

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

NATURAL RESOURCES DEFENSE COUNCIL,
INC., *et al.*,

Plaintiffs,

18 Civ. 4596 (VEC)

-against-

U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants.

NATIONAL AUDUBON SOCIETY, *et al.*,

Plaintiffs,

18 Civ. 4601 (VEC)

-against-

U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants.

STATE OF NEW YORK, *et al.*,

Plaintiffs,

18 Civ. 8084 (VEC)

-against-

U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants.

**BRIEF OF *AMICI CURIAE* FORMER INTERIOR DEPARTMENT OFFICIALS
IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Jonathan Andrew, Daniel Ashe, Donald Barry, Robert Blohm, Brad Bortner, Tom Dwyer, Lynn Greenwalt, Lyle Laverty, Lynn Scarlett, Paul Schmidt, and Rollin Sparrowe submit this brief as *amici curiae* in support of the motions for summary judgment submitted by the Natural Resources Defense Council, National Wildlife Federation, National Audubon Society, American Bird Conservancy, Center for Biological Diversity, Defenders of Wildlife, and the States of California, Illinois, Maryland, New Jersey, New Mexico, New York, Oregon, and the Commonwealth of Massachusetts (collectively, the “Plaintiffs”). *Amici* are conservation professionals who served in the Department of the Interior (the “Department”), with tenures ranging in time from 1972 through 2017. *Amici* served at all levels within the Department including as Deputy Secretary, Assistant Secretary, Director of the U.S. Fish and Wildlife Service, Assistant Solicitor for Fish and Wildlife, Assistant Director for Migratory Birds, and Division Chief for Migratory Bird Management. They served as Senate-confirmed political appointees and career civil servants under both Republican and Democratic administrations.¹

Despite their differing political backgrounds and diverse histories of service within the Department, *Amici* are gravely concerned by the reversal of the Department’s long-standing recognition that the Migratory Bird Treaty Act of 1918 (the “MBTA”) prohibits the unauthorized incidental takings and killings of migratory birds. The reversal of the Department’s decades-long interpretation of the MBTA, as embodied in the Jorjani M-Opinion (Opinion M-37050), threatens a “national interest of very nearly the first magnitude.” *Missouri v. Holland*, 252 U.S. 416, 435 (1920). *Amici* have therefore spoken out and continue to speak out against the Jorjani

¹ Short biographies of *Amici* are attached hereto as Appendix A. In their current endeavors, *Amici* continue to serve the public interest, many in the fields of habitat conservation and environmental protection.

M-Opinion's reinterpretation, joining an open letter to the Secretary of the Interior urging him to suspend the opinion, AR614,² penning an op-ed in the *New York Times* condemning the opinion's reversal of longstanding protections for birds,³ and submitting a prior amicus brief to this Court in support of Plaintiffs' opposition to the motion to dismiss of the U.S. Department of the Interior, U.S. Fish and Wildlife Service, and Daniel Jorjani (collectively, the "Defendants").⁴

Contrary to the assertions previously raised by Defendants, the Jorjani M-Opinion's impact on migratory birds has been real and immediate. The Jorjani M-Opinion has resulted in the cessation of incidental take investigations and prosecutions and has led to, and will continue to lead to, unnecessary deaths of migratory birds in untold numbers. Accordingly, *Amici* feel compelled to inform this Court of the Department's prior interpretation of the MBTA to prohibit incidental take, the anomalous lack of involvement of any U.S. Fish and Wildlife Service ("FWS") personnel in the drafting of the Jorjani M-Opinion, and the impact the Jorjani M-Opinion has already had on industry actors.

BACKGROUND

The FWS is one of the nine technical bureaus within the Department of the Interior and has as its mission to "work with others to conserve, protect, manage, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people."⁵ In support of that

² All references with the prefix "AR" are to the administrative record filed with the Clerk of Court on November 21, 2019. *See* ECF No. 65.

³ David J. Hayes & Lynn Scarlett, *A Free Pass to Kill Migratory Birds*, *N.Y. Times* (June 7, 2018), <https://www.nytimes.com/2018/06/07/opinion/a-free-pass-to-kill-migratory-birds.html>.

⁴ *Br. of Amici Curiae Former Interior Department Officials in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss*, 1:18-cv-04596-VEC, Jan. 17, 2019, ECF No. 44-1.

⁵ Memorandum of Understanding between the U.S. Department of the Interior, Bureau of Land Management, and the U.S. Fish and Wildlife Service to Promote the Conservation of Migratory Birds, 3 (April 12, 2010), <https://www.fws.gov/migratorybirds/pdf/management/moublm.pdf>.

mission, the FWS is “legally mandated to implement” the Migratory Bird Treaty Act of 1918,⁶ which includes “responsibilities for population management (*i.e.*, monitoring), habitat protection (*e.g.*, acquisition, enhancement, and modification of habitats), international coordination, and regulation development and enforcement”⁷ and must seek ways “to prevent damage to [migratory] birds and their environments, including damage from pollution.” AR45.

The MBTA was among the first environmental laws enacted in the United States and serves as the bedrock of this country’s efforts to conserve our natural resources. The MBTA has been credited with “prevent[ing] extinctions and promot[ing] recovery of once-depleted bird species.”⁸ Congress enacted and later amended the MBTA to implement four bilateral treaties with Canada, Mexico, Japan, and Russia, countries with which we share migratory bird populations and with which the United States continues to work to protect this shared resource. The goal of these treaties was to pursue the long-term conservation of our shared migratory bird species.⁹ The MBTA protects over 1,000 native species of birds, AR1461, including songbirds and other birds not commonly hunted. *See United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 532 (E.D. Cal. 1978), *aff’d on other grounds*, 578 F.2d 259 (9th Cir. 1978). In order to save migratory bird species from extinction and from “indiscriminate slaughter,” the Act made it unlawful “at any time, by any means or in any manner” to “hunt, take, capture, [or] kill . . . any

⁶ U.S. Fish & Wildlife Service, Migratory Bird Treaty Act of 1918 (August 8, 2017), <http://www.fws.gov/laws/lawsdigest/migtrea.html>.

⁷ Memorandum of Understanding, 3.

⁸ Kenneth V. Rosenberg, et al., *Decline of the North American avifauna*, *Science*, 3–4 (Oct. 4, 2019).

⁹ 56 Cong. Rec. 7360–61 (June 4, 1918) (statement of Rep. Stedman). *See also United States v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978) (noting that “Congress recognized the important public policy behind protecting migratory birds” in enacting the MBTA).

migratory bird.” 16 U.S.C. § 703(a). The MBTA is a strict liability criminal statute; violators are subject to a fine of up to \$15,000, and up to six months’ imprisonment. 16 U.S.C. § 707(a).

ARGUMENT

I. The MBTA has always been interpreted to prevent incidental takes.

A. *The Department’s prior interpretation was consistent with how it investigated and pursued MBTA violations in the modern, industrial era.*

For the past 50 years, the FWS, the Department of the Interior, and the Department of Justice have all consistently interpreted the text of the MBTA as prohibiting activities that foreseeably kill migratory birds, regardless of whether the killing of birds was intentional or incidental. Though the primary impetus for the MBTA was to stop the over-hunting and poaching of bird species that had been driven to the point of near-extinction, the goal of the MBTA was, more broadly, to protect migratory birds due to their “great value as a source of food [and] in destroying insects.”¹⁰

In the 1970s, FWS officials perceived a shift in the threat to the Nation’s migratory birds. As the protections of the MBTA began to take effect and improved conservation practices allowed many species to recover, enforcement officials noticed an increased threat to migratory birds posed by activities such as oil and gas exploration, unregulated spraying of pesticides, exposed chemical by-products associated with mining operations, and power lines, to name a few. While these activities did not have the killing of birds as their aim, their effects on migratory bird populations had become even more deleterious than hunting and poaching.

To reverse this trend and to help the Nation fulfill its treaty obligations to conserve migratory birds, FWS officials enforced the provisions of the MBTA that prohibited the taking

¹⁰ Convention for the Protection of Migratory Birds, proclamation, 39 Stat. 1702 (Aug. 16, 1916) (Canada Convention).

or killing of migratory birds “by any means or in any manner” against these activities, focusing their efforts on bird takings that were foreseeable, avoidable, or proximately caused by industry actors. This led to the development of case law, described below, confirming the government’s view that incidental takes were prohibited by the MBTA. The FWS’s approach also prompted the Department of Justice to consistently provide notice to industrial actors of risks posed by their facilities to birds, encourage remedial measures, issue permits where possible and appropriate, and “reserve for prosecution those cases in which companies ignore, deny, or refuse to comply with a [best management practices] approach to avian protection in conducting their business.” AR1368.

On January 10, 2017, then-Solicitor of the Interior Hilary Tompkins issued Opinion M-37041, which reaffirmed the FWS’s “long-standing interpretation that the MBTA prohibits incidental take.” *See* Memorandum from Hilary C. Tompkins, Solicitor of the Interior, to Director, U.S. Fish & Wildlife Serv., Opinion M-37041, *Incidental Take Prohibited Under the Migratory Bird Treaty Act* (Jan 10, 2017) (AR 44).

B. Courts have confirmed that the MBTA prohibits incidental takes.

Courts have affirmed the view of the FWS, the Department of the Interior, and the Department of Justice that incidental take is prohibited by the MBTA. For example, in the 1970s, the Department of Justice, acting on behalf of the FWS, obtained a conviction on 18 counts of violating the MBTA against a pesticide manufacturer who failed to take adequate precautions to prevent incidental deaths of birds in its contaminated wastewater pond. *See United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978). The criminal prosecution came after FWS agents visited the plant and suggested ways in which the company could repel the birds or prevent them from landing on the pond through the placement of a net. *Id.* at 905. The case thus illustrates the understanding that the MBTA imposes strict liability for the killing of protected

birds even when the killing is non-purposeful, so long as the acts that led to the killing were voluntary. *Id.* at 905–08 (concluding that courts and prosecutors could use their “sound discretion” to decide whether to pursue an incidental taking when the violation was an “innocent technical” one).

Other courts that have addressed the issue of incidental take have confirmed the Second Circuit’s view. A court in California examining the MBTA concluded that Congress’s “use of the broad language ‘by any means or in any manner’ belies the contention that Congress intended to limit the imposition of criminal penalties to those who hunted or captured migratory birds.” *Corbin*, 444 F. Supp. at 532. And while the MBTA’s language is broad, its meaning is plain and unambiguous. *United States v. Moon Lake Elec. Ass’n*, 45 F. Supp. 2d 1070, 1074–1075, 1079 (D. Colo. 1999) (concluding that the MBTA proscribes conduct “beyond that normally exhibited by hunters and poachers,” encompassing taking and killing “by any means or in any manner”). Further, though “[t]he actions criminalized by the MBTA may be legion, . . . they are not vague.” *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 689 (10th Cir. 2010).

Importantly, courts have also affirmed the strict liability nature of the MBTA. As a “public welfare offense[,]” intent is not a required element; “the guilty act alone is sufficient to make out the crime.” *Corbin*, 444 F. Supp at 535–36. Despite the lack of an intent requirement, to make out a violation of the MBTA, the government must still prove proximate causation. *Moon Lake*, 45 F. Supp. 2d at 1085; *Apollo Energies, Inc.*, 611 F.3d at 690 (holding that the MBTA requires a defendant to “proximately cause the statute’s violation”). Accordingly, and based upon a long history of a balanced and common-sense application of the MBTA over the course of *Amici*’s collective careers, fears of potential MBTA convictions for the incidental take

of a bird that flies into an automobile or a picture window of a home are unfounded. *See, e.g.*, AR22–23.¹¹

C. *The Department’s prior interpretation is consistent with Congressional understanding and intent.*

Congress intended for the MBTA to protect our Nation’s migratory birds from slaughter and extinction because of the vital role these birds play in eliminating agricultural pests and in bringing joy to those who observe them. *See, e.g.*, 56 Cong. Rec. 7360 (June 4, 1918) (statement of Rep. Anthony: “I do not think there is any question about the great value to agriculture from the protection of insectivorous birds. That has been demonstrated beyond all doubt.”); 56 Cong. Rec. 7363 (June 4, 1918) (statement of Rep. Tillman: “I, as much as any man, am in favor of conserving wild life, of protecting the song birds, and I distinctly believe in protecting those birds that destroy insects. . . .”).

Congress confirmed the understanding that the MBTA prohibits incidental take when it passed an amendment to the MBTA in 2002 with respect to certain military readiness activities. *See* Pub. L. No. 107-314, § 315, 116 Stat. 2458, 2461 (2002). This amendment was passed in response to a court decision finding that the Navy’s live-fire training in the Northern Marianas Islands resulted in the unlawful take of migratory birds. *See Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161 (D.D.C. 2002), *vacated sub. nom. Ctr. for Biological Diversity v. England*, 2003 WL 179848, at *1 (D.C. Cir. Jan. 23, 2003). The amendment temporarily exempts the incidental taking of migratory birds during military readiness activities from the MBTA and instructs the Department of the Interior to promulgate regulations to specifically exempt any such incidental takes from section 3(a) of the MBTA. Pub. L. No. 107-314,

¹¹ The strict liability, misdemeanor provisions of the MBTA stand in contrast to the statute’s felony provision, which only applies to “knowing[]” violations. *See* 16 U.S.C. § 707(b).

§ 315(a), (d). The amendment further authorized the Secretaries of Defense and Interior to work cooperatively to “identify measures (1) to minimize and mitigate, to the extent practicable, any adverse impacts of authorized military readiness activities on affected species of migratory birds; and (2) to monitor the impacts of such military readiness activities on affected species of migratory birds.” Pub. L. No. 107-314, § 315(a)–(b). And it confirms Congress’s understanding that the plain language of the MBTA prohibits all incidental takes of migratory birds and specifically authorizes the Secretary of the Interior to exempt certain incidental takes.

D. *The Department’s prior interpretation is consistent with the shared understanding among the United States and its treaty partners.*

The four conventions that formed the basis of the MBTA all evince the member countries’ desire to protect all migratory birds and their habitats from all threats, including pollution. For example, Canada and the United States confirmed their shared understanding that the goal of the convention was to protect migratory bird species who “are of great value as a source of food or in destroying insects . . . but are nevertheless in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds.”¹² The conventions between the United States and Mexico, Japan, and Russia similarly recognize a desire to protect all types of migratory birds from all threats, including environmental threats caused by pollution.¹³ The United States and its treaty partners

¹² Convention for the Protection of Migratory Birds, proclamation, 39 Stat. 1702 (Aug. 16, 1916) (Canada Convention).

¹³ See, e.g., Convention for the Protection of Migratory Birds and Game Mammals, art. IV, 50 Stat. 1311 (Feb. 7, 1936) (Mexico Convention); Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, art. VI and annex, 25 U.S.T. 3329 (Mar. 4, 1972) (Japan Convention); Convention Concerning the Conservation of Migratory Birds and Their Environment, art. IV and app’x, 29 U.S.T. 4647 (Nov. 19, 1976) (Russia Convention).

thus sought to conserve our shared bird populations through conventions that recognized environmental threats that went beyond intentional killings.

In a 1995 revision to the Canada Convention, the parties reaffirmed their commitment to the “long-term conservation of shared species of migratory birds for their nutritional, social, cultural, spiritual, ecological, economic, and aesthetic values[.]”¹⁴ This goal is to be accomplished through “monitoring, regulation, enforcement and compliance; [c]o-operation and partnership; [e]ducation and information; [i]ncentives for effective stewardship; [and] protection of incubating birds,” among others.¹⁵ The revised Convention also requires each party to use its power to “prevent damage to such birds and their environments, including damage resulting from pollution[.]”¹⁶ The Jorjani M-Opinion’s interpretation of the MBTA to exclude incidental takes resulting from pollution or habitat destruction is impossible to square with this text.

II. The Jorjani M-Opinion reversed longstanding precedent without the involvement of FWS personnel.

There is no denying that the Jorjani M-Opinion represents a complete reversal of agency policy and practice with respect to the incidental take of migratory birds. Yet such a dramatic shift was brought about without any input from FWS personnel. In a stark departure from prior practice, the Department cut FWS personnel out of the process of developing the Jorjani M-Opinion. *Amici* who were serving in the FWS in early 2017, including one who was serving as Chief of the Division of Migratory Bird Management, learned of the suspension of the Tompkins

¹⁴ Protocol Amending the 1916 Convention for the Protection of Migratory Birds, 1995 WL 877199, at *3 (Dec. 14, 1995), *reprinted in* S. Treaty Doc. No. 104-28 (Revised Canada Convention).

¹⁵ *Id.* at *4.

¹⁶ *Id.* at *5. *See also* Russia Convention art. III (“To the extent possible, the Contracting Parties shall undertake measures necessary to protect and enhance the environment of migratory birds and to prevent and abate the pollution or detrimental alteration of that environment.”).

M-Opinion only when it was announced to the general public. The exclusion of FWS personnel from the decision-making process created confusion within the FWS and among FWS's conservation partners as to whether the suspension served to reverse the government's longstanding interpretation of the MBTA as prohibiting incidental take. *Amici* who were still serving in the FWS were again blindsided when the Department issued the Jorjani M-Opinion.

Rather than involving FWS officials in the process of developing the Jorjani M-Opinion, the Department worked instead with energy industry advocates, whose clients had the most to gain from a revised interpretation of the MBTA. Since the filing of this lawsuit, *Amici* have learned of extensive email correspondence between energy industry representatives and political appointees in the Interior Department concerning the development of the Jorjani M-Opinion. *See, e.g.*, AR622 (Dec. 20, 2017 email from Samantha McDonald, Dir. of Gov't Relations, Independent Petroleum Ass'n of Am. to Timothy Williams, Principal Dep. Dir., Office of Intergovernmental and External Affairs, Dept. of the Interior, stating "[t]here's lots of chatter downtown about the MBTA solicitor's opinion coming out tomorrow"); AR624 (Nov. 3, 2017 email from Samantha McDonald, Dir. of Gov't Relations, Independent Petroleum Ass'n of Am. to Timothy Williams, asking "[a]ny word on the solicitor's opinion yet?"); AR626 (Oct. 2, 2017 email from Katie Cullen, SC Partners LLC, on behalf of First Solar, to various Dept. of Interior officials, stating "[w]e know that FWS is working on a new M-opinion regarding the applicability of MBTA to Incidental Take."); AR629 (Aug. 31, 2017, email from Rachel Kenigsberg, Baker Botts, on behalf of the "Cross-Cutting Issues Group" to Mari Grace Caminiti, Dept. of the Interior, submitting a letter "supporting the rescission of Opinion M-37041 and requesting issuance of a new Opinion . . . concluding that the Migratory Bird Treaty Act applies only to the intentional take and killing of migratory birds."). This correspondence shows that

energy industry lobbyists not only advocated in favor of the opinion's issuance, but also supplied many of the policy arguments it contains. *See, e.g.*, AR633, AR641, AR652.

By excluding FWS personnel from the process of reinterpreting the MBTA, the officials in the Solicitor's Office silenced the professionals with the deepest understanding of how MBTA enforcement efforts fit into the Department's greater conservation mission. In so doing, the Department eliminated its most important tool to wield against those who take and kill migratory birds, ignoring its mission to protect the nation's natural resources in favor of protecting the profits of the energy industry.

III. The Jorjani M-Opinion has led to and will continue to lead to an increase in avoidable migratory bird deaths.

A. *The Department's prior interpretation had important, meaningful impacts on bird conservation.*

The importance of the MBTA and its prohibition against the taking of birds, whether intentional or incidental, cannot be overstated. Migratory birds are of unquantifiable ecological and economic value to this country and to those other countries whose migratory bird populations we share. The birds protected by the MBTA "contribute to biological diversity and bring tremendous enjoyment to millions of Americans who study, watch, feed, or hunt these birds throughout the United States and other countries."¹⁷ They also provide important economic benefits to local communities and businesses.¹⁸ Finally, protecting migratory birds serves a broader purpose beyond just ensuring the survival of the birds themselves: conservation and

¹⁷ Exec. Order No. 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, 66 Fed. Reg. 3853 (Jan. 10, 2001).

¹⁸ Memorandum of Understanding between the U.S. Dep't of the Interior and the U.S. Fish and Wildlife Serv. to Promote the Conservation of Migratory Birds, 2 (April 12, 2010), <https://www.fws.gov/migratorybirds/pdf/management/moublm.pdf>.

management of migratory birds helps “sustain ecological integrity, insect control, pollination of wild and cultivated flora, and natural seed dispersal.”¹⁹

Yet, recently published research shows that the overall bird population in North America has plummeted in recent decades. Researchers estimate that since 1970, North America has lost 3 billion birds on net, with migratory birds accounting for 2.5 billion of the total loss.²⁰ The FWS’s own estimates support these researchers’ worrying conclusions. According to the FWS, tens of millions of birds every year are killed by human-caused threats, including communication towers, wind turbines, and oil spills. *See* AR1461–62. Many of the 1,027 species protected under the MBTA are experiencing population decline due to such increased threats. *See* AR1461.

All hope is not lost, however. The researchers also found that populations of once-endangered species like bald eagles, and other falcons and waterfowl, were thriving thanks to conservation measures like the Endangered Species Act and the MBTA—at least under FWS’s prior interpretation.²¹ *Amici* believe that reversing course now, when such progress has been made—and when industrial threats to migratory birds remain acute— will be catastrophic.

B. *The Department’s prior interpretation struck the appropriate balance between the economic interests of the industry and conservation.*

1. The FWS and industry actors used to work as partners to avoid unnecessary bird deaths.

Prior to the issuance of the Jorjani M-Opinion, FWS officials and industry actors considered themselves partners in the fight to prevent unnecessary deaths of migratory birds. In

¹⁹ *Id.* at 1–2.

²⁰ Kenneth V. Rosenberg, et al., *Decline of the North American avifauna*, *Science*, 1 (Oct. 4, 2019).

²¹ *See* Carl Zimmer, *Birds Are Vanishing from North America*, *N.Y. Times*, Sept. 19, 2019, <https://www.nytimes.com/2019/09/19/science/bird-populations-america-canada.html>.

order to protect the largest number of migratory birds from harm while also taking into consideration the needs of the companies affected by the MBTA, the FWS has, until the M-Opinion's issuance, acted to incentivize companies to work cooperatively with the government to prevent harm to migratory birds. During *Amici's* tenure at the Department, FWS officials ensured that industry actors understood the common threats posed to migratory birds and best management practices to minimize those threats through the development and publication of guidance documents. *See* AR1359. To encourage compliance with these voluntary guidelines, the FWS would take a company's compliance with the guidelines into account when deciding whether to prosecute that company's violations of the MBTA.

Over the past several decades, some of the most important and effective guidance documents were developed cooperatively by the government, industry participants, and nonprofit organizations to minimize migratory bird deaths, including those resulting incidentally. For example, the FWS has a long history of “work[ing] cooperatively with oil producers to cover exposed crude oil waste pits with nets to keep birds from landing in them, with the electric utility industry to minimize raptor deaths on transmission lines, and with the wind industry to improve the siting and operation of wind turbines to minimize bird killings.”²² In addition, the FWS, Edison Electric Institute, the Electric Power Research Institute, the National Rural Cooperative Electrical Association, the Rural Utilities Service, and over 50 electric utility companies in the U.S. and Canada joined together in 1989 to form the Avian Power Line Interaction Committee to curb whooping crane collisions with power lines. AR209. Together, the Committee developed guidance documents “identifying causes and minimization methods for avian electrocutions and

²² David J. Hayes and Lynn Scarlett, *A Free Pass to Kill Migratory Birds*, N.Y. Times (June 7, 2018), <https://www.nytimes.com/2018/06/07/opinion/a-free-pass-to-kill-migratory-birds.html>.

collisions.”²³ Later, in 2005, the FWS and the Avian Power Line Interaction Committee jointly released national Avian Protection Plan Guidelines. *See* AR199.

Since 2003, the FWS has been working cooperatively with conservation groups and wind industry participants to develop voluntary guidelines to “reduc[e] the adverse effects to fish and wildlife resources from wind energy projects[.]” AR297. In March 2012, the FWS issued its final Land-Based Wind Energy Guidelines to help promote compliance with relevant wildlife laws and regulations, including the MBTA, and to help “[m]itigate, . . . avoid, minimize, and compensate for potential adverse effects on species of concern and their habitats.” AR297. Though the Guidelines are voluntary, the FWS stated that it would “regard a developer’s or operator’s adherence to these Guidelines, including communication with the Service, as appropriate means of identifying and implementing reasonable effective measures to avoid the take of species protected under the MBTA. . . .” AR302.

2. Most investigations ended in voluntary adoption of corrective actions.

Over the course of their long careers in government, *Amici* have recognized that the MBTA’s strict liability standard is tempered by common sense notions of reasonable foreseeability and readily available alternatives. During *Amici*’s tenure at the Department, the death of a migratory bird caused by industry actors did not automatically lead to enforcement action. Instead, after the FWS became aware of a bird death or deaths, agents would notify the responsible actor and provide it with an opportunity to remedy the cause. In some cases, the FWS would issue a Notice of Violation, which would be addressed through the payment of a small fine (from \$250–\$1,000 per bird) and a commitment by the actor to make a modification to

²³ Avian Power Line Interaction Committee, *APLIC Mission Statement*, <https://www.aplic.org/resources.php> (last visited Jan. 23, 2020).

correct the problem. AR1359. All of this would happen without the need to involve the U.S. Attorney's Office. The majority of cases involving incidental bird deaths were resolved without the need to resort to litigation, through the voluntary adoption of corrective action.

Usually, the FWS would refer a case to the Department of Justice only if an industry actor failed to remedy an incidental taking problem after notification from the FWS. Assistant U.S. Attorneys receiving such referrals would then make their own assessments as to whether an MBTA prosecution for incidental take was appropriate, including evaluating: (1) whether the species involved were endangered or threatened; and (2) what other contact the actor may have had with FWS agents or other state or federal agencies about the condition that caused the bird death, indicating that the actor was on notice of the violation and had an opportunity to cure. AR1359–60. And even if the Department of Justice chose to pursue cases, most were resolved voluntarily through settlement.

3. The Department of Justice has used its prosecutorial discretion to bring enforcement actions in only limited circumstances.

Contrary to the insinuations in the Jorjani M-Opinion, MBTA prosecutions for incidental take have been the exception, rather than the rule. The FWS and the DOJ have been judicious in exercising their enforcement authority under the MBTA, only bringing court action in narrow circumstances, like when a company has ignored repeated warnings to change its behavior to minimize the taking of birds or when large numbers of birds are killed. In contrast to the hundreds of investigations initiated by the FWS, the DOJ has brought comparatively few prosecutions. For example, since 2013, the DOJ has brought two prosecutions for takings of eagles and species protected only by the MBTA. The plea agreements resulting from these prosecutions “provided that companies must implement plans aimed at preventing bird deaths at eight commercial wind projects.” AR85.

Two of the most recent MBTA enforcement cases have involved high-profile and large-scale incidental takings of migratory birds. First, in 2009, Exxon-Mobil pleaded guilty for violating the MBTA in five states due to the deaths of approximately 85 protected birds as a result of exposure to hydrocarbons in uncovered natural gas well reserve pits and waste water storage facilities.²⁴ As part of the plea agreement, Exxon-Mobil agreed to pay \$400,000 in fines to the North American Wetlands Conservation Fund, and \$200,000 in community service payments.²⁵ Exxon-Mobil also agreed to employ techniques at its facilities to prevent future bird deaths, including scrubbing waste water of contaminants before discharge, removing wastewater ponds, placing netting over the wastewater ponds to prevent birds from landing in them, and installing machines that emit sound and lights to scare migratory birds away from the area.²⁶

Most recently, in 2013, as a result of the Deepwater Horizon oil spill, BP pleaded guilty to 14 criminal counts, including one misdemeanor count of violating the MBTA.²⁷ It was estimated that between 65,000 and 102,000 birds across 93 species were killed by the oil spill.²⁸ As part of the settlement, BP agreed to pay \$100 million into the NAWCF.²⁹ Some of the grants

²⁴ U.S. Dep't of Justice, *Exxon-Mobil Pleads Guilty to Killing Migratory Birds in Five States* (Aug. 13, 2009), <https://www.justice.gov/opa/pr/exxon-mobil-pleads-guilty-killing-migratory-birds-five-states>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ U.S. Fish and Wildlife Serv., *BP Deepwater Horizon oil spill settlement funds migrate north* (Apr. 27, 2015), <https://www.fws.gov/southeast/articles/bp-deepwater-horizon-oil-spill-settlement-funds-migrate-north/>.

²⁸ U.S. Fish and Wildlife Serv., *Deepwater Horizon oil spill killed as many as 102,000 birds across 93 species* (June 1, 2006), <https://www.fws.gov/southeast/news/2016/06/deepwater-horizon-oil-spill-killed-as-many-as-102000-birds-across-93-species/>.

²⁹ U.S. Fish and Wildlife Serv., *BP Deepwater Horizon oil spill settlement funds migrate north* (Apr. 27, 2015), <https://www.fws.gov/southeast/articles/bp-deepwater-horizon-oil-spill-settlement-funds-migrate-north/>.

awarded as a result of the settlement money placed in the NAWCF have gone to adding over 10,000 acres of land in North Dakota to the FWS's National Wildlife Refuge System, which serve as an important habitat for migratory birds during their thousand-miles-long annual migrations.³⁰

Under the current interpretation of the MBTA as set forth in the Jorjani M-Opinion, neither Exxon nor BP would have suffered any consequences for the mass taking of migratory birds that resulted from their oil spills and—contrary to Congress's intent in providing that MBTA penalties fund the NAWCF, *see* 16 U.S.C. § 4406(b)—no conservation measures would have been accomplished to mitigate for the loss.

C. *The Jorjani M-Opinion removes all incentives for industry actors to adopt bird safety measures.*

The examples cited above of MBTA prosecutions stemming from the Exxon-Valdez and Deepwater Horizon oil spills are some of the most extreme examples of incidental takings and show the importance of the MBTA, until now, in deterring industry actors from causing bird deaths. In *Amici's* many years of experience, the FWS's authority under the MBTA to regulate and, if necessary, prosecute incidental takings was key to prompting most industry actors to voluntarily implement measures that saved protected birds. The threat of prosecution for cases in which companies directly and foreseeably cause incidental bird deaths has led to the creation of important, industry-wide guidance documents, and when voluntary compliance has failed, the FWS has wielded the MBTA to exact criminal penalties. Without the threat of prosecution for incidental takings, the scope of the MBTA's protection, and the extent of industry's willingness to voluntarily avoid widescale killings of birds, has been dramatically circumscribed. The U.S.

³⁰ U.S. Fish and Wildlife Serv., *National Wildlife Refuge System: Overview* (April 2013), <https://www.fws.gov/refuges/about/pdfs/OverviewFactSheetApril2013.pdf>.

Government cannot satisfy its treaty obligations, and the FWS cannot serve its mission to conserve and protect migratory birds, solely by relying on voluntary compliance.

1. The Jorjani M-Opinion has had an immediate impact on how FWS agents view their authority to investigate incidental take.

In the aftermath of the Jorjani M-Opinion, the FWS issued a series of guidance documents making clear to agency personnel that a dramatic shift in policy had occurred. In April 2018, the Principal Deputy Director of the FWS issued a memorandum providing guidance on “what constitutes prohibited take, what actions must be taken when conducting lawful intentional take, . . . and what changes to prior practice should be made in light of the M-Opinion.” AR80. The memorandum reiterated the change to FWS policy affected by the Jorjani M-Opinion: that “the take of birds resulting from an activity is not prohibited by the MBTA when the underlying purpose of that activity is not to take birds.” AR80. Despite this change, the memorandum stated that the FWS would continue to work with industry participants to “voluntarily reduc[e] impacts to migratory birds,” but that the Service “will ensure that our comments, recommendations, or requirements are not based on, nor imply, authority under the MBTA to regulate incidental take of migratory birds.” AR80–81.

In June 2018, the Assistant Director for Migratory Birds, Jerome Ford, issued a further clarifying memorandum to FWS personnel regarding the Destruction and Relocation of Migratory Bird Nest Contents. AR87. The memorandum states that the Jorjani M-Opinion has reversed how the FWS views the destruction of migratory birds’ nests: now, “an individual or entity may destroy an active nest while conducting any activity where the intent of the action is not to kill migratory birds or destroy their nests or contents.” AR88. Prior to the Jorjani M-Opinion, the destruction of a protected active nest without a permit, regardless of the intent, would have been considered a violation of the MBTA. AR43.

2. The Jorjani M-Opinion has already changed industry actors' incentives to avoid deaths of migratory birds

Through their continuing conservation work and contacts with current FWS employees, *Amici* have observed how the Jorjani M-Opinion's removal of the threat of prosecution has already changed industry actors' incentives to avoid deaths of migratory birds. Actors have no incentive to prevent incidental bird deaths, even when a relatively low-cost solution is available. Before, FWS officials enforcing the MBTA would serve as a check on industry impulses. Now, after obtaining a reinterpretation of the MBTA, industry participants wield all the power. Any efforts to protect migratory birds are within their sole discretion. They are free to ignore bird deaths and the effect of their actions on our shared ecosystem, so long as they can find a way to characterize those deaths as "incidental."

Since leaving the FWS, *Amici* have learned of several incidents across the country involving incidental take which would have resulted in an investigation under the MBTA before the Jorjani M-Opinion, but which received no attention from the FWS under its new directives. The impact of the Jorjani M-Opinion, for example, is evident in how FWS agents have responded to bird deaths in Woods Hole, Massachusetts. On January 21, 2018, a tugboat spilled oil in Great Harbor, Massachusetts, resulting in the death of 29 birds.³¹ After an investigation, the Coast Guard identified the name and owner of the vessel³² and passed the information along to Department officials with the expectation that they would initiate an investigation.³³ But that

³¹ Madeleine List, *Coast Guard identifies vessel responsible for Woods Hole oil spill*, Cape Cod Times, Jan. 30, 2018, <https://www.capecodtimes.com/news/20180130/coast-guard-identifies-vessel-responsible-for-woods-hole-oil-spill>.

³² *Id.*

³³ Email from Individual from First Coast Guard District Response Advisory Team to various recipients re: vessel responsible for Woods Hole oil spill, Jan. 31, 2018, <https://int.nyt.com/data/documenthelper/6618->

is not what happened. Upon learning of the vessel responsible for the oil spill, the FWS agent in charge informed his colleagues that, as a result of the Jorjani M-Opinion, “there [was] no enforcement action planned” because the oil spill “involve[d] the incidental take of birds.”³⁴

The FWS also took no action in response to a similar concern about incidental take raised by an endangered species coordinator from the Michigan Department of Natural Resources.³⁵ In a June 2018 email to the FWS, the Michigan official reported the presence of a great blue heron rookery in a timber harvest and asked whether loggers could continue to cut down the trees once the birds left the rookery.³⁶ FWS officials responded that since the “intent and purpose of the activity is to harvest trees, not to take MBTA birds, nests or eggs[,]” there is no “enforceable prohibition” to cutting down trees with active nests, even if such action resulted in the destruction of the nests and their contents. As a result, any conservation action would be “strictly voluntary” and “not required in any way under the MBTA.”³⁷

The FWS provided a virtually identical response to an inquiry from a biologist from the District of Columbia’s Department of Energy and Environment.³⁸ The biologist, tasked with

[mbtawoodsholeoilspill/b125aef2aad4afb74731/optimized/full.pdf#page=1](https://int.nyt.com/data/documenthelper/6618-mbtawoodsholeoilspill/b125aef2aad4afb74731/optimized/full.pdf#page=1).

³⁴ Email from FWS Resident Agent in Charge–New England, to various FWS personnel re: vessel responsible for Woods Hole oil spill, Jan. 31, 2018, <https://int.nyt.com/data/documenthelper/6618-mbtawoodsholeoilspill/b125aef2aad4afb74731/optimized/full.pdf#page=1>.

³⁵ Email from Michigan DNR Endangered Species Coordinator to U.S. FWS Migratory Bird Biologist, June 4, 2018, <https://int.nyt.com/data/documenthelper/6619-mbtatimbercuttingblueheronry/db040892f747528c945f/optimized/full.pdf#page=1>.

³⁶ Email from Eric Kershner, U.S. Fish and Wildlife Service, to various recipients, re: MBTA/heron rookery/timber harvest, June 12, 2018, <https://int.nyt.com/data/documenthelper/6619-mbtatimbercuttingblueheronry/db040892f747528c945f/optimized/full.pdf#page=1>.

³⁷ *Id.*

³⁸ Email from D.C. Fish and Wildlife Biologist, to U.S. Fish and Wildlife Service official, July 13, 2018, <https://int.nyt.com/data/documenthelper/6623->

managing D.C.'s wildlife control program, requested that the FWS assist in remediating netting that had been installed outside a condo building and that was ensnaring birds.³⁹ The D.C. official hoped the FWS could step in to resolve the issue “so that no more birds are needlessly trapped and killed.”⁴⁰ However, in what has become a common refrain, a FWS official responded that, “in light of the new M-opinion,” the non-purposeful killing of migratory birds during the netting installation was no longer prohibited.⁴¹

CONCLUSION

Amici respectfully urge this Court to grant Plaintiffs’ motions for summary judgment and reject the Jorjani M-Opinion’s interpretation of the MBTA as not prohibiting incidental take. Such an interpretation is arbitrary, capricious, and contrary to the text and the intent of the law and mortally wounds one of our Nation’s most important conservation statutes.

The MBTA lies at the heart of this country’s efforts to protect and conserve its most precious natural resources. For decades, *Amici*, along with all FWS agents, have dutifully guarded the interests of the Nation and the public by protecting migratory birds, and have worked to uphold our Nation’s treaty obligations with countries that share our migratory bird populations. *Amici* have dedicated their careers to the protection of our national resources, including that of vulnerable migratory bird populations. In serving the Department of Interior, *Amici* strove to protect birds from incidental takings, while working collaboratively with industry actors to balance our national interests in conservation and economic development.

[mbtadccondo/5a49b86c061a3d7f4787/optimized/full.pdf#page=1](https://int.nyt.com/data/documenthelper/6623-mbtadccondo/5a49b86c061a3d7f4787/optimized/full.pdf#page=1).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Email from U.S. Fish and Wildlife Service official, to D.C. Fish and Wildlife Biologist, re: Netting in D.C., July 23, 2018, <https://int.nyt.com/data/documenthelper/6623-mbtadccondo/5a49b86c061a3d7f4787/optimized/full.pdf#page=1>.

The Jorjani M-Opinion has upset that balance, tipping the scales in favor of industrial and commercial interests. In doing so, the Department of the Interior has left our Nation’s migratory birds without their most important protector, threatening their continued existence. As was noted during the debate over the MBTA’s passage in 1918, “[u]nless legislation is enacted for the protection of bird life with efficient regulations rigidly enforced, the birds of this country, so useful to all . . . and a source of happiness to thousands, aside from their utility, will join the wild [passenger] pigeons in their last flight.”⁴²

Respectfully submitted,

KEKER, VAN NEST & PETERS LLP

Dated: January 24, 2020

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⁴² 56 Cong. Rec. 7361 (June 4, 1918) (statement of Rep. Stedman).

APPENDIX A

BIOGRAPHICAL STATEMENT FOR JON ANDREW

Jon Andrew retired from the Department of the Interior in 2016 after 36 years of service. The first 29 years of his career were with the U.S. Fish and Wildlife Service where he held positions as a Wildlife Biologist, Refuge Manager and Wildlife Administrator in the Endangered Species Program, the National Wildlife Refuge System and the Office of Migratory Bird Management. Throughout his career and in retirement, he has been actively involved personally and professionally with the conservation of migratory birds.

BIOGRAPHICAL STATEMENT FOR DANIEL ASHE

Dan Ashe spent more than 22 years working in various posts within the FWS, including as Assistant Director for External Affairs, Chief of the National Wildlife Refuge System, Science Advisor to the Director of the Fish and Wildlife Service, Deputy Director for Policy, and as Director of the Service, in both political and non-political appointments. Mr. Ashe is a second-generation FWS employee, his father having been a career employee in the FWS for 37 years before retiring in 1990. In June 2011, Dan Ashe was unanimously confirmed by the United States Senate as the 16th Director of the U.S. Fish and Wildlife Service. He served in this post until leaving the FWS in 2017. After leaving the Service, Mr. Ashe joined the Association of Zoos and Aquariums, where he currently serves as President and CEO.

BIOGRAPHICAL STATEMENT FOR DONALD J. BARRY

Don Barry spent more than 44 years working on wildlife and public lands conservation issues as a senior governmental official and in the non-profit community. He spent more than 19 years at the Interior Department, serving as a career staff attorney and Chief Counsel for the U.S. Fish and Wildlife Service (FWS), as well as Assistant Secretary for Fish and Wildlife and Parks, overseeing the policies and programs of the National Park Service and Fish and Wildlife Service.

BIOGRAPHICAL STATEMENT FOR ROBERT BLOHM

Robert Blohm retired from the U. S. Fish and Wildlife Service in 2011, after nearly 32 years working in the field of Migratory Bird Management. He remained in the Office (now Division) of Migratory Bird Management for his entire career and held numerous staff and supervisory positions, including Chief of the Division from 2006-2011, where he helped direct the national Migratory Bird Program. During his career, he assisted in the planning and coordination of many regional, national, and international programs dedicated to conserving and managing the continent's migratory bird resource. He has authored or co-authored numerous reports and publications dealing with a variety of topics related to migratory bird research and management.

BIOGRAPHICAL STATEMENT FOR BRAD BORTNER

Brad Bortner retired from the U.S. Fish and Wildlife Service (FWS) after 33 years as a Migratory Bird Biologist and Manager. He served as Chief, Division of Migratory Bird Management, in FWS Headquarters from 2011-2017. Previously, he served in Portland, Oregon as Chief, Division of Migratory Bird and Habitat Programs, Pacific Region, FWS from 1992-2011. He also served as a Migratory Bird Biologist and Supervisor at the Patuxent Wildlife Research Center in Laurel, Maryland. During his career, Mr. Bortner was involved in many partnership efforts to conserve and manage migratory birds and their habitats at international, national and regional scales. He was extensively involved with agencies and industries to find ways to reduce incidental take while meeting other important needs.

BIOGRAPHICAL STATEMENT FOR TOM DWYER

Tom Dwyer spent the first part of his professional wildlife career in the U.S. Fish and Wildlife Service (FWS). Before joining Ducks Unlimited, Inc. (DU) in May 2000, he was

Deputy Regional Director for the FWS Pacific Region that encompassed six western states and Hawaii. He began his career with the FWS as a research scientist studying waterfowl in the U.S. and Canadian prairies. He held many other positions in the FWS including serving as Chief of the Office of Migratory Bird Management in the Washington Office. At DU, until his retirement in April 2013, he was responsible for all aspects of wetland conservation program delivery in the states of Alaska, Washington, Oregon, Idaho and Hawaii. Mr. Dwyer has been active with the North American Waterfowl Management Plan and Joint Ventures for much of his career. He served on the Arctic Goose and Black Duck Joint Ventures and has been Co-Chair of the Pacific Coast Joint Venture for 18 years.

BIOGRAPHICAL STATEMENT FOR LYNN GREENWALT

Lynn Greenwalt was a career employee of the Fish and Wildlife Service for almost three decades, holding positions as National Wildlife Refuge Manager, Regional Refuge Planning Officer, and later on, the Regional Supervisory Staff for Refuge Management in the FWS's Southwest Region and later in the Midwest Region. He moved to the Pacific Regional Office to be the Chief of Management and Enforcement in that region. He was reassigned to the Washington office to be Chief of the Division of Wildlife Refuges, and later to the role of Assistant Director for Operations. He was nominated and confirmed to the position of Director under President Nixon. He occupied that office under Presidents Nixon, Ford and Carter, after which he retired. Mr. Greenwalt then went to work for the National Wildlife Federation, and remained there for fifteen years. He helped this membership organization during its active participation in a number of environmental issues, including major legislative considerations and legal challenges. He is now retired and continues a keen interest in the activities of the FWS and the many competing interests at play in the nation's natural resources arena.

BIOGRAPHICAL STATEMENT FOR LYLE LAVERTY

Lyle Laverty, former Assistant Secretary of the Interior, has served in conservation leadership roles over four decades with the United States Forest Service, Colorado State Parks and the Department of Interior. In previous assignments, Mr. Laverty served as the Regional Forester for the Rocky Mountain Region and the Director of Colorado State Parks. Throughout his professional career he has directed natural resource management activities to protect and sustain migratory bird habitats. Appointed by President G.W. Bush as Assistant Secretary, Mr. Laverty was responsible for policy development and implementation of the U.S. Fish and Wildlife Service and the National Park Service.

BIOGRAPHICAL STATEMENT FOR LYNN SCARLETT

Lynn Scarlett is Chief External Affairs Officer at The Nature Conservancy. In this role, she directs the Conservancy's corporate engagement and public policy in the United States and the 79 countries in which the Conservancy operates. During the G.W. Bush Administration, she was the Deputy Secretary of the U.S. Department of the Interior and also served at Interior as the Acting Secretary in 2006. Ms. Scarlett is author or co-author of publications on cooperative conservation, climate change, and science and decision making.

BIOGRAPHICAL STATEMENT FOR PAUL SCHMIDT

Paul Schmidt served 33 years with the U.S. Fish and Wildlife Service in a variety of positions and locations between 1978-2011, culminating in the position as Assistant Director Migratory Birds where he was the lead career professional overseeing the national Migratory Bird Program. During his tenure he was responsible for the administration of the Migratory Bird Treaty Act and was lead U.S. representative to the four international migratory treaty partners of Canada, Mexico, Russia and Japan. He also successfully negotiated amendments to the

Migratory Bird Treaties with Canada and Mexico. From 2011–2017 he served as the Chief Conservation Officer for Ducks Unlimited, Inc. responsible for the conservation mission of this renowned non-profit organization and world leader in wetlands and waterfowl conservation. Currently, Mr. Schmidt serves as President of Paul Schmidt Consulting for Conservation assisting other organizations in fulfilling their conservation missions.

BIOGRAPHICAL STATEMENT FOR DR. ROLLIN SPARROWE

Dr. Sparrowe has more than 40 years of experience in state and federal wildlife management in North America. He spent 22 years with the U.S. Fish and Wildlife Service. While in the Service, he supervised the Cooperative Research Units, was Chief, Division of Wildlife Research and was Chief of the Office of Migratory Bird Management. In 1989, he became Deputy Assistant Director-Refuges and Wildlife. He resigned from the Service in 1991 to become President of the Wildlife Management Institute. Dr. Sparrowe was President of the Wildlife Management Institute from 1991–2004. He is a founding Board Member of the Theodore Roosevelt Conservation Partnership and served as Chair of the Fish and Wildlife Energy Working Group. Dr. Sparrowe received the Meritorious Service Award from the Department of Interior in 1991. He was President of The Wildlife Society from 1995–96, and he is a Certified Wildlife Biologist. In 2002, Dr. Sparrowe received the Aldo Leopold Memorial Award from The Wildlife Society for his 35-year record of distinguished federal and nongovernmental service to wildlife conservation. In 2003, he received the Outdoor Life Conservation Award for work on the North America Waterfowl Management Plan. He was recognized by the National Resource Council of America in 2003, and the National Wildlife Refuge System in 2004 for building coalitions to support sound policies and funding for refuges.