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

H.R. 1584

Rep. Schiff

To amend the Marine Mammal Protection Act of 1972 to prohibit the taking, importation, and exportation of Orcas and Orca products for public display, and for other purposes.

Orca Responsibility and Care Advancement Act of 2017

THIS LEGISLATION IS APPROVED

I. SUMMARY OF PROPOSED LEGISLATION

H.R. 1584¹ amends the Marine Mammal Protection Act of 1972 (“MMPA”)² to prohibit take (wild capture), import, and export of orca whales for public display purposes. The bill also amends the Animal Welfare Act (“AWA”) to prohibit any person from artificially inseminating or breeding orcas for public display purposes.

Take/Import: The bill would ban the take³ and import of orcas for public display. Under current federal law, the federal government may issue permits for the capture or import of orcas for the purposes of public display.⁴ The MMPA prohibits the “take” of any marine mammal in US waters and by US citizens on the high seas as well as the importation of marine mammals and marine mammal products into the US except by special permit issued by the National

¹ Rep. Adam Schiff reintroduced this bill in March 2017 after originally introducing it in November 2015. See Press Release, Congressman Adam Schiff (D-CA), Rep. Schiff Reintroduces ORCA Act to Phase Out Display of Captive Killer Whales (Mar. 17, 2017), <https://schiff.house.gov/news/press-releases/rep-schiff-reintroduces-orca-act-to-phase-out-display-of-captive-killer-whales>. (All citations listed herein last visited April 15, 2018).

² Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (2018).

³ The MMPA defines “take” as “the act of hunting, killing, capture, and/or harassment of any marine mammal; or, the attempt at such” and harassment as “any act of pursuit, torment or annoyance which has the potential to either: a. injure a marine mammal in the wild, or b. disturb a marine mammal by causing disruption of behavioral patterns, which includes, but is not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.” 16 U.S.C. § 1362(13), (18)(A)(i)-(ii) (2018).

⁴ 16 U.S.C. § 1374(c) (2018).

Marine Fisheries Service (NMFS) for select purposes including public display.⁵ The bill eliminates the MMPA exception that enables aquariums to legally apply for permits for the wild capture and import of orcas for purposes of public display.

Export: The bill also bans the export of orcas. However, an orca may be exported if it is being transported to a marine mammal sanctuary.

Breeding: The care and maintenance of captive orcas is federally regulated pursuant to the Animal Welfare Act.⁶ H.R. 1584 would amend the Animal Welfare Act by adding a new Section 26A to prohibit any person from artificially inseminating or breeding orcas for public display.⁷

II. WHY THIS LEGISLATION IS NEEDED

a. The Natural History of Orcas Makes Them Ill-Suited to Captivity

To fully understand why the new legislation is necessary and why existing legislation is inadequate to protect captive orcas, it is essential to have some understanding of this unique and charismatic animal, including its habits in the wild, the social structure of groups of wild orcas, and the significance of the orca's considerable intelligence.

The orca or killer whale⁸ is a mammal, a cetacean, and a member of the dolphin family, Delphinidae, the same zoological family to which dolphins and porpoises belong.⁹ "The killer whale, *Orcinus orca*, is second only to humans as the most widely distributed mammal on earth. It ranges from the tropical seas through the temperate zones to the edge of the pack ice at both poles."¹⁰ Much of the research about orcas comes from study of the orcas found in the eastern

⁵ See 16 U.S.C. §§ 1371(a)(1), 1374(c) (2018). The exception in the MMPA allowing display facilities to maintain captive marine mammals requires that those facilities, among other things, offer "a program for education or conservation purposes that is based on professionally recognized standards of the public display community." See 16 U.S.C. § 1374(c)(2)(A)(i) (2018).

⁶ Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (2018).

⁷ Proposed addition (to follow 7 U.S.C. § 2156): "SEC. 26A. BREEDING OF ORCAS: It shall be unlawful for any person to artificially inseminate or breed a marine mammal of the species *Orcinus orca* for purposes of using the progeny of such species for public display."

⁸ Because the name "orca" is the correct scientific name of the killer whale and also a well-recognized popular name and because of erroneous assumptions about the animal's allegedly bloodthirsty nature conjured up by the other popular name, "killer whale," the term orca will be used throughout this report, except when directly quoting sources using the alternate name, "killer whale."

⁹ The orca is a member of the suborder Odontoceti (toothed whale) and subfamily Orcininae. Robin Baird, *The Killer Whale*, in CETACEAN SOCIETIES: FIELD STUDIES OF DOLPHINS AND WHALES 127, 127-28 (Janet Mann *et al.*, eds., 2000) (hereinafter, "Baird/Mann").

¹⁰ JOHN K.B. FORD, ET AL., KILLER WHALES: THE NATURAL HISTORY AND GENEALOGY OF *ORCINUS ORCA* IN BRITISH COLUMBIA AND WASHINGTON STATE 11 (1994).

north Pacific, off the northwest coast of the United States and Canada, and which are broadly grouped into three main types: the residents, transients, and off-shores.¹¹ Resident orcas are divided into two sub-groups, the southern residents and the northern residents. The southern residents live off Washington State and British Columbia in Canada but their range can extend south to Oregon and northern California, while the northern residents are found in northern British Columbia and southern Alaska.¹² The transients can range from central California to southeast Alaska, a distance of over 1550 miles.¹³

There are noteworthy differences in the behavior of resident and transient orcas. Transient orcas eat marine mammals while resident orcas eat salmon.¹⁴ “In over 40 years of study, no resident orca has ever been found to kill and consume marine mammal prey and no transient has ever been documented to take fish.”¹⁵ This type of dietary specialization is accompanied by consistent differences in vocalizations between transient and resident populations, as the mammalian prey of transient orcas have good underwater hearing that can detect orca vocalizations while the salmon that are the near-exclusive prey of the resident population cannot hear orca sounds over significant distances.¹⁶ The hunting preferences and vocal differentiation between different groups of orcas are thought to be transmitted through social learning, rather than genetics.¹⁷ In other words, these differences can be viewed as a form of culture.¹⁸

The differences in hunting strategies are more than just a simple preference for eating fish as opposed to eating other marine mammals. Even within the mammal-eating populations of orcas, there appears to be “two different foraging traditions,” with some groups foraging in very shallow waters where seals haul out of the water, while other orcas forage primarily in open

¹¹ Rüdiger Riesch, *et al.*, *Cultural Traditions and the Evolution of Reproductive Isolation: Ecological Speciation in Killer Whales?*, 106 BIOLOGICAL JOURNAL OF THE LINNEAN SOCIETY 2 (May 2012), <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1095-8312.2012.01872.x>.

¹² *Id.*; see also, ROBIN W. BAIRD, KILLER WHALES OF THE WORLD--NATURAL HISTORY AND CONSERVATION 28 (2002).

¹³ BAIRD, *supra* note 12, at 28.

¹⁴ Riesch, *supra* note 11, at 6-7.

¹⁵ *Id.* at 7; BAIRD, *supra* note 12, at 61-62.

¹⁶ Reisch, *supra* note 11, at 8; BAIRD, *supra* note 12, at 61-62.

¹⁷ Reisch, *supra* note 11, at 8.

¹⁸ Reisch, *supra* note 11, at 8-12. See also, John K.B. Ford, *Vocal Traditions among Resident Killer Whales (Orcinus orca) in Coastal Waters of British Columbia*, 69 CAN. J. ZOOL. 1454-83 (June 1991), https://www.researchgate.net/profile/John_Ford23/publication/233821079_Vocal_traditions_among_resident_killer_whales_Orcinus_orca_in_coastal_waters_of_British_Columbia/links/55523b1a08ae6943a86d6ffa/Vocal-traditions-among-resident-killer-whales-Orcinus-orca-in-coastal-waters-of-British-Columbia.pdf. Note that and such complex behavioral and vocal cultures of orcas appear to have no parallel outside humans; see Luke Rendell & Hal Whitehead, *Culture in Whales and Dolphins*, 24 BEHAVIORAL AND BRAIN SCIENCES 309, 316 (2001).

water.¹⁹ Perhaps the most dramatic example of learned behavior in orca populations is the beaching foraging behavior exhibited by orcas living off the coast of Patagonia and off the Crozet Peninsula in the Southern Indian Ocean.²⁰ These orcas hunt by engaging in the very risky behavior of beaching themselves on the steep-sloping ocean-facing beaches in order to catch a high-value meal of elephant seals and southern sea lions right on the beach.²¹ The behavior is complex because the orcas must calculate the exact right moment to beach themselves, and it is dangerous because the orcas can get stuck on the beach.²² An individual orca may not be successful in this hunting strategy until he or she is five or six years old.²³

Orcas can even develop “fads”—behavioral traits that spread rapidly through a population but which seem to have no particular function.²⁴ One summer, a member of the fish-eating population of orcas off of southern Washington State was seen carrying a dead salmon on its head.²⁵ This behavior spread quickly through the population so that within a week or two, most of the orcas were carrying fish on the top of their heads.²⁶ Then, just as quickly, the behavior disappeared.²⁷

i. The Conditions of Captivity Disrupt Orca Family and Social Structure

In the most well-studied group of orcas, the so-called “residents” of the coastal waters of the Pacific Northwest, female orcas remain with their mothers for their whole lives, even after giving birth to their own calves.²⁸ In fact, their entire social structure is organized along lines of maternal relatedness.²⁹ In a study lasting over 20 years, in which researchers could reliably identify individual orcas by their unique markings, the close association of mother and her offspring of all ages was observed throughout the females’ lives.³⁰ Male orcas also stay with their mothers for their whole lives but it is assumed that they leave their matrilineal group to breed.³¹ In the wild, there is no abrupt interruption in the interactions between calves and their

¹⁹ BAIRD, *supra* note at 12, at 62.

²⁰ *Id.* at 14, 24.

²¹ *Id.* at 24.

²² *Id.* at 27.

²³ *Id.*

²⁴ BAIRD, *supra* note at 12, at 62.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ FORD, *supra* note 10, at 23-24.

²⁹ *Id.*

³⁰ *Id.* at 24, 26.

³¹ *Id.*

mothers as the calf matures.³² Among the well-studied resident orcas, “even though a juvenile decreases its dependence on its mother [as it gets older], they will never be completely separated for long periods.”³³ Meanwhile, captive orcas are taken from their mothers at very young ages, typically two or three years of age—the famous SeaWorld orca, Tilikum, was estimated to be about two or three years old when he was captured off the coast of Iceland.³⁴

Orcas are extremely large animals: the average size of a free-ranging adult male orca is 19.7 to 26.3 feet long, while females average 16.4 to 23 feet long.³⁵ Male orcas can weigh up to 13,300 pounds while females can weigh half that much, despite being only slightly shorter in length.³⁶ Depending on the type of orca, their range may extend dozens or hundreds of miles and they can travel 30 to 100 miles a day and routinely dive to 300 feet.³⁷ Captive orcas meanwhile spend the rest of their lives in small concrete pools that are one ten-thousandth or less the amount of space a free-ranging orca would have to swim.³⁸

ii. The Conditions of Captivity Damage Orca Physical Health

Orcas are among the largest animals ever kept in captivity.³⁹ There are numerous health issues that captive orcas suffer from that are rare or unknown in free-living orcas. In captivity most adult male orcas have fully collapsed dorsal fins and many female orcas have partially collapsed dorsal fins.⁴⁰ In the wild, dorsal fin collapse is extremely rare.⁴¹ Marine biologists

³² Baird/Mann, *supra* note 9, at 146.

³³ *Id.*

³⁴ Stefan Jacobs, Center for Whale Research, *Orcas in Captivity: The Deadly History of Captive Killer Whales* (Tilikum was three years old at capture), <http://www.orcahome.de/orcadead.htm>; Brian Clark Howard, *Why Tilikum, SeaWorld's Killer Orca, Was Infamous*, NAT'L GEO (Jan. 6, 2017) (Tilikum was two years old at capture), <https://news.nationalgeographic.com/2017/01/tilikum-seaworld-orca-killer-whale-dies>.

³⁵ BAIRD, *supra* note 12, at 129.

³⁶ *Id.* at 9-10.

³⁷ BAIRD, *supra* note 12, at 44; Naomi A. Rose, Humane Society International and The Humane Society of the United States, *Killer Controversy: Why Orcas Should No Longer Be Kept in Captivity* 8-9 (2011), http://www.hsi.org/assets/pdfs/orca_white_paper.pdf [hereinafter “Rose, *Killer Controversy*”]; James Gorman, *Smart, Social, and Erratic in Captivity*, N.Y. TIMES, July 29, 2013, <http://www.nytimes.com/2013/07/30/science/smart-social-and-captive.html>.

³⁸ Rose, *Killer Controversy*, *supra* note 37, at 8-9.

³⁹ Only one other animal kept in captivity comes close in size: African elephants average about six tons (12,000 pounds). World Wildlife Foundation, African Elephant, <https://www.worldwildlife.org/species/african-elephant>.

⁴⁰ Filipe Alves *et al.*, *The Incidence of Bent Dorsal Fins in Free-ranging Cetaceans*, 232 J. ANATOMY 263 (Jan. 2018), https://www.researchgate.net/profile/Arthur_Kopelman/publication/321132331_The_incidence_of_bent_dorsal_fins_in_free-ranging_cetaceans/links/5a199b214585155c26ab8bdc/The-incidence-of-bent-dorsal-fins-in-free-ranging-cetaceans.pdf?origin=publication_detail.

⁴¹ *Id.*

attribute dorsal fin collapse in captivity to conditions such as repetitive circular swimming, dehydration, and the gravitational impact of living at the surface of the water.⁴² Captive orcas are also highly susceptible to mosquito-borne illnesses, which can be fatal.⁴³ In wild orcas, mosquito-borne illness is not a cause of mortality because wild orcas are too mobile and spend too little time at the surface to be bitten by a mosquito.⁴⁴

Despite the claims of the marine mammal display industry that orcas in captivity have a better quality of life than wild orcas and have a similar life expectancy,⁴⁵ the facts do not bear those claims out.⁴⁶ The average life expectancy for wild orcas is 50 years for females and 30 years for males.⁴⁷ Maximum longevity is estimated to be about 50-60 years for males and 100 years for females.⁴⁸ By contrast, among captive orcas, only two females have lived past the age of 40 years and no captive male has lived past the age of 36 years, while only a handful of captive orcas have reached 30 years, and the vast majority die before their early twenties, many still in their early teens.⁴⁹ “Various analytical approaches have demonstrated that the mortality rate for captive orcas is at two and a half times that of wild orcas, and age- and sex-specific

⁴² *Id.*

⁴³ John Jett & Jeffrey Ventre, *Orca (Orcinus orca) Captivity and Vulnerability to Mosquito-transmitted Viruses*, 5 J. MARINE MAMMALS & THEIR ECOLOGY 9 (2012), http://www.oers.ca/journal/volume5/issue2/caseReport_vol5iss2.pdf.

⁴⁴ *Id.*

⁴⁵ See Gorman, *supra* note 37 (“Christopher Dold, vice president of veterinary services at SeaWorld, argues that orcas at SeaWorld facilities already have ‘a phenomenal quality of life.’ SeaWorld and the Association of Zoos and Aquariums say that SeaWorld offers a high level of veterinary care and psychological enrichment programs for the captive animals.”) *Also see* DAVID KIRBY, DEATH AT SEAWORLD; SHAMU AND THE DARK SIDE OF KILLER WHALES IN CAPTIVITY 186-87 (Reprint ed. 2012) quoting SeaWorld Executive Director Sydney Butler, who suggested captivity was superior to life in the wild.

⁴⁶ Stephanie Dodson Dougherty, *The Marine Mammal Protection Act: Fostering Unjust Captivity Practices Since 1972*, 28 J. LAND USE & ENVTL. L. 337, 348-50 (2013).

⁴⁷ NOAA Fisheries, Killer Whale (*Orcinus orca*), <http://www.nmfs.noaa.gov/pr/species/mammals/whales/killer-whale.html>.

⁴⁸ *Id.*; Megan J. Rechberg, *Dying to Entertain Us or Living to Educate Us? A Comprehensive Investigation of Captive Killer Whales, Their Trainers, and How the Law Must Evolve to Meet Their Needs*, 31 J. NAT’L ASS’N OF ADMIN. L. JUD. 720, 728 (Fall 2011), <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1015&context=naalj>.

⁴⁹ The Deadly History of Captive Killer Whales, <http://www.orcahome.de/orcadead.htm>; Rose, *Killer Controversy*, *supra* note 37, at 2; Isabella Langone, *Changing Tides for Captive Marine Mammals: What the Future Holds for Captive Care Requirements*, 68 HASTINGS L.J. 419, 424-25 (2017), <http://www.hastingslawjournal.org/wp-content/uploads/Langone-68.2.pdf>; Amy B. Wang, *SeaWorld’s Last Orca Calf Born in Captivity has Died*, WASHINGTON POST (July 25, 2017) (captive-bred Orca dies at SeaWorld at three months old), https://www.washingtonpost.com/news/animalia/wp/2017/07/25/seaworlds-last-orca-calf-born-in-captivity-has-died/?utm_term=.7bea017e5952.

annual mortality rates range from two to six times as high.”⁵⁰ A recent study found that the percentage of orcas in captivity reaching age milestones including sexual maturity and menopause “is as much as an order of magnitude lower than in the wild.”⁵¹

iii. *The Conditions of Captivity Damage Orca Mental Health and Present a Risk to Human Safety*

As a result of their social and physical deprivations in captivity, some orcas have displayed an array of serious behavioral problems. Perhaps the most famous case is that of Tilikum, the largest orca ever kept in captivity,⁵² who was involved in the deaths of three people and whose tragic tale was told in a best-selling book and a subsequent documentary film.⁵³ His last victim was his trainer, Dawn Brancheau, whom he grabbed from the edge of his display pool and pulled underwater, keeping her submerged until she drowned, in front of an audience that was attending his show.⁵⁴ The view of most scientists is that the combined stressful effects of their physical confinement in small shallow tanks or pools, the forced proximity of unrelated incompatible orcas confined together in those small pools and tanks, the separation of young orcas from their mothers, and the use of negative training practices by some institutions can result, and likely has resulted, in psychological harm to captive orcas like Tilikum.⁵⁵ There are only one or two reports of an orca injuring a human being in the wild.⁵⁶

Even when a captive orca does not cause the death of a marine mammal display industry worker, many marine mammal workers have sustained injuries due to their work.⁵⁷ Additionally, respiratory diseases including tuberculosis and bronchitis have been reported in numerous marine mammal workers.⁵⁸

⁵⁰ NAOMI ROSE, *ET AL.*, THE CASE AGAINST MARINE MAMMALS IN CAPTIVITY 42 (2009), http://www.humanesociety.org/assets/pdfs/marine_mammals/case_against_marine_captivity.pdf [hereinafter Rose, *Case Against Captivity*]; Rose, *Killer Controversy*, *supra* note 37, at 1-5.

⁵¹ John Jett & Jeffrey Ventre, *Captive Killer Whale Survival*, 31 MARINE MAMMAL SCIENCE 1362, 1373 (2015).

⁵² Wikipedia, *Tilikum (orca)*, [https://en.wikipedia.org/wiki/Tilikum_\(orca\)](https://en.wikipedia.org/wiki/Tilikum_(orca)).

⁵³ Tillikum’s story was recounted in detail in the book *Death at Seaworld* by David Kirby and the documentary *Blackfish*. See KIRBY, *supra* note 44 and BLACKFISH (Magnolia Pictures 2013).

⁵⁴ Rechberg, *supra* note 48, at 722-755.

⁵⁵ KIRBY, *supra* note 45, at 178-182.

⁵⁶ *Surfer says Whale bit him on the Leg*, LODI NEWS SENTINEL (Sept. 12, 1972), https://en.wikipedia.org/wiki/Lodi_News-Sentinel; Amy Mass, *Diver Survives Death Spiral in Whale Attack*, NEW ZEALAND HERALD (2014), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11208135, but see David Kirby, *Did a Wild Orca Really Attack a Diver in New Zealand? Marine Mammal Experts Aren’t so Sure*, Takepart (Feb. 24, 2014), <http://www.takepart.com/article/2014/02/24/did-wild-orca-really-just-attack-diver-new-zealand>.

⁵⁷ Tania D. Hunt *et al.*, *Health Risks for Marine Mammal Workers*, 81 DISEASES OF AQUATIC ORGANISMS 81, 84-85 (Aug. 19, 2008), http://www.int-res.com/articles/dao_oa/d081p081.pdf.

⁵⁸ *Id.*

b. The Current Legal Protections for Captive Orcas Are Inadequate

Captive orcas are currently provided with some protections by sections of two different statutes, the oversight of which falls under several federal departments: the Marine Mammal Protection Act of 1972⁵⁹ and the Animal Welfare Act.⁶⁰ Oversight of the MMPA falls under the auspices of the National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce and under the Department of the Interior. The 1994 amendment to the MMPA transferred the primary authority for the care and maintenance of captive marine mammals to the Animal and Plant Health Inspection Service (APHIS) in the Department of Agriculture.⁶¹ APHIS has the task of setting regulations for the management of captive marine mammals under the statutory authority of the Animal Welfare Act (AWA).⁶²

The MMPA has notable shortcomings that interfere with its ability to provide protection for captive marine mammals. Among those are the fact the public display industry is allowed to set the standards for itself, the lack of oversight of the display industry, and the lack of enforcement of even the industry-set standards.⁶³ Moreover, after the 1994 amendment to the MMPA, which transferred the care of captive marine mammals from the MMPA under the Departments of Commerce and the Interior, to the AWA under the Department of Commerce, National Marine Fisheries Service—the agency which is charged with ensuring that requirements of the MMPA are met before issuing permits for the taking of marine mammals—no longer has any role in monitoring the care of marine mammals after they are in captivity.⁶⁴

As Representative Adam Schiff states in his explanation for his sponsorship of the bill, “[u]pdated federal regulations for captive marine mammals are currently being considered by the United States Department of Agriculture (USDA) under the Animal Welfare Act. However, while revised standards may improve the welfare of smaller, more adaptable marine mammals, no amount of regulation can ensure that orcas thrive while in captivity and orcas are likely the

⁵⁹ 16 U.S.C. §§ 1361-1407 (2018).

⁶⁰ 7 U.S.C. §§ 2132-2159 (2018).

⁶¹ Hillary T. Wise, *All Is Whale that Ends Whale? The Deficiencies in National Protection for Orca Whales in Captivity*, 49 AKRON L. REV. 925, 930-31 (Aug. 2016), <http://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=2382&context=akronlawreview>.

⁶² See generally Specifications for the Humane Handling, Care, Treatment, and Transportation of Marine Mammals 9 C.F.R. §§ 3.100-118 (2018); 7 U.S.C. § 2132(h) (2018); Dougherty, *supra* note 46, at 337-340. The other animals covered under the MMPA (walruses, sea otters, polar bears, and manatees) are protected and managed by the Department of the Interior.

⁶³ Wise, *supra* note 61, at 932-33; Dougherty, *supra* note 46, at 338-42.

⁶⁴ Langone, *supra* note 49, at 433-35.

least suited for captivity of any species.”⁶⁵ While SeaWorld announced on March 17, 2017, that it was voluntarily ending its captive breeding program,⁶⁶ its voluntary decision does not prevent SeaWorld from resuming its breeding program should the company’s management decide to do so. We respectfully submit that legislation curtailing the breeding of captive orcas is necessary to prevent the future maintenance of captive orcas in the same type of physically and psychologically inadequate conditions as those experienced by orcas currently in captivity.⁶⁷

III. DISPLAY INDUSTRY ARGUMENTS ARE NOT SUPPORTED BY THE FACTS

Advocates for the display industry claim that the public display of orcas promotes conservation, research and public education regarding marine mammals.⁶⁸ This contention is unsupported by the facts.

Whale procurement for public display purposes has a negative impact on wild orcas and orca conservation and has contributed to the decline of the wild orca population.⁶⁹ Indeed, these practices have had a drastically harmful impact on the southern resident orcas.⁷⁰ By 1971, the population of Southern Resident whales living off the coast of Washington and British Columbia had declined from approximately 200 to 67.⁷¹ In November 2005, the National Marine Fisheries

⁶⁵ Representative Schiff explains his reasons for supporting the ORCA Act on his website. See Representative Adam Schiff, *Orca Care and Responsibility Advancement Act Fact Sheet*, <https://schiff.house.gov/imo/media/doc/ORCA%20Act%20Fact%20Sheet%2011.4.pdf>.

⁶⁶ Amber Jamieson, *SeaWorld Decides to Stop Killer Whale Breeding Program*, THE GUARDIAN (Mar. 17, 2016), <https://www.theguardian.com/us-news/2016/mar/17/seaworld-to-stop-breeding-killer-whales-orcas-blackfish>; Kaitlin Vigars, *Bigger than Blackfish: Lessons from Captive Orcas Demonstrate a Larger Problem with Animal Welfare Laws*, 44 B.C. ENVTL. AFF. L. REV. 491, 511-512, <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2232&context=ealr>.

⁶⁷ SeaWorld and Miami Seaquarium are the only two facilities in the U.S. that currently keep orcas for display purposes; Miami Seaquarium has only one orca and SeaWorld has roughly twenty. H.R. 1584 would not require them to relinquish the orcas that they currently own and the bill would not cause a substantial change in the current business practice. SeaWorld no longer imports orcas from the wild, it has ceased its orca breeding program, and it has no plans to export the orcas that it currently keeps. (SeaWorld, Last Generation, <https://seaworldcares.com/en/Future/Last-Generation>).

⁶⁸ Joel Manby, Editorial, *SeaWorld CEO: We’re Ending Our Orca Breeding Program. Here’s Why.*, L.A. TIMES (Mar. 11, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-0317-manby-sea-world-orca-breeding-20160317-story.html>. See also Kaitlin Vigars, *Bigger than Blackfish: Lessons from Captive Orcas Demonstrate a Larger Problem with Animal Welfare Laws*, 44 B.C. ENVTL. AFF. L. REV. 491, 511-12 (2017), <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2232&context=ealr>.

⁶⁹ Sue Mayer, Whale & Dolphin Conservation Society, *A Review of the Scientific Justifications for Maintaining Cetaceans in Captivity* 4 (1998), <http://www.zoocheck.com/wp-content/uploads/2015/06/WDCS-Scient-Just-98.pdf>.

⁷⁰ Nat’l Marine Fisheries Serv., Nat’l Oceanic & Atmospheric Admin., Recovery Plan for Southern Resident Killer Whales (*Orcinus Orca*), at II-54 (2008), http://www.nmfs.noaa.gov/pr/pdfs/recovery/whale_killer.pdf. See also Stefan Jacobs, Center for Whale Research, *Impact of the Captures between 1962 and 1973 on the Southern Resident Killer Whale Community* (2003), <http://www.orcahome.de/impact.htm>.

⁷¹ Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. 69,903, 69,908 (Nov. 18, 2005), <http://www.nmfs.noaa.gov/pr/species/mammals/whales/killer-whale.html>.

Service and the National Oceanic Atmospheric Administration enacted a final rule to list the Southern Resident Killer Whales as endangered.⁷² The rule specifically noted the extreme adverse impact of live capture for public display on population reduction.⁷³ In addition, removal of animals from wild populations has a significantly negative impact on orcas left behind.⁷⁴ Modeling of orca societies demonstrates that some individuals play a critical role in community cohesion, and removal of these individuals from the group has negative survival implications for the remaining animals.⁷⁵

Advocates for cetacean captivity contend that aquariums promote orca conservation through species enhancement programs, i.e., breeding endangered species in captivity to supplement wild populations in the future.⁷⁶ However, rather than enhancing wild populations, facilities conducting captive breeding create a surplus of orcas that will most likely never be released into the wild.⁷⁷ Wildlife veterinarians and biologists agree that for orcas to be reintroduced to the wild they must live in an environment closely resembling their natural habitat as well as learn survival skills and specialized group behaviors from their mothers.⁷⁸ As noted above, since seizing these animals for captivity typically involves separating orcas mothers from their calves at a young age, captive orcas are typically unable to gain critical skills required for success in the wild. The lack of a natural physical and cultural environment for captive orcas means it is extremely difficult to rehabilitate and release captive orcas into the wild and thereby utilize species enhancement to promote conservation.⁷⁹

There is little evidence to support the notion that marine parks contribute to the public's education regarding orcas and their habitats.⁸⁰ Public visitors do not receive an accurate picture

⁷² *Id.*

⁷³ *Id.* at 70 Fed. Reg. 69,908.

⁷⁴ Rob Williams and David Lusseau, *A Killer Whale Social Network is Vulnerable to Targeted Removals*, 2 BIOLOGY LETTERS, 497 (2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1834010/>.

⁷⁵ *Id.*

⁷⁶ Marcia Hope Ames, *Saving Some Cetaceans May Require Breeding in Captivity*, 41 BIOSCIENCE 746 (Dec. 1991).

⁷⁷ Rose, *Case Against Captivity*, *supra* note 50.

⁷⁸ Hal Whitehead *et al.*, *Culture and Conservation of Non-humans with Reference to Whales and Dolphins: Review and New Directions*, 120 BIOLOGICAL CONSERVATION 427 (Dec. 2004). *See also*

Luke Rendell & Hal Whitehead, *Culture in Whales and Dolphins*, 24 BEHAVIORAL AND BRAIN SCIENCES 309 (2001), <http://www.zoology.ubc.ca/~barrett/documents/Asoundapproachtostudyofculture.pdf>. Harald Yurk *et al.*, *Cultural Transmission within Maternal Lineages: Vocal Clans in Resident Killer Whales in Southern Alaska*, 63 ANIMAL BEHAVIOUR 1103 (2002), <http://courses.washington.edu/mb351/readings/Animal%20Behaviour.pdf>.

⁷⁹ HOWARD GARRETT, ORCA NETWORK, HOME AT LAST: A REVIEW OF THE RELEASABILITY OF LONG-TERM CAPTIVE ORCAS WITH SPECIAL CONSIDERATION OF LOLITA/TOKITAE AT THE MIAMI SEAQUARIUM (2015), <https://www.orcanetwork.org/Main/PDF/Releasability.pdf>.

⁸⁰ ROSE, *Case Against Captivity*, *supra* note 50, at 3-4 (2009).

of orcas' natural lives and habitats.⁸¹ Viewing orcas held in concrete tanks that bear little resemblance to their natural environment does not provide insight into wild orca biology or behavior. A study on the education and conservation efforts of marine mammal parks indicated that less than half of marine mammal parks displaying orcas provide any information on conservation or educational materials for children or teachers.⁸²

In addition, the scientific research conducted at public display facilities has minimal significance in terms of advancing scientists' understanding of wild orcas.⁸³ Most scientific research from captive orca facilities addresses captive breeding practices such as artificial insemination, which has no conservation benefit since such technology is used only in captivity.⁸⁴

IV. STATE, LOCAL AND INTERNATIONAL LAWS PROTECTING CAPTIVE ORCAS

Rather than wait for federal legislation to pass, a number of states and counties in the United States have passed their own legislation banning or restricting orca captivity/display:

a. American Jurisdictions

California: In September 2016, California passed the landmark Orca Welfare and Safety Act, which bans holding orcas in captivity for performance or entertainment purposes in the state of California as well as the import and export of orcas and their genetic materials into/out of California.⁸⁵ Under this new law, the eleven whales currently held at SeaWorld San Diego may still be held at the park, but they may only be used for educational presentations.⁸⁶ Orcas may be exported out of California for the sole purpose of transport to a North American marine mammal sanctuary.⁸⁷

⁸¹ *Id.*

⁸² *Id.* at 4.

⁸³ Sue Mayer, Whale & Dolphin Conservation Soc'y, *A Review of the Scientific Justifications for Maintaining Cetaceans in Captivity* 4 (1998), <https://pdfs.semanticscholar.org/5393/2888b9d6db8141ce32b03bed046febe7ee47.pdf>.

⁸⁴ *Id.*

⁸⁵ CAL. FISH & GAME CODE § 4502.5 (2018). See Kristin Hugo, *Orca Shows and Breeding Banned in California*, NAT'L GEOGRAPHIC (Sept. 14, 2016), <http://news.nationalgeographic.com/2016/09/california-bans-SeaWorld-orca-breeding-entertainment/>.

⁸⁶ CAL. FISH & GAME CODE § 4502.5(d)(1).

⁸⁷ CAL. FISH & GAME CODE § 4502.5(a)(4).

Maui County, Hawaii: In 2002, Maui County, Hawaii banned the display of captive cetaceans including whales and dolphins after a developer proposed to construct a dolphinarium at a Maui shopping center.⁸⁸

South Carolina: A law passed in 1992 originally prohibited “the display of dolphins and porpoises” in the state.⁸⁹ In 2000, the law was broadened to include all sea mammals.⁹⁰ In 2011, the law was limited to prohibit only the display of cetaceans (whales, dolphins, and porpoises) but not other sea mammals in state.⁹¹

In addition, several states, including Florida, New York, Hawaii and Washington State have introduced legislation that did not pass (but is likely to be reintroduced).⁹²

b. Foreign Jurisdictions

A growing list of countries has begun phasing out and banning cetacean captivity.⁹³

⁸⁸ CODE OF COUNTY OF MAUI, HAWAII § 6.01.010-6.01.030. *See* Whale and Dolphin Conservation (WDC), *Maui Bans Whale and Dolphin Exhibits* (Nov. 2002), <http://us.whales.org/news/2002/11/maui-bans-whale-and-dolphin-exhibits>.

⁸⁹ S.C. CODE ANN. § 50-5-2310 (2011).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² In previous years, bills to ban the breeding, import, and export of orcas for the purposes of entertainment have been introduced in the following states, but have not passed:

Florida: In January 2018, Representative Jared Moskowitz introduced the Florida Orca Protection Act (HB 1305), which would make it illegal to hold orcas in captivity for any purpose (grandfathering orcas already in captivity in Florida), breed captive orcas, and transport captive orcas into Florida or out of North America (unless provided by federal law or to transport to sanctuary).⁹² Unfortunately the bill died in a legislative committee in March 2018. The law will likely be reintroduced during the next Florida legislative session. For a full text of the bill, see: <http://www.flsenate.gov/Session/Bill/2018/1305/BillText/Filed/PDF>

New York: In February 2014, during the 2013-2014 legislative session, New York state Senator Greg Ball introduced S6613A bill to ban orca captivity, which banned “the possession and harboring of killer whales in aquariums and sea parks” in the state. 2013 New York Senate Bill No. 6613, New York Two Hundred Thirty-Seventh Legislative Session. This bill did not pass. For a full text of the bill, see: <https://www.nysenate.gov/legislation/bills/2013/s6613/amendment/a>

Hawaii: House Concurrent Resolution 208 was introduced in Hawaii in 2017 to urge Hawaii facilities that hold captive cetaceans for entertainment purposes to discontinue breeding and phase out captivity. The resolution, however, would not be binding law. 2017 Hawaii House Concurrent Resolution No. 208-17, Hawaii Twenty-Ninth Legislature-Regular Session of 2017. For a full text of the bill, see <https://legiscan.com/HI/text/HCR208/2017>

Washington: Orca captivity bills introduced in the 2015-2016 and 2017-2018 legislative sessions did not pass. Senate Bill 566 banning orca captivity and breeding (as well as export or import of orcas) failed to pass in the 2015-2016 legislative session. Senate Bill 6099, which bans orca breeding (as well as export or import of orcas) did not pass before the end of the 2018 Washington legislative session. For a full text of the 2018 bill, see: <https://legiscan.com/WA/text/SB6099/id/1674856>

Argentina: Argentina bans the live capture of cetaceans in its waters.⁹⁴

Australia: Australia prohibits the live capture of cetaceans in its waters for commercial and display purposes.⁹⁵ Australia also bans the import of live cetaceans for any purpose.⁹⁶

Bolivia: Bolivia has enacted a moratorium on all animals in circuses and other public performance venues (which includes marine mammal performances in public display facilities).⁹⁷

Brazil: Brazil bans the live capture of cetaceans in its waters.⁹⁸

Chile: Chile has outlawed the capture of cetaceans within its waters including holding and marketing of cetaceans.⁹⁹

Costa Rica: Costa Rica has banned the hunting and capture as well as captive holding of all cetaceans.¹⁰⁰

⁹³ Though not included here, note that, in addition to legislation at the national level, there are a growing number of foreign city/state/regional jurisdictions that ban orca captivity.

⁹⁴ Government of Argentina, Fisheries Law, Prohibition on the Hunting or Capture of Specimens of Orca, Law No. 25.052 (1998), <http://www.fao.org/faolex/results/details/en/c/LEX-FAOC039899>. In addition, Argentine Law 25.577 prohibits hunting or capture of other cetacean species. Government of Argentina, Fisheries Law, Prohibition on Cetacean Hunting & Capture, Law No. 25.577 (2002), <http://www.fao.org/faolex/results/details/en/c/LEX-FAOC039901>.

⁹⁵ Australian Government, Environment Protection and Biodiversity Conservation Act of 1999 § 229-38, <https://www.legislation.gov.au/Details/C2016C00777> (1999) (“EPBC Act”). Specifically, it is prohibited to “possess, take, trade, keep, move, interfere, injure or kill a cetacean.” EPBC Act § 229-230. The law affirmatively prohibits exceptions for exhibitions/public display. EPBC Act § 238(4). The EPBC Act designates all Australian Commonwealth waters as the Australian Whale Sanctuary. See Australian Government Department of Environment & Energy, *Australian Whale Sanctuary*, <http://www.environment.gov.au/marine/marine-species/cetaceans/whales-dolphins-porpoises>.

⁹⁶ Australian Government, List of Specimens Taken to be Suitable for Live Import (29/11/2001) (not including any species of Cetacea): <https://www.legislation.gov.au/Details/F2015C00959>.

⁹⁷ Bolivian Government, Eliminating the Use of Animals in Circuses, Law Number 4040 (June 17, 2009), <https://www.lexivox.org/norms/BO-L-4040.xhtml>. The law states that the use of animals for public entertainment “constitutes an act of cruelty.” See also, *Bolivia Bans all Circus Animals*, THE GUARDIAN, July 31, 2009, <https://www.theguardian.com/world/2009/jul/31/bolivia-bans-circus-animals>.

⁹⁸ Brazilian Government, Prohibition on the Catching of Cetaceans, Federal Law No. 7.643 (1987), http://www.planalto.gov.br/ccivil_03/Leis/L7643.htm. “Fishing, or any form of intentional harassment, of any cetacean species in Brazilian jurisdictional waters is prohibited.” Federal Law No. 7.643, Article 1.

⁹⁹ Chilean Government, Prohibition of Capture of Cetacean Species indicated in Waters of National Jurisdiction, Fisheries Decree 179 (2008), <http://www.leychile.cl/Navegar?idNorma=278877>.

Croatia: Croatia prohibits the keeping of cetaceans in captivity for all commercial purposes.¹⁰¹

Cyprus: Cyprus has banned the use of cetaceans for commercial and entertainment purposes.¹⁰²

Greece: Greece has banned the use of animals including cetaceans for all entertainment and performance purposes.¹⁰³

India: India has banned cetacean captivity including cetacean importation, capture, and exhibition for private and public exhibition.¹⁰⁴ The legislative ban explicitly refers to cetaceans as “non-human” persons.¹⁰⁵

Mexico: Mexico has enacted a moratorium on the live capture of cetaceans in Mexican waters for commercial purposes.¹⁰⁶ In addition, Mexico prohibits the import and export of marine mammals for commercial purposes.¹⁰⁷

¹⁰⁰ Government of Costa Rica, Regulations for the Operation of Activities relating to Cetaceans, Executive Decree 32495, Article 14, <http://www.mag.go.cr/legislacion/2005/de-32495.pdf>. The law prohibits “catching and killing, keeping captive, touching or trapping, or feeding or attempting to feed, any marine mammal, with exceptions provided for euthanasia or rehabilitation of ill animals.” Costa Rica’s Fishing and Agriculture law also prohibits hunting and capture of cetaceans. *See* Government of Costa Rica, Fishing and Aquaculture Law No. 8436, Article 39, <http://www.fishcostarica.org/wp-content/uploads/2017/07/costa-rican-fishing-regulations.pdf.pdf>.

¹⁰¹ Government of Croatia, Ministry of Culture, Ordinance on the Conditions for Holding, Methods of Marking and Keeping Records on Protected Animals in Captivity (2009), http://www.prijatelj-zivotinja.hr/data/file_7124.pdf. The Ordinance states: “Holding in captivity live specimens of the animal species listed in Annex II (cetaceans) to this Ordinance shall not be permitted.”

¹⁰² In October 1999, the Cyprus Council of Ministers passed a decree adopting this policy. United Nations Country Reports, Natural Resources Aspects of Sustainable Development in Cyprus, (2002), <http://www.un.org/esa/agenda21/natlinfo/countr/cyprus/natur.htm#biodiv>. *See also* Dolphinarium Talk Raises Concern, Cyprus-Mail.com (July 5, 2014), <http://cyprus-mail.com/2014/07/05/dolphinarium-talk-raises-concern/>.

¹⁰³ Greek law bans the use of animals in “recreational games, car racing platforms, musical concerts, exhibitions, fairs or other artistic or entertaining festivities.” Government of Greece, Law 4039, Article 12, https://www.griechische-fellnasen.de/app/download/13002234988/AW-LAW++4039_2012_ENGLISH.pdf?t=1487437318. This law was upheld by Greece’s parliament in January 2014 after being challenged by a zoo. *See* Aisling Maria Cronin, One Green Planet, Greece Upholds Ban on Captive Dolphin Performances (Jan. 21, 2014), <http://www.onegreenplanet.org/news/greece-upholds-ban-on-captive-dolphin-performances>.

¹⁰⁴ Government of India, Ministry of Environment & Forests, Central Zoo Authority, Policy on Establishment of Dolphinarium, F. No. 20-1/2010-CZA(M) (2013), <http://envfor.nic.in/content/policy-establishment-dolphinarium-updated-may-17-2013>.

¹⁰⁵ *Id.*

New Zealand: New Zealand requires ministerial approval for taking, holding, importing or exporting cetaceans.¹⁰⁸

Philippines: The Philippines has banned the live capture of cetaceans in their waters as well as export of cetaceans.¹⁰⁹

Slovenia: Slovenia prohibits the use of cetaceans for commercial purposes including public display and therapeutic programs.¹¹⁰

Switzerland: Switzerland has outlawed the importation of cetaceans.¹¹¹

¹⁰⁶ Mexican General Wildlife Law (Article 60) states: “No specimen of any marine mammal, no matter what species, could be subject of extractive taking for commercial or subsistence purposes, with the exception of the capture intended for both scientific research and the superior education of credited institutions.” Mexico General Wildlife Law (Ley General de Vida Silvestre), Article 60 Bis. (2002), <https://www.global-regulation.com/translation/mexico/560295/general-wildlife-law.html>.

¹⁰⁷ On January 26, 2006, the government published a decree adding Article 55 to its Wildlife Act, which bans the import and export of marine mammals with an exception for scientific research. The law states: “The import, export and re-export of specimens of any species of marine mammal or primate, as well as its parts and derivatives, is prohibited with the exception of those destined for scientific research, with previous authorization from the Secretary.” Mexico General Wildlife Law (Ley General de Vida Silvestre), Article 55 (2006), <https://www.global-regulation.com/translation/mexico/560295/general-wildlife-law.html>.

¹⁰⁸ Government of New Zealand, Marine Mammals Protection Act of 1978 § 4, Public Act 1978 No 80 (1978), <http://www.legislation.govt.nz/act/public/1978/0080/latest/DLM25111.html>.

¹⁰⁹ Philippines Government, Fisheries Administrative Order No. 185, as amended by 185-1, makes it “unlawful to take or catch dolphins, whales and porpoises in Philippine waters or to sell, purchase, possess, transport or export the same whether dead or alive, in any state or form whether raw or processed.” Philippines Bureau of Fisheries, Administrative Order No. 185, Series of 1992, § 2, <http://www.bfar.da.gov.ph/LAW?fi=324#post>; Philippines Bureau of Fisheries, Administrative Order No. 185-1, Series of 1997, § 2, <http://www.bfar.da.gov.ph/LAW?fi=327#post>.

¹¹⁰ Slovenia Government, Ministry of Agriculture and Environment, CITES Biennial Report 2011 and 2012 at 20 (2012), <http://cites.org/sites/default/files/reports/11-12Slovenia.pdf>. “Prohibition of Keeping in Captivity Cetaceans for Commercial Purposes: The Decree on the course of conduct and protection measures in the trade in animal and plant species Article 16 (Official Gazette of RS, No. 39/08, 106/10, 78/12) prohibits the use of specimens of the cetacean species (Cetacea) for commercial purposes, including for commercial dolphinariums and for therapeutic programs.”

¹¹¹ Press Release, Swiss Parliament, Swiss Commission Bans Import of Dolphins and Whales (May 10, 2012), <http://www.parlament.ch/d/mm/2012/Seiten/mm-wbk-n-2012-05-10.aspx>. The press release noted, “La majorité de la commission reste convaincue que les dolphinariums et les zoos ne sont pas adaptés aux besoins des dauphins et des baleines, qui ont besoin de grands espaces et d'un cadre de vie adapté à leur espèce.” [“The majority of the commission remains convinced that dolphinariums and zoos are not adapted to the needs of dolphins and whales, who need large spaces and a living environment adapted to their species.”]

United Kingdom: The UK has strict legislative standards for the keeping of cetaceans in captivity that currently exceed the viability of establishing dolphinariums.¹¹²

V. CONCLUSION

In sum, the intelligence, size, and complex social structure of orcas makes them ill-suited to captivity. The conditions of captivity demonstrably damage the health and shorten the lifespan of orcas, as well as presenting a danger to the safety and health of the human workers in the display industry. The current legislation is insufficient to protect captive orcas and permits display industry captive breeding programs to maintain a supply of captive orcas despite nearly worldwide bans on present-day capture of wild orcas. Display industry arguments about the supposed benefits of the public display of captive orcas are unsupported by the facts.

Accordingly, for all of the above reasons, the New York City Bar Association supports the bill.

Animal Law Committee
Lori Barrett-Peterson, Chair

May 2018

¹¹² United Kingdom, Department of the Environment, *Supplement to the Secretary of State's Standards to Modern Zoo Practice: Additional Standards for UK Cetacean Keeping* (1990), endcap.eu/wp-content/uploads/2012/07/UK-STANDARDS-FOR-DOLPHINARI.doc. See also Born Free Foundation UK, *Captive Whales and Dolphins UK*, <http://www.bornfree.org.uk/campaigns/zoo-check/captive-whales-dolphins/uk/>.