Standing on Their Own Four Legs: The Future of Animal Welfare Litigation after *Animal Legal Defense Fund, Inc. v. Glickman*

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NOTE

STANDING ON THEIR OWN FOUR LEGS: THE FUTURE OF ANIMAL WELFARE LITIGATION AFTER *ANIMAL LEGAL DEFENSE FUND, INC. v. GLICKMAN*

BY
ROB ROY SMITH*

Standing doctrine has represented the most formidable hurdle to animal welfare plaintiffs seeking to change the status quo. Without ever reaching the merits of their claims, the Court of Appeals for the District of Columbia repeatedly found that animal welfare plaintiffs lacked standing to enforce various provisions of the Animal Welfare Act. All of that, however, is about to change. No longer will government action that regulates the lives of animals and determines the experience of people who view them be unchallengeable. This Note discusses the future of animal welfare litigation after Animal Legal Defense Fund, Inc. v. Glickman, *examining the legal and political ramifications of this groundbreaking decision.*

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I. INTRODUCTION

Marc Jurnove could not believe what he saw at the Long Island Game Park Farm and Zoo. Having spent the majority of his adult life working for various human and animal relief and rescue organizations,[1] Mr. Jurnove knew inhumane treatment when he saw it. This was certainly inhumane treatment. Primates, inherently social creatures, were kept in cages isolated from other primates, often not in view of the other cages.[2] Squirrel monkeys were kept in a cage next to adult bears, causing the monkeys fright and agitation.[3] Deprived of their psychological needs, the twenty-two primates[4] housed at the Game Farm were in need of assistance.

Because of his familiarity with and love for exotic animals,[5] Mr. Jurnove was deeply affected by his observations. After the first of his nine

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[1] Animal Legal Defense Fund, Inc. v. Glickman (*ALDF v. Glickman*), 154 F.3d 426, 429 (D.C. Cir. 1998) (en banc) (citing Affidavit of Marc Jurnove, para. 3), *cert. denied*, 119 S. Ct. 1454 (1999). Mr. Jurnove's affidavit was originally filed with the district court in support of the Animal Legal Defense Fund (ALDF) Motion for Summary Judgment and Memorandum in Opposition to Defendants' Motion to Dismiss and Motion for Partial Summary Judgment, Animal Legal Defense Fund, Inc. v. Glickman, 943 F. Supp. 44 (D.D.C. 1996) (No. 96-00408). The affidavit, however, was later cited in the *ALDF v. Glickman* circuit court opinions and included as an appendix to ALDF's brief to the Supreme Court. Respondents' Brief in Opposition to Petition for Writ of Certiorari, National Ass'n for Biomedical Research v. Animal Legal Defense Fund, Inc. (*NABR v. ALDF*), 119 S. Ct. 1454 (1999) (No. 98-1059).

[2] *ALDF v. Glickman*, 154 F.3d at 429 (citing Affidavit of Marc Jurnove, para. 14).

[3] *Id.* (citing Affidavit of Marc Jurnove, para. 8).

[4] U.S. DEP'T OF AGRIC., ANIMAL CARE INSPECTION REPORT 1 (1995).

[5] 154 F.3d at 429 (citing Affidavit of Marc Jurnove, para. 6).

visits to the Game Farm, Mr. Jurnove contacted the United States Department of Agriculture (USDA) to secure help for these animals, but help never came. On repeated occasions, USDA failed to find any violations of the Animal Welfare Act (AWA)[6] at the Game Farm,[7] prompting Mr. Jurnove and three other individuals to seek legal action against USDA.

In 1996, in *Animal Legal Defense Fund, Inc. v. Glickman* (*ALDF v. Glickman*),[8] the Animal Legal Defense Fund (ALDF) successfully sued USDA on behalf of Mr. Jurnove for failing to adopt minimum standards for a physical environment adequate to promote the psychological well-being of animals at research facilities and roadside zoos.[9] However, the victory was short lived. There was still something keeping the primates from getting the help they needed—a legal fiction known as standing.

"Standing involves only one question: Who can obtain judicial review of an otherwise reviewable government action? Yet, standing law suffers from inconsistency, unreliability, and inordinate complexity."[10] In the first appellate review of *ALDF v. Glickman*,[11] a three judge panel of the United States Court of Appeals for the District of Columbia returned the type of decision that was known all too well by animal welfare activists and their attorneys. Without reaching the merits of the case, Judge David Sentelle, writing for the majority of the panel, held that the plaintiffs lacked the constitutional standing needed to challenge USDA's regulations.[12] Framing the issue as "the latest chapter in the ongoing saga of [ALDF's] effort to enlist the courts in its campaign to influence USDA's administration of the [AWA],"[13] the majority found that Marc Jurnove failed to meet two of the three requirements of standing under Article III of the United States Constitution—causation and redressability.[14] The decision was different from previous holdings, however. In a scathing dissent,[15] Judge Patricia Wald laid the groundwork for a rehearing en banc[16] that ultimately reversed the panel's ruling. In a seven to four decision, the court found Mr.

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[6] Animal Welfare Act of 1966, 7 U.S.C. §§ 2131–2157 (1994 & Supp. IV 1998).

[7] 154 F.3d at 430 (citing Affidavit of Marc Jurnove, para. 42).

[8] 943 F. Supp. 44 (D.D.C. 1996), *vacated*, 130 F.3d 464 (D.C. Cir. 1997) (panel decision), *vacated*, 154 F.3d 326 (D.C. Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1454 (1999).

[9] After finding that the individual plaintiffs had standing to sue, the district court case was decided on the merits in favor of ALDF, holding that USDA's minimum standards violated the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344 (1994 & Supp. IV 1998), on three grounds. 943 F. Supp. at 59–61. The decision was written by district court Judge Charles Richey, who three years earlier had ruled in favor of ALDF against USDA regarding the agency's failure to follow the 1985 Amendments to the AWA that mandated protection of research animals. *See The Animals' Advocate* (ALDF, Petaluma, Cal.), Summer 1993, at 1.

[10] 3 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.1 (3d ed. 1994).

[11] 130 F.3d 464 (D.C. Cir. 1997) (panel decision), *vacated*, 154 F.3d 326 (D.C. Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1454 (1999).

[12] *Id.* at 466.

[13] *Id.*

[14] *Id.* at 464.

[15] *Id.* at 471–76 (Wald, J., dissenting).

[16] *See* 154 F.3d 426 (D.C. Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1454 (1999).

Jurnove had proven that he suffered direct harm when he witnessed the living conditions of the primates at the Game Farm,[17] thereby opening a door to judicial review previously closed to animal welfare plaintiffs.

This Note examines the future of animal rights litigation after this groundbreaking decision. *ALDF v. Glickman* represents more than the first time individual plaintiffs were able to challenge USDA regulations for primate dealers, exhibitors, and research facilities. The *ALDF v. Glickman* case is important because it lays a foundation for animal welfare litigation to follow. A primary reason for the ineffectiveness of the AWA has been the inability of animal welfare plaintiffs and organizations to litigate under the statute. This does not result from deficient claims, but rather from jurisdictional challenges to third-party standing. By documenting the facts necessary to achieve standing, *ALDF v. Glickman* will enable other third-party plaintiffs to clear a once insurmountable hurdle. Further, the decision will result in renewed political pressure to improve enforcement of the AWA by adding a citizen suit provision to afford concerned citizens such as Mr. Jurnove additional opportunities to help animals living under inhumane conditions.[18]

This Note is divided into six parts. Part II discusses the evolution of the standing doctrine over the last two decades that led to the final decision in *ALDF v. Glickman*. Part III discusses and analyzes the majority and dissenting opinions of this landmark decision. Part IV addresses the implications that the decision will have on future animal welfare cases and presents the proper litigation strategy for animal welfare plaintiffs to follow to satisfy the elements of standing. Part V considers the ramifications of the decision outside of the litigation process, in particular, the potential for the creation of a citizen suit provision in the AWA. This Note concludes in Part VI that *ALDF v. Glickman* is neither a radical departure from previous standing cases nor a mere aberration. Rather, it represents the culmination of years of struggle to achieve standing on behalf of animals and fashions a precedent that will allow just that. It further concludes that *ALDF v. Glickman*'s vindication of the animal welfare movement will spark a legal and political revolution in animal law.

II. An Insurmountable Hurdle? The Evolution of the Standing Doctrine

The passage of the AWA represents recognition by policy makers that animals must be afforded protection. The purpose of the Act is clear: "To insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment."[19]

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[17] *Id.* at 445.

[18] *See infra* Part V.

[19] 7 U.S.C. § 2131(a)(1) (1994). The AWA was passed in part to protect "animals intended for use . . . for exhibition purposes." *Id.* It is the responsibility of the Secretary of Agriculture to promulgate standards to govern the humane handling, care, treatment, and transportation of animals by exhibitors. *Id.* § 2143(1). The AWA was amended in 1985 in response to the failure of the Secretary to promulgate effective standards to insure humane treatment. *See*

Even though the statute's original scope and purpose was expanded with later amendments,[20] the AWA's objectives remain unfulfilled. A primary reason for this failure lies in the inability of animal welfare activists and organizations "to litigate claims successfully against the federal government and individual violators under the statute."[21] Meritless claims are not the downfall of animal welfare plaintiffs; rather, "[i]t is in the doctrine of standing that animal rights activists have found their greatest obstacle to the extension of legal rights to animals."[22]

A. The Elements of Standing

"Standing is an essential, 'threshold determinant of the propriety of judicial intervention.'"[23] There are two required types of standing—constitutional and prudential. Although these elements were developed by the courts, their application is often "tortured and overly technical."[24] The constitutional considerations are grounded in the "Cases" and "Controversies" requirement of the United States Constitution.[25] Three elements determine whether the courts can resolve the disputed issue—injury in fact, causation, and redressability.[26]

Once the constitutional elements of standing are met, the plaintiffs must also satisfy prudential concerns. Prudential concerns arise because third-party plaintiffs must enforce animal laws such as the AWA; animals have no standing to sue on their own behalf. Established through the Administrative Procedure Act (APA),[27] prudential elements require plaintiffs to demonstrate they are within the "zone of interests" Congress sought to protect by the section of the statute under which the action is brought.[28]

Animal Welfare Act Amendments of 1985, Pub. L. No. 99-198, § 1752(a)(2), 99 Stat. 1650. It is the Secretary's failure to adopt the minimum standards set forth in the 1985 amendments to section 2143 that led to the *ALDF v. Glickman* litigation.

[20] *See supra* note 19.

[21] Joseph Mendelson, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795, 796 (1997).

[22] David R. Schmahmann, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 773 (1995).

[23] Mendelson, *supra* note 21, at 801 (quoting Warth v. Seldin, 422 U.S. 490, 517–18 (1975)).

[24] Schmahmann, *supra* note 22, at 773.

[25] U.S. CONST. art. III, § 2, cl. 1.

[26] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). In *Defenders of Wildlife*, the Supreme Court elaborated on the three elements of Article III standing. Injury in fact must be "concrete and particularized" and "'actual and imminent.'" *Id.* at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). Causation is met if the injury is "'fairly . . . trace[able] to the challenged action of the defendant.'" *Id.* at 560–61 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)) (alterations in original). Redressability is established if the injury will likely be redressed. *Id.* at 561 (citing *Simon*, 426 U.S. at 38). For an in-depth discussion of the requirements of Article III standing, see Mendelson, *supra* note 21, at 801–03. *See also* 3 DAVIS & PIERCE, *supra* note 10, §§ 16.1–16.16.

[27] 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344 (1994 & Supp. IV 1998).

[28] *See id.* § 702 (1994); Bennett v. Spear, 520 U.S. 154 (1997). For additional discussion of the prudential elements of standing, see Mendelson, *supra* note 21, at 803–04. *See also* 3 DAVIS & PIERCE, *supra* note 10, § 16.3.

Although the initial goal of the standing doctrine was to ensure parties before the court were truly adversarial and had personal stakes in the outcome,[29] the doctrine has become a judicial barrier to environmental plaintiffs who seek access to the courts.[30]

B. Standing Doctrine in Flux

The most troubling aspect of standing for animal welfare plaintiffs is the injury in fact requirement that, at a bare minimum, focuses the relevant inquiry on the interests and injuries suffered by humans, rather than injuries to the animals.[31] Despite Congress's continued interest in protecting the environment, the Supreme Court and D.C. Circuit have used standing analysis to limit the availability of judicial review in applying the standing doctrine to environmental plaintiffs.[32] Two decisions illustrating the height of judicial restraint are *Lujan v. National Wildlife Federation*[33] and *Lujan v. Defenders of Wildlife*.[34] *Defenders of Wildlife*, while closing the door on the particular plaintiffs in the suit, did open a window of opportunity for future litigants. Writing for the majority, Justice Scalia found that the plaintiffs had failed to establish a concrete, particularized injury in fact.[35] In describing why the *Defenders of Wildlife* plaintiffs did not satisfy the first element of standing, he described what it would take to confer standing: "It is clear that the person who observes or works with a *particular* animal threatened by a federal decision is facing perceptible harm."[36] Subsequently, injury to a particular animal, rather than an animal species, became a well-established interest sufficient to establish injury in fact.

Whether the majority's analysis in *Defenders of Wildlife* is flawed,[37] there was no challenge to the additional limits placed on the type of injury that could satisfy the injury in fact requirement[38] until five years later

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[29] Eric I. Abraham, *Justice Ginsburg and the Injury in Fact Element of Standing*, 25 SETON HALL L. REV. 267, 278 (1994).

[30] *See* Schmahmann, *supra* note 22, at 773–79.

[31] *Id.* at 775.

[32] *See* Abraham, *supra* note 29, at 287 n.115 and accompanying text.

[33] 497 U.S. 871 (1990).

[34] 504 U.S. 555 (1992).

[35] *Id.* at 562–63.

[36] *Id.* at 566 (emphasis added).

[37] *See* Abraham, *supra* note 29, at 291–304 (arguing that Justice Scalia's reasoning in *National Wildlife Federation* and *Defenders of Wildlife* was procedurally flawed).

[38] In *National Wildlife Federation*, a five to four majority of the Court found that the National Wildlife Federation had failed to demonstrate that they had suffered a legal wrong, because their affidavits failed to allege harm to a sufficient level of detail and demonstrate a concrete agency action that caused the harm. 497 U.S. at 889–90. *National Wildlife Federation* does however recognize that injury to aesthetic enjoyment is sufficient for standing. *Id.* at 886. In *Defenders of Wildlife*, the Court further limited injury in fact by holding that the plaintiffs lacked standing because, in part, they failed to prove an imminent, judicially cognizable injury. 504 U.S. at 564, 571. Redressability and causation were not met because the relief sought would not redress the plaintiff's injury. *Id.* at 568. The case establishes that procedural injury is not sufficient for standing. *Id.* at 571–72. Additionally, the Court found that no animal, professional, or ecosystem "nexus" theory to demonstrate injury to the plain-

when the Supreme Court granted certiorari in *Bennett v. Spear*.[39] Although *Bennett* deals with more expansive issues than Article III standing,[40] the Court's holding in this area significantly affects animal welfare plaintiffs. Again authoring the majority opinion, Justice Scalia changed injury in fact analysis by finding that 1) only minimal evidence is required at the pleading stage to demonstrate injury in fact, and 2) general allegations of the injury are sufficient to satisfy the first prong of constitutional standing.[41] Departing from earlier decisions by lessening the standing burden, *Bennett* represents a profound change in judicial attitudes towards the doctrine. Perhaps recognizing an error in his previous analysis, Justice Scalia ushered in a new era of standing doctrine by writing the first Supreme Court decision that relaxed standing requirements.

Whereas the early 1990s wielded standing as a weapon against environmental plaintiffs,[42] lower court decisions leading up to and in the wake of *Bennett* illustrate that the trend is reversing.[43] As a result of this paradigm shift in standing analysis and the district court's decision in *ALDF v. Glickman*, animal welfare plaintiffs finally believed that "the courts ha[d] carved out a standing niche for organizational and individual plaintiffs."[44] The niche was not as encompassing as they might have hoped, however,

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tiffs. 504 U.S. at 565; *see also* Abraham, *supra* note 29, at 268–304 (discussing the approach to standing used by the Court in *National Wildlife Federation* and *Defenders of Wildlife*).

[39] 520 U.S. 154 (1997); *see* Lori Marks, *Spring 1997 Term:* Bennett v. Spear, 4 ENVTL. LAW. 285, 290 (1997).

[40] For example, the *Bennett* decision also addresses the requirements for prudential standing. 520 U.S. at 162–63. For a good analysis of the *Bennett* decision, see Marks, *supra* note 39.

[41] 520 U.S. at 168.

[42] Besides the *National Wildlife Federation* and *Defenders of Wildlife* decisions, AWA cases in the early 1990s also rejected standing for third-party plaintiffs suing USDA for failure to enforce the law. *See, e.g.*, International Primate Protection League v. Institute for Behavioral Research, Inc., 799 F.2d 934 (4th Cir. 1986); In Defense of Animals v. Cleveland Metroparks Zoo, 785 F. Supp. 100 (N.D. Ohio 1991); People for Ethical Treatment of Animals v. Institutional Animal Care & Use Comm. of Univ. of Or., 794 P.2d 1224 (Or. Ct. App. 1990).

[43] As third-party plaintiffs continued to file lawsuits, the standing doctrine continued to be reexamined. *See* Humane Soc'y of the United States v. Babbitt, 46 F.3d 93 (D.C. Cir. 1995) (stating in dicta that interference with the observation and study of animals may constitute injury in fact); Animal Legal Defense Fund, Inc. v. Glickman, 943 F. Supp. 44 (D.D.C. 1996) (finding that the individual plaintiffs demonstrated standing by alleging personal, direct, and continuous injuries in witnessing particular inhumane primate exhibits that 1) were fairly traceable to USDA's failure to promulgate regulations and 2) could be redressed by establishing those regulations), *vacated*, 130 F.3d 464 (D.C. Cir. 1997) (panel decision), *vacated*, 154 F.3d 326 (D.C. Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1454 (1999); Animal Legal Defense Fund v. Yeutter, 760 F. Supp. 923 (D.D.C. 1991) (holding that the plaintiffs' informational injury was sufficient for standing), *vacated*, Animal Legal Defense Fund, Inc. v. Espy, 23 F.3d 496 (D.C. Cir. 1994); *see also* Animal Legal Defense Fund, Inc. v. Espy, 29 F.3d 720, 726 (D.C. Cir. 1994) (Mikva, C.J., concurring) ("Had the [plaintiffs] alleged an interest in protecting the well-being of *specific* laboratory animals . . ., I think [the plaintiffs] would have had standing to challenge those regulations for providing insufficient protection to the animals.") (emphasis added). Here Judge Mikva is following the reasoning of Justice Scalia in *Defenders of Wildlife*, where injury to a particular animal would have been sufficient for injury in fact analysis. Mendelson, *supra* note 21, at 810–17.

[44] Mendelson, *supra* note 21, at 817.

when the government's appeal of the district court's decision was decided in 1997.

C. The Panel's Decision

1. Judge Sentelle's Opinion

The animosity directed toward the plaintiffs in the first *ALDF v. Glickman* appeal was evident from the opening lines of the three-judge panel's majority opinion. Describing the case as the "latest chapter in the ongoing saga of [ALDF's] effort to enlist the courts in its campaign to influence USDA's administration of the [AWA],"[45] it is not difficult to surmise what Judge Sentelle would conclude: Marc Jurnove and the other plaintiffs lacked standing to sue.[46] Rejecting the district court's analysis that had found standing for the individual plaintiffs and associational standing for ALDF, Judge Sentelle held that the plaintiffs had failed to satisfy the rigors of constitutional standing.[47]

a. Injury in Fact

Addressing injury in fact, the majority found that the plaintiffs had suffered a general injury.[48] Judge Sentelle's opinion of the case was evident; describing the effects of seeing primates living under inhuman conditions, the decision states that it may be "part of the price of living in society, perhaps especially in a free society, that an individual will observe conduct that he or she dislikes."[49] Quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*[50]—where the Court held that a psychological injury caused by observing conduct that is disagreeable is not sufficient for standing—the majority belittled the concerns of the plaintiffs.[51] The analogy between the two situations is insulting.[52] Mr. Jurnove's injury is more akin to the environmental aesthetic injury found sufficient in *National Wildlife Federation* than the injurious effects of observing disagreeable religious conduct. The harm done to a person observing a primate living under inhumane conditions sur-

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[45] Animal Legal Defense Fund, Inc. v. Glickman, 130 F.3d 464, 466 (D.C. Cir. 1997) (panel decision), *vacated*, 154 F.3d 426 (D.C. Cir 1998) (en banc), *cert. denied*, 119 S. Ct. 1454 (1999).

[46] *Id.* at 471.

[47] *Id.* at 466.

[48] *Id.* at 468.

[49] *Id.*

[50] 454 U.S. 464 (1982).

[51] *ALDF v. Glickman*, 130 F.3d at 468 (quoting *Valley Forge Christian College*, 454 U.S. at 485).

[52] The majority's comparison between the injury resulting from observing religious conduct and injury resulting from observing primates living under inhumane conditions ignores precedent and common sense. *See* Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1007 (D.C. Cir. 1977). It is insulting to any scientist, recreational viewer, or animal rights activist to reason that an emotional injury caused by viewing an animal genetically similar to humans being treated inhumanely is akin to a philosophical injury resulting from one's interpretation of the First Amendment.

passes the injury caused by reading about conduct that offends one's concept of the Establishment Clause.

Nonetheless, focusing on the psychological distress element of Mr. Jurnove's injury claim,[53] the majority expressed doubt that the individual plaintiffs had demonstrated a cognizable injury in fact.[54] The majority, however, "assum[ed]" the plaintiffs had demonstrated an injury in fact for the purposes of Article III.[55]

b. Causation

In "'a breathtaking attack on the legitimacy of virtually all judicial review of agency action,'"[56] the majority of the panel denied standing based on Mr. Jurnove's inability to allege causation and redressability. Beginning with causation, the majority concluded that the plaintiffs' claims were not fairly traceable to USDA's failure to promulgate the minimum standards required by the AWA.[57] Noting that no case law supported the causal nexus between agency inaction and the asserted injury, the court found that the alleged connection was "attenuated" and insufficient.[58] The court disagreed "that a regulation which permits third parties to engage in offensive behavior, but does not require them to do so, may fairly be said to cause an injury resulting from the behavior of the third parties."[59] The permissive regulation does not have the "'determinative or coercive effect' on the third parties which would render the alleged injuries fairly traceable to governmental action."[60] Rejecting causation in this manner, the majority effectively eliminated third-party challenges to federal agencies. Limiting causation to agency action that directly compels offensive behavior in a regulated entity, Judge Sentelle made an error in judgment that would lead to the grant of rehearing.[61]

c. Redressability

Addressing redressability, the court concluded that the plaintiffs had failed to meet their burden of showing it is "likely" the relief they sought

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[53] *ALDF v. Glickman*, 130 F.3d at 468.

[54] On the contrary, this was not a case in which plaintiffs alleged mere psychological injury because they disagree with the way USDA has chosen to implement the 1985 Amendments to the AWA. This distinguishes *ALDF v. Glickman* from *Valley Forge Christian College*. Here, Mr. Jurnove identified a "personal injury" that he suffered "as a consequence" of USDA's violation of its statutory mandate to set standards to promote the psychological well being of primates. *See* Plaintiffs-Appellees' Supplemental *In Banc* Brief at 2, *ALDF v. Glickman* (No. 97-5031).

[55] 130 F.3d at 468.

[56] Plaintiffs-Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc* at 11, *ALDF v. Glickman* (No. 97-5009) (quoting Akins v. Federal Elections Comm'n, 101 F.3d 731, 736 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998)).

[57] 130 F.3d at 468.

[58] *Id.* at 469.

[59] *Id.*

[60] *Id.* (quoting Bennett v. Spear, 520 U.S. 154, 169 (1997)).

[61] *See infra* Part II.C.3.

will alleviate the alleged injury.[62] Discrediting their claim, the court found that the plaintiffs "were not entirely clear as to how any such alleviation would be accomplished."[63] The majority also noted that no judicial action could "obliterate[ ]" Mr. Jurnove's "painful memories" of seeing the primates in inhumane conditions.[64] However, the majority opinion mischaracterizes Mr. Jurnove's asserted injury and the requested relief.[65] Mr. Jurnove wants to study and observe the primates under humane conditions; he would be able to do so (and therefore receive redress) if he prevailed on the merits. Although Mr. Jurnove recounted how he is "haunted" by the memory of the events at the Game Farm,[66] he never asserts this as his injury. Rather, Mr. Jurnove's uncontested affidavit states that his injury resulted from his inability to "observe, study, and enjoy [the] animals in humane conditions."[67] Mr. Jurnove's claims were thereby dismissed through mischaracterization[68] and because he could not prove the impossible.

The majority opinion also denied ALDF's alleged associational standing for its notice and comment claim, finding that the organization's "predicament is shared by many others, indeed by the world at large."[69] Ignoring the fact that ALDF qualifies as an "interested person[ ]" for the sake of the APA,[70] the majority undermined the remedial purposes of the statute by denying persons to whom Congress granted a legal right an opportunity to remedy a violation of that right. Rather, the majority reasoned that ALDF failed to show that there was any particularized effect of the general injury caused to them by USDA's failure to promulgate adequate standards for primates in roadside zoos.[71]

The concept that standing doctrine was evolving to allow third-party plaintiffs entrance to court seemed but an illusion. However, this time there was a difference. Set against this restrictive interpretation of standing law,[72] Judge Wald dissented from the majority of the panel and wrote a

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62 130 F.3d at 469.

63 *Id.*

64 *Id.* at 470.

65 *See* Plaintiffs-Appellees' Supplemental *In Banc* Brief at 5, *ALDF v. Glickman* (No. 97-5031).

66 130 F.3d at 469–70.

67 Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 426, 432 (D.C. Cir 1998) (en banc) (quoting Affidavit of Marc Jurnove, para. 43), *cert. denied*, 119 S. Ct. 1454 (1999).

68 The plaintiffs argued for USDA's regulations interpreting section 2143 of the AWA to be set aside. "[R]edressability is present '[i]f a reviewing court agrees that the agency misinterpreted the law, [because] it will set aside the agency's action and remand the case.'" Respondents' Brief in Opposition to Petition for Writ of Certiorari at 18, National Ass'n for Biomedical Research v. Animal Legal Defense Fund, Inc., 119 S. Ct. 1454 (1999) (No. 98-1059) (quoting Federal Elections Comm'n v. Akins, 524 U.S. 11, 25 (1998)).

69 *ALDF v. Glickman*, 130 F.3d at 471 (panel decision).

70 *See* 5 U.S.C. § 553 (1994).

71 130 F.3d at 471.

72 Although it can be argued that Judge Sentelle's analysis was conservative, this interpretation fails to recognize that the majority radically departed from standing jurisprudence when it rewrote standing law to exclude a whole class of plaintiffs. *See supra* notes 56–61

dissent that would bring animal welfare groups one step closer to an unprecedented legal victory.[73]

2. Judge Wald's Dissent

In an artfully scripted, legally compelling dissent, Judge Wald recalled the words of Justice Douglas, who argued that

> [T]he critical question of "standing" [in environmental cases] would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded.[74]

Recognizing the validity of this theory and realizing that *ALDF v. Glickman* did not require a holding as drastic as granting animals themselves standing (as Justice Douglas seemed to be alluding to), Judge Wald found that Mr. Jurnove "more than met the requirements for standing."[75]

The difference for Judge Wald lies more in her approach to the issue rather than a different interpretation of the facts. Explaining the majority's causation and redressability analysis, the dissent states that "the majority opinion has strayed from a reasonable interpretation of standing requirements under Supreme Court and our circuit's law."[76] Using cases the majority ignored,[77] Judge Wald found injury in fact met by Mr. Jurnove's affidavit that "describes in great detail how conditions at the Game Farm directly impair his well-established and lifelong aesthetic interest in . . . seeing these animals in a humane environment."[78]

The dissent concludes that Mr. Jurnove also alleged causation and redressability, recognizing the "Catch-22" that the majority opinion imposes.[79] First, the dissent rejects the restricted reading of causation espoused by the majority.[80] With a more expansive view of causation, Judge Wald found that the affidavit "makes clear" that the conditions at the Game Farm persisted precisely because USDA failed to enact sufficiently stringent regulations.[81] Second, the dissent questions the majority's rejection of redressability.[82] Calling the requirement a "Catch-22," Judge Wald

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and accompanying text. However, I would hesitate to describe it as activist, because it limits access to the courts.

[73] *See infra* Part III.

[74] 130 F.3d at 476 (Wald, J., dissenting) (quoting Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting)) (alterations in original).

[75] *Id.* at 473.

[76] *Id.* at 471.

[77] *Id.* The dissent discusses two cases in particular. *See* Animal Welfare Inst. v. Kreps, 561 F.2d 1002 (D.C. Cir. 1977); Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986). In addition, Judge Wald pointed to the concurrence from *Animal Legal Defense Fund, Inc. v. Espy*, which recognized a person's interest in seeing animals free from inhumane treatment. 23 F.3d 496, 505 (D.C. Cir. 1994).

[78] *ALDF v. Glickman*, 130 F.3d at 473 (Wald, J., dissenting).

[79] *Id.* at 474.

[80] *Id.*

[81] *Id.*

[82] *See supra* notes 62–64 and accompanying text.

explained that the majority opinion asked for the impossible.[83] Mr. Jurnove cannot get access to the Game Farm plan explaining how they have implemented USDA regulations.[84] Therefore, he cannot know if they are in violation.[85] Following an established line of precedent,[86] the dissent concludes that redressability was met because Mr. Jurnove stated in his affidavit that he planned to return to the Game Farm in the future.[87] Finally, discussing the prudential element of standing—not discussed by the majority—Judge Wald concluded that, based on "logic, legislative history, and the structure of the AWA," Mr. Jurnove fell within the zone of interests protected under the AWA's provisions on animal exhibitions.[88]

3. The Petition for Rehearing

How is it possible that the same affidavit can be found sufficient for standing at the district court and then be interpreted two different ways on appeal? The answer lies not in the facts alleged or even the cases offered for support, but rather on the philosophy of the judges. The tone of the majority and dissenting opinion in the *ALDF v. Glickman* panel decision makes this point aptly. It was not the specificity of the affidavits that made the difference, but rather the judges' competing concepts of the standing doctrine.[89] As Judge Wald concluded, "it is striking, particularly in a world in which animals cannot sue on their own behalf, how far the majority opinion goes towards making governmental action that regulates the lives of animals, and determines the experience of people who view them in exhibitions, unchallengable."[90] It was not because "such a result offends the compassionate purposes of the statute"[91] that lead to the grant

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[83] 130 F.3d at 474–75.

[84] *Id.* at 474.

[85] *Id.* at 474–75.

[86] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 562–63 (1992).

[87] "More stringent regulations, that prohibit the inhumane conditions that have consistently caused Mr. Jurnove aesthetic injury in the past, will necessarily improve his aesthetic experience during his planned, future trips to the Game Farm." *ALDF v. Glickman*, 130 F.3d at 475 (Wald, J., dissenting).

[88] *Id.* at 476; *see also id.* at 474–75 (discussing in detail the prudential elements of standing).

[89] When it comes to third-party plaintiff standing, the history of Judge Sentelle's decisions compared to Judge Wald's is telling. Especially with regards to environmental third-party plaintiffs, Judge Sentelle has consistently held that the plaintiffs lacked standing. *See, e.g.*, Florida Audubon Soc'y v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996); Louisiana Envtl. Action Network v. Browner, 87 F.3d 1379 (D.C. Cir. 1996); Animal Legal Defense Fund, Inc. v. Espy, 29 F.3d 720 (D.C. Cir. 1994) (Henderson, C.J., joining). On the other hand, Judge Wald has taken a more expansive approach to third-party standing, as demonstrated by her decisions in standing cases. *See, e.g.*, Competitive Enter. Inst. v. National Highway Traffic Safety Admin., 901 F.2d 107 (D.C. Cir. 1990); Center for Auto Safety v. Thomas, 847 F.2d 843 (D.C. Cir. 1988); Humane Soc'y of the United States v. Hodel, 840 F.2d 45 (D.C. Cir. 1988); National Wildlife Fed'n v. Hodel, 839 F.2d 694 (D.C. Cir. 1988).

[90] *ALDF v. Glickman*, 130 F.3d at 476 (Wald, J., dissenting). *Compare id., with supra* note 43 and accompanying text.

[91] 130 F.3d at 476.

of a rehearing en banc, but rather, as Judge Wald recognized, because "our precedents do not require" such an impracticable result.[92]

An overriding factor in the decision to grant the rehearing was a concern that the panel opinion written by Judges Sentelle and Henderson was far too sweeping regarding causation and redressability.[93] Taken to its logical extreme, the decision sounded the "death knell"[94] for a majority of the cases brought under the APA, as the only party with standing to sue an agency under the majority's scheme are the regulated entities themselves and not third parties. Abutting Supreme Court precedent that third-party plaintiffs can have standing with several "novel barriers,"[95] the court had no choice but to grant the plaintiffs' petition for a rehearing.[96]

The plaintiffs' petition for rehearing focused on the following two issues: 1) the majority's conflict with Supreme Court and circuit precedent and 2) the inability of anyone other than a directly regulated entity to seek judicial review of an agency's failure to comply with a statutory command to issue regulations.[97] The plaintiffs asserted that the majority's broad "foreclos[ure]" to challenge agency action that permits offensive behavior "is simply not the law of standing as established by the Supreme Court and this Court."[98] In compelling fashion, the plaintiffs cited to a case authored by Judge Sentelle three years earlier that acknowledged that "fairly traceable" is the proper standard for reviewing causation.[99] Further, the causation in *ALDF v. Glickman* was more direct than in other cases where the Supreme Court had found standing.[100] The majority's conclusions to the contrary were "completely at odds" with *Bennett v. Spear*, where the Court found that "such an analysis 'wrongly equates injury "fairly traceable" to the defendant with injury as to which the defendant's actions are the last step in the chain of causation.'"[101] Finally, the plaintiffs argued that the majority's causation analysis directly conflicts with a number of other circuit decisions regarding standing.[102]

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[92] *Id.*

[93] Plaintiffs-Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc* at 9, *ALDF v. Glickman* (No. 97-5009).

[94] Telephone Interview with Katherine A. Meyer, Attorney for the *ALDF v. Glickman* Plaintiffs (Jan. 13, 1999).

[95] Plaintiffs-Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc* at 1, *ALDF v. Glickman* (No. 97-5009).

[96] *Id.* at 15.

[97] *Id.* at 7, 12.

[98] *Id.* at 7. "Rather, the test of causation is whether the plaintiff's injuries are 'fairly traceable' to the challenged agency action . . . ." *Id.* (quoting Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471–72 (1982)).

[99] *Id.* at 7–8 (citing Telephone & Data Sys., Inc. v. Federal Communications Comm'n, 19 F.3d 42, 47 (D.C. Cir. 1994) (Sentelle, J.)).

[100] *Id.* at 8; *see* Bennett v. Spear, 520 U.S. 154 (1997); Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978).

[101] Plaintiffs-Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc* at 9, *ALDF v. Glickman* (No. 97-5009) (quoting *Bennett*, 520 U.S. at 168).

[102] *Id.* at 10; *see* Mausolf v. Babbitt, 85 F.3d 1295, 1302 (8th Cir. 1996); Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 558 (5th Cir. 1996); Chiles v. United States, 69 F.3d 1094,

The petition also asserted that the majority's redressability analysis conflicted with Supreme Court and circuit court law.[103] In particular, the plaintiffs cited two Supreme Court cases rejecting the argument made by the panel majority in *ALDF v. Glickman*. First, in *Federal Elections Commission v. Akins*,[104] as previously argued in this note,[105] the Court "rejected the argument . . . that, to demonstrate redressability, a plaintiff must produce conclusive evidence that the defendant agency would actually enforce its binding regulations against the regulated third parties."[106] Second, the Supreme Court recognized in 1978 that "'[n]othing . . . requires a party seeking to invoke federal jurisdiction to negate . . . speculative and hypothetical possibilities,'"[107] yet the majority required this of Mr. Jurnove.

In conclusion, the plaintiffs illustrated the broad implications the majority's opinion would have had on standing analysis. Arguing that the panel's causation and redressability analysis "'would virtually end judicial review of agency action,'"[108] the plaintiffs cited dozens of cases decided by the D.C. Circuit that would no longer be heard based on the panel majority's holding in *ALDF v. Glickman*.[109] Based on the "drastic narrowing of judicial review of agency action" changing "this Court's fundamental and historic role in reviewing agency action," the plaintiffs argued for consideration by the full court of appeals.[110] Answering the question—"'[i]f people who love animals, and love to visit and enjoy them in captivity, have no standing to ensure that USDA follows Congress's command, who

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1096 (11th Cir. 1995); Sierra Club v. Marita, 46 F.3d 606, 611–13 (7th Cir. 1995); Idaho Conservation League v. Mumma, 956 F.2d 1508, 1518 n.19 (9th Cir. 1992); Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 646 (6th Cir. 1991); Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 70–73 (3d Cir. 1990).

[103] Plaintiffs-Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc* at 10, *ALDF v. Glickman* (No. 97-5009).

[104] 524 U.S. 11 (1998).

[105] *See infra* Part II.C.1.c.

[106] Plaintiffs-Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc* at 11, *ALDF v. Glickman* (No. 97-5009).

[107] *Id.* at 12 (quoting Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 78 (1978)) (alterations in original).

[108] *Id.* (quoting Akins v. Federal Elections Comm'n, 101 F.3d 731, 738 (D.C. Cir. 1996), *vacated on other grounds*, 524 U.S. 11 (1998)).

[109] *See* International Union, United Auto. v. Occupational Safety & Health Admin., 37 F.3d 665 (D.C. Cir. 1994); *In re* International Chem. Workers Union, 958 F.2d 1144 (D.C. Cir. 1992); American Fed'n of Labor v. Occupational Safety & Health Admin., 905 F.2d 1568 (D.C. Cir. 1990); Kokechik Fishermen's Ass'n v. Secretary of Commerce, 839 F.2d 795 (D.C. Cir. 1988); Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 824 F.2d 1146 (D.C. Cir. 1987) (en banc); Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981); National Congress of Hispanic American Citizens v. Marshall, 626 F.2d 882 (D.C. Cir. 1979); Organized Migrants in Community Action, Inc. v. Brennan, 520 F.2d 1161 (D.C. Cir. 1975).

[110] Plaintiffs-Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc* at 13–14, *ALDF v. Glickman* (No. 97-5009).

does?'"[111]—the court granted the plaintiffs' petition for a rehearing en banc four months and a day after the panel's decision.

III. *ALDF v. Glickman*: The Decision Animal Welfare Plaintiffs Have Been Waiting For

The recognition that under the current state of standing law not one party has standing to challenge USDA regulations implementing the AWA provisions on animal exhibitions[112] was a long time coming. The problem remained that this realization was made in a dissenting opinion. The rehearing en banc, compelled by the language of Judge Wald and the veracity of the majority opinion, was decided on September 1, 1998.[113] The court's holding represents a radical departure from previous AWA cases. *ALDF v. Glickman* "'is a landmark decision for anyone concerned about promoting humane treatment for animals.'"[114] It establishes the precedent that when federal agencies fail to protect animals, citizens can go to court and seek a legal remedy.[115] In a decision that finally allows third-party plaintiffs to sue USDA on the merits of their claims,[116] the court renewed old battles, and the standing doctrine and the AWA will never be the same again.

A. The Majority Opinion

Writing for seven members of the twelve member court,[117] Judge Wald expounded upon the groundwork she laid in the panel dissent and persuaded a majority of the United States Court of Appeals for the District of Columbia to hold that Mr. Jurnove met all three elements of Article III standing and fell within the zone of interests protected by the AWA (thus satisfying prudential standing requirements).[118] Since each conclusion of the majority opinion is of considerable interest, each is discussed in sequence below.

1. Injury in Fact

Beginning with a detailed account of the facts and allegations asserted in Mr. Jurnove's affidavit,[119] which were left out of the panel's ma-

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111 *Id.* at 14 (quoting Amicus Brief of Jane Goodall Inst. at 20, *ALDF v. Glickman* (No. 97-5009)) (alteration in original).

112 *See id.* (discussing the statement of government counsel at oral argument).

113 Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 326, 326 (D.C. Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1454 (1999).

114 *The Animals' Advocate* (ALDF, Petaluma, Cal.), Fall 1998, at 1 (quoting Valerie Stanley, ALDF senior staff attorney).

115 *See* 154 F.3d at 445.

116 *Id.*

117 Joining Judge Wald in the majority were Chief Judge Edwards, and Circuit Judges Williams, Randolph, Rogers, Tatel, and Garland. The dissent was written by Judge Sentelle and joined by Circuit Judges Silberman, Ginsberg, and Henderson.

118 154 F.3d at 445.

119 *Id.* at 429–30.

jority opinion,[120] the en banc majority first tackled the issue of injury in fact. From the outset, the analysis in the en banc opinion was different from that in the panel opinion, as Judge Wald cited to *Bennett v. Spear* and *Defenders of Wildlife* for her discussion of the elements of standing.[121] Besides utilizing the most recent Supreme Court decisions on standing, the reason these cases were used derives from Judge Wald's philosophy of the standing doctrine. Analyzing standing using cases that expand the doctrine rather than those from a period where the judiciary was erecting new hurdles to limit it,[122] the en banc *ALDF v. Glickman* opinion begins on sounder legal footing than its predecessor and continues the trend begun in *Bennett*.

Finding that Mr. Jurnove alleged more than an abstract injury by making it "clear that he has an aesthetic interest in seeing exotic animals living in a nurturing habitat,"[123] the majority found that injury in fact was met based on three legal principles. First, following the reasoning of *Defenders of Wildlife*, injury to the aesthetic interest in the observation of animals is sufficient to satisfy Article III standing.[124] Rejecting a reading of *Humane Society of the United States v. Hodel*[125] that would hold that standing is only satisfied if an animal population faces extinction, the majority concluded that observing animals in inhumane conditions is a "'classic aesthetic interest, which ha[s] always enjoyed protection under standing analysis.'"[126] Second, described as the "key requirement," Mr. Jurnove "suffered his injury in a personal and individual way—for instance, by seeing with his own eyes the particular animals whose condition caused him aesthetic injury."[127] Third, the majority pointed to precedent holding that "people have a cognizable interest in 'view[ing] animals free from . . . "inhumane treatment."'"[128] Whether the inhumane treatment is life threatening is moot because prior cases never distinguished between injury to

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[120] *See* Animal Legal Defense Fund, Inc. v. Glickman, 130 F.3d 464, 465–71 (D.C. Cir. 1997) (panel decision), *vacated*, 154 F.3d 326 (D.C. Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1454 (1999).

[121] 154 F.3d at 431 (en banc).

[122] *Compare id.*, *with* 130 F.3d at 467–68 (panel decision) (using cases from as early as 1984).

[123] 154 F.3d at 432 (en banc).

[124] *Id.*

[125] 840 F.2d 45, 42 (D.C. Cir. 1988).

[126] 154 F.3d at 434 n.6 (quoting *Humane Soc'y of the United States*, 840 F.2d at 42). Under any other analysis, "a court could never hear the case of persons who complained of harm to a particular national park they frequented unless the government action would result in destroying *all* national parks." Respondents' Brief in Opposition to Petition for Writ of Certiorari at 13, National Ass'n for Biomedical Research v. Animal Legal Defense Fund, Inc., 119 S. Ct. 1454 (1999) (No. 98-1059).

[127] *ALDF v. Glickman*, 154 F.3d at 433. This reasoning follows from another recent Supreme Court case. *See* Federal Elections Comm'n v. Akins, 524 U.S. 11 (1998).

[128] *ALDF v. Glickman*, 154 F.3d at 433 (quoting Humane Soc'y of the United States v. Babbitt, 46 F.3d 93, 99 n.7 (D.C. Cir. 1995) (quoting Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1007 (D.C. Cir. 1977))) (alterations in original).

aesthetic interests "based on the quality of animal life and those based on the number of animals in existence."[129]

Supporting these three principles, the majority discussed why other environmental plaintiffs had failed to achieve standing and what set this case apart. Citing *Sierra Club v. Morton*[130] and *National Wildlife Federation*, the majority compared Mr. Jurnove's aesthetic injury to those that failed to meet the standing requirements in those cases.[131] The reasons setting Mr. Jurnove's affidavit apart are two-fold. First, Mr. Jurnove established his previous relationship with the primates by his nine prior visits to observe the animals.[132] Second, his visits will continue despite his decreased aesthetic enjoyment, demonstrating his intent to observe the primates living at the Game Farm again.[133] These facts distinguish *Sierra Club v. Morton* and *National Wildlife Federation*, where it was the "failure to show such direct use that has resulted in the denial of standing in [those] high-profile environmental cases."[134]

Judge Wald also addressed the concern posed by the dissent that an aesthetic interest in observing animals living under humane conditions cannot be judicially recognized because of the various interpretations of what "humane" means.[135] To do so, the majority illustrated what makes this injury possible—the fact that the suit involved a challenge based on the AWA. The AWA "is explicitly concerned with the quality of animal life, rather than the number of animals in existence"[136]; therefore, it does not matter whether there are differing definitions of "humane" or that the animals do not face extinction, because the statute is clear.

> '[W]here an act is expressly motivated by considerations of humaneness towards animals, who are uniquely incapable of defending their own interests in court, it strikes us as eminently logical to allow groups specifically concerned about animal welfare to invoke the aid of the courts . . . ' [when] government action . . . leaves some animals in a persistent state of suffering.[137]

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129 *Id.* at 433 n.5. The majority continued, finding that no case established "that the elimination of a species or even the deaths of particular animals is an indispensable element of the plaintiff's aesthetic injury." *Id.* at 437. Moreover, "standing cases that do stress the threat of diminished animal populations were those brought under" the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531–1544 (1994), such as *Defenders of Wildlife*. 154 F.3d at 437. Certainly, as a matter of common sense, it would be unthinkable that there would be standing to challenge government actions that eliminate a species, but not to challenge those actions that leave animals in a state of suffering.

130 405 U.S. 727 (1972).

131 *ALDF v. Glickman*, 154 F.3d at 435–36 (citing Sierra Club v. Morton, 405 U.S. at 734, and Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990)).

132 *Id.* at 429.

133 *Id.* at 430.

134 *Id.* at 435.

135 *Id.* at 434 n.7 (discussing the dissent of Sentelle, J., *id.* at 448–49).

136 *Id.* at 438.

137 *Id.* (quoting Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1007 (D.C. Cir. 1977)).

By describing "both the animal exhibition that he regularly visits, and the specific animals there whose condition caused [the] injury,"[138] Mr. Jurnove met the injury in fact element of Article III standing.

2. Causation

Having satisfied the first prong of standing, Judge Wald turned to the facts Mr. Jurnove alleged for causation. Causation is established "when a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries, if that conduct would allegedly be illegal otherwise."[139] The challenged action need not directly cause the injury; an indirect result also satisfies causation.[140] Therefore, proper analysis turns on "what the agency did and what the plaintiffs allege the agency should have done under the statute."[141] Mr. Jurnove's affidavit specifically met this requirement by 1) alleging that USDA failed to adopt the specific minimum standards the AWA requires, 2) describing how the conditions that caused him injury complied with current USDA regulations, and 3) alleging that regulations in compliance with the AWA would have prohibited those conditions and protected him from the injuries the affidavit recounts.[142]

Most striking about the majority's analysis is not that causation was found, but the stark difference between Judge Sentelle's analysis in the panel decision and Judge Wald's analysis in the en banc decision. Perhaps the most effective part of her reasoning is that Judge Wald walked through the affidavit, matching its complaints to the provisions of the AWA that are supposed to prevent such injuries.[143] In so doing, she made the causal connection that Judge Sentelle found lacking.[144] Finally, in response to Judge Sentelle's challenge in the panel opinion that "we are aware of no cases . . . in which the government was said to have *caused* a constitutional injury by failing to issue regulations that would have forbidden third parties from engaging in conduct that caused a plaintiff's injury,"[145] Judge Wald cited two pages of case law that supported her conclusion that causation was established.[146]

Judge Wald supported her reasoning using Supreme Court precedent finding causation when the challenged agency action authorizes the otherwise unlawful conduct that caused the plaintiffs' injures.[147] This is well-established case law.[148] Although the dissent claims the majority uses the

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138 *Id.*

139 *Id.* at 440.

140 *Id.* at 441 (citing National Wildlife Fed'n v. Hodel, 839 F.2d 694, 705 (D.C. Cir. 1988)).

141 *Id.*

142 *Id.* at 443.

143 *Id.* at 439–40.

144 *See ALDF v. Glickman*, 130 F.3d at 469 (panel decision).

145 *Id.*

146 *ALDF v. Glickman*, 154 F.3d at 442–43 (en banc).

147 *Id.* at 440.

148 Plaintiffs-Appellees' Supplemental *In Banc* Brief at 7, *ALDF v. Glickman* (No. 97-5031); *see* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 45 n.25 (1976); Investment

term "authorize" too loosely,[149] the majority's reading is supported by a recent Supreme Court case, *National Credit Union Administration v. First National Bank & Trust Co. (National Credit)*.[150] In *National Credit*, the Court found that even though "the government 'permitted,' but did not 'require,' a third party to engage in conduct that resulted in injuries to the plaintiff," there is no causation problem.[151] In this similar case, Mr. Jurnove complained that his injuries resulted from the government's unlawful decision to allow regulated entities to operate in a manner that would not be allowed if USDA carried out its statutory mandate. There is no causation problem for Mr. Jurnove, as "this case is fundamentally no different from the plethora of other cases in which plaintiffs challenge government agencies for failing to carry out a Congressional mandate to regulate third parties."[152]

3. Redressability

The final element of Article III standing was satisfied by the specificity of Mr. Jurnove's affidavit and recent Supreme Court precedent. First, by alleging that he regularly visits the Game Farm and by providing a finite period of time within which he will make his next visit, Mr. Jurnove's affidavit demonstrates that more stringent regulations "would necessarily alleviate [his] aesthetic injury during his planned, future trips to the Game Farm."[153] This fact alone is sufficient for standing based on the holding in *Steel Co. v. Citizens for a Better Environment*,[154] where the court observed that "had the plaintiffs been able to demonstrate a *continuing* injury, their claims would have been redressable."[155]

Second, Judge Wald used the decision in *Akins* to dispel the logic used by Judge Sentelle in the panel's opinion to deny redressability. In the panel decision, Judge Sentelle had argued that because the plaintiffs had "no power to compel the exhibitors" to keep the primates in humane conditions, the injuries were not likely to be redressed by compelling USDA to promulgate new regulations.[156] However, *Akins* rejects the requirement of proving that agency action will necessarily alleviate the injury.[157] In

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Co. Inst. v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970); Telephone & Data Sys., Inc. v. Federal Communications Comm'n, 19 F.3d 42, 47 (D.C. Cir. 1994); National Wildlife Fed'n v. Hodel, 839 F.2d 694 (D.C. Cir. 1988); International Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 811 (D.C. Cir. 1983); Animal Welfare Inst. v. Kreps, 561 F.2d 1002 (D.C. Cir. 1977).

149 *ALDF v. Glickman*, 154 F.3d at 451 (Sentelle, J., dissenting).

150 522 U.S. 479 (1998).

151 Plaintiffs-Appellees' Supplemental *In Banc* Brief at 6, *ALDF v. Glickman* (No. 97-5031) (discussing the holding of *National Credit*).

152 *Id.* at 10.

153 *ALDF v. Glickman*, 154 F.3d at 443 (Wald, J., writing for the majority).

154 523 U.S. 83 (1998).

155 Plaintiffs-Appellees' Supplemental *In Banc* Brief at 1, *ALDF v. Glickman* (No. 97-5031) (discussing the holding of *Steel Co.*).

156 *ALDF v. Glickman*, 130 F.3d at 470 (panel decision).

157 Federal Elections Comm'n v. Akins, 524 U.S. 11, 25–26 (1998).

Akins, the Court based its decision on the finding that "'[a]gencies often have discretion about whether or not to take a particular action. Yet those adversely affected by a discretionary agency decision generally have standing to complain that the agency'"[158] acted improperly. Considering the impropriety of plaintiffs not being able to challenge government action unless they could prove the agency would act in the particular way they needed, *Akins* compels the holding of *ALDF v. Glickman*.

Past Supreme Court precedent supports Judge Wald's finding as well. In *Meese v. Keene*,[159] the Court held that the relief sought only has to "partially address" the alleged injury for redressability to be met.[160] Mr. Jurnove "'want[s] to observe, study, and enjoy these animals in humane conditions.'"[161] If he "prevails on the merits, entities subject to the AWA . . . will no longer be permitted to house primates in isolation without a physical environment that promotes their well-being."[162] As such, Mr. Jurnove's affidavit satisfies all three elements of Article III standing.

4. Prudential Standing

Having satisfied Article III standing, Mr. Jurnove also had to fall within the zone of interests of the statute under which he was suing. Expanding on her dissent in the panel decision, where Judge Wald had argued that "logic, legislative history and the structure of the AWA"[163] indicate that Mr. Jurnove falls within the Act's zone of interests, the majority pointed to case law arguing that "'[c]ourts should give broad compass to a statute's zone of interests in recognition that this test was originally intended to *expand* the number of litigants able to assert their rights in court.'"[164] The majority concluded that Mr. Jurnove also satisfied non-Article III standing because of the expansive purposes of the AWA and the zone of interests test.[165]

Relying on the congressional intent "to ensure . . . that adequate safeguards are in place to prevent unnecessary abuses to animals,"[166] the majority found that Mr. Jurnove had standing to sue. The plaintiffs achieved victory neither due to Mr. Jurnove's affidavit nor the precedent that litigants such as Mr. Jurnove should have access to the courts. Rather, these elements effectuated what standing doctrine had only hitherto hinted at—that animal welfare plaintiffs have standing to sue federal agencies that fail to protect animals. As with most legal victories, this one was not abso-

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158 *ALDF v. Glickman*, 154 F.3d at 444 (en banc) (quoting *Akins*, 524 U.S. at 25).

159 481 U.S. 465 (1987).

160 *Id.* at 476; *see* Plaintiffs-Appellees' Supplemental *In Banc* Brief at 4, *ALDF v. Glickman* (No. 97-5031).

161 154 F.3d at 432 (quoting Affidavit of Marc Jurnove, para. 43).

162 Plaintiffs-Appellees' Supplemental *In Banc* Brief at 4, *ALDF v. Glickman* (No. 97-5031).

163 *ALDF v. Glickman*, 130 F.3d at 476 (panel decision) (Wald, J., dissenting).

164 *ALDF v. Glickman*, 154 F.3d at 444 (en banc) (quoting Autolog Corp. v. Regan, 731 F.2d 25, 29–30 (D.C. Cir. 1984)).

165 *Id.* at 445.

166 *Id.* (quoting 131 CONG. REC. 29,153, 29,155 (Oct. 25, 1985) (statement of Sen. Dole)).

lute. Although a major hurdle had been cleared, Mr. Jurnove had to withstand the dissent of an old foe who wrote with anticipation of Supreme Court review.

B. The Dissent

The message is simple: "Because I believe the majority significantly weakens existing requirements of constitutional standing, I dissent."[167] With these words, Judge Sentelle and three other members of the D.C. Circuit Court of Appeals set out to return animal rights litigation to the status quo. However, the dissent's argument is undercut by its emphasis on policy and its focus towards the next appeal rather than the one before it.

The lofty tone is apparent from the start. "It is therefore imperative to exercise prudence when deciding a case—like the case before us today."[168] The dissenting judges argued that the majority did not use prudence, but instead "'employ[ed] untethered notions of what might be good public policy to expand our jurisdiction in an appealing case.'"[169] Beginning with different interpretations of the cases used by the majority to find injury in fact,[170] the dissent is content to leave the standing doctrine where it found it and not advance the law. This is evidenced by the dissent's argument that Mr. Jurnove's "asserted injuries are not 'traditionally thought to be capable of resolution through the judicial process.'"[171] However, finding standing does not require judicial activism. Rather, standing doctrine has been evolving over the past decade.[172] *ALDF v. Glickman* is a logical outgrowth of standing doctrine, not an aberration based on a naïve desire to right a wrong in an "appealing case."

1. Injury in Fact

"Aesthetic injury is, by its nature, a matter of individual taste."[173] Describing Mr. Jurnove's injury as "purely subjective,"[174] because "[h]umaneness, like beauty, is in the eye of the beholder,"[175] the dissent argues that the injury cannot be measured by any discernible concrete particularized standard, making it unfit for standing.[176] In an effort to prove this point, the dissent draws a comparison between "humaneness"

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[167] *Id.* at 446 (Sentelle, J., dissenting).

[168] *Id.*

[169] *Id.* at 447 (quoting Whitmore v. Arkansas, 495 U.S. 149, 161 (1990)).

[170] Describing the majority opinion as a "departure from existing aesthetic injury jurisprudence" the dissent asserts that the majority "misleadingly suggests" the wrong result from *Defenders of Wildlife* and *Animal Welfare Institute*. *Id.* at 447.

[171] *Id.* at 450 (quoting Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).

[172] *See supra* Part II.

[173] *ALDF v. Glickman*, 154 F.3d at 448 (Sentelle, J., dissenting).

[174] *Id.* at 449.

[175] *Id.* at 448.

[176] *Id.* at 450.

and the definition of "best possible legislative product."[177] Since value judgments cannot satisfy standing, Judge Sentelle reasoned that "humaneness" was a case of first impression. Having never "been asked before to find standing where the sole alleged injury is an interference with the aesthetic taste of the plaintiff,"[178] the dissent rejects Mr. Jurnove's injury. However, this analysis overlooks precedent and common sense.[179]

Whether there has been a case where the alleged injury was solely aesthetic is moot based on *Akins*. *Akins* modifies general injury by holding that if an injury suffered by many people has a particular effect on a person, that person has standing to sue.[180] Here, aesthetic injury derived from seeing primates living under inhumane conditions presumably affected many at the Game Farm. However, due to Mr. Jurnove's knowledge of and interest in animals, he was affected more than other visitors. As such, his injury falls within the purview of *Akins*. The dissent does not discuss *Akins*.[181] As the majority opinion illustrates, "the fact that many share an aesthetic interest does not make it less cognizable, less 'distinct and palpable.'"[182] After all, "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that that the most injurious and widespread government actions could be questioned by nobody."[183]

Humaneness is not as subjective as the dissent argues. In fact, numerous legislative provisions, including state anticruelty laws and the AWA, are based on the concept of what is humane.[184] Animal welfare organizations and shelters are established in part to seek humane treatment and care for animals. Although the definition may vary from person to person, the fact that "humane" means something special to Mr. Jurnove, someone "'very familiar with the needs of and proper treatment of wildlife,'"[185] is sufficient to confer standing. All aesthetic injuries are subjective. Mr. Jurnove's conception of what living conditions are appropriate for animals is no different from the Sierra Club's conception of how Mineral Valley

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177 *Id.* at 449. This standard is considered purely subjective and not sufficient for standing, because it depends solely on the value preferences of the legislator. Metcalf v. National Petroleum Council, 553 F.2d 176, 188 (D.C. Cir. 1977).

178 *ALDF v. Glickman*, 154 F.3d at 450 (Sentelle, J., dissenting).

179 Judge Sentelle's dissenting opinion has been described by one scholar as an "extreme example of the Platonic form of standing law," where injury exists "above and apart from the law." Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 642 n.154 (1999).

180 *See* 154 F.3d. at 432 (Wald, J., writing for the majority) (discussing Federal Elections Comm'n v. Akins, 524 U.S. 11 (1998)).

181 *See id.* at 447–50 (Sentelle, J., dissenting).

182 *Id.* at 432 (Wald, J. writing for the majority) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984) (citation and quotation marks omitted)).

183 United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688 (1973).

184 *See* Pamela D. Frasch et al., *State Anti-Cruelty Provisions: An Overview*, 5 ANIMAL L. 69 (1999); 7 U.S.C. § 2131 (1994).

185 *ALDF v. Glickman*, 154 F.3d at 429 (quoting Affidavit of Marc Jurnove, para. 6).

should look.[186] Since the courts recognize aesthetic injuries as an established injury in fact, there is no reason to carve "humane" out of aesthetic. The lack of recent case law cited, combined with the faulty assumption that such an injury "has not been previously asserted,"[187] seriously undermines the dissent's logic and credibility.[188]

2. Causation and Redressability

The same tone is found in the dissent's analysis of causation and redressability, both of which the dissent finds wanting. Attacking the majority's conclusions rather than offering contradictory analysis of the AWA, the dissent finds "frightening at a constitutional level the majority's assumption that the government causes everything that it does not prevent."[189] This was not the majority's causation argument, however. The majority's analysis of causation is reducible to a simple syllogism. *A* failed to implement the minimum standards required by the AWA. Viewing animals living in conditions below the minimum standards injured *B*. If minimum standards were in place, there would have been no injury. Therefore, the actions of *A* caused injury to *B*. The AWA mandates USDA's implementation of minimum standards, which the agency failed to do.[190] This is not the same as saying the government causes everything it does not prevent, because inhumane treatment is exactly what that provision of the AWA sought to prevent.[191]

The dissent also fails to adequately respond to the majority's analysis of redressability. Whereas the majority found redressability based on *Akins*,[192] the dissent ignores *Akins*, focusing instead on the "fuzzy nature" of Mr. Jurnove's injury and stating that it "would require sheer speculation to presume that any enrichment devices specified in a future regulation would satisfy Jurnove's aesthetic tastes."[193] Ignoring that such analysis forecloses litigation challenging an agency's failure to promulgate standards since it is never clear whether the desired impact will occur, the dissent is content to decide redressability on the fact that "[w]e do not

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[186] Telephone Interview with Katherine A. Meyer, *supra* note 94. In *Sierra Club v. Morton*, the plaintiffs alleged injury resulting from the destruction or adverse effects to the scenery, natural and historic objects, and wildlife of the park, as well as impaired enjoyment of the park. 405 U.S. 727, 734 (1972). These injuries are subjective and would have been sufficient had the plaintiffs proved they were directly impacted by the development. *Id.* at 734–35.

[187] *ALDF v. Glickman*, 154 F.3d at 450 (Sentelle, J., dissenting).

[188] The dissent's foray into what is "humane" was not at all necessary. As the Respondents' Brief in Opposition to Petition for Writ of Certiorari notes, USDA already made an expert determination of what was humane when it required facilities to provide a physical environment that will promote the psychological well-being of primates. Respondents' Brief in Opposition to Petition for Writ of Certiorari at 15, National Ass'n for Biomedical Research v. Animal Legal Defense Fund, Inc., 119 S. Ct. 1454 (1999) (No. 98-1059).

[189] 154 F.3d at 452.

[190] *See id.* at 438 (Wald, J., writing for the majority).

[191] *See* 7 U.S.C. § 2143 (1994).

[192] *See supra* Part III.A.3.

[193] 154 F.3d at 454 (Sentelle, J., dissenting).

know . . . how many enrichment devices Jurnove would prefer to see, or of what type."[194] The point remains, however, that the AWA requires that minimum guidelines be established.[195] The issue is not which enrichment devices will satisfy Mr. Jurnove. Mr. Jurnove is suing to compel USDA to promulgate rules to establish guidelines that include provisions for enrichment devices. Therefore, his concerns would be satisfied by a legal victory for the plaintiffs.

It is interesting to note the change in Judge Sentelle's analysis of causation and redressability in this decision compared to his majority opinion in the panel decision. No doubt in response to the petition for rehearing, which focused on his sweeping language eliminating most third-party suits under the APA,[196] Judge Sentelle narrowed his causation reasoning to find that any case without "express authorization [of the injury] *caused* by the government"[197] does not meet Article III causation requirements. Similarly, Judge Sentelle abandoned his redressability reasoning that required the plaintiffs to demonstrate how alleviation of their injury would be accomplished by the government.[198] Instead, the dissent focuses on the fact that no one can know what kind of minimum standards Mr. Jurnove would require in order for his injury to be redressed.[199]

Judge Sentelle concluded with greater rhetoric than when he began, harkening to the words of Justice Powell from 1904 that "allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government."[200] Granting standing here is by no means unrestricted, for the majority's holding is limited to suits brought under the APA. Nor does allowing complaints "formerly addressable only by the political branches, . . . now be[ing] aired in federal court"[201] come at the expense of democracy. If anything, greater access to the courts expands democracy. Congress enacted section 2143 of the AWA to set minimum standards for research facilities and roadside exhibits.[202] If an agency fails to promulgate these standards, there is no other recourse than to seek a legal remedy to compel action.

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194 *Id.*

195 *See* 7 U.S.C. § 2143 (1994).

196 *See* Plaintiffs-Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc* at 2, *ALDF v. Glickman* (No. 97-5009).

197 154 F.3d at 452. Judge Sentelle further argued that there is no precedent for the "proposition that a bare failure to prevent conduct by regulation is tantamount to causation." *Id.* at 453.

198 *See* Animal Legal Defense Fund, Inc. v. Glickman, 130 F.3d 469 (D.C. Cir. 1997) (panel decision), *vacated*, 154 F.3d 326 (D.C. Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1454 (1999).

199 *ALDF v. Glickman*, 154 F.3d at 454 (en banc) (Sentelle, J., dissenting).

200 *Id.* (quoting Missouri, Kan. & Tex. Ry. Co. v. May, 194 U.S. 267, 270 (1904)).

201 *Id.*

202 *See* 7 U.S.C. § 2143(a)(3) (1994).

Judge Sentelle's efforts to keep standing as a "troublesome hurdle"[203] did not go unnoticed. In response to the court's decision, a petition for writ of certiorari was filed with the Supreme Court on December 30, 1998.[204]

C. The Petition for a Writ of Certiorari

Filed by the intervenor in the case, National Association for Biomedical Research (NABR), the petition sought review based on the premise that

> the majority opinion below enlarges standing well beyond the metes and bounds established in this Court's prior decisions, conflicts *at least in principle* with decisions of other courts of appeals that have declined to find aesthetic injury on the basis of emotional distress alone, and was rendered in the circuit where most actions challenging federal regulations may be brought.[205]

Since the argument has previously been made that *ALDF v. Glickman* does not depart from standing precedent, this discussion focuses on other claims advanced in NABR's petition.

Not surprisingly, NABR focused on Judge Sentelle's reasoning accusing the majority of deciding the case based on an injury founded in Mr. Jurnove's "own subjective emotional responses."[206] However, the intervenors admit a few pages later that "[e]very claim of aesthetic injury necessarily involves the plaintiff's psychological response to circumstances observed."[207] Although NABR pointed out that more than a subjective response must be alleged to rise to the level of constitutional harm,[208] Mr. Jurnove does just that by alleging his purpose in going to the Game

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[203] 154 F.3d at 446 (quoting Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 476 (1982)).

[204] The petition for a writ of certiorari was filed by intervenors in the case on behalf of the National Association for Biomedical Research (NABR). USDA did not file a similar appeal. This was an interesting development from which two conclusions might be drawn. First, USDA is aware that the plaintiffs have a strong argument in their favor (supported by the fact that Mr. Jurnove's affidavit went uncontested). Second, the plaintiffs' case is so strong and the majority's analysis so sound that the special interest groups representing the animal research community are frightened by what may result if animal welfare plaintiffs are allowed access to the courts. In fact, their motion for writ focuses on the dissent's language that attacked the majority's weakening of the requirements of Article III standing. Petitioner's Petition for a Writ of Certiorari at 3, National Ass'n for Biomedical Research v. Animal Legal Defense Fund, Inc., 119 S. Ct. 1454 (1999) (No. 98-1059). It would have been premature and ill conceived for the Supreme Court to grant certiorari. First, NABR did not intervene until the district court rendered a decision for the plaintiffs. Plaintiffs challenged this intervention, but the district court had not yet decided this matter. Second, none of the criteria for granting certiorari are met, because the D.C. Circuit Court of Appeals decision does not contradict previous Supreme Court or circuit decisions. *See* Respondents' Brief in Opposition to Petition for Writ of Certiorari at 18, *NABR v. ALDF* (No. 98-1059).

[205] Petitioner's Petition for a Writ of Certiorari at 3, *NABR v. ALDF* (No. 98-1059) (emphasis added). By stating that the decision conflicts in principle, NABR concedes that there is no real conflict between circuits.

[206] *Id.* at 9.

[207] *Id.* at 12.

[208] *Id.*

Farm—to study and observe primates.[209] This injury is not subjective and is supported by precedent.[210]

The petition concluded with a policy-based argument that clearly demonstrates the organization's motive in filing the petition. Noting, as does the dissent, that "[t]he decision below has broad potential impact on litigation affecting matters of substantial public interest," NABR focused on their concern that the holding is "broadly applicable to many medical research facilities."[211] No matter how "potentially severe"[212] the impact on medical research might be, this factor is improper for a court of law to consider. Besides the fact that the holding need not be read to include medical research facilities,[213] such a policy decision is more aptly made by Congress rather than the Supreme Court.[214] The Supreme Court's role is to resolve a disputed case or controversy, not coddle to the fears of special interest groups. Additionally, the petition's conclusion, riddled with examples of other suits that could be brought based on aesthetic interest,[215] ignored the basic fact of the case—that the holding is limited to challenges brought under the APA to implement provisions of the AWA. Although one can only speculate as to the Supreme Court's reasoning for denying certiorari,[216] the Court's unwillingness to touch the issue reflects both the strength of the plaintiffs' position and a new, more inclusive, approach to standing doctrine.

The dissent and the petition for certiorari contained outdated notions of the standing doctrine and unpersuasive case law. Without a firm basis

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209 Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 426, 432 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 1454 (1999).

210 *See id.*

211 Petitioner's Petition for a Writ of Certiorari at 16, *NABR v. ALDF* (No. 98-1059).

212 *Id.*

213 *See infra* Part IV.C.2.

214 Certainly the Supreme Court can hear policy arguments and consider the effects of their decision on future litigation. Research facilities are specifically mentioned in section 2143 of the AWA. However, NABR members and other research facilities are already exempted from regulations concerning how the research is conducted. 7 U.S.C. § 2143(a)(6)(A) (1994). If research facilities seek immunity from litigation for not providing for the humane treatment of animals, they should direct their arguments to Congress. *See* Respondents' Brief in Opposition to Petition for Writ of Certiorari at 19, *NABR v. ALDF* (No. 98-1059).

215 The petition lists six different scenarios that NABR claims could be brought by would-be plaintiffs, including "the placement of animals in brightly colored cages," or a suit demanding "ornamental rather than grey scaffolding around the Washington Monument during periods of restoration." Petitioners' Petition for a Writ of Certiorari at 17, *NABR v. ALDF* (No. 98-1059). Granted, these are aesthetic desires. However, they are not representative of suits that could be brought following *ALDF v. Glickman*. This is because there is no AWA or other statutory mandate compelling the government to put animals in brightly colored cages or use ornamental scaffolding. However, if there were such a mandate and the government failed to comply with it, then these suits would certainly be allowed in federal courts. This would not be because of a feeling of "dismay and sadness," but because the government failed to act when it should have. *Id.*

216 The petition for writ of certiorari was denied without opinion. *See NABR v. ALDF*, 119 S. Ct. 1454 (1999).

to attack the majority's opinion, the dissent simply embodies the restrictive standing doctrine's last gasp.

IV. Where Do We Go from Here? Animal Welfare Litigation Strategies after *ALDF v. Glickman*

No case can be considered groundbreaking unless it has ramifications that reach beyond the parties to the case. *ALDF v. Glickman* not only represents the first time third-party plaintiffs were granted standing to challenge USDA's standards, but like any case of great precedential value, it also provides a roadmap for future plaintiffs to follow.[217]

A. How to Prepare Adequate Affidavits

Based on cases preceding *ALDF v. Glickman*, some plaintiffs believed that "once the proper formula is found, [third-party plaintiffs] may use the AWA as an effective tool to compel the USDA to implement fully regulations for the humane treatment of animals."[218] The proper formula now exists because of *ALDF v. Glickman*. Many high profile environmental cases were dismissed for lack of standing because of the failure to include direct, concrete information regarding use of the environmental area in question in pleadings and affidavits.[219] Therefore, the most important lesson *ALDF v. Glickman* teaches is the proper level of detail needed for third-party plaintiffs' affidavits to satisfy the elements of Article III standing.

1. Injury in Fact

Although pleading burdens are generally low,[220] courts routinely scrutinize third-party plaintiffs who seek access to the courts.[221] Therefore, third-party plaintiffs' affidavits require great specificity and detail.

The affidavit of Mr. Jurnove met this higher burden because it "solidly establish[ed an] injury in fact"[222] that was more than an abstract and uncognizable interest in seeing the AWA enforced. First, the affidavit established the background necessary to demonstrate why Mr. Jurnove was affected by the conditions he observed at the Game Farm.[223] To show this, the affidavit recorded that Mr. Jurnove "'enjoy[s] seeing [animals] in various zoos and other parks near his home. . .[b]ecause of [his] familiarity

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[217] Of course, it is important to remember plaintiffs who fit the *ALDF v. Glickman* mold cannot be solicited. However, individuals will continue to find themselves in situations like Mr. Jurnove's, making the possibility of future litigation a reality.

[218] Mendelson, *supra* note 21, at 815.

[219] *See* Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 426, 435–37 (D.C. Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1454 (1999).

[220] *See* Fed. R. Civ. P. 8(a). The burden is greater in summary judgment motions. *See* Fed. R. Civ. P. 56.

[221] *See* Animal Legal Defense Fund, Inc. v. Glickman, 130 F.3d 464, 468 (D.C. Cir. 1997) (panel decision), *vacated*, 154 F.3d 426 (D.C. Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1454 (1999).

[222] *ALDF v. Glickman*, 154 F.3d at 431 (en banc).

[223] *Id.*

with and love of exotic animals, as well as for recreational and educational purposes and because [he] appreciate[s] these animals' beauty.'"[224] Due to his training in wildlife rehabilitation and his experience investigating complaints about the treatment of wildlife,[225] Mr. Jurnove is set apart from the general public. Mr. Jurnove's injury is concrete and particularized, because he visited the Game Farm for the sole purpose of furthering his appreciation for the animals.[226] Finally, the affidavit asserts what the injury actually was, describing Mr. Jurnove's observations as "'an assault on [his] senses [which] greatly impaired [his] ability to observe and enjoy [the] captive animals.'"[227] Mr. Jurnove "clearly satisfie[d]" the "key requirement" for injury in fact when he suffered the injury in a personal and individual way by seeing the inhumane conditions with his own eyes.[228]

2. Causation

To satisfy causation, the factual allegations in the affidavit must correspond to the provisions of law upon which the claim is based to demonstrate how the injury resulted. In *ALDF v. Glickman*, the plaintiffs' legal theory—that USDA failed to follow the statutory mandate of section 2143 of the AWA to adopt explicit minimum standards to govern the humane treatment of primates—satisfied the causation requirement.[229] Further, if USDA had promulgated proper regulations, Mr. Jurnove would not have suffered the claimed injury, because the conditions described would have been prohibited.[230] Thus, the affidavit must describe the conditions that would have been prevented if USDA had followed the AWA's mandate.

Mr. Jurnove's affidavit had to do the following: 1) state that USDA failed to adopt the minimum standards the AWA requires, 2) describe the conditions in conjunction with current USDA regulations that caused the injury, and 3) allege that regulations complying with the AWA would have prevented the conditions and protected Mr. Jurnove from injury. The first requirement is met by asserting that AWA section 2143 requires minimum standards[231] and by comparing the statute's language with USDA's interpretation of this mandate.[232]

To satisfy the second factor, Mr. Jurnove alleged three observations related to corresponding USDA regulations.[233] First, USDA's governing

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224 *Id.* (quoting Affidavit of Marc Jurnove, para. 7).

225 *See id.* at 429 (citing Affidavit of Marc Jurnove, para. 6).

226 *See id.* at 431 (citing Affidavit of Marc Jurnove, para. 7).

227 *Id.* at 432 (quoting Affidavit of Marc Jurnove, para. 17).

228 *Id.* at 433.

229 *Id.* at 438. For the purpose of this Note, the causation discussion will revolve around this legal theory. No matter what the asserted claim is, the affidavits must be similar in terms of specificity. Therefore, although the facts may vary, the lessons to be derived from the case remain the same.

230 *Id.*

231 *See id.* at 439.

232 *See id.* at 441–42; 9 C.F.R. § 3.81 (1999).

233 These observations are sufficient for causation, not because of what they suggest on the merits, but rather by demonstrating a sufficient connection between the alleged activity and the harm produced.

regulations provide that facilities such as the Game Farm must have a plan that "include[s] specific provisions to address the social needs of nonhuman primates."[234] To demonstrate that the social needs of the primates at the Game Farm were not being met as the regulation requires, Mr. Jurnove alleged that he saw a chimpanzee "in a holding area by himself" and "viewed a monkey cage . . . that was a distance from and not in view of the other primate cages."[235] Second, "[n]onhuman primates may not be housed with other species of primates or animals unless they are compatible."[236] Proving noncompliance with this regulation, Mr. Jurnove alleges that "[t]he pen next to the adult bears housed the squirrel monkeys . . . [who] act[ed] very upset when the bears came near."[237] Third, "[t]he physical environment in the primary enclosures must be enriched by providing means of expressing non-injurious species-typical activities,"[238] meaning enrichment devices must be present in primate cages. Mr. Jurnove alleged that the Game Farm violated this regulation because "'[t]he only cage enrichment device . . . was an unused swing.'"[239]

After establishing the requisite background, Mr. Jurnove needed to allege facts to support his claim that had proper regulations been in effect, the conditions that caused his aesthetic injury would have been prevented. The affidavit accomplishes this by alleging that the Game Farm repeatedly submitted to inspection by USDA, but on all four inspections the facility was deemed in compliance.[240] If proper regulations were in place, Mr. Jurnove would not have "'experienced and continue[ ] to experience physical and mental distress when he realizes that he, by himself, is powerless to help the animals he witnesses suffering when such suffering derives from or is traceable to the improper implementation and enforcement of the [AWA] by USDA.'"[241]

Specificity and connection to the law is key. The affidavit need not establish the Game Farm was not following proper regulations.[242] Rather, it must show because USDA did not do what it had to, an indirect aesthetic injury resulted.[243] Since "the AWA itself prohibits the conditions that allegedly injured Mr. Jurnove, and the USDA regulations misinterpret the statute by permitting these conditions," causation is met because the "government action *permitted* [the Game Farm's] conduct that allegedly caused [the] plaintiff injury."[244]

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234 9 C.F.R. § 3.81(a) (1999).

235 154 F.3d at 439 (quoting Affidavit of Marc Jurnove, paras. 8, 14).

236 9 C.F.R. § 3.81(a)(3) (1999).

237 154 F.3d at 439 (quoting Affidavit of Marc Jurnove, para. 11).

238 9 C.F.R. § 3.81(b) (1999).

239 154 F.3d at 439 (quoting Affidavit of Marc Jurnove, para. 14).

240 *Id.* at 440 (citing Affidavit of Marc Jurnove, para. 18).

241 *Id.* at 430–31 (quoting Plaintiffs' First Amended Complaint ¶ 58, Animal Legal Defense Fund, Inc. v. Glickman, 943 F. Supp. 44 (D.D.C. 1996), 130 F.3d 464 (D.C. Cir. 1997) (panel decision), *vacated*, 154 F.3d 326 (D.C. Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1454 (1999) (No. 96-00408)).

242 *See id.* at 438.

243 *Id.*

244 *Id.* at 441–42.

3. Redressability

Redressability, although a stumbling block for previous animal welfare plaintiffs,[245] is satisfied by the specificity of Mr. Jurnove's affidavit and a change in the law. First, the affidavit contained the facts necessary to support redressability. Mr. Jurnove planned to "return to the Farm in the next several weeks" and to "continue visiting the Farm to see the animals there."[246] Mr. Jurnove also made nine previous visits to the Game Farm between May 1995 and June 1996.[247] This pattern, with planned future visits, demonstrates that any positive change in the living condition of the primates at the Game Farm will alleviate his injury.[248] Because *Akins* rejected the argument that redressability "requires a plaintiff to establish that the defendant agency will actually enforce any new binding regulations against the regulated third party,"[249] Mr. Jurnove's assertion is more than sufficient to satisfy the last prong of Article III standing. In order to have his complaint heard, Mr. Jurnove also had to pursue his claim against USDA under the proper statute.

4. Legal Theory

The first federal court decision concerning standing under the AWA occurred in 1986. The plaintiffs' case in *International Primate Protection League v. Institute for Behavioral Research, Inc.* (*International Primate*)[250] was dismissed on two grounds. First, the case was decided based on the inadequacy of the specific injuries alleged by the plaintiffs[251]—a finding that *ALDF v. Glickman* overcomes by determining what conditions caused aesthetic injury to Mr. Jurnove. Second, even if the affidavits were specific enough, *International Primate* would still have been dismissed because of a faulty legal theory asserted by the plaintiffs.[252] Thus, besides factual specificity, the legal theory asserted by Mr. Jurnove allowed the majority to decide *ALDF v. Glickman* in his favor.

Earlier litigation efforts failed because plaintiffs did not prove that the AWA authorized their right to seek relief. In particular, these cases were dismissed for lack of standing because the third parties sought to

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245 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 568–70 (1992).

246 *ALDF v. Glickman*, 154 F.3d at 443 (quoting Affidavit of Marc Jurnove, para. 43).

247 *Id.* at 429.

248 The majority here breaks with some AWA standing precedent. In 1994 the court rejected standing for a psychobiologist because her injury would only be suffered if she chose to engage in work with laboratory animals. *See* Animal Legal Defense Fund, Inc. v. Espy, 23 F.3d 496, 500 (D.C. Cir. 1994). In comparison, Mr. Jurnove's injury will continue to be suffered only if he continues to go to the Game Farm on his own accord. However, the *Animal Legal Defense Fund, Inc. v. Espy* court dealt with this matter under injury in fact (discussing the *Defenders of Wildlife* requirement of a presently suffered, imminently threatened injury). *See id.*

249 *ALDF v. Glickman*, 154 F.3d at 443; *see* Federal Elections Comm'n v. Akins, 524 U.S. 11, 25 (1998).

250 799 F.2d 934 (4th Cir. 1986).

251 *Id.* at 937.

252 *See id.* at 938–40.

enforce specific provisions or terms of the AWA.[253] *ALDF v. Glickman* specifically avoids the enforcement pitfall by alleging on appeal solely that USDA failed to promulgate the minimum standards the AWA requires.[254] Under the APA, persons who are injured by derelictions of statutory duty may challenge that conduct.[255] Using the APA, *ALDF v. Glickman* avoids the fact that the AWA contains no private right of action against regulated entities and demonstrates the importance of finding the proper formula to overcome the hurdles that AWA precedent has established.

B. Case Strategy

The key to standing success is to avoid the pitfalls where other environmental plaintiffs have faltered. Previous cases, such as *Sierra Club v. Morton* and *Defenders of Wildlife*, failed to reach the merits because the plaintiffs neglected detail when they went for a standing grand slam.[256] The lesson to be gained from *ALDF v. Glickman* is to avoid trying to change standing doctrine with one case, but rather to fight the instant issues with a well-structured trial strategy.

In order to survive a jurisdictional challenge to standing, two important elements of the case must be well established. First, the allegations in the complaint must be sufficiently detailed to survive a motion to dismiss by the government.[257] Second, once the inevitable summary judgment motion is filed, the plaintiffs must be prepared with affidavits that prove the specific elements of Article III standing.[258] With these two specific concerns in mind, the plaintiffs must ensure they have their "ducks in a row" by thoroughly understanding the D.C. Circuit's and Supreme Court's evolv-

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[253] In these cases, the courts found that the enforcement of the AWA was not to be realized through private lawsuits since the Act did not imply any such provision to compliment the authority of USDA. *See id.* at 940; In Defense of Animals v. Cleveland Metroparks Zoo, 785 F. Supp. 100, 103 (N.D. Ohio 1991); People for Ethical Treatment of Animals v. Institutional Animal Care & Use Comm. of Univ. of Or., 794 P.2d 1224, 1227–28 (Or. Ct. App. 1990).

[254] Although the crux of the complaint is the failure to establish proper standards, ALDF's initial and amended complaint also alleged inadequacy of enforcement. *ALDF v. Glickman*, 154 F.3d at 431 n.3. However, this portion of the complaint was found unsuitable for review and was not appealed. *Id.*

[255] Respondents' Brief in Opposition to Petition for Writ of Certiorari at 15, National Ass'n for Biomedical Research v. Animal Legal Defense Fund, Inc., 119 S. Ct. 1454 (1999) (No. 98-1059).

[256] The plaintiffs in *Sierra Club v. Morton* failed to allege direct injury, costing them their opportunity to prove injury in fact. 405 U.S. 727, 735 (1972). *Defenders of Wildlife*, on the other hand presents a classic example of going for too much in one case. Rather than focusing directly on the instant situation, the *Defenders of Wildlife* plaintiffs attempted to set precedent for years to come by attempting "novel" theories of standing, such as the "ecosystem nexus," the "vocational nexus," and the "animal nexus." Lujan v. Defenders of Wildlife, 504 U.S. 555, 565–67 (1992). Justice Scalia dismissed these theories quickly, finding that "[s]tanding is not 'an ingenious academic exercise in the conceivable.'" *Id.* at 566 (quoting United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688 (1973)). A certain pitfall to avoid is the belief that just because the issue is important, the court will be more inclined to hear it.

[257] Telephone Interview with Katherine A. Meyer, *supra* note 94; *see also* FED. R. CIV. P. 8(a).

[258] Telephone Interview with Katherine A. Meyer, *supra* note 94; *see supra* Part IV.A.

ing conception of the standing doctrine[259] to sufficiently rebut any arguments made by the government.[260]

C. *What* ALDF v. Glickman *Permits and Forecloses*

Establishing standing under the AWA prior to *ALDF v. Glickman* was more than difficult—it was almost impossible. Judge Wald's decision therefore begs the question of whether more parties concerned about the inhumane treatment of animals will have increased access to the courts to sue USDA. The answer is a resounding "maybe."

An overview of standing litigation under the AWA leads to the conclusion that *ALDF v. Glickman* was truly unique[261]—not because the court granted standing, but because Mr. Jurnove's situation represented the perfect culmination of facts that set it apart from previous animal welfare cases. Will the situation ever arise again?

1. *The Plaintiff*

To meet the requirements of standing, a prospective plaintiff needs to have four particular qualities. First, the plaintiff must have sufficient background to understand the effects the conditions are having on the animals. It is imperative to be "'very familiar with the needs and proper treatment'" of animals.[262] Courts have made clear that any educational or professional interest is not enough.[263] The plaintiff must allege a nonspeculative, con-

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259 Telephone Interview with Katherine A. Meyer, *supra* note 94. Ms. Meyer recommends future litigants familiarize themselves with the requirements of Article III standing by reading all the D.C. Circuit and Supreme Court decisions dealing with constitutional standing. This would enable those litigants to see the evolution of the law and understand why certain judges and justices decided the issues the way they did. "Knowing standing law inside and out" was echoed by attorney Valerie Stanley who was on the briefs in this case. Telephone Interview with Valerie Stanley, ALDF Senior Staff Attorney (Jan. 19, 1999).

260 For instance, USDA heavily relied on Judge Sentelle's use of *Valley Forge Christian College* in the *ALDF v. Glickman* panel decision. Thus, in oral argument during the en banc hearing, the plaintiffs were able to distinguish *Valley Forge Christian College* from the present case, because in *Valley Forge Christian College* the alleged "psychological injury" resulted from reading a newspaper regarding a property conveyance to a religious organization and not from the observation of animals suffering. Telephone Interview with Katherine A. Meyer, *supra* note 94.

261 *See* Mendelson, *supra* note 21, at 806–17.

262 *ALDF v. Glickman*, 154 F.3d at 429 (quoting Affidavit of Marc Jurnove, para. 6). This would be established if the plaintiff, like Mr. Jurnove, was employed in, or worked or volunteered for, animal relief organizations, or had experience and/or training in animal rehabilitation. *See id.* A general interest in animals would not suffice, for then the individualized injury would not be met. International Primate Protection League v. Institute for Behavioral Research, Inc., 799 F.2d 934, 938 (4th Cir. 1986) (rejecting the allegation that long-standing interest and qualifications in evaluating the problem are sufficient by themselves to effectuate standing). The injury must be concrete and particularized and not a situation where "anyone with an interest in studying or seeing endangered animals anywhere on the globe and anyone with a professional interest in such animals" can sue. Lujan v. Defenders of Wildlife, 504 U.S. 555, 556 (1992). The familiarity and love for animals demonstrated by Mr. Jurnove also works to contradict any argument made regarding the definition of "humane." *See ALDF v. Glickman*, 154 F.3d at 434.

263 *Defenders of Wildlife*, 504 U.S. at 582 (Stevens, J., concurring).

crete injury relating to specific animals under specific conditions. Second, the plaintiff must have previous and continuing contact with the conditions that caused the injury and with the particular animals in question.[264] Third, the plaintiff must have planned, future contact with the entity causing the injury, thereby allowing the relief sought to redress the injury.[265] Finally, the plaintiff must demonstrate that he is among the injured.[266] As such, the affidavit must include an account of the injury describing the "personal distress and aesthetic and emotional injury" resulting from the continuing exposure to "psychological debilitation caused to the animals by social deprivation."[267] If the potential plaintiff meets these four requirements, his "interests are among those that Congress sought to benefit through the AWA."[268]

2. The Cause of Action

Once this plaintiff is found, *ALDF v. Glickman* places specific limitations on the type of claim that can be brought. The majority's opinion allows for two interpretations of the holding. Interpreted broadly, a complainant may bring a suit to enforce the AWA where the interest he seeks to protect "'is *arguably* within the zone of interests' to be protected by the statute."[269] Under this perspective, challenges to USDA's failure to implement any provision of the AWA could be brought under the APA. The legislative history, as recognized by the majority,[270] supports the notion that "the AWA anticipated the continued monitoring of concerned animal lovers to ensure that the purposes of the Act were honored."[271] From this perspective, the AWA is opened to broad third-party involvement in the courts, where participation was previously limited to the other branches of government. However, this call to arms is not as encompassing as it

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[264] This would satisfy two requirements. First, it would meet the *Defenders of Wildlife* standard of a presently suffered or imminently threatened injury. *See supra* note 38. Second, it satisfies the *International Primate* standard that the plaintiffs' personal relationship with the primates must not exist solely because of the litigation. *International Primate*, 799 F.2d at 938. Additionally, this contact shows that the injury are not conjectural, but actual.

[265] The planned, future contact also helps to satisfy the "imminent" element of the injury in fact prong. In previous instances, affidavits that indicated "an intent to revisit" at "some indefinite future time" were found insufficient for standing. *Defenders of Wildlife*, 504 U.S. at 556. "[S]ome day intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be" is not sufficient. *Id.* at 564.

[266] Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

[267] *ALDF v. Glickman*, 154 F.3d at 430 (quoting Affidavit of Marc Jurnove, para. 58).

[268] *Id.* at 445.

[269] *See id.* at 444 (quoting National Credit Union Admin. v. First Nat'l Bank & Trust Co., 524 U.S. 479 (1998) (quoting Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 153 (1970))) (emphasis added).

[270] *See id.* at 445. The AWA is a "statutory mandate that small helpless creatures deserve the care and protection of a strong and enlightened public." H.R. REP. NO. 91-1651, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5103, 5103. Further, "we need to ensure the public that adequate safeguards are in place to prevent unnecessary abuses to animals, and that everything possible is being done to decrease the pain of animals during experimentation and testing." 131 CONG. REC. 29,153, 29,155 (Oct. 25, 1985) (statement of Sen. Dole).

[271] 154 F.3d at 445.

appears. This reading of the majority opinion fulfills the dissent's argument that allowing untethered access to the court would lead to political anarchy.[272] Considering the conservative approach to standing the Supreme Court has taken over the past decade, the majority did not allow a reading that could result in the decision being overturned on review. The majority argues for political activism, not judicial activism.[273] Thus, a narrow reading most aptly grasps the majority's intent.

Interpreted narrowly, *ALDF v. Glickman* applies only to challenges to federal agencies when they fail to promulgate standards the AWA mandates. Narrowing the scope further, the majority opinion notes that "[t]he very purpose of animal exhibitions is, necessarily, to entertain and educate people; exhibitions make no sense unless one takes the interests of their human visitors into account."[274] Two interpretations of this statement are possible. The first limits the holding only to cases brought involving animal exhibitions. However, this appears to be too narrow, as the opinion also discusses the broad purposes behind the AWA and the need for humane societies and their members "to bring the mistreatment of animals to light."[275] Since this statement is unqualified, it is logical to assume that because animals are mistreated in areas other than exhibitions, third-party plaintiffs should not be limited in standing to exhibitions only. Under the statement's broader second interpretation, the decision applies only to those instances where people are entertained or educated by the animals they observe, and *ALDF v. Glickman* grants standing to citizens who will sue USDA for failing to implement proper regulations regarding dealers and exhibitors, but not carriers or research facilities.[276] Although the holding is limited in scope, this will be the legacy of the decision, because it captures the majority's intent.[277]

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272 *See id.* at 454–55 (Sentelle, J., dissenting).

273 *See infra* Part V (discussing other ramifications of the decision, including the potential for a citizen suit provision in the AWA).

274 154 F.3d at 444 (Wald, J., writing for the majority).

275 *Id.* at 445 (citing 116 CONG. REC. 40,304, 40,305 (Dec. 8, 1970) (statement of Rep. Whitehurst)).

276 Although research facilities are included in the language of section 2143, the court notes that the AWA specifically established oversight committees with private citizen members to police research facilities. 154 F.3d at 445; *see* 7 U.S.C. § 2143(a)(3) (1994). From this, one can assume that the court granted standing because no similar AWA oversight was granted to citizens when it comes to exhibitors, because there was no other way for private citizens to police the statute. However, the groundwork has been laid for future challenges to USDA's standards regulating research facilities. Perhaps the greatest indicator of this is that the National Association for Biomedical Research appealed the decision to the Supreme Court and not USDA. *See generally* Petitioner's Petition for a Writ of Certiorari, National Ass'n for Biomedical Research v. Animal Legal Defense Fund, Inc., 119 S. Ct. 1454 (1999) (No. 98-1059).

277 Others have posited that the holding is not limited to zoos at all, but rather extends to any agency action that injures a third party. Telephone Interview with Valerie Stanley, *supra* note 259. Under this analysis, because the case was brought under the APA, any USDA regulation can be challenged if a plaintiff witnesses animal suffering. *Id.* Additionally, if the regulations implementing section 2143 are set aside, they will be set aside as to all entities covered by the section, including research facilities. Although the APA was the governing statute, I respectfully submit that the holding is limited because of the majority's discussion

Perhaps knowing that a sweeping decision would increase the likelihood of certiorari being granted, Judge Wald crafted an opinion that gave animal welfare plaintiffs access to the courts without upsetting the special interests working to avoid just that. Even though the holding is limited to suits brought under section 2143 involving dealers and exhibitors, the potential to sue for failure to promulgate minimum requirements for these regulated entities is enormous.[278] Additionally, the narrow holding will allow the decision to withstand greater scrutiny by Congress and by the spokespeople for animal dealers and exhibitors, and to withstand the potential rigors of judicial review.[279]

The most fundamental aspect of the decision remains that animal welfare plaintiffs were granted access to the courts to force agency compliance with the AWA. Instead of speculating as to whether the reasoning of concurrences and dissents in other animal welfare cases would be followed by other courts,[280] there is a definitive answer that agencies can be sued for failure to follow the mandate of the AWA. It does not matter that the holding was limited, but rather that the once impenetrable AWA is open to judicial review. As with any decision that reverses long standing precedent, future litigation will challenge the courts to take the holding of *ALDF v. Glickman* to its extreme by seeking access to the courts to sue USDA for failure to properly regulate research facilities[281] and perhaps even challenging the precedent that agency enforcement decisions are generally unsuitable for judicial review.[282] Increased litigation challenging

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of the oversight committees established in other parts of the AWA. Certainly if animals in *public* display live under inhumane conditions, they do so in *private* facilities as well. Although this challenge exists, *ALDF v. Glickman* does not bring it to fruition. Another case will have to be brought, using *ALDF v. Glickman* as precedent for standing, to challenge the inhumane treatment of animals in research facilities.

278 The standards to be promulgated govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors. In particular these standards shall include minimum requirements for handling, housing, feeding, watering, sanitation, ventilation, shelter from temperature extremes, adequate veterinary care, separation by species where found necessary for the humane care of the animals, exercise for dogs, and a physical environment adequate to promote the psychological well-being of primates. 7 U.S.C. § 2143(a)(1)–(2) (1994).

279 "[W]hile review is sometimes afforded because a decision on jurisdiction must be immediately corrected due to the far-reaching consequences such a ruling would have . . . this simply is not such a case." Respondents' Brief in Opposition to Petition for Writ of Certiorari at 11, *NABR v. ALDF* (No. 98-1059).

280 *See, e.g.*, Mendelson, *supra* note 21, at 815 ("Whether future plaintiffs take Judge Mikva [a previous concurring opinion] up on this offer remains to be seen.").

281 There is no reason why the standards regulating research facilities should be any different than those regulating exhibitors. Animals in labs are no different and should not be treated differently. Injury to an aesthetic interest should not depend on whether the person is viewing primates at a zoo or working with primates at a research facility. Telephone Interview with Valerie Stanley, *supra* note 259. *ALDF v. Glickman* does not foreclose challenges to research facilities. Rather, it establishes precedent that USDA regulations are challengeable. Considering the current composition of the Supreme Court, however, a holding expansive enough to include research facilities would probably not have survived judicial review.

282 *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985).

USDA's standards[283] and increased political pressure to make the lofty ambitions of the AWA a reality will ultimately result.

V. THE POLITICAL RAMIFICATIONS OF *ALDF v. GLICKMAN*: A CITIZEN SUIT PROVISION IN THE AWA?

Most of the nation's environmental statutes contain some version of a citizen suit provision.[284] The AWA, however, does not. In fact, nowhere in the legislative history discussing the evolution of the Animal Welfare Act from 1966 to the present is there any mention of serious congressional intent to include a citizen suit provision.[285] Although it would be easy to speculate as to why the AWA lacks a citizen suit provision, whereas other animal statutes such as the Endangered Species Act (ESA)[286] include such a provision, the reason is that the "initially . . . controversial"[287] bill remains controversial today. *ALDF v. Glickman* has the potential to change this. Certainly the AWA will remain controversial, but the majority's judicial activism will translate into renewed political pressure and a push for increased protection for animals under the AWA.[288] Political activism will most likely focus on the creation of a citizen suit provision in the AWA to further *ALDF v. Glickman* and grant concerned citizens greater access to the courts.[289]

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[283] Considering that third parties continued to file suit under the AWA after a number of circuit court and Supreme Court decisions struck down standing claims and limited judicial review of the AWA, a holding that vindicates these past claims will lead to a resurgence of AWA litigation in the hope of reaching the merits of the claims. *See* Mendelson, *supra* note 21, at 810.

[284] *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619 (1994); Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (1994); Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1365 (1994); Solid Waste Disposal Act, 42 U.S.C. § 6972 (1994); Clean Air Act, 42 U.S.C. § 7604 (1994); Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9659 (1994); *see also* Jeffery W. Ring & Andrew F. Behrend, *Using Plaintiff Motivation to Limit Standing: An Inappropriate Attempt to Short-Circuit Environmental Citizen Suits*, 8 J. ENVTL. L. & LITIG. 345, 345 (1994); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165 (1992).

[285] *See* Animal Welfare Act Amendments, Pub. L. 99-198, §§ 1751–1759, 99 Stat. 1645 (1985); Animal Welfare Act Amendments of 1976, Pub. L. 94-279, 94 Stat. 417; Annual [sic] Welfare Act of 1970, Pub. L. 91-579, 91 Stat. 5103; Research or Experimentation—Cats and Dogs, Pub. L. 89-544, 89 Stat. 2635 (1966).

[286] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (1994).

[287] H.R. REP. NO. 91-1651, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N 5103, 5104 (discussing the Annual [sic] Welfare Act of 1970, Pub. L. No. 91-579). Please note the importance this Act held for Congress, since the title was misspelled!

[288] Undoubtedly, there will be numerous political ramifications of the decision. For the sake of brevity, however, I choose to focus on the creation of a citizen suit provision. Not only will the provision strengthen the AWA, but it is a logical outgrowth of the court's decision.

[289] Admittedly, a citizen suit would not remove the constitutional barriers to standing per se; however, this does not mean it is not worth pursuing. On the contrary, the *perceived* implications of the provision are more important than its actual existence. By demonstrating that Congress is taking enforcement of the AWA seriously, hopefully others will follow suit. Courts only hear those problems brought by citizens. If more citizens *perceive* that they can

A. What Is a Citizen Suit Provision?

"The citizen suit is part of a complex system in which Congress delegates difficult or even impossible tasks, appropriates inadequate resources, imposes firm and sometimes unrealistic deadlines, and enlists courts and citizens in order to produce compliance."[290] Despite this negative, but fairly accurate description, citizen suits have been successful in meeting the two goals Congress envisioned for them—1) forcing agency officials towards better enforcement of environmental laws and 2) allowing citizens to "step forward and assume the role of private attorneys general" as "an alternative means of enforcement."[291] In so doing, the citizen suit has become "an important tool to ensure vigorous enforcement of environmental laws" that provides an effective check on the powers of federal administrative agencies.[292] As the facts behind *ALDF v. Glickman* illustrate, the AWA currently lacks proper oversight.

B. What Does a Citizen Suit Accomplish?

A citizen suit provision is important for four reasons. First, citizen suit provisions were originally enacted to eliminate the procedural barriers to standing the courts had erected[293] in the wake of new environmental laws. As such, most early citizen suits eliminated part of the difficulty of establishing injury in fact.[294] Second, Congress can ease the burden of the causation requirement.[295] Third, citizen suits "eliminate[ ] 'zone of interests' inquiry as a potential barrier to . . . standing."[296] When Congress passes a citizen suit provision, it removes judicial authority to fashion pru-

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get access to the courts, more challenges to the AWA will occur. Take, for instance, the ESA's citizen suit provision. Numerous suits have been brought under this provision in the statute's existence. In the existence of the AWA (prior to *ALDF v. Glickman*), no suit had ever reached the merits. Both the AWA and the ESA aim to protect animals. Both were, and are, controversial. The difference between these two statutes is that the ESA contains a citizen suit provision. Whether this is the reason for successful litigation under the ESA and not under the AWA remains to be seen, but perception, especially in the animal welfare movement, is just as important as the reality.

290 Sunstein, *supra* note 284, at 221 (citations omitted).

291 Stephen Fotis, Note, *Private Enforcement of the Clean Air Act and the Clean Water Act*, 35 AM. U. L. REV. 127, 136 (1985) (citation omitted).

292 *Id.* at 134.

293 *Id.* at 141.

294 *Defenders of Wildlife*, however, made these "pure" citizen suits—where any citizen can sue regardless of direct, personal injury—unacceptable, requiring at minimum that Congress "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992). To establish injury in fact, "[t]he plaintiff must point to a concrete injury, not merely to a congressional grant of standing." Sunstein, *supra* note 284, at 226.

295 Under the citizen suit of the Clean Water Act for example, any person with an interest that is or may be adversely affected by agency action is authorized to commence a suit on his or her own behalf. Fotis, *supra* note 291, at 141.

296 William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After* Bennett v. Spear, 49 ADMIN. L. REV. 763, 783 (1997).

dential or policy limitations on standing.[297] By expanding standing to the limits of Article III, citizen suits realize the intentions of Congress that "all citizens who expressed an interest in a clean and healthful environment"[298] have the ability to sue in court without being subject to limitations. Finally, some citizen suit provisions allow for attorney fees.[299] This can enable citizens to overcome the economic barriers that discourage litigation under many environmental statutes. Thus, citizen suit provisions overcome both legal and economic obstacles that prevent many citizens from pursuing valid legal claims against federal agencies. With *ALDF v. Glickman* taking huge strides to open the courthouse door to animal welfare plaintiffs, the time is right to use this legal victory to effect political change.

C. Previous Legislative Attempts to Add a Citizen Suit Provision

Movements to amend the AWA to add a citizen suit provision have never garnered enough political support to carry them through the House of Representatives.[300] However, the two previous attempts are different from the present situation, because there was no *ALDF v. Glickman* the last time legislation was attempted.

In 1986 and 1989 members of Congress proposed legislation to amend the AWA to include a citizen suit provision "to give individuals standing to sue for enforcement of the act."[301] Noting that "[i]n the first 10 years after the law was enacted in 1966, USDA brought a total of two enforcement actions,"[302] the representatives wanted to "provide an incentive to the Government to enforce the [AWA]."[303] After all, "[t]here is little point in having a law on the books that is not enforced."[304] Although the proposed bill got sixty-eight cosponsors, "which rubs against the trend, both in the courts and in the Congress, to diminish rather than expand standing to sue,"[305] the legislation died in the House Subcommittee on Administrative Law and Government Regulations.

The 101st Congress responded by proposing identical legislation to answer the question, "if the animals can't sue on their own behalf, and

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297 Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1039 (8th Cir. 1988), *rev'd on other grounds*, 504 U.S. 555 (1992).

298 Ring & Behrend, *supra* note 284, at 350 (referring to the Clean Water Act).

299 For instance, both the Clean Water Act and the Clean Air Act have attorney fees provisions. *See* Fotis, *supra* note 291, at 143–46; 33 U.S.C. § 1365(d) (1994); 42 U.S.C. § 7604(d) (1994).

300 Interview with Joyce Tischler, Executive Director of ALDF, Portland, Or. (Sept. 28, 1998).

301 135 CONG. REC. 9361, 9361 (May 16, 1989) (statement of Rep. Rose); *see also* 132 CONG. REC. 6833, 6833–34 (Apr. 9, 1986) (statement of Rep. Chandler)

302 132 CONG. REC. at 6833.

303 *Id.* at 6834

304 *Id.*

305 135 CONG. REC. at 9361. For a list of cosponsors, see a report on H.R. 1770 at *Bill Summary & Status for the 100th Congress* (visited Sept. 29, 1999) <http://thomas.loc.gov/cgi-bin/bdquery/ D?d100:1:./temp/~bdY9Uy:@@@P—/bss/ d100query.html—>.

people can't sue on their behalf, who can?"[306] Realizing that "[w]e are not going to get the enforcement of the [AWA] we demanded when we adopted toughening amendments in 1985 until we grant standing to sue on behalf of animals,"[307] H.R. 3223 contained a citizen suit provision[308] "modeled on more than a dozen provisions in Federal environmental laws."[309] The bill received only nineteen cosponsors and met a fate similar to its predecessor.[310] However, the political and legal climate has undergone significant advancements in the area of animal law since the last time citizen suit legislation was proposed.

D. The Time is Right for the AWA

Judge Wald relied on the AWA's legislative history to do more than support her conclusion that Mr. Jurnove falls within the zone of interests of the AWA. The majority implied that the AWA is ripe for political upheaval.[311] *ALDF v. Glickman* represents the first time anyone has been able to live up to the intent of Congress that "the continued monitoring of concerned animal lovers [would] ensure that the purposes of the Act were honored."[312] Justice Scalia's opinion in *Bennett v. Spear* reflected that "the 'any person' grant of cause of action," as found in the citizen suit provision of the ESA, must be taken at "'face value' because the overall subject matter of th[e] legislation is the environment (a matter in which it is common to think all persons have an interest)."[313] Similarly, the purpose of the AWA, which is in part to ensure the humane treatment of animals, is a subject matter of importance to the public. This is demonstrated by the fact that the AWA was enacted in 1966, years before the other environmental statutes[314] in which "any person may commence a civil suit."[315] Thus, it is not beyond speculation to think that animal welfare activists can successfully lobby Congress for advances in the enforcement capaci-

306 135 CONG. REC. at 9361.

307 *Id.* at 9362.

308 H.R. 3223, 101st Cong. § 3 (1989). Highlights of the citizen suit provision read as follows: "Any person may commence a civil action on behalf of such person or on behalf of any animal protected by this Act to compel" regulation and enforcement. *Id.* § 3(a)(1). "[T]he court may award the costs of litigation and reasonable attorney and expert witness fees and other expenses to the prevailing plaintiff. [The same may be awarded] to the prevailing defendant if [the court] finds that the action or proceeding was frivolous, unreasonable, or without foundation." *Id.* § 3(a)(2). Additionally, the provision makes clear that only USDA can be sued, not a laboratory. *See* 135 CONG. REC. at 9362. This makes the proposal of a similar provision more attractive since it follows from the holding of *ALDF v. Glickman* that research facilities would not be personally responsible for any violations found at their laboratories.

309 135 CONG. REC. at 9362.

310 *Bill Summary & Status for the 100th Congress*, *supra* note 305.

311 *See* Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 326, 445 (D.C. Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1454 (1999).

312 *Id.*

313 Buzbee, *supra* note 296, at 783 (quoting Bennett v. Spear, 520 U.S. 154, 165 (1994)).

314 Of particular importance, the AWA predates the ESA—considered the preeminent piece of legislation for protecting wildlife—by six years.

315 *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(1) (1994).

ties of the AWA. In this manner, *ALDF v. Glickman* does more to strengthen the nation's democratic system than to undermine "the ability of the representative branches of the Federal Government to respond to . . . citizen pressure,"[316] as the dissent claims.

With the proper legal atmosphere set by *ALDF v. Glickman* and a political atmosphere already infused by the passage of anticruelty laws and other legislative enactments designed to protect animals,[317] the time is right for Congress to make good on its promise to put "adequate safeguards . . . in place to prevent unnecessary abuses to animals."[318] This issue does not set Republicans against Democrats,[319] but rather it sets citizens concerned about the proper treatment for animals against the special interests of the biomedical, animal dealer, and exhibitor industries.[320] With access to the courts finally achieved, the animal welfare movement can finally focus on overcoming skepticism with the merits of their claims and achieving a congressional forum to air the imperfections of the AWA.

VI. Conclusion

A case that asks the court to recognize standing for animals is years, if not decades away. Of course, that does not mean it is not in the minds of the judges who must now decide the simpler question of whether USDA has failed to implement minimum standards to govern the humane handling, care, and psychological well-being of the primates living at the Long Island Game Park Farm and Zoo. Although the work of concerned citizens, animal welfare activists, their attorneys, and judges cognizant of the movement's needs is far from finished, the decision reached in *ALDF v. Glickman* is a milestone in animal rights litigation and standing doctrine.

No longer is this a world where "governmental action that regulates the lives of animals, and determines the experience of people who view them in exhibitions, [is] unchallengeable."[321] No longer can skeptics ridicule the belief among animal rights theorists that the movement will gain currency over time,[322] for *ALDF v. Glickman* is not an aberration. Constitutional standing was never intended to be used to keep citizens injured by

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316 154 F.3d at 455 (Sentelle, J., dissenting).

317 For a discussion of recent legislation proposed to protect animals see Nancy Perry, *The Fruits of Our Labor: Results from the 105th Congress—1997 Federal Legislative Summary*, 4 Animal L. 137 (1998).

318 131 Cong. Rec. 29,153, 29,155 (Oct. 25, 1985) (statement of Sen. Dole).

319 The AWA has consistently received bipartisan support as demonstrated by those who have spoken in favor of the legislation. *See supra* note 305.

320 *See generally* Appellant's Petition for a Writ of Certiorari, National Ass'n for Biomedical Research v. Animal Legal Defense Fund, Inc., 119 S. Ct. 1454 (1999) (No. 98-1059).

321 Animal Legal Defense Fund, Inc. v. Glickman, 130 F.3d 464, 476 (D.C. Cir. 1997) (panel decision) (Wald, J., dissenting), *vacated*, 154 F.3d 326 (D.C. Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1454 (1999). The following excerpt from oral argument aptly demonstrates the difficulty plaintiffs face suing under the AWA. "Q. Can you conceive of a situation . . . under this Act where any kind of plaintiff could make a necessary showing? A. Your honor, we wouldn't absolutely rule it out. But we do believe. . . Q. . . . But, I can't conceptualize it myself." *Id.* at 475 n.4.

322 *See* Schmahmann, *supra* note 22, at 779.

government action or inaction out of the judicial process. The judicial conservatism of the 1980s and early 1990s was animal welfare plaintiffs' biggest enemy. With standing law constantly evolving and more judges recognizing avenues for third-party plaintiffs to gain access to the courts, *ALDF v. Glickman* was years in the making. Besides vindicating the animal welfare movement, the decision crafted by Judge Wald contains the sound legal reasoning needed to withstand the policy-based attacks of her dissenters. What will happen next depends on too much conjecture to be worthy of speculation. One thing is certain however: Marc Jurnove and the primates he seeks to protect will have their day in court—finally.