "take" and the FWS' implementing regulations define "harm" as "...Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife...." (50 CFR §17.3).

"Harass" in the implementing regulations means:

> "Harass in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include generally accepted: (1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the

Animal Welfare Act, (2) Breeding procedures, or (3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife." (50 CFR §17.3)

The harassment exception for captive wildlife was added in 1998, for the purpose of ensuring that the captivity would not not be likely to cause injury. [1] (Captive-bred Wildlife Regulation, 63 Fed. Reg. 48634-02, 1998 WL 597499 (Sept. 11, 1998))

The Notice for the Proposed Rule provides a background that the FWS has "been striving to achieve an appropriate degree of control over prohibited activities involving living *wildlife of non-native species born in captivity*" in the United States. (58 Fed. Reg. 32637, Emphasis added) Regulations governing captive-bred wildlife (CBW) were finalized in 1979, and 12 years later FWS began revising those regulations.

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[1] Id, 48634. The Notice of the Final Rule begins: "The final rule amends the definition of "harass" in 17.3 applied to captive wildlife to exclude generally accepted animal husbandry practices, breeding procedures, and provisions of veterinary care that are not likely to result in injury to the animal."

In the Proposed Rule, the purpose of the exception was clearly for CBW, discussing the issue of captivity causing harassment, and concluding with:

"It is proposed to modify the definition of "harass" in 50 CFR 17.3 to exclude normal husbandry practices such as humane and healthful care when applied to *captive-bred wildlife*." (58 Fed. Reg. 32637, Emphasis added)

The proposed definition of harass, although using the term "captive wildlife," was focused on breeding:

> "...This definition, when applied to captive wildlife, does not include normal husbandry practices including, but not limited to, provision of adequate, safe enclosures; healthful diets, humane treatment; and confining, tranquilizing, or anesthetizing for provision of medical care or for artificial insemination procedures." (Id)

It is important to note that the entirety of the proposed rule was on CBW, and the two terms, captive wildlife and captive-bred wildlife, are used interchangeably.

Were the FWS' definition of the exception to apply to all captive endangered species, not just those used in breeding, it would contradict the Act. Any captive endangered species member,

including native species, whether lawfully or unlawfully taken from the wild could be harassed (taken).

But the FWS could not create a definition that exceeded the Act. ("... If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." (Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43, 104 *109 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

Although "captive wildlife" wasn't defined, the regulations define "captivity" as:

> "Captivity means that living wildlife is held in a controlled environment that is intensively manipulated by man *for the purpose of producing wildlife of the selected species*, and that has boundaries designed to prevent animal, eggs or gametes of the selected species from entering or leaving the controlled environment. General characteristics of captivity may include but are not limited to artificial housing, waste removal, health care, protection from predators, and artificially supplied food." (§17.3, Emphasis added)

In statutory construction, terms must retain the same meaning

throughout the statute ("identical words used in different parts of the same act are intended to have the same meaning." Gustafson v Alloyd Co., Inc., 513 U.S. 561 (1995) quoting Department of Revenue of Ore. v. ACF Industries, Inc., 510 U. S. 332, 342 (1994)); terms shouldn't be construed to make parts redundant ("It is true that the Court avoids interpreting statutes in a way that 'renders some words altogether redundant.'" South Dakota v. Yankton Sioux Tribe, 522 US 329 (1998)); and they must be taken in the context of the whole ("Statutes must be construed 'as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout.' " Sikirica v. Nationwide Ins. Co., 416 F.3d 214 (2005)).

The FWS could not create an exception outside of those in the Act. "Where Congress includes certain exceptions in a statute, the maxim expressio unius est exclusio alterius presumes that those are the only exceptions Congress intended. (Ventas, Inc. v. US, 381 F. 3d 1156 (2004), quoting TVA v Hill, 473 US 153 (1978)).

The Act's only exceptions for a "take" is by permit (16 USC §1539)

or if the species is subject to a cooperative agreement between the Secretary of the Interior and a state (16 USC 1535(g)(2)). Even so, 1535(g)(2) disallows the taking of species in Appendix I of the Convention of International Trade of Endangered Species of Flora and Fauna (CITES).

Therefore, the "captive wildlife" in the harassment exception can only be construed as CBW and their progeny, that are in "captivity" to produce members of the endangered species to prevent extinction.

Unfortunately, several courts in five circuits have used the broader definition of captive wildlife indiscriminately, as seen below, necessitating Supreme Court review.

1.B. The First Circuit erred in affirming the lower court's decision without performing a de novo review.

Asian elephants Ruth and Emily are an Appendix I-listed species and so not exempt under §1535(g)(2). Nor did the City have a permit to take them under §1539. They were not acquired for breeding nor were they bred.

Both elephants were captured from the wild and brought to the

U.S. prior to December 31, 1973 when the Act was signed. Both are "Pre-Act" elephants, but not exempt from the Act's takings clause under 16 U.S.C. 1538(b)(1) as they were not used in a commercial activity (Emily) or were not subsequently held in a commercial activity (Ruth) (16 U.S.C. §1538(b)(1)). (ASPCA v. RBBB, Inc. et al, 502 F.Supp.2d 103 (2007)), (17-cv-11809, Dkt. 91, Opinion @Fn. 5)

Rowley rightly claimed that the harassment exception did not apply (19-2000, Dkt 14, App. Br. @9).

As a question of law, the First Circuit should have performed a de novo review of the harassment claims.

"This court, and the Supreme, have been clear that such questions [of law] are subject to de novo review." Pierce v Underwood, 487 US 552 (1988)).

On appeal, the circuit court reviews for clear error with deference to the lower court. However, on questions of law, deference is not needed and the court reviews de novo. In the First Circuit:

> "For questions of law, no practical difference exists review under "contrary to law" and de novo law...To

> complete the picture, we limn the standard of review at this level. Here, too, the purely legal nature of the question controls: we, like the district court, must afford de novo review to the purely legal question..." (PowerShare, Inc. v. Subtle, Inc., No. 09-1625 (1st Cir. Mar. 1, 2010))

The First Circuit failed to perform a de novo review of the harassment exception, compounding the misinterpretation.

The First Circuit erred in affirming the lower court's failure to analyze both the harassment and the harm separately. (See: Graham on Hill, supra.)

Then, the First Circuit failed to perform a de novo review on the lower court's interpretation of "harm," in conflict with prior opinions on the analysis of "harm" by the First Circuit, other circuits and this Court. All have consistently held that "The proper standard for establishing a taking under the ESA...has been unequivocally defined as a showing of 'actual harm,' as it appears in the ESA statute..." (American Bald Eagle v. Bhatti, 9F. 3d 163, 1st Cir. (1993), Strahan v Linnon, 967 F. Supp. 581, 623, D.Mass (1997), Strahan v.Sec'y Mass. EOEEA, 19-cv-10639-IT, D.Mass., (April 30,2020)). And: "In the First

Circuit, [t]he proper standard for establishing a taking under the ESA, far from being a numerical probability of harm, has been unequivocally defined as a showing of harm." (Friends of Merrymeeting Bay v. Nextera Energy Resources, LLC, 11-cv-38-GZS, D.Me. (2013)).

And: "... courts have granted injunctive relief only where petitioners have shown that the alleged activity has actually harmed the species or if continued will actually, as opposed to potentially, cause harm to the species." (Humane Soc. of US v. Kienzle, 333 F. Supp.3d 1236, New Mexico, (2018)), quoting Amer. Bald Eagle).

Had they done so, the testimony by Rowley and Dr. Susan Mikota, DVM regarding the elephants' chronic foot and skin abscesses, and overwhelming videographic and photographic evidence of harm and harassment in the record would have led to a far different outcome.

1.C. The First Circuit opinion is inconsistent with other courts by affirming substitution of the AZA for the USDA in determining compliance with the Animal Welfare Act

The First Circuit affirmed a decision that used a trade

organization, the Association of Zoos & Aquariums (AZA), as substitute for the U.S. Department of Agriculture (USDA) in determining compliance with the Animal Welfare Act.

The USDA is the Congessionally-designated agency for administering the AWA (7 U.S.C. 2131 et seq).

Rowley demonstrated ongoing injury to both elephants attributable to the elephants' care at the zoo. (19-2000, Dkt. 14, App. Br. 19-21) The City's expert admitted that the elephants' chronic skin and foot abscesses were a result of spending 16 hours in their own waste on a dirt floor while the zoo was closed each day. (Id, 21)

Yet the zoo is AZA-accredited, and maintained its AZA accreditation even when cited by the USDA for a direct violation of the AWA in 2014 (Id, 9). Although Ruth nearly died, suffered hypothermia and frostbite that cost her the loss of skin, parts of both ears, 5" of her tail and another 5" of tail to infection when the zoo delayed surgery for four months, the AZA did not revoke the zoo's accreditation nor take any other enforcement action.

In Hill v Coggins, a citizen's suit against the Cherokee Bear Zoo for keeping grizzly bears in a concrete pit, the zoo used the harassment exception as a complete defense, pointing to its clean USDA record. (Hill v. Coggins, 867 F.3d 499 (2017)). On appeal to the Fourth Circuit, plaintiffs argued that to meet the first prong of the exception, the practice had to be both AWA-compliant and "generally accepted." The Fourth Circuit let the AWA compliance by USDA stand, and then used the AZA guidelines for bear enclosures as the "generally accepted" component.

The dissent in Hill raised this issue of substituting a non-government agency for the federally-designated USDA that sets AWA standards for care, noting that the AZA has no legal authority in the context of the Act, which has both civil and criminal penalties:

> "The interpretation adopted by the majority would have the standards to be applied to holders of captive, threatened animals established, not by the FWS, but rather by some amorphous set of "generally applicable" standards adopted by the AZA (representing less than 10% of the zoos in this country) or some other group. In analyzing the regulation, it is important to recall that the statute provides criminal sanctions for violations of its terms or of the regulations

adopted pursuant thereto—a fact the majority ignores. In short, the ESA has both criminal and non-criminal aspects." (Hill, 12)

The decision to use the AZA instead of the court's own view is also inconsistent with three other recent cases.[2] In Graham v. San Antonio Zoological Society, the Fifth Circuit stated that the court could decide for itself in the absence of USDA data (Graham v San Antonio Zoological Society, 261 F.Supp.3d 711 (2017)). In Kuehl v. Sellner (161 F.Supp.3d 678, 710-18 (N.D. Iowa 2016) and PETA v. TriState Zoological Park of Western Maryland, et al, (424 F.Supp.3d 404 (2019)) the courts did just that.

> "Kuehl provides several takeaways...the court conducted its own, independent analysis of the evidence presented — which included [USDA]' findings of previous violations of the AWA — to determine whether the zoo's animal husbandry practices met AWA standards. Finally, the court conducted separate analyses of whether the zoo's conduct "harmed" the animals and whether it "harassed" them." (Graham, 28, 29)

The Fifth Circuit then looked at Hill:

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[2] Although these courts used an incorrect harassment exception, their analysis is of value as the lack of compliance with the AWA, may be used in measuring compliance with the Endangered Species Act.

"Further, as in Kuehl, the court in Hill analyzed previous findings of AWA compliance by [USDA] as evidence of non-harassment (or more precisely, as evidence that an exhibitor's conduct fits within the "generally accepted animal husbandry practices" exclusion), and analyzed "harm" as a separate ESA violation from "harassment."" (Graham, 30)

In the matter before it, the Fifth Circuit found:

"... this Court concludes that [USDA] determinations of AWA compliance are evidence of AWA compliance for purposes of ESA take liability, but the court must independently assess the Zoo's animal husbandry practices under the AWA." (Graham, 744).

Although the San Antonio Zoo was AZA-accredited, it was the USDA that the court looked to for compliance with the AWA. None of the decisions to date substitute the AZA for the USDA, or have determined that AZA guidelines meet or exceed AWA standards.

During the View in this case, the lower court refused to see the elephants in the 800 s.f. stalls where they spend most of their lives, despite hearing the City expert's testimony that it caused injury to their feet and skins. (19-2000, Dkt. 14, App. Br. 20)

Nor did the lower court allow Rowley to see or document the

elephants in their stalls (Id, and Petition for Rehearing, No. 19-2000, 9).

But the district courts in Kuehl and PETA performed views to see for themselves the actual conditions of the living quarters of the endangered species.

The First Circuit's affirmation is therefore inconsistent with the Fifth Circuit, Fourth Circuit, and the federal district court decisions in Iowa and Maryland on use of AZA as a substitute for the USDA or the court's own judgment. As such, the ruling is also contrary to law. (Chevron, infra.) Congress did not intend to permit a trade organization to substitute for the USDA.

QUESTION #2

The First Circuit erred in affirming consolidation of the preliminary injunction with the trial on the merits pursuant to Fed. R. Civ. Proc. 65(a)(2).

On the issue of consolidation, the First Circuit's decision to affirm is inconsistent with its prior decisions, with those of other U.S. Circuit Courts, and with this Court. Only a panel *en banc* can offer an opinion that is inconsistent with a prior panel opinion of the same circuit (2A

Federal Procedure L. Ed. §3:793). Departure from precedent must be supported by special justification. (Id. §3:790). Under the stare decisis doctrine, no panel should be inconsistent with the Supreme Court's decisions.

The First Circuit decision contravenes long-held Federal Rule 65 (a)(2)) law as it is contrary to its own and Supreme Court rulings regarding Rule 65(a)(2). ("Although the rule facilitates the generally admirable objective of saving time and duplication of effort, "there are hazards inherent in fully disposing of cases in such an expedited fashion-among them incomplete coverage of relevant issues and failure to present all relevant evidence." (Lamex Foods, Inc.v Audeliz LeBron Corp., 646 F. 3d 100, 107, 1stCir. (2011), citing Caribbean Produce Exch. Inc. v Sec'y of Health & Human Services, 893 F.2d 3,5, 1st Cir. (1989)). And,"...it is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits." (Univ.of Texas v. Camenisch, 451 U.S. 390, 101 S.Ct. 1830 (1981)).

Federal Rule of Civil Procedure Rule 65(a) Consolidation states that "before or after beginning the hearing on a motion for preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing." However:

"Ordering consolidation during the course of an preliminary injunction hearing is reversible error when little or no notice is given of this change and the effect is to deprive a party of the right to present the case on the merits. (Wright, Miller, & Kane, Federal Practice & Procedure, 2nd Ed.,Vol. 11 , §§ 2951 (2018))

Here, Rowley rightly objected to the consolidation as there was no notice of it; the City had not served an Answer; and no discovery had been held. Further, the preliminary injunction was only for one of the two elephants. No filings had been made as to Emily's need for a preliminary injunction and the case should have been bifurcated.

For these reasons, the decision to consolidate the injunction with the trial on the merits should be reversed.

CONCLUSION

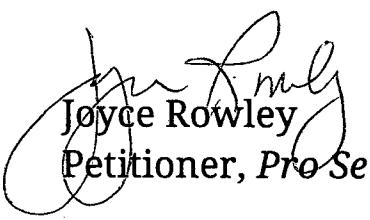
These matters are of national importance. Despite the clear intent of Congress to protect endangered species from harm and harassment

nearly half a century ago, a simple misinterpretation of the FWS regulations put all native and non-native captive endangered species in harm's way. Petitioner asks the Supreme Court to review and correct this error on behalf of Asian elephants Ruth and Emily, and all endangered species held in captivity, often in horrendous conditions.

In each of the matters presented to this Court, a panel of the First Circuit went against its own prior decisions without justification: A question of law is reviewed de novo; a consolidation before discovery is reversible; harm means harm.

Petitioner prays that this Court review and remand with direction to reverse the lower court's decision.

Respectfully submitted,



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