

No. 16-14814

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.,
ANIMAL LEGAL DEFENSE FUND,
HOWARD GARRETT, ORCA NETWORK,
Plaintiffs-Appellants,
v.
MIAMI SEAQUARIUM and FESTIVAL FUN PARKS, LLC,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
No. 1:15-CV-22692-UU

BRIEF OF AMICUS CURIAE
JOAN GONZALVO, KATHY HESSLER, LORI MARINO,
SANDRO MAZZARIOL, GIUSEPPE NOTARBARTOLO DI SCIARA,
ALISON RIESER, NAOMI ROSE, AND
THE AQUATIC ANIMAL LAW INITIATIVE
IN SUPPORT OF APPELLANTS' PETITION FOR PANEL REHEARING
AND FOR REHEARING EN BANC

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February _____, 2018

**CERTIFICATE OF INTERESTED PARTIES AND CORPORATE
DISCLOSURE STATEMENT**

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

Trial Judges

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

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

Panel Judges

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

Hull, The Honorable Frank M.; Senior Judge, U.S. Court of Appeals for the
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*People for the Ethical Treatment of Animals v.
Miami Seaquarium, No. 16-14814*

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*People for the Ethical Treatment of Animals v.
Miami Seaquarium, No. 16-14814*

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Sea Shepherd Legal

The Aquatic Animal Law Initiative

The Fund for Animals

The Humane Society of the United States

Pursuant to FRAP 26.1, amicus curiae The Aquatic Animal Law Initiative certifies that it has no parent companies, subsidiaries, or affiliates that have issued shared to the public.

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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance:

After creating a novel legal standard that diverges from that applied by other courts by requiring a plaintiff to show conditions of captivity “pose a threat of serious harm” to an animal before “harm” or “harassment” to that animal violates the Endangered Species Act (“ESA”), whether the Panel improperly affirmed the district court’s grant of summary judgment to the Seaquarium, reached under a different erroneous, heightened standard, when extensive evidence in the record below showed that Lolita, a captive orca, has suffered a range of severe, chronic physical, psychological, and behavioral injuries for more than a decade.

/s/ Kristen Schlemmer
Kristen Schlemmer

IDENTITY AND INTERESTS OF AMICI CURIAE

Amici Joan Gonzalvo, Kathy Hessler, Lori Marino, Sandro Mazzariol, Giuseppe Notarbartolo di Sciara, Alison Rieser, Naomi Rose, and the Aquatic Animal Law Initiative are cetacean scientists and researchers who submit this amici curiae brief supporting PETA’s Petition for Panel Rehearing and for Rehearing En Banc. A description of each amicus and their interests is included in the motion seeking leave to file this brief.¹

STATEMENT OF THE ISSUES MERITING REHEARING

After creating a novel legal standard requiring a plaintiff to show conditions of captivity “pose a threat of serious harm” to an animal before “harm” or “harassment” to that animal violates the ESA:

1. Did the Panel improperly affirm the district court’s grant of summary judgment to the Seaquarium, reached under an erroneous heightened standard, when extensive evidence in the record below showed Lolita, a captive orca, has suffered severe, chronic physical, psychological, and behavioral injuries for more than a decade? (Yes.)

2. Should the Panel have vacated the district court’s order and remanded for further proceedings? (Yes.)

¹ No party’s counsel authored this brief in whole or in part; no party or its counsel contributed money intended to fund preparing or submitting the brief; and no person—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF ISSUES

The record in the district court, which includes four detailed reports from credible cetacean scientists and researchers with special understanding of orcas, shows that Lolita's injuries, when viewed in the aggregate, represent serious, chronic injuries that are directly linked to Lolita's unique, problematic living conditions.

The expert report of Dr. Pierre (Pedro) Gallego, a veterinarian specializing in cetacean medicine and pathology, concluded from Lolita's laboratory work that Lolita is "chronically ill" with "frequently recurring infections and mildly impaired kidney function." (DE 118 at 15.) Compared to other captive orcas, Lolita received extremely high dosages of antibiotics and other medications. (*Id.* at 18-19.)

In her report, Dr. Ingrid Visser, an orca researcher and PhD, similarly commented that even after being given immune stimulants, Lolita's "level of infection is extremely disturbing." (DE 120 at 13, 31.) Lolita's behaviors also are "completely abnormal" and "have never been recorded in the scientific literature for wild orcas"; Lolita's "well-being is severely compromised." (*Id.* at 16, 18.)

The evidence makes clear these chronic physical, psychological, and behavioral injuries relate directly to Lolita's living conditions. Dr. Visser opined Lolita's injuries show she "is not in an environment that is beneficial to her well-being." (*Id.* at 13, 31.) Dr. Gallego noted that since Lolita's sole orca companion

died in 1980, Lolita has been deprived of the social, cognitive, and cultural needs of her species with “serious welfare implications,” including “the development of stereotypical behaviors,” like those Lolita exhibits. (DE 118 at 17.) Lolita’s “chronic stress” has, in turn, affected her immune system. (*Id.* at 18.)

In her report, Dr. Maddalena Bearzi, a Biology PhD specializing in cetaceans, noted that “Lolita’s psychological and physical health is poor... compared to her native resident population [and] other [captive] dolphins.” (DE 117 at 34.) The injuries caused by other dolphins in Lolita’s enclosure “on a year-round basis over many years... are likely to keep [Lolita] under emotional and physical stress and continuous guard.” (*Id.* at 48.) Lolita displays “precursors of aggression... on a regular basis, year-round and over the course of several years [that] exemplify how [Lolita] survives in constant stressful conditions.” (*Id.* at 45.)

Dr. Gallego “kn[e]w of no other animal [o]n display in [World Association of Zoos and Aquariums-]standard facilities which has such little space comparatively” and tied Lolita’s limited ability to swim directly to her abnormal behaviors. (DE 118 at 17.) Even Seaquarium’s expert admitted he did not recall ever seeing an orca in a tank as small as Lolita’s. (DE 164 ¶ 95.)

Remarkably, this extensive evidence represents only some of Lolita’s injuries because Seaquarium’s records are incomplete. Both Dr. Bearzi and John Hargrove, a former trainer who worked with 20 orcas over 14 years, noted the

Seaquarium produced only nine years of behavioral records—a “20% snapshot of [Lolita’s] 45 years in captivity at Miami Seaquarium.” (DE 117 at 37; *see* DE 119 at 16, 21.)

SUMMARY OF ARGUMENT

Among cetacean scientists and researchers like Amici, Lolita’s case is unique. No other orca living in captivity has been kept in such close confinement for more than 45 years. No other captive orca in the United States has been deprived of same-species companions, let alone for 38 years. And no other orca has been subjected to near-constant daytime sun exposure for decades.

These living conditions make the extent of Lolita’s physical, psychological, and behavioral injuries unsurprising. What is surprising is the Panel’s conclusion that despite robust evidence to the contrary, these injuries do not “pose a threat of serious harm” to Lolita. In the view of Amici, Lolita’s aggregate injuries represent severe, chronic injuries relating directly to her problematic living conditions.

The Panel erred because in creating a novel standard to govern ESA claims involving captive animals, the Panel overlooked a critical step: construing the evidence in the light most favorable to PETA in view of that standard. At a minimum, the Panel should have remanded to allow the district court to apply its new standard. These errors require rehearing.

ARGUMENT

1. The Panel’s Opinion Articulated a Novel Standard for Captive Endangered Species and Affirmed Without Applying the Standard to the Facts

Diverging from standards applied by courts within other circuits, the Panel held that with respect to captive animals, the ESA forbids “harm” or “harassment” only if it “poses a threat of serious harm.” *PETA v. Miami Seaquarium*, 879 F.3d 1142, 1147 (11th Cir. 2018). The Panel made clear its novel standard is less onerous than the district court’s equally novel “gravely threatening to the animal’s survival” standard. *Id.* at 1144.

With regard to the evidence, the Panel listed thirteen relevant injuries in a footnote. *Id.* at 1145 n.4. After crafting its new standard without reference to those injuries, the Panel, without any factual analysis, swiftly concluded, “[n]one of the thirteen injuries PETA cites satisfies that standard.” *Id.* at 1150. By not engaging in minimal factual analysis, the Panel disregarded extensive evidence in the record showing that under the Panel’s new standard, PETA raised a genuine dispute over material facts and erroneously affirmed the district court’s grant of summary judgment to the Seaquarium.

2. PETA’s Evidence Exceeds the Eleventh Circuit’s New Standard for the Purposes of Summary Judgment

In assessing the record on summary judgment, the Court must view the evidence through the lens of the Seaquarium’s inadequate record-keeping over the

years. (*See* DE 117 at 37 (noting behavioral records represent “20% snapshot of her 45 years in captivity”).) Even this limited subset shows Lolita is suffering serious physical, psychological, and behavioral injuries. At a minimum, PETA’s evidence more than suffices to defeat summary judgment under the Panel’s “pose a threat of serious harm” standard for three reasons:

a. Viewed in the Aggregate, PETA’s Evidence Shows a “Threat of Serious Harm”

When evaluating whether Lolita’s injuries “pose a threat of serious harm” sufficient to violate the ESA under the Panel’s newly articulated standard, Lolita’s injuries must be considered in the aggregate. *See* 879 F.3d at 1145 n.4 (listing thirteen injuries).

The impact of an injury must be understood with reference to an animal’s other injuries and overall condition. When an individual of any species suffers from one condition (e.g., bacterial infection), the impact of a second condition (e.g., viral infection or physical injury) will be more severe than if it occurred alone. It is well-established in the scientific literature that stressed animals are more vulnerable to physical injury or pathogenic infection than unstressed animals.

Viewed in the aggregate, Lolita’s injuries reflect an orca suffering from problems that are interconnected and mutually reinforcing and that “pose a serious threat” to Lolita. To illustrate, Lolita’s behavioral abnormalities created dental problems, which in turn negatively affected her overall health. To relieve chronic

stress, Lolita engages in a stereotypic behavior of chewing on her tank's metal gate. This has degraded her teeth over time and required her teeth to be drilled repeatedly.² (DE 118 at 20.)

Further, Lolita's dental problems exacerbated Lolita's other physical, psychological, and behavioral conditions. As in other mammals, poor dental health in orcas may facilitate other adverse medical conditions—including the “decreased kidney function” and “recurrent [respiratory] infections” observed in Lolita. (DE 118 at 19, 20.) For these and other conditions, Lolita has been treated with “antibiotics, antifungals, pain medication, hormones, and antacids.” 879 F.3d 1142, 1145 n.4. Administering medication at this high rate has, in turn, affected Lolita's immune system. (DE 120 at 13, 31.) Moreover, Lolita's weakened state may be responsible for broader stereotypies identified by the experts below because an animal may attempt to cope with or alleviate chronic pain with abnormal behaviors.

This is one example of several. Unless Lolita's living conditions change, her injuries will persist and may intensify. Viewing her injuries in the aggregate, the record below supports the conclusion that Lolita's injuries indeed “pose a threat of serious harm.”

² This type of behavior or injury would not take place absent some deficiency in her environment. (DE 118 at 20.)

b. The Chronic Nature of Lolita’s Injuries Supports the Seriousness of Her “Harm” and “Harassment”

The chronic nature of Lolita’s injuries must inform this Court’s ESA analysis. Not one aspect of Lolita’s injuries identified by the Panel should be regarded as temporary.

To illustrate, Lolita’s dental problems discussed above did not occur suddenly, nor have they been resolved. *See* 879 F.3d at 1145 n.4 (noting “significant wear in six teeth” and drilling of tooth “multiple times”). Rather, the original injuries have evolved, over many years, into chronic conditions with permanent effects. (*See* DE 117 at 47-48, 50; DE 118 at 20.) As a result of these injuries, Lolita experiences significant pain and receives painkillers like Tramadol, “an opioid derivative” used for “moderately-severe pain.” (DE 118 at 20.)

Again, this is one example of several in the record. Even viewing each injury listed by the Panel in isolation, their chronic nature shows they “pose a threat of serious harm.”

c. In the Context of Orcas’ Highly Intelligent and Social Nature, Lolita’s Injuries “Pose a Threat of Serious Harm”

The social and cognitive complexities of orcas must inform this Court’s evaluation of the evidence. Like humans, relative to other species, orcas are extremely intelligent, socially complex, family-oriented, long-lived, and self-aware. They are the largest animal, and by far the largest predator, held in

captivity. Orcas' sheer size, combined with their high intelligence and social complexity, requires more of captive conditions than do other species'.

In captivity, orcas suffer when their complex needs are not met. Lolita's chronic injuries reflect that the conditions at the Seaquarium are not adequate. The small size of her enclosure drives many of her behavioral abnormalities and the chronic physical conditions they have facilitated. (*See* DE 118 at 17 (noting "no other animal in display... has such little space comparatively for physical exercise" and these conditions have produced abnormal behaviors).) Further, by depriving Lolita of same-species companions, the Seaquarium breaks from other U.S. orca facilities' practices and has exposed Lolita to "serious welfare implications," including "the development of stereotypical behaviors." (*Id.*) Given Lolita's cognitive capabilities and social needs, her chronic injuries, taken in the aggregate, "pose a threat of serious harm."

3. Rehearing is Warranted

The Court should grant rehearing, vacate the district court's order, and remand for further proceedings because:

a. Neither the District Court Nor the Panel Considered Any Evidence in Rejecting PETA's Claims

The standard on summary judgment requires the Court to "constru[e] the evidence in the light most favorable to the non-moving party." *Seaquarium*, 879 F.3d at 1146. "If the record presents factual issues, the court must not decide them;

it must deny the motion and proceed to trial.” *PETA v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1336-37 (S.D. Fla. 2016).

In applying the improperly heightened “gravely threatening to survival” standard to PETA’s ESA claims, the district court disregarded the governing standards on summary judgment and analyzed the record in a manner that was cursory at best. *See id.* at 1355. Instead, after confirming PETA’s standing to sue, the district court expended most of its effort in teasing out the “gravely threatening” standard that the Panel eventually rejected. *Id.* at 1341-55. With regard to the factual inquiry central to summary judgment, the district court listed Lolita’s injuries, conceded they were in the “ambit of the ordinary meaning of ‘harm’ and ‘harass,’” but nevertheless concluded Lolita’s extensive physical, psychological, and behavioral injuries did not “gravely threaten Lolita’s existence”—without any analysis of the evidence presented. *Id.* at 1342-43, 1355.

The Panel committed a similar error. 879 F.3d at 1145 n.4, 1150 (concluding, without analysis, injuries do not satisfy Panel’s new standard). As a result, the Panel and district court did not minimally consider the severe, chronic nature of Lolita’s aggregate injuries or discharge their respective duties in reviewing the evidence “in the light most favorable” to PETA. *See id.* at 1146. At a minimum, this glaring analytical omission requires rehearing of the Panel’s opinion.

Given the record below, summary judgment should not have been granted or affirmed. In cases like this one, where the determination of “harm” and “harassment” depends on disputed facts and expert testimony, summary judgment is not appropriate. This Court should follow the example of other courts and require the intensively factual questions associated with ESA “takes” of captive animals to be resolved in the context of a bench trial. *See Hill v. Coggins*, 867 F.3d 499 (4th Cir. 2017) (reviewing judgment entered after bench trial); *Kuehl v. Sellner*, 161 F. Supp. 3d 678, 681, 718 (N.D. Iowa 2016) (ordering ESA relief after bench trial); *see also Graham v. San Antonio Zoological Soc’y*, 261 F. Supp. 3d 711, 751–52 (W.D. Tex. 2017) (concluding fact issues precluded summary judgment on ESA claims).

b. The Panel’s Newly Articulated ESA Standard Requires Further Consideration by the District Court

Because the Panel’s new standard is less demanding than the one applied by the district court, 879 F.3d at 1144 (“[W]e do not agree [with the district court] that actionable ‘harm’ or ‘harass[ment]’ includes only deadly or potentially deadly harm.”), this Court should remand so the district court may review the evidence in light of that standard. *See* PETA’s Petition for Rehearing at 20 (citing cases supporting remand in light of a newly articulated standard); *see also Coggins*, 867 F.3d at 508, 510 (after concluding district court applied wrong legal standard to an ESA claim, vacating and remanding for further consideration).

CONCLUSION

This Court should grant PETA's petition for panel rehearing and/or rehearing en banc.

Date: February __, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of FRAP 29(b)(4) because, excluding the parts of the document exempted by FRAP 32(f) and 11th Cir. Rules 29-3 and 35-5, this document contains 2,598 words.

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Date: February _____, 2018

/s/ _____
Kristen Schlemmer

CERTIFICATE OF SERVICE

I certify that on February _____, 2018, I electronically filed this Brief of Amicus Curiae Joan Gonzalvo, Kathy Hessler, Lori Marino, Sandro Mazzariol, Giuseppe Notarbartolo di Sciara, Alison Rieser, Naomi Rose, and the Aquatic Animal Law Initiative in Support of Appellants' Petition for Panel Rehearing and for Rehearing En Banc with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Date: February ____, 2018

/s/ _____
Kristen Schlemmer