Nos. 17-16677, 17-16678, 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 – Appellants,
SAFARI CLUB INTERNATIONAL,
Intervenor-Defendant – Appellant,
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' REPLY 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
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Under the Endangered Species Act, it is a crime to "knowingly violate" the statute's prohibition against the "take" of any endangered species. 16 U.S.C. §§ 1538, 1540(b). This prohibition applies to a wide range of apparently innocent conduct, including jogging, driving, fishing, hunting, and a host of common land-use activities, if performed in the wrong place at the wrong time. 16 U.S.C. § 1532(19); *see Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995). The question in this case is whether a person can be criminally punished—with imprisonment, a six-figure criminal fine, and other penalties—if she did not know that her seemingly innocent actions would result in take or did not know the identity of the species that would be taken.

Under Supreme Court precedent, the answer is a resounding "no." If the Endangered Species Act were silent on *mens rea*, this provision would be interpreted to require knowledge of each element of the offense. *See Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016). But Congress removed any doubt on this question by expressly limiting criminal enforcement to knowing violations. 16 U.S.C. § 1540(b). "[T]he 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)). Consistent with the statute's text and Supreme Court precedent, the Department of Justice interprets the Endangered Species Act to require knowledge that one's actions will cause take and knowledge of the species that would be taken. *See* ER 315-22.

Plaintiffs (collectively, WildEarth Guardians) claim that interpretation is too protective of criminal defendants and they would force the government to pursue criminal prosecutions that the government does not want to bring. In WildEarth Guardians' view, a defendant need not know the identity of the species taken. Under that interpretation, significant criminal penalties would follow from ordinary, seemingly innocent conduct. There is no indication that Congress wished to create this absurd result and it conflicts with Supreme Court precedent besides. Thus, the district court's decision should be reversed.

ARGUMENT

"In general, courts interpret criminal statutes to require that a defendant possess a *mens rea*, or guilty mind, as to every element of an offense." *Torres*, 136 S. Ct. at 1630. This rule is so ingrained in the law that courts "'interpret [] criminal statutes to include broadly applicable

scienter requirements, even where the statute by its terms does not contain them.'" *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *United States v. X-Citement Video*, 513 U.S. 64, 70 (1994)). Thus, any analysis of a federal criminal statute must begin with the presumption that *mens rea* applies to every element of the offense, a background rule that will only be set aside if Congress *expressly* says otherwise. *See Torres*, 136 S. Ct. at 1631 ("[T]he defendant must know each fact making his conduct illegal . . . absent an express indication to the contrary[.]" (citing *Staples v. United States*, 511 U.S. 600, 619 (1994))).

This background rule is well-founded. Justice Ginsburg, concurring in *Staples*, explained that such a rule is necessary "to shield people against punishment for apparently innocent activity." 511 U.S. at 622 (Ginsburg, J., concurring); *see Elonis*, 135 S. Ct. at 2010 (the background rule "separate[s] wrongful conduct from 'otherwise innocent conduct'" (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000), and *X-Citement Video*, 513 U.S. at 72)). Punishing someone for conduct that they had no reason to suspect was illegal is contrary to "the generally accepted functions of the criminal law." *United States v. U.S. Gypsum*

Co., 438 U.S. 422, 440-42 (1978). It would also raise serious concerns under the Due Process Clause. *See Lambert v. California*, 355 U.S. 225, 229-30 (1957). The Supreme Court's background *mens rea* rule respects the principle that has guided our law for centuries: "it is better that ten guilty persons escape, than that one innocent suffer." 4 William Blackstone, *Commentaries on the Laws of England* 352 (1768). "No tradition is more firmly established in our system of law . . . ." *United States v. Watson*, 792 F.3d 1174, 1183 (9th Cir. 2015).

Accordingly, the Endangered Species Act's knowledge requirement applies to every element of the "take" offense, including knowledge of the identity of the species, absent an express indication that Congress intended a lower bar. WildEarth Guardians have identified no such indication and their interpretation would lead to absurd results.

I. The Department of Justice's interpretation properly respects the background rule

The United States has long interpreted the Endangered Species Act to require knowledge of each fact constituting the offence, a position it has taken since at least 1995. In *Sweet Home*, the Supreme Court considered whether the Endangered Species Act's take prohibition

reaches common land use activities affecting species' habitat without any intent to harm wildlife. 515 U.S. at 701-02. When the Court expressed concern for the consequences of such a broad interpretation of take, the United States emphasized the knowledge requirement as limiting potential criminal applications. *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) ("[I]f you drained a pond on your property, you'd have to know that there is a particular frog or whatever . . . Mr. Kneedler: Right."). The United States explained that knowledge is required of each fact constituting the offense, but knowledge of the law is not. *See 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."); *see also* Opening Br. at 8-9.[1]

The strategy worked. In upholding the government's broad interpretation of take, the Supreme Court relied on this understanding

[1] All citations to "Opening Brief" are to the opening brief filed by Appellants New Mexico Cattle Growers' Association, et al.

of the knowledge requirement. *See Sweet Home*, 515 U.S. at 701-02;[2] *see also 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.").

There have been a handful of cases in which federal prosecutors argued that this knowledge is not required. *See* Opening Br. at 9 n.2 (citing cases). Only one of those cases—this Court's decision in *McKittrick*—resulted in an appellate decision endorsing that unforgiving interpretation of the statute.[3] *See United States v. McKittrick*, 142 F.3d

---

[2] WildEarth Guardians imply that only the dissent in *Sweet Home* addressed the United States' interpretation. Not so. The majority's opinion, consistent with that interpretation, explains that "knowingly" does not require defendants act with the conscious purpose of harming a protected species. *See Sweet Home*, 515 U.S. at 701-02. The majority also expressed concern that the statute's strict-liability civil fine could violate the background *mens rea* rule by not requiring knowledge of each fact constituting the offense. *Id.* at 696 n.9. The Court would not have raised this issue unless it agreed with the United States' interpretation of knowingly in the criminal provision.

[3] WildEarth Guardians also cite two Fifth Circuit decisions as supporting their interpretation. *See United States v. Ivey*, 949 F.2d 759 (5th Cir. 1991); *United States v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990). Those cases hold that the Endangered Species Act does not require knowledge *of the law*. *See., e.g., Ivey*, 949 F.2d at 766 ("Congress did not

1170 (9th Cir. 1998). However, the theory this Court articulated in that case is "clearly irreconcilable with the reasoning or theory of intervening higher authority[.]" *See Miller v. Gammie*, 335 F.3d 889, 893, 899-900 (9th Cir. 2003); *see also* Opening Br. at 37-39. Consequently, *McKittrick* is no longer binding authority. *See Miller*, 335 F.3d at 899-900.[4]

The United States immediately repudiated *McKittrick* when it was petitioned to the Supreme Court (a mere three years after *Sweet Home*). *See* ER 306-08. In its *certiorari*-stage brief, the United States reiterated that it interprets the Endangered Species Act to require knowledge of each element of the offense, and that the decision below was mistaken. *See id.* (explaining that the jury instruction in *McKittrick* "does not adequately explicate the meaning of the term 'knowingly'" and is inconsistent with Supreme Court precedent).

To avoid additional aberrations from its official interpretation, the Department of Justice issued a memo to all federal prosecutors informing

---

intend to make knowledge of the law an element of criminal violations."). Neither addresses knowledge *of the facts* constituting the offense.

[4] WildEarth Guardians have offered no response to this argument, apparently conceding that *McKittrick* is no longer binding.

them of the proper interpretation of the statute's knowledge requirement. *See* ER 315-22. Citing the Supreme Court's background *mens rea* rule, the memo requires federal prosecutors to prove that defendants knew the identity of the species taken and requires them to object to any jury instructions that do not impose on the government the burden of proving this element. *See id.*

II. WildEarth Guardians have not shown that Congress explicitly rejected *mens rea* for every element of the offense; on the contrary, the statute confirms it

When Congress wishes to depart from the Supreme Court's background *mens rea* rule, it must say so. *See Elonis*, 135 S. Ct. at 2009. Thus, to show that the Department of Justice's interpretation is incorrect, WildEarth Guardians must identify some indication that Congress set a lower standard for criminal prosecutions under the Endangered Species Act. They have failed to do so.

Rather than indicating that the background *mens rea* rule does not apply, Congress confirmed that it does by expressly limiting criminal enforcement to "knowing[]" violations. 16 U.S.C. § 1540(b). As Congress is well aware, courts interpret this language to require knowledge of the facts constituting the offense. *See Dixon*, 548 U.S. at 5.

This is consistent with the way the statute is written. Grammatically, the statute's knowledge requirement applies to each element of the offense. *See Flores-Figueroa v. United States*, 556 U.S. 646, 652-53 (2009) (under ordinary rules of English usage, a modifier like "knowingly" applies to each element unless Congress sets an element off from the others to clearly communicate that it is different). Nothing in the statute indicates that knowledge of the identity of the species should be treated differently from knowledge of any other element of the offense. Furthermore, the rule of lenity would require any ambiguity on this question to be resolved in favor of potential defendants. *See 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.").

Two cases illustrate what Congress means when it criminalizes the "knowing" violation of a statute or regulation: *International Minerals* and *Liparota*. In *International Minerals*, the Court considered the crime of "knowingly violating" regulations forbidding the transportation of hazardous materials without disclosing the contents. *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 559 (1971). The Court

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 and the latter as knowledge of the law. *See id*. at 563-64 ("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.").

In *Liparota*, the Supreme Court considered the crime of "knowingly" using food stamps "in any manner not authorized by" statute or regulations. *Liparota v. United States*, 471 U.S. 419, 420 (1985). Unlike *International Minerals*, the Court in *Liparota* interpreted the provision to require knowledge of both the facts and that defendant's conduct was not authorized by the statute or regulations. *Id*. at 426. In other words, it required knowledge of the law, explaining that "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Id*.

The lesson of these cases is that, when Congress makes it a crime to "knowingly violate" a statute or regulation, it requires at least knowledge of all the facts constituting the offense. If that knowledge would be insufficient to avoid criminalizing "a broad range of apparently

innocent conduct[,]" knowledge of the law may be also be required. *See id.*

WildEarth Guardians identify no text in the statute to compel its uncharitable reading of the *mens rea* requirement, relying instead on a broad articulation of the statute's general purposes. *See* Ans. Br. at 51. "Of course, the purpose of every statute would be 'obstructed' by requiring a finding of intent, if we assume that it had a purpose to convict without it." *Morissette v. United States*, 342 U.S. 246, 259 (1952). "Therefore, the obstruction rationale does not help" in the interpretation of *mens rea* protections. *Id.* WildEarth Guardians' policy arguments should be directed to Congress, not the courts. They provide no license to dispense with the Endangered Species Act's explicit knowledge requirement.

WildEarth Guardians' policy arguments also identify nothing unique about *mens rea*. The high bar for convictions, the requirement that prosecutors disclose exculpatory evidence, the requirement that investigators inform suspects of their rights, and many other cherished protections for criminal defendants make it harder to secure convictions. Yet courts would not—and should not—throw out these protections based

on vague notions that they undermine a statute's laudable purposes. *See id.*

A. The Department of Justice's interpretation requires knowledge of the facts but not knowledge of the law

WildEarth Guardians make much of a House Report's explanation that Congress changed the Endangered Species Act's *mens rea* requirement from willful 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, at 26 (1978). However, the Department of Justice's interpretation is fully consistent with Congress' wish not to require knowledge of the law. According to that interpretation, a defendant need not know that a particular species is listed under the Endangered Species Act, that the statute forbids take, or even that the statute exists. Instead, all that is required is that a defendant know his actions will cause take and the identity of the species affected. ER at 315-22. This is knowledge of the facts, not knowledge of the law.

The House Report's discussion of knowledge of the law makes conspicuous the absence of any discussion of knowledge of the facts.

Courts likely would not have interpreted the statute to require knowledge of the law. *See Elonis*, 135 S. Ct. at 2009 ("The familiar maxim 'ignorance of the law is no excuse' typically holds true."). But courts will presume knowledge of the facts is required, unless Congress says otherwise. *See id.* (explaining that the background rule applies unless Congress "explicitly" provides otherwise). Congress' failure to explicitly address that issue, even as it addressed knowledge of the law, is telling. It shows that the knowledge requirement's meaning was on Congress' mind and yet it gave no indication that it wished to depart from the background *mens rea* rule.

B. The Department of Justice's interpretation is consistent with Congress' desire that take be a general intent crime

Legislative history also indicates that Congress wished for take to be a general intent, as opposed to specific intent, crime. *See* H.R. Rep. No. 95-1625, at 26. The Department of Justice's interpretation of "knowingly" is entirely consistent with that wish too. WildEarth Guardians, in contrast, effectively interpret take as a strict liability crime, a position for which there is no support either in the text of the statute or legislative history.

There are three general types of crimes—specific intent, general intent, and strict liability. Although the lines between them can be blurry, they generally break down as follows: Specific intent crimes require that a defendant act with a conscious, prohibited purpose or motive. *See United States v. Bailey*, 444 U.S. 394, 405 (1980). General intent crime, in contrast, require that a defendant merely act with knowledge of the facts constituting the offense, regardless of her subjective purpose. *See id*. Strict liability, finally, requires only that the defendant caused a forbidden effect, regardless of what she knew or intended. *See id.* at 404 n.4.

Consider how these categories would apply to the take offense. If take were a specific intent crimes, criminal enforcement would be limited to situations where someone subjectively intended to harm a protected species. Interpreting take as a general intent crime would require only that a defendant acted with knowledge that his actions would cause the take of a particular species. Finally, interpreting take as a strict liability crime would require convictions anytime someone caused harm to a protected species.

The difference between specific and general intent is best demonstrated by so-called "incidental take"—when take is the unintended consequence of an otherwise lawful act. *See* 50 C.F.R. § 402.02. If someone is fishing, for instance, and knows that his particular method will inadvertently catch some rare species, in addition to the species the fishermen is targeting, that would constitute the general intent crime of take. But it would not be a crime under specific intent because the fishermen did not act with the conscious purpose of catching the forbidden species.

Courts routinely interpret general intent crimes this way, including in the environmental context. In *United States v. Ahmad*, for instance, the Fifth Circuit interpreted a Clean Water Act provision making it a crime to "knowingly violate" several of that statute's prohibitions. 101 F.3d 386 (5th Cir. 1996). In that case, a fellow was prosecuted for discharging gasoline into a waterway, when he claimed he thought he was discharging water. *Id.* Applying the Supreme Court's background *mens rea* rule, the Fifth Circuit concluded that "knowingly" applies to each element of the offense, including knowledge of the substance being discharged. *Id.* at 390. It noted that there was no textual indication in

the statute that this element should be treated differently than any other. *Id.* Finally, the court denied that environmental crimes should be treated differently from all other crimes, recognizing that it would impermissibly lead to criminal punishment for traditionally lawful conduct. *Id.* at 391.

This Court's precedents are in accord. In *United States v. Lynch*, the Court interpreted the Archaeological Resources Protection Act's crime of "knowingly violat[ing]" the statute's prohibition on taking an archeological resource. 233 F.3d 1139, 1143 (9th Cir. 2000). That statute uses the same phrasing as the Endangered Species Act's criminal provision; raises the same risk of criminalizing seemingly innocent conduct; has legislative history indicating Congress wished to create a general intent crime, not a specific intent crime; and has a conservation purpose. *Id.* at 1144. But, in *Lynch*, this Court held that the statute's knowledge requirement applied to every element of the offense, including knowledge that the item taken is an "archeological resource." *Id.*

WildEarth Guardians interpret take as a strict liability crime.[5] In their view, anyone who engages in an act that results in the take of a protected species, regardless of what they knew or what they intended, has committed a crime. WildEarth Guardians myopically focus on hunting, but their interpretation would apply to every form of take. Thus, a person who strikes a rare rodent with her car on a dark highway can be imprisoned for a year and fined $100,000 for this accidental take, even though she did not intend to harm the rodent or know what sort of rodent it was. WildEarth Guardians identifies nothing in the text of the statute or legislative history to support this absurd result.

C. WildEarth Guardians' interpretation would render other provisions of the Endangered Species Act redundant

Statutes should be read as a whole, so that no provision is interpreted to render any other ineffective or superfluous. *See Boise*

[5] WildEarth Guardians blur the line between general intent and strict liability. *See* Ans. Br. at 45. For instance, although some defenses are not available for general intent crime, *see id.*, others are. For general intent crimes, defenses that concern a defendant's subjective purpose are not available because general intent crimes do not require defendants act with a particular purpose. *See United States v. Lamott*, 831 F.3d 1153, 1156 (9th Cir. 2016). However, defenses concerning the defendant's knowledge are available for crimes that require such knowledge.

Cascade Corp. v. EPA, 942 F.2d 1427, 1432 (9th Cir. 1991). The Supreme Court has particularly stressed this rule in its *mens rea* cases. If a statute provides alternative means to regulate the same activity (other than through criminal enforcement), that is an additional reason to apply the background *mens rea* rule. *See Gypsum*, 438 U.S. at 442. Eroding *mens rea* protections in such circumstances is both unnecessary and renders those alternative means redundant.

WildEarth Guardians' narrow interpretation of the Endangered Species Act's knowledge requirement is inconsistent with the statute's several alternative means to address the precise problem WildEarth Guardians raise (mistaking a rare species for a common one).

1. The Endangered Species Act's look-alike provision

The Endangered Species Act allows the listing of species that "so closely resemble" an endangered species that it is difficult to distinguish them. 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). If coyotes are as easily mistaken for Mexican gray wolves as WildEarth Guardians assert, the proper means of addressing that problem is to apply the Endangered Species Act's look-alike provision. *See* Opening Br. at 25-26.

In response to this point, WildEarth Guardians merely state that this provision is not currently being used to protect Mexican gray wolves and assert, without explanation, that it never will. This speculation is beside the point. The take provision and the look-alike provision apply to every endangered species, not just Mexican gray wolves, and WildEarth Guardians ask the Court to interpret the former to render the latter redundant. That is not how statutes are interpreted. *See Boise Cascade Corp.*, 942 F.2d at 1432.

2. The Endangered Species Act's strict liability fine

The Endangered Species Act's civil penalty provisions also undermine WildEarth Guardian's interpretation. Those provisions distinguish between knowing violations and those committed without this knowledge. The former are punished much more severely, with a fine of nearly $50,000. *See* 16 U.S.C. § 1540(a)(1); *see* 81 Fed. Reg. 41,862 (June 28, 2016). Violations committed unknowingly, in contrast, are punishable by a mere $1,250 strict-liability fine. *See* 16 U.S.C. § 1540(a)(1); *see also* 82 Fed. Reg. 6307, 6308 (Jan. 19, 2017).

The only difference between these two provisions—and between the strict-liability provision and the criminal provision—is the knowledge

required. Thus, reading this knowledge requirement out of either the larger civil fine or the criminal enforcement provision would render the strict-liability fine redundant.

WildEarth Guardians argue that the strict-liability provision reinforces their interpretation. *See* Ans. Br. at 43. However, they appear to misread the statute. The first sentence of 16 U.S.C. § 1540(a)(1), like the criminal provision, requires knowledge as an element of the civil offense. WildEarth Guardians are correct that "knowingly" in this sentence should be read the same way as in the criminal enforcement provision. *See In re Consol. Freightways Corp. of Delaware*, 564 F.3d 1161, 1165 (9th Cir. 2009) (When "language is used in one section of a statute and the same language is used in another section, [courts] can infer that Congress intended the same meaning.").

However, the statute's strict-liability fine is contained in the third sentence of 16 U.S.C. § 1540(a)(1), which omits any requirement that a violation be committed "knowingly." *See id.* ("Any person who otherwise violates . . . ."). Just as phrases repeated in a statute should be given the same meaning, Congress decision to set different standards for different provisions must also be given effect. *See Boise Cascade Corp.*, 942 F.2d

1432. Here, that can only be done by interpreting the Endangered Species Act's criminal provision to require knowledge of every element of the offense.

The Supreme Court's concern about imposing even this minor penalty without *mens rea* protections further undercuts WildEarth Guardians' interpretation. *See Sweet Home*, 515 U.S. at 696 n.9. In light of that concern, this Court should be especially wary of conflating the low standard for this minor fine with the much greater criminal enforcement provision, as WildEarth Guardians urge.

Similarly, the strict-liability provision undercuts WildEarth Guardians argument that, because accidents and mistakes can result in illegal take, it follows that this take must be subject to criminal punishment. *See* Ans. Br. at 48-49. Clearly, Congress recognized that some illegal take would occur without the knowledge required for criminal enforcement and would be punished by the much smaller strict liability fine. WildEarth Guardians' interpretation fails to distinguish between the acts that trigger these very different levels of punishment and must be rejected.

3. The Endangered Species Act's injunction provision

Finally, WildEarth Guardians' argument is inconsistent with the Endangered Species Act's provision allowing any interested person to seek an injunction against anyone who takes a protected species. 16 U.S.C. § 1540(g). There is no knowledge requirement for this private, civil remedy. *See* Opening Br. at 26.

WildEarth Guardians argue that the inconsistency between their interpretation and the statute's injunction provision "deserves little attention." But it supports that argument with mere speculation that, in some cases, it may be hard for WildEarth Guardians to obtain an injunction. This is no argument for ignoring the ordinary rules of statutory construction.

WildEarth Guardians also ignore the role that the injunction provision played in *Sweet Home*. During oral argument, both the government and the Justices emphasized that a group like WildEarth Guardians can raise awareness among those who inadvertently take species by merely seeking an injunction—even if one is not issued. Once alerted, the defendant can no longer claim ignorance that his actions could harm a particular 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."). Ignoring the criminal provision's knowledge requirement would frustrate the injunction provision's ability to serve this educational function.

III. The public welfare offense exception cannot apply to the take prohibition because of the broad range of apparently innocent activities subject to it

The Supreme Court has acknowledged a narrow exception to its background *mens rea* rule for so-called "public welfare" offenses. However, the Court has also been careful to emphasize the extreme narrowness of this exception. Public welfare 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." *Liparota*, 471 U.S. at 433.[6] Take is not limited to such activity but broadly applies to much ordinary,

[6] This exception is also limited to "federal criminal statutes *that are silent* on the required mental state[.]" *Elonis*, 135 S. Ct. at 2010. The Endangered Species Act is not silent but expressly limits criminal penalties to knowing violations. *See* Opening Br. at 32-33.

seemingly innocent conduct. Thus, WildEarth Guardians' reliance on this exception is misplaced.

A. That a statute can generally be characterized as promoting the public welfare is not enough to apply the exception

WildEarth Guardians appear to argue that the public welfare exception covers any criminal provision contained in a statute that promotes the public welfare. So interpreted, the exception would swallow the rule because *every* statute promotes the public welfare, at least in some sense. The Supreme Court's application of this exception demonstrates that it cannot be interpreted as broadly as WildEarth Guardians claim.

In *Staples*, the government argued that the exception applies to a law forbidding the possession of an unregistered machine gun. 511 U.S. at 608. Obviously, a statute regulating machine guns concerns the public welfare. But the Supreme Court nonetheless rejected the government's argument, holding that it must prove the defendant knew the characteristics of the weapon making it a machine gun. *Id*. at 608-16. To hold otherwise, the Court explained, would "criminalize a broad range of

apparently innocent conduct" considering the nation's long tradition of lawful gun ownership. *Id.* at 610-11 (quoting *Liparota*, 471 U.S. at 426).

"[T]hat an item is 'dangerous,' in some general sense, does not necessarily suggest . . . that it is not also entirely innocent." *Id.* "Automobiles, for example, might also be termed 'dangerous' devices and are highly regulated" but a car owner could not be imprisoned if, unbeknownst to him, the vehicle malfunctioned and exceeded an emissions regulation (or accidentally struck a rare species of wildlife). *Id.* at 614.

Contrast *Staples* with a case where the Court found the public welfare offense exception applicable. In *United States v. Freed*, the Court held that possessing an unregistered hand grenade is a public welfare offense for which defendants need not know that the grenade is unregistered. 401 U.S. 601, 609 (1971). (Although not presented in the case, one assumes a defendant would have to know the hand grenade is, in fact, a hand grenade and not a paperweight or toy.) A ban on possessing an unregistered hand grenade, unlike a gun, fits within the exception because grenade possession is so uncommon and uniquely

dangerous that anyone possessing one knows that her conduct is not entirely innocent. *See Staples*, 511 U.S. at 606-07.

In summation, that a statute promotes the public welfare in some general sense is not enough to trigger the exception. Rather, for it to apply, a criminal provision must be limited to uncommon and uniquely dangerous activities. *See Staples*, 511 U.S. at 607. It would violate the Due Process Clause to extend the exemption beyond these narrow limits, as few would expect that common, seemingly innocent activity could lead to criminal punishment. *See Int'l Minerals*, 402 U.S. at 564-65. As explained below, "take" is not limited to uncommon and uniquely dangerous activities.

B. WildEarth Guardians' interpretation would criminalize a wide range of common and apparently innocent activities

The Endangered Species Act's take prohibition applies to much traditionally lawful conduct, a point which WildEarth Guardians do not dispute. Even hunting is perfectly innocent, assuming legal prey. But take extends much further.

Someone commits take if they accidentally hit a California tiger salamander that jumps out in front of their car on the highway. *See*

Opening Br. at 22-23. They commit take if they accidentally get too close to an animal, thereby disturbing normal behavioral patterns. *See* ER 320. Take also includes cutting down a tree where birds roost, building on land under which cave bugs dwell, or moving an animal run over in front of your house. *See* Opening Br. at 22-23, 29-30. None of these activities are remotely similar to possessing a hand grenade nor, for that matter, possessing a machine gun. *See Ahmad*, 101 F.3d at 391 (comparing the activities regulated under the Clean Water Act to the activities the Supreme Court has analyzed under the public welfare offense exception).

That the Endangered Species Act's take prohibition applies to much ordinary, seemingly innocent conduct is a result of not only how broadly take is defined but also the wide variety of obscure species the prohibition protects. *See* Jonathan Wood, *Overcriminalization and the Endangered Species Act:* Mens Rea *and Criminal Convictions for Take*, 46 Envtl. L. Rep. 10,496, 10,506 (2016). Approximately 1,500 species are listed under the statute, including dozens of birds, rodents, and insects. *See* 50 C.F.R. § 17.11(h). It is likely that no single person could correctly identify all of them, and a certainty that most people would struggle to identify more than a handful. Many may recognize the polar bear or manatee but would

be hard pressed to know what distinguishes the Delhi sands flower-loving fly from any other fly, the bone cave harvestman from any other spider, or the dusky gopher frog from any other frog. *See* Opening Br. at 29-30. Yet WildEarth Guardians' interpretation would mean that people could be imprisoned for their understandable ignorance of the differences between these obscure species, if they should accidentally take one of them.

The absurdity of that position is further highlighted by the fact that Congress did not anticipate that even highly trained enforcement officials would be able to distinguish every listed species. The look-alike provision provides for the listing of non-endangered species where enforcement officials would have difficulty distinguishing species. *See* 16 U.S.C. § 1533(e). If these officials can't be expected to know every protected species, take cannot be the sort of conduct for which Congress would 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.

WildEarth Guardians fail to grapple with this consequence of their argument, choosing instead to focus myopically on the hypothetical

hunter that mistakes a Mexican gray wolf for a coyote. They imagine a "hunter . . . who brings a deadly weapon into one of the few areas in the contiguous United States still occupied by endangered Mexican wolves, aims his rifle at an animal he *thinks* may be a coyote and then knowingly pulls the trigger" and conclude that the hunter "is not free of wrongdoing." Ans. Br. at 53. Although this is not a particularly sympathetic case, it is telling that WildEarth Guardians stresses that the hunter was in "one of the few areas in the contiguous United States still occupied by endangered Mexican wolves" even though, under its interpretation, the hypothetical hunter need not know this fact to suffer imprisonment, bankrupting fines, and other harsh punishments.

WildEarth Guardians provide no textual basis to distinguish this hypothetical from any other form of accidental take under the statute. Thus, its interpretation must apply the same way to every activity that could inadvertently cause the take of a protected species. Perhaps WildEarth Guardians would be comfortable imposing harsh criminal penalties on someone who, for instance, drove a car down a highway in one of the few areas still occupied by a rare lizard and accidentally hit

one of them. However, they have provided no support for the proposition that Congress intended this result.

WildEarth Guardians' argument that a foreseeability requirement could solve this problem fares no better. Many activities foreseeably result in some form of take but remain entirely innocent. It is foreseeable, for instance, that building a home will disturb nearby insects. What separates this innocent conduct from illegal take is the identity of the species. *See GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003) (take includes home construction that disturbs endangered spiders). Thus, knowledge of that element is required to avoid criminalizing ordinary, innocent activities.

Finally, WildEarth Guardians' analysis conflicts with Supreme Court precedent. Whereas they focus myopically on one particularly unsympathetic hypothetical, the Court's analysis has always paid particular attention to the many sympathetic examples of innocent activities that a broad interpretation of a criminal statute would ensnare. *See, e.g., X-Citement Video*, 513 U.S. at 69-70 (hypothesizing a retail druggist who unsuspectingly produces a customer's roll of film containing illicit images); *Staples*, 511 U.S. at 614 (hypothesizing a car owner whose

car malfunctions causing it to exceed an emissions level). Thus, this Court should not ignore the many innocent activities that could result in substantial criminal penalties under WildEarth Guardians' interpretation.

C. Capping the prison term at one year does not avoid the Supreme Court's concern with criminalizing common, seemingly innocent activities

WildEarth Guardians assert that concerns with criminalizing apparently innocent conduct can be safely ignored so long as the crime is not punishable as a felony. No case supports that proposition.

True, the Supreme Court has several times stressed the harshness of criminal penalties as an additional reason to apply its background *mens rea* rule. *See, e.g., Staples*, 511 U.S. at 618. But, in each case, the Court first independently justified the application of the rule based on the criminal provision reaching ordinary, innocent activity. *See id*. These cases suggest (although the Court has not yet so held) that punishing a crime as a felony is sufficient to render the public welfare offense exception inapplicable. *See id*. But it does not follow that labeling an offense as a felony is a necessary condition for concluding that it is not a public welfare offense.

Holding otherwise, as WildEarth Guardians urge, would lead to anomalous results. For instance, a crime punishable by 366 days in prison would trigger the Supreme Court's background *mens rea* rule. But a crime punishable by 365 days imprisonment and a $100,000 fine would not.[7] Because federal law defines felony solely in terms of the prison sentence that attaches to a crime, any amount of fine could be imposed without triggering *mens rea* under WildEarth Guardians' theory. Congress could freely punish the most common, apparently innocent activity with a one-year prison sentence and a $100 million fine. This is a far cry from punishing uniquely dangerous activities with penalties that "are relatively small, and conviction does no[] grave damage to an offender's reputation." *See Morissette*, 342 U.S. at 256.

[7] It bears repeating that the Supreme Court, in *Sweet Home*, expressed concern about the lack of *mens rea* protections in the Endangered Species Act's strict-liability civil-fine provision. *See* 515 U.S. at 696 n.9. The Court would likely not have raised this issue if it believed, as WildEarth Guardians argue, that Congress could criminally fine people with impunity under the public welfare offense exception.

IV. Prosecutorial discretion cannot save WildEarth Guardians' interpretation

Ultimately, WildEarth Guardians acknowledge that their interpretation would result in the criminalization of much ordinary, innocent activity. Yet, they invite the Court to ignore this problem by relying on prosecutorial discretion. *See* Ans. Br. at 55.

However, courts "'cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *Marinello v. United States*, 138 S. Ct. 1101, 1109 (2018) (quoting *McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016), and *United States v. Stevens*, 559 U.S. 460, 480 (2010)). Relying on unsupervised prosecutorial discretion "to narrow the otherwise wide-ranging scope of a criminal statute[]" places too great a power in the hands of prosecutors and "risks allowing 'policemen, prosecutors, and juries to pursue their personal predilections,'" resulting in inconsistent enforcement. *Id*. at 1108.

Thus, this Court must consider the full consequences of reading the word "knowingly" out of the Endangered Species Act, including for all of the many ordinary and innocent activities that may inadvertently result in take.

CONCLUSION

By expressly limiting criminal prosecutions under the Endangered Species Act to "knowing" violations, Congress removed all doubt about the required mental state. The statute requires prosecutors prove knowledge of each fact constituting the offense, just as the Department of Justice has interpreted it for decades. WildEarth Guardians fail to identify any indication that Congress intended a different result. Consequently, the district court's decision should be reversed.

DATED: May 10, 2018.

Respectfully submitted,

JAMES S. BURLING
JONATHAN WOOD
ETHAN W. BLEVINS

s/ Jonathan Wood
JONATHAN WOOD

Attorneys for Intervenor-Defendants - Appellants

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and 9th Cir. R. 32-1, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

[X] this document contains 6,522 words, **or**

[ ] this brief uses a monospaced typeface and contains _____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this document has been prepared in a proportionally spaced typeface using Word 2013 in Century Schoolbook, 14 point font, **or**

[ ] this document has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type*].

DATED: May 10, 2018.

s/ Jonathan Wood
JONATHAN WOOD

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2018, 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Jonathan Wood
JONATHAN WOOD