

HARMING THE TINKERER: THE CASE FOR ALIGNING STANDING AND PRELIMINARY INJUNCTION ANALYSIS IN THE ENDANGERED SPECIES ACT

By
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Reviewing preliminary injunction motions under the Endangered Species Act (ESA), most district courts evaluate “irreparable harm” through one of two lines of analysis. One line, promoted by property rights interest groups, reasons that individual mortalities might not constitute irreparable harm if they do not impact survival of the species. In contrast to this “species-level harm” analysis, another approach argues that “individual-level harm” suffices because it is irreparable to the animal. The recent First Circuit opinion in Animal Welfare Institute v. Martin attempts, but ultimately fails, to bridge the divide over which level of analysis to apply for irreparable harm under the ESA. Rather than pick a side about the appropriate level of animal harm analysis, this Article approaches the question of irreparable harm from a fresh angle. Drawing on procedural and remedial principles from across the ideological spectrum, this Article argues that analyzing the scope of animal harm is a false choice. Instead, courts should look to the human plaintiff to define irreparable harm: Will the defendant’s actions harm the plaintiff’s interest? Focusing on irreparable harm to the plaintiff cleans up a messy jurisprudence: it fits the plain text of the traditional injunction standard, fulfills the purpose of the ESA, and synchronizes with the standing analysis. This Article investigates the consequences of moving from an animal harm to a human harm analysis for ESA preliminary injunctions, and identifies the likely challenges for both institutional defendants and wildlife advocates.

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I. INTRODUCTION

*To keep every cog and wheel is the first precaution of intelligent tinkering.*¹

Not long ago, an elusive species in a remote outpost of the United States (U.S.) landed the Endangered Species Act (ESA), and the federal courts that interpret it, in a roiling controversy. In Maine's northern woods, the state permits trapping of select furbearing species.² Permits do not extend to the Canada lynx, a wildcat listed by the U.S. Fish & Wildlife Service (FWS) as threatened under the ESA.³ Section 9 of the ESA explicitly prohibits trapping endangered and threatened species, defining it as a form of unlawful "take."⁴

¹ Aldo Leopold, *A Sand County Almanac: With Essays on Conservation from Round River* 190 (Random H. Publg. 1966).

² Me. Dept. of Inland Fisheries & Wildlife, *Maine Hunting & Trapping* 39 (J.F. Griffin Publg. 2014) (available at http://www.eregulations.com/wp-content/uploads/2013/08/13MEHD-FINAL_LR.pdf [<http://perma.cc/SFQ3-QT7Y>] (accessed Apr. 12, 2014)).

³ See 50 C.F.R. § 17.40(k) (2013) (creating a special rule and listing the Canada lynx as threatened).

⁴ 16 U.S.C. § 1538(a) (2012). Take means "to harass, harm, pursue . . . trap, capture, or collect, or to attempt to engage in such conduct." *Id.* at § 1532(19).

Despite the prohibition on lynx trapping, the twenty-pound predators occasionally wind up in traps meant for other animals.⁵ These traps, called “leghold traps” or “foothold traps,” capture an animal by its leg or foot. Leghold traps occasionally result in physical injuries, such as cuts, swelling, tenderness, broken bones, and hypothermia, as well as psychological trauma.⁶ But even with the discovery that Maine’s regime results in the incidental trapping of lynx, the state has not applied for an incidental take permit.⁷ Such a permit would authorize, pursuant to strict conditions designed to minimize and mitigate lynx injury, a specified number of takes that otherwise violate the Act.⁸

In *Animal Welfare Institute (AWI) v. Martin*, a wildlife protection organization seeking a preliminary injunction against trapping brought suit against Maine under the citizen-suit provision of the ESA.⁹ The plaintiffs alleged that Maine’s trapping permit regime violated the ESA’s prohibition on taking listed species.¹⁰ The plaintiffs identified thirty instances between 1999 and 2006 where individual lynx were trapped.¹¹ Yet in the face of uncontroverted proof that Maine had and would continue to violate the ESA by permitting leghold traps that take threatened lynx, the district court declined to offer plaintiffs any relief at that stage of the proceedings.¹²

The conclusion was notable for the court’s reading of both the liability and the remedial elements of the ESA. The court was confronted with action fitting squarely within the statute’s prohibitions.¹³ By denying the injunctive relief sought, the district court advanced an idea

⁵ Walter J. Jakubas & Sandy Ritchie, Me. Dept. of Inland Fisheries, *Draft: Incidental Take Plan for Maine’s Trapping Program* 14, 52 (Aug. 13, 2008) (available at <http://www.fws.gov/northeast/pdf/lynx/mainetrappingitp.pdf> [<http://perma.cc/Y4H-DBQQ>] (accessed Apr. 12, 2014)).

⁶ Nocturnal Wildlife Research, *Review: Welfare Outcomes of Leg-Hold Trap Use in Victoria* 7 (Sept. 2008) (available at http://www.dpi.vic.gov.au/_data/assets/pdf_file/0006/38913/welfare-outcomes-of-leg-hold-trap-use-part-1.pdf [<http://perma.cc/7JCB-9GAF>] (accessed Apr. 12, 2014)).

⁷ Jakubas & Ritchie, *supra* n. 5, at 43.

⁸ See 16 U.S.C. § 1539(a)(1)(B) (authorizing certain “taking” of listed species “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity”).

⁹ *Id.* at § 1540(g); *Animal Welfare Inst. v. Martin*, 623 F.3d 19, 22 (1st Cir. 2010) [hereinafter *AWI III*].

¹⁰ *AWI III*, 623 F.3d at 25.

¹¹ *Animal Welfare Inst. v. Martin*, 668 F. Supp. 2d 254, 271 (D. Me. 2009) [hereinafter *AWI II*]. In a previous consent decree, Maine had agreed to restrict other types of traps such as “Conibear traps,” which close around an animal’s neck or torso and are more likely to kill lynx. *Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 70, 73 (D. Me. 2008) [hereinafter *AWI I*].

¹² *AWI II*, 668 F. Supp. 2d at 272–73. The court made sure to mention that other related relief had been granted; the plaintiffs had previously persuaded the court to order the State to immediately “clarify” its Conibear trap rules. *Id.* at 259–61.

¹³ *Id.* at 259 (providing the court’s discussion of whether Maine’s current regulatory scheme results in indirect take of lynx under Section 9 of the ESA).

that the statute permits *de minimis* takes which need not be remedied.¹⁴

On appeal to the First Circuit, impact litigation groups submitted briefs arguing their view of the ESA's scope and strength.¹⁵ The appellate opinion affirmed the lower court's decision. It found no error in the district court's decision that Maine's takes had a "negligible impact on the species as a whole," and thus did not meet the irreparable harm requisite to enjoin the trapping permit regime or provide any other remedy.¹⁶ The First Circuit compared the plight of the lynx to the predicted extinction of the snail darter species in *Tennessee Valley Authority (TVA) v. Hill* to point out that because leghold traps did not lead to serious lynx injury or death, "the circumstances here are none so dire."¹⁷ The AWI ruling has trickled into district court citations nationwide.¹⁸ Legislative history and case law, however, indicates that it was wrongly decided. The court's reasoning can be criticized on various fronts, but this Article focuses on one: the court's construction and application of the ESA preliminary injunction standard, in particular the irreparable harm prong.¹⁹

The First Circuit's holding is a coup for property rights groups engaged in a broad effort to limit the scope of the ESA by redefining *TVA v. Hill*. Such interest groups—for example, the Pacific Legal Foundation—have successfully argued in multiple venues that in the wildlife context, the irreparable harm prong is only met when a plaintiff proves species-wide harm to the listed species;²⁰ some of these courts are now

¹⁴ *Id.* at 263–64.

¹⁵ Private property rights advocate Pacific Legal Foundation submitted an amicus curiae brief supporting appellees. *AWI III*, 623 F.3d at 21, 23 n. 6. Wildlife protection firm Meyer Glitzenstein & Crystal stepped in to represent the appellants. *Id.* at 21 (Eric R. Glitzenstein for appellants).

¹⁶ *Id.* at 29.

¹⁷ *Id.* at 26–27 (discussing the Supreme Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978)).

¹⁸ *E.g.* Or. Denying Pls.' Mot. for Prelim. Inj., *Wild Equity Inst. v. City & Co. of San Francisco*, 2011 WL 5975029 at *7 (N.D. Cal. Nov. 29, 2011) (No. C 11-00958 SI) [hereinafter Or. Denying Prelim. Inj., *Wild Equity Inst. v. City of San Francisco*] ("No court has held that as a matter of law, the taking of a single animal or egg, no matter the circumstance, constitutes irreparable harm.").

¹⁹ Under the recent U.S. Supreme Court case *Winter v. Natural Resources Defense Council*,

[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

555 U.S. 7, 20 (2008).

²⁰ *E.g.* *N.W. Envtl. Def. Ctr. v. U.S. Army Corps of Engrs.*, 817 F. Supp. 2d 1290, 1315 (D. Or. 2011) ("Irreparable harm to ESA listed species must be measured at the species level."); *Defenders of Wildlife v. Salazar*, 812 F. Supp. 2d 1205, 1210 (D. Mont. 2009) ("[T]he measure of irreparable harm is taken in relation to the health of the overall species rather than individual members."); *Pac. Coast Fedn. of Fishermen's Assns. v. Gutierrez*, 606 F. Supp. 2d 1195, 1249–50 (E.D. Cal. 2008) (conducting the irreparable

citing to *AWI*.²¹ The property rights groups construct their argument for species-level harm around Supreme Court opinions limiting environmental injunctions.²² Courts that have accepted the species-level harm argument have in essence built a minimum threshold for takes under Section 9, a threshold that Congress recently attempted and failed to create with proposed ESA-gutting legislation.²³

In contrast, other federal courts have been receptive to plaintiffs' arguments that the threatened taking of a single ESA-covered animal requires injunctive relief.²⁴ Until *AWI*, no circuit had directly confronted the divide; however, district courts in the Ninth Circuit generally espouse a species-level harms approach, while the D.C. district court trends towards individual-level harms.²⁵

harm analysis at the species level); *see also* Amicus Curiae Br. of the Pac. Leg. Found. in Support of Defs. at 6, *AWI v. Martin* (No. 09-2643, 623 F.3d 19 (1st Cir. 2010)) (on file with *Animal Law*) (discussing the Supreme Court's decision in *TVA v. Hill* and noting that the injunction was upheld due to a species-level threat).

²¹ *See e.g. N.W. Env'tl. Def. Ctr.*, 817 F. Supp. 2d at 1315 (citing *AWI III* for the proposition that "the ESA explicitly permits taking of individual members of a species in some circumstances"); Or. Denying Prelim. Inj., *Wild Equity Inst. v. City of San Francisco* at *7 (citing *AWI I* for the proposition that "[n]o court has held that as a matter of law, the taking of a single animal or egg, no matter the circumstance, constitutes irreparable harm").

²² In their First Circuit briefs, *AWI* defendants applied *Winter* to emphasize the importance of the irreparable harm prong for injunctions. "[*Winter*] is the latest in a line of Supreme Court opinions that rebuff efforts to dispense with the four injunction elements in cases arising under environmental statutes." Br. of Defs. at 13, *AWI v. Martin* (No. 09-2643, 623 F.3d 19 (1st Cir. 2010)) (on file with *Animal Law*). *Winter*, however, was ultimately decided under the National Environmental Policy Act, and not the ESA. Differences between the two causes of action may affect the irreparable harm analysis. *Winter*, 555 U.S. at 16.

²³ *See e.g. H.R. Rpt. 109-237* at 48 (Sept. 27, 2005) (providing for an agency determination that a private action is compliant with Section 9(a) of the ESA). The agency can only withdraw a determination of compliance if "the continuation of the use would preclude conservation measures essential to the survival of an endangered or threatened species." *Id.* (emphasis added). *See also* Lib. Cong., Congress.gov, *H.R. 3824—Threatened and Endangered Species Recovery Act of 2005*, <http://beta.congress.gov/bill/109th-congress/house-bill/3824> [<http://perma.cc/8VSX-RMH3>] (accessed Apr. 12, 2014) (noting H.R. 3824 passed the House and was defeated in the Senate).

²⁴ *Humane Socy. of the U.S. v. Kempthorne*, 481 F. Supp. 2d 53, 69 (D.D.C. 2006) (noting that "[r]equiring Plaintiffs to show jeopardy to the existence of a species in order to secure injunctive relief would stand the ESA on its head"); *Loggerhead Turtle v. Volusia Co., Fla.*, 896 F. Supp. 1170, 1180 (M.D. Fla. 1995) ("Any taking and every taking—even of a single individual of the protected species—is prohibited by the Act. Hence the future threat of [even a] single taking is sufficient to invoke the authority of the Act." (emphasis in original, internal citations omitted)).

²⁵ *See infra* pt. IV(A) & (B) (discussing court opinions reaching either individual- or species-level harm conclusions); *but see Palila v. Haw. Dept. of Land & Nat. Resources*, 639 F.2d 495, 497 (9th Cir. 1981) (explaining that in an ESA Section 9 take action, "[t]he only facts material to [the] case are those relating to the questions whether the [species] is an endangered species and, if so, whether the defendants' actions amounted to a taking," and thus, "[a]ny dispute or uncertainty as to the current population trends of the [species] is immaterial").

The consequences of the distinction between species-level and individual-level harms are significant: raising the threshold for proving the elements of a preliminary injunction remedy limits the applicability of a powerful private enforcement tool. A requirement that an action creates species-level impacts in order to meet the irreparable harm prong would foreclose injunction against countless private actions.²⁶

The analytical distinction between species-level and individual-level harm arises when courts assess irreparable harm from the perspective of the animals. Litigants argue, and courts determine, whether harm to one individual is sufficient, or whether the entire population must be in jeopardy. Rather than choose a side about the necessary level of impact, this Article comes at the question of irreparable harm sideways. The underlying assumption to focus on animal harm sets up a flawed framework. Instead, a more appropriate analysis considers how a defendant's behavior can harm the *human plaintiff*. As federal standing doctrine makes clear—even in ESA cases—it is the human plaintiff, not the listed species, whose interests make judicial relief available.²⁷ This also fits the plain text of the preliminary injunction standard, which identifies the plaintiff as the potential bearer of irreparable harm.²⁸

This Article develops an argument for refocusing the irreparable harm inquiry, consistent with the purpose of Section 9 of the ESA. Part II provides background by discussing theoretical frameworks for standing and preliminary injunction doctrines. This backdrop aids in understanding the uniqueness of ESA irreparable harm, as Congress legislates against background rules of common law and traditional no-

²⁶ See Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 *Env'tl. L.* 419, 475–76 (1994) (“To read the take provision consistently with the section 7 provision you had to look to . . . injury to the whole species. So you would not get an injunction for slight modification of habitat. . . . [I]t certainly was the government's position, and one that means that the take provision does not provide a major blocking point for activity.”); see e.g. *Hamilton v. City of Austin*, 8 F. Supp. 2d 886, 897 (W.D. Tex. 1998) (“It is important to stress that if the pool cleaning activities were likely to cause the extinction of the Salamander, all these costs to Austin and its citizens would be irrelevant under the Endangered Species Act and *[TVA v.] Hill*. But under the facts of this case, that drastic measure is not necessary. The merits of this case, the lack of irreparable harm, and the equities of the case all indicate that the plaintiffs' motions for preliminary injunctions should be denied.”).

²⁷ See *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (discussing standing under the ESA as applying to persons); but see *Sierra Club v. Morton*, 405 U.S. 727, 741–42 (1972) (Douglas, J., dissenting) (describing a hypothetical system where animals or the environment would have standing in their own right).

²⁸ See e.g. *AWI III*, 623 F.3d at 27 (providing a commonly used definition of the preliminary injunction standard: “To be entitled to preliminary injunctive relief, appellants must demonstrate that *they* will otherwise suffer irreparable harm” (citing *Water Keeper Alliance v. U.S. Dept. of Def.*, 271 F.3d 21, 33 (1st Cir. 2001)) (emphasis added)).

tions of lawful conduct.²⁹ Part III reviews the irreparable harm prong of preliminary injunctions in practice under other federal environmental statutes having citizen-suit provisions. This review sets up Part IV, which discusses irreparable harm under the ESA in detail.

Finally, Part V presents diverse rationales for the thesis that in order to adhere to the express intent of ESA Section 9, courts should synchronize the irreparable harm inquiry with the harm that proves standing. First, mechanical alignment of harm analysis provides jurisprudential consistency and judicial economy. Second, a focus on human harm avoids the pitfalls of replacing statutorily defined agencies with judges in the role of expert. Third, a human-centered focus on harm highlights both the interstate and commercial nature of species protection, insulating the ESA from Commerce Clause challenges. Fourth, aligning harm analysis prevents the ratcheting of increasingly difficult procedural barriers and thus advances the precautionary intent of the statute and prophylactic nature of Section 9. Fifth, refocusing irreparable harm to the human plaintiff reduces the risk that courts will confuse ESA rights and remedies and further muddy the jurisprudence. Finally, the proposed synchronization better responds to the tension implicit in the ESA as a human-centered statute with animals as the protected beneficiaries.

Part V then distills literature and case law to predict challenges to the proposed irreparable harm analysis. Both wildlife advocates and property rights advocates will likely respond that shifting analysis to human harms would shake up jurisprudence to benefit the other side, either by closing off or opening the floodgates for preliminary injunctions. Yet this Article's focus on the plaintiff's harm does not intend to benefit one group's policy value. Rather, refocusing the harm exposes the underlying interest to the court's equitable review, creating a more certain, efficient, and just approach to ESA Section 9 remedies.

II. THEORETICAL FRAMEWORK

This Part describes the theoretical foundations and current legal frameworks of two doctrines essential to private enforcement: standing and preliminary injunctions. Both doctrines are complex and comprise inconsistent declarations from the Supreme Court.

A. *Standing*

Standing refers to the law's threshold requirements to bring suit in court. While scholars dispute the historical roots of standing, modern Supreme Court jurisprudence grounds the doctrine in the Constitution.³⁰ Standing restricts the judiciary from intruding on the other

²⁹ See *Field v. Mans*, 516 U.S. 59, 69–70 (1995) (explaining that when Congress uses terms with an established common law meaning or understanding, then courts must infer that Congress meant to adopt the common law meaning).

³⁰ See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 690–91 (2004) (arguing that, while constitutional history does

branches and tackling issues better resolved via political processes. The doctrine means to ensure that the “Case” or “Controversy” referred to in Article III is truly a dispute “appropriately resolved through the judicial process.”³¹ Courts have also added prudential standing requirements.³² Only plaintiffs who meet an “irreducible constitutional minimum” and survive prudential standing tests can access judicial relief.³³

The constitutional minimum comprises three elements: (1) the plaintiff must have suffered invasion of a legally protected interest that constitutes injury in fact; (2) there must be a causal connection between the injury and the conduct complained of; and (3) the injury must be redressable by a favorable ruling.³⁴ The causation element is not a significant obstacle for plaintiffs in wildlife cases,³⁵ but the injury in fact and redressability prongs have received extensive judicial scrutiny. The first and third prongs are detailed below.

1. *Injury in Fact*

The guiding principle behind an injury-in-fact analysis is that a plaintiff cannot walk into court merely upon identifying a statutory violation. Instead, the plaintiff must have “such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction.”³⁶ The goal of deterring disinterested parties from initiating unnecessary lawsuits applies across all areas of the law.³⁷ Courts seek to deter such plaintiffs because such plaintiffs take judicial resources away from truly interested parties and may not vigor-

not compel acceptance of the Supreme Court’s treatment of standing, the law of standing is not an innovation of the Court).

³¹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citing *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990)).

³² See e.g. *Assn. of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (requiring the plaintiff’s interest fit within the protection of the statute giving rise to the cause of action).

³³ *Lujan*, 504 U.S. at 560.

³⁴ *Id.* at 560–61.

³⁵ Preston Carter, Student Author, “*If an (Endangered) Tree Falls in the Forest, and No One Is Around . . .*”: Resolving the Divergence between Standing Requirements and Congressional Intent in Environmental Legislation, 84 *Notre Dame L. Rev.* 2191, 2198 (2009). Causation gets trickier when plaintiffs bring suit against the government for how it regulates third parties. But for suits against private parties, the Supreme Court take-away is that standing hurdles of causation cannot be higher than the showing necessary for success on the merits. *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 181 (2000).

³⁶ *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

³⁷ See e.g. Model R. Prof. Conduct 1.8(e) cmt. 10 (ABA 2014) (prohibiting lawyers from providing financial assistance to a client “in connection with pending or contemplated litigation,” to prevent lawyers from concocting disputes for their own financial gain); Clean Air Act, 42 U.S.C. § 7604(b) (2010) (requiring notice and a sixty-day waiting period so as to give the EPA or the state opportunity to enforce compliance, thus making citizen enforcement unnecessary).

ously advocate their pretextual interests. This judicial skepticism may contribute to some courts' reluctance to enjoin, under the Endangered Species Act (ESA), activities that take individual animals: By confusing Section 7 with Section 9, courts mistakenly determine the only valid personal interest is to ensure biodiversity, and thus a plaintiff often has ulterior motives beyond ensuring that one more snake continues to slither.³⁸

An injury in fact must be "concrete and particularized," as well as "actual or imminent."³⁹ Particularization requires that the injury "affect the plaintiff in a personal and individual way."⁴⁰ Imminence means the injury cannot be conjectural, because "standing is not 'an ingenious academic exercise in the conceivable.'"⁴¹ It asks for adequate assurance that the injury will occur in the future; past wrongs are evidence of imminent threat of future injury.⁴²

For environmental claims, the relevant "showing is not injury to the environment but to the plaintiff."⁴³ Cognizable standing injuries come from a wide variety of plaintiff interests. In the animal context, interests may be aesthetic, scientific, or recreational.⁴⁴ A plaintiff may suffer an injury in fact as a bird-watcher with reduced opportunity to view endangered birds; as a wildlife conservationist who cannot study whales; or as a member of an environmental group who loses an ability to see and photograph live Cape fur seals.⁴⁵ Generally, the injury must

³⁸ See Heather Welles, Student Author, *What's a Smelt Worth?: The Endangered Species Act and the Commerce Clause in the Bay-Delta*, 39 *Ecology L. Q.* 683, 690 (2012) (discussing conflation of ESA Sections 7 and 9 in court decisions); Holly Doremus, Legal Planet, *Right on the Commerce Clause, Wrong on the ESA*, <http://legal-planet.org/2011/03/31/right-on-the-commerce-clause-wrong-on-the-esa/> [<http://perma.cc/PV7R-SXT6>] (Mar. 31, 2011) (accessed Apr. 12, 2014) (same). However, in *TVA v. Hill*, plaintiffs petitioned species listing and then used the ESA status to enjoin a major construction project, bringing about ulterior ends from ESA means. The Supreme Court upheld the injunction. *TVA v. Hill*, 437 U.S. at 172.

³⁹ *Lujan*, 504 U.S. at 560.

⁴⁰ *Id.* at 560 n. 1.

⁴¹ *Id.* at 566 (citing *U.S. v. Students Challenging Reg. Agency Procs. (SCRAP)*, 412 U.S. 669, 688 (1973)).

⁴² *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974).

⁴³ *Friends of the Earth, Inc.*, 528 U.S. at 181.

⁴⁴ Carter, *supra* n. 35, at 2197. Professor Cass Sunstein has noted that harmed interests can also include competitive interests (e.g., when a competitor company unlawfully abuses animals in its production process) and informational interests (e.g., when regulated entities fail to provide mandatory public reports about treatment of animals). Cass R. Sunstein, *Can Animals Sue?*, in *Animal Rights: Current Debates and New Directions* 251, 256–57 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

⁴⁵ See e.g. *Natl. Audubon Socy. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002) ("[W]e hold that Audubon alleged sufficient injury to the aesthetic, recreational, and scientific interests of its members in the observation of birds and other wildlife to satisfy the injury-in-fact requirement."); *Jap. Whaling Assn. v. Am. Cetacean Socy.*, 478 U.S. 221, 231 n. 4 (1986) (Plaintiffs "undoubtedly have alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected by continued whale harvesting . . ."); *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1007 (D.C. Cir. 1977) (The court found injury in fact for plaintiffs who alleged that "the Defendants'

relate to sensory experience; harm to ethical views is not cognizable.⁴⁶ Yet some courts' dicta reads aesthetic injury broadly, even including "contemplating" animal suffering in an organized hunt.⁴⁷ Professor Cass Sunstein notes the distinction between moral and aesthetic interests is an "oddity," because both relate to a plaintiff's subjective judgments about beauty and ugliness.⁴⁸

In response to legal cognizance of aesthetic injury as injury in fact, the Supreme Court has raised the bar on the "concrete" requirement of aesthetic harm.⁴⁹ Plaintiffs must assure courts that they will return to situations where they would likely have aesthetic experiences again.⁵⁰

2. Redressability

The third constitutional element of standing requires that a favorable judicial decision be likely to redress the alleged injury.⁵¹ A lawsuit must be binding on the defendant or otherwise compel the defendant to stop the injurious activity.⁵²

How one defines the injury in fact can influence the redressability analysis. When a court finds the requested relief disconnected from the

decision impairs the ability of members of the Plaintiff organizations to see, photograph, and enjoy Cape fur seals in their natural habitat . . ."). Note that the ESA legislative history contemplates that even bird-watching activity could constitute an unlawful take, indicating the statute's expansive reach and prophylactic intent: The "harassment" form of taking would allow "the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young." H.R. Rpt. 93-412 at 11 (July 27, 1973).

⁴⁶ See Sunstein, *supra* n. 44, at 259 ("[I]t is the aesthetic injury that courts recognize as the basis for the suit.").

⁴⁷ *E.g. Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) ("Accordingly, it is not unreasonable for these individuals to claim that seeing or even contemplating the type of treatment of the bison inherent in an organized hunt would cause them to suffer an aesthetic injury . . ."). However, the aesthetic injury of *Clark* was within the context of preliminary injunction analysis. *Id.*

⁴⁸ Sunstein, *supra* n. 44, at 259. Sunstein cites to *Animal Leg. Def. Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998), an Animal Welfare Act case in which plaintiffs successfully alleged harm to an aesthetic interest in observing animals living under "humane" conditions. The court found that the plaintiff had alleged "far more than an abstract . . . interest in seeing the law enforced." *Id.* at 432.

⁴⁹ Neil Gormley, *Standing in the Way of Cooperation: Citizen Standing and Compliance with Environmental Agreements*, 16 Hastings W.-N.W. J. Envtl. L. & Policy 397, 400 (2010).

⁵⁰ See *Lujan*, 504 U.S. at 567 (calling it "pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection"); *Bluewater Network v. Salazar*, 721 F. Supp. 2d 7, 17-18 (D.D.C. 2010) (denying standing where a plaintiff challenging jet ski activity could not provide firm plans to return to lakes where the activity occurred, or prove a longstanding connection to the natural area).

⁵¹ *Lujan*, 504 U.S. at 561.

⁵² Carter, *supra* n. 35, at 2198.

cause of the injury, it declines to hear the case.⁵³ Redressability intertwines the relief sought with the relief available. If jurisprudence develops to eliminate injunctive relief for certain ESA violations, plaintiffs may not be able to show redressability.

Yet redressability does not require the plaintiff to prove the court will make him whole; it need only reduce the risk of future injury.⁵⁴ The Supreme Court has found redressability when punitive fines would deter the defendant from causing future injury.⁵⁵

3. Prudential Requirements

Beyond the constitutional elements of standing, courts also have rules guiding judicial self-government. Three prudential standing rules are relevant to the ESA. First, a “pervasively shared” injury is better addressed by the political branches and does not afford standing.⁵⁶ Second, plaintiffs cannot allege an invasion of a third party’s legally protected rights and interests—they must allege an invasion of their own rights and interests.⁵⁷ Third, the alleged injury must fall within the “zone of interests” protected or regulated by the statute.⁵⁸

The ESA citizen-suit provision removes prudential concerns of zone-of-interests and third-party claims.⁵⁹ It eliminates the zone-of-interests test because the clear statutory language and subject of the

⁵³ *Lujan*, 504 U.S. at 571 (“[I]t is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve. There is no standing.”).

⁵⁴ *Mass. v. EPA*, 549 U.S. 497, 526 (2007).

⁵⁵ *Friends of the Earth, Inc.*, 528 U.S. at 174 (“Such penalties may serve, as an alternative to an injunction, to deter future violations and thereby redress the injuries that prompted a citizen suitor to commence litigation.”). The idea of punitive damages payable to the government plays out interestingly in the ESA citizen-suit context. Consider if courts required defendants to pay damages to the government for ESA violations, rather than granting the injunction entitlement to the private plaintiff. First, fewer citizens would bring suit, as the opportunity to negotiate with the defendant around the injunction would no longer be available. Second, institutional defendants would see ESA regulation as a liability rule rather than a property rule, thus evaluating whether the benefits of potential activities (such as housing construction) would outweigh expected liability costs. *See infra* n. 75 (discussing the liability rule (or pricing regime) and the property rule (or sanctioning regime)).

⁵⁶ *Valley Forge Christian College v. Ams. United for Separation of Church & St.*, 454 U.S. 464, 475 (1982).

⁵⁷ Carter, *supra* n. 35, at 2200. This is not as large an obstacle as appears at first glance, because the ESA does not provide legally protected rights and interests to endangered animal species, but rather to humans. For a debate on whether laws that regulate humans’ use of animals actually provide rights to the object animals, compare Gary L. Francione, *Animals—Property or Persons?*, in *Animal Rights* 108 (Cass R. Sunstein & Martha C. Nussbaum, eds., Oxford U. Press 2004) with Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, Rights*, 62 Soc. Research 539 (1995).

⁵⁸ *Bennett*, 520 U.S. at 163–64. The zone-of-interests test arose from Administrative Procedure Act actions, but now is applied broadly in prudential standing analysis. *Id.*

⁵⁹ *See id.* at 164 (“The first question in the present case is whether the ESA’s citizen-suit provision . . . negates the zone-of-interests test (or, perhaps more accurately, expands the zone of interests). We think it does.”).

statute “make[] the intent to permit enforcement by everyman even more plausible.”⁶⁰ In addition, the provision enables third-party protections via citizen enforcement.⁶¹ Congress, however, could have resolved third-party and zone-of-interests standing obstacles with an animal-centric approach by explicitly granting standing to the species themselves.⁶² This would have enabled courts issuing injunctions to follow an “animal standing, animal harm analysis,” synchronizing injury in fact with the injunction harm inquiry.⁶³

Thus, the Article III and prudential standing requirements limit the types of plaintiffs who can receive federal jurisdiction. The limitation often applies to ESA suits, despite precatory statutory language extending protection to listed species. As a result, some statutory violations may be unreachable by judicial enforcement if the human injury required for standing is absent.⁶⁴

B. Preliminary Injunctions

Injunctions are a remedy from the court telling a defendant to either act or abstain from acting.⁶⁵ Common categorizations are preventive, reparative, or structural.⁶⁶ As plaintiffs often use the ESA to block development, courts generally issue preventive injunctions under the statute.⁶⁷

Preliminary injunctions occur in advance of a full trial on the merits.⁶⁸ Courts often explain that the purpose of a preliminary injunction

⁶⁰ *Id.*

⁶¹ *Cetacean Community v. Bush*, 386 F.3d 1169, 1177 (9th Cir. 2004) (noting that the citizen-suit provision explicitly grants standing to “any person,” distinguished in the definition section from “species” and “fish and wildlife”).

⁶² See Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. Rev. 1333, 1335 (2000) (arguing that Congress could grant standing to animals).

⁶³ Amber R. Woodward, Student Author, *The Scope of “Plaintiffs’ Harm” in Environmental Preliminary Injunctions*, 88 Wash. U. L. Rev. 507, 531–32 (2010); see *infra* pt. V introduction (describing the four approaches to standing analysis and injunction injuries in private wildlife lawsuits). But Congress did not provide standing to animals, leading courts to struggle with the resulting disconnect between standing and preliminary injunctions.

⁶⁴ Carter, *supra* n. 35, at 2204.

⁶⁵ *Black’s Law Dictionary* 855 (Bryan A. Garner ed., 9th ed., West 2009).

⁶⁶ See *Brown v. Plata*, 131 S. Ct. 1910, 1926–28 (2011) (applying both a reparative and structural injunction, as the Court looked back to past Eighth Amendment violations to require California to broadly alter how it houses prisoners). In contrast, preventive injunctions are forward-looking, with courts predicting harm to determine which measures to take.

⁶⁷ See generally Maryjo Wlazlo, *ESA Gives a “Hoot” about the Owl: Forest Conservation Council v. Rosboro Lumber Co.*, 7 Vill. Envtl. L.J. 441, 453 (1996) (discussing case law regarding the application of the ESA in “enjoining actions that pose a future or imminent threat of injury to protected species”). However, a reparative injunction analysis might follow from lawsuits under ESA Section 10(j), regarding the reintroduction of experimental populations. 16 U.S.C. § 1539(j).

⁶⁸ *Black’s Law Dictionary* at 855.

is to preserve the status quo before trial.⁶⁹ However, litigators and courts can manipulate baseline determinations to develop various versions of a status quo.⁷⁰

The standard test for preliminary injunctions, recently clarified in *Winter v. Natural Resources Defense Council*, requires four factors. Movants must show: (1) likelihood of success on the merits; (2) likelihood of irreparable harm absent injunctive relief; (3) that the balance of hardships tilts in their favor; and (4) that an injunction is in the public interest.⁷¹ However, at least one circuit applies a separate analysis for ESA injunctions.⁷² The Ninth Circuit has reasoned that “Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties’ interests,”⁷³ and the balance of hardships “always tips sharply in favor of endangered species.”⁷⁴

The concept of ripeness, which looks to the likelihood of harm if an injunction does not issue, is central to injunction analysis. Linked to ripeness, courts must balance the error costs of either action or inaction. These two concepts are detailed below. Part II concludes by reining in the various Supreme Court constructions of the preliminary injunction standard.

1. Ripeness

Courts must apply scarce judicial resources to fact-specific disputes in which the most jurisprudential value will be added. Thus, preventive injunctions cannot be issued for abstract injuries—that is, injuries that are merely “conjectural or hypothetical.”⁷⁵ Nor should courts wait for harm to occur, if the harm is reasonably expected.

Abstract injunctions can turn courts into legislatures; without specific factual cases, there is no restraint on judicial ideology.⁷⁶ How-

⁶⁹ See e.g. *Buckeye Forest Council v. U.S. Forest Serv.*, 337 F. Supp. 2d 1030, 1039 (S.D. Ohio 2004) (“The balance of equities therefore weighs heavily in favor of preserving the status quo.”).

⁷⁰ Cf. *McKune v. Lile*, 536 U.S. 24, 45–46 (2002) (casting a reward/penalty distinction in prisoner treatment analysis into doubt because of the concept of an “illusory baseline”).

⁷¹ *Winter*, 555 U.S. at 20.

⁷² The Ninth Circuit’s unique standard has survived the changes in *Winter*. See *infra* pt. IV (presenting a detailed analysis of the ESA irreparable harm standard).

⁷³ *Natl. Wildlife Fedn. v. Natl. Marine Fisheries Serv.*, 422 F.3d 782, 793–94 (9th Cir. 2005); see Or. Denying Prelim. Inj., *Wild Equity Inst. v. City of San Francisco* at *9 (“When there is a significant question as to whether a listed species even exists in an area, the plaintiffs have a high burden of showing that the species will be irreparably harmed absent an injunction.”).

⁷⁴ *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996).

⁷⁵ *Summers*, 555 U.S. at 494.

⁷⁶ See *id.* (“[A]llowing courts to oversee legislative or executive action ‘would significantly alter the allocation of power . . . away from a democratic form of government[.]’” (citing *U.S. v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring))). For example, a court untethered to specific facts may believe the precautionary principle applies to all national security issues, but not to environmental disputes.

ever, abolishing preventive injunctions has its problems. Certain statutes, such as the ESA, enforce with a sanctioning regime in which society aims to eliminate unlawful behavior at all costs.⁷⁷ Injunctions may help enforce such a regime by stopping the harmful behavior before it even occurs (or, if the harmful behavior has already begun, by stopping it from causing further damage). In addition, in granting an injunction, a court may offer clarity of law by advising parties in a factually specific way how to proceed without violating the law.⁷⁸

Inhabiting the ground between issuing abstract injunctions and imposing a prohibition on preventive injunctions, courts look to whether defendants present a *sufficient likelihood* of future harm.⁷⁹ Wrongful past actions are not dispositive of future harm if a defendant can convince a court there is no reasonable expectation the harm will repeat.⁸⁰ In the ESA context, courts look to experts to determine a likelihood of take, even if no individual animals have yet to be killed or harmed.⁸¹

2. The “Preliminary” Nature of Preliminary Injunctions: Balancing Error Costs

Preliminary injunctions occur in advance of trial, and courts currently view preliminary injunctions as an extraordinary remedy.⁸² The doctrine clarified in *Winter* requires courts to analyze four threshold

⁷⁷ See 16 U.S.C. § 1538(a)(1)(C) (explicitly prohibiting taking of listed species). A sanctioning regime (or property rule) is in contrast to a pricing regime (or liability rule) in which society allows unlawful behavior, so long as violators pay for their violation. Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. Rev. 1719, 1720 (2004). An example of a pricing regime is fining pollution emissions above a certain cap. See e.g. Gabriel Weil, *Subnational Climate Mitigation Policy: A Framework for Analysis*, 23 Colo. J. Intl. Env'tl. L. & Policy 285, 289–90 (2012) (discussing climate mitigation policies, including carbon pricing to reduce emissions). For the seminal article introducing the property rule/liability rule framework, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

⁷⁸ Even in denials of preliminary injunctions, courts may discuss the lawfulness of defendant behavior to give parties clear warning and avoid ossifying the law. E.g. *Defenders of Wildlife*, 812 F. Supp. 2d at 1209 (denying a preliminary injunction, but stating “[t]he Plaintiffs, at this early stage, have demonstrated a likelihood of success on the merits.”).

⁷⁹ *Canatella v. Cal.*, 304 F.3d 843, 852 (9th Cir. 2002) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)).

⁸⁰ See *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (defendant avoided injunction by stepping down from interlocking directorates); see also *City of Los Angeles v. Lyons*, 461 U.S. 95, 112–13 (1983) (holding that a plaintiff cannot enjoin a police force from widespread use of choke holds if the plaintiff is not likely to be injured in the future).

⁸¹ See *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 579 (D. Md. 2009) (“[L]ike death and taxes, there is a virtual certainty that Indiana bats will be harmed, wounded, or killed imminently by the Beech Ridge Project, in violation of § 9 of the ESA . . .”).

⁸² *Winter*, 555 U.S. at 24.

factors.⁸³ Ideally, the factors work together to minimize the overall risk and cost of errors in determining whether to issue injunctive relief. Thus, an injunction is socially desirable if the expected costs of enjoining lawful activity are less than the expected costs of failing to enjoin unlawful conduct.

Illustrating how courts use the injunction factors to balance costs of error, Judge Posner channels his inner Descartes⁸⁴ to offer a formula for when to grant a preliminary injunction:

$$\begin{array}{c} \text{[(Probability of success at trial) } \times \text{ Harm (Plaintiff)]} \\ > \\ \text{[(1-Probability of success at trial) } \times \text{ Harm (Defendant)]} \end{array}$$

Thus, even if a plaintiff has a 5% chance of winning at trial, a court should issue an injunction when the magnitude of harm is enormous and the defendant's injury while waiting for trial is minimal.⁸⁵ This cost-balancing formulation is traditionally known as the "sliding scale" test.⁸⁶

Aiming to reduce the likelihood and costs of error, courts contour injunctions to the substantive harm. To do so, courts must both identify the activities contributing to the harm, and also consider the prophylactic nature of the injunctions. Courts may narrowly tailor the injunction to the identifiable causes of harm,⁸⁷ or may instead cover broad activities in order to ensure no additional harm ensues.⁸⁸ Courts attempt to evaluate injunctions by assessing the collateral damage risks of tailoring an injunction's scope too narrowly or too broadly.⁸⁹

⁸³ See *id.* at 20 (The plaintiff seeking a preliminary injunction must show: (1) likelihood of success on the merits; (2) likelihood of irreparable harm absent injunctive relief; (3) that the balance of hardships tilts in their favor; and (4) that an injunction is in the public interest).

⁸⁴ Though one hopes that Judge Posner does not hold the Cartesian beliefs that animals are machines, solely for human use and consumption. See René Descartes, *Discourse on Method* pt. 5 (Donald A. Cress trans., 3d ed., Hackett Publ'g Co., Inc. 1998) (discussing the nature of animals).

⁸⁵ This circumstance is relatively common in the ESA context, as endangered species are often pitted against human leisure activities, such as golf. Compl., *Wild Equity Inst. v. City & Co. of San Francisco*, 2011 WL 917875 at ¶¶ 1–2 (N.D. Cal. Mar. 2, 2011) (No. CV11-0958) (available at http://www.meyerglitz.com/pdfs/wild-equity-gold-course-complaint/Signed_Sharp_Park_Complaint1.pdf [<http://perma.cc/FDF8-4CPA>] (accessed Apr. 12, 2014)).

⁸⁶ See e.g. *Kempthorne*, 481 F. Supp. 2d at 58 ("These factors interrelate on a sliding scale and must be balanced against each other.").

⁸⁷ See *Winston Research Corp. v. Minn. Mining & Mfg. Co.*, 350 F.2d 134, 142 (9th Cir. 1965) (upholding injunction preventing competitor company, who unlawfully stole trade secrets, from selling product for only two years because the product would become publicly available in two years).

⁸⁸ See *Bailey v. Proctor*, 160 F.2d 78, 81 (1st Cir. 1947) (enjoining entire trust structure, even though all of the past wrongdoer officer-trustees had been fired, new trustees had replaced them, and Congress had declared the structure legal).

⁸⁹ Ofer Grosskopf & Barak Medina, *Economic Analysis of the Irreparable Harm Concept in Preliminary Injunctions* 7–10 (unpublished paper, Feb. 2009) (available at http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=ofer_grosskopf [<http://per>

3. Current Formulation

Despite the theoretical clarity of ripeness and balance of error costs, the Supreme Court has been inconsistent in its injunction analysis.⁹⁰ In the environmental context, the guiding preliminary injunction decision is *Winter*.⁹¹ There, the Supreme Court vacated a preliminary injunction because of the manner in which the district court construed the “irreparable harm” factor.⁹² The district court, in a National Environmental Policy Act (NEPA) challenge to the Navy’s use of underwater sonar, had considered whether the activity led to a *possibility* of irreparable harm.⁹³ Calling the standard too lenient, the high court instead required a threshold determination that “irreparable injury is *likely* in the absence of injunction.”⁹⁴

Winter’s new threshold requirement muddies the doctrine. It seems to say that plaintiffs must now independently meet all four factors; Posner’s mathematical balance is no longer applicable. However, Justice Ginsburg’s dissent narrows the majority’s holding to a factual application to the Navy’s national security interests, leaving error cost balancing untouched.⁹⁵ Both the D.C. and Ninth Circuits follow Justice Ginsburg’s interpretation and apply a sliding scale analysis.⁹⁶

Thus an abundance of preliminary injunction tests remains.⁹⁷ Factor in the circuit splits over whether the ESA has its own unique

ma.cc/CC7W-YP64] (accessed Apr. 12, 2014)) (analyzing the court’s consideration of harm, scope, damage, and probability in preliminary injunction decisions).

⁹⁰ For an egregious example, see *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) (presenting a “well-established” four-factor framework in which both the first two factors referred to irreparable injury, and also applying a balance of hardships test that should only apply to preliminary injunctions when courts are concerned with error before a full trial on the merits).

⁹¹ See *Winter*, 555 U.S. at 20 (providing four factors to be considered in a preliminary injunction decision).

⁹² *Id.* at 20–21.

⁹³ *Id.* at 21.

⁹⁴ *Id.* at 22.

⁹⁵ *Id.* at 51 (Ginsburg, J., dissenting) (“[C]ourts have evaluated claims for equitable relief on a ‘sliding scale,’ sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high. This Court has never rejected that formulation, and I do not believe it does so today.” (internal citation omitted)).

⁹⁶ See e.g. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011) (“For the reasons identified by our sister circuits and our district courts, we join the Seventh and the Second Circuits in concluding that the ‘serious questions’ version of the sliding scale test for preliminary injunctions remains viable after the Supreme Court’s decision in *Winter*.”); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 12 (D.D.C. 2009) (“[T]he D.C. Circuit’s sliding-scale standard remains viable even in light of the decision in *Winter*.”).

⁹⁷ Posner’s 1986 error-minimizing mathematical formula still has legs. Grosskopf & Medina, *supra* n. 89, at 6. Other courts use the *Winter* majority opinion that identified four factors and added a requirement that irreparable injury be “likely” in the absence of injunction. *Winter*, 555 U.S. at 20. Justice Ginsburg’s *Winter* dissent, followed in the D.C. and Ninth Circuits, retains sliding scale analysis within the more rigid skeleton of *Winter*’s four-part test. *Id.* at 51 (Ginsburg, J., dissenting).

standard,⁹⁸ and district courts find themselves at sea when confronted with preliminary injunction motions.⁹⁹ As a result, judges likely rely on prior ideologies about the ESA.¹⁰⁰ A distinction between individual-level and species-level determinations of the irreparable harm prong¹⁰¹ preys on such priors, as it substantially affects ESA enforcement. At the cost of socially optimal outcomes, the distinction lures courts into denying preliminary injunctions. After deciding that irreparable harm requires species-level effects, a court need only find the species as a whole unaffected to avoid performing further balancing.¹⁰²

C. Relationship between Standing and Preliminary Injunction

Standing and injunction doctrines have separate elements, but both include injury. Two conflicting views exist as to whether to analyze the injury consistently or to do so through distinct processes.

One perspective is that while the standing and injunction analyses use similar language, the inquiries are distinct. Harm in the standing context gets a plaintiff through the gate, while the harm inquiry at the remedy stage is narrow, looking for irreparability in the absence of injunction.¹⁰³ Thus, in *Monsanto v. Geertson Seed Farms*, a plaintiff had standing to seek relief, but fell short of showing a sufficient irreparable injury in the absence of injunction.¹⁰⁴ The Court found the plaintiffs, organic alfalfa farmers, had an increased risk of crop contamination by genetically modified crop gene flow that was “sufficiently concrete” to meet standing.¹⁰⁵ At the same time, the relief sought—preemptive injunction of deregulation of genetically modified

⁹⁸ See *infra* pt. IV (discussing the different injunction standards applied to challenges under the ESA).

⁹⁹ The “unique ESA” aspect is particularly confusing because *Winter* may be limited to NEPA cases, as injunctions are necessary to enforce statutory compliance. William S. Eubanks II, *Damage Done? The Status of NEPA after Winter v. NRDC and Answers to Lingering Questions Left Open by the Court*, 33 Vt. L. Rev. 649, 652–54 (2009) (arguing that since “an injunction is . . . the only means of ensuring compliance’ with NEPA—logic dictates the conclusion that courts have less discretion to balance the equities with respect to NEPA violations than with violations of environmental statutes with significant substantive requirements” (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982))).

¹⁰⁰ Examples of two central prior ideologies would be the judge’s views of governmental interaction with private property rights or the judge’s affection for certain animals.

¹⁰¹ See *supra* nn. 15–25 and accompanying text (discussing courts’ competing species-level/individual-level analyses of irreparable harm under the ESA).

¹⁰² See e.g. Or. Denying Prelim. Inj., *Wild Equity Inst. v. City of San Francisco* at *9 (“Plaintiffs have failed to meet their burden of showing irreparable harm Accordingly, the motion for preliminary injunction is DENIED.”).

¹⁰³ Christopher Kendall, Student Author, *Dangerous Waters? The Future of Irreparable Harm under NEPA after Winter v. NRDC*, 39 *Envtl. L. Rep.* 11109, 11115 (2009) (“Only after a plaintiff gets his foot in the door by establishing standing, must the plaintiff prove irreparable harm for purposes of injunctive relief.”).

¹⁰⁴ *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2759 (2010).

¹⁰⁵ *Id.* at 2755. The risk caused farmers to pay for increased protections from gene flow. *Id.*

crop use—would enjoin activity from which “the risk of gene flow to their crops could be virtually nonexistent.”¹⁰⁶ In other words, the activity at issue posed no irreparable harm. *Monsanto* signifies that proving injury in the context of standing does not guarantee proof of harm sufficient to merit injunctive relief.

On the other hand, Justice Scalia has conflated standing and injunction definitions of harm. During a discussion of whether NEPA procedural injury satisfies irreparable harm at the *Winter* oral argument, he remarked: “Our cases say that procedural injury alone is not the kind of injury that confers standing; that there has to be some concrete harm.”¹⁰⁷ To Justice Scalia, standing and irreparable harm analyses have the same goal as “doctrines that reflect [the] fundamental limitation” of courts to relieve only actual or imminently threatened injury to persons caused by a violation of law, avoiding judicial intrusion on other branches.¹⁰⁸ As *City of Los Angeles v. Lyons* shows, along with standing, preliminary injunction factors foreclose a suit on the basis of inadequate injury.¹⁰⁹

The two above views—exemplified by *Monsanto* and *Lyons*—show that (1) proving injury for standing does not necessarily demonstrate harm for injunctive relief, and; (2) insufficient proof of injury for standing means the injury is also insufficient for an injunction. These views suggest that the most logical understanding of the harm analysis is to think of irreparable harm as a subset of the injury in fact inquiry of standing. Under the ESA, this means courts should look to human plaintiff harm in injunction analysis.

III. THE IRREPARABLE HARM STANDARD IN PRACTICE

Early Supreme Court environmental cases that touched on preliminary injunctions concern the big environmental statutes. Reviewing the Alaska National Interest Lands Conservation Act, the Court in *Amoco Production Co. v. Village of Gambell* offered guidance on the

¹⁰⁶ *Id.* at 2760.

¹⁰⁷ Kendall, *supra* n. 103, at 11109 (citing Transcr., *Winter v. Nat. Resources Def. Council, Inc.*, 2008 WL 4527982 at *24 (Oct. 8, 2008) (555 U.S. 7 (2008))). Kendall argues that Justice Scalia’s remark displays confusion of standing with injunctive relief and an application of the wrong test for injury. *Id.* at 11116. Kendall reasons that Scalia is mistaken because Kendall believes plaintiffs can allege one type of harm to achieve standing, while using a separate harm for the injunction analysis. *Id.* at 11115. However, Scalia is more likely implying that the standing and injunction harms synchronize: If the injury is not concrete enough to meet the injury-in-fact element of standing, then it also must fall short of irreparable harm. Synchronization arises from the third element of standing—that a judicial ruling can redress the injury in fact.

¹⁰⁸ *Summers*, 555 U.S. at 491–94.

¹⁰⁹ See *Lyons*, 461 U.S. at 106–07 n. 7 (“[T]o have a case or controversy . . . Lyons would have to credibly allege . . . that he, himself, will not only again be stopped by the police but will be choked without any provocation or legal excuse.”); *id.* at 111 (“The speculative nature of Lyons’ claim of future injury requires a finding that [the likelihood of immediate irreparable injury] prerequisite of equitable relief has not been fulfilled.”).

irreparable harm prong.¹¹⁰ In language similar to the longstanding irreparable injury rule,¹¹¹ the Court explained how environmental injury affects the irreparable harm analysis:

Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.¹¹²

According to *Gambell*, irreparable damage should relate to the underlying substantive policy that forms the essence of the statutory scheme.¹¹³ Similarly, Judge Williams has described the relevant harm as “defined in terms of the evil that the particular statute was designed to prevent.”¹¹⁴ Before turning to irreparable harm in the Endangered Species Act (ESA), this Part reviews the prong through the lens of other federal environmental statutes that have a citizen-suit and remedy provision.

A. Clean Water Act

Injunctions sought under the Clean Water Act (CWA) generally reference irreparable harm as ongoing degradation of the environment.¹¹⁵ Environmental harm must link to a CWA violation, and language from other statutes such as the ESA does not “serve as a benchmark for deciding whether plaintiffs have shown irreparable harm.”¹¹⁶ To trigger the underlying substantive concerns of the CWA, the violation must have three general characteristics. First, the violation of the statute must degrade a “human environmental factor,”¹¹⁷ creating aesthetic harm or impacting human water use.¹¹⁸ Second, the

¹¹⁰ *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

¹¹¹ Stemming from the English common law system, courts used the irreparable injury rule to determine whether to grant equitable relief (e.g., injunction) or a remedy at law (e.g., monetary damages). However, one leading remedies scholar believes the distinction is a straw man, with other doctrines determining the appropriate type of relief. See Douglas Laycock, *Modern American Remedies: Cases and Materials* 381 (4th ed., Aspen Publishers 2010).

¹¹² *Gambell*, 480 U.S. at 545.

¹¹³ *Id.*

¹¹⁴ *Natl. Wildlife Fedn. v. Burford*, 835 F.2d 305, 337 (D.C. Cir. 1987) (Williams, J., concurring in part and dissenting in part).

¹¹⁵ *S.E. Alaska Conserv. Council v. U.S. Army Corps of Engrs.*, 472 F.3d 1097, 1100 (9th Cir. 2006) (“Ongoing harm to the environment constitutes irreparable harm warranting an injunction.”).

¹¹⁶ *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (concluding that because plaintiffs did not bring an ESA challenge, the harm should instead relate to CWA language, such as “adverse impact on the aquatic ecosystem”).

¹¹⁷ *S.E. Alaska Conserv. Council*, 472 F.3d at 1100 (citing *Natl. Parks & Conserv. Assn. v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2001)).

¹¹⁸ *Sierra Club v. City of Colo. Springs*, 2009 WL 2588696 at *16 (D. Colo. Aug. 20, 2009) (observing that a discharge without the availability of money damages as a remedy of a citizen suit is a factor in showing irreparability).

harm must not be adequately fixed by money damages.¹¹⁹ Third, the violating discharges must be ongoing or continuous.¹²⁰ Courts have denied the defense that injunctive relief is unnecessary because other sources will continue to pollute waters, reasoning that “the CWA creates a regime of strict liability for violations of its standards.”¹²¹ A violation of the statute, and not some additional level of degradation, suffices as a basis for irreparable harm.

B. Clean Air Act

Similarly, the irreparable harm analysis under the Clean Air Act (CAA) looks to human interest in using and enjoying the natural environment. In the context of air quality, courts require inadequacy of economic damages in compensating environmental injuries arising from CAA violations.¹²² Some courts have held that violation of the CAA alone establishes irreparable injury, due to the unique nature of the air resource and concerns of a plaintiff's death by a thousand cuts.¹²³ These concerns lead to a prophylactic construction of irreparable harm.¹²⁴ In contrast, other courts require more than a statutory violation for irreparable harm.¹²⁵ These courts require a link between the unlawful emissions and worsening air quality and human health concerns; otherwise, there is no injury in the absence of injunctive relief.¹²⁶ Both perspectives on irreparable harm, however, view the injury anthropocentrically.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (quoting *Am. Canoe Assn. v. Murphy Farms, Inc.*, 412 F.3d 536, 539–40 (4th Cir. 2005)).

¹²² See e.g. *Sierra Club v. Franklin Co. Power of Ill., LLC*, 546 F.3d 918, 936 (7th Cir. 2008) (affirming enjoinder of a power plant construction under an expired permit because “[t]he record shows that at least one Sierra Club member will likely suffer a decrease in recreational and aesthetic enjoyment of Rend Lake if the plant is built according to the 2001 permit”).

¹²³ See *U.S. v. City of Painesville*, 644 F.2d 1186, 1194 (6th Cir. 1981) (finding that the district court was required to provide injunctive relief and that a hearing on irreparable injury was unnecessary because “Congress did not contemplate that its decision would be thwarted by judicial reluctance to require compliance when enforcement proceedings are brought and liability is proven”); *People of St. of Cal. ex rel. St. Air Resources Bd. v. Dept. of Navy*, 431 F. Supp. 1271, 1294 (N.D. Cal. 1977) (finding a presumption of irreparable harm for CAA violations because “[i]t is the cumulative effect of innumerable ‘insignificant’ pollutions which has hung an environmental cloud over our planet”).

¹²⁴ See *infra* nn. 160–163 and accompanying text (discussing ESA jurisprudence that applies the species-level effects standard: despite a broad, prophylactic definition of “take,” the statutory violation does not presumptively meet irreparable harm).

¹²⁵ See e.g. *Sierra Club v. Atlanta Regl. Commn.*, 171 F. Supp. 2d 1349, 1353, 1361 (N.D. Ga. 2001) (holding that plaintiffs failed to establish irreparable harm, even though Atlanta did not meet requirements set out by the CAA).

¹²⁶ *Id.* at 1361 (finding no irreparable harm because plaintiffs did not offer “evidence or proof of any immediate threat of a worsening of air quality in Atlanta”).

C. *National Environmental Policy Act*

The irreparable harm inquiry under the National Environmental Policy Act (NEPA) is linked to its requirement of federal agency review before undertaking any action having a significant impact on the environment.¹²⁷ The relevant harm arises from agency decision making without informed understanding of environmental considerations.¹²⁸ As Justice Breyer has stated, even when damage is later discovered, “chances that any big agency will back up once it’s committed to a course [are] a lot lower.”¹²⁹

There is considerable case law concerning irreparable harm to wildlife under NEPA.¹³⁰ Despite the government’s briefs in *Winter* arguing that irreparable harm under NEPA requires species-level effects, the Court left the question open.¹³¹ NEPA’s language states that environmental impact statements are required for local events, implying that activities need not have widespread impact to create irreparable harm.¹³² Further, irreparable harm can arise from uncertainty about effects on a local area’s wildlife.¹³³ Because NEPA concerns local effects on the environment, a court using a species-level harms standard under the ESA and reviewing claims under both statutes could reach bizarre conclusions. A proposed action to kill an individual of a listed species could result in irreparable harm for a preliminary injunction under NEPA, but not the ESA.¹³⁴

¹²⁷ *Mass. v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983).

¹²⁸ *Id.*

¹²⁹ Transcr., *Winter v. Nat. Resources Def. Council, Inc.*, 2008 WL 4527982 at *25 (Oct. 8, 2008) (555 U.S. 7 (2008)).

¹³⁰ For recent judicial review of irreparable harm in wildlife cases, see for example, Or. Denying Mot. for Prelim. Inj., *Native Songbird Care & Conserv. v. LaHood*, 2013 U.S. Dist. LEXIS 93120 at **30–31 (N.D. Cal. July 2, 2013) (No. 13-cv-02265-JST) [hereinafter Or. Denying Prelim. Inj., *Native Songbird v. LaHood*] (denying preliminary injunction, but finding plaintiffs’ assertions that “they will be harmed through diminished opportunities to look, enjoy, and study wildlife, and will suffer emotional and aesthetic injury from seeing the swallows subjected to stress and harm” is a “sort of injury [that] is irreparable”); Op. & Or., *Humane Socy. of the U.S. v. Bryson*, 2012 U.S. Dist. LEXIS 74688 at **21–24 (D. Or. May 30, 2012) (No. 3:12-cv-00642-SI) (available at http://media.oregonlive.com/environment_impact/other/SeaLionRuling.pdf [<http://perma.cc/QA5B-QS4R>] (accessed Apr. 12, 2014)) (analyzing irreparable harm to the plaintiffs’ affinity for California Sea Lions in the Columbia River).

¹³¹ Eubanks, *supra* n. 99, at 659.

¹³² 42 U.S.C. § 4332(C)(iv) (2006).

¹³³ See e.g. *Anderson v. Evans*, 314 F.3d 1006, 1018–19 (9th Cir. 2002) (considering hunting’s impact on whales in a local area); *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 219 (D.D.C. 2003) (considering localized impacts of removing swans).

¹³⁴ The listing of distinct population segments (DPSs) as protected under the ESA could limit the reach of a species-level effects test by framing the analysis through a more local lens. See 16 U.S.C. § 1532(16) (“The term ‘species’ includes any subspecies of fish or wildlife or plants, and any *distinct population segment* of any species of vertebrate fish or wildlife which interbreeds when mature.” (emphasis added)). However, this only protects the few species that receive sufficient agency attention and study to define separate segments. It could also incentivize environmental organizations to spend resources petitioning agencies to divide listed species into smaller DPSs.

IV. IRREPARABLE HARM UNDER THE ENDANGERED SPECIES ACT

The Endangered Species Act (ESA) is designed to conserve ecosystems upon which endangered and threatened species depend and to provide programmatic response for the conservation and protection of such species.¹³⁵ The Ninth Circuit has written: “Congress’s overriding purpose in enacting the ESA indicates that it intended to allow citizen suits to enjoin an imminent threat of harm to protected wildlife.”¹³⁶ Considerable power emanates from the ESA citizen-suit provision: Citizen plaintiffs gain the ability to carry out executive functions as lawmakers, watchdogs, private attorneys general, and agenda setters.¹³⁷ Where there are under-allocated federal resources to enforce statutory violations, affected citizens can step in to fill the void and receive injunctive relief.¹³⁸ This helps to narrow the enforcement gap.¹³⁹

Citizen enforcement power is strengthened by the broad definition of what “takes” a species.¹⁴⁰ Proof that habitat modification will harm a single individual of a listed species is enough to establish an ESA violation.¹⁴¹ Congressional delegation to enforce such broad liability indicates a prophylactic approach to achieve statutory ends. By looking to individual harms as an indication of larger structural failure, Congress has implied the necessity of stronger protections to keep listed species from backsliding into extinction.¹⁴² In this sense, Section 9 confronts an underlying evil distinct from the rest of the statute. Other sections of the ESA concern the continued survival of endangered and threatened species, but Section 9’s focus on takings imputes a concern

¹³⁵ *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1214 (D. Mont. 2010) (citing 16 U.S.C. § 1531(b)).

¹³⁶ *Forest Conserv. Council v. Rosboro Lumber Co.*, 50 F.3d 781, 785 (9th Cir. 1995).

¹³⁷ Susan D. Daggett, *NGOs as Lawmakers, Watchdogs, Whistle-Blowers and Private Attorneys General*, 13 *Colo. J. Intl. Env'tl. L. & Policy* 99, 102 (2002). For the text of the provision, see 16 U.S.C. § 1540.

¹³⁸ Daggett, *supra* n. 137, at 102; see e.g. *Animal Protec. Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1080–81 (D. Minn. 2008) (granting injunctive relief to citizen-plaintiffs, requiring the Minnesota Department of Natural Resources to “promptly take all action necessary to ensure no further taking of threatened Canada Lynx”).

¹³⁹ Cf. Cass R. Sunstein, *The Rights of Animals*, 70 *U. Chi. L. Rev.* 387, 391 (2003) (advocating for private enforcement of anticruelty laws “so that the law actually means, in practice, what it says on paper”).

¹⁴⁰ See e.g. *Babbitt v. Sweet Home Ch. of Communities for a Great Or.*, 515 U.S. 687, 697–98 (1995) (allowing an interpretation of “harm” to include indirect action because “the broad purpose of the ESA supports . . . protection against activities that cause the precise harms Congress enacted the statute to avoid”).

¹⁴¹ *Coalition for a Sustainable Delta v. McCamman*, 725 F. Supp. 2d 1162, 1169–70 (E.D. Cal. 2010).

¹⁴² Cf. *Brown*, 131 S. Ct. at 1940 (holding that the inability for some in California’s prison population to receive health care was symptomatic of overcrowding and in violation of the Eighth Amendment, and affirming a prophylactic injunction to transfer prisoners from California’s facilities). The Court expressed concern about “the system’s next potential victims.” *Id.*

for individual members of the protected species. A species-level harm requirement ignores Section 9 exceptionalism and sets ESA injunction jurisprudence adrift by confusing the statutory structure.¹⁴³ The First Circuit in *AWI* conflated Section 7's jeopardy standard—from which judicial review of agency action flows—with the unauthorized take standard under Section 9.¹⁴⁴

A prophylactic view of the citizen-suit provision is consistent with the Act's express goal of species "recovery." Congress unambiguously identified the "recovery of the species in the wild" in the ESA's purpose, particularly with regard to Section 9.¹⁴⁵ However, courts consistently decline to enforce the recovery goals as mandatory.¹⁴⁶

Unique underlying substantive interests and strong statutory language have led at least the Ninth Circuit to apply a different injunction standard for challenges under the ESA.¹⁴⁷ Relying on Supreme Court precedent, the circuit has removed the balance of hardships and public interest prongs of the preliminary injunction test, both of which are predetermined to favor species protection.¹⁴⁸ The irreparable harm inquiry remains. And with the removal of two factors, courts aiming to

¹⁴³ 16 U.S.C. § 1538.

¹⁴⁴ *AWI III*, 623 F.3d at 26–27.

¹⁴⁵ See e.g. 16 U.S.C. § 1539(a)(2)(B)(iv) (allowing for incidental take permits on the condition "the taking will not appreciably reduce the likelihood of . . . recovery of the species in the wild"); see also *id.* at § 1533(f)(1) (requiring the Secretary to develop "recovery plans" for listed species).

¹⁴⁶ E.g. *Home Builders Assn. of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 990 (9th Cir. 2010) ("[W]e note that . . . there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat."); *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996) ("Section 1533(f) makes it plain that recovery plans are for guidance purposes only. By providing general guidance as to what is required in a recovery plan, the ESA 'breathe[s] discretion at every pore.'" (citing *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975)) (internal citation omitted, alteration in original)).

¹⁴⁷ *Natl. Wildlife Fedn.*, 422 F.3d at 793 ("The traditional preliminary injunction analysis does not apply to injunctions issued pursuant to the ESA." (citing *Natl. Wildlife Fedn. v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1510 (9th Cir. 1994))); see also *San Luis & Delta-Mendota Water Auth. v. Salazar*, 2009 WL 1516798 at **1–2 (E.D. Cal. May 29, 2009) (collecting cases).

¹⁴⁸ *Sierra Club v. Marsh*, 816 F.2d 1376, 1382–83 (9th Cir. 1987) ("[Including balance of hardships] is not the test for injunctions under the Endangered Species Act. In *TVA v. Hill*, the Supreme Court held that Congress had explicitly foreclosed the exercise of traditional equitable discretion The Court noted that the 'language, history, and structure' of the act 'indicates beyond a doubt that Congress intended endangered species to be afforded the highest priorities.'" (internal citations omitted)). Other courts outside the Ninth Circuit have also adopted this reasoning. See e.g. *Ky. Heartwood, Inc. v. Worthington*, 20 F. Supp. 2d 1076, 1094 (E.D. Ky. 1998) ("When the ESA is involved in actions wherein injunctive relief is requested, courts are not bound to use the traditional equitable 'balancing of harms' analysis." (citing *TVA v. Hill*, 437 U.S. 153 (1978))). District courts have continued to use this unique standard after *Winter*, implying that it survived the decision. See e.g. *Or. Denying Prelim. Inj., Wild Equity Inst. v. City of San Francisco*. at *7 (requiring plaintiffs to "demonstrate both that they are likely to succeed on the merits of their claim, and demonstrate that there will be a reasonable likelihood of irreparable harm absent injunctive relief").

constrain the reach of the ESA will increase their scrutiny of the irreparable harm prong.

The irreparable harm standard's placement within ESA injunction analysis is not clearly understood. The test outlined in *Winter* requires a likelihood, rather than a possibility, of irreparable harm.¹⁴⁹ Many courts analyzing ESA preliminary injunctions accept and apply this development,¹⁵⁰ but others distinguish the *Winter* standard as "inapplicable to a claim brought under the ESA."¹⁵¹ The district, appellate, and Supreme courts in *Winter* solely analyzed the National Environmental Policy Act (NEPA) claims.¹⁵² If *Winter* does not govern ESA claims, courts can have more flexibility in assessing how much irreparable harm is necessary for injunction.¹⁵³ However, courts are wary of gamesmanship because environmental plaintiffs could leverage ESA claims for an easier path to injunction.¹⁵⁴

Nonetheless, NEPA and the ESA provide for overlapping interests that create irreparable harm when impaired. Like NEPA, the ESA requires administrative consultation for certain activities.¹⁵⁵ Justice Breyer has argued that irreparable harm includes not only the environmental injury that results from improper environmental analysis, but also the *risk* to the environment from decision making without consultation.¹⁵⁶ For instance, private actors wishing to act in a way that violates Section 9 of the ESA must apply for a permit to incidentally take individuals.¹⁵⁷ If a defendant commences activity without applying for a permit that initiates agency consultation, the resulting risk would satisfy Breyer's irreparable harm standard.

Courts view irreparable harm under the ESA in reference to environmental injury.¹⁵⁸ Defined in terms of the "evil that the particular statute was designed to prevent,"¹⁵⁹ the relevant environmental injury

¹⁴⁹ *Winter*, 555 U.S. at 22.

¹⁵⁰ See e.g. *Native Ecosystems Council & Alliance for the Wild Rockies v. U.S. Forest Serv.*, 2011 WL 4015662 at *7 (D. Idaho Sept. 9, 2011) (citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)).

¹⁵¹ *San Luis & Delta-Mendota*, 2009 WL 1516798 at *2 n. 1.

¹⁵² *Id.*

¹⁵³ *Supra* pt. II(B)(2).

¹⁵⁴ See e.g. *Heartwood v. Peterson*, 2008 WL 2151997 at *7 (E.D. Ky. May 21, 2008) ("Heartwood is not likely to succeed in establishing an ESA violation and therefore the Court will utilize the traditional four-part balancing test for determining whether preliminary injunctive relief is appropriate in this case. This [is] consistent with the approach by other circuits which have chosen to use the 'traditional balancing of harms analysis' in the ESA context.")

¹⁵⁵ 16 U.S.C. § 1539(a).

¹⁵⁶ See *Marsh*, 872 F.2d at 500 ("[T]he harm at stake is a harm to the *environment*, but the harm consists of the added *risk* to the environment that takes place when governmental decision makers make up their minds without having before them an analysis" (emphasis in original)).

¹⁵⁷ 16 U.S.C. § 1539(a)(1)(B).

¹⁵⁸ *Heartwood*, 2008 WL 2151997 at *7.

¹⁵⁹ *Burford*, 835 F.2d at 337 (Williams, J., concurring in part and dissenting in part).

concerns the species listed under ESA protection.¹⁶⁰ Yet the current view of the statutory evil is not nearly as broad as “injury to wildlife”; ESA jurisprudence now includes a major divide over the amount of injury necessary to satisfy the irreparable harm prong.¹⁶¹ In a move that limits the availability of injunctive relief, some courts require plaintiffs to prove that an ESA violation will result in effects that threaten the very existence of the species (species-level harm).¹⁶² In contrast, and consistent with the express intent in Section 9, other courts set the threshold lower, believing that irreparable harm corresponds with what Congress has defined as an unlawful take of an individual of a species deemed to be endangered or threatened.¹⁶³ The rationales offered on both sides are detailed in Part IV(A) and (B) below.

As in *AWI*, courts also try to stake out a “nuanced” middle ground.¹⁶⁴ The First Circuit explained the approach to mean that “the death of a single animal may call for an injunction in some circumstances, while in others the death of one member is an isolated event that would not call for judicial action because it has only a negligible impact on the species as whole.”¹⁶⁵ But this approach is a false distinction, as it inevitably leads to assessment of the impact on the species.¹⁶⁶ A court can say it would issue an injunction in response to a single death, as did the First Circuit in *AWI*, to explain that it is avoiding a per se species-level rule.¹⁶⁷ But such assurance is meaningless if the underlying reasoning indicates that an individual taking only meets irreparable harm when a species population is small enough to feel the impact of the take.¹⁶⁸ The “middle ground” is thus a species-level test—a wolf in sheep’s clothing.

A. Species-Level Harms

Various courts apply species-level effects as the irreparable harm standard.¹⁶⁹ These courts generally start with the understanding that

¹⁶⁰ 16 U.S.C. § 1538(a).

¹⁶¹ *See Pac. Coast Fedn.*, 606 F. Supp. 2d at 1206–07 (“There is considerable disagreement and confusion about what should be considered ‘irreparable harm’ for purposes of these injunctive relief proceedings.”).

¹⁶² *Heartwood*, 2008 WL 2151997 at *9.

¹⁶³ 16 U.S.C. § 1538(a).

¹⁶⁴ *AWI III*, 623 F.3d at 29.

¹⁶⁵ *Id.* (internal quotations and citations omitted).

¹⁶⁶ For a more persuasive construction of a “middle ground” test, see *Pac. Coast Fedn.*, 606 F. Supp. 2d at 1207 (distinguishing its irreparable harm test of a showing of significant impacts on the species from the species-level showing of “extirpation”).

¹⁶⁷ *AWI III*, 623 F.3d at 29.

¹⁶⁸ The district court in *AWI II*, explaining the test it applied, stated, “The Court reiterates its view that the proper test for determining irreparable harm is effect on the species as a whole, not on individual members of the species, unless the take of an individual member *has been demonstrated to affect the species as a whole.*” *AWI II*, 668 F. Supp. 2d at 264 (emphasis added).

¹⁶⁹ *See e.g. Humane Socy. of the U.S. v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008) (finding that the death of up to 2,000 listed salmon would not constitute irreparable harm); *Alabama v. U.S. Army Corps of Engrs.*, 441 F. Supp. 2d 1123, 1135 (N.D. Ala.

the *Winter* test applies to the ESA, freeing the analysis from a sliding scale framework.¹⁷⁰ As a result, irreparable harm becomes a stand-alone inquiry. Applying *Winter* also requires proof of likelihood of irreparable harm.¹⁷¹

Next, the courts look to early ESA analysis and frame *TVA v. Hill* in terms of its species-level impacts. The Supreme Court opinion has language to constrain judicial enforcement: “A federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law.”¹⁷² Courts then point to the Supreme Court’s belief that the Tellico Dam would have completely eradicated the snail darter species, implying that injunctive relief is the only available response to a species-level threat.¹⁷³ Whereas plaintiffs argue that *TVA*

2006) (finding no take established to warrant a temporary restraining order where hundreds of endangered mussels died as a result of the Army Corps of Engineers not releasing reservoir water into the downstream habitat of Apalachicola-Chattahoochee-Flint Basin species); *Pac. Coast Fedn.*, 606 F. Supp. 2d at 1207, 1253 (finding likelihood of irreparable harm because water projects were shown to reduce the chances of survival and recovery for endangered Chinook salmon); *Native Ecosystems Council*, 2011 WL 4015662 at *11 (finding no likelihood of irreparable harm to the Canada lynx or its habitat from the thinning of 7,000 acres of lodgepole pine); *Heartwood*, 2008 WL 2151997 at *9 (finding speculative harm to the Indiana bat from a potential outbreak of White Nose Syndrome to be insufficient to establish irreparable harm and prevent the continuation of the Ice Storm Recovery Project); *AWI II*, 668 F. Supp. 2d at 272–73 (finding no likelihood of irreparable harm where incidental takes or injuries of Canada lynx were not likely to cause damage to the species as a whole); *Bays’ Legal Fund v. Browner*, 828 F. Supp. at 114 (D. Mass. 1993) (finding no likelihood of irreparable harm where outfall tunnels discharged treated effluent into three Massachusetts bays, thereby threatening the food supply of a number of endangered whales); *Defenders of Wildlife*, 812 F. Supp. 2d at 1210 (finding no likelihood of irreparable harm where the deaths of individual Rocky Mountain gray wolves were deemed to be insufficient to affect the survival of the species as a whole); *N.W. Envtl. Def. Ctr.*, 817 F. Supp. 2d at 1315 (finding no likelihood of irreparable harm to Coho salmon, where a five-year regional permit was granted for in-stream gravel mining on the Chetco River, despite the projected taking of juvenile salmon as a result of habitat modification and heavy equipment crossing).

¹⁷⁰ See *Native Ecosystems Council*, 2011 WL 4015662 at *7 (“[I]rreparable harm has been described as ‘perhaps the single most important prerequisite for the issuance of a preliminary injunction.’” (internal citation omitted)). Disregarding an error cost balancing framework is an essential step in reasoning to a species-level effects standard. Otherwise, plaintiffs that can prove high likelihood of success on the merits will give courts pause. Would the court still be able to deny an injunction through a per se test that an individual take of a species creates zero irreparable harm? Consider the interests that the court would have to balance in *Defenders of Wildlife*. The court found a likelihood of success on the merits that wolves were unlawfully delisted, but denied preliminary injunctive relief of a planned wolf hunt because the wolf population could withstand having members killed. *Defenders of Wildlife*, 812 F. Supp. 2d at 1207.

¹⁷¹ *N.W. Envtl. Def. Ctr.*, 817 F. Supp. 2d at 1315 (applying *Winter* to an ESA challenge).

¹⁷² *TVA v. Hill*, 437 U.S. at 193. This language is quoted in, inter alia, *Ala. v. U.S. Army Corps of Engrs.*, 441 F. Supp. 2d at 1135; *AWI III*, 623 F.3d at 26.

¹⁷³ E.g. *Ala. v. U.S. Army Corps of Engrs.*, 441 F. Supp. 2d at 1135 (discussing the decision in *TVA v. Hill*, holding that injunctive relief is the only remedy to prevent the eradication of the entire species).

v. Hill signifies Congress “affording endangered species the highest of priorities,” courts rationalizing the species-level effects standard respond that *TVA v. Hill*’s precatory language is limited to the balance of equities—the third and fourth prongs of the *Winter* test¹⁷⁴—and does not govern irreparable harm.¹⁷⁵

Courts then generally point to the statutory allowance of incidental take permits to show congressional acceptance of harms to individual members; thus, a rule that “consider[s] any taking of a listed species as irreparable harm would produce an irrational result.”¹⁷⁶ In a similar use of statutory construction, one court reads the irreparable harm standard as “sufficiently analogous” to ESA Section 7(a)(2), which requires an adverse impact to the species as a whole.¹⁷⁷ Further, the purpose of the ESA is to prevent species endangerment and extinction.¹⁷⁸ The implication is that the harm alleged must be tethered to the *species* as the beneficiary of the statute, rather than

¹⁷⁴ *Winter*, 555 U.S. at 20.

¹⁷⁵ See *Defenders of Wildlife*, 812 F. Supp. 2d at 1207 (“While [*TVA v.*] *Hill* does hold that courts shall defer to Congress when it has decided priorities in a given area, and that Congress has done so with the ESA, this is not the promulgation of a unique preliminary injunction standard.”). Property rights groups advocating a species-level harms approach would even disagree with using *TVA v. Hill* for equity balancing. Brandon M. Middleton, *Restoring Tradition: The Inapplicability of TVA v. Hill’s Endangered Species Act Injunctive Relief Standard to Preliminary Injunctive Relief of Non-Federal Actors* 35 (Pac. Leg. Found., Program for Judicial Awareness, Working Paper Series No. 09-004, 2010) (available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=brandon_middleton [<http://perma.cc/GCS3-E2WQ>] (accessed Apr. 12, 2014)) (“Until there is further direction either from Congress or the Supreme Court itself on ESA preliminary injunctive relief against non-federal actors, courts should narrowly interpret *TVA v. Hill* by the traditional balancing of harms and consideration of the public interest.”). Rather than siphon *TVA v. Hill*’s powerful language into only two prongs of the preliminary injunction standard, Middleton would eliminate it entirely.

¹⁷⁶ E.g. *Defenders of Wildlife*, 812 F. Supp. 2d. at 1209 (“The ESA permits incidental takes of a listed species. If the death of a single wolf constituted irreparable harm, no species could be taken before it is delisted.” (internal citation omitted)). This is unpersuasive. When plaintiffs seek a preliminary injunction for a Section 9 violation, it is because defendants have not procured an incidental take permit. Why is it relevant that defendants could take an individual if they had an incidental take permit? If defendants did apply for and receive a lawful incidental take permit, the irreparable harm prong would not perform the work to deny an injunction. Instead, plaintiffs would lose by failing to show likelihood of success on the merits.

¹⁷⁷ See *Bays’ Legal Fund*, 828 F. Supp. at 108 n. 13 (“[T]he two standards are sufficiently analogous to treat them equivalently.”). Note, however, that the plaintiffs in the litigation alleged a violation of Section 7(a)(2). The court reasoned that the preliminary injunction harm inquiry should align with the substantive violation. *Id.* If so, then a preliminary injunction remedy for a Section 9 claim only requires injury to a single individual; ESA violations occur with the taking of an individual. *But see AWI III*, 623 F.3d at 28 (“AWI argues that it needs to show [no] species-level effect, since Section 9’s purpose is to prohibit takes of individual animals AWI’s argument mistakes the question of what violates the statute with the question of the appropriate remedy for a violation.”).

¹⁷⁸ *Defenders of Wildlife*, 812 F. Supp. 2d at 1210.

any broad definition of environmental injury.¹⁷⁹ Because the goal of a preliminary injunction is “to preserve the Court’s power to render a meaningful decision,” any unlawful action that still leaves the species standing by the time of the decision on the merits need not be enjoined.¹⁸⁰

The final step in reasoning through a species-level standard is to show that jurisprudence supports it. *Alabama v. Army Corps of Engineers* points to other opinions that similarly hold that more than individual takes are required for irreparable harm, piling precedent on the species-level side of the divide.¹⁸¹ Other courts distinguish individual-level effects precedent¹⁸² or redefine individual-effects cases as simply applying a species-level effect standard to a smaller population.¹⁸³

B. Individual-Level Harms

ESA jurisprudence also includes holdings that an individual taking establishes irreparable harm.¹⁸⁴ Courts take assorted approaches

¹⁷⁹ *Native Ecosystems Council*, 2011 WL 4015662 at *10; *S. Yuba River Citizens League v. Natl. Marine Fisheries Serv.*, 2013 WL 4094777 at *7 (E.D. Cal. Aug. 12, 2013) (“[W]ith respect to a Section 9 ‘taking’ claim under the ESA, the environmental plaintiffs must make a ‘concrete showing of probable deaths during the interim period’ and demonstrate ‘how these deaths may impact the species.’”).

¹⁸⁰ *Defenders of Wildlife*, 812 F. Supp. 2d at 1210. However, strategic framing of the baseline conditions can affect what it means to preserve the status quo for a meaningful decision. See *McKune v. Lile*, 536 U.S. at 45–46, which cast a reward/penalty distinction in prisoner treatment analysis into doubt, because of the concept of an “illusory baseline.”

¹⁸¹ *Alabama v. U.S. Army Corps of Engrs.*, 441 F. Supp. 2d at 1135–36.

¹⁸² *Defenders of Wildlife*, 812 F. Supp. 2d at 1209 n. 2.

¹⁸³ *Pac. Coast Fedn.*, 606 F. Supp. 2d at 1210 n. 12.

¹⁸⁴ See e.g. *Forest Conserv. Council*, 50 F.3d at 788 (finding irreparable harm due to habitat modification, which would actually injure a pair of Schwartz Creek owls); *Natl. Wildlife Fedn. v. Burlington N. R.R.*, 23 F.3d at 1512–13 (finding irreparable harm caused by takings through habitat modification requires showing “significant impairment [to] the species’ breeding or feeding habits and prov[ing] that the habitat degradation prevents, or possibly, retards, recovery of the species”); *Greater Yellowstone Coalition*, 321 F.3d at 1257–58 (finding the statutory language of the ESA “does not differentiate between harm to individual animals and harm to the species as a whole: rather, it looks to the impact on the ‘aquatic ecosystem’”); *Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1340 (S.D. Ala. 2002) (finding the loss of “individual members” of the Alabama beach mouse population was a taking that resulted in irreparable harm); *Kemphorne*, 481 F. Supp. 2d at 70 (finding irreparable harm caused by a depredation control program authorizing the lethal taking of forty-three gray wolves); *Fund for Animals, Inc. v. Turner*, 1991 WL 206232 at *8 (D.D.C. Sept. 27, 1991) (finding “the loss even of the relatively few grizzly bears” caused by an authorized sports hunt would result in irreparable harm); *Loggerhead Turtle*, 896 F. Supp. at 1181–82 (finding the taking of even a single individual of the protected species sufficient to constitute irreparable harm under the Act); *U.S. v. Town of Plymouth*, 6 F. Supp. 2d 81–82, 91 (D. Mass. 1998) (holding that the taking of a single piping plover chick on Plymouth Long Beach—even when the beach “experienced an increase in the number of nesting pairs”—was cause for preliminary injunctive relief sought by the U.S. Fish & Wildlife Service); *Animal Protec. Inst.*, 541 F. Supp. 2d at 1081 (finding irreparable harm caused by the threat of lynx takings under state-authorized trapping activities).

in embracing such a broad interpretation of irreparable harm. A common refrain cites to the environmental injury language of *Gambell*.¹⁸⁵ Courts interpret harm to individuals of a wildlife species as a type of *Gambell* injury. Like other environmental injuries, harms to wildlife are injuries no money award or other corrective relief can recompense—that is, these harms are irreparable. The focus is not on the gravity of the injury, but rather whether the injury is of a type that money damages cannot remedy.¹⁸⁶ Thus, when logging threatens destruction of an endangered species' habitat, “there is no adequate remedy at law” and irreparable harm is met.¹⁸⁷

In another oft-used approach, courts perform statutory construction to determine whether the threat of a single take suffices for irreparable harm. This use of ESA language parallels Judge Williams's argument that the threatened harm is defined in terms of the evil the statute intends to prevent.¹⁸⁸ The statutory analysis usually begins with an observation that a single take alone constitutes an ESA violation,¹⁸⁹ which compels the logical conclusion that threatening a single take can invoke ESA protections. The Act expressly identifies injunctive relief as the remedy.¹⁹⁰ By waiting for species-level effects, courts cannot prevent statutory harm, and are left with the option of acting only when a species is on the brink of extinction.¹⁹¹

Courts also point to ESA Section 10, which deals with take exemptions, as a means of highlighting Congress's desire to prohibit single individual harms. Thus, a court found a proposed wolf hunt “antithetical” to the requirement of “enhanc[ing] propagation or survival.”¹⁹² Another approach identifies the Section 10 incidental take process as Congress's preference that agencies, not courts, exempt actors from en-

¹⁸⁵ *Supra* n. 113 and accompanying text (quoting the relevant *Gambell* language). The refrain appears in, e.g., *Forest Conserv. Council*, 50 F.3d at 785 (citing *Gambell*, 480 U.S. at 545) (recognizing “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable”).

¹⁸⁶ *Sierra Club v. Martin*, 71 F. Supp. 2d 1268, 1327 (N.D. Ga. 1996).

¹⁸⁷ *Id.* at 1327–29 (finding “no adequate remedy at law” because “the individual sensitive plants and animals that will be killed cannot be replaced”).

¹⁸⁸ See *Burford*, 835 F.2d at 337 (Williams, J., concurring in part and dissenting in part) (describing the relevant harm as “defined in terms of the evil that the particular statute was designed to prevent”).

¹⁸⁹ See *Loggerhead Turtle*, 896 F. Supp. at 1180 (recognizing that the ESA “does not distinguish between a taking of the whole species or only one member of the species. Any taking and every taking—even of a single individual of the protected species—is prohibited by the Act.” (emphasis in original)); *Strahan v. Cox*, 127 F.3d 155, 158, 165 (1st Cir. 1997) (affirming preliminary injunction against state permitted use of gillnets and lobster pots because of their threat to the Northern Right whale, though only eleven whales were entangled in seventeen years).

¹⁹⁰ 16 U.S.C. § 1540(g); *Loggerhead Turtle*, 896 F. Supp. at 1180–82.

¹⁹¹ *Kemphorne*, 481 F. Supp. 2d at 69.

¹⁹² *Id.* at 56, 62.

forcement of incidental, minimal takes.¹⁹³ Thus, for example, a proposed regulation allowing vehicles on beaches at night must be evaluated by the Department of Interior—as opposed to federal courts—for its impact on endangered sea turtles.¹⁹⁴

Statutory construction and legislative history also imply broad policy interests underlying the ESA. Some courts read the high prioritization of species as an indicator of the irreparability of an adverse impact on any of its members.¹⁹⁵ The additional value placed upon a discrete, listed group gives heightened significance to harm to any individual within the group.¹⁹⁶

Such a broad interpretation of liability, combined with legislative history, leads courts to a purposivist understanding of irreparable harm. This appeal to congressional purpose has a collateral benefit in how it parries the species-level harms argument about the Court's decision in *TVA v. Hill*. Rather than debate whether the Supreme Court only enjoined the Tellico Dam because its construction would extirpate an endangered species, the purposivist approach instead focuses on *TVA v. Hill*'s review of congressional intent. A court applying the individual-level harm standard can accept the factual outcome of *TVA v. Hill* and simultaneously argue that the Tellico Dam dispute allowed the Court to emphasize Congress's acute concerns about disappearing species. Such an argument would underscore the gravity of a loss or injury to any of the species' members.¹⁹⁷ By logically connecting the congressional desire for species protection to a lower threshold of harm necessary to invoke the ESA's protections, courts remove injunction-

¹⁹³ See *Animal Protec. Inst.*, 541 F. Supp. 2d at 1076 (noting that escape from ESA liability via Section 10—16 U.S.C. § 1539—requires obtaining an incidental take permit, which must meet the requirements prescribed by the Secretary).

¹⁹⁴ *Loggerhead Turtle*, 896 F. Supp. at 1179 (“If Congress had wanted the federal courts to undertake a similar balancing of interests, it could have enacted such legislation.”).

¹⁹⁵ *Id.* at 1180 (noting “the broad scope and legislative history of the Act convinces the Court that a showing of threatened future harm to a protected species creates an irrebuttable presumption that the threatened harm is irreparable” as “[t]he value of this genetic history is, quite literally, incalculable” (internal citations and quotations omitted)); *Turner*, 1991 WL 206232 at *8 (finding “[i]n light of this Congressional mandate, the loss even of the relatively few grizzly bears that are likely to be taken through a sport hunt during the time it will take to reach a final decision in this case is a significant, and undoubtedly irreparable, harm”).

¹⁹⁶ See *Forest Conserv. Council*, 50 F.3d at 785 (“Once a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult.”). The court in *Forest Conservation Council* found that even impairment of the behavioral patterns—including breeding, feeding, and sheltering—of two endangered owls injured the special protection that Congress placed on the species. *Id.* at 788.

¹⁹⁷ *Turner* appears to read Congress's call for species protection for its expressive value. So even if the grizzly bear species on the whole is not impacted, a sport hunt undertaken “in light of this Congressional mandate” creates significant and irreparable harm. *Turner*, 1991 WL 206232 at *8.

constraining implications of *TVA v. Hill* from the irreparable harm prong.¹⁹⁸

Compared to a species-level approach, the individual-level test for irreparable harm increases the availability of injunctive relief. As a result, self-aware courts respond to concerns of an ESA leviathan by narrowly tailoring the scope of their injunctions.¹⁹⁹ Narrowly tailoring the injunctive relief to the specific causes of the ESA harm aims to reduce the magnitude of the costs of error. For example, while artificial beachfront lighting was found to harm and harass turtles, plaintiffs were not able to show that it was reasonably likely to result in future takes; yet because plaintiffs were able to show that vehicle headlights were reasonably likely to result in future takes, only the latter was enjoined.²⁰⁰

C. Replacing Plaintiff's Harm with Protected Species Harm

The ESA preliminary injunction jurisprudence is also rife with opinions that either avoid discussing or inconsistently identify *whose* harm matters.²⁰¹ Whether a court leans toward species-level or individual-level harms, the distinction itself detaches irreparable harm from the unique interests of the human plaintiff and performs the irreparable harm inquiry from a wildlife perspective. The result of such detachment is that plaintiffs must prove two separate categories of harm: injury in fact to their human interests, then harm to the wildlife.

Once the focus turns to the wildlife—rather than to the plaintiff—the question of “irreparable harm” to a species becomes a tricky concept to articulate. Does harm to individuals in a protected group imply harm to the entire group? Or must the entire group show signs of injury, such as decreasing population? If so, what meets the threshold? What types of data and biological analysis would prove that the threshold is met?

¹⁹⁸ Removing the judicial constraints on one prong of ESA preliminary injunctions simply shifts them to another prong. The court in *Turner* thus accepted irreparable harm but was “sensitive to the harms articulated by defendants that may result from the issuance of a preliminary injunction.” *Id.* at *8. On the other hand, Ninth Circuit courts employ a unique ESA injunction standard that balances equities in favor of protected species, thus focusing their scrutiny on irreparable harm. *Supra* nn. 147–148 and accompanying text. The central challenge for plaintiffs is that judges are not mechanically obligated to issue injunctions for violations of law. *TVA v. Hill*, 437 U.S. at 193. Thus, if one prong is automatically met because of the congressional purpose of the ESA, courts may allow for some play in another prong.

¹⁹⁹ *Animal Protec. Inst.*, 541 F. Supp. 2d at 1080 (“Such relief must be precisely tailored to remedy the precise violation of the [defendant].”).

²⁰⁰ *Loggerhead Turtle*, 896 F. Supp. at 1181–82.

²⁰¹ Woodward, *supra* n. 63, at 518; compare *S. Yuba River Citizens League* at *6 (noting that a plaintiff must show that he will suffer irreparable harm) with *id.* at *7 (for an ESA Section 9 case, plaintiff must show how deaths to listed animals “may impact the species” (internal quotations omitted)).

Such questions illustrate the necessity for both expert analysis and an existing standard against which to measure wildlife effects.²⁰² But Congress placed the standard for determining the allowable level of harm against a listed species into the province of a precise Executive Branch mechanism: the incidental take permit process. Court analysis of effects on wildlife thus conflates the roles of the reviewing court and the expert agency as synoptic planner in the statutory scheme.²⁰³

Replacing human plaintiff interests with a wildlife perspective poses risks that federal courts will act beyond the “common understanding of what activities are appropriate to legislatures, to executives, and to courts.”²⁰⁴ As explained in detail below, the approach that provides better clarity and consistency defines irreparable harm according to plaintiffs and leaves wildlife analysis to the agency. This synchronizes the irreparable harm with injuries alleged in standing.

V. COURTS SHOULD SYNCHRONIZE HARM UNDER THE STANDING AND INJUNCTION STANDARDS

There are four approaches to assessing standing and injunction injuries in private wildlife lawsuits.²⁰⁵ Two approaches look to animal injury for the standing inquiry; these are prohibited by the Endangered Species Act (ESA) citizen-suit provision.²⁰⁶ A third approach, often seen in ESA jurisprudence, analyzes human harm for injury in fact, then turns to animal injury at the preliminary injunction stage. Such an approach promotes uncertainty in the law and enables courts to set up the individual-level and species-level effects divide. The final approach is to perform a human harm inquiry for both standing and preliminary injunctions.²⁰⁷ This Part first describes how the human

²⁰² Cf. *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) (finding general unsuitability for judicial review when an “agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities”).

²⁰³ Appellants’ Reply Br. at 22–23, *AWI v. Martin* (No. 09-2643, 623 F.3d 19 (1st Cir. 2010)) (on file with *Animal Law*) [hereinafter Appellant’s Reply Br., *AWI v. Martin*]; see also *Intl. Primate Protec. League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934, 940 (4th Cir. 1986) (denying a claim under the Animal Welfare Act because “[i]t is clear that the supervisory goals of the statute were to be realized through a regime of administrative enforcement”).

²⁰⁴ *Lujan*, 504 U.S. at 559–60.

²⁰⁵ The “Proposals” section in Woodward’s note presents three options for assessing standing and injunction in animal lawsuits: (1) “human standing, human harm analysis”; (2) “human standing, human and animal harm analysis”[;] and (3) “animal standing, animal harm analysis.” Woodward, *supra* n. 63, at 527–31. Woodward omits a fourth conceptual approach, which would be an animal standing, human harm analysis. If this fourth approach seems absurd, one must ask why: Is it because animals cannot possibly have standing, or rather the logical disconnect between granting standing, but then measuring human harms for injunctive relief?

²⁰⁶ See *supra* nn. 59–63 and accompanying text (noting how the citizen-suit provision of the ESA removes zone-of-interest and third-party claims concerns).

²⁰⁷ See e.g. *Sierra Club v. Army Corps of Engrs.*, 645 F.3d at 996 (finding injunctive relief appropriate when plaintiffs’ harm was to their enjoyment of the environment).

standing, human harm analysis occurs in practice, then analyzes the consequences of its application.

A. *Mechanics of Proposed Approach*

An approach where courts look to human harm for both standing and preliminary injunction injury leaves current standing doctrine unaffected.²⁰⁸ Once plaintiffs prove standing, the preliminary injunction test should follow along traditional injunction lines, centered on the human plaintiff.²⁰⁹ The irreparable harm inquiry then concerns human interests: Will the take of a listed species—fatal or not—affect the plaintiff's aesthetic experience of the species?

In the context of the Animal Welfare Act, the D.C. Circuit has concluded that aesthetic injury does not need to be a reduction in “supply” of animal experiences.²¹⁰ Rather, human injury can include an affront to aesthetic interests in such nonfatal cases as observing animals living in humane habitats, or in using pristine environmental habitats.²¹¹ Thus, both fatal and nonfatal take can cause human harm. Thus, irreparability—historically the dividing line between damages and injunctive relief—becomes the key inquiry.²¹² Courts typically determine irreparability by comparing injunctive remedies to prevent a threatened injury and money damages that will compensate for the injury after it has occurred; if money damages are adequate, the injury is not irreparable.²¹³ The Supreme Court and others have found environmental and wildlife injury irreparable.²¹⁴

²⁰⁸ ESA standing jurisprudence already looks to human injury in fact. Woodward, *supra* n. 63, at 528.

²⁰⁹ See *supra* nn. 82–89 and accompanying text (explaining courts' use of factors to balance costs of error in the preliminary injunction test).

²¹⁰ *Animal Leg. Def. Fund*, 154 F.3d at 437.

²¹¹ *Id.* (marshalling precedent to show that aesthetic injury was not just a loss of sensory experience because of reduced animal numbers, but also because of the “humane” aspects of animal harm). In fact, action that leads to a persistent state of suffering “seems capable of causing more serious aesthetic injury” to the plaintiff. *Id.* at 438.

²¹² Laycock, *supra* n. 111, at 381.

²¹³ *Id.* at 381. Laycock provides an assortment of modern justifications for this irreparable injury rule. Of these justifications, the author of this Article finds the concern for “efficient theft” to most logically support ESA injunctions. *Id.* at 383; see also *supra* nn. 84–85 and accompanying text (providing a formula for when to grant a preliminary injunction). Congress has placed the utmost priority on endangered and threatened species, particularly for potential contribution to humanity. See *TVA v. Hill*, 487 U.S. at 174. Private actors should not be free to take the nation's resources without public consent and cannot recompense an ESA violation with mere damages.

²¹⁴ See *supra* pt. III (discussing the practical application of the irreparable harm standard under various environmental statutes); e.g. *Sierra Club v. Martin*, 71 F. Supp. 2d at 1327 (“[L]ogging will destroy certain sensitive plants and animals located in the timber project areas No monetary award can recompense this injury; thus, there is no adequate remedy at law for these injuries.”); but see Woodward, *supra* n. 63, at 529 n. 137 (arguing that if “the primary focus remains on the human harm, [it] can often be redressed with money (whereas harm to animals and the environment cannot be redressed with money unless the money is given to a caretaker for use on the environment's behalf”). Note, however, how the ESA citizen-suit provision limits recovery to

Enjoining irreparable ESA takings is necessary to satisfy the redressability prong of standing.²¹⁵ If a court categorically denies an injunction for individual takings regardless of the harm to the human plaintiff, then standing injuries in fact are never redressed. Under the *de minimis* take approach of *AWI*, a favorable judicial finding of an ESA violation can only lead to a declaratory judgment or money damages. Neither remedy will redress a plaintiff's aesthetic injuries.

A few courts have synchronized human-centered irreparable harm with the human standing inquiry. Plaintiffs, who observe and visit bison, can demonstrate irreparable harm when claiming that "seeing or even contemplating" treatment of bison inherent in an organized hunt would cause aesthetic injury not compensable in money damages.²¹⁶ Similarly, plaintiffs who regularly observe mute swans can demonstrate the likelihood of irreparable harm from a proposed state culling initiative.²¹⁷ Recently, the Eighth Circuit found that a human plaintiff can have a "very important" interest in protecting all endangered species on his property—thus a proposed power plant's effects on the Ouachita pocketbook mussel would cause the plaintiff irreparable harm.²¹⁸

injunctive relief. 16 U.S.C. § 1540(g). One implication from such limitation is congressional awareness of the irreparability of human aesthetic injury from ESA violations; a second implication, imbued in the *TVA v. Hill* opinion, is that Congress understood the availability of money damages for private suits, but sought to restrict courts to the severe remedy of injunction. *TVA v. Hill*, 437 U.S. at 194.

²¹⁵ *Cf. Mass. v. EPA*, 549 U.S. at 546 (Roberts, C.J., Scalia, Thomas & Alito, JJ., dissenting) ("The Court's sleight of hand is in failing to link up the different elements of the three-part standing test. What must be *likely* to be redressed is the particular injury in fact.").

²¹⁶ *Clark*, 27 F. Supp. 2d at 14 (NEPA claim). Gormley notes that plaintiffs' emotional reactions could at least create injury in fact. *See Gormley, supra* n. 49, at 406 ("[I]n *Laidlaw*, a 'reasonable fear' of illness stemming from toxic emissions was enough to confer standing.").

²¹⁷ *Norton*, 281 F. Supp. 2d at 222 (NEPA claim). The court also noted that irreparable harm to human plaintiffs can occur even when defendants' acts affect different wildlife individuals than those whom the plaintiffs regularly observed. *Id.* at 221.

²¹⁸ *Sierra Club v. U.S. Army Corps of Engrs.*, 645 F.3d at 996; *see also id.* at 995 ("It may have used imprecise language in finding a likelihood of irreparable harm 'to the environment' rather than to the plaintiffs' study and enjoyment of it, but in this case irreparable harm to the environment necessarily means harm to the plaintiffs' specific aesthetic, educational and ecological interests."). Two other recent district court opinions looked to the human interest in analyzing irreparable harm for lawsuits to protect wildlife. *See Or. Denying Prelim. Inj., Native Songbird v. LaHood* at *31 ("For very good reasons, courts, including this one[,] recognize a special solicitude for harms to the environment, and the attendant injury those harms inflict on people who care for it."); *Op. & Or., Humane Socy. of the U.S. v. Bryson* at *23 ("The individual Plaintiffs will suffer real emotional and aesthetic injury from the knowledge that [California Sea Lions] have been killed as a result of the authorizations, and this injury is not compensable with monetary damages.").

B. Advantages

Synchronizing the harm inquiries of standing and preliminary injunctions offers numerous advantages, six of which are discussed in this section.

1. Consistency and Efficiency

By creating consistency, the standing doctrine in animal cases is no longer a blatant legal fiction.²¹⁹ Logical consistency appears to be a selling point for Justice Scalia, who explicitly evoked the requirements of Article III standing in oral argument discussing the plaintiff's harms for injunctive relief in *Winter*.²²⁰ Scalia embraced the aligning of standing and preliminary injunction harms, which environmentalists view skeptically.²²¹ However, aligning the harms is not the death knell for ESA protections. Irreparable harm links to the evil that the statute confronts, and the unique purpose arising from the ESA's strong statutory language indicates that even slight harm to the plaintiff can be irreparable.²²²

A preliminary injunction harm inquiry linked to standing will provide judicial efficiency. Under a wildlife harm analysis, a judicial finding of insufficient injury for a preliminary injunction means that the redressability prong was not met in the first place.²²³ As a result, arguments about wildlife effects move up to the standing inquiry, and standing challenges incorporate burdensome arguments on the merits of the case.

²¹⁹ See David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 Harv. Envtl. L. Rev. 79, 94 (2004) (describing how it strains logic to conclude that human plaintiffs' interests mirror those of animals or the environment).

²²⁰ Gormley, *supra* n. 49, at 405–06.

²²¹ Kendall, *supra* n. 103, at 11116 (arguing that Natural Resources Defense Council did not want to clear up Justice Scalia's confusion about applying the same harm to separate tests because it would lead Scalia "to create a majority for the proposition that the First Circuit standard of irreparable harm is incorrect").

²²² As one scholar recently argued, "For hundreds of years, courts have had the power to award prospective relief, such as an injunction, to prevent future injuries," regardless of the size of threat. F. Andrew Hessick, *Probabilistic Standing*, 106 Nw. U. L. Rev. 55, 58 (2012). "A plaintiff who faces a small threat of injury likewise has a real interest in reducing that risk of injury. The plaintiff's interest is no less real than the interest held by an individual in avoiding a threatened injury that is extremely likely to occur." *Id.*; cf. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 61 n. 10 (1976) (Brennan & Marshall, JJ., concurring in judgment) (reading the law to allow a "small but certain" harm as sufficient basis for standing (citing *U.S. v. SCRAP*, 412 U.S. 669, 689 (1973))); but see Woodward, *supra* n. 63, at 529 (arguing that viewing harm through the human perspective "trivialize[s] the threat to wildlife" as collateral).

²²³ See *supra* pt. V(A) (discussing the approach that some courts take in looking to human harm resulting from the take of a listed species for both standing and preliminary injunction inquiries).

2. Avoidance of Judicial Shortcomings

The species-level versus individual-level harms divide has major shortcomings in its assumption that federal courts have both a scientific expertise in the subject matter and delegation from Congress to choose between the two bases of injury. Neither is present.²²⁴ A judicial determination that a single take is insufficient for irreparable harm—regardless of its impact on a human plaintiff—thus supplants the expert role that Congress assigned to the National Marine Fisheries Service (NMFS) and the U.S. Fish & Wildlife Service (FWS) in Sections 7 and 10 of the ESA.²²⁵

As the centralized expert agencies regarding listed species, NMFS and FWS retain comparatively higher institutional competency over the effects of a taking. Such questions can require deep, complex analysis, and the answers are not immediately clear. Consider the passenger pigeon, at one time a fixture of the American sky. The passenger pigeon was a social species that would roost en masse; females laid one or two eggs a year, and upon dropping below a certain threshold, the species could not recover.²²⁶ In such an example, a judge is not as well situated as a single-mission expert agency to decide what level of attacks a species can withstand.²²⁷ An approach that looks to human harm at the preliminary injunction stage bypasses this judicial shortcoming. Courts can instead rule within their functional wheelhouses, determining the irreparability of the plaintiff's injury.

The proposed approach limits judges to a proper role of resolving cases or controversies without intruding upon the political branches by replacing the incidental take permit (ITP) process. A multi-pronged preliminary injunction analysis aims to reduce the costs of error before full trial.²²⁸ However, in its concerns over threats to listed species, Congress made clear that expert agencies are better situated than courts to balance the costs of error.²²⁹ But many Section 9 cases do not

²²⁴ Note that these are the two foundational justifications for *Chevron* deference. *U.S. v. Mead Corp.*, 533 U.S. 218, 229 (2001) (explaining agency deference under *Chevron*). Because they are both present with regard to FWS and NMFS enforcement of ESA takings, it is surprising to find some courts unwilling to defer to the agencies, freeing defendants from the incidental take permit process.

²²⁵ Br. of Appellants at 44, *AWI v. Martin* (No. 09-2643, 623 F.3d 19 (1st Cir. 2010)) (on file with *Animal Law*) [hereinafter Br. of Appellants, *AWI III*].

²²⁶ Andrew D. Blechman, *Pigeons: The Fascinating Saga of the World's Most Revered and Reviled Bird* 121 (Grove Press 2006).

²²⁷ Cf. *Sierra Club v. Marita*, 46 F.3d 606, 621 (7th Cir. 1995) (denying the plaintiff's claims that national forests in northern Wisconsin be managed according to conservation biology principles, because the court deferred to the Forest Service's institutional competency to make the scientific environmental decisions).

²²⁸ See *supra* pt. II(B)(2) (explaining how four factors work together to minimize the cost of errors when courts determine whether to issue preliminary injunctions).

²²⁹ See Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning under the Endangered Species Act of 1973*, 21 *Envtl. L.* 605, 612–15 (1991) (explaining the amendments to the ESA, passed in response to district court decisions, that permit certain takings in compliance with terms set by FWS).

involve FWS and NMFS as parties, and thus courts are often left to make such decisions without the views of FWS and NMFS.²³⁰ By constructing a prophylactic definition of take and developing a complex agency process to permit takes, Congress clearly selected the actor that it wanted to scrutinize the potential effects on even an individual of a listed species.²³¹

Congress carefully crafted the ITP provision to authorize otherwise unlawful takes only after expert agencies impose conditions necessary to protect the species consistent with the requirements of the Act.²³² Thus, when a court allows takes outside of the ITP process, it does not merely intrude on the agency's field; it removes any incentive for a private defendant to seek a permit, rendering the process obsolete.²³³ Preliminary injunctive relief is the judicial safety net necessary to ensure that actors undergo the ITP process.

Judicial intervention that defangs congressionally delegated agency procedures infringes on the separation of powers. As Justice Scalia has written, the Supreme Court has always rejected judicial assumption of authority to "monitor . . . the wisdom and soundness of executive action."²³⁴ In *American Electric Power Co., Inc. (AEP) v. Connecticut*, the Supreme Court recently precluded district court decision making in favor of agency action that displaced common law nuisance claims related to carbon dioxide emissions because Congress "installed an all-encompassing regulatory program, supervised by an expert administrative agency, to deal comprehensively" with the issue.²³⁵ The displacement doctrine is rooted in congressional delegation, and where such delegation rises to agency occupation of the field,

²³⁰ See e.g. *Or. Denying Prelim. Inj., Wild Equity Inst. v. City of San Francisco* at *1 (ruling on plaintiffs' request for a preliminary injunction against defendant City and County of San Francisco and defendant-intervenor San Francisco Public Golf Alliance).

²³¹ See 16 U.S.C. § 1532(19) (providing a broad definition of take); see also *id.* at § 1539(a)(2)(A) (creating a complex agency determination process for permitting incidental takes).

²³² *Id.* at § 1539(a)(2)(A).

²³³ The First Circuit argues that judicial creation of *de minimis* take is not problematic because "[t]here is no reason to think that while Congress intended for FWS to consider the facts as to whether species-wide harm would be done before it can issue an ITP, it intended to preclude a federal judge from considering the same facts." *AWI III*, 623 F.3d at 29. However, the denial of preliminary injunctions goes much further than the First Circuit admits. It destroys all incentives to follow Section 10 of the ESA. Why undertake the transaction costs of applying to the agency and developing a habitat conservation plan when you can instead receive protection from a district court?

²³⁴ *Lujan*, 504 U.S. at 577. Conservative judges advocating for judicial inaction offer the common separation-of-powers arguments in this context. But statutes installing administrative schemes with accompanying judicial enforcement should alter separation-of-powers analysis; a hands-off court, in effect, denies Congress's intent to provide judicial oversight of agency action. *Id.* at 602 (Blackmun & O'Connor, JJ., dissenting). Thus, statutory schemes, such as the ESA, require judicial action—here in the form of injunction—to ensure that the Executive Branch is placed to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

²³⁵ *Am. Elec. Power Co., Inc. v. Conn.*, 131 S. Ct. 2527, 2534, 2537 (2011).

the Court sees “no room for a parallel track.”²³⁶ *AEP*’s subject analogizes well to judicial intrusion on the ITP process. In analyzing whether the agency occupied the field, the Court identified statutory factors for the Environmental Protection Agency (EPA) to determine if carbon dioxide reductions are “practical, feasible and economically viable.”²³⁷ Under the ESA, Congress maps out factors that the agency must consider in assessing whether a taking “appreciably reduce[s] the likelihood of the survival and recovery of the species.”²³⁸ Thus, Congress has identified the agency as occupier of the field that determines whether a prohibited take will jeopardize or impair a species.²³⁹

Moving the biological assessment of takings away from the agency also removes a level of consistency and uniformity from ESA decisions. As the Supreme Court notes in *AEP*, “federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.”²⁴⁰ The divide between individual-level and species-level harms captures this institutional inconsistency. In contrast, centralized agencies that review ITP applications provide ex ante certainty for actors affecting listed species.²⁴¹

3. *Satisfaction of the Commercial Element of the Commerce Clause Authority*

A focus on human harm helps parry a Commerce Clause attack on the ESA. Constitutional challenges to Congress’s power to enact the ESA have cooled over recent years, but still lurk in academic literature

²³⁶ *Id.* at 2538. “The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize . . .” *Id.* at 2539.

²³⁷ *Id.* at 2540. Opponents of this view of the predominance of the ITP process may argue that the *AEP* analogy should not apply: In *AEP*, the precluded judicial activity was a federal common law doctrine, whereas here displacement would remove an element of remedial analysis. However, both the remedy of injunction and the reach of judicial review are arguably grounded in common law. See *Webster v. Doe*, 486 U.S. 592, 608–10 (1988) (Scalia, J., dissenting) (explaining the “common law” of judicial review of agency action).

²³⁸ 16 U.S.C. § 1539(a)(2)(B).

²³⁹ Br. of Appellants, *AWI III* at 46.

²⁴⁰ *Am. Elec. Power Co.*, 131 S. Ct. at 2540.

²⁴¹ FWS and NMFS are centralized agencies under the ESA because, in contrast to NEPA, all agencies and private actors consult them when a proposed action risks taking an individual or habitat protected by the statute. 16 U.S.C. § 1536. This structure provides additional wildlife protection benefits. A focus on consulting leads to agency staffing of biology experts. See U.S. Fish & Wildlife Serv., *Consultations with Federal Agencies* 1–2 (Apr. 2011) (available at <https://www.fws.gov/endangered/esa-library/pdf/consultations.pdf> [<http://perma.cc/7CCP-QYX2>] (accessed Apr. 12, 2014)) (describing FWS’s consultation process with other agencies). The agencies’ wide reviews of proposed projects and incidental takes dilute the concentrated power of interest groups, thus removing a degree of susceptibility to capture. And, as iterative consultants, the agencies can refine their methodologies.

and occasional federal litigation.²⁴² Advanced by property rights groups, the challenge argues that Congress has no authority to regulate activity occurring within state borders. Circuits considering the challenge have found that even where listed species exist entirely intrastate, the comprehensive regulatory scheme's "substantial relation to commerce" justifies federal regulation.²⁴³ Referencing Justice Scalia's opinion in *Gonzalez v. Raich*, courts "refuse to excise individual components" of a larger regulatory scheme.²⁴⁴

An emphasis on the human harm to the plaintiff helps satisfy the necessary commercial element of Commerce Clause authority. Commerce Clause jurisprudence allows regulation of discrimination in hotels and restaurants because of the relation to interstate commerce.²⁴⁵ Similarly, the Commerce Clause is also implicated when visitors travel to aesthetically experience rare species. Further, a prohibited take can irreparably harm the human interest in commercial utilization of a recovered species.²⁴⁶

4. Alignment of the ESA's Text and Purpose

Linking the preliminary injunction harm inquiry to standing makes the irreparable harm test less restrictive than species-level effects and more in line with the ESA's text and purpose. The ESA's legislative history shows a preference for injunctive relief, even when effects on the species or its population are uncertain.²⁴⁷

²⁴² See Pet. for Writ of Cert., *Stewart & Jasper Orchards v. Salazar*, 2011 WL 2532943 at **2–3 (June 22, 2011) (No. 10-1551) ("The government is currently engaged in a misguided attempt to regulate a noneconomic activity—the 'take' of noncommercial delta smelt—under a noneconomic statute."); Scott Schwartz, *The Hapless Ecosystem: A Federalist Argument in Favor of an Ecosystem Approach to the Endangered Species Act*, 95 Va. L. Rev. 1325, 1326–27 (2009) (arguing for an ecosystem-based approach to wildlife protection, considering that the Roberts Court can easily distinguish Commerce Clause precedent to find that the ESA violates the Commerce Clause).

²⁴³ *Gibbs v. Babbitt*, 214 F.3d 483, 493 (4th Cir. 2000) ("Because the taking of red wolves can be seen as economic activity in the sense considered by *Lopez* and *Morrison*, the individual takings may be aggregated for the purpose of Commerce Clause analysis. . . . This is especially so where, as here, the regulation is but one part of the broader scheme of endangered species legislation."); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1176–77 (9th Cir. 2011) (collecting opinions).

²⁴⁴ *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1177; but see *Natl. Fedn. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (holding that the individual mandate of the Affordable Care Act cannot be upheld as an exercise of Congress's power under the Commerce Clause). The holding places in doubt the authority for congressional power to enact the ESA.

²⁴⁵ E.g. *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964) (holding that Congress acted within its Commerce Clause power to apply the Civil Rights Act of 1964 to places of public accommodation); *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (finding that Congress acted within its Commerce Clause power when it extended coverage of the Civil Rights Act of 1964 to restaurants).

²⁴⁶ This fits within the statutory purpose for preserving biodiversity. *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1275 (11th Cir. 2007).

²⁴⁷ "Injunctions provide greater opportunity to attempt resolution of conflicts before harm to a species occurs. . . . The ability to enjoin a violation of the Act rather than the

Such a precautionary concern guides application of the principle that preliminary injunctions minimize the costs of error: Congress has given high priority to the costs by prohibiting single takes.²⁴⁸ Judicial refusal to enjoin impending or ongoing violations ignores the explicit provisions of the ESA, which give species protection the utmost priority.²⁴⁹ Requiring an additional, distinct inquiry of harm at the preliminary injunction stage is particularly problematic because the standing elements already set a higher threshold of harm than Congress envisioned for ESA protections to apply.²⁵⁰ Courts that vacillate between human plaintiff and wildlife beneficiaries in determining the harm threshold thwart Congress's desire for a quick injunction trigger. Synchronizing the harms in standing and preliminary injunction inquiries streamlines the procedural burdens.

Similarly, the human harm-based preliminary injunction standard enables courts to incorporate the congressional intent of species recovery into the determination of equitable relief.²⁵¹ By requiring plaintiffs to show jeopardy to the species in order to enjoin private takings, courts read recovery goals out of the ESA.²⁵² An irreparable harm standard based on human injury will not preclude consideration of the statutory concern for species recovery.

ability only to prosecute a completed violation will better serve the interests of the public, the potential violator and the potentially harmed species." Sen. Rpt. 97-418 at 24 (May 26, 1982). *TVA v. Hill* referred to this element of the ESA framework as "institutionalized caution." *TVA v. Hill*, 437 U.S. at 194.

²⁴⁸ *Supra* n. 24 and accompanying text.

²⁴⁹ Appellants' Reply Br., *AWI v. Martin* at 23 (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982)).

²⁵⁰ See Carter, *supra* n. 35, at 2204 ("Although the ESA extends protection to endangered species, only human persons who suffer personal injury have standing to enforce its protections via citizen suit. Therefore, some harm outside the purpose of the statute must occur to permit enforcement in Article III courts." (internal footnote omitted)).

²⁵¹ See *supra* n. 145 and accompanying text (discussing how Congress unambiguously identified "the recovery of the species" as the ESA's purpose).

²⁵² Interview with Timothy Preso, Managing Atty. of the N. Rockies Earthjustice Off. in Bozeman, Mont. (Spring 2012); see Jennifer Jeffers, *Reversing the Trend towards Species Extinction, or Merely Halting It? Incorporating the Recovery Standard into ESA Section 7 Jeopardy Analysis*, 35 Ecol. L.Q. 455, 465 (2008) ("Guaranteeing the ultimate survival of a species is only possible if recovery efforts necessary to ensure survivability are considered. For instance, a species is listed on the ESA because its population size is already so decimated that it is 'highly vulnerable to extinction without added pressure.' [A]ny new adverse impacts to the species could significantly increase the risk of detrimental harm, and even lead to possible extinction. . . . In essence, a listed species will continue to decline in numbers over time unless its population . . . [is] measurably moving in the direction of recovery."); Federico Cheever, *The Road to Recovery: A New Way of Thinking about the Endangered Species Act*, 23 Ecol. L.Q. 1, 5-7 (1996) ("[T]he problem is not with the text or intent of the Endangered Species Act itself, but with the way it has been used and perceived. . . . Litigants, courts, and legal scholars have emphasized the enforcement of the Act's specific prohibitions at the expense of the Act's larger purpose. . . . [T]he concept of recovery should be the lens through which we view all of the Act's mandates.").

5. *Explicit Acknowledgement of the Relationship between Remedy and Violation*

A focus on wildlife harms for injunctive relief can bleed backwards into the court's view of what constitutes a violation. Because rights and remedies are functionally interrelated, courts might confuse the irreparable harm inquiry with the determination of an ESA violation.²⁵³ Such confusion is more likely when courts consider wildlife for irreparable harm. When the irreparable harm standard is harder to show, for example, when it requires species-level effects, a rights–remedy confusion can erode the prophylactic nature of the take prohibition. One court has already applied a species-level effects test at the liability stage, determining whether the defendant violated Section 9 through habitat modification.²⁵⁴ A focus on the human plaintiff for irreparable harm does not risk rights–remedy confusion, but rather forces courts to explicitly acknowledge the relationship between the remedy and the violation.²⁵⁵

6. *Clarification of the Focus of the ESA*

Lastly, the synchronized approach helps resolve a tension inherent in the statute: while the tangible protections apply to wildlife, the ESA is fundamentally a human-centered statute. The ESA does not put the interest of “‘obscure’ species ahead of the interests of man, [but instead] puts foremost . . . the long-term interest of human[s].”²⁵⁶ The findings, purpose, and structure of the ESA indicate that Congress acted out of a concern for human interests in the threatened and endangered species.²⁵⁷ Focusing on the harm to the human plaintiff better fits the remedy to the underlying intent of the statute.²⁵⁸

²⁵³ Note that this can cut both ways. Courts feeling obligated by the ESA to broadly issue preliminary injunctive relief may try to insert equitable factors into the liability decision. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857, 885 (1999) (describing the phenomenon of remedial deterrence as “the threat of undesirable remedial consequences motivating courts to construct the right in such a way as to avoid those consequences”).

²⁵⁴ *Coalition for a Sustainable Delta*, 725 F. Supp. 2d at 1196.

²⁵⁵ Cf. Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 Stan. J. Intl. L. 279, 322 (2011) (“[S]cholars argue that courts should openly acknowledge when they withhold certain remedies because they find them troubling.”).

²⁵⁶ Amy Sinden, *The Economics of Endangered Species: Why Less Is More in the Economic Analysis of Critical Habitat Designations*, 28 Harv. Envtl. L. Rev. 129, 146 n. 81 (2004) (citing 124 Cong. Rec. 38, 126 (1978) (statement of Rep. Dingell)).

²⁵⁷ The “Findings” section declares that species are of, inter alia, aesthetic, historical and scientific “value to the Nation and its people,” and that the Act encourages all “to better safeguard[, for the benefit of all citizens, the Nation’s heritage in fish, [and] wildlife . . .” 16 U.S.C. § 1531(a)(3)–(5). Further, the ESA’s “Definitions” section defines “endangered species” as including any species other than “a pest” who presents “an overwhelming and overriding risk to man.” *Id.* at § 1532(5).

²⁵⁸ One could say that the ESA continues a longstanding human interest in the heterogeneity of the natural world. This human interest could explain the diversity of ani-

C. Disadvantages

Challenges to aligning standing injury with irreparable harm will arise from both environmental and property rights advocates. The strongest counterargument to synchronizing standing and injunctive relief harms comes from the environmental camp. Wildlife protection advocates will ask whether the shift in harm will actually provide more clarity than the status quo. Even with a focus on the human plaintiff, will the harm not still depend on whether the human will actually lose the opportunity to aesthetically experience a species, thus requiring species-level effects?²⁵⁹ Defendants may still argue that there is no harm to the human plaintiff unless the conduct harms the species as a whole. Further, advocates argue that such framing devalues species by trivializing them as collateral to human interests. Finally, grounding the harm inquiry in standing terms highlights the oddity of the doctrine,²⁶⁰ which risks destroying animal and environmental standing in a single judicial stroke.

There are both narrow and broad responses to the arguments of wildlife advocates. First, precedent indicates that human plaintiffs can show harm by proving injury to animals, even when the proposed action would not directly affect the exact animals they regularly observe.²⁶¹ Instead, what matters is whether the plaintiff establishes a relationship with the species, and whether the plaintiff would have a particularized response to an action that affects members of that species.²⁶² The irreparable, aesthetic harm to a human plaintiff is completely distinct from the impact on a species, so courts should not apply such a test. Second, an anthropocentric view of harm is better aligned with the driving force behind ESA enactment: The first rule of an intelligent tinkerer is to keep all of the pieces.²⁶³ The human aesthetic and utilitarian interests in endangered and threatened species are wide-

mals allowed to board Noah's Ark. Holly Doremus, *The Rhetoric and Reality of Nature Protection: Toward a New Discourse*, 57 Wash. & Lee L. Rev. 11, 40 (2000) ("[T]he Noah story seems to have helped bring the ethical justifications for species protection out of the political closet. By 1985, the story of Noah's ark had made its way explicitly into legislative discussions of endangered species policy. In 1996, when the new Republican majority in Congress sought to substantially weaken the ESA, the Noah story was the strongest political response." (internal footnotes omitted)).

²⁵⁹ See Woodward, *supra* n. 63, at 529 (arguing that the approach "circumvents congressional intent to provide protection for threatened and endangered wildlife by focusing on the procedurally logical need to reconcile differing definitions of the 'plaintiff' at different stages of litigation").

²⁶⁰ See *e.g.* Sunstein, *supra* n. 44, at 1349 (arguing that there are problems with injury in fact because "[a]n obvious oddity here is that the plaintiff is likely to be concerned ethically or morally, not aesthetically—at least if the notion of the aesthetic is taken to refer to judgments, neither ethical nor moral in character, but rather about beauty or ugliness").

²⁶¹ See Norton, 281 F. Supp. 2d at 221.

²⁶² *Id.*

²⁶³ Leopold, *supra* n. 1, at 140 ("To keep every cog and wheel is the first precaution of intelligent tinkering.").

ranging.²⁶⁴ In contrast, an irreparable harm focus on animals would create problems of proof.²⁶⁵ For example, is impaired breeding necessarily an irreparable injury from the perspective of an individual member of a listed species? Would plaintiffs need to use scientists to prove hedonic injury to the animal?

More broadly, the problem with the current preliminary injunction framework is its uncertainty over which irreparable harm test courts should apply. A logical synchronization of plaintiff harm with the preliminary injunction analysis thus benefits wildlife-advocate plaintiffs by providing certainty in how to shape irreparable harm arguments.²⁶⁶ While a test's increased certainty can cut both ways—certainty within courts advantages institutional litigants, who happen to be both plaintiffs and defendants in ESA litigation—a move to human-centered irreparable harm enhances plaintiff control in framing a claim's narrative. As the jurisprudential development of standing in animal law cases has shown, passionate advocates can learn to situate themselves in circumstances necessary to fit legal requirements.²⁶⁷ Further, because “unknown policy and regulatory outcomes induce fear . . . and political opposition,” the certainty provided by a synchronized harm standard may reduce regulated community pushback.²⁶⁸

²⁶⁴ See 16 U.S.C. § 1531(a)(3) (“[T]hese species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people . . .”).

²⁶⁵ See e.g. *AWI III*, 623 F.3d at 24 (Although “Maine conceded that Canada lynx would continue to be caught in foothold traps” and data from the Maine Department of Inland Fisheries & Wildlife showed that thirty lynx were taken in foothold traps in a seven-year period, the district court found that the plaintiffs “had failed to prove lynx suffer serious physical injury from incidental takes in foothold traps.”). The district court also accepted expert testimony that lynx “might experience physical symptoms of stress . . . as a result of being trapped,” but rejected the experts’ argument that lynx could die from this stress. *Id.*

²⁶⁶ The issue of certainty distinguishes this Article from Woodward’s piece. While Woodward responds to the uncertainty over *what type of harm* to include in a preliminary injunction analysis, the author of this Article responds to the uncertainty of the *threshold magnitude of harm* necessary to satisfy irreparable harm. From these starting points, Woodward and this author come to opposite conclusions. Woodward argues that including animal harms in the irreparable harm inquiry will make close cases dispositive for the plaintiff. Woodward, *supra* n. 63, at 532. However, this will simply force courts to explicitly weigh the interests of animals against the interests of humans, a dangerous proposition in a society which allows animal testing for perfume and killing animals for fashion. Would all animal death and injury—regardless of the ESA context—become irreparable, as it is for humans? Additionally, an animal-centric harms analysis risks giving anti-ESA advocates a narrative for congressional backlash.

²⁶⁷ See the progression of *Animal Legal Defense Fund, Inc. (ALDF) v. Glickman*, a series of cases, in which animal protection groups returned to the D.C. Circuit with plaintiffs meeting the requirements of standing that the court found wanting in previous cases. *ALDF v. Glickman*, 204 F.3d 229, 234 (D.C. Cir. 2000); *ALDF v. Glickman*, 154 F.3d 426, 429 (D.C. Cir. 1998); *ALDF v. Glickman*, 130 F.3d 464, 469 (D.C. Cir. 1997); *ALDF v. Glickman*, 943 F. Supp. 44, 53 (D.D.C. 1996).

²⁶⁸ Steven P. Quarles, *Wyman’s Rethinking the ESA: Right Diagnosis, Wrong Remedies*, 40 *Env’tl. L. Rptr. News & Analysis* 10815, 10817 (2010).

A second challenge could come from property rights advocates.²⁶⁹ If a plaintiff proves standing, what would the irreparable harm inquiry then look like? Defendants will argue that after standing, a court would have no factors to consider for determining irreparability. This would set up the familiar refrain that “a chancellor is not mechanically obligated to grant an injunction for every violation of law.”²⁷⁰

On irreparability, the property rights advocates may be correct. Synchronizing the harms for standing and preliminary injunctions, taken to its logical end, may remove the irreparable harm prong.²⁷¹ But after proving standing, an injunction would not automatically follow. Under *Winter*, there are four factors to a preliminary injunction; a plaintiff’s irreparable injury is but one.²⁷² Courts will still have the equitable freedom that has traditionally accompanied the remedy of injunction.²⁷³ And even under the Ninth Circuit’s unique ESA preliminary injunction standard, plaintiffs would still need to prove a likelihood of success on the merits—no small task when take violations often occur on private property, out of the environmentalist’s eyesight, and the presence of the species on a given property must often be proven by expert testimony.²⁷⁴ The proposed approach would create no spillover by enjoining nonviolation behavior. In fact, it likely would resolve the absurdity presented in cases like *Defenders of Wildlife v. Salazar*, in which private citizens were not preliminarily enjoined

²⁶⁹ *E.g.* Avalyn Taylor, *Rethinking the Irreparable Harm Factor in Wildlife Mortality Cases*, 2 Stan. J. Animal L. & Policy 113, 117 (2009) (arguing that basing an irreparable harm inquiry on plaintiff interests “contradicts the principle that preliminary injunctions are an ‘extraordinary remedy’ and also can undermine the policies underlying environmental statutes”); *see also* Middleton, *supra* n. 175, at 35 (arguing that “courts should narrowly interpret *TVA v. Hill* by the traditional balancing of harms and consideration of the public interest”).

²⁷⁰ *TVA v. Hill*, 437 U.S. at 193.

²⁷¹ There are instances where a plaintiff could prove standing based on wholly past takes, seeking relief under 16 U.S.C. § 1540(g)(B).

²⁷² *Winter*, 555 U.S. at 20.

²⁷³ *Cf.* Taylor, *supra* n. 269, at 140–41 (“Indeed, even if a court establishes that an action that kills wildlife would result in irreparable harm under the proposed standard, it should nevertheless decline to issue a preliminary injunction if the other traditional factors . . . weigh against awarding preliminary relief.”). This suggestion—in support of how courts could patrol Taylor’s proposed approach of using the “primary purpose” of a statute to define irreparable harm—would just as well resolve her central complaint against using plaintiff injury for irreparable harm. Earlier, Taylor writes, “[i]f establishing ‘injury in fact’ for standing automatically establishes the injury required for a preliminary injunction, courts will be required to grant such relief unless they find that the injury is not ‘irreparable[]’ . . . [and] the remedy might no longer be extraordinary in practice.” *Id.* at 127.

²⁷⁴ *See* Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Use Controls*, 49 B.C. L. Rev. 301, 332 (2008) (“[S]tatutes like the ESA . . . discourage[] private landowners from disclosing information and cooperating with scientific research on their land, further compromising species conservation efforts.”).

from a planned hunt of endangered wolves that the reviewing court found inevitably constituted unlawful lethal takes.²⁷⁵

A third challenge would argue that synchronizing standing and preliminary injunction harm bypasses the underlying reasons for why the two inquiries are separate. Many feared that the ESA citizen-suit provision could flood the courthouse.²⁷⁶ Those fearing a flood point to lawyers using straw clients in search of attorney fees, as well as plaintiffs seeking policy change via judicial mobilization.²⁷⁷ They argue that such risks have caused courts to dig in with rigid standing requirements; once plaintiffs prove their standing, courts are satisfied that a valid controversy exists and feel free to determine harm to third-party wildlife.²⁷⁸

But the argument that the sole ESA beneficiaries are wildlife, and that standing doctrine only exists to limit the flood of lawsuits, runs into the problems with the third prong of Article III standing: redressability. If courts use standing as simply a threshold question and then consider a completely different injury for relief, a favorable outcome on the merits will only by chance redress the harm alleged.²⁷⁹ For exam-

²⁷⁵ *Defenders of Wildlife*, 812 F. Supp. 2d at 1209–10 (“The Plaintiffs fail to offer evidence that the [distinct population segment] will suffer irreparable harm if the Idaho and Montana wolf hunting seasons occur in 2009—even assuming hunters manage to kill 330 wolves.”).

²⁷⁶ See e.g. Michael S. Greve, *Business, the States, and Federalism’s Political Economy*, 25 Harv. J.L. & Pub. Policy 895, 917 (2002) (“Former Secretary of the Interior Bruce Babbitt . . . has bitterly complained about the flood of environmental citizen suits that has effectively eviscerated the enforcement of the Endangered Species Act.”).

²⁷⁷ Bruce Fein, *Citizen Suit Attorney Fee Shifting Awards: A Critical Examination of Government-Subsidized Litigation*, 47 L. & Contemp. Probs 211, 213–14 (1984) (noting that “[c]itizen suits clog court dockets, slow the administrative process, [and] shift policy-making to the judiciary,” and that “[b]ecause of frequent fee shifting, many plaintiffs’ attorneys are likely to encourage citizen suit litigation beyond what is socially optimal in pursuit of government-provided attorney fees that may be obtained even when the citizen is not the prevailing party”).

²⁷⁸ Similarly, the majority in *Sierra Club v. Morton* rationalized separating injury assessments for standing and injunctive relief to deal with public interest harms. Justice Stewart responded to environmental plaintiff concerns that the particularized injury requirement blocks judicial consideration of public interests: “The short answer to this contention is that the ‘trap’ does not exist. The test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief.” *Morton*, 405 U.S. at 740 n. 15. However, consideration of public interest injury now applies to the third and fourth equitable balancing prongs in the preliminary injunction test. Wildlife-centric views of harm should apply to the equitable balancing inquiries, as opposed to irreparable harm. The Ninth Circuit’s unique ESA preliminary injunction test, *supra* nn. 148–149 and accompanying text, can be read to incorporate the interests of listed wildlife in the third and fourth prongs.

²⁷⁹ Cf. *Mass. v. EPA*, 549 U.S. at 546 (Roberts, C.J., Scalia, Thomas, & Alito, JJ., dissenting) (“The Court’s sleight of hand is in failing to link up the different elements of the three-part standing test. What must be *likely* to be redressed is the particular injury in fact.”); *Sprint Commun. Co., LP v. APCC Servs., Inc.*, 554 U.S. 269, 301 (2008) (Roberts, C.J., Scalia, Thomas, & Alito, JJ., dissenting) (“The absence of any right to the substantive recovery means that [plaintiffs] cannot benefit from the judgment they seek

ple, the declaratory relief requested in *AWI v. Martin* would not have met standing's redressability prong. The district court's focus on the ESA violation's consequences to *the lynx* was distinct from the *human interests* necessary to create the controversy.²⁸⁰ In contrast, a preliminary injunction would redress the aesthetic injuries suffered from the human plaintiff's potential exposure to unlawfully trapped lynx.

A final challenge argues that such an approach to irreparable harm places immense burdens on the human plaintiff. The plaintiff must not only credibly allege injury that meets the standing factors, but also continue to prove irreparable harm at a preliminary injunction hearing. Plaintiff credibility often becomes more tenuous with increased court focus.²⁸¹

Irreparable harm based on injury to the human plaintiff would add weight to the plaintiff's shoulders. Yet the alternative approach of looking to the wildlife risks relying on a separate set of actors: scientists. A potential ESA violation's impacts on wildlife are often as uncertain as a plaintiff's aesthetic injury. Further clouding reliability, the judicial system allows parties on both sides to pay scientists as expert witnesses. Thus, plaintiffs that allege animal harm must not only present scientists as expert witnesses that risk impeachment, but defendants may rebut with expert scientists of their own.

VI. CONCLUSION

As the *AWI v. Martin* experience shows, federal district and circuit courts have no unified approach to the irreparable harm prong of Endangered Species Act preliminary injunctions.²⁸² Rather than struggle through a species-level versus individual-level harms quagmire, courts should bypass animal harm analysis and look to harm to the plaintiff. Performing the irreparable harm analysis as a subset inquiry of injury in fact will create logical consistency for theories of standing and preliminary injunctive relief. It will also enable courts to avoid scientific expert interpretation and remain in their constitutionally circumscribed sphere. And most importantly, it will focus attention on the powerful plaintiff interests underlying the claims. Indeed, there is nothing *de minimis* about a harm that arises when Animal Welfare Institute members hiking in Maine's woods witness a rare, majestic animal writhing in a trap.

and thus lack Article III standing. 'When you got nothing, you got nothing to lose.'" (citing Bob Dylan, CD, *Like a Rolling Stone*, on *Highway 61 Revisited* (Columbia Recs. 1965))).

²⁸⁰ *Supra* nn. 9–18 and accompanying text (discussing the line of *AWI v. Martin* cases).

²⁸¹ See e.g. *Am. Socy. for Prevention of Cruelty to Animals v. Feld Ent., Inc.*, 677 F. Supp. 2d 55, 67 (D.D.C. 2009) (After earlier finding that an individual plaintiff had standing to survive a motion to dismiss, the court found at trial that he was "repeatedly impeached, and indeed was 'pulverized' on cross-examination," thus leading to the court's conclusion that he did not meet the Article III standing requirements.).

²⁸² Discussed *supra* pt. I.