

**STOP PUR-PETUATING THE NORM: AMENDING THE LACEY  
ACT TO INCLUDE A “DANGEROUS OR POTENTIALLY  
DANGEROUS WILDLIFE” DEFINITION FOR EXOTIC PET  
PROTECTION**

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## INTRODUCTION

In the early morning hours, a lion-like animal roamed a Milwaukee, Wisconsin suburb.<sup>1</sup> In the middle of an afternoon, police captured a rouge marsupial at a busy intersection in Franklin, Wisconsin.<sup>2</sup> Franklin's ordinance restricts animal ownership to a two-animal limit on dogs, cats, or even tiny horses, but mentions nothing about exotic pets; therefore, the owners legally possessed the marsupial.<sup>3</sup> Franklin's ordinance is the norm across other municipalities in the state. It is easier to own a tiger than a dog in some municipalities due to the state's lax licensure scheme.<sup>4</sup> The lack of regulation makes Wisconsin a hot spot for the exotic pet trade because the federal government generally leaves private exotic pet enforcement and regulation up to the states.<sup>5</sup>

However, exotic pet regulation issues are not exclusive to Wisconsin. Many other states do not necessarily ban wild animals as pets.<sup>6</sup> Instead, they require permits for some species but not for others.<sup>7</sup> Five states have no statutory or regulatory scheme.<sup>8</sup> Fourteen states allow private ownership through a license or permitting scheme, while thirteen states have partial exotic pet bans.<sup>9</sup> Twenty states have comprehensive bans.<sup>10</sup>

Each state approaches and defines exotic pet bans differently.<sup>11</sup> A comprehensive ban broadly means that states classify wild cats, large non-domesticated carnivores, reptiles, and nonhuman primates as *dangerous*

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1. Marion Renault, *Two More Unconfirmed Sightings of Lion-like Animal*, MILWAUKEE J. SENTINEL (July 31, 2015), <https://archive.jsonline.com/news/milwaukee/two-more-unconfirmed-sightings-of-lion-like-animal-b99548442z1-320318901.html/>.

2. Erik S. Hanley, *A Kangaroo had to be Captured After it got Loose from a Yard in Franklin*, MILWAUKEE J. SENTINEL (June 9, 2020), <https://www.jsonline.com/story/communities/south/news/franklin/2020/06/09/kangaroo-loose-franklin-police-chief-rick-oliva/5330613002/>.

3. *Id.*

4. *Wisconsin One of Five States Where 'Dangerous' Exotic Animals can be Pets*, WIS. CTR. FOR INVESTIGATIVE JOURNALISM (Aug. 16, 2015), <https://www.wisconsinwatch.org/2015/08/exotic-and-exploited-lions-and-tigers-and-wisconsins-lax-wild-animal-laws/>.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Map of Private Exotic Pet Ownership Laws*, ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/content/ma.-private-exotic-pet-ownership-laws> (last accessed Oct. 4, 2020).

9. *Id.*

10. *Id.*

11. Martha Drouet, *Overview of Exotic Pet Laws*, ANIMAL LEGAL & HIST. CTR. (2014), <https://www.animallaw.info/intr./exotic-pets-update-2013> (last visited Oct. 4, 2020).

*animals* or otherwise prohibit private ownership of these species.<sup>12</sup> Alaska facially bans certain exotic pets, but the regulation does not outright do so, which is similar to Wisconsin's approach.<sup>13</sup> Comparatively, California only issues permits for narrow purposes and does not allow a permit for exotic pet ownership.<sup>14</sup> The hodge-podge, state-by-state approach fosters illegal trade and jeopardizes public health and safety for both the animals and humans.<sup>15</sup>

This note analyzes the missing link between federal and state regulation of exotic wildlife and pet ownership. Congress passed the Lacey Act (the Act) in 1900.<sup>16</sup> This Act was the country's first law that attempted to regulate poaching and interstate shipment of wildlife.<sup>17</sup> Congress amended the Act over the years, which diverged from its original intent.<sup>18</sup> Congress must amend the Act to supplement the *injurious wildlife* standard because it does not adequately protect wild animals or exotic pets. The solution is to create an all-encompassing standard that adds *potentially dangerous or aggressive wildlife* in addition to the injurious wildlife standard. Amending the Lacey Act to protect all potentially dangerous wildlife will ensure enhanced animal welfare for exotic animals, while simultaneously providing for the public health and safety of humans and animals. This note recommends using the Lacey Act over other federal laws because the Act provides the most coverage and offers the most significant potential for penalties.<sup>19</sup>

This note provides a background section that discusses: (1) the history and overview of the United States' exotic animal trade—focusing on the history of the first United States' zoo; (2) the Act's history, and; (3) the intersections between the Act, the Animal Welfare Act (AWA), and the Endangered Species Act (ESA). Part I discusses: (1) the Act's current approach to wildlife trafficking and regulation; (2) Ohio's recent efforts to curb exotic pet ownership; and (3) how combining the Act's original legislative intent with Ohio's approach to exotic pet ownership creates the new recommended proposal for amending the Act. Part II discusses the Act's federal application and how states, such as Wisconsin, would benefit from the proposed amendment to the Act. Part III addresses potential concerns to

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12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *The Lacey Act*, U.S. SUSTAINABILITY ALL., <https://thesustainabilityalliance.us/lacey-act/> (last visited October 4, 2020).

17. *Id.*

18. Kaela S. Sculthorpe, *Ethical Management of Invasive Species*, ANIMAL LEGAL & HIST. CTR. 16 (2018), <https://www.animallaw.info/sites/default/files/Ethical%20Management%20of%20Invasive%20Species%20The%20Burmese%20Python.pdf> (explaining that the Lacey Act initially banned all species unless Congress explicitly provided approval until 1949 when amendments to the Act changed it to its current approach).

19. Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. L. L.R. 27, 30 (1995).

the proposed amendment, such as Commerce Clause and state law concerns. It also refutes Congress's species-by-species approach. The last section concludes the argument.

## I. BACKGROUND

### *A. History and Overview of the United States' Exotic Animal Trade*

*Exotic pet* has a broad definition, but it generally refers to “any non-traditionally domesticated animal that is kept as a pet.”<sup>20</sup> A domestic pet is typically an animal that has been “selectively bred by humans for hundreds, or even thousands, of years.”<sup>21</sup> These animals are usually cats, dogs, and horses.<sup>22</sup> The exotic pet trade is a legal or illegal business that deals with and handles exotic pets.<sup>23</sup>

Philadelphia was the first city in the United States to establish a zoo, which officially opened on July 1, 1874.<sup>24</sup> The zoo's owner hired a naturalist to capture and transport live wild animals from overseas; the zoo also accepted live animal donations.<sup>25</sup> Donations of animals often came from the Western United States or from wealthy hunters who no longer wished to show off their foreign, captured prize.<sup>26</sup> The zoo's success became so popular that Congress waived all customs fees for animals headed to the Philadelphia zoo.<sup>27</sup>

Zoo popularity gained traction and expanded into the next century with 60 new zoos formed by the American Association of Zoological Parks and Aquariums (AZA).<sup>28</sup> The AZA imported animals for the zoos directly from the wild.<sup>29</sup> As the American public expressed great interest in circuses and zoos, these organizations began to excessively breed animals like lions and tigers.<sup>30</sup> The overbreeding led to such a surplus of baby animals that zoos and circuses had to figure out another use for them, so many created exhibits for

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20. Gabrielle C. Tegeder, A Research Framework for the Geographic Study of Exotic Pet Mammals in the USA (Jan. 2015) (Ph.D. dissertation, U. of Neb. Lincoln) at 12, <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1026&context=geographythesi>.

21. *Id.*

22. Jani Actman, *Exotic Pet Trade, Explained*, NAT'L GEOGRAPHIC (Feb. 20, 2019), <https://www.nationalgeographic.com/animals/reference/exotic-pet-trade/>.

23. *Id.*

24. Sandy Hingston, *11 Things You Might Not Know About: The Philadelphia Zoo*, PHILA. MAG. (Dec. 22, 2015), <https://www.phillymag.com/news/2015/12/22/philadelphia-zoo-facts/>.

25. *Id.*

26. *Id.*; *History of the Exotic Pet Trade*, TURPENTINE CREEK WILDLIFE REFUGE (June 29, 2018), <https://www.turpentinecreek.org/history-of-the-exotic-pet-trade/>.

27. Hingston, *supra* note 24.

28. TURPENTINE CREEK WILDLIFE REFUGE, *supra* note 26.

29. *Id.*

30. *Id.*

people to feed the baby animals.<sup>31</sup> The zoo or circus would kill the now-adult animal if it did not have the room or a buyer for the animal.<sup>32</sup>

Zoos and aquariums were not the only places people wished to see animals. In the United States, private exotic pet ownership rose to 29 million pets in 2012.<sup>33</sup> The demand for private exotic pet ownership exploded because the internet provides ease of access to social media and e-commerce websites.<sup>34</sup> Many people assume their exotic animal is captive-bred but that is not always true.<sup>35</sup> Often, traders purposely mislabel the animals as captive-bred when they actually smuggled the animal out of the wild or its native country.<sup>36</sup> These animals suffer during transportation, and if they do not die before reaching the United States, the animals often cannot “eat, move, and behave as they would in the wild.”<sup>37</sup> The animals may—and frequently do—attack their owners and can spread diseases to their human handlers and other animals.<sup>38</sup> There are global efforts to combat the exotic pet trade, but countries like the United States have few federal laws that specifically address the exotic pet industry.<sup>39</sup> The closest federal law the United States has to combat the global issue is the Lacey Act.

### *B. The Lacey Act's History*

Congress passed the Lacey Act in 1900 as its first attempt to regulate poaching and illegal interstate shipment of wildlife.<sup>40</sup> In its current form, the Act states: “any exotic species may be imported into the United States unless the Department of Interior designates the species as ‘injurious wildlife.’”<sup>41</sup> *Injurious wildlife* are animals that are harmful to other wildlife or to humans and human interests like agriculture and forestry.<sup>42</sup> These animals are typically invasive and include mammals, wild birds, reptiles, amphibians, fishes, mollusks, and crustaceans.<sup>43</sup>

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31. *Id.*

32. *Id.*

33. Tegeder, *supra* note 20, at 9.

34. Actman, *supra* note 22.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Drouet, *supra* note 11.

40. U.S. SUSTAINABILITY ALL., *supra* note 16.

41. Robert Brown, *Exotic Pets Invade United States Ecosystems: Legislative Failure and A Proposed Solution*, 81 IND. L.J. 713, 719 (2006).

42. *Injurious Wildlife: A Summary of the Injurious Provisions of the Lacey Act*, U.S. FISH & WILDLIFE SERV. (Dec. 2017), [https://www.fws.gov/injuriouswildlife/pdf\\_files/InjuriousWildlifeFactSheet2017.pdf](https://www.fws.gov/injuriouswildlife/pdf_files/InjuriousWildlifeFactSheet2017.pdf).

43. *Id.*

The Act also regulates the interstate and foreign commerce wildlife trades.<sup>44</sup> Importers must verify specific information about the wildlife import, such as: genus and species name; value of the animal; the exporting country; etc., before Customs and Border Protection (CBP) clears the import.<sup>45</sup> The Act's enforcement powers include civil and criminal penalties and even imprisonment.<sup>46</sup> The USDA's Animal and Plant Health Inspection Service (APHIS), the Department of the Interior's Fish and Wildlife Service (FWS), and the Department of Homeland Security all operate with enforcement authority under the Act.<sup>47</sup> If the Department of Interior places an animal on the injurious wildlife list, the Act cannot prevent the animal's breeding or ownership amongst the states unless United States federal law or Indian tribal law prohibits ownership.<sup>48</sup> This is one of the major flaws in the Act.

### *C. Intersections Between the Act, the Animal Welfare Act, and the Endangered Species Act*

There are a few policies and federal laws that address exotic animals, but the big three are the Lacey Act, the Animal Welfare Act (AWA), and the Endangered Species Act (ESA).<sup>49</sup> This note will discuss these three acts. As previously stated, the Lacey Act spurred federal control of illegal wildlife in 1900.<sup>50</sup> The Act targets the illegal trafficking of fish, wildlife, and plants through the USDA and FWS enforcement.<sup>51</sup>

Several decades later in 1966, President Lyndon Johnson signed the AWA into law.<sup>52</sup> The AWA's primary focus was on dogs and cats, but it later added other animals such as nonhuman primates, rabbits, hamsters, and guinea pigs.<sup>53</sup> The AWA requires dealers and laboratories to be licensed, provide identification for their animals, and set minimum care and handling

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44. 50 C.F.R. § 16.3.

45. U.S. SUSTAINABILITY ALL., *supra* note 16.

46. *Id.*

47. *Id.*

48. 16 U.S.C. § 3372(a)(1) (2000).

49. Rebecca Chapman, *Tiger King: Murder, Mayhem and Conservation Policy*, OHIO STATE U. (Apr. 3, 2020), <https://u.osu.edu/chapman.751/2020/04/03/tiger-king-murder-mayhem-andconservation-policy/>.

50. Holly Doremus, *The Endangered Species Act: Static Law Meets Dynamic World*, 32 WASH. U. J. L. & POL'Y 175, 204 (2010).

51. Chapman, *supra* note 49.

52. Benjamin Adams & Jean Larson, *Legislative History of the Animal Welfare Act: Introduction*, NAT'L AGRIC. LIBR., <https://www.nal.usda.gov/awic/legislative-history-animal-welfare-act-introduction> (last visited Oct. 4, 2020).

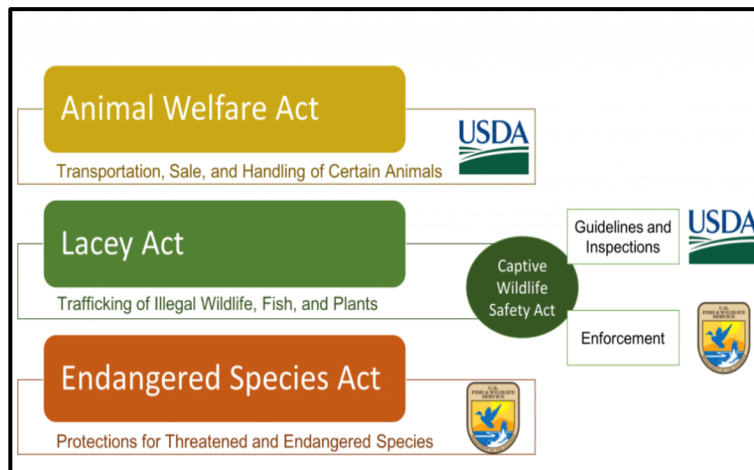
53. *Id.*

guidelines.<sup>54</sup> The AWA made the Department of Agriculture responsible for the law's implementation.<sup>55</sup>

Finally, Congress enacted the ESA in 1973 “to protect and recover imperiled species and the ecosystems upon which they depend.”<sup>56</sup> The ESA “prohibits the taking of, sale, transportation, ownership, and harm of any listed species.”<sup>57</sup> However, the ESA only covers purebred species; therefore, the FWS may issue permits for hybrids, scientific research, or captive-bred wildlife.<sup>58</sup>

Many pieces of separate animal-specific legislation govern various aspects of an animal's life. How a law governs an animal depends mostly on two requirements: (1) the animal's method of transportation throughout the United States, and (2) how the animal will be used.<sup>59</sup> Figure 1 provides a visual representation of the three main pieces of wildlife protection legislation. Without the implementation of new legislation, the United States must use what is already law to curb the exotic pet trade. The best legislation amongst the three is the Lacey Act.

**Figure 1: Key Federal Laws Related to Exotic Animals<sup>60</sup>**



54. *Id.*

55. *Id.*

56. *Endangered Species Act Overview*, U.S. FISH & WILDLIFE SERV. (Jan. 30, 2020), <https://www.fws.gov/endangered/laws-policies/index.html>.

57. Chapman, *supra* note 49.

58. *Id.*

59. 9 C.F.R. § 1.1.

60. Chapman, *supra* note 49.

## II. APPROACHES TO EXOTIC SPECIES REGULATION

*A. The Lacey Act's Current Blacklist Approach*

This section explains the Act's current blacklist approach.<sup>61</sup> The Department of the Interior designates species as injurious, which subsequently bars their import.<sup>62</sup> Congress can also add or prevent the addition of a species to the blacklist.<sup>63</sup> For the agencies, the listing process operates via informal rulemaking under the Administrative Procedure Act (APA).<sup>64</sup> The agency proposes the listing, receives and evaluates public comments, and issues a final rule.<sup>65</sup>

The agency and FWS must also comply with the National Environmental Policy Act (NEPA) environmental impact provision and prepare an environmental impact statement (EIS) if findings are significant.<sup>66</sup> The agencies do not have a formal definition of what constitutes as an injurious species, but FWS has unofficial guidance criteria: "FWS conducts a risk analysis to assess the likelihood of escape, establishment, and eradication of a proposed injurious species. It also considers the likelihood and magnitude of the injurious species' impact on species listed under the Endangered Species Act; humans; agriculture; horticulture; and forestry."<sup>67</sup>

However, the APA procedure is slow, and it can take up to six years before the government lists a species as injurious.<sup>68</sup> The delay allows a threatening species to become well established in its new ecosystem, which can be deadly to other wildlife and costly to manage.<sup>69</sup> The Act also lacks an emergency measure to expedite a species listing without a previous APA filing.<sup>70</sup> A petition option is available, but it lists very few species as a result.<sup>71</sup> Additionally, once the Agency lists the species, current animal owners can still retain their ownership, breed, and sell the animal within the United States.<sup>72</sup>

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61. Christopher J. Patrick, *Ballast Water Law: Invasive Species and Twenty-Five Years of Ineffective Legislation*, 27 VA. ENV'T L.J. 67, 80 (2009).

62. Kristina Alexander, CONG. RESEARCH SERV., R43170, INJURIOUS SPECIES LISTINGS UNDER THE LACEY ACT: A LEGAL BRIEFING 1, 8 (2013).

63. *Id.* at 10.

64. *Id.* at 8.

65. *Id.*

66. *Id.*

67. *Id.* at 10.

68. Sculthorpe, *supra* note 18, at 16.

69. *Id.* at 18.

70. *Id.* at 19.

71. See *id.* (discussing that another method is to petition a species listing, but this method is slow—only one species has made the list via petition in the past decade).

72. *Id.*



The blacklist approach is the least effective method to curb invasive species and completely misses regulating animals used in wildlife trafficking and the exotic pet trade. The blacklist approach is problematic because a species must already be in the United States and invading an ecosystem before the FWS considers adding the species to the blacklist.<sup>73</sup> If the FWS adds the species to the blacklist, the approach effectively prevents importation.<sup>74</sup>

Another option is to have a *clean list* or *whitelist* approach, which deems all species illegal to import and transport until decided otherwise through the APA's procedure or Congress.<sup>75</sup> The Act originally operated through a whitelist approach because of its broad language banning "any foreign wild animal or bird" except with a permit.<sup>76</sup> In 1949, Congress passed an amendment that changed the injurious species provision to the current blacklist approach.<sup>77</sup> The blacklist started with four species: the mongoose, fruit bats, sparrows, and starlings.<sup>78</sup> Later, Congress "added scientific names for the mongoose and fruit bat, included fish, amphibians, and reptiles to the term 'animals and birds,' and removed the English sparrow and starling from the black list."<sup>79</sup> The blacklist approach creates a less effective measure for preventing and reducing the spread of invasive species and is against the original intent of the Act.<sup>80</sup>

### *B. State Law Approach—Ohio as an Example*

In October of 2011, Terry Thompson from Zanesville, Ohio, released his 56 exotic animals from their pens on his property before killing himself.<sup>81</sup> Sheriff Lutz, familiar with the local and notorious Thompson, arrived on the scene to find dozens of exotic animals off Thompson's property.<sup>82</sup> Sheriff Lutz ordered the officers to shoot all of the animals that had wandered off Thompson's property.<sup>83</sup> Sheriff Lutz feared that the animals could hurt the officers and that some of the monkeys had the Herpes B virus because

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73. Patrick, *supra* note 61, at 80.

74. 16 U.S.C. § 3372(a)(1) (2000).

75. Sculthorpe, *supra* note 18, at 16.

76. *Id.* at 4 (emphasis added).

77. *Id.*

78. Sculthorpe, *supra* note 18, at 17.

79. *Id.*

80. *Id.*

81. Christina Caron, *Zanesville Animal Massacre Included 18 Rare Bengal Tigers*, ABC NEWS (Oct. 19, 2011), <https://abcnews.go.com/US/zanesville-animal-massacre-included-18-rare-bengal-tigers/story?id=14767017>.

82. Chris Heath, *18 Tigers, 17 Lions, 8 Bears, 3 Cougars, 2 Wolves 1 Baboon, 1 Macaque, and 1 Man Dead in Ohio*, GQ (Feb. 6, 2012), <https://www.gq.com/story/terry-thompson-ohio-zoo-massacre-chris-heath-gq-february-2012>.

83. *Id.*

animal's lack of veterinarian care and horrific living conditions.<sup>84</sup> It took authorities and zoologists all night to account for each of Thompson's animals.<sup>85</sup> In all, authorities slaughtered 49 animals and managed to rescue six: three leopards (still in their cages), two macaques, and a small grizzly bear (kept in a small bird cage).<sup>86</sup>

The Sheriff's office had cited Thompson's property as a huge problem in the past for law enforcement.<sup>87</sup> Past violations resulted in an Alcohol, Tobacco, and Firearms (ATF) raid and one year of jail time for Thompson.<sup>88</sup> The Zanesville Massacre sparked Ohio legislators to review their exotic animal laws.<sup>89</sup> At the time, Ohio had exotic animal laws analogous to Wisconsin's—there were few to none.<sup>90</sup> The only control in place was that to breed, exhibit, or commercially transport animals across state lines, owners needed a USDA license requiring facility inspection.<sup>91</sup> Otherwise, there were no further special checks or controls, which made Ohio the state with one of the most lenient exotic pet laws in the country.<sup>92</sup>

In the wake of the Zanesville Massacre, lawmakers passed (and Governor John Kasich signed into law on June 5, 2012) the Dangerous Wild Animal Act (DWA) despite widespread opposition.<sup>93</sup> The law bans new ownership of dangerous and wild animals but grandparented in current exotic pet owners.<sup>94</sup> Grandparented pet owners must: (1) register with the state; (2) obtain permits; (3) obtain liability insurance; (4) comply with housing and safety standards; and (5) pass a criminal background check.<sup>95</sup> Owners had to obtain a permit by October 1, 2013, to keep their animals past January 1, 2014, when the law went into full enforcement.<sup>96</sup>

The Ohio Department of Agriculture (ODA) oversees the law's enforcement.<sup>97</sup> ODA seized 122 exotic animals in the first three years that

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84. *Id.* (Herpes B is not dangerous to monkeys, but it is extremely dangerous to humans and can lead to deadly brain infections).

85. *Id.*

86. *Id.*

87. *Id.*

88. Caron, *supra* note 81.

89. Heath, *supra* note 82.

90. *Id.*

91. *Id.*

92. Christopher M. Lucca, *Keeping Lions, Tigers, and Bears (Oh My!) in Check: The State of Exotic Pet Regulation in the Wake of the Zanesville, Ohio Massacre*, 24 VILL. ENV'T L.J. 125, 140 (2013).

93. *Id.* at 141.

94. *Id.*

95. *Id.*

96. Sheila McLaughlin, *Hundreds of Exotic Animals Registered in Ohio*, THE CINCINNATI ENQUIRER (Nov. 23, 2012), <https://www.usatoday.com/story/news/nation/2012/11/23/exotic-animals-registered-in-ohio/1723753/>.

97. *Dangerous Wild Animals*, OHIO DEP'T OF AGRI. (Apr. 10, 2018), <https://agri.ohio.gov/wps/portal/gov/oda/divisions/animal-health/resources/dangerous-wild-animals>.

the law was in full effect.<sup>98</sup> Various exotic pet owners filed a lawsuit against the ODA in 2012 stating that the DWA was unconstitutional.<sup>99</sup> Plaintiffs' cited First Amendment, Fourteenth Amendment Due Process, and Fifth Amendment Takings Clause violations.<sup>100</sup> The United States District Court for the Southern District of Ohio held that the DWA did not violate plaintiffs' First, Fourteenth, and Fifth Amendment rights, and stated that the owners were not likely to succeed on the merits for any of their claims.<sup>101</sup> The plaintiffs appealed the First Amendment claim, and the district court's holding that the DWA's microchipping requirement constituted a Fifth Amendment Taking.<sup>102</sup> The Sixth Circuit disagreed and affirmed the lower court's decision.<sup>103</sup>

The Sixth Circuit is not alone in its ruling. Other states and the circuit courts are known to uphold dangerous animal laws and ordinances against pet owners.<sup>104</sup> Broadly, these courts held that the states have a legitimate interest in distinguishing between dangerous exotic animals and other animals based "on a rational basis review to justify the disparate treatment between these classes of pet owners."<sup>105</sup> Strict exotic animal laws serve a legitimate purpose when courts uphold them. A nationwide reform could provide a solution for states like Wisconsin that do not have adequate exotic pet laws.

### *C. Recommendation and Solution*

Because the state-by-state approach to curb exotic pet ownership is slow or nonexistent in some states, Congress should amend the Act back to its original intent which was whitelist approach. Additionally, Congress should take reform one step further to include "potentially dangerous or aggressive wildlife" language to its injurious definition. The "potentially dangerous or aggressive wildlife" portion would add an extra layer of protection for wildlife that may not meet the FWS's criteria for injurious and invasive. The

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98. *Id.*

99. *Wilkins v. Daniels*, 913 F. Supp. 2d 517, 532 (S.D. Ohio 2012), *aff'd*, 744 F.3d 409 (6th Cir. 2014).

100. *Id.*

101. *Id.*

102. *Wilkins v. Daniels*, 744 F.3d 409, 411 (6th Cir. 2014) (explaining that the Act required owners microchip their animals upon registration. Petitioners argued the microchipping requirement constituted a physical taking without compensation violating the Takings Clause of the Fifth Amendment.)

103. *Id.*

104. Lucca, *supra* note 92, at 144.

105. *Id.*

proposed definition could model that of Ohio's Dangerous Wild Animal Law.<sup>106</sup>

The law states that a "dangerous wild animal" means any of the following, including hybrids and a detailed list of restricted snakes, unless otherwise specified:

- (1) Hyenas; (2) Gray wolves, excluding hybrids; (3) Lions; (4) Tigers; (5) Jaguars; (6) Leopards, including clouded leopards, Sunda clouded leopards, and snow leopards; (7) All of the following, including hybrids with domestic cats unless otherwise specified: (a) Cheetahs; (b) Lynxes, including Canadian lynxes, Eurasian lynxes, and Iberian lynxes; (c) Cougars, also known as pumas or mountain lions; (d) Caracals; (e) Servals, excluding hybrids with domestic cats commonly known as savannah cats; (8) Bears; (9) Elephants; (10) Rhinoceroses; (11) Hippopotamuses; (12) Cape buffaloes; (13) African wild dogs; (14) Komodo dragons; (15) Alligators; (16) Crocodiles; (17) Caimans, excluding dwarf caimans; (18) Gharials; (19) Nonhuman primates other than lemurs and the nonhuman primates specified in division (C)(20) of Ohio Revised Code 935; (20) All of the following nonhuman primates: (a) Golden lion, black-faced lion, golden-rumped lion, cotton-top, emperor, saddlebacked, black-mantled, and Geoffroy's tamarins; (b) Southern and northern night monkeys; (c) Dusky titi and masked titi monkeys; (d) Muriquis; (e) Goeldi's monkeys; (f) White-faced, black-bearded, white-nose bearded, and monk sakis; (g) Bald and black uakaris; (h) Black-handed, white-bellied, brown-headed, and black spider monkeys; (i) Common woolly monkeys; (j) Red, black, and mantled howler monkeys.<sup>107</sup>

Ohio's DWA prohibits owning, trading, selling, or offering for sale a dangerous wild animal without a permit unless protected by the grandparent clause.<sup>108</sup> The DWA requires that owners (1) register with the state and (2) apply for a permit.<sup>109</sup> The DWA does not require a permit for certain organizations such as: (1) an accredited AZA facility; (2) an accredited Zoological Association of America facility; (3) wildlife sanctuaries, and; (4) eight other types of organizations.<sup>110</sup>

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106. OHIO REV. CODE ANN. § 935.01 (2012).

107. *Id.*

108. *Dangerous Wild Animals*, OHIO DEP'T OF AGRI, *supra* note 97.

109. *Id.*

110. *Id.*

When the DWA went into full effect (January 1, 2014), the ODA had registration applications from 150 private exotic animal owners, and a number of zoos registered 888 animals.<sup>111</sup> The owners then had to apply for a permit from the state per DWA regulation.<sup>112</sup> By the 2014 deadline, the ODA had only five complete and 25 incomplete permit applications for the exotic pets, which meant about 90% of private owners lacked a permit.<sup>113</sup> The state approved 53 permit requests less than six months later.<sup>114</sup> That still left out countless pet owners.<sup>115</sup>

The ODA said it saw a huge shift of exotic pet owners giving up their animals to sanctuaries and new homes out-of-state.<sup>116</sup> For example, a 45-year-old chimpanzee “who had spent most of his life locked in a cage in a Dayton garage went to [the] Center for Great Apes, an accredited sanctuary in Florida. When he first arrived, he could barely walk, but now Clyde has largely regained his health and even has a girlfriend.”<sup>117</sup> Other notorious Ohio exotic pet owners sent their bears and big cats to accredited agencies in other states.<sup>118</sup> The state worries about—and has no way to track—owners who may relocate their animals to unaccredited facilities or private owners in other states.<sup>119</sup> Overall, the state has seen a decrease in exotic pet breeding and ownership.<sup>120</sup>

The federal government should apply the same measures in the DWA to the Lacey Act to create comprehensive wildlife protection nationwide. The strict standards of the DWA protects animals from cruel and unsanitary conditions and allows the animals to live in sanctuaries where organizations properly care for and manage the animals.<sup>121</sup> Applying the dangerous wild animal language to the Act expands the scope beyond *injurious* and protects noninvasive species. The added language provides the animals with an extra layer of protection and helps the Act get back to its original intent.

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111. Catherine Becker, Ohio's Dangerous Wild Animal Act of 2012: Enactment, Implementation and Evaluation (Dec. 9, 2014) (Ph.D. dissertation, Ohio State U.) at 19, <https://cpbusw2.wpmucdn.com/u.osu.edu/dist/9/5049/files/2015/01/6000-Final-Paper-Becker-lj7ufe9.pdf>.

112. *Id.*

113. *Id.*

114. *Id.* at 20.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 21.

## III. FEDERAL FUNCTION AND STATE FAILURE

*A. The Lacey Act's Federal Application*

This section goes beyond the scope of the Act's history and looks at conduct prohibited by the Act and its application in lawsuits. First, the Act requires accurately marking wildlife shipments.<sup>122</sup> Section 3372(b) prohibits the import, export, or transport in interstate commerce of any container of wildlife or fish that is not plainly marked, labeled, or tagged as required by the applicable regulations.<sup>123</sup> Next, preparing false documentation for shipments of wildlife, fish, or plants violates the Act and comes with a misdemeanor or felony penalty.<sup>124</sup> The difference between a misdemeanor or felony penalty depends on if the violator knowingly created false documentation and the market value exceeds \$350.<sup>125</sup> While there is some litigation about this section, it is not the main provision officials use to prosecute individuals.<sup>126</sup>

The main provision officials use for prosecution are sections 3372(a)(1) and (a)(2).<sup>127</sup> These sections outline and refer to the unlawful (1) import, export, transport, selling, receiving, acquiring, or purchasing of (2) wildlife, fish, or plants that have been taken, possessed, transported, or sold in violation of a (3) state, federal, foreign, or tribal law or regulation.<sup>128</sup> The Act analyzes trafficking violations with these questions:

1. Is the wildlife, fish, or plant at issue covered by the Lacey Act?
2. If so, can the government prove that the wildlife, fish, or plant was taken, possessed, transported, or sold in violation of a wildlife-related state, federal, tribal, or foreign law or regulation?
3. If so, can the government prove that the defendant imported, exported, transported, received, acquired, or purchased the illegal wildlife, fish, or plant, or attempted to do so?
4. If the underlying law was a state or foreign law, did the accused import, export, transport, receive, acquire, or purchase the wildlife, fish, or plant in interstate or foreign commerce?

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122. 16 U.S.C. § 3372(b).

123. *Id.*

124. Anderson, *supra* note 19, at 53.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

5. If so, are the additional elements necessary for proof of a misdemeanor or felony violation present, such as commercial conduct, market value, and knowledge of the wildlife's illegality?<sup>129</sup>

The following cases provide just a few examples of how the Act works to protect wildlife, and the power of its criminal prosecutions. In July 2020, the United States District Court for the Western District of Louisiana upheld Kaenon Constantin's conviction under the Lacey Act's §§3372(a)(1) and 3373(d)(2).<sup>130</sup>

Constantin, along with a juvenile, shot two whooping cranes—a protected species—in May of 2016.<sup>131</sup> Constantin only found the body of one whooping crane and immediately transported it to the juvenile's house where they severed its legs and removed a tracking transponder.<sup>132</sup> Constantin pled guilty that knew or should have known that he took and possessed the wildlife unlawfully.<sup>133</sup> The lower court sentenced Constantin to “a fine of \$10,000 and special assessment of \$25, due immediately, the payment of restitution in the amount of \$75,000, payable over a 60-month period of probation, and conditions of probation including 360 hours of community service approved by the LDWF, and a prohibition against hunting during that period.”<sup>134</sup> The fine is so high because the International Crane Foundation estimates it costs \$94,000 to raise, release, and monitor the protected whooping crane.<sup>135</sup>

Louisiana—a state traditionally favored by bird poachers—has more prosecutions than any other state in the last five years for illegally killing or possessing a migratory bird.<sup>136</sup> Louisiana's shift to a pro-prosecution state largely has to do with an uptick in government convictions.<sup>137</sup> The shift effectively proves that when the government takes serious action against illegal wildlife trafficking, it sends a message to poachers and traffickers that the government will convict them for their actions. The government's full enforcement allows the Act to do what Congress intended almost 120 years ago—to stop illegal poaching and trafficking to protect wildlife.

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129. *Id.*

130. *United States v. Constantin*, No. 6:19-CR-00345-01, 2020 WL 5807519, at \*1 (W.D. La. Sept. 29, 2020).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Sara Sneath, *Poachers Threaten Louisiana's Mostly Successful Whooping Crane Reintroduction Program*, NOLA (Sept. 6, 2020), [https://www.nola.com/news/courts/article\\_2354dde4-ee4f-11ea-aff0-eb82f52359ab.html](https://www.nola.com/news/courts/article_2354dde4-ee4f-11ea-aff0-eb82f52359ab.html).

136. *Id.*

137. *Id.*

The Environmental Crimes Division of the United States' Department of Justice uses the Act to protect wildlife.<sup>138</sup> It also prosecutes individuals and organizations involved in illegal wildlife trafficking.<sup>139</sup> For example, Robert MacInnes and Robert Keszey co-owned a reptile dealership in Florida that was well-known because of a Discovery Channel TV show.<sup>140</sup> The owners illegally collected wild timber rattlesnakes and transported the snakes from Florida to Pennsylvania and New York over the course of two years.<sup>141</sup> The owners even arranged for some of the snakes to go to an exotic pet auction in Europe.<sup>142</sup> The United States caught the owners and charged them with violations of the Lacey Act.<sup>143</sup> The government successfully proved the Lacey Act violations, among other charges, at trial.<sup>144</sup> The court sentenced MacInnes to 18 months of incarceration and a \$4,000 fine and sentenced Keszey to 12 months of incarceration and a \$2,000 fine.<sup>145</sup> The Third Circuit denied the owners' motion for a new trial and upheld their convictions.<sup>146</sup> This recent case is a primary example of how wildlife in the United States ends up in the exotic pet trade, but there are other case examples of people facing Lacey Act violations.

The United States convicted Christopher Loncarich in violation of the Lacey Act because he illegally captured and maimed mountain lions and bobcats even though they were not kept as exotic pets.<sup>147</sup> Over the course of three years, Loncarich guided hunts for mountain lions and bobcats across the Book Cliffs Mountains along the Colorado-Utah border.<sup>148</sup> Loncarich trapped the cats in cages prior to hunts and would shoot them in the paws, legs, or place leghold traps to keep them from moving too much.<sup>149</sup> Loncarich would then release the cats when a hunter was nearby, so that the hunter had a better chance for the kill.<sup>150</sup> Loncarich pled guilty to Lacey Act conspiracy charges, and the court sentenced him to 27 months incarceration.<sup>151</sup>

These cases provide just a few examples that the Act works when prosecutors use its full force. The Obama administration recognized that it is

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138. *Id.*

138. *Environment and Natural Resources Division*, DEP'T OF JUST., <https://www.justice.gov/enrd/prosecution-federal-wildlife-crimes> (last visited Nov. 29, 2020) [hereinafter *ENRD*, DEP'T OF JUST.].

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *United States v. Keszey*, 643 F. App'x 153, 155 (3d Cir. 2016).

147. *ENRD*, DEP'T OF JUST, *supra* note 138.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*



in the United States' best interest to combat the ever-escalating international wildlife trafficking crisis by taking a "whole-of-government" approach to curb the threat.<sup>152</sup> The approach aimed to "both strengthen anti-trafficking efforts already underway in ENRD and other federal agencies and elevate illegal wildlife trafficking as a priority for additional agencies whose missions include law enforcement, trade regulation, national security, international relations, and global development."<sup>153</sup> While the whole-of-government approach was meant to be effective, it is subject to differing presidential administration priorities and directives. Amending the Act to include protections for animals outside the scope of the injurious wildlife standard creates concrete protections for these animals that can withstand administration change.

*B. Wisconsin's Failure to Protect Exotic Pets*

Wisconsin is one of five states with virtually no wild or exotic animal laws.<sup>154</sup> The state sets loose guidelines for obtaining a license and primarily relies on the AWA and USDA for inspection and enforcement. Wisconsin statutes outline two requirements for wildlife possession but has a lengthy list of exemptions where a license is not needed.<sup>155</sup> The following subsections explain when owners do not need a license.<sup>156</sup>

The Wisconsin Department of Agriculture, Trade and Consumer Protection is the agency responsible for regulating the imports and exports of exotic animals, including exotic pets.<sup>157</sup> The state requires a certificate of veterinary inspection (CVI) for importing exotic species.<sup>158</sup> While Wisconsin requires a CVI, the state does not require vaccinations and official individual identification for exotic pets.<sup>159</sup> For moving exotic animals within the state and exporting them Wisconsin "does not have specific requirements for

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152. *Id.*

153. *Id.*

154. *Wisconsin One of Five States Where 'Dangerous' Exotic Animals can be Pets*, WIS. CTR. FOR INVESTIGATIVE JOURNALISM, *supra* note 4.

155. WIS. STAT. § 169.04(1)(a) (2001); *See* WIS. STAT. § 169.04(1)(b) (2001) (defining restrictions on possession of live wild animals in the state's Captive Wildlife chapter); *See also* WIS. STAT. § 169.04(4) (2001) (listing exemptions for certain wildlife); *See also* WIS. STAT. § 169.04(5) (2001) (providing general exceptions to persons and institutions).

156. *Id.*

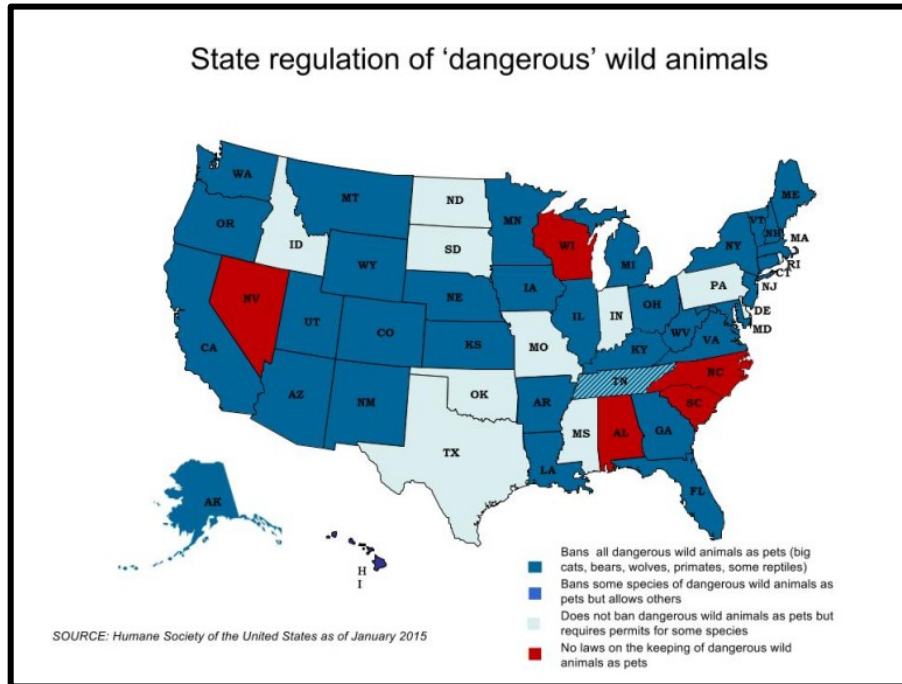
157. *Exotic Species Movement*, DEP'T OF AGRIC., TRADE AND CONSUMER PROT., [https://datcp.wi.gov/Pages/Programs\\_Services/ExoticSpeciesMvmt.aspx](https://datcp.wi.gov/Pages/Programs_Services/ExoticSpeciesMvmt.aspx) (last visited Nov. 3, 2020).

158. *Id.*

159. *Id.*

moving exotic animals [in the state] [and] does not have specific export requirement for exotic animals.”<sup>160</sup>

**Figure 2: State Regulation of ‘Dangerous’ Wild Animals**<sup>161</sup>



Comparatively, Wisconsin State Statute Chapter 174 is entirely about dogs.<sup>162</sup> Chapter 174.02 outlines the owner’s liability for damage caused by a dog.<sup>163</sup> In some cases, a court may even issue a kill order for the dog.<sup>164</sup> Wisconsin statute draws a stark contrast between the details and laws for dog ownership compared to exotic animals.

In 2015, State Senator Van Wanggard introduced a bipartisan bill to the Wisconsin State Legislature that would ban the ownership, breeding, and sale of dangerous exotic animals “including nonnative big cats, nonnative bears,

160. *Id.* (demonstrating the DATCP’s administrative code ATCP 10.06 and others in the chapter on animal diseases and movement).

161. *Id.*

162. WIS. STAT. § 174 (2011).

163. *Id.*

164. *Id.*

apes, and crocodilians.”<sup>165</sup> The bill required insurance and care regulations similar to Ohio’s law.<sup>166</sup> It also grandparented in current pet owners and provided financial penalties for owners whose animal attacked someone or caused property damage.<sup>167</sup> While many organizations supported the bill, others said it did not go far enough to protect popular exotic pet species.<sup>168</sup> The Zoological Association of America (ZAA) opposed the bill because it said that there were no important differences in the bill’s language regarding animal welfare and public safety concerns.<sup>169</sup> The ZAA also cited the lengthy exemption list of permitted exotic pets and stressed that the bill’s current form will not likely achieve what lawmakers intend. Figure three below illustrates what species the law would outright ban and not ban.<sup>170</sup>

**Figure 3: Species Banned or Not Banned in Senate Bill 241**<sup>171</sup>



165. *Limits to Exotic Pets in Wisconsin Loom, but Critics Cite Several Loopholes*, WIS. WATCH (Oct. 15, 2015), <https://www.wisconsinwatch.org/2015/10/limits-to-exotic-pets-in-wisconsin-loom-but-critics-cite-several-loopholes/>.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. Haley Henschel, Illustration of potentially banned or not banned exotic animals in the Wis. Senate Bill 241, in Wisconsin Center for Investigative Journalism.

As the list indicates, people could still keep animals like kangaroos, baboons, and zebras as exotic pets. Nevertheless, this bill never made it out of committee, and the Wisconsin Legislature has not returned to it.<sup>172</sup>

#### IV. CONSTITUTIONAL CONCERNS AND CURRENT INEFFICIENCY

##### *A. Addressing Concerns*

##### 1. Potential Commerce Clause and State Constitutional Concerns

Congressman Lacey considered Commerce Clause implications of the Act at its inception.<sup>173</sup> He stated on the House floor that the Act's intent was not to be a "national game law, which, I think, would be unconstitutional."<sup>174</sup> Rather, Congressman Lacey argued that the federal government had authority to "begin where the State authority ends."<sup>175</sup> Congress actually used the Commerce Clause to its benefit by regulating in the Act that all interstate shipments of wildlife must be clearly marked and labeled.<sup>176</sup> The Act also circumvented Commerce Clause concerns by removing "federal restrictions on the states' ability to regulate the sale of wildlife within [its] borders by subjecting all game animals and birds entering a state to the state's laws."<sup>177</sup> The Act modeled language from a federal statute that allowed dry states to regulate liquor sales passing through their jurisdictions.<sup>178</sup>

The Commerce Clause plays a prominent role over federal wildlife laws.<sup>179</sup> For example, the ESA is constitutionally justified in its exercise of commerce power because the federal government may use its powers to deal with multistate transport issues.<sup>180</sup> Adding the "potentially dangerous or aggressive wildlife" language to the injurious wildlife standard would not frustrate the Commerce Clause. The new language simply expands the scope of protected animals and leaves the marking requirement.<sup>181</sup> Consequently, owners could transport and move exotic pets throughout the United States.

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172. S.B. 241, 2015 Leg. (Wis. 2015.), <https://docs.legis.wisconsin.gov/2015/related/proposals/sb24>.

173. Anderson, *supra* note 19, at 40.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. David Favre, *American Wildlife Law – An Introduction*, ANIMAL LEGAL & HIST. CTR. (2003), <https://www.animallaw.info/article/american-wildlife-law-introduction>.

180. *Id.*

181. 16 U.S.C. § 3372(b) prohibits the import, export, or transport in interstate commerce of any container of wildlife or fish not plainly marked, labeled, or tagged as required by the applicable regulations.

They would just be subject to a strict regulatory process. To allow otherwise continues the hodge-podge approach to exotic wildlife and pet regulation.

Similarly, the proposed amendment does not interfere with state law concerns. The Act's disclaimer provision does "not repeal, modify, or supersede . . . nor change state or tribal power to regulate the activities of persons on Indian reservations."<sup>182</sup> The proposed amendment merely supplements state wildlife laws and does not seek to overturn or frustrate any current state laws. Again, Congress designed the Act to supplement inadequate state law, and the proposed amendment adds to that supplementation. The Ninth Circuit held that "[T]he Act must be applied to conduct that is also regulated by an existing treaty, state or federal law, regulation or tribal law. The grand purpose of fish, wildlife, and plant protection by the federal government would be severely dissipated by an exaggerated reading of the disclaimer provision."<sup>183</sup> It is in the federal government's interest to protect wildlife, and the Act can live in harmony with state and tribal laws. The proposed amendment will not disrupt that harmony.

## 2. The Species-by-species Approach is Ineffective

The U.S. House of Representatives passed "The Big Cat Public Safety Act" (H.R. 1380) on Thursday, December 3, 2020.<sup>184</sup> The Big Cat Public Safety Act amends the Captive Wildlife Safety Act "to prohibit the private possession of lions, tigers, leopards, cheetahs, jaguars, cougars, or any hybrid of these species" by individuals who are not licensed by the U.S. Department of Agriculture.<sup>185</sup> The Captive Wildlife Safety Act's (CWSA) title is misleading in the sense that it does not apply to all captive wildlife and only applies to "big cats."<sup>186</sup> The CWSA amended the Lacey Act to make it illegal to import, export, buy, sell, transport, receive, or acquire certain big cats, but the CWSA did not place restrictions on various potential owners. The Big Cat Public Safety Act also ends roadside zoos from offering cub petting and photo-ops because its other goal is to restrict direct contact between the public and big cats for both human and the cat's protection.<sup>187</sup> The bill includes exemptions for sanctuaries, universities, and accredited zoos.<sup>188</sup> It

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182. Anderson, *supra* note 19, at 62.

183. *Id.* (citing *United States v. Sohappi*, 770 F.2d 816, 818-20 (9th Cir. 1985), cert. denied, 477 U.S. 906 (1986)).

184. H.R. 1380, 116th Cong. (2020).

185. *Big Cat Public Safety Act*, ANIMAL WELFARE INST., <https://awionline.org/legislation/big-cat-public-safety-act> (last visited Dec. 2, 2020).

186. *Captive Wildlife Safety Act – What Big Cat Owners Need to Know*, U.S. FISH & WILDLIFE SERV. (Aug. 2007), <https://www.fws.gov/Le/pdf/CaptiveWildlifeSafetyActFactsheet.pdf>.

187. McPherson, *supra* note 170.

188. *Big Cat Public Safety Act*, *supra* note 184.

grandparents in current owners of big cats but requires them to register their animals with the government “to ensure that first responders and animal control officers are aware of the presence of such animals in their communities.”<sup>189</sup> The Senate received the bill and referred it to the Committee on Environment and Public Works.<sup>190</sup>

While the Big Cat Public Safety Act is a step in the right direction, a species-by-species approach is a slow and ineffective way to protect all dangerous or potentially dangerous wildlife in private captivity. It should not take a TV show or massacre like Zanesville to spur action from Congress to protect exotic pets. The CWSA and Big Cat Public Safety Act’s language models this article’s proposed amendment language to the Act, and Congress recognizes it is well within its purview to regulate big cats. The solution is a sweeping and universal proposal to protect all wildlife in the exotic pet trade. Amending the Lacey Act with the proposed new language is the most effective method for protecting these exotic pets.

#### CONCLUSION

The Lacey Act provides the most robust consequences for violators of the wildlife trade and its nexus to exotic pet ownership. But as the Act currently stands, it fails to yield strong enough language to protect vulnerable animals that may not meet the injurious wildlife standard. Amending the injurious wildlife standard to include “injurious wildlife or potentially dangerous or aggressive wildlife” using Ohio’s model could expand the Lacey Act to protect animals in the exotic pet trade. Amending the Act to allow for federal exotic animal and ownership regulation within the states provides the most robust protections for the most vulnerable animals in the exotic pet industry. Congress is already attempting to protect exotic pets, but the species-by-species approach is slow and ineffective. A sweeping amendment by Congress would put states like Wisconsin on notice that the federal government will not tolerate private exotic pet ownership with relaxed laws. Without the amendment, the world will continue to see environmental degradation, exotic pet attacks, and increased zoonotic diseases. Change must happen now.

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189. *Id.*

190. H.R. 1380, 116th Cong. (2020).