UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al., Plaintiffs, -against- U.S. DEPARTMENT OF THE INTERIOR, et al., Defendants.	:	18 Civ. 4596 (VEC)
NATIONAL AUDUBON SOCIETY, et al., Plaintiffs, -against- U.S. DEPARTMENT OF THE INTERIOR, et al., Defendants.	:	18 Civ. 4601 (VEC)
STATE OF NEW YORK, et al., Plaintiffs, -against- U.S. DEPARTMENT OF THE INTERIOR, et al., Defendants.	:	18 Civ. 8084 (VEC)

THE STATES' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The Migratory Bird Treaty Act ("MBTA" or the "Act") provides that "it shall be unlawful at any time, by any means or in any manner" to "pursue, hunt, take, capture [or] kill" migratory birds unless authorized by regulation. 16 U.S.C. § 703(a). For nearly 40 years, defendants ("Interior") interpreted the Act to prohibit conduct that either intentionally or unintentionally (*i.e.*, incidentally) caused deaths of migratory birds. That longstanding interpretation was consistent with the Act's language and legislative history, as well as Second Circuit precedent and principles of international comity. Based on that interpretation, Interior saved large numbers of migratory birds by inducing industry to take measures that mitigated foreseeable hazards like oil, poison, and electrocution.

In December 2017, Interior issued a legal opinion ("Jorjani Opinion") concluding that the MBTA applies only to the intentional taking or killing of migratory birds. This reinterpretation ended Interior's previously successful efforts to reduce incidental take, creating a substantial risk of increased death of migratory birds owned by plaintiffs (the "States") on behalf of their citizens.

The Jorjani Opinion is inconsistent with the MBTA's text, which includes a mental state requirement for two specific prohibitions but not for the general prohibition on taking migratory birds. It is also inconsistent with the Act's legislative history and clear purpose of protecting migratory birds: when Congress amended the Act to impose mental state requirements for selling migratory birds and hunting them over baited fields, it reaffirmed that the general prohibition on killing migratory birds would remain subject to strict liability, and not limited to directly intended

killing. Furthermore, the Second Circuit rejected the position taken by the Jorjani Opinion in *United States v. FMC Corp.*, 572 F.2d 902, 903-04, 908 (2d Cir. 1978), holding that the MBTA applies to incidental take. Finally, the Jorjani Opinion is inconsistent with the treaties that the MBTA implements, which mandate that the United States and other signatories regulate incidental take.

For these reasons the Jorjani Opinion is arbitrary, capricious, and not in accordance with law under the Administrative Procedure Act and should be vacated.

BACKGROUND

A. The Migratory Bird Treaties

In 1916, the United States signed a treaty with Great Britain, acting on behalf of Canada, to protect migratory birds. To implement that treaty, Congress enacted the MBTA in 1918. *See* 16 U.S.C. §§ 703-712. While that treaty was largely focused on overhunting, it was not limited to that issue. Rather, it proclaimed an expansive goal of "insuring the preservation of such migratory birds as are either useful to man or are harmless." *See* Canada Treaty of 1916, Preamble, 39 Stat. 1702 (Aug. 16, 1916).

The United States later signed similar treaties with Mexico, Japan, and the Soviet Union. *See* 16 U.S.C. § 703(a). The treaties with Japan and the Soviet Union, as well as the amended treaty with Canada, address unintentional harm caused by pollution.[1] The MBTA was amended to incorporate these treaties. *See* Administrative

[1] *See* Japan Treaty of 1972, art. VI(a), 25 U.S.T. 3329 (Mar. 4, 1972) (parties shall "[s]eek means to prevent damage to such birds and their environment, including, especially, damage resulting from pollution of the seas"); Soviet Union Treaty of 1976, art. IV(1), 29 U.S.T. 4647 (Nov. 19, 1976) (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"); Protocol Amending the Canada Treaty of 1916, art. IV(a), S. Treaty Doc. No. 104-28, 1995 WL 877199 at *5 (Dec. 14, 1995).

Record ("AR") 48.

B. The Migratory Bird Treaty Act

The MBTA provides that "it shall be unlawful *at any time, by any means or in any manner*" to, among other things, "pursue, hunt, take, capture, kill, attempt to take, capture, or kill" migratory birds unless authorized by regulation. 16 U.S.C. § 703(a) (emphasis added). The general prohibition does not include a mental state requirement. *Id.* Unless specified, violations are misdemeanors. *Id.* § 707(a).

In 1936, Congress moved the phrase "at any time or in any manner" from the end of the Act's list of prohibitions to the beginning and added the words "by any means." Pub. L. No. 74-728, § 3, 49 Stat. 1555, 1556 (1936). This amendment made clear that that language applied to all of the prohibited actions.

In 1960, Congress amended the MBTA to make the sale of migratory birds a felony. *See* Pub. L. No. 86-732, 74 Stat. 866 (1960) (codified at 16 U.S.C. § 707(b)). Like the rest of the statute, that provision initially did not specify a mental state requirement. *Id.* In 1985, a federal court ruled that imposing felony sanctions on a strict liability basis violated due process. *United States v. Wulff*, 758 F.2d 1121, 1122 (6th Cir. 1985). In response, Congress amended the Act in 1986 to specify that the felony provision would apply only to actions taken knowingly. *See* AR49; 16 U.S.C. §§ 707(b)-(c). The accompanying Senate Report explained that "[n]othing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions . . . , a standard which has been upheld in many Federal court decisions." S. Rep. No. 99-445, at 16 (1986).

In 1998, Congress added a negligence requirement to the Act's prohibition on

hunting over a baited field, requiring proof that "the person knows or reasonably should know that the area is baited." 16 U.S.C. § 704(b)(1). The Senate stressed that the negligence requirement applied only in the narrow context of the baiting provision:

> The elimination of strict liability, however, applies only to hunting with bait or over baited areas, and is not intended in any way to reflect upon the general application of strict liability under the MBTA. Since the MBTA was enacted in 1918, offenses under the statute have been strict liability crimes. The only deviation from this standard was in 1986, when Congress required scienter for felonies under the Act.

S. Rep. No. 105-366, at 3 (1998).

In 2002, a federal district court enjoined military training activities that caused incidental take. *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161 & 201 F. Supp. 2d 113 (D.D.C. 2002), *vacated as moot*, Nos. 02-5163, 02-5180, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003). In response, Congress enacted legislation temporarily authorizing "military readiness activities" that cause incidental take and directing Interior to use its authority under the MBTA to regulate such take. *See* Pub. L. No. 107-314, § 315, 16 Stat. 2458, 2509 (2002).

C. Enforcement of the MBTA Before December 2017

From the 1970s until Interior issued the Jorjani Opinion in December 2017, Interior interpreted the MBTA to prohibit incidental take (*i.e.*, activities that result in bird deaths but are not done with the purpose of killing birds). Based on that interpretation, the U.S. Fish and Wildlife Service ("FWS") investigated hundreds of incidental takes caused by oil pits, oil spills, power lines, waste pools, and pesticides, among other hazards, including the deaths of 92 migratory birds in "toxic and noxious

waters" near an industrial plant in New York. *See FMC Corp.*, 572 F.2d at 903-05. FWS generally pursued criminal prosecution only after working with industry to find solutions and educating industry about ways to avoid or minimize incidental take.

Before the Jorjani Opinion, the standard enforcement procedure was to "provide notice to industry of the risks posed by facilities and equipment, encourage compliance through remediation, adaptive management and, where possible, permitting, 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*." AR 38 n.205 (emphasis in original).

As Gary G. Mowad, former Deputy Chief of the FWS Office of Law Enforcement, explains, industrial and agricultural activities have the capacity to kill vast numbers of migratory birds. Decl. of Mowad ("Mowad") ¶¶ 9-20. Accordingly, before the Jorjani Opinion, FWS employed an enforcement protocol to discourage "industrial activities [that] were killing birds predictably but unnecessarily." *Id.* ¶¶ 24-26. That protocol emphasized cooperation and reserved prosecution for those who refused to cooperate. For example, with respect to oil production activities, FWS would first notify industry that agents "would be coming to look for practices [they] knew killed migratory birds in large numbers," such as uncovered oil waste pits. *Id.* ¶ 26. Second, FWS agents inspected for hazards by, for example, conducting flyovers of oil fields to identify uncovered waste. *Id.* Third, FWS informed industry of any hazards that were identified, instructed industry to remedy them, and explained that agents would inspect again in 30 days. *Id.* FWS would only take enforcement actions

against those actors who had refused to implement protective measures. *Id.*

The measures taken by industry to avoid enforcement successfully prevented incidental take. As Mowad explains, "[i]n our initial flyovers, we would often see many operations (as much as 80 percent) with active threats to migratory birds. But when we came back 30 days later, in the vast majority of cases we found that operators had skimmed the oil off their ponds or covered the ponds with nets. Based on my years of observations of bird mortality events caused by uncovered waste ponds, I conservatively estimate that these reasonable measures by industry prevented hundreds of bird deaths at each operation." *Id.* ¶ 27. Enforcement proceedings were reserved for "the remaining small number of recalcitrant actors (usually no more than 15 percent of operators) who refused to comply by taking the same basic measures implemented by other operators." *Id.* These enforcement efforts were effective. For example, in one oil and gas producing region in southeast New Mexico, FWS documented "extensive" mortalities of migratory birds "linked to contact with surface oil on production pits or waste ponds." *Id.* ¶ 45. FWS enforcement actions significantly reduced the number of bird mortalities in that region. *Id.*

The threat of enforcement was "crucial to convincing industrial actors to eliminate bird hazards caused by their operations." *Id.* ¶ 35. Indeed, "[i]t costs money and time to implement protections." *Id.* ¶ 29. For example, following migratory bird deaths in Oregon and Nevada, a company spent $216,667 in 2015 to modify several hundred structures to avoid liability. Decl. of Jason Rylander ("Rylander") Ex. A at 3. In a briefing paper dated *after* the Jorjani Opinion, FWS concurred that the threat

of enforcement "provided an incentive for those engaged in activities that may take birds to attempt to reduce or eliminate that take." *Id.* Ex. B at 2. Mowad observed that "only once industrial actors were informed of their potential MBTA liability did they spend resources to reduce their impacts on migratory birds." Mowad ¶ 29.

D. Interpretation of the MBTA Before December 2017

In 2001, Interior's longstanding interpretation of the MBTA was reaffirmed by an executive order explaining that "take," for purposes of MBTA regulations, "includes both 'intentional' and 'unintentional' take." Exec. Order No. 13186, 66 Fed. Reg. 3853 § 2(a) (Jan. 10, 2001). The order cited the "substantive obligations on the United States for the conservation of migratory birds and their habitats" imposed by treaties and stated that "migratory birds are of great ecological and economic value to this country" and "bring tremendous enjoyment to millions of Americans." *Id.* § 1.

In 2008, the United States and Canada discussed Canadian legislation to make "the authorization of incidental take contingent on compliance with approved conservation measures." *See* AR1381. The parties agreed in diplomatic notes that the legislation would be consistent with their "mutually held interpretation" of the treaty. *Id.*; AR888. Canada explained that the parties "specifically reviewed the issues of the incidental take of migratory birds, nests or eggs, caused by activities including, but not limited to, forestry, agriculture, mining, oil and gas exploration, construction and fishing activities, and concluded that these issues have become a concern for the long-term conservation of migratory bird populations." AR1380-1381.

In January 2017, Interior's Solicitor, Hillary Tompkins, issued a memorandum that reaffirmed Interior's "long-standing interpretation that the MBTA prohibits

incidental take." AR44. This interpretation was based, *inter alia*, on FWS's understanding that "the MBTA's prohibition of take 'by any means and in any manner' unambiguously includes incidental take." *Id.* at n.5. The Tompkins Opinion also cited the 1936 amendment moving the phrase "by any means or in any manner" to the beginning of the list of prohibited acts. AR48. In addition, it noted that the underlying treaties "broadly support the regulation of the taking and killing of migratory birds by any means, including by industrial or commercial activities unrelated to hunting." AR46.

The Tompkins Opinion found that Congress confirmed this interpretation when it amended the Act to require proof of knowledge for felony violations and proof of negligence for violations involving the use of bait. AR51. It found that Congress confirmed that interpretation again when it passed legislation authorizing military-readiness activities that cause incidental take. *Id.* That carve-out would have been unnecessary if the MBTA did not impose liability for incidental take. *Id.*

The Tompkins Opinion also concluded that this interpretation was consistent with principles of international comity. In particular, it noted that the United States and Canada had formally acknowledged their "mutually held interpretation" that the regulation of incidental take was consistent with the underlying treaty. AR46.

Finally, the Tompkins Opinion explained that a majority of courts had upheld incidental take convictions. AR55, 57-65. It concluded the majority was correct and specifically rejected the Fifth Circuit's decision in *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 492 (2015), which reached the opposite result. AR67-71. The

Tompkins Opinion found that the *CITGO* court had conflated *mens rea*[2] with *actus reus*[3] in ruling that the MBTA's strict liability prohibition on killing migratory birds was limited to deliberate acts done directly and *intentionally* to kill migratory birds. AR71. According to the Tompkins Opinion, the *CITGO* court was effectively "grafting a scienter component onto the prohibited act." *Id.* The Tompkins Opinion concluded that "any affirmative act that proximately causes a protected bird to die" would satisfy the *actus reus* requirement of the MBTA. *Id.*

E. Interpretation of the MBTA After December 2017

In December 2017, defendant Daniel Jorjani, then serving as Interior's Deputy Solicitor, issued a memorandum finding that the MBTA does not apply to incidental take. AR1-2. The memorandum found that, even if the MBTA were a strict liability statute that did not require intent, the MBTA still would apply only to "affirmative actions that have as their purpose the taking or killing of migratory birds, their nests or their eggs." AR2, 22-23. This interpretation was based on the *CITGO* opinion from the Fifth Circuit that the Tompkins Opinion had rejected for conflating *mens rea* with *actus reus*. *Id. Cf.* AR71. The Jorjani Opinion promised to remove "the sword of Damocles" that previously hung "over a host of otherwise lawful and productive actions." AR1.

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[2] "*[M]ens rea* refers to the degree of mental culpability with which a defendant committed the acts underlying a conviction and comes in four basic types (intent, knowledge, recklessness, negligence), with a crime in which *mens rea* is not required being referred to as a 'strict liability' offense." *Efstathiadis v. Holder*, 752 F.3d 591, 596 (2d Cir. 2014).

[3] "[C]riminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*." *Powell v. Texas*, 392 U.S. 514, 533 (1968).

F. Enforcement of the MBTA After December 2017

In April 2018, FWS issued guidance explaining that it "will not withhold a permit, request, or require mitigation based upon incidental take concerns under the MBTA." AR81. As a result, FWS has been powerless to prevent incidental take. Even FWS's capacity to promote voluntary corrective measures has been curtailed, as the agency is no longer authorized to expend resources on activities such as flyovers. *See* Mowad ¶ 33. Indeed, according to FWS's own calculations, the Jorjani Opinion has caused FWS to cut 10 full-time enforcement positions. Rylander Ex. C at 1.

Responses to FOIA requests illustrate that FWS has been powerless to address incidental avian mortality as a result of the Jorjani Opinion. An FWS agent who received a tip in 2018 about "an abundance of dead birds" that appeared to have eaten poisoned corn, concluded that "[w]e have been severely restricted on MBTA issues recently so I can't really do anything right now about this." Rylander Ex. D at 1. Under the prior enforcement protocol, the agent would have visited the site to suggest measures to avoid further harm, which the responsible party would have ignored at risk of MBTA liability. However, FWS was not even authorized to *investigate* those deaths, absent some indication that the birds were intentionally poisoned. *Id.* In addition, enforcement actions commenced before the Jorjani Opinion were dropped. In 2016, FWS investigated a California utility for removing a tree containing an osprey nest, causing destruction of an egg—a clear instance of incidental take. Ryland Ex. G at 1-4. On January 18, 2018, the U.S. Attorney's Office declined to prosecute the case, due to the Jorjani Opinion. *Id.* at 5.

Mowad has conducted two flyovers in Wyoming since the new interpretation

took effect. Both times he observed hazardous conditions that FWS, under its prior interpretation, would have addressed. *Id.* ¶¶ 42-44. In May 2018, he saw "dozens of open, uncovered waste ponds with surface oil on them" as well as waste ponds in which the netting for excluding birds was poorly maintained. *Id.* ¶ 42. In August 2019, he observed a large number of uncovered oil ponds and oil spills, as well as a broken flow line poised to spill oil into the local wetlands. *Id.* ¶ 43. Similar conditions exist in oil-producing regions of New Mexico, where, since the Jorjani Opinion, Mowad has observed open waste ponds from 30,000 feet above ground. *Id.* ¶¶ 45-46. Under the prior interpretation, FWS would have required industry to fix these conditions within 30 days. *See id.* ¶ 26. Now FWS cannot do so. *Id.* ¶¶ 32-33.

The documents disclosed by Interior also show instances when FWS could not pursue penalties, which previously benefitted the States by funding wetland or habitat restoration projects. *See infra* p. 12. An FWS agent's January 2018 email concerning an oil spill in Woods Hole, Massachusetts explained that, "[a]s this spill involves the incidental take of birds protected by the [MBTA], there is currently no enforcement action planned." Rylander Ex. E at 1; *see also id.* Ex. F at 1 (FWS would take no action on oil spill because post-Jorjani Opinion enforcement policies "do not allow for any activities spent towards incidental take").

G. The States' Interests

The States own, or hold in trust, all game and wildlife within their borders, including migratory birds. *See Hughes v. Oklahoma*, 441 U.S. 322, 324-25 (1979) ("[T]he wild animals and fish within a state's border are . . . owned by the state in its sovereign capacity for the common benefit of all its people."). The States' interests in

migratory birds are harmed by incidental take in both the States themselves and in other states. As Kenneth V. Rosenberg, Ph.D, an ornithologist with Cornell University, explains, migratory birds that nest or winter in, or migrate through, a particular state can be killed anywhere their migrations take them. *See* Decl. of Rosenberg ("Rosenberg") ¶¶ 1, 15. For example, the hazards Mowad observed during flyovers of non-plaintiff Wyoming are likely to lead to the deaths of migratory birds that would otherwise migrate through or spend the winter in plaintiffs California and New Mexico. *See* Rosenberg ¶¶ 13-14; Mowad ¶¶ 43-44.

Prior to the Jorjani Opinion, the States also benefitted from MBTA penalties for incidental take that funded wetlands and bird habitat restoration projects. *See* 16 U.S.C. § 4406(b). For example, in 2003, a tanker spilled 98,000 gallons of oil in Buzzards Bay, Massachusetts, which killed a recorded 461 birds. The court sentenced the company to pay a $10 million of fine, of which $7 million was dedicated to wetlands conservation projects in Massachusetts. *See* Decl. of Seth Schofield ("Schofield") ¶¶ 2-9. The States will now be deprived of such restoration projects.

H. Procedural History

On September 6, 2018, the States filed a complaint alleging that the Jorjani Opinion was arbitrary, capricious, and contrary to law. No. 18-cv-8084, Dkt. 6. On July 31, 2019, the Court consolidated the States' lawsuit with two related actions and denied Interior's motion to dismiss the States' lawsuit, ruling, among other things, that the States and other plaintiffs had adequately alleged standing. Opinion & Order on Motion to Dismiss, Dkt. 53 ("Op.").

STANDARD OF REVIEW

Summary judgment should be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Summary judgment is particularly appropriate in cases in which the court is asked to review or enforce a decision of a federal administrative agency." *Fund for Animals v. Norton*, 365 F. Supp. 2d 394, 405 (S.D.N.Y. 2005).

ARGUMENT

I. THE STATES HAVE STANDING.

The States have standing if they show (1) an injury in fact that is (2) fairly traceable to the challenged action and (3) redressable by a favorable decision. Op. 7-8 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). In denying Interior's motion to dismiss for lack of standing, the Court found, first, that the States own the migratory birds within their borders and that the States had adequately alleged a "substantial risk" of harm to at least a single migratory bird owned by one of the States, which was sufficient to show injury in fact. *Id.* at 9-11 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). Second, the Court found that the States had adequately alleged a "substantial likelihood" that the Jorjani Opinion, by eliminating the threat of liability, would cause third parties to take actions that harm migratory birds, which was sufficient to show traceability. *Id.* at 12 (citing *NRDC v. NHTSA*, 894 F.3d 95, 104 (2d Cir. 2018)). Third, the Court held that vacating the Jorjani Opinion would "reduce that risk," which was sufficient for redressability. *Id.*

The Court explained that, on summary judgment, the States must substantiate their allegations with evidence, which will be taken as true. *Id.* at 8 n.8 (citing *Lujan*, 504 U.S. at 561). The States' evidence shows that, before the Jorjani Opinion, FWS successfully used the threat of enforcement to decrease incidental take of migratory birds by inducing industry to remedy hazards likely to cause incidental take. The evidence also shows that, as a result of the Jorjani Opinion, FWS no longer does so. By removing the threat of enforcement and terminating FWS's successful efforts to induce industry to take protective measures, Interior has created a substantial likelihood that industry will no longer take those measures and that incidental take will increase. The evidence also shows that events such as oil spills, which previously would have generated MBTA penalties that funded projects benefitting the States, no longer do so.

As shown by the Tompkins Opinion and Mowad's declaration, FWS's enforcement protocol prior to the Jorjani Opinion induced industry to take measures that prevented incidental take. As the Tompkins Opinion explained, "[i]n many cases, simple, relatively low-cost methods have proven effective in reducing the impacts of [industrial] activities on migratory birds" such as "replacing non-flashing warning lights on communication towers with flashing lights" and "fencing and netting waste pits" to avoid oiling, poisoning, and drowning. AR43. As Mowad explained, in the "vast majority" of cases, operators remedied hazards within 30 days' notice to avoid liability. *Id.* ¶ 27. Indeed, the Jorjani Opinion itself likened the threat of enforcement to "the sword of Damocles" that inhibited "otherwise lawful and productive actions."

AR1. And an FWS briefing paper issued after the Jorjani Opinion stated that the threat of prosecution had "provided an incentive for those engaged in activities that may take birds to attempt to reduce or eliminate that take." Rylander Ex. B at 2.

As a result of the Jorjani Opinion, FWS has suspended efforts to induce industry to mitigate incidental take. Pursuant to FWS guidance, FWS "will not withhold a permit, request, or require mitigation based upon incidental take concerns under the MBTA." AR81. Moreover, FWS is now restricted from expending resources on activities such as flyovers that previously identified major sources of bird mortality. Mowad ¶ 33. Since those efforts had successfully induced industry to take measures to prevent incidental take, their suspension creates a substantial risk that industry will not take those measures and that incidental take of birds that migrate through the States will increase. For example, the operator of the waste pond in *FMC Corp*. that killed dozens of migratory birds in New York could now kill dozens more with impunity. *See* 572 F.2d at 903.

Mowad's and Rosenberg's testimony demonstrate the injury caused by the termination of FWS's enforcement efforts—and the elimination of the threat of enforcement—on the country at large and on plaintiffs New Mexico and California in particular. During flyovers in Wyoming in 2018 and 2019, Mowad observed many conditions hazardous to migratory birds. Mowad ¶¶ 42-44. As Rosenberg explains, migratory birds that spend time in a particular state can be killed anywhere their migrations take them, and a substantial number of birds that breed in Wyoming winter in the plaintiff States of California and New Mexico. Rosenberg ¶¶ 1, 13, 15.

Mowad has also observed open waste ponds in New Mexico. Mowad ¶¶ 45-46.

Before the Jorjani Opinion, FWS would have used the threat of enforcement to induce industry to fix these hazards and prevent incidental take. *Id.* ¶ 26. As a result of the Jorjani Opinion, however, FWS no longer dedicates resources to finding these conditions, nor requires remediation. *Id.* ¶¶ 32-33. By removing the threat of enforcement and terminating FWS's successful efforts to induce industry to take protective measures, Interior has created a substantial likelihood that birds that migrate through California, New Mexico, and the other States will be harmed, depleting the bird populations of those States.

Due to the Jorjani Opinion, FWS is also constrained from collecting penalties related to events, such as oil spills, that would have previously generated funding for restoration projects that benefitted the States. *See* 16 U.S.C. § 4406(b). For example, FWS recently declined to pursue enforcement action concerning an oil spill in Woods Hole, Massachusetts, because it lacked authority to do so pursuant to the Jorjani Opinion. *See supra* p. 11. By comparison, before the Jorjani Opinion, an oil spill in Buzzards Bay, Massachusetts that killed migratory birds resulted in $7 million of funding for wetlands conservation projects in Massachusetts. *See* Schofield ¶¶ 2-9.

II. THE JORJANI OPINION IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

"The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984). When, as here, "the intent of Congress is clear, that is the end of the matter," and an agency's

statutory interpretation is given no deference. *Id*. at 842. Nor in any event would the Jorjani Opinion be entitled to the deference afforded a regulation that is the product of notice and comment or other similar procedure and based on an agency's expertise. *See United States v. Mead Corp.*, 533 U.S. 218, 226-231 (2001).

Interior's long-standing interpretation that the MBTA prohibits incidental take has been upheld by the Second Circuit and is squarely based on the Act's language, legislative history, and purpose. The Jorjani Opinion's reinterpretation of the Act is supported by neither the Act's text nor its history. The Jorjani Opinion is also inconsistent with principles of international comity, which support interpreting the MBTA in a manner that is consistent with the underlying treaties' purpose of protecting migratory birds.

A. The Text, Legislative History, and Purpose of the MBTA Show that It Prohibits Incidental Take.

Both the language and legislative history of the MBTA make clear that, consistent with Interior's longstanding interpretation, the Act imposes strict liability for violations of the general prohibition on taking or killing migratory birds, whether purposeful or incidental. Moreover, Interior's longstanding interpretation is consistent with the controlling precedent of this Circuit, and the Act's purpose of protecting migratory birds.

To start, when interpreting a statute, a court "look[s] first to its language . . . , giving the words used their ordinary meaning." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (internal quotation marks omitted). The Act's general prohibition contains no mental state requirement. *See* 16 U.S.C. § 703(a). Rather, it provides that

"it shall be unlawful at any time, by any means or in any manner" to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill" migratory birds unless authorized by regulation. *Id.* As the Tompkins Opinion concluded, this "extraordinarily expansive" language "mandates the broadest reasonable interpretation of the scope of the MBTA." AR51. According to Webster's, "kill" is "the general term for depriving of life," which is sufficiently broad to include both intentional and unintentional conduct. *See* AR19 n.121 (citing Webster's Second New Int'l Dictionary 1362 (1934)). Likewise, Webster's defines "take" to include passively "get[ing] possession or control," which also does not require intent. AR19-20 n.121 (citing Webster's, *supra*, at 2569).

In contrast, the Act does specify mental state requirements for two offenses: (1) selling migratory birds, a felony that requires knowledge, 16 U.S.C. §§ 707(b)-(c), and (2) hunting over baited fields, a misdemeanor that requires negligence, *id.* § 704(b)(1). As a matter of statutory interpretation, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (internal quotation marks omitted). And where, as here, a statute specifies a mental state requirement for one type of violation but not another, it must be presumed that the omission was intentional. *See, e.g.*, *United States v. Thornton*, 306 F.3d 1355, 1358-59 (3d Cir. 2002) (declining to read a mental state requirement into a provision because "[w]hen Congress wanted to include [a mental state] requirement

. . . , it knew exactly how to do so"); *accord United States v. Lewis*, 386 F.3d 475, 479 (2d Cir. 2004) (agreeing with *Thornton*).[4] Here, Congress twice amended the Act to specify a mental state requirement for certain violations but did not specify a mental state requirement for the general prohibition. Thus, it should be presumed that Congress did not intend to impose a mental state requirement on the general prohibition, and Congress's intent should be given effect.

Second, the legislative history of those two amendments explicitly *disavowed* any intent to impose a mental state requirement on the general prohibition. The 1986 amendment adding the knowledge requirement to the prohibition on selling birds was prompted by a Sixth Circuit decision holding that imposing felony penalties on a strict liability basis was unconstitutional. *See* S. Rep. No. 99-445, at 16 (1986) (adding a knowledge requirement to the felony provision was meant "to cure the unintended infirmity" identified by the Sixth Circuit). But violating the general prohibition on taking or killing migratory birds is a misdemeanor, and the Senate Report regarding the amendment made clear that "[n]othing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions . . . , a standard which has been upheld in many Federal court decisions." *Id.*

The 1998 amendment adding the negligence requirement for hunting over baited fields was prompted by the concern that it would be unfair to penalize a person

[4] *See also Zortman v. J.C. Christensen & Assocs., Inc.*, 819 F. Supp. 2d 874, 879 (D. Minn. 2011) ("The inclusion of an intent element in [one provision] strongly suggests that no such element is required by [the other]."); *Clinton Plumbing & Heating of Trenton, Inc. v. Ciaccio*, No. CIV. 09-2751, 2010 WL 4224473, at *4 (E.D. Pa. Oct. 22, 2010) (when Congress specifies an intent requirement for certain sections of a statute, its failure to do so in another section "indicates that Congress did not establish an intent requirement" for that section).

who did not have a reasonable basis to know the field was baited. AR49. Here again, the Senate Report in support of the amendment reaffirmed that Congress did not intend to impose a mental state requirement on the general prohibition, stating: "[t]he elimination of strict liability . . . applies only to hunting with bait or over baited areas, and is not intended in any way to reflect upon the general application of strict liability under the MBTA." S. Rep. No. 105-366, at 3. Indeed, the Senate Report stressed that strict liability was "a hallmark of the law." *Id.* at 2.

Third, Congress explicitly recognized the MBTA's prohibition on incidental take when enacting other legislation. After a court enjoined certain military training activities as violating the MBTA, Congress enacted legislation in 2002 that temporarily exempted "the incidental taking of a migratory bird by a member of the Armed Forces during a military-readiness activity." 16 Stat. at 2509. That statute directed Interior to use its authority under the MBTA to regulate "military readiness activities" that cause incidental take. *Id.* These provisions would have been unnecessary if the MBTA did not prohibit incidental take.

Finally, Interior's longstanding interpretation that the MBTA prohibits incidental take is the settled law of this Circuit. In *FMC Corp.*, the Second Circuit held that a pesticide manufacturer in New York was liable for the deaths of 92 migratory birds that were unintentionally killed by "toxic and noxious waters" in a contaminated pond. 572 F.2d at 903-04, 908.[5] In reaching this decision, the Second

[5] The court explained that "[i]mposing strict liability on FMC in this case does not dictate that every death of a bird will result in imposing strict criminal liability on some party." *Id.* at 908. Rather, an "innocent technical violation" could be addressed through enforcement discretion. *Id.* at 905.

Circuit cited the fact that the statute did not require intent, knowledge, recklessness, or negligence, as well as the "important public policy behind protecting migratory birds." *Id.* at 908. *FMC Corp.* remains the law of this Circuit. Indeed, as another court would later note, "Congress reviewed and substantively amended the MBTA in 1986 without attempting to vitiate the holding[] of FMC [that] killing of migratory birds by dumping waste water violates the MBTA." *United States v. Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d 1070, 1077 (D. Colo. 1999).

B. The Jorjani Opinion's Interpretation of the MBTA Is Incorrect.

The Jorjani Opinion's attempt to add a mental state requirement to the MBTA's general prohibition conflicts with the Act's text, purpose and legislative history. As a threshold matter, the Jorjani Opinion notes, without objection, that numerous courts have held that misdemeanor violations of the MBTA are subject to strict liability. *See* AR12. Indeed, Interior's talking points defending the Jorjani Opinion *continue* to describe the MBTA as "a strict liability statute that criminalizes the killing or taking of a migratory bird." AR618.

The Jorjani Opinion goes on to find, however, that even if the MBTA is a strict liability statute, it only applies to "affirmative actions that have as their *purpose* the taking or killing of migratory birds, their nests or their eggs." AR2, 22-23 (emphasis added). This sleight of hand is both legally and logically unsound. If the MBTA imposes strict liability—which, as Interior concedes, it does—then, by definition, there is no mental state requirement. *Efstathiadis*, 752 F.3d at 596 ("[A] crime in which *mens rea* is not required [is] referred to as a 'strict liability' offense."). Because *purpose* is a mental state, it cannot be true that the MBTA lacks a mental state

requirement, but nonetheless only prohibits conduct that has the *purpose* of taking or killing migratory birds.

The Jorjani Opinion relies heavily on the Latin phrase *noscitur a sociis* (*i.e.*, a word's meaning may be known from the accompanying words), arguing that, because the words "take" and "kill" are surrounded by words such as "pursue," "hunt," and "capture"—which connote "affirmative and purposeful action"—the words "take" and "kill" should be limited to "affirmative actions that have as their *purpose* the taking or killing of migratory birds, their nests or their eggs." AR2, 18-19. However, that interpretation would just as soon render the prohibition on taking and killing birds superfluous, which violates another canon of construction—namely, the rule against superfluities. *See Panjiva, Inc. v. U.S. Customs & Border Prot.*, 342 F. Supp. 3d 481, 490 (S.D.N.Y. 2018) ("[W]here parties offer two competing interpretations of a statute, the rule against superfluities favors that interpretation which avoids surplusage and redundancies." (citations omitted)).

The Jorjani Opinion's invocation of ancient treatises, including the *Digest of Justinian* and *Blackstone's Commentaries*, to parse the meaning of "take" is equally unpersuasive. The Jorjani Opinion finds that, because the *Digest of Justinian* purportedly "places 'take' squarely in the context of acquiring dominion over wild animals," the use of the word "take" in the MBTA connotes an action with the purpose of acquiring dominion over migratory birds. AR21. However, as the Tompkins Opinion observed, "even if the traditional common-law meaning of 'take' introduces some ambiguity as to whether that term applies to incidental take, 'kill' is

unambiguous." AR72. Under common law, "kill" did not refer only to deliberate killing. Rather, "kill" has long been used to include deaths caused unintentionally. *See, e.g.*, 4 William Blackstone, Commentaries *182 (discussing homicide *per infortunium*, "where a man, doing a lawful act, without any intention of hurt, unfortunately kills another").

The Jorjani Opinion also reasons that, because the Act was originally motivated by the problem of overhunting, the prohibitions should be restricted to "activities akin to hunting and trapping." AR24. However, Congress did not limit the statute to "activities akin to hunting or trapping," and there is no basis to read that limiting language into the statute. *See Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004) (declining to "read an absent word into the statute" when there was "a plain, nonabsurd meaning in view"). Rather, Congress drafted the Act's prohibitions in the broadest terms, prohibiting the taking or killing of migratory birds "at any time, by any means or in any manner." 16 U.S.C. § 703(a). Supporting this interpretation, statements in the congressional record as early as 1918 cited various, non-hunting-related threats to migratory birds requiring a need for regulation to prevent the killing of birds, such as "the extension of agriculture, and particularly the draining on a large scale of swamps and meadows." *Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d at 1080-81 (citing H.R. No. 65-243, at 2 (1918)). Moreover, when Congress amended the Act in 1936, it moved the phrase "at any time, by any means or in any manner" to the beginning of the paragraph to emphasize that it applied to any manner of taking or killing migratory birds. 49 Stat. at 1556.

C. Principles of International Comity Support the Longstanding Interpretation that the MBTA Prohibits Incidental Take.

As the Second Circuit has explained, the doctrine of international comity should guide the interpretation of a statute "where the issues to be resolved are entangled in international relations." *In re Maxwell Commc'n Corp. plc by Homan*, 93 F.3d 1036, 1046 (2d Cir. 1996).[6] Moreover, "a statute 'ought never to be construed to violate the law of nations, if any other possible construction remains.'" *Id.* (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

Here, principles of international comity support Interior's longstanding, pre-Jorjani Opinion interpretation that the MBTA prohibits incidental take. First, that interpretation was consistent with the treaties the MBTA implements, which reflect a shared commitment to regulate incidental take. Even the original Canada treaty, which was largely focused on hunting, proclaimed a goal of "insuring the preservation of such migratory birds as are useful to man or are harmless." *See supra* p. 2. As amended, the treaties with Canada, Japan, and Russia all call for protecting birds and their environments from pollution. *Id*. Because deaths from pollution are unintentional, they are incidental takes.

Second, the United States and Canada explicitly acknowledged, through the exchange of diplomatic notes, a "mutually held interpretation" that the treaty between the two nations extends to regulation of incidental take. AR886-888. This

[6] International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). It is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Id.* at 163-64.

mutually held interpretation is entitled to great weight when interpreting a statute that was enacted to implement that treaty. *See Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 490 (D.N.J. 1999) ("[C]ourts generally give great weight to a signatory nation's interpretation of a treaty."). Further, a Canadian court examining the original treaty and subsequent amendments rejected a narrow interpretation of the word "taking" that would limit its scope to hunting-related offenses, explaining that this would be contrary to the treaty's protective purpose. AR1697-1698.

Whereas Interior's longstanding interpretation was consistent with the underlying treaties and the mutually held understanding shared by Canada and the United States, the Jorjani Opinion is inconsistent with those treaties and directly contrary to that mutual understanding. Because "a statute 'ought never to be construed to violate the law of nations, if any other possible construction remains,'" *In re Maxwell Commc'n Corp.*, 93 F.3d at 1046, principles of international comity warrant rejecting the Jorjani Opinion.

CONCLUSION

For the foregoing reasons, the States' motion for summary judgment vacating the Jorjani Opinion should be granted.

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Respectfully submitted,

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