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A PACT for the Future: Improving Animal Protection Legislation for Captive Orcas

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NOTE

A PACT FOR THE FUTURE: IMPROVING ANIMAL PROTECTION LEGISLATION FOR CAPTIVE ORCAS

EMILY LIVELY*

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INTRODUCTION

In 1983, whalers trapped a young male orca in a net off the coast of Iceland.¹ Ignoring the frantic cries of his family, the whalers hauled the young orca out of the ocean and separated him from his family at just two years old.² The whale became known as Tilikum.³

Tilikum was placed in an enclosed and barren “holding tank” until he was moved to a Canadian marine park.⁴ In holding, Tilikum could do little but float aimlessly in his concrete prison, bored and alone.⁵ After a year in these conditions, Tilikum was finally freed of his holding tank and flown across the sea to the “rundown” Sealand of the Pacific facility in British Columbia.⁶ Alongside two female orcas, Tilikum learned to jump out of the water and perform tricks for food in front of adoring crowds.⁷ At night, the three whales were locked into a cramped “module” for up to “fourteen hours” without any light or view of the sky.⁸ His two female tankmates spent much of that time scratching and biting Tilikum’s skin to the point where he would be covered in bloody toothmarks by park reopening each morning.⁹ Several years passed with the same repetitive routine, until 1991 when Sealand trainer Keltie Bryne slipped into Tilikum’s tank.¹⁰ She would be “the first of three” deaths attributed to Tilikum during his thirty-three-year captivity.¹¹

In 1992, Tilikum once again found himself removed from his tank and flown thousands of miles to what would be his new

¹ See Kim Johnson, *Tilikum’s Life Story Will Bring You to Tears*, PETA2 (Jan. 6, 2017), <https://www.peta2.com/news/tilly-seaworld/> [<https://perma.cc/G65A-R3Z3>] [hereinafter Johnson].

² See DAVID KIRBY, *DEATH AT SEAWORLD: SHAMU AND THE DARK SIDE OF KILLER WHALES IN CAPTIVITY* 49 (2012); see also BLACKFISH (CNN Films Manny O. Productions 2013) [hereinafter BLACKFISH].

³ See Johnson, *supra* note 1.

⁴ *Id.*

⁵ See *id.*

⁶ *Id.*; see KIRBY, *supra* note 2, at 49.

⁷ See Johnson, *supra* note 1; KIRBY, *supra* note 2, at 49–50.

⁸ See KIRBY, *supra* note 2, at 50.

⁹ See *id.* at 49–50.

¹⁰ Johnson, *supra* note 1.

¹¹ *Id.*; see also BLACKFISH, *supra* note 2.

and final home – a marine park known as SeaWorld Orlando.¹² There, Tilikum would become the centerpiece of SeaWorld Park & Entertainment, Inc.’s (“SeaWorld”) captive breeding program, with fifty-four percent of all SeaWorld’s orcas sharing at least some of his DNA.¹³ Tilikum, however, is most famous for his reputation of aggressive behaviors in response to the stressors of captivity, which resulted in two additional fatalities, including the death of the very experienced and beloved trainer Dawn Brancheau.¹⁴ Following the death of Brancheau, Tilikum spent much of the final years of his life in captivity as he did his early years – alone and in isolation.¹⁵

Tilikum’s tragic story is perhaps the most famous of all captive orcas, but it is just one of many. Through the documentary film *Blackfish*, Tilikum’s story brought to light the disturbing and cruel conditions and treatment discussed herein that plague all orcas living in captivity.¹⁶ Despite increasing public and scientific awareness of their harsh treatment, SeaWorld continues to operate its orca program, which largely falls outside the reach of existing welfare and anticruelty laws. Using SeaWorld as a case study, this Note will argue that existing federal and state legislation fails to protect captive orcas from cruel and harmful treatment while in captivity.

Part I of this Note will address the gaps in federal and state animal welfare and cruelty legislation relevant to captive orcas. Part II will discuss the enactment of the Preventing Animal Cruelty and Torture Act of 2019 (“PACT Act”), the first federal animal cruelty statute.¹⁷ Part III will use SeaWorld as a case study to test the effectiveness of the PACT Act in criminalizing animal cruelty at the federal level. Finally, Part IV will discuss ways in which Congress could amend the PACT Act or use it as a model for a more comprehensive federal animal cruelty statute and include protections for animals suffering cruel and inhumane treatment in captivity.

¹² See Johnson, *supra* note 1; BLACKFISH, *supra* note 2.

¹³ Johnson, *supra* note 1.

¹⁴ See BLACKFISH, *supra* note 2.

¹⁵ See Photograph of Tilikum in Isolation, *in* Johnson, *supra* note 1.

¹⁶ See generally BLACKFISH, *supra* note 2; see also LONG GONE WILD (Long Gone Wild LLC 2019) [hereinafter LONG GONE WILD].

¹⁷ See generally PACT Act, 18 U.S.C. § 48.

I. RELEVANT GAPS IN FEDERAL AND STATE ANIMAL CRUELTY LEGISLATION

A. Current Federal Legislation is Ineffective at Protecting Captive Orcas

Federal legislation in the area of humane treatment and animal welfare offers minimal protection for animals used for entertainment purposes. For marine mammals, like orcas, animal welfare at the federal level is primarily governed by two statutes: the Marine Mammal Protection Act (cite: *See generally* 16 U.S.C. §§ 1361–1423h) and the Animal Welfare Act (cite: *See generally* 7 U.S.C. §§ 2131–2160). Both statutory frameworks fail to hold marine parks accountable by establishing the standards necessary for the captive animals to lead a healthy, high-quality life. Instead, as detailed below, marine parks generally must only provide their animals with the minimum basic needs required to keep them alive to comply with federal law.

(1) *Marine Mammal Protection Act*

Congress passed the Marine Mammal Protection Act (“MMPA”) in 1972, making the live capture and importation of “marine mammals” and “marine mammal products” illegal without a permit.¹⁸ The National Oceanic and Atmospheric Administration (“NOAA”) is delegated the authority to issue permits “for purposes of scientific research, public display, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock.”¹⁹ NOAA may issue a permit to a public display facility for the live capture of wild orcas if the organization satisfies three requirements.²⁰ Specifically, the facility must (1) “[o]ffer an education or conservation program based on industry standards,” (2) “[b]e open to the public on a regularly scheduled basis,” and (3) “[b]e licensed or registered by the U.S. Department of Agriculture’s

¹⁸ *See generally* 16 U.S.C. §§ 1361–1423h.

¹⁹ *Id.* §§ 1362(12)(A)(i), 1371(a)(1).

²⁰ *Public Display of Marine Mammals*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/public-display-marine-mammals> [https://perma.cc/RRR7-AT3V] (Aug. 24, 2021).

Animal and Plant Health Inspection Service . . . per the Animal Welfare Act.”²¹

While the MMPA does regulate SeaWorld’s ability to capture live orcas for display in its marine parks, SeaWorld has not relied on live capture to replenish its “orca stock” since its captive breeding program became a success in the 1980s.²² Moreover, despite the Congressional goal of protecting marine mammals, the MMPA includes no provisions to ensure marine mammals are cared for and humanely treated once taken from the wild for public display.²³ Without such provisions, the MMPA offers no help or salvation to a captive orca’s plight.

(2) *Animal Welfare Act*

The Animal Welfare Act (“AWA”)²⁴, passed in 1966, is the first and “only federal statute” to address the “care” and “welfare” of animals used for public display and entertainment.²⁵ The AWA, however, is severely limited in both its “scope” and its “enforcement.”²⁶

The AWA authorizes the Secretary of Agriculture to establish “standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors.”²⁷ Facilities like SeaWorld are considered “exhibitors” and, as such, are subject to the AWA.²⁸ For the United States Department of Agriculture (“USDA”) to grant SeaWorld a license to display orcas under the AWA, SeaWorld must satisfy all welfare regulations established under the statute’s section 2143.²⁹

²¹ *Id.*

²² See Kaitlin Vigars, *Bigger than Blackfish: Lessons from Captive Orcas Demonstrate a Larger Problem with Animal Welfare Laws*, 44 B.C. ENV’T AFFS. L. REV. 491, 501, 503 (2017).

²³ See *id.* at 503–504; see generally 16 U.S.C. §§ 1361–1423h.

²⁴ 7 U.S.C. §§ 2131–2160.

²⁵ Rebecca L. Jodidio, *The Animal Welfare Act is Lacking: How to Update the Federal Statute to Improve Zoo Animal Welfare*, 12 GOLDEN GATE U. ENV’T L.J. 53, 54 (2020).

²⁶ See KALI S. GRECH, ANIMAL LEGAL & HIST. CTR.: MICH. STATE UNIV. COLL. OF L., DETAILED DISCUSSION OF THE LAWS AFFECTING ZOOS II.A.i (2004).

²⁷ 7 U.S.C. § 2143(a)(1).

²⁸ See LAUREN TIERNEY, ANIMAL LEGAL & HIST. CTR.: MICH. STATE UNIV. COLL. OF L., DETAILED DISCUSSION OF LAWS CONCERNING ORCA CAPTIVITY III.B. (2010).

²⁹ See *id.*; see generally 7 U.S.C. § 2143.

The USDA promulgated the standards for the care of marine mammals, which are detailed in 9 C.F.R. Subpart E.³⁰ Both the AWA and the USDA guidelines only require captive marine mammals be provided with their most basic needs, such as food, water, “shelter,” and “sanitation.”³¹ These minimum standards hardly scrape the surface of all the needs that “highly intelligent species,” like orcas, require to maintain a high quality of life.³² Furthermore, the USDA regulations fail to address enrichment needs for species like orcas, which these species require to maintain adequate psychological health.³³ The minimum guidelines the USDA has developed are often so “vague” that they allow for too much “subjective interpretation.”³⁴ For example, feeding standards require food “be of sufficient quality and nutritive value to maintain marine mammals in a state of good health.”³⁵ These guidelines offer no specific nutritional requirements, leaving the interpretation of the “good health” standard up to individual facilities.³⁶ In the wild, orcas maintain a relatively varied diet of fish, seabirds, seals, sea lions, turtles, and even other whales.³⁷ Captive orca diets, on the other hand, are limited to frozen fish.³⁸ Given the ambiguous nature of the USDA regulations, the people who will initially evaluate whether frozen fish satisfies the feeding standards of the AWA are SeaWorld’s own marine biology experts and veterinary staff – employees whose job security largely rests on providing SeaWorld the answers it wants to hear.

³⁰ See generally 9 C.F.R. §§ 3.100–3.118 (2021).

³¹ See 7 U.S.C. § 2143(a)(2)(A); see also GRECH, *supra* note 26, at II.A.i.

³² See also GRECH, *supra* note 26, at II.A.i; see also 7 U.S.C. § 2132(g) (definition of animals included under the AWA).

³³ See GRECH, *supra* note 26, at II.A.i.; see generally 9 C.F.R. §§ 3.100–3.118 (2021).

³⁴ Jodidio, *supra* note 25, at 57; see generally 9 C.F.R. §§ 3.100–3.118 (2021).

³⁵ 9 C.F.R. § 3.105(a) (2021).

³⁶ See *id.*

³⁷ See *Orca*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.com/animals/mammals/facts/orca> [https://perma.cc/786G-6P9V] [hereinafter *Orca*].

³⁸ See JOHN HARGROVE, *BENEATH THE SURFACE: KILLER WHALES, SEAWORLD, AND THE TRUTH BEYOND BLACKFISH* 39 (2015).

The USDA regulations also establish the size requirements for orca pools,³⁹ which rely on four main criteria: (1) “minimum horizontal dimension,” (2) “depth,” (3) “volume” of water, and (4) “surface area.”⁴⁰ Even when minimum pool size standards are met, or even exceeded slightly, concrete tanks can never simulate the vast expanse of the ocean nor provide the space orcas require to “move and behave as they would in the wild.”⁴¹ Wild orcas can swim upwards of one hundred miles every day in “straight lines.”⁴² In captivity, however, orcas must swim in endless circles around their tank.⁴³ This is not only an unnatural swimming pattern but also fails to allow the orcas sufficient exercise and can lead to negative health effects.⁴⁴

The USDA regulations for the handling of captive animals prohibit the “[d]eprivation of food” for training purposes.⁴⁵ Captive orcas, however, are completely reliant on human trainers for their food.⁴⁶ There are no fish swimming alongside the orcas in their tanks to feed on when they grow hungry.⁴⁷ Trainers rely on food as a positive training reinforcement, as they have limited other means to encourage the orcas to perform.⁴⁸ As such, while it may be unintentional, food deprivation is in fact an integral part of a captive orca’s daily life.

The AWA offers no guidelines in relation to the breeding of captive animals.⁴⁹ Captive breeding programs, therefore, fall outside federal regulation entirely.⁵⁰ While SeaWorld has pledged

³⁹ TIERNEY, *supra* note 28, at III.B. (describing the regulations’ requirements that pools must be two times “the length of an orca” and “half the length of an orca deep,” based on the size of the largest orca kept in the pool; referencing the requirement that no more than two orcas are to be kept in the same pool unless a facility designs the pool with “an additional 10,851.54 cubic feet of water” per orca).

⁴⁰ Vigars, *supra* note 22, at 504; *see* 9 C.F.R. § 3.104(b) (2021).

⁴¹ Vigars, *supra* note 22, at 505.

⁴² *See* LONG GONE WILD, *supra* note 16.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 9 C.F.R. § 2.131(b)(2)(ii) (2021).

⁴⁶ *See* HARGROVE, *supra* note 38, at 40.

⁴⁷ *Id.*

⁴⁸ *See id.* at 75.

⁴⁹ Vigars, *supra* note 22, at 505; *see generally* 7 U.S.C. §§ 2131–60.

⁵⁰ *See* Vigars, *supra* note 22, at 505.

to cease its captive breeding program,⁵¹ there are currently no federal laws preventing it from continuing the practice or guidelines to ensure artificial insemination is conducted humanely.⁵² Outside of state legislation and the potential for public outcry, there is nothing holding SeaWorld accountable for keeping its pledge.

Alongside vague statutory and regulatory requirements, the AWA also has a substantial enforcement problem. The AWA grants enforcement authority to USDA, which has “delegate[d]” its duty to enforce the AWA standards to the Animal and Plant Health Inspection Services (“APHIS”).⁵³ Although APHIS technically possesses enforcement capabilities, the agency is stretched incredibly thin, with only roughly “130” inspectors to inspect “over 8,000” licensed facilities.⁵⁴ In addition to personnel deficiencies, the Office of Management and Budget’s (“OMB”) oversight of APHIS inhibits enforcement.⁵⁵ If APHIS wishes to take action, it must first obtain approval from OMB, whose mission is in direct conflict with the AWA.⁵⁶ Specifically, OMB prioritizes the financial costs of actions taken by federal agencies, not the wellbeing and humane treatment of animals.⁵⁷

Even in circumstances where OMB allows APHIS to perform inspections of licensed facilities, procedures for addressing violations remain severely lacking. When APHIS notes a violation during an inspection, it issues a “warning” to the facility and provides a timeline for the facility to correct the issue.⁵⁸ APHIS, however, “does not follow up” on violating facilities to ensure they make the required changes.⁵⁹ Instead, if the infraction remains uncorrected, inspectors “simply note the violation again during the next inspection,” and on and on the cycle continues.⁶⁰ Additionally,

⁵¹ See Greg Allen, *SeaWorld Agrees to End Captive Breeding of Killer Whales*, NPR (Mar. 17, 2016), <https://www.npr.org/sections/thetwo-way/2016/03/17/470720804/seaworld-agrees-to-end-captive-breeding-of-killer-whales> [https://perma.cc/B3LT-45SZ].

⁵² See Vigars, *supra* note 22, at 505.

⁵³ Jodidio, *supra* note 25, at 55.

⁵⁴ See *id.* at 55–56.

⁵⁵ GRECH, *supra* note 26, at II.A.i.

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ Jodidio, *supra* note 25, at 56.

⁵⁹ See *id.* at 58.

⁶⁰ *Id.*

the AWA does not prevent license renewal to facilities “under investigation,” those with “pending” violations, or those that have already paid substantial fines in relation to repeated violations.⁶¹ Furthermore, even if APHIS went as far as to “revoke” a facility like SeaWorld’s license under the AWA, the captive orcas would still remain SeaWorld’s property.⁶² In that scenario, nothing prevents SeaWorld from selling its orcas to marine parks in Europe, Russia, or China, subjecting them to continued life in captivity in a facility that is even less-strictly regulated than those in the United States.

“[B]eyond financial penalties,” the AWA statute provides little means for APHIS to force violators to adhere to existing regulations.⁶³ Unlike most other federal environmental statutes, including the Endangered Species Act, the AWA does not include a citizen suit provision.⁶⁴ Without this, private citizens struggle to meet standing requirements to sue.⁶⁵ On the rare occasion where a private citizen can show standing to file a suit, courts generally give deference to the USDA and dismiss the case.⁶⁶

B. State Animal Welfare and Cruelty Laws are Ineffective at Protecting Captive Orcas

Congress designed the AWA to work concurrently with state animal welfare legislation.⁶⁷ Under their police power, states could enact welfare laws and standards far exceeding the AWA’s minimum care guidelines.⁶⁸ The states, however, “have largely failed to act” in this area, leaving much of job of establishing standards of care for captive animals up to the individual “zoos and aquariums.”⁶⁹ The ultimate goal of zoos and aquariums is to earn a profit.⁷⁰ Therefore, when the cost of high-quality care conflicts

⁶¹ See *id.* at 56; see generally 7 U.S.C. §§ 2131–60.

⁶² See Jodidio, *supra* note 25, at 58.

⁶³ Vigars, *supra* note 22, at 505; see generally 7 U.S.C. §§ 2131–60.

⁶⁴ See GRECH, *supra* note 26, at II.A.i–ii.; Jodidio, *supra* note 25, at 59.

⁶⁵ See GRECH, *supra* note 26, at II.A.i.; Vigars, *supra* note 22, at 506.

⁶⁶ See Vigars, *supra* note 22, at 505.

⁶⁷ See *id.* at 506.

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See *id.*

with profitability, it is unsurprising that animal care can end up compromised.⁷¹

In circumstances where states have passed welfare legislation, the inconsistencies from state to state ultimately provide little protection for animals owned by corporations with facilities across the country. For example, SeaWorld has marine parks in California, Florida, and Texas,⁷² and all three states address captive orcas very “differently” under their individual laws.⁷³ Texas currently possesses no legislation detailing any minimum standards of care and humane treatment for marine mammals held in captivity.⁷⁴ California recently banned captive breeding for orcas and prohibited their use in theatrical performances, but the state still allows their use for “educational” purposes.⁷⁵ Florida imposes some permitting and inspection requirements for captive animals; however, the state provides no definition or guidance on what constitutes proper housing of marine mammals.⁷⁶

Every state in the United States has passed some version of an anti-cruelty statute.⁷⁷ However, much like the realm of animal welfare legislation at the state level, a lack of uniformity in anti-cruelty laws exists across the United States.⁷⁸ Each statute differs in what it considers as an “animal,” in what conduct it considers as “cruelty,” and in the types of exemptions it provides.⁷⁹ Some states even exempt entire “classes of animals” from anti-cruelty protections, and only three states have statutes with zero

⁷¹ *See id.*

⁷² *See SeaWorld Theme Parks*, SEAWORLD PARKS & ENT., <https://seaworldentertainment.com/our-brands/seaworld/> [<https://perma.cc/G64D-MUET>].

⁷³ Vigars, *supra* note 22, at 506.

⁷⁴ *See id.*

⁷⁵ *See* CAL. FISH & GAME CODE § 4502.5(a)(1)(A)-(B) (West) (effective Sept. 13, 2016); Madison Park, *California Bans Whale Theatrical Shows, Breeding*, CNN (Sept. 14, 2016, 7:20 PM), <https://www.cnn.com/2016/09/14/us/orca-killer-whales-california-ban/index.html> [<https://perma.cc/LFR6-2BM3>].

⁷⁶ *See generally* FLA. ADMIN. CODE ANN. r. ch. 68A-6 (2022) (establishing requirements for “Captive Wildlife”); Vigars, *supra* note 22, at 506–07 (citing provisions of the 2017 version of the FLA. ADMIN CODE ANN r., one of which has since been repealed).

⁷⁷ GRECH, *supra* note 26, at II.B.

⁷⁸ *See id.*

⁷⁹ *See id.*

exemptions.⁸⁰ Additionally, local and state police departments are tasked with enforcing state anti-cruelty statutes.⁸¹ Typically, local police do not consider animal cruelty a high-priority crime, and as a result only the most egregious crimes are ever prosecuted.⁸²

Ultimately, even if SeaWorld could be found liable under Florida, California, or Texas's animal cruelty statutes, little would change. Because SeaWorld owns its captive orcas, even if legislated to the point of closure, the corporation could easily transfer their orcas to one of its two remaining theme parks to escape regulation.⁸³

C. The "Blackfish Effect" and SeaWorld's Pledge to End Orca Captivity

In January 2013, a documentary titled *Blackfish*⁸⁴ premiered at Sundance Film Festival.⁸⁵ Unknown to producers at the time, the film would go on to launch a grassroots activist movement opposing SeaWorld in what has since been referred to as the "*Blackfish* effect."⁸⁶ The film documented the story of Tilikum, the captive orca at SeaWorld Orlando who was connected to the death of three people, including experienced trainer Dawn Brancheau in 2010.⁸⁷ The documentary looked at Tilikum's life in captivity and interviewed orca biologists and former SeaWorld trainers in an attempt to determine the cause of Tilikum's aggressive nature.⁸⁸

⁸⁰ *See id.*

⁸¹ *Id.*

⁸² *See id.*

⁸³ *See* LONG GONE WILD, *supra* note 16.

⁸⁴ *See* BLACKFISH, *supra* note 2.

⁸⁵ *See* Kenneth Brower, *Opinion: SeaWorld vs. the Whale that Killed its Trainer*, NAT'L GEOGRAPHIC (Aug. 4, 2013), <https://www.nationalgeographic.com/animals/article/130803-blackfish-orca-killer-whale-keiko-tilikum-sea-world?loggedin=true> [https://perma.cc/9KRA-PK9B].

⁸⁶ Tim Zimmermann, *First Person: How Far Will the Blackfish Effect Go?*, NAT'L GEOGRAPHIC (Jan. 13, 2014), <https://www.nationalgeographic.com/animals/article/140113-blackfish-seaworld-killer-whale-orcas> [https://perma.cc/FD2G-VWGD].

⁸⁷ *See* BLACKFISH, *supra* note 2.

⁸⁸ *See generally id.* Unlike in captivity, wild orcas are not known for aggressive behavior against humans. *See* KIRBY, *supra* note 2, at 3.

Following its premiere at Sundance, the film debuted in theaters and on CNN, generating substantial publicity.⁸⁹ Public outcry skyrocketed at the film's depiction of the physical and psychological strains impacting orcas, including shocking footage of "live captures" and sounds of grieving mothers screaming as their calves are taken from them.⁹⁰ Prior to the release of *Blackfish*, people thought the orcas at SeaWorld were happy and had a positive relationship with the theme park.⁹¹ Public opinion, however, changed overnight post-*Blackfish*, drastically impacting SeaWorld's attendance, stock prices, corporate partnerships,⁹² and overall reputation.⁹³ Activists and the public mobilized a movement demanding SeaWorld retire its orcas to a seaside sanctuary.⁹⁴

After years of public outcry and declining reputation, SeaWorld announced in March 2016 that it would terminate its captive breeding program.⁹⁵ As such, the orcas currently in SeaWorld's care will be the last.⁹⁶ While this pledge represents a positive step forward toward ending orca captivity in the United States, it does little to protect the orcas currently held in captivity at SeaWorld. Furthermore, absent legislation, there is little beyond the threat of additional public outcry that will hold SeaWorld accountable in keeping its pledge.

D. Post-Blackfish Legislation Does Not Protect Orcas Currently in Captivity

⁸⁹ See Zimmermann, *supra* note 86.

⁹⁰ See *id.*; see also BLACKFISH, *supra* note 2.

⁹¹ LONG GONE WILD, *supra* note 16.

⁹² See *id.*; see also Natasha Daly, *Orcas Don't Do Well in Captivity. Here's Why*, NAT'L GEOGRAPHIC (Mar. 25, 2019), <https://www.nationalgeographic.com/animals/article/orcas-captivity-welfare> [https://perma.cc/49AC-476X] (stating that Southwest Airlines pulled out of its well-established partnership with SeaWorld and that the Miami Dolphins "severed ties" with SeaWorld following *Blackfish*'s release); Zimmermann, *supra* note 86 (providing that a number of "musical acts" also canceled scheduled performances at the park).

⁹³ See generally Zimmermann, *supra* note 86; LONG GONE WILD, *supra* note 16.

⁹⁴ LONG GONE WILD, *supra* note 16.

⁹⁵ Cathy Borum Chattoo, *Anatomy of "The Blackfish Effect,"* HUFFINGTON POST (Mar. 26, 2017), https://www.huffpost.com/entry/anatomy-of-the-blackfish-b_9511932 [https://perma.cc/Z7MG-4AFZ].

⁹⁶ See *id.*

As the below discussion describes, in response to SeaWorld's post-*Blackfish* pledges, legislators in California and Florida sought to take these promises and codify them into law.

(1) *The California Orca Protection Act*

In 2014, California Assembly Member Richard Bloom introduced a bill that would “end performance-based entertainment” involving orca whales, ban captive breeding programs, and ban any future import or export of orcas in California.⁹⁷ The goal was to take SeaWorld's agreement and turn it into a law prohibiting the capture and use of orcas in entertainment.⁹⁸ Despite substantial opposition from SeaWorld, California Governor Jerry Brown signed the California Orca Protection Act (“CA OPA”) into law on September 13, 2016, making any future captive orca entertainment performances or captive breeding programs illegal in the state of California.⁹⁹

While the CA OPA prevents any future entertainment park in California from utilizing captive orcas for entertainment purposes, the CA OPA does little to protect the orcas currently in captivity at SeaWorld San Diego, which are grandfathered in under the Act.¹⁰⁰ As of 2016, eleven orca whales lived in captivity at SeaWorld's San Diego.¹⁰¹ These orcas are young, most with decades left to live, and the CA OPA requires no change to their current living conditions.¹⁰²

Additionally, while the CA OPA technically bans theatrical performances by captive orcas, the Act still allows captive orcas to be used for shows that serve an “educational” purpose.¹⁰³ Following

⁹⁷ See A.B. 1453, 2015 Gen. Assemb., Reg. Sess. (Cal. 2015) (assembly bill text); see also Park, *supra* note 75; LONG GONE WILD, *supra* note 16.

⁹⁸ LONG GONE WILD, *supra* note 16.

⁹⁹ See California Orca Protection Act, S. 839, 2016 Leg. ch. 340 § 8 (Cal. 2016), CAL. FISH & GAME CODE § 4502.5; see also Nicole Pallotta, *California Passes Orca Protection Act*, ANIMAL LEGAL DEF. FUND (Sept. 16, 2016), <https://aldf.org/article/california-passes-orca-protection-act/> [https://perma.cc/9D9K-MXLX].

¹⁰⁰ See CAL. FISH & GAME CODE § 4502.5(a)(1)(B); Pallotta, *supra* note 99.

¹⁰¹ Pallotta, *supra* note 99.

¹⁰² LONG GONE WILD, *supra* note 16; see CAL. FISH & GAME CODE § 4502.5.

¹⁰³ CAL. FISH & GAME CODE § 4502.5(a)(1)(B); see also LONG GONE WILD, *supra* note 16.

the enactment of CA OPA, SeaWorld transitioned their theatrical orca whale performances into “educational” “orca encounter[s].”¹⁰⁴ In January 2020, SeaWorld introduced its latest orca production, *Orca Encounter*; however, the only major changes from the previous productions are the visual elements seen by SeaWorld’s human parkgoers.¹⁰⁵ SeaWorld revamped the stage at Shamu stadium with waterfalls, artificial boulders, and fake evergreen trees to create a more nature-based aesthetic for the *human* eye.¹⁰⁶ Nothing, however, has improved the orcas’ conditions.¹⁰⁷ Their concrete pool is still the same size it’s always been.¹⁰⁸ They perform the same tricks they always have.¹⁰⁹ Nearly eight years after the 2013 “pledge,” captive orcas performing circus tricks for an adoring crowd of park visitors remains a focal point at SeaWorld parks.

(2) *The Florida Orca Protection Act*

In 2018, Florida State Representative Jared Moskowitz attempted to enact the Florida Orca Protection Act (“FL OPA”), modeled after the California Orca Protection Act.¹¹⁰ The intention was to ensure that “SeaWorld [was] held to its promise to end orca captivity and extend . . . important protections to other captive-

¹⁰⁴ LONG GONE WILD, *supra* note 16.

¹⁰⁵ See Michael Mountain, *What Does SeaWorld’s New “Orca Encounter” Teach Us?*, THE WHALE SANCTUARY PROJECT (Dec. 31, 2019), <https://whalesanctuaryproject.org/what-does-seaworlds-new-orca-encounter-teach-us/> [https://perma.cc/7VXX-WYXP].

¹⁰⁶ See *id.*; LONG GONE WILD, *supra* note 16 (noting that a large view screen plays footage of wild orcas and ocean scenes to provide the tanks with an artificial connection to the vast expansive ocean).

¹⁰⁷ Mountain, *supra* note 105.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*; see generally, Dewayne Bevil, *New ‘Orca Encounter’ Show Joins SeaWorld Orlando lineup*, ORLANDO SENTINEL (Jan. 2, 2020, 2:30 PM), <https://www.orlandosentinel.com/travel/attractions/seaworld/os-et-seaworld-new-whale-show-orca-encounter-20200102-bkci2wsvsvhbnkqrvyb7saw7tustory.html> [https://perma.cc/FMU2-H77F].

¹¹⁰ See Florida Orca Protection Act, H.R. 1305, 2018 Reg. Sess. (Fla. 2018); see also LONG GONE WILD, *supra* note 16; see Colleen Weiler, *Florida Orca Protection Act Introduced in Florida State House*, WHALE AND DOLPHIN CONSERVATION (Jan. 12, 2018), <https://us.whales.org/2018/01/12/florida-orca-protection-act-introduced-in-florida-state-house/> [https://perma.cc/7JG8-DFBA] [hereinafter WHALE AND DOLPHIN CONSERVATION].

held orcas in Florida.”¹¹¹ Representative Moskowitz wanted to “test [SeaWorld’s] real intent” with its pledge by using its exact language, changing nothing, and turning it “into law.”¹¹² Not only did the bill merely prohibit what SeaWorld already pledged not to do, but it also benefited SeaWorld by eliminating the possibility of “competition.”¹¹³ The FL OPA would prevent another aquarium or theme park, which had not made the same pledges as SeaWorld, from setting up shop in Florida with captive orca performances and a captive breeding program.¹¹⁴ “You would’ve thought they would’ve jumped all over that,” Representative Moskowitz stated in an interview for the film *Long Gone Wild*.¹¹⁵ “But no, they did the exact opposite.”¹¹⁶ SeaWorld lobbied hard against the FL OPA because its Florida facility housed its global headquarters and because it feared the negative media attention the bill’s passage could bring the company.¹¹⁷ Ultimately, the proposed bill failed in the Florida Legislature, leaving both current and future captive orcas unprotected in Florida.¹¹⁸

II. ENACTMENT OF THE FIRST FEDERAL ANIMAL CRUELTY STATUTE

A. *The Evolution and Legislative History of the PACT Act*

¹¹¹ WHALE AND DOLPHIN CONSERVATION, *supra* note 108. The FL OPA would also have provided protections for Lolita, the lone captive orca held at Miami Seaquarium in the smallest orca tank in the world. See LONG GONE WILD, *supra* note 16.

¹¹² See *id.* (“I have taken your exact pledge, word for word. I’ve changed nothing. And I’m just [going to] put it into law. That’s all I’m [going to] do. Because SeaWorld, I don’t want another company to come in and do what you’re pledging not to do.”)

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See Tracey McManus, *Bill to Ban Orca Breeding in Florida Dies in the Legislature*, TAMPA BAY TIMES (Jan. 30, 2018), https://www.tampabay.com/news/environment/wildlife/Bill-to-ban-orca-breeding-in-Florida-dies-in-the-Legislature_164973448/ [<https://perma.cc/X9Y8-FJWZ>].

¹¹⁸ *Id.*

The Preventing Animal Cruelty and Torture (“PACT”) Act of 2019¹¹⁹ stemmed out of legislation from 1999 and 2010 that attempted to combat a growing trend of creating and circulating videos depicting graphic acts of animal cruelty and torture.¹²⁰ In the late 1990s, animal crushing videos “flood[ed]” the internet.¹²¹ These crush videos primarily showed women physically “crushing” small animals (i.e., puppies, kittens, bunnies) under stiletto heels while the animals screeched in extreme pain.¹²² In an effort to curb the making and distribution of these disturbing videos, then-President Bill Clinton signed the Depiction of Animal Cruelty Act (“Depiction Act”), the precursor to the PACT Act.¹²³ The Depiction Act prohibited interstate sale and distribution of any video depicting live cruelty acts, including intentional “maiming, mutilation, torture, wounding, or killing,” if those actions infringed “Federal law or the law of the State in which the creation, sale, or possession [took] place.”¹²⁴

In April 2010, the Supreme Court decided the case of Robert Stevens, who created a website selling videos of “pit bulls engaging in dogfights and attacking other animals” and subsequently challenged his 2005 criminal conviction under the Depiction Act, arguing the statute as written violated the First Amendment.¹²⁵ The Supreme Court of the United States ultimately found the statute impermissibly broad and in violation of the First Amendment, noting that the language of the statute at the time

¹¹⁹ Pub. L. No. 116–72, 133 Stat. 1151 (2019) (codified at 18 U.S.C. § 48).

¹²⁰ See *Crush Videos*, ANIMAL WELFARE INST., <https://awionline.org/content/crush-videos> [<https://perma.cc/JU4G-4YWN>] [hereinafter *Crush Videos*]; see generally MARTHA GOLAR & NAOMI WERNE, ANIMAL L. COMM. OF THE ASS’N OF THE BAR OF THE CITY OF N.Y., PROSECUTING ANIMAL FIGHTING AND LIVE ANIMAL CRUELTY DEPICTIONS: LEGAL ISSUES UNDER NEW YORK & FEDERAL LAW 6–7 (2014), <https://www2.nycbar.org/pdf/report/uploads/20072198-ProsecutingAnimalFightingManual.pdf> [perma.cc/GRE3-W4TG].

¹²¹ *Crush Videos*, *supra* note 120.

¹²² *Id.*; see *United States v. Stevens*, 559 U.S. 460, 465–66 (2010).

¹²³ See Pub. L. No. 106–152, 113 Stat. 2732 (1999) (codified at 18 U.S.C. § 48); see also Press Release, The Humane Soc’y of the U.S., The HSUS Applauds Signing of Animal Crush Video Prohibition Act (Dec. 9, 2010), <https://www.humanesociety.org/news/hsus-applauds-signing-animal-crush-video-prohibition-act> [<https://perma.cc/QHV7-C3QU>]; *Crush Videos*, *supra* note 120.

¹²⁴ Pub. L. No. 106–152, § 1(a), 113 Stat. 2732 (1999) (codified at 18 U.S.C. § 48(a), (c)(1)); see also *Stevens*, 559 U.S. at 465 (quoting 18 U.S.C. § 48(c)(1)).

¹²⁵ *Stevens*, 559 U.S. at 466, 472.

could arguably have criminalized hunting videos.¹²⁶ The Depiction Act was ultimately struck down as unconstitutional by an eight-justice majority.¹²⁷ However, in a dissenting opinion, Justice Alito stated “[t]he animals used in crush videos are living creatures that experience excruciating pain.”¹²⁸ He believed the Depiction Act was not designed as a means to “suppress speech” but instead to “prevent horrific acts of animal cruelty.”¹²⁹

After the *Stevens* opinion, Congress sought to draft a new bill that would pass the constitutional constraints set forth in *Stevens* and once again criminalize videos depicting extreme acts of animal cruelty.¹³⁰ To achieve this, House Representatives Elton Gallegly of California and Gary Peters of Michigan co-sponsored the Animal Crush Video Prohibition Act of 2010 (“Crush Act”), which focused exclusively on the creation and distribution of animal crush videos.¹³¹ In the Crush Act, Congress identified that “[t]he Federal Government and the States have a compelling interest in preventing intentional acts of extreme animal cruelty.”¹³² After succeeding in the House “by a vote of 416-3,” and passing unanimously in the Senate, then-President Barack Obama signed the Crush Act into binding law on December 9, 2010.¹³³

B. Enactment of the PACT ACT

¹²⁶ See *id.* at 475–76, 482. The Court explained that the Act applied “to depictions of illegal conduct extend[ing] to conduct that is illegal in only a single jurisdiction,” and that “[a] depiction of entirely lawful conduct runs afoul of the bank if that depiction later finds its way into another State where the same conduct is unlawful.” *Id.* at 475–76. Therefore, the Act could criminalize the sale of a video depicting conduct that was legal in the state where the conduct actually took place and was filmed. The Supreme Court pointed to hunting as an example, as hunting is illegal in the District of Columbia: “[B]ecause the statute allows each jurisdiction to export its laws to the rest of the country, § 48(a) extends to any magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation’s Capital.” *Id.* at 476.

¹²⁷ *Id.* at 482.

¹²⁸ *Id.* at 496 (Alito, J., dissenting).

¹²⁹ *Id.* at 482.

¹³⁰ See GOLAR & WERNE, *supra* note 120, at 5–6.

¹³¹ See *id.*; *Crush Videos*, *supra* note 120.

¹³² Animal Crush Video Prohibition Act of 2010, Pub. L. No. 111–294, §2(2), 124 Stat. 3177 (2010) (codified at 18 U.S.C. § 48 note).

¹³³ *Crush Videos*, *supra* note 120.

While the Crush Act prohibited the “creation” and “sale” of videos depicting animal crushing, it did not criminalize the underlying acts of animal cruelty.¹³⁴ Therefore, in the years following the Crush Act’s passage, prosecution for extreme animal cruelty acts largely depended upon state animal cruelty legislation and enforcement.¹³⁵ Anticruelty laws vary in their classifications of what constitutes animal cruelty and the harshness of their punishments, resulting in “inconsistent” enforcement across the fifty states.¹³⁶

Acknowledging this gap, Congress turned its attention to enacting a federal animal cruelty statute. Congress aimed to create a statute that would prohibit extreme acts of animal abuse found to be beyond regulation under existing state anticruelty laws.¹³⁷ Congressman Ted Deutch co-introduced the PACT Act, intending to make animal cruelty a federal crime.¹³⁸ The bill reached the House floor in October 2019 with “301 bipartisan co-sponsors,” reflecting a substantial Congressional commitment to animal welfare.¹³⁹ Congressman Chris Smith stated: “The PACT Act will strengthen federal penalties for those who promote and engage in the torture and abuse of animals.”¹⁴⁰ The PACT Act unanimously passed through both the House and the Senate before being signed into law by President Donald Trump in November 2019.¹⁴¹ After

¹³⁴ See Danny Prater, *Animal Abuse Now a Federal Offense After Passage of PACT ACT*, PETA (Nov. 27, 2019), <https://www.peta.org/blog/pact-act-signed-into-law/> [<https://perma.cc/MSH7-23GX>].

¹³⁵ See *id.*; Courtney G. Lee, *The PACT Act: A Step in the Right Direction on the Path to Animal Welfare*, JURIST (Dec. 1, 2019, 8:55 PM), <https://www.jurist.org/commentary/2019/12/courtney-lee-pact-act/> [<https://perma.cc/68PG-JSPH>] [hereinafter Lee].

¹³⁶ See Lee, *supra* note 135.

¹³⁷ See *Passage of Bipartisan PACT Act, Protecting Animals from Cruelty in Key Utilization of New House Rules*, U.S. CONGRESSMAN CHRIS SMITH (Oct. 21, 2019), <https://chrissmith.house.gov/news/documentsingle.aspx?DocumentID=406200> [<https://perma.cc/LTP5-PRJB>] [hereinafter SMITH].

¹³⁸ See Press Release, Ted Deutch, U.S. Congressman, Deutch Statement on Animal Cruelty Bill Signed into Law, (Nov. 25, 2019), [<https://perma.cc/76CY-YHV2>] [hereinafter Deutch Press Release].

¹³⁹ SMITH, *supra* note 137.

¹⁴⁰ *Id.*

¹⁴¹ See Kitty Block & Sara Amundson, *Breaking News: President Trump Signs PACT Act; Law Will Crack Down on Some of the Worst Animal Cruelty Crimes*, A HUMANE WORLD (Nov. 25, 2019), <https://blog.humanesociety.org/2019/11/breaking-news-president-trump-signs->

President Trump signed the PACT Act, Congressman Deutch celebrated the fact that animal cruelty was finally a federal crime in the United States, stating, “animal cruelty is no longer just unacceptable, it is now illegal . . . Americans have long stood in support of animal welfare protections, and now our national laws reflect these values.”¹⁴²

C. Overview of the PACT Act and its Limitations

The 2019 PACT Act amended 18 U.S.C. section 48 to criminalize certain intentional acts of animal cruelty.¹⁴³ Under the statute, it is now “unlawful for any person to purposely engage in animal crushing in or affecting interstate or foreign commerce.”¹⁴⁴ The United States Code defines a “person” to “include corporations, companies, associations, firms, partnerships, societies, and joint stock companies.”¹⁴⁵ Therefore, violators under the PACT Act are not limited to individuals. Criminal charges can be filed against corporations, such as SeaWorld, that contravene the PACT Act.

While Congressman Deutch set out to create a federal statute prohibiting animal cruelty, the PACT Act, as currently written, does not completely fulfill that all-encompassing intention. The PACT Act does not prohibit all acts of extreme animal abuse, but rather only specific acts meeting the definition of “animal crushing.”¹⁴⁶ Animal crushing is defined under 18 U.S.C. section 48(f)(1) to mean “actual conduct in which one or more living non-human mammals . . . is purposely crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury.”¹⁴⁷ Furthermore, the PACT Act was enacted under Congress’s Commerce Clause power, limiting the Act’s reach to only animal cruelty actions “affecting interstate or foreign commerce.”¹⁴⁸

[pact-act-law-will-crack-down-on-some-of-the-worst-animal-cruelty-crimes.html](https://perma.cc/J2FP-GHEU)
[<https://perma.cc/J2FP-GHEU>].

¹⁴² See Deutch Press Release, *supra* note 138.

¹⁴³ See PACT Act, Pub. L. No. 116–72, 133 Stat. 1151 (2019) (codified as amended at 18 U.S.C. § 48).

¹⁴⁴ 18 U.S.C. § 48(a)(1).

¹⁴⁵ 1 U.S.C. § 1.

¹⁴⁶ See 18 U.S.C. § 48(a)(1), (f)(1).

¹⁴⁷ *Id.* § 48(f)(1).

¹⁴⁸ See *id.* § 48(a)(1).

III. SEAWORLD CASE STUDY: COULD THE PACT ACT PROVIDE THE ANSWER TO PROTECTING CAPTIVE ORCAS?

With the enactment of the PACT Act, Congress intended to close the gaps in federal and state legislation regarding the treatment of animals. This section will utilize SeaWorld as a case study to analyze whether Congress accomplished this goal and to investigate whether the PACT Act provides captive orcas protection under federal law.

A. *Serious Bodily Injury Element*

The PACT Act's definition of "animal crushing" includes the broad phrase "otherwise subjected to serious bodily injury."¹⁴⁹ The statute defines "serious bodily injury" by providing a reference to 18 U.S.C. section 1365.¹⁵⁰ Accordingly, a violator subjects an animal to "serious bodily injury" when that bodily harm implicates "(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty."¹⁵¹ A person need only subject an animal to injury involving one of the four sub-definitions to be found liable under the PACT Act; however, there are strong arguments, discussed below, that orca captivity satisfies all four.

(1) *Substantial Risk of Death*

In 1965, Ted Griffin, owner of an aquarium in Seattle, captured a young female orca from the Puget Sound with the intent that she would serve as a "companion" for the aquarium's male orca, Namu.¹⁵² Unfortunately for Griffin, Namu and the young female could not get along, and he found himself with an orca he

¹⁴⁹ *Id.* § 48(f)(1).

¹⁵⁰ *Id.*

¹⁵¹ 18 U.S.C. § 1365(h)(3)(A)–(D).

¹⁵² See HARGROVE, *supra* note 3838, at 28; see also LONG GONE WILD, *supra* note 16.

needed to unload quickly.¹⁵³ A newly-founded marine park in San Diego, SeaWorld, purchased the young orca from the aquarium in Seattle.¹⁵⁴ They named her Shamu, meaning She-Namu, and she became the first captive orca to call SeaWorld home.¹⁵⁵ Shamu did not live long, dying from an infection after just five years in captivity.¹⁵⁶ While Shamu only lived a few short years, her name “live[s] on” in infamy: for decades, all orcas that performed at SeaWorld went by the stage name “Shamu” in an effort to “immortal[ize]” her and, by association, all captive orcas.¹⁵⁷

Behind the curtain, however, there exists a very stark contrast in the lifespan of captive orcas in comparison to wild orcas. In the wild, orcas typically live for upward of fifty, even up to eighty, years.¹⁵⁸ In contrast, very few captive orcas ever live beyond the age of thirty.¹⁵⁹ What causes such a drastic disparity in lifespan? For one, captivity itself severely compromises orca health.

Captivity puts orcas at risk of developing infections, which are rarely, if ever, documented in the wild.¹⁶⁰ Shamu fell victim to this phenomenon,¹⁶¹ as she developed “pyometra,” a “hormonal imbalance that causes blood poisoning by allowing bacteria to enter the whale’s uterine lining,” which is practically never seen in wild whales.¹⁶² This infection ultimately resulted in Shamu’s early death.¹⁶³ Two other orcas in SeaWorld history have died from mosquito bites, another risk to which they likely would not have been exposed in the open ocean.¹⁶⁴ Specifically, Kanduke contracted St. Louis Encephalitis at SeaWorld Orlando, and Taku contracted West Nile at SeaWorld San Antonio.¹⁶⁵

¹⁵³ See LONG GONE WILD, *supra* note 16.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *See id.*

¹⁵⁷ HARGROVE, *supra* note 38, at 26 (“[H]er name would live on and on, as if Shamu herself was immortal.”).

¹⁵⁸ See Daly, *supra* note 922.

¹⁵⁹ *See id.*

¹⁶⁰ *See id.*

¹⁶¹ See HARGROVE, *supra* note 38, at 34.

¹⁶² *Id.*

¹⁶³ *See id.*

¹⁶⁴ *See id.* at 86–87.

¹⁶⁵ *See id.*

The severe boredom that orcas experience in captivity drastically exacerbates their risk of infection. In the wild, orcas swim for many miles daily and dive anywhere from one to five hundred feet multiple times per day.¹⁶⁶ Concrete pools can hardly accommodate such expansive movement and exercise needs.¹⁶⁷ The average dimensions of orca pools at SeaWorld's facilities measure "approximately 86 feet by 51 feet" with a depth of just 34 feet.¹⁶⁸ Growing tired of swimming in circles, captive orcas spend much of their day "logging," or floating motionless in their pools.¹⁶⁹ Such a lack of physical exercise can compromise an orca's immune system, rendering the animal highly susceptible to infections.¹⁷⁰ Additionally, captive orcas are known to grind their teeth on the metal gates separating their pools out of boredom, sometimes to the point of revealing the nerves.¹⁷¹ These activities lead to "pinholes" in their teeth, allowing "abscesses" to develop.¹⁷² Nearly a fourth "of all orcas in captivity in the U.S." suffer from "severe" dental concerns, and "seventy percent" possess "at least some" teeth-related issues.¹⁷³ Trainers must flush their teeth out with "hydrogen peroxide solution" to try to prevent infections.¹⁷⁴ Even still, multiple orcas at SeaWorld have died from infections related to open cavities, abscesses, and drilling for dental work.¹⁷⁵ Some orcas reach the point where living with their damaged teeth becomes so unbearable that they ultimately refuse to eat, leading to sickness and eventually death.¹⁷⁶

In addition to infection-related dangers of captivity, orcas also face a substantial risk of death from their artificial enclosures. Captive orcas do not swim about in "natural" seawater.¹⁷⁷ The water in their pools is chemically treated with chlorine, ozone, and

¹⁶⁶ *Orca*, *supra* note 37.

¹⁶⁷ *See id.*

¹⁶⁸ *See* PETA, A SUMMARY OF THE EFFECTS OF CAPTIVITY ON ORCAS 6, <https://www.peta.org/wp-content/uploads/2021/06/SeaWorldCruelty.pdf> [<https://perma.cc/MK4Z-NFKP>] [hereinafter EFFECTS OF CAPTIVITY].

¹⁶⁹ LONG GONE WILD, *supra* note 16.

¹⁷⁰ *See id.*

¹⁷¹ *See* Daly, *supra* note 922.

¹⁷² HARGROVE, *supra* note 38, at 85.

¹⁷³ Daly, *supra* note 922.

¹⁷⁴ *See* HARGROVE, *supra* note 38, at 86.

¹⁷⁵ *See id.*; *see also* Daly, *supra* note 922.

¹⁷⁶ *See* HARGROVE, *supra* note 38, at 86.

¹⁷⁷ *See id.* at 72.

aluminum sulfate.¹⁷⁸ The “chlorine solution” utilized in the orca pools is far more potent than everyday bleach.¹⁷⁹ Ozone is used as a means to limit the orca’s exposure to bacteria; however, exposure to ozone can harm “all living organisms,” causing respiratory issues when inhaled and negatively impacting ecosystems.¹⁸⁰ Aluminum sulfate keeps water “clear,” but the chemical compound is acidic enough to “burn skin” and eyes and “corrode metal.”¹⁸¹ Filtration systems work alongside chemical treatment to keep the water clean for the orcas, but even these can turn deadly when malfunctions occur. For example, an orca named Splash died of a “perforated ulcer.”¹⁸² His necropsy revealed “hundreds of pounds of filtration sand in his stomach.”¹⁸³ It was later determined that the filtration system in his pool had malfunctioned and the sand used to clean the water was pumped straight into his tank.¹⁸⁴

Even just the very concept of living in a pool with walls poses a level of risk for orcas. In the open ocean, orcas are free to roam for miles upon miles, in any direction.¹⁸⁵ Living in a concrete pool is a learned behavior, and some orcas adapt better than others. Splash, for example, suffered from epilepsy.¹⁸⁶ During his seizures, the only assurance and protection he had from accidentally slamming into a wall or drowning was a fellow orca, Orkid.¹⁸⁷ She would nudge him to the top of the pool so he could breathe and “put herself between” him and the tank walls.¹⁸⁸ Other orcas, suffering from boredom and depression, have intentionally rammed repeatedly into tank walls, ultimately resulting in their

¹⁷⁸ *Id.* at 173.

¹⁷⁹ *Id.*

¹⁸⁰ *See id.*; *Ground-level Ozone Pollution*, EPA, <https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics> [https://perma.cc/QZ6M-8HJF].

¹⁸¹ *See* HARGROVE, *supra* note 38, at 173; *Hazardous Substance Fact Sheet*, N.J. DEP’T OF HEALTH 1 (Mar. 2016), <https://www.nj.gov/health/eoh/rtkweb/documents/fs/0068.pdf> [https://perma.cc/ZFW7-5HMF].

¹⁸² HARGROVE, *supra* note 38, at 87.

¹⁸³ *See id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See* Daly, *supra* note 922.

¹⁸⁶ *See* HARGROVE, *supra* note 38, at 87.

¹⁸⁷ *See id.* at 90.

¹⁸⁸ *See id.*

death.¹⁸⁹ Behaviorists who have studied these incidents have ruled them suicides.¹⁹⁰

(2) *Extreme Physical Pain*

On average, SeaWorld's pools are a mere "34 feet deep," providing little depth for an up to 12,000-pound orca to submerge itself.¹⁹¹ On top of such shallow tanks, the pools are largely exposed to the open air with "minimal" shade for the orcas.¹⁹² As such, orcas spend much of their day with their black skin exposed to the sun in the intense heat of Florida, Texas, or California.¹⁹³ Baking in the sun for days on end, orcas develop "bubbled skin" and suffer from severe sunburns.¹⁹⁴ Trainers often need to apply black zinc oxide to the orca's skin – both as a "protectant" and to cover up existing sunburns from the public's view.¹⁹⁵

The dental procedures provided to captive orcas, to address their teeth damage from chewing on metal for their entertainment, are agonizing.¹⁹⁶ The orcas must first be "immobilize[d]" in a medical pool, which is barely eight feet deep.¹⁹⁷ A "block of wood" is then placed in the end of their throats to keep their jaws open while the veterinarian drills into the affected teeth.¹⁹⁸ As a former trainer noted, "[t]he whale doesn't know why the procedure is happening, just that the experience is painful."¹⁹⁹

Food intake is extremely vital to orcas, as it not only provides their nutrition but their hydration as well.²⁰⁰ Orcas "hydrate by absorbing the water content of the fish they eat."²⁰¹ While SeaWorld does not punish poor performance by depriving orcas of food, food is still the "primary reinforcement" in their training.²⁰²

¹⁸⁹ See LONG GONE WILD, *supra* note 16.

¹⁹⁰ See *id.*

¹⁹¹ EFFECTS OF CAPTIVITY, *supra* note 168, at 6.

¹⁹² See LONG GONE WILD, *supra* note 16.

¹⁹³ See *id.*

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ See HARGROVE, *supra* note 38, at 85.

¹⁹⁷ See *id.* at 72, 85.

¹⁹⁸ *Id.* at 85.

¹⁹⁹ *Id.*

²⁰⁰ See *id.* at 76.

²⁰¹ *Id.*

²⁰² See *id.* at 63, 76.

Food is a trainer's only real method for exerting power over an orca and encouraging the behavior the trainer desires.²⁰³ Because of this, however unintentional it might be, orcas are "kept . . . on the verge of hunger" so that they always want to perform.²⁰⁴ With their food intake so closely controlled, captive orcas are not only often left hungry, but also dehydrated, in areas of the country that experience extreme heat.²⁰⁵

(3) *Protracted and Obvious Disfigurement*

Neither the PACT Act nor section 1365 of the United States Code define what "protracted and obvious disfigurement" means.²⁰⁶ Black's Law Dictionary defines disfigurement as "[a]n impairment or injury to the appearance of a person or thing,"²⁰⁷ which has been accepted by some courts.²⁰⁸ The courts that used the Black's Law "disfigurement" definition also interpreted the plain meaning of "protracted" as "prolong[ed] in time or space," as defined under Merriam-Webster's Collegiate dictionary.²⁰⁹ It could, therefore, be inferred that "protracted and obvious disfigurement" under the PACT Act is likely to mean a "prolong[ed]" "impairment or injury to the appearance of" an animal.²¹⁰

Many orcas in captivity, particularly males, experience collapsing of their dorsal fins – a phenomenon rarely seen outside captivity.²¹¹ Wild orcas are free to "spend much of their time fully submerged" underwater, protecting their dorsal fins from "expos[ure] to the air and to the sun."²¹² In captivity, orcas spend

²⁰³ *See id.*

²⁰⁴ *See* LONG GONE WILD, *supra* note 16.

²⁰⁵ *See* HARGROVE, *supra* note 38, at 37.

²⁰⁶ *See* 18 U.S.C. § 48(f); 18 U.S.C. § 1365(h)(3)(C).

²⁰⁷ *Disfigurement*, BLACK'S LAW DICTIONARY (7th ed. 1999).

²⁰⁸ *See* Reck v. State, 84 So. 3d 155, 157 (Ala. 2011) (quoting Hunter v. State, 866 So. 2d 1177, 1179 (Ala. Crim. App. 2003)).

²⁰⁹ *See id.* (quoting Hunter v. State, 866 So. 2d 1177, 1179 (Ala. Crim. App. 2003)); *Protracted*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/https://perma.cc/597Q-8VTJ>.

²¹⁰ *See Protracted*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/https://perma.cc/597Q-8VTJ>; *Disfigurement*, BLACK'S LAW DICTIONARY (7th ed. 1999).

²¹¹ *See* HARGROVE, *supra* note 38, at 37.

²¹² *Id.*

hours of their day “motionless at the surface of [their] pool.”²¹³ With their dorsal fins above water level, there is little “support for the height and weight” of the fins, resulting in them falling over.²¹⁴ This is exacerbated further by the fact that captive orcas must swim in circles rather than the linear patterns they use in the wild.²¹⁵

(4) *Protracted Loss or Impairment of Mental Faculty*

Captivity not only poses risks of physical injury and death, but it also substantially negatively impacts an orca’s psychological well-being.²¹⁶ Trapping an orca in a tiny concrete tank without its family pod is not unlike subjecting a human to “incarceration.”²¹⁷ Like humans, orcas are incredibly complex and social mammals.²¹⁸ They are among the most intelligent beings on the planet, with the “second largest brain of any animal.”²¹⁹ Orcas are deeply curious and utilize echolocation²²⁰ to “communicate” and “explore their environment.”²²¹ In their barren tanks, however, there is nothing to explore and “no information coming in” when they attempt to echolocate.²²² Captivity deprives orcas of the complex, stimulating environment of the open ocean.²²³ Instead, they spend their lives confined to a pool with nothing meaningful to do.²²⁴ Eventually, they just “shut down.”²²⁵

²¹³ *See id.*

²¹⁴ *Id.*

²¹⁵ *See id.*; Daly, *supra* note 922.

²¹⁶ *See* Daly, *supra* note 922; HARGROVE, *supra* note 38, at 168 (“Many of SeaWorld’s whales had elevated and chronic stress levels reflected in their blood work; many were medicated for ulcers.”).

²¹⁷ HARGROVE, *supra* note 38, at 168–69; LONG GONE WILD, *supra* note 16.

²¹⁸ *See* Daly, *supra* note 922; LONG GONE WILD, *supra* note 16.

²¹⁹ Daly, *supra* note 922; *see also* LONG GONE WILD, *supra* note 16.

²²⁰ *See Orca*, *supra* note 37 (explaining that orcas use echolocation by emitting a variety of high-pitch clicks and sounds “that travel underwater until they encounter objects, then bounce back, revealing their location, size, and shape.”).

²²¹ LONG GONE WILD, *supra* note 16.

²²² *Id.*

²²³ *See id.*

²²⁴ *See id.*

²²⁵ *See id.*; HARGROVE, *supra* note 38, at 65 (“Young orcas have so much energy and curiosity—I could sense the desperation sink in when they finally realize their fate is to be one of repetitive performance and routine.”).

As previously discussed, captive orcas spend much of their day “logging” around motionless in their pools or swimming in endless circles.²²⁶ However, that only encompasses the time where they actually have free reign of their tanks.²²⁷ SeaWorld’s “eight-foot-deep med[ical] pool” is regularly used as a “staging area” during orca performances.²²⁸ Trainers corral the orcas into the medical pool prior to each show, during shows when it is not their turn to perform a trick, and for a time after the shows.²²⁹ With roughly “seven shows a day” plus special encounters, the orcas can spend “hours” each day confined and unable to move entirely.²³⁰ Additionally, SeaWorld only operates during the hours of 9 a.m. and 10 p.m. at most, with fewer operating hours during slower periods.²³¹ After hours, orcas are confined to certain pools where they have little to do except log around, anticipating the park’s reopening, when they will have performances and coaching sessions once more.²³²

With minimal ability to spend their day swimming, and little to explore if they could, the endless boredom can wear on an orca.²³³ Captive orcas have been documented to develop disturbing and abnormal behaviors to cope with the stress of their prison-like environment. Orcas often pick at and eat the paint from the tank walls and stage areas, while others are seen “bang[ing] their heads against” the tank walls or metal gates between pools.²³⁴ Some orcas have rammed into the walls with such force that they ultimately kill themselves.²³⁵ Other orcas develop a form of bulimia where they “regurgitate food” simply to pass the time.²³⁶

In addition to stress from limited space and extreme boredom, captive orcas also face many social stressors they ordinarily would not experience in the wild. Wild orcas are categorized in terms of

²²⁶ LONG GONE WILD, *supra* note 16.

²²⁷ *See id.*

²²⁸ HARGROVE, *supra* note 38, at 72.

²²⁹ *See id.*

²³⁰ *See id.*

²³¹ *See Park Hours and Experience Times*, SEAWORLD ORLANDO, <https://seaworld.com/orlando/park-info/theme-park-hours/> [<https://perma.cc/KY98-PDRH>].

²³² *See* HARGROVE, *supra* note 38, at 64–65.

²³³ *See* Daly, *supra* note 922.

²³⁴ HARGROVE, *supra* note 38, at 84.

²³⁵ *See* LONG GONE WILD, *supra* note 16.

²³⁶ *See* HARGROVE, *supra* note 38, at 84.

“three ecotypes: resident, transient, and offshore.”²³⁷ Each “ecotype” exhibits different characteristics, including pod size, behavioral patterns, “language,” and diet.²³⁸ The three ecotypes generally reside in different parts of the world, but even in areas where they overlap, orcas rarely “interact socially with whales from other ecotypes.”²³⁹ In captivity, however, orcas from different ecotypes are mixed together in the same pool.²⁴⁰ Additionally, “vocalization patterns,” which are how orcas communicate with one another, are unique not just to an ecotype but to a specific “social group.”²⁴¹ Therefore, captive orcas are not only integrated into “artificial social groups” with unknown orcas of varying ecotypes, but the groups also do not even speak the same language.²⁴²

Orcas experience significant separation anxiety during their time in captivity. SeaWorld regularly moves its orcas between its three parks, routinely breaking up any makeshift familial units that do evolve.²⁴³ During the decades in which SeaWorld operated its captive breeding program, these transfers often resulted in the separation of baby orcas and their mothers.²⁴⁴ In the wild, orcas remain “with their mothers [for] their entire lives.”²⁴⁵ They never go off on their own to join other pods.²⁴⁶ As such, these forced separations in captivity traumatize both the mother and her calf.²⁴⁷ Mothers grieve the loss of their calves deeply, emitting gut-wrenching vocalizations that continue for days after the calf is

²³⁷ Vigars, *supra* note 22, at 495.

²³⁸ *See id.* at 495–96.

²³⁹ *See id.* at 495.

²⁴⁰ *See* HARGROVE, *supra* note 38, at 115; *see also* BLACKFISH, *supra* note 2 (describing the “pods” at SeaWorld as “an artificial assembly that show their collection, however management decides they should mix them.”).

²⁴¹ *See* Vigars, *supra* note 22, at 496.

²⁴² *See* Daly, *supra* note 922; BLACKFISH, *supra* note 2 (“You got animals from different cultural subsets that have been brought in from various parks. These are different nations. These aren’t just two different killer whales. These animals they’ve got different gene[s], they use different languages.”).

²⁴³ Daly, *supra* note 922.

²⁴⁴ *See* LONG GONE WILD, *supra* note 16; HARGROVE, *supra* note 38, at 158.

²⁴⁵ Sindya N. Bhanoo, *Orca Mothers Coddle Adult Sons, Study Finds*, N.Y. TIMES (Sept. 17, 2012), <https://www.nytimes.com/2012/09/18/science/orca-mothers-coddle-adult-sons-study-finds.html> [https://perma.cc/96T2-D8DH]

²⁴⁶ *See* LONG GONE WILD, *supra* note 16.

²⁴⁷ *See id.*

removed by crane.²⁴⁸ At the height of captive breeding, female orcas were bred often, meaning mothers experienced this traumatic separation multiple times in their lifetime.²⁴⁹ For example, an orca named Katina had “five out of her seven calves” transferred away from her to other parks.²⁵⁰

Throughout their time in captivity, these constant stressors build, and many orcas develop “zoochosis,”²⁵¹ as well as “self-mutilation” and suicidal tendencies.²⁵² Aggressive behaviors are also becoming common among captive orcas.²⁵³ Aggression is not typically a behavior exhibited by wild orcas.²⁵⁴ Wild orcas are “generally mild-mannered” and sociable among other orcas and among humans.²⁵⁵ In captivity, however, whale on whale aggression is commonplace,²⁵⁶ and there have been at least one

²⁴⁸ See *id.*; HARGROVE, *supra* note 38, at 102–03 (detailing the separation of an orca named Kasatka from her first born offspring, stating that Kasatka “began to emit continuous vocalizations, sounds that had never been heard from her in three decades of her captivity,” describing the vocalizations as “long-range vocals,” and asserting that “Kasatka was sending sounds far into the word, as far as she could” in search of her daughter); BLACKFISH, *supra* note 2 (explaining that when SeaWorld separated another orca, Catina, from her calf, “[s]he stayed in the corner of the pool . . . just shaking and screaming . . . screeching, crying.”).

²⁴⁹ See LONG GONE WILD, *supra* note 16; HARGROVE, *supra* note 38, at 154–55.

²⁵⁰ LONG GONE WILD, *supra* note 16.

²⁵¹ See *Orca*, *supra* note 37. Zoochosis is a psychological condition that causes animals held in to exhibit “repetitive” behavior that seems to serve no direct purpose. *Id.* Such behaviors can include “self-mutilation,” “rocking,” and “constant swaying.” *Id.*

²⁵² See LONG GONE WILD, *supra* note 16.

²⁵³ See *id.*

²⁵⁴ See *A Look Into How Life for Captive Orcas Differs from their Wild Counterparts*, ONEGREENPLANET, <https://www.onegreenplanet.org/animalsandnature/a-look-into-how-life-for-captive-orcas-differs-from-wild/> [https://perma.cc/59AA-T35Q] [hereinafter ONEGREENPLANET] (explaining how orcas in the wild follow “a sort of code that prohibits serious violence towards one another,” stating that “[w]hile they can have oppositional relationships with other orcas . . . wild orcas have the ability to remove themselves from these situations simply by swimming away.”).

²⁵⁵ KIRBY, *supra* note 2, at 3.

²⁵⁶ See HARGROVE, *supra* note 38, at 134. Whales in captivity often take out their frustrations by “raking” one another with their teeth, sometimes to the point where they require antibiotics to “prevent infection.” See *id.*; Michelle Kretzer, *Video Shows Stressed Captive Orcas and Other Dolphins Biting Each Other*, PETA (Mar. 15, 2017), <https://www.peta.org/blog/video-shows-stressed-captive-orcas-dolphins-biting/> [https://perma.cc/W657-S6KP]. Raking occurs when orcas scrape and bite the skin of other orcas using their teeth. See HARGROVE, *supra* note 38, at 116, 134.

hundred reported events related to aggression against trainers.²⁵⁷ Wild orcas have miles of ocean available to separate themselves when tensions rise between whales.²⁵⁸ Captive orcas, on the other hand, are trapped in their tanks with no means of escape, and tension between tankmates can lead to fatalities.²⁵⁹ As stated in *Blackfish*, “a result of [orcas] being thrown in with other whales that they haven’t grown up with, that are not part of their culture, is [that] there’s hyper aggression” and “a lot of killing” that has not been observed “in the wild.”²⁶⁰ *Blackfish*, the very film that first brought the harsh realities of orca captivity into the public light, documented the experiences of Tilikum.²⁶¹ The documentary interviewed several former SeaWorld trainers and marine behavioral experts to highlight how the stress of captivity provided a direct link to his aggressive tendencies, which ultimately led to the death of two SeaWorld trainers.²⁶²

²⁵⁷ *What SeaWorld Won't Tell You About Dawn Brancheau's Death*, SEAWORLD OF HURT (Feb. 24, 2016), <https://www.seaworldofhurt.com/features/seaworld-trainer-dawn-brancheau-death/> [<https://perma.cc/KDX4-VU6A>] [hereinafter SEAWORLD OF HURT]. Twelve of these reported occurrences led to serious “injury or death.” *Id.* Furthermore, these instances only include those reported by SeaWorld’s own “zoological operations.” *See id.* The estimate of one hundred does not include instances of aggression that went undocumented. *Id.* For example, no incident report was filed for the fatality of trainer Dawn Brancheau. *Id.*

²⁵⁸ *See* ONEGREENPLANET, *supra* note 254; LONG GONE WILD, *supra* note 16.

²⁵⁹ *See* HARGROVE, *supra* note 38, at 106. For example, at “SeaWorld San Diego in the 1980s,” a “dominant female” named Kandu rammed into tankmate Corky during a show. *Id.* Kandu’s jaw broke from the impact, rupturing an artery. *Id.* She ultimately died from blood loss in her tank. *Id.*

²⁶⁰ BLACKFISH, *supra* note 2; *see also* HARGROVE, *supra* note 38, at 117 (quoting an expert’s opinion that “[a]ll captive orcas, whether caught in the wild or born in captivity, are behaviorally abnormal. They are like the children in *Lord of the Flies* — unnaturally violent.”); *id.* at 118 (quoting the same expert’s statement that “[t]heir ‘childish’ levels of violence and aggression are not socialized out of them by normal adults. The only adult orcas they know were either caught when very young themselves or were born in captivity.”).

²⁶¹ *See* BLACKFISH, *supra* note 2.

²⁶² *See id.* (former SeaWorld trainer describing the circumstances of Dawn Brancheau’s death, stating, “[t]here’s no food left. She kept asking him for more and more behaviors. He wasn’t getting reinforced for the behaviors that he was doing correctly. He probably was frustrated towards the end.”); *see also* HARGROVE, *supra* note 38, at 190. During a “Dine with Shamu performance,” Tilikum grabbed his trainer Dawn Brancheau “by the arm and dragged her underwater.” HARGROVE, *supra* note 38, at 189–90. He thrashed her around repeatedly and held onto her body long after she drowned. *Id.* at 190–91. By

B. Interstate or Foreign Commerce Requirement

Congress enacted the PACT Act under its Commerce Clause power.²⁶³ Therefore, any violator must engage in animal cruelty “in or affecting interstate or foreign commerce.”²⁶⁴ SeaWorld is a theme park and entertainment facility that attracts “local,” “non-local domestic,” and “international” guests.²⁶⁵ Part of theme park admission includes the opportunity to see SeaWorld’s orcas perform and observe them in their tanks during non-performance times.²⁶⁶ In 2019,²⁶⁷ SeaWorld welcomed “22.6 million guests” into its facilities and generated more than \$802 million in net annual revenue from park admissions, reflecting a substantial impact on interstate commerce.²⁶⁸ To further encourage out-of-state and foreign guests to visit their parks, SeaWorld works closely with travel agencies and provides “vacation packages” with local hotels.²⁶⁹ In addition to park admission, SeaWorld has an online store with shipping options to all fifty states and throughout the

the time her body was recovered, she “had been scalped, her spinal cord was severed, her ribs broken, and her left arm had been torn off.” *Id.* at 191. Dawn’s was one of three fatalities to which Tilikum has been linked during his 33 years in captivity. See SEAWORLD OF HURT, *supra* note 252.

²⁶³ See 18 U.S.C. § 48(a)(1); Associated Press, *Bill Making Extreme Animal Cruelty a Federal Felony Passes Congress with Unanimous Support*, USA TODAY (Nov. 6, 2019, 3:31 PM), <https://www.usatoday.com/story/news/nation/2019/11/06/pact-act-bill-banning-extreme-animal-cruelty-passes-senate/2510366001/> [<https://perma.cc/SE5A-L4CG>].

²⁶⁴ 18 U.S.C. § 48(a)(1).

²⁶⁵ See SEAWORLD ENT., INC., 2019 ANNUAL REPORT 13, 42 (2020), https://s1.q4cdn.com/392447382/files/doc_financials/Annual%20Reports/Annual/SEAS-2019-Annual-Report.pdf [<https://perma.cc/LMK9-L3ZB>] [hereinafter SEAWORLD REPORT 2019].

²⁶⁶ See generally *Orca Encounter*, SEAWORLD PARKS & ENT., <https://seaworld.com/orlando/shows/orca-encounter/> [<https://perma.cc/FD4R-E74Y>]; *Orca Underwater Viewing*, SEAWORLD PARKS & ENT., <https://seaworld.com/orlando/animal-experiences/orca-underwater-viewing/> [<https://perma.cc/67VG-5VJZ>].

²⁶⁷ Fiscal year 2019 was utilized for the purposes of this analysis as it was the most recent full year not impacted by the 2020 global coronavirus pandemic.

²⁶⁸ SEAWORLD REPORT 2019, *supra* note 265, at 3, 41; see *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 256 (1964) (internal citation and quotation marks omitted) (finding that touristic activities involving the “transportation of passengers in interstate commerce” substantially affects interstate commerce).

²⁶⁹ SEAWORLD REPORT 2019, *supra* note 265, at 12.

world.²⁷⁰ Much of SeaWorld's merchandise sold is designed using the likeness of orca whales, including stuffed animals, apparel, toys, and more.²⁷¹

Furthermore, the orcas themselves sometimes become commerce. SeaWorld regularly transfers its orcas among its three United States parks.²⁷² Additionally, SeaWorld will occasionally sell or lease its orca whales to foreign marine parks.²⁷³ For example, SeaWorld leased six of its orcas to Loro Parque, a marine park in Tenerife, Spain.²⁷⁴ The lease was intended to last through 2031 with options to renew; however, in 2017, SeaWorld permanently relinquished the six orcas to the Spanish marine park.²⁷⁵

C. Purposeful and Conscious Intent Mens Rea

Under the PACT Act, a person must “purposely engage in animal crushing” in order to violate the statute.²⁷⁶ The statute does not define “purposely,” so this case study uses the Model Penal Code for analysis. Under the Model Penal Code, “[a] person acts purposely” when “it is his conscious object to engage in conduct of that nature or to cause such a result.”²⁷⁷

There can be little doubt SeaWorld knows their orcas suffer in captivity. Substantial scientific research has existed since the 1980s documenting the detrimental effects captivity has on orcas.²⁷⁸ With the release of *Blackfish*, SeaWorld certainly found its attention drawn to these studies, if it was not previously aware

²⁷⁰ See generally *Shop by Park*, SEAWORLD PARKS SHOP, <https://seaworldparksshop.com/> [<https://perma.cc/FRA8-NWRX>].

²⁷¹ See generally *Shop by Animal: Orca*, SEAWORLD PARKS SHOP, <https://seaworldparksshop.com/collections/orca> [<https://perma.cc/V9JA-WNYV>].

²⁷² Daly, *supra* note 922.

²⁷³ See *Who Owns Morgan?*, FREE MORGAN FOUND., <https://www.freemorgan.org/who-owns-morgan/> [<https://perma.cc/JT3N-KWJ7>].

²⁷⁴ See *id.*

²⁷⁵ See *id.*

²⁷⁶ 18 U.S.C. § 48(a)(1).

²⁷⁷ MODEL PENAL CODE § 202(2)(a)(i) (AM. L. INST. 1962).

²⁷⁸ See Daly, *supra* note 922 (stating that SeaWorld has “documented” occurrences of orca aggression since 1988); see also *Orca*, *supra* note 37 (explaining that “stereotypic behavior[s],” developed as a stress response, have been observed by researchers since the “late 1980s”).

of them.²⁷⁹ SeaWorld provides its employees with a manual for answering questions relating to any potential negative treatment of their orcas.²⁸⁰ Included in the manual are facts misleading staff and the public that captive orcas live just as long, if not longer, than in the wild.²⁸¹ A researcher interviewed in *Blackfish* stated: “Because the whales in their pools die young, they like to say that all orcas die at 25 or 30 years.”²⁸² Trainers are warned against speaking out regarding any mistreatment they witness.²⁸³

SeaWorld ensures that trainers watch the orcas closely at all times, reflecting an awareness of potential aggressive behavior.²⁸⁴ In fact, SeaWorld’s awareness of the potential for aggression dates back to their very first captive orca. In 1971, Anne Godsey was “asked to ride Shamu’s back” for a promotional featurette.²⁸⁵ During filming, Shamu “pull[ed] her under” the water.²⁸⁶ When trainers attempted to pull Godsey out of the tank, Shamu bit her leg and tried to pull her back into the water.²⁸⁷ Following the incident, it was discovered SeaWorld had documentation that Shamu previously harmed two other

²⁷⁹ See LONG GONE WILD, *supra* note 16 (demonstrating that in response to *Blackfish*, SeaWorld launched the “Ask SeaWorld Campaign” in an attempt to discredit the film’s accusations regarding how they care for their orcas.).

²⁸⁰ See KIRBY, *supra* note 2, at 96.

²⁸¹ See *id.* at 98.

²⁸² BLACKFISH, *supra* note 2. As discussed, the lifespan of wild orcas can reach eighty years, depending on gender. See Daly, *supra* note 92. In addition to lifespan, SeaWorld provides many other misleading facts, including telling the public collapsed dorsal fins are observed frequently in the wild, when the affliction is only seen in “less than one percent” of the world’s wild orca population. See BLACKFISH, *supra* note 2; see also *id.* (“[E]very other potentially embarrassing fact is twisted and turned and denied one way or another.”).

²⁸³ See HARGROVE, *supra* note 38, at 220–21 (“I had been told time after time that, if I left and spoke out, I would be hurting the whales; that they would then cut back on my contact with the orcas.”).

²⁸⁴ See *id.* at 81 (“The fact that we monitored their behavior so carefully for aggression meant that something must be wrong with the conditions of their confinement. If the whales out in nature were harmless to human beings, why then did we have to be so wary of their moods in captivity?”).

²⁸⁵ *Anne Godsey Survived 1971 Killer Whale Attack*, INSIDE EDITION (Feb. 26, 2010, 12:00 AM), <https://www.insideedition.com/headlines/265-anne-godsey-survived-1971-killer-whale-attack> [<https://perma.cc/FXY4-ZVBJ>].

²⁸⁶ *Id.*

²⁸⁷ See *id.*

individuals.²⁸⁸ Shamu was subsequently removed from participating in performances.²⁸⁹

Like other aspects of an orca's life in captivity, SeaWorld goes to great lengths to cover up these acts of aggression. During a filming of a performance, Tilikum "lunged" at a trainer, and SeaWorld directed a trainer "to get rid of the tape" containing footage of the event.²⁹⁰ Even after the trainer edited out the aggression footage, SeaWorld management still refused allow its existence.²⁹¹ By the time SeaWorld acquired Tilikum in 1992, he'd already been involved in the death of an employee at his prior home, Sealand of the Pacific, in Canada. SeaWorld trainers were told Tilikum had nothing to do with the death, but they were nonetheless warned to watch him carefully.²⁹² Following the death of Dawn Brancheau, SeaWorld initially told the public she "slipped or fell into the tank."²⁹³ It was only after eyewitnesses came forward "disput[ing]" that story that SeaWorld admitted Tilikum pulled Brancheau into the water.²⁹⁴ Despite this admission, SeaWorld still attempted to steer the story against aggression by placing the blame on Brancheau for wearing her hair in a ponytail.²⁹⁵ In the wake of Brancheau's death, the Occupational

²⁸⁸ HARGROVE, *supra* note 38, at 34.

²⁸⁹ *Id.*

²⁹⁰ See BLACKFISH, *supra* note 2.

²⁹¹ See *id.* ("[W]e had to destroy the tape.").

²⁹² See *id.* ("[M]anagement thought there was . . . some reason to exercise caution around him . . . clearly they knew more than they were telling us.").

²⁹³ See *id.* Brancheau's death was not the first time SeaWorld provided conflicting information in regards to a death associated with its orcas. In 1999, a man was found "draped over the back of Tilikum." *Id.* The man was thought to have snuck into the park while it was closed and climbed into Tilikum's tank. *Id.* SeaWorld told the public the man "died of hypothermia." *Id.* Additionally, SeaWorld reported that it was undeterminable whether any of the "bite marks" occurred before or after his death, despite there being cameras "all over" Shamu Stadium, including "underwater cameras." *Id.*

²⁹⁴ *Id.*

²⁹⁵ See Lee Ferran & Russell Goldman, *Trainer Error Caused Whale Attack, Mentor Says*, ABC NEWS (Feb. 25, 2010, 3:16 PM), <https://abcnews.go.com/GMA/seaworld-trainer-error-caused-whale-attack-mentor/story?id=9952102> [https://perma.cc/SFL4-T6BY] (reporting that Thad Lacinak, "former head trainer at SeaWorld" stated: "Dawn, if she was standing here with me, would tell you that it was her mistake.>"). *But see* BLACKFISH, *supra* note 2 (indicating that many other trainers wore ponytails without incident, and there were no SeaWorld regulations or policies requiring trainers to wear their

Safety and Health Administration (“OSHA”) cited SeaWorld with two “willful” infractions “for exposing animal trainers to the recognized hazards of” working with orcas.²⁹⁶ Specifically, SeaWorld was cited for (1) “allow[ing] unprotected contact with Tilikum” during “drywork” and (2) “allow[ing] [trainers] to engage in waterwork and drywork performances with the killer whales without adequate protection.”²⁹⁷ The District of Columbia Court of Appeals found “substantial evidence” reflecting SeaWorld’s awareness of the “hazards” associated with orca aggression,²⁹⁸ noting that “a substantial portion of SeaWorld’s killer whale population had at least one reported incident” of aggression against trainers.²⁹⁹

While it is clear SeaWorld *knows* the harm captivity causes the orcas in their care, the PACT Act requires a *purposeful intent* to cause such harm³⁰⁰ SeaWorld obtained its first captive orca in 1965³⁰¹ when little to nothing was known about orcas, let alone how they would fair in captivity.³⁰² SeaWorld’s founders likely did not intend to display Shamu and her progeny for the purpose of harming the orcas. SeaWorld is a for-profit corporation,³⁰³ its goal

hair up in a bun); Barbara Liston, *Possible Ponytail Dangers on SeaWorld’s Radar Before Drowning*, THOMSON REUTERS (Nov. 17, 2011, 3:26 PM), <https://www.reuters.com/article/us-seaworld-osha/possible-ponytail-dangers-on-seaworlds-radar-before-drowning-idUSTRE7AG2AE20111117>

[<https://perma.cc/N3Q8-G3ZF>] (stating that “SeaWorld had chosen to ‘desensitize’ the animals to dangling hair rather than ban it.”); BLACKFISH, *supra* note 2 (noting that eyewitness testimony and video confirmed Tilikum grabbed Brancheau by her arm, not her hair).

²⁹⁶ See *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1205 (D.C. Cir. 2014).

²⁹⁷ *Id.* (internal quotation marks and citation omitted). “Waterwork” includes “any interaction” between orcas and trainers occurring in “deep[er] water,” while “drywork” includes any interactions between orcas and trainers occurring out of the water or in “slideouts” in knee-deep water at most. See *id.*

²⁹⁸ See *id.* at 1208.

²⁹⁹ See *id.* at 1208–09. The Court also stated that SeaWorld “trains its employees . . . to recognize . . . ‘precursors,’ which indicate that the [orcas] may act aggressively, and asserted that company’s protocols “demonstrate [its] recognition that the killer whales interacting with trainers are dangerous and unpredictable.” *Id.* at 1209.

³⁰⁰ See 18 U.S.C. § 48(a)(1).

³⁰¹ See HARGROVE, *supra* note 38, at 28.

³⁰² See Kirby, *supra* note 2, at 3.

³⁰³ See *About Us*, SEAWORLD PARKS & ENT. <https://seaworldentertainment.com/about-us/> [<https://perma.cc/35AC-2AFU>] [hereinafter *About Us*, SEAWORLD].

is to sell park tickets, sell merchandise, and earn revenue.³⁰⁴ Capturing and breeding orcas with an intent to cause them harm or death would actively work against that goal. SeaWorld built its entire brand on the likeness of its orcas.³⁰⁵ They are the company's most important "asset."³⁰⁶ While SeaWorld clearly actively works to cover up or downplay any mistreatment occurring at its facilities, these actions are most likely driven by an intent to keep parkgoers buying tickets,³⁰⁷ not a conscious desire to harm the orcas in their care.

D. *The Scientific Research Exception*

Even if SeaWorld could be found to have purposely engaged in "animal crushing," the PACT Act provides six exceptions,³⁰⁸ including once related to "scientific research."³⁰⁹ Under this exception, the Act does not apply in "regard to any conduct . . . that is . . . medical or scientific research."³¹⁰ As discussed, SeaWorld is a for-profit theme park whose primary purpose is entertainment.³¹¹ Despite this, SeaWorld proclaims a "commitment" to "conservation" and "research."³¹² The company asserts: "This commitment includes publishing our own research,

³⁰⁴ See HARGROVE, *supra* note 38, at 8 ("[T]he corporate ideology was . . . driven by dollars and cents.").

³⁰⁵ See *id.* ("SeaWorld's corporate marketing strategy turned the orcas into the pandas of the sea, commercial and cuddly.").

³⁰⁶ See *id.* ("The whales are a company asset on the ledgers.").

³⁰⁷ See BLACKFISH, *supra* note 2. ("The industry has a vested interest in spinning these [stories] so that the animals continue to appear like cuddly teddy bears . . . That sells a lot of Shamu dolls. It sells a lot of tickets at the gate.").

³⁰⁸ 18 U.S.C. § 48(d)(1).

³⁰⁹ 18 U.S.C. § 48(d)(1)(D).

³¹⁰ *Id.*

³¹¹ See *About Us*, SEAWORLD, *supra* note 303; see also Melissa Cronin, *SeaWorld has Even Lost the Faith of a Former Director*, ACTION FOR DOLPHINS (Feb. 19, 2015), <https://www.afd.org.au/news-articles/seaworld-has-even-lost-the-faith-of-a-former-director> [<https://perma.cc/38B5-CBFB>] (asserting that despite the company's current "educational" messaging, SeaWorld's founder stated: "SeaWorld was created as strictly entertainment. We didn't try to wear this false facade of educational significance.").

³¹² *Our Partners in Conservation*, SEAWORLD PARKS & ENT., <https://seaworldentertainment.com/commitment/science-and-research/> [<https://perma.cc/PF8V-KZHZ>] [hereinafter *Partners in Conservation*, SEAWORLD].

sharing our parks and animals as controlled research environments, and funding and supporting projects around the world.”³¹³

SeaWorld itself has a team of scientists that conduct research with their captive whales to improve the handling of marine mammals in captivity and expand the understanding of orcas in the wild.³¹⁴ Their research contributes to published scientific papers,³¹⁵ though the value of this research is subject to much debate in the scientific community.³¹⁶ Additionally, SeaWorld partners with other “research organizations,” allowing visiting researchers “access” to their facilities and their captive orcas to develop studies.³¹⁷

While many marine biologists question the usefulness of the research conducted at SeaWorld, the PACT Act does not provide any clear statutory language indicating such scientific research would not allow SeaWorld to fall within the exception. The Act states that “*any* conduct” constituting scientific research is excluded.³¹⁸ It would be up to a reviewing court to interpret whether the validity of such research contributes to the applicability of the scientific research exception. The issue, however, has not yet been raised in the courts.

³¹³ *Id.*

³¹⁴ *See id.*

³¹⁵ *See id.*

³¹⁶ *See* HARGROVE, *supra* note 38, at 232 (explaining that SeaWorld is not “respect[ed]” as a research facility by many scientists in the field, and “eminent New Zealand orca scientist Dr. Ingrid Visser,” in particular, must often request SeaWorld stop “misquoting” her findings); *see also* LONG GONE WILD, *supra* note 16. Much of SeaWorld’s research is questioned in terms of its relevance and accuracy, as many of its studies center around captivity. *AskSeaWorld – Research, SEAWORLD FACT CHECK*, <https://www.seaworldfactcheck.com/research.htm> [<https://perma.cc/QL9W-N5TJ>]. For example, several of SeaWorld’s studies discuss captive breeding and artificial insemination. *Id.* Scientists are also skeptical of a SeaWorld study that focus on the “metabolism of adult male orcas,” as the research only considered Tilikum and “would have limited applicability” to wild orcas. *Id.* Additional concern exists regarding disparities between captive and wild orcas invalidating the usefulness of the research in the studies. *See id.*

³¹⁷ *Partners in Conservation*, SEAWORLD, *supra* note 312 (providing that some of these research partners include OCEARCH, Humane Society of the United States, and Hubbs-SeaWorld Research Institute).

³¹⁸ 18 U.S.C. § 48(d)(1)(D) (emphasis added).

IV. THE PACT ACT COULD SERVE AS MODEL FOR A MORE EXPANSIVE ANIMAL CRUELTY STATUTE THAT INCLUDES PROTECTIONS FOR CAPTIVE ANIMALS

The above case study analyzing SeaWorld highlights the PACT Act does not fully live up to its intended purpose of preventing acts of serious animal cruelty at the federal level. As such, acts of heinous and inhumane treatment of animals in captivity can slip through gaps in the legislation. Captive animals are no different than domesticated animals and, as such, should be entitled to equal protection against acts of cruelty under the law. Corporations, like SeaWorld, own their animals just as individuals own their pets. They assume responsibility for the welfare and treatment of the animals in their care. As such, Congress should not hold them to a lesser standard than pet owners by allowing them to fall outside animal cruelty legislation. If Congress truly intended for the PACT Act to provide “a clear message that our society does not accept cruelty against animals,”³¹⁹ then it should enact legislation ending acts of animal cruelty against *all* animals.

While the PACT Act does not fully realize the Congressional intent of ending animal cruelty in the United States, it does provide a good starting point for doing so. As established in the SeaWorld case study, the PACT Act covers a substantial amount of inhumane and abhorrent acts of animal cruelty. Additionally, by using its Commerce Clause powers, Congress ensured that corporations operating in multiple states fall within reach of the statute, avoiding the challenges that arise when regulating animal cruelty at the state level. Using these provisions, Congress could further amend the PACT Act or use it as a model to enact legislation that would also protect captive animals from acts of cruelty.

A. Eliminate the Scientific Research Exception

To fill in some of the gaps found in the PACT Act, Congress should consider eliminating its scientific research exception.

SeaWorld can be credited for increasing the world’s understanding of the relatively unknown orca whale species in the

³¹⁹ Deutch Press Release, *supra* note 138.

1960s.³²⁰ While displaying orcas in captivity once provided the best means of studying these mammals, captivity has become unnecessary for the advancement of scientific research in the twenty-first century.³²¹ With the evolution of technology, scientists today are capable of studying marine mammals in their natural habitat with far greater ease than at the time of SeaWorld's founding.³²² Additionally, scientists are less likely to choose to study orcas in captivity out of concern the captive orcas could provide misleading results. Because captive animals live in artificial environments, under significant "stress" and other unnatural conditions, studies with captive subjects can often produce results that cannot be applied to wild populations.³²³ SeaWorld's orcas, in particular, pose problems for researchers as the corporation bred orcas from different ecotypes and inbred mothers with their sons, creating "hybrids" not found in the wild.³²⁴ Studies on these genetic variants provide little insight on wild orcas, which are genetically quite different.³²⁵ Furthermore, displaying marine mammals and having them perform circus tricks provides little educational value.³²⁶ Instead, it poses the risk of teaching children that it is acceptable to exploit animals for human entertainment.³²⁷

Given that the scientific community no longer relies on captivity to further research, keeping the scientific research exception does little other than provide a loophole for zoos and aquariums to skirt around regulation. As stated in the *Long Gone Wild* documentary, "[a]s long as we call it . . . education, research, or conservation, [they] can do whatever [they want to] do."³²⁸

B. Lower the Requisite Mens Rea to 'Knowingly' or 'Negligently'

³²⁰ See LONG GONE WILD, *supra* note 16.

³²¹ See LONG GONE WILD, *supra* note 16.

³²² See *id.*

³²³ See Marc Bekoff, *Research on Captive Animals Produces Misleading Results*, PSYCH. TODAY (Feb. 5, 2017), <https://www.psychologytoday.com/us/blog/animal-emotions/201702/research-captive-animals-produces-misleading-results> [<https://perma.cc/6TZN-AG3D>].

³²⁴ See HARGROVE, *supra* note 38, at 113, 117.

³²⁵ See LONG GONE WILD, *supra* note 16.

³²⁶ See *id.*

³²⁷ See *id.*

³²⁸ *Id.*

In addition to removing the scientific research exception, to improve the PACT Act, Congress should lower the statute's requisite mens rea from "purposely" to "knowingly," if not "negligently." As discussed, there is substantial evidence that SeaWorld knows its captive orcas are suffering harm in captivity. A less stringent mens rea, accounting for violators who *knowingly* "engage in animal crushing in or affecting interstate or foreign commerce,"³²⁹ would likely capture SeaWorld within the meaning of the Act and bring within its reach any other zoos or aquariums that subject captive animals to cruel treatment.

The Department of Justice has classified nineteen federal environmental statutes as relating to "pollution crimes" and four as relating to "wildlife crimes,"³³⁰ and many of these laws impose criminal penalties for knowing or negligent endangerment.³³¹ Through the pollution statutes that include knowing or negligent mens rea, it is clear Congress deems it sufficient for a polluter to face criminal charges if they take actions they know could harm the environment. It follows that a person or corporation should face criminal penalties if they knowingly harm a *living being*. Furthering this point, studies have shown that dolphin species, including orcas,³³² can recognize themselves in the mirror, suggesting that they are "self-aware" like humans.³³³ As such,

³²⁹ See 18 U.S.C. § 48(a)(1).

³³⁰ See *Federal Environmental Crimes, By Statute*, U.S. DEPT OF JUST., ENV'T AND NAT. RES. DIV. (May 13, 2015), <https://www.justice.gov/enrd/federal-environmental-crimes-statute> [<https://perma.cc/QV73-MJUU>].

³³¹ See Clean Water Act, 33 U.S.C. § 1319(c)(1)–(3) (imposing "criminal penalties" for "negligent violations," "knowing violations," and "knowing endangerment"); Clean Air Act, 42 U.S.C. § 7413(c) (imposing "criminal penalties" for "knowing[]" and "negligent[]" infractions); Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a) (imposing "criminal penalties" for "knowingly, or with wanton disregard for the consequences of his act tak[ing] . . . any bald eagle.").

³³² See Katie Hogge, *Why Is an Orca Not a Whale?*, OCEAN CONSERVANCY (Mar. 13, 2019), <https://oceanconservancy.org/blog/2019/03/13/orca-not-whale/> [<https://perma.cc/3CW7-A9WB>] (explaining that orca whales are the largest species of dolphin).

³³³ See Philippa Brakes, *Are Orcas Non-Human Persons?*, WHALE AND DOLPHIN CONSERVATION (Oct. 30, 2014), <https://us.whales.org/2014/10/30/are-orcas-non-human-persons/#:~:text=Research%20suggests%20that%20orcas%20are,haveing%20a%20concept%20of%20themselves.> [<https://perma.cc/5WFE-3M46>]; *New Study Finds Dolphins Demonstrate Self-Awareness Earlier than Humans and Chimpanzees*, HUNTER (Jan. 11, 2018), <https://hunter.cuny.edu/news/new-study-finds-dolphins->

criminal statutes designed to protect them should include the same knowing or negligent endangerment standards that Congress includes in statutes aimed at protecting human beings.

CONCLUSION

In recent years, scientists and activists have shown how harmful and cruel captive treatment of orca whales can be. This newfound information illuminates the ineffectiveness of current federal and state legislation in the area of animal welfare and anticruelty laws. Congress attempted to close this gap in legislation with the passage of the PACT Act. However, much like the AWA and other legislation before it, the PACT Act falls short of achieving Congress's goals, and gaps in the law remain. Despite this, the PACT Act provides Congress a starting point to create a more all-encompassing federal animal cruelty statute. With the elimination of exceptions for scientific research and imposition of a lower mens rea requirement, Congress could amend the PACT Act into an anticruelty statute protecting *all* animals.

Tilikum died in 2017, after spending thirty-six traumatic years in captivity.³³⁴ Animal welfare and anticruelty laws, as written, failed him, but his story started a movement that still lives on. With such substantial public opposition to the inhumane treatment many captive animals experience, Congress should expand upon the work it begun with the PACT Act and finally end animal cruelty in the United States. After all, as Mahatma Gandhi once said, “the greatness of a nation and its moral progress can be judged by the way its animals are treated.”³³⁵

[demonstrate-self-awareness-earlier-than-humans-and-chimpanzees/](https://perma.cc/PSY5-B35C)
[<https://perma.cc/PSY5-B35C>].

³³⁴ Johnson, *supra* note 1.

³³⁵ Peter Singer, *Moral Progress and Animal Welfare*, ABC RELIGION & ETHICS (July 14, 2011, 9:30 AM), <https://www.abc.net.au/religion/moral-progress-and-animal-welfare/10101318> [<https://perma.cc/4ACS-RMXZ>] (quoting Mahatma Gandhi).