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Supreme Court No. 101264-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

IN

ANIMAL LEGAL DEFENSE FUND,

Plaintiff,

v.

OLYMPIC GAME FARM INC., ROBERT BEEBE, JAMES BEEBE, and KENNETH BEEBE,
Defendants.

AMICI CURIAE BRIEF OF HISTORIANS AND LEGAL SCHOLARS

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INTRODUCTION

This brief offers historical perspective to inform this Court's analysis of the relationship between animal welfare and the public nuisance doctrine under Washington law.

Public interest in the protection of animals has a long history in North America. From Puritan New England legal codes and the common law of the Early Republic, through the burst of late nineteenth-century lawmaking associated with organized animal protection, to contemporary animal-focused legislation and litigation, animals have steadily become the deserving subjects of heightened legal and regulatory protections across the United States.

Throughout the course of American history, consistent with widely shared standards of public decency and the public good, the historically broad doctrine of public nuisance has both informed and been influenced by the development of animal cruelty laws. Legislators passing animal cruelty laws, including in Washington, have not sought to narrow or abrogate the

foundational influence of a strong public interest in protecting against animal cruelty, cognizable in nuisance suits. If anything, laws were passed to broaden the scope of public nuisance to include animal cruelty violations that were not on public display. Both past and contemporary laws and statutes perpetuate, implicitly and explicitly, our historical concern with cruel, neglectful, or socially irresponsible treatment of animals as a public nuisance and a social harm.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are historians and legal scholars with extensive experience in studying and teaching the history of animal welfare and animal-related law, the doctrines of public nuisance, or both. Amici share a strong interest in the proper application of the doctrine of public nuisance in Washington State and throughout the country, and in confirming the availability of public nuisance actions for claims of interference with the public good based on acts of animal cruelty or neglect.

Amici seek to assist the Court by explaining the historical

reach and proper contours of public nuisance claims, and the historical recognition that animal cruelty interferes with the public good.[1]

Amici submit this brief solely on their own behalf, not as representatives of their universities or places of employment; institutional affiliations are provided solely for purposes of identification. Amici are:

- Thomas Aiello, Professor of History and Africana Studies, Valdosta State University
- Diane L. Beers, Professor of History, Holyoke Community College

[1] Key scholarship informing this brief includes Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 Yale L.J. 702 (2023); Claire Priest, *Enforcing Sympathy: Animal Cruelty Doctrine after the Civil War*, 44 Law & Soc. Inquiry 136 (2019); Susan J. Pearson & Kimberly K. Smith, *Developing the Animal Welfare State*, in *Statebuilding From the Margins: Between Reconstruction and the New Deal* 118 (Carol Nackenoff & Julie Novkov eds., 2014); Bernard Unti, *The Quality of Mercy: Organized Animal Protection in the United States 1865-1930* (2002) (Ph.D. dissertation, American University), https://animalstudiesrepository.org/acwp_awap/40/; and David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws during the 1800's*, 1993 Det. C.L. Rev. 1 (1993).

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ISSUE ADDRESSED BY *AMICI CURIAE*

Whether the scope of public nuisance—consistent with its historic breadth and the centuries-old public recognition of the social harms caused by animal cruelty—is broad enough to cover claims of animal cruelty like those alleged here because such misconduct constitutes an unreasonable interference with the common good.

STATEMENT OF THE CASE

The certified question here arises from a case brought by Animal Legal Defense Fund ("ALDF") against Olympic Game Farm ("OGF"), an unaccredited zoo in Sequim, raising allegations of persistent violations of wildlife protection and animal cruelty laws. Amici address only the legal question of whether such violations, if proved, unreasonably interfere with various public rights—including the right to public comfort and decency—such that they constitute a public nuisance.

They do. Centuries of common law prove as much, and amici agree with ALDF that public nuisance in Washington, as

in other common law jurisdictions, "is not and never has been limited to legislatively declared nuisances, harms to property, or public health and safety hazards." Pl. Opening Br. at 1. Understanding the common law history shows that the capacious scope of public nuisance covers far more than interference with the use and enjoyment of property or injury to public health or safety. This Court should answer the certified question in the affirmative and hold that ALDF's allegations of harm to animals and violation of wildlife laws can give rise to a public nuisance under Washington law.

ARGUMENT

I. Common Law Sets the Bounds of Public Nuisance and the Broad Common Law Scope of Public Nuisance Included Redress for Claims of Animal Cruelty.

A. Washington Public Nuisance Is Not Limited to Statutory Examples.

The historic scope of the common law matters here because Washington does not limit public nuisance to the codified examples, which are meant to be indicative, but not exhaustive or exclusive. The statutory language defining public

nuisance is itself open-ended. A nuisance is broadly defined to include "an act or omission" that "either annoys, injures or endangers the comfort, repose, health or safety of others." RCW 7.48.120. A "public nuisance," in turn, is a nuisance "which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal." RCW 7.48.130; *see also Miotke v. City of Spokane*, 101 Wn.2d 307, 331, 678 P.2d 803 (1984) (describing statutory nuisance definitions).

Although the statute lists certain examples that the legislature has chosen over time to specify as public nuisances, RCW 7.48.140, the governing definition of public nuisance embraces a far broader range of (mis)conduct, consistent with the common law history. Washington precedent confirms that the statutory examples are not exhaustive, but rather "nonexclusive instances." *Wood v. Mason Cnty.*, 174 Wn. App. 1018, 2013 WL 1164437, at *9 (2013) (unpublished).

Washington's nuisance statute is thus meant to reinforce,

and if anything, to "widen[] the common-law definition of nuisance." *Goodrich v. Starrett*, 108 Wash. 437, 440-41, 184 P. 220 (1919); *State v. Primeau*, 70 Wn.2d 109, 122, 422 P.2d 302 (1966). And the history of the common law shows that public nuisance comfortably covers the wrongdoing alleged here.

B. The Capacious Scope of Public Nuisance at Common Law Covers Acts of Animal Cruelty.

Public nuisance is generally defined as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (Am. L. Inst. 1979). The doctrine is broad, spanning beyond activities and/or conditions that affect real property, health, or safety, to include acts that endanger the right to comfort and repose, as well as the right to be free of conduct that offends decency. At common law, therefore, courts successfully "fashion[ed] a cause of action [to combat animal cruelty] under the concepts of public nuisance; that is, a breach of the public peace." Favre & Tsang, *supra*, at 6. American courts followed the English precedent, under which "at Common Law, acts of cruelty perpetrated upon animals in

public … constituted a common nuisance and were indictable as such." *Id.* at 5 n.23.[2]

Such use of public nuisance to abate animal mistreatment that affects the common good is consistent with the historically capacious scope of public nuisance, as revealed by historical sources. While "the archetypal public-nuisance cases remain the medieval actions removing impediments from public roads and waterways," the doctrine has also "contained much more diversity for centuries." Kendrick, *supra*, at 716. By the 1660s, William Sheppard identified "common nuisances" as covering not only those "affecting public highways and waterways," but also an array of other wrongful circumstances including "polluting the air 'with houses of office, laying of garbage, carrion or the like, if it be near the common high way'" and

[2] Historically, at common law, the line between nuisance found in civil and criminal cases was blurry at best. *See* Kendrick, *supra*, at 714 nn.46-48.

"victuallers, butchers, bakers, cooks, brewers, maltsters and apothecaries who sell products unfit for human consumption."[3]

Blackstone, too, chronicled the broad sweep of public nuisance. In his non-exclusive list of "common nuisances" in 1769, obstruction of public ways was but the first of eight categories of common, or public, nuisances. Kendrick, *supra*, at 716-17 (quoting 4 William Blackstone, *Commentaries* *168). As Blackstone recounted, "common nuisances are a species of offenses against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires," 4 William Blackstone, *Commentaries* *167 (spelling modernized). As such, his list included, to name only a few, "[t]he making and selling of fireworks and squibs, or

[3] Kendrick, *Public Nuisance* at 716 (citing J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 Cambridge L.J. 55, 60 (1989) (quoting William Sheppard, *The Court-Keepers Guide: Or, a Plain and Familiar Treatise, Needfull and Usefull for the Help of Many That Are Imployed in the Keeping of Law Days, or Courts Baron* (5th ed. 1662))).

throwing them about in any street," "eavesdroppers," and "common scold[s]." *Id.* at *168.

As the law developed, "public nuisance came to cover a large, miscellaneous and diversified group of minor criminal offenses, all of which involved some interference with the interests of the community at large." Kendrick, *supra*, at 718 (quoting Restatement (Second) of Tort § 821B cmt. b).[4] Like the Washington code, RCW 7.48.130, aggregate harm formed the cornerstone of public nuisance at common law, too. Blackstone explicitly recognized common nuisances to include "[a]ll those kinds of nuisances, (such as offensive trades and manufactures) which when injurious to a private man are actionable." Kendrick,

[4] Blackstone's catch-all definition of common nuisances (like Washington's broad statutory definition of public nuisance) encompasses acts of animal cruelty that injure the common good. Blackstone's Commentaries also discuss malicious mischief, or "injury to private property, which the law considers as a public crime," which was the other cause of action available at common law for redress against acts of animal cruelty. *See* Priest, *supra*, at 145 (quoting 4 William Blackstone, *Commentaries* *243).

supra, at 739 (quoting 4 William Blackstone, *Commentaries* *167-69).

Courts have long recognized that animal cruelty inflicts such aggregate harm. Early American cases show how "[t]he common law has often been called into efficient operation, for the punishment of public cruelty inflicted upon animals." *State v. Hale*, 9 N.C. 582, 585 (1823), 2 Hawks 582; *see also* Priest, *supra*, at 144-46 (chronicling historic state cases allowing public nuisance claims for animal cruelty). The interference to the public good was sometimes seen as an offense "against the public morals, which the commission of cruel and barbarous acts tends to corrupt." *Commonwealth v. Turner*, 14 N.E. 130, 132, 5 Mass. 296, 300 (1887) (citing *Commonwealth v. Tilton*, 49 Mass. (8 Met.) 232 (1844), a public nuisance case involving cockfighting).

Contemporary cases reflect and reinforce this longstanding common law precedent, allowing public nuisance claims to be brought for violations involving animal cruelty,

including cases involving allegations like those here.[5] And, as described in the next section, the common law of public nuisance was but the starting point for much animal welfare legislation, which drew from and expanded its scope.

The common law and statutory animal cruelty laws are thus interwoven and reinforcing, particularly in current public nuisance formulations, which recognize that statutory and regulatory violations can serve as grounds for public nuisance claims. *See* Restatement (Second) of Torts § 821B (stating that violation of "a statute, ordinance or administrative regulation" is a circumstance that "may sustain a holding that an interference with a public right is unreasonable").

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[5] Courts have often allowed public nuisance claims for allegations of animal mistreatment generally, and against unaccredited zoos, specifically. *See, e.g., ALDF v. Lucas*, CV No. 2:19-40, 2022 WL 16575761, at *2-5 (W.D. Pa. Nov. 1, 2022); *Kuehl v. Sellner*, 965 N.W.2d 926, 2021 WL 3392813, at *3-4 (Iowa Ct. App. Aug. 4, 2021) (table decision); *ALDF v. Special Memories Zoo*, No. 20-C-216, 2021 WL 101121, at *1-2 (E.D. Wis. Jan. 12, 2021); *Collins v. Tri-State Zoological Park of W. Md.*, 514 F. Supp. 3d 773, 780-81 (D. Md. 2021).

II. Historically, Harm to Animals Has Long Been Recognized As Harm to the Public Good.

The plethora of cases recognizing that animal cruelty and mistreatment harm the public—and therefore give rise to public nuisance liability—did not arise in a historical or social vacuum. Public interest in the protection of animals has a long history in North America, stretching back to Puritan New England and persisting as a major social concern through every era. Throughout this history, the evolution of animal protection legislation has been intertwined with the common law, both drawing upon common law precedent and expanding its reach.

A. Concern for Animals Emerged Early in the Republic and Was Addressed within the Common Law Context of Public Nuisance.

1. One of the earliest enactments in North America, the Massachusetts Bay Colony's Body of Liberties enacted in 1641, included Liberty 92, which targeted a frequently practiced act of revenge: malicious wounding of other people's animals. Jack L. Albright, *Animal Welfare and Animal Rights*, 66 National Forum 34 (1986). Liberty 92 reflected both an understanding of animals'

economic value and the general social benefits of good stewardship and treatment. *Id.* It marked society's compelling interest in the protection of animals both as property and as the objects and victims of socially dangerous acts of cruelty and neglect. Unti, *supra*, at 17-19.

During the Early Republic and the antebellum years, anti-cruelty statutes and prevention societies were scarce, but the law and society nonetheless recognized the harm caused by animal cruelty. Public acts of cruelty to animals were quintessentially representative of and treated as public nuisance cases, breaches of the peace or public harm. Priest, *supra*, at 143-45; Favre & Tsang, *supra*, at 6 nn.26-27. Whenever animal-related concerns like animal fighting, municipal dog roundups, individual acts of public cruelty, and the siting of slaughterhouses surfaced in public discourse, they did so within an established framework of public nuisance. *See* Catherine McNeur, *Taming Manhattan: Environmental Battles in the Antebellum City* 6-43, 95-173 (2014); Andrew A. Robichaud, *Animal City: The Domestication*

of America 53-83 (2019); Unti, *supra*, at 39-43. That public nuisance framing of animal cruelty extended to agricultural practices and to sites like urban stables in which dairy cows were packed inside unventilated buildings and fed on distillery slops. *Id*.

Over time, the law of public (or common) nuisance evolved "to cover cases in which a man was punished not for his cruelty to animals *per se* but because his conduct offended the sensibilities of others." Unti*, supra*, at 39. But still, pre-Civil-War common law "placed no restraints upon [a man's] cruelty if it occurred in private." *Id*.

Early state regulation of diseased or unwholesome food products derived from mistreated, unhealthy animals was another form of legal prohibition against animal mistreatment. These regulations encompassed both the prevention of cruelty and the protection of consumers. Such adulterated foods were considered, in the language of one 1784 Massachusetts law, a "great nuisance of public health and peace." An Act Against

Selling Unwholesome Provisions, Mass. Gen. Laws ch. 50, §1 (1784), available at https://tinyurl.com/nhdjy9tv.

2. In this period, the common law tradition of public nuisance provided the predominant context for both criminal prosecutions and civil regulation of animal mistreatment acts. Courts treated such acts as public nuisances, sometimes labeling them as malicious mischief committed against property and in other instances representing them as "moral turpitude." *People v. Smith*, 5 Cow. 258, 259 (N.Y. Sup. Ct. 1825). In *Smith*, a common nuisance case, the court observed that the animal cruelty there at issue constituted "an outrage upon the principles and feelings of humanity. The direct tendency is a breach of the peace. What [is] more likely to produce it, than wantonly killing, out of mere malice, a useful and domestic animal?" *Id.*; *see also* Priest, *supra*, at 146; Unti, *supra*, at 41.

In a similar vein, a British legal reformer noted, "there can be no doubt that any malicious and wanton cruelty to animals in public outrages the feelings—has a tendency to injure the moral

character of those who witness it—and may therefore be treated as a crime." 9 John Campbell, *Lives of the Lord Chancellors and Keepers of the Great Seal of England, from the Earliest Times till the Reign of King George IV* 22-23 (4th ed. 1857). The common law thus offered what legal scholar Joel Prentiss Bishop termed "indirect" protections of animals, making it a crime to injure or kill domestic animals belonging to others as a form of malicious mischief and vengeful destruction of property, the equivalent of larceny. See Priest, *supra*, at 165 (citing Joel Prentiss Bishop, *Commentaries on the Law of Statutory Crimes* (1873)). And it was also a crime under common law to beat an animal in public, an act that defied the public peace and public morals—in its essence, a crime of public nuisance. Susan J. Pearson, *The Rights of the Defenseless: Protecting Animals and Children in Gilded Age America* 78 (2011); Priest, *supra*, at 143-45.

Given this context, it is not surprising that the few state anti-cruelty statutes that did exist in this period were mostly

placed within criminal codes concerning public morality and decency, and were nearly all grounded in common law concerns about malicious mischief, public nuisance, property in animals, or the public peace. Favre & Tsang, *supra*, 6-12; Unti, *supra*, at 42-43; Pearson, *The Rights of the Defenseless*, *supra*, at 78. As one scholarly account chronicles, these early laws were "reflective of the continued confusion about the intended purpose of the law: to protect valuable personal property or to restrict the pain and suffering inflicted upon animals." Favre & Tsang, *supra*, at 12.

B. After the Civil War, New Animal Protection Legislation Expanded the Common Law Scope to Protect Animals from Private Cruelty.

By the 1870s, society had evolved, and animal protectionists had succeeded in making animal cruelty a problem of general societal scope and legitimated it as a subject of state action. *See* Pearson, *The Rights of the Defenseless*, *supra*, at 138; Unti; *supra*, at 43-49, 261; Favre & Tsang, *supra*, at 13. The post-Civil War statutes differed in an important dimension from

earlier common law treatment—these laws recognized animal suffering as a harm in and of itself. Pearson & Smith, *supra*, at 123. In other words, while the common law of public nuisance was the starting point for this next wave of animal welfare legislation, the new animal cruelty laws went beyond the common law to include liability for even non-public animal abuse. *See, e.g.*, Priest, *supra*, at 158-64. One judge referred to these laws as "the result of modern civilization," based on the principle that "[p]ain is an evil." *People v. Brunell*, 48 How. Pr. 435, 437 (N.Y. Gen. Sess. 1874). Another described this wave of legislation as "the outgrowth of modern sentiment" about the need to protect the rights of "all … animate creation." *Grise v. State*, 37 Ark. 456, 458-59 (1881).

Thus, towards the end of the nineteenth century, legislatures and courts began to recognize the suffering of animals as an additional distinct harm and to criminalize the infliction of pain upon animals. At the same time, however, lawmakers did not abandon the frames of social danger and

public nuisance. Those aggregate-harm concerns continued to shape both the composition of statutes and their interpretation in the courts. Over successive decades, animal protection societies supported increased "regulation of property and the redefinition of property interests in terms that linked private behavior with the public good." Pearson, *The Rights of the Defenseless*, *supra*, at 164-65.

Above all, the new statutes expanded the scope for intervention, treating animal cruelty as criminal whether carried out in public or in private. New York's law, and that of other states, expanded the scope of intervention in a second way, eliminating the common law focus on malicious intent as a requirement for the offense of cruelty to animals, too. *See* Pearson & Smith, *supra*, at 123; Priest, *supra*, at 160.

While the suffering of animals was emphasized in these laws, they continued to encompass concern for social order, and most laws were incorporated within state criminal codes regulating public welfare and morals. In *The Stage Horse Cases*,

which involved the first judicial interpretation of New York's 1867 statute, Judge Daly considered the rationale for government's authority to pass and enforce such a law. 15 Abb. Pr. (n.s.) 51 (N.Y. Com. Pl. 1873); Priest, *supra*, at 152-53, 158. He recognized that animal cruelty had been a common law offense long before any criminal statute because punishing acts of animal cruelty served a clear public purpose. Priest, *supra*, at 152-53. But while noting that the statute eliminated both the intent and breach of the peace requirements of the common law tradition, the judge still emphasized the continuities between the two. *Id.*

C. Modern Development of Animal Protection Laws Continues to Reflect Concern for Both Private and Public Harms.

Through early American history until today, laws reflecting the success of the movement seeking to advocate for animals' better treatment reflect that animal mistreatment both causes private harm and represents a general social problem. Animal protection advocates have not been alone in perceiving

animal cruelty or neglect as degrading and demoralizing to victims, perpetrators, and the broader society alike. Modern laws recognize that acts of cruelty not only cause animal suffering, but they also violate social norms and disturb the peace, and anything so potentially dangerous to the social body is a matter of public concern. In this sense, the anti-cruelty cause successfully "joined personal to social harm" in the minds of legislators and courts. Pearson, *The Rights of the Defenseless*, *supra*, at 59. These broader dangers of animal cruelty to human society were never far from the thoughts of those seeking to frame laws or adjudicate cases. *See id.*; *see also* Susan J. Pearson, *The Cow and the Plow: Animal Suffering, Human Guilt and the Crime of Cruelty*, in 36 *Studies in Law, Politics and Society; Toward A Critique of Guilt: Perspectives from Law and the Humanities* 77, 93 (Matthew Anderson ed., 2005).

Moving into the twentieth century and beyond, matters of nuisance have continued to inform the passage and revision of state laws concerning the protection and safety of animals.

Examples include measures relating to the failure to fill pits and old wells to prevent danger or harm; the careless exposure of barbed wire near livestock; proper street paving and surfaces that allow for the human use of horses; and the throwing, dropping or placement of substances injurious to animals upon roads, highways, streets and in other public places. Roswell McCrea, *The Humane Movement: A Descriptive Survey* 233 (1910); William J. Shultz, *The Humane Movement in the United States 1910-1922* 102, 106, 251-52 (1924). Washington public nuisance law is of a piece with this general trend. *E.g.*, RCW 7.48.140 (9) (failure to fill pits and old wells to prevent danger).

Today, our regulation of animals' treatment is grounded on the shared societal premise that the government has a duty to protect animals as members of a broader human-animal community and to take positive steps to make their lives better. *See* Kimberly Smith, *Governing Animals: Animal Welfare and the Liberal State* xxii, 161 (2013). Public nuisance has not lost its significance amidst the rise of the modern administrative state.

See Kendrick, *supra*, at 785-87. Rather, public nuisance claims are welcome complements for statutory and regulatory obligations, particularly when regulatory enforcement is compromised due to lack of resources or other issues. *Id*. Washington law thus reflects the complementary relationship between statutory and regulatory obligations and the common law in the availability of per se nuisance claims, *see* Pl. Opening Br. at 18-20 (discussing the scope of per se nuisance in Washington).

What's more, the application of public nuisance to activities like those alleged here—captive display operations that mistreat animals—is consistent with more than a century of pronounced social concern over the propriety of debasing display and contact, the unnatural conditions in such facilities and other entertainment and performance settings, and their degrading influence upon the character of those who witness or visit them. *See* Unti, *supra*, at 554-69.

Ultimately, the common law of public nuisance continues to play a role in shaping our view of animal cruelty, and legislators and jurists have never relinquished concern for the protection of public morals. In fact, it is rare to see animal cruelty or neglect—wherever practiced—as anything other than a public harm. Given the scope of society's anti-cruelty concerns, the deleterious social effects of animal cruelty readily qualify as "an unreasonable interference with a public right" and paradigmatic public nuisance.

CONCLUSION

The certified question should be answered to allow the public nuisance claim brought by Animal Legal Defense Fund to proceed.

The undersigned certifies that this brief contains 4,229 words in compliance with Rule 18.17(c)(6).

April 12, 2023

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