

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 19-2000

JOYCE ROWLEY,
Plaintiff-Appellant

v.

CITY OF NEW BEDFORD, MASSACHUSETTS,
Defendant-Appellee

**ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS**

**BRIEF OF APPELLEE
CITY OF NEW BEDFORD, MASSACHUSETTS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
ISSUES PRESENTED	1
STANDARD OF REVIEW	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
A. Background.....	3
B. The Elephants’ Life, Care, and Development at Buttonwood Park Zoo.....	5
i. 2014 AZA Audit.....	8
ii. 2015 Independent Panel Review.....	10
iii. 2018 Accreditation Report.....	12
C. Expert Testimony.....	13
SUMMARY OF THE ARGUMENT	14
ARGUMENT	15
I. The District Court, after reviewing all evidence and testimony, did not err in concluding that the City is not harassing or harming Emily and Ruth.....	15
A. All Allegations of Physical Harm Considered by the District Court.....	16
B. Purported Harm Caused by the Elephants’ Habitat.....	20
C. Stereotypy.....	21
D. Nourishment and Socialization.....	22

E. Damages and Alleged Past, Present, and Continuing Harm.....23

II. The District Court correctly applied the relevant case law, regulations and standards in deciding that the City’s elephant program meets “generally accepted animal husbandry” practices.....24

III. The District Court did not abuse its discretion in consolidating Appellant’s Motion to Confiscate into the trial on the merits.....27

CONCLUSION.....28

CERTIFICATE OF COMPLIANCE.....30

CERTIFICATE OF SERVICE.....31

TABLE OF AUTHORITIES

Cases

American Cyanamid v. Capuano, 381 F.3d 6, 21 (1st Cir. (2004)2

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985)16

Babbitt v. Sweet Home Chapter of Cmty. for a Great Or., 515 U.S. 687, 703 (1995)25

Doyle v. Hasbro, 103 F.2d 186, 190 (1st Cir. 1996)2

Graham v. San Antonio Zoological Soc’y, 261 F. Supp. 3d 711 (W.D. Tex. 2017)25

I.P. Lund Trading ApS v. Kohler Co., 163 F.3d 27, 33 (1st Cir. 1998)27

Lanier Professional Services Inc. v. Ricci, 192 F.3d 1, 3 (1st Cir.1999)27

Parts and Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228 (7th Cir. 1988), cert. denied, 493 U.S. 847 (1989)16

Used Tire Int’l, Inc. v. DiazSaldana, 155 F.3d 1, 4 (1st Cir. 1998)27

Veranda Beach Club v. Western Surety, 936 F.2d 1364, 1370 (1st Cir. 1991)2

Statutes

7 U.S.C. § 13125

7 U.S.C. §§ 2132(b), 2133, 214625

16 U.S.C. § 531(b)24

16 U.S.C. §§ 1531-1544.....1, 2

16 U.S.C. § 1532(19).....1, 18, 24

16 U.S.C. § 1538(a)(1)(B)18, 24

28 U.S.C §1291.....1

28 U.S.C. § 1331.....1

Rules

Fed. R. App. P. 9(a)(5).....30

Fed. R. App. P. 32(a)(5)-(6)30

Fed. R. App. P. 32(f)30

Fed. R. Civ. P. 52(a)15

Fed. R. Civ. P. 65(b)(2)2, 27

Regulations

9 C.F.R. 2131(b)(1)8

50 C.F.R. § 17.324, 25, 26

50 C.F.R. § 17.11(h)18

STATEMENT OF JURISDICTION

On September 21, 2017, Appellant Joyce Rowley (“Appellant”) filed this lawsuit against the Appellee, the City of New Bedford (“the City”). ECF No. 1. Appellant subsequently filed an Amended Complaint on January 15, 2019, stating claims under the Endangered Species Act, 16 U.S.C. §§ 1531-1544. ECF No. 47. Pursuant to 28 U.S.C. § 1331, the United States District Court for the District of Massachusetts had federal question jurisdiction in the matter. After a bench trial, the District Court entered final judgment in favor of the City on September 24, 2019, from which Appellant has filed her appeal. ECF No. 91. Under 28 U.S.C § 1291, the First Circuit Court of Appeals has jurisdiction over this appeal.

ISSUES PRESENTED

Appellant’s claims against the City all center on the prohibition against “harassing” and “harming” endangered species where those terms constitute a “taking” under the Endangered Species Act. 16 U.S.C. § 1532(19). Upon hearing all the evidence on the matter, determining the credibility of witnesses, and reviewing the law and applying it soundly to its Findings of Fact, Rulings of Law, and Order for Judgment, the District Court ruled in favor of the City on all Counts of Appellant’s Amended Complaint. ECF Nos. 47, 91.

In this appeal, Appellant’s challenges to the District Court’s ruling can be summarized as follows:

- I. Whether the District Court was clearly erroneous in finding that, Appellant failed to prove that the City is harassing or harming the elephants in light of Plaintiff’s failure to present any directly applicable expert testimony to support her contention?

- II. Whether the District Court was clearly erroneous in accepting the testimony of the City’s elephant veterinary experts and in finding that the City’s care for the elephants meets “generally accepted animal husbandry” practices?
- III. Whether the District Court erred in consolidating Appellant’s Motion to Confiscate into the trial on the merits?

STANDARD OF REVIEW

Issues I and II challenge the District Court’s factual findings, which should be reversed only upon a finding of clear error. American Cyanamid v. Capuano, 381 F.3d 6, 21 (1st Cir. 2004). To the extent that the Appellant challenges the District Court’s application of the ESA and its interplay with related regulations as to Issue II, this Court’s review is *de novo* regarding that legal question. Doyle v. Hasbro, 103 F.2d 186, 190 (1st Cir. 1996).

Issue III challenges a discretionary decision of the District Court as to how it should manage its trial calendar. That decision should only be reversed upon a finding that the court abused its discretion. Veranda Beach Club v. Western Surety, 936 F.2d 1364, 1370 (1st Cir. 1991).

STATEMENT OF THE CASE

Appellant’s Amended Complaint alleged six Counts of violations of the Endangered Species Act (16 U.S.C. §§1531-1544). Appellant has also filed three motions seeking preliminary injunctions (the first two resolved in the City’s favor), the last on January 18, 2019. Pursuant to Fed.R.Civ.P. 65(b)(2), the District Court collapsed the process and combined the final injunction hearing with a trial on the merits. A three-day trial began on March 5, 2019. On September 24, 2019, the

court entered its Findings of Fact, Rulings of Law, and Order of Judgment, a final decision entered in favor of the City on all Counts of the Amended Complaint.

STATEMENT OF THE FACTS

At trial, the evidence presented established the following pertinent facts upon which the District Court based its Order of Judgment:

A. Background

The City owns and operates the Buttonwood Park Zoo. The zoo is AZA accredited. Trial Transcript, Day 3, p. 39.

In April 1968, the City purchased Emily, a four-year-old Asian elephant, the Mendon Animal Farm, and the elephant was transferred to the Buttonwood Park Zoo. Trial Ex. 4, p. 1, 6. Emily is now fifty-five years old. Trial Ex. 4, p. 1. Aside from a brief period from November 1983 to July 1985, she has resided in the City's zoo, approximately forty-nine of her fifty-five years. Id.

In 1986, the City acquired a second elephant, Ruth. She had been abandoned in a dump site in Danvers, Massachusetts. Trial Ex. 5, p. 5-6. At that time, the United States Dept. of Agriculture ("USDA") seized the elephant. Id. According to the USDA's report, Ruth suffered several ailments: her ear condition was fair, with one hole and ragged edges; her skin was fair to poor; her tail and skin had extreme build-up of necrotic tissue; she had scars on her legs (indicative of excessive chain wear) and chin (more than twenty hook scars); and she was underweight, among other issues. Id. Further, Ruth was a "striker, hitter, but not to the point of killing," and she had repeatedly struck out at her keepers. Id.

Ruth's trunk was of particular concern when she was rescued from abandonment. The report stated that Ruth had "[l]ittle control of distal area; no fine control of finger; appears paralyzed in proximal area and peduncle; must use head to swing trunk." Id. Dr. Michael Ryer, then a zookeeper at the City's zoo, confirmed Ruth's partial trunk paralysis and overall poor health upon her arrival to the City's habitat. Trial Transcript, Day 1, p. 97.

Ruth was approximately twenty-eight years old when she was delivered into the City's care. Trial Ex. 5, p. 1, 5. She is now sixty-one years old and has resided at the Buttonwood Park Zoo for the last thirty-three years, together with Emily. Id.

Appellant Joyce Rowley resides in New Bedford. Trial Transcript, Day 3, p. 62. She has a Bachelor of Science degree in geology and a Masters degree in community planning. Id. at 63. She worked for the USDA Soil Conservation Service as a construction and as a community planner for twenty-three years Id. Although she has read articles regarding elephant care and has personally observed the living conditions of Ruth and Emily, Appellant has no specialized training in zoology or veterinary techniques, relating to elephants or otherwise. Id. at 62-65.

Appellant took an interest in Emily and Ruth and their care in 2010. By 2012 or 2013, she was visiting the elephant habitat multiple times each week, spending an hour or more observing Ruth and Emily's care, treatment, living conditions during each visit. Id. at 64-65. She often recorded (video and audio) her time at the zoo, including interactions between staff and the elephants. Id.

Appellant further testified that since 2010, she has participated in public hearings, written letters to local newspapers, started petitions, and has otherwise

been openly critical of the City's management of the elephant habitat and care for the elephants. *Id.* at 64. She advocated for the animals' transfer to a sanctuary.

On September 21, 2017, Appellant, on behalf of the Friends of Ruth and Emily, Inc., filed the Complaint in this action. An Amended Complaint, naming Joyce Rowley as the sole Appellant, *pro se*, was filed on January 15, 2019, together with a request for injunctive and declaratory relief. The Amended Complaint alleged the City failed to provide Ruth and Emily with: adequate shelter; adequate space; adequate social opportunities; adequate veterinary care; and adequate sustenance and enrichment. Appellant further alleged that the City has failed to protect Ruth from being attacked by Emily. ECF 47.

B. The Elephants' Life, Care, and Development at Buttonwood Park Zoo

The average life expectancy for Asian elephants in captivity in North America is forty-five years. ECF 91, p. 16, *citing* Trial Ex. 15, p. 1. Ruth and Emily have already far exceeded that average, with Ruth being one of the oldest living elephants in the country. Trial Transcript, Day 2, p. 73.

Having spanned decades together at the zoo, Ruth and Emily have received constantly improving care, treatment, training, enrichment activities. According to the testimony of Dr. Ryer, a veterinarian with more than thirty years of experience with Ruth and Emily, the habitat evolved from being "deplorable" in 1982 to "a state-of-the-art type facility amongst elephant programs these days." *Id.* at 34-35.

Appellant's knowledge of the animals' health and habitat began sometime in 2010. Trial Transcript, Day 3, p. 63-64. However, the elephants' medical history and the testimony from Dr. Ryer and Shara Crook, Assistant Director and Elephant

Manager whose employment at Buttonwood Park Zoo began in 1986, offer detailed insight into the conditions that existed prior to 2010.

Dr. Ryer received a Doctorate in Veterinary Medicine degree from Tufts University in 1993. Trial Transcript, Day 1, p. 110. He has consistently provided care for the elephants for the better part of thirty-five years. He opined that Ruth and Emily are both “in great health” for their respective ages, and that they have received “excellent care” since at least as far back as 2000, in the hands of a “top-rate elephant program.” Id. at 14-15, 30-32.

Elephant Manager Shara Crook is and has been largely responsible for the constant improvement of the elephant program and for ensuring the zoo’s compliance with federal regulations governing the care and treatment of the elephants. Over three decades, she has led the improvement and the evolution of the habitat, including its increase in area (presently, 34,000 square feet); renovations to a heated barn with available water, automatic waterers, sand floor installation, and hydraulic gates, all of which allow the animals to live in a clean and healthy environment. The development and improvement of the indoor and outdoor areas has promoted elephant interaction, socialization, freedom, and enrichment. Trial Transcript, Day 3, p. 33-34, 37.

Over the years, Dr. Ryer has helped to implement better care for the elephants, resulting from the zoo’s commitment to animal health. Trial Transcript, Day 2, p. 16-17, 26-32. The zoo developed a comprehensive program for elephant care. Trial Ex. 16. It has moved to a “protected contact” model, which eliminates

negative reinforcement (e.g., the use of a bull hook), limits human interaction in unrestricted space and encourages motivation techniques. Trial Ex. 17.

Though Appellant's personal knowledge of the elephants' care does not pre-date 2010, testimony elicited from zoo staff brought to light an incident circa 2006 where Emily bit off a portion of Ruth's tail. Trial Transcript, Day 1, 62-63.

Appellant alleges that this thirteen year old incident establishes a hostile relationship between the co-inhabiting elephants. While it was treated as a serious issue at the time, the bite incident is the only evidence of any aggression between the animals pre-dating 2010—except for normal “displacement,” whereby Emily would nudge or push Ruth away from a food source or enrichment activity. Both Dr. Ryer and Dr. Mikota explained that this is “normal elephant behavior”—and it has little probative value with respect to the relationship between Ruth and Emily presently. Trial Transcript, Day 1, p. 103.

Since 2010, a wealth of evidence has been collected that is instructive as to the elephants' lives at Buttonwood Park Zoo. In addition to the live testimony of two expert witnesses (Dr. Ryer and Dr. Mikota), bountiful documentary evidence supports a finding in favor of the City – including USDA Audit and Inspection Reports. Trial Exs. 6, 7, 9, 10 and an Association of Zoos and Aquariums (“AZA”) Accreditation Report. Trial Ex. 7. The elephant program received a full evaluation with emphasis on veterinary care, general management, behavioral training, records, nutrition, enrichment, and safety. Id. After receiving a favorable inspection, the zoo received AZA accreditation in March 2014. Id. Between 2013 and 2017, the zoo also received a half-dozen or more routine inspections, at least

three of which were focused on the elephant habitat. Trial Ex. 6. In none of these reports was the zoo found to be non-compliant in any way. Id.

i. 2014 AZA Audit

In March 2014, the City asked the AZA to perform a focused elephant program evaluation. Trial Ex. 7, p. 1. A team consisting of a zoo director with elephant experience, an elephant curator, and a veterinarian specializing in veterinary care visited the zoo. Trial Ex. 7, p. 1; Trial Ex. 9, p. 1. In January 2014, the zoo self-reported an incident and was cited for a violation of the Animal Welfare Act (9 C.F.R. §2131(b)(1)). The incident involved a failure to secure an access door in the elephant building that allowed Ruth to venture outside during a snowstorm. Trial Ex. 1, p. 1. Ruth suffered frostbite-type injuries to her ear, vulva, tail, and extremities. Id. There was no other evidence of any other violation during the many decades they have lived in the zoo.

The AZA team conducted its audit on April 18-19, 2014, three months after Ruth's frostbite injuries. Trial Ex. 8, p. 1. With respect to the physical health of the elephants, the auditors found as follows:

Physical Health: Both geriatric elephants are in excellent health. The frostbite lesions on the ears & tail of Ruth from January 3, 2014 are being medically well managed with full recovery anticipated. The zoo staff and facilities are well prepared to care for both elephants as they age through senescence. Id.

The audit team reported that both elephants had age-related degenerative joint disease, which caused stiffness in the animals' front legs. Id. at 2. Moreover: Buttonwood Zoo veterinary and animal care staff have demonstrated by example over the years impressive care of two aging elephants

specifically related to age-related joint disease in front legs and managing weight gain promoting physical fitness and preventing obesity. The challenges with managing two elephants in the elephants' final 5-15 years of life will pose minimal problems considering the existing facilities and highest quality of medical & animal care delivered by staff over the elephants' recent years of senescence. Id. at 3-4.

The findings conclude with a reiteration of the elephants' "excellent" health status. Id. at 2-3.

Further, the auditors found that "[b]oth elephants are socially compatible demonstrating affiliative behaviors with each other and especially to staff with no stereopathies." Id. at 1, 3. They demonstrated "anticipatory swaying" behavior before enrichment and feeding sessions. Id.

With respect to the habitat itself, the 2014 AZA Team found that the existing facility provided "climate controlled, ventilated and illuminated indoor space with the ability to separate the two animals for any reason." Id. at 3. The barn's sand flooring was ideal for cushioning the elephants' feet and joints as well as for maintaining a dry, sanitary space. Id. The experts noted that the yard was shaded and spacious, and it provided bathing opportunities in a 100,000 gallon pool. Id.

The 2014 AZA team noted that the zoo had received funding to upgrade the facility and to transition to managing elephants with barriers and restraints per AZA standards. Id. at 2. This is consistent with the continuous improvements made to the habitat and to the training processes testified to by Shara Crook and Dr. Ryer. The "protected contact" protocol included at Trial Ex. 18 was one such advance. The auditors concluded that the zoo "has all the appropriate protocols and paperwork in place to share unrestricted space with elephants." Id. at 3. All

recommendations in the 2014 audit report have been implemented by the zoo where applicable. Trial Ex. 7, p. 2.

ii. 2015 Independent Panel Review

In 2015, the City contacted three experts to perform an independent review of the elephant program. Id. The review focused on elephant health, care, and welfare; management practices; social behavioral health; general husbandry; and training and enrichment. Id. The team consisted of three independent experts, including Dr. Susan Mikota, the City's expert in this lawsuit. Trial Ex. 8, Independent Panel Review of BPZ Elephant Program.

The 2015 team began by reviewing the history and background of each elephant, including their medical records. Id. at 1-2. For Emily, records from October 1992 into June 2015 were reviewed. Id. at 1. For Ruth, records from October 1986 into June 2015 were reviewed. Id. at 2. The 2015 team found that both Ruth and Emily "had experienced common medical problems of elephants over the years." Id. at 1-2. One of these issues—recurrent pressure sores on Emily's hip and side of her face—ceased being a problem when the City proactively changed the barn flooring from concrete to sand. Id. at 1. With respect to the frostbite Ruth sustained in early 2014, the report notes that the elephant received "[a]ppropriate emergency treatment" and that all affected areas have healed. Id. at 2, 8. The report provides extensive findings regarding the elephants, stating that each elephant is "in good condition for her age." Id. at 7-8.

In addition to confirming the adequacy of care and facilities, the 2015 team addressed the alleged aggressive behavior of the elephants. Id. at 5-6, 25-32. At

trial and in her brief, Appellant claimed that Emily often exhibited aggressive behavior toward Ruth. These same claims appear in the record as complaints made to the USDA, and they are addressed in the 2015 report. *Id.* at 25-32. Though the inspectors determined that assertive and displacement behaviors by Emily toward Ruth occurred in the past, they had substantively waned, with none observed since February 2013. *Id.* at 5. In fact, the “behaviors exhibited by both Emily and Ruth were noted to be well within the normal ethogram for elephants.” *Id.* at 4.

Further, the 2015 team found:

During all interactions with keepers as well as unstructured “elephant time”, no agonistic or aggressive behaviors were observed between Ruth and Emily throughout all hours of observation – directly and on videotape. Likewise, our meticulous review of videos labeled by BPZ critics as evidence of “aggressive” and/or “dominant” behaviors failed to reveal any signs of social conflict and *were clearly misrepresentations of benign social signals and interactions* . . . The number and extent of these misrepresentations of videos and records brings to question the judgment and ethics of said critics toward an agenda of moving one or both elephants elsewhere. *Id.* at 5.

Although the team did not witness any aggression between the elephants, it noted that in the nearly thirty years the animals had been living together, “it is reasonable to presume that social conflicts have occurred, as with other groups of elephants and any social species.” *Id.* “Across the full range of social and environmental contexts, no behavioral or physiological signs of stress were evident.” *Id.* at 4. The team characterized the relationship between Ruth and Emily as “broadly cooperative.” *Id.* at 5.

The inspectors praised the relationship between zoo staff and the elephants, which is “essential for any type of elephant program to be effective.” *Id.* at 6.

Buttonwood Park Zoo animal care and veterinary teams have demonstrated a truly impressive commitment toward the health and well being of both Emily and Ruth. Caring for two aging elephants in the final 5-15 years of their lives is clearly a priority of the zoo and all members of the elephant team—keepers, veterinary staff, curator, and zoo director. Based on the long-established bond between the elephants and their caretakers, transfer of one or both elephants at this stage of their lives would expose the elephants to unjustifiable and undue stress. Likewise, with the strength of the affiliative bond evident between Emily and Ruth, transferring one or both to separate facilities would be ill-advised. *Id.* at 11.

iii. 2018 Accreditation Report

From June 26-28, 2018, a Visiting Committee of the AZA inspected Buttonwood Park Zoo. Trial Ex. 10, Narrative Rpt., p. 1. They noted that the animals appeared “healthy and well cared for by a dedicated and knowledgeable staff.” *Id.* The exhibits were “well maintained and appropriate for the species.” *Id.* Animal welfare was a clear priority for the zoo. *Id.*

With respect to the elephants, the Visiting Committee concluded that the zoo was “meeting or exceeding all of the *AZA Standards for Elephant Management and Care*, and closely following requirements in the *AZA Policy for Maximizing Occupational Safety for Elephant Care Professionals*.” *Id.* at 2.

The elephant exhibit has been expanded and holding renovated to meet AZA standards for restricted contact management. The elephant program has made great strides in transitioning to the new system. The renovated holding with hydraulic gates, chute and portable scale, and the expansion of the yard to about an acre (pool, grasses, sand, dirt, enrichment items,

etc.) will increase the level of care, enrichment, stimulation and exercise for the elephants. Id.

C. Expert Testimony

At trial, Appellant relied primarily on her own lay testimony, photographs, and videos she entered into the record, and on examination of the City's witnesses and expert witness. Appellant did not produce an expert witness of her own.

The City's expert, Dr. Susan Mikota, obtained her Doctorate of Veterinary Medicine from the University of Illinois in 1979. Trial Transcript, Day 2, p. 51. She testified that she has worked with elephants for more than thirty years and has published approximately eighty articles pertaining to their care. Id. at 51-53. In 2005, she co-founded Elephant Care International, a non-profit organization dedicated to elephant health, welfare, and conservation. She has examined hundreds of elephants. Though much of her employment has been in Asia, she also worked at a U.S. zoo, as a USDA inspector (and was part of the 2015 team that inspected BPZ), and as a Director of the elephant sanctuary to which Appellant has sought to have Ruth and Emily transferred. Her CV is included at Trial Ex. 13 and her textbook, *Biology, Medicine, and Surgery of Elephants*, is Trial Ex. 14. The latter is the primary textbook for elephant care in both America and Asia. Id. at 53.

Dr. Mikota's testimony bolstered the findings of the 2015 zoo inspection of which she took part. Trial Ex. 8. During that independent assessment, Dr. Mikota conducted comprehensive physical examinations of both Ruth and Emily. Id. She reviewed all aspects of the veterinary program at Buttonwood Park Zoo, including preventative health and diet. Id. She spent time observing Ruth and Emily's

behaviors, interviewed staff, and reviewed videos of purported aggressive encounters between Ruth and Emily. Id.

Dr. Mikota concluded to a reasonable degree of professional certainty that Ruth and Emily: have sufficient social activities with staff and one another; have an appropriate diet with appropriate supplements to it; are healthy for their ages; are receiving excellent care; and are in an elephant program that exceeds standards. Trial Transcript, Day 2, p. 66-67, 69-70, 78, 84, 98. The veterinary care program at the zoo, including but not limited to preventative health care, diet, foot care, and keeper health training, not only exceeded professional standards, but also AZA standards, as did the size of the habitat. Id. Her review of the videos and the elephants themselves did not reveal any threat of harm from either elephant to the other. On the contrary, she observed affiliative behaviors between the elephants.

With respect to Ruth and Emily's future at BPZ, Dr. Mikota believes it is in their best interests to live out their lives at the zoo, where they receive excellent care in a habitat that meets AZA standards. Id. at 68; Trial Ex. 8. The elephants and staff have strong and long-standing relationships. Dr. Mikota believes that moving the animals, given their age, longevity at the zoo, relationships with zoo staff and with each other, and other issues discussed above, would be stressful for the animals, an unnecessary risk to their health lacking any reasonable rationale.

SUMMARY OF THE ARGUMENT

In the light of her failure to produce any expert evidence at trial to support allegations relating to proper elephant management and veterinary care, Appellant cannot show that the District Court was clearly erroneous in making any of its

factual findings, all of which were made after a lengthy review of evidence and testimony at trial. Further, merging the final motion for preliminary injunction with a trial on the merits was well within the District Court's discretion. As such, the District Court's Order of Judgment should be upheld.

ARGUMENT

- I. The District Court, after reviewing all evidence and testimony, did not err in concluding that the City is not harassing or harming Emily and Ruth.

Appellant's brief is largely a rehash of factual issues heard and decided by the District Court at trial. Many of Appellants' claims were unsupported by evidence, and *none* were supported by expert testimony. Based on a complete analysis of the facts, testimony, trial exhibits, and other evidence presented at trial, the District Court properly ruled that the City has not and is not harassing or harming Emily and Ruth and thus has not committed a "take" under the ESA.

Federal Rule of Civil Procedure 52(a) governs this Court's appellate review of facts tried to the District Court bench. In pertinent part, the rule states:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing, interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. Fed.R.Civ.P. 52(a)

Under this rule, this Court must accept the District Court's findings of fact unless they are "clearly erroneous," a standard defined by the U.S. Supreme Court:

A finding is “clearly erroneous” when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed... If the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985) (internal citations omitted).

The question is not whether the District Court’s findings of fact were correct, but whether they were clearly wrong.¹ Where a district court chooses between two permissible views, the choice cannot be clearly erroneous. Id. at 574.

On September 24, 2019, the District Court entered a thirty-two page decision whereby it analyzed and afforded weight to all evidence presented at trial. ECF 91. Rather than restate the facts upon which the District Court based its Order of Judgment, this brief will address the specific “omissions” claimed by Appellant.

A. All Allegations of Physical Harm Considered by the District Court.

Appellant alleges little if any facts relating to direct physical harm to Emily, the larger and healthier of the two elephants. Much of the harm alleged concerns past physical ailments allegedly suffered by Ruth, including injuries to her trunk, ear, and other ailments that existed at the time she was found in an abandoned truck in 1986 and taken into the City’s care. ECF 91, p. 14. These claims are overstated, wrongly attributed to the City where injuries existed before Ruth was taken into the zoo’s care, and lack expert support. Moreover, they are controverted

¹ One Circuit Court described the standard as such: “To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.” Parts and Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228 (7th Cir. 1988), *cert. denied*, 493 U.S. 847 (1989).

by the testimony of caretakers, a veterinarian, and an internationally recognized expert. Appellant fails to appreciate the elephants' ages and draws nefarious conclusions from lay observations. She restates these familiar allegations without citing to the record for evidentiary support, for no such support can be found there.

Specifically, Appellant claims that the District Court failed to consider that, as she puts it, a former zookeeper issued a shot to Ruth's ear that caused it to "slough off during the ongoing litigation."² Further, Appellant claims a host of other injuries, all of which were the subject of the trial. Though Appellant clearly disagrees with the weight given by the District Court to the facts she deems pertinent, she does not deny that the court heard testimony in their regard.³

Appellant continues to argue her unsupported and erroneous conjectures regarding elephant behavior and care. She criticizes the opinions of leading expert, Dr. Susan Mikota, while offering no contradicting expert testimony of her own.⁴ Appellant's lack of expert testimony infected all of her claims and alone is and should have been dispositive of this lawsuit.⁵ Appellant owned the burden to prove her allegations, the same allegations restated here. She aggressively and repeatedly

² Appellant's claim of the sloughing off of Ruth's ear is somewhat tempered on page 18 of her brief, where she states Ruth has lost 70% of her ear over the course of the litigation.

³ E.g., Emily's biting of Ruth's tail; the Court's (and also Dr. Mikota's) review of what Appellant at trial called "attacks" between the animals; and even the sole frostbite incident of 2014, where the City acknowledged its own negligence and sought immediate measures to rectify. APHIS and the City discussed and settled this latter concern.

⁴ See, e.g., Appellant's Brief, pg. 16, where she discusses Ruth's tail bandage and Emily's attempts to pull it off. Dr. Mikota refers to this as "object play," to which Appellant seems to take offense. However, she offers no contrary expert testimony to support calling it anything but.

⁵ Even *Amici*, ALDF and PETA, concede "this appeal can be resolved on a straight forward failure of proof". *Amici* Motion for Leave, p. 4. *Amici* won't go as far as to state that expert testimony is always needed in similar claims under the ESA, but they do concede that "given the fact-specific nature of such cases, which are inherently rooted in scientific issues such as animal physiology and psychology, expert testimony is often vital," concluding that since Appellant provided none here, she failed to meet her burden of proof. *Amici* Brief, p. 4-5. Appellant is not a veterinarian, is not qualified to testify regarding the quality of the elephants' veterinary care, and has presented no expert evidence to support her assertions.

alleges misconduct by the City, but the evidence at trial did not prove her claim. She is now seeking a second trial of the facts based on the same evidence considered by the District Court in making its well-reasoned Order of Judgment.

Since 2010, Appellant has embarked on a crusade to remove Ruth and Emily from the zoo. In advocating for the animals' transfer, she argues for a solution that is antithetical to her purported goal, one that according to expert testimony would cause serious detriment to Ruth and Emily's health. No qualified evidence has been produced to support of such a transfer despite, whereas in contrast a plethora of evidence and expert testimony has been proffered outlining the quality of the elephants' care and the risks associated with relocating them at their age.

The Endangered Species Act ("ESA") prohibits the "taking" of any endangered species. 16 U.S.C. § 1538(a)(1)(B). The ESA broadly defines "taking" to include harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting any endangered or threatened species or attempting to engage in such conduct. *Id.* at § 1532(19). Asian elephants, wherever found, are listed as endangered species. 50 C.F.R. § 17.11(h).

The 2015 audit team reviewed all thirty of Appellant's videos, which she claimed to evidence elephant aggression. Dr. Mikota testified that the behaviors seen in the videos were not signs or acts of aggression. The 2015 team determined that although displacement behaviors by Emily toward Ruth had occurred, they had waned. Trial Ex. 8, p. 5. In fact, the "behaviors exhibited by both Emily and Ruth [in the videos and during inspections] were noted to be well within the normal ethogram for elephants." *Id.* at 4. Dr. Mikota's review of the videos and the

elephants themselves did not reveal any threat of harm from either elephant to the other. Instead, she observed affiliative behaviors between the elephants.

Elephant experts have repeatedly praised the City for the quality of its veterinary care, evident in the elephants' good health for their ages. The zoo's "veterinary and animal care staff have demonstrated by example over the years impressive care of two aging elephants specifically related to age-related joint disease in front legs and managing weight gain promoting physical fitness and preventing obesity." Trial Ex. 8, p. 3-4. The 2015 panel had the utmost faith in the zoo's ability to care for the elephants, concluding that "challenges with managing two elephants in the elephants' final 5-15 years of life will pose minimal problems considering the existing facilities and highest quality of medical [and] animal care delivered by staff over the elephants' recent years of senescence." Id.

Appellant asserts that the District Court failed to account for Ruth's injuries, "except to mention Ruth's ear condition on arrival and that she lost the 'tip' of her tail." Appellant Brief, p. 18. This gripe with the detailed decision goes toward the weight given these alleged injuries, not to a failure to consider them.

On page 14 of the District Court's decision, the court discusses a report made by the U.S. Department of the Interior regarding Ruth's condition *before* entering the City's care, which included these ailments: "her ear condition was fair, with one hole and ragged edges on each ear; her skin was fair to poor; her tail and skin had an extreme build-up of necrotic tissue; she had scars on her legs (indicative of excessive chain wear) and chin (more than twenty hook scars); and she was underweight, among other issues." ECF 91, p. 14. The trunk and its partial

paralysis was of particular concern then. *Id.* Today, after thirty plus years in the zoo's care, Ruth is sixty-one years old, healthy, and among the oldest living Asian elephants in America. *Id.* at 16.

B. Purported Harm Caused by the Elephants' Habitat

With respect to the elephants' living arrangements, Appellant again seeks to have the weight the District Court gave to evidence and expert testimony reevaluated. She challenges the conditions in the barn and habitat that are ever-improving, not only keeping up with the times and current governing regulations but exceeding them. She alleges nothing new in her brief that wasn't the subject of lengthy testimony at trial and a formal "view" by Judge Young.

She attacks the habitat on three grounds: a leaky roof, stall quality, and availability of water for cooling. Though Appellant concedes that the District Court conducted its own view of the barn and habitat, she asserts that because the animals were not in the barn at the time, the court is unable to envision the sense of scale from the animals' perspective. This is not persuasive.

The habitat has been greatly improved over the years and is continually being improved to the point where it is "meeting or exceeding all of the AZA *Standards for Elephant Management and Care*, and closely following requirements in the AZA *Policy for Maximizing Occupational Safety for Elephant Care Professionals*." Trial Ex. 10, p. 2. That said, neither the City nor the District Court denies that in thirty plus years of cohabitation, the elephants have, on rare occasion, had tiffs, been injured in some way by past living arrangements, or, in Ruth's case even once by the City's own negligence. What the District Court has

ruled, after an exhaustive review of the facts, is that past problems have been rectified (even though most were accordance with general husbandry practices of their times) and that no harm or harassment has occurred in recent years and none occurs today in violation of the ESA (discussed below).

As the District Court found:

Rowley faults the City for being behind the curve in every respect. The Court finds the contrary to be true... The pace of change at the zoo has been commensurate with the evolution of elephant husbandry. ECF 91, p. 17-18.

The District Court lists many improvements made over the years, including expensive renovations in habitat and training techniques. *Id.* The court specifically describes how hydraulic fences were put in to allow zookeepers to move the animals without the need for guides and how sand banks and sand floors put less pressure on the elephants' geriatric joints. *Id.* at 18. The Court also found, "each elephant has adequate freedom of movement within the barn and sufficient space to stand, drink, and sleep." *Id.*

C. Stereotypy

At trial, Appellant produced video evidence which she believed to show stereotypy, which is an abnormal behavior. Other than her own theory as to what her videos represent, she offered no additional testimony, expert or otherwise, supporting her claims. Again, Appellant is not a qualified expert in any matter

relating to this trial, but her lack of qualification is even more glaring when it comes to the elephants' alleged medical conditions or quality of care.⁶

All of the expert testimony refuted Appellant's claims. Nevertheless, the District Court chose to consider the evidence in a light most favorable to the *pro se* plaintiff, as discussed in the five-paragraph footnote on page 28 of its decision. ECF 91, p. 28. Without explicitly referencing Dr. Mikota's testimony, the Court found that Appellant "failed to carry her burden of proving that Ruth and Emily regularly engage in stereotypic behaviors, and, moreover, did not prove that the City's action or inaction caused the behaviors that she describes as stereotypy." *Id.*

D. Nourishment and Socialization

Anyone who has dogs knows that a more dominant dog sometimes nudges or block the less dominant dog from the food dish. The responsible dog owner handles this by providing separate feeding times or an additional feeding area.

Appellant claims that Emily, the larger of the two elephants, does the same to Ruth. She generally lumps all incidents of what she alleges to be "aggression" (as opposed to normal animal behavior) under this matter whether they had anything to do with food or not. Many of the same videos were reviewed by an independent panel of experts in 2015, who concluded:

[O]ur meticulous review of videos labeled by BPZ critics as evidence of "aggressive" and/or "dominant" behaviors failed to reveal any signs of social conflict and *were clearly misrepresentations of benign social signals and interactions*. Trial Ex. 8, p. 5 (emphasis added)

⁶ While in her brief Appellant states that she relied on an opinion of a Dr. Bradshaw, this individual was not present at the trial nor did he or she provide an expert report.

The District Court discussed Emily's displacement of Ruth in great detail:

Sporadically over the years there have been incidents where, while Ruth has been peacefully feeding, Emily has come up and shouldered her out of the way in order to enjoy that particular foodstuff herself. There is ample available food and Ruth, although dispossessed, shambles off to feed elsewhere. Ruth is not malnourished... In the absence of directly applicable expert testimony about elephant behavior, and recognizing that Rowley bears the burden of proof, this Court concludes that she has not proved that the City was harassing or harming Ruth in violation of the law by negligently allowing Emily to attack her. ECF 91, p. 29.

Before entering its decision, the District Court received yet another motion to "confiscate" Ruth or otherwise remove her from the habitat. The court found that, *even taking all facts as alleged by Appellant as true:*

[I]t appears that the City's response is precisely what responsible elephant management requires. Rowley's allegations in the motion to confiscate suggest that the zookeepers have decided to provide separate feedings to the two elephants to ensure that Ruth gets adequate nutrition despite Emily's displacement behaviors... Rather than proving that the City fails to protect Ruth from Emily's aggression... these allegations demonstrate that the City is proactively responding to changes in the social dynamic between the two elephants to ensure that both animals are comfortable and are able to meet their needs to the extent possible. Id. at 31 (internal citations omitted)

E. Damages and Alleged Past, Present, and Continuing Harm

With respect to Appellant's claim for relief, the District Court ruled that Appellant failed to meet her burden of proving the City had committed a "take" under the ESA. ECF 91. Thus, no relief should be awarded Appellant, be it for alleged past harms, prospective harms, or otherwise.

- II. The District Court correctly applied the relevant case law, regulations and standards in deciding that the City’s elephant program meets “generally accepted animal husbandry” practices.

Appellant argues that because Ruth and Emily were not bred to propagate their species and are now certainly not likely to be, the care shown them by the City does not fall under the exemption to harassment: where alleged harassment is considered generally accepted animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act. As the court reasoned, the exception is the correct standard to apply.⁷

The Endangered Species Act (“ESA”) was enacted to: (1) “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” (2) “provide a program for the conservation of such endangered species and threatened species,” and (3) take appropriate steps to carry out the United States’ commitments in various international treaties and conventions regarding species conservation. 16 U.S.C. § 1531(b). Under Section 9 of the ESA, it is unlawful to “take” any endangered species. 16 U.S.C. § 1538(a)(1)(B). A “take” may occur when individuals “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The ESA is enforced by the Fish and Wildlife Service, who has define “harm” and “harass” within the meaning of a “take,” as:

[A]n act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns,

⁷ “The reference standard for an endangered species in captivity is not a goal requiring the least restrictive environment or the most natural possible setting. Rather, it is generally accepted and appropriate animal husbandry. ECF 91, p.21, *citing* 50 C.F.R. § 17.3.

including breeding, feeding or sheltering. 50 C.F.R. § 17.3; Babbitt v. Sweet Home Ch. of Cmtys. for a Great Or., 515 U.S. 687, 703 (1995).

“Harass” is defined as follows:

[A]n intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. Id.

Exempted from the definition of “harass” are generally accepted “animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act.” Id.

The District Court ruled, because “the City is engaged in animal husbandry practices with ‘animals intended... for exhibition purposes,’ see 7 U.S.C. § 2131, the [AWA] exclusion applies to [Appellant’s] harassment claims.” ECF 91, p. 5. The USDA enforces AWA regulations. 7 U.S.C. §§ 2132(b), 2133, 2146.

Citing as persuasive authority the District Court Western District of Texas case of Graham v. San Antonio Zoological Society, 261 F. Supp. 3d 711, 745-46 (W.D. Tex. 2017), the District Court found “that a claim that a zoo has violated the Endangered Species Act by ‘harassing’ a captive endangered species requires the court to determine, first, if the zoo’s practices are generally accepted, and, second, whether the zoo’s practices comply with the governing Animal Welfare Act regulations.” ECF 91, p. 7. “The burden is on [Appellant] to show that the Animal Welfare Act’s minimum standards were not met.” Graham, 261 F. Supp. at 741.⁸

⁸ Although not properly before this Court since the appeal should be decided based on Appellant’s failure to meet her burden of proof, *Amici* have presented legal arguments in an effort to shape the law going forward. First, they argue that the exemption for generally accepted animal husbandry practices only applies “when such practices, procedures, or provisions are not likely to result in injury to wildlife.” The advocacy groups bases this argument on a position that defies principles of statutory construction. The black-letter law is:

After reviewing additional persuasive authority, the District Court proceeded down the correct and only path that properly summarizes the interplay between the ESA, AWA, and related enforcement agencies:

In sum, this Court must determine whether the City is harming or harassing Ruth and Emily pursuant to the Endangered Species Act. If any of the City's intentional or negligent conduct "creates the likelihood of injury to [the elephants] by annoying [them] to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering," that conduct constitutes a "take" and violates the Endangered Species Act, unless the conduct is a generally accepted and Animal Welfare Act-compliant animal husbandry practice... In addition, the City has committed a "take" if its conduct "actually kills or injures" the elephants. ECF 91, p. 12-13.⁹

Reviewing the evidence presented and holding the City accountable to these standards, the District Court properly adjudicated Appellant's claims.

"[The definition of "harass"], when applied to captive wildlife, does not include generally accepted:

- (1) Animal husbandry practices that meet or exceed minimum standards for facilities and care under the Animal Welfare Act,
- (2) Breeding procedures, *OR*
- (3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, *when such practices, procedures, or provisions are not likely to result in injury to the wildlife.* 50 C.F.R. § 17.3(1)-(3).

Amici ignore the word "or" and its clear, unambiguous meaning in the above code. The qualification they seek to apply to Subsection (1), animal husbandry practices, only applies to Subsection (3), provisions of veterinary care. It is not surprising that *Amici* can find no case law to support their interpretation, while the cases cited by the District Court support a different conclusion. In any case, the Court need not reach this issue to deny this appeal.

Second, *Amici* argues that the City should have the burden of proof in showing the exception to "harass" for generally accepted animal husbandry practices applies. Again, the advocacy groups cite to no case law to support this assertion. This is a necessary element of a plaintiff's case. She must prove that the City is not engaged in generally accepted animal husbandry practice. Conceivably, and for the sake of argument only, there could be a burden shift *after* a plaintiff meets her full burden of proof, but that would likely only be one of presentment, e.g., where a Defendant must offer a legitimate non-discriminatory reason in an employee discrimination case.

Though very interesting and academic, *Amici's* arguments are moot as the Court has clear and legitimate grounds to uphold the District Court's decision without having to create new law or opine on an interesting issue.

⁹ The District Court then cited many Codes of Federal Regulations dealing with veterinary care, food and shelter, and social opportunities and enrichment. ECF 91, p. 21-29. While Appellant challenges the weight the District Court gave to evidence presented (discussed above and to be analyzed under the "clearly erroneous" standard), she does not challenge any of the Court's applications of the relevant regulations to the facts aside from whether or not the generally accepted animal husbandry exemption should apply to the City's care of Emily and Ruth.

III. The District Court did not abuse its discretion in consolidating Appellant's Motion to Confiscate into the trial on the merits.

Fed.R.Civ.P. 65(a)(2) states: "Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing." The District Court consolidated Appellant's third motion to have Ruth removed from the zoo. Appellant claims that this action was an abuse of the District Court's discretion.

The First Circuit Court of Appeals reviews denials of requests for preliminary injunctions for abuse of discretion. Lanier Professional Services Inc. v. Ricci, 192 F.3d 1, 3 (1st Cir. 1999). "The appealing party bears the considerable burden of demonstrating that the District Court flouted the four-part test for preliminary injunctive relief." Used Tire Int'l, Inc. v. DiazSaldana, 155 F.3d 1, 4 (1st Cir. 1998). The four-part test requires Appellant to show: "(1) [she] is substantially likely to succeed on the merits of [her] claim; (2) absent the injunction there is a significant risk of irreparable harm; (3) the balance of hardships weighs in [her] favor; and (4) the injunction will not harm the public interest." I.P. Lund Trading ApS v. Kohler Co., 163 F.3d 27, 33 (1st Cir. 1998).

Appellant has made no attempt to meet her burden or show an abuse of discretion. She claims hardship in foregoing discovery and a reply to her third motion. However, she cannot show likelihood of success on the merits.

As noted above, the District Court, in considering consolidation, was managing its own calendar and was viewing all facts alleged in Appellant's motion in a light most favorable to Appellant. ECF 91, p. 31. Despite doing so, the court

ruled: “the City’s response is precisely what responsible elephant management requires... Rather than proving that the City fails to protect Ruth from Emily’s aggression... these allegations demonstrate that the City is proactively responding to changes in the social dynamic between the two elephants to ensure that both animals are comfortable and are able to meet their needs to the extent possible. Id.

Appellant’s motion is seeking yet another bite of the apple, and the court properly used its discretion to consolidate matters for a more complete resolution of the entire case on its merits.

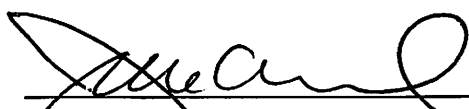
CONCLUSION

For more than three decades, Ruth and Emily have resided together in a nurturing environment populated with a dedicated staff that has always sought to improve the elephants’ quality of life at the zoo. Surrounded by experienced caretakers and zoo officials constantly under a microscope for their actions with respect to the elephants, Ruth and Emily have aged with relative ease and comfort. Buttonwood Park Zoo is their home, and by all knowing accounts, they are happy there. No evidence presented substantiates Plaintiff’s claims that circumstances exist today that negatively impact the care the elephants are receiving or their overall quality of life. She has put forth no expert testimony to establish any violation of the standard of care under either the ESA or the AWA. Nor did she put forth evidence that any animal husbandry practice is AWA non-compliant, and she cannot show causation between any City act and any alleged harm to the elephants.


As the 2015 independent panel stated, “Caring for two aging elephants in the final 5-15 years of their lives is clearly a priority of the zoo and all members of the

elephant team—keepers, veterinary staff, curator, and zoo director.” Trial Ex. 8. With Appellant’s claims unsupported by expert testimony and in spite of the court’s affording a *pro se* plaintiff every leniency and benefit of the doubt, the District Court was left with only one possible ruling. As such, its Order of Judgment in favor of the City should be upheld on all Counts.

Respectfully submitted,



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January 7, 2020

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 8,558 words, excluding the portions exempted by Rule 32(f).

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: January 7, 2020



JOHN A. MARKEY, JR., ESQUIRE

CERTIFICATE OF SERVICE

I certify that on December 24, 2019, I emailed counsel to the other parties copies of the attached brief. I further certify that today, **January 7, 2020**, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. Once the brief is accepted for filing by the Clerk's office, I will send nine (9) copies to the Clerk of Court.

Dated: January 7, 2020



JOHN A. MARKEY, JR., ESQUIRE