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**REPORT ON LEGISLATION  
BY THE ANIMAL LAW COMMITTEE**

**H.R. 2603**

**Rep. Louie Gohmert**

AN ACT to amend the Endangered Species Act of 1973 to provide that nonnative species in the United States shall not be treated as endangered species or threatened species for purposes of that Act.

**Saving America's Endangered Species Act**

**THIS LEGISLATION IS OPPOSED**

**I. SUMMARY OF PROPOSED LAW**

H.R. 2603, entitled “Saving America’s Endangered Species Act” or the “SAVES Act”, seeks to amend section 13 of the Endangered Species Act (ESA) of 1973<sup>1</sup> (Pub. L. 93–205, § 13, Dec. 28, 1973) to provide that “species in the United States that are not native to the United States” “shall not be treated as endangered species or threatened species for purposes of that Act.”<sup>2</sup> Approximately 2,300 species are listed as endangered or threatened under the ESA. More than 600 listed species (including elephants, tigers, chimpanzees, cheetahs, mountain gorillas, and giant pandas) have a natural geographic distribution that is not within any part of the United States.<sup>3</sup> If the Act passes, those over 600 species will no longer be protected by the ESA in the United States.

This report discusses the reasons why the Act should not be enacted into law, including, that its reach is vaguely stated, its rationale is unsupportable, it would negatively impact efforts to protect threatened and endangered species across the globe, and it carries the risk of significant unintended consequences.

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<sup>1</sup> The ESA is codified at 16 U.S.C. §§ 1531 *et seq.*

<sup>2</sup> H.R. 2603, Saving America’s Endangered Species Act, 115th Congress, <https://www.congress.gov/bill/115th-congress/house-bill/2603/text> (All websites referenced were last visited February 9, 2018).

<sup>3</sup> For a list of foreign species that are currently protected by the ESA, see U.S. Fish & Wildlife Services’ listing of 631 foreign species under its jurisdiction at <https://ecos.fws.gov/ecp0/reports/ad-hoc-species-report?status=E&status=T&status=EmE&status=EmT&lead=10&header=Foreign+Species&fleadreg=on&fstatus=on&finvpop=on> and see the National Oceanic and Atmospheric Administration’s list of 65 foreign species under its jurisdiction at <http://www.nmfs.noaa.gov/pr/species/esa/listed.htm>.

## II. THE ENDANGERED SPECIES ACT

The ESA protects (i) endangered and threatened species that have a habitat or range in the United States, and (ii) endangered or threatened species that have a natural geographic distribution outside of the United States. (This report uses the term “foreign species” to refer to wildlife whose natural geographic distribution is not within any part of the United States, including our waters. The term “foreign species” is not used in the ESA, but is used by the U.S. Fish & Wildlife Service and the National Oceanic and Atmospheric Administration.<sup>4</sup>) The ESA’s prohibitions regarding endangered and threatened species apply only to persons subject to the jurisdiction of the U.S.<sup>5</sup> In general, those countries where foreign species have their natural geographic distribution enact their own laws protecting such species. With respect to foreign species, the U.S. Fish and Wildlife Service (“Service”), the agency responsible for determining which animals are placed on the endangered and threatened lists, must give consideration to any species identified by a foreign nation as being in danger of extinction.<sup>6</sup> Hence, in addition to protecting endangered and threatened species native to the U.S., the ESA is a means by which the United States meets its responsibilities under international treaties to protect endangered and threatened species across the globe.<sup>7</sup>

The ESA includes numerous restrictions concerning endangered and threatened species listed by the Service, whether or not they have a natural geographic distribution in the United States. For example, it is unlawful to import or export any such species into or from the United States.<sup>8</sup> It is unlawful to possess or transport in interstate or foreign commerce any such species that was unlawfully hunted, trapped, shot, killed, collected, or otherwise taken.<sup>9</sup> It is unlawful to

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<sup>4</sup> The U.S. Fish & Wildlife Service refers to “foreign species” on its website at <https://www.fws.gov/endangered/what-we-do/foreign-species.html> and the National Oceanic and Atmospheric Administration refers to “foreign species” on its website at <http://www.nmfs.noaa.gov/pr/species/esa/listed.htm>.

<sup>5</sup> 50 CFR § 17.21(a).

<sup>6</sup> 16 USC § 1533(b)(1)(B)(ii).

<sup>7</sup> See 16 USC § 1537a U.S. Fish & Wildlife Service, Endangered Species Act, <https://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/endangered-species-act.html>. The U.S. Fish & Wildlife Service’s website (<https://www.fws.gov/endangered/what-we-do/foreign-species.html>) explains that benefits of the ESA to foreign species include:

prohibitions on certain activities including import, export, take, commercial activity, interstate commerce, and foreign commerce. By regulating activities, the United States ensures that people under the jurisdiction of the United States do not contribute to the further decline of listed species. Although the ESA’s prohibitions regarding listed species apply only to people subject to the jurisdiction of the U.S., the ESA can generate conservation benefits such as increased awareness of listed species, research efforts to address conservation needs, or funding for in-situ conservation of the species in its range countries.

<sup>8</sup> 16 USC § 1538(a)(1)(A); 50 CFR § 17.21(b); 50 CFR § 17.31(a).

<sup>9</sup> Specifically, the ESA provides that it is unlawful to “possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C) [of 16 USC § 1538(a)(1).]” 16 USC § 1538(a)(1)(D); 50 CFR § 17.21(d); 50 CFR § 17.31(a).

sell or offer for sale in interstate or foreign commerce any such species.<sup>10</sup> These prohibitions apply to both animals that are alive and animals that are dead, and include whole animals and their body parts (such as ivory from elephant tusks<sup>11</sup>). The ESA regulations provide the Secretary of the Interior with the discretion to make exceptions to the prohibitions;<sup>12</sup> for example, regulations allow endangered foreign species that are bred in captivity in the United States to be shipped in interstate commerce provided certain conditions are met.<sup>13</sup>

The ESA was enacted in 1973 by large bipartisan margins—390 to 12 in the House and 92 to 0 in the Senate. The impetus for the ESA was the “modern extinction crisis,”<sup>14</sup> and specifically, foreign species and species with international range such as leopards and whales.<sup>15</sup>

The ESA is still supported by a majority of the public: a 2015 poll of 600 registered voters shows that approximately 90% support the ESA<sup>16</sup> and a 2016 poll of approximately 1,000 registered voters shows that 70% oppose “(e)liminating protections for some at-risk wildlife species such as the gray wolf or the greater sage grouse so that they cannot be protected by the Endangered Species Act.”<sup>17</sup>

In addition to enjoying support from registered voters in both major parties, the ESA in practice has been effective at protecting at-risk species. The ESA has saved several animal species from the brink of extinction, including the bald eagle, the American alligator, the peregrine falcon, and the brown pelican.<sup>18</sup> Without the ESA’s protections, 227 species would have gone extinct.<sup>19</sup>

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<sup>10</sup> 16 USC § 1538(a)(1)(F); 50 CFR § 17.21(f); 50 CFR § 17.31(a).

<sup>11</sup> 50 CFR § 17.40(e).

<sup>12</sup> 16 USC § 1539.

<sup>13</sup> 50 CFR § 17.21(g).

<sup>14</sup> Shannon Peterson, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 487 (1999) (available at <http://heinonline.org/HOL/Page?handle=hein.journals/envlnw29&collection=journals&id=475&startid=475&end=504>).

<sup>15</sup> Jesse Greenspan, *How Can the Endangered Species Act Protect Wildlife That Lives Outside the U.S.?* AUDUBON.ORG (Oct. 26, 2015), <http://www.audubon.org/news/how-can-endangered-species-act-protect-wildlife-lives-outside-us>.

<sup>16</sup> Tulchin Research, *New National Poll Finds Strong Support for Endangered Species Act* (July 7, 2015), <https://tulchinresearch.com/2015/07/new-national-poll-finds-strong-support-for-endangered-species-act>.

<sup>17</sup> Hart Research Associates, *CAP Energy/Environment/Climate Voters Survey* (Dec. 2016), <https://cdn.americanprogress.org/content/uploads/2017/01/18040011/FI-CAP-Energy-Enviro-Dec2016.pdf>.

<sup>18</sup> Alina Bradford, *Facts About the Endangered Species Act of 1973*, LIVE SCIENCE (May 11, 2016), <https://www.livescience.com/54707-endangered-species-act.html>.

<sup>19</sup> Christopher Ketcham, *Inside the Effort to Kill Protections for Endangered Animals*, NAT’L GEOGRAPHIC (May 19, 2017), [https://news.nationalgeographic.com/2017/05/endangered\\_speciesact](https://news.nationalgeographic.com/2017/05/endangered_speciesact).

### III. THE SAVES ACT'S REACH IS VAGUELY STATED, THEREFORE IT IS UNCLEAR WHAT SPECIES IT IS SUPPOSED TO COVER

The SAVES Act refers to “species in the United States that are not native to the United States.” It’s unclear which wild animals that phrase refers to. One reading is that the Act is referring to all foreign species in or entering into the U.S.<sup>20</sup> This report assumes that is the what the Act intends to cover because that is the plainest reading.

But the Act may be referring to captive-bred species whose natural geographic distribution is not in any part of the United States because, as discussed in the next section, the memorandum explaining the SAVES Act to the House of Representatives Natural Resources Committee from the Committee Chair (the “Mark-up Memo”) focuses on the Service’s Captive Bred Wildlife Program. Or the Act could be referring to wild animals that that have been introduced into areas in the United States that have not historically been part of their native range, such as mute swans and Quaker parrots, because the term “non-native species” often refers to such animals.<sup>21</sup> Or it could be referring to animals that have migratory paths through the United States and/or spend only a portion of the year in the United States.<sup>22</sup>

### IV. THE RATIONALE FOR THE SAVES ACT IS MISTAKEN

We respectfully submit that the Mark-up Memo contains several errors that bear highlighting because they appear to underlie the rationale for the Act.<sup>23</sup> The primary purpose of this report is to identify how the Act will affect the ESA and potentially endanger wildlife that is on the brink of extinction.<sup>24</sup>

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<sup>20</sup> There is strong bipartisan support of restrictions on such trade. Rebecca Savransky, *Fox’s Ingraham rips Trump for Ending ban on Elephant Trophies*, THE HILL (Nov. 16, 2017), <http://thehill.com/homenews/media/360634-foxs-laura-ingraham-rips-trump-for-ending-ban-on-importing-elephant-trophies>.

<sup>21</sup> E.g., U.S. Fish & Wildlife Services, J.N. Ding Darling, Non-native Invasive Species, [https://www.fws.gov/refuge/JN\\_Ding\\_Darling/wildlife\\_and\\_habitat/invasives.html](https://www.fws.gov/refuge/JN_Ding_Darling/wildlife_and_habitat/invasives.html); National Park Service, Non-Native Species, <https://www.nps.gov/mnrr/learn/nature/nonnativespecies.htm> (“The National Park Service defines nonnative as species that occur in a given place as a result of direct, indirect, deliberate, or accidental actions by humans.”)

<sup>22</sup> For example, Swainson’s hawks spend one season of the year in the United States. Audubon, <http://www.audubon.org/field-guide/bird/swainsons-hawk>.

<sup>23</sup> Rob Bishop, Chairman, U.S. House of Representatives Committee on Natural Resources, Mark-up Memorandum (Sept. 29, 2017), [https://naturalresources.house.gov/uploadedfiles/fc\\_mu\\_memo\\_-\\_hr\\_2603.pdf](https://naturalresources.house.gov/uploadedfiles/fc_mu_memo_-_hr_2603.pdf).

<sup>24</sup> As a preliminary matter, the Mark-up Memo refers to “nonnative endangered species,” a term for which there is no definition. For the purposes of this report, we assume the author is referring to what this report refers to as “foreign species.”

First, the Mark-Up Memo suggests that the Service regulates all foreign species through the Captive Bred Wildlife Program (“CBW”)<sup>25</sup> and that the CBW is the only means by which the ESA regulates foreign species.<sup>26</sup> Specifically, the Mark-up Memo says, “Nonnative endangered species are regulated by the U.S. Fish and Wildlife Service (FWS) under the Endangered Species Act (ESA) through the captive bred wildlife (CBW) program.” And the Mark-up Memo cites three letters from constituent organizations that appear to be complaining solely about problems in the CBW permitting process: the Zoological Association of America,<sup>27</sup> the Parrot Fund,<sup>28</sup> and the Zoo of the Acadania.<sup>29</sup> The Mark-up Memo does not discuss other ways in which foreign species are regulated under the ESA.

This suggestion that only captive-bred species would be affected is incorrect. The ESA reaches beyond captive-bred animals and covers, for example, the importation of living or dead, whole or parts of foreign species into the United States (for example, as discussed in greater detail below, the importation and interstate trade of African elephant ivory and pangolin skins, the importation of reptiles for the pet trade, the importation of hunting trophies, and the treatment of chimpanzees by laboratories). Many of the largest bird and wildlife conservation groups in the United States oppose bills that would undermine the ESA, such as the SAVES Act.<sup>30</sup>

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<sup>25</sup> Mark-up Memo at 1. The U.S. Fish and Wildlife Service’s FAQ page describes the CBW program as follows: “A person registered with the U.S. Fish and Wildlife Service (Service) may obtain a captive-bred wildlife permit to buy and sell within the United States live, non-native endangered or threatened animals that were captive born in the United States for enhancement of species propagation, provided the other person in the transaction is registered for the same species.” <https://www.fws.gov/endangered/permits/faq.html>.

<sup>26</sup> The Secretary of the Interior established the CBW in accordance with 16 USC § 1539 to allow exceptions to the ESA restrictions for activities that enhance the propagation or survival of affected species. For more information on the CBW, see U.S. Fish & Wildlife Service, Captive-bred Wildlife Registration under the U.S. Endangered Species Act, <https://www.fws.gov/international/pdf/factsheet-captive-bred-wildlife-and-endangered-species-act-2012.pdf>.

<sup>27</sup> Letter from John Seyjagat, Executive Director, Zoological Association of America, to Congressman Louie Gohmert (July 6, 2017) (“The onerous and prohibitive regulation of captive bred, non-native species under the ESA is counterproductive to conservation efforts.”), [https://naturalresources.house.gov/uploadedfiles/gohmert\\_zaa\\_to\\_gohmert\\_re\\_hr\\_2603.pdf](https://naturalresources.house.gov/uploadedfiles/gohmert_zaa_to_gohmert_re_hr_2603.pdf). Notably, the nation’s largest zoo association opposes the SAVES Act. Association of Zoos & Aquariums, <https://www.aza.org/legislative-education-center#>.

<sup>28</sup> Letter from Janice D. Boyd, President, Parrot Fund to Congressman Louis Gohmert (July 4, 2017) (“The present implementation of the ESA makes it nearly impossible to maintain viable populations of non-native species in captivity because of the time consuming, complex, costly and often conflicting regulations that owners must contend with.”), [https://naturalresources.house.gov/uploadedfiles/gohmert\\_parrot\\_fund\\_to\\_gohmert\\_re\\_hr\\_2603.pdf](https://naturalresources.house.gov/uploadedfiles/gohmert_parrot_fund_to_gohmert_re_hr_2603.pdf).

<sup>29</sup> Letter from Matt Oldenburg, Zoo of Acadiana, to Congressman Louis Gohmert (July 7, 2017) (“Managed breeding programs are truly stifled by ESA listings as interstate movement is largely prohibited and the licenses to allow this, called CBW permits, are becoming difficult to renew.”), [https://naturalresources.house.gov/uploadedfiles/gohmert\\_zoosiana\\_to\\_gohmert\\_re\\_hr\\_2603.pdf](https://naturalresources.house.gov/uploadedfiles/gohmert_zoosiana_to_gohmert_re_hr_2603.pdf).

<sup>30</sup> E.g., National Audubon Society, Don't Let Congress Dismantle the Endangered Species Act, [https://act.audubon.org/onlineactions/hnXMGMjJkG3ND-3V83VZQ2?ms=policy-adv-web-website\\_nas-card-201702xx\\_esa](https://act.audubon.org/onlineactions/hnXMGMjJkG3ND-3V83VZQ2?ms=policy-adv-web-website_nas-card-201702xx_esa); Wildlife Conservation Society, Protect the Endangered Species Act, <https://secure.wcs.org/campaign/protect-endangered-species-act>; International Fund for Animal Welfare, Harmful Bills, <http://www.ifaw.org/oneactforall>; World Wildlife Fund, Maintain US Protections for Endangered Species, <https://support.worldwildlife.org/site/Advocacy?cmd=display&page=UserAction&id=955>; In Defense of Animals, Stop the SAVES Act Before It Kills Endangered Animals, <https://www.idausa.org/campaign/elephants/latest-news/stop-the-saves-act-before-it-kills-endangered-animals>.

The complaint about the burdensome CBW permitting process is less about problems inherent in the ESA and more about the “present implementation of the ESA” and the regulatory burden imposed by the Service under the CBW program. Any problems with the CBW permitting process would be better addressed by the U.S. Fish and Wildlife Service through amendments to its regulations or changes in its processes—not eliminating the ESA’s protections of foreign species entirely.<sup>31</sup>

*Second*, the Mark-up Memo opines that the SAVES Act would not increase the likelihood of international wildlife trafficking due to the protections of Convention on International Trade in Endangered Species of Flora and Fauna (“CITES”).<sup>32</sup> This statement implies that CITES prohibits the importation of foreign species into the United States—it does not. CITES is an international treaty designed to prevent species from becoming endangered or extinct as a result of international trade.<sup>33</sup> Under CITES, countries collaborate to regulate the international trade of wildlife and ensure that this trade does not negatively affect the survival of wild populations.<sup>34</sup>

CITES provides a framework for countries to enact their own national laws; it does not replace national laws.<sup>35</sup> CITES does not confer any actual authority on Service inspectors and agents.<sup>36</sup> Rather, the ESA is the vehicle by which the United States meets its international responsibilities to treaties and conventions, including CITES.<sup>37</sup>

*Third*, the Mark-up Memo states that the SAVES Act is necessary to eliminate the “duplicative requirement” for CBW permits.<sup>38</sup> The “duplicative requirement” seems to be

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<sup>31</sup> The Mark-up Memo cites only one other constituent letter of support: one from the National Aquaculture Association, which objects to the ESA on the basis that it “hampers commerce and oppresses conservation.” It cites a proposed rule under President Trump’s administration to protect a giant clam as evidence of this problem. Letter from Jim Parsons, President, National Aquaculture Association, to Congressman Louis Gohmert (July 7, 2017), [https://naturalresources.house.gov/uploadedfiles/gohmert\\_naa\\_to\\_gohmert\\_re\\_hr\\_2603.pdf](https://naturalresources.house.gov/uploadedfiles/gohmert_naa_to_gohmert_re_hr_2603.pdf).

<sup>32</sup> Mark-up Memo at 3 (“This bill would not increase the likelihood of international wildlife trafficking as such matters are regulated under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), an international agreement between 183 member nations that protects endangered nonnative species from the perils of international wildlife trafficking.”)

<sup>33</sup> U.S. Fish & Wildlife Service, *What is CITES?*, <https://www.fws.gov/international/cites/what-is-cites.html>.

<sup>34</sup> *Id.*

<sup>35</sup> CITES, National Laws for Implementing the Convention, <https://cites.org/legislation> (“Although CITES is legally binding on States it is generally not self-executing. This means that it cannot be fully implemented until specific domestic measures have been adopted for that purpose. It is therefore absolutely essential that CITES Parties have legislation in place allowing them to implement and enforce all aspects of the Convention.”).

<sup>36</sup> The Parrot Fund’s statement in its letter that “H.R. 2603 cleans up duplicate regulations” because “CITES . . . will continue to regulate international movement and protection of endangered species” misstates how the ESA implements CITES.

<sup>37</sup> U.S. Fish & Wildlife Service, *Endangered Species Act*, <https://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/endangered-species-act.html>.

<sup>38</sup> Rob Bishop, Chairman, U.S. House of Representatives Committee on Natural Resources, Mark-up Memorandum (Sept. 29, 2017), [https://naturalresources.house.gov/uploadedfiles/fc\\_mu\\_memo\\_-\\_hr\\_2603.pdf](https://naturalresources.house.gov/uploadedfiles/fc_mu_memo_-_hr_2603.pdf).



referring again to CITES, though it is not clear. The Parrot Fund’s letter to the bill sponsor says that the SAVES Act “cleans up duplicate regulations: CITES, a major international conservation treaty with 183 parties, will continue to regulate international movement and protection of endangered species. There is no need for another US law to regulate species not native to the United States.”<sup>39</sup> As explained above, CITES does not independently regulate the foreign and interstate commerce of endangered foreign species in the United States and, as discussed further below, there is significant need for the continued protection of foreign species by the ESA.

*Fourth*, proponents of legislation to limit the ESA argue generally that reform is necessary because the ESA is ineffective. The Chairman of the Natural Resources Committee has stated that the ESA “doesn’t work” and that “of all the government programs, it is probably the least effective, and the least efficient.”<sup>40</sup> This argument seems to be based on the fact that, of the 1,652 species listed as threatened or endangered, only 47, or roughly 2.8%, have been delisted.<sup>41</sup> However, this is not an appropriate metric for evaluating the effectiveness of the ESA. The ESA is only 44 years old. It takes decades for a species to recover from the brink of extinction.<sup>42</sup> For example, the Bald Eagle took 40 years of conservation efforts to be taken off the ESA list.<sup>43</sup> Almost half of all listed species have received protection under the ESA for less than 20 years.<sup>44</sup> And species de-listings “increased significantly” under the previous administration.<sup>45</sup> While the number of species that have achieved recovered status may seem low, the protections of the ESA have undoubtedly prevented further depletion of endangered species that could have resulted in extinction.

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<sup>39</sup> Letter from Janice D. Boyd, President, Parrot Fund to Congressman Louis Gohmert (July, 4, 2017), [https://naturalresources.house.gov/uploadedfiles/gohmert\\_parrot\\_fund\\_to\\_gohmert\\_re\\_hr\\_2603.pdf](https://naturalresources.house.gov/uploadedfiles/gohmert_parrot_fund_to_gohmert_re_hr_2603.pdf).

<sup>40</sup> Kaleigh Rogers, *The Republican Plan to Dismantle the Endangered Species Act*, VICE (Sept. 3, 2015), [https://motherboard.vice.com/en\\_us/article/nze8vk/republicans-are-trying-their-damndest-to-dismantle-the-endangered-species-act](https://motherboard.vice.com/en_us/article/nze8vk/republicans-are-trying-their-damndest-to-dismantle-the-endangered-species-act).

<sup>41</sup> Chris D’Angelo, *Republicans Look to ‘Modernize’ (Read: Weaken) The Endangered Species Act*, HUFFINGTON POST (Feb. 15, 2017), [https://www.huffingtonpost.com/entry/republicans-modernize-endangered-species-act\\_us\\_58a45df8e4b03df370dc1282](https://www.huffingtonpost.com/entry/republicans-modernize-endangered-species-act_us_58a45df8e4b03df370dc1282).

<sup>42</sup> John R. Platt, *The 5 Biggest Myths about the Endangered Species Act*, SCIENTIFIC AMERICAN BLOG (Sept. 18, 2013), <https://blogs.scientificamerican.com/extinction-countdown/the-5-biggest-myths-about-the-endangered-species-act>.

<sup>43</sup> U.S. Fish & Wildlife Service, *Questions and Answers about Bald Eagles Recovery and Delisting*, <https://www.fws.gov/midwest/eagle/recovery/qandas.html>.

<sup>44</sup> Ketcham, *supra* note 19.

<sup>45</sup> Rene Marsh, *Republicans Explore Curbing the Endangered Species Act*, CNN (Feb. 15, 2017), <http://www.cnn.com/2017/02/15/politics/endangered-species-act-republicans-congress/index.html>. During the eight years of the previous administration, a record-setting 29 species were removed from the endangered species list - “more than all previous administrations combined.”

## V. THE SAVES ACT MAY COMPLICATE WORLDWIDE EFFORT TO PROTECT WILDLIFE

The core principle of the SAVES Act would be to provide different protections to animals based on their country of origin. The sale of elephant parts in Thailand illustrates how this arrangement could complicate worldwide efforts to protect endangered and threatened wildlife.

Until recently, Thailand's wildlife laws covered domestic and foreign species under two different laws (the Draught Animal Act of 1939 and the Wild Animal Reservation and Protection Act of 1992, respectively); the penalties relating to domestic Asian elephants were significantly higher than those related to foreign African elephants.<sup>46</sup> As a result, Thailand was flooded with ivory from African elephants because, unlike the law governing domestic elephants, the law governing foreign elephants failed to act as an effective deterrent.<sup>47</sup> In 2015, Thailand approved the Elephant Ivory Act, which criminalized the sale of African elephant ivory and regulated any ivory trade in or passing through Thailand.<sup>48</sup> The result was a huge decrease in the amount of ivory openly for sale in Thai markets.<sup>49</sup>

This cautionary tale bears scrutiny when it comes to considering a change in how the United States protects endangered and threatened elephant species both here and abroad. African elephant populations have been reduced by more than two thirds in the past 30 years,<sup>50</sup> and are in danger of becoming extinct largely due to poaching for the ivory trade.<sup>51</sup> In 2016, the U.S. Fish and Wildlife Service implemented a regulation, promulgated under the ESA, banning most

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<sup>46</sup> VINCENT NIJMAN, TRAFFIC, AN ASSESSMENT OF THE WILD ELEPHANT TRADE IN THAILAND vi-vii (2014), [http://www.trafficj.org/publication/14\\_An\\_Assessment\\_of\\_the\\_Live\\_ElephantTrade\\_Thailand.pdf](http://www.trafficj.org/publication/14_An_Assessment_of_the_Live_ElephantTrade_Thailand.pdf); UNITED NATIONS OFFICE ON DRUGS & CRIME, CRIMINAL JUSTICE RESPONSE TO WILDLIFE CRIME IN THAILAND 5 (June 2017), [https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/Thai\\_Assessment\\_13\\_16\\_May\\_2017.pdf](https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/Thai_Assessment_13_16_May_2017.pdf).

<sup>47</sup> NIJMAN, *supra* note 61.

<sup>48</sup> John Scanlon, *CITES Secretary-General's Remarks on the Destruction of Confiscated Elephant Ivory at Bangkok, Thailand* (Aug. 26, 2015), [https://www.cites.org/eng/news/sg/thailand\\_ivory\\_crush\\_26082015](https://www.cites.org/eng/news/sg/thailand_ivory_crush_26082015).

<sup>49</sup> *Massive Downturn in Bangkok Ivory Market as Thailand Implements National Ivory Action Plan*, TRAFFIC (Sept. 29, 2017), <http://www.traffic.org/home/2016/9/29/massive-downturn-in-bangkok-ivory-market-as-thailand-impleme.html>.

<sup>50</sup> International Union for Conservation of Nature ("IUCN") Species Survival Commission ("SSC") African Elephant Database 2013 Continental Total; Preview Report update to 31 December 2013, [http://www.elephantdatabase.org/preview\\_report/2013\\_africa\\_final/2013/Africa](http://www.elephantdatabase.org/preview_report/2013_africa_final/2013/Africa) (The African elephant population was depleted from an estimate of over 1.3 million in 1979 to 401,732 identified wild elephants throughout Africa in 2013.).

<sup>51</sup> *Id.* at 13.



domestic trade of African elephant ivory.<sup>52</sup> Now illegal trade in elephant ivory is decreasing in the United States.<sup>53</sup>

If the SAVES Act passes and the ESA no longer applies to foreign species, the ESA's near ban on domestic trading of African elephant ivory would no longer be applicable. Although the African Elephant Conservation Act<sup>54</sup> will still ban most *imports* of African elephant ivory, no federal law or regulation will ban domestic trade in African elephant ivory, unless and until Congress passes a separate law.<sup>55</sup> It is safe to assume, then, that the illegal ivory trade (including imports of illegal ivory) will resume in force because it is not possible for consumers to tell the difference between ivory imported when it was legal to do so and ivory that was imported illegally.

This is a consequence that must be taken seriously because the United States is among the world's largest consumers of wildlife, both legal and illegal, and a significant consumer and trader of illegal ivory. By effectively controlling illegal ivory trade at home and assisting elephant range states and consumer countries around the world, the United States has had a significant impact on elephant conservation. That likely will change with passage of the SAVES Act.

## **VI. THE SAVES ACT WOULD BE A WINDFALL FOR THE WILDLIFFE TRAFFICKING BLACK MARKET**

As summarized in section 2 above, the ESA prohibits certain activities with respect to endangered and threatened foreign species including import, export, take, commercial activity, interstate commerce, and foreign commerce. The ESA is necessary because the United States is a destination country for the sale of endangered and threatened foreign species. Even when wildlife species are captured or killed overseas, they—or their body parts—often end up back in

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<sup>52</sup> 50 CFR § 17.40(e). Prior to implementation of this 2016 regulation, U.S. laws and regulations “focused on controlling import and export while allowing some ivory trade within the United States. In 1989, a moratorium on ivory imports was put in place through the African Elephant Conservation Act (AfECA).” Despite that moratorium, when the pre-2016 law “permitted domestic trade in antiques and other legally acquired ivory imported prior to 1989 . . . a substantial amount of elephant ivory continue[d] to be illegally imported and enter the domestic market.” U.S. Fish & Wildlife Service, *Revisions to the Endangered Species Act (ESA) Special Rule for the African Elephant Questions and Answers*, <https://www.fws.gov/international/pdf/questions-and-answers-african-elephant-4d-final-rule.pdf>.

<sup>53</sup> RACHEL KRAMER, ET AL., TRAFFIC, THE U.S. ELEPHANT IVORY MARKET: A NEW BASELINE 18 (July 2017), [file:///Users/loribaret/Downloads/TRAFFIC\\_US\\_Ivory\\_Report\\_2017.pdf](file:///Users/loribaret/Downloads/TRAFFIC_US_Ivory_Report_2017.pdf). Even though illegal trade of African elephant ivory is decreasing, between May and July 2016, investigators from TRAFFIC found 658 ivory items for sale from 68 vendors in Washington, D.C. alone, and hundreds more throughout the country. *Id.* This suggests that consumer appetite for ivory has not been completely diminished and allowing such trade to resume in the United States could contribute to the extinction of the species.

<sup>54</sup> 16 U.S.C. §§ 4201 *et seq.* In promulgating its final rule, the Service explained, “The AfECA does not regulate the use of ivory within the United States and, other than the prohibition on the export of raw ivory, does not regulate export of ivory from the United States. The AfECA also does not regulate the import or export of live African elephants.” 81 FR 36389-36390 (June 6, 2016).

<sup>55</sup> For a comprehensive explanation of existing federal laws that protect elephants, see the U.S. Fish & Wildlife's Notice of Final Rule at 81 FR 36389-36390 (June 6, 2016).

the United States to be sold.<sup>56</sup> This was illustrated by Operation Crash, a nationwide wildlife trafficking investigation involving the undercover work of more than 140 U.S. law enforcement officers.<sup>57</sup> The investigation yielded in excess of 50 arrests, more than 35 convictions, the seizure of elephant tusks and rhino horns worth tens of millions of dollars, and combined prison sentences of more than 36 years—all within U.S. borders.”<sup>58</sup>

The economic impact of illegal wildlife trafficking is unknown, but various sources estimate that it is worth \$7.6 to \$25 billion per year.<sup>59</sup> The lucrative industry has attracted professional criminal groups involved in drug trafficking, human trafficking, and terrorism.<sup>60</sup> The effects have been devastating. For example, “nearly the entire black rhino population has disappeared since the middle of the 20th century.”<sup>61</sup>

According to Daniel Rohlf, a professor at Lewis & Clark Law School in Oregon who specializes in biodiversity issues, “Without [ESA] barriers in the U.S. market, a lot of species around the world would be in more trouble than they are now.”<sup>62</sup> The following are some examples that illustrate the gravity of the problem:

### **A. African Lions**

African lions face extinction by 2050.<sup>63</sup> Worldwide, the U.S. is the biggest importer of lion trophies.<sup>64</sup> In 2015, 405 lion trophies were imported into the United States.<sup>65</sup>

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<sup>56</sup> Charles Bergman, *Wildlife Trafficking*, SMITHSONIAN MAGAZINE (Dec. 2009), <https://www.smithsonianmag.com/travel/wildlife-trafficking-149079896>.

<sup>57</sup> U.S. Fish & Wildlife Service, *Operation Crash Fact Sheet* (last updated Oct. 1, 2017), <https://www.fws.gov/le/pdf/Operation-Crash-Fact-Sheet.pdf>.

<sup>58</sup> *Id.*

<sup>59</sup> JEREMY HAKEN, GLOBAL FINANCIAL INTEGRITY, TRANSNATIONAL CRIME IN THE DEVELOPING WORLD 11 (Feb. 2011), [http://www.gfintegrity.org/wp-content/uploads/2014/05/gfi\\_transnational\\_crime\\_high-res.pdf](http://www.gfintegrity.org/wp-content/uploads/2014/05/gfi_transnational_crime_high-res.pdf).

<sup>60</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, WORLD WILDLIFE CRIME REPORT 23 (2016), [https://www.unodc.org/documents/data-and-analysis/wildlife/World\\_Wildlife\\_Crime\\_Report\\_2016\\_final.pdf](https://www.unodc.org/documents/data-and-analysis/wildlife/World_Wildlife_Crime_Report_2016_final.pdf).

<sup>61</sup> Darryl Fears, *Overwhelmed U.S. Port Inspectors Unable to Keep up with Illegal Wildlife Trade*, WASHINGTON POST, Oct. 17, 2014, [https://www.washingtonpost.com/national/health-science/overwhelmed-us-port-inspectors-unable-to-keep-up-with-illegal-wildlife-trade/2014/10/17/2fc72086-fe42-11e3-b1f4-8e77c632c07b\\_story.html?utm\\_term=.ae7de9e512d1](https://www.washingtonpost.com/national/health-science/overwhelmed-us-port-inspectors-unable-to-keep-up-with-illegal-wildlife-trade/2014/10/17/2fc72086-fe42-11e3-b1f4-8e77c632c07b_story.html?utm_term=.ae7de9e512d1).

<sup>62</sup> Jesse Greenspan, *How Can the Endangered Species Act Protect Wildlife That Lives Outside the U.S.?* AUDUBON.ORG (Oct. 26, 2015), <http://www.audubon.org/news/how-can-endangered-species-act-protect-wildlife-lives-outside-us>.

<sup>63</sup> John R. Platt, *African Lions Face Extinction by 2050, Could Gain Endangered Species Act Protection*, SCIENTIFIC AMERICAN (Oct. 27, 2014), <https://blogs.scientificamerican.com/extinction-countdown/african-lions-face-extinction-by-2050-could-gain-endangered-species-act-protection>.

<sup>64</sup> Jani Actman, *Why New U.S. Protections for Lions Matter*, NAT’L GEOGRAPHIC (Dec. 21, 2015), <https://news.nationalgeographic.com/2015/12/151221-African-lions-United-States-endangered-species>.

<sup>65</sup> *Id.*

Two subspecies of lions are listed under the ESA.<sup>66</sup> *Panthera leo leo* (the Barbary lion) is listed as endangered and the *Panthera leo melanochaita* (the Cape lion) is listed as threatened. The Service allows the importation of Cape lion trophies into the United States if it has issued an import permit in accordance with the ESA regulations.<sup>67</sup> The Service will allow the import of a Cape lion trophy (such as a lion head) from “countries that have well-managed hunting programs that are contributing to conservation of lions in the wild.”<sup>68</sup> Currently, the Service has determined that four countries meet this standard and three more are under review.<sup>69</sup> Permit applications take 45 to 60 days for review for “approved countries” and longer for countries that are under review.<sup>70</sup>

If the SAVES Act passes and African lions are no longer protected as threatened or endangered species under the ESA, then the Service will no longer have the ability to prohibit the importation of the endangered Barbary lion and restrict the importation of the Cape lion. As a result, the importation of lions into the United States will likely increase, contributing to lions’ threat of extinction.

## **B. Pangolins**

Pangolins, a scaly mammal prized for their meat and skin, are among the most commonly poached wild animal in the world.<sup>71</sup> Worldwide, almost one million were illegally poached over a decade.<sup>72</sup> The United States is the “dominant player” in the global pangolin trade.<sup>73</sup> Between 2004 and 2013, over 26,000 pangolin products were imported into the United States.<sup>74</sup> Because of the threat of extinction, as of January 2, 2017, pangolins are listed under Appendix 1 of CITES.<sup>75</sup> The United States was one of the chief advocates for protecting pangolins under Appendix 1.<sup>76</sup>

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<sup>66</sup> 50 CFR § 17.11(h)

<sup>67</sup> 50 CFR § 17.40(r).

<sup>68</sup> U.S. Fish & Wildlife Service, Import of Hunted Lions, <https://www.fws.gov/international/permits/by-activity/sport-hunted-trophies-lions.html>.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> U.S. Fish & Wildlife Service, Pangolins, <https://www.fws.gov/international/animals/pangolins.html>.

<sup>72</sup> Terrace Garnier, *Pangolin Faces Extinction but 5-Year-Old Raises Awareness for Endangered Mammal*, FOX NEWS (July 14, 2017), <http://www.foxnews.com/science/2017/07/14/pangolin-faces-extinction-but-5-year-old-raises-awareness-for-endangered-mammal.html>.

<sup>73</sup> Sarah Heinrich, *et al.*, *Where did all the Pangolins go? International CITES Trade in Pangolin Species*, 8 GLOBAL ECOLOGY AND CONSERVATION 241-53 (2016), <https://www.sciencedirect.com/science/article/pii/S2351989416300798>.

<sup>74</sup> Jeffrey Flocken, IFAW, Listing pangolins under US Endangered Species Act (July 15, 2015), <http://www.ifaw.org/united-states/news/listing-pangolins-under-us-endangered-species-act>.

<sup>75</sup> CITES, Appendices I, II and III, <https://www.cites.org/eng/app/appendices.php>.

<sup>76</sup> U.S. Fish & Wildlife Service, Pangolins, <https://www.fws.gov/international/animals/pangolins.html#1>.

Currently, only one of the eight species of pangolin is protected by the ESA. As of March 2016, the Service has been considering whether to add the remaining seven species act to its list of protected endangered and threatened species. If the SAVES Act is passed, the one pangolin currently protected by the ESA will lose its protection under that law, and the Service will not be able to protect the other seven species under the ESA, despite having advocated for their protection under CITES.

### C. Exotic Reptiles

The United States is among the world's largest consumers of reptiles for the pet industry.<sup>77</sup> Endangered wild reptiles are frequently smuggled from Latin America to the United States to be sold in the pet trade threatening their populations' sustainability in their home countries.<sup>78</sup> From 2005 to 2014, pursuant to its authority under the ESA, the Service denied 13,325 shipments of wildlife from Latin America;<sup>79</sup> such shipments contained 54,886 live animals, 620,014 specimens, and 3 million pounds of wildlife and wildlife products.<sup>80</sup> Over 50 percent of these shipments contained at least one animal protected by CITES.<sup>81</sup> But many species of reptiles that are in danger of extinction are not yet covered by CITES.<sup>82</sup> And the pet trade has caused over 20 species of reptile to go extinct almost as soon as they have been discovered.<sup>83</sup>

If the SAVES Act passes, the Service's ability to prevent the import of endangered reptiles will be significantly impaired.<sup>84</sup> And as a result, American consumers may unknowingly contribute to the extinction of reptile species.

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<sup>77</sup> Humane Society of the U.S., *The Trade in Live Reptiles: Imports to the United States*, [http://m.humanesociety.org/issues/wildlife\\_trade/facts/trade\\_live\\_reptiles\\_imports\\_us.html](http://m.humanesociety.org/issues/wildlife_trade/facts/trade_live_reptiles_imports_us.html); CRAIG HOOVER, TRAFFIC, THE U.S. ROLE IN THE INTERNATIONAL LIVE REPTILE TRADE (1998), [http://www.traffic.org/species-reports/traffic\\_species\\_reptiles40smaller.pdf](http://www.traffic.org/species-reports/traffic_species_reptiles40smaller.pdf).

<sup>78</sup> Tina Deines, *Illegal Wildlife Trade Booming Across U.S.-Mexico Border*, NAT'L GEOGRAPHIC (Mar. 14, 2017), <https://news.nationalgeographic.com/2017/03/wildlife-watch-wildlife-trafficking-reptiles-mexico-united-states>;

<sup>79</sup> Defenders of Wildlife, *Trends in Wildlife Imports from Latin America Denied Entry into the United States*, [https://defenders.org/sites/default/files/publications/trends\\_in\\_wildlife\\_trade\\_from\\_latin\\_america\\_to\\_the\\_us.pdf](https://defenders.org/sites/default/files/publications/trends_in_wildlife_trade_from_latin_america_to_the_us.pdf).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> James M. Green, *Detailed Discussion of Trade in Wild-Caught Reptiles*, Animal Legal & Historical Center (2005), <https://www.animallaw.info/article/detailed-discussion-international-trade-wild-caught-reptiles>.

<sup>83</sup> Alice Catherine Hughes, *Trading in Extinction: How the Pet Trade is Killing off many Animal Species*, THE CONVERSATION (Feb. 7, 2017), <http://theconversation.com/trading-in-extinction-how-the-pet-trade-is-killing-off-many-animal-species-71571>.

<sup>84</sup> While the Lacey Act, 16 U.S.C. § 3372(a)(2)(A) provides authority for the Service to prevent the importation of wildlife taken in violation of any foreign law, the enforcement of this law is less straightforward than the enforcement of the ESA. The ESA bans importation of animals on a list promulgated by the U.S. Fish & Wildlife Service. Thus inspectors need only ascertain that a species is on the list to prevent its entry. In contrast, enforcing the Lacey Act requires familiarity with the wildlife laws of over 190 foreign countries and coordination with such countries to ascertain whether they were taken in violation of such laws.

The above examples are only a small sampling of the consequences the SAVES Act could have.

## VII. THE SAVES ACT COULD HAVE FURTHER UNINTENDED CONSEQUENCES

The SAVES Act could have consequences that may not be readily apparent. The treatment of chimpanzees is an example.

In 1990, the U.S. Fish and Wildlife Service listed wild chimpanzees as endangered but kept captive chimps listed as threatened.<sup>85</sup> No other species has had this split status between wild and captive.<sup>86</sup> The U.S. Fish and Wildlife Service eliminated the distinction in 2015, when it issued a final rule that classified all chimpanzees, both wild and captive, as endangered under the ESA.<sup>87</sup> As a result, anyone working with captive chimps in the United States has to obtain a permit from the U.S. Fish and Wildlife Service.<sup>88</sup> Organizations that wanted to continue working with chimpanzees had to show that the work “enhances the survival of the species and benefits chimps in the wild.”<sup>89</sup>

As of 2017, approximately 600 chimpanzees remain at research facilities in the United States.<sup>90</sup> This is in part because, although biomedical studies on chimps are no longer allowed, there has been little effort or analysis to determine what should now be done with these captive chimpanzees.<sup>91</sup> “Retiring” all of these chimps to sanctuaries is both costly and complicated.<sup>92</sup> James Anderson, the Deputy Director of the National Institutes of Health in Bethesda, Maryland, thinks that a 10-year time frame for retiring all of these chimps is realistic.<sup>93</sup>

If the SAVES Act becomes law, chimpanzees would no longer be shielded from invasive experiments by the ESA.<sup>94</sup> There is a great deal of public support against experimenting on

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<sup>85</sup> David Grimm, *Research Chimps to be Listed as ‘Endangered’*, SCIENCE (June 12, 2015), <http://www.sciencemag.org/news/2015/06/research-chimps-be-listed-endangered>.

<sup>86</sup> *Id.*

<sup>87</sup> U.S. Fish & Wildlife Service, *Chimpanzee (Pan troglodytes)* (last updated June 19, 2015), <https://www.fws.gov/endangered/what-we-do/chimpanzee.html>.

<sup>88</sup> Grimm, *Research Chimps to be Listed as ‘Endangered’*, *supra* note 67.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* In the past two years, only 73 lab chimps in the U.S. have entered sanctuaries.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> The ESA provides that it is unlawful to “take” an endangered or threatened species. 16 U.S. Code § 1538(a)(1)(B). The “prohibition against take . . . ensures an adequate level of care for wildlife held in captivity.” 81 FR 36388. It also bars harming or injuring protected wildlife. U.S. Fish & Wildlife Service, *Chimpanzee*, <https://www.fws.gov/endangered/what-we-do/chimpanzee.html>. Thus lifting this prohibition would expose chimpanzees to activity that would otherwise be banned by the ESA such as invasive experiments on their bodies.

chimpanzees<sup>95</sup> (and non-human primates generally, considering the outcry after the use of monkeys in Volkswagen emissions tests<sup>96</sup>) and this potential consequence must be part of the discussion of the SAVES Act.

## VIII. SUMMARY

This report identifies just some examples of foreign wildlife that desperately need the protection provided by the ESA. If the SAVES Act passes, endangered and threatened foreign species in other countries would re-enter the U.S. market in various forms and create a boon for wildlife traffickers and trophy hunters.<sup>97</sup>

Taking away ESA protections from non-native species would severely impact the United States' ability to contribute to the worldwide effort to prevent threatened and endangered species from becoming extinct and would be a dereliction of our duty under CITES.

For the reasons explained above, H.R. Bill No. 2603 is opposed.

Animal Law Committee  
Lori Barrett-Peterson, Chair

February 2018

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<sup>95</sup> The Humane Society of the United States sent the National Institutes of Health “more than 57,000 letters from the public in support of retiring all government-owned chimpanzees to sanctuary, ending the use of chimpanzees in harmful research, and permanently ending the breeding of chimpanzees for research.” The Humane Society of the United States, National Institutes of Health to Retire Hundreds of Chimpanzees to Sanctuary (June 26, 2013), [http://www.humanesociety.org/news/press\\_releases/2013/06/NIH-retires-hundreds-of-chimps-to-sanctuary-062613.html?referrer=https://www.google.com/](http://www.humanesociety.org/news/press_releases/2013/06/NIH-retires-hundreds-of-chimps-to-sanctuary-062613.html?referrer=https://www.google.com/).

<sup>96</sup> Christine Dell'Amore, *Outrage Over VW Monkey Diesel Tests Reflects Changing Public Opinion*, NATIONAL GEOGRAPHIC (Jan. 30, 2018), <https://news.nationalgeographic.com/2016/01/primates-cars-world-science-volkswagen/>.

<sup>97</sup> Ginette Hemley, *Don't Create Safe Haven for Wildlife Trafficking — Reject SAVES Act*, THE HILL (Oct. 3, 2017), <http://thehill.com/opinion/energy-environment/353511-dont-make-the-us-a-safe-haven-for-wildlife-trafficking-reject>.