New Civil Liberties Alliance

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FWS-HQ-MB-2018-0090

Mr. Jerome Ford
Assistant Director, Migratory Birds
U.S. Fish and Wildlife Service
U.S. Department of the Interior
MS: JAO/3W
5275 Leesburg Pike
Falls Church, VA 22041–3803

Re: Proposed Rule, Regulations Governing Take of Migratory Birds [*Docket No. FWS-HQ-MB-2018-0090; FF09M21200-212-FXMB1231099BPP0; RIN 1018-BD76*]

Dear Mr. Ford:

The New Civil Liberties Alliance (NCLA) submits these comments in response to the request for comments issued by the Fish and Wildlife Service (FWS) on its May 7, 2021 proposed rule. *See* 86 Fed. Reg. 24,573 (May 7, 2021) (proposing to repeal 50 C.F.R. § 10.14). 50 C.F.R. § 10.14 (emphasis added) provides:

> The prohibitions of the Migratory Bird Treaty Act (16 U.S.C. 703) that make it unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, or kill migratory birds, or attempt to engage in any of those actions, *apply only to actions directed at migratory birds, their nests, or their eggs*. Injury to or mortality of migratory birds that results from, but is not the purpose of, an action (*i.e.*, incidental taking or killing) is not prohibited by the Migratory Bird Treaty Act.

By repealing this language, FWS would greatly expand its interpretation of the Migratory Bird Treaty Act (MBTA), so as to grant the Justice Department the discretion to prosecute actions with the mere effect of "kill[ing]" or "tak[ing]" migratory birds, including even attempting actions that have such an effect. As a result, even if the actions of putative MBTA violators were undertaken for reasons having nothing to do with migratory birds, including for entirely lawful purposes, if at least one

covered migratory bird dies or is "tak[en]" in the process, a crime will have occurred.

NCLA strongly opposes this change in the statute's interpretation, principally because § 10.14 as it currently appears in the *Code of Federal Regulations* better accords with the language and purpose of MBTA as passed by Congress.

INTRODUCTION

NCLA appreciates the opportunity to submit comments on the proposed repeal of § 10.14. According to FWS, "[t]he effect of this proposed rule would be to return to implementing the MBTA as prohibiting incidental take and applying enforcement discretion consistent with judicial precedent." 86 Fed. Reg. at 24,573. NCLA disagrees with FWS's view that the MBTA was ever properly applied to what FWS calls "incidental take[s]" of migratory birds.[1] Instead, as NCLA sets out below, the MBTA, first enacted in 1918, was not interpreted that way for the first 55 years of its existence. Even in the 48-year period since 1973 (uncoincidentally, the year the Endangered Species Act (ESA) was enacted), the matter has long been controversial and has split both the courts and the Interior Departments of different Administrations.

For reasons NCLA explains below, the best reading of the MBTA is consistent with § 10.14, not with FWS's "incidental take" reading of the statute. The wide range of interpretive battles, which span decades, over the MBTA's misdemeanor provision indicates that those who do not accept NCLA's reading of the MBTA must concede, at the very least, that the statute is ambiguous, else incidental take prosecutions would have been pursued shortly after the inception of the statute in 1918 and certainly at some point before 1973. Hence, to prevail in defending the proposed rule, should it become final, FWS will eventually be forced to invoke *Chevron* deference. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984) (establishing a two-part test to assess whether administrative agencies have been implicitly delegated the power to interpret the statutes committed to their care). But NCLA establishes below that *Chevron* deference cannot save the proposed rule because such deference is unconstitutional, being dramatically at odds with the design of our Republic. *Chevron* deference both abdicates the judicial role of independent judgment, violating the separation of powers, and it contravenes due process by systematically stacking the deck in favor of Executive Branch interpretations of the law.

In the alternative, NCLA argues that the best interpretation of the MBTA is that "incidental takes" fall outside the reach of the statute, not within it. This is true both because of the text of the statute and a slew of applicable interpretive canons all pointing in the same direction. Indeed, one of the most powerful arguments supporting the conclusion that "incidental takes" are not covered by the MBTA is that Congress knows how to protect wildlife in a very broad fashion when it wants to do so. Nor is this a purely theoretic point, *for Congress did just that in the ESA*, most clearly when that statute was amended in 1982 to authorize the issuance of incidental-take permits. But Congress never did so in the MBTA, which contains *no language* indicating that the statute extends to incidental takes. *See, e.g., Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 384 (2013) ("These statutes confirm that Congress knows how to limit a court's discretion under Rule 54(d)(1) when it so desires.").

NCLA will confine its comments to the outline of points set out above, which correspond to

[1] For purposes of these comments, please consider references to migratory birds (unless otherwise specified to the contrary) also to refer to the parts of such birds, their nests, or their eggs as well as to whole migratory birds themselves.

the first question that FWS explicitly requested comment upon in its May 2021 preamble to the proposed rule: "Whether we should revoke the rule as proposed here, and why or why not … ." NCLA will not focus these comments on the costs or benefits of revoking the rule, nor on the reliance interests generated by FWS's January 7, 2021 final rule adopting § 10.14, nor on the M-Opinion issued by Interior's Principal Deputy Solicitor in late 2017, which set out the same interpretation adopted in § 10.14 a bit more than three years before issuance of the 2021 final rule. *See* Memorandum from Principal Deputy Solicitor Daniel Jorjani to Secretary of Interior Ryan Zinke, *et al.*, *The Migratory Bird Treaty Act Does Not Preclude Incidental Take*, M-37050 (Dec. 22, 2017) [hereafter *Jorjani* M-Opinion at __], *vacated by NRDC v. Department of the Interior*, 478 F. Supp. 3d 469 (S.D.N.Y. 2020).[2]

NCLA strongly urges FWS to maintain the approach in its current rule, § 10.14. NCLA does so both (1) because the best reading of the MBTA is that FWS lacks statutory authority to regulate activities that, while they may have an incidental effect on some migratory birds, are not directed at those birds, and (2) because *Chevron* deference was established without considering the constitutionality of deferring to Executive Branch interpretations of statutes. When the courts ultimately do confront the serious constitutional defects present in the *Chevron* doctrine, *Chevron* deference should be invalidated, leaving FWS without any legal protection for its incidental-take misinterpretation of the MBTA.

Because review under the Administrative Procedure Act will result in the courts "decid[ing] all relevant questions of law, [including] interpret[ing] constitutional … provisions [and] hold[ing] unlawful and set[ting] aside agency actions … contrary to constitutional right, power, privilege, or immunity," FWS should consult with fellow federal agencies now, including with litigators at the Department of Justice, and not hide in ostrich-like fashion from the serious constitutional issues presented by this rulemaking. 5 U.S.C. § 706 & *id.* § 706(2)(B). Because questions of *Chevron*'s constitutionality remain unanswered, FWS cannot ignore those constitutional issues; they comprise an important part of the problem. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). FWS's response to these comments should accordingly include either a confession of *Chevron*'s defects and withdrawal of the proposed rule or a straight-up defense of *Chevron*'s constitutional validity if FWS persists in its proposed course of action.

INTERESTS OF THE NEW CIVIL LIBERTIES ALLIANCE

NCLA is a nonpartisan, nonprofit civil-rights organization founded by Philip Hamburger to defend constitutional freedoms against unlawful exercises of administrative power including the plethora of unconstitutional deference doctrines federal judges have created in violation of judicial independence and due process. NCLA challenges constitutional defects in the modern American legal framework by bringing original litigation, defending Americans from unconstitutional actions, filing *amicus curiae* briefs, and petitioning for a redress of grievances in other ways, including by filing rulemaking comments like these. Although Americans still enjoy the shell of our Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent.

[2] "At the time the January 7 rule was published, the United States had filed a notice of appeal of the *NRDC* decision in the U.S. Court of Appeals for the Second Circuit. Since that time, the United States filed a stipulation to dismiss that appeal on February 25, 2021, and the Deputy Solicitor permanently withdrew M–37050 on March 8, 2021." 86 Fed. Reg. at 24,574.

The first Earth Day was observed on April 22, 1970. Conservation statutes like the MBTA predated the 1970s by many decades, stretching back into the nineteenth century. But modern environmental statutes such as the ESA trace only to the 1970s and later. This more recent period was one of a rapidly rising environmental consciousness and, in consequence, a large number of very broad statutes abdicating regulation to sprawling administrative agencies was adopted, such as the Clean Air Act, Clean Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Congress, like all our governmental institutions, is made up of human beings. NCLA submits that this dispute over the meaning of the MBTA is the result of the newfangled hyper-deference that arose in the post-1970s period, leading to the strange phenomenon of "backcasting" that interpretive approach onto the early twentieth-century MBTA statute, which was produced by a Congress with greater fidelity to the core constitutional order.

Several courts in the 1970s succumbed to this tide and authorized one or another reading of the MBTA to embrace incidental takes.[3] *See, e.g., United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (MBTA reached corporate conduct that failed to prevent migratory birds from coming into contact with pesticide-contaminated water); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal. 1978), *aff'd*, 578 F.2d 259 (9th Cir. 1978) (MBTA reached migratory bird death caused by spraying an alfalfa field with a pesticide). But by the 1990s, many courts had rejected broad interpretations of the MBTA. *See, e.g., Seattle Audubon Socy' v. Evans*, 952 F.3d 297 (9th Cir. 1991) (MBTA did not criminalize the destruction of spotted owl habitat); *Newton County Wildlife Ass'n v. FWS*, 113 F.3d 110 (8th Cir. 1997) (MBTA did not criminalize activities such as timber harvesting that incidentally resulted in the death of migratory birds); *Mahler v. FWS*, 927 F. Supp. 1559 (S.D. Ind. 1996) (MBTA did not criminalize U.S. Forest Service tree-cutting activities that could destroy migratory bird nesting areas). This change in the judicial tide manifested itself in courts reading statutory language far more textually, with a concomitant deemphasis on whether some interpretation or other comports with a statute's often vague and lofty primary purpose.[4] *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("[I]t is quite mistaken to assume ... that whatever might appear to further the statute's primary objective must be the law." (internal quotation marks and alterations omitted)).

Even as it questions *Chevron*, NCLA believes that in contested Article III litigation, the judicial role is to interpret statutes as they are written, employing the traditional tools of statutory interpretation. Interpreting a statute by placing undue emphasis on its primary purpose (e.g., to protect the environment) is improper. It is an approach to statutory interpretation widely acknowledged to have been interred as of at least the late 1980s. "[N]o legislation pursues its purposes at all costs.

[3] NCLA will use the term "incidental take" in these comments for convenience's sake but notes that it regards that term as loaded. Specifically, the term "incidental take" is unhelpful in attempting to discern the meaning of the MBTA. The MBTA makes it unlawful to "take" a migratory bird. The meaning of that statutory term is key to determining whether FWS possesses authority under the MBTA to regulate activities that cause only incidental, indirect harm to migratory birds. Use of the term "incidental take" as a synonym for incidental, indirect harm is inappropriate because it assumes an affirmative answer to the statutory interpretation question—*i.e.*, that an "incidental take" is one of a number of different types of "take." Instead, as we set out below, incidental harm is not a form of MBTA "take" at all. It is only a form "take" under the ESA's different definition of that term.

[4] "In the years since *Chevron*, textualism has played an increasingly central role in statutory interpretation. We can even call it the Textualist Revolution, led by Justice Scalia, which put severe pressure on Legal Process approaches. A central goal of the Textualist Revolution has been to focus insistently on the legal sources for judicial decisions. The Textualist Revolution requires courts to ask not about reasonable legislators acting reasonably but instead: *What provision of law authorizes one or another approach, and what exactly does it say?*" Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1631 (2019).

Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

The proposed rule gives lip service to a textualist approach, but its underlying premise is that the MBTA's purpose—to protect migratory birds—must be pursued at all costs. FWS's views can be given careful consideration by the courts, but they are not entitled to dispositive weight. A fair-and-balanced reading of the MBTA, and application of the appropriate canons of interpretation, after a review of the history of the statute and its place in the *corpus juris*, should lead the courts to reject FWS's most recent proposed interpretation of the MBTA as embracing "incidental takes." *See Branch v. Smith*, 538 U.S. 254, 281 (2003) ("courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes"). Moreover, as these comments will explore, FWS should not expect the courts to call on *Chevron* deference to tip the balance in FWS's favor.

The MBTA's legislative history indicates that it was adopted with the stated intent of "saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless." Convention between the United States and Great Britain for the Protection of Migratory Birds, 39 Stat. 1702 (Aug. 16, 1916) (ratified Dec. 7, 1916). That goal was threatened at the turn of the last century by out-of-season hunters and profiteers preying on migratory birds in ways emblematic of what would come to be called the "tragedy of the commons." *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). Congress sought to end that ill.

But nothing did prevent nor could have prevented FWS, in the period after 1973 (or after 1982) and up to the present day, from asking Congress to carry over the broader incidental-take approach of the ESA to the MBTA. Instead, FWS took it upon itself to rewrite the statute to encompass incidental takes. It should be Congress alone that undertakes any such amendment to the MBTA. Amendment should not occur on a *de facto* basis by an Executive Branch agency, and it certainly should not occur because lower courts have deferred to such an agency and ceded the field of statutory interpretation to a sister branch of government. The Constitution's instantiation of an independent judiciary and its respect for due process deserve much better. NCLA will stand in the breach to take all necessary steps to restore the proper constitutional order and defend the judiciary's proper role in resolving legal disputes without bias.

The meaning of the MBTA should be fixed judicially via the adversary process—by the Supreme Court if necessary. The statute's meaning should not ping-pong depending on who occupies the White House or the Interior Department. *See, e.g.,* David Freudenthal *et al.*, *A Pendulum Seldom Stops in the Middle: Shifting Views on "Take" of Raptors and Other Migratory Birds*, 48 ENVT'L L. REP. NEWS & ANALYSIS 10555 (July 2018). Nor should it vary from one part of the country to another so that a landowner that allows a standing puddle to stagnate in a way that attracts birds and then befouls their wings is guilty of a federal crime in Connecticut but someone engaging in precisely the same conduct in Mississippi is not guilty of a crime. Few areas of the law cry out for uniformity more than the criminal law, where imprisonment often hangs in the balance. *See Leland v. Oregon*, 343 U.S. 790, 797 (1952) ("[I]t is desirable that there be uniformity of rule in the administration of the criminal law in governments whose constitutions equally recognize the fundamental principles that are deemed essential for the protection of life and liberty.") (cleaned up).

BACKGROUND OF THE MIGRATORY BIRD TREATY ACT

The Jorjani M-Opinion, at 2-11, sets forth an extensive history of the relevant treaties with the United Kingdom, Mexico, Canada, and the USSR (succeeded to by Russia), and of the MBTA itself, including how it has been amended. That material should be deemed incorporated by reference into these comments. Nothing in Judge Caproni's decision in *NRDC v. Interior*, which vacated the Jorjani M-Opinion, questioned the steps and analysis of the evolution of the MBTA set forth by Solicitor Jorjani. For ease of exposition here, we specifically reference some of the Jorjani M-Opinion's points on this score, make additional points of NCLA's own, and describe the procedural events occurring after the Jorjani M-Opinion was issued.

Americans hunted and poached birds at a much greater rate in the late nineteenth and early twentieth centuries than they do today. "The scope of commercial hunting at the turn of the century is hard to overstate. One author, describing hunters descending upon a single pigeon nesting ground, reported '[h]undreds of thousands, indeed millions, of dead birds were shipped out at a wholesale price of fifteen to twenty-five cents a dozen.'" Jorjani M-Opinion at 2, *quoting* Peter Matthiessen, WILDLIFE IN AMERICA 159-60 (1987). Many species of bird populations declined rapidly, and the passenger pigeon notably went extinct in 1914. *See* Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENV'TL L. 673, 691–692 (2005).

Since then, the United States has entered into four migratory bird treaties. The United States signed the first of these treaties with Great Britain (on behalf of Canada) in 1916 to curb the "indiscriminate slaughter" of migratory birds. *See* Convention between the United States and Great Britain for the Protection of Migratory Birds, 39 Stat. 1702 (Aug. 16, 1916) (ratified Dec. 7, 1916). The Migratory Bird Treaty Act implemented this treaty in 1918, making it one of the oldest conservation laws in the country. *See* 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. § 703-712). The Act criminalizes specific acts that kill or traffic birds without permission from FWS. The Act has even survived a famous constitutional challenge. *See Missouri v. Holland*, 252 U.S. 416 (1920).

A. Additional Historical Points

The MBTA focuses exclusively on actions that take, kill, or trade in protected migratory birds. A separate statute, the Migratory Bird Conservation Act (MBCA), protects migratory bird habitat. *See* 45 Stat. 1222 (1929) (codified as amended at 16 U.S.C. § 715-715a). Standing alone, the fact that Congress saw it necessary to establish a separate regime to protect habitat strongly reinforces the conclusion that the MBTA was not broadly intended to prohibit all actions with *adverse effects* on migratory birds. If so, the MBCA would have been unnecessary, since conduct that harmed bird habitat, thereby harming migratory birds, would already have been criminalized 11 years earlier in 1918 when the MBTA was passed.

The enforcement history of the MBTA also shows that the United States and Canada instinctively shied away from enforcing the statute against the traditional hunting activities of Native American and Canadian tribes and other aboriginal peoples. *See* Jorjani M-Opinion at 8-9 & n.53. Eventually, a U.S.-Canadian Protocol was signed to memorialize this agreement. *See* Protocol Between the Government of the United States of America and the Government of Canada Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States, 1995 WL 877199 (signed Dec. 14, 1995), *reprinted* in

S. Treaty Doc. No. 104-28 at 1. This development bolsters the conclusion that both Congress and all treaty partners understood the United States domestic legislation designed to effectuate migratory bird treaty protections (*i.e.*, the MBTA) to focus on ending modern over-hunting practices that were not sustainable. In other words, Congress wanted the MBTA to combat "the avarice and brutality of man in their slaughter [of birds] for sale and for sport, unrestricted by regulations of any kind." 56 Cong. Rec. 7361 (1918) (statement of Rep. Stedman).

Congress also reinforced its understanding that the MBTA is focused on commercial exploitation of migratory birds when in 1960 it amended the statute to create a tier of felony violations. *See* Act of Sept. 8, 1960, Pub. L. No. 86-732, 74 Stat. 866. Indeed, after the Sixth Circuit held that this amendment violated defendants' due process rights, *see United States v. Wulff*, 758 F.3d 1121 (6th Cir. 1985), Congress further amended the felony provision. *See* Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, sec. 501, 100 Stat. 3582, 3590-91. Thus, in its current form, "[w]hoever … shall knowingly (1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or (2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both." 16 U.S.C. § 707(b).

Nor can the creation of a felony tier of offenses be spun in favor of reading the MBTA to authorize the prosecution of incidental takes. The existence of separate misdemeanor and felony provisions—the latter limiting convictions to those who act "knowingly" and the former containing no such limitation—provides no support for assertions that MBTA § 703(a) applies to activities that result in incidental harm to migratory birds. The misdemeanor and felony provisions address altogether different crimes; the felony provisions focus solely on the "sale" of migratory birds. *See generally Mahler*, 927 F. Supp. 1559. Congress added the felony "knowing" violation to § 707 in 1986 to "close a loophole," allowing felony prosecution for the commercial trafficking of birds and bird parts. *Id.* at 1580–81. The longstanding misdemeanor provision applies much more broadly to *any* violation of the MBTA; the presence of alternative penalties was a later addition and thus does not indicate that the misdemeanor provision covers unintended harm.

Moreover, as with any criminal statute, doubts as to the meaning of the MBTA must be resolved in favor of a narrow construction. Thus, even if FWS's proposed broad interpretation of the MBTA here (that it applies to conduct not directed at migratory birds) were plausible, the rule of lenity would require that FWS's interpretation nonetheless be rejected.

The Supreme Court has reaffirmed multiple times that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). So, in deciding whether Congress intended the word "take" to include incidental and indirect bird deaths, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–222 (1952). It is inappropriate to criminalize incidental harm under the MBTA, as Congress did not "plainly and unmistakably" make this action a crime. *Bass*, 404 U.S. at 348 (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917)). *See also United States v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202, 1211 (D.N.D. 2012).

Congress discussed no types of violators other than hunters. The 1974 MBTA amendment also focused on bird-directed activity, as it banned selling illegally obtained birds. *See* Migratory Bird Act Amendment of 1974, Pub. L. No. 93–300, 88 Stat. 190. *See also Mahler*, 927 F. Supp. at 1580

("[The amendment] reflects an intent to prohibit activity that is intended to kill or capture birds. There is again no indication that Congress intended to reach activities not even intended to kill or capture birds."). Congress enacted this amendment the year after it drafted a much broader definition of "take" in the ESA. 16 U.S.C. § 1532(19) ("The term 'take' means to *harass*, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.") (emphasized terms do not appear as part of the MBTA's prohibitions). Congress had the opportunity to broaden the MBTA definition of "take" to match the ESA definition but chose not to do so.

And, as noted above, in 1982 Congress specifically added the concept of incidental take to the ESA but did not do so to the MBTA. *See* Endangered Species Act | A History of the Endangered Species Act of 1973 | 1982 ESA Amendment, *available at* https://www.fws.gov/endangered/laws-policies/esa-1982.html (last visited June 7, 2021) ("Congress enacted the following amendments to the Endangered Species Act in 1982 … Section 10 introduced habitat conservation plans, providing 'incidental take' permits for listed species in connection with otherwise lawful activities.").

So, in sum, the ESA *both* applies more broadly to "harming" and "harassing" protected wildlife (categories of harm not present in the MBTA) *and* explicitly contains the concept of incidental takes (also absent from the MBTA). This alone should make it obvious that ESA's incidental take concept was erroneously ported over and injected into the MBTA.

B. The MBTA and Its Regulations in Their Current Form

The Migratory Bird Treaty Act in its current form is codified at 16 U.S.C. §§ 703-712. Most relevant to the proposed rule are §§ 703, 704, and 707. Section 703(a) declares a lengthy list of activities regarding migratory birds to be "unlawful":

> Unless and except as permitted by regulations … it shall be unlawful at any time, by any means or in any manner, to [1] pursue, [2] hunt, [3] take, [4] capture, [5] kill, [6] attempt to take, capture, or kill, [7] possess, [8] offer for sale, [9] sell, [10] offer to barter, [11] barter, [12] offer to purchase, [13] purchase, [14] deliver for shipment, [15] ship, [16] export, [17] import, [18] cause to be shipped, exported, or imported, [19] deliver for transportation, [20] transport or cause to be transported, [21] carry or cause to be carried, or [22] receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or in part, of any such bird or any part, nest, or egg thereof.

16 U.S.C. § 703(a) (numbering added). Thus, the statute declares that 22 specifically listed activities regarding migratory birds are flatly unlawful. The words in the listed activities share a common theme: all suggest what is prohibited is activity intentionally directed at migratory birds (or at related articles, such as nests or eggs).

Not included in MBTA § 703(a)'s list of prohibited activities is the phrase "incidental take." FWS's proposed rule withdraws text from the *Code of Federal Regulations* and thus does not define "incidental take" directly, but implicitly notes that "incidental take" is the application of the MBTA's penalties "to conduct resulting in the injury or death of migratory birds protected by the MBTA." 86 Fed. Reg. at 24,573. Additionally, Interior's ESA and Marine Mammal Protection Act (MMPA) regulations define the term to mean "any taking otherwise prohibited, if such taking is incidental to,

and not the purpose of, the carrying out of an otherwise lawful activity." 50 C.F.R. § 17.3. *Contrast* 50 C.F.R. § 10.14 (the regulation the proposed rule would repeal) (providing the MBTA "appl[ies] only to actions directed at migratory birds, their nests, or their eggs. Injury to or mortality of migratory birds that results from, but is not the purpose of, an action (*i.e.*, incidental taking or killing) is not prohibited by the Migratory Bird Treaty Act.").

MBTA § 704(a) grants the Secretary of the Interior authority to determine whether and to what extent to permit activities otherwise prohibited under that provision of law. The Secretary is further authorized by MBTA § 704(a) to issue regulations permitting and governing such activities; in exercising that authority, the Secretary has adopted regulations that create an FWS permitting program. Those wishing to engage in activities otherwise prohibited under § 703(a) may apply to FWS for an authorizing permit. The regulations provide permits for various activities, including import and export, banding or marking, scientific collecting, taxidermy, waterfowl sale and disposal, falconry, propagation, rehabilitation, depredation, and population control. *See* 50 C.F.R. §§ 21.21–21.61. The "special purpose permits" regulation allows applicants to seek permits for activities not explicitly covered by another of the permitting regulations. 50 C.F.R. § 21.27.

Section 707 of the Act imposes criminal penalties for violating § 703. Anyone who "shall violate or fail to comply" with the statute commits a misdemeanor. 16 U.S.C. § 707(a). Anyone who, in violation of § 703(a), sells a migratory bird, or takes a migratory bird with intent to sell, commits a felony punishable by imprisonment of up to two years. 16 U.S.C. § 707(b).

FWS originally confined its enforcement of the MBTA to hunting, poaching, and other activities involving intentional harm to migratory birds. *See* George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 182–183 (1979). Since 1973, however, FWS has sought to expand its jurisdiction by sometimes enforcing the Act against those who did not act to harm a migratory bird, but whose conduct led at least indirectly to the harming of migratory birds. *See NRDC*, 478 F. Supp. 3d at 473 ("From the early 1970s until 2017, Interior interpreted the MBTA to prohibit incidental takes and kills, imposing liability for activities and hazards that led to the deaths of protected birds, irrespective of whether the activities targeted birds or were intended to take or kill birds."); Meredith B. Lilley & Jeremy Firestone, *Wind Power, Wildlife, and the Migratory Bird Treaty: A Way Forward*, 38 ENVTL. L. 1167, 1181 (2008) ("In the early 1970s, *United States v. Union Texas Petroleum* [No, 73-CR-127 (D. Colo. Jul. 11, 1973)] marked the first case dealing with the issue of incidental take.").

THE FWS's PROPOSED RULE

On May 7, 2021, FWS proposed to repeal 50 C.F.R. § 10.14. This would reverse the final rule issued on January 7, 2021. *See* 86 Fed. Reg. at 24,573. FWS rejected not only its own recently expressed conclusion that "the MBTA does not prohibit incidental take," *id.* (an interpretation it adopted following lengthy notice-and-comment consideration), but also a recent Fifth Circuit decision that reached the identical conclusion. *Id.* (citing *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015)). NCLA submits that the 55-year absence of incidental-take prosecutions and especially the absence of incidental-take *text* in the MBTA are strong indications that the MBTA does not "prohibit[s] incidental take" and FWS bears a heavy burden if it seeks to demonstrate, in the face of that evidence, that Congress intended to criminalize such conduct.

The main reasons given for FWS's proposed rule are that the agency has:

> determined that the rule does not reflect the best reading of the MBTA's text, purpose, and history. It is also inconsistent with the majority of relevant court decisions addressing the issue, including the decision of the District Court for the Southern District of New York that expressly rejected the rationale offered in the rule. The rule's reading of the MBTA also raises serious concerns with a United States' treaty partner, and for the migratory bird resources protected by the MBTA and underlying treaties.

Id.

FWS acknowledges that the "MBTA statutory provisions at issue in the January 7 rule have been the subject of repeated litigation and diametrically opposed opinions of the Solicitors of the Department of the Interior," *id.*, suggesting that the statute is, at best for FWS, ambiguous as to whether it criminalizes incidental takes. But FWS quickly brushes aside this observation by noting that its current proposed position embodies "longstanding historical agency practice [as] confirmed in the earlier Solicitor M-Opinion, M-37041 [Tompkins] …." *Id.*

Again, however, this account ignores that incidental takes were not prosecuted under the MBTA until 1973, the same year when the ESA was enacted.[5] And that 55-year span of time (from 1918 to 1973) is longer than the roughly 48-year period (1973-2021) during which, with a mixed record in the courts characterized by diametrically opposed Solicitor's opinions, incidental takes have been prosecuted. The period closer to a statute's enactment typically signals greater fidelity by the superintending agency to what Congress intended in the statute because an enactment's main proponents clearly remain in Congress and can conduct oversight quickly if an agency picking up the reins of a new statute goes astray. In any event, a checkered period of more-recent history marked out by divergent judicial decisions and wild administrative pendulum swings obviously does not equate to a monolithic "longstanding historical agency practice" entitled to dispositive respect.

FWS notes it acted on February 9, 2021, to postpone until an effective date of March 8, 2021, the January 7, 2021 final rule that disclaimed incidental-take prosecutions. The proposed rule indicates that further postponements were considered but not adopted, leaving 50 C.F.R. § 10.14 to come into effect on March 8, 2021, which remains the final rule's status. *See* 86 Fed. Reg. at 24,573.

In the last Administration, the Jorjani M-Opinion was challenged in the Southern District of New York and vacated. *See NRDC*, 478 F. Supp. 3d at 489. As noted above, an appeal was filed but later dropped on February 25, 2021. *See* 86 Fed. Reg. at 24,574. FWS spends a full page of the *Federal Register* summarizing Judge Caproni's decision in *NRDC* and her refusal to follow *CITGO*, 801 F.3d 477. *See* 86 Fed. Reg. 24,574-75. Summing up, FWS states:

> [T]he interpretation of the MBTA set forth in the January 7 rule and Solicitor's Opinion M–37050 [Jorjani] … simply cannot be squared with the *NRDC* court's holding that the MBTA's plain language encompasses the incidental killing of migratory birds. Even if the NRDC court's plain-language analysis were incorrect, the

[5] In 1966 (amending it in 1969), Congress had earlier passed a statute called the Endangered Species Preservation Act. But the ESA of 1973 completely rewrote and beefed up that regulatory regime, marking it out as an expansive environmental statute more in the vein of the Clean Air Act. *See* FWS, *Endangered Species Act | A History of the Endangered Species Act of 1973*, *available at* https://www.fws.gov/endangered/laws-policies/esa-history.html (last visited June 7, 2021).

> operative language of the MBTA is at minimum ambiguous, thus USFWS has discretion to implement that language in a manner consistent with the conservation purposes of the statute and its underlying Conventions.

86 Fed. Reg. at 24,575. NCLA will address Judge Caproni's reasoning later in these comments.

FWS next turns to its policy arguments. *First*, it addresses a carveout Congress adopted for the military during a period when FWS maintained that incidental takes were covered by the MBTA. *See id. Second*, FWS highlights concerns voiced by a single minister of the government of Canada, raised against the Jorjani M-Opinion and the final rule, arguing that repeal of that rule would alleviate Canada's concerns. *See id.* at 24,575-76. Finally, FWS states that the policy rationales for the Jorjani M-Opinion and the January 7, 2021 final rule were given as "resolving uncertainty and increasing transparency through rulemaking. These concerns, however, do not outweigh the legal infirmities of the January 7 rule or the conservation objectives described above." *Id.* at 24,576-77. NCLA will also address FWS's current policy arguments later in these comments.

The remainder of the proposed rule's preamble addresses whether repeal of 50 C.F.R. § 10.14 comports with other sources of law (the National Environmental Policy Act, the Endangered Species Act, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, the Unfunded Mandates Reform Act, and the Paperwork Reduction Act) and with executive orders (on tribal relations, energy supply distribution, cost-benefit analysis, takings, federalism, and civil justice reform). *See* 86 Fed. Reg. at 24,577-81. For the most part, NCLA does not address these issues.

I. THE BEST READING OF THE MBTA IS THAT IT DOES NOT COVER INCIDENTAL HARM TO BIRDS

According to FWS, its "longstanding prior interpretation," 86 Fed. Reg. at 24,578, is that the MBTA applies to what it calls "incidental take." But as explained below, FWS lacks authority to issue "incidental take" regulations; the MBTA cannot plausibly be interpreted as prohibiting acts not directed at birds which result in incidental and indirect harm to them. FWS should therefore refrain from repealing the final rule, and instead continue its current practice of not prosecuting incidental takes. That valid approach became effective on March 8, 2021, and thus could remain in effect for quite some time even if FWS finalizes its proposed rule.

A. The MBTA's Language Does Not Encompass Incidental and Indirect Harm

As noted above, the MBTA prohibits specified acts directed at migratory birds or objects associated with migratory birds:

> Unless and except as permitted by regulations … it shall be unlawful at any time, by any means or in any manner, to [1] pursue, [2] hunt, [3] take, [4] capture, [5] kill, [6] attempt to take, capture, or kill, [7] possess, [8] offer for sale, [9] sell, [10] offer to barter, [11] barter, [12] offer to purchase, [13] purchase, [14] deliver for shipment, [15] ship, [16] export, [17] import, [18] cause to be shipped, exported, or imported, [19] deliver for transportation, [20] transport or cause to be transported, [21] carry or cause to be carried, or [22] receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or in part, of any such bird

or any part, nest, or egg thereof.

16 U.S.C. § 703(a) (numbering added).

> The statute lists 22 direct actions, with migratory birds serving as the object of each prohibited action. The listed actions share a common theme: all suggest activity directed at migratory birds. It is highly implausible to read that list and conclude that Congress intended (as FWS now proposes) to criminalize any and all activity that ultimately leads to harm to a migratory bird, no matter how indirect the cause and without regard to the actor's intent. This is especially true for a reason that the Jorjani M-Opinion identifies: "At times the Department of Justice has taken the position that the MBTA permits charges to be brought for each and every bird taken, notwithstanding whether multiple birds are killed via a single action or transaction." Jorjani M-Opinion at 13.[6] In this way, accidental action not directed at protected birds could quickly mount up penalties that would seem to make a violator "Public Enemy Number One."

For example, one cannot "import" a migratory bird indirectly; importing is by definition a direct and intentional act. The two words often relied on by those urging an expansive definition of FWS regulatory authority—"take" and "kill"—must therefore share this connotation of directed action.

Moreover, the statute itself reveals that Congress knew how to refer to predicate actions that *cause* actions Congress also sought to regulate. Specifically, § 703(a) refers to banning these three types of actions concerning migratory birds: "[18] cause to be shipped, exported, or imported … [20] transport or cause to be transported, [21] carry or cause to be carried … ." This leads to the obvious inference that the other 19 categories of action that do *not* use the word "cause" cannot be extended to criminalize those actions that indirectly cause some other prohibited action. No, the other 19 categories of action prohibit only the action itself—*i.e.*, the kill, take, capture, sale, barter, etc.—not other acts that might cause such an effect.

In reaching a contrary statutory interpretation, FWS hangs its hat in part on inclusion of "take" among MBTA § 703's 22 prohibited activities. *See* 86 Fed. Reg. at 24,574 ("[W]e do not agree with the *CITGO* court's interpretation of the term 'take' under the MBTA …."). But FWS's expansive

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[6] The Jorjani M-Opinion provides greater detail underscoring the irrationality of criminalizing incidental takes:

> Robert S. Anderson & Jill Birchell, *Prosecuting Industrial Takings of Protected Avian Wildlife*, U.S. ATT'YS BULL. July 2011, at 65, 68 ("Prosecutors and agents are often left to decide how many separate charges should be filed—one per bird, one per species, one per incident, one per site? Virtually all of these parsings have been used in past cases. *See, e.g., United States v. Apollo Energies*, 611 F.3d 679, 683 (10th Cir. 2010) (one count per inspection that discovered dead birds); *United States v. Corbin Farm Services*, 578 F.2d 259, 260 (9th Cir. 1978) (one count per transaction that resulted in bird deaths); *United States v. FMC Corp.*, 572 F.2d 902, 903 (2d Cir. 1978) (one count per species per day); *United States v. Rogers*, 367 F.2d 998, 999 (8th Cir. 1966) (one count per day); *United States v. Fleet Management, Ltd.*, No. 3:08-CR-OO 160 (N.D. Cal. 2010) (one count per discharge); *United States v. Exxon Corp.*, No. A90-015 CR (D. Alaska Feb. 27, 1990); *United States v. Equity Corp.*, Cr. No. 75-51 (D. Utah Dec. 8, 1975) (one count per bird). Most of these cases are resolved by plea agreement, without litigation regarding the unit of prosecution. *But see Corbin Farm Serv.*, 444 F. Supp. at 527-31 (E.D. Cal. 1978) (dismissing nine out of ten counts against the defendants on multiplicity grounds), *aff'd*, 578 F.2d 529 (9th Cir. 1978).

Jorjani M-Opinion at 13 n.79.

definition of the word "take" contradicts the ordinary understanding of that word. "Take" connotes an intentional act of seizure by the actor. *See, e.g.*, G.C. Merriam Co., WEBSTER'S NEW COLLEGIATE DICTIONARY (1981) (defining the verb "take" as "1: to get into one's hands or into one's possession, power, or control: as: (a) to seize or capture physically; (b) to get possession of (as fish or game) by killing or capturing; or (c) to move against (as an opponent's piece in chess) and remove from play."). Nothing about the word "take" or the MBTA's statutory structure suggests a statutory intent to prohibit incidental, indirect harm to migratory birds, and FWS has pointed to nothing in the language, design, or history of the MBTA indicating that Congress meant "take" to be interpreted so broadly.

Nor has FWS ever promulgated regulations trying to adopt a broadened definition of "take." FWS's longstanding regulations instead define "take" to mean "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, capture, or collect." 50 C.F.R. § 10.12. Each word used by FWS in its own regulation to explain the word "take" connotes an active effort to harm a migratory bird, not actions that incidentally and indirectly may lead to such harm. Accordingly, any effort by FWS to establish an "incidental take" permitting program or otherwise restrict such activity would actually constitute a major reversal of the longstanding agency position as reflected in the text of its formal regulations. And FWS does not propose to amend 50 C.F.R. § 10.12, only to repeal new § 10.14. For, to propose changes to § 10.12 would require that FWS acknowledge that its purportedly "longstanding" interpretation is not so longstanding after all, but is of a most-modern vintage.

Dictionary definitions of "kill" are similar; the word connotes direct causation of death and does not include actions only remotely associated with the death of another. For example, the builder of a bridge would not be described as having "killed" a motorist who dies when his car collides with a bridge abutment. Remember the point about the disparate use of the term "cause" attaching to three banned activities in the MBTA but not to 19 others. Had Congress intended to bar activities that lead to or "cause" "takes" or "kills," it easily could have said so; it did not. "[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." *Russello v. United States*, 464 U.S. 16, 23 (1983). There is no indication that Congress made a mistake when it chose not to attach the "cause" penumbra to the prohibited "take" and "kill" actions, attaching that penumbra only to shipping, exporting, importing, transporting, and carrying.

Given the types of action prohibited by MBTA § 703(a), the statute does not cover conduct not directed at birds, just because a bird happens to die later. Thus, a migratory bird that flies into a power line is not killed or taken by the electrical company.

Even if the words "take" and "kill" could be interpreted more broadly by considering them in isolation, their use in association with the 20 other acts in MBTA § 703(a) confirms their more limited meaning in the MBTA. The principle of *noscitur a sociis* states that "a word is known by the company it keeps." *Yates v. United States*, 574 U.S. 528, 543 (2015). This method of statutory interpretation "avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (internal quotation marks omitted). *See also United States v. Williams*, 553 U.S. 285, 294 (2008) ("a word is given more precise content by the neighboring words with which it is associated"). The Fifth Circuit in *CITGO* adopted application of the *noscitur a sociis* canon to conclude that the MBTA does not permit the criminalization of incidental takes. *See CITGO*, 801 F.3d at 489 n.10.

"Take" and "kill" are surrounded by words like "pursue," "hunt," "capture," and "sell." It is self-evident that the acts of pursuing, hunting, capturing, and selling birds involve acts directed at those birds. No one can hunt or pursue birds by doing a completely unrelated activity, by merely allowing an unrelated activity to take place, or by attempting an unrelated activity. Indeed, it especially makes no sense to apply the concept of attempted action to "incidental takes." Applying the *noscitur a sociis* principle, "take" and "kill" must be read only to cover purposeful acts directed at birds. Since the language surrounding "take" and "kill" applies only to purposeful acts, those categories of liability must likewise be limited. *See Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202 (asserting that "take" refers only to intentional acts).

Indeed, the FWS regulation that defines "take" as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect," 50 C.F.R. § 10.12, mirrors the statute by limiting itself to words that connote conduct directed at migratory birds. Nothing in the regulation suggests that at the time of promulgation FWS understood the verb "take" as including any activity that ultimately *leads to* harm to a migratory bird, no matter how indirect the cause and without regard to the actor's intent.

Examining the language of nearby provisions in the MBTA in accord with *noscitur a sociis* and structural statutory interpretation demands the same result. Section 704(b) of the MBTA makes it unlawful for any person to "take any game bird by the aid of baiting." That use of the word "take" is confined to intentional, direct acts; the baiting provision makes no sense if "take" covers unintended harms. Congress should not be deemed to have ascribed a different meaning to "take" in § 703(a) than the one conveyed by § 704(b).

MBTA § 706 authorizes FWS enforcement personnel to make warrantless arrests of "any person committing a violation of [the MBTA] in his presence or view." This arrest authorization suggests that MBTA violations are capable of being viewed by an observer, as when an individual takes an action directed at a migratory bird. If so, this further reveals that bird injuries with only a remote connection to observable human activity, such as a bird caught in a wastewater disposal pit constructed years earlier, are not prohibited by the MBTA. The "genesis point" of multi-step, shinbone-is-connected-to-the-kneebone causal chains is not something that can be observed *in flagrante delicto* by percipient witnesses.

Moreover, Congress has amended the MBTA on several occasions since its initial passage in 1918 to add to the list of prohibited activities. For example, it amended the Act in 1998 to add a provision making it unlawful to "take a migratory game bird by the aid of baiting, or on or over any baited area, *if the person knows or reasonably should know that the area is a baited area*." 16 U.S.C. § 704(b)(1). In each such instance, the new prohibition focused on activity directed at migratory birds—reinforcing the view that "take" and the other activities listed in MBTA § 703(a) do not include activities whose effects on migratory birds are only incidental and indirect.

B. The MBTA's Legislative History Elucidates a Proper Understanding of Statutory Term "Take"

The legislative history of the MBTA supports this limited definition of take. *See generally* Benjamin Means, *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 MICH. L. REV. 823, 831–833 (1998). The underlying treaties and subsequent legislation were

reactions to the enormous rate at which people hunted and poached birds in the late nineteenth and early twentieth centuries. Many species of birds rapidly declined in population, and some species faced extinction. Congress's primary goal in drafting the MBTA was to meaningfully regulate both commercial and recreational hunting.

As one Senator explained, "[n]obody is trying to do anything here except to keep pothunters [those who hunt game for food, ignoring the rules of sport] from killing game out of season, ruining the eggs of nesting birds, and ruining the country by it. Enough birds will keep every insect off of every tree in America, and if you will quit shooting them they will do it." 55 Cong. Rec. 4816 (1917) (statement of Sen. Smith). Furthermore, Congress could never have gotten the support it received for the MBTA from the timber and farming industries if the law had included such extensive land-use regulation. See 56 Cong. Rec. 7357-58 (1918).

Later amendments to the MBTA did not expand the definition of "take" or otherwise seek to regulate activity not directed at migratory birds. In 1960, Congress distinguished between different types of hunters and various penalties. *See* Migratory Bird Treaty Act Amendment of 1960, Pub. L. No. 86–732, 74 Stat. 866. Congress discussed no types of violators other than hunters. This explains why from 1960 to 1973, there continued to be no MBTA incidental-take prosecutions.

What changed in 1973? The clear answer is the passage of the ESA. That development gave prosecutors and FWS the idea to start going after the kinds of indirect activities causing "harm" or "harass[ment]"—two categories of ESA "take" (16 U.S.C. § 1532(19)) that just are *not* terms used in the MBTA. Of course, while this legislative development on a separate track carries strong explanatory value as to why the enforcement approach of FWS using the MBTA began to expand vastly in 1973, the differences between the text of the ESA and the MBTA reinforce why FWS's proposed new interpretation of the MBTA, so it can repeal 50 C.F.R. § 10.14, is erroneous.

C. Several Prior Court Rulings Adopted a Limited Definition of "Take"

Many courts have found that the MBTA prohibits certain purposeful conduct directed at birds. Some courts have framed their conclusions in terms of the statute's purpose. These courts adhere to the decades-old interpretation that the MBTA was enacted to combat hunting and poaching. *See United States v. Olson*, 41 F. Supp. 433, 434 (W.D. Ky. 1941) ("The fundamental purpose of the [MBTA is] … the protection of migratory birds from destruction in an unequal contest between the hunter and the bird.");[7] *see also Newton Cnty. Wildlife Assoc.*, 113 F.3d at 115 (agreeing with the Ninth Circuit that "take" means "physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918.") (quoting *Seattle Audubon Soc'y*, 952 F.2d at 302); *Mahler*, 927 F. Supp. at 1579 ("The MBTA applies to activities that are intended to harm birds or to exploit harm to birds, such as hunting and trapping, and trafficking in birds and bird parts. The MBTA does not apply to other activities that result in unintended deaths of migratory birds."); *Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502, 1510 (D. Or. 1991) ("I further find that the Act was intended to apply to individual hunters and poachers.").

[7] From this perspective, it is easy to see why the U.S. and Canada rapidly agreed to exempt traditional tribal hunting activities of foul from the reach of the treaties that undergird the MBTA. The contest between aboriginal hunter and prey is not the same "unequal contest" that arose in the nineteenth century, with its widespread use of rifles and other deadly technologies to take migratory birds with brutal efficiency.

Other courts have explicitly defined the word "take." Under the MBTA, take is "conduct directed at birds." *Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d at 1208. *Accord Protect Our Cmtys. Found. v. Salazar*, No. 12cv2211–GPC (PCL), 2013 WL 5947137, at *18 (S.D. Cal. Nov. 6, 2013) (slip opinion) (supporting the proposition that "the MBTA was intended to prohibit conduct directed towards birds"); *United States v. Ray Westall Operating, Inc.*, No. CR 05–1516–MV, 2009 WL 8691615, at *7 (D.N.M. Feb. 25, 2009) ("The Court concludes that Congress intended to prohibit only conduct directed towards birds and did not intend to criminalize negligent acts or omissions that are not directed at birds, but which incidentally and proximately cause bird deaths.").

The most natural reading of "take" as used in the MBTA is "conduct directed at birds." Besides being in accord with common sense, this definition of take is driven by four factors: the language of the statute, the context in which the provision appears, the legislative history, and the best-reasoned legal precedent.

D. *The Service's Counterarguments in the Proposed Rule Are Unavailing*

The Service is, in effect, contemplating a vast expansion of its current regulatory footprint.[8] Before undertaking such an expansion, one would expect the agency to begin with a clear explication of its basis for claiming the requisite regulatory authority. But the Interior Department is not proposing to readopt the Tompkins M-Opinion from January 2017. Nor is FWS proposing to adopt regulations asserting authority over what it calls "incidental take."

Instead, FWS essentially wraps itself in the Judge Caproni opinion from the Southern District of New York, adopting her reasoning uncritically. *See* 86 Fed. Reg. at 24,574-75. Hence, it is worthwhile unpacking and analyzing that opinion.

1. Arguments Advanced in the SDNY's NRDC *Opinion*

FWS's "Longstanding" Interpretation Should Be Restored. Judge Caproni begins by arguing that the Jorjani-M opinion repudiates "almost fifty years of his agency's interpretation of 'takings' and 'killings' …." *NRDC*, 478 F. Supp. 3d at 472. Beside the quibble that the real period (1973-2017) is only 44 years, which does not even round up to 50, Judge Caproni ignores the actual 55-year period from the inception of the MBTA in 1918 during which there were no incidental-take

[8] In this vein, FWS tries an interesting maneuver. Because some regulated businesses may have postponed ending their "best practices" to avoid indirect bird deaths because the January 7, 2021 final rule (effective March 8, 2021) is so new, FWS asserts it can properly measure costs and benefits from a baseline of assuming those best practices are part of the *status quo* and thus do not need to be reimposed. *See* 86 Fed. Reg. 24,580; *see also id.* at 24,578 ("The primary cost of this rule is the compliance cost incurred by industry, which is also not quantifiable. Firms are more likely to implement best practice measures to avoid potential fines."); *id.* ("Only those businesses that reduced best management practices that avoid or minimize incidental take of migratory birds as a result of the issuance of M-37050 in January 2017 and the January 7, 2021, rule would incur costs.").

But that's not the way it works. To fairly assess costs and benefits, the agency in question must compare a regime in which precautions against incidental bird death do not need to be taken to a regime where such precautions instead must be taken under pain of criminal prosecution. The *status quo* at this point is clearly that such precautions do *not* need to be taken under 50 C.F.R. § 10.14. The Service could have postponed (or tried to postpone) the effective date of that regulation until after March 8, 2021 but it deliberately chose not to do so. *See* 86 Fed. Reg. 24,573. It cannot have its cake and eat it too on that choice in order to distort the cost baseline.

prosecutions. That is not even-handed interpretation of the statute and its context.

FWS Is Acting Consistently with Certain Prior Guidance Documents. Next, the *NRDC* opinion points to guidance documents from the Interior Department. *See id.* at 473. At no point does Judge Caproni consider whether mere guidance documents can trump the regulatory definition of "take" that FWS adopted in 50 C.F.R. § 10.12 or whether guidance documents are a proper way for an agency to provide the regulated public with all required due process. Contrast how the D.C. Circuit approaches that issue:

> [W]e are convinced that elements of the Guidance—those elements petitioners challenge—significantly broadened the 1992 rule. The more expansive reading of the rule, unveiled in the Guidance, cannot stand. In directing State permitting authorities to conduct wide-ranging sufficiency reviews and to enhance the monitoring required in individual permits beyond that contained in State or federal emission standards even when those standards demand some sort of periodic testing, EPA has in effect amended § 70.6(a)(3)(i)(B). This it cannot legally do without complying with the rulemaking procedures required by 42 U.S.C. § 7607(d) [i.e., Clean Air Act (CAA) Section 307, often referred to as the CAA's mini-APA].

Appalachian Power Co. v. EPA, 208 F.3d 1015, 1028 (D.C. Cir. 2000).[9]

The Jorjani Opinion May Be Improperly Injecting a* Mens Rea *Requirement into the MBTA. Judge Caproni next turns to dissecting the Jorjani M-Opinion. *See NRDC*, 478 F. Supp. 3d at 476-77. The court begins by accepting the validity of the environmental plaintiffs' argument that this M-Opinion wrongly tries to insert into the statute a *mens rea* requirement. Interior responded by arguing that "the Jorjani Opinion interprets only the *actus reus* of the MBTA (those acts or behaviors that the statute prohibits and that can result in criminal penalties) by limiting its coverage to activities that are directed at birds. *NRDC*, 478 F. Supp. 3d at 475. This is undoubtedly correct. The argument to the contrary represents poor structural analysis of the statute and a patent attempt to sidestep what the 22 categories of prohibited action in MBTA § 703(a) must mean in juxtaposition with one another. The *NRDC* analysis plays a game of "gotcha" with the Jorjani M-Opinion, insisting that when it lapses into summarizing the meaning of § 703(a) to apply to purposeful conduct, this proves inapplicable *mens rea* analysis was being imported into the statute. But agencies may offer constructions of statutes that cut to the chase and state a bottom-line conclusion. That is all the Jorjani M-Opinion is doing when it summarizes the MBTA as criminalizing purposeful conduct based on construing MBTA § 703(a) as a whole. The whole argument that *mens rea* is a concept relevant to deciding how to construe *vel non* § 703(a) is a diversion.

Worse yet, the Southern District of New York eventually reveals that its lengthy discussion of the *mens rea* dispute is all beside the point. *See NRDC*, 478 F. Supp. 3d at 477 (quoting Jorjani M-Opinion heading "Interpreting Strict Liability as Dispositive Conflates *Mens Rea* and *Actus Rea*."); *id.* ("the Jorjani Opinion relies heavily on two decisions that slice the MBTA along more pure *actus reus* lines"); *id.* (in light of those two decisions and the Jorjani M-Opinion's citation of them, "the Court will accept Interior's formulation of the Opinion for the purpose of deciding the motions for summary

[9] To be clear, NCLA recognizes that the addiction to guidance documents is one that can affect all stripes of Executive Branch action. *See NRDC*, 478 F. Supp. 3d at 474 (describing 2018 guidance issued after the Jorjani M-Opinion). This does not excuse such methods and the refusal to comport with case law like *Appalachian Power*.

judgment"). This leads the reader to ask, what was the point of the multi-page discussion of this issue—was it to plant a seed that the agency opinion was internally contradictory? In any event, neither NCLA nor any other commenter on the proposed rule is bound by the *NRDC* decision, especially as its discussion of *mens rea* boils down to *dicta*.

Finally, even if the district court's discussion of *mens rea* were not *dicta*, there is still no reason related to that body of doctrine to read the MBTA to reach incidental takes. This is because whether a defendant lacking knowledge of the MBTA has actually committed an act that violates § 703(a) is an antecedent question that bears no logical relationship to the question of the *mens rea* required to bring misdemeanor charges against one who has, in fact, violated that provision. A penalty cannot be imposed absent conduct that constitutes a violation, and (as demonstrated above) conduct cannot violate the MBTA unless it is *directed at* migratory birds.

The Jorjani Opinion Is Not Entitled to* Skidmore *Deference. The next topic the court addressed was whether the Jorjani M-Opinion was entitled to deference. *See NRDC*, 478 F. Supp. 3d at 478-80. The Department of Justice asserted only that the opinion could benefit from *Skidmore* deference. *See id.* at 478 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)). NCLA is content not to contest the district court's ruling that *Skidmore* deference was inappropriate, but only because it is skeptical of any administrative deference doctrine given the constitutional concerns such doctrines raise (see below). Also, before passing to other topics, NCLA notes that the principal reason the district court gives for not deferring under *Skidmore* to the Jorjani M-Opinion is that it is supposedly "riddled with ambiguities made only more apparent by the incoherent guidance FWS subsequently issued," *id.*, blending both the *dicta* of its prior *mens rea* discussion with the court's failure to see that guidance documents seeking to vary the meaning of a statute or of prior agency regulations can safely be ignored.

Federal Precedent Is Not as Divided as the Jorjani Opinion Asserts. In its deference analysis, the district court stops to construe the Fifth, Eighth, and Ninth Circuit decisions that the Jorjani M-Opinion relied upon. Turning first to the Eighth and Ninth Circuit decisions, Judge Caproni interprets them *not* as being about whether incidental takes are criminalized by the MBTA but about proximate cause. *See NRDC*, 478 F. Supp. 3d at 479. NCLA differs here from Judge Caproni by observing that as to the terms in the MBTA § 703(a) that actually use the word "cause," it is necessary to decide how long the causal chain can be—or, to put the point differently, to ask what test of causation Congress chose. It is a standard move for the courts to default to proximate cause analysis when Congress does not specify a causation test. *See, e.g., Paroline v. United States*, 572 U.S. 434, 446 (2014) ("Given proximate cause's traditional role in causation analysis, this Court has more than once found a proximate-cause requirement built into a statute that did not expressly impose one.").

As to incidental take, however, discussions of proximate cause are a diversion. For the terms "take" and "kill" do not come packaged with a textual penumbra in MBTA § 703(a) extending to prior acts that cause the main prohibited act, as for instance the term "export" comes with an accompanying prohibition on "cause to be … exported" is. For that reason, just as it would be nonsensical to start talking about whether the act of selling a migratory bird or bartering with such a bird was proximately caused by some other act (one either sells or barters a migratory bird or one does not), it is nonsensical in the full context of the prohibited acts defined in § 703(a) to talk about proximately caused "takes" or "kills."

What the Ninth Circuit's decision in *Seattle Audubon Soc'y*, 952 F.3d 297, and the Eighth

Circuit's decision in *Newton County Wildlife Ass'n*, 113 F.3d 110, really show is that those courts were extremely troubled by attempts to extend the MBTA to indirect harm caused to birds, whether by habitat destruction (*Seattle Audubon Soc'y*) or by timber harvesting (*Newton County Wildlife Ass'n*). But it is parsing those judicial decisions much too finely to try to limit the "damage" caused to the aggressive 1973-2017 position of the government that the MBTA covers incidental takes by asserting these decisions are only about the (inapposite) issue of proximate cause. Judge Caproni's mode of analysis boils down to the equivalent of assessing whether there was a circuit split for purposes of the Supreme Court granting *certiorari*. But that is not the right approach for one district court to use when deciding how to proceed in a single case before it.

Judge Caproni next argues that if one properly ignores *Seattle Audubon Society* and *Newton County Wildlife Association*, then there are only two decisions consistent with the Jorjani reading of the MBTA: the Fifth Circuit's *CITGO* and the Southern District of Indiana's *Mahler*. Judge Caproni again employs something of the same cert-like analytical move. Here, she argues that *CITGO* can be discounted because it "interpreted only the term 'take'; the case 'did not present the opportunity to interpret 'kill' because the indictment charged only illegal taking." *NRDC*, 478 F. Supp. 3d at 479 (citing *CITGO*, 801 F.3d at 489 n.10).[10] This is more over-thin slicing of the onion. Judge Caproni never explains why the term "kill" could somehow sneak in incidental takes but the term "take" could not (indeed the more natural place to source an "incidental take" concept to would seem to be the MBTA word "take" not the MBTA word "kill"). Indeed, in *CITGO* the Fifth Circuit made just this point, which the Southern District of New York simply dismisses in the same way it insisted on assessing how pristine and precise the relevant MBTA circuit splits are. *See CITGO*, 801 F.3d at 489 n.10 ("Although this case does not present an opportunity to interpret 'kill,' there is reason to think it too is limited to intentional acts aimed at migratory birds.").

The Jorjani Opinion Runs Contrary to the Primary Purpose of the MBTA. Next, the Southern District of New York relies on the argument that the Jorjani M-Opinion is contrary to the purpose of the MBTA, which is to protect birds. *See NRDC*, 478 F. Supp. 3d at 480. But that argument proves too much. On that logic, recognizing proximate cause limits on MBTA incidental-take crimes similarly runs counter to the purpose of that statute, yet Judge Caproni approvingly cites the Tenth Circuit's proximate-cause analysis in *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 684–90 (10th Cir. 2010). *See NRDC*, 478 F. Supp. 3d at 479, noting that *Apollo Energies* "affirm[ed] MBTA liability after FWS inspectors found dead bird remains in unprotected oil field equipment that birds were known to enter."[11] NCLA also reiterates that, according to the Supreme Court, it has been

[10] In the proposed rule's preamble, FWS latches with particular force onto the *non sequitur* that it is somehow pivotal that *CITGO* did not need to construe the term "kill." *See* 86 Fed. Reg. at 24,574 ("The *CITGO* court's analysis is limited by its terms to addressing the meaning of the term 'take' under the MBTA; thus, any analysis of the meaning of the term 'kill' was not part of the court's holding."). The Service's seeming desperation to be able to dismiss the *CITGO* analysis out of hand is telling.

[11] *See also NRDC*, 478 F. Supp. 3d at 482 n.15 ("One could say imagination is the limit. But to be clear, that does not mean any strange and improbable bird killing will expose a person to criminal liability. Proximate cause requirements can limit broad statutes like the MBTA. *See, e.g., Apollo Energies*, 611 F.3d at 690."). But at that point, the debate is not whether the MBTA can be limited or not but what those limits *are*. The structural arguments to limit the MBTA's *criminal* provisions to purposeful conduct directed at birds are much stronger than the second-best measure of importing proximate cause analysis into the MBTA as a backstop, especially given that Congress disparately referenced causation analysis in a few of the MBTA's 22 categories but not in others. That brings the *Russello* canon to bear against Judge Caproni's analysis as well.

improper statutory interpretation for decades to fail to recognize that federal statutes have stopping points and that these statutory boundaries cannot be pushed ever outward in reliance on a statute's "primary objective." *Rodriguez*, *supra*, 480 U.S. at 525-26.

The Jorjani Opinion Is at Odds with the Text of the MBTA. It is not until 11 pages deep into the opinion (as pages are printed in the *Federal Supplement 3d* no less) that Judge Caproni turns to analyzing the text of the statute. *See NRDC*, 478 F. Supp. 3d at 480-88. She makes several arguments.

First, Judge Caproni argues that the MBTA's language making it unlawful "'at any time, by any means or in any manner to … kill … any migratory bird' protected by the conventions is in direct conflict with the Jorjani opinion." *Id.* at 481 (quoting 16 U.S.C. § 703(a)). The Jorjani M-Opinion itself anticipates and rebuts that argument. *See* Jorjani M-Opinion at 22 ("However, this language does not change the nature of those prohibited acts and simply clarifies that activities directed at migratory birds, such as hunting and poaching, are prohibited whenever and wherever they occur and whatever manner is applied, be it a shotgun, a bow, or some other creative approach to deliberately taking birds.").[12] NCLA adds that the Southern District of New York's analysis, in essence, imagines it is unlawful "at any time, by any means, or in any manner to kill, *directly or indirectly*, any migratory bird." But it is precisely the concept of indirect kills or takes that is present in the ESA, yet absent from the MBTA. And, unlike the long detour *NRDC* undertakes as to *mens rea*, this is a real issue of improper insertions into the statute of text that is not there. Congress frequently enacts statutes that prescribe certain conduct whether it occurs "directly or indirectly." It knows how to do so. The absence of such a phrase from the MBTA is not an oversight.

Judge Caproni's only response to these points is thin:

(1) She asserts that "kill" should be read to embrace indirect effects because Blackstone recognized the common law crime of homicide *per infortunium* "where a man doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet and the head thereof flies off an kills a bystander." *NRDC*, 478 F. Supp. 3d at 481. But that argument logically can't get very far. For the Judge provides no evidence that Congress intended to embed this now-exotic concept (in a world where crimes are now usually defined by carefully drawn statutes) of homicide *per infortunium*. No doubt many modern manslaughter statutes define that crime by referencing the killing of someone without motive but no one would even try to assert that the fact that we have manslaughter statutes that use the word "kill" means that an MBTA statute interpreted for 55 years not to apply to incidental takes now must be read in that fashion. *See, e.g.,* Nev. Rev. Stat. Ann. § 200.180 (West) ("Excusable homicide by misadventure occurs when: (a) A person is doing a lawful act, without any intention of killing, *yet unfortunately kills another*, as where a person is at work with an ax and the head flies off and kills a bystander ….") (emphasis added). Moreover, William Blackstone did not have before him anything as complex as a highly reticulated MBTA statute banning 22 activities and thus could not have been anticipating the proper structural-interpretation analysis that would follow from such a detailed statutory scheme.

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[12] *See also* Jorjani M-Opinion at 22, n.133 ("*See generally CITGO*, 801 F.3d at 490 ('The addition of adverbial phrases connoting 'means' and 'manner,' however, does not serve to transform the nature of the activities themselves. For instance, the manner and means of hunting may differ from bowhunting to rifles, shotguns, and air rifles, but hunting is still a deliberately conducted activity. Likewise, rendering all-inclusive the manner and means of 'taking' migratory birds does not change what 'take' means, it merely modifies the mode of take.').").

(2) The district court cites a religious source to argue that one of the Ten Commandments ("thou shalt not kill") prohibits not just murder but "unintentional, accidental death or manslaughter." *NRDC*, 478 F. Supp. 3d at 481 n.13 (quoting Gerardo Sachs, *Blood Feud*, 36 JEWISH BIBLE Q. 261, 261 (2008)). But we are not dealing with a moral matter here,[13] only with a statute regulating economic activity—and where reading the statute too broadly could have profound adverse consequences on the economy given how far and wide *migratory* birds range.

The Southern District of New York also invoked the Supreme Court's decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), which held that the Interior Department's definition of "harm," as included within the ESA's term "take," to bar habitat modification or degradation that actually kills or injures wildlife, was reasonable. But this case does not involve the ESA, the ESA's term "harm" does not appear in the MBTA's 22-item litany of forbidden act the ESA does refer incidental takes, and a wholly separate statute protects migratory bird habitat. *See* Migratory Bird Conservation Act (MBCA), 45 Stat. 1222 (1929) (codified as amended at 16 U.S.C. § 715-715a). Thus, invoking *Sweet Home* here is to engage in the "original sin," i.e., assuming that all the jots and tittles of ESA liability can automatically be ported over into the MBTA context because doing so serves the primary purpose of the MBTA to better protect birds.

Judge Caproni responds that referencing the MBCA is a "red herring" because it is a statute consistent with the MBTA. *See NRDC*, 478 F. Supp. 3d at 482 n.14. But this misses the point, which is that if the MBTA already prohibits habitat modifications that harm migratory birds via reaching incidental takes, then Congress's later decision to create a separate statute to protect migratory bird habitat would seem head-scratching.

Similarly, Judge Caproni scores no analytical points by arguing that *CITGO* misanalyzes the Supreme Court's discussion of the term "harm" in *Sweet Home*. *See id.* Again, the term "harm" is foreign to the MBTA. It is an ESA term. The one thing it is safe and correct to argue about *Sweet Home* is that Justice Scalia's dissent there, emphasizing the active nature of the term "take" in light of its common law meaning, bears a lot of intellectual similarity to the Fifth Circuit's analysis in *CITGO* and other cases resisting FWS's aggressive reading of the statute beginning in 1973:

> If "take" were not elsewhere defined in the Act, none could dispute what it means, for the term is as old as the law itself. To "take," when applied to wild animals, means to reduce those animals, by killing or capturing, to human control. *See, e.g.*, 11 Oxford English Dictionary (1933) ("Take ... To catch, capture (a wild beast, bird, fish, etc.)"); Webster's New International Dictionary of the English Language (2d ed. 1949) (take defined as "to catch or capture by trapping, snaring, etc., or as prey"); *Geer v. Connecticut*, 161 U.S. 519, 523 (1896) (" '[A]ll the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them' ") (quoting the Digest of Justinian); 2 W. Blackstone, Commentaries 411 (1766) ("Every man ... has an equal right of pursuing and taking to his own use all such creatures as are *ferae naturae*").
>
> This is just the sense in which "take" is used elsewhere in federal legislation and treaty.

[13] Judge Caproni may not see the issue that way—in other words, she may understand the issue as a moral one. For her opinion begins with this line: "It is not only *a sin* to kill a mockingbird, it is also a crime," citing Harper Lee, TO KILL A MOCKINGBIRD 103 (Harper Perennial 2002) (1960) (emphasis added).

> *See, e.g., Migratory Bird Treaty Act*, 16 U.S.C. § 703 (1988 ed., Supp. V) (no person may "pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill" any migratory bird); Agreement on the Conservation of Polar Bears, Nov. 15, 1973, Art. I, 27 U.S.T. 3918, 3921, T.I.A.S. No. 8409 (defining "taking" as "hunting, killing and capturing").

Sweet Home, 515 U.S. at 717 (Scalia, J., dissenting) (paragraph break added). And in no event does the failure of Justice Scalia to convince a majority of the Court to rule that the common law concept of "take" was built into the ESA doom the argument that, at a time far closer to the classic understanding of "take," Congress did proceed from such a classical understanding of "take" when it framed the 1918 Migratory Bird Treaty Act. This is especially true where the purpose of the MBTA was to leverage the Treaty Clause power to assume federal control over wildlife resources previously thought to be controlled exclusively by the States, not to broaden the common law concept of "takes" as part of property law's concept of a natural right held by all persons to seize for themselves creatures that were *ferae naturae*. *See* Jorjani M-Opinion at 2-4 (describing the constitutional "cloud" hanging over the purely domestic Weeks-McLean Law that predated the treaties and *Missouri v. Holland*).

The *NRDC* decision invokes *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1473-74 (2020), for the proposition that the Supreme Court found one county's interpretation of the Clean Water Act (CWA) "difficult to reconcile" with the CWA's reference to "any addition" of a pollutant into navigable waters "from any point source." But *County of Maui* is very distinguishable (and not just because the relevant CWA provisions do not involve the 22-item list in the MBTA) but because the County had, on the facts, engaged in a Rube Goldberg-like regime designed to end run the CWA permitting regime. As is obvious, Hawaii comprises a series of islands, so the Pacific Ocean is never far away from any point inland. In *County of Maui*, the county government could have disposed its sewage directly in the Pacific Ocean, after treating it, by seeking a permit to do so. Instead, the County built injection wells to send its sewage underground, where it later seeped into groundwater and only then made its way to the Pacific. All the Supreme Court did was reject the argument that the scheme was valid; instead the Court required the injection wells to similarly be permitted under the CWA. The conduct at issue in *County of Maui* is not remotely like an incidental take. No doubt prosecutors could pursue MBTA cases where bird hunters set up a double-ricochet system to kill birds they could see in mirrors and a purported defend that shooting the birds wasn't purposeful would fail. But that is not the kind of conduct FWS reaches by reauthorizing "incidental take" prosecutions. The point of the incidental-take concept is to reach conduct in ways aimed at killing or taking covered birds.

The* Noscitur a Sociis *Canon Does Not Support the Jorjani Opinion. Next, Judge Caproni turned her attention to rebutting the argument that the *noscitur a sociis* canon imparts the qualities of the vast majority of the 22 listed items, even to the term "kill." *See NRDC*, 478 F. Supp. at 483-84. The essence of her argument is that if "kill" is not given a broad reading, it is deprived of independent meaning in the 22-item statutory litany. That argument fails as it is easy at all to see each term in the litany as carrying its own independent significance, even as the terms are also capable (at the margins) of some overlap. It is not hard, for instance, to distinguish "export" from "import" or "sell" from "barter." We thus confine the point to setting out how to distinguish between the statutory terms "kill," "capture," and "take." Namely,

- Killing would cover ending the life of a bird, letting it fall to the ground, and leaving it there.
- Capturing a bird would be to seize it and keep it, including as a pet or breeding animal.

- Taking a bird would be ending its life and consuming it in some fashion, whether for food or as ingredients in an industrial process.

In any event, FWS is in no position to adopt Judge Caproni's approach where its own longstanding regulation, which it is not proposing to change, deliberately blurs the MBTA's textual categories. *See* 50 C.F.R. 10.12 (defining "take" to mean "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect."). That obviously conflates "take" with the separate MBTA § 703(a) categories of "pursue," "hunt," "kill," and "capture," adding only the new concepts of "shoot," "wound," "trap," and "collect."

Anticipating part of this response, Judge Caproni argues that "the Court does not agree that shooting birds and leaving them to rot where they fall (or to become food for carrion eaters) does not 'reduce the bird to man's dominion and make it the object of profit.' *NRDC*, 478 F. Supp. 3d at 484. This makes no sense. Shooting a bird and leaving it as carrion may be *temporarily exercising* dominion over it, but it is not *reducing* the bird to dominion (i.e., it is not making the bird into property claimed out of the wild pursuant to the doctrine of *ferae naturae*). And that same action of leaving a dead bird on the ground after killing it certainly does not "make it the object of profit" because it is leaving the resource of the bird as waste. Indeed, Judge Caproni appears to recognize the weakness of her own argument as she concedes that "the odd example might exist where 'kill' would capture conduct that the other terms do not." *Id.* At that point, the court simply asserts without further argument that the Jorjani M-Opinion went too far, "effectively neuter[ing] the term" "kill." *Id.* That is not a real response to the M-Opinion's arguments.

FWS amplifies this argument by asserting that *CITGO* wrongly concluded that the term "capture" can only be applied to deliberate acts and in that way erred when it further employed that conclusion, coupled with the *noscitur a sociis* canon, to apply a deliberate-acts restriction to the terms "kill" and "take." *See* 86 Fed. Reg. at 24,574. But this simply perpetuates a tiny error in the Jorjani M-Opinion that NCLA is not bound by—namely, conceding there is a list of only 5 terms in MBTA § 703(a) to worry about: pursue, hunt, capture, kill, and take. *See* Jorjani M-Opinion at 19. Hence, what rides on the error is whether most of those five terms in § 703(a) list of prohibited actions involved deliberate acts or instead involve unintentional or incidental acts. According to the Jorjani M-Opinion, there are three deliberate-act terms (pursue, hunt, and capture) and two unintentional terms (take and kill). The Service's point is that the capture prohibition should be placed in the unintentional category, meaning the polarity (as it were) of the *noscitur a sociis* canon flips away from Jorjani's interpretation to support FWS's current incidental-take interpretation: a score of 3-2 in favor of an incidental-take interpretation instead of a 2-3 score against such an interpretation.

Both sides in that debate are off base. Once one properly expands the field of vision to the full list of 22 prohibited acts in MBTA § 703(a), it becomes clear that the majority of such terms involve deliberate acts, fully justifying application of the *noscitur a sociis* canon to cut off any interpretation of the statute criminalizing incidental takes. To get to a majority of 22, NCLA need only point out that at least 12 of the 22 prohibited acts are deliberate. This is not hard. Using the numbering scheme on pages 8, *supra*, the following verbs reflect acts which are clearly deliberate: [1] pursue, [2] hunt, [3] take, [8] offer for sale, [9] sell, [10] offer to barter, [11] barter, [12] offer to purchase, [13] purchase, [14] deliver for shipment, [15] ship, [16] export, [17] import, and [19] deliver for transportation. That's a list of 14 prohibited acts—the clear majority of the 22-item list in § 703(a). Deliberateness thus pervades the statutory listing and applies that quality to all 22 items on the list.

Allowing the MBTA to Reach Incidental Takes Does Not Create Constitutional Vagueness. The Southern District of New York tackles the Jorjani M-Opinion's argument that if the MBTA is not narrowly construed, then the statute is so broad as to be unconstitutionally vague. *See id.* at 484-85. Without the SDNY's go-to tool of proximate cause as applied to "take" and "kill," however, the statute would seem to deprive the regulated public of "fair notice" as to how far the statute reaches. *See* Jorjani M-Opinion at 33 ("The 'scope of liability' under an interpretation of the MBTA that extends criminal liability to all persons who inadvertently or accidentally kill or take migratory birds incidental to another activity is 'hard to overstate' [quoting *CITGO*, 801 F.3d at 493] and 'offers unlimited potential for criminal prosecutions' [quoting *Brigham Oil*, 840 F. Supp. 2d 1213]." So the failure to perceive that proximate cause is at best a concept that could be applied to causal terms on the 22-item MBTA § 703(a) list is quite significant, as it strips the *NRDC* opinion of another defect it claims to have identified in the Jorjani analysis.

The breadth of problems that a broad interpretation of the MBTA would create is compounded by an issue the common law calls "coming to the nuisance." *See, e.g.,* 58 AM. JUR. 2d *Nuisances* § 372, Generally ("According to the Restatement, the fact that the plaintiff has acquired or improved his or her land after a nuisance interfering with it has come into existence is not in itself sufficient to bar his or her action, but it is a factor to be considered in determining whether the nuisance is actionable."). In this context, imagine that 30 years ago an oil company built a refinery far from any known migratory bird route and away from migratory bird nesting grounds, etc. But then, one year ago, migratory patterns changed significantly (perhaps due to a climate shift). In that situation, do operations at the refinery that were once entirely lawful suddenly become criminal acts, even though the conduct of the oil company has not changed at all since the refinery was built? Even clever sleight of hand trying to import proximate-cause limitations into the MBTA cannot solve that problem, which is just one point illustrating how allowing the MBTA to criminalize incidental takes could leave the public confused and without any effective guidance as to where the prohibition ends.

Making even clearer that proximate cause is the Southern District of New York's all-purpose Maslow's hammer,[14] the *NRDC* decision also asserts that proximate cause answers Solicitor Jorjani's fear of arbitrary enforcement. *See NRDC*, 478 F. Supp. 3d at 486. But if NCLA is right that the tool of proximate cause analysis is simply not available to limit the reach of incidental "kills" and "takes," then the district court has no answer to the problem of standardless enforcement discretion.

Wise Prosecutorial Discretion Deflates the Jorjani Opinion. Judge Caproni argues that the "Jorjani Opinion is a solution in search of a problem" because enforcement discretion can be counted on to ensure, as it has "for decades" that the statute is not interpreted unreasonably." *Id.* at 487. The FWS can claim all day that under its proposed rule, it does not intend to color outside the lines of a "judicious" use of its enforcement authority under the MBTA to prosecute only appropriate incidental takes. But courts cannot take the assurance of prosecutors that they will use their powers justly; the judiciary must ensure that the law adopted by Congress is faithfully interpreted and applied. As it is frequently said, we are a government of laws and not of men. *See Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966) (equality is "an essential part of the concept of a government of

[14] "The law of the instrument, law of the hammer, Maslow's hammer (or gavel), or golden hammer is a cognitive bias that involves an over-reliance on a familiar tool. As Abraham Maslow said in 1966, 'I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail.'" *Law of the Instrument*, Wikipedia, https://en.wikipedia.org/wiki/Law_of_the_instrument (last visited June 7, 2021) (cleaned up).

laws and not men. This is at the heart of Lincoln's vision of 'government of the people, by the people, (and) for the people.'") (cleaned up).

In 2015 when FWS last talked about an incidental-take-related rulemaking, it issued similar assurances, stating that it would not prosecute every violation of the Act. There, the FWS noted that it has "historically pursued criminal prosecution under the Act only after notifying an industry of its concerns regarding avian mortality, working with the industry to find solutions, and proactively educating industry about ways to avoid or minimize take of migratory birds … [FWS] will focus on industries and activities that involve significant avian mortality." FWS, *Migratory Bird Permits; Programmatic Environmental Impact Statement*, 80 Fed. Reg. 30,032, 30,034 (May 26, 2015).

But prosecutorial discretion is an unacceptable method of *interpreting* the statute. Although Judge Caproni and the FWS think that the MBTA should be interpreted as applying to incidental and indirect harms to migratory birds, even they would likely recoil from the conclusion that Congress intended to impose criminal responsibility on a driver whose car windshield strikes a bird (or vice versa). Yet rather than seeking to draw a clear line between regulated and unregulated conduct, FWS argues that anyone who lacks an FWS permit and whose conduct results in incidental and indirect harm has violated the statute. It simply asks the public to trust that it will act responsibly in deciding whom to prosecute. As one federal court has observed in response to FWS's position, "proper construction of a criminal statute cannot depend upon the good will of those who must enforce it." *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070, 1084 (D. Colo. 1999).

The rule of law requires regulatory agencies to specify in advance the scope of prohibited conduct, so companies and others subject to the law can comply. Promises of discretion are especially inappropriate to limit enforcement of the MBTA, given the willingness of some federal courts to allow private parties to sue to enforce the MBTA even when FWS has decided not to undertake enforcement activity. *Center for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161 (D.D.C. 2002), *dismissed as moot, given statutory amendment, sub nom. Center for Biological Diversity v. England*, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003). Therefore, prosecutorial discretion by FWS gives no assurance that companies will be able to escape liability in any situation where their activities happen to have a nexus to one or more dead migratory birds.

The MBTA's Legislative History Does Not Support the Jorjani Opinion. Finally, Judge Caproni rejects Solicitor Jorjani's arguments from the legislative history (construing the statute as focused on problems caused by modern hunting and the resulting trade in carcasses) on the theory that the statute would not have been written so broadly if that were a proper interpretation of the legislative history. *See NRDC*, 478 F. Supp. 3d at 487-88.[15] In essence, the court is employing the controversial theory known as "dynamic statutory interpretation." *See id.* at 488 ("Even if Congress did not foresee that modern industrial activity would one day threaten protected migratory bird populations, that does not justify disregarding the statute's unambiguous language."); *see also* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) ("Statutes, however, should—like the Constitution and the common law—be interpreted 'dynamically,' that is, in light of their present societal, political, and legal context.").

[15] One of the most important defects of purposive interpretation elevated over textual interpretation in practice is that it can lead to one-way ratchets. Notice here, that SDNY rejected an argument based on a primary purpose of the MBTA only to accept a reconceptualization of the statute's purpose at a higher level of generality so it could protect more birds.

Such an approach is contrary to one of the major goals of the law, which is to provide stability and predictability (especially in the area of economic regulation, where sizable capital investments can be stranded if significant regulatory changes arrive without warning). Attempting to ground this approach in actual Supreme Court doctrine instead of in academic theory, the court cites *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007)'s holding that the term "pollutant" was defined broadly in order to "forestall … obsolescence."

It is one thing, however, to define a concept like pollution in a way that will allow permitting regimes to apply to new problems as they arise, but the provisions at issue in *Massachusetts* were not self-executing; they anticipated that further agency rulemaking action would be necessary to set out a regime for regulating greenhouse gas emissions if they were deemed to be "pollutants." The MBTA, by contrast, is a direct criminal prohibition on "kills" and "takes," *inter alia*. To construe those terms to cover indirect and accidental kills and takes, especially as to unforeseen activities never before thought to be criminal is a very different kettle of fish. Especially given the rule of lenity, which was not at play in *Massachusetts*, new action by Congress amending the statute is necessary to reach incidental takes. And that is especially true since the ESA showed the way to a broader approach. Yet despite passing that separate statute, in the ensuing 48 or so years, Congress has never gone back to the MBTA to amend it to parallel the ESA.

2. The Additional Arguments FWS Makes to Support the Proposed Rule Not Contained in Judge Caproni's NRDC *Decision Also Fail*

The Service also added its own arguments to those adopted by the Southern District of New York.

First, FWS argues the

> January 7 rule is undermined by the 2002 legislation authorizing military-readiness activities that incidentally take or kill migratory birds. In that legislation, Congress temporarily exempted "incidental taking" caused by military-readiness activities from the prohibitions of the MBTA; required the Secretary of Defense to identify, minimize, and mitigate the adverse effect of military-readiness activities on migratory birds; and directed USFWS to issue regulations under the MBTA creating a permanent exemption for military-readiness activities. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Public Law 107–314, Div. A, Title III, section 315 (2002), 116 Stat. 2509 (Stump Act).
>
> This legislation was enacted in response to a court ruling that had enjoined military training that incidentally killed migratory birds[, citing the *Pirie* litigation, *see supra*.]

86 Fed. Reg. at 24,575 (paragraph break added).

But the fact that Congress mandated a military-readiness activities regulation and denied FWS authority to regulate incidental harms in military-training exercises does not support the Service's claim to general incidental-take prosecutorial power. And FWS's claim with respect to military-readiness activities is false: the FWS has never "authoriz[ed] incidental[] take" by the Armed Forces. To the contrary, Congress adopted legislation in 2002 that explicitly exempted the Armed Forces from any

obligation to obtain a permit before engaging in military-readiness activities that could cause incidental, indirect harm to migratory birds.

In 2015, the Service went so far as to claim that it had issued a regulation—50 C.F.R. § 21.15—that authorizes "incidental take for military-readiness activities." 80 Fed. Reg. at 30,034. But that statement is flawed. Congress adopted legislation in 2002—Pub. L. 107-314, div. A, title III, § 315—stating unequivocally that the MBTA "shall not apply to the incidental taking of a migratory bird by a member of the Armed Forces during a military readiness activity." It further ordered FWS to issue a regulation making clear that the MBTA does not apply. FWS complied with that mandate by issuing a regulation acknowledging that military-readiness activity is not subject to the MBTA. *See* 50 C.F.R. § 21.15. Thus, contrary to FWS's 2015 exaggerated position, FWS possesses no power either to authorize or prohibit "incidental take for military readiness activity."

Additionally, FWS's placement of the regulation in the "General Requirements and Exceptions" §, 50 C.F.R. pt. 21, subpt. B, rather than in the permit section reinforces that the statute exempts activities from FWS regulation. It is not an area over which FWS can exercise any regulatory authority, and when the military engages in military-readiness activities, it does not need FWS's "permission" to do so.

For all of these reasons, the 2002 legislation cuts against FWS's interpretation of the MBTA. The only time it addressed FWS's claim of authority over "incidental take," Congress rejected that claim. Congress went so far as to order the Secretary of the Interior to adopt the § 21.15 regulation to reinforce that FWS could not regulate military-readiness activities. At the very least, Congress's flat rejection of the "incidental take" concept to the military cannot be viewed as an acceptance of that concept in other contexts.

Nothing required Congress to insert a general negation of incidental-take power into the MBTA (or direct the insertion of such a negation into the MBTA's regulations) to solve the problems presented by the *Pirie* district court ruling. Congress could instead opt just to tackle the specific problem that *Pirie* posed for military operations and enact a targeted fix. *See also CITGO*, 801 F.3d at 491 (a "single carve-out from the law cannot mean that the entire coverage of the MBTA was implicitly and hugely expanded"). Finally, contrary to FWS's assertions, *CITGO*'s reasoning that a general incidental-take power of prosecution would "hugely" expand the MBTA is not "circular." 86 Fed. Reg. at 24,575. As is clear from the *CITGO* opinion itself and other parts of these comments, the Fifth Circuit set out several independent reasons explaining why the MBTA does not reach incidental takes.

Second, FWS argues that it is relevant that Canada registered concerns with the January 7, 2021 final rule. *See id.* at 24,575-77. This is a weak argument. Canada's concerns may say a lot about the policy desires of our current government neighbor to the north, but such contemporaneous concerns expressed in one minister's "public statement" cannot amend the applicable treaties and associated protocols, let alone amend our domestic statutory law as it exists in the MBTA. Further reason to question the relevance of a single Canadian minister's views come from the fact that the "public statement" in question was filed outside the comment period FWS had established on the proposed rule that became the January 7 final rule. If the issue had been that important to Canada, Minister Wilkinson would have acted to register his objections to the new U.S. rule far sooner.

II. *CHEVRON* DEFERENCE CANNOT JUSTIFY REPEAL OF THE PROPOSED RULE, WHICH WOULD LEAD TO A LAWLESS REGIME WHERE INCIDENTAL TAKES CAN AGAIN BE CRIMINALLY PROSECUTED

The Constitution requires federal judges to exercise independent judgment and to refrain from exhibiting bias when interpreting the law. These are the most foundational constitutional requirements of an independent judiciary. Article III gives federal judges life tenure and salary protection to ensure that judicial pronouncements will reflect a court's independent judgment rather than the desires of the political branches. Additionally, the Due Process Clause forbids judges to display any type of bias for or against a litigant when resolving disputes. These statements of judicial duty are so axiomatic that they are seldom if ever mentioned or relied upon in legal argument—because to even suggest that a court might depart from its duty of independent judgment or display bias toward a litigant would be a scandalous insinuation.

Yet the judiciary has been flouting these foundational constitutional commands by "deferring" to agency interpretations of federal statutes. This regime of judicial "deference" is commanded in part by *Chevron*.[16] *Chevron* is the most cited administrative-law case of all time, with some regarding it as a canonical precedent. See Peter M. Shane & Christopher J. Walker, *Foreword: Chevron at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 (2014). Unfortunately, repeated citations and incantations of any legal precedent run the danger of producing uncritical, unthinking acceptance. The constitutional problems with the court-created *Chevron* regime discussed in these comments thus remain as critical as ever.

Affording *Chevron* deference as to the MBTA constructions by FWS which are inherent in repealing the proposed rule is particularly egregious because of the statute at issue—which predates *Chevron*. The MBTA dates to 1918, 66 years before *Chevron* was handed down. And the MBTA was framed as a criminal statute, one that it is thus constitutionally curious (at the very least) to imagine was committed by Congress to a mere agency to "gap fill"[17] and, in the process, define the parameters of new criminal offenses against the United States. Only our elected lawmakers should be able to define new crimes.

"*Chevron* deference" violates the Constitution for two separate and independent reasons. *First*, *Chevron* requires judges to abandon their duty of independent judgment, in violation of Article III, the judicial oath, and the separation of powers. *Second*, *Chevron* violates the Due Process Clause by commanding judicial bias toward a litigant.

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[16] *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 ("It should not be thought that the *Chevron* doctrine—except in the clarity and the seemingly categorical nature of its expression—is entirely new law."); *Mitchell v. Budd*, 350 U.S. 473, 480 (1956) (deferring to the Secretary of Labor's definition of "area of production" in the Fair Labor standards Act); *Gray v. Powell*, 314 U.S. 402, 412 (1941) (deferring to Department of Interior definition of coal "producer" under Bituminous Coal Act).

[17] "[T]he Court sought to encapsulate what earlier opinions, including *Chevron*, made clear. Those opinions identify the underlying interpretive problem as that of deciding whether, or when, a particular statute in effect delegates to an agency the power to fill a gap, thereby implicitly taking from a court the power to void a reasonable gap-filling interpretation." *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487 (2012).

A. *Chevron* Violates Article III by Requiring Judges to Abandon Their Duty of Independent Judgment

Chevron compels judges to abandon their duty of independent judgment. Under the Constitution, the federal judiciary was established as a separate and independent branch of the federal government, and its judges were protected in their tenure and salary to shield their independent judgment from the influence of the political branches.

Despite these extraordinary measures, *Chevron* commands Article III judges to abandon their independence by giving controlling weight to an agency's opinion of what a statute means—not because of the agency's persuasiveness,[18] but based solely on the brute fact this or that administrative entity has addressed the interpretive question before the Court. *See Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) ("'The judicial power … requires a court to exercise its independent judgment in interpreting and expounding upon the laws,' … *Chevron* deference precludes judges from exercising that judgment.") (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring)).

This abandonment of judicial responsibility has not been tolerated in any other context—and NCLA has faith it will eventually be repudiated by a truly independent judiciary. The Constitution's mandate of judicial independence cannot be so facilely displaced. Yet *Chevron* allows a non-judicial entity to usurp the judiciary's power of interpretation, and then commands judges to "defer" to the legal pronouncements of a supposed "expert" body entirely external to the judiciary.

Defenders of *Chevron* have tried to avoid this problem by pretending that the underlying statute authorizes the agency to choose from among a menu of "reasonable" options, thereby creating an "implied delegation" of lawmaking authority that binds subsequent judicial decision-making. *See Chevron*, 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). *See also* Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 308–09 (1986).

From this perspective, a court that applies "*Chevron* deference" is not actually deferring to an agency's interpretation of a statute. Instead, the court interprets the statute broadly to vest the agency with discretion to choose among multiple different policies, which makes the agency's choice

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[18] To be sure, the Interior and Justice Departments called only for *Skidmore* deference to the Jorjani M-Opinion in the case before Judge Caproni because that opinion was not a regulation. *See Christensen v. Harris County*, 529 U.S. 576 (2000) ("[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference"). But if FWS finalizes its proposed action here, a regulation will be removed from the *Code of Federal Regulations*. Hence, the danger that FWS will call for *Chevron* deference to its proposed action, if finalized, is imminent.

"Obviously, agency interpretations are an opportunity for administrative legislation, and the judges therefore worry that *Chevron* deference allows lawmaking interpretations to evade the notice-and-comment process required for informal lawmaking. Concerned about this evasion—though not the larger evasion of the Constitution's lawmaking process—the judges conclude that, where agencies in effect are altering their rules by means of interpretation, they can get *Chevron* deference only by adopting their interpretations with notice-and-comment procedures." Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? at 315.

conclusive and binding on the courts.[19] This notion supposedly enables "*Chevron* deference" to coexist with the judicial duty of independent judgment, and it is often invoked to reconcile *Chevron* with § 706 of the Administrative Procedure Act, 5 U.S.C. § 706, and *Marbury v. Madison*'s pronouncement that "it is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803).

This theory might make some sense if a statute were to say that an administrative official is vested with discretion in carrying out his statutory duties. Many statutes authorize the executive to choose among various policies and forbid the courts to second- guess those determinations. *See, e.g.*, 8 U.S.C. § 1182(f) ("Whenever the President finds [a particular fact], and for such period as he shall deem necessary, [perform a specified action].").

In these situations, there is no need to invoke *Chevron*; a court simply reads the statute and sees that it empowers the executive (for instance, 8 U.S.C. § 1182(f))—or does not (as in the case of the MBTA, 16 U.S.C. § 703(a)[20])—rather than the judiciary having to decide the matter. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2410 (2018) (upholding the President's travel ban under 8 U.S.C. § 1182(f), not invoking *Chevron*, but by observing that the President's proclamation "does not exceed any textual limit on the President's authority").

Such decisions do not sacrifice the Court's duty of independent judgment, nor do they place a thumb on the scale in favor of the executive's preferred interpretation of the law. They simply interpret the statute according to the only possible meaning it can bear. The Executive decides within the parameters established in the statute, and the courts (and everyone else) must accept the Executive's decision as conclusive and binding.

The only time "*Chevron* deference" comes into play is when the underlying statutory language is ambiguous—and *Chevron* instructs courts to treat statutory ambiguity as if it were an explicit vesting of discretionary powers in the agency that administers the statute. *See Chevron*, 467 U.S. at 844. But the notion that ambiguity itself creates an "implied delegation" of lawmaking or interpretive powers to administrative agencies is a transparent fiction, as jurists and commentators have repeatedly acknowledged.[21] *See generally* Philip Hamburger, Chevron *on Stilts: A Response to Jonathan Siegel*, 72 VAND. L. REV. EN BANC 77, 90 (2018). An agency's authority to act must be granted by Congress, and one cannot concoct that congressional authority when no statutory language empowers the agency to act in a particular manner.

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[19] *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 6 (1983) ("A statement that judicial deference is mandated to an administrative 'interpretation' of a statute is more appropriately understood as a judicial conclusion that some substantive law-making authority has been conferred upon the agency.").

[20] The MBTA's key provision here, 16 U.S.C. § 703(a), does reference regulations. *See id.* ("Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful ….") But this clearly empowers the Interior Department to grant exceptions from the statute's coverage (thereby *de-criminalizing* such conduct); Section 703(a) does not empower any part of the Interior Department to *expand* the MBTA's 22 prohibitions and other terms and thereby *criminalize new conduct*. Hence, Section 703(a) clearly does not assign the power to FWS that it claims in pressing the case for criminalizing incidental takes that were not criminal for the first 55 years of the statute's history.

[21] *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring) (describing "*Chevron's* fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law."); Thomas W. Merrill, *Step Zero After* City of Arlington, 83 FORDHAM L. REV. 753, 759 (2014) ("Even *Chevron's* most enthusiastic champions admit that the idea of an 'implied delegation' is a fiction.").

The Supreme Court has sought to alleviate this problem by claiming that *Chevron* deference depends on a "congressional intent" to delegate. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). But congressional intent must be discerned most basically from Congress's statutes and its words, and in the ambiguous statutes to which *Chevron* applies, Congress does not grant agency lawmaking or interpretive power. Although Congress gives agencies rulemaking power in some of its authorizing statutes, this is precisely what it does not do in laws subject to *Chevron*.

So, in the end, *Chevron* is nothing more than a command that courts abandon their duty of independent judgment and assign controlling weight to a non-judicial entity's interpretation of a statute. It is no different from an instruction that courts must assign weight and defer to statutory interpretations announced by a congressional committee, a group of expert legal scholars, or the *New York Times* editorial page. In each scenario, the courts would be following another entity's interpretation of a statute if it is "reasonable"—even if the court's own judgment would lead it to conclude that the statute means something else.

Article III not only empowers but requires independent judges to resolve "cases" and "controversies" that come before them. *See Cohens v. Virginia*, 19 U.S. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution."). Article III makes no allowance for judges to abandon their duty to exercise their own independent judgment, let alone to rely upon the judgment of entities that are not judges and do not enjoy life tenure or salary protection. When they do so, they violate the separation of powers,[22] allowing a sub-unit of the Executive Branch to wield what are solely judicial powers. The constitutional offense is even greater when the courts behave this way in lockstep under the command of the Supreme Court. And for the same reason—that it abets the separation-of-powers violation—the FWS should not invoke *Chevron* deference or even proceed at the agency stage as it if will be able to count on it:

> Professor Hamburger describes the problem in nutshell form:
>
> > Defenders of administrative law candidly acknowledge that its consolidation of powers conflicts with the separation of powers. But they offer reassurances that the Constitution requires only a separation of branches and that any stricter separation is undesirable.
> >
> > The separation of powers, however, was a specialization of powers. It therefore was not so much a separation of the branches of government as, more basically, a matter of distinguishing three specialized powers of government and vesting each in its own specialized part of government.
> >
> > It thus becomes clear why the administrative consolidation of power is so dangerous. By cutting through the specialization, administrative law creates and unspecialized

[22] "In all of these ways, administrative law substitutes soft [European continental]civilian-style academic rationality for the hard edges of Anglo-American law. The common law protected liberty with clear-cut divisions of authority. In contrast, administrative law emulates the civilian pattern, in which consolidated power is subject to largely academic limits of good cause, specificity, and reasonableness." Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? at 475 n.q.

> irregular regime alongside the specialized regular government. It thereby threatens the structural foundations of American government and freedom.

Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 325 (2014).

To be clear, there is nothing at all wrong or constitutionally problematic about a court that considers an agency's interpretation and gives it weight according to its persuasiveness.[23] An agency is entitled to have its views heard and considered by the court, just as any other litigant or amicus, and a court may and should consider the "unique insights" an agency may bring on account of its expertise and experience. *Id.* "'[D]ue weight' means 'respectful, appropriate consideration to the agency's views' while the court exercises its independent judgment in deciding questions of law"—due weight "is a matter of persuasion, not deference." *Tetra Tech EC, Inc.*, 914 N.W.2d at 53.

Recognizing an argument's persuasive weight does not compromise a court's duty of independent judgment. But *Chevron* requires far more than respectful consideration of an agency's views; it commands that courts give weight to those views simply because the agency espouses them, and it instructs courts to subordinate their own judgments to the views preferred by the agency. The Article III duty of independent judgment allows (indeed, requires) courts to consider an agency's views and to adopt them when persuasive, but it absolutely forbids a regime in which courts "defer" or give automatic and controlling weight to a non-judicial entity's interpretations of statutory language—particularly when that interpretation does not accord with the court's sense of the best interpretation.

B. *Chevron* Violates the Due Process Clause by Requiring Judges to Show Bias in Favor of Agencies

A related and more serious problem with *Chevron* is that it requires the judiciary to display systematic bias in favor of agencies whenever they appear as litigants. *See generally* Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016). It is bad enough that a court would abandon its duty of independent judgment by "deferring" to a non-judicial entity's interpretation of a statute. But for a court to abandon its independent judgment in a manner that favors an actual litigant before the court is an abomination. The Supreme Court has held that even the appearance of potential bias toward a litigant violates the Due Process Clause. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). The due process concerns are particularly acute in this situation, as it involves the criminal law where an accused's rights must be scrupulously respected. *See Tumey v. State of Ohio*, 273 U.S. 510 (1927) ("Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to *hold the balance nice, clear, and true* between the state and the accused denies the latter due process of law.")

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[23] The Supreme Court came close to saying precisely this in *Barnhart v. Walton*: "In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate …." 535 U.S. 212, 222 (2002). But instead of completing that thought by following the word "indicate" with something like "the Agency has persuaded us that they have the best textual interpretation of the statute," instead the Court kept going with its slavish adherence to *Chevron*, despite the unexamined constitutional questions wrapped up in that doctrine. Hence, the Court instead actually completed its *Barnhart* thought with: "… that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue."

State courts are often much better on this area. *See, e.g., Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21, 53 (Wis. 2018) (noting "administrative agencies can sometimes bring unique insights to the matters for which they are responsible" but that "does not mean we should defer to them").

(emphasis added).

Yet *Chevron* institutionalizes a regime of systematic judicial bias, by requiring courts to "defer" to agency litigants whenever a disputed question of statutory interpretation arises. Rather than exercise their own judgment about what the law is, judges under *Chevron* defer to the judgment of one of the litigants before them.

A judge who openly admitted that he or she accepts a government-litigant's interpretation of a statute whenever it is "reasonable"—and that he or she automatically rejects any competing interpretations that might be offered by the non-government litigant—would ordinarily be impeached and removed from the bench for exhibiting bias and abusing power. Yet this is exactly what judges do whenever they apply "*Chevron* deference" in cases where an agency appears as a litigant. The government litigant wins simply by showing that its preferred interpretation of the statute is "reasonable" even if it is wrong—while the opposing litigant gets no such latitude from the court and must show that the government's view is not merely wrong but unreasonably so.

Judges take an oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent upon me," and judges are ordinarily very careful to live up to these commitments. 28 U.S.C. § 453. Indeed, the Constitution's Oath Clause is itself implicated because all federal judges also take an oath to support the Constitution (which is, in turn, grounded in the separation of powers in Articles I through III): "[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution …." U.S. Const. art VI, cl. 3. Nonetheless, under *Chevron*, otherwise scrupulous judges who are sworn to administer justice "without respect to persons" must remove the judicial blindfold and tilt the scales in favor of the government's position.

In short, no rationale can defend a practice that weights the scales in favor of a government litigant—the most powerful of parties—and that commands systematic bias in favor of the government's preferred interpretations of federal statutes. Whenever *Chevron* is applied in a case in which the government is a party, the courts are denying due process by showing favoritism to the government's interpretation of the law. *See Tetra Tech*, 914 N.W.2d at 50 (prohibiting the equivalent of *Chevron* deference in the Wisconsin state courts because its "systematic favor deprives the non-governmental party of an independent and impartial tribunal").

C. The *Chevron* Precedent Itself Is No Barrier to the Service Recognizing *Chevron*'s Constitutional Invalidity on Its Way to Leaving the January 7, 2021 Final Rule in Place

In response to the *Chevron* arguments made in these comments, FWS might object that it lacks the power to do anything other than proceed as if it will be able to rely on *Chevron*, taking refuge in the shade of *Chevron*'s long shadows. But this ignores that *Chevron* is not binding precedent as to various constitutional matters the Supreme Court has never reached.

Specifically, the *Chevron* case itself never considered or addressed the constitutional objections presented here to its regime of agency deference—and neither has any subsequent Supreme Court decision. So, it cannot be said that the Supreme Court has rejected these constitutional arguments by adhering to *Chevron* for 37 years. Judicial precedents do not resolve issues or arguments never raised or discussed. *See Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) ("Cases cannot be

read as foreclosing an argument that they never dealt with."); *Hall v. Louisiana*, 884 F.3d 546, 550 (5th Cir. 2018).[24]

Stare decisis thus presents no obstacle to a lower court's reaching these constitutional issues, if it becomes necessary for NCLA or another litigant to raise them on judicial review of this rulemaking, with such a court going on to declare *Chevron* deference unconstitutional. And in all events, it is a court's ultimate duty is to enforce the Constitution—even if that comes at the expense of Supreme Court opinions that never considered the constitutional obstacles to what the opinions were holding. *See Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").

Instead of hiding in *Chevron*'s shadow, it makes sense for FWS to recognize now that it will be judged in the dock of the Constitution. And the FWS embarking on that course makes particularly good sense where, as here, the Supreme Court has in recent years repeatedly declined to rely on *Chevron* to uphold agency interpretations. So, FWS should consider the constitutional *Chevron* defects now, recognize their force, and abandon this proposed rulemaking.

III. FWS AND JUSTICE DEPARTMENT ENFORCERS SHOULD NOT USE THE RESPONSIBLE CORPORATE OFFICER DOCTRINE IN MBTA CASES

NCLA opposes use of the responsible-corporate-officer doctrine to bring criminal charges against corporate executives whose employees (unbeknownst to the executives) have violated some federal law. Because the MBTA's misdemeanor provision does not include an independent *mens rea* requirement, NCLA is concerned that irresponsible prosecutors might be tempted to use FWS's proposed "incidental take" power to threaten criminal charges against executives of companies whose activities may cause some incidental and indirect harm to migratory birds. NCLA's well-founded fear is an additional reason for FWS to use extreme caution before proceeding with its proposed repeal of the January 7, 2021 final rule.

The responsible-corporate-officer doctrine, commonly known as the *Park* doctrine, originated in two cases involving the Food, Drug, and Cosmetic Act (FDCA). In *United States v. Dotterweich*, the Supreme Court held that a corporate officer may be held personally liable for the corporation's violation of strict liability provisions of the FDCA because the officer had a "responsible share in furtherance of the transaction which the statute outlaws." 320 U.S. 277, 284 (1943).

The court later elaborated that strict liability under the FDCA may be imputed to a corporate officer who "had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so." *United States v. Park*, 421 U.S. 658, 673 (1975). The responsible-corporate-officer doctrine imposes strict, vicarious liability. Liability is strict because no *mens rea* is required, and liability is vicarious because officers are held personally liable for companies' violations.

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[24] *See also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998) ("We have often said that drive-by jurisdictional rulings of this sort … have no precedential effect."), *citing Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (holding that when "standing was neither challenged nor discussed" in an earlier case, that case "has no precedential effect" on the issue of standing); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.").

If FWS goes forward with its proposed repeal, prosecutors will likely be tempted to threaten *Park*-doctrine prosecutions whenever incidental harm to migratory birds is alleged to have occurred. Such threats are extremely powerful. Few companies will risk criminal sentences for their executives; thus, faced with such threats, they may often have no realistic choice but to accede to whatever mitigating actions the government demands, regardless of the expense. NCLA does not know whether FWS is proposing its regulatory repeal so as to create a tool that will allow companies to be bludgeoned into submission to whatever actions FWS desires. Whether that is FWS's aim, however, the Service needs to be aware of the dangerous tool it is creating.

In situations involving conduct directed at migratory birds, such as hunting and poaching, the Service can plainly determine the person who is responsible. It is easy to arrest a hunter, and the MBTA envisions such interactions. The same cannot be said when birds die accidentally after coming into contact with industrial equipment or standing infrastructure. The *Park* doctrine would provide an all-too-easy solution to the causation issues that would inevitably arise in connection with efforts to bring criminal charges for "incidental takes."

Use of the *Park* doctrine in MBTA enforcement would be irresponsible. As has been well documented, its use is the opposite of measured prosecutorial discretion.[25] It instead acts as a powerful weapon to wield against corporations to browbeat companies into compliance with ever-more extensive, creeping regulations. Yet, NCLA fears that its eventual use (or at least the threat of its use) is all but inevitable if FWS repeals the current wise protections for regulated parties lodged in 50 C.F.R. § 10.14.

CONCLUSION

The MBTA does not cover accidental harm to migratory birds. Therefore, we respectfully urge FWS not to go forward with its plans to repeal 50 C.F.R. § 10.14. Instead, the Service should keep that rule making clear that the government should not prosecute as crimes accidental actions without further guidance from Congress that Congress has not saw fit to give in the 103-year history of the MBTA.

Very truly yours,

/s/ Sheng Li

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[25] *See* Washington Legal Foundation, *Special Report: Federal Erosion of Business Civil Liberties* 1-11 to 1-17 (Cory L. Andrews ed., 2010); Brian Stimson & Kimyatta McClary, *Responsible Corporate Officer: Business Executives Face Strict Liability Under Novel Criminal Law Doctrine*, Washington Legal Foundation (2010), *available at* http://www.wlf.org/Upload/legalstudies/legalbackgrounder/4-9-20Stimson_LegalBackgrounder.pdf (last visited June 7, 2021).