No. 17-16679

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILDEARTH GUARDIANS
and NEW MEXICO WILDERNESS ALLIANCE,

Plaintiffs - Appellees,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant,

SAFARI CLUB INTERNATIONAL,

Intervenor - Defendant,

and,

NEW MEXICO CATTLE GROWERS' ASSOCIATION, et al.,

Intervenor-Defendants - Appellants.

On Appeal from the United States District Court
for the District of Arizona
Honorable David C. Bury, Senior District Judge

APPELLANTS' OPENING BRIEF

JONATHAN WOOD
Pacific Legal Foundation
3033 Wilson Blvd., Suite 700
Arlington, Virginia 22201
Telephone: (703) 647-4119
E-mail: jw@pacificlegal.org

JAMES S. BURLING
M. REED HOPPER
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111

ETHAN W. BLEVINS
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484

Attorneys for Intervenor-Defendants - Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants, Defendant-Intervenors below, hereby state they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

STATEMENT OF SUBJECT MATTER JURISDICTION

This appeal arises from the district court's judgment granting Plaintiffs' motion for summary judgment. Appellants' Excerpts of Record (ER) at 1, 2. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 702 (judicial review of federal agency action). The district court's entry of judgment on June 21, 2017, is a final judgment under Rule 54 of the Federal Rules of Civil Procedure.

STATEMENT OF THE ISSUE

The Endangered Species Act makes it a crime to "knowingly violate[]" the statute's prohibition on the "take" of any endangered species. Is the Department of Justice's interpretation applying the statute's knowledge requirement to every element of the offense an abdication of its statutory responsibility in violation of the Administrative Procedure Act?

STATUTORY PROVISIONS

The Endangered Species Act, 16 U.S.C. § 1532(19) provides:

> 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.

16 U.S.C. § 1538(a) provides, in relevant part:

> [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to . . .
>
> > (B) take any such species within the United States or the territorial sea of the United States;
> >
> > (C) take any such species upon the high seas; . . . or
> >
> > (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

16 U.S.C. § 1540 provides, in relevant part:

> (a) Civil Penalties
>
> > (1) Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of this chapter, or any provision of any permit or certificate issued hereunder, or of any regulation issued [under several subsections] may be assessed a civil penalty by the Secretary of not more than $25,000 for each violation. . . . Any person who otherwise violates any provision of this chapter, or any regulation, permit, or certificate issued hereunder, may be

> assessed a civil penalty by the Secretary of not more than $500 for each such violation. . . .
>
> (b) Criminal Violations
>
> (1) Any person who knowingly violates any provision of this chapter, or any permit or certificate issued hereunder, or of any regulation issued in order to implement [several subsections] shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both.

STATEMENT OF THE CASE

A. Introduction

The Endangered Species Act forbids the "take" of endangered species, which includes essentially any activity that adversely affects a listed species. It is not limited to acts that intentionally cause take; incidental impacts on species caused by ordinary, innocent conduct are also forbidden. The prohibition is enforced by injunctive suits; a small, strict-liability civil fine; and, for the most serious violations, a larger civil fine, a six-figure criminal fine, and one-year imprisonment. This case concerns the reach of the criminal penalty provisions, which limit the severest punishment to those who "knowingly violate[]" the take prohibition.

For decades, the Department of Justice has interpreted the statute's knowledge requirement to apply to every element of the offense: that a defendant must know his actions will cause take and know the species that will be taken. The Department construes Supreme Court precedent to require this interpretation. WildEarth Guardians and New Mexico Wilderness Alliance (collectively WildEarth Guardians) oppose this interpretation, believing it is not sufficiently protective of endangered species. They argue that the statute's knowledge requirement should be interpreted narrowly so that the statute's harshest penalties are available when someone knowingly engages in some act, regardless whether they know it will cause take or the species that will be taken. The district court sided with them, holding that the Department of Justice's interpretation is an abdication of its statutory responsibility because it is too protective of criminal defendants.

That decision is belied by the statute's text and Supreme Court precedent. "Take" is such a broad offense that, under the district court's interpretation, imprisonment could be imposed for innocent conduct that unexpectedly causes the take of a protected species. Supreme Court precedent forecloses this possibility, requiring knowledge of every fact

constituting the offense to shield people from criminal punishment for traditionally lawful conduct. The Department of Justice's interpretation, far from being an abdication of its statutory responsibility, is a laudable effort to avoid unlawful convictions for innocent mistakes. The decision below should be reversed and the government's long-standing interpretation restored as the only legally tenable interpretation of the statute.

B. Background

1. The Endangered Species Act

The Endangered Species Act provides for the listing of species as threatened or endangered and, depending on which status a species is given, mandates certain protections for it. *See* 16 U.S.C. § 1533. Approximately 1,500 species are listed under these two categories, including dozens of insects, spiders, rodents, and small birds. *See* U.S. Fish & Wildlife Serv., ECOS: Environmental Conservation Online System.[1]

[1] *Available at* https://ecos.fws.gov/ecp/ (last visited Oct. 16, 2017).

One of the statute's protections, which applies to all endangered species and can be extended to threatened species by regulation, is a prohibition on the "take" of the species. *See* 16 U.S.C. § 1538(a)(1); 50 C.F.R. § 17.31. "Take" is an expansive term, defined as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Take is not limited to its ordinary meaning but also forbids otherwise innocent acts that incidentally result in harm to a single member of a species. *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 701-02 (1995).

Although WildEarth Guardians and the district court focus on hunting, the prohibition applies to many more activities, including cutting down a tree where birds roost, building on land under which cave bugs dwell, moving an animal run over in front of your house, and even getting too close to an animal. *See*, *e.g.*, *id.* (prohibits cutting down a tree inhabited by owls); *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003) (prohibits private property development in an area inhabited by subterranean spiders); 62 Fed. Reg. 6729 (Feb. 13, 1997) (prohibits getting within five football fields of a right whale while surfing

or boating); ER 320 (prohibits "annoying" wildlife if it disrupts normal behavioral patterns).

Despite the long list of innocuous acts that could violate the take prohibition, the punishments can be severe. The most serious punishments, reserved for "knowing" violations, are criminal fines of up to $100,000, a year in prison, and the revocation of federal business licenses, grazing permits, and hunting rights. 16 U.S.C. § 1540(b); *see* 18 U.S.C. § 3571(b)(5) (increasing the fine). Knowing violations can also be penalized with a $49,467 civil penalty. 16 U.S.C. § 1540(a)(1); *see* 81 Fed. Reg. 41,862 (June 28, 2016) (increasing the fine). Lesser violations—those not committed knowingly—are punishable with a much smaller, strict liability fine of $1,250. 16 U.S.C. § 1540(a)(1); *see* 82 Fed. Reg. 6307, 6308 (Jan. 19, 2017) (increasing the fine). Additionally, anyone may bring a lawsuit to enjoin take, without regard to the knowledge of the party against whom the injunction is sought. 16 U.S.C. § 1540(g).

As originally drafted, the Endangered Species Act's criminal punishments were reserved for willful violations, those done with knowledge that they were illegal. But the *mens rea* requirement was lowered to knowing violations in 1978, to "make[] criminal violations of

the act a general rather than a specific intent crime." H.R. Rep. No. 95-1625, 26 (1978). Congress made this change because it did "not intend to make knowledge *of the law* an element of either civil penalty or criminal violations of the Act." *Id.* (emphasis added).

2. The McKittrick Memorandum

The United States has long interpreted the Endangered Species Act's knowledge requirement to apply to each element of the offense: requiring knowledge that an act will cause take and of the species that will be taken. In the seminal Supreme Court case upholding the government's broad interpretation of "take," the United States relied on its understanding of "knowingly" to alleviate the Justices' concerns about the potential reach of this criminal statute. *See* Transcript of Oral Argument, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, No. 94-859, 1995 WL 243452, at *6 (U.S. Apr. 17, 1995) ("[W]ould [you] have to know, for example—if you drained a pond on your property, you'd have to know that there is a particular frog or whatever—Mr. Kneedler: Right."). The only thing a defendant need not know, the United States explained, is that the species is listed under the act; that would be knowledge of the law rather than the facts constituting the

offense. *Id.* at **5-6 ("[T]he only thing he doesn't have to know is that the species is listed, and that was what Congress was driving at by changing the mens rea requirement from willful to knowingly."). Relying on this representation, the Supreme Court upheld the government's broad interpretation of take. *See Sweet Home*, 515 U.S. at 701-02 (citing the knowledge requirement). Although the dissenting Justices disagreed about the scope of take, they too endorsed the United States' understanding of the knowledge requirement. *See id.* at 722 (Scalia, J., dissenting) ("The hunter who shoots an elk in the mistaken belief that it is a mule deer has not knowingly violated [the take prohibition] . . . because he does not know what sort of animal he is shooting.").

Unfortunately, it appears not every federal prosecutor was aware of the United States' position. Three years after *Sweet Home*, federal prosecutors succeeded in convicting Chad McKittrick for taking a gray wolf under a narrower theory of the statute's knowledge requirement. ER 298-99.[2] McKittrick claimed he thought he was shooting a wild dog and

[2] Prior to *Sweet Home*, two district courts had accepted jury instructions interpreting "knowingly" similarly. *See United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988); *United States v. Billie*, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987).

did not, therefore, knowingly take the wolf. *Id*. But a panel from this Court upheld the conviction, construing the Endangered Species Act's knowledge requirement narrowly and denying that knowledge of the species taken is required. *See United States v. McKittrick*, 142 F.3d 1170 (9th Cir. 1998).

McKittrick petitioned the Supreme Court to review the decision. ER 282. Rather than flip-flop from the position taken before the Court a mere three years earlier in *Sweet Home*, the United States confessed error. In its opposition to McKittrick's petition, the United States admitted that the jury instruction "does not adequately explicate the meaning of the term 'knowingly'" and that it is inconsistent with Supreme Court precedent. ER 306-07. For those reasons, the United States avowed to no longer request the challenged jury instructions. *Id*. After the United States made this representation, the Supreme Court denied the petition. 525 U.S. 1072 (1999).

The United States kept its word to the Court. Shortly after the petition was denied, the Department of Justice issued a memorandum to federal prosecutors directing them to no longer request the jury instruction approved in *McKittrick*. ER 315-22. This McKittrick

Memorandum reiterated the United States' position from *Sweet Home*: the Endangered Species Act limits criminal convictions to cases where a defendant knows his actions will cause take and the identity of the species taken. *Id*. That memorandum has governed federal Endangered Species Act prosecutions for nearly 20 years.

C. Procedural History

On May 30, 2013, WildEarth Guardians filed this lawsuit challenging the McKittrick Memorandum. New Mexico Cattle Growers' Association, New Mexico Federal Lands Council, and New Mexico Farm and Livestock Bureau moved to intervene as of right, as did Safari Club separately. Both motions were granted. ER 428. WildEarth Guardians subsequently moved for summary judgment, which was granted on June 21, 2017. ER 430. The district court held that the Department of Justice's interpretation is more protective of criminal defendants than Congress intended and therefore an abdication of the Department's statutory responsibility. ER 2-46.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine dispute as to any material fact and a party can show that it is entitled to

judgment as a matter of law. Fed. R. Civ. P. 56. This Court "review[s] the grant of summary judgment de novo, thus reviewing directly the agency's action under the Administrative Procedure Act[.]" *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1065 (9th Cir. 2004). Because this case concerns the interpretation of a criminal statute, any ambiguity must be construed in favor of potential criminal defendants and the government can receive no deference. *See Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014) (the government receives no deference to its interpretation of the criminal law); *United States v. Santos*, 553 U.S. 507, 514 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.").

ARGUMENT

Criminal punishments cannot be imposed for traditionally lawful conduct on defendants that lack a culpable state of mind. Even if a criminal statute were silent on the question, the Supreme Court requires *mens rea* to be inferred under a general rule "that the defendant must know each fact making his conduct illegal." *See Torres v. Lynch*, 136 S. Ct. 1619, 1631 (2016); *see also Staples v. United States*, 511 U.S. 600, 619

(1994). That rule dictates that to "knowingly violate" the Endangered Species Act's prohibition against the take of endangered species a defendant must know his actions will cause take and know the identity of the species taken.[3] The Department of Justice has correctly interpreted the statute to require this knowledge for decades. *See supra* at 8-11.

The district court upended this longstanding interpretation, holding that the Department of Justice *must* interpret the statute's explicit *mens rea* requirement narrowly. ER 2-46. The court based its decision on an exception to the general rule for so-called public welfare offenses. However, the Supreme Court has narrowly limited this exception, recognizing that it "always entails some possibility of injustice[.]" *See Staples*, 511 U.S. at 634 (Stevens, J., dissenting). The "limited circumstances" where *mens rea* protections can be relaxed are those where a criminal prohibition can *only* apply to "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or

[3] *See* Jonathan Wood, *Overcriminalization and the Endangered Species Act:* Mens Rea *and Criminal Convictions for Take*, 46 Envtl. L. Rep. 10,496 (2016).

safety[.]" *See Staples*, 511 U.S. at 629 (quoting *Liparota v. United States*, 471 U.S. 419, 433 (1985)). It applies, for instance, to uniquely dangerous activities like handling toxic chemicals[4] or hand grenades[5] but not traditionally lawful conduct like driving a car[6] or possessing a gun.[7]

WildEarth Guardians' concern appears to be that the McKittrick Memorandum allows people to falsely claim ignorance or mistake and thereby avoid punishment for their criminal acts. But its cure for that problem, eroding the statute's *mens rea* protection, would reverse the principle that has guided our criminal law for centuries: "it is better that ten guilty persons escape, than that one innocent suffer." 4 Blackstone, *Commentaries on the Laws of England* 352 (1768); *see United States v. Watson*, 792 F.3d 1174, 1183 (9th Cir. 2015) ("No tradition is more firmly established in our system of law . . . ."). WildEarth Guardians would

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[4] *United States v. International Minerals & Chemicals Corp.*, 402 U.S. 558 (1971).

[5] *United States v. Freed*, 401 U.S. 601 (1971).

[6] *See Staples*, 511 U.S. at 614.

[7] *Id.* at 608-16 (holding that the government must prove that a defendant knew the characteristics of a gun that made it a machine gun for the exception to apply; the mere fact that it was a gun is not enough because they are "so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation").

sacrifice innocents to ensure that a few potentially guilty people could be more easily convicted. The district court expressed indifference to "impos[ing] liability upon at least some innocents" because they could *only* be robbed of a year of their lives, forced to pay a six-figure fine, and sacrifice licenses and permits that may be the basis of their livelihoods.

This holding is out of step with Supreme Court precedent, which forbids criminal punishment for innocent activities committed without some degree of culpability. *See Staples*, 511 U.S. at 619. Contrary to WildEarth Guardians' and the district court's myopic focus on hunting, *see* ER 41, the crime of taking an endangered species sweeps in an endless list of traditionally lawful conduct. Building a home, plowing a field, going for a jog, and driving a car could all unintentionally cause take without the violator having any reason to think that her actions may expose her to criminal penalties for her innocent activities. *See supra* at 8-11.

Consequently, take is not the sort of unusually dangerous conduct to which the public welfare offense exception applies. The provision is subject to the general rule requiring knowledge of every element of the offense and the McKittrick Memorandum's interpretation is the only

legally tenable interpretation of the statute. The decision below should be reversed and summary judgment ordered for Defendants.

I. The Endangered Species Act requires knowledge of each fact constituting the offense before criminal punishments can be imposed for take

a. Criminal statutes must be interpreted to require knowledge of all the facts constituting the offense

The bedrock principle of criminal law is that a crime consists of the combination of a bad deed (an *actus reus*) with a culpable state of mind (a *mens rea*). This principle is no relic of a foregone era; courts continue to insist that a defendant accused of a crime must be "'blameworthy in mind'" to be found guilty. *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)); *see Morissette*, 342 U.S. at 252 ("wrongdoing must be conscious to be criminal"). "[T]he 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every crime.'" *Elonis*, 135 S. Ct. at 2009 (quoting *United States v. Balint*, 258 U.S. 250, 251 (1922)).

This general rule is so essential to our legal tradition that courts will "'interpret [] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.'" *Elonis*, 135 S. Ct. at 2009 (quoting *United States v. X-Citement*

Video, 513 U.S. 64, 70 (1994)). When inferring *mens rea* into a statute silent on the point, courts carefully distinguish between knowledge of the law and knowledge of the facts. To this day, "[t]he familiar maxim 'ignorance of the law is no excuse' typically holds true." *Elonis*, 135 S. Ct. at 2009. But "a defendant generally must 'know the facts that make his conduct fit the definition of the offense[.]'" *Elonis*, 135 S. Ct. at 2009 (quoting *Staples*, 511 U.S. at 608 n.3).

Courts are no less protective where Congress explicitly incorporates *mens rea* protections into criminal statutes. There, too, courts require these protections to be broadly applicable to each element of the offense. *See Elonis*, 135 S. Ct. at 2009-10. This rule is intuitive; if this degree of *mens rea* is read into statutory silence, it makes little sense to read it out when Congress includes a state of mind requirement in a statute's text.

Relevant here, "the term 'knowingly' . . . requires proof of knowledge of the facts that constitute the offense." *Dixon v. United States*, 548 U.S. 1, 5 (2006) (quoting *Bryan v. United States*, 524 U.S. 184, 193 (1998)). Two cases are illustrative of what Congress means when it criminalizes the "knowing" violation of a statute or regulation. In *United States v. International Minerals & Chemicals Corp.*, the Court interpreted the

crime of "knowingly violat[ing]" regulations forbidding the transportation of hazardous materials without disclosing the contents. 402 U.S. at 559. Construing the reference to the regulations as shorthand for the conduct forbidden by those regulations, the majority interpreted the phrase to require knowledge that one is shipping hazardous materials but not knowledge that regulations require disclosure, distinguishing the former as knowledge of the facts of the crime and the latter as knowledge of the law. *See id.* at 563-64. Someone who mistook a hazardous material for an innocuous one—the analog to someone who mistakes an endangered species for a common one—has not knowingly transported hazardous materials. *See id.* ("A person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered."). Three Justices dissented, arguing that the decision was not protective enough of criminal defendants. They would have interpreted "knowingly violate any such regulation" literally to also require knowledge that one's conduct violates the regulation. *See id.* at 565-69 (Stewart, J., dissenting).

In *Liparota v. United States*, the Supreme Court interpreted the crime of "knowingly" using food stamps "in any manner not authorized

by" a statute or regulations. 471 U.S. at 420. This time, the majority adopted the reasoning of the dissenting Justices in *International Minerals*. The Court interpreted the provision to require knowledge of both the facts constituting the offense and knowledge that the defendant's conduct was not authorized by the statute or regulations. *Id.* at 426. This broad construction of the statute's knowledge requirement was "particularly appropriate[,]" the Court explained, because "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Id.* Neither the general rule that crimes must require proof of a guilty mind nor the rule of lenity would permit such a result. *See id.* at 426-27. Two Justices dissented and would have interpreted the provision, consistent with *International Minerals*, to require knowledge of all of the facts constituting the offense, but not knowledge of the law. *See id.* at 441-42 (White, J., dissenting).

The lesson of *International Minerals* and *Liparota* is that a criminal statute forbidding the "knowing" violation of a statute or regulation requires, at a minimum, that the defendant must know all of the facts making his conduct illegal. If necessary to shield apparently innocent conduct from criminal punishment, knowledge of the law may also be

required, unless Congress clearly foreclosed it. But in no circumstances can a criminal statute's knowledge requirement be read out of the statute so as to not apply to the facts constituting the offense. This would violate the general rule requiring this knowledge even when a statute is silent and would raise significant Due Process and Rule of Lenity concerns. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 440-42 (1978); *Lambert v. California*, 355 U.S. 225, 229-30 (1957) (criminally punishing activity which an ordinary person would have no reason to think is illegal violates the Due Process Clause).

b. The Endangered Species Act explicitly requires this knowledge by limiting criminal punishment to knowing violations

The Endangered Species Act reserves criminal punishment for those who "knowingly violate[]" its prohibitions and regulations issued to implement them. 16 U.S.C. § 1540(b). Under *Dixon*, *Liparota*, and *International Minerals*, the statute's "knowingly violate[]" language requires, at a minimum, knowledge of the facts constituting the offense: that one's conduct will cause take and the species that will be taken. *See Dixon*, 548 U.S. at 5 (knowingly "requires proof of knowledge of the facts that constitute the offense"); *Liparota*, 471 U.S. at 426; *International*

Minerals, 402 U.S. at 559. Because the take prohibition could apply to "a broad range of apparently innocent conduct"—like building a home, driving a car, or going for a jog, *see supra* 5-8—it arguably requires knowledge that the Endangered Species Act forbids the conduct.[8] But this Court needn't resolve that issue because the decision below must be reversed even under *International Minerals*' less protective interpretation of "knowingly."

It is not clear what elements, if any, WildEarth Guardians and the district court believe the Endangered Species Act's knowledge requirement applies to. If it does not require knowledge of the species taken, does it require knowledge that one's conduct will cause take?

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[8] Legislative history supports the *International Minerals* interpretation of this language, rather than *Liparota*'s. According to the House Report, Congress weakened the *mens rea* requirement from "willfully" to "knowingly" because it did "not intend to make knowledge of the law an element of either civil penalty or criminal violations of the Act." H.R. Rep. No. 95-1625, 26 (1978). But legislative history is often unreliable and the Supreme Court has not clarified whether it can overcome *Liparota*'s requirement that knowledge of the law is necessary to shield apparently innocent conduct from criminal punishment. *See Gonzalez v. Arizona*, 677 F.3d 383, 441-42 (9th Cir. 2012) (Kozinski, J., concurring) ("The Supreme Court has warned us time and again not to rely on legislative history in interpreting statutes, largely because of the ease with which floor statements and committee reports can be manipulated to create a false impression as to what the body as a whole meant.").

Grammatically, there is no basis in the text to distinguish between the two elements of the offense. Neither are specified in the criminal penalty provision of the Act. *See* 16 U.S.C. § 1540(b). Instead, it refers to the statutory provisions and regulations imposing the take prohibition. *See id*. Under *International Minerals*, those references act as a stand-in for the conduct forbidden by the cited provisions. 402 U.S. at 563-64.

To knowingly engage in the conduct forbidden by the take prohibition, one must know her actions will cause take and know the species that will be taken. Without this knowledge, one has not knowingly engaged in the conduct forbidden by the cited statutory provisions and regulations. For instance, the take prohibition forbids the shooting of a gray wolf. 16 U.S.C. § 1540. A person who knows they are hunting but does not know that the animal in their sights is a wolf is not knowingly engaging in the forbidden conduct—hunting is not forbidden by the take prohibition.

This conclusion is unavoidable if you consider other, more common activities that can violate the take prohibition. It forbids, for instance, hitting a California tiger salamander that darts in front of your car on the highway. *See* U.S. Fish & Wildlife Service, *Species Account:*

California Tiger Salamander (2009)[9] (describing vehicle collisions as a significant threat to the species). A person who knows they are driving a car is not knowingly engaging in the prohibited conduct, since driving is not prohibited. The driver's knowledge that her actions will cause the take of something—an insect unfortunate enough to collide with her windshield, for instance—does not mean she's knowingly engaging in the forbidden conduct either, since that too is not forbidden. Instead, the driver only knowingly violates the take prohibition if she knows that her actions will cause the take of a California tiger salamander.

The take prohibition also forbids building a home where the construction would disturb spiders residing in subterranean caves. *Cf. GDF Realty*, 326 F.3d 622 (upholding the prohibition of private property development as take where a rare species of spider resided in caves under the land). A person does not knowingly engage in the prohibited conduct by building a home—that commonplace activity remains entirely innocent. Nor does a person knowingly violate the take prohibition because she knows that the construction will inevitably disturb common

[9] https://www.fws.gov/sacramento/es_species/Accounts/Amphibians-Reptiles/Documents/california_tiger_salamander.pdf

insects, rodents, or other species. That too is legal. A person can only knowingly engage in the prohibited conduct if she builds a house knowing that it will cause the take of Tooth Cave Spiders living below the surface.

The district court reached a contrary result by ignoring the broad reach of the take prohibition. Its analysis myopically focused on hunting as a means of violating the prohibition. ER at 41. But the text of the statute draws no distinction between the *mens rea* that applies to one type of take and that which applies to others; "knowingly" applies to all of them. 16 U.S.C. § 1540(b). Therefore, the text of the statute unambiguously requires knowledge of all of the facts constituting the offense, including that one's conduct will cause take and the species that will be taken.

c. Congress addressed WildEarth Guardians' policy concerns through other provisions of the statute, which would be superfluous under its interpretation

Statutes should be read as a whole, so that no provision is interpreted to render any other superfluous. *See Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991). Yet that's precisely what would result from WildEarth Guardians' interpretation. Congress recognized the concern that endangered species could be mistaken for more common

ones, resulting in harm to the listed species. And it included several provisions in the statute to address that specific problem. Eroding the statute's *mens rea* protections, as WildEarth Guardians seeks, would impermissibly render these provisions redundant or ineffective, thus, it should be rejected. *See Gypsum*, 438 U.S. at 442 (citing the availability of alternative remedies as an additional basis to refuse to erode *mens rea* protections).

The statutory provision most directly aimed at the mistaken identity situation allows the listing of species that "so closely resemble" a listed species that it is difficult to distinguish them and the listing would facilitate protection of the truly endangered species. 16 U.S.C. § 1533(e); *see Illinois Commercial Fishing Ass'n v. Salazar*, 867 F. Supp. 2d 108, 114-19 (D.D.C. 2012). The statute sets out criteria for the U.S. Fish and Wildlife Service to use in deciding to list a look-alike species and allows the take prohibition's application to that species to be tailored to avoid unnecessarily criminalizing innocent activity. *See* 16 U.S.C. § 1533(e); *Illinois Commercial Fishing Ass'n*, 867 F. Supp. 2d at 118-19 (upholding the decision to narrow the take prohibition's application to a look-alike species). If an endangered species is easily mistook as a more

common species, as WildEarth Guardians fears is the case for the Mexican gray wolf, this provision is the proper means of addressing that problem—if the statutory criteria are satisfied. WildEarth Guardians' efforts to narrow the statute's explicit *mens rea* requirement would render this process unnecessary and superfluous, as there would be no need to list species easily mistaken for endangered ones if that mistake would not otherwise absolve one of culpability.

The Endangered Species Act also allows WildEarth Guardians to address its concerns by seeking an injunction against particular instances of take. There is no knowledge requirement for this private, civil remedy. And the right of any citizen to pursue an injunction also has an educational benefit; it allows interested groups like WildEarth Guardians to alert private parties to the risks their actions pose to listed species. *See* Transcript of Oral Argument, *Sweet Home*, 1995 WL 243452, at *54-55 ("[W]ouldn't you be in court getting the injunction, and you'd tell the person . . . that if he cuts down the tree, it's going to kill the koala bear . . . and by that time he'd know it.").

The statute also addresses WildEarth Guardians' policy concerns by allowing a much smaller civil fine, on a strict liability basis, for violations that are not committed knowingly. *See* 16 U.S.C. § 1540(a)(1). WildEarth Guardians' interpretation would render this provision redundant too, as any violation triggering it would also be eligible for the more severe criminal punishments.

d. Under the rule of lenity, any ambiguity in the statute must be construed to benefit potential criminal defendants

Although the text of the statute forecloses WildEarth Guardians' miserly interpretation of the Endangered Species Act's *mens rea* protection, any doubt about that question must be resolved against its interpretation. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *Santos*, 553 U.S. at 514. Thus, if it is unclear whether the statute's knowledge requirement applies to each element of the offense, that ambiguity must be resolved to provide maximum protection to potential criminal defendants.

This comports with due process, which the Supreme Court has repeatedly cited as justification for the general rule requiring knowledge

of each element of the offense. *See United States v. U.S. Gypsum Co.*, 438 U.S. at 440-42 (reading a *mens rea* protection into the Sherman Act because it would otherwise apply to seemingly innocent conduct contrary to "the generally accepted functions of the criminal law"); *Lambert v. California*, 355 U.S. at 229-30 (criminally punishing activity which an ordinary person would have no reason to think is illegal violates the Due Process Clause).

Due process concerns are at their apex for crimes that could apply to traditionally lawful conduct, which most people would have little reason to suspect could lead to their ruin. Recently, the Supreme Court reaffirmed this understanding of the general rule, explaining that knowledge is required for every element of the offense necessary "to separate wrongful conduct from 'otherwise innocent conduct.'" *Elonis*, 135 S. Ct. at 2010 (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000), and *X-Citement Video*, 513 U.S. at 72). Without it, nothing would "shield people against punishment for apparently innocent activity." *See Staples*, 511 U.S. at 622 (Ginsburg, J., concurring).

These concerns are particularly acute here. As explained above, *see supra* 5-8, the Endangered Species Act's take prohibition applies to a

broad range of ordinary, lawful conduct. That broad interpretation of the prohibition was upheld in reliance on the government's interpretation of "knowingly" to avoid the risk of criminalizing this innocent conduct. *See supra* 8-11. Having been given the proverbial inch (a broad interpretation of "take"), WildEarth Guardians now seeks to force the Department of Justice to claim the mile by abandoning its decades-long commitment to a robust interpretation of the statute's *mens rea* protections.

But the combination of a broad understanding of take and a weak knowledge requirement is a nonstarter under Supreme Court precedent, as it would criminalize innocent activity that few would expect could lead to harsh criminal punishment. An ordinary person has little reason to think that a jog, drive, construction project, or hunting trip could result in the loss of a year of her life to prison, a bankrupting six-figure criminal fine, and the cancelation of a variety of federal permits. (That last punishment is particularly punitive to someone whose livelihood depends on federal grazing rights, like many of appellants' members.)

The long list of obscure species protected by the prohibition exacerbates the problem. The statute applies to approximately 1,500 species, most of which are unrecognizable to the average person. All but

the most popular and charismatic of listed species are unknown to most people. While many can identify the polar bear and manatee, few have ever heard of the Delhi sands flower-loving fly, the bone cave harvestman (a cave-dwelling spider), the flat-spired three-toothed snail, or the dusky gopher frog. *See* 50 C.F.R. § 17.11(h) (list of all endangered and threatened wildlife).

The Endangered Species Act implicitly recognizes that no one can reasonably be expected to identify every listed species. It allows the listing of common species if enforcement officials would have difficulty distinguishing them from endangered species. *See* 16 U.S.C. § 1533(e). If even trained professionals cannot be expected to identify every listed species, take cannot be the sort of conduct that Congress could reasonably expect an ordinary person, without *mens rea* protections, to "ascertain at his peril whether [his conduct] comes within the inhibition of the statute." *See Staples*, 511 U.S. at 607.

According to the district court's decision, a person who accidentally shoots an endangered species would not be subject to criminal punishment only "if he did not intend to discharge his firearm, or the weapon malfunctioned, or similar circumstances occurred." ER 22. This

is insufficient to protect against criminal punishment for traditionally lawful activity. What would it mean for other activities that may cause take? Is a person who accidentally hits a protected rodent scurrying across the highway guilty unless his brakes malfunctioned? Would someone who accidentally stepped on a protected beetle be guilty unless he was sleepwalking? Again, the district court's tunnel-vision focus on hunting caused it to miss the forbidden result of its interpretation: a broad swath of innocent activity would be subject to criminal punishment without any *mens rea* protection.

Nothing in the Endangered Species Act's text compels WildEarth Guardians' uncharitable interpretation of the knowledge requirement. At most, the statute may be ambiguous on the point. The rule of lenity compels that ambiguity to be resolved in favor of potential criminal defendants, especially in light of the traditionally lawful conduct implicated by the prohibition. Thus, the statute's explicit knowledge requirement must be construed to apply to every element of the offense.

II. The public welfare offense exception does not apply because take is not limited to uniquely dangerous activity but forbids much traditionally lawful conduct

The general rule that a criminal defendant must have knowledge of all the facts constituting the offense is subject to a narrow exception for so-called "public welfare offenses." These offenses exist in "limited circumstances" involving "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety" and are enforced by "only light penalties[.]" *See Staples*, 511 U.S. at 606-07, 616-18. The Supreme Court has identified three limits on this exception, and the Endangered Species Act's criminal provision fails each of them.

First, the exception only applies where Congress has omitted *mens rea* protection from the statute. In *Elonis*, the Supreme Court acknowledged that "[i]n some cases, a general requirement that a defendant *act* knowingly is itself an adequate safeguard." 135 S. Ct. at 2010. But this only applies to "federal criminal statutes *that are silent* on the required mental state[.]" *Id.* (emphasis added). The Endangered Species Act is not silent on the required mental state but expressly limits

criminal punishment to knowing violations. That is sufficient to bring the provision outside the exception.

Second, the public welfare offense exception is limited to crimes that could only apply to uncommon and unusually dangerous conduct, where any violator would know that the conduct subjects him to the risk of criminal punishment. *See Staples*, 511 U.S. at 606-07. That an activity is regulated or could be dangerous is not enough.[10] Expanding the public welfare offense exception to encompass innocuous conduct "would undoubtedly reach some untoward results." *Staples*, 511 U.S. at 614. "Automobiles, for example, might also be termed 'dangerous' devices and are highly regulated at both the state and federal levels." *Id.* But that

[10] The district court appears to have concluded that Congress' desire to regulate something is enough to trigger the exception. It repeatedly emphasized that Congress' overarching purpose in enacting the Endangered Species Act was to prevent extinction "whatever the cost." ER at 36-37 (describing the statute's "special nature" as a comprehensive effort to preserve endangered species). However, that purpose does not justify ignoring explicit text or traditional legal requirements. "Knowingly" can no more be read out of the statute in pursuit of that purpose than the maximum prison term of one-year can be reinterpreted as 2, 5, or 10. *See* 16 U.S.C. § 1540(b). The question for purposes of the public welfare offense exception is not whether Congress regulates an activity but whether the activity is so uncommon and uniquely dangerous that *mens rea* protections can be dispensed with.

does not mean that a car owner could be imprisoned if, unbeknownst to him, his vehicle malfunctioned and exceeded an emissions regulation. *Id.*

The extreme circumstances where the Supreme Court has applied the exception demonstrate its narrowness. The Court has held, for instance, that the possession of an unlicensed hand grenade is a public welfare offense that does not require the defendant to know that hand grenades must be licensed to be lawfully possessed. *See United States v. Freed*, 401 U.S. at 609 (although not presented in the case, one assumes a defendant must know the hand grenade is a hand grenade). The Supreme Court has refused, however, to dispense with the general rule requiring knowledge of the facts constituting the offense for a crime forbidding the possession of unlicensed machine guns, citing the nation's long history of lawful gun possession. *See Staples*, 511 U.S. at 608-16.

It is undisputed that the take prohibition applies to a wide variety of ordinary, traditionally lawful activities. Hunting has long been a lawful activity in this country, but the take prohibition goes much further than that. It could likewise be violated by someone jogging, surfing, driving, plowing a field, or building a home. *See supra* 5-8. All of these are traditionally lawful activities and not the sort of uncommon, uniquely

dangerous activities to which the public welfare offense exception could apply.[11] Therefore, the public welfare offense exception is inapplicable to the Endangered Species Act's crime of knowingly taking a listed species.

Third, the Supreme Court has repeatedly expressed serious misgivings that a public welfare offense could ever be subject to serious punishment. *See Staples*, 511 U.S. at 616-18. It has noted that the exception arose from state laws creating minor regulatory violations enforced with very small fines and minor jail sentences. *See id.* at 616 (explaining these offenses involve "only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary" and citing examples of a $500 fine and a short jail sentence). The Supreme

[11] The district court briefly discussed a possible conflict among the circuits on whether the Clean Water Act establishes public welfare offenses. This Court's decision in *Hanousek* is easily distinguished from this case as it concerned a provision that criminalized the negligent discharge of a pollutant into a water in circumstances where the violator knew the nature of the pollutant. *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999). In a more closely analogous case, the Fifth Circuit interpreted another provision of the Clean Water Act, making it a crime to "knowingly violate" several other provisions, to require knowledge of each element of the offense, including that a pollutant (oil) would be discharged rather than a non-pollutant (water). *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996). Applying *Ahmad* to this case would require knowledge that a defendant's conduct would cause take and the identity of the species that would be taken.

Court has explained "'penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.'" *See id*. at 617-18 (quoting *Morissette*, 342 U.S. at 256).

The Court has suggested that the exception could never apply to an offense punished as a felony. *See Staples*, 511 U.S. at 618. However, it has never definitively settled that issue because, in each case where the question arose, the crime could also apply to traditionally lawful activity and the exception was inapplicable for that reason. *See id*. ("We need not adopt such a definitive rule of construction to decide this case, however. Instead, we note only that where, as here, dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor . . . .").

The district court significantly misread *Staples*' discussion whether a public welfare offense could ever be punished as a felony, construing it as allowing any activity to be punished as a public welfare offense provided that the offense was not defined as a felony. ER at 40-41. A federal statute classifies any crime punishable by more than a year in prison as a felony. 18 U.S.C. § 3156(a)(3). The punishment for knowingly taking a protected species falls one day short of this definition (although

it adds a six-figure criminal fine and other punitive consequences in place of that day). These life-altering punishments are not the sort of light penalties doing no harm to one's reputation that the public welfare offense exception could apply to.

But, even if they were, the statute's inclusion of an express knowledge requirement and the wide variety of traditionally lawful activities that would trigger these punishments are each sufficient to foreclose the exception's application. *See Staples*, 511 U.S. at 618 (declining to decide the relevance of punishment because the crime applied to traditionally lawful conduct).

III. The district court's reliance on *United States v. McKittrick* is misplaced because, as the United States has acknowledged for 20 years, that decision is irreconcilable with Supreme Court precedent

Plaintiffs rely heavily on *United States v. McKittrick*, 142 F.3d 1170 (9th Cir. 1998), arguing that it controls the outcome of this case. In *McKittrick*, this Court construed the Endangered Species Act's criminal provision to not require knowledge of the species taken. *Id.* at 1177 ("[S]ection 11 requires only that McKittrick knew he was shooting an animal, and that the animal turned out to be a protected gray wolf.").

Although *McKittrick* interprets the knowledge requirement narrowly, that is not the end of the matter. If "the reasoning or theory of [] prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority[,]" this Court's precedent must yield. *See Miller v. Gammie*, 335 F.3d 889, 893, 899-900 (9th Cir. 2003). This is so even if the issues in the two cases are not identical; if the earlier decision's reasoning is inconsistent with Supreme Court precedent, that binding precedent cannot be ignored. *See id.*

McKittrick's reasoning and theory is irreconcilable with *Elonis*, *Dixon*, and *Carter*, which require proof of knowledge of the facts that constitute the offense. *See Elonis*, 135 S. Ct. at 2010; *Dixon,* 548 U.S. at 5 (quoting *Bryan*, 524 U.S. at 193); *Carter*, 530 U.S. at 269. *McKittrick* does not acknowledge this rule or offer any basis to avoid it. The district court nonetheless followed *McKittrick*, citing *Elonis*' acknowledgement of the public welfare offense exception. ER at 36. But *McKittrick* does not mention or apply this exception. And the exception is inapplicable to the Endangered Species Act. *See supra* Part II. Thus, *McKittrick* is irreconcilable with Supreme Court precedent.

Supreme Court precedent leaves no doubt that the wide variety of traditionally lawful activities that can run afoul of the take prohibition forbid the application of the public welfare offense exception to it. *See Staples*, 511 U.S. at 610-11 ("Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation."); *International Minerals*, 402 U.S. at 564-65 (explaining that although "[p]encils, dental floss, [and] paper clips" may be regulated, it does not mean that Congress can dispense with applying "'mens rea' as to each ingredient of the offense" involving them). Therefore, the general rule requiring knowledge of all the facts constituting the offense applies, *McKittrick* notwithstanding.

CONCLUSION

Admirably, the Department of Justice has acquiesced to Supreme Court precedent limiting its power to stretch the criminal law to reach ordinary, apparently innocent conduct. But no good deed goes unpunished. WildEarth Guardians challenges that legally compelled interpretation, offering an alternative that is foreclosed by the text of the statute, Supreme Court precedent, and common sense. The take

prohibition is so broad and the list of species to which it applies is so long that WildEarth Guardians' interpretation would criminalize a broad range of lawful conduct. No ordinary person would suspect their innocent activities could result in the loss of a year of their lives to prison, crushing six-figure criminal fines, and other punitive measures. Therefore, the general rule requiring knowledge of all the facts constituting the criminal offense must apply to the Endangered Species Act's take prohibition, just as the Department of Justice has interpreted it for decades. The decision below should be reversed.

DATED: October 18, 2017.

Respectfully submitted,

JAMES S. BURLING
JONATHAN WOOD
M. REED HOPPER
ETHAN W. BLEVINS

s/ Jonathan Wood
JONATHAN WOOD

Attorneys for Intervenor-Defendants - Appellants

STATEMENT OF RELATED CASES

This case is one of three appeals from the district court's decision below, all of which raise the question of the McKittrick Memorandum's legality. The others are 17-16677 and 17-16678.

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I hereby certify that on October 18, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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