Jeffrey S. Kerr (admitted *pro hac vice*)
Martina Bernstein (State Bar No. 230505)
PETA Foundation
1536 16th Street NW
Washington, DC 20036
Tel: 202-483-2190
Fax: 202-540-2207
JeffK@petaf.org
MartinaB@petaf.org

Matthew Strugar (State Bar No. 232951)
PETA Foundation
2154 W. Sunset Blvd.
Los Angeles, CA 90026
Tel: 323-739-2701
Fax: 202-540-2207
Matthew-s@petaf.org

Philip J. Hirschkop (application for admission *pro hac vice* forthcoming)
Hirschkop & Associates P.C.
1101 King St., Ste. 610
Alexandria, VA 22314
Tel: 703-836-5555
Fax: 703-548-3181
pjhirschkop@aol.com

UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

Tilikum, Katina, Corky, Kasatka, and Ulises, five orcas, Plaintiffs, by their Next Friends, People for the Ethical Treatment of Animals, Inc., Richard "Ric" O'Barry, Ingrid N. Visser, Ph.D., Howard Garrett, Samantha Berg, and Carol Ray, v. SeaWorld Parks & Entertainment, Inc. and SeaWorld, LLC, Defendants.	Case No.: 11-cv-2476 JM WMC **Plaintiffs' Opposition to Defendants' Motion to Dismiss** Date: February 6, 2012 Time: 10:30 a.m. Courtroom: 5190

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INTRODUCTION

The Thirteenth Amendment is absolute in its command that "[n]either slavery nor involuntary servitude . . . shall exist within the United States[.]" U.S. CONST. amend. XIII, § 1. On its face, it prohibits all conduct that falls within the definition of involuntary servitude, slavery, and slavery-like conditions. The Amendment contains no limiting language defining particular classes or types of slaves. Instead, it uses broad language outlawing the conditions and practices of slavery and involuntary servitude wherever they may exist in this country.

Defendants do not dispute that *they* are subject to the prohibitions of the Thirteenth Amendment, which applies to governmental as well as private actors. Rather, Defendants argue that no court could ever find that—or even has subject matter jurisdiction to determine whether—the Thirteenth Amendment's protections extend to non-human beings under certain circumstances. Defendants essentially ask this Court to engraft onto the Thirteenth Amendment a limitation that does not exist and that flies in the face of more than two hundred years of Constitutional jurisprudence.

What constitutes slavery and involuntary servitude has been variously defined, but at its core it refers to a relationship of dominance and subservience, in which the slave is entirely subjugated to the master's will. The facts alleged in the Complaint—which are undisputed for purposes of this motion—demonstrate that Plaintiffs have been exploited and physically dominated by Defendants in a manner equivalent to enslavement. The conditions of coercion and total dominion by Defendants over virtually all aspects of Plaintiffs' lives display all of the quintessential attributes of chattel slavery. As detailed in the Complaint, Plaintiffs Tilikum, Katina, Kasatka, Corky, and Ulises were born free and lived in their natural environment until they were forcibly taken from their families and homes. Complaint at ¶¶ 1, 9, 32, 47, 53, 56, 62, 63, 66. They were trafficked, brought to this country, and sold to Defendants to be used for entertainment. *Id.* at ¶¶ 9, 33, 34, 48, 54, 55, 57, 62, 65, 66. Plaintiffs are kept in constant involuntary physical confinement at Defendants' facilities and are deprived of the ability to engage in natural behaviors and live in a manner of their choosing and in which they were intended to live in nature. *Id.* at ¶¶ 1, 5, 9, 19, 37-41, 46, 49, 53, 54, 57, 62, 65, 66. Plaintiffs are

compelled to serve Defendants and to perform tricks for the entertainment of SeaWorld visitors. *Id.* at ¶¶ 1, 9, 36, 54, 66. In sum, Plaintiffs' lives are subject to complete control and coercion by their "masters" who treat them as chattel. *Id.* at ¶¶ 9, 46, 54, 62, 66.

These conditions of systematic subjugation, coercion, and deprivation are the hallmarks of slavery and involuntary servitude—and there would be no hesitation in classifying them as such if inflicted upon human beings. It is an open question whether non-humans who are kept in such slave-like conditions are entitled to relief under the Thirteenth Amendment.

Defendants' contention that this case must be dismissed because the relief Plaintiffs seek has never been granted is illogical and circular: the reason non-human beings currently do not have a "recognized" right under the Thirteenth Amendment is that no court has previously been asked to recognize such a right. In this case of first impression, Plaintiffs are asking the Court to find that the specific acts of domination, exploitation, and coercion to which they are subjected are repugnant to the Thirteenth Amendment. Defendants argue that no court has the authority to even consider this question—much less to answer it in the affirmative. However, Defendants' notion that this Court lacks the authority to "say what the law is" and to "expound and interpret" the law, *see Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803), is far more "radical" and unprecedented than Plaintiffs' request in opposing this motion: to be heard at trial on the merits of their case.

In arguing that this Court lacks the authority to grant (or even consider) the requested relief, Defendants would treat the Thirteenth Amendment as a dead letter, whose significance is limited to emancipating African slaves. While it is undisputed that the Amendment was passed in 1865 to end chattel slavery as practiced in the South prior to the Civil War, it is equally beyond dispute that the Amendment serves a far more expansive function. The United States Supreme Court has made clear that the principles of the Thirteenth Amendment are broad and evolving, and not to be understood as a prohibition of specific antebellum practices frozen in time.

Boiled down to its essence, Defendants' motion would deny an opportunity to courts to even examine whether the Thirteenth Amendment applies to current problems and needs—thus precluding any possibility for society and the judiciary to redress existing wrongs. Defendants'

assertion that relief should be denied because "from time immemorial there has been a legal distinction between humans and animals," Defs.' Br. at 17,. mirrors the invidious reasoning of *Dred Scott v. Sandford*, 60 U.S. 393, 410 (1856)—that African-Americans must be chattel because they have always been treated as such. However, the Constitutional jurisprudence that has developed since *Dred Scott* teaches that long-established prejudice does not determine constitutional rights.

Accordingly, and for the reasons demonstrated in detail below, Plaintiffs respectfully submit that this motion should be denied.

STANDARD OF REVIEW

In analyzing Defendants' motion to dismiss pursuant to Rule 12(b)(1) or 12(b)(6), the court must accept as true all material allegations in the complaint, and must construe them and draw all reasonable inferences from them in Plaintiffs' favor. *See*, *e.g.*, *Metzler Inv. GMBH v. Corinthian Colls.*, *Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008) (12(b)(6)); *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (12(b)(1)). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2008).

ARGUMENT

I. The Thirteenth Amendment May Properly Prohibit the Slavery and Involuntary Servitude of Plaintiffs.

Soon after it was ratified, the Supreme Court emphasized that the Thirteenth Amendment was "intended to prohibit *all forms* of involuntary slavery *of whatever class or name*.". *The Slaughter-House Cases*, 83 U.S. 36, 37 (1872) (emphasis added). The "letter *and spirit* of [the Amendment] must apply to all cases coming within [its] purview, *whether the party concerned be of African descent or not*." *Id.* (emphasis added). The Court expounded:

> [W]hile negro slavery alone was in the mind of the Congress which proposed the thirteenth article, *it forbids any other kind of slavery, now or hereafter*. If Mexican

> peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.

Id. at 72 (emphasis added).[1]

The Court reiterated the broad reach of the Amendment when it stated that "[t]he undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States." *Pollock v. Williams*, 322 U.S. 4, 17 (1944). According to the Court, "the . . . Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist," *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968) (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (internal quotation marks omitted)), and that "all vestiges of slavery w[ill] be illegal," *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157, 1160 (9th Cir. 1976) (citing *District of Columbia v. Carter*, 409 U.S. 418, 421-22 (1973)).

Thus, the Supreme Court has interpreted the Thirteenth Amendment as a "'promise of freedom'—embodying a vague principle to be defined and enforced over time." *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1320 (1969) (quoting *Jones*, 392 U.S. at 443). It is this "promise of freedom" that Plaintiffs ask this Court to fulfill in holding that the Thirteenth Amendment prohibits their enslavement.

The historical context cited by Defendants is well-known and undisputed, but is not the crux of the inquiry. Constitutional principles are frequently applied in ways "which could not have been foreseen completely by the most gifted of [their] begetters." *Missouri v. Holland*, 252 U.S. 416, 433 (1920). The slavery *of animals* was not the framers' focus in enacting the Thirteenth Amendment, but *slavery* was: and the Amendment's prohibition of slavery and involuntary servitude applies with equal force to Plaintiffs.

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[1] Defendants are inconsistent on this point. On the one hand, Defendants argue that the Thirteenth Amendment cannot apply to the enslavement of animals because it was designed to rectify the slavery of "millions of people of African descent." Defs.' Br. at 14. On the other, they admit that the Thirteenth Amendment is not limited to African slavery and that it has "been used to prohibit other morally unjust conditions of bondage and forced service." *Id*. at 15 (internal quotation marks and citation omitted).

Defendants' contrary assertion that relief should be denied these Plaintiffs because "from time immemorial there has been a legal distinction between humans and animals," Defs.' Br. at 17, mirrors the invidious reasoning of *Dred Scott* that African-Americans could not be citizens because "[t]he unhappy black race w[as] separated from the white by indelible marks, and laws long before established." *Dred Scott*, 60 U.S. at 410. No principled distinction can be made between the faulty analytical underpinnings of *Dred Scott* and Defendants' contention that Plaintiffs must be chattel because they have always been treated as such. If the constitutional jurisprudence that has developed since *Dred Scott* teaches anything, it is that such long-established prejudice does not determine constitutional rights.

II. Defendants' Analysis Is Contrary to Two Centuries of Constitutional Interpretation.

"It is emphatically the province and duty of the [Court] to say what the law is. Those who apply [a legal] rule to particular cases must, of necessity, *expound and interpret* that rule." *Marbury*, 5 U.S. at 177 (emphasis added). SeaWorld's analysis would stunt the Thirteenth Amendment and limit the Court's authority to "expound and interpret" the Amendment. This flies in the face of two-hundred years of Supreme Court jurisprudence recognizing that constitutional principles evolve "to meet the challenges of a changing society." Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987).

As far back as *McCulloch v. Maryland*, 17 U.S. 316 (1819), Chief Justice Marshall observed that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs," counseling:

> [The] nature [of a constitution]. . . requires[] that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. [W]e must never forget that it is a *constitution* we are expounding.

Id. at 407, 415.

Justice Holmes likewise recognized that the Constitution "adapt[s] to the changing conditions and evolving norms of our society," Pamela S. Karlan et al., KEEPING FAITH WITH THE CONSTITUTION 1 (2009), when he wrote that the document has

> called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century . . . to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. . . . We must consider what this country has become in deciding [the constitutional question].

Missouri, 252 U.S. at 433-34.

In considering the scope of constitutional protections, the Court has emphasized the "universal law of language": that "words do not change their meaning; but the application of words grows and expands." *Mo. Pac. R.R. Co. v. United States*, 271 U.S. 603, 607 (1926). As the Court explained in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926):

> [W]hile the meaning of constitutional guaranties [sic] never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. . . . [A] degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles . . . .

Id. at 387.

This principle was reiterated in *Weems v. United States*, 217 U.S. 349 (1910), where the Supreme Court declared:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.

Id. at 373; *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) ("[T]he majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century," must be "translat[ed] . . . into concrete restraints on officials dealing with the problems of the twentieth century."). Although Defendant's Brief seeks to limit *Weems* to the Eighth Amendment, Defs.' Br. at 16 n.15, the Court in *Weems* in fact saw the Eighth Amendment as but one example of how "[t]he meaning and vitality of the Constitution have

developed against narrow and restrictive construction," citing the Fourteenth Amendment as another example. 217 U.S. at 373. Indeed, Justice Brennan quoted *Weems* for the proposition that

> the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure of the vision to our time.

William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986).

Likewise, what the Thirteenth Amendment "meant to the wisdom" of 1865 "cannot be the measure of the vision to our time." *Id*. "Time works changes, brings into existence new conditions and purposes." *Weems*, 217 U.S. at 373. We can recognize that animals ripped from their homes; separated from their families; held captive; and forced to perform for fleeting human entertainment for SeaWorld's benefit are slaves, even if the framers could not.

A. Constitutional Principles Have Long Been Extended to Apply to Changing Times and Conditions.

Defendants' analysis is at odds with 200 years of constitutional jurisprudence, in which rights have been created, extended, and expanded to adapt to changing times and conditions. Mindful that the Constitution "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago," *Missouri*, 252 U.S. at 433, the Supreme Court has repeatedly extended the protection of the Constitution to new groups and interests. Among these, the Court has recognized the right to privacy; subjected sex discrimination to heightened scrutiny; extended the application of the Equal Protection guarantee to "social" rights; drawn on evolving social norms to interpret the meaning of "cruel and unusual" punishment; and expanded constitutional protections for criminal defendants, to name but a few. We discuss each of these developments in turn below.

1. The Development of the Right to Privacy.

No example better illustrates how "[t]he meaning and vitality of the Constitution have developed against narrow and restrictive construction" than the right to privacy. *Weems*, 217 U.S. at 373. "The Constitution does not explicitly mention any right of privacy," *Roe v. Wade*,

410 U.S. 113, 152 (1973), yet the Court has implied the right from various amendments—a right broad enough to encompass both "the individual interest in avoiding disclosure of personal matters" and "the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977).

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), for example, the Supreme Court held that a state law prohibiting possession of contraceptives constituted an unconstitutional incursion into the right of privacy in marriage. It explained that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," and that, by this means, "[v]arious guarantees create zones of interest," including those of the First, Third, Fourth, Fifth, and Ninth Amendments. *Id*. at 484. While these "emanations" are "not expressly included in [the] Amendment[s]," the Court concluded that their "existence is necessary in making the express guarantees fully meaningful." *Id*. at 483.

The Supreme Court again extended the constitutional principle of privacy in *Lawrence v. Texas*, 539 U.S. 558 (2003), where it struck down a law criminalizing consensual sodomy, overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986). Reiterating that there "is a realm of personal liberty which the government may not enter," *Lawrence* recognized a capacious right *"to define one's own concept of existence, of meaning, of the universe, and of human life"—including the right of homosexuals and others to "decid[e] how to conduct their private lives in matters pertaining to sex." Id*. at 574, 578 (emphasis added) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)). Writing for the majority, Justice Kennedy concluded:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. *They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.* As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Id. at 578-79 (emphasis added).

As those who drew and ratified the Due Process Clause could not know the components of liberty in its manifest possibilities, those who drew and ratified the Thirteenth Amendment could

not imagine slavery in all of its forms. But the Thirteenth Amendment's promise of "universal freedom" is enduring, *Civil Rights Cases*, 109 U.S. at 20; and it is this promise—*"that slavery or involuntary servitude shall not exist" by "whatever class or name," The Slaughter-House Cases*, 83 U.S. at 37 (emphasis added)—that Plaintiffs invoke "in their own search for greater freedom." *Lawrence*, 539 U.S. at 579.

2. The Supreme Court's Changing View of the "Separate but Equal" Doctrine.

The Supreme Court originally distinguished between "laws interfering with the political equality of the negro"—which it held were prohibited by the Fourteenth Amendment—and those "forbidding the intermarriage of the two races" or "requiring the separation of the two races in schools, theaters, and railway carriages"—which were not. *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896). It reasoned that the Amendment "could not have been intended to abolish distinctions based upon color, or to enforce . . . a commingling of the two races upon terms unsatisfactory to either." *Id*. at 544. But this restrictive view was soundly rejected by later cases such as *Brown v. Board of Education*, 347 U.S. 483 (1954) (prohibiting laws "requiring the separation of the two races in schools"), and *Loving v. Virginia*, 388 U.S. 1 (1967) (prohibiting laws "forbidding intermarriage of the two races"), in which the Supreme Court extended the reach of the Equal Protection Clause's protections to non-political rights.

3. The Application of the Fourteenth Amendment to Sex Discrimination.

"The construction of the 14th Amendment is . . . an[other] example" of how "[t]he meaning and vitality of the Constitution have developed against narrow and restrictive construction." *Weems*, 217 U.S. at 373-74. For almost 100 years after the Amendment's enactment, "it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any 'basis in reason' could be conceived for the discrimination." *United States v. Virginia*, 518 U.S. 515, 531 (1996) [hereinafter *VMI*]. It was not until 1973 that a plurality of the Supreme Court held that sex is a suspect classification that "frequently bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Finally, 128 years after passage of the Fourteenth Amendment, the Court recognized in *VMI* that the government cannot discriminate on the basis

of sex without an "exceedingly persuasive" reason. 518 U.S. at 533. The majority's holding that states cannot "rely on overbroad generalizations about the different talents, capacities or preferences of males and females," *id*. at 532-33, represented a quantum leap from its view in *Bradwell v. Illinois*, 83 U.S. 130 (1872) (Bradley, J., concurring), that the "peculiar characteristics, destiny, and mission of woman" justify sex discrimination, *id*. at 142.

The Constitution prohibits sex discrimination, even though "[t]he civil law . . . [long] recognized a wide difference in the respective spheres and destines of man and woman." *Id*. at 141. It prohibits racial discrimination, even though the law long "dr[ew] a broad line of distinction between the [white] and the [black] races." *Dred Scott*, 60 U.S. at 412. Cases like *Frontiero*, *VMI*, *Loving*, and *Brown* are conclusive that Defendants cannot violate Plaintiffs' constitutional rights simply because "there has [long] been a legal distinction between humans and animals." Defs.' Br. at 17.

4. The "Progressive" Eighth Amendment.

The Eighth Amendment further demonstrates the evolution of Constitutional protections. The Supreme Court has recognized that

> [t]he authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the evolving standards of decency that mark the progress of a maturing society.

Thompson v. Oklahoma, 487 U.S. 815, 821 (1988) (internal quotation marks and citation omitted).

Originally, the Eighth Amendment and state counterparts with substantially similar wording were interpreted to prohibit only certain modes of punishment. *See generally Harmelin v. Michigan*, 501 U.S. 957, 982-83 (1991). However, *Weems*, 217 U.S. at 349—which held that the Amendment is "progressive" and "is not fastened to be obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice"—marked a sea change in Eighth Amendment jurisprudence. *Id*. at 378. On numerous occasions since *Weems*, the Supreme Court

has judged the meaning of "cruel and unusual" "in the light of contemporary human knowledge." *Robinson v. California*, 370 U.S. 660, 666 (1962).

5. The Evolution of Constitutional Protections for Criminal Defendants.

The broadening of constitutional protections for criminal defendants is yet another example of how the Supreme Court has eschewed "narrow and restrictive construction" of the Constitution. *Weems*, 217 U.S. at 373. For instance, the Court required safeguards for criminal suspects during police interrogation in *Escobedo v. Illinois*, 378 U.S. 478 (1965) (right to counsel), and *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring "Miranda" warnings). Grounding these requirements in the Fifth and Sixth Amendments, the majority in *Miranda* explained:

> In stating the obligation of the judiciary to apply these constitutional rights, this Court declared in *Weems v. United States*, 217 U.S. 349, 373, 30 S.Ct. 544, 551, 54 L.Ed. 793 (1910): "our contemplation cannot be only of what has been, but of what may be. . . ." This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. It was necessary in *Escobedo*, as here, to insure that what was proclaimed in the Constitution had not become but a "form of words" in the hands of government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of *Escobedo* today.

Id. at 443-44 (internal citation omitted).

The Court recognized the holdings in *Miranda* and *Escobedo* "not [as] an innovation in [its] jurisprudence, but [a]s an application of principles long recognized and applied in other settings." *Id*. at 442. That is all that Plaintiffs seek here. The Thirteenth Amendment was "intended to prohibit *all forms* of involuntary slavery *of whatever class or name*." *The Slaughter-House Cases*, 83 U.S. at 37 (emphasis added). "While negro slavery alone was in the mind of the Congress which proposed the [Amendment], *it forbids any other kind of slavery*, now or hereafter." *Id*. at 72 (emphasis added). Plaintiffs are not asking this Court to create a right and a remedy out of whole cloth. They are asking only that the Court apply the principle "long recognized and applied in other settings" that "slavery or involuntary servitude shall not exist." *Jones*, 392 U.S. at 438.

6. The Constitutional Jurisprudence Establishes that the Original Understanding of the Thirteenth Amendment Is Not Controlling.

Cases like *VMI*, *Brown*, *Loving*, *Weems*, *Griswold*, and *Lawrence* amply demonstrate that the original understanding of the Thirteenth Amendment does not control the question of whether wild-captured orcas held against their will and forced to perform for fleeting entertainment for SeaWorld's benefit are "slaves" within the meaning of the Constitution. *Brown* counseled that, "[i]n approaching th[e] problem" of the rights protected by the Equal Protection Clause, "we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written." 347 U.S. at 492. In holding that the Eighth Amendment is "progressive," the Court in *Weems* rejected the argument that the meaning of "what is generically included in the words employed in the Constitution" can only "be ascertained by considering their origin and their significance at the time of their adoption." 217 U.S. at 410-11. And, while the majority in *Lawrence* acknowledged "that for centuries there have been powerful voices to condemn homosexual conduct as immoral," it found that "our laws and traditions in the past half century are of most relevance here," declaring that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." 539 U.S. at 571-72 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)). Whether the framers would have recognized the Plaintiffs as slaves, the Thirteenth Amendment's "promise of freedom" is broad enough to "embrace[]" their condition "in its grasp." *South Carolina v. United States*, 199 U.S. 437, 448 (1905).

B. Neither Statute Nor Common Law Can Immunize Defendants' Enslavement of the Plaintiffs.

Defendants' contention that Plaintiffs' enslavement is somehow authorized by the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361, *et seq.*, and the Animal Welfare Act ("AWA"), 7 U.S.C. § 2131, *et seq*., Defs.' Br. at 4-5, is wrong, because no statute can immunize an unconstitutional act. "If . . . the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply." *Marbury*, 5 U.S. (1 Cranch) at 178.

Were this Court to grant the requested relief, the ruling would only invalidate the MMPA and AWA to the extent that they authorize Plaintiffs' enslavement. The greater part of each statute would still stand: for example, where they authorize captive breeding or the taking of wild animals for any purpose other than that for which Plaintiffs are enslaved.

However, even were this not the case, the MMPA and AWA could not trump the dictates of the Thirteenth Amendment. The Constitution is the supreme law of the land, and a statute in conflict with the Constitution cannot stand. The ruling in *Brown*, 347 U.S. at 483, invalidated school-segregation laws in twenty-one states; while *Loving*, 388 U.S. at 1, struck down miscegenation laws in fifteen states; and *Lawrence*, 539 U.S. at 558, nullified laws prohibiting consensual sodomy in fourteen. R. Richard Banks, *Intimacy and Racial Equality: The Limits of Antidiscrimination*, 38 HARV. C.R.-C.L. L. REV. 455, 455 n.3 (2003); William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1023 (2004).[2]

Implicit in Defendants' assertion that they have cared for Plaintiffs in accord with the AWA is the claim that Defendants can violate the Thirteenth Amendment because they are "good" slaveholders. This is the same tired and discredited argument that was used to justify African slavery a century-and-a-half ago.[3] Slavery and involuntary servitude are "evil institutions," 22

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[2] *See also, e.g.*, *Califano v. Westcott*, 443 U.S. 76 (1979) (provision of federal law discriminating on the basis of sex held to violate the Fifth Amendment); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (same); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (same); *Jiminez v. Weinberger*, 417 U.S. 628 (1974) (section of federal law held to deny class of children the Fifth Amendment's equal-protection guarantee); *Frontiero*, 411 U.S. at 686 (striking down federal law that discriminated on the basis of sex); *Richardson v. Davis*, 409 U.S. 1069 (1972) (striking down section of federal law that discriminated against illegitimate children); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (school-segregation laws in the District of Columbia held to violate the equal-protection guarantee of the Fifth Amendment).

[3] *See, e.g.*, *The End of Rebel Logic*, HARPER'S WKLY., Dec. 3, 1864 (According to slavery's proponents, "the slaves were happier than any peasantry in the world. They were comfortably cared for in sickness and age. They had no anxieties, no responsibilities. They danced to the banjo under the peaceful palmetto . . . ."); *The Highest State of the Negro*, S. CONFEDERACY, Apr. 17, 1861, at 1 ("[The slave] has but a single master to whom he is responsible, who watches over his well being and comfort, and in old age and sickness supports and protects him. . . . [S]lavery is the best possible condition of the negro."); *American Slavery: Eloquent and*

U.S.C. § 7101(b)(22), that arouse "universal disapprobation," *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 942 (D.C. Cir. 1988). The law does not recognize "good" slavery or "bad" slavery; only slavery—which is repugnant to the Constitution.

Moreover, Defendants' reliance on state property laws to immunize their unconstitutional conduct recalls arguments that the abolition of African slavery would "violate[] that good faith which all civilized Governments have hitherto observed, by destroying valuable rights hitherto acknowledged as property." Rep. Brown of Wisconsin, The Congressional Globe, 527, Jan. 31, 1865; *see also Washington v. Glucksberg,* 521 U.S. 702, 770 (1997) (Souter, J., concurring) (stating that *Dred Scott* "treated prohibition of slavery . . . as nothing less than a general assault on the concept of property"). If the Thirteenth Amendment means anything, it means that one cannot have a right to property in slaves.

III. The Court Should Reject SeaWorld's Slippery-Slope Argument.

Article III, § 2 of the Constitution limits the federal "judicial Power" to the resolution of "Cases" and "Controversies": specific claims based on a specific set of facts brought by specific litigants and "presented in an adversary context." *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 382 (1980) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). This case is limited to the issue: whether wild-captured orcas held against their will and forced to perform for fleeting entertainment for SeaWorld's benefit are "slaves" within the meaning of the Constitution, not whether all animals in all relationships with humans not addressed here are slaves. "As in other realms of developing constitutional law," whether the line should be drawn to embrace other relationships between animals and humans "must be left, whatever the difficulties, to case by case evolution on the variety of circumstances inevitably to be presented." *Cooper v. United States*, 594 F.2d 12, 18 (4th Cir. 1979), *abrogated on other grounds by Mabry v. Johnson*, 467 U.S. 504 (1984).

Elaborate Vindication of the System, NEW YORK DAILY NEWS, Sept. 15, 1854, at 3 ("The owners love their race and its qualities better than their pseudo friends, the abolitionists, do. They have no occasion to buy anything but fine cloths. They have their rations weekly of molasses, coffee, and tobacco. They are not allowed to work, and carefully nursed, when sick, and when well don't average ten hours of labor per day.").

This Court should decline to give in to the hysteria that Defendants seek to create, when they prophesy that extending the application of Thirteenth-Amendment protections to the particular plaintiffs here will "open a veritable 'Pandora's box' of inescapable-problems [sic] and absurd consequences." Defs.' Br. at 1. The Supreme Court rejected precisely this kind of insidious slippery-slope argument in *VMI*, where it stated:

> The notion that admission of women would downgrade VMI's statute, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other 'self-fulfilling prophec[ies],' once routinely used to deny rights or opportunities.

518 U.S. at 542-43 (internal citation omitted). Likewise, in *Lawrence*, the majority rejected the dissent's strident assertions that the decision would bring down generations of precedents in its wake and constitute "a massive disruption of the current social order." 539 U.S. at 590-91 (Scalia, J., dissenting).

Defendants' "parade of horribles" is also premature at the motion-to-dismiss stage. Any cases that *might* follow are dependent on the contours of the ruling that this Court *might* make—contours which cannot be determined until the Court has conducted a full trial on the merits.

But, even if the Court is ultimately faced with that decision, the fact that "recognizing one [constitutional] right would leave [the] [C]ourt with no principled basis to avoid recognizing another" cannot excuse it from the "necessity" of "expound[ing] and interpret[ing]" the Constitution, *Marbury*, 5 U.S. at 177. *Glucksberg*, 521 U.S. at 785 (Souter, J., concurring).[4] Lord Mansfield acknowledged this long ago when he ruled that slavery was unsupported by the law of England and Wales—*"[w]hatever inconveniences . . . may follow from [such] decision."* *Somerset v. Stewart*, Lofft 1, 98 ER 499 (K.B. 1772) (emphasis added). "If the parties will have judgment, *fiat justitia, ruat caelum*," he declared: Let justice be done though the heavens fall. *Id*.

[4] In his concurrence, Justice Souter made clear that slippery-slope arguments of the form that "recognizing one [constitutional] right would leave a court with no principled basis to avoid recognizing another" do not warrant the Court's attention. *Glucksberg*, 521 U.S. at 785.

IV. Plaintiffs State a Cause of Action Under Section 1 of the Thirteenth Amendment and the Declaratory Judgment Act.

A. Plaintiffs May Sue for Equitable Relief Directly Under Section 1 the Thirteenth Amendment.

Plaintiffs have a right to seek their freedom from Defendants directly under Section 1 the Thirteenth Amendment. Defendants' argument to the contrary exposes a misunderstanding of the mechanisms of constitutional litigation and the distinction between legal and equitable remedies. "[I]t is established practice for th[e] [Supreme] Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Bell v. Hood*, 327 U.S. 678, 684 (1948). As the Court recognized just last term in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. __, 130 S. Ct. 3138 (2010), in which it implied an equitable remedy under Article II, equitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Id*. at 3151 n.2 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)).

While *Ex parte Young*, 209 U.S. 123 (1908) is widely credited with establishing the principle that a plaintiff seeking equitable relief may proceed directly under the Constitution, Ninth Circuit Court of Appeals Judge Marsha Berzon has explained that the practice dates back as far as 1824 in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). *See* Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. REV. 681, 688 (2009). This practice has continued uninterrupted. As Judge Berzon shows, both of the major school desegregation cases, *Bolling*, 347 U.S. 497, and *Brown*, 347 U.S. 483, grounded their claims for relief directly in the Fifth and Fourteenth Amendments (respectively), not in 42 U.S.C. § 1983. Berzon, 84 N.Y.U. L. REV. at 685-87. "[T]he Court evidently saw it as uncontroversial that the federal courts should be able to hear the plaintiffs' claims and grant the remedies sought without needing to locate a statutory source for the cause of action." *Id*. at 687. *Cf. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring) (recognizing the already-existing "presumed availability of federal equitable relief against threatened invasions of constitutional interests" in crafting damages remedy for constitutional violations).

Plaintiffs invoke the uncontroversial right to equitable relief to enjoin Defendants' unconstitutional activity. As explained below, none of the cases Defendants rely on address the issue of equitable relief for ongoing enslavement—the situation Plaintiffs here face.

1. The Damages Actions Defendants Rely on Are Irrelevant.

Claims for damages for constitutional violations often require a cause of action—typically Section 1983 for violations under color of state law and *Bivens* actions for violations under color of federal law. But Plaintiffs do not seek damages.

Nearly every case cited by Defendants in support of their contention that there is no direct cause of action under the Thirteenth Amendment is a case seeking a damage remedy. Those cases are inapposite. For instance, in *John Roe 1 v. Bridgestone Corp.*, 492 F.Supp.2d 988 (S.D. Ind. 2007), the court was explicit in limiting its ruling that no cause of action exists under the Thirteenth Amendment to damages remedies, including in the heading of the relevant section of the ruling—"No Implied Right of Action for Damages"—and repeatedly throughout the section. *Id*. at 997. *See also id*. ("Although the question does not arise frequently, federal district courts have consistently held that the Thirteenth Amendment itself does not provide a private right of action *for damages*. . . . Plaintiffs have not cited any decisions contrary to the many cases holding that there is no direct cause of action *for damages* under the Thirteenth Amendment.") (emphasis added). Similarly, in *Jane Doe I v. Reddy*, 2003 WL 23893010 (N.D. Cal. Aug. 4, 2003), where the plaintiffs sought damages for work in excess of overtime laws as well as sexual and physical abuse, the court was clear it was addressing a damages remedy. *Id*. at *9-*10. The *Jane Doe* plaintiffs themselves limited their argument to a damages remedy, arguing that "'every court of appeal to address the issue has assumed that *damages claims* for forced labor or involuntary servitude are available directly under the 13th Amendment.'" *Id*. at *9 (quoting plaintiffs' opposition papers) (emphasis added). *See also Del Elmer; Zachay v. Metzger*, 967 F. Supp. 398 (S.D Cal. 1997) (seeking damages for seizure of property); *Roberts v. WalMart Stores, Inc*., 736 F.Supp. 1527 (E.D. Mo. 1990) (seeking damages for retailer noting race of customers); *Sanders v. A.J. Canfield Co*., 635 F. Supp. 85 (N.D.I11. 1986) (seeking damages for employment discrimination); *Jones v. Cawley*, 2010 WL 4235400 (N.D.N.Y. Oct. 21, 2010)

(seeking damages for breach of contract); *Marshall v. Nat'l Ass'n of Letter Carriers BR36*, 2003 WL 22519869 (S.D.N.Y. Nov. 7 2003) (seeking damages for employment termination); *Randell v. Cal. State Comp. Ins. Fund*, 2008 WL 2946557 (E.D. Cal. July 29, 2008) (seeking damages related to insurance premiums).[5]

2. The "Badges and Incidents" Cases Defendants Rely on Are Irrelevant.

Defendants' argument also overlooks the distinction between Sections 1 and 2 of the Thirteenth Amendment. As the Supreme Court has explained, "[t]he Thirteenth Amendment authorizes Congress *not only* to outlaw all forms of slavery and involuntary servitude *but also* to eradicate the last vestiges and incidents of a society half slave and half free, by securing to all citizens, of every race and color, 'the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.' *Jones*, 392 U.S. at 443 (emphasis added). Thus, Section 1 of the Thirteenth Amendment abolished slavery and involuntary servitude, while section 2 provided the power to Congress to provide *additional* relief by enacting appropriate legislation to abolish "badges and incidents" of slavery. *See id.*

Since Plaintiffs' seek relief only under Section 1, the many cases replied upon by Defendants that were brought under Section 2 of the Amendment to challenge such "badges and incidents of

[5] *Nattah v. Bush*, 770 F. Supp. 2d 193 (D.D.C. 2011), the only case cited by Defendants to seemingly address the question of equitable relief for forced labor, is distinguishable. First, *Nattah* sought relief related to past forced labor, so any injunctive relief related to the Thirteenth Amendment would have been moot. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Second, *Nattah* appears to misread relevant precedent. *Nattah* cites *Holland v. Bd. of Trustees of Univ. of the Dist. of Columbia*, 794 F. Supp. 420, 424 (D.D.C. 1992), a "badges and incidents" case, for the proposition that no cause of action exists under Section 1 of the Thirteenth Amendment. *Nattah*, 770 F. Supp 2d at 204 (internal citation omitted) and *Holland*, 794 F. Supp. at 424. Whether a plaintiff can seek relief for discrimination pursuant to a "badges and incidents" theory under Section 2 is a separate question from whether a plaintiff can seek relief from slavery or involuntary servitude under Section 1. *See* Section IV.A.2.; *Nattah*, 770 F. Supp. 2d at 202-04. Finally, the *Nattah* court's rationale for finding there was no direct cause of action under the Thirteenth Amendment for equitable claims appears to have been adopted directly from an earlier ruling in the same action finding there was no damages cause of action against a different defendant, suggesting the court's rationale was aimed at damages remedies. *Compare Nattah,* 770 F. Supp. 2d at 204-05 *with Nattah v. Bush*, 541 F. Supp. 2d 223, 234 (D.D.C. 2008).

slavery" are inapposite. Defendants say nothing about whether Plaintiffs can challenge their *per se* slavery or involuntary servitude directly under Section 1 of the Thirteenth Amendment. As the Fifth Circuit explained in *Channer v. Hall*, 112 F.3d 214 (5th Cir. 1997):

> While it is true that suits attacking the "badges and incidents of slavery" must be based on a statute enacted under § 2, suits attacking compulsory labor arise directly under prohibition of § 1, which is "*undoubtedly self-executing without any ancillary legislation*" *and* "*[b]y its own unaided force and effect . . . abolished slavery, and established universal freedom*." *The Civil Rights Cases*, 109 U.S. at 20, 3 S.Ct. at 28. The cases upon which Appellees rely are § 2 "badges and incidents" cases and are thus inapplicable to [the Appellant]'s claim.

Id. at 217 n.5 (emphasis added).

For example, in *Jones v. Cawley*, a badges and incidents case holding that a plaintiff who sought damages for a breach of contract could not sue directly under the Thirteenth Amendment, the court cited *City of Memphis v. Greene*, 451 U.S. 100 (1981) and *Palmer v. Thompson*, 403 U.S. 217 (1971). *Cawley*, 2010 WL 4235400 at *4. The *Greene* plaintiffs' claims were not of slavery *per se*, but that the city's closing of a residential street that traversed a white neighborhood was one of the "badges or incidents" of slavery. 451 U.S. at 105. Similarly, the *Palmer* plaintiffs' claim was that the city's refusal to integrate the swimming pools was a "badge or incident" of slavery. 403 U.S. at 226. Each of these cases held only that the plaintiffs could not bring an action directly under the Thirteenth Amendment to challenge badges or incident of slavery because Section 2 only empowers Congress to outlaw badges of slavery and Congress had not acted regarding the discrimination at issue. Neither *City of Memphis*, *Palmer*, *Cawley*, nor any of other cases cited in Defendants' Motion address whether a cause of action exists to challenge slavery or involuntary servitude directly under the Thirteenth Amendment. *See also Roberts*, 736 F. Supp. at 1528 (plaintiffs who challenged store's practice of recording the race of black citizens who paid for merchandise by check could not bring a direct cause of action under the Thirteenth Amendment, but had to resort to statutory remedies promulgated under Section 2); *Sanders*, 635 F. Supp. at 87 (plaintiff seeking damages for employment discrimination required to use statutory remedies promulgated under Section 2).

B. Defendants Do Not Dispute That Plaintiffs Have a Cause of Action Under the Declaratory Judgment Act.

Furthermore, irrespective of whether Plaintiffs can sue for relief directly under Section 1 of the Thirteenth Amendment, the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq*. ("DJA"), provides an additional or alternative cause of action for the remedies Plaintiffs seek. Plaintiffs seek relief under the DJA, *see* Compl. at ¶¶1, 3, and Prayer for Relief, and Defendants make no challenge to Plaintiffs' ability to obtain relief under the DJA.

"[W]here the Constitution is the source of the right allegedly violated, no other source of a right—or independent cause of action—[other than the DJA] need be identified." *Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 81 (D.D.C. 2008). While the DJA does not act as an independent source of jurisdiction, it serves as a cause of action when federal question jurisdiction is independently established. *See generally id*. at 78-88. *See also United States v. City of Arcata*, 629 F.3d 986, 990 (9th Cir. 2010) (DJA serves as a cause of action for Constitutional question, since federal question jurisdiction is necessarily established); *N. County Communications Corp. v. Verizon Global Networks, Inc*., 685 F. Supp. 2d 1112, 1122-23 (S.D. Cal. 2010) (explaining the difference between establishing jurisdiction and creating a cause of action). *See generally* Donald L. Doernberg, *The Trojan Horse: How the Declaratory Judgment Act Created A Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529, 582-83 (1989).

Federal question jurisdiction indisputably exists here. Since Plaintiffs' claims arise under the Thirteenth Amendment, the DJA creates a cause of action for this Court to declare the Plaintiffs' legal rights.

In addition, the DJA authorizes Plaintiffs' requested injunctive relief. The DJA permits this court to issue any "[f]urther necessary or proper relief based on a declaratory judgment or decree." 28 U.S.C. § 2202; *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981) (relief pursuant to Section 2202 may include injunctive relief).

V. Plaintiffs Have Standing to Raise These Claims.

Where a motion to dismiss challenges both the merits pursuant to Rule 12(b)(6) and jurisdiction due to a plaintiff's alleged lack of a "legally protected interest" pursuant to Rules 12(b)(6) and 12(b)(1), the jurisdictional inquiry is inextricably intertwined with the merits of plaintiffs' claim. In that situation, the proper course of action is to find that jurisdiction exists and to decide the plaintiff's case on the merits. *See Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981); *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1189 (2nd Cir. 1996) (stating that "in cases where the asserted basis for subject matter jurisdiction is also an element of the plaintiff's allegedly federal cause of action . . . we assume or find a sufficient basis for jurisdiction, and reserve further scrutiny for an inquiry on the merits").

To demonstrate standing under Article III, a plaintiff must satisfy three elements: (1) an injury in fact, i.e., an invasion of a legally protected interest; (2) a causal connection between injury and the alleged conduct; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Defendants do not dispute that the Complaint establishes the second and third elements, but merely question the existence of a "legally protected interest." In this motion, Defendants only challenge standing on the ground that Plaintiffs lack a legally protected interest and, as a corollary, are not within the zone of interest of the Thirteenth Amendment. These inquiries implicate the merits of this case and are therefore subsumed with the Defendants' Rule 12(b)(6) motion. For the reasons demonstrated in Section II, *supra,* Plaintiffs have stated a claim within the meaning of Rule 12(b)(6).

The Ninth Circuit has made clear that "Article III does not compel the conclusion that a . . . suit in the name of an animal is not a 'case or controversy' . . . [and] nothing in the text of Article III explicitly limits the ability to bring a claim in federal court to humans." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004) (citing U.S. CONST. art. III; and Cass R. Sunstein, *Standing for Animals*, 47 UCLA L. REV. 1333 (2000); Katherine A. Burke, *Can We Stand For It?*, 75 U. COLO. L. REV. 633 (2004)). The Ninth Circuit recognized that the inability of an animal to "function as a plaintiff in the same manner as a juridically competent human being" is "no reason" why an animal cannot be granted standing—"any more than it prevents suits brought

in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents." *Cetacean Cmty.*, 386 F.3d at 1176.

Defendants' assertion, based on a Dormant Commerce Clause case, that Plaintiffs' claims are not within the zone of interests of the Thirteenth Amendment should similarly be rejected. "A plaintiff who states a claim under constitutional provisions that protect personal dignity or liberty . . . should not be subjected to further standing inquiry; if need be, stating a claim within the reach of the provision can be found to put the plaintiff within the zone of protected interests." 13A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE § 3531.7. A plaintiff need only allege that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."*Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). "The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987) (footnote omitted). The relevant question is whether or not the Thirteenth Amendment extends to Plaintiffs' slavery. If this Court answers that question in the affirmative, Plaintiffs have standing their claims are undoubtedly within the zone of interest of the Thirteenth Amendment.

VI. Defendants Do Not Challenge the Next Friends' Status and Rule 17 Does Not Bar Plaintiffs' Suit.

Defendants do not challenge that the Next Friends satisfy the criteria established by *Whitmore v. Arkansas*, 495 U.S. 149 (1990). *See* Defs' Brief at 24 n.19. Instead, Defendants invoke the prudential limitation on third party standing. But Plaintiffs and Next Friends do not claim third party standing—the Next Friends bring this case on behalf of Plaintiffs. Compl. at ¶¶ 6, 67-100. Whether a third party can assert the rights of a real party in interest through a next friend is a separate analysis from whether a litigant may assert third party standing generally. *See, e.g., Coal. of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1157-64 (9th Cir. 2002) (conducting separate and distinct inquiries for next friend status and third party standing).

Defendants' third party standing argument addresses a nonissue.

Defendants also conflate Rule 17, the prudential limitation on third party standing, and next friend status, confusing the analysis of each of these issues. Defendants wrongly argue that, because Plaintiffs do not bring a representative action under Rule 17(c) or Rule 17(a), the prudential limitation on third party standing is a barrier to this suit.

Defendants' Rule 17(c) argument misreads Plaintiffs' complaint and the law. Rule 17(c) has no bearing on this action as it addresses procedures for filing suit on behalf of minors and incompetent adult persons, neither of which is present in this case. Defendants appear to suggest that Rule 17(c) occupies the field of circumstances in which parties can be represented by next friends, which is simply wrong. Cases involving competent adults represented by next friends have long been recognized at common law and are not barred by Rule 17(c).[6] Therefore, Rule 17(c) does nothing to preclude Plaintiffs' suit.

Defendants make a similar mistake with regard to Federal Rule of Civil Procedure 17(a). Rule 17 (a) requires that the case be prosecuted in the real party in interest's name absent certain exceptions. Rule 17(a) does not require that the real party in interest even be a party to the litigation. This case is not only being prosecuted in the name of the real parties in interest—the five orcas—but they are parties to the litigation.

Defendants' argument that Rule 17(a) requires a human real party in interest is contradicted by Rule 17(b), which provides rules for capacity determinations not only for human individuals, but for corporations and "all other parties," including, *inter alia*, partnerships, unincorporated associations, and the federal government. FED. R. CIV. PROC. 17(b)(1)-(3). Moreover, Defendants' argument that a real party in interest must be a human being is also contradicted by the sole case they rely on, *U.S. ex rel. Eisenstein v. City of New York, New York*, 129 S. Ct. 2230,

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[6] *See, e.g., Whitmore*, 495 U.S. 149 (next friend action on behalf of competent adult not barred by Rule 17); *Coal. of Clergy*, 310 F.3d 1153 (next friend action on behalf of competent adult Guatanamo detainees not barred by Rule 17); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13, n. 3 (1955) (next friend action for competent adult prisoner held in inaccessible detention in Korea not barred by Rule 17); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 89 (D.D.C. 1998) (105th House of Representatives acting as next friend for a future, yet-to-be-elected House of Representatives not barred by Rule 17).

2235 (2009), a *qui tam* action where the real party in interest was the federal government. 129 S. Ct. at 2231.

Because Defendants make no challenge to the propriety of Plaintiffs proceeding through Next Friends under *Whitmore*, *see* Defs.' Brief at 24 n.19, and neither Rule 17(a) nor 17(c) prevent Plaintiffs from bringing this action through next friends, Defendants' Rule 17 and third party standing arguments should be rejected.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion to Dismiss.

Respectfully submitted,

/s/ Jeffrey S. Kerr

Jeffrey S. Kerr (admitted *pro hac vice*)
Martina Bernstein (State Bar No. 230505)
PETA Foundation
1536 16th Street NW
Washington, DC 20036
Tel: 202-483-2190
Fax: 202-540-2207
JeffK@petaf.org
MartinaB@petaf.org

Matthew Strugar (State Bar No. 232951)
PETA Foundation
2154 W. Sunset Blvd.
Los Angeles, CA 90026
Tel: 323-739-2701
Fax: 202-540-2207
Matthew-s@petaf.org

Philip J. Hirschkop (application for admission *pro hac vice* forthcoming)
Hirschkop & Associates P.C.
1101 King St., Ste. 610
Alexandria, VA 22314
Tel: 703-836-5555
Fax: 703-548-3181
pjhirschkop@aol.com

Attorneys for Plaintiffs