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Levine v. Vilsack: When “Likely” Actually Means “Definitely”

Bruce Wagman & Lisa McCurdy*

Sometimes procedural rulings allow courts to avoid important decisions that would otherwise make social and ethical declarations about the duality of American values with respect to animals. Stark evidence of that comes with the recent Ninth Circuit opinion in *Levine v. Vilsack*.¹ The Ninth Circuit ruled only that plaintiffs had no standing to sue because they did not meet the “redressability” requirement of standing under Article III, Section 2 of the U.S. Constitution.² With this holding, the opinion may signal a new hurdle for plaintiffs to clear. The opinion also leaves in place a federal policy that has mandated the humane treatment of animals before they are slaughtered for food for over fifty years, but applies it to only one out of every ten animals who reach the slaughterhouse. The opinion thus delivers two unfortunate messages. As a nation, we care about animals—but not 90 percent of them. And if you are working to protect animals in the courts, that work could become more difficult.

In 1958, Congress passed the Humane Methods of Slaughter Act (HMSA) that declares it is “the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.”³ This policy extends to “cattle, calves, horses, mules, sheep, swine, and other livestock.”⁴ The *Levine* plaintiffs challenged a determination by the United States Department of Agriculture

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1. *Levine v. Vilsack*, 587 F.3d 986 (9th Cir. 2009).

2. *Id.* at 988, 991–97.

3. 7 U.S.C. § 1901 (2006).

4. *Id.* § 1902.

(USDA) that the term “livestock” in the HMSA does not include chickens, turkeys, and other birds, which the USDA classifies as “poultry,” not livestock. This construction guts the statute’s reach, because the vast majority of animals killed for food are birds—roughly twenty-five million are slaughtered *every day* in America, for a total of over nine billion each year.⁵

The *Levine* case was originally filed in 2005 by a group of animal protection advocates, consumers, and poultry workers. The plaintiffs alleged that the USDA exceeded its authority by issuing an interpretation of the HMSA that violated the statute. The USDA stated that the HMSA does not cover “the handling and slaughter of poultry.”⁶ The plaintiffs sought a judicial pronouncement that the slaughter of birds for food was covered by the HMSA, which mandates humane slaughter methods for certain specified animals and “other livestock.”

In the published district court opinion granting summary judgment and dismissing the action, Judge Marilyn Hall Patel held that the Congressional intent behind the word “livestock” was clear and consistent with the interpretation adopted by the USDA, namely, that “there is no specific federal humane handling and slaughter statute for poultry.”⁷ The Ninth Circuit vacated the district court opinion not on the merits, but solely because it found plaintiffs never had standing to bring the action in the first place.⁸ The case was remanded for dismissal.

By focusing on the plaintiffs’ standing (which Judge Patel had found viable), the Ninth Circuit thus avoided the central question underlying the case and exposed the problem with the very notion of “humane slaughter” that does not cover nine out of ten animals killed for food. Some sectors may criticize the methods of slaughter and whether there is anything humane about the transport, forced march, and ultimate death of animals who become our food. The fact that 90 percent of the animals killed for us are actually excluded from the HMSA’s coverage suggests that humane slaughter is sacrificed where it is inconvenient—that is, with all birds. It certainly makes federal oversight and industry practices involving most slaughter much easier when they are exempted from the coverage of a law like the HMSA.

The *Levine* court focused on redressability, the least-often considered of the three constitutional standing requirements, which also include injury in fact and causation. Plaintiffs alleged aesthetic injury as well as an increased risk of illness from consumption of inhumanely slaughtered animals. The Ninth Circuit held those injuries were not “likely” to be redressed by a favorable

5. U.S. DEP’T OF AGRIC., NAT’L AGRIC. STATISTICS SERV., POULTRY-PRODUCTION AND VALUE: SUMMARY OF 2001 (2002).

6. Treatment of Live Poultry before Slaughter, 70 Fed. Reg. 56,624, 56,624–25 (Dep’t of Agric. Sept. 28, 2005).

7. *Levine v. Conner*, 540 F. Supp. 2d 1113, 1114 (N.D. Cal. 2008) (citing Treatment of Live Poultry before Slaughter, 70 Fed. Reg. at 56,625).

8. *Levine v. Vilsack*, 587 F.3d 986 (9th Cir. 2009).

decision.⁹ In so reasoning, the court adopted a very narrow interpretation of what a “likely” outcome really is, one that further limits the ability to challenge government conduct. In terms of the current case, the ruling means that “humane slaughter” does not even get lip service for most of the animals killed for our food.

THE LAWS AND REGULATIONS AT ISSUE

The HMSA directs the Secretary of Agriculture to designate humane methods of slaughter for each species of livestock, but defines neither “livestock” nor “other livestock.”¹⁰ According to the *Levine* opinion, the legislative history provided no guidance regarding whether “other livestock” should include birds.

One complication for the *Levine* plaintiffs was that after adopting the HMSA, Congress subsequently enacted and amended a number of laws that interrelated with the HMSA and its protections. In 1978, without repealing the HMSA, Congress introduced new legislation also titled Humane Methods of Slaughter Act (HMSA of 1978).¹¹ That law repealed the only enforcement provision contained in the 1958 HMSA, which prohibited federal government purchases of inhumanely slaughtered livestock. Simultaneously, Congress incorporated humane slaughter requirements for “cattle, sheep, swine, goats, horses, mules, and other equines” into the Federal Meat Inspection Act (FMIA).¹² The USDA has enforcement authority for violations of the FMIA.¹³

The USDA issued regulations under the 1978 HMSA enactments covering only those animals listed in the FMIA, even though the original, still-valid HMSA kept its broader reference to “livestock” and “other livestock.”¹⁴ In 2005, Congress deleted the FMIA’s specific list of protected animals and substituted the term “amenable species,” which included FMIA’s previous list and “any additional species of livestock that the Secretary considers appropriate.”¹⁵ The USDA thus had the discretion to include birds in the HMSA’s scope, if it wished to follow the unchanged national policy of utilizing “humane methods of slaughtering.”

THE NINTH CIRCUIT DEFINES “LIKELY” TO MEAN SOMETHING AKIN TO “CERTAIN”

The Ninth Circuit held that a favorable decision for the *Levine* plaintiffs would not necessarily remedy their stated injuries because further independent action by the Secretary would be necessary—action over which the court had no authority. Courts have interpreted Article III to require, in order to establish

9. *Id.* at 994.

10. 7 U.S.C. §§ 1901–1902 (2006).

11. See 44 Fed. Reg. 37,954 (June 29, 1979) (to be codified in 7 U.S.C. § 1901).

12. 21 U.S.C. § 603(a).

13. 21 U.S.C. §§ 603(b), 604, 676.

14. *Levine*, 587 F.3d at 990 (citing 44 Fed. Reg. at 37,954).

15. 21 U.S.C. § 601(w).

standing, that (1) plaintiffs have suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury was likely to be redressed by a favorable court decision.¹⁶ According to the court, plaintiffs did not meet the final requirement.

The court cited the statutory entanglement described above in support of its redressability holding, asserting that one of the plaintiffs' problems was that they sought a decision that the "other livestock" language of the 1958 HMSA—not the phrase "amenable species" under the FMIA—included birds.¹⁷ The appellate panel found that even if it ruled that "other livestock" under the 1958 law included birds, the USDA would still have unfettered discretion to determine that the term "amenable species" did not include them within the meaning of the FMIA.¹⁸ As the court saw it, the relief that the plaintiffs sought would not directly bind the USDA to issue regulations under the FMIA, and the FMIA is the only statute offering an enforcement mechanism for humane slaughter requirements.¹⁹

Because the enforcement provisions are under the FMIA, the court found the relief was "outside of the scope of [the] lawsuit."²⁰ The court also found redressability unlikely because the Secretary would then need to issue regulations and those regulations would have to be followed by slaughterers and processors.²¹ As a practical matter, the Ninth Circuit held that plaintiffs' requested relief—a declaration that nine billion birds each year were entitled to a modicum of humane treatment on their way to the table—would require the USDA to act consistently with the notion that birds should be treated humanely.²² It would compel the USDA to act in compliance with the federal policy, stated fifty-two years ago, that animals deserve to be treated kindly on their way to death. This was too far a stretch for the Ninth Circuit.

The Ninth Circuit partially relied in its opinion on an extra hurdle thrown in the way of environmental and animal-protection plaintiffs by Justice Scalia's opinion in *Lujan v. Defenders of Wildlife*.²³ That case effectively raised the standing bar where "third parties not before the court must change their behavior in order for any injury suffered to be redressed."²⁴ In reality, that is often the case; however, neither *Lujan* nor *Levine* (nor any other case) provide clarity on just what or how much more plaintiffs must allege or prove when third parties are involved. The doctrine is thus open for courts to impose their own interpretation of this crucial issue on plaintiffs.

16. *Levine*, 587 F.3d at 991–92.

17. *Id.* at 994.

18. *Id.*

19. *Id.* at 993–94.

20. *Id.* at 993.

21. *Id.* at 994.

22. *Id.* at 990 (citing Treatment of Live Poultry before Slaughter, 70 Fed. Reg. 56,624, 56,625 (Dep't of Agric. Sept. 28, 2005)).

23. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992).

24. *Levine*, 587 F.3d at 992.

The court's decision rests on an interpretation of what "likely" means under the judicial precedent interpreting the "case or controversy" language of Article III. Tightening the reins on federal standing, the Ninth Circuit now defines a "likely" outcome as one that is mandated and a virtual certainty and that cannot be circumvented by a violation of law.²⁵ The court crafted this new definition by relying on language and sentiments from *Lujan* and *Fernandez v. Brock*.²⁶ The Ninth Circuit determined it was mere speculation that the USDA would follow the federal policy of humane slaughter, and found no redressability because "the Supreme Court rejected speculation [about the likelihood of a remedy], even when it took the form of 'confiden[t]' speculation."²⁷ But *Lujan* and *Fernandez* involved neither an agency presumably operating in accord with a half-century of Congressional policy, nor of course the slaughter of billions of animals.

REDRESSABILITY—THE LEAST-DEFINED STANDING REQUIREMENT

The Ninth Circuit's decision in *Levine* is complicated by the interplay among the FMIA, the first HMSA, and the HMSA of 1978. But the opinion glosses over a continuing question about the true meaning of the redressability requirement and creates a potentially rocky road for plaintiffs in future cases.

In most cases, including certain animal protection cases, redressability folds easily into causation for Article III standing purposes. In a hypothetical example, assume the federal government determines that certain breeds of dog must be killed, and your companion animal is a member of that breed. You sue to enjoin the operation of the statute. For purposes of federal standing, your potential injury in fact is clear, the federal action is certainly the cause of your injury, and if the action is halted your injury would be redressed. In that case the remedy—saving your dog—is concrete and identifiable. In many environmental and animal protection cases, however, plaintiffs claim "aesthetic injury" and allege the government's wrongful conduct harms them in terms of their ability to appreciate an identified resource, such as the ability to view animals, or to see them treated humanely, as opposed to inhumanely.²⁸ When

25. *Id.* at 993–94.

26. *Fernandez v. Brock*, 840 F.2d 622 (9th Cir. 1988). The *Fernandez* plaintiffs were migrant farmworkers seeking increased coverage under federal pension laws. They requested an order requiring federal agencies to draft regulations that would entitle them to that relief. The court found that plaintiffs could only get the increased benefits if a number of third parties and the plaintiffs themselves acted independently. Because the court had no jurisdiction to mandate the outcome of those independent acts, it held plaintiffs' likelihood of getting their remedy was too speculative, and that therefore they could not satisfy the standing redressability requirement.

27. *Levine*, 587 F.3d at 993 (quoting *Lujan*, 504 U.S. at 569–70).

28. See, e.g., *Lujan*, 504 U.S. at 562–64 (plaintiffs alleged limitation on coverage of Endangered Species Act would impair their ability to view crocodiles, elephants and leopards); *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1988) (plaintiffs alleged violation of Animal Welfare Act caused their injuries when they viewed animals suffering in roadside zoo); *Humane Society of the United States v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988) (plaintiffs alleged improper allowance of hunting on federal wildlife refuges would cause them aesthetic injury when they witnessed decreased numbers of animals, and injured animals).

aesthetic injury enters the picture, redressability becomes a harder concept, and one that demands a flexibility that not all courts embrace.

Animal Legal Defense Fund v. Glickman, perhaps the leading case on standing for animal-protection plaintiffs, provides a good real-life example of this dilemma and the active dispute (judicial as well as academic) over redressability.²⁹ The *Glickman* plaintiffs were distressed at the treatment of animals in a roadside zoo and alleged that the USDA's failure to adopt appropriate regulations under the Animal Welfare Act permitted dealers and exhibitors like the zoo to keep animals in inhumane conditions.³⁰ The individual plaintiffs alleged aesthetic injury based on their experiences viewing animals that they believed were being treated inhumanely.³¹ The majority held that the plaintiffs had standing.³² With respect to redressability, the court rejected the notion that the redressability requirement was not met because the agency might not enact regulations that met the plaintiffs' subjective standards for humane treatment.³³ The *Glickman* court did not require certainty that the plaintiffs' aesthetic injury would be eliminated—only that there would be a “likely” potential for redress.³⁴

The virulent dissent by Judge David Sentelle in *Glickman* demonstrates the wild card that is redressability.³⁵ The dissent asserted that questions of humane treatment were virtually immune from judicial review. “[W]hen... a plaintiff asserts that a regulation has injured an unquantifiable interest (the plaintiff's own taste), it seems to me nearly impossible to redress such an injury by a general court order....”³⁶ According to Judge Sentelle, redressability cannot be satisfied in virtually any animal welfare case, because the courts can never be sure if a plaintiff with aesthetic injuries would be happy.³⁷

The *Glickman* dissent and the *Levine* opinion threaten to turn the redressability prong into a bar to any animal-protection plaintiff who cannot prove that the relief she seeks will definitely come to pass. But prior jurisprudence and practical application of the standing doctrine suggest that this cannot and should not be the standard for redressability. The question for courts should simply be: if the plaintiffs prevail, is it likely that their injuries will be redressed? And in terms of viewing those injuries, the focus should not be solely on actual subjective injury—to personal taste, in aesthetic injury cases. The redressability question should also focus on the *legal* injury that is the basis for the causes of action in the case. For example, in *Glickman* the injury would be the failure to enact regulations required by the intent and spirit of the

29. *Glickman*, 154 F.3d 426.

30. *Id.* at 428.

31. *Id.*

32. *Id.* at 429.

33. *Id.* at 443–44.

34. *Id.* at 454.

35. *Id.* (The majority and dissent could not even agree on the *spelling* of the word, with the majority choosing “redressibility” and the dissent “redressability.”).

36. *Id.* (Sentelle, J., dissenting).

37. *Id.* at 453–54.

Animal Welfare Act and the remedy would be their enactment. In *Levine*, the injury would be the failure to provide for humane slaughter for birds as required by the HSMA, and the remedy would be the correction of that failure.

LEVINE'S REDRESSABILITY—THE JUDICIAL EQUIVALENT OF THE OLD WEST

In *Levine*, the court decided that even if it found that federal law and longstanding policy require that all animals be humanely slaughtered, the USDA was likely to ignore that ruling and refuse to apply FMIA inspection requirements to all animals protected from inhumane slaughter by the HMSA. *Levine* makes the initial, faulty assumption that the USDA would ignore both the legislative intent behind the HMSA and any judicial holding that the HMSA does apply to birds who become food. Thus the court includes in its redressability analysis the possibility of blatant disregard of the law by the agency tasked with carrying out the law.

If that potential for lawlessness is sufficient to negate the redressability prong of Article III standing, virtually all injuries are unredressable. If the HMSA requires that birds be slaughtered humanely, and the FMIA requires inspections to ensure that “amenable” species are slaughtered humanely, is it not likely that the USDA would conclude that bird slaughter methods be inspected for compliance with federal law? It is the court’s own faulty reasoning, not the statutory scheme nor the language relating to humane slaughter laws, that renders redressability “unlikely” in *Levine*.